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OF THE

UNITED STATES DEPARTMENT OF JUSTICE

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THE ATTORNEY GENERAL,

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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 41 published volumes of the OLC series covered the years 1977 through 2017. The present volume 42 covers 2018.

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.

Opinions of the Office of Legal Counsel

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OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Committee Resolutions Under 40 U.S.C. § 3307(a) and the Availability of Enacted Appropriations

Under 40 U.SC. § 3307(a), committee approval resolutions do not establish binding limits on how the General Services Administration may expend appropriated funds. If Congress appropriates funds for a project that has not received committee approval, section 3307(a) does not constrain what the Executive Branch may do with the funds.

Committee resolutions adopted under section 3307(a) have no effect on the availability of appropriated funds for purposes of the Anti-Deficiency Act.

January 26, 2018

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

Under 40 U.S.C. § 3307(a), an appropriation to construct, alter, acquire, or lease certain buildings "may be made only if the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives adopt resolutions approving the purpose for which the appropriation is made." An adjoining provision directs the Administrator of General Services to "transmit to Congress a prospectus of the proposed facility" in order to "secure consideration for the approval referred to in subsection (a)." *Id*. § 3307(b).

Your office has asked whether committee resolutions adopted under section 3307(a) create conditions on the availability of enacted appropriations that bind the Executive Branch. *See* Letter for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Kris E. Durmer, General Counsel, General Services Administration (May 13, 2016) ("GSA Letter").[1] This request follows a decision of the

[1] We have also solicited and considered the views of other agencies. *See* Memorandum for Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Douglas K. Mickle, Assistant Director, Civil Division, National Courts Section, *Re: Prospective Application of 40 U.S.C. § 3307 by the General Services Administration in Light of* Springfield Parcel C, LLC v. United States*, 124 Fed. Cl. 163 (2015)* (June 29, 2016); E-mail for Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Heather Walsh, Deputy General Counsel, Office of Management and Budget, *Re: GSA Request for Opinion* (June 24, 2016 1:13 PM); E-mail for Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Richard Hipolit, Deputy General Counsel, Department of Veterans Affairs, *Re: GSA Request for Opinion* (Aug. 5, 2016 3:57 PM).

Court of Federal Claims, *Springfield Parcel C, LLC v. United States*, 124 Fed. Cl. 163 (2015), which set aside a General Services Administration ("GSA") lease on precisely that ground, *id.* at 185–90, contravening the Executive Branch's longstanding interpretation of section 3307 and its previous incarnations.

Having reviewed the matter again in light of *Springfield Parcel*, we reiterate this Office's established position and conclude that section 3307(a) does not impose independent limitations on the use of enacted appropriations. By its plain terms, section 3307(a) sets an internal rule of congressional procedure that no appropriations "may be made" for certain projects unless preceded by resolutions of approval from the relevant committees. Section 3307(a) does not purport to make those committee resolutions binding upon the actions of the Executive Branch. Thus, if Congress disregards section 3307(a) and appropriates funds for projects that have not received committee approval, then section 3307(a) does not constrain what the Executive Branch may do with the appropriated funds.

I.

GSA "may enter into a lease agreement . . . for the accommodation of a federal agency in a building (or improvement) which is in existence or being erected by the lessor to accommodate the federal agency." 40 U.S.C. § 585(a)(1). In fact, GSA has the "sole authority" to enter into such leases for many federal agencies. *Authority of Military Exchanges to Lease General Purpose Office Space*, 21 Op. O.L.C. 123, 124 (1997); *see also, e.g.*, 3 General Accounting Office, *Principles of Federal Appropriations Law* 13-135 to -136 (3d ed. 2008) ("*Federal Appropriations Law*") (noting that GSA "serves as the government's chief 'leasing agent'"). GSA finances its leasing operations and other real-estate activities through the Federal Buildings Fund established by 40 U.S.C. § 592. GSA Letter at 9. Money in the fund is "available for real property management and related activities in the amounts specified in annual appropriation laws." 40 U.S.C. § 592(c)(1). In 2015, for example, Congress appropriated more than $10 billion to the fund, "of which . . . $5,579,055,000" was appropriated "for rental of space to remain available until expended." Financial Services and General Government Appropriations Act, 2016, Pub. L. No. 114-113, div. E, tit. V, 129 Stat. 2242, 2423, 2451–53 (2015).

The statute at issue provides that "appropriations may be made" for certain substantial real-estate projects "only if the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives adopt resolutions approving the purpose for which the appropriation is made." 40 U.S.C. § 3307(a). The covered projects include those that require appropriations "to lease any space at an average annual rental in excess of $1,500,000 for use for public purposes," *id.* § 3307(a)(2), or appropriations to "construct, alter, or acquire any building to be used as a public building which involve[] a total expenditure in excess of $1,500,000," *id.* § 3307(a)(1).[2]

The statute also establishes a process by which the committees are to review and grant their approval for potential appropriations. Under section 3307(b), the Administrator of General Services must send Congress a prospectus to secure the committees' consideration of the approval referred to in subsection (a). The prospectus must contain various details about the project, including a "brief description of the building" and "an estimate of the maximum cost to the Government of the facility to be constructed, altered, acquired, or the space to be leased." *Id.* § 3307(b)(1), (2). Section 3307(c) provides that "[t]he estimated maximum cost of any project approved under this section . . . may be increased by an amount equal to any percentage increase, as determined by the Administrator, in construction or alteration costs from the date the prospectus is transmitted to Congress," but "[t]he increase . . . may not exceed 10 percent of the estimated maximum cost." Finally, section 3307(d) provides that "[i]f an appropriation is not made within one year" of the committees' approval of a prospectus for the project, either committee "may rescind its approval before an appropriation is made."

The project at issue in *Springfield Parcel* illustrates the typical operation of section 3307. In January 2014, GSA submitted a prospectus to the congressional committees for a "lease of up to 625,000 rentable square feet" of office space for the Transportation Security Administration ("TSA"), with an estimated annual cost of more than $24 million. GSA

[2] GSA may adjust the dollar figures in section 3307 to account for changes in construction costs. 40 U.S.C. § 3307(h). The Fiscal Year 2018 prospectus threshold for construction, alteration, and leasing projects is $3.095 million. *See* 41 C.F.R. § 102-73.35; *GSA Annual Prospectus Thresholds*, http://www.gsa.gov/annualprospectusthreshold (last visited Jan. 26, 2018).

Letter, Ex. 2. The three-page prospectus described additional details of the proposed project and explained its purpose—chiefly, consolidating TSA's offices from five buildings into one. In February 2014, the House Committee on Transportation and Infrastructure resolved, "pursuant to 40 U.S.C. § 3307," that "appropriations are authorized for a replacement lease of up to 625,000 rentable square feet," as described in the prospectus. GSA Letter, Ex. 3. In April 2014, the Senate Committee on Environment and Public Works similarly resolved, "pursuant to title 40 U.S.C. § 3307," that the "prospectus . . . is approved." GSA Letter, Ex. 4. Each resolution recited some details of the proposed project, including the 625,000-square-foot cap, and described the prospectus as either "included in" (Ex. 3) or "made part of" (Ex. 4) the resolution. Congress did not appropriate any funds on a line-item basis for the project, but it did later appropriate lump-sum funds to the Federal Buildings Fund for leasing activities. *See, e.g.*, Financial Services and General Government Appropriations Act, 2015, Pub. L. No. 113-235, div. E, tit. V, 128 Stat. 2130, 2332, 2360 (2014). Congress never adopted or approved the prospectus itself in legislation.

In September 2015, after GSA awarded a lease for the TSA project, an unsuccessful offeror challenged the award in the Court of Federal Claims. GSA Letter at 1–2. Among other things, the plaintiff alleged that GSA had "violated the Public Buildings Act, specifically 40 U.S.C. § 3307(a)," by awarding a lease for more than 625,000 rentable square feet of office space, "because Congress authorized appropriations only for a building with a maximum of 625,000 rentable square feet." *Springfield Parcel*, 124 Fed. Cl. at 182. The court agreed, holding that committee resolutions under section 3307(a) "create[] binding conditions upon the availability of appropriations" and that "[a]ppropriations for TSA headquarters were accordingly available only for a lease of up to 625,000 square feet because that was the limit included in the resolutions adopted by the relevant congressional committees." *Id.* at 189. The court also held that, "[b]ecause no appropriation ha[d] been made for a space exceeding 625,000 rentable square feet," *id.*, GSA had violated the Anti-Deficiency Act, 31 U.S.C. § 1341, in awarding the TSA lease. The government declined to appeal the decision, and GSA complied with the judgment, despite continuing to disagree with its reasoning. GSA Letter at 1, 3 n.4, 11. GSA later requested our views concerning the effect of committee

resolutions adopted under section 3307 and their implications for the Anti-Deficiency Act, in light of *Springfield Parcel*.

II.

A.

We first consider whether the committee approvals under section 3307(a) establish binding limits on how GSA may expend appropriated funds. In answering that question, "we begin by analyzing the statutory language." *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

Section 3307(a) states that "appropriations may be made" for prospectus-level projects only after the relevant committees "adopt resolutions approving the purpose for which the appropriation is made." Under the Constitution, appropriations must be "made by Law," art. I, § 9, cl. 7, which means they must be made by Congress. Here, section 3307(a) makes committee approval a prerequisite to the enactment of an appropriation, but it does not regulate the actions of the Executive Branch or anyone else. Nothing in the text of section 3307(a) limits GSA's use of funds once "appropriations [have been] made." Thus, contrary to the conclusion of the Court of Federal Claims in *Springfield Parcel*, the "plain text" of section 3307(a) does not make committee approval a "precondition to availability of appropriations," 124 Fed. Cl. at 186. Rather, the plain text makes committee approval a condition only on whether "appropriations may be made" by Congress itself in the future. *Cf. Cleveland Assets, LLC v. United States*, 132 Fed. Cl. 264, 277 n.13 (2017) ("[T]he prohibition contained in § 3307 affects whether Congress will appropriate funds for the lease at issue, and not GSA's authority to solicit proposals for a lease."). As we explain below, because Congress may decline to follow such internal directives, committee approval is not, in fact, an invariable precondition to the availability of appropriations.[3]

[3] We are aware of no other judicial authority, apart from *Springfield Parcel*, that bears directly on the question presented here. In *Realty Income Trust v. Eckerd*, 564 F.2d 447 (D.C. Cir. 1977), the court of appeals stated that "[u]nder the Public Buildings Act of 1959" GSA "is required to obtain Congressional approval before entering into major leaseholds." *Id*. at 449. But that case did not address the effect of committee approval;

As Assistant Attorney General William Rehnquist explained in an opinion of our Office discussing a similar 1954 law, a statute addressing when Congress may make appropriations "is, by its terms, not a restriction on the Executive, but rather a directive to Congress itself that there shall be a condition precedent for the enactment of appropriation legislation for a particular project or group of projects." *Constitutionality of "No Appropriation" Clause in the Watershed Protection and Flood Prevention Act*, 1 Op. O.L.C. Supp. 296, 299 (Feb. 27, 1969) ("Rehnquist Memorandum"). "Sponsors . . . have stated that such a requirement could, if desired, be enforced by a point of order in any floor debate of an appropriation bill containing funds for projects which have not been so approved by committee resolution." *Id*. Requiring committee preapproval, on threat of a point of order, may give particular committees—such as the two specified in section 3307(a)—a degree of control over appropriations, which are otherwise principally the domain of the appropriations committees. But such a limitation on making appropriations "confines its operative effect to the Legislative Branch" and "by its terms does not seek to reach out beyond the legislative preserve." *Id*. at 300.

The Rehnquist Memorandum addressed a statute providing that "[n]o appropriation shall be made" absent committee approval. *Id*. at 296 (quoting Watershed Protection and Flood Prevention Act, Pub. L. No. 83-566, § 2, 68 Stat. 666, 666 (1954)). But the opinion's reasoning also applies to section 3307(a), which originated as section 7(a) of the Public Buildings Act of 1959 and was phrased in the same terms. *See* Public Buildings Act of 1959, Pub. L. No. 86-249, § 7(a), 73 Stat. 479, 480 ("no appropriation shall be made" for certain construction projects "if such construction . . .

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instead, the question before the court was whether the National Environmental Policy Act required GSA to submit an environmental impact statement when submitting a prospectus. *See id*. at 449, 453. In *210 Earll, LLC v. United States*, 77 Fed. Cl. 710 (2006), the court observed that section 3307(a) did "not operate as a bar to [GSA's] award" of a lease above the prospectus threshold even though GSA had not submitted a prospectus (because the project had been expected to fall below the threshold), but that the statute would require GSA to "take the extra step . . . of obtaining Prospectus approval" before executing the lease. *Id*. at 718. The court was addressing the plaintiff's status as an eligible bidder, not the effect of prospectus approval on the availability of enacted appropriations. In any event, for the reasons discussed in the text, we do not believe that section 3307 itself makes committee approval a prerequisite to the availability of appropriations for any GSA leasing projects.

has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives") (codified at 40 U.S.C. § 606(a) (1964)). Indeed, Rehnquist himself later found his reasoning "equally applicable" to the "Public Buildings Act of 1959, 40 U.S.C. 606(a)." Memorandum for Egil Krogh, Staff Assistant to the Counsel to the President, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Encroachment Problem in "No Appropriation" Provisions* at 1 (June 11, 1969).

In 2002, in the course of enacting title 40 into positive law, Congress created section 3307(a) by making minor stylistic changes to former section 606(a), including replacing the "no appropriation shall be made" formulation with the current statement that "appropriations may be made only if" the two committees have adopted resolutions. Pub. L. No. 107-217, sec. 1, § 3307(a), 116 Stat. 1062, 1161 (2002). In doing so, Congress specified that the new version "makes no substantive change in existing law and may not be construed as making a substantive change in existing law." *Id*. sec. 5(b)(1), 116 Stat. at 1303; *see, e.g.*, *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 282 (2014) (relying on similar disclaimer of substantive change in recodification of title 49). The phrasing of section 3307(a) is therefore substantively indistinguishable from the kind of "no appropriation" clause that we have long understood as "bind[ing] only the Congress and not the Executive." Rehnquist Memorandum, 1 Op. O.L.C. Supp. at 301. It still means that committee approval should be understood as a condition applicable only to Congress's appropriation decision, and not to GSA's use of appropriated funds.

Similarly, section 3307(a) does not make binding on GSA any specific term or condition that the committees may recite in approving a prospectus, such as the 625,000-square-foot parameter for the TSA project. In fact, the committee resolutions do not always recite identical terms. *See* GSA Letter at 7. On the TSA headquarters project, for example, each committee resolution contained provisos that were not found in the other committee's resolution. *Compare* GSA Letter, Ex. 3 (House committee approval resolution, providing that GSA and tenant agencies "agree to apply an overall utilization rate of 153 square feet or less per person"), *with* GSA Letter, Ex. 4 (Senate committee approval resolution without any such proviso, but providing that GSA "shall require that the procurement include requirements requiring energy efficiency as would be re-

quired for the construction of a federal building," to the "maximum extent practicable"). If the committee resolutions were understood to set binding conditions, then there could well be circumstances in which they would conflict.

To the extent that it sheds light on the question, the legislative history of the Public Buildings Act is consistent with our view that section 3307(a) limits only the legislative process for making appropriations. In a hearing, one Senator asked GSA officials to address a professor's criticism that the "no appropriations" language gave the committees a legislative veto. *Hearing on S. 1654 and H.R. 7645 before a Subcomm. of the S. Comm. on Public Works*, 86th Cong. 19–21 (1959) (statement of Sen. Neuberger). GSA had assisted in drafting the legislation, and its general counsel explained that the committee-approval mechanism was "not strictly a legislative veto" because "it is committee approval for the making of appropriations." *Id*. at 21 (statement of Mr. Macomber). He later elaborated:

> And the way that leaves it is that if a prospectus, a project, is approved by the two committees, then an appropriation can be made, and it is in the appropriation process that the consideration of the Congress will occur. On the other hand, of course, there would be nothing to prevent the inclusion in an appropriations bill of a project that was not approved by the two committees, except that in that event, such language would be subject to a point of order.

Id. at 23. The committee reports also suggest that legislators understood that section 7(a) of the Public Buildings Act would operate as merely an internal limit on making appropriations. *See* H.R. Rep. No. 86-557, at 9 (1959) (section 7 "generally prohibits an appropriation" absent committee approval); S. Rep. No. 86-694, at 6 (1959) (same).[4]

The Executive Branch has long adhered to this interpretation of "no appropriation" clauses, including in section 7(a) of the Public Buildings Act. Before the Rehnquist Memorandum, the Johnson Administration did object on constitutional grounds to several "no appropriation" clauses,

[4] The Senate committee report concerned a parallel bill that contained the same "no appropriation" clause. *See* S. 1654, 86th Cong. § 7(a) (as reported by S. Comm. on Pub. Works, Aug. 13, 1959).

treating them as the equivalent of a legislative veto. *See, e.g.*, Statement by the President Upon Signing the Water Resources Research Act (July 17, 1964), 2 *Pub. Papers of Pres. Lyndon B. Johnson* 861, 862 (1963–64); *see also* Rehnquist Memorandum, 1 Op. O.L.C. Supp. at 299–300 (discussing Johnson Administration objections). The Rehnquist Memorandum, however, addressed that concern, and since then, the Executive Branch has generally seen "no appropriation" clauses as consistent with the separation of powers because they operate only as internal restraints on Congress's appropriations processes. In 1972, when Congress amended section 7(a) to cover leases for the first time, President Nixon's signing statement memorialized, and "acquiesced in," the understanding that "Congress regards th[e] 'no appropriation may be made' provision as internal Congressional rulemaking which does not affect the executive branch." Statement About Signing the Public Buildings Amendments of 1972 (June 17, 1972), *Pub. Papers of Pres. Richard M. Nixon* 686, 687 (1972); *see also* Public Buildings Amendments of 1972, Pub. L. No. 92-313, sec. 2(4), § 7(a), 86 Stat. 216, 217 (amending section 7 to cover certain leases). In the intervening decades, the Department of Justice has repeatedly expressed the same view.[5]

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[5] *See, e.g.*, Letter for James T. McIntyre, Jr., Acting Director, Office of Management and Budget, from Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs, at 1 (Nov. 25, 1977) ("It is our view . . . that statutes such as [40 U.S.C.] § 606 . . . operate only as internal rules of Congress that may be overridden by a subsequent appropriation bill disregarding their plain language."); Memorandum for Nicholas P. Wise, Deputy Assistant Attorney General, Office of Legislative Affairs, from David G. Leitch, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Judicial Space and Facilities Management Act of 1991, S. 2070*, att. at 1 (Mar. 4, 1992) ("[W]e have long interpreted the 'no appropriation' provision in the Public Buildings Act, 40 U.S.C. § 606(a), to be, in effect, an internal regulation by which Congress has established the committee review procedure for handling the appropriations legislation necessary to fund the particular building project described in the prospectus."); Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Randolph Moss, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: S. 1005*, at 1 (May 30, 1996) ("As it currently stands, . . . § 606 is an internal procedural rule governing Congress's deliberation with respect to appropriations for the covered categories of public buildings projects."); Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Sheldon Bradshaw, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: General Services Administration Draft Bill to Raise Certain Prospectus Submission Thresholds in the Public Buildings Act of 1959*, at 3 (Feb. 20, 2002) ("[W]e have viewed the current version of 40 U.S.C. § 606 . . . as an internal

During that period, Congress amended section 7 of the Public Buildings Act on several occasions, both before and after the 2002 codification of title 40 discussed above.[6] But, so far as we are aware, Congress has never disagreed with the Executive Branch's construction of the "no appropriation" clause. To the contrary, in 1980, the chairman of the pertinent Senate committee, joined by other committee members of both parties, acknowledged GSA's legal conclusion that the committee-approval requirement "does no more than establish a rule internal to the Congress" and that "action by th[e] Committee need not precede the negotiation and execution of any lease" for which GSA "has obtained an appropriation sufficient to meet the Government's obligations under the lease." Letter for Rowland G. Freeman III, Administrator, GSA, from Jennings Randolph, Chairman, Senate Committee on Environment and Public Works, et al., at 1 (June 26, 1980) (GSA Letter, Ex. 7). The Senators stated that they would "not object" to GSA's proceeding on the basis of that interpretation. *Id*. And the Comptroller General has adopted the same interpretation. *See* 3 *Federal Appropriations Law* at 13-194 to -195 (describing the approval requirement as "a restriction on the appropriation of funds," and recognizing that "[l]imiting language in the approval is not legally binding unless incorporated" in legislation). When Congress is thus "aware of an administrative or judicial interpretation of a statute," it is "presumed . . . to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

B.

In concluding that committee resolutions under section 3307(a) establish binding conditions on GSA's use of appropriated funds, the Court of

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procedural rule governing Congress's deliberation with respect to appropriations for the covered categories of public building projects."). On a few recent occasions, in the context of commenting on proposed legislation, we have characterized section 3307 as an unconstitutional legislative veto. We have reviewed these aberrant comments and, on reflection, have concluded that they were incorrect in suggesting that section 3307(a) constitutes a legislative veto, rather than merely an internal constraint on the appropriations process.

[6] *See, e.g.*, Federal Assets Sale and Transfer Act of 2016, Pub. L. No. 114-287, § 17, 130 Stat. 1463, 1476; Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 323, 121 Stat. 1492, 1589–90; Public Buildings Amendments of 1988, Pub. L. No. 100-678, §§ 2, 3(a), 102 Stat. 4049, 4049.

Federal Claims relied upon section 3307(c), which grants the Administrator the authority to exceed the estimated maximum cost by 10 percent. *See Springfield Parcel*, 124 Fed. Cl. at 186. The court reasoned that such express authority to deviate from the cost cited in the approved prospectus implies the absence of authority to deviate from any other conditions set forth in the prospectus. We disagree with that interpretation.

Section 3307(c) provides that "[t]he estimated maximum cost of any project approved under this section as set forth in any prospectus may be increased by an amount equal to any percentage increase, as determined by the Administrator, in construction or alteration costs from the date the prospectus is transmitted to Congress," but that the "increase authorized by this subsection may not exceed 10 percent of the estimated maximum cost."

In *Springfield Parcel*, the court assumed that section 3307(c) regulates how GSA may expend appropriated funds and concluded that the "exception" in section 3307(c)—permitting GSA to depart from the "estimated maximum cost" in the prospectus—implies that the specifications in a prospectus approved under section 3307(a) are binding on GSA. *See* 124 Fed. Cl. at 186. But the court's premise is questionable. While section 3307(c) does not itself mention the appropriations process, it plainly refers to the subsections that do. Section 3307(c) addresses the "estimated maximum cost . . . as set forth in [the] prospectus" and refers to projects "approved under this section." Insofar as the section 3307(a) approval and the section 3307(b) prospectus concern when "appropriations may be made," section 3307(c) would most naturally be read to address when Congress may appropriate funds beyond the initial estimate of the maximum cost of the project without the need for the committees to review another prospectus.[7] Although the GSA Administrator may determine when the project overruns its initial costs, it does not follow that section

[7] The Comptroller General appears to have adopted the same reading we find most natural. *See* 3 *Federal Appropriations Law* at 13-194 ("The project cost may be increased by up to 10 percent of the prospectus estimate without having to submit a revised prospectus."); *see also* 105 Cong. Rec. 12,987 (1959) (statement of Rep. Mack) ("If the maximum costs of construction or alteration should, due to price advances, be increased by more than 10 percent, the Administrator must secure further additional authorization of the congressional committees.").

3307(c) specifically regulates the actions of GSA. To the contrary, the Administrator could spend additional funds on the project only if they were or had been appropriated in the first place.[8]

For these reasons, we disagree with the *Springfield Parcel* court's interpretation of section 3307(c). In any event, we do not believe that any ambiguity in subsection (c) would weigh in favor of a different interpretation of subsection (a). *See, e.g.*, *Arnold P'ship v. Dudas*, 362 F.3d 1338, 1342 (Fed. Cir. 2004) (noting that "a vague implication in" one statutory subsection "cannot override the unambiguous language in the remainder of the section"). The language of section 3307(a) plainly establishes a prerequisite to enacting "appropriations" and not a limit on what GSA may do with appropriated funds. The language now found in section 3307(c) has coexisted with the "no appropriation" clause since the Public Buildings Act was first enacted in 1959, yet it has never been thought to make the committees' approval binding on GSA. *See* Pub. L. No. 86-249, § 7(b), 73 Stat. at 480. The language of section 3307(c) does not override the unambiguous language of section 3307(a) itself.

C.

Finally, even if section 3307 were ambiguous, principles of constitutional avoidance would counsel in favor of our longstanding interpretation. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). If section 3307(a) were read to mean that committee resolutions approving a prospectus may bind GSA's use of appropriated funds, then section 3307(a) would operate as an unconstitutional legislative veto.

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[8] Congress has included in annual appropriations acts a provision permitting GSA to exceed by 10 percent the amount otherwise appropriated for line-item projects, assuming funds are available. GSA Letter at 6; *see, e.g.*, Financial Services and General Government Appropriations Act, 2015, 128 Stat. at 2360–61 ("*Provided*, That each of the foregoing limits of costs on new construction and acquisition projects may be exceeded to the extent that savings are effected in other such projects, but not to exceed 10 percent of the amounts included in a transmitted prospectus, if required[.]"). The inclusion of such a proviso suggests that Congress itself does not view section 3307(c) as already regulating GSA's ability to spend appropriated funds in excess of the estimated maximum cost in a prospectus.

Federal legislative power must "be exercised in accord with a single, finely wrought and exhaustively considered, procedure": the bicameralism and presentment procedure specified in Article I. *INS v. Chadha*, 462 U.S. 919, 951 (1983). "Congress may not delegate the power to legislate to its own agents or to its own Members." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 275 (1991) ("*MWAA*"); *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 136 (1996) ("[T]he requirement of bicameralism and presentment is infringed whenever a single house, committee, or agent of Congress attempts to direct the execution of the law[.]"). Instead, "when Congress 'takes action that has the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch,' it must take that action by the procedures authorized in the Constitution." *MWAA*, 501 U.S. at 276 (brackets omitted) (quoting *Chadha*, 462 U.S. at 952).

Section 3307(a) would violate those precepts if—contrary to our view—it were read to empower two congressional committees to control GSA's use of previously appropriated funds. "Such legislative action cannot be validly accomplished by mere committees of the Congress." *Severability and Duration of Appropriations Rider Concerning Frozen Poultry Regulations*, 20 Op. O.L.C. 232, 234 (1996); *see also Constitutionality of Committee Approval Provision in Department of Housing and Urban Development Appropriations Act*, 6 Op. O.L.C. 591, 592 (1982) ("[C]ommittees of Congress may not, by the approval resolution mechanism contemplated by the HUD appropriations statute, control the execution of the laws by an executive agency[.]"); *Am. Fed'n of Gov't Emps. v. Pierce*, 697 F.2d 303, 305–06 (D.C. Cir. 1982) (per curiam) (holding committee-approval requirement unconstitutional). Section 3307(a) would run afoul of the same constitutional prohibition were it read to give binding force to committee resolutions that were never adopted by both Houses of Congress and presented to the President.

We therefore disagree with the footnote in *Springfield Parcel* concluding that committee resolutions under section 3307(a) may establish binding conditions on the use of appropriated funds without violating *Chadha*. *See* 124 Fed. Cl. at 186 n.23. Raising the question *sua sponte*, the claims court reasoned that such resolutions "precede, not follow, the pertinent

appropriation," and therefore that "any conditions stated in the committees' approving resolutions flow through to the appropriation." *Id*. at 187 n.23.[9] But mere "[e]xpressions of committees" during the legislative process "cannot be equated with statutes enacted by Congress." *TVA v. Hill*, 437 U.S. 153, 191 (1978); *see also Lincoln v. Vigil*, 508 U.S. 182, 192–93 (1993) (explaining that statements in committee reports "do not establish any legal requirements on the agency" when Congress appropriates lump-sum amounts (internal quotation marks omitted)). Nor may Congress decree in advance that committee resolutions, which are neither approved by both Houses nor presented to the President, will automatically "flow through" to future appropriations. "[W]hen Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I." *MWAA*, 501 U.S. at 274 n.19 (internal quotation marks omitted). If Congress sought to impose conditions specified in committee resolutions to limit the Executive Branch's use of appropriated funds on the basis of conditions in committee resolutions, then it would be obliged to identify those conditions in legislation, either in the text of the statute or by incorporating their terms by reference. *See, e.g.*, *Hershey Foods Corp. v. U.S. Dep't of Agric.*, 158 F. Supp. 2d 37, 40–41 (D.D.C. 2001) (holding that *Chadha* is not violated when a law incorporates a prior unenacted bill by reference, as long as the law was enacted in accordance with the bicameralism and presentment requirements). Congress may not, however, give a committee resolution or report the force of law when the appropriations law actually enacted is silent with respect to the resolution or report. These constitutional concerns provide all the more reason to read section 3307(a) as establishing merely an internal constraint on the appropriations process.

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[9] In support of its reading, the court cited a post-*Chadha* letter from the Comptroller General. *See Letter to Silvio O. Conte, Ranking Minority Member, House Committee on Appropriations*, B-196854, 1984 WL 262173 (Comp. Gen. Mar. 19, 1984). That letter, however, did not support the court's conclusion that committee-approval resolutions "flow through" to any future appropriations. Instead, the letter concluded that "a convincing argument may be made" in support of a committee-approval requirement "for obligations or expenditures beyond those clearly authorized by the appropriations acts." *Id*. at *3. Moreover, subsequent guidance from the Comptroller General squarely contradicts the court's reading of the Public Buildings Act. *See* 3 *Federal Appropriations Law* at 13-195.

III.

For similar reasons, we conclude that when Congress appropriates funds for prospectus-level projects, those appropriations make funds available to GSA without regard to whether the committees have approved them under section 3307(a). According to GSA, Congress regularly appropriates funds for prospectus-level projects "for which the requirements of section 3307 have not been met." GSA Letter at 5 n.8 (citing examples). Once Congress has appropriated the funds, section 3307(a) does not constrain GSA's use of them consistent with the terms of the applicable appropriations law.

As noted above, section 3307(a) should be regarded as an internal directive to the relevant appropriations committees. If a proposed appropriation does not comply with those procedures, the statute "provide[s] a member of Congress the right to interpose a point of order" in objection. Letter for James T. McIntyre, Jr., Acting Director, Office of Management and Budget, from Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs, at 1 n.* (Nov. 25, 1977). But the procedures are not self-implementing. No member is obligated to raise such points of order, and, even when raised, they may be overruled. *See* 2 *Federal Appropriations Law* at 2-20 to -21 & n.25 (4th ed. 2016) (explaining that points of order can "[u]sually . . . be waived by a simple majority vote"); *see also* Thomas J. Wickham, *Constitution, Jefferson's Manual, and the Rules of the House of Representatives*, H.R. Doc. No. 114-192, §§ 1043–44, at 871–75 (2017) (discussing House rules for points of order against unauthorized appropriations); Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure: Precedents and Practices*, S. Doc. No. 101-28, at 150–52, 210 (1992) (discussing Senate rules). In any event, Congress always has the power to disregard section 3307(a)'s limitation and appropriate funds for prospectus-level projects that have not received the committee approval that the statute purports to require. That conclusion is compelled by the fundamental principle that "statutes enacted by one Congress cannot bind a later Congress, which remains free to . . . exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified." *Dorsey v. United States*, 567 U.S. 260, 274 (2012).

When Congress wields that power, "the committees' failure to approve a prospectus is without any legal significance, because if Congress in fact appropriates funds for a project, the Executive Branch may legally expend those funds notwithstanding the failure of the committees to approve that project prior to the appropriation." Letter for Allie B. Latimer, General Counsel, General Services Administration, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, at 2 (Sept. 27, 1983). The general counsel of GSA made this point in the 1959 hearings on the Public Buildings Act, and we have consistently endorsed it. *See* Rehnquist Memorandum, 1 Op. O.L.C. Supp. at 301 (explaining that "if Congress passes general, unspecified . . . appropriations, . . . the Executive is entitled to treat this money as finally appropriated and allocable to projects which have not received committee approval"); *supra* note 5 (citing other opinions). And the Comptroller General has repeatedly adopted the same construction. *See* Letter for Daniel Patrick Moynihan, United State Senate, from R.F. Keller, Acting Comptroller General, at 2 (Sept. 27, 1978) ("[I]f the Congress, notwithstanding the [committee-approval] restriction in question, appropriates funds to GSA for the projects, we would not question the use of the funds for the purposes appropriated, such appropriations being the latest expression of congressional intent."); 3 *Federal Appropriations Law* at 13-195 ("If GSA does not comply with the prospectus approval requirement and Congress chooses to appropriate the money anyway, the appropriation might be subject to a point of order, but it would be a perfectly valid appropriation if enacted.").

Finally, we believe that our interpretation of section 3307 is buttressed by the fact that annual appropriations acts sometimes include a rider that purports directly to bar GSA from using lump-sum appropriations for certain projects that have not received committee approval. The Fiscal Year 2016 provision, for instance, prohibited the use of appropriations "for expenses of any construction, repair, alteration and acquisition project for which a prospectus, if required by 40 U.S.C. 3307(a), has not been approved" (except for the expenses associated with preparing a prospectus). Financial Services and General Government Appropriations Act, 2016, 129 Stat. at 2453; *see also, e.g.*, Financial Services and General Government Appropriations Act, 2015, 128 Stat. at 2362 (same); Financial Services and General Government Appropriations Act, 2014, Pub. L.

No. 113-76, div. E, tit. V, 128 Stat. 5, 184, 214 (same). Such a proviso would be unnecessary if section 3307(a) itself already imposed mandatory conditions upon the use of those appropriations for a project without an approved prospectus.[10]

IV.

Our conclusion with respect to section 3307 also means that GSA would not violate the Anti-Deficiency Act, 31 U.S.C. § 1341, if it were to expend appropriated funds in a manner inconsistent with a committee approval resolution. As noted above, the Court of Federal Claims in *Springfield Parcel* concluded that section 3307(a) "committee resolutions create[] binding conditions upon the availability of appropriations" and therefore that funds are "available in an appropriation or fund" within the meaning of the Anti-Deficiency Act only to the extent that GSA complies with the committee resolutions. 124 Fed. Cl. at 189 (quoting 31 U.S.C. § 1341(a)(1)(A)). GSA contends that the court misunderstood that, under 40 U.S.C. § 592, the Federal Buildings Fund will make funds "available" under the Anti-Deficiency Act without regard to the putative limitations in committee resolutions. GSA Letter at 9–10. We see no need to address that theory, however. In our view, the Anti-Deficiency Act discussion in *Springfield Parcel* is unpersuasive for a simpler reason: The court's premise regarding section 3307(a) resolutions was incorrect. Committee resolutions adopted in accordance with section 3307(a) do not establish binding conditions on GSA's use of appropriated funds and,

[10] We note that the constitutionality of such an appropriations rider would depend upon whether it merely incorporated existing committee approvals by reference, or instead purported to grant individual congressional committees the authority to control the use of already-appropriated funds through future committee actions. *See supra* Part II.C (discussing impermissible legislative vetoes). The Fiscal Year 2016 provision quoted in the text does not appear to apply to leasing projects like the one at issue in *Springfield Parcel*, because it concerns expenses associated with "construction, repair, alteration and acquisition project[s]," which are covered by section 3307(a)(1), rather than leases covered by section 3307(a)(2). That distinguishes it from similar provisos that Congress previously enacted, which expressly included leases along with construction and other projects. *See, e.g.*, Independent Agencies Appropriations Act, 1994, Pub. L. No. 103-123, tit. IV, 107 Stat. 1226, 1238, 1243–44 (1993). Because the recent form of the appropriations rider does not apply to the *Springfield Parcel* lease that occasioned the request for this opinion, we do not address its lawfulness.

therefore, have no effect on the availability of appropriated funds for purposes of the Anti-Deficiency Act.

CURTIS E. GANNON
Principal Deputy Assistant Attorney General
Office of Legal Counsel

The Department of Defense's Authority to Conduct Background Investigations for Its Personnel

Section 925 of the National Defense Authorization Act for Fiscal Year 2018 authorizes the Department of Defense to conduct the background investigations for its personnel currently performed by the National Background Investigations Bureau of the Office of Personnel Management, including investigations to determine whether those personnel may be granted security clearances giving them access to classified information or whether they are eligible to hold sensitive positions.

This statutory reallocation of investigative authority from one part of the Executive Branch to another does not raise constitutional concerns. It does not infringe upon the President's constitutional role in protecting national security information.

February 7, 2018

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF PERSONNEL MANAGEMENT

You have asked whether the Department of Defense ("DoD") has the authority to conduct the background investigations for its personnel currently performed by the National Background Investigations Bureau ("NBIB"), an entity within the Office of Personnel Management ("OPM"). Those background investigations include investigations to determine whether DoD personnel may be granted a security clearance giving them access to classified information or whether they are eligible to hold a sensitive position.[1] You indicated that, in your view, a statutory amendment or new executive order would be necessary for DoD to assume these functions. *See* OPM Opinion Request at 9–10.[2]

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[1] *See* Letter for Curtis E. Gannon, Acting Assistant Attorney General, Office of Legal Counsel, from Theodore M. Cooperstein, General Counsel, Office of Personnel Management at 1–2, 9–10 (Oct. 4, 2017) ("OPM Opinion Request"); *see also* Letter for Curtis E. Gannon, Acting Assistant Attorney General, Office of Legal Counsel, from Theodore M. Cooperstein, General Counsel, Office of Personnel Management (Oct. 12, 2017) ("OPM Opinion Request Supplement").

[2] We also received views from DoD and the Office of the Director of National Intelligence ("ODNI"). *See* Letter for Curtis E. Gannon, Acting Assistant Attorney General, Office of Legal Counsel, from William S. Castle, Acting General Counsel, Department of Defense (Nov. 9, 2017) ("DoD Views Letter"); E-mail for Henry C. Whitaker, Office of Legal Counsel, from Spencer R. Fisher, National Counterintelligence and Security Center, ODNI, *Re: OPM OLC opinion request* (Nov. 3, 2017 1:28 PM) ("ODNI Views

After you requested this opinion, the President signed into law the National Defense Authorization Act for Fiscal Year 2018 ("FY 2018 NDAA"), Pub. L. No. 115-91, 131 Stat. 1283 (2017). Section 925 of the NDAA provides that "[t]he Secretary of Defense has the authority to conduct security, suitability, and credentialing background investigations for Department of Defense personnel," *id.* § 925(a)(1), 131 Stat. at 1526, and explains how DoD should exercise that authority, *id.* § 925(a)(2), (b), 131 Stat. at 1526–27. We conclude that section 925 unambiguously authorizes DoD to conduct the investigations at issue and that this authorization is constitutional. We thus need not consider whether DoD possessed this authority under previous statutes or executive orders.

I.

Before 2003, DoD performed certain background investigations for its own personnel. *See* OPM Opinion Request Supplement at 1; OPM Opinion Request at 4 n.8. Pursuant to a delegation of authority from OPM, those investigations included applicants for, and employees in, competitive service positions within DoD. *Id.* In 2003, the National Defense Authorization Act for FY 2004 ("FY 2004 NDAA") authorized DoD to transfer those investigative functions to OPM so long as certain conditions were met, including that DoD and OPM agreed to the transfer. Pub. L. No. 108-136, § 906(a), 117 Stat. 1392, 1561 (2003). In October 2004, OPM and DoD agreed to the transfer, and OPM assumed control over these functions by February 2005. *See* DoD Views Letter at 3–4 & att. 2.

In December 2004, Congress passed the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638. Section 3001 of that law, which has been codified at 50 U.S.C. § 3341 and is referred to subsequently as section 3341, instructed the

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E-mail"). In addition, we received further submissions from OPM, DoD, and ODNI regarding the effect of section 925 of the National Defense Authorization Act for Fiscal Year 2018. *See* E-mail for Henry C. Whitaker, Office of Legal Counsel, from Robert J. Girouard, Office of Personnel Management, *Re: OPM opinion request* (Oct. 18, 2017 1:08 PM) ("OPM Supplemental Views E-mail"); E-mail for Henry C. Whitaker, Office of Legal Counsel, from Spencer R. Fisher, National Counterintelligence and Security Center, ODNI, *Re: OPM OLC opinion request* (Dec. 1, 2017 5:31 PM); Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from William S. Castle, Acting General Counsel, Department of Defense (Dec. 7, 2017).

President to select a single Executive Branch agency to oversee security clearance investigations and adjudications and to set uniform policies in this area throughout the United States Government. *See id.* § 3001(b)(1)–(2), (4), 118 Stat. at 3705–10 (codified at 50 U.S.C. § 3341(b)(1)–(2), (4)). That section further required that, "[n]otwithstanding any other provision of law," the President, in consultation with the designated oversight agency, would select "a single agency . . . to conduct, to the maximum extent practicable, security clearance investigations of employees and contractor personnel of the United States Government who require access to classified information and to provide and maintain all security clearances of such employees and contractor personnel." *Id.* § 3001(c)(1), 118 Stat. at 3707 (codified at 50 U.S.C. § 3341(c)(1)). Section 3341 also authorized the oversight agency to designate "other agencies to conduct such investigations" if "appropriate for national security and efficiency purposes." *Id.*

At present, those provisions of section 3341 have been implemented in Executive Orders that charge the Director of National Intelligence with oversight of security clearance investigations and adjudications. *See* Exec. Order No. 13764, § 3(s), 82 Fed. Reg. 8115, 8123 (Jan. 17, 2017) (amending Exec. Order No. 13467, § 2.5(e), 3 C.F.R. 196 (2008)). In those Orders, the President has also charged OPM with overseeing suitability investigations and determinations. *See id.* §§ 1(a)(iii), 3(s) (amending Civil Service Rule II, 5 C.F.R. §§ 2.1(a), and Exec. Order No. 13467, § 2.5(b)). He has further specified that the NBIB, an entity within OPM, shall "serve as the primary executive branch service provider for background investigations" for security clearances and related adjudications as well as for suitability determinations. *Id.* § 3(t) (amending Exec. Order No. 13467, § 2.6(a)(1)); *see also id*. § 1(b)(i) (amending Civil Service Rule V, 5 C.F.R. § 5.2(a)). But the Director of National Intelligence retains the ultimate authority "to designate an agency or agencies, to the extent that it is not practicable to use the [NBIB], to conduct investigations of persons who are proposed for access to classified information or for eligibility to hold a sensitive position." *Id.* § 3(s) (amending Exec. Order No. 13467, § 2.5(e)(vi)).[3] At the time of your opinion request, the

[3] The President originally designated the Office of Management and Budget as the agency responsible for overseeing security clearance investigations and adjudications. *See*

Director of National Intelligence had not indicated that it would be impracticable for the NBIB to conduct security clearance investigations for DoD personnel, nor had the Director designated DoD to conduct those investigations. *See* ODNI Views E-mail.

On December 12, 2017, Congress enacted the FY 2018 NDAA, which included a new provision, section 925, concerning DoD personnel background and security investigations. Section 925(a) of that law provides in relevant part:

> (a) TRANSITION TO DISCHARGE BY DEFENSE SECURITY SERVICE [("DSS")].—
>
> (1) SECRETARIAL AUTHORITY.—The Secretary of Defense has the authority to conduct security, suitability, and credentialing background investigations for Department of Defense personnel. In carrying out such authority, the Secretary may use such authority, or may delegate such authority to another entity.
>
> (2) PHASED TRANSITION.—As part of providing for the conduct of background investigations initiated by the Department of Defense through the Defense Security Service by not later than the deadline specified in subsection (b), the Secretary shall, in consultation with the Director of the Office of Personnel Management, provide for a phased transition from the conduct of such investigations by the National Background Investigations Bureau of the Office of Personnel Management to the conduct of such investigations by the Defense Security Service by that deadline.

Id. § 925(a), 131 Stat. at 1526.

Section 925(b), in turn, provides:

Exec. Order No. 13381, § 2, 3 C.F.R. 167, 167–68 (2005). In 2008, however, the President transferred most of those oversight functions to the Director of National Intelligence. *See* Exec. Order No. 13467, § 2.3(c). Executive Order 13467 also specified that the Director of OPM would oversee investigations and adjudications relating to determinations of suitability and eligibility for logical and physical access. *Id.* § 2.3(b). As noted above, the Director of OPM continues to serve in this role. And the President since 2005 has designated OPM as the lead entity responsible for conducting investigations for security clearances and related determinations. *See* OPM Opinion Request at 6 & n.15; *see also* Exec. Order No. 13467, § 3(g). OPM has also been granted responsibility for performing suitability investigations for decades. *See* OPM Opinion Request at 3, 8.

> (b) COMMENCEMENT OF IMPLEMENTATION PLAN FOR ONGOING DISCHARGE OF INVESTIGATIONS THROUGH DSS.—Not later than October 1, 2020, the Secretary of Defense shall commence carrying out the implementation plan developed pursuant to section 951(a)(1) of the National Defense Authorization Act for Fiscal Year 2017[.]

Id. § 925(b), 131 Stat. at 1527.[4]

Section 925(d) then states:

> (d) TRANSFER OF CERTAIN FUNCTIONS IN OPM TO DSS.—
>
> (1) IN GENERAL.—For purposes of meeting the requirements in subsections (a) and (b), the Secretary of Defense shall provide for the transfer of the functions described in paragraph (2), and any associated personnel and resources, to the Department of Defense.
>
> (2) FUNCTIONS.—The functions to be transferred pursuant to paragraph (1) are the following:
>
> (A) Any personnel security investigations functions transferred by the Secretary to the Director of the Office of Personnel Management pursuant to section 906 of the [FY 2004 NDAA].
>
> (B) Any other functions of the Office of Personnel Management in connection with background investigations initiated by the Department of Defense that the Secretary and the Director jointly consider appropriate.

Id. § 925(d), 131 Stat. at 1527.

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[4] In the National Defense Authorization Act for Fiscal Year 2017 ("FY 2017 NDAA"), Pub. L. No. 114-328, 130 Stat. 1999 (2016), Congress had directed DoD to develop and submit an implementation plan for DoD to conduct background investigations for specified DoD personnel. *Id.* § 951(a)(1), 130 Stat. at 2371. The FY 2017 NDAA further directed DoD and OPM jointly to develop a plan to transfer personnel and resources in proportion to the workload that DoD would assume were this plan implemented. *Id.* § 951(a)(2), 130 Stat. at 2371. In August 2017, before section 925's enactment, DoD submitted to Congress a three-phase, three-year plan whereby DoD would ultimately assume responsibility for conducting all background investigations for DoD-affiliated personnel. *See* Department of Defense Response to the National Defense Authorization Act for Fiscal Year 2017 Section 951: Implementation Plan for Potential Transfer of Background Investigation Responsibility to the Department of Defense ("DoD Implementation Plan").

II.

The enactment of section 925 of the FY 2018 NDAA resolves the question that you have asked. No matter whether DoD previously had authority to conduct background investigations for DoD personnel, DoD has that authority now. By its terms, section 925 authorizes DoD to "conduct security, suitability, and credentialing background investigations for Department of Defense personnel." FY 2018 NDAA, § 925(a)(1), 131 Stat. at 1526. Section 925 also states: "Any personnel security investigations functions transferred by the Secretary [of Defense] to the Director of the Office of Personnel Management pursuant to section 906 of" the FY 2004 NDAA shall "be transferred" back to DoD. *Id.* § 925(d)(2), 131 Stat. at 1527. Indeed, section 925 not only authorizes, but requires DoD to conduct investigations for DoD personnel. DoD, in consultation with OPM, "shall provide for a phased transition from the conduct of such investigations by the [NBIB] to the conduct of such investigations by [DSS]." *Id.* § 925(a)(2), 131 Stat. at 1526. And DoD must begin executing those functions by 2020 by following the implementation plan that DoD developed pursuant to the FY 2017 NDAA. *Id.* § 925(b), 131 Stat. at 1527; *see supra* note 4.

OPM, however, contends that section 925 "poses significant interpretive difficulties" because it conflicts with, but does not expressly repeal, various statutory provisions that OPM reads as authorizing only OPM to conduct investigations. OPM Opinion Request at 9 n.22; *see also* OPM Supplemental Views E-mail. In particular, OPM sees a conflict between section 925 and IRTPA, under which the President, "[n]otwithstanding any other provision of law," must "select a single agency of the executive branch to conduct, to the maximum extent practicable, security clearance investigations of employees and contractor personnel" across the government. 50 U.S.C. § 3341(c)(1). Because the President designated OPM as this "single agency," OPM suggests, section 925's assignment to DoD of responsibility for conducting security clearance investigations for DoD employees cannot be reconciled with this provision. *See* OPM Opinion Request at 9 n.22; *see also* ODNI Views E-mail (expressing a similar concern).

We disagree. As its heading indicates, section 925(d) requires the "transfer of certain functions in OPM to DSS," namely those involving

personnel security investigations. FY 2018 NDAA, § 925(d), 131 Stat. at 1527 (capitalization modified). Section 925(a) similarly provides for the phased transition from the NBIB (within OPM) to DSS of functions that include the conduct of security clearance investigations. *See id.* § 925(a)(2), 131 Stat. at 1526. Although the statute does not expressly modify the "single agency" directive of section 3341, we could not give effect to section 925 without concluding that it creates an exception to the prior rule. "[N]ormally the specific governs the general." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170 (2007). That "canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission," so that, "[t]o eliminate the contradiction, the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *see also GAO Access to Trade Secret Information*, 12 Op. O.L.C. 181, 182–83 (1988) ("It is a cardinal axiom of statutory construction that 'where there is no clear congressional intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of priority of enactment.'" (brackets omitted) (quoting *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974))). That principle applies in determining in particular how a later-enacted statute should be harmonized with an earlier one. *See, e.g.*, *United States v. Estate of Romani*, 523 U.S. 517, 530–31 (1998) (concluding that the more specific provisions of the later-enacted Tax Lien Act should be given effect over the federal priority statute, even though the Tax Lien Act did not expressly amend the earlier statute). Here, section 925 is the more specific provision: its sole concern is with allocating responsibility for background investigations of DoD personnel. By contrast, section 3341 describes how responsibility for security clearance investigations should be allocated government-wide.

Nor do we see anything in the statutory text that would displace this presumption. While section 3341 applies "[n]otwithstanding any other provision of law," that phrase does not preclude a later Congress from effectively enacting a specific exception to the general rule of single-agency administration of security clearance investigations. *See Dorsey v. United States*, 567 U.S. 260, 274 (2012) ("[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to

modify the earlier statute, or to apply the earlier statute but as modified. And Congress remains free to express any such intention either expressly or by implication as it chooses." (citations omitted)); *see also Lockhart v. United States*, 546 U.S. 142, 147–48 (2005) (Scalia, J., concurring) (similar). Thus, "the general language" of section 3341, "although broad enough to include it, will not be held to apply to a matter specifically dealt with" in section 925. *RadLAX*, 566 U.S. at 646 (internal quotation marks omitted).

For the same reasons, we disagree with the suggestion that our reading of section 925 would pose "significant interpretive difficulties" with respect to other statutory provisions. *See* OPM Opinion Request at 9 n.22. Section 925 can be read alongside 5 U.S.C. § 3301, which grants the President broad authority to regulate the civil service, including the authority to select individuals to conduct investigations to determine the fitness of applicants. *See id.* § 3301(3). We think that section 925's more specific provision controls, and that DoD has the authority to conduct specified investigations for its own personnel. We also see no conflict between section 925 and 5 U.S.C. § 11001, which cross-references 50 U.S.C. § 3341 and simply confers authority on the Director of National Intelligence over certain security reinvestigations without independently specifying which entity must perform those reinvestigations.

OPM also has identified a "marked contrast" between section 925 and section 906 of the FY 2004 NDAA, which OPM interpreted as providing for a transfer of investigative authority from DoD to OPM that, once made, was irreversible except through subsequently enacted legislation. *See* OPM Opinion Request at 9 & n.22. OPM subsequently clarified that it does not see a direct conflict between these provisions. We do not in any event think that section 906 creates any interpretive difficulties with respect to section 925. Even if OPM's reading of section 906 were correct, section 925(d)(2) expressly reverses any transfer of investigative functions effected by the earlier provision. *See* FY 2018 NDAA, § 925(d)(2), 131 Stat. at 1527 (providing that "[a]ny personnel security investigations functions transferred by the Secretary [of Defense] to the Director of the Office of Personnel Management pursuant to section 906 of" the FY 2004 NDAA must "be transferred" back to DoD). Therefore, section 925 "specifically addresses language on the statute books that

[Congress] wishes to change" and supersedes section 906. *United States v. Fausto*, 484 U.S. 439, 453 (1988).

Finally, we disagree with OPM's suggestion that this reading of section 925 might raise constitutional concerns. OPM indicates that if Congress assigned to DoD the authority to conduct security clearance and related background investigations for specific personnel, that could interfere with the President's constitutional authority to control the dissemination of national security information, which OPM suggests includes control over which agency conducts background investigations. *See* OPM Opinion Request at 9 n.22. We do not believe, however, that the statutory reallocation of the responsibility to conduct such background investigations infringes upon the President's constitutional role in protecting national security information.

As the Supreme Court has recognized, the President has significant independent constitutional authority in this area. The President's "authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information" derives from his constitutional authority as "Commander in Chief of the Army and Navy of the United States." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (quoting U.S. Const. art. II, § 2, cl. 1). That authority thus "exists quite apart from any explicit congressional grant." *Id.* Indeed, "[t]he President's roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch." *Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996) (quoting Brief for the Appellees at 42, *Am. Foreign Serv. Ass'n v. Garfinkel*, 488 U.S. 923 (1988) (No. 87-2127)). Thus, while Congress is not entirely disabled from participating in the system for protecting classified information, Congress may not impair the President's control over national security information. *See, e.g.*, *Security Clearance Adjudications by the DOJ Access Review Committee*, 35 Op. O.L.C. 86, 95–96 (2011). "Congress may not, for example, provide Executive Branch employees with independent authority to countermand or evade the President's determinations as to when it is lawful and appropriate to disclose classified information." *Id.* at 96.

But section 925 does not encroach upon presidential prerogatives with respect to the protection of classified information. Section 925 does not purport to dictate who should be granted access to national security information. Nor does section 925 attempt to alter the substantive standards governing which individuals are entitled to be granted such access. Rather, section 925 simply reallocates from OPM to DoD the authority to conduct the background investigations generating the information required to make such access determinations for a subset of federal personnel. Moreover, section 925 gives the Secretary of Defense the flexibility either to use this authority himself or to "delegate such authority to another entity," suggesting that the Executive Branch will still have ultimate control over which entity conducts these investigations. FY 2018 NDAA, § 925(a)(1), 131 Stat. at 1526. And in any event, DoD would remain subject to the framework for controlling how access determinations will be made that the President established in Executive Orders. When performing security clearance and related background investigations, DoD would, for example, remain subject to the oversight of the Director of National Intelligence. *See* Exec. Order No. 13764, § 3(s) (amending Exec. Order No. 13467, § 2.5(e)(i)–(vi), (vii)).[5] We conclude that this statutory reallocation of investigative functions from one part of the Executive Branch to another does not raise constitutional concerns.

III.

For the reasons set forth above, we conclude that, under section 925 of the FY 2018 NDAA, DoD has the authority to conduct background investigations for its personnel that the NBIB currently performs, including investigations to determine whether those personnel may be granted a security clearance giving them access to classified information or whether they are eligible to hold a sensitive position. We do not understand this specific grant of investigative authority to DoD otherwise to disrupt the

[5] Indeed, the implementation plan that DoD developed pursuant to the FY 2017 NDAA, which section 925(b) directs DoD to follow, specifically includes as a criterion of the plan's "end-state success" with respect to such investigations the achievement of "[c]ompliance with [ODNI] oversight, reporting and assessment requirements." DoD Implementation Plan at 6–7.

general oversight framework for background investigations established by Executive Order 13764 and its predecessors.

SARAH M. HARRIS
Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of the Miscellaneous Receipts Act to an Arbitral Award of Legal Costs

An arbitral award of legal costs does not qualify as a refund for purposes of the "refunds to appropriations" exception to the Miscellaneous Receipts Act. The Millennium Challenge Corporation therefore must deposit the award in the general fund of the Treasury.

March 6, 2018

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
MILLENNIUM CHALLENGE CORPORATION

You have asked whether the Millennium Challenge Corporation ("MCC") may retain an arbitral award of legal costs under the refund exception to the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b).[1] The Act requires a federal official or agent "receiving money for the Government from any source" to deposit it in the Treasury "as soon as practicable without deduction for any charge or claim," *id*., but the Act has long been understood to allow the retention of certain refunds to appropriations for amounts erroneously disbursed. Because the arbitral award cannot be viewed as such a refund, we conclude that the exception does not apply and that MCC must deposit the award in the general fund of the Treasury.

I.

MCC is a government corporation within the Executive Branch that provides assistance to developing countries to promote economic growth and reduce poverty. *See* Millennium Challenge Act of 2003, Pub. L. No.

[1] *See* Memorandum for Curtis E. Gannon, Acting Assistant Attorney General, Office of Legal Counsel, from David P. Kassebaum & Richard J. McCarthy, Assistant General Counsels, Millennium Challenge Corporation (Mar. 23, 2017). In considering this question, we requested and received the views of the Department of State and the Office of Management and Budget. *See* E-mail for Sarah M. Harris, Deputy Assistant Attorney General, Office of Legal Counsel, from Richard C. Visek, Acting Legal Adviser, Department of State, *Re: Request for Views on a Miscellaneous Receipts Act Issue*, att. (Dec. 15, 2017 5:30 P.M.); E-mail for Sarah M. Harris, Deputy Assistant Attorney General, Office of Legal Counsel, from Heather V. Walsh, Deputy General Counsel, Office of Management and Budget, *Re: Request for Views on a Miscellaneous Receipts Act Issue* (Dec. 15, 2017 5:55 P.M.).

108-199, div. D, tit. VI, §§ 602, 604(a), 605(a), 118 Stat. 211, 211–12, 214 (2004) (codified at 22 U.S.C. §§ 7701, 7703(a), 7704(a)). MCC provides such assistance "in the form of grants, cooperative agreements, or contracts," *id*. § 605(b), and receives congressional appropriations to fund its programs and operations, including its administrative costs. In 2015, for example, Congress made "up to $105,000,000" available for MCC's "administrative expenses" out of a total appropriation of $901 million. Department of State, Foreign Operations, and Related Programs Appropriations Act, 2016, Pub. L. No. 114-113, div. K, tit. III, 129 Stat. 2705, 2722 (2015). The vast majority of MCC's appropriations are "no-year" funds, *see, e.g*., *id*., meaning that they "are not limited to use in any specific fiscal year" and "remain available . . . until expended," *Immigration Emergency Fund*, 20 Op. O.L.C. 23, 23 (1996).

In 2012, a contractor working on a Mali development program named MCC as a defendant in an international arbitration. Represented by the Department of State's Office of the Legal Adviser, MCC successfully argued for dismissal, and the arbitrator ordered the contractor to pay $715,104 in costs, comprising the arbitrator's costs and the legal costs incurred by the Department of State and MCC. MCC received $97,575 of that award, which reflected the amounts it expended for outside counsel, labor, and travel.

MCC has asked whether it may retain its portion of the award. It admits that the Miscellaneous Receipts Act generally requires federal officials to deposit in the Treasury the funds they receive for the government, and that no other statute expressly allows MCC to retain the funds. MCC contends, however, that the award "logically can be construed as a refund" related to the arbitration, since allowing MCC to retain that money would "make [the] agency whole" for expenditures that it unnecessarily incurred. Memorandum for Curtis E. Gannon, Acting Assistant Attorney General, Office of Legal Counsel, from David P. Kassebaum & Richard J. McCarthy, Assistant General Counsels, Millennium Challenge Corporation at 3, 5 (Mar. 23, 2017).

The Department of State disagrees, noting that it "has not viewed arbitral awards in general as falling" within the refund exception to the Act. E-mail for Sarah M. Harris, Deputy Assistant Attorney General, Office of Legal Counsel, from Richard C. Visek, Acting Legal Adviser, Department of State, *Re: Request for Views on a Miscellaneous Receipts Act Issue*, att.

at 1 (Dec. 15, 2017 5:30 P.M.). The Department of State may retain, and deposit into its International Litigation Fund, portions of some arbitral awards under 22 U.S.C. § 2710(e), but that statute does not apply here, and the Department of State accordingly deposited its share of the award in the Treasury. *See id*. at 1–2. The Office of Management and Budget concurs with that view. *See* E-mail for Sarah M. Harris, Deputy Assistant Attorney General, Office of Legal Counsel, from Heather V. Walsh, Deputy General Counsel, Office of Management and Budget, *Re: Request for Views on a Miscellaneous Receipts Act Issue* (Dec. 15, 2017 5:55 P.M.).

II.

Enacted in 1849, the Miscellaneous Receipts Act provides that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b); *see* Act of Mar. 3, 1849, ch. 110, 9 Stat. 398. The Act codifies the "anti-augmentation principle," under which "an agency may not augment its appropriations from outside sources without statutory authority." *Application of the Miscellaneous Receipts Act to the Settlement of False Claims Act Suits Concerning Contracts with the General Services Administration*, 30 Op. O.L.C. 53, 56 (2006) ("*FCA Suits*"). As the United States Court of Appeals for the District of Columbia Circuit has recognized, "[b]y requiring government officials to deposit government monies in the Treasury, Congress has precluded the executive branch from using such monies for unappropriated purposes." *Scheduled Airlines Traffic Offs., Inc. v. Dep't of Def.*, 87 F.3d 1356, 1361–62 (D.C. Cir. 1996). The statute thus preserves Congress's constitutional control over the expenditure of public funds. *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]").

While the Act applies to money received "from any source," the Executive Branch and the Comptroller General have recognized two exceptions to this general rule.[2] The first exception applies "when Congress has

[2] As we have repeatedly stated, the opinions of the Comptroller General do not bind the Executive Branch, but they may provide helpful guidance on appropriations matters and related questions. *See, e.g.*, *FCA Suits*, 30 Op. O.L.C. at 56 n.2. Our prior opinions

specifically authorized the agency to retain" recovered funds. *FCA Suits*, 30 Op. O.L.C. at 57. (Strictly speaking, that circumstance is not an exception, but rather an example of a specific statute modifying a general one.) The second exception addresses "refunds to appropriations" and permits an agency to retain a recovery of "an amount it erroneously paid from an appropriation or fund account." *Id*. This exception "is grounded in, guided by, and furthers the anti-augmentation principle," because retaining those funds "essentially returns" the agency "to the position it had occupied based on the authorization of Congress." *Id*. at 57–58. By keeping that refund, the agency does not improperly augment its appropriations from outside sources. Rather, the agency cancels out an erroneous payment and returns its appropriations to the level that Congress intended. *See id*. at 62.

The Executive Branch and the Comptroller General have repeatedly explained that the refund exception applies where the agency erroneously paid too much. In 1926, for instance, the Comptroller General described the "accepted and uniform rule of the accounting officers in the past": "if the collection involves a refund or repayment of moneys paid from an appropriation in excess of what was actually due," then the agency may treat the money as "credit to the appropriation originally charged." *Postal Service—Recovery of Indemnities Paid for Lost Mail*, 5 Comp. Gen. 734, 736 (1926) ("*Postal Service*"). In 1950, the Treasury Department and the Comptroller General jointly defined the refund exception as applying to "amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed, including returns of authorized advances." Treasury Department–General Accounting Office Joint Regulation No. 1, § 2(b) (Sept. 22, 1950), *reprinted in* 30 Comp. Gen. 595 (1950). And in a 1950 memorandum "amplif[ying]" that joint regulation, the Comptroller General emphasized that the types of refunds covered by the exception must "represent adjustments for excess payments," and listed "items rejected and returned," "allowances" on

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have specifically endorsed certain Comptroller General opinions concerning the scope of the refund exception. *E.g*., *id*. at 59–60; *Apportionment of False Claims Act Recoveries to Agencies*, 28 Op. O.L.C. 25, 27–28 (2004); *see also Federal Claims Collection Standards*, 49 Fed. Reg. 8889, 8892 (Mar. 9, 1984) (preamble to a final rule issued jointly by the Department of Justice and the General Accounting Office noting that "[t]he law with respect to refunds has evolved largely through decisions of the Comptroller General" and expressing no intention "to change any existing administrative law with respect to refunds").

unsatisfactory government purchases, and recoveries on partially or fully canceled contracts as further examples. Accounting Systems Memorandum No. 10, § 2(b) (Comp. Gen. Oct. 5, 1950), *reprinted in* 30 Comp. Gen. 614 (1950).

More recent statements have confirmed that the refund exception is limited to recoveries of money "paid from an appropriation in excess of what was actually due." 2 Government Accountability Office, *Principles of Federal Appropriations Law* 6-172 (3d ed. 2006) ("*Federal Appropriations Law*") (quoting *Postal Service*, 5 Comp. Gen. at 736); *see also FCA Suits*, 30 Op. O.L.C. at 57–58 ("An agency that recovers an amount it erroneously paid from an appropriation or fund account essentially returns to the position it had occupied based upon the authorization of Congress."); *Federal Motor Carrier Safety Administration—Retention of Court-Ordered Restitution*, B-308476, 2006 WL 3956702, at *3 (Comp. Gen. Dec. 20, 2006) ("*FMCSA*") (the refund exception applies only when the agency recovers "an improper payment"). In 2004, for instance, the Comptroller General stated that the exception "operates simply and solely to restore to an appropriation amounts that should not have been paid from the appropriation." *Department of Energy—Disposition of Interest Earned on State Tax Refund Obtained by Contractor*, B-302366, 2004 WL 1812721, at *4 (Comp. Gen. July 12, 2004).[3]

When it comes to litigation, the Comptroller General has long held that funds recovered by the Department of Justice are not refunds unless "they represent recoveries of moneys theretofore illegally or erroneously paid from appropriated funds." *Accounting—Repayments to Appropriations*, 6 Comp. Gen. 337, 339–40 (1926). Thus, the Comptroller General deemed the refund exception inapplicable to a court-ordered restitution award compensating an agency for the costs of a criminal investigation. *FMCSA*, 2006 WL 3956702, at *3. "The restitution award at issue is not properly classified as a refund," that decision explained, because "cred-

[3] For example, the Comptroller General has opined that the refund exception applies to "[r]ecoveries of payments made under a fraudulent contract" as a result of an embezzlement scheme. *Appropriation Accounting—Refunds and Uncollectibles*, B-257905, 1995 WL 761474, at *3 (Comp. Gen. Dec. 26, 1995). Furthermore, an agency may retain refunds of payments "in excess of the value of the goods or services that the agency actually received from [a] contractor." *Bureau of Prisons—Disposition of Funds Paid in Settlement of Breach of Contract Action*, 62 Comp. Gen. 678, 680 (1983).

iting the agency's appropriation with the restitution award would not restore[] to the appropriation amounts that should not have been paid." *Id*. In other instances, the Comptroller General has concluded that agencies may not retain awards of legal costs unless a statute expressly authorizes the retention. *Court Costs for Defending Employment Discrimination Suits*, B-139703, at 2 (Comp. Gen. Mar. 2, 1978) (Department of Justice must deposit in the Treasury "award[s] of court costs to the Government" in cases arising under Title VII of the Civil Rights Act of 1964); 47 Comp. Gen. 70, 71–72 (1967) (National Labor Relations Board must deposit in the Treasury "moneys derived from a judgment for costs awarded . . . by a court" to the Board as a prevailing party). Although these determinations did not expressly address the refund exception, they are consistent with the conclusion that agencies may not retain funds in compensation for litigation expenses.

While most litigation awards must therefore be deposited into the Treasury, the refund exception does permit an agency to retain the portion of a judgment corresponding to an erroneous payment. Thus, in a False Claims Act suit, an agency may retain compensatory damages awards that reflect the payments the agency was fraudulently induced to make. *See FCA Suits*, 30 Op. O.L.C. at 59; *Apportionment of False Claims Act Recoveries to Agencies*, 28 Op. O.L.C. 25, 27 (2004) ("*FCA Recoveries*"); *Federal Emergency Management Agency—Disposition of Monetary Award Under False Claims Act*, 69 Comp. Gen. 260, 262 (1990) ("*FEMA*"); *Tennessee Valley Authority—False Claims Act Recoveries*, B-281064, 2000 WL 230221, at *2 (Comp. Gen. Feb. 14, 2000) ("*TVA*"). By contrast, if the agency recovers treble damages in a False Claims Act suit, the agency must deposit in the Treasury the portion of the award that goes beyond the actual losses incurred. *TVA*, 2000 WL 230221, at *3.

III.

Applying these well-established principles, we conclude that MCC's arbitral award does not qualify as a refund for purposes of the exception to the Miscellaneous Receipts Act. The arbitrator awarded MCC the costs it incurred in connection with the arbitration. However, MCC did not initially pay those legal costs erroneously or "in excess of what was actually due." 2 *Federal Appropriations Law* at 6-172. To the contrary, MCC paid those costs in return for the actual services it received. Even if

the contractor may be viewed as having wrongfully imposed such costs on MCC—because the contractor lacked a valid arbitration claim in the first place—MCC did not make, and the contractor did not receive, any "improper payment." *FMCSA*, 2006 WL 3956702, at *3. An agency's expenditure of funds for legal costs is a necessary incident of its operations, and those expenditures do not become erroneous or improper simply because the agency later prevails in the litigation.

In appropriating funds, Congress provided for MCC to incur "administrative expenses" like the legal costs at issue here. *See supra* Part I. Because Congress anticipated that MCC would incur administrative costs, these expenditures do not fall within the refund exception. *See* 2 *Federal Appropriations Law* at 6-162; *FMCSA*, 2006 WL 3956702, at *3 (concluding that, where congressional appropriations covered an agency's investigative costs, allowing the agency to retain an award reimbursing its investigative costs "would improperly contribute financial resources that supplement those already provided for the agency by Congress"). In other circumstances, Congress has expressly authorized agencies to retain recoveries similar to this arbitral award. *See, e.g.*, 22 U.S.C. § 2710(e)(1) (authorizing the Secretary of State to retain funds recovered from foreign entities "[t]o reimburse the expenses of the United States Government in preparing or prosecuting a proceeding before an international tribunal, or a claim against a foreign government or other foreign entity"). Yet Congress has made no such provision for MCC.

MCC emphasizes that retaining the arbitral award is necessary to make MCC whole and return it to the position it was in before it had to incur legal costs. But this argument proves too much, because the same could be said of any receipts recouping previous agency expenditures, not just those satisfying the "limited exception" for refunds. *FMCSA*, 2006 WL 3956702, at *4; *see supra* Part II. MCC's reasoning would expand the scope of the exception beyond its traditional boundaries, covering not merely cost awards in litigation, but also any compensatory damages awards that would make an agency whole following a loss attributable to an agency expenditure. MCC identifies no precedent for allowing agencies to retain awards of legal costs absent express statutory authority, even though the United States routinely receives such costs as the prevailing party in litigation. *See, e.g.*, *Baez v. U.S. Dep't of Just.*, 684 F.2d 999, 1005–06 (D.C. Cir. 1982) (en banc) (per curiam).

MCC also contends that retaining the arbitral award would vindicate the purpose of the refund exception, since MCC receives "no-year" appropriations and thus could still spend the funds in support of its poverty-reduction mission. But the anti-augmentation principle applies "even though the appropriation is a no-year appropriation." 2 *Federal Appropriations Law* at 6-169. Congress chose to fund MCC's administrative expenses in general, and MCC spent the appropriated funds on legal costs. The fact that MCC might now spend the arbitral award on expenses more closely related to its core mission does not give the agency the authority to retain the arbitral award under the Miscellaneous Receipts Act. The Act requires that the money be deposited into the Treasury to preserve Congress's prerogative to determine how such additional receipts are to be spent.

Finally, MCC cites two Comptroller General opinions and one opinion of this Office holding that agencies could retain not only compensatory damages for false claims, but also recoveries for the costs of investigating false claims. *TVA*, 2000 WL 230221, at *2; *FEMA*, 69 Comp. Gen. at 263; *FCA Recoveries*, 28 Op. O.L.C. at 28 (citing *FEMA*, 69 Comp. Gen. at 263). Those decisions are distinguishable, however, because each involves a revolving fund, a funding mechanism by which Congress, rather than setting a particular funding level, "authorizes an agency to retain receipts and deposit them into the fund to finance the fund's operations." 3 *Federal Appropriations Law* at 12-85 (3d ed. 2008).[4] In the context of revolving funds, this Office and the Comptroller General have applied the refund exception not only to refunds of erroneous payments, but also to refunds of ancillary expenses that are inextricably linked to erroneous payments. *See, e.g.*, *FEMA*, 69 Comp. Gen. at 263 (investigative costs "were a direct consequence of the false claims FEMA paid and increased the magnitude of the . . . resulting losses"). By contrast, MCC's appropriations reflect a degree of congressional control over agency appropriations that differs materially from the revolving-fund context. And in all

[4] *See FCA Recoveries*, 28 Op. O.L.C. at 25 n.1 (limiting the opinion's scope "to the revolving fund context"); *FEMA*, 69 Comp. Gen. at 263 (recognizing that the fund at issue "does not receive any appropriations to cover its administrative expenses or losses" because "Congress intended [it] to be self-supporting to the greatest extent possible"); *TVA*, 2000 WL 230221, at *1 (noting that TVA "charge[s] rates for power that will produce sufficient revenues to provide funds" for its operational needs).

events, the legal costs at issue are untethered from any initial erroneous payment. *See National Science Foundation—Disposition of False Claims Act Recoveries*, B-310725, 2008 WL 2229784, at *3 (Comp. Gen. May 20, 2008) (declining to apply the refund exception to a recovery of investigative costs that were "properly [paid] from an appropriation that is available for incurring costs for such investigations"); *FMCSA*, 2006 WL 3956702, at *3 (same). Allowing MCC to retain the arbitral award would therefore present more serious anti-augmentation concerns than are present in these revolving-fund cases.

* * * * *

For the foregoing reasons, we conclude that the arbitral award of legal costs to MCC does not qualify as a "refund to appropriations" exempt from the requirements of the Miscellaneous Receipts Act. MCC therefore must deposit the award in the general fund of the Treasury "without deduction for any charge or claim." 31 U.S.C. § 3302(b).

STEVEN A. ENGEL
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Office of Legal Counsel

April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities

The President could lawfully direct airstrikes on facilities associated with Syria's chemical-weapons capability because he had reasonably determined that the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense.

May 31, 2018

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

On April 13, 2018, the President directed the United States military to launch airstrikes against three facilities associated with the chemical-weapons capability of the Syrian Arab Republic ("Syria"). The President's direction was consistent with many others taken by prior Presidents, who have deployed our military forces in limited engagements without seeking the prior authorization of Congress. This deeply rooted historical practice, acknowledged by courts and Congress, reflects the well-established division of war powers under our Constitution. Prior to the Syrian operation, you requested our advice on the President's authority. Before the strikes occurred, we advised that the President could lawfully direct them because he had reasonably determined that the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense. This memorandum explains the bases for our conclusion.

I.

On April 7, 2018, the Syrian regime used chemical weapons in the eastern Damascus suburb of Duma. *United States Government Assessment of the Assad Regime's Chemical Weapons Use* (Apr. 13, 2018) ("*USG Assessment*"), https://dod.defense.gov/portals/1/features/2018/0418_syria/img/United-States-Assessment-of-the-Assad-Regime%E2%80%99s-Chemical-Weapons-Use.pdf. At the time, the intelligence community had assessed that the regime carried out this attack with chlorine gas and perhaps with the nerve agent sarin as well. *Briefing by Secretary Mattis on U.S. Strikes in Syria* (Apr. 13, 2018) ("*Mattis Briefing*"), https://www.defense.gov/News/Transcripts/Transcript-View/Article/1493658/briefing-

by-secretary-mattis-on-us-strikes-in-syria. The attack, part of a weeks-long offensive by the regime, killed dozens of innocent men, women, and children, and injured hundreds. *USG Assessment*. In this use of chemical weapons, the regime sought to "terrorize and subdue" the civilian population, as well as opposition fighters. *Id*.

The Syrian government's latest use of chemical weapons followed a string of other chemical-weapons attacks. The regime used sarin in November 2017 in the suburbs of Damascus and in an April 2017 attack on Khan Shaykhun. *Id.* It also dropped chlorine bombs three times in just over a week last spring and launched at least four chlorine rockets in January in Duma. *Id*. The U.S. government has assessed that the regime used chemical weapons on many other occasions—it has identified more than fifteen chemical-weapons uses since June 2017 in the suburb of East Ghutah alone—and believes that the regime, unless deterred, will continue to make use of such weapons. *Id*.

On April 13, 2018, in coordination with the United Kingdom and France, the United States attacked three facilities associated with Syria's use of chemical weapons: the Barzeh Research and Development Center, the Him Shinshar chemical-weapons storage facility, and the Him Shinshar chemical-weapons bunker facility. *Department of Defense Press Briefing by Pentagon Chief Spokesperson Dana W. White and Joint Staff Director Lt. Gen. Kenneth F. McKenzie Jr. in the Pentagon Briefing Room* (Apr. 14, 2018) (statement of Lt. Gen. McKenzie) ("*DoD Briefing*"), https://www.defense.gov/News/Transcripts/Transcript-View/Article/1493749/department-of-defense-press-briefing-by-pentagon-chief-spokesperson-dana-w-whit. The Barzeh Center was used for the research, development, production, and testing of chemical and biological weapons. *Mattis Briefing* (statement of Gen. Dunford). The Him Shinshar sites were a chemical-weapons storage facility assessed to be the primary location of Syrian sarin-production equipment, as well as a chemical-weapons storage facility and an important command post. *Id*. In total, the United States launched 105 missiles from naval platforms in the Red Sea, the Northern Arabian Gulf, and the Eastern Mediterranean. *DoD Briefing* (statement of Lt. Gen. McKenzie). The missiles all hit their targets within a few minutes of each other, although the full operation lasted several hours. *Id*.

The United States deconflicted the airspace with Russia in advance and selected the sites to reduce the risk of hitting Russian forces. *DoD Brief-*

ing (statement of Lt. Gen. McKenzie); *Mattis Briefing* (statement of Gen. Dunford). The strikes were timed to hit their targets around 4 a.m. local time to reduce casualties. *DoD Briefing* (statement of Lt. Gen. McKenzie). The sites were chosen to minimize collateral damage, while inflicting damage on the chemical-weapons program. *Id*. ("[T]hese are the targets that presented the best opportunity to minimize collateral damage, to avoid killing innocent civilians, and yet to send a very strong message."); *Mattis Briefing* (statement of General Dunford) ("[W]e chose these particular targets to mitigate the risk of civilian casualties, number one. We chose these targets because they were specifically associated with the chemical program . . . . So these targets were carefully selected with proportionality[,] discrimination and being specifically associated with the chemical program.").

The allied attacks followed a limited U.S. strike in April 2017, in the wake of Syria's use of sarin against civilians in Khan Shaykhun. At that time, the United States responded with fifty-eight missiles aimed at the Shayrat airfield, which damaged or destroyed Syrian fuel and ammunition sites, air defense capabilities, and twenty percent of the Syrian Air Force's operational aircraft. Remarks on United States Military Operations in Syria, 2018 Daily Comp. Pres. Doc. 201800242, at 1 (Apr. 13, 2018) ("*Remarks on Syria Operations*"); *Statement by Secretary of Defense Jim Mattis on the U.S. Military Response to the Syrian Government's Use of Chemical Weapons* (Apr. 10, 2017), https://www.defense.gov/News/News-Releases/News-Release-View/Article/1146758/statement-by-secretary-of-defense-jim-mattis-on-the-us-military-response-to-the/source/GovDelivery. While the April 2017 strike targeted the airfield from which the Syrian regime delivered the weapons, the 2018 attacks were focused on the long-term degradation of Syria's capability to research, develop, and use chemical and biological weapons. *Mattis Briefing* (statement of Gen. Dunford).

II.

When it comes to the war powers of the President, we do not write on a blank slate. The legal opinions of executive advisers and the still weightier precedents of history have established that the President, as Commander in Chief and Chief Executive, has the constitutional authority to deploy the military to protect American persons and interests without seeking

prior authorization from Congress. *See, e.g.*, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries*, 1 Op. O.L.C. Supp. 321, 331 (May 22, 1970) ("*Cambodian Sanctuaries*"); *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941) (Jackson, Att'y Gen.) ("*British Flying Students*"). The President's authority in this area has been elucidated by dozens of occasions over the course of 230 years, quite literally running from the halls of Montezuma to the shores of Tripoli and beyond.[1] Many of those actions were approved by opinions of this Office or of the Attorney General, and many involved engagements considerably broader than the April 2018 Syrian strikes. The Constitution reserves to Congress the authority to "declare War" and thereby to decide whether to commit the Nation to a sustained, full-scale conflict with another Nation. Yet Presidents have repeatedly engaged in more limited hostilities to advance the Nation's interests without first seeking congressional authorization.

The President's authority to direct U.S. military forces arises from Article II of the Constitution, which makes the President the "Commander in

[1] After receiving an ultimatum from the Bey of Tripoli in May 1801, President Jefferson dispatched U.S. ships to the Mediterranean with orders, in the event the Barbary Powers declared war, to "distribute your force . . . so as best to protect our commerce & chastise their insolence—by sinking, burning or destroying their ships & Vessels wherever you shall find them." David P. Currie, *The Constitution in Congress: The Jeffersonians, 1801–1829*, at 127–28 (2001). After Tripoli declared war, the United States launched a surprise attack on a Tripolitan vessel. *Id.* at 128. In reporting the action to Congress, Jefferson elided the offensive nature of the attack and sought authorization to "go beyond the line of defense," *id.* at 124, 128, which Congress granted on February 6, 1802, *see* Act of Feb. 6, 1802, ch. IV, § 2, 2 Stat. 129, 130.

After Congress annexed Texas, President Polk deployed the U.S. military 150 miles south of the disputed border with Mexico to the Rio Grande in June 1845. *See* David P. Currie, *The Constitution in Congress: Descent into the Maelstrom, 1829–1861*, at 102 (2005); 4 *A Compilation of the Messages and Papers of the Presidents, 1788–1897*, at 437, 440 (James D. Richardson ed., 1897); *see also Cambodian Sanctuaries*, 1 Op. O.L.C. Supp. at 327. After active hostilities commenced, Congress declared war. *See* Act of May 13, 1846, ch. XVI, 9 Stat. 9 (1846); *see also The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863) ("The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the Act of Congress of May 13th, 1846, which recognized 'a state of war as existing by the act of the Republic of Mexico.' This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the Act of the President in accepting the challenge without a previous formal declaration of war by Congress.").

Chief of the Army and Navy of the United States," U.S. Const. art. II, § 2, cl. 1, and vests in him the Executive Power, *id*. art. II, § 1, cl. 1. These powers allow him "to direct the movements of the naval and military forces placed by law at his command." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850). Chief Justice Marshall suggested that the President's "high duty" to "take care that the laws be faithfully executed," as well as his power as Commander in Chief, imply some authority to deploy U.S. military force. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804). The Supreme Court has recognized that the President holds the "vast share of responsibility for the conduct of our foreign relations," *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (internal quotation marks omitted), and holds "independent authority in the areas of foreign policy and national security," *id*. at 429 (internal quotation marks omitted); *see also Dep't of Navy v. Egan*, 484 U.S. 518, 529 (1988) ("The Court also has recognized the generally accepted view that foreign policy [is] the province and responsibility of the Executive.") (internal quotation marks omitted). By its terms, Article II provides the President with the authority to direct U.S. military forces in engagements necessary to advance American national interests abroad.

In evaluating the division of authority between the President and Congress, the Supreme Court has placed "significant weight" on "accepted understandings and practice." *Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015); *see NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (noting that "long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President" (internal quotation marks and alterations omitted)); *Dames & Moore v. Regan*, 453 U.S. 654, 678–86 (1981) (describing "a history of congressional acquiescence in conduct of the sort engaged in by the President"). We have recognized that "[s]ince judicial precedents are virtually non-existent" in defining the scope of the President's war powers, "the question is one which of necessity must be decided by historical practice." *Presidential Authority to Permit Incursion Into Communist Sanctuaries in the Cambodia-Vietnam Border Area*, 1 Op. O.L.C. Supp. 313, 317 (May 14, 1970) ("*Vietnam Border Area*").

And that history points strongly in one direction. While our Nation has sometimes debated the scope of the President's war powers under the Constitution, his authority to direct U.S. forces in hostilities without prior

congressional authorization is supported by a "long continued practice on the part of the Executive, acquiesced in by the Congress." *Cambodian Sanctuaries*, 1 Op. O.L.C. Supp. at 326; *see also Deployment of United States Armed Forces to Haiti*, 28 Op. O.L.C. 30, 31 (2004) ("*Haiti Deployment II*") ("History offers ample evidence for the proposition that the President may take military action abroad, even, as here, in the absence of specific prior congressional authorization."); *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980) ("*Presidential Power*") ("Our history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.").

Presidents have exercised their authority to direct military operations without congressional authorization since the earliest days of the Republic. President Washington directed offensive operations against the Wabash Indians in 1790. *See* David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 84 (1997) ("[B]oth Secretary [of War] Knox and [President] Washington himself seemed to think [the Commander in Chief] authority extended to offensive operations undertaken in retaliation for Indian atrocities."). As noted above, the Jefferson Administration instructed the United States Navy to "sink[], burn[] or destroy[]" Barbary cruisers. *See supra* note 1; *see also Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 9 (1992) ("*Somalia Deployment*"). These past deployments have included President Truman's defense of South Korea; President Kennedy's introduction of U.S. forces into Vietnam; President Reagan's retaliatory strikes on Libya following the Beirut bombing; President George H.W. Bush's introduction of U.S. troops into Somalia; President Clinton's actions in Bosnia, Haiti, Kosovo, Sudan, and Afghanistan; President George W. Bush's intervention in Haiti; and President Obama's airstrikes in Libya and in Houthi-controlled territory in Yemen.

While the precise counting varies, by the middle of the twentieth century, scholars had identified well over 100 instances of military deployments without prior congressional authorization. *See Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327, 331 (1995) ("*Bosnia Deployment*") ("In at least 125 instances, the President acted without express authorization from Congress."); William Gabriel Carras, *The Analysis and Interpretation of the Use of Presidential Author-*

ity to Order United States Armed Forces into Military Action in Foreign Territories Without a Formal Declaration of War 369 (1959) (identifying 124 of 141 military deployments between 1798 and 1956); James Grafton Rogers, *World Policing and the Constitution* 93–123 (1945) (identifying 119 of 149 military deployments between 1798 and 1941). In the forty-five years since the 1973 enactment of the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555, Presidents have submitted more than eighty reports of hostilities to Congress that did not rely upon statutory authorization. *See* Matthew C. Weed, Cong. Research Serv., R42699, *The War Powers Resolution: Concepts and Practice* 57–83 (Mar. 28, 2017). From the border of the Rio Grande to the thirty-eighth parallel on the Korean peninsula, from the Gulf of Tonkin to the Shayrat Airfield, Presidents have acted, and Congress has accepted or ratified the President's use of the military, to advance our national interests.

As Assistant Attorney General Rehnquist observed, "[i]t is too plain" in view of this record "to admit of denial that the Executive, under his power as Commander in Chief, is authorized to commit American forces in such a way as to seriously risk hostilities, and also to actually commit them to such hostilities, without prior congressional approval." *Cambodian Sanctuaries*, 1 Op. O.L.C. Supp. at 331. That historical record has only expanded in the decades since Vietnam. Since then, in light of "repeated past practice under many Presidents," this Office has repeatedly advised that "the President has the power to commit United States troops abroad for the purpose of protecting important national interests." *Somalia Deployment*, 16 Op. O.L.C. at 9; *see also Authority to Use Military Force in Libya*, 35 Op. O.L.C. 20, 27–28 (2011) ("*Libya Deployment*"); *Haiti Deployment II*, 28 Op. O.L.C. at 31. Congress likewise acknowledged this authority in the War Powers Resolution, at least implicitly, by recognizing that the President may introduce U.S. forces into hostilities for up to sixty days or more without congressional authorization. 50 U.S.C. § 1544(b); *see also Deployment of United States Armed Forces into Haiti*, 18 Op. O.L.C. 173, 176 (1994) ("*Haiti Deployment I*").[2]

[2] The War Powers Resolution does not constitute an affirmative source of authority for the President to introduce U.S. forces into hostilities, 50 U.S.C. § 1547(d)(2), but it also is not "intended to alter the constitutional authority . . . of the President," *id.* § 1547(d)(1). By seeking to require the cessation of hostilities within sixty days, absent congressional authorization, the statute assumes that the President has the authority to authorize such

Although "[t]he limits of the President's power as Commander in Chief are nowhere defined in the Constitution," we have recognized a "negative implication from the fact that the power to declare war is committed to Congress." *Cambodian Sanctuaries*, 1 Op. O.L.C. Supp. at 325. The Constitution reserves to Congress the power to "declare War," U.S. Const. art. I, § 8, cl. 11, and the authority to fund military operations, *id*. art. I, § 8, cl. 12. This was a deliberate choice of the Founders, who sought to prevent the President from bringing the Nation into a full-scale war without the authorization of Congress. *See, e.g.*, *The Federalist* No. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (recognizing that the President lacks the authority of the British King, which "extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature"); 4 Jonathan Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution* 107–08 (2d ed. 1836) (James Iredell, speaking at the North Carolina Ratifying Convention) ("The President has not the power of declaring war by his own authority, nor that of raising fleets and armies. These powers are vested in other hands. The power of declaring war is expressly given to Congress, that is, to the two branches of the legislature . . . . They have also expressly delegated to them the powers of raising and supporting armies, and of providing and maintaining a navy."); *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) ("[I]t is the exclusive province of congress to change a state of peace into a state of war."). These legislative powers ensure that the use of force "cannot be sustained over time without the acquiescence, indeed the approval, of Congress, for it is Congress that must appropriate the money to fight a war or a police action." *Presidential Power*, 4A Op. O.L.C. at 188. These powers further oblige the President to

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engagements. The statute begins with a statement of purpose and policy that identifies a narrow set of engagements that the President may direct without congressional authorization. *Id.* § 1541(c). Yet we have recognized that this policy statement neither affirmatively limits presidential authority nor constitutes an exhaustive list of the circumstances in which the President may use military force to protect important national interests. *See, e.g.*, *Overview of the War Powers Resolution*, 8 Op. O.L.C. 271, 274 (1984); *see also Authority of the President Under Domestic and International Law to Use Military Force Against Iraq*, 26 Op. O.L.C. 143, 159–61 (2002) (summarizing the Executive Branch's longstanding constitutional concerns with the War Powers Resolution).

seek congressional approval prior to contemplating military action that would bring the Nation into a war.

Not every military operation, however, rises to the level of a war. Rather, "the historical practice of military action without congressional approval precludes any suggestion that Congress's authority to declare war covers every military engagement, however limited, that the President initiates." *Libya Deployment*, 35 Op. O.L.C. at 31. Early on, the Supreme Court distinguished between a declared war (which arises where "one whole nation is at war with another whole nation" with hostilities arising "in every place, and under every circumstance") and a more limited engagement, an "*imperfect war*" (in which hostilities are "more confined in its nature and extent; being limited as to places, person and things"). *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40–41 (1800).[3] Consistent with that early recognition, we have repeatedly distinguished between limited hostilities and "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period." *Libya Deployment*, 35 Op. O.L.C. at 31.

When reviewing proposed military engagements, this Office has recognized that "a planned military engagement that constitutes a 'war' within the meaning of the Declaration of War Clause may require prior congressional authorization." *Id.*; *see also Cambodian Sanctuaries*, 1 Op. O.L.C. Supp. at 331–32 ("[I]f the contours of the divided war power contemplated by the framers of the Constitution are to remain, constitutional practice must include executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale."); *Vietnam*

[3] *Bas* concerned the Quasi-War with France, which involved hostilities that Congress had authorized by statute without a formal declaration of war. *See Treason*, 1 Op. Att'y Gen. 84, 84 (1798) ("Having taken into consideration the acts of the French republic relative to the United States, and the laws of Congress passed at the last session, it is my opinion that there exists not only an *actual* maritime war between France and the United States, but a maritime war *authorized* by both nations."). We do not suggest that every "imperfect war" falls within the sphere of unilateral executive action. As with the Quasi-War, Congress may authorize the use of force in such conflicts, and we do not rule out that some imperfect wars may involve such prolonged and substantial engagements as to require that authorization. Our point though is that the early Supreme Court recognized the distinction between wars that must be declared under Article I, Section 8 of the Constitution and more limited military engagements—many of which have not traditionally been authorized by Congress.

Border Area, 1 Op. O.L.C. Supp. at 317 ("Under our Constitution it is clear that Congress has the sole authority to declare formal, all-out war."). We have therefore considered the scale of the expected hostilities in analyzing whether a proposed engagement would constitute a war for constitutional purposes. *See Libya Deployment*, 35 Op. O.L.C. at 31–33; *Haiti Deployment I*, 18 Op. O.L.C. at 177–78.

III.

We now explain our analysis of the April 13, 2018 Syrian strikes in light of our precedents. In evaluating whether a proposed military action falls within the President's authority under Article II of the Constitution, we have distilled our precedents into two inquiries. First, we consider whether the President could reasonably determine that the action serves important national interests. *See, e.g.*, *Somalia Deployment*, 16 O.L.C. at 9 ("At the core of this power is the President's authority to take military action to protect American citizens, property, and interests from foreign threats."); *British Flying Students*, 40 Op. Att'y Gen. at 62 ("[T]he President's authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of good will or rescue, or for purposes of protecting American lives or property or American interests."). Second, we consider whether the "anticipated nature, scope, and duration" of the conflict might rise to the level of a war under the Constitution. *See Libya Deployment*, 35 Op. O.L.C. at 31 (quoting *Haiti Deployment I*, 18 Op. O.L.C. at 179). Prior to the Syrian strikes, we applied this framework to conclude that the proposed Syrian operation would fall within the President's constitutional authority.

A.

This Office has recognized that a broad set of interests would justify use of the President's Article II authority to direct military force. These interests understandably grant the President a great deal of discretion. The scope of U.S. involvement in the world, the presence of U.S. citizens across the globe, and U.S. leadership in times of conflict, crisis, and strife require that the President have wide latitude to protect American interests by responding to regional conflagrations and humanitarian catastrophes as he believes appropriate. The Commander in Chief bears great responsibil-

ity for the use of the armed forces and for putting U.S. forces in harm's way. We would not expect that any President would use this power without a substantial basis for believing that a proposed operation is necessary to advance important interests of the Nation. The aim of this inquiry is not to evaluate the worth of the interests at stake—a question more of policy than of law—but rather, to set forth the justifications for the President's use of military force and to situate those interests within a framework of prior precedents.

In our past opinions, this Office has identified a number of different interests that have supported sending U.S. forces into harm's way, including the following:

- the protection of U.S. persons and property, *see, e.g.*, *Presidential Power*, 4A Op. O.L.C. at 187 ("Presidents have repeatedly employed troops abroad in defense of American lives and property."); *Haiti Deployment II*, 28 Op. O.L.C. at 31 ("The President has the authority to deploy the armed forces abroad in order to protect American citizens and interests from foreign threats.");
- assistance to allies, *see, e.g.*, *Haiti Deployment I*, 18 Op. O.L.C. at 79 (approving of intervention "at the invitation of a fully legitimate government"); *Presidential Power*, 4A Op. O.L.C. at 187–88 (citing the Korean War as "precedent . . . for the commitment of United States armed forces, without prior congressional approval or declaration of war, to aid an ally in repelling an armed invasion");
- support for the United Nations, *see, e.g.*, *Haiti Deployment II*, 28 Op. O.L.C. at 33 ("Another American interest in Haiti arises from the involvement of the United Nations in the situation there."); *Somalia Deployment*, 16 Op. O.L.C. at 11 ("[M]aintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest[.]"); and
- promoting regional stability, *see, e.g.*, *Haiti Deployment II*, 29 Op. O.L.C. at 32 ("The President also may determine that the deployment is necessary to protect American foreign policy interests. One such interest is the preservation of regional stability."); *Libya Deployment*, 35 Op. O.L.C. at 36 ("[W]e believe the President could

> reasonably find a significant national security interest in preventing Libyan instability from spreading elsewhere in this critical region.").

In recent years, we have also identified the U.S. interest in mitigating humanitarian disasters. *See* Memorandum Opinion for the Counsel to the President, from Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority to Use Military Force in Iraq* at 20–24 (Dec. 30, 2014) ("*Iraq Deployment*"). With respect to Syria, in April 2017, the President identified the U.S. interest in preventing the use and proliferation of chemical weapons. *See* Letter to Congressional Leaders on United States Military Operations in Syria, 2017 Daily Comp. Pres. Doc. 201700244, at 1 (Apr. 8, 2017) ("2017 Congressional Notification"). As explained below, these interests too are consistent with those that the President and his advisers have relied upon in the past.

The President identified three interests in support of the April 2018 Syria strikes: the promotion of regional stability, the prevention of a worsening of the region's humanitarian catastrophe, and the deterrence of the use and proliferation of chemical weapons. *See* Letter to Congressional Leaders on United States Military Operations in Syria, 2018 Daily Comp. Pres. Doc. 201800243, at 1 (Apr. 15, 2018). Prior to the attack, we advised that the President could reasonably rely on these national interests to authorize air strikes against particular facilities associated with Syria's chemical-weapons program without congressional authorization.

As discussed above, Presidents have deployed U.S. troops on multiple occasions in the interest of promoting regional stability and preventing the spread of an ongoing conflict. While the United States is not the world's policeman, as its power has grown, the breadth of its regional interests has expanded and threats to national interests posed by foreign disorder have increased. *See, e.g.*, *Authority of the President to Repel the Attack in Korea*, 23 Dep't of State Bull. 173, 175 (1950) ("*Attack in Korea*") (quoting Secretary of State Hay's statement that President McKinley dispatched troops to China during the Boxer rebellion in part to "prevent a spread of the disorders"); Clarence W. Berdahl, *War Powers of the Executive of the United States* 53–55 (1921) (describing numerous instances of the deployment of troops to secure stability in the Caribbean). This Office has consistently recognized that U.S. national interests in regional stability may support military intervention. *See Haiti Deployment II*, 28 Op. O.L.C. at 32 ("The President also may determine that the deployment is

necessary to protect American foreign policy interests. One such interest is the preservation of regional stability."); *Bosnia Deployment*, 19 Op. O.L.C. at 332–33 ("[Military deployment] would serve significant national security interests, by preserving peace in the region and forestalling the threat of a wider conflict."); *Libya Deployment*, 35 Op. O.L.C. at 34 (concluding the combination of interests in "preserving regional stability and supporting the [United Nation Security Council's] credibility and effectiveness" were a "sufficient basis for the President's exercise of his constitutional authority to order the use of military force").

Here, the President could reasonably determine that Syria's use of chemical weapons in the ongoing civil war threatens to undermine further peace and security of the Near East, a region that remains critically important to our national security. Syria's possession and use of chemical weapons have increased the risk that others will gain access to them. *See* Daniel R. Coats, Director of National Intelligence, Statement for the Record: Worldwide Threat Assessment of the US Intelligence Community at 7 (Feb. 13, 2018), https://www.dni.gov/files/documents/Newsroom/Testimonies/2018-ATA---Unclassified-SSCI.pdf ("*Worldwide Threat Assessment*") ("Biological and chemical materials and technologies—almost always dual-use—move easily in the globalized economy, as do personnel with the scientific expertise to design and use them for legitimate and illegitimate purposes."). The proliferation of such weapons to other countries with fragile governments or to terrorist groups could further spread conflict and disorder within the region. *See* Council on Foreign Relations, A Conversation with Nikki Haley (Mar. 29, 2017), https://www.cfr.org/event/conversation-nikki-haley ("Let's really look at the fact that if we don't have a stable Syria, we don't have a stable region."); Remarks to the United Nations General Assembly in New York City, 2017 Daily Comp. Pres. Doc. 201700658, at 5 (Sept. 19, 2017), ("No society can be safe if banned chemical weapons are allowed to spread."); United States Mission to the United Nations, Ambassador Haley Delivers Remarks at a UN Security Council Meeting on Nonproliferation (Jan. 18, 2018), https://usun.usmission.gov/ambassador-haley-delivers-remarks-at-a-un-security-council-meeting-on-nonproliferation/ ("The regimes that most threaten the world today with weapons of mass destruction are also the source of different kinds of security challenges. They deny human rights and fundamental freedoms to their people. They

promote regional instability. They aid terrorists and militant groups. They promote conflict that eventually spills over its borders."). The United States has a direct interest in ensuring that others in the region not look to Syria's use of chemical weapons as a successful precedent for twenty-first-century conflicts.

Moreover, the regime's use of chemical weapons is a particularly egregious part of a broader destabilizing conflict. The civil war in Syria directly empowered the growth of the Islamic State of Iraq and Syria ("ISIS"), a terrorist threat that has required the deployment of over 2,000 U.S. troops. *See* Jim Garmone, DoD News, Defense Media Activity, *Pentagon Announces Troop Levels in Iraq, Syria* (Dec. 6, 2017), https://www.defense.gov/News/Article/Article/1390079/pentagon-announces-troop-levels-in-iraq-syria.[4] The instability in Syria has had a direct and marked impact upon the national security of close American allies and partners, including Iraq, Israel, Jordan, Lebanon, and Turkey, all of which border Syria and have had to deal with unrest from the conflict. Rand Corporation, Research Brief, *The Conflict in Syria: Understanding and Avoiding Regional Spillover Effects* at 1 (2014), https://www.rand.org/content/dam/rand/pubs/research_briefs/RB9700/RB9785/RAND_RB9785.pdf; *see also generally* Leïla Vignal, *The Changing Borders and Borderlands of Syria in a Time of Conflict*, 93 Int'l Affairs 809 (2017). In addition, the power vacuum in Syria has provided an opportunity for Russia and Iran to deepen their presence in the region and engage in activities that have had a directly adverse impact on the interests and security of the United States and its allies in the area. *See* President Donald J. Trump, National Security Strategy of the United States of America at 49 (Dec. 2017), https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf ("Rival states are filling vacuums created by state collapse and prolonged regional conflict.").

The Syrian regime's continued attacks on civilians have also contributed to the displacement of civilians and thus deepened the instability in the

[4] The U.S. deployment against ISIS is supported by congressional authorization pursuant to the 2001 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, and the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498. U.S. actions to counter ISIS in Syria are therefore based upon a different legal footing than are the attacks against Syria's chemical-weapons facilities.

region. According to the Director of National Intelligence, as of October 2017, more than 5 million Syrian refugees had fled to neighboring countries and more than 6 million were displaced internally. *See Worldwide Threat Assessment* at 21; *see also* Arwa Damon and Gul Tuysuz, CNN, *Survivors of a Chemical Attack in Syria Tell Their Stories for the First Time* (Apr. 16, 2018), https://www.cnn.com/2018/04/15/middleeast/douma-chemical-attack-survivors-stories-arwa-damon-intl/index.html (interviewing individuals at a refugee camp who survived the chemical-weapons attack on Douma). These large-scale population movements have added to unrest throughout the region. *Cf. Libya Deployment*, 35 Op. O.L.C. at 35 (explaining that the flight of civilians to neighboring countries was "destabilizing the peace and security of the region" (internal quotation marks omitted)).

In directing the strikes, the President also relied on the national interest in mitigating a humanitarian crisis. In analyzing proposed military operations in Iraq designed to prevent genocidal acts against the Yazidis and otherwise to protect civilians at risk, we advised that humanitarian concerns could provide a basis for the President's use of force under his constitutional authority. *See Iraq Deployment* at 20–24. Given the role of the United States in the international community and the humanitarian interests of its people, Presidents have on many occasions deployed troops to prevent or mitigate humanitarian disasters. *See, e.g.*, Letter to Congressional Leaders on Deployment of United States Armed Forces to Haiti (Sept. 18, 1994), 2 *Pub. Papers of Pres. William J. Clinton* 1572, 1572 (1994) ("The deployment of U.S. Armed Forces into Haiti is justified by United States national security interests" including "stop[ping] the brutal atrocities that threaten tens of thousands of Haitians"); Letter to Congressional Leaders Reporting on the Commencement of Military Operations Against Libya (Mar. 21, 2011), 1 *Pub. Papers of Pres. Barack Obama* 280, 280 (2011) (notifying Congress of the commencement of operations "to prevent a humanitarian catastrophe").

In some cases, humanitarian concerns have been a significant, or even the primary, interest served by U.S. military operations. In 1992, when President George H.W. Bush announced that he had ordered the deployment of "a substantial American force" to Somalia during a widespread famine, he described it as "a mission that can ease suffering and save lives." Address to the Nation on the Situation in Somalia (Dec. 4, 1992),

2 *Pub. Papers of Pres. George Bush* 2174, 2174–75 (1992–93); *see also id*. at 2175 ("Let me be very clear: Our mission is humanitarian[.]"); *Somalia Deployment*, 16 Op. O.L.C. at 6 ("I am informed that the mission of those troops will be to restore the flow of humanitarian relief to those areas of Somalia most affected by famine and disease[.]"). Similarly, military intervention in Bosnia included the establishment of a no-fly zone, maintained for roughly two-and-a-half years, in support of a humanitarian air drop. Daniel L. Haulman, *The United States Air Force and Bosnia, 1992–1995*, Air Power History 24, 35 (2013); Letter to Congressional Leaders Reporting on the No-Fly Zone in Bosnia-Herzegovina (Oct. 13, 1993), 2 *Pub. Papers of Pres. William J. Clinton* 1740, 1741 (1993) ("[T]he no-fly zone enforcement operations have been militarily effective and have reduced potential air threats to our humanitarian airlift and airdrop flights."); Address Before a Joint Session of the Congress on the State of the Union (Jan. 25, 1994), 1 *Pub. Papers of Pres. William J. Clinton* 126, 132 (1994) (noting the continuation of the "longest humanitarian air lift in history in Bosnia"); Address to the Nation on Implementation of the Peace Agreement in Bosnia-Herzegovina (Nov. 27, 2995), 2 *Pub. Papers of Pres. William J. Clinton* 1784, 1785 (1995) ("We used our airpower to conduct the longest humanitarian airlift in history and to enforce a no-fly zone that took the war out of the skies.") ("*Clinton Address to the Nation*"). President Clinton also framed U.S. peacekeeping efforts in humanitarian terms. *Clinton Address to the Nation* at 1784 ("In fulfilling this mission, we will have the chance to help stop the killing of innocent civilians, especially children[.]").

The Syrian regime's use of chemical weapons has contributed to the ongoing humanitarian crisis in Syria. As discussed above, civilians fleeing from the strikes become refugees needing assistance. *See* Carla E. Humud et al., Cong. Research Serv., RL33487, *Armed Conflict in Syria: Overview and U.S. Response* 19 (Apr. 18, 2018) (explaining that 13.1 million people in Syria were in need of humanitarian assistance as of early 2018, more than two-thirds of the country's 18 million people). Internally displaced persons in Syria often lack access to basic services or medical care, *see* World Health Organization, *Syrian Arab Republic Humanitarian Response Plan* (2018), difficulties that are heightened for victims of chemical-weapons attacks. But even where the attacks do not displace civilians, the nature of chemical weapons alone makes their use a humanitarian

issue. *See Remarks on Syria Operations* at 1 ("The evil and the despicable attack left mothers and fathers, infants and children, thrashing in pain and gasping for air. These are not the actions of a man; they are crimes of a monster instead."). As the President explained after the Syrian strike, "[c]hemical weapons are uniquely dangerous not only because they inflict gruesome suffering, but because even small amounts can unleash widespread devastation." *Id*.

In carrying out these strikes, the President also relied on the national interest in deterring the use and proliferation of chemical weapons. The President previously relied upon this interest in ordering the April 2017 airstrike in response to the attack on Khan Shaykhun. *See* 2017 Congressional Notification (stating that the President directed a strike on the Shayrat military airfield to "degrade the Syrian military's ability to conduct further chemical weapons attacks and to dissuade the Syrian regime from using or proliferating chemical weapons, thereby promoting the stability of the region and averting a worsening of the region's current humanitarian catastrophe"). While we are unaware of prior Presidents justifying U.S. military actions based on this interest as a matter of domestic law, we believe that it is consistent with those that have justified previous uses of force. The United States has long and consistently objected to the use and proliferation of chemical weapons. *See* Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, *adopted* June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; The Axis Is Warned Against the Use of Poison Gas (June 8, 1948), *Pub. Papers of Pres. Franklin D. Roosevelt* 242, 243 (1943) ("Use of [chemical] weapons has been outlawed by the general opinion of civilized mankind."). For nearly thirty years, Presidents have repeatedly declared the proliferation of chemical weapons to be a national emergency. *See* Notice Regarding the Continuation of the National Emergency with Respect to the Proliferation of Weapons of Mass Destruction, 82 Fed. Reg. 51,971 (Nov. 6, 2017) (most recent order continuing in effect an emergency first declared in Executive Order 12735 of Nov. 16, 1990). In 1997, the United States ratified the Chemical Weapons Convention, which prohibits the use, development, production, and retention of chemical weapons. *See* Remarks on Senate Ratification of the Chemical Weapons Convention and an Exchange with Reporters (Apr. 24, 1997), 1 *Pub. Papers of Pres. William J. Clinton* 480,

480 (1997) (stating that ratification will permit the end of "a century that began with the horror of chemical weapons in World War I much closer to the elimination of those kinds of weapons"). And Congress cited Iraq's development of chemical weapons as one of the reasons in support of authorizing the use of military force against Iraq in 2002. *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1498 ("Whereas the efforts of international weapons inspectors, United States intelligence agencies, and Iraqi defectors led to the discovery that Iraq had large stockpiles of chemical weapons").

The United States has also repeatedly joined international condemnation of Syria's use of chemical weapons. *See, e.g.*, S.C. Res. 2319 (Nov. 17, 2016) ("*Condemning* again in the strongest terms any use of any toxic chemicals as a weapon in the Syrian Arab Republic and *expressing alarm* that civilians continue to be killed and injured by toxic chemicals as weapons in the Syrian Arab Republic"); S.C. Res. 2235 (Aug. 7, 2015) ("*Condemning* in the strongest terms any use of any toxic chemical as a weapon in the Syrian Arab Republic and *noting* with outrage that civilians continue to be killed and injured by toxic chemicals as weapons in the Syrian Arab Republic, *Reaffirming* that the use of chemical weapons constitutes a serious violation of international law, and *stressing* again that those individuals responsible for any use of chemical weapons must be held accountable"); S.C. Res. 2209 (Mar. 6, 2015) ("*Reaffirming* that the use of chemical weapons constitutes a serious violation of international law and *reiterating* that those individuals responsible for any use of chemical weapons must be held accountable"); S.C. Res. 2118 (Sept. 2017, 2013) ("*Determining* that the use of chemical weapons in the Syrian Arab Republic constitutes a threat to international peace and security").

Despite near-global condemnation, a small number of state and nonstate actors persist in using chemical weapons, and Syria's continued use of them "threatens to desensitize the world to their use and proliferation, weaken prohibitions against their use, and increase the likelihood that additional states will acquire and use these weapons." *USG Assessment*. Last year's U.S. strike did not fully dissuade the Syrian regime from continuing to use chemical weapons. And Russia recently used a nerve agent in an attempted assassination in the United Kingdom, "showing an uncommonly brazen disregard for the taboo against chemical weapons."

Id.; *see also* United States Mission to the United Nations, *Ambassador Haley Delivers Remarks at a UN Security Council Briefing on Chemical Weapons Use in Syria* (Apr. 4, 2018), https://usun.usmission.gov/ambassador-haley-delivers-remarks-at-a-un-security-council-briefing-on-chemical-weapons-use-in-syria ("When we let one regime off the hook, others take notice. The use of nerve agents in Salisbury and Kuala Lumpur proves this point and reveals a dangerous trend. We are rapidly sliding backward, crossing back into a world that we thought we left."). ISIS has also acquired and deployed chemical weapons. *See Worldwide Threat Assessment* at 8. The United States has a weighty interest in deterring the use of these weapons.

In sum, the President here was faced with a grave risk to regional stability, a serious and growing humanitarian disaster, and the use of weapons repeatedly condemned by the United States and other members of the international community. In such circumstances, the President could reasonably conclude that these interests provided a basis for airstrikes on facilities that support the regime's use of chemical weapons. *See Attack in Korea*, 23 Dep't of State Bull. at 174 ("The United States has, throughout its history, upon orders of the Commander in Chief to the Armed Forces and without congressional authorization, acted to prevent violent and unlawful acts in other states from depriving the United States and its nationals of the benefits of such peace and security."). We believe that these interests fall comfortably within those that our Office has previously relied upon in concluding that the President had appropriately exercised his authority under Article II, and we so advised prior to the Syrian strikes.

B.

We next considered whether the President could expect the Syrian operations to rise to the level of a war requiring congressional authorization. Such a determination "requires a fact-specific assessment of the 'anticipated nature, scope, and duration' of the planned military operations." *Libya Deployment*, 35 Op. O.L.C. at 31 (quoting *Haiti Deployment I*, 18 Op. O.L.C. at 179). As we have previously explained, military operations will likely rise to the level of a war only when characterized by "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period." *Id.*

We have found that previous military deployments did not rise to the level of a war even where the deployment was substantial. For example, the United States spent two years enforcing a no-fly zone, protecting United Nations ("UN") peacekeeping forces, and securing safe areas for civilians in Bosnia, all without congressional authorization. *See Bosnia Deployment*, 19 Op. O.L.C. at 329 & n.2 (noting the plan to deploy 20,000 ground troops to Bosnia as well as additional troops to surrounding areas in a support capacity); *see also Libya Deployment*, 35 Op. O.L.C. at 32 (noting "one two-week operation in which NATO attacked hundreds of targets and the United States alone flew over 2300 sorties"). Similarly, in 1994, we approved a plan to deploy as many as 20,000 troops to Haiti. *Haiti Deployment I*, 18 Op. O.L.C. at 179 n.10. We also approved a U.S.-led air campaign in Libya in 2011 that lasted for over a week and involved the use of over 600 missiles and precision-guided munitions. *See* DoD News Briefing with Vice Adm. Gortney from the Pentagon on Libya Operation Odyssey Dawn (Mar. 28, 2011). In none of these cases did we conclude that prior congressional authorization was necessary.

In reviewing these deployments, we considered whether U.S. forces were likely to encounter significant armed resistance and whether they were likely to "suffer or inflict substantial casualties as a result of the deployment." *Haiti Deployment I*, 18 Op. O.L.C. at 179. In this regard, we have looked closely at whether an operation will require the introduction of U.S. forces directly into the hostilities, particularly with respect to the deployment of ground troops. The deployment of ground troops "is an essentially different, and more problematic, type of intervention," given "the difficulties of disengaging ground forces from situations of conflict, and the attendant risk that hostilities will escalate." *Bosnia Deployment*, 19 Op. O.L.C. at 333. In such circumstances, "arguably there is a greater need for approval at the outset for the commitment of such troops to such situations." *Id*.

In connection with reviewing the proposed peacekeeping operations in Bosnia, we noted that U.S. forces enforcing the no-fly zone had "engaged in combat," including the destruction of three aircraft violating the no-fly ban and the downing of a fourth, and engaging Bosnian-Serb aircraft and gunners. *See Bosnia Deployment*, 19 Op. O.L.C. at 328 (also noting airstrikes in response to Serb air attacks threatening UN peacekeeping

forces). We noted that the peacekeeping force would require the deployment of 20,000 ground troops to Bosnia, which would "raise[] the risk that the United States w[ould] incur (and inflict) casualties." *Id*. at 333. Nonetheless, while "combat conceivably may occur during the course of the operation," we did not believe it was "likely that the United States [would] find itself involved in *extensive* or *sustained* hostilities." *Id*. at 332–33 (emphases added). In Somalia, we approved the introduction of U.S. combat-equipped forces to ensure the protection of noncombatant forces involved in UN humanitarian relief. *See Somalia Deployment*, 16 Op. O.L.C. at 10 ("It is also essential to consider the safety of the troops to be dispatched as requested by Security Council Resolution No. 794. The President may provide those troops with sufficient military protection to insure that they are able to carry out their humanitarian tasks safely and efficiently."). And in approving the deployment of U.S. Marines to Haiti in 2004, we noted that it was "possible that some level of violence and instability will continue." *Haiti Deployment II*, 28 Op. O.L.C. at 34 (quoting *Presidential Power*, 4A Op. O.L.C. at 194); *see also Presidential Power*, 4A Op. O.L.C. at 187 ("Operations of rescue and retaliation have also been ordered by the President without congressional authorization even when they involved hostilities."). Thus, even in cases involving the deployment of ground troops, we have found that the expected hostilities would fall short of a war requiring congressional authorization.

With these precedents in mind, we concluded that the proposed Syrian operation, in its nature, scope, and duration, fell far short of the kinds of engagements approved by prior Presidents under Article II. First, in contrast with some prior deployments, the United States did not plan to employ any U.S. ground troops, and in fact, no U.S. airplanes crossed into Syrian airspace. Where, as here, the operation would proceed without the introduction of U.S. troops into harm's way, we were unlikely to be "confronted with circumstances in which the exercise of [Congress's] power to declare war is effectively foreclosed." *Bosnia Deployment*, 19 Op. O.L.C. at 333.

Second, the mission was sharply circumscribed. This was not a case where the military operation served an open-ended goal. Rather, the President selected three military targets with the aim of degrading and destroying the Syrian regime's ability to produce and use chemical weapons. *Mattis Briefing* (statement of Secretary Mattis) ("Earlier today,

President Trump directed the U.S. military to conduct operations in consonance with our allies to destroy the Syrian regime's chemical weapons research[,] development and production capability."); *id*. ("It was done on targets that we believed were selected to hurt the chemical weapons program. We confined it to the chemical weapons-type targets. We were not out to expand this. We were very precise and proportionate."); *id*. (noting that "right now this is a one-time shot"). And the strikes were planned to minimize casualties, further demonstrating the limited nature of the operation. *See DoD Briefing* (statement of Lt. Gen. McKenzie). Those aspects both underscored the "limited mission" and the fact that the operation was not "aim[ed] at the conquest or occupation of territory nor even, as did the planned Haitian intervention, at imposing through military means a change in the character of a political régime." *Bosnia Deployment*, 19 Op. O.L.C. at 332.

Third, the duration of the planned operation was expected to be very short. In fact, the entire operation lasted several hours, and the actual attack lasted only a few minutes. *DoD Briefing* (statement of Lt. Gen. McKenzie).

Standing on its own, the attack on three Syrian chemical-weapons facilities was not the kind of "prolonged and substantial military engagement" that would amount to a war. *Libya Deployment*, 35 Op. O.L.C. at 31. We did not, however, measure the engagement based solely upon the contours of the first strike. Rather, in evaluating the expected scope of hostilities, we also considered the risk that an initial strike could escalate into a broader conflict against Syria or its allies, such as Russia and Iran. *See Haiti Deployment I*, 18 Op. O.L.C. at 179 ("In deciding whether prior Congressional authorization for the Haitian deployment was constitutionally necessary, the President was entitled to take into account . . . the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment."). But the fact that there is some risk to American personnel or some risk of escalation does not itself mean that the operation amounts to a war. *See Cambodian Sanctuaries*, 1 Op. O.L.C. Supp. at 331; *Bosnia Deployment*, 19 Op. O.L.C. at 332. We therefore considered the likelihood of escalation and the measures that the United States intended to take to minimize that risk.

We were advised that escalation was unlikely (and reviewed materials supporting that judgment), and we took note of several measures that had been taken to reduce the risk of escalation by Syria or Russia. The targets were selected because of their particular connections to the chemical-weapons program, underscoring that the strikes sought to address the extraordinary threat posed by the use of chemical weapons and did not seek to precipitate a regime change. *See DoD Briefing* (statement of Ms. White) ("This operation does not represent a change in U.S. policy, nor an attempt to depose the Syrian regime. The strikes were [a] justified, legitimate and proportionate response to the Syrian regime's continued use of chemical weapons on its own people."). The targets were chosen to minimize civilian casualties, *see Mattis Briefing* (statement of Gen. Dunford) ("[W]e did not select those that had a high risk of collateral damage, and specifically a high risk of civilian casualties."), and the strikes took place at a time that further reduced the threat to civilians, *see DoD Briefing* (statement of Lt. Gen. McKenzie) ("We also chose to strike it [at] . . . 4:00 in the morning local time, so we weren't trying to kill a lot of people on the objective, and so we struck at a different time of the day."), again reducing the likelihood that Syria would retaliate. The targets were also chosen to minimize risk to Russian soldiers, and deconfliction processes were used, two steps that reduced the possibility that Russia would respond militarily. *See Mattis Briefing* (statement of Gen. Dunford) ("[W]e specifically identified these targets to mitigate the risk of Russian forces being involved, and we used our normal deconfliction channels—those were active this week—to work through the airspace issue and so forth."). Given the absence of ground troops, the limited mission and time frame, and the efforts to avoid escalation, the anticipated nature, scope, and duration of these airstrikes did not rise to the level of a "war" for constitutional purposes.

IV.

For the foregoing reasons, we concluded that the President had the constitutional authority to carry out the proposed airstrikes on three Syrian chemical-weapons facilities. The President reasonably determined that this operation would further important national interests in promoting regional stability, preventing the worsening of the region's humanitarian catastrophe, and deterring the use and proliferation of chemical weapons.

Further, the anticipated nature, scope, and duration of the operations were sufficiently limited that they did not amount to war in the constitutional sense and therefore did not require prior congressional approval.

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Licensing Marijuana Cultivation in Compliance with the Single Convention on Narcotic Drugs

Under the Controlled Substances Act, the Drug Enforcement Administration may register an applicant to cultivate marijuana only if the registration scheme is consistent with the Single Convention on Narcotic Drugs. To comply with the Single Convention, DEA's licensing framework must provide for a system in which DEA or its legal agent has physical possession and ownership over the cultivated marijuana and assumes control of the distribution of marijuana no later than four months after harvesting.

June 6, 2018

MEMORANDUM OPINION FOR THE ACTING CHIEF COUNSEL
DRUG ENFORCEMENT ADMINISTRATION

Under the Controlled Substances Act, the Attorney General is authorized to license marijuana cultivation if he determines that it would be "consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971." 21 U.S.C. § 823(a). Such obligations include those under the Single Convention on Narcotic Drugs ("Single Convention"), Mar. 30, 1961, 18 U.S.T. 1407. As relevant here, the Single Convention requires parties either to prohibit marijuana cultivation altogether or, if they permit cultivation, to establish "a single government agency" to oversee marijuana growers and generally to monopolize the wholesale trade in the marijuana crop. *Id*. arts. 22, 23(3), 28(1). That single agency must strictly regulate any lawful cultivation of marijuana by, among other things, "purchas[ing] and tak[ing] physical possession of [the] crops as soon as possible, but not later than four months after the end of the harvest." *Id*. art. 23(2)(d).

This opinion considers whether the Drug Enforcement Administration ("DEA"), which exercises the Attorney General's licensing authority, must alter existing licensing practices to comply with the Single Convention. At present, DEA does not purchase or take physical possession of lawfully grown marijuana at any point in the distribution process. Instead, the only currently licensed marijuana cultivator grows and distributes the marijuana itself pursuant to a contract with, and under the supervision of, the National Institute on Drug Abuse ("NIDA"), a component of the Department of Health and Human Services' National Institutes of Health.

In 2016, DEA revised this process and announced that it would increase the number of licensees and supervise the additional growers itself. *See* Applications To Become Registered Under the Controlled Substances Act To Manufacture Marijuana To Supply Researchers in the United States, 81 Fed. Reg. 53,846, 53,848 (Aug. 12, 2016) ("Applications To Manufacture Marijuana"). Under the new policy, DEA would not purchase or possess the marijuana before licensees distributed it to government-approved researchers. Several entities have applied for licenses under the new policy, but no applications have been approved.

We conclude that DEA must change its current practices and the policy it announced in 2016 to comply with the Single Convention. DEA must adopt a framework in which it purchases and takes possession of the entire marijuana crop of each licensee after the crop is harvested. In addition, DEA must generally monopolize the import, export, wholesale trade, and stock maintenance of lawfully grown marijuana.[1] There may well be more than one way to satisfy those obligations under the Single Convention, but the federal government may not license the cultivation of marijuana without complying with the minimum requirements of that agreement.

I.

The Single Convention entered into force for the United States on June 24, 1967, after the Senate had given its advice and consent to the United States' accession. *See* Single Convention, 18 U.S.T. 1407. The Convention requires parties to impose stringent controls on the cultivation, manu-

[1] In preparing this opinion, we considered the views of DEA, the Office of the General Counsel of the Department of Health and Human Services, and the Department of State's Office of the Legal Adviser. *See* Applications To Manufacture Marijuana, 81 Fed. Reg. at 53,846–48 (discussing requirements of the Single Convention applicable to licensing marijuana cultivation); Lyle E. Craker, PhD, 76 Fed. Reg. 51,403, 51,409–11 (DEA Aug. 18, 2011) (same); Lyle E. Craker, 74 Fed. Reg. 2101, 2114–18 (DEA Jan. 14, 2009) (same); Memorandum for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Matthew S. Bowman, Deputy General Counsel, Department of Health and Human Services (Apr. 13, 2018) ("HHS Mem."); Office of Law Enforcement and Intelligence and Office of Treaty Affairs, *Single Convention Analysis* (Jan. 29, 2018) ("State Mem."); Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Jennifer G. Newstead, Legal Adviser, Department of State (Apr. 17, 2018) ("State Supp. Mem.").

facture, and distribution of narcotic drugs, including "cannabis," which it defines as "the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted, by whatever name they may be designated." Single Convention art. 1(1)(b). Parties must, among other things, establish quotas on the import and manufacture of cannabis, generally prohibit the possession of cannabis, and adopt penal provisions making violations of those controls punishable offenses. *Id*. arts. 21, 33, 36.

Article 28 of the Single Convention requires that any lawful cultivation of the cannabis plant be subject to the same system of strict controls "as provided in article 23 respecting the control of the opium poppy." *Id*. art. 28. The cross-referenced provisions in Article 23 provide as follows:

> 1. A Party that permits the cultivation of the opium poppy for the production of opium shall establish, if it has not already done so, and maintain, one or more government agencies (hereafter in this article referred to as the Agency) to carry out the functions required under this article.
>
> 2. Each such Party shall apply the following provisions to the cultivation of the opium poppy for the production of opium and to opium:
>
> a. The Agency shall designate the area in which, and the plots of land on which, cultivation of the opium poppy for the purpose of producing opium shall be permitted.
>
> b. Only cultivators licensed by the Agency shall be authorized to engage in such cultivation.
>
> c. Each license shall specify the extent of the land on which the cultivation is permitted.
>
> d. All cultivators of the opium poppy shall be required to deliver their total crops of opium to the Agency. The Agency shall purchase and take physical possession of such crops as soon as possible, but not later than four months after the end of the harvest.
>
> e. The agency shall, in respect of opium, have the exclusive right of importing, exporting, wholesale trading and maintaining

> stocks other than those held by manufacturers of opium alkaloids, medicinal opium, or opium preparations. Parties need not extend this exclusive right to medicinal opium and opium preparations.
>
> 3. The governmental functions referred to in paragraph 2 shall be discharged by a single government agency if the constitution of the Party concerned permits it.

The agency's "exclusive right[s]" over the harvested marijuana need not extend to "medicinal" marijuana or marijuana "preparations," but the national cannabis agency must still purchase and take physical possession of all marijuana grown for such purposes. *Id*. art. 23(2)(d)(e); *see* Report of the International Narcotics Control Board for 2014, at 35 (Mar. 3, 2015) ("2014 INCB Report"); Secretary-General of the United Nations, *Commentary on the Single Convention on Narcotic Drugs, 1961*, at 284, 314 (1973) ("*Commentary*").[2]

Three years after the United States acceded to the Single Convention, Congress in 1970 enacted the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq*., "a comprehensive statute designed to rationalize federal control of dangerous drugs." *Nat'l Org. for Reform of Marijuana Laws (NORML) v. DEA*, 559 F.2d 735, 737 (D.C. Cir. 1977). "[A] number of the provisions of [the CSA] reflect Congress' intent to comply with the obligations imposed by the Single Convention." *Control of Papaver Bracteatum*, 1 Op. O.L.C. 93, 95 (1977); *see, e.g*., 21 U.S.C. §§ 801(7), 811(d)(1), 958(a); *see also* S. Rep. No. 91-613, at 4 (1969) ("The United States has international commitments to help control the worldwide drug traffic. To honor those commitments, principally those established by the Single Convention on Narcotic Drugs of 1961, is clearly a Federal responsibility.").

The CSA imposes strict controls on marijuana, which is defined to include "all parts of the plant Cannabis sativa L." and all compounds and derivatives thereof, with certain exceptions not relevant here. 21 U.S.C.

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[2] The United Nations' Economic and Social Council requested that the Secretary-General prepare the *Commentary* "in the light of the relevant conference proceedings and other material" in order to aid governments in applying the Single Convention. Economic and Social Council Resolution 1962/914(XXXIV)D (Aug. 3, 1962).

§ 802(16). The statute classifies marijuana as a schedule I substance, the most stringent classification available, reflecting a determination that marijuana "has a high potential for abuse" and "no currently accepted medical use." 21 U.S.C. § 812(b); *see Craker v. DEA*, 714 F.3d 17, 19 (1st Cir. 2013); 21 C.F.R. § 1308.11. The CSA makes the unauthorized possession, manufacture, and distribution of marijuana a crime punishable by severe penalties. 21 U.S.C. §§ 841, 844.

Although federal law recognizes no currently accepted medical use for marijuana, *see United States v. Oakland Cannabis Buyers' Co-op*., 532 U.S. 483, 491 (2001), it does permit the cannabis plant to be cultivated lawfully for research purposes pursuant to a DEA license. *See* 21 U.S.C. §§ 822(a)(1), 823(a); 21 C.F.R. pt. 1301.[3] Since its founding in 1973, DEA has licensed only one such grower to supply researchers with marijuana—the National Center for Natural Products Research ("National Center"), a division of the University of Mississippi. *See* Lyle E. Craker, 74 Fed. Reg. at 2104; Applications To Manufacture Marijuana, 81 Fed. Reg. at 53,846. The National Center cultivates marijuana pursuant to a contract administered by NIDA. Besides overseeing the cultivation of marijuana, NIDA also plays a role in determining which researchers may obtain marijuana for medical or scientific use. *See* 21 U.S.C. § 823(f); Announcement of Revision to the Department of Health and Human Services Guidance on Procedures for the Provision of Marijuana for Medical Research as Published on May 21, 1999, 80 Fed. Reg. 35,960 (June 23, 2015).

The current contract between NIDA and the National Center, which became effective on March 23, 2015, provides that the National Center will, among other things, "cultivate and harvest, process, analyze, store, and distribute cannabis . . . for research." Award/Contract Issued by Nat'l Inst. on Drug Abuse, to the University of Mississippi, Contract No. HHSN271201500023C, at 4 (effective Mar. 23, 2015) ("2015 NIDA Contract"). The National Center must also "[p]rovide an adequate DEA approved storage facility" for the harvested cannabis and may ship it to researchers only "as required by NIDA." *Id*. at 17. All work under the

[3] Sections 822(a) and 823(a) vest authority over registration for such licenses in the Attorney General. Pursuant to 21 U.S.C. § 871(a), the Attorney General delegated this function to DEA. 28 C.F.R. § 0.100(b).

contract is to be "monitored" by the Government Contracting Officer's Representative, an employee at NIDA's headquarters in Bethesda, Maryland. *Id*. at 16, 34. The contract requires the NIDA representative to monitor technical progress based on the National Center's monthly progress reports, to evaluate the National Center's work, to perform technical evaluations and inspections of a sample of the marijuana shipped to NIDA, and to assist in resolving technical problems. *Id*. at 17, 26, 34.

In 2016, in response to increasing public interest in marijuana research, DEA announced a new policy reflecting its intention to increase the number of federally authorized growers. *See* Applications To Manufacture Marijuana, 81 Fed. Reg. at 53,846–48. Under the new policy, a grower, if approved for a license, would "be permitted to operate independently, provided the grower agrees (through a written memorandum of agreement with DEA) that it will only distribute marijuana with prior, written approval from DEA." *Id*. at 53,848. NIDA would not be involved in monitoring the additional licensees. We understand that DEA has several currently pending requests from entities that seek to register as marijuana growers under that policy.

II.

Under the CSA, DEA may register an applicant to cultivate marijuana only if the registration scheme is consistent with the Single Convention. We address whether DEA's practices and policy for licensing marijuana cultivation comply with the Single Convention and, if not, what changes DEA must make to conform to the treaty.

A.

An international agreement has the force of domestic U.S. law if it is self-executing or if Congress has implemented it by legislation. *See Medellín v. Texas*, 552 U.S. 491, 504–05 (2008). Here, Congress has executed the Single Convention in the CSA. In that Act, Congress provided that the Attorney General "shall" license the cultivation of marijuana "if he determines that such registration is consistent with . . . United States obligations under international treaties, conventions, or protocols

in effect on May 1, 1971." 21 U.S.C. § 823(a).[4] The Attorney General is thus required to determine that the licensing scheme is consistent with the Single Convention before exercising his authority to register an applicant to cultivate marijuana. *See Control of Papaver Bracteatum*, 1 Op. O.L.C. at 99; Memorandum for John E. Ingersoll, Director, Bureau of Narcotics and Dangerous Drugs, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Petition to Decontrol Marihuana—Interpretation of Section 201 of the Controlled Substances Act of 1970*, at 4 (Aug. 21, 1972) ("[I]n making determinations as to the fitness of registrants to receive licenses for manufacture or export and import of controlled substances, the Attorney General is instructed to ensure consistency 'with United States obligations under international treaties.'").

Article 23(2) of the Single Convention, made applicable to marijuana cultivation by Article 28, contains five requirements for the supervision, licensing, and distribution of marijuana. *See* Single Convention art. 23(2)(a)–(e). Under current regulations and practice, DEA satisfies the first three requirements. The Convention specifies that the agency must designate the land on which cannabis cultivation is permitted, limit cultivators to those licensed by the agency, and specify the extent of the land on which cultivation is permitted. *Id*. art. 23(2)(a), (b), (c). Federal regulations implement those requirements by mandating that a marijuana manufacturer obtain a DEA license annually for each physical location at which marijuana is grown. 21 U.S.C. § 822(a)(1); 21 C.F.R §§ 1301.11(a), 1301.12(a). DEA establishes annual production quotas for lawful marijuana cultivation, and it has exercised that authority by setting the annual quotas for the National Center, the only entity ever registered by DEA to grow marijuana to supply researchers in the United States. 21 U.S.C. § 826; 21 C.F.R. § 1303.11. DEA has ample authority under this framework to specify the areas and circumstances under which a licensee may cultivate marijuana and in fact satisfies the first three requirements of Article 23(2) of the Single Convention in registering applicants under the CSA pursuant to those requirements.

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[4] The Single Convention was amended by a 1972 protocol, but the amendments are not material to the obligations discussed in this opinion. *See* Protocol Amending the Single Convention on Narcotic Drugs, Mar. 25, 1972, 26 U.S.T. 1439.

Article 23 of the Single Convention also imposes control requirements beyond those currently carried out by DEA. Under Article 23(2)(d), "all cultivators shall be required to deliver their total crops" to the agency, and the agency "shall purchase and take physical possession of such crops as soon as possible, but not later than four months after the end of the harvest." Article 23(2)(e) requires the agency to "have the exclusive right of importing, exporting, wholesale trading and maintaining stocks." The United States currently attempts to comply with those requirements through NIDA's contract with the National Center, under which NIDA's contracting officials supervise the National Center's cultivation of marijuana and distribution of marijuana to researchers. Article 23's final requirement, however, provides that the "governmental functions" in Article 23(2) must be "discharged by a single government agency if the constitution of the Party concerned permits it." Single Convention art. 23(3).

We conclude that the existing licensing framework departs from Article 23 in three respects. First, the division of responsibilities between DEA and NIDA, a component of the Department of Health and Human Services ("HHS"), contravenes Article 23(2)'s requirement that all Article 23 functions be carried out by a single government agency. Second, neither of the two government agencies "take[s] physical possession" of the marijuana grown by the National Center, as required by Article 23(2)(d). Third, no federal agency exercises a monopoly over the wholesale trade in marijuana, as required by Article 23(2)(e). We discuss each departure in turn.

1.

Current practice diverges from the Single Convention's requirement that a single agency undertake each of the listed control functions unless the constitution of the treaty party forbids it. As explained, DEA is responsible for the controls required by Article 23(2)(a), (b), and (c) because it effectively designates the area where marijuana cultivation is permitted, limits cultivators to those licensed by the agency, and specifies the extent of the land on which cultivation is permitted. NIDA, for its part, attempts to satisfy the physical-possession and government-monopoly-control requirements of Article 23(2)(d) and (e) by supervising cultivation under its contract with the National Center. That division of

authority is contrary to Article 23(3), because nothing in the Constitution would preclude the United States from discharging all of those controls through one government agency.

DEA agrees that "the United States fails to adhere strictly" to the single government agency provision because "both DEA and HHS carry out certain functions set forth in article 23, paragraph 2." Lyle E. Craker, PhD, 76 Fed. Reg. at 51,409.[5] For the current framework to be in compliance with the single-agency requirement of the treaty, we would have to view NIDA as performing the physical-possession and government-monopoly functions on behalf of DEA. *See* State Mem. at 5. But we do not believe that NIDA acts for DEA, and it is unlikely that DEA could lawfully supervise NIDA in the performance of its functions. We are aware of no statute that gives DEA that authority. And the President may not delegate to DEA his constitutional authority to supervise NIDA in the exercise of its statutory responsibilities. *See Centralizing Border Control Policy Under the Attorney General*, 26 Op. O.L.C. 22, 24–25 (2002).

2.

We turn next to the requirement that the single government agency "purchase and take physical possession" of the marijuana. Single Convention art. 23(2)(d). As noted above, NIDA contracts with, and partially oversees, the cultivation of marijuana by the National Center, which is licensed by DEA. But under that contractual arrangement, neither NIDA nor DEA takes physical possession of the marijuana. Rather, the National Center itself stores the marijuana on the premises of the University of

[5] Members of Congress and the American Bar Association have also recognized that the division of regulatory responsibilities among federal agencies fails to comply with the Single Convention. *See* 129 Cong. Rec. 7434 (Mar. 24, 1983) (Rep. McKinney) (recognizing that the current division of responsibilities is in "violation of the [S]ingle [C]onvention" and introducing a bill that would create an "Office for the Supply of Internationally Controlled Drugs" within the Department of Health and Human Services to "comply[] with the [S]ingle [C]onvention on [N]arcotic [D]rugs"); *Report No. 1 of the Section of Administrative Law*, 109 Ann. Rep A.B.A. 447, 482 (1984) (noting that the Single Convention "requires that a *single* government agency license all domestic produce[r]s of marijuana, specify the particular plots of land on which it is to be grown, and collect the crops of all domestic producers of marijuana" and that "at present the authority to control marijuana production is split between" government agencies).

Mississippi and ships it to researchers approved by DEA. Neither NIDA nor DEA accepts delivery of the harvested crops. That contractual arrangement does not satisfy the United States' obligations under Article 23(d). The contract at most results in a federal government agency's having constructive, rather than physical, possession of the marijuana crop.

a.

The Single Convention does not define "physical possession." In construing that term we should "begin with the text of the treaty and the context in which the written words are used." *Water Splash, Inc. v. Menon*, 581 U.S. 271, 276 (2017) (internal quotation marks omitted); *see also Restatement (Third) of the Foreign Relations Law of the United States* § 325(1) (Am. Law Inst. 1987) ("*Restatement of Foreign Relations*") ("An international agreement is to be interpreted in good faith according to the ordinary meaning to be given to its terms in their context and in light of its object and purpose."); Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 ("Vienna Convention") (similar).[6]

We think it evident from the treaty's text and context that "physical possession" requires growers licensed under the CSA to transfer the crops to the physical, and not merely legal, control of the federal government. Article 23(2)(d) says that "cultivators" must "deliver their total crops" to the government—a clear indication that the treaty contemplates the physical transfer of control from one party to another. The Single Convention's *Commentary* reinforces that point in emphasizing that "the time between the harvest and *delivery of the crop* should be as short as possible" and recommending that parties "set a final date after which possession of harvested [crops] by a private cultivator is in any event illegal and [the crop] subject to confiscation." *Commentary* at 283 (emphasis added). And this understanding of the words used in the Single Convention is further confirmed by the decisions of U.S. courts, which have consistently distin-

[6] The United States is not a party to the Vienna Convention, but this Office has relied on Article 31 as generally reflecting customary international law and practice. *See Article 17* Bis *of the Air Transport Agreement with the European Union*, 40 Op. O.L.C. 26, 31 (2016); *"Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention*, 28 Op. O.L.C. 35, 53 n.21 (2004).

guished constructive possession from physical possession, with the latter requiring direct physical control over the item in question.[7]

One might argue that NIDA, through its contract, satisfies the treaty requirements of physical possession via the pervasive influence and control NIDA exercises over the National Center's cultivation operations. *See* State Mem. at 5; State Supp. Mem. at 2. NIDA's contract does provide that the National Center serves as "NIDA's cannabis drug repository." 2015 NIDA Contract at 16. DEA regulations also include detailed specifications for the material, size, and accessibility of the storage facility. *See* 21 C.F.R. §§ 1301.71–1301.76. The contract further specifies particular temperatures for the storage facility and notes that "[l]ocal DEA agents will determine the exact type of security required." 2015 NIDA Contract at 17. And the contract provides for federal monitoring of compliance by the NIDA representative, although that supervision occurs primarily from NIDA's headquarters in Bethesda, Maryland. *Id*. at 16, 26, 34. But the control that NIDA exercises through these contractual provisions amounts at most to constructive possession of the marijuana, and is thus insufficient to meet the treaty requirement of physical possession by the federal government.

In particular, this requirement demands that the government have physical control over the crop. Because a government acts through its agents, that mandate means the marijuana must be delivered to government agents who must have personal and direct physical access to the crops in question, and not simply the ability or power to obtain access to them.

b.

It could be argued that the National Center's employees are acting as federal government agents, and that the federal government physically possesses marijuana grown by the National Center through those employees. But in a similar context, for purposes of asking whether the federal

[7] *See, e.g.*, *United States v. Hunter*, 558 F.3d 495, 503–04 (6th Cir. 2009) ("Actual possession exists when an individual knowingly has direct physical control over a thing at a given time[.]"); *United States v. Derose*, 74 F.3d 1177, 1185 (11th Cir. 1996) (defining "actual possession" as "physical possession or . . . actual personal dominion over the thing allegedly possessed"); *United States v. Raper*, 676 F.2d 841, 848 (D.C. Cir. 1982) (finding constructive possession even though the drugs were in another's "physical possession"); *United States v. Moreno*, 649 F.2d 309, 313 (5th Cir. Unit A June 1981) (same).

government is liable for the actions of a contractor under the Federal Tort Claims Act, the Supreme Court has emphasized that requiring compliance with "federal standards and regulations" or contract terms that "fix specific and precise conditions to implement federal objectives" does not suffice to "convert the acts of [contractors] into federal governmental acts." *United States v. Orleans*, 425 U.S. 807, 815–16 (1976). A contractor's employees may become federal agents only if the government has the authority "to control the detailed physical performance of the contractor" and supervise its "day-to-day operations." *Id.* at 814–16 (internal quotation marks omitted).

For analogous reasons, the National Center's employees are not agents of the federal government. The parameters of the contract do not provide for DEA or NIDA to supervise closely the day-to-day physical operations of the National Center's distribution and storage functions. And the NIDA contract disavows the notion that it creates an agency relationship. It provides that the National Center operates "[i]ndependently, *and not as an agent* of the Government" and, further, that the National Center "shall be required to furnish all necessary services, qualified personnel, materials, equipment, and facilities, not otherwise provided by the Government." 2015 NIDA Contract at 15 (emphasis added). There is simply no indication that the federal government, rather than the National Center, exercises the kind of close supervision of the National Center's employees that would make them federal agents.

We are also not persuaded by a similar line of argument contending that the National Center "could be considered an extension of" the federal government. Applications To Manufacture Marijuana, 81 Fed. Reg. at 53,847. The suggestion is that the National Center itself operates as the federal government in carrying out the controls required by the Single Convention. The question of whether an entity is part of the federal government turns on a variety of factors, including whether the government owns the entity; whether the government appoints its officers and directors; whether Congress has defined its corporate purposes or appropriated funds for its operations; and whether the entity is controlled by or operates for the benefit of the federal government. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 51–55 (2015); *United States v. New Mexico*, 455 U.S. 720, 739–40 (1982); Memorandum for Edward A. Frankle, General Counsel, National Aeronautics & Space Administration,

from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of Government Corporation Control Act to Gain Sharing Benefit Agreement* at 7–9 (Sept. 18, 2000).

Under those factors, the National Center is not an extension of the federal government. The National Center is part of the University of Mississippi, located on campus in a university-owned building, and run by its own employees. It does not operate solely for a federal purpose, but instead was established to help the University conduct "research to discover and develop natural products for use as pharmaceuticals, dietary supplements and agrochemicals, and to understand the biological and chemical properties of medicinal plants." National Center for Natural Products Research, About NCNPR, https://pharm.olemiss.edu/ncnpr/about (last visited June 6, 2018). While the federal government pays the National Center to grow marijuana and exercises some supervision over its growing operations, the government does not generally fund or control the National Center. That the National Center may physically possess the marijuana it grows, then, does not satisfy the federal government's obligation to do so.[8]

c.

In addition to taking "physical possession," Article 23(2)(d) requires that the national agency "purchase" the marijuana from the cultivator. That requirement provides for the government to pay for and take legal title to the marijuana. The *Commentary* advises that the payment of money was meant to encourage the delivery of the crops because "[p]rompt payment, a good price and other favourable conditions of purchase may be incentives to producers to deliver speedily their total" crops to the agency. *Commentary* at 283. The exchange of payment for the harvested

[8] The Supreme Court has cautioned against applying "background principle[s] of American law" that are "relevant to the interpretation of federal statutes" but were not necessarily adopted by the signatories to a treaty (for example, the presumption in favor of equitable tolling of federal statutes of limitations). *Lozano v. Montoya Alvarez*, 572 U.S. 1, 12 (2014). Here, we have sought help from analogies drawn from U.S. law to interpret the Single Convention "in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose." *Restatement of Foreign Relations* § 325(1).

crops encourages each grower to deliver its full inventory to the government.

Neither NIDA nor DEA "purchases" the harvested crops from the National Center, but it could be said that NIDA does not need to do so if it already has title to the marijuana. *See* State Mem. at 4–5; HHS Mem. at 5–6. Although the contract between NIDA and the National Center includes some provisions discussing government property, they do not expressly address or otherwise make clear where title to the marijuana crops lies.[9] But we need not decide whether NIDA has title to the crops. The requirement that the federal government physically possess the marijuana crops is distinct from the requirement that it "purchase" the crops and thus secure title. *See* Single Convention art. 23(d). Physical possession is not conferred by mere "transfer of title or risk of loss." *In re World Imports, Ltd*., 862 F.3d 338, 344 (3d Cir. 2017) (interpreting the Bankruptcy Code's reference to "receipt of goods" as requiring "physical possession"); *see Matter of Brio Petroleum, Inc*., 800 F.2d 469, 472 (5th Cir. 1986) (same); *Matter of Marin Oil, Inc*., 740 F.2d 220, 225 (3d Cir. 1984) (same). Moreover, DEA certainly does not have title to the crops. Even if NIDA had formal legal title to the crops, the current arrangement would still have to be adjusted to comply with the treaty's requirements that a single government agency be charged with licensing cultivators, purchasing, and physically possessing the crops. In the course of making those adjustments, DEA could enter into a contract that expressly states that it owns the marijuana crops, should the agency seek to obviate the need for a purchase and claim ownership in the marijuana from its inception, rather than buying back the crops shortly after the harvest.

[9] The current NIDA contract incorporates a clause of the Federal Acquisition Regulation dealing with government title to property. 2015 NIDA Contract at 55. That clause states that "[t]itle to property (and other tangible personal property) purchased with funds available for research and having a unit acquisition cost of less than $5,000 shall vest in the Contractor upon acquisition or as soon thereafter as feasible; provided that the Contractor obtained the Contracting Officer's approval before each acquisition." 48 C.F.R. § 52.245-1 Alternate II (2012). If the unit acquisition cost is $5,000 or more, title vests "as set forth in this contract." *Id*. The application of this clause to marijuana the contractor grows rather than purchases is ambiguous and the contract does not otherwise expressly address title to the crops.

3.

Finally, we do not believe that the current arrangement provides for the federal government to exercise "the exclusive right of importing, exporting, wholesale trading and maintaining stocks" in the drug, as required by Article 23(2)(e). DEA has authority to control the lawful distribution of the crops in certain respects. But just as with the physical possession requirement, the Single Convention contemplates that the government monopoly will involve more than the exercise of regulatory authority. The *Commentary* on the Convention stresses that wholesale trade "must be undertaken by governmental authorities," rather than private parties, because of the risk of diversion. *Commentary* at 278. The Convention contemplates an actual "monopoly," *id*. at 284, i.e., "[t]he market condition existing when only one economic entity produces a particular product or provides a particular service," *Black's Law Dictionary* 1160 (10th ed. 2014). The government agency responsible for the relevant controls must own the crops and be the sole distributor of the marijuana. In allowing the National Center to maintain possession of the marijuana and ship it to DEA-approved researchers, the NIDA contract does not create the required government monopoly over the lawful marijuana trade.[10]

For the reasons discussed above, the National Center does not play the role of the government monopolist. *See supra* Part II.A.2.b. Indeed, that conclusion is buttressed here by a constitutional concern. If the National Center were viewed as exercising significant authority in establishing a federal government monopoly over the lawful distribution of marijuana, in conformity with the international obligations of the United States, its officials might be viewed as officers of the United States, who would

[10] The government monopoly need not extend to "medicinal" marijuana. Single Convention art. 23(e). But that exception is not available under current federal law. As noted above, the federal government has not recognized any accepted medical use for marijuana. *See Oakland Cannabis Buyers' Co-op*., 532 U.S. at 491. As a result, "there is currently no such thing in the United States as 'medicinal cannabis'" for purposes of the Single Convention. Lyle E. Craker, 74 Fed. Reg. at 2116. Moreover, anyone who wished to produce medicinal marijuana or marijuana preparations would still be required to purchase cannabis stocks from the national cannabis agency that purchases and takes physical possession of the marijuana crop grown by licensees. *See Commentary* at 284.

need to be appointed consistent with the Appointments Clause. *See Ass'n of Am. Railroads*, 575 U.S. at 55–56; *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 87–93, 100–110, 121 (2007). If any National Center officials were officers of the United States, they would have to be appointed either by the President with the advice and consent of the Senate, or, pursuant to statutory authority, by a court of law, a department head, or the President alone. *See* U.S. Const. art. II, § 2, cl. 2. We are not aware that any National Center officials are so appointed, but because, as discussed above, we do not believe that the National Center is exercising the sovereign authority of the United States, such concerns do not arise.

B.

Even if the current framework departs from Article 23, it would still comply with the Convention if it satisfied Article 39, which provides that, "[n]otwithstanding anything contained in this Convention, a Party shall not be, or be deemed to be, precluded from adopting measures of control more strict or severe than those provided by this Convention." We therefore must consider whether the NIDA contract system may be viewed as resulting in a "more strict or severe" system of controls than one where the government physically possesses the marijuana crops and monopolizes their distribution. *See* State Mem. at 4–6.

Article 39 permits a party to the Single Convention to impose substitute measures that result in tighter controls than those otherwise required. *See Commentary* at 449. But as the *Commentary* explains, such "substitute measures should *clearly* be 'more strict or severe' to prevent any . . . doubts" about their validity. *Id.* (emphasis added). As examples of "[p]ermissible substitute controls," the *Commentary* identifies "the prohibition of manufacture of and trade in certain drugs instead of subjecting them to a system of licensing, or the imposition of the death penalty in place of 'imprisonment or other penalties of deprivation of liberty.'" *Id.* at 449–50.

The close regulation of the National Center is not clearly more strict or severe than the controls in Articles 23 and 28. The Office of the Legal Adviser points out that the NIDA contract, unlike the controls required by Article 23(2), addresses the risk of diversion during the cultivation process in addition to diversion that may occur after the crops are harvest-

ed. *See* State Mem. at 5; State Supp. Mem. at 1.[11] For example, the National Center must maintain its registration for working with scheduled drugs, 2015 NIDA Contract at 13, which requires certain security measures for manufacturing activities, *see, e.g.*, 21 C.F.R. § 1301.73(b) ("Manufacturing activities with controlled substances shall be conducted in an area or areas of clearly defined limited access which is under surveillance by an employee or employees designated in writing as responsible for the area.").

As effective as those contractually imposed diversion controls may be during marijuana *cultivation*, however, we cannot say that they clearly compensate for the absence of the required controls governing the *trade* in the crops, which the treaty drafters evidently believed posed greater risks of diversion. The controls required by Article 23 of the Single Convention reflect the specific concern that "experience has shown that permitting licensed private traders to purchase the crops results in diversion of large quantities of drugs into illicit channels." *Commentary* at 278. The treaty drafters thus concluded that "the acquisition of the crops and the wholesale and international trade in these agricultural products cannot be entrusted to private traders, but must be undertaken by governmental authorities in the producing countries." *Id*. The *Commentary* then explains that pursuant to Article 23 "[f]armers should be required to deliver the opium as soon as the Agency requests it, that is, is in a position to take physical possession of the crops of the cultivator concerned. . . . The Convention not only requires that the Agency should take physical possession of the opium, but also that it should 'purchase' it as soon as possible." *Id*. at 283. In other words, allowing the National Center, rather than the federal government, to distribute marijuana replicates in critical respects a system that the drafters rejected as inadequate, not one that they would have seen as "clearly more strict."

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[11] The Office of the Legal Adviser suggests that DEA's framework is also stricter than required by the Single Convention because DEA establishes annual quotas for the National Center's marijuana production. *See* State Mem. at 1, 5. But those quotas not only indirectly implement the requirements in Article 23(2) for the national cannabis agency to designate the land on which cultivation is permitted, *see Commentary* at 281, but also directly implement Article 21 of the Convention, which requires parties to limit the annual quantity of drugs lawfully manufactured and imported. DEA's quotas are therefore not more strict or severe than the Single Convention otherwise requires.

We also believe that reliance upon Article 39 here would be hard to reconcile with other provisions in the Single Convention that expressly provide parties with discretion to impose appropriate controls. For example, Article 28(3) gives parties discretion "to adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant."[12] *See also* Single Convention art. 2(8) (requiring parties to "use their best endeavours to apply . . . such measures of supervision as may be practicable" to substances that "may be used in the illicit manufacture of drugs"); *id*. art. 30(2)(b)(ii) (stating that parties should require that prescriptions for Schedule I drugs be written on official forms "[i]f the Parties deem these measures necessary or desirable"); *id*. art. 30(4) (stating that parties should require certain drug wrappings if the parties "consider[] such measure necessary or desirable"). Article 23 and the remaining provisions of Article 28, however, require a party to adopt very specific controls over the cultivation of marijuana (aside from the leaves of the plant) and do not give discretion to choose alternative means, simply because the party believes in good faith that the controls will accomplish the same purpose. Article 39 thus permits parties to depart from the specific controls mandated only where the alternatives are plainly more "strict or severe." The existing licensing scheme falls short of that standard.

C.

In considering the appropriate interpretation of the Single Convention, we have reviewed the statements and practice of the International Narcotics Control Board ("INCB"), the international body established by the Single Convention to monitor treaty compliance, which we understand has not objected to the United States' licensing scheme. While the interpretation of a body charged with monitoring treaty implementation may sometimes help in resolving ambiguities in the treaty's text, such views are not authoritative interpretations of the treaty or legally binding on the United States or other parties.[13]

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[12] As noted above, the Single Convention's definition of cannabis does not include the leaves when unaccompanied by the top of the plant. Single Convention art. 1(1)(b). The CSA's definition of marijuana, by contrast, includes the leaves. 21 U.S.C. § 802(16).

[13] *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 427–28 (1999) (guidance issued by the Office of the UN High Commissioner for Refugees regarding the interpretation of

Here, the INCB's failure to object reveals little. The INCB's mandate does not require it to note every instance of noncompliance. Rather, the INCB is charged with identifying situations in which the Convention's aims "are being seriously endangered by reason of the failure of any Party, country or territory to carry out [its] provisions." Single Convention art. 14(1)(a). In fulfilling this mandate, the INCB has, for example, objected to "the legalization of the production, sale and distribution of cannabis for non-medical and non-scientific purposes in the states of Alaska, Colorado, Oregon and Washington." 2014 INCB Report at 25. But the fact that the INCB has not objected to the federal licensing scheme does not mean that the INCB views that framework as complying with the Single Convention.

Indeed, the INCB's interpretation of the Single Convention appears entirely consistent with ours. For instance, the INCB's 2014 annual report advises that "States wishing to establish programmes for the use of cannabis for medical purposes that are consistent with the requirements of the Single Convention must establish a national cannabis agency to control, supervise and license the cultivation of cannabis crops." *Id*. at 35. The national cannabis agency must "purchase and tak[e] physical possession of crops" and maintain "the exclusive right of wholesale trading and maintaining stocks." *Id*. While the INCB has not expressly objected to the United States' licensing scheme, it has "note[d] that the control measures in place under many existing programmes in different countries fall short of the requirements set out above." *Id*. at 36. We do not infer from the INCB's silence any affirmative approval of the existing licensing scheme or the licensing schemes of other countries.

D.

We have also reviewed information about Executive Branch practice and the practice of other state parties to the Single Convention. As we

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the Refugee Convention "may be a useful interpretative aid, but it is not binding on the Attorney General, the [Board of Immigration Appeals], or United States courts"); Observations of the United States of America on the Human Rights Committee's Draft General Comment 35: Article 9, *2014 Digest of United States Practice in International Law* ch. 6, § A(2)(b), at 179 ("The United States believes the views of the Committee should be carefully considered by the States Parties. Nevertheless, they are neither primary nor authoritative sources of law.").

have observed, the Executive Branch has long licensed the National Center to grow marijuana without having a single government agency purchase and take physical possession of the cannabis crops after harvest. A number of other state parties to the Single Convention apparently follow the U.S. practice. *See* State Mem. at 6–7; State Supp. Mem. at 3.

The practice of the Executive Branch and other state parties is relevant in treaty interpretation. Courts "find particularly persuasive a consistent pattern of Executive Branch interpretation, reflected in the application of the treaty by the Executive and the course of conduct of the parties in implementing the agreement." *Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 36 (1987) (citing *O'Connor v. United States*, 479 U.S. 27, 32–33 (1986)); *see also* Vienna Convention art. 31(3)(b) (noting that, "together with the context," treaty interpretation should take into account "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"). The practices of a treaty's parties can also be useful evidence of the parties' "understanding of the agreement they signed." *United States v. Stuart*, 489 U.S. 353, 369 (1989); *see Medellín*, 552 U.S. at 507.

But as the Supreme Court has explained, "where the text [of a treaty] is clear . . . we have no power to insert an amendment." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (holding that the text of the Warsaw Convention controlled where it could not "be dismissed as an obvious drafting error").[14] Here, Articles 23 and 28 clearly require that the United

[14] *See Water Splash*, 581 U.S. at 280 ("[W]hen a treaty provision is ambiguous, the Court may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." (internal quotation marks omitted)); *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534–35 (1991) (explaining that treaty interpretation begins "with the text of the treaty and the context in which the written words are used," while "[o]ther general rules of construction may be brought to bear on difficult or ambiguous passages" (internal quotation marks omitted)); *United States v. Jeong*, 624 F.3d 706, 711 (5th Cir. 2010) ("Only if the language of a treaty, when read in the context of its structure and purpose, is ambiguous may we resort to extraneous information like the history of the treaty, the content of negotiations concerning the treaty, and the practical construction adopted by the contracting parties." (internal quotation marks omitted)); *Avero Belgium Ins. v. American Airlines, Inc.*, 423 F.3d 73, 86 (2d Cir. 2005) (holding that secondary evidence of the parties' intent "may be useful where the intentions of the party States cannot be deduced by the treaty's plain language, but we

States have a single government agency "purchase and take physical possession of" lawfully grown cannabis crops "as soon as possible, but not later than four months after the end of the harvest," Single Convention art. 23(2)(d), and that this agency thereafter "have the exclusive right of importing, exporting, wholesale trading and maintaining stocks" of marijuana, *id*. art. 23(2)(e).

In addition to the fact that the Single Convention is unambiguous, state practice does not appear to reflect a conclusive or consistent interpretation of the controls required. *See* Memorandum for Edwin Meese, III, Attorney General, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Intent and Constitutionality of Legislation Prohibiting the Maintenance of an Office of the Palestine Liberation Organization in the United States* at 4 n.5 (Feb. 13, 1988) (declining to depart from the text of an international agreement based on inconclusive post-ratification practice). The Office of the Legal Adviser identifies Australia, Canada, Israel, and the United Kingdom as countries with similar licensing practices as the United States, in which the government agency does not purchase or take physical possession of the marijuana, but allows private growers to distribute it. State Supp. Mem. at 3. But the practices of a handful of the 186 parties to the treaty are entitled to comparatively little weight in illuminating the meaning of the treaty, and certainly do not supply the kind of subsequent practice that "establishes the agreement of the parties regarding its interpretation." Vienna Convention art. 31(3)(b).

In fact, the practice of parties regarding lawful marijuana cultivation is hardly unambiguous. In the Czech Republic, for example, the applicable legal regime requires licensed cannabis growers to "transfer cannabis grown and harvested . . . exclusively to the State Institute for Drug Control," which is instructed to "buy cannabis harvested within 4 months of its harvesting." On Dependency Producing Substances and on Amending Certain Other Acts, Act No. 167/1998 Coll. sec. 24b(1) (as amended). And a 2017 report on cannabis legislation in Europe states that in Italy, "[f]rom November 2015, the [Ministry of Health] can issue permits for cultivation" of cannabis and that "[l]icensed farmers deliver the canna-

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need not rely upon such evidence here as the text of Montreal Protocol No. 4 is clear and, consequently, controlling" (internal citation omitted)).

bis to the ministry, which then allocates it for production." European Monitoring Centre for Drugs and Drug Addiction, *Cannabis Legislation in Europe: An Overview* 8 (2017).[15] Currently, it appears that the only authorized grower in Italy is the Italian Army, *see* Anna Momigliano, *In Italy, the Army Provides Medical Marijuana. And Some Say That's a Problem*, Wash. Post, Dec. 1, 2017, which would suggest that a single Italian government agency has physical possession of the crop and a monopoly on trade in cannabis, as the text of Articles 23 and 28 requires. There is also evidence that other parties to the Single Convention have established a single government agency to administer the controls required by Articles 23 and 28. *See, e.g.*, *Narcotic Drugs Act 1967*, Act No. 53/1967 (Cth) ch 2 pt 2 (as amended) (Austl.) (establishing marijuana licensing framework operated by the Department of Health); Report of the International Narcotics Control Board for 2005, at 16 (Mar. 1, 2006) (noting that "since the last report of the Board was published, the Government of the United Kingdom has established a national cannabis agency"); David Mansfield, *An Analysis of Licit Opium Poppy Cultivation: India and Turkey* 10–17 (Apr. 2001) (describing the regulation of opium in Turkey under the Grain Marketing Board and in India under the Central Bureau for Narcotics).

We find relevant as well the practice of countries that license private growers to cultivate the opium poppy and the coca leaf—both of which are subject to the same Article 23 regime as the cannabis plant.[16] The practice among countries that permit lawful production of those plants is consistent with the text of Article 23. In India, Turkey, and Peru, for

[15] The report also describes the Netherlands' regime for medicinal cannabis, which provides that cannabis producers may be "licenced by the Dutch government and must sell all produce to the [Office of Medicinal Cannabis], which then distributes it to pharmacies." *Cannabis Legislation in Europe: An Overview* at 7. Although this regime appears to comply with the text of the Single Convention, the Netherlands has a separate regime for non-medical cannabis, pursuant to which it licenses coffee shops to sell small quantities of cannabis. The INCB has objected to this practice and noted that it "is in contravention of the provisions of the [Single] Convention." Report of the International Narcotics Control Board for 2001, at 35 (Feb. 27, 2002).

[16] Article 26 provides that Article 23 applies to licit cultivation of the coca leaf except that the government agency is not required to take physical possession of the crops within four months, but only "as soon as possible after the end of the harvest." Single Convention art. 26(1).

example, a government agency purchases and takes physical possession of those crops following the harvest.[17]

The Office of the Legal Adviser suggests that state practice with regard to opium may not be instructive as to marijuana because "[t]he vulnerabilities of the two plants" to diversion "are significantly different" owing to their different properties. State Mem. at 6. But the Single Convention's drafters recognized that "the conditions under which the cannabis plant is cultivated for the production of drugs are very different from those under which the opium poppy is grown for opium," and nonetheless "provide[d] the same regime for both, namely that of article 23." *Commentary* at 313.[18]

While state practice is therefore inconclusive, the Single Convention's drafting history would strongly support our interpretation of the text of Articles 23 and 28 even if the treaty were ambiguous. *See Water Splash*, 581 U.S. at 280. An earlier draft of the Single Convention would have provided a less-stringent regime for cannabis than applicable to the coca leaf, under which a closely regulated private entity could grow marijuana. Under that draft, a "licensed scientific institute" would have been permitted to "produce, manufacture, possess and export under close State supervision to the government of another Party small amounts of cannabis . . . for the purpose of scientific research." Memorandum for Malcolm R. Wilkey, Assistant Attorney General, Criminal Division, from Robert Kramer, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Legislation to Carry Out Certain Provisions of Draft Single Convention on Narcotic Drugs* at 2–3 n.2 (Jan. 20, 1960) (quoting Article 39 of draft Single Convention). With regard to the coca leaf, however, the

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[17] *See* Central Bureau of Narcotics, Licit Cultivation of Opium Poppy, http://cbn.nic.in/en/opium/overview (last visited June 6, 2018) (explaining that licensed opium cultivators in India "are required to tender their entire produce to the Government"); Mansfield, *An Analysis of Licit Opium Poppy Cultivation* at 10–12 (describing the licensing and control measures for opium cultivation in Turkey, overseen by the Grain Marketing Board, which takes physical possession of crops); United Nations Office on Drugs and Crime, *Peru Coca Cultivation Survey* 8 (June 2005) (explaining that the National Coca Enterprise ("ENACO") "has a monopoly on the commercialization and industrialization of the coca leaves," such that "the selling of coca leaves to any party other than ENACO is considered illicit by national law").

[18] Indeed, the *Commentary* suggests that the regime for opium could, "in practice," prove to be inadequate to control cannabis production. *Commentary* at 313 n.9.

draft would have provided for the Article 23 system of controls. *See id.* at 1–2 n.1 (quoting Article 36 of draft Single Convention). In other words, the Single Convention's drafters considered, but rejected, allowing licensed private institutions to produce, store, and ship marijuana under close government supervision, and instead adopted a requirement that the government take physical possession of the crop and conduct trade in the drug. That history also shows that the drafters of the Single Convention considered applying less-stringent controls to marijuana, but declined to do so and instead applied the same stringent controls to marijuana, opium, and the coca leaf.

III.

For similar reasons, DEA's 2016 policy statement also fails to establish a framework that would fully comply with Articles 23 and 28 of the Single Convention.

Under that policy, DEA would allow a licensee "to operate independently" of NIDA, "provided the grower agrees (through a written memorandum of agreement with DEA) that it will only distribute marijuana with prior, written approval from DEA." Applications To Manufacture Marijuana, 81 Fed. Reg. at 53,848. Such a licensee would also "be subject to all applicable requirements of the CSA and DEA regulations, including those relating to quotas, record keeping, order forms, security, and diversion control." *Id.* DEA suggests that these requirements would be consistent with the purposes of Articles 23 and 28 of the Single Convention because these requirements "will succeed in avoiding one of the scenarios the treaty is designed to prevent: Private parties trading in marijuana outside the supervision or direction of the federal government." *Id.*

While DEA focuses on its view of the broader purposes of the treaty's requirements, the Single Convention requires the United States to adopt specific, listed controls if it licenses cannabis cultivation. A single government agency must purchase and take physical possession of harvested cannabis, and generally monopolize the wholesale trade in that plant. The United States cannot satisfy those requirements simply by employing alternatives that the government believes may prevent unlawful diversion. As we have explained, Articles 23 and 28 certainly could have given the parties the discretion to determine the particular controls necessary. Rather than take that route, the parties to the treaty agreed to certain

specific controls, and Congress has required the Attorney General to apply those strictures when granting licenses under the CSA. Accordingly, DEA's licensing procedures must comply with those choices. DEA's announced policy, however, would not comply with Articles 23 and 28 of the Single Convention.

IV.

We conclude that DEA must alter the marijuana licensing framework to comply with the Single Convention. DEA has discretion to develop a regulatory framework that meets the requirements of Articles 23 and 28. In doing so, DEA need not rule out a regime in which DEA purchases or takes legal title to the marijuana plants prior to their cultivation; adopts a system of regulation and day-to-day supervision that would create an agency relationship; or relies upon NIDA's expertise to assist the agency in its functions. At a minimum, however, this licensing framework must provide for a system in which DEA or its legal agent has physical possession and ownership over the cultivated marijuana and assumes control of the distribution of marijuana no later than four months after harvesting.

In justifying the current licensing framework, DEA had concluded that the division of labor with NIDA was "a result of the existing statutes, regulations, and Congressional appropriations," and declined to opine on whether, absent legislation, DEA could carry out all the functions required by the Single Convention. Lyle E. Craker, PhD, 76 Fed. Reg. at 51,409–10. Having examined DEA's and NIDA's authorities, we do not believe that further legislation is required for DEA to perform those functions. DEA has statutory authority to do so pursuant to 21 U.S.C. § 823(a), which obliges DEA (by delegation from the Attorney General) to ensure that registrations for the manufacture of marijuana comply with the Single Convention. That language authorizes DEA to take steps reasonably necessary to ensure that the registration scheme complies with the Single Convention, which as we have said clearly contemplates that a single government agency will purchase and take physical possession of marijuana crops from registrants. The statute thus authorizes DEA to perform the control functions contemplated by the Single Convention, including the functions of purchasing (or otherwise securing title over) and taking physical possession of marijuana crops. Reading the statute

otherwise would preclude DEA from registering any marijuana manufacturer because no registration could be in compliance with the Single Convention, contrary to Congress's evident intent that DEA administer the registration system. Congress has also established a fund for DEA's diversion control program, which includes DEA activities "related to the *registration* and control of the manufacture, distribution, [and] dispensing . . . of controlled substances." 21 U.S.C. § 886a(2)(B) (emphasis added). Because Congress has made compliance with the Single Convention a necessary condition of registration, *id*. § 823(a), that fund may be used in purchasing, storing, and monopolizing the wholesale trade in marijuana. And although HHS has statutory authority to "determine the qualifications and competency" of the *researchers* who seek to purchase marijuana from licensed growers to conduct research, *id*. § 823(f), that provision would not bar DEA from establishing a government monopoly from which those researchers could purchase marijuana.

The NIDA contract is a longstanding feature of the marijuana licensing scheme, and the current version of that contract is annually renewable through March 2020. 2015 NIDA Contract at 27. Although DEA must discharge the obligations required by Article 23(2), NIDA may still play a significant role. The relevant statutes require that "[r]egistration applications by practitioners wishing to conduct research with controlled substances in schedule I shall be referred to the Secretary [of Health and Human Services], who shall determine the qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol." 21 U.S.C. § 823(f). The Single Convention does not require that a single government agency be charged with all responsibilities related to marijuana, and the congressional decision to delegate those responsibilities to HHS is consistent with the Single Convention. Aside from carrying out its role under section 823(f), NIDA may continue to exercise some supervision over certain aspects of the marijuana cultivation, and DEA may consult NIDA in the process. We see no reason why the NIDA contract framework might not remain in place under a system in which DEA assumes clear title to the marijuana, either at inception or by purchase after harvest, and then takes physical possession after harvest. For instance, DEA could station one or more employees at the National Center after cultivation as a way of ensuring physical possession of the marijuana and exclusive control over its distribution.

We would be pleased to advise on these or any other matters concerning implementation of a new licensing framework.

HENRY C. WHITAKER
Deputy Assistant Attorney General
Office of Legal Counsel

The Scope of State Criminal Jurisdiction over Offenses Occurring on the Yakama Indian Reservation

In partially retroceding the criminal jurisdiction that it had obtained under Public Law 280, the State of Washington retained criminal jurisdiction over an offense on the Yakama Indian Reservation when the defendant or the victim is a non-Indian, as well as when both are non-Indians.

July 27, 2018

MEMORANDUM OPINION FOR THE PRINCIPAL DEPUTY SOLICITOR
DEPARTMENT OF THE INTERIOR

You have asked us to examine the scope of state criminal jurisdiction on the Yakama Indian Reservation in the State of Washington. Specifically, you have asked whether Washington, in retroceding criminal jurisdiction to the United States over offenses on the reservation involving Indians, retained jurisdiction over criminal offenses only when both the defendant and the victim are non-Indians, or also when either the defendant or the victim is a non-Indian.[1]

In 1963, Washington assumed jurisdiction over criminal offenses on the Yakama Reservation under Public Law 280, a 1953 federal statute. *See* Pub. L. No. 83-280, § 7, 67 Stat. 588. In 2014, the Governor of Washington partially retroceded that jurisdiction in a proclamation accepted by the United States. *See* Acceptance of Retrocession of Jurisdiction for Yakama Nation, 80 Fed. Reg. 63,583, 63,583 (Oct. 20, 2015) ("Retrocession Acceptance"); *see also* 25 U.S.C. § 1323(a). Your question turns on the interpretation of the Governor's proclamation in light of the federal statutory framework.

The two pertinent paragraphs of the Governor's proclamation addressing Washington's partial retrocession of criminal jurisdiction both state

[1] Although your request also refers to civil jurisdiction, you note that you are making your request for "the sake of enhanced public safety," which we understand from separate discussions to be the primary concern animating your inquiry. Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Daniel H. Jorjani, Principal Deputy Solicitor, Department of the Interior, *Re: Scope of Federal Jurisdiction on the Yakama Indian Reservation* at 1 (Mar. 30, 2018) ("Request Letter"). We therefore focus on criminal jurisdiction, although aspects of our analysis touch upon civil jurisdiction.

that, "[w]ithin the exterior boundaries of the Yakama Reservation," Washington retains "jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." Proclamation by the Governor 14-01, ¶¶ 2, 3, at 2 (Jan. 17, 2014) ("Proclamation 14-01"). In a letter transmitting the proclamation to the Department of the Interior ("DOI"), the Governor explained that "the intent" in the relevant paragraphs "is for the State to retain jurisdiction . . . where *any* party is a non-Indian." Letter for Kevin Washburn, Assistant Secretary of Indian Affairs, DOI, from Jay Inslee, Governor, State of Washington, *Re: Yakama Nation Retrocession Petition* at 2 (Jan. 27, 2014) ("Gov. Inslee Letter").[2] In notifying the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") of the United States' acceptance of the retrocession, DOI stated that, with respect to "the extent of retrocession," the proclamation was "plain on its face and unambiguous," but DOI did not set out its view of that plain meaning. Letter for JoDe Goudy, Chairman, Yakama Nation Tribal Council, from Kevin K. Washburn, Assistant Secretary, DOI at 5 (Oct. 19, 2015) ("2015 DOI Letter").[3]

In a November 2016 guidance memorandum, DOI's Bureau of Indian Affairs ("BIA") took the position that, under the proclamation, Washington had retained criminal jurisdiction on the Yakama Reservation only over those cases in which *both* the defendant *and* the victim are non-Indian. Memorandum for Darren Cruzan, Director, Office of Justice Services, from Lawrence S. Roberts, Principal Deputy Assistant Secretary, BIA, *Re: Guidance to State, Local, and Tribal Enforcement Agencies on Yakama Retrocession Implementation* at 1 (Nov. 30, 2016) ("BIA Guidance"). In the letter requesting our opinion, DOI now "concedes the scope of jurisdiction retroceded by the State is somewhat ambiguous," but otherwise stands by the interpretation set forth in the 2015 DOI Letter and the 2016 BIA Guidance.[4] Request Letter at 1.

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[2] Washington reiterated this position in later correspondence, *see* Letter for Sally Jewell, Secretary of the Interior, from Gov. Jay Inslee (Apr. 19, 2016), and in state prosecutions, *see, e.g.*, *State v. Zack*, 413 P.3d 65, 70 (Wash. Ct. App. 2018), *petition for review denied*, 425 P.3d 517 (Wash. 2018) (unpublished table decision).

[3] The proclamation, Governor Inslee's transmittal letter, and the 2015 DOI Letter are all reprinted as appendices to the decision in *Zack*. *See* 413 P.3d at 71–81.

[4] The scope of criminal jurisdiction on the Yakama Reservation implicates the interests of the Environmental and Natural Resources Division ("ENRD"), *see* 28 C.F.R. § 0.65(b)

Having considered the language of the proclamation and the relevant context, we conclude that the interpretation offered by Washington is the correct one. This conclusion is consistent with the only published judicial decision directly addressing this issue. *See State v. Zack*, 413 P.3d 65, 70 (Wash. Ct. App. 2018), *petition for review denied*, 425 P.3d 517 (Wash. 2018) (unpublished table decision).

I.

We begin with a brief overview of federal, state, and tribal criminal jurisdiction on Indian reservations before turning to the jurisdiction Washington assumed under Public Law 280 and then partially retroceded.

A.

Congress has defined "Indian country" as including, in part, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a). "Criminal jurisdiction over offenses committed in 'Indian country' is governed by a complex patchwork of federal, state, and tribal law." *Negonsott v. Samuels*, 507

(delegating to ENRD responsibility for "all civil ligation . . . pertaining to Indians, Indian tribes, and Indian affairs); the Office of Tribal Justice ("OTJ"), *see id.* § 0.134(b) (designating OTJ as "the principal point of contact . . . to listen to the concerns of Indian Tribes and other parties interested in Indian affairs"); and the United States Attorney's Office for the Eastern District of Washington ("USAO"), where the reservation is located. These components submitted views on the issue to the Deputy Attorney General ("DAG") and the Solicitor General in 2016. *See* Memorandum for the Deputy Attorney General and the Acting Solicitor General, from Sam Hirsch, Principal Deputy Assistant Attorney General, ENRD, *Re: State and Federal Criminal Jurisdiction on the Yakama Reservation* (Nov. 23, 2016) ("ENRD Memorandum"); Memorandum from Tracy Toulou, Director, OTJ, *Re: Yakama Retrocession* (Dec. 23, 2016) ("OTJ Memorandum"). In connection with this opinion request, we offered each component the chance to supplement its views. *See* E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Eric Grant, Deputy Assistant Attorney General, ENRD, *Re: Yakama Materials Due 4/2 to Dan Koffsky* (Apr. 2, 2018 4:37 PM); E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Tracy Toulou, Director, OTJ, *Re: Yakama* (Apr. 2, 2018 5:03 PM) ("OTJ E-mail"); Memorandum for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Joseph H. Harrington, United States Attorney, Eastern District of Washington, *Re: Yakama Nation Jurisdiction Issue* (Apr. 2, 2018).

U.S. 99, 102 (1993) (internal quotation marks and citation omitted). The federal government's criminal jurisdiction derives primarily from the General Crimes Act, 18 U.S.C. § 1152, and the Major Crimes Act, *id*. § 1153. The General Crimes Act makes applicable in Indian country those federal criminal statutes that are applicable in places, other than the District of Columbia, under the exclusive jurisdiction of the United States. *Id*. § 1152. It does not apply to "offenses committed by one Indian against the person or property of another Indian," *id*.—a category of cases over which the tribe will generally retain exclusive jurisdiction, *see United States v. Lara*, 541 U.S. 193, 204–05 (2004). The Major Crimes Act, however, provides for federal jurisdiction over an Indian who has committed, in Indian country, any of the serious crimes on an enumerated list, whatever the status of the victim. 18 U.S.C. § 1153.

In the absence of federal legislation providing otherwise, Indian tribes generally have—and States generally do not have—criminal jurisdiction over Indians within Indian reservations.[5] *See Lara*, 541 U.S. at 199–200; *Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984). Indian tribes, however, have no "inherent jurisdiction to try and to punish non-Indians." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978). Although no statute speaks precisely to the question, the Supreme Court has concluded that a State has criminal jurisdiction over a non-Indian who commits a crime against a non-Indian on an Indian reservation within that State. *See, e.g*., *New York ex rel. Ray v. Martin*, 326 U.S. 496, 500 (1946); *Draper v. United States*, 164 U.S. 240, 242–43 (1896); *United States v. McBratney*, 104 U.S. 621, 624 (1882). "As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has expressly provided that State laws shall apply." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470–71 (1979) ("*Yakima Indian Nation*") (internal quotation marks and citation omitted).

[5] The Yakama Reservation includes both land that is held in trust by the United States for the benefit of the Yakama Nation or its individual members (or otherwise restricted for sale by the United States) and land that is owned in fee by Indians or non-Indians. *See Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 415 (1989).

B.

Against this backdrop of overlapping federal and tribal jurisdiction, Congress enacted Public Law 280 "in part to deal with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." *Yakima Indian Nation*, 439 U.S. at 471. Although earlier legislation had conveyed jurisdiction to certain States in specific circumstances, Public Law 280 "was the first federal jurisdictional statute of general applicability to Indian reservation lands." *Yakima Indian Nation*, 439 U.S. at 471; *see id*. at 471 n.8 (citing earlier statutes).

Public Law 280 provided for additional state criminal jurisdiction in two ways. First, it provided that five (and later six) named States "shall have jurisdiction over offenses committed by or against Indians" in certain specified areas "to the same extent that such State has jurisdiction over offenses committed elsewhere within the State," and that "the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State." 18 U.S.C. § 1162(a). In the areas where the named States obtained mandatory jurisdiction, Public Law 280 made the General Crimes Act and Major Crimes Act inapplicable. *See id*. § 1162(c).

Second, for other States, including Washington, Public Law 280 offered an alternative path to jurisdiction by providing the "consent of the United States" for "any other State . . . to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." Pub. L. No. 83-280, § 7, 67 Stat. at 590. Through action of its legislature, a State could therefore "unilaterally extend[] full jurisdiction over crimes and civil causes of action" occurring on an Indian reservation. *Yakima Indian Nation*, 439 U.S. at 499. Such a State could also choose to assume only part of the offered jurisdiction, limiting either the geographical reach or subject matters of its jurisdiction. *Id*. at 496–97.

Washington opted to assume some jurisdiction under Public Law 280. In 1963, the State enacted legislation generally assuming criminal and civil jurisdiction "over Indians and Indian territory, reservations, country, and lands in accordance with [Public Law 280]." Wash. Rev. Code Ann. § 37.12.010 (West 2003). But this general assumption of jurisdiction

explicitly did "not apply to Indians . . . when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States" unless certain subject matters were involved.[6] *Id*. The Yakama Reservation accordingly was brought under state criminal jurisdiction according to the terms of this statute: Washington assumed general criminal jurisdiction over Indians and non-Indians alike on fee land within the Yakama Reservation but did not assume general jurisdiction over Indians on trust or restricted land, where it took on only narrowly specified jurisdiction.[7] *Id*.; *see also Yakima Indian Nation*, 439 U.S. at 475–76.

In 1968, Congress amended Public Law 280 and repealed the option for additional States to assume jurisdiction. 25 U.S.C. § 1323(b). For Washington and other States that had already assumed jurisdiction, Congress authorized the United States to "accept a retrocession by [the] State of all or any measure" of the jurisdiction previously acquired. *Id*. § 1323(a). The President delegated the authority to accept such a retrocession to the Secretary of the Interior, in consultation with the Attorney General. Exec. Order No. 11435 (Nov. 21, 1968), 33 Fed. Reg. 17,339 (Nov. 23, 1968).

In 2012, Washington adopted a law by which an Indian tribe can request that the State retrocede its Public Law 280 jurisdiction to the United States. *See* Wash. Rev. Code Ann. § 37.12.160 (West Supp. 2018). A tribe must submit a petition for retrocession, and the Governor is then authorized to issue a proclamation "approving the request either in whole or in part." *Id*. § 37.12.160(4).

The Yakama Nation submitted a petition on July 17, 2012, requesting "full retrocession of civil and criminal jurisdiction on all of Yakama

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[6] The subject matters over which Washington assumed more extensive jurisdiction were "(1) Compulsory school attendance; (2) Public assistance; (3) Domestic Relations; (4) Mental illness; (5) Juvenile delinquency; (6) Adoption proceedings; (7) Dependent Children; and (8) Operation of motor vehicles." Wash. Rev. Code Ann. § 37.12.010.

[7] As ENRD notes, under a Washington Supreme Court decision, only members of the Yakama Nation are considered "Indians . . . on their tribal lands or allotted lands" for purposes of section 37.12.010; Indians from other tribes are accordingly subject to Washington's general criminal jurisdiction even on the lands specified in the statute. *See* ENRD Memorandum at 6 n.20 (citing *State v. Shale*, 345 P.3d 776 (Wash. 2015)).

Nation Indian country" and in five of the subject matters where the State had specifically assumed jurisdiction. *See* Proclamation 14-01, at 1. Governor Inslee issued a proclamation on January 17, 2014, granting in part and denying in part the Yakama Nation's petition. *See id*. at 2. On October 19, 2015, DOI accepted that proclamation on behalf of the United States. *See* Retrocession Acceptance, 80 Fed. Reg. at 63,583.

II.

The scope of Washington's retrocession of criminal jurisdiction on the Yakama Reservation is controlled by the terms of the Governor's 2014 proclamation, as accepted by the United States. Relying on the text of the proclamation itself and the applicable law, we conclude that Washington has retained jurisdiction over criminal offenses where any party is a non-Indian, as the Washington Court of Appeals recently held in *State v. Zack*, 413 P.3d at 70.[8] The extrinsic evidence also strongly supports this conclusion.

A.

The paragraphs in the retrocession proclamation directly pertaining to your inquiry provide as follows:

> 2. Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, civil and criminal jurisdiction in Operation of Motor Vehicles on Public Streets, Alleys, Roads, and Highways cases in the following manner: Pursuant to RCW 37.12.010(8), the State shall retain jurisdiction over civil causes of action involving non-Indian plaintiffs, non-Indian defendants, and non-Indian victims; *the State shall retain jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims*.

[8] As we explain above, Washington did not claim all of the jurisdiction that Public Law 280 would have permitted. For example it did not assume jurisdiction over certain crimes committed by Indians against Indians on trust or restricted lands. In defining jurisdiction retained in criminal matters involving certain parties, the proclamation naturally did not "retain" any jurisdiction that Washington had never assumed.

> 3. Within the exterior boundaries of the Yakama Reservation, the State shall retrocede, in part, criminal jurisdiction over all offenses not addressed by Paragraphs 1 and 2. *The State retains jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims*.

Proclamation 14-01, ¶¶ 2–3, at 2 (emphasis added).[9]

BIA Guidance issued in 2016 interprets paragraphs 2 and 3 of the proclamation to mean that "Washington State retains jurisdiction only over civil and criminal causes of action in which no party is an Indian." BIA Guidance at 1. The BIA Guidance does not explain the reasoning that led to this conclusion, but it appears to rest on reading the "and" that appears between references to "non-Indian defendants" and references to "non-Indian victims" as requiring *each* party to be non-Indian for Washington to retain jurisdiction. ENRD, taking the same position as the Governor of Washington and the Washington Court of Appeals in *Zack*, instead reads "and" to signify that Washington has jurisdiction if *any* listed party is a non-Indian. *See* ENRD Memorandum at 21–23; Gov. Inslee Letter at 1–2; *Zack*, 413 P.3d at 69.

The dispute thus centers on how to interpret "and" in paragraphs 2 and 3 of the proclamation. In one typical usage, which BIA would apply here, "and" connects two elements that must both be present for the larger statement to obtain. *See Webster's Third New International Dictionary* 80 (1993) (def. 4). This usage of "and" is often said to be logically "conjunctive." *See id*. (cross-referencing "conjunction"); *see also id*. at 480 (def. 7a of "conjunction"). When the Constitution provides that "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a citizen," U.S. Const. art. I, § 2, cl. 2, it is specifying just such a conjunctive relationship: both the condition of twenty-five years of age and the condition of seven years of citizenship must be present for a person to be a Representative.

There is, however, another potential reading of "and." Governor Inslee has described his use of "and" in the disputed sentences as meaning

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[9] In paragraph 1 of the operative section of the proclamation, Washington retroceded "full civil and criminal jurisdiction in" four subject matters: "Compulsory School Attendance; Public Assistance; Domestic Relations; and Juvenile Delinquency." Proclamation 14-01, ¶ 1, at 2.

"and/or," Gov. Inslee Letter at 2, a formulation "denoting that the items joined by it can be taken either together or as alternatives." 1 *Oxford English Dictionary* 449 (2d ed. 1989) (*conj.*[1] def. B.I.3.c). That, too, is an established usage of "and." *See, e.g.*, *Webster's Third New International Dictionary* at 80 (def. 2(6): "used as a function word to express . . . reference to either or both of two alternatives . . . esp. in legal language when also plainly intended to mean *or*"). That usage is often said to be "disjunctive," but it would be more precise to describe it as an example of an "inclusive disjunction," in which either element or both elements can be present. *Id.* at 651 (def. 2 of "disjunction"). For instance, when the Constitution states that "Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," U.S. Const. art. I, § 8, cl. 11, the authorizations are disjunctive in the sense that Congress may declare war without granting letters of marque and reprisal, but inclusive in the sense that Congress might choose to enact all three kinds of measures or any combination of them. Similarly, in the context of Public Law 280 itself, the Supreme Court has construed the authorization of state assumption of "civil and criminal jurisdiction" as permitting a State to assume civil *or* criminal jurisdiction *or* both. *See Zack*, 413 P.3d at 69 n.10 (citing *Yakima Indian Nation*, 439 U.S. at 496–97); *see also* ENRD Memorandum at 23 (same).[10]

As we have previously observed, "[d]etermining which usage [of 'and'] was intended in a particular provision requires . . . an examination of the context in which the term appears." *Whether False Statements or Omissions in Iraq's Weapons of Mass Destruction Declaration Would Constitute a "Further Material Breach" Under U.N. Security Council Resolution 1441*, 26 Op. O.L.C. 217, 219 (2002); *see Territorial Legislature*, 18 Op. Att'y Gen. 540, 540 (1887) ("It is right to interpret the word 'and' with a disjunctive meaning when such meaning entirely coin-

[10] Although legal drafters are often warned against interchanging "and" with "or," *see* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 56 (3d ed. 2011), they have often failed to heed the warning, *see, e.g.*, *Webster's New International Dictionary* 98 (2d ed. 1943) (def. 1.f of "and": "In legal language *and* is interpreted as if it were *or*, and vice versa, whenever this construction is plainly required to give effect to the intention of the person using it."). Like others interpreting legal provisions, we must recognize that the disfavored usage may be the one that the drafter intended.

cides with the rest of the statute and with the evident intention of the legislature."). Accordingly, we turn to an examination of the proclamation as a whole.

We start by examining the immediate context in which "and" appears. The proclamation provides that the State retains jurisdiction over "criminal offenses involving non-Indian defendants and non-Indian victims." The use of the plural throughout this sentence provides some support to the meaning that the Governor understands the sentence to convey. The phrase "criminal offenses involving" is followed by two different categories of offenses (those involving non-Indian defendants *and* those involving non-Indian victims). By contrast, describing the State as retaining "jurisdiction over *a* criminal offense involving *a* non-Indian defendant and *a* non-Indian victim" would have been a more natural way to point toward the BIA's interpretation, which would cover only the category of cases in which each case had both a non-Indian defendant and a non-Indian victim.

By itself, this immediate context, while suggestive, is not decisive. But when the proclamation is considered as a whole and in the context of the petition that the Yakama Nation submitted to the Governor, the meaning of "and" comes into a sharper focus that decidedly favors the Governor's view. Under the state law that authorized the retrocession, upon receipt of a petition, the Governor had to "issue a proclamation, if approving the request either in whole or in part." Wash. Rev. Code Ann. § 37.12.160(4). The petition of the Yakama Nation, and subsequent government-to-government meetings, asked "the State to retrocede all jurisdiction" that Washington had assumed "over the Indian country of the Yakama Nation" pursuant to Public Law 280. Proclamation 14-01, at 1–2. The proclamation itself, after a series of *whereas* clauses, declares Governor Inslee's determination to "grant in part, and deny in part, the retrocession petition." *Id*. at 2. Paragraphs 2 and 3 both explain that the State is retroceding "in part" certain criminal jurisdiction "[w]ithin the exterior boundaries of the Yakama Reservation" and that it is "retain[ing] jurisdiction over criminal offenses involving non-Indian defendants and non-Indian victims." *Id*.

The proclamation expressly declined to retrocede some of the jurisdiction over the Yakama Reservation that Washington had assumed under Public Law 280. But, as noted above, the States already had jurisdiction,

quite apart from Public Law 280, over crimes committed on Indian reservations by non-Indians against non-Indians. *See Martin*, 326 U.S. at 500; *Draper*, 164 U.S. at 242–43; *McBratney*, 104 U.S. at 624. If we were to read the proclamation as the BIA Guidance suggests, the proclamation would retain only that species of jurisdiction on the Yakama Reservation that predated Public Law 280. That would be inconsistent with the state law's declared purpose of retroceding some of the jurisdiction acquired under Public Law 280. *See* Wash. Rev. Code Ann. § 37.12.160(9)(b) ("'Criminal retrocession' means the state's act of returning to the federal government the criminal jurisdiction acquired over Indians and Indian country under federal Public Law 280[.]"). The proclamation, therefore, should be read as retaining jurisdiction other than the jurisdiction over any crime on the Yakama Reservation that involves both a non-Indian defendant and a non-Indian victim.

Nor do we think that the retention language in paragraphs 2 and 3 signals that Washington sought to retrocede all of the criminal jurisdiction it had assumed under Public Law 280. *See* OTJ Memorandum at 4 n.10. Paragraphs 2 and 3 both open by stating that Washington is retroceding jurisdiction "in part." A retrocession of all but the criminal jurisdiction existing before Public Law 280 would not have been a retrocession "in part" of the jurisdiction assumed under Public Law 280; it would have been a retrocession in full.[11] As a consequence, the interpretation offered under the BIA Guidance would conflict with the explicitly partial nature of the retrocession proclaimed in the relevant paragraphs and would render superfluous each paragraph's concluding description of the jurisdiction that Washington was "retain[ing]." *Cf. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (reciting a "cardinal principle of contract construction: that a document should be read to give effect to all its provisions and to render them consistent with each other");

[11] DOI, in requesting consultation with the Attorney General under Executive Order 11435, described the proclamation as "granting *in part* retrocession of criminal jurisdiction over the [Yakama Nation]." Letter for Eric Holder, Attorney General, Department of Justice, from Kevin K. Washburn, Assistant Secretary, DOI at 1 (June 16, 2014) (emphasis added); *see also* Letter for JoDe Goudy, Chairman, Yakama Nation Tribal Council, from Kevin K. Washburn, Assistant Secretary, DOI at 1 (Dec. 17, 2014) ("Governor Jay Inslee signed a proclamation granting, *in part*, retrocession of criminal jurisdiction over the Yakama Nation's Reservation, to the United States Government." (emphasis added)).

United States v. Menasche, 348 U.S. 528, 538–39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks and citation omitted)).

Moreover, paragraph 2 of the proclamation retroceded both "civil and criminal jurisdiction" over the operation of motor vehicles. With respect to civil jurisdiction, it provides that "the State shall retain jurisdiction over civil causes of action involving non-Indian plaintiffs, non-Indian defendants, and non-Indian victims." Proclamation 14-01, ¶ 2, at 2. If the BIA's interpretation of "and" were applied to the clause addressing retained civil jurisdiction, which immediately precedes the clause about retained criminal jurisdiction, the proclamation would permit Washington to assert civil jurisdiction only when there are (1) a non-Indian plaintiff, (2) a non-Indian defendant, *and* (3) a non-Indian victim. In other words, in a motor-vehicle collision between non-Indians, the State could entertain civil jurisdiction only if the "plaintiff" and the "victim" were different persons. Under the BIA's reading, there could be no other reasonable ground for specifying the "plaintiff" and the "victim" separately. We can discern no rationale for such an odd jurisdictional reservation. Instead, it is much more straightforward to read the "and" so that the clause reserves civil jurisdiction when any possible party is a non-Indian. That reading supports the adoption of the same reading for the adjoining clause of paragraph 2, retaining criminal jurisdiction, and the parallel clause at the end of paragraph 3. *Cf. McLane & McLane v. Prudential Ins. Co. of America*, 735 F.2d 1194, 1195 (9th Cir. 1984) (noting the presumption that words have the same meaning throughout a contract); *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (noting the same presumption in the statutory context).[12]

Accordingly, we believe that the text of the proclamation should be understood as retaining Washington's jurisdiction over criminal offenses when at least one party is a non-Indian.

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[12] ENRD also points out that a clause of the proclamation reports the Yakama Nation's "acknowledg[ment] that [Washington] would retain criminal jurisdiction over non-Indian defendants," which would be accurate (albeit incomplete) under Washington and ENRD's interpretation but would be inaccurate under the BIA Guidance. ENRD Memorandum at 22–23 (citing Proclamation 14-01, at 2). The Yakama Nation's contemporaneous statements strongly suggest that our reading of the proclamation is the one that was understood at the time.

B.

Courts examining state retrocession under 25 U.S.C. § 1323(a) have generally focused on the acceptance of the retrocession by the United States rather than the particular terms of the State's offer of retrocession. *See United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979) (declining to examine validity of retrocession proclamation under state law because "[t]he acceptance of the retrocession by the Secretary . . . made the retrocession effective, whether or not the Governor's proclamation was valid under Washington law" (internal quotation marks and citation omitted)). Here, however, DOI's notice simply declared that the partial retrocession "offered by the State of Washington in Proclamation by the Governor 14-01" had been accepted. Retrocession Acceptance, 80 Fed. Reg. at 63,583; *see also* Letter for Jay Inslee, Governor, State of Washington, from Lawrence S. Roberts, Acting Assistant Secretary, DOI at 1 (June 20, 2016) ("[R]etrocession was accepted according to the terms of the Proclamation of the Governor 14-01."). Moreover, DOI expressly declined to identify the scope of the phrases in the proclamation that are now in dispute, deeming them "plain" and "unambiguous." 2015 DOI Letter at 5.[13] Accordingly, the proclamation itself remains the best evidence of the scope of the retrocession accepted by DOI, and, for the reasons set forth above, we believe that Washington retained jurisdiction in the manner that it has claimed.

We note, however, that extrinsic evidence supports this interpretation. Several documents reflect the negotiations and internal discussions that led up to the issuance of the proclamation and its acceptance, as well as subsequent discussion of the proclamation's meaning. *See, e.g.*, ENRD Memorandum at 8–20 & app. The earliest documents demonstrate an almost immediate focus on crimes committed by non-Indians against Indians on the Yakama Reservation. For example, several months after the Yakama Nation submitted its petition for retrocession, the Washington Association of Prosecuting Attorneys wrote then-Governor Christine

[13] The Executive Order under which DOI accepted the retrocession directs that the Secretary of the Interior "effect[]" the retrocession through a notice in the Federal Register that "shall specify the jurisdiction retroceded." *See* 33 Fed. Reg. at 17,339. If DOI wished to dispute the Governor's view of the scope of the retrocession that Washington had offered, that would have been the time to do so.

Gregoire expressing skepticism about the wisdom of "withdrawal of state jurisdiction over non-Indians who commit crimes against Indian victims within the reservation." Letter for Christine Gregoire, Governor, State of Washington, from Russell Hauge, Kitsap County Prosecuting Attorney, Washington Association of Prosecuting Attorneys (Sept. 14, 2012). And, after convening a government-to-government meeting with the Yakama Nation, as required by state law, *see* Wash. Rev. Code Ann. § 37.12.160(3), Governor Gregoire memorialized Washington's understanding that the Yakama Nation's petition "did not seek retrocession of state criminal authority over non-Indians who commit crimes against Indians." Letter for Harry Smiskin, Chairman, Yakama Nation, from Christine Gregoire, Governor, State of Washington at 1 (Jan. 10, 2013); *see also supra* note 12 (discussing a clause in Governor Inslee's proclamation that is most consistent with that understanding). Thus, as the discussions about retrocession began, key Washington stakeholders—state prosecutors—expressed concern about a retrocession of the State's criminal jurisdiction over non-Indians on the Yakama Reservation, and Washington separately recorded its understanding that such a retrocession would be beyond the scope of what the Yakama Nation had requested.

Some of the records also suggest that DOI's acceptance of the scope of retrocession implicitly embraced Washington's view. In its acceptance letter, DOI discussed a March 2015 FBI report analyzing "the implications of retrocession." 2015 DOI Letter at 4. That report's analysis reflected an understanding that the proclamation sought to retrocede jurisdiction only over criminal activity between Indians, and the report is cited without reservation in the DOI letter. *See* ENRD Memorandum at 18–19; 2015 DOI Letter at 4. Accordingly, even as DOI pronounced the proclamation "plain" and "unambiguous," DOI relied on an FBI report that agreed with our reading, and DOI did not identify any contrary position taken by anyone else at the time.[14]

[14] DOI described the advice from the U.S. Attorney as "key to our consideration of retrocession" and cited a letter submitted by the USAO to the Acting Deputy Attorney General. DOI Letter at 3. But the cited letter explicitly requested clarification from DOI about the scope of retrocession. Letter for Sally Quillian Yates, Acting Deputy Attorney General, Department of Justice, from Michael C. Ormsby, United States Attorney, USAO, *Re: Possible Retrocession of the Yakama Nation in Washington State* at 6 (May 5, 2015).

In any event, no document provides as clear a picture about the intended scope of the proclamation as the transmittal letter that Governor Inslee sent to DOI ten days after he signed the proclamation. Under the state statute setting out the retrocession procedure, the Governor had the exclusive authority to determine, within the outer limits of the tribe's request, the scope of Washington's proposed retrocession. The statutory process by which the Governor reached his decision included consultations with others, but the ultimate decision was his. The Governor had to make the retrocession decision within a certain period after receiving the Yakama Nation's petition and had to convene a "government-to-government meeting" with the Yakama Nation's representatives. Wash. Rev. Code Ann. § 37.12.160(3)–(4). The statute permitted the state legislature to conduct hearings and "submit advisory recommendations and/or comments to the governor," but the "legislative recommendations" would not be "binding on the governor or otherwise of legal effect." *Id.* § 37.12.160(5). The only action with legal effect was the Governor's issuance of "a proclamation" "approv[ing] the [retrocession] request either in whole or in part."[15] *Id.* § 37.12.160(4). We therefore find most probative the Governor's contemporaneous statements about what he intended his own proclamation to mean. *See* Gov. Inslee Letter at 2 ("The intent set forth in paragraph two . . . is for the State to retain jurisdiction in this area where *any* party is non-Indian[.]"); *id.* ("[T]he intent [in paragraph three] is for the State to retain such jurisdiction in those cases involving non-Indian defendants *and/or* non-Indian victims."). The Governor was uniquely situated to explain his own intent at the time of the proclamation.

Thus, the extrinsic evidence confirms our conclusion from the text of the proclamation and its legal context.

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[15] The statute also provides that "[i]n the event the governor denies all or part of the resolution, the reasons for such denial must be provided to the tribe in writing." Wash. Rev. Code Ann. § 37.12.160(4). Four days after signing the proclamation, Governor Inslee sent a letter providing reasons for denying part of the Yakama Nation's petition. *See* Letter for Harry Smiskin, Chairman, Yakama Nation, from Jay Inslee, Governor, State of Washington, *Re: Yakama Nation Retrocession Petition* (Jan. 21, 2014). That letter did not shed light on the current dispute because it either paraphrased the sentences in question directly, or it paraphrased them while replacing "and" with "not . . . or." *Id.* at 1.

III.

Neither the BIA Guidance nor OTJ has identified compelling reasons to interpret the proclamation differently. The BIA Guidance cites the 2015 DOI Letter notifying the Yakama Nation that the partial retrocession had been accepted. *See* BIA Guidance at 1. As noted above, however, that letter described the proclamation as "plain on its face and unambiguous" and deferred further interpretation to the "courts." 2015 DOI Letter at 5. The BIA Guidance also contends that its conclusion "is consistent" with one district court decision. BIA Guidance at 1 n.2 (citing *Klickitat Cty. v. U.S. Dep't of the Interior*, No. 1:16-CV-03060-LRS, 2016 WL 7494296 (E.D. Wash. Sept. 1, 2016)). The cited opinion notes that "[t]he particular areas of civil and criminal jurisdiction [for retrocession] were set forth in the proclamation . . . and that is what DOI accepted." *Klickitat Cty.*, 2016 WL 7494296, at *5. But the decision in *Klickitat County* had to do with a challenge to the proclamation's handling of the boundaries of the Yakama Reservation, and the opinion does not consider the scope of Washington's retrocession of criminal jurisdiction within those boundaries. *See id.*

OTJ reads "and" as the BIA does, *see* OTJ Memorandum at 2, and suggests that the purpose of 25 U.S.C. § 1323(a) was to encourage *full* retrocession of jurisdiction previously assumed under Public Law 280, and that the retrocession should be read to cause a "change in jurisdiction from a Federal perspective," OTJ Memorandum at 4. This argument assumes that the federal government did not already have concurrent jurisdiction where the State had assumed jurisdiction under Public Law 280.[16] In any event, there were important changes to *state* jurisdiction effectuated by the retrocession. For example, under Public Law 280, Washington had assumed jurisdiction generally over "Indians and Indian territory, reservations, country, and lands," including certain crimes committed by Indians

[16] In a January 2017 memorandum that has been made public, ENRD notified several U.S. Attorneys of the Acting Solicitor General's decision that "the litigating position of the United States is that the United States does have . . . concurrent criminal jurisdiction" over "Indian-country crimes that fall within an 'optional [Public Law] 280' State's jurisdiction under Section 7 of [Public Law 280]." Memorandum for United States Attorneys in "Optional" Public Law 280 States from John C. Cruden, Assistant Attorney General, ENRD, and Sam Hirsch, Principal Deputy Assistant Attorney General, ENRD, *Re: Concurrent Federal Criminal Jurisdiction Under 18 U.S.C. §§ 1152 and 1153 in "Optional" Public Law 280 States* at 1 (Jan. 18, 2017).

on trust or restricted lands. Wash. Rev. Code Ann. § 37.12.010; *see Yakima Indian Nation*, 439 U.S. at 475–76; *see, e.g.*, *State v. Yallup*, 248 P.3d 1095, 1099 (Wash. Ct. App. 2011) (upholding state conviction of Yakama tribe member for criminal motor vehicle offenses occurring on the Yakama reservation); *State v. Abrahamson*, 238 P.3d 533, 539 (Wash. Ct. App. 2010) (same for different tribal member and reservation). The proclamation reaches this significant class of crimes and retrocedes jurisdiction over them. *See* Proclamation 14-01, ¶ 3, at 2. Whether or not that change in the State's criminal jurisdiction alters the cases that the federal government may prosecute, it is still a genuine change that is significant "from a Federal perspective," OTJ Memorandum at 4, because, by curtailing state jurisdiction, it promotes tribal self-government. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63 (1978) (explaining that the title containing 25 U.S.C. § 1323(a) was "hailed . . . as the most important part" of the Indian Civil Rights Act of 1968, which was intended to "promote the well-established federal policy of furthering Indian self-government" and to "protect tribal sovereignty from undue interference" (internal quotation marks and citation omitted)).

OTJ also relies on practice, noting that most previous retrocessions involved "all" or "essentially all" criminal jurisdiction obtained under Public Law 280. *See* OTJ Memorandum at 3, 4 n.11. But section 1323(a) expressly contemplates that a State has discretion to retrocede "all *or any measure* of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of [Public Law 280]." 25 U.S.C. § 1323(a) (emphasis added). Finally, OTJ suggests that DOI has "broad authority to determine on what terms the United States would resume" jurisdiction. OTJ Memorandum at 5. While that is true as far as it goes, the text of section 1323(a) does not suggest that, in deciding whether to "accept a retrocession by any State," the United States may accept *more* than the State has offered.

OTJ further maintains that DOI, rather than the Department of Justice, "should determine the scope of the retrocession." OTJ E-mail at 1. DOI effectively set the scope of the retrocession by accepting the proclamation, and our analysis does not disparage DOI's authority over that acceptance. *See* Retrocession Acceptance, 80 Fed. Reg. at 63,583. Nor does our interpretation detract from DOI's authority, by the act of acceptance, to make a State's offer effective. *See* OTJ Memorandum at 4–7. Because

our analysis of the proclamation is being provided at DOI's request, comes after DOI accepted the offer of retrocession, and concerns the text of the proclamation accepted, it does not trench on any power by DOI "to . . . define and construe" section 1323(a), which confers the authority to accept offers of retrocession. *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976) (quoting *United States v. Brown*, 334 F. Supp. 536, 541 (D. Neb. 1971)), *rev'd on other grounds sub nom. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

IV.

For these reasons, we conclude that, under the proclamation making a partial retrocession, Washington has retained criminal jurisdiction over an offense on the Yakama Reservation when the defendant or the victim is a non-Indian, as well as when both are non-Indians.

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Statutory Restrictions on the PLO's Washington Office

The Anti-Terrorism Act of 1987 may not constitutionally bar the Palestine Liberation Organization from maintaining its Washington, D.C. office and undertaking diplomatic activities the Secretary of State wishes to authorize.

September 11, 2018

MEMORANDUM OPINION FOR THE LEGAL ADVISER
DEPARTMENT OF STATE[*]

Earlier this year, you asked whether the State Department could authorize the Palestine Liberation Organization ("PLO") to engage in certain diplomatic activities out of its Washington, D.C. office. At the time, the State Department had concluded that these activities, which included communications with the U.S. government, would advance U.S. efforts to promote peace between Israel and the Palestinians, and that barring the PLO from engaging in these activities would interfere with U.S. diplomacy.[1] Your formal request followed an informal inquiry in November 2017.

These requests arose because the Secretary of State had determined that he could no longer make the required certification under the federal appropriations law that would permit the waiver of section 1003 of the Anti-Terrorism Act of 1987 ("ATA"), Pub. L. No. 100-204, tit. X, § 1003,

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[*] Editor's note: In an October 28, 2022, opinion addressing similar expenditures, this Office concluded that the Anti-Terrorism Act of 1987 is unconstitutional to the extent it prevents Palestine Liberation Organization representatives invited by the State Department to Washington, D.C., from spending PLO funds to attend diplomatic meetings with Executive Branch officials, including for expenses that are necessary incidents to those meetings. *See Application of the Anti-Terrorism Act of 1987 to Diplomatic Visit of Palestinian Delegation*, 46 Op. O.L.C. __ (Oct. 28, 2022). Although the 2022 opinion's conclusion is consistent with this opinion's conclusion, its analysis differs in certain respects from that in this opinion. Specifically, the 2022 opinion states that certain statements made in this opinion are "overstated" and "inconsistent with the Supreme Court's rationale in *Zivotofsky* [*v. Kerry*, 576 U.S. 1 (2015)]." *Id.* at *11–13.

[1] *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Jennifer G. Newstead, Legal Adviser, Dep't of State at 1 (Apr. 23, 2018) ("State Opinion Request"); E-mail for Sarah Harris, Deputy Assistant Attorney General, Office of Legal Counsel, from Mary Mitchell, Assistant Legal Adviser, Dep't of State, *Re: PLO Office Opinion Request – Responses to Questions* att. at 4–6 (May 31, 2018, 10:54 PM) ("May 31, 2018 E-mail").

101 Stat. 1331, 1406, 1407 (1987). Section 1003 bars the PLO from maintaining its Washington office or from expending funds in the United States to promote the PLO's interests, including the diplomatic activities that the State Department wished to authorize. 22 U.S.C. § 5202(2), (3). If section 1003 were constitutional, then the PLO was obliged to close its Washington office immediately and to cease funding its activities in the United States.

When the question first arose, we informally advised, consistent with this Office's prior position, that such restrictions would encroach upon the President's exclusive constitutional authority to conduct diplomatic relations. On April 23, 2018, you requested a formal opinion on the subject. Before we completed that opinion, however, the State Department concluded that the PLO had failed to use its Washington office to engage in direct and meaningful negotiations on achieving a comprehensive peace settlement and, therefore, that closing the PLO's Washington office would serve the foreign policy interests of the United States.

This memorandum explains the basis for the informal advice that the State Department relied upon in authorizing the PLO's Washington office to remain open between November 2017 and September 2018. Under the Constitution, the President has the exclusive authority to receive foreign diplomatic agents in the United States and to determine the conditions under which they may operate. Since the enactment of the ATA in 1987, Presidents have consistently recognized the statute's potential constitutional infirmity, and this Office has twice concluded that Congress may not prohibit the President from authorizing the PLO to conduct diplomatic activities in the United States. In keeping with that established position, we advised that the ATA may not constitutionally bar the PLO from maintaining its Washington office and undertaking diplomatic activities the Secretary of State wishes to authorize. The Executive Branch may also close the PLO's Washington office, consistent with the ATA's restrictions. But the Constitution requires that the President retain the flexibility to calibrate the United States' diplomatic contacts as circumstances warrant.

I.

The PLO was established in 1964 for the purpose of working on behalf of "the Palestinian Arab people" to "liberate its homeland" through armed

conflict with the State of Israel. *See* Palestinian National Charter intro. & art. 25 (1964). For several decades, the PLO pursued those aims through acts of violence, often directed against civilians in Israel and the rest of the world. During that period, the United States refused to maintain any relations with the PLO. *See* State Opinion Request, *supra* note 1, at 1 n.4.

In 1974, the United Nations General Assembly granted the PLO the status of an observer in its proceedings as the representative of the Palestinian people. *See* G.A. Res. 3210 (XXIX) (Oct. 14, 1974); G.A. Res. 3237 (XXIX) (Nov. 22, 1974). In 1978, the PLO opened a Washington information office to act as "the 'voice' of the PLO in the United States." *Constitutionality of Closing the Palestine Information Office, an Affiliate of the Palestine Liberation Organization*, 11 Op. O.L.C. 104, 105 (1987) ("*Palestine Information Office*"). The State Department closed that office in 1987 because individuals and organizations affiliated with the PLO committed and supported acts of terrorism. *See* Determination and Designation of Benefits Concerning Palestine Information Office, 52 Fed. Reg. 37,035 (Oct. 2, 1987).

Shortly thereafter, on December 22, 1987, Congress enacted the ATA, a statute "unique" in "the long history of Congressional enactments." *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1460 (S.D.N.Y. 1988). In section 1002 of the ATA, Congress "determine[d] that the PLO and its affiliates are a terrorist organization and a threat to the interests of the United States, its allies, and to international law and should not benefit from operating in the United States." 22 U.S.C. § 5201(b). Section 1003 of the Act provides in full:

> It shall be unlawful, if the purpose be to further the interests of the [PLO] or any of its constituent groups, any successor to any of those, or any agents thereof, on or after the effective date of this chapter—
>
> (1) to receive anything of value except informational material from the PLO or any of its constituent groups, any successor thereto, or any agents thereof;
>
> (2) to expend funds from the PLO or any of its constituent groups, any successor thereto, or any agents thereof; or
>
> (3) notwithstanding any provision of law to the contrary, to establish or maintain an office, headquarters, premises, or other facilities or establishments within the jurisdiction of the United

> States at the behest or direction of, or with funds provided by the [PLO] or any of its constituent groups, any successor to any of those, or any agents thereof.

22 U.S.C. § 5202. Section 1004 provides that the Attorney General "shall take the necessary steps and institute the necessary legal action to effectuate the policies and provisions of" the ATA. *Id*. § 5203(a). Section 1005(b) states that the ATA's provisions "shall cease to have effect if the President certifies . . . that the [PLO], its agents, or constituent groups thereof no longer practice or support terrorist actions anywhere in the world." 22 U.S.C. § 5201 note.

At the time of the ATA's passage, the United States did not maintain any relations with the PLO, and the Executive Branch had already shut down the PLO's Washington office. Nonetheless, in signing the ATA into law, President Reagan expressed concern that its provisions would infringe upon the President's exclusive authority to conduct the Nation's diplomatic affairs. As he explained in his signing statement:

> Section 1003 of the Act prohibits the establishment anywhere within the jurisdiction of the United States of an office "to further the interests of" the Palestine Liberation Organization. The effect of this provision is to prohibit diplomatic contact with the PLO. I have no intention of establishing diplomatic relations with the PLO. However, the right to decide the kind of foreign relations, if any, the United States will maintain is encompassed by the President's authority under the Constitution, including the express grant of authority in Article II, Section 3, to receive ambassadors. I am signing the Act, therefore, only because I have no intention of establishing diplomatic relations with the PLO, as a consequence of which no actual constitutional conflict is created by this provision.

Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (Dec. 22, 1987), 2 *Pub. Papers of Pres. Ronald Reagan* 1541, 1542 (1987).[2]

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[2] The PLO has also maintained a United Nations observer mission in New York since 1974. In 1988, a district court held that section 1003(3) did not require closing that mission because the ATA should not be read to abrogate the United States' treaty obligations under the United Nations Headquarters Agreement, which applies to U.N. missions. *PLO*, 695 F. Supp. at 1468–71. The United States did not appeal this ruling. Accordingly,

In 1993, in connection with the Oslo Accords, the PLO renounced terrorism and recognized Israel's right to exist, and Israel recognized the PLO as the representative of the Palestinian people for purposes of negotiations for permanent status and peace. State Opinion Request, *supra* note 1, att. at 3 & n.8. In June 1994, the State Department authorized the PLO to open a foreign mission in Washington. *See* Letter for Hasan Abdel Rahman, Palestine Affairs Office, from Eric J. Boswell, Director, Office of Foreign Missions, Dep't of State (June 22, 1994) ("Boswell Letter"). Congress, in the Middle East Peace Facilitation Act of 1993, also authorized President Clinton to suspend section 1003 of the ATA, and later authorized that suspension in annual appropriations riders.[3] In authorizing the opening of a foreign mission, the State Department advised the PLO that its members would lack diplomatic status and that they must continue to meet the requirements of the suspension. Boswell Letter at 1–2.

Since 1994, Presidents have routinely exercised their authority to waive section 1003's requirements. In signing appropriations bills, however, Presidents on several occasions have reiterated President Reagan's concern and advised that the conditions of certification could unconstitutionally restrict the President's authorities over foreign affairs.[4] Despite those

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the PLO has maintained that U.N. mission for several decades notwithstanding section 1003.

[3] *See, e.g.*, Middle East Peace Facilitation Act of 1993, Pub. L. No. 103-125, § 3(b)(2), (d)(2), 107 Stat. 1309, 1310 (authorizing temporary waiver if the President certified that it advanced the national interest and that the PLO was abiding by its Oslo Accords commitments); Middle East Peace Facilitation Act of 1994, Pub. L. No. 103-236, tit. V, pt. E, § 583(a), (b)(2), 108 Stat. 382, 488, 488–89 (same); Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1998, Pub. L. No. 105-118, § 539(d), 111 Stat. 2386, 2417–18 (authorizing six-month waiver if President certified it was "important to the national security interests of the United States"); Department of State, Foreign Operations, and Related Programs Appropriations Act, 2012, Pub. L. No. 112-74, div. I, § 7086(b), 125 Stat. 786, 1164, 1265 (authorizing six-month waiver if the President certified that Palestinians had not obtained member state standing in the United Nations).

[4] *See, e.g.*, Statement on Signing the Consolidated Appropriations Act, 2017, 2017 Daily Comp. Pres. Doc. No. 312, at 1 (May 5, 2017) (Pres. Trump) ("Numerous provisions could, in certain circumstances, interfere with the exercise of my constitutional authorities . . . to receive ambassadors . . . and to recognize foreign governments[.]"); Statement on Signing the Consolidated Appropriations Act, 2012 (Dec. 23, 2011), 2 *Pub. Papers of Pres. Barack Obama* 1568, 1569 (2011) ("Certain provisions in Division I . . . , including section[] 7086, hinder my ability to receive diplomatic representatives of foreign governments."); Statement on Signing the Consolidated Appropriations Legisla-

concerns, each year, the President or the Secretary of State (to whom the President later delegated the waiver authority) issued the required certification and waived the restrictions of section 1003.[5]

That changed in the fall of 2017. The 2017 waiver provision authorized the President to suspend the ATA only if he were able to certify both that the Palestinians had not attained formal status within the United Nations and that they had not taken any actions to prompt the International Criminal Court ("ICC") to investigate alleged crimes committed by Israeli nationals against Palestinians. *See* Department of State, Foreign Operations, and Related Programs Appropriations Act, 2017, Pub. L. No. 115-31, div. J, § 7041(*l*)(2)(B), 131 Stat. 135, 589, 667–68. On November 15, 2017, the Secretary of State concluded that he could not make this required certification. State Opinion Request, *supra* note 1, att. at 2.

On November 17, the State Department informed the PLO that the waiver of statutory restrictions had lapsed, instructed the PLO to cease operations at its Washington office, and promised further guidance after additional review. Letter for Husam Zomlot, Chief Representative, General Delegation of the PLO, from Cliff Seagroves, Acting Director, Office

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tion for Fiscal Year 2000 (Nov. 29, 1999), 2 *Pub. Papers of Pres. William J. Clinton* 2156, 2160 (1999) ("This legislation includes a number of provisions . . . regarding the conduct of foreign affairs that raise serious constitutional concerns. . . . [S]ome provisions would constrain . . . the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy."); *see also, e.g.*, Statement on Signing the Palestinian Anti-Terrorism Act of 2006 (Dec. 21, 2006), 2 *Pub. Papers of Pres. George W. Bush* 2221, 2221 (2006) (objecting to a provision purporting to prevent the Palestinian Authority from establishing a U.S. office); Statement on Signing the Foreign Relations Authorization Act, Fiscal Year 2003 (Sept. 30, 2002), 2 *Pub. Papers of Pres. George W. Bush* 1697, 1698 (2002) (objecting to a provision requiring the President to rescind any section 1003 waiver upon certain triggering events, and advising that the Executive Branch would comply with that requirement only to the extent the President deemed it consistent with his foreign-affairs responsibilities).

[5] *See, e.g.*, Waiver and Certification of Statutory Provisions Regarding the Palestine Liberation Organization Office (Apr. 10, 2013), 78 Fed. Reg. 25,780 (May 2, 2013); Waiver and Certification of Statutory Provisions Regarding the Palestine Liberation Organization, Pres. Determination No. 01-13 (Apr. 17, 2001), 66 Fed. Reg. 20,585 (Apr. 24, 2001); Lifting Restrictions on U.S. Relations with the Palestine Liberation Organization, Pres. Determination No. 94-13 (Jan. 14, 1994), 59 Fed. Reg. 4777 (Feb. 1, 1994). In 2010, the President delegated his certification authority to the Secretary of State. *See* Delegation of Certain Functions and Authorities (July 21, 2010), 75 Fed. Reg. 43,795 (July 26, 2010); *see also* 3 U.S.C. § 301.

of Foreign Missions, Dep't of State (Nov. 17, 2017). Ten days later, State advised that the Washington office could continue to engage in activities "that support the objective of achieving a lasting, comprehensive peace between the Israelis and Palestinians." Letter for Husam Zomlot, Chief Representative, General Delegation of the PLO, from Cliff Seagroves, Acting Deputy Director, Office of Foreign Missions, Dep't of State (Nov. 27, 2017). State further advised that, under the FY 2017 waiver provision, a secondary waiver might be available if the Secretary "determine[d] that the Palestinians ha[d] entered into direct and meaningful negotiations with Israel." *Id*. State informs us that the PLO still has not returned to meaningful negotiations. *See* State Opinion Request, *supra* note 1, att. at 3.

Although the FY 2017 waiver provision has expired, the FY 2018 waiver provision, which was enacted on March 23, 2018, is materially similar, and the Secretary of State cannot make the required certification.[6] The Secretary also cannot recommend that the President certify that the PLO, its agents, or its constituent groups no longer practice or support terrorism, so as to invoke the termination provision in section 1005(b) of the ATA.[7] By its terms, then, section 1003 bars the PLO from maintaining its Washington office or expending any funds to support the PLO's activities in the United States.

In your April 23, 2018, opinion request, you advised that section 1003 would prevent the President from conducting diplomacy with the PLO and therefore would unconstitutionally encroach upon the President's exclusive authority to receive ambassadors and to conduct foreign affairs. *See* State Opinion Request, *supra* note 1, att. at 9–11. The State Department believes that it may authorize the PLO to engage in diplomatic activities if, in the judgment of the Executive Branch, those activities would support

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[6] Congress kept the same general waiver criteria, but modified the ICC condition slightly, requiring certification that the PLO had not "initiated or actively supported an ICC investigation against Israeli nationals for alleged crimes against Palestinians." Department of State, Foreign Operations, and Related Programs Appropriations Act, 2018, Pub. L. No. 115-141, div. K, § 7041(m)(2)(B)(i)(II), 132 Stat. 348, 833, 911–12.

[7] The State Department informs us that certain groups (including the Popular Front for the Liberation of Palestine, the Democratic Front for the Liberation of Palestine, and the Palestine Liberation Front) designated as terrorist organizations under Executive Order 12947 (Jan. 23, 1995), 60 Fed. Reg. 5079, 5081 (Jan. 25, 1995), have not sufficiently dissociated from the PLO to allow this certification. State Opinion Request, *supra* note 1, att. at 1 n.1.

the United States' foreign policy objective of fostering a lasting peace between Israelis and Palestinians. The State Department believes that this authority would extend to authorizing the PLO to (1) maintain its Washington office; (2) maintain regular contact with U.S. officials and engage with foreign government interlocutors in Washington on diplomatic matters; (3) report to Palestinian leadership on relevant developments; (4) engage in public diplomacy; and (5) provide financial and administrative support for these activities. *See* May 31, 2018 E-mail, *supra* note 1, att. at 1, 4–8.

On September 10, 2018, the State Department ordered the PLO to close its Washington office. The State Department explained that "the PLO Office is not currently engaged in activities that support the U.S. objective of achieving a lasting, comprehensive peace" and thus that the United States would no longer permit the office to operate. Letter for Husam Zomlot, Chief Representative, General Delegation of the PLO, from Cliff Seagroves, Acting Director, Office of Foreign Missions, Dep't of State (Sept. 10, 2018).

II.

We agree that Congress may not constitutionally require the PLO to close its office and cease performing other diplomatic activities, should the Executive Branch wish to authorize them. In so doing, section 1003 of the ATA would intrude upon the diplomatic powers that "the Constitution grants to [the President] alone." *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)). On several prior occasions, this Office has reviewed section 1003 or similar restrictions and advised that they could not constitutionally obstruct the Executive's ability to facilitate relations with the PLO in the United States. We reach the same conclusion here.

Before the ATA's enactment in 1987, this Office had advised that two proposed bills similar to section 1003 would have been unconstitutional. *Palestine Information Office*, 11 Op. O.L.C. at 122. We explained that "[t]he right to decide whether to accord to the PLO diplomatic status and what that diplomatic status should be is encompassed within the right of the President to receive ambassadors," a power "textually committed to

the Executive alone." *Id*. The proposed provisions would be a "serious infringement" on the President's foreign-affairs authorities because they purported to forbid the President, "as a practical matter," from "establish[ing] diplomatic relations with the PLO" unless he certified that the PLO had renounced terrorism. *Id*.

Following the enactment of the ATA, we advised that Congress could require the closure of the PLO's U.N. observer mission in New York only because the President had not, to that point, engaged in any relations with the PLO. *See* Memorandum for Edwin Meese III, Attorney General, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Intent and Constitutionality of Legislation Prohibiting the Maintenance of an Office of the Palestine Liberation Organization in the United States* at 23–24 (Feb. 13, 1988) ("1988 Cooper Memorandum"). In upholding section 1003, we cautioned that "this is a situation where Congress has power to act so long as the President has not." *Id*. at 22. The President had not, "in the case of the PLO, chosen to invoke his constitutional authority either to receive ambassadors or to conduct foreign affairs" by "recogniz[ing] the PLO formally," by "establish[ing] an official relationship with the PLO and with its representatives," or by taking actions short of recognition whereby the President "permits the alien representatives to enter the United States or conduct negotiations with our representatives." *Id*. at 20, 22–23 & n.23. If the President chose to take any of these actions, thereby invoking his "exclusive constitutional powers in the area of foreign affairs," such action would "serve to shield the PLO Mission from the operation of the Act." *Id*. at 18, 24. Absent such actions, however, section 1003's restrictions on the PLO did not impair the President's exclusive authority over diplomacy because those restrictions fell within Congress's Article I powers and did not interfere with the decision of the Executive Branch not to engage with the PLO.

We agree with those conclusions. The Constitution vests the President with the exclusive authority to conduct diplomacy on behalf of the United States. That authority includes determining whether to recognize a foreign entity as a sovereign and, if not, the degree of relations the United States should maintain with it. That authority also includes the power to receive and expel foreign representatives, and to determine the scope of their diplomatic activities in the United States. If the President chooses to maintain diplomatic contacts with the PLO and to permit the organization

to maintain a foreign mission in the United States, then Congress may not intrude on that choice by ordering the closure of the PLO's Washington office or by prohibiting the PLO from engaging in the diplomatic activities authorized by the Executive Branch.

A.

The President has "unique responsibility" for the conduct of "foreign . . . affairs," *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993), and "the lead role . . . in foreign policy," *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972). The Constitution grants the President a host of express powers concerning foreign affairs: to "receive Ambassadors and other public Ministers," U.S. Const. art. II, § 3, to "make Treaties" and "appoint Ambassadors" with the consent of the Senate, *id.* art. II, § 2, cl. 2, and to exercise authority as Commander in Chief, *id.* art. II, § 2, cl. 1. Congress, too, has powers touching upon foreign affairs, such as the powers "[t]o regulate Commerce with foreign Nations," "[t]o establish an uniform Rule of Naturalization," and "[t]o declare War." *Id.* art. I, § 8. But the Constitution vests in the President "[t]he Executive power," *id.* art. II, § 1, which includes the "vast share of responsibility for the conduct of our foreign relations" and "independent authority in the areas of foreign policy and national security." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414, 429 (2003) (internal quotation marks omitted).[8]

Within this sphere of presidential power, it is "well settled that the Constitution vests the President with the exclusive authority to conduct

[8] *See, e.g.*, *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) ("The Court also has recognized the generally accepted view that foreign policy [is] the province and responsibility of the Executive."); *Haig v. Agee*, 453 U.S. 280, 293–94 (1981) (same); *Zivotofsky v. Kerry*, 576 U.S. 1, 33–40 (2015) (Thomas, J., concurring in the judgment in part and dissenting in part); *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (the President is the country's "guiding organ in the conduct of our foreign affairs," and possesses "vast powers in relation to the outside world"); *Kumar v. Republic of Sudan*, 880 F.3d 144, 157 (4th Cir. 2018) (recognizing "the Constitution's grant to the Executive Branch—not the Judicial Branch—of broad oversight over foreign affairs"); *Nat'l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 555 (2d Cir. 1988) ("The President alone" is "the constitutional guardian of foreign policy[.]"); 10 Annals of Cong. 613 (Mar. 7, 1800) (statement of then-Rep. John Marshall) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.").

the Nation's diplomatic relations with other States." *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, 267 (1996); *see also id*. at 267 n.41. Although the President and Congress have overlapping authority in some areas, the President has "a unique role in communicating with foreign governments," and Congress may not compel the President to contradict that message. *Zivotofsky*, 576 U.S. at 21–23, 29–30. Thus, in *Zivotofsky,* the Supreme Court held unconstitutional a statute requiring U.S. passports to acknowledge Israeli sovereignty over Jerusalem on the ground that the law intruded upon the President's exclusive authority to recognize foreign sovereigns. *Id*. at 12–15. The Court reasoned that "[r]ecognition is a topic on which the Nation must 'speak . . . with one voice,'" and "[t]hat voice must be the President's" because "[t]he President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition." *Id*. at 14–15 (quoting *Garamendi*, 539 U.S. at 424) (ellipsis in original). Whereas the President "has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers," the Court explained, Congress "has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation." *Id*. at 13–14.

The President's exclusive authority over diplomacy flows from the text of the Constitution and a long line of "accepted understandings and practice" by all three branches of government. *Id*. at 23. The President alone decides whether to recognize a foreign sovereign. *Id*. at 14. The President can "open diplomatic channels" through direct diplomacy, or can instead insist that those channels stay closed. *Id*. at 13–14. The President decides whom to nominate as ambassador and unilaterally "dispatches other diplomatic agents." *Id*. at 13. The President "has the sole power to negotiate treaties," *id*., and Congress may not require the President to "initiate discussions with foreign nations" or prevent them from occurring, *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652–53 (9th Cir. 1993).[9] In sum, the President has the sole role in deciding "whether, how,

[9] *Accord, e.g*., *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (The President is "the constitutional representative of the United States in its dealings with foreign nations."); *Prohibition of Spending for Engagement of the Office of Science and Technology Policy with China*, 35 Op. O.L.C. 116, 121 n.2 (2011) ("*OSTP Engagement with China*") ("[T]he

when, and through whom to engage in foreign diplomacy." *Legislation Prohibiting Spending for Delegations to U.N. Agencies Chaired by Countries That Support International Terrorism*, 33 Op. O.L.C. 221, 230 (2009) ("*Delegations to U.N. Agencies*").

Similarly, the President alone determines which foreign agents may come into the United States, how long they may stay, and what diplomatic activities they may carry out while here. The Reception Clause empowers the President alone to "receive Ambassadors and other public Ministers." U.S. Const. art. II, § 3. And this authority includes whether to accept the request by foreign sovereigns to send particular dignitaries and to assure them of entry. *See Presidential Power to Expel Diplomatic Personnel from the United States*, 4A Op. O.L.C. 207, 208–09, 215 (1980) ("*Presidential Power to Expel Diplomatic Personnel*"). As early as 1793, the Washington Administration considered it self-evident that the President alone would decide when to recognize the new French government and receive its minister. *See Zivotofsky*, 576 U.S. at 24; Saikrishna Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 312–13 (2001) ("Prakash & Ramsey").

Congress, too, shared this understanding in the early Republic. As the Supreme Court discussed in *Zivotofsky*, in 1818, the House of Representatives took up the question of whether to recognize the new South American republics that had broken away from Spain. 576 U.S. at 25. Speaking in opposition, Representative Alexander Smyth explained, "it is the President who receives all foreign Ministers, and determines what foreign Ministers shall or shall not be received. It is by the exercise of one

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courts, the Executive, and Congress have all concurred that the President's constitutional authority specifically includes the exclusive authority to represent the United States abroad." (internal quotation marks omitted)); Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993 (Oct. 28, 1991), 2 *Pub. Papers of Pres. George Bush* 1344, 1344 (1991) ("[U]nder our system of government, all decisions concerning the conduct of negotiations with foreign governments are within the exclusive control of the President."); *Authority to Participate in International Negotiations*, 2 Op. O.L.C. 227, 228 (1978) ("Negotiation is a necessary part of the process by which foreign relations are conducted, and the power to conduct foreign relations is given to the President by the Constitution."); Louis Henkin, *Foreign Affairs and the United States Constitution* 42 (2d ed. 1996) ("As 'sole organ,' the President determines also how, when, where, and by whom the United States should make or receive [diplomatic] communications" and cannot be "limited as to time, place, form, or forum.").

of these powers, in neither of which has this House any participation, that a foreign Power must be acknowledged." 32 Annals of Cong. 1569–70 (Mar. 27, 1818). The House voted down the bill and deferred any efforts toward recognition until after President Monroe made that decision, four years later. This episode reflected the early congressional understanding that "the recognition power rested solely with the President." *Zivotofsky*, 576 U.S. at 25.

Likewise, it has been "beyond serious question" that the President's power to engage with foreign emissaries encompasses the power to expel them from the United States. *Presidential Power to Expel Diplomatic Personnel*, 4A Op. O.L.C. at 209; *accord* 3 Joseph Story, *Commentaries on the Constitution* § 1562, at 418 (1833) ("Story") (the President's reception authority includes "the power to refuse [foreign dignitaries], and to dismiss those who, having been received, become obnoxious to censure, or unfit to be allowed the privilege"). Most famously, in 1793, President Washington demanded the recall of the French minister, Edmond Charles Genet, after Genet embarked on a public campaign to oppose the President's neutrality policy and win American support for France's war against Great Britain. Prakash & Ramsey, 111 Yale L.J. at 314–15; Stanley Elkins & Eric McKitrick, *The Age of Federalism* 341–53, 363–65 (1993) ("Elkins & McKitrick"). Genet contended that only Congress could recall diplomats—but the Washington Administration disagreed, and Congress acquiesced in the administration's position. Prakash & Ramsey, 111 Yale L.J. at 314–15; Elkins & McKitrick at 365. Since then, the Executive has unilaterally decided when to expel foreign representatives. *See generally* 5 John Bassett Moore, *A Digest of International Law*, H.R. Doc. No. 56-551, §§ 700–01, at 19–32 (1906) ("Moore") (citing over a dozen examples). Accordingly, in 1980, this Office concluded that the President had the authority to expel Iranian diplomats and could do so for any reason. *See* Memorandum for the Attorney General, from Larry A. Hammond, Acting Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power to Declare Iranian Diplomats* Persona Non Grata *Because of Their Public Statements* at 1–2 (Mar. 20, 1980).

Congress has accepted the President's authority over the entry and expulsion of foreign diplomats. For instance, the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq*., has long exempted diplomatic personnel from its provisions. Congress added this general exemption in recognition

of "the constitutional limitations on its ability to control or regulate the President's constitutional power to receive (and expel) the foreign representatives of countries with whom we have diplomatic relations." *Presidential Power to Expel Diplomatic Personnel*, 4A Op. O.L.C. at 215; *see also* H.R. Rep. No. 82-1365, at 34 (1952) (explaining that various foreign diplomats who have been "accepted by the President or the Secretary of State" are generally exempted from provisions relating to admission or removal "[i]n view of constitutional limitations"). On the rare occasions when Congress sought to bar the entry of foreign representatives, Presidents have regularly objected.[10] And for good reason: just as the President's recognition authority will not tolerate a contradictory message from Congress, *Zivotofsky*, 576 U.S. at 29–30, the President's reception authority similarly prohibits Congress from barring the emissaries whom the President wishes to receive.

The President's foreign-affairs authorities also give him exclusive control over the activities of foreign representatives in the United States. *See, e.g.*, *Tachiona v. United States*, 386 F.3d 205, 213–14 (2d Cir. 2004) (the President possesses the "authority to set the terms upon which foreign ambassadors are received"). Presidents have long set the conditions under which diplomats may operate. For instance, in 1793, Secretary of State Jefferson cautioned Genet that the Executive Branch would "admit the continuance of your functions so long as they shall be restrained within the limits of the law as heretofore announced to you, or shall be of the tenor usually observed towards independent nations by the representative

[10] *OSTP Engagement with China*, 35 Op. O.L.C. at 123 ("Presidents . . . have regularly objected to legislation purporting to bar their interaction with particular foreign officials."); Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (Feb. 16, 1990), 1 *Pub. Papers of Pres. George Bush* 239, 240 (1990) (declaring provision restricting the President's ability to receive spies as ambassadors to be unconstitutional); Statement on Signing the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Mar. 12, 1996), 1 *Pub. Papers of Pres. William J. Clinton* 433, 434 (1996) ("A categorical prohibition on the entry of [individuals who confiscate or traffic in expropriated property] could constrain the exercise of my exclusive authority under Article II of the Constitution to receive ambassadors and to conduct diplomacy"); Statement on Signing the Countering America's Adversaries Through Sanctions Act, 2017 Daily Comp. Pres. Doc. No. 559, at 1 (Aug. 2, 2017) (Pres. Trump) (deeming unconstitutional provisions that purported to require the President to "deny certain individuals entry into the United States, without an exception for the President's responsibility to receive ambassadors").

of a friendly power residing with them." Thomas Jefferson to Edmond Charles Genet (Sept. 7, 1793), 27 *The Papers of Thomas Jefferson* 52–53 (John Catanzariti ed., 1997) ("*Jefferson Papers*"). After the French consuls sought to exercise admiralty jurisdiction in the United States to "try the validity of prizes" seized by privateers, Jefferson directed them to stop and threatened to "immediately revoke[]" the exequaturs that authorized them to operate in the United States. Thomas Jefferson, Circular to French Consuls and Vice-Consuls (Sept. 7, 1793), 27 *Jefferson Papers* at 51. The Washington Administration similarly advised France that any limitations placed on the jurisdiction of U.S. consuls abroad would result in reciprocal limitations on French consuls in the United States. Prakash & Ramsey, 111 Yale L.J. at 313. Since then, Presidents have set the conditions under which foreign representatives must operate in the United States.[11] This long practice confirms that the President has the sole authority to decide which foreign representatives to receive, what activities they may undertake, and when they must depart.

Congress therefore could not impose restrictions like those in section 1003 upon accredited foreign diplomats in the United States. "[W]hen a Presidential power is 'exclusive,' it 'disabl[es] the Congress from acting upon the subject.'" *Zivotofsky*, 576 U.S. at 29–30 (quoting *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring)); *see OSTP Engagement with China*, 35 Op. O.L.C. at 124–29. Prohibiting representatives of a foreign sovereign from maintaining any office or mission in the United States would be tantamount to prohibiting them from engaging in diplomacy, since missions are "the machinery through which States conduct diploma-

[11] *See, e.g.*, 5 Moore § 700, at 20 (noting that in 1855, the Secretary of State threatened to revoke the exequatur of the Portuguese consul in New York if he refused to appear as a witness in prosecuting persons charged with fitting vessels for use in the slave trade); Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 64 (4th ed. 2016) ("Denza") (noting that power to expel diplomats "enables the receiving State to protect itself against numerous forms of unacceptable activity by members of diplomatic missions and forms an important counterweight to the immunities conferred elsewhere"); *id*. at 409 (describing State Department practices of "cutting of telephone lines, refusal of customs clearance for diplomatic imports, and refusal of permission to purchase private residences" that were taken against the missions of the Soviet Union, China, Czechoslovakia, Iran, Vietnam, and Cambodia); *id*. at 410 ("The Department of State systematically monitors tax exemptions granted to U.S. missions abroad and adjusts the privileges accorded to missions in the United States so as to ensure a high level of reciprocity.").

cy." Denza, *supra* note 11, at 1. So, too, prohibiting foreign diplomats from expending any funds in the United States for the purpose of furthering their sovereign's interests would effectively block those diplomats from discharging their duties. The President's decision to receive a diplomat entails an implicit authorization for the diplomat to perform the customary incidents of diplomatic office, unless the President chooses to modify the scope of that authorization.

B.

The President's exclusive authority over diplomatic affairs extends as well to foreign political organizations, such as the PLO. Because the President's "exclusive and plenary" powers to "receive emissaries from a foreign entity" and to recognize foreign sovereigns "need not be exercised concurrently," the "President's decision to engage in diplomatic activity . . . does not obligate him to recognize the state sending those representatives." 1988 Cooper Memorandum at 22–23 n. 23. Nor must the President accept emissaries as accredited diplomats to invoke his foreign-affairs authorities. The President's reception power extends to "all possible diplomatic agents which any foreign power may accredit to the United States." *Ambassadors and Other Public Ministers of the United States*, 7 Op. Atty. Gen. 186, 209 (1855).[12] So the President may authorize foreign emissaries to enter the United States and engage in diplomatic relations without affording them diplomatic status. The Supreme Court has recognized the President's diplomatic authority includes such informal diplomatic channels. *United States v. Belmont*, 301 U.S. 324, 330 (1937) (it "may not be doubted" that it was "within the competence of the President" alone to engage in negotiations with the Soviet Union before its recognition); *see Zivotofsky*, 576 U.S. at 14–15 ("The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition."). This Office thus previously concluded that the President has the sole

[12] For instance, at the Founding, consuls were "not diplomatic functionaries, or political representatives of a foreign nation," but were "treated in the character of mere commercial agents." 3 Story § 1559, at 415. Yet, Justice Story explained, the President's sole authority to receive them "has constantly been exercised without objection; and foreign consuls have never been allowed to discharge any functions of office, until they have received the exequatur of the president." *Id.*

authority to "decide whether to accord to the PLO diplomatic status and what that diplomatic status should be." *Palestine Information Office*, 11 Op. O.L.C. at 122.[13]

Since the Founding, Presidents have received and negotiated with representatives from non-sovereign entities. From 1796 to 1800, following an uprising in the French colony of Saint-Domingue, President Adams accepted agents of the provisional government of Toussaint L'Ouverture. The Adams administration did not recognize L'Ouverture's government or grant his agents diplomatic status, but negotiated with them over trade. *See* Rayford W. Logan, *The Diplomatic Relations of the United States with Haiti 1776–1891*, at 73–76, 105 (1941). Likewise, as other Latin American colonies edged towards independence in the nineteenth century, Presidents Madison, Monroe, and Quincy Adams authorized provisional governments to send agents and received them on an informal basis. Samuel Flagg Bemis, *Early Diplomatic Missions from Buenos Aires to the United States 1811–1824*, 49 Proc. of Am. Antiquarian Soc. 11, 12–13, 55 (Apr. 1939) ("Bemis"); Julius Goebel, Jr., *The Recognition Policy of the United States* 121, 134, 138 (1915) ("Goebel"). Some of these agents remained in the United States for decades to lobby for recognition. Bemis, 49 Proc. of Am. Antiquarian Soc. at 21, 93.

Long before recognizing the Soviet Union, the Executive Branch allowed unofficial Soviet representatives into the United States. In 1921, during the Russian Civil War, the State Department authorized the short-lived Far Eastern Republic—an entity later subsumed within the Soviet Union—to send "responsible persons of good record to whom the Department would extend informal assistance but no official recognition." Svetlana Chervonnaya & Donald Evans, *Left Behind: Boris E. Skvirsky and the Chita Delegation at the Washington Conference, 1921–22*, 29 Intel. & Nat'l Sec. 19, 26 (2014) (internal quotation marks omitted).

[13] *See also Section 609 of the FY 1996 Omnibus Appropriations Act*, 20 Op. O.L.C. 189, 194 (1996) ("The Executive's recognition power necessarily subsumes within itself the power to withhold or deny recognition, to determine the conditions on which recognition will be accorded, and to define the nature and extent of diplomatic contacts with an as-yet unrecognized government."); *Nat'l Petrochemical Co. of Iran*, 860 F.2d at 554–55 ("[T]he power to deal with foreign nations outside the bounds of formal recognition is essential to a president's implied power to maintain international relations," and "the president alone—as the constitutional guardian of foreign policy—knows what action is necessary to effectuate American relations with foreign governments.").

That delegation included Boris Skvirsky, who established the Soviet Union Information Bureau, negotiated with U.S. officials, and engaged in public diplomacy as the Soviet Union's unofficial diplomatic representative for more than a decade, *id*. at 27, 51, while occupying the "legal status of a private citizen," *id*. at 50 (internal quotation marks omitted).

During World War II, President Roosevelt admitted Charles de Gaulle, the leader of the French Committee of National Liberation, to the United States for meetings while avoiding recognizing either de Gaulle or the Vichy regime as the legitimate government of France. 2 Marjorie M. Whiteman, *Digest of International Law* § 5, at 129 (1963). The Executive Branch likewise authorized the People's Republic of China to open an unofficial liaison office and granted its representatives certain diplomatic privileges and immunities before recognizing the Communist Chinese government. 2 Jerome Alan Cohen & Hungdah Chiu, *People's China and International Law: A Documentary Study* 1108 (1974). And the Executive Branch permitted breakaway entities like Katanga and Rhodesia, which never attained recognition, to open unofficial U.S. offices and to take actions in the United States to advance their political interests. *See* Josiah Brownell, *Diplomatic Lepers: The Katangan and Rhodesian Foreign Missions in the United States and the Politics of Nonrecognition*, 47 Int'l J. of African Hist. Stud. 209, 213–14, 226–27, 230 (2014).

Congress too has acknowledged the President's authority to engage in diplomacy with non-sovereign entities. The Foreign Missions Act defines a "foreign mission" on U.S. soil to include "any mission to or agency or entity in the United States which is involved in the diplomatic, consular, or other activities of" either (i) "a foreign government," or (ii) "an organization . . . representing a territory or political entity which has been granted diplomatic or other official privileges and immunities under [U.S. law] or which engages in some aspect of the conduct of the international affairs of such territory or political entity." 22 U.S.C. § 4302(a)(3). The statute grants the Secretary of State the discretion to determine which organizations constitute a "foreign mission." *Id*. § 4302(b). Under the Foreign Missions Act, Presidents have authorized the PLO and other foreign entities to open offices and engage in diplomatic activities in the United States.[14]

[14] *See, e.g*., National Coalition of Syrian Revolution and Opposition Forces, 79 Fed. Reg. 27,675 (May 14, 2014) (determining that the offices of the National Coalition of

Similarly, this Office has often concluded that the President's exclusive authority over diplomatic affairs extends to representatives of non-recognized foreign entities. For instance, in 1977, President Carter sought to close Rhodesia's unofficial U.S. office in view of his Administration's foreign policy and a recent U.S.-sponsored United Nations Security Council resolution. This Office advised that, notwithstanding the mission's lack of diplomatic status, its closure fell within the President's exclusive foreign-affairs powers, including "the right to determine who is to be regarded here as representing a foreign state or regime." Letter for the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel att. 2, at 7 (Dec. 13, 1977).

This Office also objected to a bill that would have required the Secretary of State to permit the entry of the President of Taiwan to the extent it could be "construed to prevent the President from denying [him] permission to enter the United States." Memorandum for the Files, from Richard Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 1460*, at 2 (May 18, 1995). The United States did not recognize Taiwan as a foreign sovereign, the Clinton administration had not decided whether to grant the Taiwanese President diplomatic status, and the Taiwanese President merely sought entry to speak at Cornell University. *Id.* at 1–2. Nonetheless, we concluded that Congress could not require the President to admit him, because doing so "would undermine the President's recognition policy toward" the People's Republic of China. *Id.* at 2–3.

These precedents leave little doubt that Congress may not interfere with the President's authority to engage in diplomatic contacts with non-recognized entities. Foreign political entities that engage with the United States are engaged in diplomacy even if they never attain recognition. If the President did not have the exclusive authority to set the parameters of United States engagement, then Congress could thwart the President's authority to recognize such entities or to calibrate the nature of relations

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Syrian Revolution and Opposition Forces constitute a foreign mission); Taipei Economic and Cultural Offices, 79 Fed. Reg. 16,090 (Mar. 24, 2014) (determining that the Taipei Economic and Cultural Representative Office in Washington, D.C., and its subsidiary offices throughout the United States constitute foreign missions); Amtorg Trading Corporation, 52 Fed. Reg. 5,373 (Feb. 20, 1987) (authorizing the de facto Soviet trade delegation to operate a mission).

with them. The authority to engage with foreign entities in the United States therefore falls well within the President's exclusive authority.

This conclusion is consistent with the course of United States relations with the PLO. Although the United States has never recognized the PLO as a foreign sovereign, the United States maintained relations with the PLO for over two decades, and Presidents have repeatedly objected to legislative efforts to cabin such engagement.[15] Since 1994, Presidents have engaged with the PLO as the international representative of the Palestinian people. *See* State Opinion Request, *supra* note 1, att. at 1. The State Department authorized the PLO to maintain a foreign mission in Washington, D.C., in the expectation that PLO representatives should "have ready access to State Department officials on matters of mutual concern" and be "invited to official U.S. functions on a case by case basis." Boswell Letter at 2. If the Executive Branch wishes to authorize the PLO to conduct such diplomatic activities, Congress may not constitutionally bar such engagement.

C.

The President's exclusive authority over diplomatic affairs necessarily implies the discretion to permit the PLO to maintain a mission within the United States. Since the early days of the Nation, the Executive Branch has allowed non-recognized entities to send agents to the United States to reside on a long-term basis and establish diplomatic contacts. Forbidding these entities from establishing an office from which to operate would cut

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[15] *See supra* note 4; *accord, e.g.*, *Delegations to U.N. Agencies*, 33 Op. O.L.C. at 232 ("[T]he Executive Branch has objected numerous times on constitutional grounds to legislative provisions purporting to preclude any U.S. government employee from negotiating with (or recognizing) the [PLO] or its representatives until the PLO had met certain conditions."); Statement on Signing the Consolidated Appropriations Act, 2012 (Dec. 23, 2011), 2 *Pub. Papers of Pres. Barack Obama* 1568, 1569 (2011) (prohibition on establishing an office in Jerusalem for the purpose of conducting official business with the Palestinian Authority would "hinder my ability to receive diplomatic representatives of foreign governments"); Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (Feb. 16, 1990), 1 *Pub. Papers of Pres. George Bush* 239, 240 (1990) (objecting to a statute prohibiting the use of any funds to continue "the current dialogue on the Middle East peace process" with any PLO representatives known to have been directly involved in terrorist activity because such a prohibition interferes with the President's "constitutional authority to negotiate with foreign organizations").

off a critical conduit for such relations. *Cf.* Denza, *supra* note 11, at 1 (missions are "the machinery through which States conduct diplomacy"). Therefore, at a minimum, Congress may not prohibit the PLO from maintaining an office dedicated to conducting relations with the United States should the Executive seek to facilitate such relations.

The question remains whether additional PLO activities fall within the President's exclusive authority over diplomacy. In light of the State Department's expertise in this area, we give great weight to its views regarding whether particular activities are diplomatic in nature. *See Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 21 (1992) ("defer[ring] to the State Department's expertise" concerning the foreign policy consequences of a proposed bill); *OSTP Engagement with China*, 35 Op. O.L.C. at 125 (relying on the State Department's judgments as to how integral particular activities are to the conduct of diplomacy); *Delegations to U.N. Agencies*, 33 Op. O.L.C. at 235 (deferring to the State Department's conclusion that a legislative restriction on its participation in negotiations would undermine U.S. diplomacy); *cf. United States v. Al-Hamdi*, 356 F.3d 564, 571–72 (4th Cir. 2004) (treating the State Department's views as conclusive regarding whether a foreign representative possesses diplomatic status in light of the President's foreign-affairs authorities). We also consider whether these activities constitute a necessary incident of diplomacy by looking to the historical practices of the Executive Branch. *See Zivotofsky*, 576 U.S. at 23 (examining "accepted understandings and practice").

Based on these criteria, we believe that the specific activities that the State Department identified are necessary incidents of engaging the PLO in diplomatic contact with the United States. The State Department may authorize the PLO to meet with U.S. and foreign officials in the United States. Indeed, the whole point of allowing a foreign representative to enter the United States and establish an office is to foster such contacts, whether they are with representatives of the U.S. government or with members of the foreign diplomatic corps. *Cf. OSTP Engagement with China*, 35 Op. O.L.C. at 125 (Congress has no authority to limit meetings between U.S. and Chinese officials abroad because such contacts "fall squarely within the scope of the President's constitutional authority to engage in discussions with foreign governments").

Likewise, the State Department may authorize the PLO's Washington office to communicate with its leadership abroad. There would be few surer ways of thwarting the President's diplomatic efforts than to bar foreign representatives from reporting on developments within the United States. *Cf.* Denza, *supra* note 11, at 29 ("The function of a diplomatic mission" includes "report[ing] to the sending government on all matters of importance to it[.]"); Vienna Convention on Diplomatic Relations art. 3.1(d), Apr. 18, 1961, 500 U.N.T.S. 95, 98 (functions of diplomatic missions include "[a]scertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State"); 2 Foreign Affairs Manual ("FAM") 113.1.c.10 (responsibilities of a U.S. Chief of Mission include "reporting significant political, economic, and societal developments occurring abroad").

The State Department also identified various forms of public diplomacy—namely, "outreach to Palestinian-Americans, Palestinians in the United States, or interested Americans on matters relevant to the Palestinian community." May 31, 2018 E-mail, *supra* note 1, att. at 7. That, too, is a typical and accepted incident of diplomacy. *See, e.g.*, Vienna Convention on Diplomatic Relations art. 3(b), (e) (the functions of a diplomatic mission include "[p]rotecting in the receiving State the interests of the sending State and of its nationals" and "[p]romoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations"); Richard T. Arndt, *The First Resort of Kings: American Cultural Diplomacy in the Twentieth Century* 12–15 (2005) (upon their reception as the United States' earliest ambassadors to France, Benjamin Franklin and later Thomas Jefferson published information and engaged with influential French citizens in an effort to correct misimpressions about America); *accord, e.g.*, 1 FAM 114.2 (describing functions of "[a] bureau's public diplomacy office"). Representatives of non-recognized entities have long been permitted to pursue such activities in the United States. In 1835, for example, Texas declared independence from Mexico and the provisional government sent three commissioners here, in part to enlist "public sympathy" for their cause. Goebel at 145. In the twentieth century, representatives of the Soviet Union, Rhodesia, and Katanga likewise engaged in extensive public diplomatic efforts in the United States in support of their governments. *See supra* p. 124.

Logistical and financial services provided to support PLO representatives' official trips to meet with high-level U.S. officials are also necessary incidents of diplomacy. *Cf. OSTP Engagement with China*, 35 Op. O.L.C. at 127 (activities "necessary to carry out meaningful diplomatic initiatives" fall within the President's exclusive authority over diplomacy). Without such support, those diplomatic trips might not happen. *Cf. id.* (Congress could not restrict U.S. officials' preparation and logistical support for diplomatic meetings, including the arrangement of travel and lodging). For similar reasons, financial and administrative activities related to diplomatic efforts, such as maintaining bank accounts and paying bills, are necessary incidents of diplomacy. Just as the President could not conduct diplomacy abroad without the ability to make "expenditures [necessary] for preparation, support, and facilitation of diplomatic discussion," *id.*, depriving foreign representatives of the ability to perform these basic functions would prevent them from operating in our country. We therefore conclude that section 1003 may not prohibit such diplomatic activities if the Executive Branch wishes to authorize them.

In reaching this conclusion, we are mindful that the Executive Branch has at times acted consistently with section 1003's restrictions. For example, in authorizing the PLO's Washington mission in 1994, the State Department instructed the PLO that the mission could stay open only if the President could continue complying with the ATA waiver provision. *See* Boswell Letter at 1. And in 1997, State directed the PLO to suspend its Washington office because Congress had allowed the statutory waiver authority to lapse. *See* Letter for Hasan Abdel Rahman, Chief Representative, Palestine Liberation Organization, from Eric J. Boswell, Assistant Secretary of State for Diplomatic Security (Aug. 8, 1997).

At the same time, we must judge those episodes against the broader executive practice. Those episodes may well reflect the Executive Branch's determination that compliance with section 1003 would support the President's diplomatic objectives or his efforts to win support for a renewed waiver authority. *See, e.g.*, *Zivotofsky*, 576 U.S. at 52 (Thomas, J., concurring in part and dissenting in part) ("[T]he argument from Presidential acquiescence here is particularly weak" where the "statute is consistent with the President's longstanding policy[.]"); *Haig v. Agee*, 453 U.S. 280, 302 (1981) ("[T]he continued validity of a power is not diluted simply because there is no need to use it."). Moreover, those episodes must be

considered against the Executive Branch's repeated objections to the actual or potential burdens imposed by section 1003, including this Office's two opinions on the subject, President Reagan's 1987 signing statement, and statements of Presidents since objecting as a matter of constitutional principle to the ATA and similar restrictions.

We also do not dispute that some of section 1003's prohibitions may otherwise be justified as regulations of commerce within the United States. Congress has the authority under Article I to regulate any non-diplomatic activities conducted by the PLO, but those measures may not invade the President's exclusive authority over diplomacy.[16] In addition, although Congress has reduced section 1003's potential for interference by permitting the President to waive section 1003's prohibitions, that waiver provides no help if its conditions are not met and the Executive Branch wishes to authorize the PLO's Washington office to remain open and to engage in particular diplomatic activities. To the extent that the conditions for the waiver stand in the way, Congress may not "burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the exercise of that power." *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 186–88 (1996) (concluding that a provision allowing the President to waive a restriction on national security grounds with advance notice to Congress was insufficiently protective of his exclusive authority to control when and where to deploy U.S. forces). Congress has not granted the President the authority to waive section 1003 for purely diplomatic reasons, and the provision therefore impermissibly constrains the President's exclusive authority over the conduct of diplomacy.

In sum, if the President chooses to allow the PLO to pursue diplomatic endeavors in the United States, then Congress may not impede that deci-

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[16] *See, e.g.*, *OSTP Engagement with China*, 35 Op. O.L.C. at 124 (although "Congress may use its spending power to decline to appropriate money or place conditions on its appropriations," it cannot use that power to circumvent the President's exclusive foreign-affairs authorities); *Delegations to U.N. Agencies*, 33 Op. O.L.C. at 237 ("[T]he Executive Branch has long adhered to the view that Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control." (internal quotation marks and citations omitted)); *The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 169–70 (1986) (similar).

sion. For that reason, we informally advised the State Department that the PLO's Washington office could remain open between November 2017 and September 2018. By the same token, if the President determines that closing the PLO office and enforcing section 1003's restrictions is in the interest of United States foreign policy, that action too would fall within his exclusive authority over the conduct of diplomacy. *See* 1988 Cooper Memorandum at 22; *supra* note 4. On September 10, 2018, the Executive Branch made that determination, and the PLO's Washington office must now cease operating unless or until the President deems it within the interest of the United States to reopen.

III.

For the foregoing reasons, we advised that Congress could not require the Secretary of State to close the PLO's Washington office or to prohibit the PLO from performing the diplomatic activities described in this opinion.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Authority to Withdraw from the North American Free Trade Agreement

The President may lawfully withdraw the United States from the North American Free Trade Agreement without the need for any further legislative action.

October 17, 2018

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether the President may lawfully withdraw the United States from the North American Free Trade Agreement ("NAFTA"), Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 (1993), according to its terms, without obtaining approval from Congress. NAFTA is a congressional-executive agreement, negotiated by the President and approved by Congress. Article 2205 of the agreement permits a party to withdraw from it on six months' notice. In the legislation approving NAFTA, Congress authorized the President to carry out the agreement and imposed no limits on his authority to withdraw. Because the Constitution and the governing statute vest the President with the authority to invoke article 2205 of NAFTA, we conclude that the President may give notice on behalf of the United States to withdraw from the agreement without the need for any further legislative action.[1]

I.

NAFTA is an international agreement among the United States, Canada, and Mexico that created "a 'free trade zone' on the North American continent through the phased elimination or reduction of both tariff and non-tariff barriers to trade." *Made in the USA Found. v. United States*, 242 F.3d 1300, 1302–03 (11th Cir. 2001). President George H.W. Bush negotiated NAFTA consistent with section 1103(b) of the Omnibus Trade and Competitiveness Act of 1988 ("1988 Act"), Pub. L. No. 100-418, 102 Stat. 1107, 1129–30, which entitled certain trade agreements to the

[1] In preparing this opinion, we have solicited and considered the views of the Department of State's Office of the Legal Adviser. *See* Memorandum for Henry C. Whitaker, Deputy Assistant Attorney General, Office of Legal Counsel, from Michael J. Mattler, Assistant Legal Adviser for Treaty Affairs, Dep't of State (Dec. 1, 2017).

expedited parliamentary procedures of the Trade Act of 1974, 19 U.S.C. § 2101 *et seq.* To qualify for the Trade Act's procedures, an agreement must be subject to termination "upon due notice" at the end of a period specified in the agreement; if the agreement is not terminated at that time, "it shall be subject to termination or withdrawal thereafter upon not more than 6 months' notice." 19 U.S.C. § 2135(a). President Bush and the leaders of Canada and Mexico signed NAFTA on December 17, 1992. 32 I.L.M. at 703. Consistent with the Trade Act, article 2205 of NAFTA provides for withdrawal on six months' notice: "A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties." NAFTA art. 2205, 32 I.L.M. at 703.

In 1993, President Clinton submitted to Congress the agreement itself, a "statement of administrative action" describing the Executive Branch's plan for implementing the agreement, and proposed implementing legislation. H.R. Doc. No. 103-159, vol. 1, at 1–2 (1993). The statement of administrative action discussed one potential withdrawal scenario. Reflecting the importance of supplemental agreements on labor and environmental issues to his Administration's support for NAFTA, President Clinton advised that if Mexico or Canada ever withdrew from one of those supplemental agreements, the President would, "after thorough consultation with the Congress, . . . provide notice of withdrawal under the NAFTA, and cease to apply that Agreement, to Mexico or Canada." *Id.* at 456. The President did not suggest that notice of withdrawal would be contingent on congressional approval or any other formal action.

Congress enacted the proposed implementing legislation later that year. *See* North American Free Trade Agreement Implementation Act ("NAFTA Implementation Act"), Pub. L. No. 103-182, 107 Stat. 2057 (1993). In that statute Congress "approve[d]" both NAFTA and the statement of administrative action. *Id.* § 101(a)(1)–(2), 107 Stat. at 2061 (codified at 19 U.S.C. § 3311(a)(1)–(2)). The Act changed U.S. law to comply with the international-law obligations that the United States would assume under NAFTA. The Act also authorized the President, if he determined that certain conditions had been satisfied, to take steps to "provid[e] for the entry into force" of the Agreement with Canada and

Mexico. 19 U.S.C. § 3311(b). President Clinton took those steps and NAFTA entered into force among the three countries on January 1, 1994. Office of the United States Trade Representative, Executive Office of the President, *North American Free Trade Agreement (NAFTA)*, https://ustr.gov/about-us/policy-offices/press-office/ustr-archives/north-american-free-trade-agreement-nafta (last visited October 17, 2018).

II.

A.

The Constitution empowers the President, with the advice and consent of the Senate, to make treaties. U.S. Const. art. II, § 2, cl. 2. The Constitution does not expressly address the procedures by which the United States may enter other forms of international agreements. But from the earliest days of the Republic, it has been established that the President may, on behalf of the United States, "make such international agreements as do not constitute treaties in the constitutional sense." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936); *see Weinberger v. Rossi*, 456 U.S. 25, 30 n.6 (1982) ("We have recognized . . . that the President may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause[.]"); *see also* Memorandum for Ambassador Michael Kantor, U.S. Trade Representative, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Whether the GATT Uruguay Round Must Be Ratified as a Treaty* at 2–3 (July 29, 1994); Memorandum for the Attorney General from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutional Aspects of the General Agreement on Tariffs and Trade* at 26 (Nov. 19, 1954).

In some instances, the President may enter into such agreements based solely upon his own constitutional authority. These agreements include military truces, agreements to resolve foreign claims, and agreements recognizing a foreign power. *See, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 679–83 (1981); *United States v. Pink*, 315 U.S. 203, 229–30 (1942); *United States v. Belmont*, 301 U.S. 324, 330–31 (1937); Louis Henkin, *Foreign Affairs and the United States Constitution* 219–22 (2d ed. 1996) ("Henkin"). Such executive agreements may have legal force without any legislative action. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S.

396, 415 (2003); *Dames & Moore*, 453 U.S. at 682–83; *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. 232, 244–45 (1994) ("*Uruguay Round Agreements*"); *Presidential Authority to Settle the Iranian Crisis*, 4A Op. O.L.C. 248, 249 (1980).

In other instances, the President may negotiate and conclude an international agreement that the full Congress approves through legislation (either in advance or after the agreement is concluded). Unlike a treaty, "which in a single instrument both constitutes an international obligation and may have the force of law, a congressional-executive agreement taking this form consists of two distinct instruments: the international agreement . . . concluded by the President, and the authorizing statute to which it is an incident[.]" Memorandum for Robert F. Hoyt, General Counsel, Dep't of the Treasury, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: President's Authority to Terminate or Amend a Certain Congressional-Executive Agreement* at 5 (May 9, 2008) ("2008 Bradbury Opinion"). The United States has frequently employed such congressional-executive agreements to assume major international trade obligations. *See Uruguay Round Agreements*, 18 Op. O.L.C. at 234–35; Richard S. Beth, Cong. Research Serv., R44584, *Implementing Bills for Trade Agreements: Statutory Procedures under Trade Promotion Authority* 2–3 (2016); *Restatement (Third) of the Foreign Relations Law of the United States* § 303 reporters' note 9 (Am. Law Inst. 1987) (noting that "agreements on [tariffs and other trade matters] are now commonly effected by Congressional-Executive agreement"). NAFTA is such an agreement. The President negotiated and concluded NAFTA, and Congress then approved it by enacting the NAFTA Implementation Act, which authorized the President to bring NAFTA into force for the United States.

B.

You have asked whether the President may, without obtaining additional congressional authorization, exercise the right of the United States to withdraw from NAFTA. In the 2008 Bradbury Opinion, we addressed a similar question in response to a request from the Department of the Treasury regarding another congressional-executive agreement. Earlier this year, we addressed this issue in another opinion about a different

international agreement.[2] We provide the same answer today. Where an international agreement contains defined procedures for termination or withdrawal and Congress approves the agreement without limiting those procedures, the President may invoke the right of the United States to terminate or withdraw under those procedures without the need for additional congressional authorization. *See* 2008 Bradbury Opinion at 5.[3]

While there have been fewer occasions to consider the President's authority to terminate congressional-executive agreements, many precedents support the President's authority to terminate a treaty pursuant to its terms. That authority flows from the President's constitutional responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, which includes the power to execute treaties, *see Constitutionality of the Rohrabacher Amendment*, 25 Op. O.L.C. 161, 169–70 (2001) ("*Rohrabacher Amendment*"); *Constitutionality of Legislative Provision Regarding ABM Treaty*, 20 Op. O.L.C. 246, 249 (1996). Thus, "[w]here the Senate has consented to a treaty that provides for its termination, it has consented to the President's implementing that provision, just as it has consented to his implementing other provisions of the treaty." 2008 Bradbury Opinion at 6. The termination provisions are "simply part of the treaty the President is authorized to execute, according to his discretion." *Id*.

The President's authority to terminate a treaty also follows from his role as "the sole organ of the nation in its external relations, and its sole representative with foreign nations." *Curtiss-Wright*, 299 U.S. at 319 (quoting then-Rep. John Marshall, 10 Annals of Cong. 595, 613 (1800)). As the Supreme Court has observed, "the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Garamendi*, 539 U.S. at 414 (quoting *Youngstown Sheet &*

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[2] Because this opinion may be published prior to that one, we fully explore the issue here rather than rely on our prior opinion as precedent.

[3] Bilateral agreements typically provide for a party to "terminate" the agreement; multilateral agreements typically provide a right of "withdrawal," since those agreements may remain in force for other parties. *See* Anthony Aust, *Modern Treaty Law and Practice* 245 (3d ed. 2013). The same legal principles that apply to the President's authority to terminate international agreements apply equally to his authority to withdraw, and so this memorandum uses the terms interchangeably, as appropriate.

Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). The President has the "exclusive authority to determine the time, scope, and objectives of international negotiations." *Prohibition of Spending for Engagement of the Office of Science and Technology Policy with China*, 35 Op. O.L.C. 116, 121 (2011) ("*OSTP*") (internal quotation marks omitted). Thus, "[t]he President has the sole power to negotiate treaties, and the Senate may not conclude or ratify a treaty without Presidential action." *Zivotofsky v. Kerry*, 576 U.S. 1, 13 (2015) (citation omitted).[4]

The President's exclusive authority over diplomacy extends not only to the making of treaties, but to their maintenance as well. The Supreme Court has long recognized that "the execution of a contract between nations is to be demanded from, and, in the general, superintended by the executive of each nation[.]" *The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801). "'In the conduct of negotiations with foreign governments, it is imperative that the United States speak with one voice. The Constitution provides that that one voice is the President's.'" *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 40 (1990) (quoting Message to the Senate Returning Without Approval the Bill Prohibiting the Export of Technology for the Joint Japan-United States Development of FS-X Aircraft (July 31, 1989), 2 *Pub. Papers of Pres. George Bush* 1042, 1043 (1989)); *cf. United States v. Louisiana*, 363 U.S. 1, 35 (1960) ("The President . . . is the constitutional representative of the United States in its dealings with foreign nations."). As the Nation's chief representative abroad, the President has the authority to determine whether and when the United States should exercise its right to terminate treaties.

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[4] Specifically, the President has the power "to make Treaties, provided two thirds of the Senators present concur," under Article II, Section 2, Clause 2 of the Constitution. The same clause of the Constitution empowers the President to "appoint Ambassadors," "Consuls," and other officers of the United States. Although some appointments require the Senate's advice and consent, the President alone has the power to remove the executive officers he appoints. *See Myers v. United States*, 272 U.S. 52, 122 (1926) ("The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment[.]"). Just as the textual requirement to obtain Senate approval for certain appointments does not imply any role for the Senate in removal, so too the fact that the Senate must concur in a treaty does not give the Senate any necessary role in treaty termination.

In evaluating the President's authority to terminate a treaty without action by Congress, we place "significant weight" on "accepted understandings and practice." *Zivotofsky*, 576 U.S. at 23; *see NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (noting that "long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President" (internal quotation marks and brackets omitted)); *Dames & Moore*, 453 U.S. at 678–86 (describing "a history of congressional acquiescence in conduct of the sort engaged in by the President"). In this regard, however, historical practice has evolved over time. *See generally* Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 Tex. L. Rev. 773, 788–99, 807–16 (2014). Although the President's authority to act unilaterally to terminate a treaty is now well established, there are a number of early examples involving alternative procedures for treaty termination, including "direct congressional action, congressional authorization or direction of presidential action, and senatorial authorization or approval." *Restatement (Fourth) of the Foreign Relations Law of the United States* § 113 cmt. c (Am. Law Inst., Tentative Draft No. 2, 2017); *see also id*. § 113 reporters' note 2 (collecting examples); Edwin S. Corwin, *The President: Office and Powers, 1787–1984*, at 226, 481 n.75 (5th rev. ed. 1984) (similar); Memorandum for the Secretary of State from Herbert J. Hansel, Legal Adviser, Dep't of State, *Re: President's Power to Give Notice of Termination of U.S.-ROC Mutual Defense Treaty* (Dec. 15, 1978), *reprinted in Termination of Treaties: The Constitutional Allocation of Power*, S. Comm. on Foreign Relations, 95th Cong. 395, 400–10 (Comm. Print 1978) ("1978 Legal Adviser Memo") (survey of historical practice).

While it would have been convenient had the Founders squarely addressed treaty termination in the constitutional text itself, we are left with no such clarity, and the appropriate division of authority between the President and Congress was hotly debated at the very start of the Republic. Here, as in other areas, "[a] Hamilton may be matched against a Madison." *Youngstown*, 343 U.S. at 635 n.1 (Jackson, J., concurring). After President Washington issued a proclamation to maintain U.S. neutrality in France's war with Great Britain and other European powers, Hamilton and Madison famously divided over the President's powers, including over whether the President could suspend the treaty of alliance with France without congressional action. *Compare* Alexander Hamilton,

Pacificus No. 1 (June 29, 1793) ("Hence in the case stated, though treaties can only be made by the President and Senate, their activity may be continued or suspended by the President alone."), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 42 (Harold C. Syrett et al. eds., 1969), *with* James Madison, *Helvidius* No. 3 (Sept. 7, 1793) ("Nor can [the President] have any more right to suspend the operation of a treaty in force as a law, than to suspend the operation of any other law."), *reprinted in* 15 *The Papers of James Madison* 95, 99 (Thomas A. Mason et al. eds., 1985).

When the United States terminated the treaty of alliance with France five years later, it did so only after an act of Congress. Following the XYZ Affair, Congress enacted a series of measures to authorize the Quasi-War with France, one of which included a declaration that "the treaties concluded with France," including the treaty of alliance, "shall not henceforth be regarded as legally obligatory on the government or citizens of the United States." Act of July 7, 1798, ch. 67, 1 Stat. 578, 578. There was some debate within Congress about whether that step fell within Congress's power. *See* David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 251–52 (1997). Thomas Jefferson (siding with Madison's earlier view) opined that "[t]reaties being declared, equally with the laws of the U. States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded." Thomas Jefferson, *A Manual of Parliamentary Practice* § 52 (Samuel H. Smith 1801). The 1798 example, however, "appears to be the only instance in U.S. history in which the full Congress purported to effectuate a termination directly," Bradley, *Treaty Termination*, 92 Tex. L. Rev. at 789, and it might be justified as incident to the power of Congress to "declare War," U.S. Const. art. I, § 8, cl. 11; *see* Bradley, *Treaty Termination*, 92 Tex. L. Rev. at 789–90, 799 & n.143; William Rawle, *A View of the Constitution of the United States of America* 68 (Philip H. Nicklin, 2d ed. 1829) ("Congress alone possesses the right to declare war; and the right to qualify, alter, or annul a treaty being of a tendency to produce war, is an incident to the right of declaring war.").[5]

[5] In *Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 272 (1817), the Supreme Court referred to the 1798 Act as a "repeal" of the treaty of alliance. But that case addressed only the domestic effects of abrogating the treaty, where Congress's authority is

The United States terminated two other treaties prior to the Civil War. In 1846, President Polk requested Congress's authorization to give notice to terminate a treaty with the United Kingdom concerning the Oregon territory. *See* Bradley, *Treaty Termination*, 92 Tex. L. Rev. at 790. Although Congress passed an act authorizing the President "at his discretion" to do so, Act of Apr. 27, 1846, ch. 4, 9 Stat. 109, 110, some legislators stated that the law was unnecessary because the President could act of his own authority or with Senate consent, *see* 1978 Legal Adviser Memo at 403–04; Cong. Globe, 29th Cong., 1st Sess. 159 (1846) (statement of Rep. Smith) (arguing that whether to give notice under the treaty "is a duty that belongs to the President, and he is responsible to the people for his discharge of it"). In 1855, after President Pierce announced his desire to terminate a Navigation Treaty with Denmark, the Senate alone provided him with authorization. Bradley, *Treaty Termination*, 92 Tex. L. Rev. at 793; *see* Franklin Pierce, Second Annual Message (Dec. 4, 1854), *in* 5 *A Compilation of the Messages and Papers of the Presidents* 273, 279 (James D. Richardson ed., 1897) ("*Papers of the Presidents*"). Again, some legislators questioned whether congressional involvement was necessary. 1978 Legal Adviser Memo at 404. Accordingly, prior to the Civil War, the United States had not settled on a clear understanding as to the role of Congress and which legislative actor, the Senate or the full Congress, had the authority to authorize the action.[6]

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well established, *see, e.g.*, *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899); *Rohrabacher Amendment*, 25 Op. O.L.C. at 169, not whether Congress could terminate the treaty as a matter of international law. The Supreme Court has never decided that latter question, nor do we address it here. The 1798 Act led Attorney General Biddle to suggest that congressional action might be required to denounce a treaty, *see International Load Line Convention*, 40 Op. Att'y Gen. 119, 123 (1941), but that dictum does not represent the considered view of the Department of Justice. *See, e.g.*, 2008 Bradbury Opinion at 5 n.1; *Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligations Under An Existing Treaty*, 20 Op. O.L.C. 389, 395–96 n.14 (1996).

[6] In addition to these two examples, President Madison's Administration exchanged diplomatic correspondence in 1815 regarding the impact of the Napoleonic Wars on a commercial treaty between the United States and the Netherlands; although both countries later disputed the status of the treaty, the United States "successfully argued that it had been agreed by the Netherlands government and President Madison in 1815 to regard the treaty as terminated." 1978 Legal Adviser Memo at 402; *see* 2 *Foreign Relations of the United States, 1873*, at 720–24 (1873). Notwithstanding Madison's earlier views, his

Over the course of time, historical practice shifted towards the view that the President could terminate a treaty without congressional authorization. In some instances, the President effectuated the termination, but Congress or the Senate then authorized it. Thus, in 1864, in response to Confederate raids from Canada, President Lincoln provided notice to terminate the Great Lakes Agreement with Great Britain, pursuant to the agreement's notice provision. *See* Abraham Lincoln, Fourth Annual Message (Dec. 6, 1864), *in* 6 *Papers of the Presidents* 243, 246; *see also* 12 Charles I. Bevans, Ass't Legal Adviser, Dep't of State, *Treaties and Other International Agreements of the United States of America: 1776–1949*, at 54 (1971) ("Bevans") (text of agreement). A fierce debate in the Senate ensued over whether President Lincoln had exceeded his constitutional powers in doing so and whether Congress could properly ratify his action.[7] In the end, however, Congress passed a joint resolution authorizing the President's action. Joint Resolution No. 13 of Feb. 9, 1865, 13 Stat. 568. (The President later rescinded the notice of termination before the six months had expired. *See* H.R. Doc. No. 56-471, at 33–34 (1900) (reprinting diplomatic correspondence).) And in 1911, President Taft gave notice to Russia of his intent to terminate a commercial treaty according to its terms, and then submitted a resolution for "ratification and approval" of his action to the Senate. 48 Cong. Rec. 453 (1911). Congress enacted a joint resolution that "adopted and ratified" the Presi-

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Administration did not seek or obtain congressional approval. There remains some debate, however, about whether the United States terminated the treaty, or whether the parties jointly recognized that the treaty had ceased to have effect. *Compare* Bradley, *Treaty Termination*, 92 Tex. L. Rev. at 796–97, *with* Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L.J. 181, 336 & n.127 (1945).

[7] *Compare* Cong. Globe, 38th Cong., 2d Sess. 312 (1865) (statement of Sen. Davis) ("[U]ntil it is ratified and confirmed by the action of Congress, as every gentleman acknowledges, [the President's notice] has no effect or operation whatever."), *and id*. (statement of Sen. Sumner) ("[A] treaty may be regarded as to a certain extent a part of the law of the land, to be repealed or set aside only as other law is repealed or set aside: that is, by act of Congress."), *with id*. at 313 (statement of Sen. Johnson) ("We know that under the Constitution of the United States, the only organ between the United States and foreign Governments is the Executive. They have nothing to do with the Congress of the United States or with the judiciary of the United States. The whole foreign relations of the country . . . are to be conducted by the President.").

dent's action. Joint Resolution No. 1 of Dec. 21, 1911, 37 Stat. 627 (1911); Bradley, *Treaty Termination*, 92 Tex. L. Rev. at 795.

That Congress has played a role in terminating treaties does not demonstrate that the President lacks the unilateral authority to do so. Beginning with President McKinley in 1899, and growing over time, Presidents increasingly assumed the authority to terminate a treaty without approval by the Senate or the full Congress. Over the past century, "unilateral presidential termination of treaties has . . . become the norm." Bradley, *Treaty Termination*, 92 Tex. L. Rev. at 801. As relevant to the case of NAFTA, many of these withdrawals have involved commercial treaties. For example:

- In 1899, President McKinley gave notice to denounce portions of a commercial treaty with Switzerland, Nov. 25, 1850, 11 Stat. 587, on the ground that those provisions required trade concessions from the United States that the President deemed contrary to U.S. policy. *See* 1978 Legal Adviser Memo at 406.
- In 1936, President Roosevelt notified Italy of his intent to withdraw from an 1871 commercial treaty, on the ground that his Administration wished to take measures against prejudicial trade control measures imposed by Italy. *See id*. at 414–15.
- In 1962, President Kennedy gave notice of the termination of a 1902 commercial convention with Cuba pursuant to the terms of the treaty. *See id*. at 420–21.
- In 1985, President Reagan gave notice of the termination of a treaty of friendship, commerce, and navigation with Nicaragua according to its terms. *See* Treaties Terminated by the President, *2002 Digest of United States Practice in International Law*, ch. 4, § B(5)(b), at 204.
- In 1987, President Reagan gave notice of the termination of the United States-Netherlands Antilles Income Tax Convention, on the ground that it had facilitated tax evasion using accounts and companies based in the Antilles. *See id*.
- In 1995, President Clinton gave notice of the termination of a 1980 tax treaty with Malta, on the ground that recent changes in Maltese law allowed exploitation of the terms of the treaty. *See id*. at 203–04; Dep't of the Treasury, *United States Terminates Tax*

Treaty with Malta, Treas. RR-717, 1995 WL 685012 (Nov. 20, 1995).

- In 2007, President George W. Bush gave notice to terminate a tax treaty with Sweden because Sweden had abolished the tax in question. Dep't of the Treasury, *United States Terminates Estate and Gift Tax with Sweden*, Treas. HP-436, 2007 WL 1724190 (June 15, 2007).
- In 2016, President Obama gave notice to withdraw the United States from the South Pacific Tuna Treaty in accordance with that treaty's withdrawal provision. *See* Treaty Amendment, *2016 Digest of United States Practice in International Law*, ch. 4, § B, at 149 ("*2016 Digest of U.S. Practice*").[8]

In view of these historical examples of presidential action, combined with what has usually been congressional acquiescence, there can no longer be serious doubt that the President may terminate a treaty in accordance with its terms. *See Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty*, 20 Op. O.L.C. 389, 395 n.14 (1996) ("[T]he executive branch has taken the position that the President possesses the authority to terminate a treaty in accordance with its terms by his unilateral action[.]"); *Goldwater v. Carter*, 617 F.2d 697, 699–708 (D.C. Cir.) (en banc) (per curiam) (upholding President Carter's authority to terminate a mutual defense treaty with the Republic of China according to the treaty's terms), *vacated*, 444 U.S. 996 (1979); *Restatement (Fourth) of Foreign Relations Law* § 113(1) ("According to established practice, the President has the authority to act on behalf of the United States in . . . withdrawing the United States from treaties . . . on the basis of terms in the treaty allowing for such action (such as a withdrawal clause)[.]"); *id*. § 113 cmt. c ("Since [the end of the 19th century], almost all actions to . . . withdraw from treaties have been carried out on behalf of the United States by the President and his or her agents acting unilaterally." (citation omitted)); *Restatement (Third) of Foreign Relations Law* § 339 ("Under the law of the United States, the President has the power . . . to suspend or

[8] After further negotiations, the United States rescinded its notice of withdrawal from the South Pacific Tuna Treaty also without seeking or obtaining Congress's approval. *See 2016 Digest of U.S. Practice* at 150.

terminate an agreement in accordance with its terms[.]"); Henkin at 213–14 (explaining that it is now "accepted that the President has the authority to denounce or otherwise terminate a treaty"); Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 Duke L.J. 1615, 1623 (2018) (observing that the Senate "knows that presidents claim authority to invoke withdrawal clauses unilaterally" and "routinely consents to treaties containing such clauses"). In so concluding, we are mindful of the historical examples in which Congress or the Senate has played a role in treaty termination. *See, e.g.*, *Van der Weyde v. Ocean Transp. Co.*, 297 U.S. 114, 116 (1936). But such examples do not suggest that congressional approval is always required—especially since it has, as an historical matter, more often been lacking. The President therefore need not return to Congress before terminating or withdrawing from a treaty according to its terms.

C.

There has been comparatively less discussion concerning the President's authority to terminate or withdraw from a congressional-executive agreement, as distinct from a treaty. However, we believe that the textual and structural reasoning described above, as well as the historical practice, applies "with equal force to the President's authority to terminate congressional-executive agreements according to their terms." 2008 Bradbury Opinion at 6. When the President invokes a termination provision in a congressional-executive agreement, he is implementing the laws that Congress has enacted and exercising his own foreign-affairs powers. In doing so, his powers are "unquestionably expansive, consisting of both the authority provided by Congress's authorizing legislation and the President's considerable independent authority to act in the realm of foreign affairs." *Id*. In that field the President's action is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Dames & Moore*, 453 U.S. at 668 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)).

It could be argued that the President may not unilaterally terminate a congressional-executive agreement because Congress approved the agreement by statute, and therefore, any changes would require a new statute. That argument parallels one made—ultimately unsuccessfully—in early

debates on the President's authority to terminate treaties, which may also have the force of domestic law. *See, e.g.*, Madison, *Helvidius* No. 3 ("Nor can [the President] have any more right to suspend the operation of a treaty in force as a law, than to suspend the operation of any other law."), 15 *Papers of James Madison* at 99; Jefferson, *Manual of Parliamentary Practice* § 52 ("Treaties being declared, equally with the laws of the U. States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded."). Here too the argument fails. As explained above, a congressional-executive agreement "consists of two distinct instruments," both the international agreement and the authorizing statute to which it is incident. 2008 Bradbury Opinion at 5. When Congress approves an international agreement, that legislative act does not make the international agreement itself a statute. The international agreement remains a "distinct" instrument, *id*., entered into by the President "pursuant to his constitutional authority for conducting the Nation's foreign affairs," *Uruguay Round Agreements*, 18 Op. O.L.C. at 234; *see also* Bradley, *Congressional-Executive Agreements*, 67 Duke L.J. at 1632–34 (2018) (explaining that congressional-executive agreements "reflect a *combination* of congressional and presidential authority" and that "Congress has no authority to make binding international agreements"). Under international law, the mechanism for communicating treaty termination is typically "through an instrument communicated to the other parties" which only "the Head of State, Head of Government, or Minister for Foreign Affairs are presumed to have the authority to sign on behalf of the State." Vienna Convention on the Law of Treaties art. 67.2, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. The diplomatic responsibility for communicating that notice would rest squarely with the President.

The President may thus terminate the international-law obligations of the United States under the terms of an agreement without additional action by Congress. The President's termination of the international agreement will not necessarily suspend the operation of any domestic implementing legislation. That question will depend upon the terms of the implementing legislation—whether, for example, Congress has provided that the statute should cease to have effect upon termination of the international agreement. The effect of termination on such implementing legislation, however, is a separate question from whether the President may terminate the international agreement and thereby relieve the United

States of its international-law obligations. *See* Bradley, *Congressional-Executive Agreements*, 67 Duke L.J. at 1634 (noting that even if implementing legislation remains in force, that "does not itself disallow a presidential termination" of the international agreement, just as the President may terminate an Article II treaty that has been implemented by legislation).

It could also be argued that the President must seek congressional approval in terminating an international trade agreement because Congress approved the agreement under its broad authority to "regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 3. But many treaties have dealt with "matters that were subject to legislation," including international trade, Henkin at 195; *see also supra* pp. 143–44 (discussing examples), and that fact has never been thought to disable the President from terminating a treaty without obtaining additional congressional authorization. *See, e.g.*, Bradley, *Congressional-Executive Agreements*, 67 Duke L.J. at 1630 (identifying examples from 1936 and 1985). Given the President's powers in this area, there is no good reason to believe that the Constitution preserves any greater role for Congress in the termination of a congressional-executive agreement on international trade than on any other subject matter. *See id.* at 1638. It is therefore entirely congruent with the constitutional design for the President to carry out the termination provisions consistent with the agreement as approved by Congress.

Finally, the historical practice over the past century once again weighs in favor of presidential authority. While examples involving congressional-executive agreements are not as numerous as those involving treaties, Presidents have invoked the right of the United States to withdraw from such agreements on a number of occasions. In 1975, the Ford Administration gave "notice of the intention of the United States to withdraw from the International Labor Organization" ("ILO"), which the United States had joined pursuant to a congressional-executive agreement, in accordance with a provision in the ILO constitution requiring two years' notice of withdrawal. Membership and Representation, *1975 Digest of United States Practice in International Law*, ch. 2, § 4(C), at 71 (quoting Secretary of State Kissinger's letter to the ILO).[9] The authorizing legislation

[9] The United States joined the ILO in 1934. *See* Pub. Res. No. 73-43, § 1, 48 Stat. 1182, 1182 (1934) (codified at 22 U.S.C. § 271); Proclamation of President Franklin D. Roosevelt, Sept. 10, 1934, 49 Stat. 2712 (1934). The ILO constitution was later amended

did not limit the President's authority to withdraw, and President Ford did not seek congressional approval. 1978 Legal Adviser Memo at 423. Indeed, it appears that "the issue of Congressional approval was not raised in either House of the Congress, despite the fact that a number of members of the Senate and House did not favor withdrawal from the ILO." *Id*.

Similarly, in 1983, without seeking congressional approval, the Reagan Administration gave notice to withdraw the United States from the United Nations Educational, Scientific and Cultural Organization ("UNESCO") in accordance with "the terms of Article Two Paragraph Six of the [UNESCO] Constitution." Letter from George P. Shultz, Secretary of State, to Amadou-Mahtar M'Bow, Director General, UNESCO (Dec. 28, 1983), *reprinted in* 84 Dep't of State Bull. 41, 41 (Feb. 1984); *see also* Amendments to the Constitution of the United Nations Educational, Scientific and Cultural Organization, Dec. 8, 1954, T.I.A.S. No. 3469 (amending UNESCO constitution to provide for withdrawal upon notice). As with the ILO, Congress had approved U.S. membership in UNESCO by statute. *See* Pub. L. No. 79-565, § 1, 60 Stat. 712, 712 (1946) (codified at 22 U.S.C. § 287m); Constitution of the United Nations Educational, Scientific and Cultural Organization, Nov. 16, 1945, 61 Stat. 2495, 2519 (1946). President Reagan's notice took effect, and the United States withdrew, on December 31, 1984. *See* Message to the Congress Transmitting the Annual Report on International Activities in Science and Technology (Mar. 20, 1985), 1 *Pub. Papers of Pres. Ronald Reagan* 319, 321 (1985).

The United States rejoined UNESCO in 2002. *See* Address to the United Nations General Assembly in New York City (Sept. 12, 2002), 2 *Pub. Papers of Pres. George W. Bush* 1572, 1572 (2002). On October 12, 2017, the Trump Administration again gave notice that the United States intended to withdraw. *See* Heather Nauert, Dep't of State, Press Release, *The United States Withdraws from UNESCO* (Oct. 12, 2017), https://2017-

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to add a withdrawal provision, and the President submitted the amended constitution to Congress, which approved it. *See* Instrument for the Amendment of the Constitution of the International Labor Organization, annex art. 1(5), Apr. 20, 1948, 62 Stat. 3485, 3494 (providing that "[n]o Member . . . may withdraw from the [ILO] without giving notice," and that such notice "shall take effect two years after the date of its reception"); H.R. Rep. No. 80-1057, at 10 (1947) (transmittal of the amended constitution); Pub. L. No. 80-843, § 1, 62 Stat. 1151, 1151 (1948) (congressional approval).

2021.state.gov/the-united-states-withdraws-from-unesco (stating that, "[p]ursuant to Article II(6) of the UNESCO Constitution, U.S. withdrawal will take effect on December 31, 2018"). Once again, the President did not seek congressional approval.

Presidents have also terminated international agreements for which Congress provided advance statutory authorization, without seeking congressional approval for the termination. *See, e.g.*, Diplomatic Note to the Secretariat of Foreign Relations, Mexico, from the U.S. Embassy at 1 (June 28, 2012) (notice to terminate 1972 agreement on screwworm eradication); Diplomatic Note to the Ministry of Foreign Affairs of Japan from the U.S. Embassy at 1 (Dec. 17, 2004) (notice to terminate 1987 textile trade agreement); U.S. Trade Representative, Press Release, *U.S. Files WTO Case Against EU Over Unfair Airbus Subsidies* (Oct. 10, 2004) (notice to terminate 1992 agreement implementing 1979 agreement on trade in civil aircraft); Proclamation No. 2763, 12 Fed. Reg. 8866, 8866–67 (1946) (notice to terminate five bilateral trade agreements); Bradley, *Congressional-Executive Agreements*, 67 Duke L.J. at 1638 & n.95 (citing examples from the Johnson, Eisenhower, and Truman Administrations); Randall H. Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 Minn. L. Rev. 879, 880–81 n.7 (1958) (collecting additional examples).[10] Some of those actions concerned termination by mutual consent of the parties or by the supersession of a later agreement. *See, e.g.*, *2016 Digest of U.S. Practice*

[10] For the respective statutory bases of these congressional-executive agreements, see 21 U.S.C. § 114b (1970) (screwworm agreement); 7 U.S.C. § 1854 (1982) (textile agreement); 19 U.S.C. § 2503(c)(10) (1982) (aircraft trade agreement); 19 U.S.C. § 1351 (1940) (bilateral trade agreements). In addition to these examples, President Kennedy gave notice in 1962 to terminate a 1934 trade agreement with Cuba. 1978 Legal Adviser Memo at 421; *see also* 6 Bevans at 1163 & n.5. The 1934 trade agreement was a congressional-executive agreement: President Roosevelt had entered into it pursuant to the Tariff Act of 1930. *See* Reciprocal Trade Agreement, Cuba-U.S., Aug. 24, 1934, 49 Stat. 3559, 3559 (1936); *see also id.* art. XVII, 49 Stat. at 3568–69 (termination provision). The United States and Cuba had suspended the 1934 trade agreement in 1947 but had reserved each country's right to terminate it. *See* Exclusive Agreement Between the United States of America and the Republic of Cuba Supplementary to the General Agreement on Tariffs and Trade, Cuba-U.S., ¶ 1, Oct. 30, 1947, 61 Stat. 3699, 3700; Exchange of Letters, Cuba-U.S., Oct. 30, 1947, T.I.A.S. No. 1703, *in* 6 Bevans at 1231–33. When President Kennedy terminated the agreement pursuant to that reservation of rights, he did so without seeking congressional approval. 1978 Legal Adviser Memo at 421.

at 477 (supersession of 1960 U.S.-Mexico air transportation services agreement by new agreement); 49 U.S.C. § 1462 (1958) (statutory basis for 1960 agreement). But even these precedents illustrate the established practice of the President ending congressional-executive agreements without involving Congress.

While history provides ample precedent for the President's authority to withdraw without congressional approval, it is also true that, as with treaties, there have been instances where Congress purported to direct the termination of congressional-executive agreements. The Comprehensive Anti-Apartheid Act of 1986, for example, provided that "[t]he Secretary of State shall terminate" an air services agreement with South Africa, Pub. L. No. 99-440, § 306(b)(1), 100 Stat. 1086, 1100, an agreement which Congress had authorized, *see* 49 U.S.C. § 602 (1940). The Secretary of State then terminated the agreement. *See South African Airways v. Dole*, 817 F.2d 119, 121 (D.C. Cir. 1987); *see also infra* p. 155 (discussing example in which Congress purported to reserve for itself the power to "annul" mail privileges Congress authorized the President to extend to Mexico and Canada by international agreement); Walter McClure, *International Executive Agreements* 29 (1941) (noting congressional authorization in 1923 for the termination of certain executive agreements relating to the Panama Canal, which Congress had ratified). But, as with treaties, such examples suggest only that Congress has sometimes sought to play a role in the process, not that congressional approval is necessary. Where Congress has not sought to involve itself in the process, the President is not constitutionally required to seek congressional approval before invoking the terms of a congressional-executive agreement to terminate or withdraw from the agreement.

III.

In view of the principles discussed above, we have no difficulty concluding that the President has the authority, without further action by Congress, to give notice on behalf of the United States to withdraw from NAFTA according to its terms. NAFTA contains an express mechanism for withdrawal, and nothing in the NAFTA Implementation Act or any other statute purports to limit the President's authority to carry out that mechanism.

President Bush conducted the negotiations that led to NAFTA under the authority granted to him by Article II and consistent with the procedures specified by Congress to make the trade agreement eligible for fast-track consideration, *see* 19 U.S.C. §§ 2902–2903, and he signed NAFTA on behalf of the United States in 1992. NAFTA provides that "[a] Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties." NAFTA art. 2205, 32 I.L.M. at 703. Congress "approve[d]" NAFTA in its entirety and without reservation, including article 2205. *See* 19 U.S.C. § 3311(a)(1). Pursuant to the NAFTA Implementation Act, *id.* § 3311(b), President Clinton directed an exchange of notes with Canada and Mexico and provided for NAFTA's "entry into force on January 1, 1994." Memorandum on Implementation of NAFTA (Dec. 27, 1993), 2 *Pub. Papers of Pres. William J. Clinton* 2206, 2206 (1993).

As the constitutional actor with "exclusive prerogatives in conducting the Nation's diplomatic relations," *OSTP*, 35 Op. O.L.C. at 120, the President may invoke NAFTA's withdrawal provision on behalf of the United States to communicate the notice of withdrawal to Canada and Mexico. The President's role as the agent of the United States in conducting diplomacy, coupled with his constitutional responsibility to execute the laws, justifies "presum[ing] (at least absent evidence to the contrary) that Congress, in approving an international agreement . . . , intended for the President to administer the agreement in accordance with its terms." 2008 Bradbury Opinion at 8 (citing *Goldwater*, 617 F.2d at 708). No language in the NAFTA Implementation Act limits his authority to do so, or rebuts the presumption that, "in approving an international agreement" like NAFTA, Congress "intended for the President to administer the agreement in accordance with its terms." *Id*. A presidential act withdrawing from NAFTA under the terms of article 2205 would therefore be supported by both the President's own independent foreign-affairs authority and Congress's approval through the NAFTA Implementation Act—putting the President's authority at its constitutional zenith. *See Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

Other provisions in the statute confirm that Congress left the President broad discretion to implement the agreement. Congress expected the President, for example, to exchange notes with Canada and Mexico to make NAFTA effective, and to determine whether those countries had

implemented sufficient changes to their domestic laws to permit NAFTA to enter into force. 19 U.S.C. § 3311(b)(1)(A). Congress charged the Executive Branch with administering NAFTA and its authorizing statute through appropriate proclamations, regulations, and other executive action. *Id.* §§ 3314, 3331, 3332(q), 3372. Congress's broad delegations to the President of the authority to take action consistent with NAFTA and its implementing statute presumptively include the power to invoke the agreement's withdrawal provision. *See* 2008 Bradbury Opinion at 8. The delegations reflect "congressional acceptance of a broad scope for executive action," *Dames & Moore*, 453 U.S. at 677, in the administration of NAFTA, including in making determinations about whether and when to withdraw from that agreement.

Indeed, far from restricting that authority, the relevant provisions of the NAFTA Implementation Act authorize the President to take any and all actions consistent with NAFTA's terms. In the Act, Congress "approve[d]" "the statement of administrative action" that President Clinton submitted along with NAFTA. 19 U.S.C. § 3311(a)(2). That statement had explained that the President would, after "consultation" with Congress, invoke article 2205 to withdraw the United States from NAFTA if Mexico or Canada failed to abide by three supplemental agreements. H.R. Doc. No. 103-159, vol. 1, at 456. And even that pledge to consult with Congress before withdrawing from the agreement was not compelled by anything in the NAFTA Implementation Act. The Act requires the President to consult with Congress in many instances before exercising his authority to proclaim tariffs and other matters under the NAFTA Implementation Act. *See, e.g.*, 19 U.S.C. § 3313(a). But the Act does not call for consultation before the President makes a decision to withdraw from NAFTA. The NAFTA Implementation Act thus confirms that the President may withdraw from the Agreement without obtaining congressional approval.[11]

[11] We note that there is at least one statement in the legislative history suggesting that congressional approval may be required. *See* 139 Cong. Rec. 29,784 (1993) (statement of Rep. Franks) ("[U]nder article 2205, each country has the opportunity to withdraw from NAFTA. All it would require for U.S. withdrawal, is a vote of the Congress and 6 months [sic] notice."). That statement, however, finds no support in either article 2205 or the NAFTA Implementation Act, so we do not rely upon it.

Had Congress sought to restrict the President's discretion in this regard, it would have said so expressly. The NAFTA Implementation Act is filled with provisions anticipating that NAFTA might cease to be effective as between the United States and Canada or Mexico (e.g., through withdrawal). Yet none restricts the President's power to invoke NAFTA's withdrawal provision. Section 2, for example, generally defines the term "NAFTA country" to mean:

> (A) Canada for such time as the Agreement is in force with respect to, and the United States applies the Agreement to, Canada; and
>
> (B) Mexico for such time as the Agreement is in force with respect to, and the United States applies the Agreement to, Mexico.

19 U.S.C. § 3301(4). Section 109(b), entitled "Termination of NAFTA Status," provides that, "[d]uring any period in which a country ceases to be a NAFTA country, sections 101 through 106 shall cease to have effect with respect to such country." *Id.* § 3311 note. Section 415 similarly provides that title IV of the NAFTA Implementation Act, governing dispute resolution between the parties to the agreement, generally "shall cease to have effect" with respect to a country "on the date on which a country ceases to be a NAFTA country." *Id.* § 3451; *see also* NAFTA Implementation Act § 203(b)(1), 107 Stat. at 2088 (amending 19 U.S.C. § 1311 to provide a rule for drawback of certain duties "[i]f Canada ceases to be a NAFTA country"); *id.* § 203(b)(2)(B) & (C), (b)(3), (b)(4)(B), (b)(5)(A)(i), 107 Stat. at 2089–91 (making similar amendments to other provisions). Congress plainly anticipated these possibilities, yet did not purport to restrict the President's authority to bring them about.

Congress in fact has acknowledged the President's authority to exercise the termination right of the United States under the free trade agreement with Canada that preceded NAFTA. Before reaching the NAFTA deal, the United States and Canada entered into a bilateral free trade agreement, CFTA, which Congress approved by statute. *See* United States-Canada Free-Trade Agreement Implementation Act of 1988 ("CFTA Implementation Act"), Pub. L. No. 100-449, § 101(a)(1), 102 Stat. 1851, 1852 (codified at 19 U.S.C. § 2112 note). The agreement allowed either party to terminate on six months' notice if the parties failed to agree in the future on revised rules for certain duties. United States-Canada Free-Trade

Agreement, Can.-U.S., art. 1906, Dec. 22, 1987–Jan. 2, 1988, 27 I.L.M. 293, 390. Section 410(a) of the implementing law required the President to submit a report "if the President decide[d] not to exercise the rights of the United States . . . to terminate" the agreement under that provision. 102 Stat. at 1897. No provision of the CFTA Implementation Act expressly conferred upon the President the authority to exercise the right of the United States to terminate, but this reporting requirement unequivocally confirms that Congress believed such authority rested with the President. There is every reason to think (and no reason to doubt) that Congress embraced a similar understanding with respect to the United States' parallel withdrawal right under NAFTA.

The 1988 Act and the Trade Act of 1974 are similarly consistent with this understanding of the President's withdrawal authority. NAFTA's negotiations were consistent with these statutory frameworks, and it was approved under both statutes. Section 125(a) of the Trade Act requires that trade agreements "entered into under [the Trade Act] shall be subject to termination, . . . or withdrawal, upon due notice, at the end of a period specified in the agreement." 19 U.S.C. § 2135(a). Section 125(b) provides the President with broad authority to "at any time terminate . . . any proclamation made under" it, but does not speak to the termination of trade agreements. *Id.* § 2135(b). In both the Trade Act and the 1988 Act, Congress specified that congressional approval would be required for certain kinds of trade agreements to "enter into force with respect to the United States." *Id.* §§ 2112(e), 2903(a)(1). Congress did not, however, reserve a similar role for itself in the process of *withdrawing* from any such agreements. Indeed, "[v]arious forms of this trade legislation date back at least to the Trade Act of 1930, and yet in the succeeding eighty-eight years Congress has never sought to limit presidential termination in this legislation." Bradley, *Congressional-Executive Agreements*, 67 Duke L.J. at 1635. And section 102(a) of the Trade Act encourages the President "to take all appropriate and feasible steps within his power (including the full exercise of the rights of the United States under international agreements)" to eliminate distortions of international trade, once again reflecting the background assumption that the President "exercise[s] . . . the rights of the United States" under its international agreements. 19 U.S.C. § 2112(a).

In other cases, Congress has been explicit when it sought to play a role in the termination of international agreements authorized by statutes. "For example, in 1960 Congress authorized the President to enter into postal agreements with Mexico and Canada that would extend to those nations the privilege of transporting mail over United States territory." 2008 Bradbury Opinion at 9. Congress "provided that 'the President or Congress may annul the privilege at any time.'" *Id*. (quoting Pub. L. No. 86-682, sec. 1, § 6103, 74 Stat. 578, 688 (1960)). That and other examples demonstrate that Congress "is readily capable of indicating its intention to have a role by statute in the termination of agreements it has authorized." *Id*. Yet it did not do so in implementing NAFTA.[12]

We conclude therefore that, consistent with longstanding Executive Branch practice and the NAFTA Implementation Act, the President may invoke article 2205 of NAFTA to withdraw from the agreement in six months, without obtaining congressional approval. That withdrawal, once it took effect, would mean that the United States is no longer bound by NAFTA as a matter of its international obligations.

IV.

Withdrawing from NAFTA would also have consequences under U.S. domestic law. For instance, many provisions of the NAFTA Implementation Act apply to "a NAFTA country" or "NAFTA countries." *See, e.g.*, 19 U.S.C. §§ 3311 note, 3333, 3334, 3335, 3371, 3372, 3391(b)(1). Section 2(4) provides that Canada and Mexico are each a "NAFTA country," and thus entitled to receive certain trade benefits prescribed throughout the Act, "for such time as the Agreement is in force with respect to, *and the United States applies the Agreement to*," each country. *Id.* § 3301(4) (emphasis added). After withdrawing from NAFTA, the United States would no longer be "appl[ying]" the agreement to either country, and therefore, they would cease to be NAFTA countries for purposes of the Act.

The fact that the President's invocation of article 2205 could trigger that event is unremarkable. When the President terminates a self-

[12] Because Congress did not purport to limit the President's authority to terminate NAFTA, we have no occasion to address constitutional limits on Congress's ability to do so.

executing treaty, the domestic-law consequence is similar, and the Supreme Court has long recognized that Congress may authorize the President to execute the law in a manner that terminates the legal effect of statutory provisions. *See Marshall Field & Co. v. Clark*, 143 U.S. 649, 690–91 (1892) (discussing "the sanction of many precedents in legislation" that "invest the president with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations"); *see also, e.g.*, *The Orono*, 18 F. Cas. 830, 830 (C.C.D. Mass. 1812) (No. 10,585) (Story, Circuit J.) (upholding the President's statutory authority to drop trade restrictions against Great Britain and France upon finding that those countries had modified edicts harmful to U.S. trade); Department of Defense Appropriations Act, 1991, Pub. L. No. 101-511, § 8105(d)(2), 104 Stat. 1856, 1902 (1990) (codified as amended at 10 U.S.C. § 113 note) (authorizing the President to waive statutory limits capping the number of troops stationed in Japan); 22 U.S.C. § 2370a(g) (providing that the President may "waive" prohibitions on foreign assistance to foreign nations that wrongfully expropriate property of Americans); 50 U.S.C. § 4305(a) (authorizing the President to "suspend" prohibitions on trade with an ally of an enemy of the United States during wartime). Thus, in providing notice under article 2205, the President would be acting pursuant to the terms of the agreement and would be both carrying out legislation that Congress properly authorized him to implement and exercising his foreign-affairs powers. He would be executing the laws, not unmaking them.

Finally, while the President's authority to withdraw under article 2205 is based upon his Article II authority, in addition to the statute, the Supreme Court has made clear that in the field of foreign affairs, Congress may delegate broad discretion to the Executive. When the President acts "as the sole organ of the federal government in the field of international relations," the Constitution does not require Congress "to lay down narrowly definite standards by which the President is to be governed." *Curtiss-Wright*, 299 U.S. at 320, 322; *see also Zivotofsky*, 576 U.S. at 20 (recognizing that, under *Curtiss-Wright*, "Congress may grant the President substantial authority and discretion in the field of foreign affairs"); *Youngstown*, 343 U.S. at 636 n.2 (Jackson, J., concurring) ("[T]he strict limitation upon congressional delegations of power to the President over internal affairs does not apply with respect to delegations of power in

external affairs."). Many volumes "of the United States Statutes contain[] one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *Curtiss-Wright*, 299 U.S. at 324.

In this opinion, we do not address the full range of domestic-law implications that would follow from the United States' withdrawal from NAFTA. Please let us know if we can be of any further assistance in this or any other regard.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Reconsidering Whether the Wire Act Applies to Non-Sports Gambling

This Office concluded in 2011 that the prohibitions of the Wire Act in 18 U.S.C. § 1084(a) are limited to sports gambling. Having been asked to reconsider, we now conclude that the statutory prohibitions are not uniformly limited to gambling on sporting events or contests. Only the second prohibition of the first clause of section 1084(a), which criminalizes transmitting "information assisting in the placing of bets or wagers on any sporting event or contest," is so limited. The other prohibitions apply to non-sports-related betting or wagering that satisfy the other elements of section 1084(a).

The 2006 enactment of the Unlawful Internet Gambling Enforcement Act did not alter the scope of section 1084(a).

November 2, 2018

MEMORANDUM OPINION FOR THE
ACTING ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

In 2010, the Criminal Division asked whether the Wire Act, 18 U.S.C. § 1084, prohibits New York and Illinois from using the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults. That request arose from a potential conflict between the Wire Act and the Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–5367 ("UIGEA"). In the Criminal Division's view, the Wire Act prohibits such transactions, but UIGEA might permit the interstate routing of certain state lottery transactions.

We answered that request by challenging its underlying premise: that the Wire Act prohibits transmissions unrelated to sports gambling. Instead of analyzing the interplay between the Wire Act and UIGEA, we concluded, more broadly, that the prohibitions of the Wire Act are limited to sports gambling and thus do not apply to state lotteries at all. *See Whether the Wire Act Applies to Non-Sports Gambling*, 35 Op. O.L.C. 134 (2011) ("2011 Opinion"). Our opinion departed from the position of the Department of Justice, which had successfully brought Wire Act prosecutions for offenses not involving sports gambling.

The Criminal Division has asked us to reconsider the 2011 Opinion's conclusion that the Wire Act is limited to sports gambling. *See* Memorandum for Curtis E. Gannon, Acting Assistant Attorney General, Office of

Legal Counsel, from Kenneth A. Blanco, Acting Assistant Attorney General, Criminal Division (May 26, 2017).[1] We do not lightly depart from our precedents, and we have given the views expressed in our prior opinion careful and respectful consideration. Based upon the plain language of the statute, however, we reach a different result. While the Wire Act is not a model of artful drafting, we conclude that the words of the statute are sufficiently clear and that all but one of its prohibitions sweep beyond sports gambling. We further conclude that that the 2006 enactment of UIGEA did not alter the scope of the Wire Act.

I.

The Wire Act prohibits persons involved in the gambling business from transmitting several types of wagering-related communications over the wires. The prohibitions, located at 18 U.S.C. § 1084, were originally enacted in 1961.[2] Section 1084(a) sets them out:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers,

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[1] We address this opinion to John Cronan, as the Acting Assistant Attorney General for the Criminal Division, because Assistant Attorney General Brian Benczkowski is recused from this matter.

[2] Pub. L. No. 87-216, § 2, 75 Stat. 491. The provision has been amended three times, although none of those amendments is material to our analysis. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7024, 102 Stat. 4181, 4397 (adding section 1084(e), which defines "State"; making conforming amendments; and adding the term "foreign country" to section 1084(b), so that the Wire Act now includes an exception for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest *from* a state or "foreign country" where such betting is legal *into* a state or "foreign country" in which such betting is also legal); Crime Control Act of 1990, Pub. L. No. 101-647, § 1205(g), 104 Stat. 4789, 4831 (amending the definition of "State" in section 1084(e)); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 330016(1)(L), 108 Stat. 1796, 2147 (altering the statutory penalty in section 1084).

> shall be fined under this title or imprisoned not more than two years, or both.

Section 1084(a) consists of two general clauses, each of which prohibits two kinds of wire transmissions, creating four prohibitions in total. The first clause bars anyone in the gambling business from knowingly using a wire communication facility to transmit "bets or wagers" or "information assisting in the placing of bets or wagers on any sporting event or contest." *Id*.[3] The second clause bars any such person from transmitting wire communications that entitle the recipient to "receive money or credit" either "as a result of bets or wagers" or "for information assisting in the placing of bets or wagers." *Id*.[4]

The Wire Act's interpretive difficulties arise from the phrase "on any sporting event or contest," which appears immediately after the second prohibition in the first clause. Those words narrow the prohibition on transmitting "information assisting in the placing of bets or wagers" to bets or wagers "on a sporting event or contest." That phrase is not otherwise repeated in section 1084(a). The other three prohibitions thus appear to be naturally read to apply to wire transmissions involving all forms of gambling, not just "bets or wagers on any sporting event or contest." But if that reading is correct, our 2011 Opinion asked, then why would Congress, "having forbidden the transmission of *all* kinds of bets or wagers . . . prohibit only the transmission of information assisting in bets or wagers concerning sports"? 35 Op. O.L.C. at 140–41. Why permit transmissions of information that assists gambling on non-sporting events, but

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

[4] As our 2011 Opinion explained, the second clause prohibits "the transmission of a wire communication which entitles the recipient *to receive money or credit*" either "as a result of bets or wagers[] *or* for information assisting in the placing of bets or wagers." 35 Op. O.L.C. at 139 n.5 (emphases and alterations in original). Reading the second clause to prohibit "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers" or "the transmission of a wire communication . . . for information assisting in the placing of bets or wagers" would be awkward and would duplicate the second prohibition, which covers "information assisting in the placing of bets or wagers on any sporting event or contest."

then prohibit transmissions "entitling the recipient to receive money" for providing information that assists "in the placing of those lawfully-transmitted bets"? *Id*. at 144. In short, why would Congress have limited just one of the four prohibitions to sports gambling?

Absent any obvious answer to these questions, our 2011 Opinion concluded that the statutory text was ambiguous, and that the "more logical result" was to read section 1084(a)'s prohibitions as parallel in scope and therefore as all limited to sports gambling. *Id*. at 140. In so doing, we recognized that our reading of the statute departed from that of the Criminal Division and of some courts that had addressed the statute. *See id*. at 137–38. Several district courts had upheld prosecutions involving non-sports gambling, reasoning that the limitation to "sporting event or contest" did not apply to all of section 1084(a)'s prohibitions.[5] On the other hand, the Fifth Circuit had affirmed a district court opinion that found that the "plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest." *In re Mastercard Int'l, Inc., Internet Gambling Litig*., 132 F. Supp. 2d 468, 480 (E.D. La. 2001), *aff'd*, 313 F.3d 257 (5th Cir. 2001).[6]

Those prosecutions, of course, were brought by the Department of Justice. In requesting our opinion, the Criminal Division had advised that "[t]he Department has uniformly taken the position that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling[.]" Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, from

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[5] *See United States v. Lombardo*, 639 F. Supp. 2d 1271, 1281 (D. Utah. 2007) (holding that the "sporting event or contest" qualifier does not apply to section 1084(a)'s second clause; noting that this conclusion "aligns with the Tenth Circuit's *Criminal Pattern Jury Instructions*"); Report and Recommendation of United States Magistrate Judge Regarding Gary Kaplan's Motion to Dismiss Counts 3–12, at 4–7, *United States v. Kaplan*, No. 06-CR-337CEJ-2 (E.D. Mo. Mar. 20, 2008) (concluding that the "sporting event or contest" qualifier applies only to the second prohibition in section 1084(a)'s first clause); *see also United States v. Ross*, No. 98 CR. 1174-1 (KMV), 1999 WL 782749, at *2 (S.D.N.Y. Sept. 16, 1999) (suggesting that the term "sporting event or contest" modifies only the second prohibition in section 1084(a)'s first clause); *Vacco v. World Interactive Gaming Corp*., 714 N.Y.S.2d 844, 847, 851–52 (N.Y. Sup. Ct. 1999) (suggesting same).

[6] Since our 2011 Opinion, the First Circuit has observed in dictum that the Wire Act is limited to betting and wagering on "any sporting event or context." *United States v. Lyons*, 740 F.3d 702, 718 (1st Cir. 2014).

Lanny A. Breuer, Assistant Attorney General, Criminal Division, Department of Justice (July 12, 2010). In the years before our opinion, the Department had advanced that position in court and before Congress.[7] And on several prior occasions, the Criminal Division had prosecuted defendants whose wire communications involved non-sports gambling, including a 1971 prosecution of "a business enterprise involving gambling in the form of numbers writing." *United States v. Manetti*, 323 F. Supp. 683, 687 (D. Del. 1971); *see also United States v. Vinaithong*, No. 97-6328, 188 F.3d 520, at *1 (10th Cir. 1999) (unpublished table decision) (order and judgment affirming the sentences of defendants who pleaded guilty under the Wire Act for transmission of "gambling information" related to a "gambling enterprise which has been referred to as a mirror lottery").[8] In two congressional hearings in 1998 and 2000, the Criminal Division had acknowledged some uncertainty concerning the scope of the Wire Act and urged Congress to amend the statute to confirm its application to non-sports gambling.[9] But our 2011 Opinion represented a marked

[7] *See* Letter for Dennis K. Neilander, Chairman, Nevada Gaming Control Board, from Michael Chertoff, Acting Assistant Attorney General, Criminal Division (Aug. 23, 2002) ("[T]he Department of Justice believes that federal law prohibits gambling over the Internet, including casino-style gambling."); *Unlawful Internet Gambling Funding Prohibition Act and the Internet Gambling Licensing and Regulation Commission Act: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 108th Cong. 70 (2003) (response of John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, to questions for written submission from Rep. Goodlatte) ("The Department of Justice has long held, and continues to hold, the position that 18 U.S.C. § 1084 applies to all types of gambling, including casino-style gambling, not just sports betting."); Letter for Carolyn Adams, Superintendent, Illinois Lottery, from Laura H. Parsky, Deputy Assistant Attorney General, Criminal Division (May 13, 2005) (explaining that if Illinois permitted online purchase of state lottery tickets it would be in violation of federal law—so long as the "transmission [were] routed outside of the state"); *Establishing Consistent Enforcement Policies in the Context of Online Wagers: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 13 (2007) (statement of Catherine Hanaway, U.S. Attorney) ("It is the Department's view, and that of at least one federal court (the E.D. Mo.), that [the Wire Act] applies to both sporting events and other forms of gambling, and that it also applies to those who send or receive bets in interstate or foreign commerce, even if it is legal to place or receive bets in both the sending jurisdiction and the receiving jurisdiction.").

[8] The Criminal Division advises that the Department secured at least seventeen Wire Act convictions between Fiscal Years 2005 and 2011 that involved non-sports betting.

[9] *Compare, e.g.*, *Internet Gambling Prohibition Act of 1997: Hearings on H.R. 2380 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. 78 (1998)

shift in how the Department interpreted the statute, including with respect to some successful prosecutions.

II.

The Criminal Division has asked us to reconsider our 2011 Opinion. We do not lightly depart from our precedent. But having reconsidered our conclusion, we now reach a different result. The 2011 Opinion, in our view, incorrectly interpreted the limitation "on any sporting event or contest" (the "sports-gambling modifier") to apply beyond the second prohibition that it directly follows: the prohibition on transmitting "information assisting in the placing of bets or wagers."

A.

Section 1084(a)'s first clause makes it a crime to use the wires "for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or

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(statement of Kevin DiGregory, Deputy Assistant Att'y Gen., Criminal Division) ("That being said, [section 1084] currently prohibits someone in the business of betting and wagering from using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers on any sporting event or contest. . . . [T]he statute may relate only to sports betting and not to the type of real-time, interactive gambling that the Internet now makes possible for the first time. Therefore, we generally support the idea of amending the Federal gambling statutes by clarifying that the Wire Communications Act applies to interactive casino betting[.]"); *Internet Gambling Prohibition Act of 1999: Hearing Before the Subcomm on Telecommunications, Trade, & Consumer Protection of the H. Comm. on Commerce*, 106th Cong. 35 (2000) (statement of Kevin DiGregory, Deputy Assistant Att'y Gen., Criminal Division) ("We urge you to consider a proposal that we have made, and I will highlight what that proposal would do. It would clarify that [section] 1084 applies to all betting and not just betting on sporting events or contests. . . . Our proposed amendment, Mr. Chairman and members of the committee, would not prohibit any gambling currently permitted nor would our proposal permit anything that is currently prohibited."), *with id*. at 88 (answering question from Rep. Tauzin and explaining that "[s]ection 1084 applies to sports betting but not to contests like a lottery"). In a 1962 speech shortly following the passage of the Wire Act, then-Assistant Attorney General for the Office of Legal Counsel Nicholas deB. Katzenbach explained that, under the Wire Act, "gamblers, bookies and related members of their fraternity are barred from using the phones for the interstate transmission of wagers on sporting events or contests," without addressing whether the statute was limited to such wagering. Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, Address on Federal and Local Cooperation in Fighting Crime (Jan. 25, 1962).

contest." Our 2011 Opinion concluded that this clause was ambiguous on whether the sports-gambling modifier applies to both prohibitions in the first clause. 35 Op. O.L.C. at 140. We reasoned that "[t]he text itself can be read either way" because section 1084(a) lacks "a comma after the first reference to 'bets or wagers'"; we thought that such a comma would have made it "plausible" that the first prohibition in the first clause was not limited to sports-based gambling. *Id*. "By the same token," we continued, "the text does not contain commas after *each* reference to 'bets or wagers,'" which we would have considered evidence that the sports-gambling modifier qualified each prohibition in the first clause. *Id.* In light of this perceived ambiguity, we interpreted both prohibitions in the first clause as confined to sports gambling because that reading "produce[d] the more logical result" and was supported by the legislative history. *Id*. at 140–43.

We do not believe that the first clause is ambiguous, however. "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)); *see also Sebelius v. Cloer*, 569 U.S. 369, 381 (2013) (same). There was no need for Congress to add a comma to clarify that the sports-gambling modifier applies only to the second prohibition in the first clause, because the grammar of the provision itself accomplishes that task. The sports-gambling modifier comes at the end of a complex modifier that defines the type of "information" reached by section 1084(a)'s second prohibition: "information *assisting in the placing of bets or wagers on any sporting event or contest*." 18 U.S.C. § 1084(a) (emphasis added). Since "assisting in the placing of bets or wagers" modifies only the prohibition on transmitting information, it follows that "on any sporting event or contest"—a component of the same modifier—is similarly limited.

Traditional canons of statutory construction confirm that conclusion. In construing the reach of modifiers like "on any sporting event or contest," the default rule is that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Lockhart v. United States*, 577 U.S. 347, 351 (2016) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)); *see also Barnhart*, 540 U.S.

at 26 ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent") (quoting 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.33, at 369 (6th rev. ed. 2000)); *United States v. Loyd*, 886 F.3d 686, 688 (8th Cir. 2018) (describing the rule as "a rebuttable presumption in statutory interpretation"); *In re Sanders*, 551 F.3d 397, 399 (6th Cir. 2008) (similar). That rule, the "last-antecedent rule," "reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it." *Lockhart*, 577 U.S. at 351; *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012) ("Scalia & Garner").[10]

In *Lockhart*, for example, the Court applied this rule to a statute that subjected a criminal defendant to increased penalties if the defendant had "a prior conviction . . . under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." 577 U.S. at 350 (quoting 18 U.S.C. § 2252(b)(2)). The Court held that the phrase "involving a minor or ward" modified only the one item on this list that immediately preceded it. *Id*. at 349. Similarly, in *Barnhart*, the Court considered the meaning of a statutory reference to circumstances in which someone "is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 540 U.S. at 23 (quoting 42 U.S.C. § 423(d)(2)(A)). The Court applied the rule of the last antecedent to conclude that the qualifier "which exists in the national economy" could reasonably be read to modify only its closest referent: "any other kind of substantial gainful work." *Id*. at 26. And in *Loyd*, the Eighth Circuit applied the last-antecedent rule to a statute that made a mandatory minimum sentence applicable to anyone with a prior conviction under enumerated federal laws "or under the laws of any State relating to" certain types of sexual misconduct. 886 F.3d at 687 (quoting 18 U.S.C. § 2251(e)). The court held that the sexual misconduct language "modifies only the phrase that immediately precedes it: 'the laws of any State.'" *Id*. at 688 (quoting 18 U.S.C. § 2251(e)). As in the examples discussed in those cases, the Wire

[10] Courts commonly refer to this canon as the "last-antecedent rule," although the more precise term where, as here, the modifier is an adjectival or adverbial phrase is the "nearest reasonable referent" canon. Scalia & Garner at 152–53.

Act's reference to gambling "on any sporting event or contest" modifies only the phrase it immediately follows: "information assisting in the placing of bets or wagers."

We have considered whether the series-qualifier rule might rebut the last-antecedent presumption. The series-qualifier rule provides that a modifying phrase used to qualify one element of a list of nouns or verbs may sweep beyond the nearest referent if the list "contain[s] items that readers are used to seeing listed together or a concluding modifier that readers are accustomed to applying to each of them." *Lockhart*, 577 U.S. at 352. Importantly, that principle is generally limited to lists of items that are "simple and parallel without unexpected internal modifiers or structure." *Id.*; *see* Scalia & Garner at 147 (canon applies where "there is a straightforward, parallel construction that involves all nouns or verbs in a series"). The series-qualifier rule thus may support applying a modifier beyond its nearest referent and across multiple, simple, parallel phrases.

But the structure of section 1084(a)'s first clause is not straightforward. The sports-gambling modifier is embedded within a longer modifier: "assisting in the placing of bets or wagers on any sporting event or contest." Reading "on any sporting event or contest" alone to carry backward to modify the prohibition on "bets or wagers" would "take[] more than a little mental energy" and be a "heavy lift." *Lockhart*, 577 U.S. at 351 (rejecting the applicability of the series-qualifier rule to the phrase "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward"). Nor is there any other textual evidence that would justify departing from the usual presumption that modifiers apply only to their closest referents. *See United States v. Hayes*, 555 U.S. 415, 425 (2009) (declining to apply that rule because it would introduce superfluity and would require accepting the ungrammatical premises "that Congress employed the singular 'element' to encompass two distinct concepts, and that it adopted the awkward construction 'commi[t]' a 'use'"); *see also Paroline v. United States*, 572 U.S. 434, 447 (2014) (declining to apply the rule of the last antecedent because it was overcome by other indicia of meaning). We therefore do not believe that the series-qualifier rule warrants extending the sport-gambling modifier across both prohibitions in the first clause.

This conclusion is confirmed by comparing the structure of the sports-gambling modifier with other phrases in section 1084(a)'s first clause that

do apply across multiple phrases. For instance, in speaking of "information assisting in the placing of *bets or wagers* on any sporting event or contest" (emphasis added), Congress employed a structure making clear that both "bets" and "wagers" were modified by the phrases that come before and after those items. "Bets" and "wagers" are two like items in the series, and it is straightforward to modify them with the phrases that immediately precede ("information assisting in the placing of") and follow ("on any sporting event or contest") those terms. Applying the last-antecedent rule so that the prohibition would instead cover "information assisting in the placement of bets" and "wagers on sporting events or contests" would also introduce superfluity, since section 1084(a)'s first prohibition already extends to wire transmissions of "bets or wagers." To take another example, the phrase "sporting event or contest" is a textbook example of a simple, parallel structure where "sporting" modifies both "event" and "contest." *See* Scalia & Garner at 147–48 (providing similar examples and citing authorities); *cf.* 2011 Opinion, 35 Op. O.L.C. at 150 n.11 (concluding the same, although for different reasons). In contrast with such simple constructions, the sports-gambling modifier is embedded in a more complex structure that does not easily allow that modifier to extend beyond its immediate referent.

Section 1084(a) similarly limits both prohibitions in the first clause to interstate wire transmissions. Congress prefaced both prohibitions with the phrase "*for the transmission in interstate or foreign commerce of* bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest." 18 U.S.C. § 1084(a) (emphasis added). In context, the "transmission" must be "of" what is mentioned in the following phrase. By placing the interstate-commerce requirement before the word "of," Congress made clear that the entire phrase preceding "of"—"the transmission in interstate or foreign commerce"—would apply to the first two prohibitions. Otherwise, the second prohibition would be missing a preposition: "for the transmission . . . information assisting in the placing of bets or wagers on any sporting event or contest." But there are no similar indicators that would support rebutting the last-antecedent presumption and applying the sports-gambling modifier to the first prohibition.

The road not taken is also illuminating. Simply by adding two commas, Congress could have unambiguously extended both prohibitions in the

first clause to sports-related gambling: "for the transmission in interstate or foreign commerce of bets or wagers[,] or information assisting in the placing of bets or wagers[,] on any sporting event or contest." *See* 2011 Opinion, 35 Op. O.L.C. at 140 (recognizing that if the text contained "commas after *each* reference to 'bets or wagers,'" it would have made the opinion's interpretation "much more certain"). Congress "could have easily" crafted text that would have carried that meaning, but did not. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013). The absence of these commas is particularly significant because it leaves "nothing in the statute to rebut the last-antecedent presumption." *In re Sanders*, 551 F.3d at 400. Because "Congress no doubt could have worked around this grammatical rule had it wished . . . we see nothing in the section to justify dispensing with this default rule of interpretation." *Id.* The sports-gambling modifier therefore does not limit the first prohibition of section 1084(a)'s first clause, which makes it a crime to transmit "bets or wagers," including those unrelated to sports gambling.

B.

We likewise conclude that section 1084(a)'s second clause is not limited to sports gambling. The second clause prohibits the use of a wire communication facility "for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers." 18 U.S.C. § 1084(a). That clause, on its face, applies to bets or wagers of any kind, even those unrelated to sports.

We do not think it tenable to read into the second clause the qualifier "on any sporting event or contest" that appears in the first clause. Carrying that qualifier forward to the second clause is even less textually plausible than carrying it backward to the first prohibition of the first clause. As a matter of basic grammar, section 1084(a)'s first clause is distinct from the second clause; the two clauses are separated not only by a comma, but also by an introductory determiner that repeats the beginning of the first clause ("for the transmission of"). There is no reference to "any sporting event or contest" in that clause and no apparent textual reason why the modifier in the first clause would extend to the second clause.

Nor does any canon of construction support reading the sports-gambling modifier transitively across the two clauses. As our analysis of

the first clause demonstrates, the series-qualifier principle would appear the most natural candidate to justify such a reading. But here, the sports-gambling modifier appears after the second of four statutory prohibitions. It would take a considerable leap for the reader to carry that modifier both backward to the first prohibition of the first clause, then forward across the entire second clause. *See, e.g.*, *United States v. Lockhart*, 749 F.3d 148, 152–53 (2d Cir. 2014) ("[T]his is not the prototypical situation in which the series qualifier canon is applied, since . . . the modifier does not end the list in its entirety."), *aff'd*, 577 U.S. 347 (2016); *Wong v. Minn. Dep't of Human Servs.*, 820 F.3d 922, 928 (8th Cir. 2016) ("[T]he series-qualifier canon generally applies when a modifier precedes or follows a list, not when the modifier appears in the middle."); *cf. Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 61–62 (2004) (applying a qualifier at the end of the second item on a list to the first item as well, based in part on specific textual evidence that the second item modified the first item).

Other portions of the Wire Act support this reading. Section 1084(b) uses the phrase "sporting event[s] or contest[s]" three times to define the scope of exceptions to section 1084(a)'s prohibitions. Subsection (b) exempts the transmission "of information for use in news reporting of *sporting events or contests*," then exempts "the transmission of information assisting in the placing of bets or wagers on *a sporting event or contest* from a State or foreign country where betting on that *sporting event or contest* is legal into a State or foreign country in which such betting is legal" (emphases added). That language illustrates that Congress repeated the sports-gambling modifier when applying that term beyond its nearest, and most natural, referent. "When Congress includes particular language in one section of a statute but omits it in another," we presume "that Congress intended a difference in meaning." *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 777 (2018) (quoting *Loughrin v. United States*, 573 U.S. 351, 358 (2014) (internal quotation marks and alteration omitted)); *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 826 (2018) (rejecting a proposed reading of a statutory provision on the ground that if Congress wanted the provision to have the claimed effect "it knew how to say so").

By contrast, section 1084(d) creates a notice-and-disconnect regime for common carriers, which must discontinue services to subscribers upon

notice that the subscribers are using, or will use, their facilities "for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law." Section 1084(d), however, contains none of the sports-gambling qualifiers that appear in section 1084(a) or (b), and section 1084(d) contains no indication that it is limited to gambling information involving sporting events or contests. The absence of that modifier in section 1084(d) was presumably intentional. We thus cannot regard Congress's decision to omit the modifier from the second clause of section 1084(a) as an accident.

Our 2011 Opinion concluded that the sports-gambling modifier applied to section 1084(a)'s second clause, reasoning that Congress had used "shortened phrases in the second clause to refer back to terms spelled out more completely in the first clause." 35 Op. O.L.C. at 143–44. We observed that the first clause prohibits the use of a wire communication facility for "the transmission *in interstate or foreign commerce*" of the prohibited bets or information, but that the second clause prohibits the use of the facility just for "the transmission of a wire communication" without repeating again the words "in interstate or foreign commerce." *Id*. at 143. Citing the views of the Criminal Division and the legislative history, we concluded that Congress "presumably intended *all* the prohibitions in the Wire Act, including those in the second clause, to be limited to interstate or foreign (as opposed to intrastate) wire communications." *Id*. Because the interstate-commerce qualifier could apply to both clauses, we concluded that the second clause used the phrase "for the transmission of a wire communication" as shorthand for both the interstate-commerce modifier and the sports-gambling modifier. *Id*. at 143–44.

We disagree with this inference, however, because the interstate-commerce modifier and the sports-gambling modifier are not parallel phrases. Within the grammar of the statute, the interstate-commerce element reaches beyond its nearest referent to modify at least the second prohibition as well as the first. *See* 18 U.S.C. § 1084(a) ("for the transmission *in interstate or foreign commerce of* bets or wagers *or* information assisting in the placing of bets or wagers") (emphases added). Both prohibitions are tied by prepositional phrases to the "transmission in interstate or foreign commerce." By contrast, there is no similar textual indication that the sports-gambling modifier ranges beyond its nearest referent: "information assisting in the placing of bets or wagers." In

addition, the interstate-commerce modifier appears at the beginning of a list of four prohibitions, and so there is precedent to support carrying the modifier forward to modify the prohibitions in the second clause. *See United States v. Bass*, 404 U.S. 336, 339–40 (1971) ("Since 'in commerce or affecting commerce' undeniably applies to at least one antecedent, and since it makes sense with all three, the more plausible construction here is that it in fact applies to all three."). By contrast, the sports-gambling modifier appears midway through the list, which does not support the shorthand reference suggested by our 2011 Opinion. In view of these textual differences, we do not believe that the interstate-commerce modifier helps us to interpret the sports-gambling modifier. If anything, the textual differences underscore why the sports-gambling modifier does not apply across the statute.

In sum, the linguistic maneuvers that are necessary to conclude that the sports-gambling modifier sweeps both backwards and forwards to reach all four of section 1084(a)'s prohibitions are too much for the statutory text to bear. *See Lockhart*, 749 F.3d at 152–53; *Wong*, 820 F.3d at 928. For these reasons, we conclude that the phrase "on any sporting event or contest" does not extend beyond the second prohibition in section 1084(a)'s first clause to qualify section 1084(a)'s second clause.

C.

Having concluded the text was ambiguous, our 2011 Opinion reasoned that reading the Wire Act's prohibitions as limited to sports gambling "produce[d] the more logical result." 35 Op. O.L.C. at 140; *see also id*. at 144 (applying the sports-gambling modifier across all four prohibitions "made[] functional sense of the statute"). We found it "difficult to discern why Congress, having forbidden the transmission of *all* kinds of bets or wagers, would have wanted to prohibit only the transmission of information assisting in bets or wagers concerning sports." *Id*. at 140–41. There is a logic to this reasoning, but unlike the 2011 Opinion, we view the statutory language as plain, and, absent a patent absurdity, we must apply the statute as written. *See Dunn v. CFTC*, 519 U.S. 465, 470 (1997).

We do not think that applying the Wire Act as written would result in an interpretation "where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be most obvious to most anyone." *Pub. Citizen v. U.S. Dep't of Justice*, 491

U.S. 440, 470–71 (1989) (Kennedy, J., concurring in judgment); *see* Scalia & Garner at 237 ("The absurdity must consist of a disposition that no reasonable person could intend."). Congress may well have had reasons to target the transmission of information assisting in sports gambling. Unlike lotteries, numbers games, or other kinds of non-sports gambling, sports gambling has long depended on the real-time transmission of information like point spreads, odds, or the results of horse races. Indeed, in concluding that the Wire Act was limited to sports gambling, our 2011 Opinion quoted the legislative history in which Senator Eastland, the Chairman of the Judiciary Committee, emphasized that illegal bookmaking required the use of the wires, because bookmakers and betters needed real-time results of horse "races at about 20 major racetracks throughout the country." 35 Op. O.L.C. at 146 (quoting 107 Cong. Rec. 13,901 (1961)). Moreover, Congress might have been worried that an unfocused prohibition on transmitting any information that "assisted" in any sort of gambling whatsoever would criminalize a range of speech-related conduct—concerns that Congress evidently had in mind when it narrowed section 1084(a)'s prohibitions by excepting transmissions made "for use in news reporting of sporting events or contests." 18 U.S.C. § 1084(b). We need not speculate further. It is sufficient that Congress targeted the transmission of information assisting in sports gambling in the text, and that applying the Wire Act as written does not produce an obviously absurd result.

In our 2011 Opinion, we found it improbable that Congress would have failed to prohibit "the transmission of information assisting in the placing of bets or wagers on non-sporting events," but then, in section 1084(a)'s second clause, prohibited transmissions "entitling the recipient to receive money or credit for the provision of information assisting in the placing of those lawfully-transmitted bets." 35 Op. O.L.C. at 144.[11] But improbable is not absurd, and that anomaly largely falls away if, as we have conclud-

[11] Similar results would follow even if section 1084(a) were limited to sports gambling. If it were so limited, section 1084(a)'s first clause would allow people to relay sports bets and wagers so long as they did not use the wires to do so—yet the second clause would prohibit wire transmissions entitling the recipients to receive money or credit for those bets and wagers. The primary conduct of betting would not be prohibited under the Wire Act, yet the wire transmission entitling the bettor to payment would be a criminal offense under that statute.

ed, transmitting bets or wagers of any kind is indeed unlawful under section 1084(a)'s first clause. *See supra* Part II.A. It was not absurd for Congress to supplement a broad prohibition on transmitting information that assists sports gambling in the first clause with another prohibition on a particular species of transmissions concerning all forms of gambling: those that entitle a recipient to money or credit for information that assists in the placing of unlawfully transmitted bets and wagers. Even if these prohibitions were anomalous, however, that result would simply reflect the statutory text. It is the job of the Executive to faithfully execute those words, and that of Congress to fix or improve those laws as it sees fit. *See Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 565 (2005) (If there is an "unintentional drafting gap," "it is up to Congress rather than the courts to fix it. The omission may seem odd, but it is not absurd.").

Our 2011 Opinion also relied heavily upon the legislative history of the 1961 Wire Act. Citing the many references in the legislative history to sports gambling and the dearth of references to other forms of gambling, the opinion concluded that "Congress's overriding goal in the Act was to stop the use of wire communications for sports gambling in particular." 35 Op. O.L.C. at 145; *see id.* at 145–47. That may well have been true. But "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); *see also Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142, 1143 (2018) (declining to attach significance to the fact that the legislative history of the Fair Labor Standards Act "discusses 'automobile salesmen, partsmen, and mechanics' but never discusses service advisors," because "[e]ven if Congress did not foresee all of the applications of the statute, that is no reason not to give the statutory text a fair reading").

Our 2011 Opinion also emphasized the drafting history of the Wire Act. As we explained it, an earlier draft of the bill was unequivocally limited to sports gambling. When the Senate Judiciary Committee substantially redrafted the provision to change it to its current form, the Committee removed the commas that had so clearly limited the initial prohibitions to sporting events and contests. Our 2011 Opinion could not identify evidence in the legislative history that when Congress reworked the provi-

sion, it intended "to expand dramatically the scope of prohibited transmissions from 'bets or wagers . . . on any sporting event or contest' to *all* 'bets or wagers,' or to introduce a counterintuitive disparity between the scope of the statute's" different prohibitions. 35 Op. O.L.C. at 142. The committee reports, for instance, did not suggest that these changes dramatically expanded the Wire Act's coverage. Given that such substantial changes "would have significantly altered the scope of the statute," our 2011 Opinion read the "absence of comment" to be significant. *Id*. at 142–43.

But we do not share the 2011 Opinion's confidence that silence in the legislative history on those revisions is so probative. As the Supreme Court recently observed, "if the text is ambiguous, silence in the legislative history cannot lend any clarity," and "if the text is clear, it needs no repetition in the legislative history." *Encino Motorcars*, 138 S. Ct. at 1143; *see also Avco Corp. v. U.S. Dep't of Justice*, 884 F.2d 621, 625 (D.C. Cir. 1989) ("[S]ilence in legislative history is almost invariably ambiguous. If a statute is plain in its words, the silence may simply mean that no one in Congress saw any reason to restate the obvious."). Here, the text is clear, and thus, even if so inclined, we would not have a justification for delving into the Congressional Record to ascertain what individual Members of Congress may have thought at the time. It is the words of the statute that the President signs into law, and in so doing, "it is not to be supposed that . . . the President endorses the whole Congressional Record." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring). As the Supreme Court recently emphasized, "'[i]t is the business of Congress to sum up its own debates in its legislation,' and once it enacts a statute, 'we do not inquire what the legislature meant; we ask only what the statute means.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) (quoting *Schwegmann Bros.*, 341 U.S. at 396 (Jackson, J., concurring) (some internal quotation marks omitted)). Congress left the authoritative record of its deliberations in the text of the statute, and we rely solely upon its plain meaning to govern our interpretation here.[12]

[12] Even if we were to consider the legislative history, there are multiple inferences one could reasonably draw from the progression of the legislation through Congress. The 2011 Opinion quoted concerns expressed by Senator Kefauver (the leader of the Senate's 1950s investigation into organized crime), who pressed a Department of Justice witness

III.

In view of our conclusion that the Wire Act applies to non-sports gambling, the Criminal Division has asked us to revisit the question that our 2011 Opinion did not need to answer, namely whether the 2006 enactment of UIGEA modifies the scope of the Wire Act. *See* Memorandum for John P. Cronan, Principal Deputy Assistant Attorney General, Criminal Division, from David C. Rybicki, Deputy Assistant Attorney General, Criminal Division, *Re: The Interaction Between UIGEA and the Wire Act* at 2 (Aug. 28, 2018). Specifically, the Criminal Division has asked whether, in excluding certain activities from UIGEA's definition of "unlawful Internet gambling," UIGEA excludes those same activities from the prohibitions under other federal gambling laws. *Id*. We conclude that it does not.

Congress enacted UIGEA to strengthen the enforcement of existing prohibitions against illegal gambling on the Internet. 31 U.S.C. § 5361(4). UIGEA prohibits anyone "engaged in the business of betting or wagering" from "knowingly accept[ing]" various kinds of payments "in connection with the participation of another person in unlawful Internet gambling." *Id*. § 5363. UIGEA defines "unlawful Internet gambling" as follows:

> IN GENERAL.—The term "unlawful Internet gambling" means to place, receive, or otherwise knowingly transmit a bet or wager by

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on why the draft Wire Act did not reach numbers games and other forms of non-sports-based gambling. 35 Op. O.L.C. at 147 n.7. Shortly after that hearing, the Judiciary Committee added the new language to change the prohibitions of the bill to their enacted form; in so doing, it removed the commas that had limited the draft prohibitions to sporting events and contests. Our 2011 Opinion concluded from this chain of events that Congress did not intend that change to extend the Wire Act's prohibitions to non-sports gambling. *Id*. at 142–43. But one might just as well speculate that the Judiciary Committee made such changes to respond to Senator Kefauver's urging that the Wire Act reach non-sports gambling. Here then, as in other instances, the legislative record provides grounds for alternative interpretations of what the Members may have intended. *See Exxon Mobil*, 545 U.S. at 568 (The "investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'" (quoting Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983)); *see also* Scalia & Garner at 377 ("With major legislation, the legislative history has something for everyone."). Rather than relying upon suppositions concerning Members' intent, however, we view the relevant record to be the unambiguous words of the statute.

> any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.

Id. § 5362(10)(A). That term, however, "does not include" certain enumerated activities. *Id*. § 5362 (10)(B)–(D). For instance, UIGEA excludes from coverage certain bets or wagers that are "initiated and received or otherwise made exclusively within a single State" and done so in accordance with the laws of such State, even if the routing of those wire transmissions was done in a manner that involved interstate commerce. *Id*. § 5362(10)(B).

UIGEA's definition of "unlawful Internet gambling" simply does not affect what activities are lawful under the Wire Act. This definition applies only to the "subchapter" in which UIGEA is contained, 31 U.S.C. § 5362, and the Wire Act does not use the term "unlawful Internet gambling" in any event. Our conclusion follows from the plain meaning of the statutory definition, and Congress has confirmed it with a reservation clause stating that "[n]o provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States." *Id*. § 5361(b). UIGEA therefore in no way "alter[s], limit[s], or extend[s]" the existing prohibitions under the Wire Act.

IV.

For the reasons explained, we conclude that our 2011 Opinion conflicts with the plain language of the Wire Act. We emphasize, however, that we employ considerable caution in departing from our prior opinions, and we therefore think it appropriate to explain in detail why reconsideration is warranted here. This Office, exercising authority delegated by the Attorney General, provides binding legal advice within the Executive Branch. *See* 28 U.S.C. § 511; 28 C.F.R. § 0.25(a); Memorandum for the Attorneys of the Office, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Best Practices for OLC Legal Advice and Written Opinions* at 1 (July 16, 2010) ("2010 Best Practices Memo"), https://www.justice.gov/sites/default/files/pages/attachments/2014/07/11/olc-best-practices-2010.pdf; Memorandum for the Attorneys of the Office,

from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Best Practices for OLC Opinions* at 1 (May 16, 2005) ("2005 Best Practices Memo"), https://www.justice.gov/sites/default/files/pages/attachments/2014/07/11/olc-best-practices-2005.pdf. Although the Judicial Branch's doctrine of stare decisis does not itself apply to the Executive Branch, we embrace the long tradition of general adherence to Executive Branch legal precedent, reflecting strong interests in efficiency, institutional credibility, and the reasonable expectations of those who have relied on our prior advice. This tradition of respect for Department precedent predates the establishment of this Office and reflects the longstanding practice of Attorneys General in providing legal advice.[13]

Reconsidering past opinions without considering these interests "could easily lead to requests for reconsideration of earlier Opinions on other subjects," thereby undermining the value of our legal advice. Memorandum for the Attorney General, from Malcolm R. Wilkey, Assistant Attorney General, Office of Legal Counsel, *Re: Gifts from Foreign Governments, CP-58-80 of May 14, 1958*, at 3 (May 15, 1958). Accordingly, we "should not lightly depart from such past decisions, particularly where they directly address and decide a point in question." 2010 Best Practices Memo at 2; *accord* 2005 Best Practices Memo at 2.

We nevertheless have recognized that, "as with any system of precedent, past decisions" of our Office "may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes." 2010 Best Practices Memo at 2. We have departed from our prior advice for a

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[13] *See, e.g.*, *Import Duties—Warehoused Goods*, 21 Op. Att'y Gen. 23, 24 (1894) ("A [definitional] question once definitely answered by one of my predecessors and left at rest for a long term of years should be reconsidered by me only in a very exceptional case," and "reconsideration" would only be appropriate if predicate assumptions on which the past advice relied were no longer correct); *Camel's Hair Noils—Drawback*, 24 Op. Att'y Gen. 53, 55 (1902) ("[Attorney General] Olney's opinion, although brief, is evidently based on careful consideration of all aspects of the case. It is not perhaps accurate, . . . but I concur in the principle of my predecessor's ruling, and perceive no sufficient reason to revise the same. A question once definitely answered by one of my predecessors and left at rest for a long term of years should be reconsidered by me only in a very exceptional case." (internal citations omitted)); *see also* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1471–74 (2010) (discussing the historical practice of stare decisis within the Department of Justice).

range of reasons. In many instances, we have withdrawn precedents when intervening developments in the law appear to cast doubt upon our conclusions.[14] We have also modified earlier advice where the factual predicates have shifted or we have come to a better understanding of them. *See, e.g.*, *Scope of Treasury Department Purchase Rights with Respect to Financing Initiatives of the U.S. Postal Service*, 19 Op. O.L.C. 238, 238, 243, 244 (1995) (upon being asked to "reconsider and rescind" a 1993 opinion, we "reaffirmed and clarified" that opinion but, after gathering information from the agencies and learning that one agency was not operating in the manner anticipated by the statute or by us, we modified one of its conclusions).

In other instances, however, we have reconsidered our advice after identifying errors in the supporting legal reasoning.[15] We have, for example, modified our position regarding whether the Appointments Clause applies to private entities who perform functions on behalf of the federal

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[14] *See, e.g.*, Memorandum for the Files, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, *Re: Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001*, at 2 (Jan. 15, 2009) ("Bradbury Memo on 9/11 Opinions") (withdrawing certain post-9/11 opinions because, among other things, their legal reasoning had "been overtaken by subsequent decisions of the Supreme Court and by legislation passed by Congress and supported by the President"); *Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church*, 27 Op. O.L.C. 91, 117 (2003) ("Perhaps more important, recent Supreme Court decisions have brought the demise of the 'pervasively sectarian' doctrine that comprised the basis . . . the 1995 Opinion of this Office.").

[15] *See, e.g.*, *Application of the Anti-Nepotism Statute to a Presidential Appointment in the White House*, 41 Op. O.L.C. 49, 58–64 (2017) (describing our past opinions as legally erroneous as an initial matter and overtaken by subsequent developments in the law); *Definition of Torture under 18 U.S.C. §§ 2340–2340A*, 28 Op. O.L.C. 297, 304 n.17 (2004) ("We do not believe [these statutory sources] provide a proper guide for interpreting 'severe pain' in the very different context of the prohibition against torture in sections 2340–2340A."); *Reconsideration of Applicability of the Davis-Bacon Act to the Veteran Administration's Lease of Medical Facilities*, 18 Op. O.L.C. 109 (1994) (reversing the conclusions reached in *Applicability of the Davis-Bacon Act to the Veterans Administration's Lease of Medical Facilities*, 12 Op. O.L.C. 89 (1988)); *Authority of the Federal Bureau of Investigation To Override International Law In Extraterritorial Law Enforcement Activities*, 13 Op. O.L.C. 163 (1989) (disapproving the conclusion reached in *Extraterritorial Apprehension by the Federal Bureau of Investigation*, 4B Op. O.L.C. 543 (1980), that the FBI lacked authority to apprehend a fugitive in a foreign state in a manner contrary to customary international law).

government.[16] And we have revisited precedents that themselves had reversed established positions of the Executive Branch.[17]

Several factors justify reconsideration here. Although the 2011 Opinion directly addressed the question now before us, we believe that the 2011 Opinion devoted insufficient attention to the statutory text and applicable canons of construction, which we believe compel the conclusion that the prohibitions of the Wire Act are not uniformly limited to sports gambling. Furthermore, the 2011 Opinion is of relatively recent vintage and departed from established Department practice, which included successful prosecutions under a broader understanding of the Wire Act and repeated representations to Congress about the Department's views. *See supra* Part I. The Department's position prior to our 2011 Opinion, indeed, may have informed Congress's action in 2006 in enacting the UIGEA, which prohibited the acceptance of payment in connection with "unlawful Internet gambling," but expressly declined to alter, limit, or extend any federal laws "prohibiting, permitting, or regulating gambling within the United States." 31 U.S.C. § 5361(b).

Reaching a contrary conclusion from our prior opinion will also make it more likely that the Executive Branch's view of the law will be tested in

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[16] *Compare The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 146 n.65 (1996) ("disapprov[ing of] the Appointments Clause analysis and conclusion of an earlier opinion of this Office," and finding that the Appointments Clause does not apply to private entities), *with Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 121 (2007) (reversing the 1996 opinion's conclusion that the Appointments Clause does not apply to private entities).

[17] *See, e.g.*, *Statutory Rollback of Salary to Permit Appointment of Member of Congress to Executive Office*, 33 Op. O.L.C. 201, 201–02 (2009) (reconsidering 1987 OLC opinion that "was not in accord with the prior interpretations of this Clause by the Department of Justice and has not consistently guided subsequent practice of the Executive Branch" and did not "reflect[] the best reading of the Ineligibility Clause" of the Constitution); Memorandum for the Files, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities* at 2 (Oct. 6, 2008) (overturning post-9/11 precedent that had departed from "the longstanding interpretation of the Executive Branch," under which "any particular application of the Insurrection Act to authorize the use of the military for law enforcement purposes would require the presence of an actual obstruction of the execution of federal law or a breakdown in the ability of state authorities to protect federal rights").

the courts. We have sometimes relied on that likelihood in considering whether the Executive should decline to enforce or defend unconstitutional statutes. *See Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 201 (1994); *Recommendation that the Department of Justice Not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federalist Judgeship Act of 1984*, 8 Op. O.L.C. 183, 193–94 (1984). We likewise believe it relevant in determining whether to depart from our precedent. Under our 2011 Opinion, the Department of Justice may not pursue non-sports-gambling-related prosecutions under the Wire Act. But under the conclusion we adopt today, such prosecutions may proceed where appropriate, and courts may entertain challenges to the government's view of the statute's scope in such proceedings. While the possibility of judicial review cannot substitute for the Department's independent obligation to interpret and faithfully execute the law, that possibility does provide a one-way check on the correctness of today's opinion, which weighs in favor of our change in position.

We acknowledge that some may have relied on the views expressed in our 2011 Opinion about what federal law permits. Some States, for example, began selling lottery tickets via the Internet after the issuance of our 2011 Opinion.[18] But in light of our conclusion about the plain language of the statute, we do not believe that such reliance interests are sufficient to justify continued adherence to the 2011 opinion.[19] Moreover, if Congress finds it appropriate to protect those interests, it retains ultimate authority over the scope of the statute and may amend the statute at any time, either to broaden or narrow its prohibitions.

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[18] *See, e.g.*, John Byrne, *Quinn Says Online Lottery Sales Could Start in Spring*, Chi. Tribune (Dec. 27, 2011) (explaining that "following a U.S. Justice Department ruling that the Internet sales [of state lottery tickets] are legal," the Governor of Illinois planned to move forward with plans to sell lottery tickets on the Internet); State of Illinois, Office of Management and Budget, Illinois Performance Reporting System, Agency Performance Metric Reports FY18 Quarter 4 (Aug. 14, 2018 3:53 PM) ("Internet sales" of Illinois lottery tickets were about $20 million in FY 2017 and in FY 2018).

[19] An individual who reasonably relied upon our 2011 Opinion may have a defense for acts taken in violation of the Wire Act after the publication of that opinion and prior to the publication of this one. *See, e.g.*, *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 673–74 (1973); *Cox v. Louisiana*, 379 U.S. 559, 568–69 (1965). The reliance interest implicit in any such defense, however, does not bear upon our reconsideration of the 2011 Opinion.

V.

We conclude that the prohibitions of 18 U.S.C. § 1084(a) are not uniformly limited to gambling on sporting events or contests. Only the second prohibition of the first clause of section 1084(a), which criminalizes transmitting "information assisting in the placing of bets or wagers on any sporting event or contest," is so limited. The other prohibitions apply to non-sports-related betting or wagering that satisfy the other elements of section 1084(a). We also conclude that section 1084(a) is not modified by UIGEA. This opinion supersedes and replaces our 2011 Opinion on the subject.

STEVEN A. ENGEL
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Designating an Acting Attorney General

The President's designation of a senior Department of Justice official to serve as Acting Attorney General was expressly authorized by the Vacancies Reform Act. That act is available to the President even though the Department's organic statute prescribes an alternative succession mechanism for the office of Attorney General.

The President's designation of an official who does not hold a Senate-confirmed office to serve, on a temporary basis, as Acting Attorney General was consistent with the Appointments Clause. The designation did not transform the official's position into a principal office requiring Senate confirmation.

November 14, 2018

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

After Attorney General Jefferson B. Sessions III resigned on November 7, 2018, the President designated Matthew G. Whitaker, Chief of Staff and Senior Counselor to the Attorney General, to act temporarily as the Attorney General under the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d. This Office had previously advised that the President could designate a senior Department of Justice official, such as Mr. Whitaker, as Acting Attorney General, and this memorandum explains the basis for that conclusion.

Mr. Whitaker's designation as Acting Attorney General accords with the plain terms of the Vacancies Reform Act, because he had been serving in the Department of Justice at a sufficiently senior pay level for over a year. *See id.* § 3345(a)(3). The Department's organic statute provides that the Deputy Attorney General (or others) may be Acting Attorney General in the case of a vacancy. *See* 28 U.S.C. § 508. But that statute does not displace the President's authority to use the Vacancies Reform Act as an alternative. As we have previously recognized, the President may use the Vacancies Reform Act to depart from the succession order specified under section 508. *See Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208 (2007) ("*2007 Acting Attorney General*").

We also advised that Mr. Whitaker's designation would be consistent with the Appointments Clause of the U.S. Constitution, which requires the President to obtain "the Advice and Consent of the Senate" before appointing a principal officer of the United States. U.S. Const. art. II, § 2,

cl. 2. Although an Attorney General is a principal officer requiring Senate confirmation, someone who temporarily performs his duties is not. As all three branches of government have long recognized, the President may designate an acting official to perform the duties of a vacant principal office, including a Cabinet office, even when the acting official has not been confirmed by the Senate.

Congress did not first authorize the President to direct non-Senate-confirmed officials to act as principal officers in 1998; it did so in multiple statutes starting in 1792. In that year, Congress authorized the President to ensure the government's uninterrupted work by designating persons to perform temporarily the work of vacant offices. The President's authority applied to principal offices and did not require the President to select Senate-confirmed officers. In our brief survey of the history, we have identified over 160 times before 1860 in which non-Senate-confirmed persons performed, on a temporary basis, the duties of such high offices as Secretary of State, Secretary of the Treasury, Secretary of War, Secretary of the Navy, Secretary of the Interior, and Postmaster General. While designations to the office of Attorney General were less frequent, we have identified at least one period in 1866 when a non-Senate-confirmed Assistant Attorney General served as Acting Attorney General. Mr. Whitaker's designation is no more constitutionally problematic than countless similar presidential orders dating back over 200 years.

Were the long agreement of Congress and the President insufficient, judicial precedent confirms the meaning of the Appointments Clause in these circumstances. When Presidents appointed acting Secretaries in the nineteenth century, those officers (or their estates) sometimes sought payment for their additional duties, and courts recognized the lawfulness of such appointments. The Supreme Court confirmed the legal understanding of the Appointments Clause that had prevailed for over a century in *United States v. Eaton*, 169 U.S. 331 (1898), holding that an inferior officer may perform the duties of a principal officer "for a limited time[] and under special and temporary conditions" without "transform[ing]" his office into one for which Senate confirmation is required. *Id*. at 343. The Supreme Court has never departed from *Eaton*'s holding and has repeatedly relied upon that decision in its recent Appointments Clause cases.

In the Vacancies Reform Act, Congress renewed the President's authority to designate non-Senate-confirmed senior officials to perform the

functions and duties of principal offices. In 2003, we reviewed the President's authority in connection with the Director of the Office of Management and Budget ("OMB"), who is a principal officer, and concluded that the President could designate a non-Senate-confirmed official to serve temporarily as Acting Director. *See Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121 (2003) ("*Acting Director of OMB*"). Presidents George W. Bush and Barack Obama placed non-Senate-confirmed officials in several lines of agency succession and actually designated unconfirmed officials as acting agency heads. President Trump, too, has previously exercised that authority in other departments; Mr. Whitaker is not the first unconfirmed official to act as the head of an agency in this administration.

It is no doubt true that Presidents often choose acting principal officers from among Senate-confirmed officers. But the Constitution does not mandate that choice. Consistent with our prior opinion and with centuries of historical practice and precedents, we advised that the President's designation of Mr. Whitaker as Acting Attorney General on a temporary basis did not transform his position into a principal office requiring Senate confirmation.

I.

Mr. Whitaker's designation as Acting Attorney General comports with the terms of the Vacancies Reform Act. That Act provides three mechanisms by which an acting officer may take on the functions and duties of an office, when an executive officer who is required to be appointed by the President with the advice and consent of the Senate "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). First, absent any other designation, the "first assistant" to the vacant office shall perform its functions and duties. *Id.* § 3345(a)(1). Second, the President may depart from that default course by directing another presidential appointee, who is already Senate confirmed, to perform the functions and duties of the vacant office. *Id.* § 3345(a)(2). Or, third, the President may designate an officer or employee within the same agency to perform the functions and duties of the vacant office, provided that he or she has been in the agency for at least 90 days in the 365 days preceding the vacancy, in a position for which the rate of pay is equal to or greater than the minimum rate for GS-15 of the

General Schedule. *Id*. § 3345(a)(3). Except in the case of a vacancy caused by sickness, the statute imposes time limits on the period during which someone may act. *Id*. § 3346. And the acting officer may not be nominated by the President to fill the vacant office and continue acting in it, unless he was already the first assistant to the office for at least 90 days in the 365 days preceding the vacancy or is a Senate-confirmed first assistant. *Id*. § 3345(b)(1)–(2); *see also Nat'l Labor Relations Bd. v. SW General, Inc*., 580 U.S. 288, 304–05 (2017).

A.

The Vacancies Reform Act unquestionably authorizes the President to direct Mr. Whitaker to act as Attorney General after the resignation of Attorney General Sessions on November 7, 2018.[1] Mr. Whitaker did not fall within the first two categories of persons made eligible by section 3345(a). He was not the first assistant to the Attorney General, because 28 U.S.C. § 508(a) identifies the Deputy Attorney General as the "first assistant to the Attorney General" "for the purpose of section 3345." Nor did Mr. Whitaker already hold a Senate-confirmed office. Although Mr.

[1] Attorney General Sessions submitted his resignation "[a]t [the President's] request," Letter for President Donald J. Trump, from Jefferson B. Sessions III, Attorney General, but that does not alter the fact that the Attorney General "resign[ed]" within the meaning of section 3345(a). Even if Attorney General Sessions had declined to resign and was removed by the President, he still would have been rendered "otherwise unable to perform the functions and duties of the office" for purposes of section 3345(a). As this Office recently explained, "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].')." *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. 99, 102 (2017); *see also 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."). Indeed, any other interpretation would leave a troubling gap in the ability to name acting officers. For most Senate-confirmed offices, the Vacancies Reform Act is "the exclusive means" for naming an acting officer. 5 U.S.C. § 3347(a). If the statute did not apply in cases of removal, then it would mean that no acting officer—not even the first assistant—could take the place of a removed officer, even where the President had been urgently required to remove the officer, for instance, by concerns over national security, corruption, or other workplace misconduct.

Whitaker was previously appointed, with the advice and consent of the Senate, as the United States Attorney for the Southern District of Iowa, he resigned from that position on November 25, 2009. At the time of the resignation of Attorney General Sessions, Mr. Whitaker was serving in a position to which he was appointed by the Attorney General.

In that position, Mr. Whitaker fell squarely within the third category of officials, identified in section 3345(a)(3). As Chief of Staff and Senior Counselor, he had served in the Department of Justice for more than 90 days in the year before the resignation, at a GS-15 level or higher. And Mr. Whitaker has not been nominated to be Attorney General, an action that would render him ineligible to serve as Acting Attorney General under section 3345(b)(1). Accordingly, under the plain terms of the Vacancies Reform Act, the President could designate Mr. Whitaker to serve temporarily as Acting Attorney General subject to the time limitations of section 3346.

B.

The Vacancies Reform Act remains available to the President even though 28 U.S.C. § 508 separately authorizes the Deputy Attorney General and certain other officials to act as Attorney General in the case of a vacancy.[2] We previously considered whether this statute limits the President's authority under the Vacancies Reform Act to designate someone else to be Acting Attorney General. *2007 Acting Attorney General*, 31 Op. O.L.C. 208. We have also addressed similar questions with respect to other agencies' succession statutes. *See Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. 99 (2017) ("*Acting Director of CFPB*"); *Acting Director of OMB*, 27 Op. O.L.C. at 121 n.1. In those instances, we concluded that the Vacancies Reform Act is not the "exclusive means" for the temporary designation of an acting official, but that it remains available as an option to the President.

[2] Under 28 U.S.C. § 508(a), in the case of a vacancy in the office of Attorney General, "the Deputy Attorney General may exercise all the duties of that office, and for the purpose of [the Vacancies Reform Act] the Deputy Attorney General is the first assistant to the Attorney General." If the offices of Attorney General and Deputy Attorney General are both vacant, "the Associate Attorney General shall act as Attorney General," and "[t]he Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General." *Id.* § 508(b).

We reach the same conclusion here: Section 508 does not limit the President's authority to invoke the Vacancies Reform Act to designate an Acting Attorney General.

We previously concluded that section 508 does not prevent the President from relying upon the Vacancies Reform Act to determine who will be the Acting Attorney General. Although the Vacancies Reform Act, which "ordinarily is the exclusive means for naming an acting officer," *2007 Acting Attorney General*, 31 Op. O.L.C. at 209 (citing 5 U.S.C. § 3347), makes an exception for, and leaves in effect, statutes such as section 508, "[t]he Vacancies Reform Act nowhere says that, if another statute remains in effect, the Vacancies Reform Act may not be used." *Id*. In fact, the structure of the Vacancies Reform Act makes clear that office-specific provisions are treated as exceptions from its generally exclusive applicability, not as provisions that supersede the Vacancies Reform Act altogether.[3] Furthermore, as we noted, "the Senate Committee Report accompanying the Act expressly disavows" the view that, where another statute is available, the Vacancies Reform Act may not be used. *Id*. (citing S. Rep. No. 105-250, at 17 (1998)). That report stated 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." *Id*. We therefore concluded that the President could direct the Assistant Attorney General for the Civil Division to act as Attorney General under the Vacancies Reform Act, even though the incumbent Solicitor General would otherwise have served under the chain of succession specified in section 508 (as supplemented by an Attorney General order).

At the time of our *2007 Acting Attorney General* opinion, the first two offices specified in section 508(a) and (b)—Deputy Attorney General and Associate Attorney General—were both vacant. *See* 31 Op. O.L.C. at 208. That is not currently the case; there is an incumbent Deputy Attorney General. But the availability of the Deputy Attorney General does

[3] One section (entitled "Exclusion of certain officers") is used to exclude certain offices altogether. 5 U.S.C. § 3349c. Office-specific statutes, however, are mentioned in a different section (entitled "Exclusivity") that generally makes the Vacancies Reform Act "the exclusive means" for naming an acting officer but also specifies exceptions to that exclusivity. *Id*. § 3347(a)(1).

not affect the President's authority to invoke section 3345(a)(3). Nothing in section 508 suggests that the Vacancies Reform Act does not apply when the Deputy Attorney General can serve. To the contrary, the statute expressly states that the Deputy Attorney General is the "first assistant to the Attorney General" "for the purpose of section 3345 of title 5" (i.e., the provision of the Vacancies Reform Act providing for the designation of an acting officer). 28 U.S.C. § 508(a). It further provides that the Deputy Attorney General "may" serve as Acting Attorney General, not that he "must," underscoring that the Vacancies Reform Act remains an alternative means of appointment.[4] These statutory cross-references confirm that section 508 works in conjunction with, and does not displace, the Vacancies Reform Act.

Although the Deputy Attorney General is the default choice for Acting Attorney General under section 3345(a)(1), the President retains the authority to invoke the other categories of eligible officials, "notwithstanding [the first-assistant provision in] paragraph (1)." 5 U.S.C. § 3345(a)(2), (3). Moreover, there is reason to believe that Congress, in enacting the Vacancies Reform Act, deliberately chose to make the second and third categories of officials in section 3345(a) applicable to the office of Attorney General. Under the previous Vacancies Act, the first assistant to an office was also the default choice for filling a vacant Senate-confirmed position, and the President was generally able to depart from that by selecting another Senate-confirmed officer. *See* 5 U.S.C. § 3347 (1994). That additional presidential authority, however, was expressly made inapplicable "to a vacancy in the office of Attorney General." *Id.*; *see also* Rev. Stat. § 179 (2d ed. 1878), 18 Stat. pt. 1, at 28 (repl. vol.). Yet, when Congress enacted the Vacancies Reform Act in 1998, it did away with the exclusion for the office of Attorney General. *See* 5 U.S.C. § 3349c (excluding certain other officers).[5]

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[4] We do not mean to suggest that a different result would follow if section 508 said "shall" instead of "may," since as discussed at length in *Acting Director of CFPB*, such mandatory phrasing in a separate statute does not itself oust the Vacancies Reform Act. *See* 41 Op. O.L.C. at 105–07 & n.3. The point is that, in contrast with the potential ambiguity arising from the appearance of "shall" in the CFPB-specific statute, section 508 expressly acknowledges that the Deputy Attorney General is the first assistant but will not necessarily serve in the case of a vacancy in the office of Attorney General.

[5] When it reported the Vacancies Reform Act, the Senate Committee on Governmental Affairs contemplated that the Attorney General would continue to be excluded by lan-

Our conclusion that the Vacancies Reform Act remains available, notwithstanding section 508, is consistent with our prior opinions. In *Acting Director of OMB*, we recognized that an OMB-specific statute, 31 U.S.C. § 502(f), did not displace the President's authority under the Vacancies Reform Act. *See* 27 Op. O.L.C. at 121 n.1 ("The Vacancies Reform Act does not provide, however, that where there is another statute providing for a presidential designation, the Vacancies Reform Act becomes unavailable."). More recently, we confirmed that the President could designate an Acting Director of the Bureau of Consumer Financial Protection ("CFPB"), notwithstanding 12 U.S.C. § 5491(b)(5), which provides that the Deputy Director of the CFPB "shall" serve as Acting Director when the Director is unavailable. *See Acting Director of CFPB*, 41 Op. O.L.C. 99. We reasoned that the CFPB-specific statute 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." *Id*. at 105–07 & n.3. We noted that the Vacancies Reform Act itself provides that a first assistant to a vacant office "shall perform the functions and duties" of that office unless the President designates someone else to do so, 5 U.S.C. § 3345(a), and that mandatory language in either the CFPB-specific statute or the Vacancies Reform Act does not foreclose the availability of the other statute, *Acting Director of CFPB*, 41 Op. O.L.C. at 105–06.

Courts have similarly concluded that the Vacancies Reform Act remains available as an alternative to office-specific statutes. *See Hooks v. Kitsap Tenant Support Servs., Inc*., 816 F.3d 550, 555–56 (9th Cir. 2016) (General Counsel of the National Labor Relations Board, which has its own office-specific statute prescribing a method of filling a vacancy); *English v. Trump*, 279 F. Supp. 3d 307, 323–24 (D.D.C. 2018) (holding that the mandatory language in the CFPB-specific statute is implicitly qualified by the Vacancies Reform Act's language providing that the President also "may direct" qualifying individuals to serve in an acting

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guage in a proposed section 3345(c) that would continue to make section 508 "applicable" to the office. *See* S. Rep. No. 105-250, at 13, 25; 144 Cong. Rec. 12,433 (June 16, 1998). But that provision "was not enacted as part of the final bill, and no provision of the Vacancies Reform Act bars the President from designating an Acting Attorney General under that statute." *2007 Acting Attorney General*, 31 Op. O.L.C. at 209 n.1.

capacity), *appeal dismissed upon appellant's motion*, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018).

For these reasons, we believe that the President could invoke the Vacancies Reform Act in order to designate Mr. Whitaker as Acting Attorney General ahead of the alternative line of succession provided under section 508.

II.

While the Vacancies Reform Act expressly authorizes the President to select an unconfirmed official as Acting Attorney General, Congress may not authorize an appointment mechanism that would conflict with the Constitution. *See Freytag v. Comm'r*, 501 U.S. 868, 883 (1991). The Appointments Clause requires the President to "appoint" principal officers, such as the Attorney General, "by and with the Advice and Consent of the Senate." U.S. Const. art. II, § 2, cl. 2. But for "inferior Officers," Congress may vest the appointment power "in the President alone, in the Courts of Law, or in the Heads of Departments." *Id.*

The President's designation of Mr. Whitaker as Acting Attorney General is consistent with the Appointments Clause so long as Acting Attorney General is not a principal office that requires Senate confirmation. If so, it does not matter whether an acting official temporarily filling a vacant principal office is an inferior officer or not an "officer" at all within the meaning of the Constitution, because Mr. Whitaker was appointed in a manner that satisfies the requirements for an inferior officer: He was appointed by Attorney General Sessions, who was the Head of the Department, and the President designated him to perform additional duties. *See Acting Director of OMB*, 27 Op. O.L.C. at 124–25. If the designation constituted an appointment to a principal office, however, then section 3345(a)(3) would be unconstitutional as applied, because Mr. Whitaker does not currently occupy a position requiring Senate confirmation.

For the reasons stated below, based on longstanding historical practice and precedents, we do not believe that the Appointments Clause may be construed to require the Senate's advice and consent before Mr. Whitaker may be Acting Attorney General.

A.

The Attorney General is plainly a principal officer, who must be appointed with the advice and consent of the Senate. *See Edmond v. United States*, 520 U.S. 651, 662–63 (1997); *Morrison v. Olson*, 487 U.S. 654, 670–72 (1988). The Attorney General has broad and continuing authority over the federal government's law-enforcement, litigation, and other legal functions. *See, e.g.*, 28 U.S.C. §§ 516, 533. The Supreme Court has not "set forth an exclusive criterion for distinguishing between" inferior officers and principal officers. *Edmond*, 520 U.S. at 661. "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President." *Id.* at 662. There is no officer below the President who supervises the Attorney General.

Although the Attorney General is a principal officer, it does not follow that an Acting Attorney General should be understood to be one. An office under the Appointments Clause requires both a "continuing and permanent" position and the exercise of "significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (internal quotation marks omitted); *see also Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 74 (2007). While a person acting as the Attorney General surely exercises sufficient authority to be an "Officer of the United States," it is less clear whether Acting Attorney General is a principal office.

Because that question involves the division of powers between the Executive and the Legislative Branches, "historical practice" is entitled to "significant weight." *Nat'l Labor Relations Bd. v. Noel Canning*, 573 U.S. 513, 525 (2014); *see also, e.g.*, *The Pocket Veto Case*, 279 U.S. 655, 689 (1929). That practice strongly supports the constitutionality of authorizing someone who has not been Senate-confirmed to serve as an acting principal officer. Since 1792, Congress has repeatedly legislated on the assumption that temporary service as a principal officer does not require Senate confirmation. As for the Executive Branch's practice, our non-exhaustive survey has identified over 160 occasions between 1809 and 1860 on which non-Senate-confirmed persons served temporarily as an acting or ad interim principal officer in the Cabinet.

Furthermore, judicial precedents culminating in *United States v. Eaton*, 169 U.S. 331 (1898), endorsed that historical practice and confirm that the

temporary nature of acting service weighs against principal-officer status. The Supreme Court in *Eaton* held that an inferior officer may perform the duties of a principal officer "for a limited time[] and under special and temporary conditions" without "transform[ing]" his office into one for which Senate confirmation is required. *Id*. at 343. That holding was not limited to the circumstances of that case, but instead reflected a broad consensus about the status of an acting principal officer that the Supreme Court has continued to rely on in later Appointments Clause decisions.

1.

Since the Washington Administration, Congress has "authoriz[ed] the President to direct certain officials to temporarily carry out the duties of a vacant PAS office [i.e., one requiring Presidential Appointment and Senate confirmation] in an acting capacity, without Senate confirmation." *SW General*, 580 U.S. at 293; *see also Noel Canning*, 573 U.S. at 600 (Scalia, J., dissenting in relevant part) (observing that the President does not need to use recess appointments to fill vacant offices because "Congress can authorize 'acting' officers to perform the duties associated with a temporarily vacant office—and has done that, in one form or another, since 1792"). Those statutes, and evidence of practice under them during the early nineteenth century, did not limit the pool of officials eligible to serve as an acting principal officer to those who already have Senate-confirmed offices. This history provides compelling support for the conclusion that the position of an *acting* principal officer is not itself a principal office.

In 1792, Congress first "authorized the appointment of 'any person or persons' to fill specific vacancies in the Departments of State, Treasury, and War." *SW General*, 580 U.S. at 294 (quoting Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281). Although the statute expressly mentioned vacancies in the position of Secretary in each of those Departments, the President was authorized to choose persons who held no federal office at all—much less one requiring Senate confirmation. Although the 1792 statute "allowed acting officers to serve until the permanent officeholder could resume his duties or a successor was appointed," Congress "imposed a six-month limit on acting service" in 1795. *Id*. at 294 (citing Act of Feb. 13, 1795, ch. 21, 1 Stat. 415). In 1863, in response to a plea from President Lincoln, *see* Message to Congress (Jan. 2, 1863), Cong. Globe,

37th Cong., 3d Sess. 185 (1863), Congress extended the provision to permit the President to handle a vacancy in the office of "the head of any Executive Department of the Government, or of any officer of either of the said Departments whose appointment is not in the head thereof." Act of Feb. 20, 1863, ch. 45, § 1, 12 Stat. 656, 656. The 1863 statute allowed the duties of a vacant office to be performed for up to six months by "the head of any other Executive Department" or by any other officer in those departments "whose appointment is vested in the President." *Id*.

In 1868, Congress replaced all previous statutes on the subject of vacancies with the Vacancies Act of 1868. *See* Act of July 23, 1868, ch. 227, 15 Stat. 168. That act provided that, "in case of the death, resignation, absence, or sickness of the head of any executive department of the government, the first or sole assistant thereof shall . . . perform the duties of such head until a successor be appointed, or such absence or sickness shall cease." *Id*. § 1, 15 Stat. at 168. In lieu of elevating the "first or sole assistant," the President could also choose to authorize any other officer appointed with the Senate's advice and consent to perform the duties of the vacant office until a successor was appointed or the prior occupant of the position was able to return to his post. *Id*. § 3, 15 Stat. at 168. In cases of death or resignation, an acting official could serve for no longer than ten days. *Id*. The 1868 act thus eliminated the President's prior discretion to fill a vacant office temporarily with someone who did not hold a Senate-confirmed position. Yet, it preserved the possibility that a non-Senate-confirmed first assistant would serve as an acting head of an executive department.

Over the next 120 years, Congress repeatedly amended the Vacancies Act of 1868, but it never eliminated the possibility that a non-Senate-confirmed first assistant could serve as an acting head of an executive department. In 1891, it extended the time limit for acting service in cases of death or resignation from ten to thirty days. Act of Feb. 6, 1891, ch. 113, 26 Stat. 733. In 1966, it made minor changes during the course of recodifying and enacting title 5 of the United States Code. *See* S. Rep. No. 89-1380, at 20, 70–71 (1966); 5 U.S.C. §§ 3345–3349 (1970). Congress amended the Act once more in 1988, extending the time limit on acting service from 30 to 120 days and making the statute applicable to offices that are not in "Departments" and thus are less likely to have Senate-

confirmed first assistants. Pub. L. No. 100-398, § 7(b), 102 Stat. 985, 988 (1988).

Accordingly, for more than two centuries before the Vacancies Reform Act, Congress demonstrated its belief that the Appointments Clause did not require Senate confirmation for temporary service in a principal office, by repeatedly enacting statutes that affirmatively authorized acting service—even in principal offices at the heads of executive departments—by persons who did not already hold an appointment made with the Senate's advice and consent.

2.

Not only did Congress authorize the Presidents to select officials to serve temporarily as acting principal officers, but Presidents repeatedly exercised that power to fill temporarily the vacancies in their administrations that arose from resignations, terminations, illnesses, or absences from the seat of government. In providing this advice, we have not canvassed the entire historical record. But we have done enough to confirm that Presidents often exercised their powers under the 1792 and 1795 statutes to choose persons who did not hold any Senate-confirmed position to act temporarily as principal officers in various departments. In the Washington, Adams, and Jefferson Administrations, other Cabinet officers (or Chief Justice John Marshall) were used as temporary or "ad interim" officials when offices were vacant between the departure of one official and the appointment of his successor. *See, e.g.*, *Biographical Directory of the American Congress, 1774–1971*, at 13–14 (1971) ("*Biographical Directory*"); *see id.* at 12 (explaining that the list of Cabinet officers excludes "[s]ubordinates acting temporarily as heads of departments" and therefore lists only those who served ad interim after an incumbent's departure).

President Jefferson made the first designation we have identified of a non-Senate-confirmed officer to serve temporarily in his Cabinet. On February 17, 1809, approximately two weeks before the end of the Jefferson Administration, John Smith, the chief clerk of the Department of War, was designated to serve as Acting Secretary of War. *See id.* at 14; Letter from Thomas Jefferson to the War Department (Feb. 17, 1809), National Archives, *Founders Online*, https://founders.archives.gov/documents/Jefferson/99-01-02-9824 ("Whereas, by the resignation of Henry Dear-

borne, late Secretary at War, that office is become vacant. I therefore do hereby authorize John Smith, chief clerk of the office of the Department of War, to perform the duties of the said office, until a successor be appointed."). As chief clerk, Smith was not a principal officer. He was instead "an inferior officer . . . appointed by the [Department's] principal officer." Act of Aug. 5, 1789, ch. 8, § 2, 1 Stat. 49, 50. The next Secretary of War did not enter upon duty until April 8, 1809, five weeks after the beginning of the Madison Administration. *See Biographical Directory* at 14.

Between 1809 and 1860, President Jefferson's successors designated a non-Senate-confirmed officer to serve as an acting principal officer in a Cabinet position on at least 160 other occasions. We have identified 106 additional instances during that period where chief clerks, who were not Senate confirmed, temporarily served as ad interim Secretary of State (on 48 occasions), Secretary of the Treasury (on 33 occasions), or Secretary of War (on 25 occasions). *See id*. at 15–19; 1 *Trial of Andrew Johnson, President of the United States, Before the Senate of the United States, on Impeachment by the House of Representatives for High Crimes and Misdemeanors* 575–81, 585–88, 590–91 (Washington, GPO 1868); *In re Asbury Dickins*, Rep. C.C. 9, 34th Cong., 1st Sess. at 4–5 (Ct. Cl. 1856) (listing 18 times between 1829 and 1836 that chief clerk Asbury Dickins was "appointed to perform the duties of Secretary of the Treasury" or Secretary of State "during the absence from the seat of government or sickness" of those Secretaries, for a total of 359 days).[6] Between 1851 and

[6] *See also* Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (providing that the chief clerk in what became the Department of State was "an inferior officer, to be appointed by the [Department's] principal officer"); Act of Sept. 2, 1789, ch. 12, § 1, 1 Stat. 65, 65 (providing for an "Assistant to the Secretary of the Treasury," later known as the chief clerk, who "shall be appointed by the said Secretary"). The sources cited in the text above indicate that (1) the following chief clerks served as ad interim Secretary of State: Aaron Ogden Dayton, Aaron Vail (twice), Asbury Dickins (10 times), Daniel Carroll Brent (5 times), Daniel Fletcher Webster, Jacob L. Martin (3 times), John Appleton, John Graham, Nicholas Philip Trist (4 times), Richard K. Cralle, William S. Derrick (12 times), William Hunter (7 times); (2) the following chief clerks served as ad interim Secretary of the Treasury: Asbury Dickins (8 times), John McGinnis, and McClintock Young (24 times); and (3) the following chief clerks (or acting chief clerks) served as ad interim Secretary of War: Albert Miller Lee, Archibald Campbell (5 times), Carey A. Harris (4 times), Christopher Vandeventer, George Graham, John D. McPherson, John Robb (6 times), Philip G. Randolph (4 times), Samuel J. Anderson, and William K. Drinkard.

1855 there were also at least 21 occasions on which non-Senate-confirmed Assistant Secretaries were authorized to act as Secretary of the Treasury.[7]

We have also identified instances involving designations of persons who apparently had no prior position in the federal government, including Alexander Hamilton's son, James A. Hamilton, whom President Jackson directed on his first day in office to "take charge of the Department of State until Governor [Martin] Van Buren should arrive in the city" three weeks later. 1 *Trial of Andrew Johnson* at 575; *see Biographical Directory* at 16. President Jackson also twice named William B. Lewis, who held no other government position, as acting Secretary of War. *See* 1 *Trial of Andrew Johnson* at 575. Moving beyond the offices expressly covered by the 1792 and 1795 statutes, there were at least 23 additional instances before 1861 in which Presidents authorized a non-Senate-confirmed chief clerk to perform temporarily the duties of the Secretary of the Navy (on 21 occasions) or the Secretary of the Interior (on 2 occasions).[8]

At the time, it was well understood that when an Acting or ad interim Secretary already held an office such as chief clerk, he was not simply performing additional duties, but he was deemed the Acting Secretary.

Editor's note: As originally issued, footnote 6 and accompanying text referred to a total of 109, rather than 106, instances. Some had been inadvertently counted twice and Carey A. Harris had been omitted because the *Biographical Directory* identifies him as the Commissioner of Indian Affairs though he did not assume that position until later. The total number of known instances between 1809 and 1860 remains more than 160 because, after the opinion was issued, we confirmed three additional examples in which persons without any Senate-confirmed position served as an ad interim Secretary: William S. Derrick was ad interim Secretary of State while serving as Clerk for the Diplomatic Bureau; Samuel H. Porter was ad interim Secretary of War while serving as Agent for the Office of the Commissioner of Indian Affairs; and Mahlon Dickerson was ad interim Secretary of War before becoming the Secretary of the Navy. *See* 1 *Trial of Andrew Johnson* at 577, 578, 579.

[7] *See* 1 *Trial of Andrew Johnson* at 580–81, 590–91 (entries for William L. Hodge and Peter Washington); Act of Mar. 3, 1849, ch. 108, § 13, 9 Stat. 395, 396–97 (providing for appointment by the Secretary of an "Assistant Secretary of the Treasury").

[8] *See Biographical Directory* at 14–17 (chief clerks of the Navy in 1809, 1814–15, 1829, 1831, and 1841); *id.* at 18 (chief clerk of the Department of the Interior, Daniel C. Goddard, in 1850 (twice)); *In re Cornelius Boyle*, Rep. C.C. 44, 34th Cong., 3d Sess. at 3, 12–13 (Ct. Cl. 1857) (identifying 13 times between 1831 and 1838 that chief clerk John Boyle was appointed as Acting Secretary of the Navy, for a total of 466 days).

We know this because the chief clerks sometimes sought payment for the performance of those additional duties. Attorney General Legaré concluded that Chief Clerk McClintock Young had a claim for compensation as "Secretary of the Treasury *ad interim*." *Pay of Secretary of the Treasury ad Interim*, 4 Op. Att'y Gen. 122, 122–23 (1842). And the Court of Claims later concluded that Congress should appropriate funds to compensate such officers for that service. *See, e.g.*, *In re Cornelius Boyle*, Rep. C.C. 44, 34th Cong., 3d Sess. at 9, 1857 WL 4155, at *4 (Ct. Cl. 1857) ("The office of Secretary *ad interim* being a distinct and independent office in itself, when it is conferred on the chief clerk, it is so conferred not because it pertains to him *ex officio*, but because the President, in the exercise of his discretion, sees fit to appoint him[.]"); *Dickins*, Rep. C.C. 9, at 16, 1856 WL 4042, at *3.

Congress not only acquiesced in such appointments, but also required a non-Senate-confirmed officer to serve as a principal officer in some instances. In 1810, Congress provided that in the case of a vacancy in the office of the Postmaster General, "all his duties shall be performed by his senior assistant." Act of Apr. 30, 1810, ch. 37, § 1, 2 Stat. 592, 593. The senior assistant was one of two assistants appointed by the Postmaster General. *Id*. When Congress reorganized the Post Office in 1836, it again required that the powers and duties of the Postmaster General would, in the case of "death, resignation, or absence" "devolve, for the time being on the First Assistant Postmaster General," who was still an appointee of the Postmaster General. Act of July 2, 1836, ch. 270, § 40, 5 Stat. 80, 89. On four occasions before 1860, a First Assistant Postmaster General served as Postmaster General ad interim. *See Biographical Directory* at 17–19 (in 1841 (twice), 1849, and 1859).

On the eve of the Civil War in January 1861, President Buchanan summarized the Chief Executive's view of his authority to designate interim officers in a message submitted to Congress to explain who had been performing the duties of the Secretary of War:

> The practice of making . . . appointments [under the 1795 statute], whether in a vacation or during the session of Congress, has been constantly followed during every administration from the earliest period of the government, and *its perfect lawfulness has never, to my knowledge, been questioned or denied*. Without going back further than the year 1829, and without taking into the calculation any but

> the chief officers of the several departments, it will be found that provisional appointments to fill vacancies were made to the number of one hundred and seventy-nine . . . . Some of them were made while the Senate was in session, some which were made in vacation were continued in force long after the Senate assembled. *Sometimes, the temporary officer was the commissioned head of another department, sometimes a subordinate in the same department*.

Message from the President of the United States, S. Exec. Doc. No. 2, 36th Cong., 2d Sess. at 1–2 (Jan. 15, 1861) (emphases added).

3.

When it comes to vacancy statutes, the office of Attorney General presents an unusual case, albeit not one suggesting any different constitutional treatment. The office was established in the Judiciary Act of 1789, *see* Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 93, and the Attorney General was a member of the President's Cabinet, *see Office and Duties of Attorney General*, 6 Op. Att'y Gen. 326, 330 (1854). But the Attorney General did not supervise an "executive department," and the Department of Justice was not established until 1870. *See* Act of June 22, 1870, ch. 150, § 1, 16 Stat. 162, 162. Thus, the terms of the 1792, 1795, and 1863 statutes, and of the Vacancies Act of 1868, did not expressly apply to vacancies in the office of the Attorney General.

Even so, the President made "temporary appointment[s]" to the office of Attorney General on a number of occasions. In 1854, Attorney General Cushing noted that "proof exists in the files of the department that temporary appointment has been made by the President in that office." *Office and Duties of Attorney General*, 6 Op. Att'y Gen. at 352. Because the 1792 and 1795 statutes did not provide the President with express authority for those temporary appointments, Cushing believed it "questionable" whether the President had the power, but he also suggested that "[p]erhaps the truer view of the question is to consider the two statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one." *Id*. Cushing nonetheless recommended the enactment of "a general provision . . . to remove all doubt on the subject" for the Attorney General and "other non-enumerated departments." *Id*.

Congress did not immediately remedy the problem that Cushing identified, but Presidents designated Acting Attorneys General, both before and

after the Cushing opinion. In some instances, the President chose an officer who already held another Senate-confirmed office. *See Acting Attorneys General*, 8 Op. O.L.C. 39, 40–41 (1984) (identifying instances in 1848 and 1868 involving the Secretary of the Navy or the Secretary of the Interior).[9] In other instances, however, non-Senate-confirmed individuals served. After the resignation of Attorney General James Speed, for instance, Assistant Attorney General J. Hubley Ashton was the ad interim Attorney General from July 17 to July 23, 1866. *See id*. at 41; *Biographical Directory* at 20. At the time, the Assistant Attorney General was appointed by the Attorney General alone. *See* Act of March 3, 1859, ch. 80, 11 Stat. 410, 420 ("[T]he Attorney-General . . . is hereby[] authorized to appoint one assistant in the said office, learned in the law, at an annual salary of three thousand dollars[.]").[10]

On other occasions between 1859 and 1868, Ashton and other Assistant Attorneys General who had not been Senate confirmed also signed several formal legal opinions as "Acting Attorney General," presumably when their incumbent Attorney General was absent or otherwise unavailable. *See Case of Colonel Gates*, 11 Op. Att'y Gen. 70, 70 (1864) (noting that the question from the President "reached this office in [the Attorney General's] absence").[11] In 1873, when Congress reconciled the Vacancies

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[9] This list is almost certainly under-inclusive because the published sources we have located identify only those who were Acting Attorney General during a period between the resignation of one Attorney General and the appointment of his successor. They do not identify individuals who may have performed the functions and duties of Attorney General when an incumbent Attorney General was temporarily unavailable on account of an absence or sickness that would now trigger either 28 U.S.C. § 508(a) or 5 U.S.C. § 3345(a).

[10] In 1868, Congress created two new Assistant Attorney General positions to be "appointed by the President, by and with the advice and consent of the Senate," and specified that those positions were "in lieu of," among others, "the assistant attorney-general now provided for by law," which was "abolished" effective on July 1, 1868. Act of June 25, 1868, ch. 71, § 5, 15 Stat. 75, 75. A few weeks later, Ashton was confirmed by the Senate as an Assistant Attorney General. *See* S. Exec. J., 40th Cong. 2d Sess. 369 (July 25, 1868). He was therefore holding a Senate-confirmed office when he served another stint as Acting Attorney General for several days at the beginning of the Grant Administration in March 1869, *see Biographical Directory* at 21, and when he signed five opinions as "Acting Attorney General" in September and October 1868.

[11] There were two additional opinions signed by Ashton as "Acting Attorney General" in 1864 and 1865 (11 Op. Att'y Gen. 482; 11 Op. Att'y Gen. 127); as well as four signed as "Acting Attorney General" by Assistant Attorney General John Binckley in 1867 (12

Act of 1868 with the Department of Justice's organic statute, it expressly excepted the office of Attorney General from the general provision granting the President power to choose who would temporarily fill a vacant Senate-confirmed office. *See* Rev. Stat. § 179 (1st ed. 1875), 18 Stat. pt. 1, at 27. There is accordingly no Attorney General-specific practice with respect to the pre-1998 statutes.

B.

Well before the Supreme Court's foundational decision in *Eaton* in 1898, courts approved of the proposition that acting officers are entitled to payment for services during their temporary appointments as principal officers. *See, e.g.*, *United States v. White*, 28 F. Cas. 586, 587 (C.C.D. Md. 1851) (No. 16,684) (Taney, Circuit J.) ("[I]t often happens that, in unexpected contingencies, and for temporary purposes, the appointment of a person already in office, to execute the duties of another office, is more convenient and useful to the public, than to bring in a new officer to execute the duty."); *Dickins*, Rep. C.C. 9, at 17, 1856 WL 4042, at *3 (finding a chief clerk was entitled to additional compensation "for his services[] as acting Secretary of the Treasury and as acting Secretary of State"). Most significantly, in *Boyle*, the Court of Claims concluded that the chief clerk of the Navy (who was not Senate confirmed) had properly served as Acting Secretary of the Navy on an intermittent basis over seven years for a total of 466 days. Rep. C.C. 44, at 8, 1857 WL 4155, at *1–2 (1857). The court expressly addressed the Appointments Clause question and distinguished, for constitutional purposes, between the office of Secretary of the Navy and the office of Acting Secretary of the Navy. *Id.* at 8, 1857 WL 4155 at *3 ("It seems to us . . . plain that the office of Secretary *ad interim* is a distinct and independent office in itself. It is not the office of Secretary[.]"). Furthermore, the court emphasized, the defining feature of the office of Secretary ad interim was its "temporary" character, and it must therefore be considered an inferior office:

Op. Att'y Gen. 231; 12 Op. Att'y Gen. 229; 12 Op. Att'y Gen 222; 12 Op. Att'y Gen. 227); two signed as "Acting Attorney General" by Assistant Attorney General Titian J. Coffey in 1862 and 1863 (10 Op. Att'y Gen. 492; 10 Op. Att'y Gen. 377); and one signed as "Acting Attorney General" by Assistant Attorney General Alfred B. McCalmont in 1859 (9 Op. Att'y Gen. 389).

> Congress has exercised the power of vesting the appointment of a Secretary *ad interim* in the President alone, and we think, in perfect consistency with the Constitution of the United States. We do not think that there can be any doubt that he is an *inferior* officer, in the sense of the Constitution, whose appointment may be vested by Congress in the President alone.

Id.

When the Supreme Court addressed this Appointments Clause issue in 1898, it reached a similar conclusion. In *United States v. Eaton*, the Court considered whether Congress could authorize the President alone to appoint a subordinate officer "charged with the duty of temporarily performing the functions" of a principal officer. 169 U.S. at 343. The statute authorized the President "to provide for the appointment of vice-consuls . . . in such manner and under such regulations as he shall deem proper." *Id*. at 336 (quoting Rev. Stat. § 1695 (2d ed. 1878), 18 Stat. pt. 1, at 303 (repl. vol.)). The President's regulation provided that "[i]n case a vacancy occurs in the offices both of consul and the vice-consul, which requires the appointment of a person to perform temporarily the duties of the consulate, the diplomatic representative has authority to make such appointment, with the consent of the foreign government . . . immediate notice being given to the Department of State." *Id*. at 338 (quoting regulation). Pursuant to that authority, Sempronius Boyd, who was the diplomatic representative and consul-general to Siam, appointed Lewis Eaton (then a missionary who was not employed by the government) as a vice-consul-general and directed him to take charge of the consulate after Boyd's departure. *Id*. at 331–32. With the "knowledge" and "approval" of the Department of State, Eaton remained in charge of the consulate, at times calling himself "acting consul-general of the United States at Bangkok," from July 12, 1892, until a successor vice-consul-general arrived on May 18, 1893. *Id*. at 332–33. In a dispute between Boyd's widow and Eaton over salary payments, the Court upheld Eaton's appointment, and the underlying statutory scheme, against an Appointments Clause challenge. *Id*. at 334–35, 352.

The Constitution expressly includes "Consuls" in the category of officers whose appointment requires the Senate's advice and consent. U.S. Const. art. II, § 2, cl. 2. The *Eaton* Court, however, concluded that a "vice-consul" is an inferior officer whose appointment Congress may

"vest in the President" alone. 169 U.S. at 343. The Court held that Eaton's exercise of the authority of a Senate-confirmed office did not transform him into an officer requiring Senate confirmation:

> Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions, he is not thereby transformed into the superior and permanent official. To so hold would render void any and every delegation of power to an inferior to perform under any circumstances or exigency the duties of a superior officer, and the discharge of administrative duties would be seriously hindered.

Id. The Court concluded that more than forty years of practice "sustain the theory that a vice-consul is a mere subordinate official," which defeated the contention that Eaton's appointment required Senate confirmation. *Id*. at 344. In so doing, the Court cited Attorney General Cushing's 1855 opinion about appointments of consular officials, which had articulated the parameters for that practice. *See id*.[12] Significantly, the Court also made clear that its holding was not limited to vice-consuls or to the exigencies of Eaton's particular appointment. Rather, the Court emphasized that the temporary performance of a principal office is not the same as holding that office itself. The Court feared that a contrary holding would bear upon "any and every delegation of power to an inferior to perform *under any circumstances or exigency*." *Id*. at 343 (emphasis added). In view of the long history of such appointments, *Eaton* simply confirmed the general rule. It did not work any innovation in that practice.

The Court has not retreated from *Eaton*, or narrowed its holding, but instead has repeatedly cited the decision for the proposition that an inferior officer may temporarily perform the duties of a principal officer without Senate confirmation. In *Edmond*, the Court observed that "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." 520 U.S. at 663. But the Court also observed

[12] In the 1855 opinion, Attorney General Cushing explained that a vice-consul is "the person employed to fill the [consul's] place temporarily in his absence." *Appointment of Consuls*, 7 Op. Att'y Gen. 242, 262 (1855). He noted that consuls had to be Senate-confirmed, but vice-consuls were regarded as the "subordinates of consuls" and therefore did not require "nomination to the Senate." *Id*. at 247.

that there is no "exclusive criterion for distinguishing between principal and inferior officers" and restated *Eaton*'s holding that "a vice consul charged temporarily with the duties of the consul" is an "inferior" officer. *Id*. at 661. In *Morrison*, the Court emphasized that a subordinate who performed a principal officer's duties "for a limited time and under special and temporary conditions" is not "thereby transformed into the superior and permanent official," and explained that a vice-consul appointed during the consul's "temporary absence" remained a "'subordinate officer' notwithstanding the Appointment Clause's specific reference to 'Consuls' as principal officers." 487 U.S. at 672–73 (quoting *Eaton*, 169 U.S. at 343). Justice Scalia's dissenting opinion in *Morrison* similarly described *Eaton* as holding that "the appointment by an Executive Branch official other than the President of a 'vice-consul,' charged with the duty of temporarily performing the function of the consul, did not violate the Appointments Clause." *Id*. at 721 (Scalia, J., dissenting). Likewise, in his dissenting opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008), *aff'd in part and rev'd in part*, 561 U.S. 447 (2010), then-Judge Kavanaugh cited *Eaton* to establish that "[t]he temporary nature of the office is the . . . reason that *acting* heads of departments are permitted to exercise authority without Senate confirmation." *Id*. at 708 n.17 (Kavanaugh, J., dissenting). Notably, Judge Kavanaugh also cited our 2003 opinion, which concluded that an OMB official who was not Senate confirmed could serve as Acting Director of OMB. *See id*. (citing *Acting Director of OMB*, 27 Op. O.L.C. at 123).

In *SW General*, the Court acknowledged the long history of Acts of Congress permitting the President to authorize officials to temporarily perform the functions of vacant offices requiring Senate approval. 580 U.S. at 294. Although the Court's opinion did not address the Appointments Clause, Justice Thomas's concurring opinion suggested that a presidential directive to serve as an officer under the Vacancies Reform Act should be viewed as an appointment, and that such a direction would "raise[] grave constitutional concerns because the Appointments Clause forbids the President to appoint principal officers without the advice and consent of the Senate." *Id*. at 313. But Justice Thomas also distinguished *Eaton* on the ground that the acting designation at issue in *SW General* was not "special and temporary" because it had remained in place "for

more than three years in an office limited by statute to a 4-year term." *Id.* at 313 n.1. Justice Thomas's opinion may therefore be understood to be consistent not only with *Eaton*, but also with the precedents of this Office, which have found it "implicit" that "the tenure of an Acting Director should not continue beyond a reasonable time." *Continuing Service of Deputy Director of OMB as Acting Director During Vacancy*, 1 Op. O.L.C. 287, 289–90 (1977). Even under Justice Thomas's opinion, Mr. Whitaker's designation as Acting Attorney General, which was made one week ago, and which would lapse in the absence of a presidential nomination, should qualify as "special and temporary" under *Eaton*.

C.

Executive practice and more recent legislation reinforce that an inferior officer may temporarily act in the place of a principal officer. In 1980, for instance, this Office raised no constitutional concerns in concluding (in the context of a non-executive office) that the Comptroller General was statutorily authorized to "designate an employee" of the General Accounting Office to be Acting Comptroller General during the absence or incapacity of both the Senate-confirmed Comptroller General and the Senate-confirmed Deputy Comptroller General. *Authority of the Comptroller General to Appoint an Acting Comptroller General*, 4B Op. O.L.C. 690, 690–91 (1980).

Most significantly, in 2003, this Office relied on *Eaton* in concluding that, although "the position of Director [of OMB] is a principal office, . . . an Acting Director [of OMB] is only an inferior officer." *Acting Director of OMB*, 27 Op. O.L.C. at 123. We did not think that that conclusion had been called into question by *Edmond*'s statement that an inferior officer is one who reports to a superior officer below the President, because in that case "[t]he Court held only that '[g]enerally speaking' an inferior officer is subordinate to an officer other than the President," and because *Edmond* did not deal with temporary officers. 27 Op. O.L.C. at 124 (citations omitted). Assuming that for constitutional purposes the official designated as acting head of an agency would need to be an inferior officer (and that the OMB official in question was not already such an officer), we further concluded that the President's designation of an acting officer under the Act should be regarded as an appointment by the President alone—a constitutionally permissible mode for appointing an inferior officer.

Id. at 125. Since then, Presidents George W. Bush and Obama each used their authority under the Vacancies Reform Act to place non-Senate-confirmed Chiefs of Staff in the lines of succession to be the acting head of several federal agencies.[13] In three instances, President Obama placed a Chief of Staff above at least one Senate-confirmed officer within the same department.[14] And, in practice, during the Bush, Obama, and Trump Administrations, multiple unconfirmed officers were designated to serve as acting agency heads, either under the Vacancies Reform Act or another office-specific statute.[15] Those determinations reflect the judgments of

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[13] *See* Memorandum, Designation of Officers of the Social Security Administration, 71 Fed. Reg. 20333 (Apr. 17, 2006); Memorandum, Designation of Officers of the Council on Environmental Quality, 73 Fed. Reg. 54487 (Sept. 18, 2008) (later superseded by 2017 memorandum cited below); Memorandum, Designation of Officers of the Overseas Private Investment Corporation to Act as President of the Overseas Private Investment Corporation, 76 Fed. Reg. 33613 (June 6, 2011); Memorandum, Designation of Officers of the Millennium Challenge Corporation to Act as Chief Executive Officer of the Millennium Challenge Corporation, 77 Fed. Reg. 31161 (May 21, 2012); Memorandum, Designation of Officers of the General Services Administration to Act as Administrator of General Services, 78 Fed. Reg. 59161 (Sept. 20, 2013); Memorandum, Designation of Officers of the Office of Personnel Management to Act as Director of the Office of Personnel Management, 81 Fed. Reg. 54715 (Aug. 12, 2016); Memorandum, Providing an Order of Succession Within the National Endowment of the Humanities, 81 Fed. Reg. 54717 (Aug. 12, 2016); Memorandum, Providing an Order of Succession Within the National Endowment of the Arts, 81 Fed. Reg. 96335 (Dec. 23, 2016); Memorandum, Designation of Officers or Employees of the Office of Science and Technology Policy to Act as Director, 82 Fed. Reg. 7625 (Jan. 13, 2017); Memorandum, Providing an Order of Succession Within the Council on Environmental Quality, 82 Fed. Reg. 7627 (Jan. 13, 2017).

[14] *See* Executive Order 13612, Providing an Order of Succession Within the Department of Agriculture, 77 Fed. Reg. 31153 (May 21, 2012); Executive Order 13735, Providing an Order of Succession Within the Department of the Treasury, 81 Fed. Reg. 54709 (Aug. 12, 2016); Executive Order 13736, Providing an Order of Succession Within the Department of Veterans Affairs, 81 Fed. Reg. 54711 (Aug. 12, 2016).

[15] For example, during this administration, Grace Bochenek, a non-Senate-confirmed laboratory director, served as Acting Secretary of Energy from January 20, 2017, until March 2, 2017; Tim Horne, a non-Senate-confirmed Regional Commissioner, served as Acting Administrator of the General Services Administration from January 20, 2017, until December 12, 2017 (pursuant to a designation under a GSA-specific statute); Phil Rosenfelt, a non-Senate-confirmed Deputy General Counsel, served as Acting Secretary of Education from January 20, 2017, until February 7, 2017 (pursuant to a designation under a statute specific to that department); Don Wright, a non-Senate-confirmed Deputy Assistant Secretary, served as Acting Secretary of Health and Human Services from

these administrations that the President may lawfully designate an unconfirmed official, including a Chief of Staff, to serve as an acting principal officer.

Congress too has determined in the Vacancies Reform Act and many other currently operative statutes that non-Senate-confirmed officials may temporarily perform the functions of principal officers. By its terms, the Vacancies Reform Act applies to nearly all executive offices for which appointment "is required to be made by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 3345(a); *see id*. § 3349c(1)–(3) (excluding only certain members of multi-member boards, commissions, or similar entities). And it specifically provides for different treatment in some respects depending on whether the vacant office is that of an agency head. *Id*. § 3348(b)(2). Moreover, the statute contemplates that non-Senate-confirmed officials will be able to serve as acting officers in certain applications of section 3345(a)(1) as well as in all applications of section 3345(a)(3), which refers to an "officer or employee." The latter provision had no counterpart in the Vacancies Act of 1868, but it was not completely novel, because clerks, who were not Senate-confirmed, were routinely authorized to serve as acting officers under the 1792 and 1795 statutes.[16]

Congress has also enacted various statutes that enable deputies not confirmed by the Senate to act when the office of the Senate-confirmed agen-

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September 30, 2017, until October 10, 2017; Peter O'Rourke, a non-Senate-confirmed Chief of Staff, served as Acting Secretary of Veterans Affairs from May 29, 2018, until July 30, 2018; and Sheila Crowley, a non-Senate-confirmed Chief of Operations, served, upon President's Obama's designation, as Acting Director of the Peace Corps from January 20, 2017, until November 16, 2017. During the Obama administration, Darryl Hairston, a career employee, served as Acting Administrator of the Small Business Administration from January 22, 2009, until April 6, 2009, and Edward Hugler, a non-Senate-confirmed Deputy Assistant Secretary, served as Acting Secretary of Labor from February 2, 2009, until February 24, 2009. During the Bush Administration, Augustine Smythe, a non-Senate-confirmed Executive Associate Director, served as Acting Director of OMB from June 10, 2003, until late June 2003, consistent with our opinion.

[16] Echoing the movement in the early nineteenth century to chief clerks rather than Senate-confirmed officials from other departments, section 3345(a)(3) was reportedly the product of a desire to give the President "more flexibility" to use "qualified individuals who have worked within the agency in which the vacancy occurs for a minimum number of days and who are of a minimum grade level." S. Rep. No. 105-250, at 31 (additional views of Sen. Glenn et al.); *id*. at 35 (minority views of Sens. Durbin and Akaka).

cy head is vacant. *See* 12 U.S.C. § 4512(f) (providing for an Acting Director of the Federal Housing Finance Agency); *id.* § 5491(b)(5) (providing for an Acting Director of the Bureau of Consumer Financial Protection); 21 U.S.C. § 1703(a)(3) (providing for an Acting Director of the Office of National Drug Control Policy); 40 U.S.C. § 302(b) (providing for an Acting Administrator of the General Services Administration); 44 U.S.C. § 2103(c) (providing for an Acting Archivist). All of those provisions contemplate the temporary service of non-Senate-confirmed officials as acting principal officers, and these statutes would appear to be unconstitutional if only a Senate-confirmed officer could temporarily serve as an acting principal officer.

Similarly, other current statutes provide that, although the deputy is appointed by the President with the Senate's advice and consent, the President or the department head may designate another official to act as the agency head, even though that official is not Senate-confirmed. *See* 20 U.S.C. § 3412(a)(1) (providing that "[t]he Secretary [of Education] shall designate the order in which other officials of the Department shall act for and perform the functions of the Secretary . . . in the event of vacancies in both" the Secretary and Deputy Secretary positions); 31 U.S.C. § 502(f) (providing that the President may designate "an officer of the Office [of Management and Budget] to act as Director"); 38 U.S.C. § 304 (providing that the Deputy Secretary of Veterans Affairs serves as Acting Secretary "[u]nless the President designates another officer of the Government"); 42 U.S.C. § 7132(a) (providing that "[t]he Secretary [of Energy] shall designate the order in which the Under Secretary and other officials shall act for and perform the functions of the Secretary . . . in the event of vacancies in both" the Secretary and Deputy Secretary positions); 49 U.S.C. § 102(e) (providing that the Secretary of Transportation shall establish an order of succession that includes Assistant Secretaries who are not Senate-confirmed for instances in which the offices of the Secretary, Deputy Secretary, and Under Secretary of Transportation for Policy are vacant); 40 U.S.C. § 302(b) (providing that the Deputy Administrator serves as Acting Administrator of General Services when that office "is vacant," "unless the President designates another officer of the Federal Government"); *cf.* 44 U.S.C. § 304 (limiting the individuals whom the President may choose to serve as Acting Director of the Government Printing Office to those who occupy offices requiring presidential appointment with the Senate's advice and consent).

Indeed, if it were unconstitutional for an official without Senate confirmation to serve temporarily as an acting agency head, then the recent controversy over the Acting Director of the CFPB should have been resolved on that ground alone—even though it was never raised by any party, the district court, or the judges at the appellate argument. On November 24, 2017, the Director of the CFPB appointed a new Deputy Director, expecting that she would become the Acting Director upon his resignation later that day. *Acting Director of CFPB*, 41 Op. O.L.C. at 100 n.1. The Director of the CFPB relied on 12 U.S.C. § 5491(b)(5), which expressly contemplates that a non-Senate-confirmed official (the Deputy Director) will act as a principal officer (the Director). The President, however, exercised his authority under 5 U.S.C. § 3345(a)(2) to designate the Director of OMB as Acting Director of the CFPB. *See English*, 279 F. Supp. 3d at 330. When the Deputy Director challenged the President's action, we are not aware that anyone ever contended that the Deputy Director was constitutionally ineligible to serve as Acting Director because she had not been confirmed by the Senate. If the newly installed Deputy Director of the CFPB could lawfully have become the Acting Director, then the Chief of Staff to the Attorney General may serve as Acting Attorney General in the case of a vacancy.

D.

The constitutionality of Mr. Whitaker's designation as Acting Attorney General is supported by Supreme Court precedent, by acts of Congress passed in three different centuries, and by countless examples of executive practice. To say that the Appointments Clause now prohibits the President from designating Mr. Whitaker as Acting Attorney General would mean that the Vacancies Reform Act and a dozen statutes were unconstitutional, as were countless prior instances of temporary service going back to at least the Jefferson Administration.

There is no question that Senate confirmation is an important constitutional check on the President's appointments of senior officers. The Senate's role "serves both to curb Executive abuses of the appointment power, and to promote a judicious choice of [persons] for filling the offices of the union." *Edmond*, 520 U.S. at 659 (internal quotation marks omitted). At the same time, the "constitutional process of Presidential appointment and Senate confirmation . . . can take time: The President

may not promptly settle on a nominee to fill an office; the Senate may be unable, or unwilling, to speedily confirm the nominee once submitted." *SW General*, 580 U.S. at 293–94. Despite their frequent disagreements over nominees, for over 200 years, Congress and the President have agreed upon the value and permissibility of using temporary appointments, pursuant to limits set by Congress, in order to overcome the delays of the confirmation process.

If the President could not rely on temporary designations for principal offices, then the efficient functioning of the Executive Branch would be severely compromised. Because most Senate-confirmed officials resign at the end of an administration, a new President must rely on acting officials to serve until nominees have been confirmed. If Senate confirmation were required before anyone could serve, then the Senate could frustrate the appropriate functioning of the Executive Branch by blocking the confirmation of principal officers for some time. *See* 144 Cong. Rec. 27496 (Oct. 21, 1998) (statement of Sen. Thompson) (noting that section 3345(a)(3) had been added because "[c]oncerns had been raised that, particularly early in a presidential administration, there will sometimes be vacancies in first assistant positions, and that there will not be a large number of Senate-confirmed officers in the government," as well as "concerns . . . about designating too many Senate-confirmed persons from other offices to serve as acting officers in additional positions"). A political dispute with the Senate could frustrate the President's ability to execute the laws by delaying the appointment of his principal officers.

The problems with a contrary rule are not limited to the beginning of an administration. Many agencies would run into problems on an ongoing basis, because they have few officers subject to Senate confirmation. Thus, when a vacancy in the top spot arises, such an agency would either lack a head or be forced to rely upon reinforcements from Senate-confirmed appointees outside the agency. Those outside officers may be inefficient choices when a non-Senate-confirmed officer within the agency is more qualified to act as a temporary caretaker. At best, designating a Senate-confirmed officer to perform temporary services would solve a problem at one agency only by cannibalizing the senior personnel of another.

It is true that these concerns do not apply to the current circumstances of the Department of Justice, which is staffed by a number of Senate-

confirmed officers. Following Attorney General Sessions's resignation, the President could have relied upon the Deputy Attorney General, the Solicitor General, or an Assistant Attorney General to serve as Acting Attorney General. But the availability of potential alternatives does not disable Congress from providing the President with discretion to designate other persons under section 3345(a)(3) of the Vacancies Reform Act. Nothing in the text of the Constitution or historical practice suggests that the President may turn to an official who has not been confirmed by the Senate if, but only if, there is no appropriate Senate-confirmed official available.

III.

The President's designation to serve as Acting Attorney General of a senior Department of Justice official who does not currently hold a Senate-confirmed office is expressly authorized by 5 U.S.C. § 3345(a)(3). Mr. Whitaker has been designated based upon a statute that permits him to serve as Acting Attorney General for a limited period, pending the Senate's consideration of a nominee for Attorney General. Consistent with our 2003 opinion, with *Eaton*, and with two centuries of practice, we advised that his designation would be lawful.

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