OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES,

THE ATTORNEY GENERAL,

AND OTHER EXECUTIVE
OFFICERS OF THE FEDERAL
GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

EDITOR
Ryan Watzel

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Office of Legal Counsel
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Attorneys General

Matthew G. Whitaker (Acting)
William P. Barr

Assistant Attorney General
Office of Legal Counsel

Steven A. Engel

Deputy Assistant Attorneys General
Office of Legal Counsel

Curtis E. Gannon (Principal)
Liam P. Hardy
Sarah M. Harris
Daniel L. Koffsky
Jennifer L. Mascott
Henry C. Whitaker

Office of Legal Counsel
(2019)

Attorneys

Sean Aasen
Amin Aminfar
Kevin Barber
Christine M. Buzzard
Conor Clarke
Paul P. Colborn
(Special Counsel)
Conor J. Craft
Catherine H. Dorsey
Nathan A. Forrester
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(Special Counsel)
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(Senior Counsel)
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Zachary E. Tyree
Benjamin L. Wallace
Ryan Watzel

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 42 published volumes of the OLC series covered the years 1977 through 2018. The present volume 43 covers 2019.

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

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OPINIONS

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

Protective Assertion of Executive Privilege Over Unredacted Mueller Report and Related Investigative Files

The President may make a preliminary, protective assertion of executive privilege over the entirety of the materials subpoenaed by the Committee on the Judiciary of the House of Representatives relating to Special Counsel Mueller's investigation, to ensure the President's ability to make a final assertion, if necessary, over some or all of the subpoenaed material.

May 8, 2019

THE PRESIDENT
THE WHITE HOUSE

Dear Mr. President:

I am writing to request that you make a protective assertion of executive privilege with respect to Department of Justice documents recently subpoenaed by the Committee on the Judiciary of the House of Representatives. In cases like this where a committee has declined to grant sufficient time to conduct a full review, the President may make a protective assertion of privilege to protect the interests of the Executive Branch pending a final determination about whether to assert privilege. *See Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 1 (1996) (Reno, Att'y Gen.). The Committee has demanded that I produce the "complete and unredacted version" of the report submitted to me on March 22, 2019, by Special Counsel Robert S. Mueller, III, regarding his investigation of Russian interference in the 2016 presidential election. The Committee also seeks "[a]ll documents referenced in the Report" and "[a]ll documents obtained and investigative materials created by the Special Counsel's Office." The Committee therefore demands all of the Special Counsel's investigative files, which consist of millions of pages of classified and unclassified documents bearing upon more than two dozen criminal cases and investigations, many of which are ongoing. These materials include law enforcement information, information about sensitive intelligence sources and methods, and grand-jury information that the Department is prohibited from disclosing by law.

Consistent with paragraph 5 of President Reagan's 1982 memorandum about assertions of executive privilege, the Department requested that the

Chairman of the Committee hold the subpoena in abeyance and delay any vote recommending that the House of Representatives approve a resolution finding me in contempt of Congress for failing to comply with the subpoena, pending a final presidential decision on whether to invoke executive privilege. *See* Memorandum for the Heads of Executive Departments and Agencies, *Re: Procedures Governing Responses to Congressional Requests for Information* at 2 (Nov. 4, 1982). The Department made this request because, although the subpoenaed materials assuredly include categories of information within the scope of executive privilege, the Committee's abrupt resort to a contempt vote—notwithstanding ongoing negotiations about appropriate accommodations—has not allowed sufficient time for you to consider fully whether to make a conclusive assertion of executive privilege. The Chairman, however, has indicated that he intends to proceed with the markup session scheduled at 10:00 a.m. today on a resolution recommending a finding of contempt against me for failing to produce the requested materials.

In these circumstances, you may properly assert executive privilege with respect to the entirety of the Department of Justice materials that the Committee has demanded, pending a final decision on the matter. As with President Clinton's assertion in 1996, you would be making only a preliminary, protective assertion of executive privilege designed to ensure your ability to make a final assertion, if necessary, over some or all of the subpoenaed materials. *See Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. at 1. As the Attorney General and head of the Department of Justice, I hereby respectfully request that you do so.

WILLIAM P. BARR
Attorney General

Assertion of Executive Privilege Over Deliberative Materials Regarding Inclusion of Citizenship Question on 2020 Census Questionnaire

The President may assert executive privilege over "priority documents" relating to the Secretary of Commerce's decision to include a citizenship question on the 2020 decennial census questionnaire that the House Committee on Oversight and Reform has demanded as responsive to its subpoenas. The "priority documents" all involve predecisional deliberative material, attorney-client communications, or attorney work product.

The President may make a protective assertion of executive privilege over the remaining subpoenaed documents to give time for the Departments of Commerce and Justice to determine whether any remaining documents may be subject to privilege.

June 11, 2019

THE PRESIDENT
THE WHITE HOUSE

Dear Mr. President:

The Secretary of Commerce and I are requesting that you assert executive privilege with respect to documents responsive to a subpoena served on the Department of Justice and a subpoena served on the Department of Commerce by the Committee on Oversight and Reform of the United States House of Representatives ("Committee") on April 2, 2019. The subpoenas relate to the Committee's investigation into the Secretary's decision to include a citizenship question on the 2020 decennial census questionnaire. The Committee has scheduled a meeting for June 12, 2019, to vote on a resolution holding the Secretary and me in contempt of Congress for failing to comply with the subpoenas. This letter formally requests you assert executive privilege and explains the legal basis for such an assertion.[1]

I.

On December 12, 2017, the General Counsel of the Justice Management Division sent a letter to the U.S. Census Bureau requesting the

[1] The Secretary of Commerce has made a parallel request. *See* Letter for the President from Wilbur Ross, Secretary, Department of Commerce (June 11, 2019).

reinstatement of a question regarding citizenship on the 2020 decennial census questionnaire. The letter stated that citizenship data is critical to the Department of Justice's enforcement of the Voting Rights Act and its protections against racial discrimination in voting. The Department explained that, to enforce the Act's requirements, it needs a reliable calculation of the citizen voting-age population in localities where voting rights violations are alleged or suspected, and that the census is the most appropriate vehicle for collecting that data. Approximately three months later, on March 26, 2018, the Secretary announced that he was reinstating a citizenship question on the census in response to the Department's request.

On January 8, 2019, the Committee sent a letter to the Secretary requesting an extremely broad set of documents regarding the Secretary's decision to include the citizenship question on the census questionnaire. On February 12, 2019, the Committee sent a letter to the Acting Attorney General requesting similar documents regarding the Department of Justice's role in that decision. The Departments promptly began producing thousands of responsive documents to the Committee on a rolling basis, and made multiple witnesses available for interviews.

Despite these efforts, the Committee issued separate subpoenas to the Secretary and me on April 2, 2019, seeking many of the documents requested in the Committee's January 8 and February 12 letters. The subpoena issued to the Secretary requested eleven specific documents, including e-mails between the Secretary and his close advisers, as well as e-mails and documents produced by or sent to an attorney in the Department of Commerce's Office of General Counsel. The subpoena also requested all communications from January 20, 2017, through December 12, 2017, among Department of Commerce officials or between such officials and outside entities concerning the citizenship question. The subpoena issued to me requested a memorandum and note to the Acting Assistant Attorney General for the Department of Justice's Civil Rights Division from the same Department of Commerce attorney regarding the citizenship question. The subpoena also requested all documents and communications from January 20, 2017, through December 12, 2017, within the Department of Justice and with outside entities regarding the Department of Justice's request to include the citizenship question.

The Department of Justice and the Department of Commerce have made substantial efforts to accommodate the Committee's oversight interests concerning the citizenship question. To date, the Department of Commerce has produced almost 14,000 pages of responsive documents. The Secretary testified before the Committee for nearly seven hours, and the Department of Commerce also agreed to make available for voluntary transcribed interviews its General Counsel, a senior adviser to the Secretary, and a former senior counsel to the General Counsel. The Department of Justice, meanwhile, has made eight document submissions to the Committee between February and May of 2019 that total more than 17,000 pages. In addition, the Principal Deputy Assistant Attorney General for the Civil Rights Division voluntarily appeared for a transcribed interview, as did a Counselor to the Attorney General.

While the Department of Justice and the Department of Commerce have produced an extensive amount of material, both Departments have withheld from production a limited number of documents that are covered by components of executive privilege, including the deliberative process, attorney-client, and attorney work product components. A federal court has held that many of these same documents are privileged from disclosure in ongoing litigation over the inclusion of the citizenship question on the census. *See New York v. U.S. Dep't of Commerce*, 345 F. Supp. 3d 444, 451 n.7 (S.D.N.Y. 2018) (noting denials of motions to compel on, *inter alia*, "deliberative-process-privilege grounds" and "attorney-client-privilege grounds"). Despite the Executive Branch's good-faith efforts at accommodating the Committee's information needs, on June 3, 2019, the Committee sent separate letters to the Secretary and me stating that it would schedule a vote to hold each of us in contempt of Congress as a result of our purported failures to comply with the April 2 subpoenas. Although the Committee demanded an immediate production of all subpoenaed documents in unredacted form, it stated that it would consider postponing the contempt vote if the Secretary and I produced certain documents of priority to the Committee. Those documents include (i) the eleven documents specified in the Committee's subpoena to the Secretary; and (ii) the memorandum and note to the Acting Assistant Attorney General for the Civil Rights Division from the Department of Commerce attorney, as well as all drafts of the Department of Justice's December 2017 letter to the U.S. Census Bureau requesting the inclusion of a citi-

zenship question. The Committee's contempt vote is currently scheduled for June 12, 2019.[2]

II.

In my view, production of the priority documents identified in the Committee's June 3 letters—all of which involve predecisional deliberative material, attorney-client communications, or attorney work product—would have a significant chilling effect on future deliberations among senior Executive Branch officials, and would compromise the confidentiality on which the Executive Branch's attorney-client relationships depend. These confidentiality concerns are heightened at this time because, as noted above, a federal court has held that a number of these documents are protected by privilege in ongoing litigation. Accordingly, the Secretary and I respectfully request that you assert executive privilege over the specific documents identified in the Committee's June 3 letters. We also request that you make a protective assertion of executive privilege with respect to the remainder of the subpoenaed documents in order to give the Departments of Commerce and Justice time to determine whether a conclusive assertion of executive privilege would be necessary with respect to any of the remaining documents.

A.

The priority documents requested in the Committee's June 3 letters fit squarely within the scope of executive privilege. Executive privilege flows from the authorities vested in the President by Article II of the Constitution and "has been asserted by numerous Presidents from the earliest days of our Nation." *Congressional Requests for Confidential*

[2] The Committee has also indicated that it scheduled the contempt vote based on my instruction to a Department of Justice official not to appear for a deposition without the assistance of agency counsel. As the Department has explained, the Committee may not constitutionally prohibit agency counsel from accompanying agency employees called to testify about matters that potentially involve information protected by executive privilege. *See Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. 131 (2019). Therefore, the congressional subpoena purporting to require the Department official to appear without agency counsel was legally invalid, and my instruction to the Department official was lawful and necessary to prevent such a constitutional violation.

Executive Branch Information, 13 Op. O.L.C. 153, 154 (1989) ("*Requests for Confidential Information*"). It is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974).

One category of documents protected by executive privilege is "Executive Branch deliberative communications." *Assertion of Executive Privilege Over Communications Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request*, 32 Op. O.L.C. 1, 2 (2008) ("*EPA Assertion*") (Mukasey, Att'y Gen.).[3] The Supreme Court has recognized "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties," concluding that "the importance of this confidentiality is too plain to require further discussion." *Nixon*, 418 U.S. at 705. "Threat of compelled disclosure of confidential Executive Branch deliberative material can discourage robust and candid deliberations, for '[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.'" *Assertion of Executive Privilege Over Deliberative Materials Generated in Response to Congressional Investigation Into Operation Fast and Furious*, 36 Op. O.L.C. 1, 4 (2012) ("*Fast and Furious Assertion*") (Holder, Att'y Gen.) (quoting *Nixon*, 418 U.S. at 705). It is for this reason that Presidents have repeatedly asserted executive privilege to protect confidential deliberative materials of senior Executive Branch officials from disclosure to Congress.[4]

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[3] *See also Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1, 2 (2007) ("*U.S. Attorneys Assertion*") (Clement, Act'g Att'y Gen.); *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 1–2 (1999) ("*Clemency Assertion*") (Reno, Att'y Gen.); *Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (Reno, Att'y Gen.).

[4] *See, e.g.*, *Fast and Furious Assertion*, 36 Op. O.L.C. at 2–5; *EPA Assertion*, 32 Op. O.L.C. at 2–3; *Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 8–11 (2008); *Assertion of Executive Privilege with Respect to Prosecutorial Documents*, 25 Op. O.L.C. 1, 1–2 (2001); *Clemency Assertion*, 23 Op. O.L.C. at 1–4; *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 29–31 (1981) (Smith, Att'y Gen.).

The priority documents requested in the Committee's June 3 letters—the eleven documents identified in the subpoena to the Secretary, the memorandum and note concerning the citizenship question drafted by a Department of Commerce attorney, and drafts of the Department of Justice's 2017 letter requesting the inclusion of the citizenship question—are deliberative communications protected by executive privilege. Each of these documents or communications was generated in the course of the deliberative process concerning either the Secretary's decision to reinstate a citizenship question or the Department of Justice's decision to request that such a question be reinstated, and reflect the internal advice, opinions, or recommendations of senior Executive Branch officials. All of the Commerce documents predate the Secretary's March 2018 decision to reinstate a citizenship question, and all of the Justice documents predate its 2017 letter requesting the inclusion of the question. To protect the integrity of Executive Branch decision-making, department heads and their advisers must be able to engage in full and candid discussions about the advantages and disadvantages of significant and sensitive decisions, such as the Secretary's decision to include the citizenship question on the census questionnaire. Indeed, a federal court has already held that some of these priority documents, such as certain of the drafts of the 2017 letter requesting the inclusion of the citizenship question, are protected by the deliberative process privilege for substantially similar reasons. *See* Memorandum Opinion and Order at 5, *New York v. U.S. Dep't of Commerce*, No. 18-CV-2921 (S.D.N.Y. Oct. 5, 2018) (Dkt. No. 369).

Executive privilege also protects attorney-client communications and attorney work product. *Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (Reno, Att'y Gen.). In the common law, the attorney-client privilege "is the oldest of the privileges for confidential communications." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* As for attorney work product, in the ordinary case, "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947). Were attorney work product "open to opposing counsel on mere demand, . . . [i]nefficiency, unfairness and

sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial . . . , [a]nd the interests of the clients and the cause of justice would be poorly served." *Id.* at 511. These considerations apply with even greater force where senior Executive Branch officials are the clients. These officials must be able to have free and frank consultations with their attorneys about the scope of their legal authorities and responsibilities, without fear that these discussions, or attorney work product generated in preparation for potential litigation, will be publicized.

Some of the priority documents requested by the Committee are covered by the attorney-client-communications or attorney-work-product components of executive privilege. Specifically, the memorandum and note drafted by an attorney in the Department of Commerce's Office of General Counsel contain legal analysis, recommendations, and advice concerning the reinstatement of a citizenship question. Versions of this memorandum were transmitted to the Secretary as well as to the Acting Assistant Attorney General for the Department of Justice's Civil Rights Division, and in both instances offered advice to a client regarding the legal authority and pertinent case law for various potential courses of action and the strengths and weaknesses of these alternatives. Moreover, the attorney was asked to prepare the memorandum precisely because the Departments expected that litigation would follow a decision to include the citizenship question. If the attorney-work-product doctrine is to have any force, then an Executive Branch agency may not be required to disclose attorney work product developed in preparation for potential litigation while that very litigation is ongoing. For these reasons, the memorandum drafted by the Department of Commerce attorney, and the note ancillary to it, fit comfortably within the attorney-client-communications and attorney-work-product components of executive privilege. This conclusion, too, is consistent with a federal court's holding that the memorandum is protected by the common-law attorney-client privilege. *See* Order, *New York*, No. 18-CV-2921 (Sept. 30, 2018) (Dkt. No. 361).

Accordingly, I conclude that the subpoenaed materials identified as priority documents in the Committee's June 3, 2019, letters clearly fall within the scope of executive privilege.

B.

I next explain the need for you to make a protective assertion of executive privilege with respect to the remainder of the documents requested in the Committee's April 2 subpoenas to the Secretary and me. In cases "where a committee has declined to grant sufficient time to conduct a full review, the President may make a protective assertion of privilege to protect the interests of the Executive Branch pending a final determination about whether to assert privilege." Letter for the President from William P. Barr, Attorney General at 1–2 (May 8, 2019); *Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 1 (1996) ("*Protective Assertion of Executive Privilege*") (Reno, Att'y Gen.). The remainder of the requested documents—identified in item 2 of the schedule for each of the subpoenas—include all documents and communications between Department of Commerce and Department of Justice officials within and outside of the Executive Branch through most of 2017 regarding the decision to include a citizenship question on the census questionnaire. That extremely broad request sweeps in many tens of thousands of pages of information, much of which has already been produced to the Committee, but much of which the Departments of Justice and Commerce are still continuing to process. These materials, which may include documents withheld on privilege grounds during ongoing litigation, undoubtedly have the potential to include additional deliberative, attorney-client, or attorney-work-product documents protected by executive privilege.

Consistent with paragraph 5 of President Reagan's 1982 memorandum about assertions of executive privilege, the Department of Justice has requested that the Chairman of the Committee hold the subpoenas in abeyance and delay any vote recommending that the House of Representatives approve contempt resolutions for failing to comply with the subpoenas, pending a final presidential decision on whether to invoke executive privilege as to the remainder of the documents. *See* Memorandum for the Heads of Executive Departments and Agencies, *Re: Procedures Governing Responses to Congressional Requests for Information* at 2 (Nov. 4, 1982). The Chairman, however, has not agreed to adjourn the markup session scheduled for 10:00 a.m. on June 12 on a resolution recommending findings of contempt. In these circumstances, where a department lacks sufficient time to review the requested documents, you

may properly assert executive privilege with respect to the entirety of the remaining materials that the Committee has demanded, pending a final decision on the matter. You would be making only a preliminary, protective assertion of executive privilege designed to ensure your ability to make a final assertion, if necessary, over some or all of the remaining materials. *See Protective Assertion of Executive Privilege*, 20 Op. O.L.C. at 1. I conclude that such a preliminary, protective assertion is legally permissible.

III.

A congressional committee "may overcome an assertion of executive privilege only if it establishes that the subpoenaed documents are '*demonstrably critical* to the responsible fulfillment of the Committee's functions.'" *Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 11 (2008) (emphasis added) (quoting *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc)).[5] "Those functions must be in furtherance of Congress's legitimate legislative responsibilities," *id.*, because "[c]ongressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws," *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 29–31 (1981) ("*1981 Assertion*") (Smith, Att'y Gen.); *see McGrain v. Daugherty*, 273 U.S. 135, 176 (1927) (congressional oversight power may be used only to "obtain information in aid of the legislative function"). The Committee has not satisfied that high standard here.

The Committee has asserted that it needs the subpoenaed documents because it is investigating "the actual reasons behind the Trump Administration's decision to add a citizenship question to the 2020 Census." Letter for Wilbur L. Ross, Jr., Secretary, Department of Commerce, from Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives at 2–3 (June 3, 2019) ("Cummings Letter

[5] *See also, e.g.*, *U.S. Attorneys Assertion*, 31 Op. O.L.C. at 2; *Clemency Assertion*, 23 Op. O.L.C. at 2; *Nixon*, 418 U.S. at 707 ("[I]t is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch.").

to Ross"); *see* Letter for William P. Barr, Attorney General, from Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives at 2–3 (June 3, 2019) ("Cummings Letter to Barr") (similar). According to the Committee, the Secretary "began a secret campaign to add the citizenship question just days after assuming [his] post and several months before any request from the Department of Justice." Cummings Letter to Ross at 2; *see also* Cummings Letter to Barr at 2 (similar). The Committee believes that "the real reason the Trump Administration sought to add the citizenship question was not to help enforce the Voting Rights Act at all, but rather to gerrymander congressional districts in overtly racist, partisan, and unconstitutional ways." Cummings Letter to Ross at 2; *see also* Cummings Letter to Barr at 2 (similar). The Committee has stated that its investigation "may lead to legislation" concerning the processes and notification requirements for adding questions to the census. Cummings Letter to Ross at 6; *see also* Cummings Letter to Barr at 6 (similar).

The Constitution authorizes Congress to enact laws governing the census. *See* U.S. Const. art. I, § 2. Thus, I recognize that the Committee has legitimate oversight interests in this area generally. It is not sufficient, however, that the subpoenaed documents may, at some level, relate to a legitimate oversight interest. To overcome an assertion of executive privilege, a congressional committee must "point[] to . . . specific legislative decisions that cannot responsibly be made without access to [the privileged] materials." *Senate Select Comm.*, 498 F.2d at 733. "While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events." *Id.* at 732; *see also Requests for Confidential Information*, 13 Op. O.L.C. at 159 ("Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular executive branch officials.").

The Committee has yet to identify any specific legislative need for the subpoenaed documents, much less a "demonstrably critical" one. *Senate Select Comm.*, 498 F.2d at 731. It is difficult to conceive how the Secretary's deliberative e-mails regarding the inclusion of the citizenship question, or an attorney's legal analysis and assessment regarding that

inclusion, are necessary predicates to Congress's enactment of legislation regarding the census. Rather, the Committee appears to believe it may investigate any and all processes of decision-making in the Executive Branch regarding the census, regardless of whether that investigation has any bona fide relationship to possible legislation, and regardless of whether that investigation intrudes on Executive Branch prerogatives.

Thus, what the Committee appears to seek is a "precise reconstruction of past events," not because there are "specific legislative decisions that cannot responsibly be made without" it, but simply for the sake of the information itself. *Id.* at 732–33. That purpose does not clear the high bar required to overcome an assertion of executive privilege. The "informing function" that Congress possesses under Article I "is that of informing itself about subjects susceptible to legislation, not that of informing the public." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 531 (9th Cir. 1983) (citing *Hutchinson v. Proxmire*, 443 U.S. 111, 132–33 (1979)); *see also Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1, 4 (2007) ("Broad, generalized assertions that the requested materials are of public import are simply insufficient under the 'demonstrably critical' standard."). The Committee has not identified any "specific legislative decisions that cannot responsibly be made without access" to the privileged materials. *Senate Select Comm.*, 498 F.2d at 733.

The Departments of Justice and Commerce, moreover, have already made extensive efforts to accommodate the Committee's requests. As discussed above, each Department has produced tens of thousands of pages of responsive documents and has made senior officials available for hearings and transcribed interviews—and that process remains ongoing. Except where the Committee unconstitutionally demanded that Executive Branch officials appear without agency counsel, the Executive Branch has made every official requested by the Committee in this investigation available to testify, declining to answer only those questions that implicated a protected privilege. *See Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. 131 (2019). In my view, through these efforts, the two Departments have been fulfilling in good faith their constitutional "obligation . . . to make a principled effort to acknowledge, and if possible to meet, the [Committee's] legitimate needs." *1981 Assertion*, 5 Op. O.L.C. at 31.

Accordingly, when I balance the Committee's attenuated legislative interest in the subpoenaed documents against the Executive Branch's strong interest in protecting the confidentiality of its internal deliberations and the integrity of attorney-client communications and attorney work product, I conclude that the Committee has not established that the subpoenaed documents are "demonstrably critical to the responsible fulfillment" of the Committee's legitimate legislative functions. *Senate Select Comm.*, 498 F.2d at 731.

IV.

For the reasons set forth above, I have concluded that you may properly assert executive privilege over the priority subpoenaed documents identified in the Committee's June 3, 2019, letters, and may properly make a protective assertion of executive privilege with respect to the remainder of the subpoenaed documents to give the Departments of Commerce and Justice time to determine whether any remaining documents may be subject to privilege. I respectfully request that you do so.

WILLIAM P. BARR
Attorney General

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Mandatory Disclosure of Civil Rights Cold Case Records

The mandatory disclosure regime in S. 3191, the Civil Rights Cold Case Records Collection Act of 2018, could curtail the President's ability to protect information subject to executive privilege.

S. 3191 unconstitutionally restricts the qualifications for appointees to the Civil Rights Cold Case Records Review Board and unconstitutionally dictates the timing of their appointments.

S. 3191 unconstitutionally restricts the President's supervision of the Executive Branch by prohibiting the President from removing Review Board members absent cause.

February 4, 2019

MEMORANDUM OPINION FOR THE
DEPUTY COUNSEL TO THE PRESIDENT

On December 27, 2018, Congress presented S. 3191, the Civil Rights Cold Case Records Collection Act of 2018, to the President as an enrolled bill. Relying on advice from this Office, the Department of Justice had raised serious constitutional concerns about earlier versions of this bill.[1] Congress alleviated some of those concerns, but major issues remained in the enrolled version. When confronted with legislation presenting similar problems, Presidents have historically issued signing statements to explain why the Executive believes certain provisions would violate the Constitution and how the President would interpret or implement provisions to avoid constitutional infirmities. Consistent with this Office's advice, when the President signed this bill into law on January 8, 2019, he issued a signing statement indicating how the Administration would interpret and apply the Act in a manner consistent with the Constitution. *See* Statement by the President (Jan. 8, 2019), https://www.whitehouse.gov/briefings-statements/statement-by-the-president-24 ("2019 Signing Statement"); Civil Rights Cold Case Records Collection Act of 2018, Pub.

[1] *See* Letter for Ron Johnson, Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, from Prim F. Escalona, Principal Deputy Assistant Attorney General, Office of Legislative Affairs, Department of Justice (Nov. 13, 2018); Letter for Trey Gowdy, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, from Prim F. Escalona, Principal Deputy Assistant Attorney General, Office of Legislative Affairs, Department of Justice (Nov. 13, 2018).

L. No. 115-426, 132 Stat. 5489 (2019). This memorandum explains the basis for our advice.

Congress appears to have modeled this legislation after the President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, 106 Stat. 3443 ("JFK Act"). The JFK Act created an independent agency—the Assassination Records Review Board—charged with determining whether to require the public disclosure of records related to President Kennedy's assassination. When President George H.W. Bush signed that bill into law, he noted that he "fully support[ed] the goals of this legislation." Statement on Signing the President John F. Kennedy Assassination Records Collection Act of 1992 (Oct. 26, 1992), 2 *Pub. Papers of Pres. George Bush* 2004, 2004 (1992–93) ("1992 Signing Statement"). But his signing statement also explained that the JFK Act's mandatory disclosure regime encroached upon the President's control over information subject to executive privilege—a constitutional authority that "cannot be limited by statute"—and had to be interpreted in a manner consistent with the President's constitutional authority. *Id*. at 2004–05. President Bush observed that the JFK Act also presented other significant separation of powers concerns. *Id*. at 2005.

S. 3191 replicates, and in some instances exacerbates, the constitutional infirmities of the JFK Act. It creates an independent agency—the Civil Rights Cold Case Records Review Board ("Review Board")—and tasks it with publicly releasing all records relating to unsolved civil rights cases unless clear and convincing evidence establishes that disclosure would pose a concrete threat to national security, foreign affairs, law enforcement, or certain privacy interests. As under the JFK Act, this mandatory disclosure regime could curtail the President's ability to protect information subject to executive privilege. In his signing statement, the President explained that, although he "fully support[s] the goals of this Act," he "cannot abdicate [his] constitutional responsibility to protect such information when necessary." 2019 Signing Statement. He thus signed the Act "on the understanding that the public disclosure of records may be postponed where necessary to protect executive privilege" and explained that he would interpret the Act "consistent with [his] authority under the Constitution to protect confidential executive branch materials." *Id*.

This legislation also trenches upon the constitutional separation of powers in other ways. The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, gives the President broad discretion when appointing principal

officers, but the Act unconstitutionally restricts the qualifications for Review Board appointees and impermissibly dictates the timing of future appointments. The President's signing statement indicated that he "will make every effort to heed" those restrictions, "but, consistent with [his] constitutional authorities," will treat those restrictions as advisory. Finally, the Act purports to restrict the President's ability to supervise principal officers performing sensitive executive functions, by insulating the Review Board members from removal except for cause. Because Congress cannot constitutionally "insulate decisionmakers who exercise core executive functions from plenary presidential supervision," the President stated that he "will, therefore, comply with these removal restrictions only insofar as they comport with [his] constitutional responsibility to supervise the executive branch." 2019 Signing Statement.

I.

This legislation establishes a new "independent agency," the Civil Rights Cold Case Records Review Board, and vests it with broad powers to decide whether to direct the public release of "civil rights cold case records." S. 3191, § 5. The Review Board has jurisdiction over a potentially wide range of materials, because such records include all records of any "civil rights cold case," defined as "any unsolved case" arising from events between January 1, 1940, and December 31, 1979, "related to" certain federal civil rights statutes—namely 18 U.S.C. § 241 (conspiracy against rights), 18 U.S.C. § 242 (deprivation of rights under color of law), 18 U.S.C. § 245 (federally protected activities), 18 U.S.C. §§ 1581 and 1584 (peonage and involuntary servitude), 42 U.S.C. § 3631 (criminal interference with housing-related rights), and any other federal law in effect by December 31, 1979, that is enforced by the criminal section of the Department of Justice's Civil Rights Division. S. 3191, § 2(2). Cold case records also include any records "related to a civil rights cold case." *Id.* § 2(3)(A). Because of the breadth of the phrase "related to," such cases need not involve violations of those statutes. Further, cold case records extend well beyond files created during any investigation of such cases, and could encompass materials created long after 1979.[2]

[2] The Assassination Records Review Board interpreted the analogous phrase "relate[] to the assassination of President John F. Kennedy" in the definition of an "assassination

The Review Board also has the power to decide whether to order the public disclosure of records from all three branches of government, because civil rights cold case records encompass any relevant material that any branch of government originated or possessed. The definition of a "civil rights cold case record" under the Act includes records "created or made available for use by, obtained by, or [which] otherwise came into the possession of" all executive agencies, independent agencies, and "any other entity of the Federal Government." S. 3191, § 2(3)(B); *see id.* § 2(6) (defining "Government office" to include "any office of the Federal Government" holding cold case records); *id.* § 2(10) (defining "originating body" to include executive agencies, congressional committees, and any "other Governmental entity that created a record"); *id.* § 7(c)(5) (contemplating that records from outside the Executive Branch qualify as cold case records).[3]

To make these disclosure decisions, the Review Board has five members, whom the President must appoint subject to the advice and consent of the Senate. *Id.* § 5(b)(1). Though the President chooses nominees, the Act purports to confine his choice to individuals satisfying numerous qualifications, including never having been involved in any investigation or inquiry related to any civil rights cold case. *Id*. § 5(b)(2)(B), (3). The Act also directs that, "so far as practicable," appointments should occur within 60 days of enactment. *Id*. § 5(b)(2)(A). Appointment of a replacement must occur "in the same manner as the original appointment within 60 days of the occurrence of the vacancy." *Id*. § 5(d). Thus, in the event of a vacancy, the Act purports not only to impose the same qualifications on nominees, but also to require that the entire process, from the initial selection to Senate confirmation and presidential appointment, occur within 60 days.

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record," JFK Act § 3(2), 106 Stat. at 3444, to encompass records generated in the 1990s pertaining to investigations or inquiries into the assassination. *Temporary Certification Under the President John F. Kennedy Assassination Records Collection Act of 1992*, 41 Op. O.L.C. 80, 82 (2017).

[3] The bill does not appear to subject grand jury materials or other sealed materials that otherwise qualify as cold case records to the mandatory disclosure procedures. Rather, the bill authorizes the Review Board to "request the Attorney General to petition any court in the United States" to release such records, and requires the Attorney General to respond to such a request within 45 days. S. 3191, § 8(a)(1), (2)(A), (3)(A).

Once constituted, the Review Board has four years to operate, but can add another year at its discretion to complete its work. *Id*. § 5(n)(1). The Act authorizes the President to remove Review Board members from office only for cause: "inefficiency, neglect of duty, malfeasance in office, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the member's duties." *Id*. § 5(f)(1)(B). And the President must notify Congress of the justification for any removal within ten days. *Id*. § 5(f)(2)(A). A member who is removed can seek review in the U.S. District Court for the District of Columbia. *Id*. § 5(f)(3).

The records review process will work as follows: within two years of the Act's enactment, every relevant entity within the federal government—whether in the Executive, Legislative, or Judicial Branch—must identify all cold case records in its possession and decide whether to publicly disclose them. If the entity determines that a record can be publicly disclosed, it must transmit the record to the Archivist of the United States, *id*. § 3(e)(1)(A), who must make the record publicly available within 60 days, *id*. § 3(b).

The Act authorizes postponement of disclosure in only two circumstances. First, the Attorney General can temporarily delay transmitting records to the Archivist by certifying within two years of the Act's enactment that he "intends to reopen and pursue prosecution of the civil rights cold case to which a civil rights cold case record relates." *Id*. § 3(e)(2). That certification gives the Attorney General one year to file an indictment or information; if he fails to do so, he must then transmit the records to the Archivist. *Id*. § 3(e)(2)(B). If he pursues the case, he may delay transmitting records to the Archivist until 90 days after either "final judgment is entered in the proceedings relating to" the cold case or such proceedings were "dismissed with prejudice." *Id*. § 3(e)(2)(A). The Act does not include any mechanism for requesting further delay on another basis after this temporary postponement ends, even if the case is under active investigation at that point. It is also unclear whether the Attorney General can seek Review Board approval of further postponement at that juncture.

Second, within two years of the Act's enactment, any governmental entity with a cold case record can seek the Review Board's approval to postpone disclosure. *See id*. §§ 3(e)(1)(B), 5(h), 5(i)(1)(A). But the Re-

view Board must order public disclosure absent "clear and convincing evidence" that the record is "not a civil rights cold case record" or that it qualifies for postponement under one of the narrow exceptions in section 4 of the Act. *Id.* § 7(c)(1).[4] Even if the Review Board determines that postponement is warranted, it must designate a recommended specific time or occurrence "following which the material may be appropriately disclosed to the public." *Id.* § 7(c)(3)(B).

Once the Review Board decides whether to postpone or withhold "executive branch civil rights cold case record[s] or information," the President has "sole and nondelegable authority to require the disclosure or postponement of such record or information" and "shall" notify the Review Board of his determination "within 30 days." *Id.* § 7(d)(1). Further, the Act purports to limit the President's postponement power by authorizing him to override the Review Board's determination only if he finds that the record satisfies the section 4 postponement criteria. *Id.* The Review Board's decisions as to records originating in or received by the Legislative or Judicial Branches are final; representatives of those branches have no similar means to override decisions mandating the disclosure of their records.

Postponed records—including those the President orders postponed—undergo periodic further review. *Id.* §§ 3(f), 7(d)(2). The Archivist and the governmental entity that created the record must review every postponed record annually, "consistent with the recommendations of the

[4] Section 4 authorizes postponement only if disclosure "would clearly and demonstrably be expected to" (1) reveal certain classified information or "cause identifiable or describable damage to national security, military defense, law enforcement, intelligence operations, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure"; (2) reveal a living confidential informant and "pose a substantial risk of harm to that individual"; (3) "constitute an unwarranted invasion of personal privacy"; (4) compromise a confidentiality understanding with a cooperating individual, such that the harm of disclosure would outweigh the public interest; (5) "endanger the life or physical safety of any individual"; or (6) "interfere with ongoing law enforcement proceedings." The bill elsewhere states that the Review Board "shall consider[] . . . relevant laws and policies protecting criminal records of juveniles," in addition to the section 4 criteria. S. 3191, § 7(c)(1)(B). But it is unclear whether government entities can recommend postponement on this basis, *see id.* § 4, and the bill does not authorize the President to reverse the Review Board's determination when it has inadequately considered such laws or policies, *id.* § 7(d)(1) (requiring the President to apply "the standards set forth in section 4").

Review Board" regarding circumstances warranting future disclosure. *Id.* § 3(f)(1). The Act does not specify a mechanism for the President or anyone else to review these decisions.

Finally, the Act mandates disclosure of all postponed records in 25 years unless disclosure (1) would "cause identifiable or describable damage to national security, military defense, law enforcement, intelligence operations, or the conduct of foreign relations that is of such gravity that it outweighs the public interest in disclosure" or (2) would reveal certain classified information. *Id.* § 3(f)(4)(A)(i). A governmental entity can recommend postponing disclosure beyond 25 years only if it makes the case, in writing, as to why its record satisfies those criteria. Even then, the Archivist must "agree[] with the written recommendation" for postponement to continue. *Id.* § 3(f)(4)(A)(iii).

II.

In various applications, this legislation purports to impermissibly restrict the President's exercise of his constitutional authority to control the disclosure of information protected by executive privilege. S. 3191 contains various grounds for postponing the disclosure of cold case records, and in many instances those grounds may allow governmental entities to protect information subject to executive privilege. But the criteria for postponement do not appear to encompass the gamut of privileged information and erect significant obstacles to its protection. Furthermore, the Act purports to unconstitutionally dictate the disclosure of privileged information within the Executive Branch and to Congress.

The President's obligation to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, requires him to interpret and implement statutes in a constitutional manner. *See Presidential Signing Statements*, 31 Op. O.L.C. 23, 27 (2007); *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 202 (1994). Faced with legislation raising similar constitutional problems, Presidents have frequently issued signing statements indicating that the Executive will treat as advisory provisions that purport to mandate the disclosure of privileged information. *See, e.g.*, *Presidential Signing Statements*, 31 Op. O.L.C. at 33–34. Indeed, President Bush's signing statement regarding similar provisions of the JFK Act explained that because Congress cannot limit the President's constitutional authority to protect privileged information,

the President would protect such information "when necessary" and would interpret relevant provisions "consistently with [his] authority under the Constitution to protect confidential executive branch materials." 1992 Signing Statement at 2004–05.[5] We accordingly advised that the President should notify Congress and the public that he would treat similar provisions in S. 3191 the same way.

A.

We start with the constitutional concerns arising from the Act's mandatory disclosure regime. The President's authority "to prevent disclosure of certain Executive Branch documents under the doctrine of executive privilege" is "fundamental to the President's ability to carry out his constitutionally prescribed duties." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 116 (1984) ("*Contempt of Congress*"). "[I]n order for the President to carry out his constitutional responsibility to enforce the laws, he must be able to protect the confidentiality of certain types of documents and communications within the Executive Branch." *Id*. at 115; *see also Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154 (1989) ("*Congressional Requests*") (executive privilege "is a necessary corollary of the executive function vested in the President by Article II of the Constitution"). The Supreme Court has thus recognized that executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974).

Although there is no "absolute, unqualified Presidential privilege" to prevent the disclosure of all privileged information, *id*. at 706, the

[5] *See also, e.g.*, Statement on Signing the Consolidated Appropriations Act, 2017 (May 5, 2017), 2017 Daily Comp. Pres. Doc. No. 312, at 2 (May 5, 2017); Statement on Signing the Omnibus Appropriations Act, 2009 (Mar. 11, 2009), 1 *Pub. Papers of Pres. Barack Obama* 216, 216–17 (2009); Statement on Signing the E-Government Act of 2002 (Dec. 17, 2002), 2 *Pub. Papers of Pres. George W. Bush* 2200, 2201 (2002); Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (Oct. 23, 1998), 2 *Pub. Papers of Pres. William J. Clinton* 1843, 1848 (1998); Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993 (Oct. 28, 1991), 2 *Pub. Papers of Pres. George Bush* 1344, 1345–46 (1991).

privileged information at issue falls in the heartland of information that the Executive Branch must be able to protect to perform its constitutionally assigned functions. "Opinions by Attorneys General and this Office have repeatedly recognized the President's authority and responsibility to protect against the release of information affecting the Executive Branch's intelligence activities, military operations, conduct of foreign affairs, or law enforcement proceedings, even in the face of statutory disclosure requirements." *Temporary Certification Under the President John F. Kennedy Assassination Records Collection Act of 1992*, 41 Op. O.L.C. 80, 96 (2017) ("*Temporary Certification*"); *see id.* at 96–97; *In re Sealed Case*, 121 F.3d 729, 736–39 (D.C. Cir. 1997). S. 3191, however, purports to cabin the President's authority by imposing statutory criteria that could subject large swaths of privileged information to mandatory disclosure during the initial review process. And provisions concerning successive rounds of review and disclosure of remaining records 25 years after the Act's enactment could jeopardize protection even for privileged records that satisfy the initial postponement criteria.

With respect to initial disclosure determinations, the Act will protect privileged information only based on "clear and convincing evidence" that a record satisfies one of the statutory grounds for postponement in section 4. S. 3191, § 7(c)(1). But the President cannot lose the constitutional prerogative of asserting executive privilege merely because an agency fails to satisfy a burden of proof that exceeds the standard in most civil cases. Such a regime could impermissibly compel the disclosure of privileged records irrespective of how greatly their disclosure would interfere with Executive Branch functions.

Furthermore, no matter what the standard of proof, the Act purports to disable the President from protecting an array of privileged information that may not fit within the narrow statutory grounds in section 4. For example, the deliberative process component of executive privilege encompasses "advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated"—materials often found in investigative files. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). Such files may also contain "communications between high Govern-

ment officials and those who advise and assist them in the performance of their manifold duties," which also fall within the scope of the privilege. *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 2 (1999) (Reno, Att'y Gen.) (quoting *United States v. Nixon*, 418 U.S. at 705). As the Supreme Court has explained, "the valid need for protection" of such communications is "too plain to require further discussion." *United States v. Nixon*, 418 U.S. at 705. Yet section 4 of the Act contains no express mechanism for protecting information on that basis. The JFK Act similarly failed to "contemplate nondisclosure of Executive Branch deliberations," prompting President Bush to explain that he could not "abdicate [his] constitutional responsibility" to postpone records containing such deliberative information "when necessary." 1992 Signing Statement at 2004.

The section 4 postponement criteria could also inadequately protect records subject to the law enforcement component of executive privilege, which gives the President the discretion to withhold investigative files, whether open or closed, from disclosure. *See generally Assertion of Executive Privilege Concerning Special Counsel's Interviews*, 32 Op. O.L.C. 7, 10–11 (2008).[6] As Attorney General William French Smith explained, "[i]f the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination." *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 35 (1982); *see also Temporary Certification*, 41 Op. O.L.C. at 96; *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 75–78 (1986) ("*Response to Congressional Requests*").

Investigative files often contain factual information that could, if disclosed, compromise an investigation or prosecution, reveal sensitive

[6] *See also Contempt of Congress*, 8 Op. O.L.C. at 117–18 ("[T]he Executive's ability to enforce the law would be seriously impaired . . . if the Executive were forced to disclose sensitive information on case investigations and strategy from open enforcement files."); *Response to Congressional Requests*, 10 Op. O.L.C. at 77 ("Obviously, much of the information in a closed criminal enforcement file, such as unpublished details of allegations against particular individuals and details that would reveal confidential sources, and investigative techniques and methods, would continue to need protection[.]").

investigative techniques, or endanger confidential sources. Such files may also contain strategic information about the Department of Justice's plans for investigating and prosecuting a case. *See Position of the Executive Department Regarding Investigative Reports*, 40 Op. Att'y Gen. 45, 46 (1941) (Jackson, Att'y Gen.) ("Counsel for a defendant or prospective defendant[] could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon."); *cf. United States v. Agurs*, 427 U.S. 97, 108–13 (1976) (prosecutors are constitutionally obligated to disclose material favorable evidence if nondisclosure would deny defendant a fair trial, but "there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work") (internal quotation marks omitted). While not every cold case record may contain such sensitive information—let alone information that remains sensitive today—the President must retain the ability to withhold such records when disclosure would interfere with his constitutional responsibility to enforce the law. As President Bush emphasized when objecting to similar provisions in the JFK Act, the President's "authority to protect" information subject to executive privilege "comes from the Constitution and cannot be limited by statute." 1992 Signing Statement at 2004.

The Act, however, purports to replace the President's judgment about the sensitivity of law enforcement files with statutory grounds for withholding law enforcement records. The phrase "cold case records" refers to all records "related to" "unsolved" criminal cases "related to" alleged violations of certain civil rights statutes between 1940 and 1980—cases that may never have been closed and may still be under active investigation. S. 3191, § 2(2), 2(3)(A).[7] Yet the Act allows agencies to withhold investigative files only if disclosure would (1) "cause identifiable or describable damage to . . . law enforcement . . . of such gravity that it

[7] While courts have recognized that the common-law law enforcement privilege does not extend indefinitely, it usually expires "at the close of an investigation or at a reasonable time thereafter based on a particularized assessment of the document." *In re U.S. Dep't of Homeland Security*, 459 F.3d 565, 571 (5th Cir. 2006). Many cold case records, however, may involve open investigations, and this Office has long recognized that the law enforcement component of executive privilege can extend to closed files as well. *See supra* p. 26.

outweighs the public interest in disclosure," *id*. § 4(1)(A); (2) reveal the identity of living confidential sources *and* "pose a substantial risk of harm to that person," *id*. § 4(2); (3) "compromise the existence of an understanding of confidentiality" with a cooperating individual *and* "be so harmful that the understanding of confidentiality outweighs the public interest," *id*. § 4(4); or (4) "interfere with ongoing law enforcement proceedings," *id*. § 4(6).

These statutory exceptions could curtail the President's ability to safeguard privileged information even when disclosure could jeopardize important law enforcement interests. For example, cold case records may contain information that investigators withheld in order to test the veracity of confessions. But unless disclosure of such information would cause "identifiable or describable damage" to law enforcement "of such gravity that it outweighs the public interest in disclosure," the Act appears to require public disclosure. Furthermore, the Act could require the government to reveal the identities of its confidential sources even if there were some risk they would face harm, so long as the risk would not be "substantial." Likewise, the Act arguably compels the disclosure of confidential cooperation—even ongoing cooperation—if the harm from disclosure would not outweigh the public interest in disclosure. But the law enforcement component of executive privilege protects such information against public disclosure based on whether disclosure would "discourag[e] citizens from giving the government information," among other considerations. *Temporary Certification*, 41 Op. O.L.C. at 93 n.7 (internal quotation marks and citations omitted). While the Act authorizes withholding if disclosure would "interfere with ongoing law enforcement proceedings," it is unclear whether that would cover interference with investigative steps preceding an indictment or the convening of a grand jury, especially if the investigation were inactive at the time of review.

Compounding these concerns, the Act could handcuff the Attorney General in prosecuting cold cases for which the statute of limitations has not expired. The Attorney General has only two years from enactment to certify that he is temporarily delaying the transmission of records to the Archivist in a cold case he may wish to reopen and prosecute. S. 3191, § 3(e)(2). But other agencies with cold case records potentially relevant to any prosecution face the same two-year window to decide whether to disclose those records. *Id*. § 3(e)(1). This provision could artificially

constrain the Attorney General's decisions about whether to reopen cold cases, lest governmental entities outside the Executive Branch beat him to the punch and publicly disclose records that would thwart any future prosecution. Even if the Attorney General makes the requisite certification to protect such records, the Act mandates their transmission to the Archivist within one year, unless the Attorney General has brought charges by then. *Id.* § 3(e)(2). And the Act does not clearly provide for postponement of public disclosure after transmission, especially if the Review Board has terminated by that point. In other words, the Attorney General could certify that he plans to reopen a case based on a new lead, but if an indictment or information takes longer than a year to file, any new and highly sensitive information could, perversely, become more vulnerable to disclosure because of the certification.

The Act could also intrude on the President's control over information relating to national security and foreign relations, which involve core aspects of executive privilege. The President's "authority to classify and control access to information bearing on national security . . . flows primarily from th[e] constitutional investment of [the Commander in Chief] power in the President," and the "authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief." *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Thus, "since the Washington Administration, Presidents and their senior advisers have repeatedly concluded that our constitutional system grants the executive branch authority to control the disposition of secret information." *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 97 (1998); *see also Presidential Certification Regarding the Disclosure of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 269–76 (1996). Courts, too, have "shown the utmost deference to Presidential responsibilities" over the control of "military or diplomatic secrets." *United States v. Nixon*, 418 U.S. at 710.

The Act, however, allows withholding only when disclosure would reveal certain kinds of classified information or would "cause identifiable or describable damage to national security, military defense, law enforcement, intelligence operations, or the conduct of foreign relations that is of such gravity that it outweigh[ed] the public interest in disclosure." S. 3191, § 4(1). It thus could mandate the disclosure of sensitive infor-

mation if the harm from disclosure is insufficiently grave or particularized. It may well be that few cold case records contain information bearing on national security or foreign relations, let alone information this statutory standard would not protect. But, to the extent they do, the Constitution requires that the President retain ultimate control over whether, when, and to whom to disclose them. President Bush deemed similar provisions in the JFK Act unduly "narrow" and explained they could not prevent him from exercising his constitutional duty to protect national security information as he saw necessary. 1992 Signing Statement at 2004.

Finally, even privileged information that initially fits within a statutory ground for postponement would not be assured continued protection. First, S. 3191 imposes even narrower grounds for withholding during subsequent rounds of re-review. To justify any initial postponement, the Review Board must recommend a future time or event when a record may be disclosed. S. 3191, § 7(c)(3)(B). That recommendation then binds governmental entities and the Archivist when they conduct every round of annual re-review. *Id*. § 3(f)(1). Thus, after the Review Board picks a future date or occurrence that it believes should trigger disclosure, the Act does not expressly provide the President with a way to intervene at that juncture if he believes the information remains sensitive notwithstanding the Review Board's recommendation.

Second, the Act could insufficiently protect even sensitive records postponed during successive rounds of re-review. Such records would almost certainly contain privileged information. But S. 3191 mandates the disclosure of all postponed records within 25 years unless it would cause "identifiable or describable damage to national security, military defense, law enforcement, intelligence operations, or the conduct of foreign relations that is of sufficient gravity that it outweighs the public interest in disclosure," *id.* § 3(f)(4)(A)(i)(I), or would reveal certain kinds of classified information, *id*. § 3(f)(4)(A)(i)(II). That basis for disclosure is narrower than the section 4 postponement criteria, and could thus mandate disclosure even of records that continued to meet those criteria. Although the sensitivity of this information may wane over time, this is a judgment committed to the discretion of the President, not Congress. *Cf. Temporary Certification*, 41 Op. O.L.C. at 95 (noting that "[s]erious constitutional concerns would arise if the [JFK] Act were construed to require . . . prem-

ature disclosures of records while they are likely to contain still-sensitive information").[8]

B.

The Act also purports to interfere with the President's authority to control access to privileged information within the Executive Branch or by Congress. But Congress may not "act to prohibit the supervision [by the President] of the disclosure of any privileged information, be it classified, deliberative process or other privileged material." *Authority of Agency Officials to Prohibit Employees From Providing Information to Congress*, 28 Op. O.L.C. 79, 80–81 (2004) ("*Authority of Agency Officials*"); *see The Department of Defense's Authority to Conduct Background Investigations for Its Personnel*, 42 Op. O.L.C. 19, 27–28 (2018) ("Congress may not impair the President's control over national security information"); *Egan*, 484 U.S. at 527 (the President's "authority to . . . control access to information bearing on national security" is an incident of his Article II powers). Such interference is unconstitutional regardless of whether Congress is dictating the flow of privileged information within the Executive Branch or mandating its own access.

Like the JFK Act, this bill impedes the President's control over the dissemination of privileged information in two respects. First, it requires governmental entities to give the Review Board access to all identified cold case records, *see* S. 3191, § 5(i)(1)(A), as well as any "additional information, records, or testimony . . . which the Review Board has reason to believe" it must obtain in order "to fulfill its functions and responsibilities under this Act," *id*. § 5(i)(1)(B), all of which may contain privileged information. Decisions about when, how, and to whom to disseminate

[8] The bill also lacks any mechanism whereby legislative entities or the courts could assert any relevant constitutional privileges to protect the confidentiality of any cold case records they originated. *See In re Grand Jury*, 821 F.2d 946, 957 (3d Cir. 1987) ("[T]he legislator's need for confidentiality is similar to the need for confidentiality between judges, between executive officials, and between a President and his aides. The need for a full, frank exchange of ideas has led courts to recognize qualified privileges for each of these governmental decisionmakers.") (citation omitted); *Matter of Certain Complaints Under Investigation*, 783 F.2d 1488, 1519 (11th Cir. 1986) ("The Supreme Court's reasons for finding a qualified privilege protecting confidential Presidential communications in *United States v. Nixon*, 418 U.S. 683 (1974), support the existence of a similar judicial privilege.").

such sensitive information are central to the President's authority to supervise and manage the Executive Branch. *See Access to Classified Information*, 20 Op. O.L.C. 402, 404 (1996) ("[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." (internal citation omitted)); *Authority of Agency Officials*, 28 Op. O.L.C. at 80–81. The Review Board's obligation to order disclosure of any records that fall outside the statutory postponement criteria, coupled with its insulation from presidential supervision, make this bill far different from legislation allowing Executive Branch officials sensitive to privilege concerns to review former Presidents' records. *See Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443–44 (1977).

Second, the Act gives congressional committees "access to any records" the Review Board has "held or created." S. 3191, § 5(k)(1). Such records will presumably include any records the Review Board obtains from other agencies to conduct its investigations and records of its own decision-making. Such records may contain a wide range of information protected by executive privilege, yet the Act purports to give the Executive Branch no choice but to disclose them. What is more, this requirement effectively supplants the accommodation process, the longstanding manner in which the Executive and Legislative Branches have traditionally balanced their respective constitutional prerogatives through negotiation. *See Congressional Requests*, 13 Op. O.L.C. at 157–59. President Bush thus objected to the constitutionality of a similar provision in the JFK Act. *See* 1992 Signing Statement at 2004–05.

III.

This legislation also establishes unconstitutional procedures for appointing members of the Review Board. The Appointments Clause, U.S. Const. art. II, § 2, cl. 2, sets forth the respective roles of the President and Congress in appointing principal and inferior officers of the United States. Principal officers must be appointed by the President with the advice and consent of the Senate. Inferior officers may be appointed in the same fashion or by the President alone, a court of law, or the head of a department, as provided by law.

Review Board members are principal officers: they have ongoing authority to make final, binding decisions about the disposition of potentially sensitive government records, and they are supervised only by the President. Even based on "the understanding that the public disclosure of records may be postponed where necessary to protect executive privilege," as required by the 2019 Signing Statement, Review Board members would remain intimately involved in discharging a core Article II function. And they would still, in some instances, have the final say as to whether records will be disclosed. Yet the Act purports to constrain the President's broad discretion to select principal officers by imposing a litany of restrictions on how the President may select his preferred nominees. Furthermore, in the event of vacancies on the Review Board, the Act purports to require the President to make his selections swiftly enough to satisfy a 60-day deadline for installing replacements. President Bush objected to similar restrictions on the JFK Act's Assassination Records Review Board that "purport[ed] to set the qualifications for Board members, to require the President to review lists supplied by specified organizations, and to direct the timing of nominations," in contravention of the Appointments Clause. 1992 Signing Statement at 2005. Consistent with the President's duty to implement statutes in a constitutional manner and with previous signing statements, we concluded that the President should treat S. 3191's putative restrictions on the appointments of principal officers as advisory.

A.

Based on the Review Board's responsibilities, its members are "Officers of the United States" under the Appointments Clause, because they will "exercis[e] significant authority pursuant to the laws of the United States" and "occupy a continuing position established by law." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (internal quotation marks omitted). They exercise "significant authority pursuant to the laws of the United States" in the form of "power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit." *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 87 (2007) ("*Officers of the United States*"). Indeed, in many cases, the Review Board may make final determinations about disclosure that bind the government, and that type of "last-word capacity"

is sufficient, though not necessary, to establish officer status. *Lucia*, 138 S. Ct. at 2054; *see Officers of the United States*, 31 Op. O.L.C. at 95. For instance, the Review Board's decisions to disclose non-Executive Branch records appear to be final and binding on the government because the President can review only decisions regarding Executive Branch records. S. 3191, § 7(d)(1). The Review Board may also have final say for many Executive Branch records because any decision to disclose such records appears to go into immediate effect if the President fails to review it within 30 days. *See id*. Furthermore, during the re-review process, the Review Board's prescriptions for triggering events or timetables for future disclosure purport to bind governmental entities and the Archivist. *Id*. §§ 3(f)(1), 7(c)(3)(B).

Even aside from this final decision-making authority, the Review Board performs functions "within the 'executive Power' that Article II of the Constitution confers, functions in which no mere private party would be authorized to engage." *Officers of the United States*, 31 Op. O.L.C. at 90. The Review Board will execute the mandatory disclosure regime in lieu of the Executive's ordinary mechanisms for controlling access to confidential information. Not only that, it can "issue interpretive regulations" to perform those functions, S. 3191, § 5(m)—and significant authority includes the power to "interpret the law." *Officers of the United States*, 31 Op. O.L.C. at 87; *Bowsher v. Synar*, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.").[9]

[9] While the Review Board can also issue subpoenas that "any appropriate Federal court" may enforce "pursuant to a lawful request of the Review Board," S. 3191, § 5(i)(1)(C), (F), (2), that does not constitute significant authority because we do not believe that these provisions give the Review Board independent litigating authority to enforce subpoenas. Rather, the Attorney General retains plenary authority to represent the Review Board in litigation, including when deciding whether to represent the Review Board in an action to enforce its subpoenas. *See* 2019 Signing Statement ("I have signed the Act on the understanding that the Board must request judicial enforcement of a subpoena through the Department of Justice, consistent with 28 U.S.C. 516 and the President's supervisory authority under Article II of the Constitution."); *see generally United States v. Hercules, Inc.*, 961 F.2d 796, 798–99 (8th Cir. 1992); *FTC v. Guignon*, 390 F.2d 323, 324–25 (8th Cir. 1968); *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 56–57 (1982). The power to issue subpoenas does not constitute significant authority absent additional independent authority to enforce the subpoena in court, which would transform investigative authority into an executive

Review Board members also satisfy the second criterion of officer status: they occupy continuing positions established by law. *See Lucia*, 138 S. Ct. at 2051. They have continuous duties to decide whether to publicly disclose governmental records. The fact that the Review Board terminates in four to five years, S. 3191, § 5(n)(1), does not detract from the continuing nature of their statutory responsibilities during that term. *See Participation of Members of Congress in the Ronald Reagan Centennial Commission*, 33 Op. O.L.C. 193, 197 (2009).

Finally, Review Board members have all the hallmarks of principal officers. They are removable solely by the President, and they can render final decisions for the Executive Branch without the supervision, review, or approval of anyone besides the President. *See Edmond v. United States*, 520 U.S. 651, 664–65 (1997); *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 150 (1996) ("*Constitutional Separation of Powers*"); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1339–41 (D.C. Cir. 2012); *Secretary of Education Review of Administrative Law Judge Decisions*, 15 Op. O.L.C. 8, 14 & n.11 (1991). They accordingly may not be considered "inferior 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." *Edmond*, 520 U.S. at 663.

B.

This legislation purports to limit the President's appointment of these principal officers in two unconstitutional ways: by overly restricting qualifications for the office and by prescribing a timetable for the President to fill any vacancies. The Appointments Clause leaves minimal room for Congress to impose qualifications for holding a principal office. "[U]nder the Appointments Clause, '[t]he President has the sole responsibility for nominating [principal officers] and the Senate has the sole responsibility of consenting to the President's choice.'" *Constitutionality of Statute Governing Appointment of United States Trade Representative*,

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authority to enforce the law. *See Buckley v. Valeo*, 424 U.S. 1, 137–38 (1976) (per curiam); Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Sheldon Bradshaw, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Abolishment of Obsolete Agencies and Federal Sunset Act of 2001, H.R. 2373*, at 2–3 (Apr. 15, 2002).

20 Op. O.L.C. 279, 280 (1996) ("*USTR*") (quoting *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring in the judgment)); *see The Federalist* No. 76, at 512 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("In the act of nomination [the President's] judgment alone would be exercised[.]"); *The Federalist* No. 66, at 449 (Alexander Hamilton) ("[The Senate] may defeat one choice of the executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice, of the president.").

To be sure, the First Congress imposed a modest qualification on the office of Attorney General: the Judiciary Act of 1789 required that he be "a meet person, learned in the law." Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92. More generally, Congress may have a role in "the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees." *Myers v. United States*, 272 U.S. 52, 129 (1926). But "a restriction ruling out a large portion of those persons best qualified by experience and knowledge to fill a particular office invades the constitutional power of the President and Senate to install the principal officers of the United States." *USTR*, 20 Op. O.L.C. at 280. Even if some limited qualifications for principal officers are permissible, "where an office . . . entails broad responsibility for advising the President and for making policy, the President must have expansive authority to choose his aides." *Id.* at 281. For instance, Congress cannot constitutionally disqualify anyone "who has directly represented, aided, or advised a foreign entity . . . in any trade negotiation, or trade dispute, with the United States" from the position of United States Trade Representative, who is a principal officer. *Id.* at 279; *see also id.* at 280–81.

Under these precedents, the qualifications that S. 3191 prescribes for Review Board members clearly cross the line. Review Board members answer to no one but the President and may determine whether to release privileged material—a core Article II prerogative. The President might find it especially valuable to select members with some previous involvement in any federal, state, or local investigation or inquiry relating to any civil rights cold case, which could signal both relevant subject-matter expertise and an understanding of executive privilege concerns. Yet the Act renders that experience disqualifying. S. 3191, § 5(b)(3)(A). The Act further requires the President to pick "distinguished individuals of high national professional reputation in their respective fields," *id.*

§ 5(b)(3)(B), and dictates that at least one must be a professional historian and another must be a lawyer, *id.* § 5(b)(3)(C). Nominees must also be "capable of exercising . . . independent and objective judgment" and "possess an appreciation of the value of [cold case records] to the public, scholars, and government." *Id.* § 5(b)(3)(B). Taken in combination, and especially given the important and sensitive nature of the Review Board members' duties, these criteria leave insufficient "scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment"—the President. *Civil-Service Commission*, 13 Op. Att'y Gen. 516, 520–21 (1871).[10]

Adding to the Appointments Clause problem, the legislation provides that in the event of a vacancy, the President "shall . . . within 60 days" appoint a Senate-confirmed replacement to the Review Board. S. 3191, § 5(d). Unlike the provision governing the timing of initial appointments, which gives the President the discretion to determine whether a 60-day process is "practicable," *id.* § 5(b)(2)(A), the vacancies provision purports to be mandatory. But forcing the President to select a nominee within a short timeframe interferes with the President's appointment authority by limiting the amount of time he can dedicate to searching for and selecting suitable nominees. This 60-day deadline is particularly onerous because, to comply with it, the President would not only need to make his selections and resolve security clearances, but would need somehow to leave time for Senate confirmation—a process that, in recent years, has averaged well over 60 days.

Presidents have repeatedly objected that similar restrictions on the qualifications of principal officers and on the timing of their appointments violate the Appointments Clause.[11] In these signing statements, Presidents

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[10] Helpfully, the enrolled version of S. 3191 did remedy some unconstitutional features of previous iterations of this legislation. Previous versions had required appointment of the Review Board members by the President alone or appointments by Congress, in clear contravention of the Appointments Clause. And both the introduced House and Senate versions of the bill originally purported to require the President to consider the recommendations of various private organizations, such as the American Historical Association, before selecting nominees for the Review Board—a restriction that unconstitutionally interfered with the timing of the President's selections.

[11] *See, e.g.*, Statement on Signing the Postal Accountability and Enhancement Act (Dec. 20, 2006), 2 *Pub. Papers of Pres. George W. Bush* 2219, 2219 (2006) ("The executive branch shall construe subsections 202(a) and 502(a) of title 39 . . . , which purport to

have indicated their intent to treat such restrictions as advisory. We recommended similar treatment in the President's signing statement on S. 3191.

IV.

Finally, the Act unconstitutionally restricts the President's supervision of the Executive Branch by prohibiting the President from removing Review Board members absent cause. *See* S. 3191, § 5(f)(1)(B) (authorizing removal only for "inefficiency, neglect of duty, malfeasance in office, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the member's duties"). As the Supreme Court has recognized, "Article II confers on the President 'the general administrative control over those executing the laws.'" *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010). Accordingly, "restrictions on the President's power to remove officers with broad policy responsibilities in areas Congress does not or cannot shelter from presidential policy control clearly should be deemed unconstitutional." *Constitutional Separation of Powers*, 20 Op. O.L.C. at 169. Congress may not impose removal restrictions on officers if those restrictions would unduly interfere with the President's exercise of a core Article II function.

The President's appointing authority and his constitutional obligations to execute the laws and to supervise the Executive Branch carry with them the authority to remove executive officers. "Because the power to remove is the power to control, restrictions on removal power strike at the heart of the President's power to direct the executive branch and perform his constitutional duties." *Common Legislative Encroachments on Executive*

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limit the qualifications of the pool of persons from whom the President may select appointees [to the Board of Governors of the U.S. Postal Service] in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the position, in a manner consistent with the Appointments Clause of the Constitution. The executive branch shall also construe as advisory the purported deadline in subsection 605(c) for the making of an appointment, as is consistent with the Appointments Clause."); Statement on Signing the Help America Vote Act of 2002 (Oct. 29, 2002), 2 *Pub. Papers of Pres. George W. Bush* 1927, 1928 (2002) ("Section 203(a)(4) purports to require the President to make appointments to the [Election Assistance] Commission no later than 120 days after enactment of the new law. . . . [T]his deadline unduly circumscribes the presidential appointment power."); 1992 Signing Statement at 2005 (objecting to such restrictions for the Assassination Records Review Board created by the JFK Act).

Branch Authority, 13 Op. O.L.C. 248, 252 (1989). The Supreme Court held in *Myers* that the President's "power of removal" is "an indispensable aid" to discharging his "responsib[ility] under the Constitution for the effective enforcement of the law." 272 U.S. at 132–33. And in *Morrison v. Olson*, 487 U.S. 654 (1988), the Court stated that "*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." *Id*. at 690.

The Act's removal restrictions, however, interfere with the President's core constitutional prerogative to decide whether and how to disclose information subject to executive privilege. The Act inserts into that process a Review Board that answers solely to the President and whose members can be removed only for specified causes. "Congress may not . . . 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," let alone all other types of privileged information. *Security Clearance Adjudications by the DOJ Access Review Committee*, 35 Op. O.L.C. 86, 96 (2011). That is why the Supreme Court emphasized the extent of presidential supervision over the General Services Administration when sustaining the constitutionality of legislation giving that agency responsibility for former President Richard M. Nixon's records, which included privileged materials. *Nixon v. Adm'r*, 433 U.S. at 443–44. Professional archivists' review of such records "constitute[d] a very limited intrusion by personnel in the Executive Branch sensitive to executive concerns," *id*. at 451, because they were supervised by the Administrator of General Services, who was "himself an official of the Executive Branch, appointed by the President," *id*. at 441, and expressly "subject to the direction and control of the President," 40 U.S.C. § 751(b) (1976).[12]

[12] To the extent the bill were read to authorize the Review Board to direct Executive Branch agencies to re-investigate a cold case, that provision would also involve a core executive function requiring presidential supervision. *See* S. 3191, § 5(i)(1)(B) (authorizing the Review Board to "direct a Government office to . . . if necessary investigate the facts surrounding, additional information, records, or testimony from individuals, which the Review Board has reason to believe is required to fulfill its functions and responsibilities under this Act"). But the better reading of that provision—especially in light of this constitutional concern—is that it merely authorizes the Review Board to direct agencies

By purporting to insulate Executive Branch decision-makers exercising critical executive functions from plenary presidential supervision, S. 3191's removal restrictions also materially differ from the few instances where the Supreme Court has upheld restrictions on the President's authority to remove principal officers. As the Supreme Court reiterated in *Free Enterprise Fund*, 561 U.S. at 493, the Court may have upheld for-cause limitations on the removal of principal officers in "quasi-legislative and quasi-judicial" bodies. *Id*. (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628, 629 (1935)); *see also Wiener v. United States*, 357 U.S. 349, 355–56 (1958) (holding that Congress could insulate members of the War Claims Commission from at-will removal because their work had an "intrinsic judicial character"). Yet that rationale does not apply to members of the Review Board, who would be principal officers exercising purely "executive functions." *Humphrey's Ex'r*, 295 U.S. at 627; *see also Constitutional Separation of Powers*, 20 Op. O.L.C. at 169–70. The Review Board members' authority to review and disclose confidential Executive Branch information directly relates to the President's execution of the laws, and therefore must ultimately be exercised only by officers subject to direct presidential control. Congress may not use removal restrictions on principal officers as an indirect means of compromising the President's control over this core executive function. *Cf. Morrison*, 487 U.S. at 695–96 (allowing "good cause" removal restriction on independent counsel even though she exercised executive power, because she was an inferior officer with a narrow ambit); *Free Enter. Fund*, 561 U.S. at 494–95 (emphasizing that *Morrison* concerned the "status of inferior officers" and the specific "circumstances" of the independent counsel statute).

Previous Presidents have accordingly objected to restrictions on removing officers, especially principal officers. Their signing statements expressed their intention to interpret and implement removal restrictions in a manner consistent with the President's constitutional authority to supervise the Executive Branch.[13] We advised that the President follow a similar course in addressing S. 3191.

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to supply supplemental information so as to facilitate the Review Board's determinations of whether a record is a cold case record or falls within the postponement criteria.

[13] *See, e.g.*, Statement on Signing the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Oct. 30, 2000), 3 *Pub. Papers of Pres. William J. Clinton* 2379,

V.

For the reasons set forth above, we concluded that several provisions in S. 3191 raise serious constitutional concerns. We thus advised that the President should issue a signing statement explaining how he would interpret and implement constitutionally problematic provisions. Consistent with this advice, the President issued the January 8, 2019, signing statement upon signing S. 3191 into law.

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

2380 (2000–01) (interpreting a for-cause restriction on removal of the Under Secretary for Nuclear Security at the Department of Energy to include "a failure to comply with the lawful directives or policies of the President" in light of the need for presidential supervision over sensitive national security functions); Statement on Signing the Social Security Independence and Program Improvements Act of 1994 (Aug. 15, 1994), 2 *Pub. Papers of Pres. William J. Clinton* 1471, 1472 (1994) (noting "significant constitutional question" regarding the removal restriction on "the single Commissioner [of the Social Security Administration] only for neglect of duty or malfeasance"); *cf.* Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990 (Nov. 30, 1989), 2 *Pub. Papers of Pres. George Bush* 1609, 1610 (1989) (objecting that a requirement that the President "immediately communicate . . . the reasons" for removing an Inspector General would "burden [the] exercise" of "the President's constitutional authority to remove an executive branch subordinate").

Requests by Individual Members of Congress for Executive Branch Information

In reviewing requests from Congress, the Executive Branch's longstanding policy has been to engage in the established process for working to accommodate congressional requests for information only when those requests come from a committee, subcommittee, or chairman acting pursuant to oversight authority delegated from a House of Congress. Departments and agencies, however, may appropriately give due weight and sympathetic consideration to requests for information from individual members of Congress not delegated such authority.

Only a committee chairman may request presidential records under section 2205(2)(C) of the Presidential Records Act, unless the committee has specifically delegated that authority to another member.

February 13, 2019

MEMORANDUM OPINION FOR THE FILES

This memorandum expands upon a letter opinion for the Counsel to the President issued on May 1, 2017, in which we addressed certain questions concerning the authority of individual members of Congress to exercise Congress's oversight authority. *Authority of Individual Members of Congress to Conduct Oversight of the Executive Branch*, 41 Op. O.L.C. 76 (2017) ("*Oversight by Individual Members*"). This memorandum also memorializes more recent, informal advice provided to the General Counsel of the National Archives and Records Administration ("NARA") concerning the authority of individual members to request presidential records under the Presidential Records Act ("PRA").

In *Oversight by Individual Members*, we concluded that "the constitutional authority to conduct oversight—that is, the authority to make official inquiries into and to conduct investigations of executive branch programs and activities—may be exercised only by each House of Congress or, under a delegation, by committees and subcommittees (or their chairmen)." *Id.* at 76. "Individual members of Congress, including ranking minority members," we stated, "do not have the authority to conduct oversight in the absence of a specific delegation by a full house, committee, or subcommittee." *Id.*

Oversight by Individual Members "briefly explained" our views concerning requests for information from individual members of Congress.

Id. The Supreme Court has defined the congressional oversight authority to consist of the inherent power of each House to "gather information in aid of its legislative function" by means of compulsion, if necessary. *Id.* at 77. Each House has the authority to delegate that function under its own rules and procedures. Typically, however, Congress has not delegated such authority to individual members of Congress who are not committee chairmen. Although requests for information from individual members of Congress do not constitute exercises of Congress's oversight authority, that does not mean that an individual member's request should be treated the same as a Freedom of Information Act request or a request from a member of the general public. As a matter of comity, the Executive Branch's appropriate respect for the legislative functions of individual members supports Executive Branch officials' practice of giving due weight and sympathetic consideration to those requests.

We recently addressed a related question in connection with the Senate Judiciary Committee's request for presidential records relevant to the nomination of then-Judge Brett Kavanaugh to the Supreme Court. In July 2018, the Chairman of the Judiciary Committee requested from NARA special access to a substantial volume of records concerning Kavanaugh's service in the Office of the White House Counsel during the George W. Bush Administration. Following that request, the Ranking Member of the Committee requested additional records—those relating to Kavanaugh's subsequent work as Staff Secretary—that the Chairman had specifically declined to request. The PRA provides that a committee of Congress may request nonpublic records when needed for the conduct of its business. 44 U.S.C. § 2205(2)(C). Consistent with NARA's past administration of this statute, as well as our interpretation of a similar provision under the Privacy Act, we informally advised NARA that only a committee chairman may request presidential records under section 2205(2)(C), unless the committee has specifically delegated that authority to another member.

I.

The Constitution vests "[a]ll legislative Powers" in "a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const. art. I, § 1. The Supreme Court has recognized that one of those legislative powers is the implicit authority of each House of Congress to gather information in aid of its legislative function. *See*

McGrain v. Daugherty, 273 U.S. 135, 174 (1927). As the Court has explained, "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it." *Id.* at 175. Because "mere requests for such information often are unavailing, and . . . information which is volunteered is not always accurate or complete," though, "some means of compulsion are essential to obtain what [information] is needed." *Id.*; *see also Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975) ("[I]ssuance of subpoenas . . . has long been held to be a legitimate use by Congress of its power to investigate."); *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 81–82 (1986) ("*Response to Congressional Requests*"). For purposes of this memorandum, we refer to each House's formal "power of inquiry . . . with process to enforce it," *McGrain*, 273 U.S. at 174, as that House's "oversight" authority.

Each house may exercise its oversight authority directly—for example, by passing a resolution of inquiry seeking information from the Executive Branch. *See* 4 Lewis Deschler, *Deschler's Precedents of the United States House of Representatives* ch. 15, § 2, at 2304–23 (1994) (describing the practice of resolutions of inquiry and providing examples); Floyd M. Riddick & Alan S. Frumin, *Riddick's Senate Procedure* 882 (1992) ("The Senate itself could investigate or hear witnesses as it has on rare occasions[.]"). In modern practice, however, each House typically employs its oversight authority "through delegations of authority to its committees, which act either through requests by the committee chairman, speaking on behalf of the committee, or through some other action by the committee itself." *Application of Privacy Act Congressional-Disclosure Exception to Disclosures to Ranking Minority Members*, 25 Op. O.L.C. 289, 289 (2001) ("*Application of Privacy Act*"); *see also* Alissa Dolan et al., Cong. Research Serv., *Congressional Oversight Manual* 65 (Dec. 19, 2014). "The theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose" and, in such circumstances, "committees and subcommittees, sometimes one Congressman," are authorized to

exercise the parent assembly's authority. *Watkins v. United States*, 354 U.S. 178, 200–01 (1957).

The Senate authorizes committees, "including any subcommittee of any such committee," to hold hearings, subpoena witnesses, and require the production of "correspondence, books, papers, and documents," Senate Rule XXVI(1), while the House authorizes "a committee or subcommittee" to exercise similar authority, House Rule XI.2(m)(1). In turn, a committee's chairman generally may act on behalf of the committee, at least in the absence of a contrary vote of the majority of its members. *See* Letter for David S. Ferriero, Archivist of the United States, National Archives and Records Administration, from Chuck Grassley, Chairman, U.S. Senate Committee on the Judiciary at 2 (July 30, 2018); *see, e.g.*, House Rule XI.2(m)(3) (providing that the full committee determines the "rules" and "limitations" for a delegation to a chair). Although the procedures for these compulsory processes vary based on the issuing committee or subcommittee, they all derive their authority from a delegation by the relevant House as a whole. *See, e.g.*, *Response to Congressional Requests*, 10 Op. O.L.C. at 82 ("exercise of subpoena power must be authorized by the relevant House" (citing *Reed v. County Comm'rs*, 277 U.S. 376, 389 (1928), and *McGrain*, 273 U.S. at 158)); *Congressional Oversight Manual* at 24 ("Committees of Congress only have the power to inquire into matters within the scope of the authority delegated to them by their parent body.").

By contrast, individual members of Congress who are not serving as the chairman of a committee, including ranking minority members, "generally do not act on behalf of congressional committees." *Application of Privacy Act*, 25 Op. O.L.C. at 289; *see also id.* at 289–90 (concluding that "the Privacy Act's congressional-disclosure exception does not generally apply to disclosures to ranking minority members," because ranking minority members "are not authorized to make committee requests, act as the official recipient of information for a committee, or otherwise act on behalf of a committee"). Under existing congressional rules, those members have not been delegated the authority to institute official committee investigations, hold hearings, or issue subpoenas. *See Congressional Oversight Manual* at 65. For example, the Rules of the House state that a subpoena generally "may be authorized and issued . . . only when authorized by the committee or subcommittee, a majority being present," except

that the committee may delegate subpoena power to a chairman. House Rule XI.2(m)(3)(A)(i); *see also Response to Congressional Requests*, 10 Op. O.L.C. at 82 ("The rules of each [House] committee flesh out somewhat the requirements for issuance of a subpoena, specifying in particular if, or under what circumstances, the chairman of the full committee may issue a subpoena without a vote of the committee."); Michael L. Koempel, Cong. Research Serv., R44247, *A Survey of House and Senate Committee Rules on Subpoenas* 4–10 (Jan. 29, 2018) (summarizing House rules). The Standing Rules of the Senate delegate to each committee responsibility to establish subpoena procedures, Senate Rule XXVI(2), and while some of those committees delegate subpoena authority to a chairman, none authorizes an individual member who is not a chairman to issue a subpoena unilaterally. *See A Survey of House and Senate Committee Rules on Subpoenas* at 11–16 (summarizing Senate rules).

Federal courts have recognized that "no Senator and no Representative, is free on . . . his own to conduct investigations" without congressional authorization. *Gojack v. United States*, 384 U.S. 702, 716 (1966); *see Exxon Corp. v. FTC*, 589 F.2d 582, 593 (D.C. Cir. 1978) ("[D]isclosure of information can only be compelled by authority of Congress, its committees or subcommittees, not solely by individual members; and only for investigations and congressional activities."); *Lee v. Kelley*, 99 F.R.D. 340, 342 n.2 (D.D.C. 1983) (denying Senator leave to intervene to request access to sealed materials on the grounds that the Senator "appears as an individual Senator, without Senate authorization, in what is undeniably an investigatory role"), *aff'd sub nom. S. Christian Leadership Conf. v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984). As the Congressional Research Service has summarized, individual members of Congress not acting pursuant to delegated oversight authority are entitled only to "the *voluntary* cooperation of agency officials or private persons." *Congressional Oversight Manual* at 65 (emphasis added).

II.

The distinction between Congress's constitutionally based oversight authority and other congressional requests for information informs the Executive Branch's obligations and practices when responding to such requests. When a committee, subcommittee, or chairman exercising delegated oversight authority asks for information from the Executive

Branch, that request triggers the "implicit constitutional mandate to seek optimal accommodation . . . of the needs of the conflicting branches." *United States v. Am. Tel. & Tel.* ("*AT&T*"), 567 F.2d 121, 127 (D.C. Cir. 1977); *see also id.* at 130–31 (describing the "[n]egotiation between the two branches" as "a dynamic process affirmatively furthering the constitutional scheme"); *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 31 (1981) ("The accommodation required . . . is an obligation of each branch to make a principled effort to acknowledge, and if possible to meet, the legitimate needs of the other branch."). Such requests are enforceable by the issuance of a subpoena and the potential for contempt-of-Congress proceedings. *See McGrain*, 273 U.S. at 174; 2 U.S.C. §§ 192, 194; *see also* Senate Rule XXVI(1); House Rule XI.2(m)(1).

Regardless of whether the chairman or committee has served a subpoena, the Executive Branch will work to accommodate the committee's legitimate oversight needs, because a request for information is itself a valid exercise of Congress's oversight authority. The Executive Branch need not, and rarely does, insist upon the service of a subpoena or other compulsory process. Upon receipt of any request made by a committee, the Executive Branch's longstanding policy has been to engage in the accommodation process by supplying the requested information "to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch." Memorandum for the Heads of Executive Departments and Agencies from Ronald Reagan, *Re: Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982).

In contrast with a committee request, a letter or inquiry from an individual member or members of Congress is not made "pursuant to Congress's constitutional authority to conduct oversight and investigations." *Congressional Oversight Manual* at 56. As a result, while the Executive Branch often will respond to and cooperate with such a request, the request differs from an oversight request and does not trigger the "implicit constitutional mandate to seek optimal accommodation" that a request from a committee or chairman exercising Congress's delegated oversight authority would trigger. *AT&T*, 567 F.2d at 127.

These distinctions between requests for information made by a chairman or committee and requests made by individual members of Congress do not mean that individual members have no need for information from Executive Branch officials, or that Executive Branch officials should

disregard their requests. "Senators" and "Representatives" compose Congress as an institution, U.S. Const. art. I, §§ 1–3, and each member of Congress "participates in the law-making process" and "has a voice and a vote in that process." *Murphy v. Dep't of the Army*, 613 F.2d 1151, 1157 (D.C. Cir. 1979). Individual members, even those who are not chairmen of committees that have been delegated the oversight authority of a House of Congress, thus may "request . . . information from the executive agencies" about Executive Branch programs or activities—whether for legislation, constituent service, committee activities, or other purposes arising from members' legislative "responsibilities" (such as Senators' role in providing advice and consent for presidential appointments). *Id.*

The Executive Branch has historically exercised discretion in determining whether and how to respond to requests for information from individual members of Congress. Individual members often have legitimate interests in seeking information from Executive Branch officials, and providing this information can aid individual members in carrying out their legislative responsibilities. When individual members are requesting information in their official capacity on their own behalf, and not acting on behalf of a body of Congress, an Executive Branch policy of providing good-faith responses to their requests exhibits a proper respect for members of a coordinate branch of the government. Departments and agencies, therefore, appropriately give due weight and sympathetic consideration to requests for information from individual members of Congress.[*]

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[*] In response to a letter from Senator Grassley expressing concerns with *Oversight by Individual Members*, the White House Director of Legislative Affairs issued a policy statement regarding requests from individual members on July 20, 2017. That statement provides, consistent with our conclusion here, that

> [t]he Administration's policy is to respect the rights of all individual Members, regardless of party affiliation, to request information about Executive Branch policies and programs. The Administration will use its best efforts to be as timely and responsive as possible in answering such requests consistent with the need to prioritize requests from congressional Committees, with applicable resource constraints, and with any legitimate confidentiality or other institutional interest of the Executive Branch. Moreover, this policy will also apply to other matters on which individual Members may have an interest, whether it be considering possible legislation, evaluating nominees for confirmation, or providing service to constituents.

Letter for Charles E. Grassley, Chairman, U.S. Senate Committee on the Judiciary, from Marc Short, Director of Legislative Affairs, The White House at 2 (July 20, 2017).

In doing so, the Executive Branch may—and often does—provide information to individual members that is more than what is required under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. FOIA generally requires only that a department or agency release certain records in its custody. It does not require the department or agency to explain existing policies or to create documents that do not already exist. *See Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 152 (1980) (FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained"). Yet the Executive Branch often responds to requests by members of Congress with correspondence that answers substantive questions, supplies a reasoned justification for existing policy, or explains why the Executive Branch's established confidentiality interests preclude it from providing requested information. Such discretionary responses also furnish the department or agency with an opportunity to correct misperceptions or inaccurate factual statements that may be the basis for a request. By the same token, departments and agencies often prioritize their responses to the members' requests in a manner that differs from ordinary FOIA requests submitted by members of the general public.

Although departments and agencies will generally respond to requests from individual members of Congress, we recognize that they may decline to provide information to individual members when doing so would, for example, be overly burdensome; would inhibit the Executive's responsibility to protect information that is privileged, confidential, or otherwise protected by law; or would interfere with the ability to respond in a timely manner to requests for information submitted pursuant to Congress's oversight authority.

Our treatment of requests for information from individual members of Congress is consistent with the D.C. Circuit's decision in *Murphy v. Department of the Army*. *Murphy* held that memoranda withheld from disclosure in response to a FOIA request did not lose their statutorily exempt character as a result of disclosure to an individual member of Congress. In reaching this holding, the court pointed to then-5 U.S.C. § 552(c), which provided that FOIA "is not authority to withhold information from Congress." 613 F.2d at 1155. The court reasoned that, "to the extent that Congress has reserved to itself in section 552(c) the right to

receive information not available to the general public, and actually does receive such information pursuant to that section . . . , no waiver occurs of the privileges and exemptions which are available to the executive branch under the FOIA with respect to the public at large." *Id.* at 1156. The court found "no basis in the statute or in public policy for distinguishing for FOIA purposes between a congressional committee and a single Member acting in an official capacity," on the grounds that "[a]ll Members have a constitutionally recognized status entitling them to share in general congressional powers and responsibilities, many of them requiring access to executive information." *Id.* at 1157.

Murphy's holding—that, in light of section 552(c), disclosure of materials to an individual member of Congress does not waive the FOIA exemptions that are available for requests from the public—does not erode the legal distinction between requests for information made by a committee (pursuant to Congress's delegated oversight authority) and requests made by individual members of Congress. *Murphy* involved the statutory meaning of the word "Congress" "for FOIA [exemption] purposes," which the court read to include individual members of Congress. *Id.*; *see id.* at 1158 ("What is at issue is the construction to be given to [section 552(c)] which safeguards congressional access to executive information notwithstanding the FOIA exemptions and the relationship of that provision to the question of when confidentiality is waived or destroyed by disclosure to a third party."). To be sure, *Murphy* recognized the significant role that individual members play in congressional processes as providing support for reading "Congress" to include individual members. But the court's point was that FOIA was not designed to stymie the flow of information between Executive Branch agencies and individual members by subjecting those materials to a waiver of privilege. That holding is entirely consistent with the view that there is a distinction between a committee request, which is an exercise of Congress's delegated oversight authority, and a request made by an individual member.

This understanding of *Murphy* is supported by an opinion by Judge Wald concurring in part and dissenting in part in a D.C. Circuit decision issued a few months after *Murphy*. *See FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 975–79 (1980). There, Judge Wald (who formerly served as Assistant Attorney General for the Office of Legislative Affairs) emphasized that only a "formal" congressional request, such as a letter or

subpoena from a committee, would qualify for an exception to a statutory prohibition on the disclosure of trade-secret information. Two pre-*Murphy* D.C. Circuit cases had held that the Federal Trade Commission's disclosure of trade secret information to congressional committees was "not a public disclosure forbidden by" the Federal Trade Commission Act ("FTC Act"). *Id.* at 970 (majority opinion) (citing *Exxon*, 589 F.2d at 589, and *Ashland Oil, Inc. v. FTC*, 548 F.2d 977, 979 (D.C. Cir. 1976)). *Owens-Corning* also concerned disclosure in response to a "formal request" from a committee, and the majority opinion relied on those cases to support its conclusion that the disclosure at issue was permissible under the FTC Act. *See id.* at 970, 974. However, a passing reference in the opinion to the recently decided *Murphy*, *see id.* at 974 & n.16, elicited a strong dissent from Judge Wald:

> The majority opinion's footnote 16, suggesting that a single Congressman's request for confidential information protected by [the FTC Act], even though the request is unauthorized by any committee or subcommittee of Congress, may stand on the same footing as a duly authorized committee or subcommittee request, is especially troubling. . . .
>
> I cannot agree with the majority's citation of [*Murphy*] to support their position. . . .
>
> Duly authorized Congressional requests were judicially recognized as a narrow exception [under the FTC Act] in *Exxon*; therefore, it is doubly important to insure that these requests are authorized ones. The majority too casually dismisses *Exxon* in this regard. No Member of Congress, acting on his own, has yet been judicially declared to have access rights to subpoenaed trade secret material for his own individually-defined legislative purposes, no matter how legitimate his interest.
>
> To suggest that *Murphy* may expand *Exxon*'s limited access [for committees] to cover any Member acting individually is to seriously dilute the protections of [the FTC Act], and even to undermine the duly constituted authority and processes of Congress. The Legislative branch operates in the sensitive area of trade secret disclosure with its coordinate branch, the Executive, through the structure and delegated powers of Congressional committees and subcommittees. Only if the Executive and the courts honor that structure will the

> Legislature itself, as well as agencies, be able to assure subpoenaed parties that their trade secret material is not subject to indiscriminate disclosure to any or all of the 535 Members of Congress with diverse political and legislative interests.

Id. at 978–79 (Wald, J., concurring in part and dissenting in part).

Our consideration of congressional access to Executive Branch privileged information raises many of the concerns addressed by Judge Wald in her consideration of congressional access to statutorily protected trade secret information. Her rationale for distinguishing between requests from committees and individual members applies as well in the context of Congress's constitutional oversight authority as it does in the context of congressional requests under the FTC Act. Extending *Murphy* outside its FOIA context to apply to individual-member requests for information protected by executive privilege would intrude upon a comparably "sensitive area" in which the Executive Branch has recognized that Congress operates "through the structure and delegated powers of Congressional committees and subcommittees." *Id.* at 979. Giving the same access rights to individual members would also "seriously dilute" the protections that the accommodation process provides for the Executive Branch's privileged information and "undermine the duly constituted authority and processes of Congress." *Id.* at 978–79. To say that the Executive Branch should provide respectful consideration to a request from a member of Congress is not to say that each and every member may be viewed as exercising the oversight responsibilities that the Constitution entrusts collectively to each House of Congress.

III.

We recently confronted a similar issue in advising NARA about the rights of individual Senators who were seeking records under the PRA related to the nomination of then-Judge Kavanaugh to the Supreme Court. In July and August 2018, we informally advised NARA that only a congressional committee or its chairman has authority to request presidential records under the PRA, unless the committee specifically delegates that authority to another member.

The PRA restricts access to presidential records after they are accessioned to NARA at the end of a President's tenure in office. *See* 44 U.S.C.

§§ 2203(f), 2204. The PRA includes various exceptions to its restrictions on access, one of which provides that

> subject to any rights, defenses, or privileges which the United States or any agency or person may invoke, Presidential records shall be made available . . . to either House of Congress, or, to the extent of matter within its jurisdiction, to any committee or subcommittee thereof if such records contain information that is needed for the conduct of its business and that is not otherwise available.

Id. § 2205(2)(C). The congressional exception provides that, under appropriate circumstances, NARA may provide access to nonpublic presidential records in response to a request from either House of Congress or any committee or subcommittee thereof.

Consistent with *Application of Privacy Act*, 25 Op. O.L.C. 289, we advised NARA that no individual member of a congressional committee other than its chairman is authorized to speak for or otherwise represent the committee for purposes of the PRA's congressional exception, absent an express delegation of authority from the committee to that member. The relevant PRA language in section 2205(2)(C) is identical to the Privacy Act language in 5 U.S.C. § 552a(b)(9), which we considered in *Application of Privacy Act*. In that opinion, we concluded that this language "prohibits the disclosure of . . . Privacy Act-protected information to [a] ranking minority member," absent an express authorization from the committee. 25 Op. O.L.C. at 289. We explained that "[e]xcept where the Senate or House exercises its investigative and oversight authority directly, . . . each House of Congress exercises its investigative and oversight authority through delegations of authority to its committees," which in turn often delegate that authority to chairmen. *Id.* In contrast, "[a]s a general matter, ranking minority members are not authorized to make committee requests, act as the official recipient of information for a committee, or otherwise act on behalf of a committee." *Id.*; *see supra* pp. 45–46. Accordingly, "although the congressional-disclosure exception to the Privacy Act disclosure prohibition is available for disclosures to either House of Congress or to a committee of Congress," we concluded that a "disclosure of Privacy Act information solely to a ranking minority member is not a disclosure to the committee" because "ranking minority members generally do not act on behalf of congressional committees."

Application of Privacy Act, 25 Op. O.L.C. at 289–90. "[T]he congressional-disclosure exception is therefore unavailable." *Id.* at 290.

So, too, under the PRA, no individual member of a committee other than its chairman may act on behalf of a committee, absent a specific delegation of authority to that effect, and thus disclosure to the individual member does not qualify as disclosure to the committee under the statutory exception to restrictions on access. 44 U.S.C. § 2205(2)(C). Nothing in the PRA suggests that Congress intended those terms to function differently in the PRA than in the Privacy Act. On the contrary, Congress used the same language in both statutes, enacted only a few years apart, to establish a similar congressional exception to prohibitions on disclosure. These similarities are "strong indication[s] that the two statutes should be interpreted *pari passu*." *Northcross v. Bd. of Educ.*, 412 U.S. 427, 428 (1973) (per curiam); *see also Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality opinion) ("[W]hen Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

This interpretation of section 2205(2)(C) is consistent with NARA's longstanding administration of the statute. *See Application of Privacy Act*, 25 Op. O.L.C. at 290 (noting that the conclusion that the Privacy Act prohibits disclosure to ranking minority members "follows the longstanding Executive Branch practice on this question"). NARA informed us that it has always understood the PRA to give authority to request records only to the chairman of a committee or the committee itself, and that NARA has relied on *Application of Privacy Act* in concluding that ranking minority members could not make requests under section 2205(2)(C). For example, NARA declined to process requests from the Ranking Members of the Senate Judiciary Committee in connection with the nomination of Eric Holder as Attorney General and again with respect to the nomination of Elena Kagan to the Supreme Court. NARA's position with respect to the Kavanaugh nomination therefore was consistent with prior Executive Branch practice regarding section 2205(2)(C).

IV.

In reviewing requests from Congress, the Executive Branch's longstanding policy has been to engage in the established process for working

to accommodate congressional requests for information only when those requests come from a committee, subcommittee, or chairman acting pursuant to oversight authority delegated from a House of Congress. Departments and agencies, however, may appropriately give due weight and sympathetic consideration to requests for information from individual members of Congress not delegated such authority.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Paying for Removing Structures at the Treasure Lake Civilian Conservation Center

The interdepartmental-waiver doctrine, under which one agency generally may not pay to restore or repair property in the custody of another agency, prevents the Department of Labor from paying to remove structures at a defunct Job Corps site that is located within a wildlife refuge in the custody of the Department of Interior. No statutory authority has displaced that doctrine's applicability by authorizing the Department of Labor to pay for removing the structures.

February 22, 2019

MEMORANDUM OPINION FOR THE SOLICITOR OF LABOR

Your office has asked us to resolve a dispute between the Department of Labor ("Labor") and the Department of the Interior ("Interior") about whether Labor may use its Job Corps appropriation to pay for removing several structures at the defunct Treasure Lake Civilian Conservation Center ("Treasure Lake") in the Wichita Mountains Wildlife Refuge in Indiahoma, Oklahoma.[1] Under the interdepartmental-waiver doctrine, one agency generally may not pay to restore or repair property in the custody of another agency. As different arms of a single government, federal agencies typically cannot bring claims for repairs or restorations against one another; instead, the interdepartmental-waiver doctrine provides the longstanding default rule for allocating such costs. Because Interior has custody of the land at Treasure Lake, Labor contends that the interdepartmental-waiver doctrine requires Interior to restore the property. Inte-

[1] In considering this question, we requested and received the views of the Department of Labor, the Department of Interior, and the Office of Management and Budget. *See* Letter for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from M. Patricia Smith, Solicitor of Labor (Dec. 21, 2016) ("Labor Letter"); Letter for Curtis E. Gannon, Acting Assistant Attorney General, Office of Legal Counsel, from Daniel H. Jorjani, Principal Deputy Solicitor, Department of Interior, *Re: Removal of Treasure Lake Job Corps Facility Structures* (June 30, 2017) ("Interior Letter"); Letter for Curtis E. Gannon, Acting Assistant Attorney General, Office of Legal Counsel, from Heather V. Walsh, Acting General Counsel, Office of Management and Budget (July 7, 2017); Letter for Curtis E. Gannon, Acting Assistant Attorney General, Office of Legal Counsel, from Nicholas C. Geale, Acting Solicitor of Labor (Aug. 1, 2017) ("Labor Reply Letter"); E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Heather V. Walsh, Acting General Counsel, Office of Management and Budget (Aug. 30, 2017, 4:54 PM).

rior argues that the doctrine should not apply to intentional alterations of property and that Labor should rely upon its own appropriations to perform the restoration. We conclude that the interdepartmental-waiver doctrine does apply here, and that Congress has not otherwise authorized Labor to pay for removing the structures on land in Interior's custody.

I.

The Wichita Mountains Wildlife Refuge is one of the Nation's oldest conservation areas, first established in 1905 by President Theodore Roosevelt as a reserve for game animals and birds. *See* Interior Letter at 2; Pub. L. No. 58-24, 33 Stat. 614 (1905) (codified as amended at 16 U.S.C. § 684); Proclamation of June 2, 1905, 34 Stat. 3062; Pub. L. No. 74-637, tit. I, 49 Stat. 1421, 1446 (1936). Interior administers the wildlife refuge with the aim of long-term conservation. *See* Interior Letter at 2; *see generally* 16 U.S.C. § 668dd.

In 1965, the Wichita Mountains Wildlife Refuge also became home to Treasure Lake, a center run under the auspices of the Job Corps program. *See* Labor Letter at 1; Economic Opportunity Act of 1964, Pub. L. No. 88-452, § 102, 78 Stat. 508, 508 (establishing Job Corps). Since 1998, Labor has overseen the Job Corps program, which is a primarily residential program that offers education and vocational training to young men and women. *See* 29 U.S.C. §§ 3191, 3194(a), 3197(c); Workforce Investment Act of 1998, Pub. L. No. 105-220, § 143, 112 Stat. 936, 1007. The program has more than 100 centers throughout the country. *See* Updated Methodology for Selecting a Job Corps Center for Closure and Center Proposed for Closure, 82 Fed. Reg. 44,842, 44,843 (Sept. 26, 2017). Most Job Corps centers are operated by businesses, nonprofit organizations, or tribes that have procurement contracts with Labor. *Id*. But those, like Treasure Lake, that are denominated "Civilian Conservation Centers" are operated under interagency agreements between Labor and other federal agencies. *See* 29 U.S.C. § 3197(d)(1); 20 C.F.R. § 670.310(e).

Under a series of such agreements, Labor paid for the buildings, structures, and operations at the Treasure Lake Job Corps site. *See* Labor Letter at 2; Interagency Agreement Between the United States Department of Labor and the United States Department of Agriculture Governing the Funding, Establishment, and Operation of Job Corps Civilian Conservation Centers at 2–3 (Mar. 10, 2008) ("Labor-Agriculture Agreement").

Appropriations for the Job Corps provide Labor with funds for, among other things, the "construction, alteration, and repairs of buildings and other facilities" used in the Job Corps program. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No. 115-245, div. B, tit. I, 2018 U.S.C.C.A.N. (132 Stat.) 2981, 3050 ("Labor FY 2019 Appropriations"); *see also* Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, div. H, tit. I, 131 Stat. 135, 504 (similar provision for prior year). Meanwhile, the Fish and Wildlife Service (part of Interior) and the Forest Service (part of the Department of Agriculture) at various points conducted the day-to-day operations at Treasure Lake. *See* Labor Letter at 2; Labor-Agriculture Agreement at 1–4.

During its time as a Civilian Conservation Center, Treasure Lake evolved into a "26-building facility," with "a heliport, fuel station, motor pool, carpentry shop, brick masonry shop, library, cafeteria, gymnasium, dormitories and numerous other features." Interior Letter at 6. In 2014, however, Labor selected Treasure Lake for closure based on performance-related statutory criteria. *See* Final Methodology for Selecting a Job Corps Center for Closure and Center Selected for Closure: Comments Request, 79 Fed. Reg. 51,198 (Aug. 27, 2014) (announcing initial closure decision); Final Notice of Job Corps Center for Closure, 79 Fed. Reg. 61,099 (Oct. 9, 2014) (announcing final decision). Treasure Lake closed in June 2015, and Interior regained complete custody of the land in December 2015. *See* Labor Letter at 3.

Interior now wants Labor to pay for the removal of the Treasure Lake structures because Interior views them as "inconsisten[t] with the [Fish and Wildlife Service's] statutory mandate" to manage the Wichita Mountains Wildlife Refuge. Interior Letter at 6. Specifically, Interior suggests that the structures may have lead-based paint and asbestos that could contaminate the refuge and that the structures "create a negative visual impact to visitors at nearby scenic areas." *Id*. at 7. The costs of removal may run between $7 million and $9.5 million. *See id*. at 2.

II.

Labor identifies two primary reasons why it cannot pay to remove the structures at Treasure Lake: (1) it contends that the interdepartmental-

waiver doctrine requires Interior, as the agency with custody of the land, to bear the costs of restoring land that was temporarily used by another agency; and (2) alternatively, it contends that specific appropriations authorize Interior to pay to remove buildings on lands within national wildlife refuges, implicitly preventing Labor from using a more-general appropriation to do the same thing. *See* Labor Letter at 1–2.

Interior disagrees that the interdepartmental-waiver doctrine would bar Labor from paying for remediation at Treasure Lake because, in its view, that doctrine should be limited to circumstances where one agency unintentionally damages another agency's property—excluding those where, as here, one agency intentionally alters real property. Interior invokes another appropriations principle, the necessary-expense doctrine—which permits an agency to make those expenditures reasonably necessary to carry out the objects of an appropriation—and contends that Labor may use its Job Corps appropriation to pay for removing the structures. *See* Interior Letter at 5–11; *see also* 1 General Accounting Office, *Principles of Federal Appropriations Law* 4-20 (3d ed. 2004) ("*Federal Appropriations Law*"). Interior concludes that the structures' removal "is more central to" Labor's Job Corps appropriation than it is to Interior's construction appropriation. Interior Letter at 9.

We conclude that the interdepartmental-waiver doctrine prevents Labor from paying to remove the structures at Treasure Lake. The doctrine embodies a longstanding principle of appropriations law: the agency with custody of property bears the costs of any repairs arising from another agency's temporary use of that property. While that default rule may be overcome by a statute—or by an interagency agreement authorized by statute—no statute or agreement applies to overcome the doctrine here. Nor does the necessary-expense doctrine suggest a different result. Although the necessary-expense doctrine may expand the availability of agency appropriations beyond what Congress has expressly specified, it does not implicitly authorize interdepartmental reimbursements.

A.

The interdepartmental-waiver doctrine is a long-established piece of federal appropriations law. The doctrine prescribes that, absent legislation providing otherwise, one agency may not expend federal funds to restore another agency's property. *See, e.g.*, 2 *Federal Appropriations Law* at

6-197 (3d ed. 2006) ("What happens when one federal agency damages the property of another agency? Under the so-called 'interdepartmental waiver doctrine,' the general rule is that funds available to the agency causing the damage may not be used to pay claims for damages by the agency whose property suffered the damage."); *Payment by National Weather Service to Bonneville Power Administration for Use of Microwave Radio Station Site*, 71 Comp. Gen. 1, 2–3 (1991) ("*National Weather Service*") (explaining that the doctrine ordinarily "prohibits a federal agency from paying for the use or repair of real property controlled by another federal agency").

The interdepartmental-waiver doctrine derives in significant part from the idea that government property does not belong to any single agency, but to the federal government as a whole. *See* 2 *Federal Appropriations Law* at 6-197. Because the government cannot bring a damages claim against itself, and because agencies are not free to redistribute the funds that Congress has appropriated, default rules are needed for allocating certain costs between agencies. The interdepartmental-waiver doctrine is the rule that generally governs the repair and restoration of loaned property. It provides that the agency with custody over the property should bear the costs of any losses arising from its use by other agencies. *See National Weather Service*, 71 Comp. Gen. at 2; *Reimbursement by Navy to Federal Aviation Administration for Damage to Instrument Landing System*, 65 Comp. Gen. 464, 466, 468 (1986); *Departments and Establishments—Damage Claims—Reimbursement Prohibition*, 41 Comp. Gen. 235, 237 (1961); *Public Property—Loans Between Departments—Repairs and Replacements*, 10 Comp. Gen. 288, 289 (1930) ("*Public Property*"). Absent a contrary statute, the agency with custody of the property may not even charge rent to the agency using the property. *See National Weather Service*, 71 Comp. Gen. at 2 (citing prior Comptroller General decisions); *Leases—Rent—Property Held by the Reconstruction Finance Corporation*, 20 Comp. Gen. 699, 701 (1941) ("[T]he general rule is that payment of rent is unauthorized by one Government department or agency for premises under the administrative control of another department or agency."). Some Comptroller General opinions have also reasoned that the agency with ultimate custody of the property should pay for repairs because those repairs are for its "future use and benefit." *Public Property*, 10 Comp. Gen. at 289; *see also, e.g.*, *Use of One Agency's Real Property*

by Another—Liability for Damage, 59 Comp. Gen. 93, 95 (1979) ("*Use of One Agency's Real Property*").

The doctrine predates the creation of the office of Comptroller General and was first articulated by the Executive Branch in 1899, when the Comptroller of the Treasury concluded that, after a vessel of the U.S. Navy was damaged by a ship of the Revenue-Cutter Service, the costs of repairs had to be paid from the Navy's appropriations, reasoning that "the injured vessel is a vessel of the Navy" and "the appropriation for expenses of the Revenue-Cutter Service, which is applicable to repairs of revenue vessels only, is not applicable to repairs of vessels of the Navy." *Damage to a Vessel of the Navy by Collision with a Revenue-Cutter Vessel*, 6 Comp. Dec. 74, 74–75 (1899) ("*Damage to a Vessel*"); *see Attorney General—Opinions—Comptroller of the Treasury*, 26 Op. Att'y Gen. 609, 610 (1908) (explaining that the Comptroller of the Treasury's opinions were, by statute, generally binding within the Executive Branch). By 1945, the Comptroller General could state that it had "been held repeatedly that [a department's or agency's] funds are not available for payment of claims for damages to the property of other Government departments or agencies." *Government Corporation Vessels Damaged by Naval Vessels—Appropriation Availability for Payment of Damage Claims*, 25 Comp. Gen. 49, 54 (1945). And in 1952, the Comptroller General characterized the doctrine as "so firmly embedded in the substantive law of the United States as to require specific statutory authority to overcome the rule." *National Forest Lands—Interagency Use—Liability for Damages, Restoration, Etc.*, 32 Comp. Gen. 179, 180 (1952) ("*National Forest Lands*").[2]

Because the interdepartmental-waiver doctrine reflects a background principle of appropriations law, Congress may override it and has done so in a number of instances. Most significantly, in the Economy Act of 1932, Congress authorized an agency to "place an order with . . . another agency for goods or services" and thereby impose conditions on the loan or use of

[2] As we have said before, "the opinions of the Comptroller General do not bind the Executive Branch, but they may provide helpful guidance on appropriations matters and related questions." *Applicability of the Miscellaneous Receipts Act to an Arbitral Award of Legal Costs*, 42 Op. O.L.C. 30, 32 n.2 (2018). That is especially so when, as explained below, Congress has effectively ratified the Comptroller General's long-established default rule by specifically overriding it in some, but not all, instances.

property. 31 U.S.C. § 1535. Shortly before the Economy Act, the Comptroller General had concluded that one agency could not pay to restore another agency's property even when such restoration was provided for in an agreement between the agencies. *See, e.g.*, *Public Property*, 10 Comp. Gen. at 288 (holding that the interdepartmental-waiver doctrine applied even though the loan at issue was made "with the understanding that the articles were to be returned in good condition" and that the loaning agency "would be reimbursed for the cost of [restoring] the property"). Now, however, the Economy Act "provide[s] the specific legislative authority stated by the Comptroller General to be necessary by authorizing the performance of work or services or furnishing of materials by one department or establishment to another without any limitation." *Jack Brooks, House of Representatives*, B-197686, 1980 WL 14507, at *2 (Comp. Gen. Dec. 18, 1980) (quoting *Interdepartmental Work: Hearings on H.R. 10199 Before the H. Comm. on Expenditures in the Executive Departments*, 71st Cong. 4 (Apr. 10, 1930)); *see* 3 *Federal Appropriations Law* at 12-22 (3d ed. 2008) (similar). If agencies satisfy the Economy Act's criteria for interagency agreements, then they may contract around the doctrine.[3]

In addition to the Economy Act, Congress has enacted other targeted exceptions to the doctrine's default rule. For example, when an agency has received "an appropriation specifically for the purpose of removing improvements on land withdrawn for its use," that is understood as supplying "the statutory authority . . . required" to displace the interdepartmental-waiver doctrine. *Interdepartmental Waiver Doctrine—Withdrawn Lands*, 60 Comp. Gen. 406, 407–08 (1981) ("*Withdrawn Lands*").

[3] *See, e.g.*, *Department of the Air Force—Reimbursement of Industrial Fund Agency for Damage to Vehicle*, 65 Comp. Gen. 910, 911 (1986) (noting that a "major exception [to the interdepartmental-waiver doctrine] is where reimbursement for damages has been provided for in an agreement under the Economy Act"); *Finance and Accounting Officer, Department of the Army*, B-146588, 1961 WL 2188, at *1 (Comp. Gen. Aug. 23, 1961) (concluding that the Army and the Air Force had entered into a valid Economy Act agreement under which the Army could reimburse the Air Force for damage to borrowed planes); *Public Property—Loans Between Departments, Etc.—Liability for Repairs*, 30 Comp. Gen. 295, 296–97 (1951) (finding that the Economy Act modified the result in the 1930 *Public Property* opinion, such that the Bureau of Land Management could execute an agreement requiring that its boat be returned in a condition as good as when it was loaned).

Thus, in 1984, Congress specifically authorized the military departments to "remove improvements and take any other action necessary . . . to restore land used" under a "permit from another military department or Federal agency," when the permit requires restoration. 10 U.S.C. § 2691(a). And, in 2017, Congress amended that section to allow the Secretary of Defense to "restore" land under the administration of a different federal agency when the land is "damaged as a result of a mishap involving a vessel, aircraft, or vehicle of the Department of Defense." *Id.* § 2691(e)(1) (Supp. V 2017). As the conference report explained, the amendment as it was enacted supplied the same authority that the Senate bill had expressly entitled an "[e]xception to the interdepartmental waiver doctrine for cleanup of vehicle crashes." H.R. Rep. No. 115-404, at 944 (2017) (Conf. Rep.). Congress has also given the General Services Administration ("GSA") the authority to recover from other agencies the costs of operating and maintaining a motor pool, including "estimated replacement cost." 40 U.S.C. § 605(b)(2). Thus, when a vehicle in GSA's motor pool is damaged as a result of a driver's "misconduct or improper operation," GSA is permitted to "charg[e] such losses directly to the agency whose driver is responsible for the loss." *Interagency Property Damage Liability*, 59 Comp. Gen. 515, 517 (1980).[4]

The Executive Branch has similarly applied the interdepartmental-waiver doctrine since at least the Comptroller of the Treasury's 1899 decision in *Damage to a Vessel*. *See* 6 Comp. Dec. at 74–75; *see also Replacing Property Borrowed from Another Department*, 10 Comp. Dec. 222, 224–25 (1903); *Ownership of Public Property*, 22 Comp. Dec. 390, 390 (1916). Executive agencies have considered and applied the doctrine

[4] The Comptroller General has also recognized an exception to the interdepartmental-waiver doctrine where an agency's activities are supported by a revolving fund, a mechanism that authorizes an agency to retain receipts and deposit them into the fund to finance the fund's operations. *See National Weather Service*, 71 Comp. Gen. at 3 ("[W]e have recognized exceptions to the interdepartmental waiver doctrine where Congress has, by statute, expressly required an interagency activity to operate on a self-sustaining basis by recovering all costs from using agencies."); *Loan of Equipment Purchased from the Reclamation Fund*, 3 Comp. Gen. 74, 74–75 (1923) (explaining that the interdepartmental-waiver "rule is predicated on appropriations not reimbursable," so another agency's "use of equipment purchased [by an agency with a reimbursable fund] is on a somewhat different basis, the equipment being an asset which should not be permitted to be depreciated from use on other than objects for which the fund was created").

when promulgating regulations, guidance, and legal opinions. *See* 32 C.F.R. § 536.27(g) (subsection of Department of the Army regulations about claims against the United States, stating that "[n]either the U.S. government nor any of its instrumentalities are proper claimants due to the interdepartmental waiver rule"); U.S. Dep't of Energy, DOE 4300.1C, *Real Property Management* (June 28, 1992) (agency guidance noting that "[t]he Interdepartmental Waiver Doctrine should be considered whenever there is a possibility of outgranting property to other Federal agencies"); Office of General Counsel, Immigration & Naturalization Service, U.S. Dep't of Justice, *Missing GSA Painting*, Op. No. 93-29 (May 5, 1993) (describing the doctrine as "the substantive law of the United States"). The interdepartmental-waiver doctrine thus establishes the general default rule for allocating the costs of repairs among departments and agencies.

B.

Applying the foregoing principles, we conclude that the interdepartmental-waiver doctrine prohibits Labor from paying for the removal of the Treasure Lake structures. Interior has custody over the Wichita Mountains Wildlife Refuge, where the Treasure Lake structures are located. The Comptroller General has previously (and, in our view, correctly) concluded that other conservation sites are subject to the interdepartmental-waiver doctrine, as is governmental property generally. *See Public Lands—Interagency Loans, Transfers, Etc.—Damages, Restoration, Etc.—Authority*, 44 Comp. Gen. 693, 695 (1965) ("*Public Lands*") (opining that the Army may not reimburse the National Park Service for road repairs after military exercises because "an executive department may not be reimbursed for the use or depreciation of real property loaned, used or damaged by another department"); *National Forest Lands*, 32 Comp. Gen. at 180 (rejecting the argument that the interdepartmental-waiver doctrine "should not apply to national forest lands since such lands are analogous to property held in trust"). This result comports with the notion that the interdepartmental-waiver doctrine allocates losses to the agency that will benefit from the future use of the repaired property. Because Labor is no longer using the Treasure Lake property, Labor will receive no future benefit from removing the structures. To the contrary, the benefits from restoration will flow to Interior, which seeks the structures' removal to advance its statutory mission of managing a wildlife

refuge. *See Withdrawn Lands*, 60 Comp. Gen. at 408 (noting that a restoration benefits the lending agency when the agency "would use the property upon its return to carry out agency functions"). Absent a contrary statute, the interdepartmental-waiver doctrine applies and makes Interior responsible for the costs of restoration.

We do not believe that any statute displaces the general rule here. Labor's Job Corps appropriations have not expressly provided for the removal of structures at Treasure Lake. Nor have they otherwise authorized Labor, more generally, to pay damages for its use of other agencies' lands. *See, e.g.*, Labor FY 2019 Appropriations, 2018 U.S.C.C.A.N. (132 Stat.) at 3050; *see also Withdrawn Lands*, 60 Comp. Gen. at 407–08 (noting that when an agency has an "appropriation specifically for the purpose of removing improvements on land withdrawn for its use, this constitutes the statutory authority . . . required" to overcome the interdepartmental-waiver doctrine); *Public Lands*, 44 Comp. Gen. at 693, 695 (concluding that the Army could not reimburse Interior for property damage, even though Army appropriations contained no limitations on such expenditures). And Interior has no authorization to charge other agencies for costs arising from their use of wildlife refuges. *See* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, div. E, tit. I (making appropriations for Interior, including the Fish and Wildlife Service, but containing no such authority); Consolidated Appropriations Act, 2017, 131 Stat. at 436–68 (same); *see also National Forest Lands*, 32 Comp. Gen. at 180–81 (concluding that the Secretary of Agriculture's statutory authority to protect and preserve national forests does not override the interdepartmental-waiver doctrine).[5]

Furthermore, no other exception to the interdepartmental-waiver doctrine applies. Labor and Interior did not enter into any agreement under

[5] We thus reject the premise of Labor's alternative argument that Interior's purportedly-more-specific appropriation governs over what Labor describes as more-general language in its Job Corps appropriation. *See* Labor Letter at 1–3. The dispositive question is not which agency's appropriation contains more specific language, but whether Congress has overridden the interdepartmental-waiver doctrine. Even if Interior's appropriation contained more-general language than Labor's appropriation, it would be irrelevant unless Labor's appropriation (or some other statute) specified with sufficient clarity that, notwithstanding the interdepartmental-waiver doctrine, Labor could bear the costs of removing the Treasure Lake structures.

the Economy Act or similar statutory authority under which Labor "assume[d] responsibility for the removal of the structures or the restoration of the wildlife refuge following the closure of the Center." Labor Reply Letter at 2.[6] And Interior's relevant appropriations are annual appropriations, not revolving funds. *See supra* note 4.

C.

In reaching this conclusion, we have considered other points that Interior contends would, when taken in combination, support having Labor pay to restore the Treasure Lake property.

First, Interior argues that the interdepartmental-waiver doctrine should be limited to situations where an agency unforeseeably or accidentally damages another agency's property. In its view, where an agency's activities foreseeably damage another agency's property, the costs of restoration are sufficiently predictable that they should be borne by the agency responsible for the damage. *See* Interior Letter at 12–15. As Interior acknowledges, however, several Comptroller General opinions go the other way, *see id*. at 11, and we believe that those decisions correctly interpret the doctrine.

The Comptroller General's longstanding view is that the interdepartmental-waiver doctrine does not turn upon the cause of, or comparative fault for, the property damage. *See, e.g.*, *National Forest Lands*, 32 Comp. Gen. at 180–81 ("The question is not how the damages were caused, but to which agency has the Congress delegated the responsibility for administering and conserving the property and to which agency has it appropriated funds for such repair and replacements as may be necessary."); *Public Property*, 10 Comp. Gen. at 289 (noting that the doctrine bars interagency reimbursement not only for property loss or damage, but also for property "use or depreciation"). That is also the Executive Branch's longstanding view. *See Damage to a Vessel*, 6 Comp. Dec. at 75 ("The appropriation [of the custodial agency] . . . is applicable . . . without

[6] This opinion does not address whether an agreement concerning real property constitutes an agreement "for goods or services" under the Economy Act, 31 U.S.C. § 1535(a), or whether an agreement concerning services related to real property—such as the removal or alteration of facilities like those at Treasure Lake—could have been reached under the Economy Act or similar statutory authority.

regard to the origin of the injury necessitating the repairs, whether arising from natural deterioration or wear and tear, or from an accident of any kind, whether by the fault of the officers of the [custodial agency] or others or otherwise."). That view is consistent with the doctrine's underlying premise: regardless of whether one agency has damaged another agency's property in a foreseeable or unforeseeable manner, the agency with custody of the property does not make a claim for damage because the property belongs to the government as a whole. Even if we were to distinguish between the individual agencies' interests in this context, the same conclusion would follow, because the agency with custody of the property will be the one that reaps the benefits of removing the structures at Treasure Lake. *See Public Property*, 10 Comp. Gen. at 289.

Second, Interior contends that the interdepartmental-waiver doctrine has generally been applied to personal property, and not to real property like the buildings and other permanent improvements at Treasure Lake. *See* Interior Letter at 9, 11, 15. Interior reads the Comptroller General's 1981 opinion in *Withdrawn Lands* as "appear[ing] to narrow" the doctrine's applicability in cases involving public lands. *Id*. at 11–12. We disagree with Interior's attempt to extend that opinion's reasoning to Treasure Lake. In *Withdrawn Lands*, the Comptroller General concluded that the interdepartmental-waiver doctrine should not apply to public lands managed by the Bureau of Land Management because those lands were held in anticipation of future assignment. *See* 60 Comp. Gen. at 408–09. The opinion explained that the Bureau "does not benefit, in the sense referred to in the [Comptroller General's previous decisions], from restoration by another agency" of its lands. *Id*. at 408. Significantly, the Comptroller General contrasted the Bureau's public lands with National Forest lands administered by the Forest Service, reasoning that "restoration of property within the Forest's boundaries" would "clearly benefit[] the Forest Service," rather than the paying agency. *Id*. at 409. That same distinction would also apply to repairs within wildlife refuges, which are administered by Interior in a similar fashion, for long-term preservation and public benefit. *Compare, e.g.*, 16 U.S.C. § 742a (giving the Fish and Wildlife Service the statutory goal of "maintaining and increasing the public opportunities for recreational use of our fish and wildlife resources"), *with id*. § 1609(a) (giving the National Forest System

and Forest Service the statutory mission of maintaining a system of forests "dedicated to the long-term benefit for present and future generations").

Furthermore, as Interior acknowledges, *see* Interior Letter at 11 & n.40, a number of other Comptroller General opinions, before and after 1981, have applied the interdepartmental-waiver doctrine to real property. *See, e.g.*, *National Weather Service*, 71 Comp. Gen. at 2 (reaffirming that the "interdepartmental waiver doctrine prohibits a federal agency from paying for the use or repair of real property controlled by another federal agency"); *Use of One Agency's Real Property*, 59 Comp. Gen. at 93–95 (applying doctrine to Army's damage to national forest lands); *Public Lands*, 44 Comp. Gen. at 695 (applying doctrine to Army's damage to lands in national recreation area); *National Forest Lands*, 32 Comp. Gen. at 179–81 (applying doctrine to Army's damage to national forest lands).

Finally, we disagree with Interior's contention that the necessary-expense doctrine would authorize Labor to pay for removing the Treasure Lake structures. *See* Interior Letter at 9. This Office has explained that the Comptroller General's necessary-expense doctrine tracks our interpretation of the Purpose Act, 31 U.S.C. § 1301(a). *See State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments*, 36 Op. O.L.C. 77, 87–88 (2012). The basic principle is that a federal agency may use its appropriations for purposes that Congress has not expressly specified, so long as the "expenditure bears a logical relationship to the objectives of the general appropriation[] and will make a direct contribution to the agency's mission." *Id.* (internal quotation marks omitted). But treating each agency as having an implicit authorization to use its funds to pay other agencies would render the interdepartmental-waiver doctrine superfluous. If agencies were already authorized to pay for the repair or restoration of other agencies' property whenever doing so bore some relation to the objects of a general appropriation, then there would never be a need to determine whether a specific appropriation authorized an agency using another agency's property to bear the costs of that use. Nor would there be any need for the Economy Act; agencies would already be entitled to make such agreements whenever they are "reasonably necessary" to achieve the goals of an appropriation. We therefore think that a more-specific authorization is required to override the interdepartmental-waiver doctrine's default rule.

III.

Interior is the custodian of the land at Treasure Lake. Accordingly, we conclude that, under the interdepartmental-waiver doctrine, Labor cannot pay to remove the structures at Treasure Lake, and, further, that no statutory authority has displaced that doctrine's applicability in this instance.

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

Designating an Acting Director of the Federal Housing Finance Agency

In designating an Acting Director of the Federal Housing Finance Agency, the President may choose either an incumbent Deputy Director under 12 U.S.C. § 4512(f), the vacancy statute that applies specifically to the office of the Director, or someone who is made eligible to be an acting officer by the Vacancies Reform Act of 1998. Under the latter, the President may select the Senate-confirmed Comptroller of the Currency.

March 18, 2019

MEMORANDUM OPINION FOR THE
DEPUTY COUNSEL TO THE PRESIDENT

On December 18, 2018, the Director of the Federal Housing Finance Agency ("FHFA") sent the President a letter of resignation, "effective at midnight on January 6, 2019." Two days later, the President announced his intention to designate the Comptroller of the Currency as FHFA's Acting Director.[1] This Office had previously advised that the President could invoke the Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d, to make that designation upon the resignation of the incumbent Director. This memorandum explains the basis for that advice, which is consistent with several previous opinions of this Office.

The Vacancies Reform Act provides the President with authority "for temporarily authorizing an acting official to perform the functions and duties" of an officer of an "Executive agency" whose appointment, like that of the FHFA Director, "is required to be made by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 3347(a). The Vacancies Reform Act is the "*exclusive* means" for authorizing acting service in most such positions "unless" another statute expressly designates an officer to serve in an acting capacity or expressly authorizes the President, a court, or an agency head to designate an acting officer. *Id.* (emphasis added). In the case of a vacancy in the office of the FHFA Director, another statute does allow the President to select an Acting

[1] *See President Donald J. Trump Announces Intent to Designate Individual to a Key Administration Post* (Dec. 20, 2018), https://trumpwhitehouse.archives.gov/presidential-actions/president-donald-j-trump-announces-intent-designate-individual-key-administration-post-2.

Director from among three Deputy Directors appointed by the Director. *See* 12 U.S.C. § 4512(f).

This Office has repeatedly concluded that the Vacancies Reform Act still applies to an executive office, including that of an agency head, when another office-specific statute would enable someone else to serve as the acting officer. The federal courts have consistently agreed that, in such a circumstance, the President may choose between the office-specific statute and the Vacancies Reform Act when designating an acting officer. We therefore advised that the President could invoke the Vacancies Reform Act to designate an Acting Director of FHFA and, in doing so, could select a Senate-confirmed officer, such as the Comptroller of the Currency. *See* 5 U.S.C. § 3345(a)(2).

I.

In the Housing and Economic Recovery Act of 2008 ("HERA"), Congress established FHFA as "an independent agency of the Federal Government" and charged it with supervising and regulating the following mortgage-financing institutions: the Federal National Mortgage Association (known as "Fannie Mae") and its affiliates; the Federal Home Loan Mortgage Corporation (known as "Freddie Mac") and its affiliates; the Federal Home Loan Banks; and the Office of Finance of the Federal Home Loan Bank System. *See* 12 U.S.C. § 4511(a)–(b). The Director of FHFA is "the head of the Agency," *id.* § 4512(a), and is appointed for a five-year term by the President with the Senate's advice and consent, *id.* § 4512(b)(1)–(2). An incumbent Director may also continue to "serve as the Director after the expiration of the term for which appointed until a successor has been appointed." *Id.* § 4512(b)(4). The FHFA Director is authorized to appoint three deputies: the Deputy Director of the Division of Enterprise Regulation, the Deputy Director of the Division of Federal Home Loan Bank Regulation, and the Deputy Director for Housing Mission and Goals. *Id.* § 4512(c)–(e).

The five-year term of FHFA Director Melvin L. Watt expired on January 6, 2019, and he chose to resign rather than hold over until his successor could be appointed. *See* Letter for the President from Melvin L. Watt, Director, FHFA (Dec. 18, 2018).

II.

Director Watt's resignation implicated two different statutes, each potentially available for naming an Acting Director of FHFA. First, HERA provides that, "[i]n the event of the death, resignation, sickness, or absence of the Director, the President shall designate [one of FHFA's three Deputy Directors] to serve as acting Director until the return of the Director, or the appointment of a successor." 12 U.S.C. § 4512(f). Second, the Vacancies Reform Act applies to the vast majority of Senate-confirmed offices in the Executive Branch. *See* 5 U.S.C. §§ 3345(a), 3349c. It is triggered when an officer "dies, resigns, or is otherwise unable to perform the functions and duties of the office," *id*. § 3345(a), and it permits the President to designate, as acting officers, certain executive officials, including those who already hold "office[s] for which appointment is required to be made by the President, by and with the advice and consent of the Senate," *id*. § 3345(a)(2).[2]

Rather than select one of the incumbent Deputy Directors under section 4512(f), the President sought to designate Joseph M. Otting, the Comptroller of the Currency, to act as FHFA Director upon Director Watt's resignation. Because the Comptroller of the Currency is appointed after Senate confirmation, *see* 12 U.S.C. § 2, the President could designate Mr. Otting if the Vacancies Reform Act were available. Accordingly, we considered whether the President could use that statute or whether section 4512(f) provides the exclusive means for designating an Acting Director of FHFA.[3] Consistent with our previous opinions about materially similar

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[2] Director Watt created a vacancy by resigning from office. *See* 5 U.S.C. § 3345(a). If the Director had sought to hold over after the expiration of his term, the Vacancies Reform Act would not have been available unless he were removed or otherwise left office before his successor's appointment. *See id.* §§ 3345(a), 3349b. Separately, HERA provides that a "vacancy in the position of Director that occurs before the expiration of the term for which a Director was appointed" shall be filled through appointment by the President with the Senate's advice and consent. 12 U.S.C. § 4512(b)(3). That provision does not concern the service of an Acting Director, and it was inapplicable here because Director Watt's resignation did not become effective "before the expiration" of his term.

[3] Congress has specified that the FHFA Director must "have a demonstrated understanding of financial management or oversight, and have a demonstrated understanding of capital markets, including the mortgage securities markets and housing finance." 12 U.S.C. § 4512(b)(1). Additionally, the FHFA Director "may not" (1) possess a financial interest in the entities FHFA regulates or their affiliates; (2) hold any position in such

offices, we concluded and advised that the President may use the Vacancies Reform Act to designate an Acting Director of FHFA.

A.

In four published opinions over the last sixteen years, this Office has concluded that an office-specific statute designating an individual who "may" or "shall" assume an office in an acting capacity in the event of a vacancy did not negate the availability of the Vacancies Reform Act as an alternative mechanism for naming an acting official.

In 2017, we considered the availability of the Vacancies Reform Act for designating an Acting Director of the Bureau of Consumer Financial Protection ("CFPB"), who, like the Director of FHFA, is the single head of an independent agency created after Congress enacted the Vacancies Reform Act. The CFPB's organic statute provides that the CFPB's Deputy Director shall "serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5). We concluded that "[t]he fact that the Deputy Director may serve as Acting Director by operation of the statute . . . does not displace the President's authority under the Vacancies Reform Act." *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. 99, 100 (2017) ("*Acting Director of CFPB*"). We reasoned as follows:

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

entities; or (3) have served as an executive officer or director of such entities during the preceding three years. *Id.* § 4512(g). We did not address whether an *Acting* Director must satisfy these provisions, because, even assuming that they apply, we were informed that Mr. Otting would satisfy them.

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

Id. at 103–04. We emphasized that, in addition to the provision establishing that the Vacancies Reform Act will cease to be "exclusive" with respect to some offices (section 3347(a)), another provision entirely excludes some offices from the Act. *Id*. at 108 & n.5. The latter provision is entitled "Exclusion of certain officers," and it provides that the Act simply "shall not apply" to certain specified offices (individual members of certain multi-member agencies and Article I judges). 5 U.S.C. § 3349c. The contrast between those two provisions reinforced our conclusion that section 3347(a)'s non-exclusivity provision does not preclude the use of the Vacancies Reform Act when another statute applies to an office but does not itself purport to be exclusive. *See Sebelius v. Cloer*, 569 U.S. 369, 378 (2013) ("We have long held that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks and brackets omitted)).

In *Acting Director of CFPB*, we observed that the only court of appeals to address the issue had reached the same result with respect to the Acting General Counsel of the National Labor Relations Board. *See* 41 Op. O.L.C. at 104; *see also Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 556 (9th Cir. 2016) ("neither the [Vacancies Reform Act] nor the [National Labor Relations Act] is the *exclusive* means of appointing an Acting General Counsel"; "the President is permitted to elect between these two statutory alternatives to designate an Acting General Counsel"). We further noted that two of this Office's previous opinions had "recognized that the legislative history confirms this reading of the Vacancies Reform Act." *Acting Director of CFPB*, 41 Op. O.L.C. at 104 (citing *Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208, 209 (2007), and *Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121, 121 n.1 (2003)); *see also* S. Rep. No. 105-250, at 17 (1998). The next year, we reached a similar conclusion with respect to the President's ability to use the Vacancies Reform Act to designate an Acting Attorney General, notwithstanding an office-specific statute under which the Deputy Attorney General would

have been the Acting Attorney General. *See Designating an Acting Attorney General*, 42 Op. O.L.C. 182, 184–90 (2018).[4]

Since our *Acting Director of CFPB* opinion, several district courts have agreed that the Vacancies Reform Act remains available for acting designations, notwithstanding the simultaneous applicability of office-specific statutes, in the course of rejecting challenges to the President's designations of an Acting Director of the CFPB[5] and of an Acting Attorney General.[6] To date, no court has adopted a contrary conclusion.

B.

The reasoning of our four previous opinions applies equally to the interaction between the Vacancies Reform Act and the office-specific statute that allows the President to designate a Deputy Director as the Acting Director of FHFA.

Although FHFA is "an independent agency," 12 U.S.C. § 4511(a), it is not governed by a "board, commission, or similar entity that . . . is composed of multiple members," 5 U.S.C. § 3349c(1)(A). The Vacancies Reform Act therefore does not expressly exclude the office of the Director from its coverage. Instead, that Act's relationship with other designation

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[4] In addition to the instances addressed in our four published opinions, the President invoked the Vacancies Reform Act on at least two other occasions to designate individuals other than those specified in the relevant office-specific statute, even when an official designated by the office-specific statute was available to serve. *See* Presidential Designation of Michael Hager, Assistant Secretary of Veterans Affairs, to serve as Acting Director, Office of Personnel Management (Aug. 11, 2008, effective Aug. 14, 2008); Presidential Designation of Santanu Baruah, Assistant Secretary of Commerce for Economic Development, to serve as Acting Administrator, Small Business Administration (Aug. 13, 2008, effective Aug. 18, 2008).

[5] *See English v. Trump*, 279 F. Supp. 3d 307, 319–30 (D.D.C. 2018), *appeal dismissed upon appellant's motion*, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018).

[6] *See Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 138–44 (D.D.C. 2019), *appeals docketed*, Nos. 19-5042, 19-5043, 19-5044 (D.C. Cir. Feb. 26, 2019); *United States v. Santos-Caporal*, No. 18-cr-171, 2019 WL 468795, at *6–7 (E.D. Mo. Jan. 9, 2019), *report and recommendation adopted by* 2019 WL 460563, at *1 (E.D. Mo. Feb. 6, 2019); *United States v. Smith*, No. 18-cr-115, 2018 WL 6834712, at *2 (W.D.N.C. Dec. 28, 2018); *United States v. Peters*, No. 17-cr-55, 2018 WL 6313534, at *2–5 (E.D. Ky. Dec. 3, 2018); *United States v. Valencia*, No. 17-cr-882, 2018 WL 6182755, at *2–4 (W.D. Tex. Nov. 27, 2018), *appeal docketed*, No. 18-51008 (5th Cir. Dec. 3, 2018).

mechanisms is governed by section 3347(a)'s exclusivity provision. The Vacancies Reform Act is not *exclusive* under that provision because section 4512(f) is a "statutory provision [that] expressly . . . authorizes the President . . . to designate an officer or employee to perform the functions and duties of" the office of FHFA Director "temporarily in an acting capacity." 5 U.S.C. § 3347(a)(1)(A).

At the same time, nothing in HERA makes section 4512(f) the exclusive mechanism for designating an Acting Director of FHFA. HERA was enacted in 2008, against the backdrop of the Vacancies Reform Act. Congress knew that the Vacancies Reform Act could apply to a single-member head of an independent agency and to subsequently created offices. *See* 5 U.S.C. § 3349c (exempting only those independent agencies that are headed by multi-member entities); S. Rep. No. 105-250, at 16–17 (noting that both an office-specific statute and the Vacancies Reform Act would be available to fill a vacancy in the office of the Commissioner of the Social Security Administration); *see also Acting Director of CFPB*, 41 Op. O.L.C. at 105 n.2 (noting that "[t]he enacted version also removed the requirement [in an earlier bill] that a statutory provision be in effect on the date of the Vacancies Reform Act's enactment in order to be available for filling a vacancy"). Congress could easily have excluded the FHFA Director from coverage under the Vacancies Reform Act—either in section 4512(f) itself, or by amending section 3349c's list of excluded offices—but it did not do so. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) (noting "the strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute" (internal quotation marks and alterations omitted)).

Section 4512(f) is phrased in mandatory terms, providing that "the President *shall* designate either the Deputy Director of the Division of Enterprise Regulation, the Deputy Director of the Division of Federal Home Loan Bank Regulation, or the Deputy Director for Housing Mission and Goals" as the Acting Director in the absence of the FHFA Director. 12 U.S.C. § 4512(f) (emphasis added). But the Vacancies Reform Act also employs mandatory language, stating that the first assistant "*shall* perform the functions and duties" of the vacant office unless the President chooses to direct another official to do so in accordance with the other provisions of the statute. 5 U.S.C. § 3345(a)(1) (emphasis added). "A

party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow." *Epic Sys. Corp.*, 138 S. Ct. at 1624 (internal quotation marks omitted). When confronting similarly mandatory text in the CFPB's statute, we concluded that "we cannot view either [the CFPB's office-specific statute or the Vacancies Reform Act] as more mandatory than the other. Rather, they should be construed in parallel." *Acting Director of CFPB*, 41 Op. O.L.C. at 105 (addressing 12 U.S.C. § 5491(b)(5), which provides that the CFPB's Deputy Director "shall" serve as Acting Director when the Director is unavailable). The same is true here, and the Congress that enacted HERA was aware that the Vacancies Reform Act distinguished between offices to which the Vacancies Reform Act is inapplicable (5 U.S.C. § 3349c) and those for which it can be rendered non-exclusive (*id.* § 3347(a)).

HERA and the Vacancies Reform Act can be harmonized by reading section 4512(f) as supplementing the President's designation options—a construction that coheres with the strong presumption against any implied repeal. HERA requires that each FHFA Deputy Director possess "a demonstrated understanding" of the financial fields most relevant to his or her role. *See, e.g.*, 12 U.S.C. § 4512(c)(1) (Deputy Director of the Division of Enterprise Regulation must "have a demonstrated understanding of financial management or oversight, and have a demonstrated understanding of mortgage securities markets and housing finance"). Congress could reasonably determine that individuals appointed to these offices would likely be appropriate candidates to serve temporarily as Acting Director of FHFA. The Deputy Directors, however, would not necessarily qualify for designation under the Vacancies Reform Act. None of them is obviously the FHFA Director's "first assistant," 5 U.S.C. § 3345(a)(1); they are not Senate confirmed, *id*. § 3345(a)(2); and they may not be eligible as senior agency officials if, for instance, they recently arrived at the agency, *id.* § 3345(a)(3). In addition, section 4512(f) permits the President to designate one of these pre-screened individuals to serve in an acting capacity for a longer period than the Vacancies Reform Act would otherwise allow. Section 4512(f) thus comfortably co-exists with the Vacancies Reform Act as an alternative means of designating an Acting Director. *See Epic Sys. Corp.*, 138 S. Ct. at 1624 ("Respect for Congress

as drafter counsels against too easily finding irreconcilable conflicts in its work."). Because section 4512(f) did not implicitly repeal the applicability of the Vacancies Reform Act to the office of the FHFA Director, the President may choose to "direct a person who serves in" a Senate-confirmed office "to perform the functions and duties" of the FHFA Director "temporarily in an acting capacity subject to the time limitations of [5 U.S.C. §] 3346." 5 U.S.C. § 3345(a)(2).[7]

Although HERA authorizes one method of presidential designation, we do not read it as displacing the President's alternative authority under the Vacancies Reform Act. In sustaining the legality of the President's designation of an Acting Director of the CFPB, a district court recently emphasized that the CFPB's office-specific provision "is silent regarding the *President*'s ability to appoint an acting Director." *English*, 279 F. Supp. 3d at 322. The court noted that the CFPB-specific provision "does not expressly prohibit the President from" naming an acting Director of the CFPB, "[n]or does it affirmatively require the President to appoint a particular person." *Id.* (citing 12 U.S.C. § 4512(f)). According to the court, "[t]his silence makes it impossible to conclude that [the CFPB-specific provision] 'expressly' makes the [Vacancies Reform Act]'s appointment mechanisms unavailable" in the case of the CFPB. *Id.*

[7] This conclusion is reinforced by the report of the Senate Committee on Governmental Affairs, which listed forty specific statutes to which the Vacancies Reform Act was intended to offer an alternative. *See* S. Rep. No. 105-250, at 16–17. That list included, for example, 15 U.S.C. § 633(b)(1), which concerns the Administrator of the Small Business Administration and provides that "[t]he Deputy Administrator shall be Acting Administrator . . . during the absence or disability of the Administrator or in the event of a vacancy in the office of the Administrator." *See* S. Rep. No. 105-250, at 16. The list also included 44 U.S.C. § 2103(c), which provides that "the Deputy Archivist shall act as Archivist [of the United States]" "[d]uring any absence or disability of the Archivist" and "[i]n the event of a vacancy in the office of the Archivist." *See* S. Rep. No. 105-250, at 16. As under the FHFA Director provision, the set of individuals eligible for designation under those two statutes is significantly narrower than those from whom the President could choose under the Vacancies Reform Act. These examples demonstrate that "Congress plainly intended in those cases that the President could invoke the Vacancies Reform Act as 'an alternative procedure' and depart from the statutory order of succession," even when an office-specific statute speaks in mandatory terms. *Acting Director of CFPB*, 41 Op. O.L.C. at 106 (quoting S. Rep. No. 105-250, at 17); *see also Guedes*, 356 F. Supp. 3d at 143 ("The legislative history not only speaks to the issue; it confirms the government's interpretation. [Office]-specific statutes . . . were expected to operate alongside the [Vacancies Reform Act], not to displace it.").

Although it cited section 4512(f) as an example where Congress was not silent about the President's ability to designate an Acting Director, the court did not (and had no need to) consider whether that statute went further by displacing the Vacancies Reform Act, and its dictum did not deny that the Vacancies Reform Act is, as explained above, equally "affirmative[]." Consistent with our prior analysis of this question, we conclude that, when addressing the office of FHFA Director in section 4512, Congress failed to employ the "language that [it] would have used to expressly displace the [Vacancies Reform Act]." *Id.*[8]

In fact, the contrary result—reading section 4512(f) as the sole option for presidential designation—could raise constitutional concerns by significantly curtailing the President's ability to choose who will lead an executive agency. FHFA's Deputy Directors are appointed by the Director, who is himself appointed for a five-year term and statutorily protected from removal without "cause." 12 U.S.C. § 4512(b)(2), (c)(1), (d)(1), (e)(1). The President therefore has no express or implied power to remove the Deputies from their positions as Deputy Directors. *See Keim v. United States*, 177 U.S. 290, 293 (1900) ("In the absence of specific provision to the contrary, the power of removal from [an inferior] office is incident to the power of appointment."); *see also Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010). In the absence of the Vacancies Reform Act's alternative mechanism, section 4512(f) might oblige the President to select an Acting Director from among the three Deputy Directors who were appointed by a departed Director from a previous administration. And the Senate could indefinitely limit the President's control over FHFA by declining to confirm his Director nominee. *Cf. Swan v. Clinton*, 100 F.3d 973, 986 (D.C. Cir. 1996) ("[A]ccording holdover Board members [of the National Credit Union Administration] removal protection might be pushing the constitutional envelope to the edge, because this protection could in practice serve to give the Senate control over holdover members' tenure in office or to preclude Presidents from being able to replace holdover members for substantial periods

[8] FHFA differs from the CFPB in one other respect. HERA lacks a provision comparable to 12 U.S.C. § 5491(a), which makes title 5 generally applicable to the CFPB. We did not, however, rely on the presence of that provision in *Acting Director of CFPB*, and the text and structure of the Vacancies Reform Act are sufficiently clear to make it applicable (though not exclusively so) to an agency with an office-specific statute.

of time."). Such interference with the President's constitutional role as head of the Executive Branch (U.S. Const. art. II, § 1, cl. 1) and his constitutional obligation to "take Care that the Laws be faithfully executed" (*id.* art. II, § 3) would be avoided if the President could also use the Vacancies Reform Act to select an Acting Director from those whom he has already appointed to other offices with the Senate's advice and consent, or from eligible senior agency employees.

Finally, we note that a panel of the Fifth Circuit, in a later-vacated decision addressing the constitutionality of the FHFA Director's tenure protection, observed that the "statutory provisions governing how to *replace* the FHFA Director may blunt the effectiveness of [the President's ability to control the agency through] 'for cause' removal. . . . [T]he President must designate an acting Director from the ranks of Deputy Directors[.]" *Collins v. Mnuchin*, 896 F.3d 640, 667 n.199 (5th Cir.), *vacated upon grant of reh'g en banc*, 908 F.3d 151 (5th Cir. 2018); *see* 5th Cir. R. 41.3. Although the panel assumed that the President would employ section 4512(f) to designate an Acting Director, its opinion did not consider the applicability of the Vacancies Reform Act. We therefore do not read the opinion as reflecting a considered view on the matter at issue here.

III.

For the reasons set forth above, we conclude that, in designating an Acting Director of FHFA, the President may choose either an incumbent Deputy Director under 12 U.S.C. § 4512(f) or someone who is made eligible to be an acting officer by the Vacancies Reform Act, 5 U.S.C. § 3345(a)(2), (3). Under the latter, the President may select the Senate-confirmed Comptroller of the Currency. *Id.* § 3345(a)(2).

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

Whether the Food and Drug Administration Has Jurisdiction over Articles Intended for Use in Lawful Executions

May 3, 2019

Articles intended for use in executions carried out by a State or the federal government cannot be regulated as "drugs" or "devices" under the Federal Food, Drug, and Cosmetic Act. The Food and Drug Administration therefore lacks jurisdiction to regulate articles intended for that use.

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

The Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301 *et seq*., grants the Food and Drug Administration ("FDA") the authority to regulate all "drugs" and "devices," which include any "articles (other than food) intended to affect the structure or any function of the body," as well as any components of such articles. *Id*. § 321(g)(1)(C)–(D), (h)(3). Your office has asked us whether FDA has authority to regulate articles used in historically accepted methods of execution. Some of those articles—like electric chairs and gas chambers—exist for the sole purpose of effectuating capital punishment. Others—like substances used in lethal-injection protocols and firearms used by firing squads—have other intended uses.

FDA has not historically exercised jurisdiction over articles intended to carry out a lawful sentence of capital punishment. In connection with challenges to FDA's regulatory inaction, the federal courts have addressed when the agency may lawfully decline to enforce the FDCA against such articles. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821 (1985); *Cook v. FDA*, 733 F.3d 1 (D.C. Cir. 2013). Yet they have not squarely addressed whether FDA has administrative jurisdiction in the first place. Congress has repeatedly authorized the death penalty on the assumption that there are lawful means to carry it out, but the regulation of such articles under the FDCA would effectively require their prohibition because they could hardly be found "safe and effective" for such an intended use. *See FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 137–39 (2000). Consistent with the agency's practice in this area for several decades before 2017, we thus conclude that, when an article's intended use is to

effectuate capital punishment by a State or the federal government, it is not subject to regulation under the FDCA.[1]

I.

The FDCA was first enacted in 1938. Act of June 25, 1938, ch. 675, 52 Stat. 1040. Then, as well as now, the United States and several States authorized the imposition of capital punishment for the most serious offenses. From the time of the FDCA's enactment until very recently, FDA had never claimed authority over the methods by which the federal and state governments carry out executions. That is in no small part because one of the FDCA's fundamental purposes is to ensure that drugs and devices marketed in interstate commerce are safe and effective for their intended uses—a goal that markedly conflicts with the purpose of an execution. In this Part, we summarize the regulatory structure of the FDCA and the history of its intersection with capital punishment.

A.

The FDCA authorizes FDA to regulate drugs and devices. The FDCA defines "drug" to mean:

> (A) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and
>
> (B) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and
>
> (C) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and
>
> (D) articles intended for use as a component of any article specified in clause (A), (B), or (C).

21 U.S.C. § 321(g)(1) (paragraph breaks added). Congress has made only superficial changes to this definition since 1938. *Compare* Act of June 25, 1938, § 201(g), 52 Stat. at 1041.

[1] In reaching this conclusion, we have solicited and considered the views of FDA and of the Office of the Associate Attorney General.

The FDCA defines "device" as any "instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article" that does not "achieve its primary intended purposes through chemical action within or on the body"; is not "dependent upon being metabolized for the achievement" of those purposes; and is:

> (1) recognized in the official National Formulary, or the United States Pharmacopeia, or any supplement to them,
>
> (2) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or
>
> (3) intended to affect the structure or any function of the body of man or other animals.

21 U.S.C. § 321(h) (paragraph breaks added). The definition of "device" also includes "any component, part, or accessory" of such articles. *Id*.[2]

As the statutory definitions indicate, whether FDA may regulate an article as a "drug" or "device" often depends not just on that article's effect on a human or animal body, but also on whether that effect is intended. *Id*. § 321(g)(1), (h). An article may be a "drug" or "device" for some uses but not for others, depending on the manufacturer's or distributor's intent. For instance, FDA regulates "medical gases," but not chemically identical industrial gases. As FDA has explained, "industrial gases . . . are not drugs" because manufacturers and distributors of industrial gases do not intend their products to treat disease or other conditions, or to otherwise affect the structure or function of the body. Medical Gas Containers and Closures; Current Good Manufacturing Practice Requirements, 71 Fed. Reg. 18,039, 18,044 (Apr. 10, 2006); *see* 21 C.F.R. §§ 201.161, 211.94(e). In a similar vein, FDA considers hot tubs, saunas, and treadmills as "devices" only when they are "intended for medical

[2] Initially, the FDCA defined "device" as "instruments, apparatus, and contrivances, including their components, parts, and accessories" if they were "intended" either "for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals" or "to affect the structure or any function of the body of man or other animals." Act of June 25, 1938, § 201(h), 52 Stat. at 1041. In 1976, Congress expanded the definition of "device" to its current scope. Medical Device Amendments of 1976, Pub. L. No. 94-295, sec. 3(a)(1)(A), § 201(h), 90 Stat. 539, 575.

purposes." Physical Medicine Devices; General Provisions and Classification of 82 Devices, 48 Fed. Reg. 53,032, 53,034, 53,044, 53,051–52 (Nov. 23, 1983); *see* 21 C.F.R. §§ 890.5100, 890.5250, 890.5380. Thus, powered treadmills intended "to redevelop muscles or restore motion to joints" are "devices," but those sold solely for recreational purposes are not. 48 Fed. Reg. at 53,044, 53,052; 21 C.F.R. § 890.5380. Likewise, FDA considers tape recordings as "devices" when they are "intended for use in the mitigation, treatment, and cure of disease and other medical conditions" (as in hypnotherapy), but not when they are intended "for behavior modification, self-improvement, habit correction, learning techniques, and simple relaxation." FDA, Compliance Policy Guide § 335.300.

Many of the FDCA's prohibitions are keyed to a product's intended use. The FDCA prohibits distribution of a "new drug" that FDA has not approved as safe and effective for its intended use. *See* 21 U.S.C. § 355(a), (d)(1), (d)(5); *United States v. Caronia*, 703 F.3d 149, 152–53 (2d Cir. 2012). Similarly, the FDCA prohibits distribution of certain devices that present "a potential unreasonable risk of illness or injury," unless FDA has approved them as safe and effective for their intended uses. 21 U.S.C. § 360c(a)(1)(C); *see id.* §§ 331(a), 351(f)(1), 360e(a), (d)(2)(A)–(B). The FDCA also bars distribution of "misbranded" drugs and devices, including those whose labeling lacks adequate directions for their intended uses, *id.* § 352(f)(1), or adequate warnings against unsafe dosages or methods of administration for those uses, *id.* § 352(f)(2). Finally, the FDCA provides that FDA "shall" block the importation of drugs and devices that appear to be unapproved for their intended use or misbranded. *Id.* § 381(a)(3).

Even if FDA has approved an article for one intended use, it still may not be imported, sold, or distributed for another, unapproved use. *See Wash. Legal Found. v. Henney*, 202 F.3d 331, 332–33 (D.C. Cir. 2000). FDA's regulations define the "intended use" of a drug or device with reference to "the objective intent of the persons legally responsible for the labeling" of the article. 21 C.F.R. §§ 201.128 (drugs), 801.4 (devices). That intent "is determined by such persons' expressions" or from "the circumstances surrounding the distribution of the article." *Id.* §§ 201.128, 801.4. The regulations emphasize that "[t]he intended uses of an article may change after it has been introduced into interstate commerce by its

manufacturer." *Id*. §§ 201.128, 801.4. "[F]or example, a packer, distributor, or seller [may] intend[] an article for different uses than those intended by the person from whom he received the" drug or device, in which case "such packer, distributor, or seller is required to supply adequate labeling in accordance with the new intended uses." *Id*. §§ 201.128, 801.4. Likewise, a manufacturer could lawfully distribute an article intending that it be used for an approved purpose, and then later violate the FDCA by distributing the same article intending that it be used for a different, unapproved purpose.

As a general matter, FDA does not regulate the practice of medicine, which includes "off-label" prescribing—that is, when physicians prescribe FDA-approved drugs or devices for non-FDA-approved uses.[3] As the Supreme Court has explained in the context of medical devices, "'off-label' usage . . . (use of a device for some other purpose than that for which it has been approved by the FDA) is an accepted and necessary corollary of the FDA's mission to regulate in this area without directly interfering with the practice of medicine." *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001); *see also Caronia*, 703 F.3d at 153. Thus, while the FDCA bars a manufacturer or distributor from selling any drug or device for an unapproved use, physicians may, with limited exceptions, prescribe and administer FDA-approved drugs and devices for unapproved uses.

B.

Capital punishment in the United States predates the Republic. For most of the Nation's history, the federal government and the States employed the gallows. Starting in the late nineteenth century, States began using the electric chair and, to a lesser degree, the gas chamber. At least since Thomas Edison's New Jersey laboratory supplied parts for New York's first electric chair in 1890, prison authorities have used interstate

[3] *See* Citizen Petition Regarding the Food and Drug Administration's Policy on Promotion of Unapproved Uses of Approved Drugs and Devices; Request for Comments, 59 Fed. Reg. 59,820, 59,821 (Nov. 18, 1994) ("[O]nce a [drug] product has been approved for marketing, a physician may prescribe it for uses or in treatment regimens o[f] patient populations that are not included in approved labeling." (quoting 12 FDA Drug Bulletin 5 (Apr. 1982))); *see also* 21 U.S.C. § 396.

suppliers to procure articles necessary for executions.[4] Today, every method of execution appears to involve some component that traveled in interstate or foreign commerce.

Beginning in the late 1970s, many States and the federal government adopted lethal injection as the preferred method of execution. Those executions generally used sodium thiopental, a widely administered surgical anesthetic. Although patients typically received a dose of around 300 milligrams of sodium thiopental during surgical procedures, the dose in a lethal injection was anywhere from "seven to sixteen times higher." Mark Dershwitz & Thomas K. Henthorn, *The Pharmacokinetics and Pharmacodynamics of Thiopental as Used in Lethal Injection*, 35 Fordham Urb. L.J. 931, 932 (2008); *see also Glossip v. Gross*, 576 U.S. 863, 885 (2015) (noting that the dose of midazolam in Oklahoma's more recent execution protocol "is many times higher than a normal therapeutic dose").

In 1980, death-row inmates petitioned FDA to seize lethal-injection substances from several States, arguing that, although the substances were approved for other uses, their use in executions would violate the FDCA's prohibitions against the distribution of unapproved new drugs and misbranded drugs. FDA denied the petition, reasoning that it lacked authority to regulate States' use of FDA-approved drugs in capital punishment. FDA also stated that, even if it had such authority, it would decline to regulate in its enforcement discretion. When the issue reached the Supreme Court, the United States argued more broadly that FDA lacked jurisdiction over articles intended for use in capital punishment. *See Heckler*, 470 U.S. 821; Br. for Pet'r at 13–14, 44–46, *Heckler v. Chaney*, 470 U.S. 821 (1985) (No. 83-1878) ("*Heckler* Pet'r Br."). The Court

[4] *See* Stuart Banner, *The Death Penalty: An American History* 183, 197 (2002) (describing New York's purchase of electric-chair components, and Nevada's purchase of hydrocyanic acid for use in the gas chamber from a California source); Scott Christianson, *The Last Gasp: The Rise and Fall of the American Gas Chamber* 6 (2010) (explaining that Eaton Metal Products in Colorado built gas chambers for most of the States that used them); Carol J. Williams, *Maker of Anesthetic Used in Executions is Discontinuing Drug*, L.A. Times (Jan. 22, 2011), http://articles.latimes.com/2011/jan/22/local/la-me-execution-drug-20110122 (discussing California's use of sodium thiopental produced in North Carolina); Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 354 & n.207 (1997) (explaining that the sole commercial suppliers of electric-chair equipment were in Massachusetts and Arkansas).

found it "implausible . . . that the FDA is required to exercise its enforcement power to ensure that States only use drugs that are 'safe and effective' for human execution." 470 U.S. at 827. Rather than "address the thorny question of the FDA's jurisdiction," however, the Court held that FDA's exercise of enforcement discretion is not subject to judicial review. *Id*. at 828.

In 2009, the sole American manufacturer of sodium thiopental ceased production. *See Glossip*, 576 U.S. at 870. Since then, several States have imported sodium thiopental from foreign suppliers. *Cook*, 733 F.3d at 4. In 2012, however, the U.S. District Court for the District of Columbia held that, although FDA has unreviewable discretion when enforcing the FDCA's domestic prohibitions, FDA's discretion is more limited with respect to the Act's importation provisions. The court issued a permanent injunction requiring FDA to block the importation of sodium thiopental on the grounds that it was unapproved and misbranded. *See Beaty v. FDA*, 853 F. Supp. 2d 30 (D.D.C. 2012), *aff'd*, *Cook*, 733 F.3d 1. Neither the parties nor the district court, however, addressed the government's previous argument in *Heckler* that FDA lacks jurisdiction over articles intended for use in capital punishment. *See Beaty*, 853 F. Supp. 2d at 34. Following the *Beaty* injunction, FDA expressly stated in a letter ruling, apparently for the first time, that it had jurisdiction over a substance intended for that use, though, significantly, the State seeking the ruling had conceded the point. *See* Letter from Todd W. Cato, Director, Southwest Import District Office at 5 (Apr. 20, 2017).

As of December 31, 2016, there were over 2,750 inmates with state death sentences. Elizabeth Davis & Tracy L. Snell, Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2016*, at 3 tbl.1 (2018). And there are now approximately 62 civilian prisoners with federal death sentences. *See* Federal Bureau of Prisons, *Statistics: Sentences Imposed*, https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp (last updated Apr. 13, 2019). In response to difficulties in obtaining appropriate substances for lethal injection, some States are considering turning to different methods of execution, including the electric chair and nitrogen gas. Tom Barton, *SC Senators Resurrect Bill to Bring Back the Electric Chair, Add Firing Squad*, The State (Jan. 30, 2019), https://www.thestate.com/news/politics-government/article225312765.html; Denise Grady & Jan Hoffman, *States Turn to an Unproven Method of Execution:*

Nitrogen Gas, N.Y. Times (May 7, 2018), https://www.nytimes.com/2018/05/07/health/death-penalty-nitrogen-executions.html.

II.

With this background in mind, we turn to whether FDA may regulate articles intended for use in capital punishment. The Supreme Court recognized some time ago that "Congress fully intended that the [FDCA]'s coverage be as broad as its literal language indicates—and equally clearly, broader than any strict medical definition might otherwise allow." *United States v. Bacto-Unidisk*, 394 U.S. 784, 798 (1969). Nevertheless, in *Brown & Williamson*, the Court recognized one limitation to such coverage in the context of reviewing FDA's authority to regulate tobacco products.

In *Brown & Williamson*, the Court considered whether FDA had properly determined that tobacco products as customarily marketed could be regulated as "drugs" or "devices" under the FDCA. FDA had conducted a rulemaking in which it concluded that the definitional phrase, "intended to affect the structure or any function of the body," is "broad in scope and encompass[es] a range of products wider than those ordinarily thought of as drugs or medical devices." Analysis Regarding the Food and Drug Administration's Jurisdiction over Nicotine-Containing Cigarettes and Smokeless Tobacco Products, 60 Fed. Reg. 41,453, 41,463 (Aug. 11, 1995); Nicotine in Cigarettes and Smokeless Tobacco Is a Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,619, 44,658 (Aug. 28, 1996). FDA deemed nicotine to be regulable as a "drug" because it was "intended" to have "psychoactive, or mood-altering, effects on the brain" that foster addiction, stimulate and depress the nervous system, and suppress appetite, thus mirroring the effects of tranquilizers, stimulants, weight-loss drugs, and other articles long subject to FDA jurisdiction. 61 Fed. Reg. at 44,631–32.

The Supreme Court rejected FDA's conclusion, holding that the FDCA's jurisdictional provisions must be read in the context of the entire statute, and of later-enacted laws, to ensure "a symmetrical and coherent regulatory scheme." *Brown & Williamson*, 529 U.S. at 133. "Viewing the FDCA as a whole," the Court concluded that it would "contravene[] the clear intent of Congress" to treat tobacco products as subject to FDA regulation. *Id*. at 132, 133. Were tobacco products regulated as "drugs" or

"devices," the FDCA would prohibit their sale, because they could not be "safe" or "effective" for their intended use. *Id*. at 134–37. Yet such "a ban would contradict Congress's clear intent as expressed in its more recent, tobacco-specific legislation," which reflected the "collective premise . . . that cigarettes and smokeless tobacco will continue to be sold in the United States." *Id*. at 137, 139, 143–56. Furthermore, Congress had enacted this tobacco-specific legislation "against the background of the FDA repeatedly and consistently asserting that it lacks jurisdiction under the FDCA to regulate tobacco products as customarily marketed." *Id*. at 155–56. The Court concluded: "The inescapable conclusion is that there is no room for tobacco products within the FDCA's regulatory scheme. If they cannot be used safely for any therapeutic purpose, and yet they cannot be banned, they simply do not fit." *Id*. at 143.[5]

Congress subsequently ratified the Court's conclusion in the Tobacco Control Act, 21 U.S.C. § 387 *et seq*., which confirmed that tobacco products as customarily marketed are not regulable as "drugs" or "devices" under the FDCA. *See id*. § 321(rr)(1)–(2). At the same time, Congress granted FDA the authority to impose other regulations on tobacco products. *See id*. § 387a(a) ("Tobacco products . . . shall be regulated . . . under this subchapter and shall not be subject to the [drug-and-device] provisions of subchapter V."); *Sottera, Inc. v. FDA*, 627 F.3d 891, 898 (D.C. Cir. 2010).

Under *Brown & Williamson*, FDA lacks jurisdiction to regulate articles intended for a use not traditionally regulated by FDA, when those articles cannot be safe and effective for such intended use, and Congress has otherwise made clear its expectation that at least some of those articles shall remain lawful and available for that use. *See Sottera*, 627 F.3d at 896 (interpreting *Brown & Williamson*); *see also Massachusetts v. EPA*, 549 U.S. 497, 530–31 (2007) (explaining that *Brown & Williamson* rested

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[5] The *Brown & Williamson* Court declined to give the agency deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc*., 467 U.S. 837 (1984), because "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." 529 U.S. at 160; *see also King v. Burwell*, 576 U.S. 473, 485–86 (2015) (similarly concluding that "[w]hether [tax] credits are available on Federal [Health Insurance] Exchanges is . . . a question of deep 'economic and political significance'" that Congress did not implicitly delegate to the agency (quoting *Brown & Williamson*, 529 U.S. at 160)).

on "the unlikel[ihood] that Congress meant to ban tobacco products" and "an unbroken series of congressional enactments that made sense only if adopted against the backdrop of the FDA's consistent and repeated statements" disclaiming jurisdiction (internal quotation marks omitted)); *Verizon v. FCC*, 740 F.3d 623, 638 (D.C. Cir. 2014) (similar).

III.

Applying *Brown & Williamson*, we conclude that the FDCA does not allow FDA to regulate an article intended for use in capital punishment in the United States. The FDCA's regulatory framework for "drugs" and "devices" cannot sensibly be applied to such articles. If the FDCA applied to electric chairs, gallows, gas chambers, firearms used in firing squads, and substances used in lethal-injection protocols, the statute would effectively ban those articles. Yet the Constitution and laws of the United States presuppose the continued availability of capital punishment for the most heinous federal and state crimes. FDA did not expressly assert the authority to regulate articles intended for use in executions at any time before 2017, and we believe that such an assertion cannot be reconciled with the FDCA and other federal law.

A.

Articles used in capital punishment do literally "affect the structure or any function of the body" by causing all bodily functions to cease. 21 U.S.C. § 321(g)(1)(C), (h)(3). Hanging, gas asphyxiation, a firing squad, lethal injection, and electrocution are all intended to achieve the same effect: they cause death. When a prison official seeks to purchase an article essential to one of these methods of execution, the seller will often know that the item will be used in an execution and is thus "intended" to affect the structure or any function of the body. *Id.*; *see* 21 C.F.R. § 201.128 (a drug's "intended use" can "be shown by the circumstances surrounding the distribution of the article"); *id.* § 801.4 (same for devices); *cf. United States v. Kaminski*, 501 F.3d 655, 671 (6th Cir. 2007) (concluding that egg powders were "drugs" because defendants "distributed them to consumers for the express purpose of treating and/or preventing diseases" as evidenced by, among other things, "the methods of sale and distribution").

Nevertheless, *Brown & Williamson* prevents us from interpreting the FDCA in a manner that would depart from its "symmetrical and coherent regulatory scheme," 529 U.S. at 133, and interpreting the FDCA to authorize regulation of articles intended for use in executions would do exactly that. *See also Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018) ("[S]tatutory language cannot be construed in a vacuum . . . so we must also consider [the term] in its statutory context." (internal quotation marks and citation omitted)). If such articles were regulated as "drugs" or "devices," the FDCA would effectively ban them and FDA could seek fines or prosecutions against those involved in their sale or distribution. The FDCA "generally requires the FDA to prevent the marketing of any drug or device where the potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit." *Brown & Williamson*, 529 U.S. at 134 (internal quotation marks omitted). In the case of tobacco products, their short-term physiological effects were greatly outweighed by their demonstrated carcinogenic qualities. *Id*. at 134–35. Thus, if tobacco products had been regulated as "drugs" or "devices," the FDCA would have effectively rendered them unlawful. *Id*. at 135–37.

The same conclusion follows here, because the articles used in capital punishment are intended to cause death—for some articles that is their sole purpose. Under the FDCA, a "new drug" may not go to market unless FDA determines, based on "adequate and well-controlled investigations," that the substance is "safe" and "effective[]" for the "use . . . prescribed, recommended, or suggested in the proposed labeling thereof." 21 U.S.C. § 355(d)(1), (5); *see also* 21 C.F.R. § 314.50(d)(5). To approve a substance for use in a lethal-injection protocol, then, FDA would have to find that clinical-trial data established that the substance was "safe" for executions—that is, that the harm inflicted by the product would be "offset by the possibility of therapeutic benefit" to the inmate. *Brown & Williamson*, 529 U.S. at 134. It would not be sufficient to show that the substance is safer or more effective than other means of execution. *Brown & Williamson* dismissed such an interpretation of "safety" as involving a "qualitatively different inquiry" from that required by the FDCA. *Id*. at 140. Instead, FDA must find "that the *product itself* is safe as used by consumers." *Id*. But there is no way products intended to carry out capital punishment could ever satisfy that test, under which "a drug is unsafe

if its potential for inflicting death . . . is not offset by the possibility of therapeutic benefit." *United States v. Rutherford*, 442 U.S. 544, 556 (1979).

The same would be true if electric chairs, gallows, or firing squads' firearms were regulated as "devices." Those articles would require premarket approval because they "present[] a potential unreasonable risk of illness or injury." 21 U.S.C. § 360c(a)(1)(C)(ii)(II). And FDA could approve them only if the applicant provided "reasonable assurance" that they were "safe" and "effective" for the intended use of carrying out capital punishment, *id*. § 360e(d)(1)(A), (2)(A)–(B), after "weighing any probable benefit to health from the use of the device against any probable risk of injury or illness from such use," *id*. § 360c(a)(2)(C). Again, FDA could not possibly approve "devices" that are intended to effectuate executions as "safe" and "effective."[6]

Nor would it matter whether an article intended for use in capital punishment was designed solely for that purpose or had other, FDA-approved uses.[7] Either way, whenever manufacturers or distributors intended that an article be used in capital punishment, the FDCA would prohibit distributing it for that use. For example, FDA has approved midazolam for use as a sedative and anesthetic in certain procedures. But if a manufacturer or distributor of midazolam sold it to prison officials specifically for use in capital punishment, the drug's "intended use" would be different from any approved use. *See* 21 C.F.R. § 201.128. A drug's labeling must bear adequate directions for use for all of its intended uses; otherwise it is misbranded. *See* 21 U.S.C. § 352(f)(1); 21 C.F.R. § 201.128. Accord-

[6] Applications to market drugs and devices both require the submission of well-controlled clinical investigations. 21 U.S.C. §§ 355(d), 360c(a)(2), (3)(A)–(B); 21 C.F.R. § 860.7(c). Given that the articles at issue here are intended to cause death during lawful executions, it is difficult to envision how the articles could be studied in clinical investigations involving humans.

[7] The FDCA's practice-of-medicine exception does not extend to articles used in executions. That exception applies only when an article is "prescribe[d] or administer[ed]" to treat a "condition or disease within a legitimate health care practitioner-patient relationship." 21 U.S.C. § 396 (devices); *see* James M. Beck & Elizabeth D. Azari, *FDA, Off-Label Use, and Informed Consent: Debunking Myths and Misconceptions*, 53 Food & Drug L.J. 71, 77–78 (1998) (discussing history behind section 396, which shows it was enacted to extend to devices the practice-of-medicine exception that already applied to drugs).

ingly, the manufacturer or distributor would violate the FDCA's new drug prohibition where the product's labeling suggested its use in capital punishment. Drugs intended for use in lethal injection that were FDA-approved only for other uses would also be misbranded because their FDA-approved labeling would, by definition, lack adequate warnings against unsafe dosages or methods of administration for use in capital punishment. *See* 21 U.S.C. § 352(f)(2).[8] In sum, if articles intended for use in capital punishment were regulated as "drugs" or "devices," then the FDCA would prohibit them altogether.

In the past, FDA has avoided such regulatory consequences by declining to regulate the domestic sale and distribution of articles intended for use in executions as a matter of enforcement discretion. But the D.C. Circuit recently upheld a district court order enjoining FDA from permitting the importation of foreign-manufactured sodium thiopental, on the grounds that it was misbranded and unapproved. *Cook*, 733 F.3d 1. And the question now is whether FDA's regulatory authority encompasses articles intended for use in lethal injection or other methods of capital punishment, not whether FDA may use its enforcement discretion to alleviate the regulatory consequences. FDA equally had discretion not to enforce the FDCA against domestic tobacco sales that, in FDA's view, would have violated the FDCA's prohibitions on misbranding or unapproved new drugs or devices. What mattered in *Brown & Williamson* was that the FDCA would have rendered the sale of tobacco products per se unlawful, not that FDA could have tempered that ban by selectively sparing particular manufacturers from civil and criminal penalties. *See, e.g.*, 529 U.S. at 136 ("[T]he Act admits no remedial discretion once it is evident that the device is misbranded."). The prospect that articles intended for use in capital punishment could be sold or distributed at FDA's sufferance does not alter the fact that the FDCA, by its terms, would

[8] The law-enforcement exception in 21 C.F.R. § 201.125 exempts a drug from the requirement in section 502(f)(1) of the FDCA that labeling include "adequate directions for use." 21 U.S.C. § 352(f)(1). That exception, however, does not extend to section 502(f)(2), which requires "adequate warnings . . . against unsafe dosage or methods or duration of administration." *Id.* § 352(f)(2). Thus, even if executions qualified as an excepted law-enforcement use, substances used in executions would be misbranded under subsection (f)(2).

effectively require a ban of such articles if they were regulated under the FDCA as "drugs" or "devices."

B.

Even if the FDCA could be interpreted to authorize regulation of articles intended for use in executions without requiring them to be banned, any attempt to do so would create serious tension with other provisions of the Act. We do not conclude that, in order for FDA to have jurisdiction over an article as a "drug" or "device," every drug- or device-related provision of the FDCA must apply neatly to the article's intended use. But the sheer number of FDCA provisions here that would make no sense as applied reinforces the conclusion that FDA lacks jurisdiction over articles intended for use in capital punishment. For example, with respect to articles intended for use in capital punishment, FDA could not assess "[t]he seriousness of the disease or condition that is to be treated with the drug" or "[t]he expected benefit of the drug with respect to such disease or condition." 21 U.S.C. § 355-1(a)(1)(B)–(C). Execution drugs address no "condition" suffered by, and produce no "benefit" for, the end user; instead, they exclusively inflict harm upon that user. For the same reason, when reviewing a new drug application for an article intended for use in capital punishment, FDA could not provide for review of scientific disputes by a "panel[] of experts" that includes members with "expertise in *the particular disease or condition* for which the drug . . . is proposed to be indicated." *Id.* § 355(n)(1), (3)(D) (emphasis added); *see also id.* § 360bbb-1; 8 C.F.R. § 10.75(b)(2). In the context of an execution, there is no applicable "disease or condition."

Further, with respect to articles intended for use in capital punishment, "patient experience data"—which includes "information about patients' experiences with a disease or condition," such as "patient preferences with respect to treatment of such disease or condition"—would never be available. 21 U.S.C. § 360bbb-8c(b)(1), (c)(2). Other FDCA provisions treat death as a serious side effect that triggers mandatory reporting and FDA oversight. *See, e.g.*, *id.* § 355(k)(3)(C)(i)(II) (requiring drug manufacturers to "report[] . . . on all serious adverse drug experiences," including death); 21 C.F.R. § 314.80 (detailing exhaustive reporting requirements for each "adverse drug experience," including those resulting in

death). These provisions cannot sensibly be read to allow an article's intended use to be the causing of death in an execution.

Other provisions presuppose that an approved device may not be intended to effectuate an execution. A manufacturer's application for FDA approval "shall include" a "description of any pediatric subpopulations that suffer from the disease or condition that the device is intended to treat, diagnose, or cure," 21 U.S.C. § 360e-1(a)(2)(A), which suggests that a device must be intended to *improve* a patient's circumstances. FDA must also submit any new device to a panel of experts with "adequate expertise . . . to assess . . . the disease or condition which the device is intended to cure, treat, mitigate, prevent, or diagnose." *Id*. § 360c(b)(1), (5)(B)(i)(I). But again, it would make no sense to apply those provisions to articles for use in executions, which are not intended to produce any benefit for the end user.

Congress has treated certain articles intended to cause death as falling outside FDA's jurisdiction. For instance, the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") expressly gives the Environmental Protection Agency rather than FDA jurisdiction over "pesticides," which include "any substance . . . intended for preventing, destroying, repelling, or mitigating any pest" but exclude "any article that is a 'new animal drug' within the meaning" of the FDCA. 7 U.S.C. § 136(u). FIFRA thus suggests that Congress generally views substances intended to harm or kill pests (such as mosquitos and rats, *see id*. § 136(t)) as outside FDA's jurisdiction.

Over the years, FDA has disclaimed jurisdiction over several other articles intended to kill or harm humans or animals. In 1969, for instance, FDA's Chief Counsel testified that even though "pistols and bullets are intended to affect the function or structure of the body in the same way" as mace, the agency "concluded that the products could not properly be classified as drugs under the definition" in the FDCA. *Public Sale of Protective Chemical Sprays: Hearings Before the Consumer Subcomm. of the S. Comm. on Commerce*, 91st Cong. 37 (1969) (statement of William Goodrich). FDA reiterated that position when asserting jurisdiction over tobacco products in 1996, explaining that it "has never construed the structure-function provision to include products such as guns, airbags, and chemical sprays," despite their intended effects on the structure or func-

tion of the body. 61 Fed. Reg. at 44,684. That same rationale extends to articles intended for use in executions.[9]

C.

The FDCA cannot be read as authorizing FDA to effectively ban capital punishment, because that reading would contravene or render moot a host of federal statutes that presuppose the lawfulness of capital punishment. In *Brown & Williamson*, the Court held that FDA was not authorized to prohibit tobacco products because Congress had repeatedly confirmed that such products would remain available. That reasoning applies equally well to articles intended for use in capital punishment. The Constitution and numerous federal statutes presuppose that capital punishment will remain available and that the federal government will defer to States over methods of execution. Interpreting the FDCA to bar the importation, sale, and distribution of articles intended for use in executions would conflict with that settled understanding. By contrast, the conclusion that articles

[9] Since 1977, FDA has asserted jurisdiction over articles intended for animal euthanasia. FDA first asserted jurisdiction over Beuthanasia-D. *See United States v. Articles of Drug Beuthanasia-D Regular*, Food Drug Cosm. L. Rep. (CCH) ¶ 38,265 (D. Neb. Aug. 1, 1979). A district court agreed that FDA had jurisdiction, both because Beuthanasia-D's two active ingredients were listed in the United States Pharmacopoeia (a different component of the FDCA's definition of "drug"), *id*. ¶ 39,129 (citing 21 U.S.C. § 321(g)(1)(A) (1972)), and because "euthanasia—the cessation of all bodily functions— . . . constitute[s] an effect on the function, if not the structure, of the animal's body," *id*. ¶ 39,130 (citing 21 U.S.C. § 321(g)(1)(C) (1972)). In 1980, FDA issued a two-paragraph guidance statement, opining that "products intended for animal euthanasia . . . conform to the definition of a drug" under the FDCA "since they are clearly intended to affect the function of the body by inducing death." FDA, Compliance Policy Guide § 650.100 (Oct. 1, 1980). FDA's guidance in this area predates *Brown & Williamson*, and no court has revisited the matter. Although it may be difficult to view animal-euthanasia articles as "safe" for their intended use (at least where such articles are used on healthy but unwanted animals), FDA has regulated such articles since 1977; it has approved five applications for these articles; its regulation does not raise constitutional concerns; and we are aware of no legislation that suggests FDA's assertion of jurisdiction over articles intended for animal euthanasia is contrary to the intent of Congress. Additionally, animal euthanasia has long been an accepted part of veterinary practice, whereas capital punishment has not been a part of medical practice. Therefore, whether or not animal euthanasia may be distinguishable from executions, we do not view FDA's practice of regulating the former as sufficient to overcome the force of the arguments against FDA's authority to regulate the latter.

intended for use in executions cannot be regulated under the FDCA would be consistent with how FDA has traditionally exercised its authority; and it would avoid the serious federalism concerns that would arise from a contrary interpretation.

1.

As the Supreme Court recently observed, the Constitution expressly "allows capital punishment." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019). Indeed, "the Fifth Amendment, added to the Constitution at the same time as the Eighth, expressly contemplates that a defendant may be tried for a 'capital' crime and 'deprived of life' as a penalty, so long as proper procedures are followed." *Id*. Federal law, accordingly, has authorized the imposition of the death penalty since 1790, when the First Congress mandated that several federal crimes, including treason and murder on federal land, be punished by death. Act of Apr. 30, 1790, ch. 9, §§ 1, 3, 33, 1 Stat. 112, 112, 113, 119. By 1938, federal statutes authorized the death penalty for dozens of offenses. And, in the decades since the FDCA's enactment, Congress has acted numerous times to make additional federal crimes punishable by death.[10] In providing that the death penalty is an available punishment for dozens of federal crimes, Congress has presupposed there would be a lawful means for carrying out such a sentence.

From 1790 until 1937, federal law prescribed hanging as the method of execution. Act of Apr. 30, 1790, § 33, 1 Stat. at 119; *Andres v. United States*, 333 U.S. 740, 745 n.6 (1948). Congress then mandated that each

[10] *See, e.g.*, Act of June 8, 1940, ch. 286, 54 Stat. 255, 255–56 (authorizing capital punishment if anyone is killed by the willful derailment of any train in interstate commerce); Uniform Code of Military Justice, Act of May 5, 1950, ch. 169, 64 Stat. 107, 135–40 (articles 85, 90, 94, 99, 100, 101, 102, 104, 106, 110, 113, 118, and 120, establishing 13 military offenses punishable by death); Organized Crime Control Act of 1970, Pub. L. No. 91-452, sec. 1102, § 844(d), 84 Stat. 922, 957 (authorizing capital punishment if death results from the use of explosives to maliciously destroy government property); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7001(a), 102 Stat. 4181, 4387–88 (codified at 21 U.S.C. § 848(e)) (authorizing capital punishment for intentional killing while engaging in criminal enterprises or drug felonies); Federal Death Penalty Act of 1994, Pub. L. No. 103-322, §§ 60001–60026, 108 Stat. 1796, 1959–82 (codifying procedures for federal death sentences and authorizing capital punishment for 60 offenses under 13 existing and 28 new federal statutes).

federal execution be carried out in "the manner prescribed by the laws of the State within which the sentence is imposed," or, if that State did not have the death penalty, in accordance with the laws of another State designated by the sentencing court. Act of June 19, 1937, ch. 367, 50 Stat. 304, 304 (repealed 1984). At the time, nearly 30 States were using cyanide gas or the electric chair, but the States adopted at least six different methods of execution between then and the early 1980s. *See* Deborah A. Denno, *Getting to Death: Are Executions Constitutional?*, 82 Iowa L. Rev. 319, 439–64 (1997). After that provision was repealed in 1984, federal regulations required the government to propose to the sentencing court that any death sentence be carried out by lethal injection. 28 C.F.R. § 26.2(a)(2). Unless the court ordered otherwise, they required the Director of the Federal Bureau of Prisons to "determine[]" which "substance or substances" to use. *Id*. § 26.3(a)(4).

Today, capital sentences imposed under the Federal Death Penalty Act of 1994 are again required to be implemented "in the manner prescribed by" either (i) "the law of the State in which the sentence is imposed," or (ii) if that State does not have the death penalty, the law of another State designated by the sentencing court. 18 U.S.C. § 3596(a). The Army's executions are by "intravenous administration of a lethal substance, or substances, in a quantity sufficient to cause death." Army Regulation 190-55, U.S. Army Corrections System: Procedures for Military Executions §§ 3-1, -2 (Jan. 17, 2006).

This extensive backdrop of legislative and regulatory action precludes any suggestion that the FDCA prohibits the importation, sale, or distribution of articles intended for use in executions; to the contrary, these statutory and regulatory schemes unambiguously assume the continued availability of such articles. Before and after the FDCA's enactment, Congress extended the federal death penalty and required the federal government to adopt States' preferences as to methods of execution. Such provisions would be nonsensical if the FDCA had rendered it a crime to distribute in interstate commerce, including through importation (*see* 21 U.S.C. § 321(b)), the very articles that States and the federal government need to effectuate capital sentences. By expressly recognizing States' discretion to select methods of execution (subject to constitutional limits), Congress precluded any role for FDA in supplanting States' judgments about those methods.

2.

In addition, as in *Brown & Williamson*, "[t]he consistency of the FDA's prior position" concerning the absence of regulatory jurisdiction over methods of execution, coupled with a corresponding history of non-enforcement, "provides important context" for interpreting federal death-penalty legislation postdating the FDCA. 529 U.S. at 157. Just as FDA "asserted authority to regulate tobacco products as customarily marketed" only late in its history, *id*. at 146, FDA does not appear to have asserted jurisdiction to regulate articles intended for use in executions before 2017.

Between 1981 and 1985, FDA directly addressed its jurisdiction in the proceedings associated with *Heckler*, 470 U.S. 821. The challenge in *Heckler* involved state lethal-injection protocols, which required the unapproved use of drugs that were FDA-approved for other purposes. Although the *Heckler* Court found it "implausible . . . that the FDA is required to exercise its enforcement power to ensure that States only use drugs that are 'safe and effective' for human execution," *id*. at 827, the Court ultimately declined to resolve the "thorny question of the FDA's jurisdiction" in that circumstance, *id*. at 828. Instead, the Court held that FDA's decision not to enforce the FDCA was unreviewable. *Id*. at 837–38. Even so, we find instructive FDA's own statements about its jurisdiction in the Supreme Court and in the underlying administrative proceeding.

In 1981, FDA rejected a petition from death-row inmates asking FDA to adopt a procedure for the seizure and condemnation of drugs destined or held for use in executions. *See* Letter for David E. Kendall, from Arthur Hull Hayes, Commissioner of Food and Drugs at 1 (July 7, 1981) ("*Heckler* Petition Response"). The inmates contended that the States' acquisition of FDA-approved drugs for capital punishment constituted misbranding because the drugs lacked adequate directions or warnings for that use. *Id*. at 1–2. FDA denied the petition in the first instance because "the use of lethal injection by State penal systems is a practice over which FDA has no jurisdiction." *Id*. at 2. FDA concluded that the States' off-label use of FDA-approved drugs in lethal-injection protocols was sufficiently analogous to the practice of medicine, including physicians' lawful off-label use of FDA-approved drugs, to fall outside the FDCA's ambit. *Id*. at 3–4. But FDA also emphasized that its lack of jurisdiction

flowed from "a consideration of the proper role of the Federal Government with respect to the conduct of State criminal justice systems." *Id.* at 2. FDA further recognized that, "[b]ecause . . . the [FDCA] does not provide us with authority to declare unlawful the use by State governments of drugs for lethal injection," concerns about the safety of lethal-injection protocols would "more appropriately [be] addressed to the State legislatures." *Id.* at 4.[11]

In the resulting litigation, the D.C. Circuit divided over whether FDA had jurisdiction over drugs intended for use in executions. *See Chaney v. Heckler*, 718 F.2d 1174 (D.C. Cir. 1983), *rev'd*, 470 U.S. 821 (1985). The majority rejected FDA's conclusions that administering capital punishment fell within the FDCA's "practice of medicine" exception or, in the alternative, that actions taken by prison officials did not qualify as misbranding under the Act. *See id.* at 1179, 1181. Then-Judge Scalia, in dissent, recognized the incongruity in treating "a law designed to protect consumers against drugs that are unsafe or ineffective for their represented use" as "mandating federal supervision of the manner of state executions." *Id.* at 1192 (Scalia, J., dissenting). He would have held that FDA lacked jurisdiction because the drugs were not "held for sale" in interstate commerce. *Id.* at 1199–1200. Because FDA did not press the point, neither opinion addressed whether "the unapproved use of drugs for lethal

[11] FDA did contend that, "[u]nder the Supremacy Clause," "a State could not legitimize the unlawful shipment of an unapproved new drug in interstate commerce or prevent its misbranding after shipment in interstate commerce by authorizing its use," including for purposes of execution. *Heckler* Petition Response at 3. But that reflected a general observation that state law cannot trump the FDCA's provisions to the extent they apply to a given drug or device, or effectively immunize prior conduct that violated the FDCA by approving a product's use at a later time. The government's opening brief in the Supreme Court also represented in a footnote that "[t]his case concerns the FDA's authority to regulate the states' *use* of drugs, lawfully in interstate commerce, for the unapproved purpose of causing death, and not the *marketing* of drugs for an unapproved use." *Heckler* Pet'r Br. at 45–46 n.34; *accord* Reply Br. at 8, *Heckler v. Chaney*, 470 U.S. 821 (1985) (No. 83-1878) ("*Heckler* Reply Br.") ("FDA lacks jurisdiction over the use of approved drugs by state authorities for capital punishment purposes."). The brief asserted that an FDCA violation would occur "if a drug were marketed for the purpose of causing death without being approved for that use," but it noted that no one was alleged to have "directly or indirectly promote[d] the use of the drugs at issue" for executions. *Heckler* Pet'r Br. at 45–46 n.34. Those statements did not reserve FDA jurisdiction over unapproved articles used in executions because the government's briefs categorically disclaimed FDA jurisdiction over any method of execution. *See infra* notes 12–13 and accompanying text.

injection is outside the general jurisdictional provisions of the Act"—that is, whether drugs intended for use in lethal injection are subject to regulation under the FDCA. *Id*. at 1179.

In the Supreme Court, the government contended that FDA categorically lacked jurisdiction over articles used in capital punishment, and that FDA had denied the inmates' petition because it had concluded "that it lacked authority under the FDCA to regulate the states' use of lethal injections for capital punishment." *Heckler* Pet'r Br. at 13; *see id*. at 4 (similar). The government repeatedly asserted that "Congress did not intend the FDA to regulate capital punishment," *id*. at 45, and emphasized that the assessment of lethal injections would be "far removed from [FDA's] mission of protecting the consuming public from unsafe and improperly labeled drugs," *id*. at 10; *see id*. at 45 (similar).[12] The government concluded that FDA jurisdiction over the unapproved use of FDA-approved drugs in executions "would lead to the absurd result of requiring the FDA to regulate such traditional means of capital punishment as the gas chamber, electric chair, and gallows." *Heckler* Reply Br. at 8.[13]

Although *Heckler* did not resolve the question of the agency's jurisdiction, *see* 470 U.S. at 837–38, for more than three decades thereafter, FDA continued to avoid regulating drugs intended for use in capital punishment. In 2011, FDA explained that "[r]eviewing substances imported

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[12] *See also Heckler* Reply Br. at 8 ("[T]here is not a scintilla of evidence that Congress intended for the FDCA to regulate capital punishment."); *id*. at 11 ("The FDA has no experience or particular expertise in making a comparative assessment of different methods of capital punishment, nor does it have a congressional mandate to venture into this field."); *Heckler* Pet'r Br. at 13 ("[T]here is not a hint in the legislative history that Congress had any intention to regulate the methods used by states in carrying out lawful death sentences."); *id*. at 44 ("Neither the court of appeals nor respondents have produced a shred of evidence that Congress wanted the FDA to regulate the methods of capital punishment used by the states."); *id*. at 46 ("[T]here is absolutely no evidence that Congress intended to regulate the use of drugs or devices, pursuant to a lawful court order, for the purpose of capital punishment.").

[13] *See also Heckler* Pet'r Br. at 13–14 (if FDA had jurisdiction over FDA-approved lethal-injection drugs, then the FDCA would also "encompass many of the paraphernalia traditionally used for executions, such as the gallows and the electric chair," and would presumably oblige FDA "to regulate the use of these devices as well"); *id*. at 44 ("the state and federal governments regularly used" the electric chair and gallows in 1938, and "there is no indication that any member of Congress even considered the possibility that enactment of the FDCA might affect these practices").

or used for the purpose of state-authorized lethal injection clearly falls outside of FDA's explicit public health role," and that as a matter of "longstanding policy," FDA would "continue to defer to law enforcement on all matters involving lethal injection." E-mail for Nathan Koppel, from Shelly Burgess, FDA Public Affairs Specialist (Jan. 4, 2011), Doc. 13-3, *Beaty v. FDA*, No. 11-cv-289 (D.D.C. Apr. 20, 2011).

In 2012, a group of death-row inmates sued FDA, alleging that it had violated the FDCA by allowing shipments of a misbranded and unapproved new drug from an unregistered foreign establishment to enter the United States. The U.S. District Court for the District of Columbia held that, unlike in the domestic context where FDA has unreviewable discretion when enforcing violations, the statutory scheme for imports under 21 U.S.C. § 381(a) is different, and the court enjoined FDA from permitting entry of foreign-manufactured sodium thiopental, on the grounds that it was unapproved and misbranded. *Beaty*, 853 F. Supp. 2d at 37–41. The D.C. Circuit affirmed the injunction. *Beaty* and *Cook*, however, turned solely on whether FDA could exercise enforcement discretion over the imported sodium thiopental. Although the district court assumed that "thiopental is both 'misbranded' and an unapproved 'new drug' under the FDCA," *id*. at 34 n.2, neither the district court, nor the D.C. Circuit, addressed the broader question of FDA's jurisdiction.

Following the *Beaty* injunction, in 2015, FDA blocked Texas's attempt to import sodium thiopental for use in capital punishment. FDA's Southwest Import District Office detained and then refused the shipment on the grounds that the drug was misbranded and unapproved. *See* Letter from Todd W. Cato, Director, Southwest Import District Office at 1–2 (Apr. 20, 2017). FDA's 2017 notice of final action appears to be the first instance in which FDA expressly asserted jurisdiction over a substance intended for use in capital punishment. Even then, Texas conceded that sodium thiopental "is a drug within the meaning of the [FDCA]," *id*. at 5, and FDA's decision was based upon the premise that "FDA is bound by the terms of the order issued by the District Court" in *Beaty*, *id*. at 2; *see also id*. at 6–7, 23, 24.

An agency may, of course, change its interpretation of an ambiguous statute when the new interpretation falls within the permissible scope of the agency's discretion and the agency shows "that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc*., 556 U.S. 502,

515 (2009); *see Brown & Williamson*, 529 U.S. at 156–57. But for nearly 80 years after the FDCA's enactment, FDA had never asserted jurisdiction over articles intended for use in capital punishment, notwithstanding thousands of cases that would have implicated FDA's enforcement discretion under such a theory. During that period, States carried out approximately 3,700 executions, and the federal government carried out approximately 192 civilian or military executions, employing a range of methods (hanging, the electric chair, firing squads, gas chambers, and lethal injections).[14] FDA did not regulate the method of execution in any of those instances or assert the authority to do so.

3.

Even if there were genuine ambiguity about whether FDA has jurisdiction over articles intended for use in capital punishment, serious constitutional concerns would arise if FDA could regulate and take enforcement action against (including seizing and destroying) such articles. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018) ("When a serious doubt is raised about the constitutionality of an Act of Congress, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." (internal quotation marks omitted)). As the Supreme Court recently explained, "because it is settled that capital punishment is constitutional, [i]t necessarily follows that there must be a [constitutional] means of carrying it out." *Glossip*, 576 U.S. at 869 (internal quotation marks omitted); *see Bucklew*, 139 S. Ct. at 1122–23 (similar). It would present a serious intrusion on state sovereignty if Congress sought, under the guise of drug-safety regulation, to bar States from effectuating otherwise-lawful death sentences.

The Supreme Court requires an unambiguous statement of congressional intent before it will construe a federal statute as effecting a significant intrusion into an area of traditional state responsibility. Courts must "be

[14] *See Glossip*, 576 U.S. at 868–69; Bureau of Justice Statistics, U.S. Dep't of Justice, *Publications & Products: Executions*, https://www.bjs.gov/index.cfm?ty=pbtp&tid=182&iid=1 (last visited Apr. 29, 2019); M. Watt Espy & John Ortiz Smykla, *Executions in the United States, 1608-2002: The ESPY File*, Inter-university Consortium for Political and Social Research (July 20, 2016), https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/8451.

certain of Congress' intent before finding that federal law overrides the usual constitutional balance of federal and state powers." *Bond v. United States*, 572 U.S. 844, 858 (2014) (internal quotation marks omitted). When States choose to impose and effectuate death sentences, they are engaged in "the punishment of local criminal activity," which is the "clearest example of traditional state authority." *Id.*[15]

So long as a State employs a method of execution that comports with the Fourteenth Amendment's incorporation of the Eighth Amendment's Cruel and Unusual Punishments Clause, "the Constitution affords a 'measure of deference to a State's choice of execution procedures.'" *Bucklew*, 139 S. Ct. at 1125 (quoting *Baze*, 553 U.S. at 51 n.2). Thus, *In re Kemmler*, 136 U.S. 436 (1890), held that the New York statute requiring execution by electrocution was "within the legitimate sphere of the legislative power of the State." *Id.* at 449. And the plurality opinion in *Baze v. Rees*, 553 U.S. 35 (2008), explained that "[o]ur society has . . . steadily moved to more humane methods of carrying out capital punishment" because state legislatures have taken "the steps they deem appropriate, in light of new developments, to ensure humane capital punishment." *Id.* at 62 (opinion of Roberts, C.J.); *accord Glossip*, 576 U.S. at 867–69 (similar). The Court has never endorsed an Eighth Amendment standard that would "transform [federal] courts into boards of inquiry charged with determining 'best practices' for executions," because that "would substantially intrude on the role of state legislatures in implementing their execution procedures." *Baze*, 553 U.S. at 51 (opinion of Roberts, C.J.).

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[15] *See also Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (referring to "[t]he fundamental interest in federalism that allows individual States to define crimes, punishments, rules of evidence, and rules of criminal and civil procedure in a variety of different ways—so long as they do not violate the Federal Constitution"); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003) ("A basic principle of federalism is that . . . each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."); *Ewing v. California*, 538 U.S. 11, 24 (2003) (plurality opinion) ("Though three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding."); *Patterson v. New York*, 432 U.S. 197, 201 (1977) ("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.").

The FDCA does not reflect any clear statement of congressional intent to regulate the States' administration of capital punishment. Had Congress sought to enable FDA to prohibit articles that States have chosen to use for executions, it would have said so explicitly. But Congress did no such thing. The FDCA's definitions of "drug" and "device" are broad, but breadth alone fails to manifest the intent needed to alter federal-state relations so dramatically with respect to capital punishment. *See, e.g.*, *Bond*, 572 U.S. at 860 ("insist[ing] on a clear indication that Congress meant to reach purely local crimes [in a statute implementing a chemical-weapons treaty] before interpreting the statute's expansive language in a way that intrudes on [States'] police power"). This principle of federalism provides further support for the conclusion that the FDCA should not be read to regulate—and therefore, effectively prohibit—the States' administration of capital punishment.

D.

We emphasize the narrowness of our conclusion that articles intended for use in capital punishment may not be regulated under the FDCA. We are not concluding that the FDCA covers only "drugs" or "devices" that have a medical or therapeutic purpose. For example, FDA has consistently regulated other products that affect the structure or function of the human body for an aesthetic, rather than medical or therapeutic, purpose (e.g., implants to augment breasts, dermal fillers to correct wrinkles, and silicone injections to augment buttocks and breasts). Likewise, FDA has long regulated drugs with non-therapeutic or recreational uses, including narcotics, street drugs, and their alternatives. *See, e.g.*, FDA, *Guidance for Industry: Street Drug Alternatives* (Mar. 2000), https://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm070343.pdf. Unlike with tobacco products or articles intended for use in capital punishment, however, federal statutes evince no "collective premise" that drugs intended to be used in achieving a recreational high "will continue to be sold in the United States." *Brown & Williamson*, 529 U.S. at 139. To the contrary, the manufacture and distribution of recreational drugs is already highly restricted by other federal statutes, such as the Controlled Substances Act. *See* 21 U.S.C. § 812.

Nor do we address whether FDA has jurisdiction over drugs intended for use in physician-assisted suicide. In marked contrast with capital punishment and tobacco products, at the time of the FDCA's enactment, there was not—so far as we are aware—any history of federal or state laws authorizing human euthanasia. As with recreational drugs, there is no congressional determination that human-euthanasia drugs remain lawfully on the market, nor has FDA historically disclaimed jurisdiction over them. *Cf. Brown & Williamson*, 529 U.S. at 137–53. Accordingly, human-euthanasia drugs lack the historical backdrop that weighs heavily against FDA jurisdiction over capital punishment.

We further note that a contrary conclusion regarding articles intended for use in capital punishment could sweep well beyond execution-related articles. If FDA had jurisdiction over such articles simply because they are "intended to affect the structure or any function of the body," 21 U.S.C. § 321(g)(1)(C), (h)(3), such reasoning would likely mean that FDA also had jurisdiction in a host of other areas that have long been considered well beyond its purview. Any type of firearm, when used for hunting or by the military or law enforcement, is intended to affect the structure or function of the body by killing or disabling a person or animal. But FDA has never sought to regulate firearms when they are intended to be used for hunting, police operations, or military purposes, and such an implausible interpretation of the FDCA would raise serious constitutional questions of its own.

Finally, there is nothing unusual about our conclusion that articles intended for use in capital punishment fall outside FDA's jurisdiction, even though the same articles could be subject to regulation when intended for other uses. For example, as noted above, FDA has classified articles such as hot tubs, saunas, and treadmills as devices for some purposes, but not for others. *See supra* pp. 83–84. Therefore, finding that substances fall outside FDA's jurisdiction when they are intended for use in capital punishment does not bear upon FDA's potential jurisdiction over other intended uses of the same substances.

IV.

We conclude that articles intended for use in capital punishment by a State or the federal government cannot be regulated as "drugs" or "devic-

es" under the FDCA. FDA accordingly lacks jurisdiction to regulate such articles for that intended use.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Testimonial Immunity Before Congress of the Former Counsel to the President

The immunity of the President's immediate advisers from compelled congressional testimony on matters related to their official responsibilities has long been recognized and arises from the fundamental workings of the separation of powers. This immunity applies to former senior advisers such as the former White House Counsel. Accordingly, the former Counsel is not legally required to appear and testify about matters related to his official duties as Counsel to the President.

The President does not waive an adviser's immunity from compelled congressional testimony by authorizing disclosure of any particular information. The disclosure's impact on executive privilege does not ultimately bear on any underlying immunity from compelled testimony.

Because Congress may not constitutionally compel the former Counsel to testify about his official duties, he may not be civilly or criminally penalized for following a presidential directive not to appear. The same rationale applies equally to an exercise of inherent contempt powers against a senior aide who has complied with a presidential direction that he not provide testimony to a congressional committee.

May 20, 2019

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

On April 22, 2019, the Committee on the Judiciary of the House of Representatives subpoenaed Donald F. McGahn II, the former Counsel to the President, to testify about matters described in the report of Special Counsel Robert S. Mueller, III. You have asked whether Mr. McGahn is legally required to appear.

We provide the same answer that the Department of Justice has repeatedly provided for nearly five decades: Congress may not constitutionally compel the President's senior advisers to testify about their official duties. This testimonial immunity is rooted in the constitutional separation of powers and derives from the President's independence from Congress. As Attorney General Janet Reno explained, "[s]ubjecting a senior presidential advisor to the congressional subpoena power would be akin to requiring the President himself to appear before Congress on matters relating to the performance of his constitutionally assigned executive functions." *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 5 (1999) ("Reno Opinion"). Yet Congress may no more sum-

mon the President to a congressional committee room than the President may command Members of Congress to appear at the White House. *See* Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (July 29, 1982) ("Olson Memorandum").

Although the White House has opposed sending senior advisers to testify for almost as long as there has been an Executive Office of the President, Assistant Attorney General William Rehnquist first described the legal basis for immunity in a 1971 memorandum. *See* Memorandum for John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* (Feb. 5, 1971) ("Rehnquist Memorandum"). The Rehnquist Memorandum has been consistently reaffirmed by administrations of both political parties, most recently during the Obama Administration. *See, e.g.*, *Immunity of the Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. 5, 5–6 & n.1 (2014) ("*Immunity of the Director of the Office of Political Strategy*").

We believe that these established principles apply to bar the Committee from compelling Mr. McGahn to testify. The Counsel to the President clearly qualifies as a senior adviser entitled to testimonial immunity. Attorney General Reno reached that conclusion in her 1999 opinion, and this Office has made the same determination on at least three other occasions. We have also recognized that the immunity continues to apply after the Counsel leaves the White House. *See Immunity of the Former Counsel to the President from Compelled Congressional Testimony*, 31 Op. O.L.C. 191, 192 (2007) ("*Immunity of the Former Counsel*").

The Chairman of the Committee has suggested that the justification for Mr. McGahn's testimonial immunity is undermined by the President's decision not to assert executive privilege over the redacted version of the Special Counsel's report that the Attorney General released last month. *See, e.g.*, Letter for Donald F. McGahn II, from Jerrold Nadler, Chairman, Committee on the Judiciary, U.S. House of Representatives at 1 (May 17, 2019) ("Nadler Letter"). But the question whether an adviser need comply with a subpoena purporting to require an appearance is different from the question whether the adviser's testimony would itself address privileged

matters. Therefore, the public disclosure of the Special Counsel's report does not have any legal bearing upon the force of the congressional subpoena. For these reasons, and consistent with nearly 50 years of Executive Branch precedent, we conclude that Mr. McGahn is not legally required to appear and testify before the Committee.

I.

Since the 1970s, this Office has consistently advised that "the President and his immediate advisers are absolutely immune from testimonial compulsion by a Congressional committee" on matters related to their official duties. Memorandum for All Heads of Offices, Divisions, Bureaus and Boards of the Department of Justice, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977) ("Harmon Memorandum"); *see also* Rehnquist Memorandum at 7 ("The President and his immediate advisers—that is, those who customarily meet with the President on a regular or frequent basis—should be deemed absolutely immune from testimonial compulsion by a congressional committee."). Indeed, this Office has endorsed that legal principle on more than a dozen occasions, over the course of the last eight presidential administrations.[1]

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[1] *See Immunity of the Director of the Office of Political Strategy*, 38 Op. O.L.C. at 5; Letter for Fred F. Fielding, Counsel to the President, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel at 1–2 (Aug. 1, 2007) ("Bradbury Letter"); *Immunity of the Former Counsel*, 31 Op. O.L.C. at 191; Reno Opinion, 23 Op. O.L.C. at 4; *Immunity of the Counsel to the President from Compelled Congressional Testimony,* 20 Op. O.L.C. 308, 308 (1996) ("*Immunity of the Counsel to the President*"); Letter for Jack Brooks, Chairman, Committee on the Judiciary, U.S. House of Representatives, from Nicholas E. Calio, Assistant to the President for Legislative Affairs at 1 (June 16, 1992) ("Calio Letter"); Olson Memorandum at 2; Memorandum for Rudolph W. Giuliani, Associate Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Demand for Deposition of Counsel to the President Fred F. Fielding* at 2 (July 23, 1982) ("*Congressional Demand for Deposition of Counsel*"); Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Testimony by Presidential Assistants* at 1 (Apr. 14, 1981); Memorandum for Margaret McKenna, Deputy Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Dual-Purpose Presidential Advisers* at 5 (Aug. 11, 1977); Harmon Memorandum at 5; Letter to Phillip E. Areeda, Counsel to the President, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel

This testimonial immunity is distinct from, and broader than, executive privilege. Like executive privilege, the immunity protects confidentiality within the Executive Branch and the candid advice that the Supreme Court has acknowledged is essential to presidential decision-making. *See United States v. Nixon*, 418 U.S. 683, 705 (1974) ("Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process."). But the immunity extends beyond answers to particular questions, precluding Congress from compelling even the appearance of a senior presidential adviser—as a function of the independence and autonomy of the President himself. In this regard, the President's immediate advisers are constitutionally distinct from the heads of executive departments and agencies, whose offices are created by acts of Congress, whose appointments require the Senate's advice and consent, and whose responsibilities entail the administration of federal statutes. Those officers can and do testify before Congress. The President's immediate advisers, however, exercise no statutory authority and instead act solely to advise and assist the President. Their independence from Congress reflects that of the President.

A.

The President stands at the head of a co-equal branch of government. Yet allowing Congress to subpoena the President to appear and testify would "promote a perception that the President is subordinate to Congress, contrary to the Constitution's separation of governmental powers into equal and coordinate branches." *Immunity of the Director of the Office of Political Strategy*, 38 Op. O.L.C. at 8. As Assistant Attorney General Theodore Olson explained in 1982: "The President is a separate

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(Sept. 25, 1974) (enclosing a memorandum, hereinafter "Scalia Memorandum"); Memorandum for John W. Dean III, Counsel to the President, from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters* at 6 (Dec. 21, 1972) ("Cramton Memorandum"); Memorandum for John W. Dean III, Counsel to the President, from Ralph E. Erickson, Assistant Attorney General, Office of Legal Counsel, *Re: Appearance of Presidential Assistant Peter M. Flanigan Before a Congressional Committee* at 1 (Mar. 15, 1972) ("Erickson Memorandum"); Rehnquist Memorandum at 7.

branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it." Olson Memorandum at 2. The President's immediate advisers are an extension of the President and are likewise entitled to absolute immunity from compelled congressional testimony.

In 2014, our most recent opinion on the topic described the bases for this immunity in detail. "For the President's absolute immunity to be fully meaningful," we explained, "and for these separation of powers principles to be adequately protected, the President's immediate advisers must likewise have absolute immunity from congressional compulsion to testify about matters that occur during the course of discharging their official duties." *Immunity of the Director of the Office of Political Strategy*, 38 Op. O.L.C. at 7. The demands of the office require the President to rely on senior advisers who serve "as the President's alter ego, assisting him on a daily basis in the formulation of executive policy and resolution of matters affecting the military, foreign affairs, and national security and other aspects of his discharge of his constitutional responsibilities." *Id*. (quoting Reno Opinion, 23 Op. O.L.C. at 5); *see also In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997) ("The President himself must make decisions relying substantially, if not entirely, on the information and analysis supplied by advisers.").

There are dozens of congressional committee and subcommittees with the authority to conduct hearings and subpoena witnesses. Recognizing a congressional authority to compel the President's immediate advisers to appear and testify at the times and places of their choosing would interfere directly with the President's ability to faithfully discharge his responsibilities. It would allow congressional committees to "wield their compulsory power to attempt to supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain." *Immunity of the Director of the Office of Political Strategy*, 38 Op. O.L.C. at 8. And in the case of the President's current advisers, preparing for such examinations would force them to divert time and attention from their duties to the President at the whim of congressional committees. This "would risk significant congressional encroachment on, and interference with, the President's prerogatives and his ability to discharge his duties with the advice and assistance of his closest advisers," ultimate-

ly subordinating senior presidential advisers to Congress rather than the President. *Id.*; *see also Loving v. United States*, 517 U.S. 748, 757 (1996) ("Even when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.").

The immunity of senior presidential advisers also protects the Executive Branch's strong interests in confidentiality as well as the President's ability to obtain sound and candid advice. As the Supreme Court has recognized, "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Nixon*, 418 U.S. at 708. While a senior presidential adviser, like other executive officials, could rely on executive privilege to decline to answer specific questions at a hearing, the privilege is insufficient to ameliorate several threats that compelled testimony poses to the independence and candor of executive councils.

First, compelled congressional testimony "create[s] an inherent and substantial risk of inadvertent or coerced disclosure of confidential information," despite the availability of claims of executive privilege with respect to the specific questions asked during such testimony. *Immunity of the Director of the Office of Political Strategy*, 38 Op. O.L.C. at 9. As we explained in 2014, senior presidential advisers

> could be asked, under the express or implied threat of contempt of Congress, a wide range of unanticipated and hostile questions about highly sensitive deliberations and communications. In the heat of the moment, without the opportunity for careful reflection, the adviser might have difficulty confining his remarks to those that do not reveal such sensitive information. Or the adviser could be reluctant to repeatedly invoke executive privilege, even though validly applicable, for fear of the congressional and media condemnation she or the President might endure.

Id.; *see also Congressional Demand for Deposition of Counsel*, *supra* note 1, at 2 ("A witness before a Congressional committee may be asked—under threat of contempt—a wide range of unanticipated questions about highly sensitive deliberations and thought processes. He

therefore may be unable to confine his remarks only to those which do not impair the deliberative process.").

Second, even "[t]he prospect of compelled interrogation by a potentially hostile congressional committee about confidential communications with the President or among the President's immediate staff could chill presidential advisers from providing unpopular advice or from fully examining an issue with the President or others." *Immunity of the Director of the Office of Political Strategy*, 38 Op. O.L.C. at 8–9. This is true whether or not the President might ultimately assert executive privilege over the testimony in question, given the adviser's uncertainty over whether a particular matter will become the subject of future congressional inquiry and whether the President would choose to incur the political costs associated with invoking the privilege.

Finally, given the frequency with which the testimony of a senior presidential adviser—whose sole and daily responsibility is to advise and assist the President—would fall within the scope of executive privilege, compelling the adviser's appearance is not likely to promote any valid legislative interests. Coercing senior presidential advisers into situations where they must repeatedly decline to provide answers, citing executive privilege, would be inefficient and contrary to good-faith governance. The President's immediate advisers, if compelled to testify, are unlikely to answer many of the Members' questions, suggesting that the hearing itself will not serve any legitimate purpose for the Committee.

B.

The Executive Branch's position on testimonial immunity reflects historical practices dating back nearly to the 1939 establishment of the Executive Office of the President. As Assistant Attorney General Antonin Scalia explained in a 1974 memorandum, "at least since the Truman Administration," presidential advisers "have appeared before congressional committees only where the inquiry related to their own private affairs or where they had received Presidential permission." Scalia Memorandum, *supra* note 1, at 6. Although Presidents have occasionally permitted such testimony, the longstanding policy has been to decline invitations for voluntary appearances and to resist congressional subpoenas for involuntary ones.

In surveying the history through 1971, Assistant Attorney General Rehnquist described the earliest application of the policy to be inconclusive and at times inconsistent. *See* Rehnquist Memorandum at 4–6. But even when senior presidential advisers did appear, those appearances were frequently accompanied by a claim of legal privilege not to do so. Assistant Attorney General Rehnquist thus described the claim as an absolute testimonial immunity for the President's immediate advisers, *see id*. at 7, and this Office has reaffirmed and expanded upon that conclusion in the decades since. The following examples, while not exhaustive, demonstrate the strong historical foundation for the Executive Branch's position that Congress may not compel the President's senior advisers to appear and testify.

In 1944, during the Administration of Franklin D. Roosevelt, a subcommittee of the Senate Committee on Agriculture and Forestry subpoenaed Jonathan Daniels, an Administrative Assistant to President Roosevelt, to testify about his reported attempts to compel the resignation of the Rural Electrification Administrator. *See Administration of the Rural Electrification Act: Hearing on S. 197 Before a Subcomm. of the S. Comm. on Agric. and Forestry*, 78th Cong., pt. 3, at 611–28, 629 (1944). Mr. Daniels appeared at the hearing but advised that he could not answer questions that would concern his confidential relationship with the President. *Id*. After the hearing ended with the subcommittee threatening contempt, Mr. Daniels wrote to the subcommittee and reiterated his belief that the subcommittee could not compel his testimony. *See id*. at 740. However, he stated that the President had determined that his testimony would not be contrary to the public interest and that he therefore was willing to appear in the future. *See id*.; *see also id*. at 695–740. *The New York Times* reported that "[w]ith Mr. Daniels' agreement to testify disappeared the possibility of using his previous defiance as the first test of the division between executive and legislative power before the Senate." *Daniels to Answer Senators' Queries: President Agrees*, N.Y. Times, Mar. 5, 1944, at 1.

The first outright refusal of a presidential adviser to appear apparently occurred during the Truman Administration, in 1948, when a special subcommittee of the House Committee on Education and Labor twice subpoenaed John R. Steelman, an Assistant to the President, to testify about his communications with President Truman regarding administra-

tion of the Taft-Hartley Act during a strike. *See Investigation of GSI Strike: Hearing Before a Special Subcomm. of the H. Comm. on Educ. and Labor*, 80th Cong. 347–53 (1948). Mr. Steelman declined to comply and returned the subpoenas with a letter stating: "[I]n each instance the President directed me, in view of my duties as his Assistant, not to appear before your subcommittee." H.R. Rep. No. 80-1595, at 3 (1948).

During the Eisenhower Administration, in 1955, a subcommittee of the Senate Committee on the Judiciary invited the President's Chief of Staff, Sherman Adams, to testify about a contract between the Atomic Energy Commission and two power companies. He declined, citing in part his "official and confidential relationship with the President." *Power Policy, Dixon-Yates Contract: Hearing Before the Subcomm. on Antitrust and Monopoly of the S. Comm. on the Judiciary*, 84th Cong., pt. 2, at 675–76, 779 (1955). Later, in 1958, Mr. Adams testified, with President Eisenhower's approval, before a House subcommittee concerning allegations of impropriety relating to his relationship with a New England industrialist. *Investigation of Regulatory Commissions and Agencies: Hearing Before a Subcomm. of the H. Comm. on Interstate and Foreign Commerce*, 85th Cong., pt. 10, at 3712–40 (1958).

During the Administration of President Lyndon B. Johnson, in 1968, the Senate Committee on the Judiciary requested the testimony of Associate Special Counsel to the President W. DeVier Pierson to testify concerning the nomination of Associate Justice Abe Fortas to be Chief Justice of the United States. The inquiry concerned whether Justice Fortas had inappropriately participated in developing certain legislation. Mr. Pierson responded that "[i]t has been firmly established, as a matter of principle and precedents, that members of the President's immediate staff shall not appear before a Congressional committee to testify with respect to the performance of their duties on behalf of the President." *Nominations of Abe Fortas and Homer Thornberry: Hearing Before the S. Comm. on the Judiciary*, 90th Cong., pt. 2, at 1348 (1968). He continued: "This limitation, which has been recognized by the Congress as well as the Executive, is fundamental to our system of government. I must, therefore, respectfully decline the invitation to testify in these hearings." *Id.*

In 1972, during the Nixon Administration, the Senate Committee on the Judiciary invited Peter M. Flanigan, an Assistant to the President, to testify. This Office advised that Mr. Flanigan occupied "a close and

confidential relationship with the President and share[d] the President's immunity from congressional process." Erickson Memorandum, *supra* note 1, at 1. Our disposition was clear: "[I]t has been firmly established that members of the President's immediate staff may not appear before a congressional committee to testify with respect to the performance of their duties." *Id*.[2]

In 1979, during the Carter Administration, Special Assistant to the President Sarah Weddington was invited to testify before the Senate Human Resources Committee as part of a hearing on "Women in the Coming Decade." At the instruction of the Counsel to President, she declined to appear, explaining that "it is White House policy for personal aides to the President to decline invitations to testify before Congressional committees." Letter for Harrison A. Williams, U.S. Senate, from Sarah Weddington, Special Assistant to the President at 1 (Jan. 31, 1979) ("Weddington Letter"). She offered, however, to meet informally with committee members or staff to discuss related programs and proposals. *Id*. at 2.

In 1980, the Subcommittee on Investigations of the House Committee on Armed Services requested the testimony of Deputy Assistant to the President for National Security Affairs David Aaron concerning leaks to *The Washington Post*. President Carter directed Mr. Aaron not to appear. The Counsel to the President, Lloyd N. Cutler, explained that "Congress has always respected the privilege of the President to decline requests that the President himself or his immediate White House advisors appear to testify before Congressional committees," instead provided a sworn affidavit by Mr. Aaron denying the allegations, and offered to make Mr. Aaron available for an interview or deposition under oath. Letter for Samuel S. Stratton, Chairman, Subcommittee on Investigation of the

[2] In connection with the Watergate investigations, President Nixon reached an agreement with the Senate's Watergate Select Committee to authorize current and former White House officials to appear voluntarily and under oath before the committee in closed session. *See* Remarks Announcing Procedures and Developments in Connection with the Watergate Investigations (Apr. 17, 1973), *Pub. Papers of Pres. Richard Nixon* 298, 298–99 (1973). President Nixon later determined that he would not claim executive privilege over the subject matters of the testimony and would allow the witnesses to testify in open hearings. *See* Statements About the Watergate Investigations (May 22, 1973), *Pub. Papers of Pres. Richard Nixon* 547, 554 (1973). He therefore waived the testimonial immunity to authorize those appearances.

Committee on Armed Services, U.S. House of Representatives, from Lloyd N. Cutler, Counsel to the President at 1–2 (Sept. 30, 1980).

In 1982, during the Reagan Administration, the Senate Labor and Human Resources Committee sought the testimony of Counsel to the President Fred F. Fielding concerning allegations of corruption against Secretary of Labor Raymond Donovan. Mr. Fielding declined to appear and testify. *See* Olson Memorandum at 1–4 (explaining the legal basis for that decision). Deputy Attorney General Edward C. Schmults notified the Committee that, "[a]s an institutional matter, the President cannot permit his Counsel to provide sworn testimony to the Legislative Branch regarding the performance of his duties," but offered to arrange for written responses to a reasonable number of written inquiries. Letter for Orrin G. Hatch, Chairman, Committee on Labor and Human Resources, U.S. Senate, from Edward C. Schmults, Deputy Attorney General at 2–3 (Apr. 19, 1983) ("Schmults Letter").

In 1992, during the George H.W. Bush Administration, the House Committee on the Judiciary requested that C. Boyden Gray, Counsel to the President, and Nicholas Rostow, Special Assistant to the President and a Senior Director for Legal Affairs at the National Security Council, testify concerning Bush Administration policies towards Iraq prior to the first Gulf War. The White House declined, citing "the longstanding practice of the Executive Branch to decline requests for testimony by members of the President's personal staff." Calio Letter, *supra* note 1, at 1.

In 1999, President Clinton directed Counsel to the President Beth Nolan not to appear in response to a subpoena from the House Committee on Government Reform and Oversight concerning a clemency decision. President Clinton relied on an opinion from Attorney General Reno that concluded that "the Counsel serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony" on matters related to the performance of official duties. Reno Opinion, 23 Op. O.L.C. at 4.

In 2007, during the George W. Bush Administration, the House Committee on the Judiciary subpoenaed former Counsel to the President Harriet Miers to testify about the Department of Justice's decision to request the resignation of certain United States Attorneys. President Bush directed Ms. Miers not to testify after this Office concluded that she was "immune from compelled congressional testimony about matters . . . that

arose during her tenure as Counsel to the President and that relate to her official duties in that capacity." *Immunity of the Former Counsel*, 31 Op. O.L.C. at 193.

Also in 2007, the Senate Committee on the Judiciary subpoenaed the testimony of Karl Rove, the Deputy White House Chief of Staff, on the same subject. This Office confirmed that Mr. Rove was "immune from compelled congressional testimony about matters (such as the U.S. Attorney resignations) that arose during his tenure as an immediate presidential adviser and that relate to his official duties in that capacity." Bradbury Letter, *supra* note 1, at 1–2. In 2008, a subcommittee of the House Committee on the Judiciary also subpoenaed Mr. Rove, and he was again directed not to testify. *See* Letter for Robert D. Luskin, Patton Boggs LLP, from Fred F. Fielding, Counsel to the President at 1 (July 9, 2008).

In 2014, during the Obama Administration, the House Committee on Oversight and Government Reform issued a subpoena to David Simas to testify about matters related to his official responsibilities as Assistant to the President and Director of the Office of Political Strategy and Outreach. In particular, the committee requested testimony regarding "the role and function of the White House Office of Political Strategy and Outreach" and the question "whether the White House [was] taking adequate steps to ensure that political activity by Administration officials complies with relevant statutes, including the Hatch Act." *Immunity of the Director of the Office of Political Strategy*, 38 Op. O.L.C. at 5 (internal quotation marks omitted). This Office concluded that Mr. Simas was "immune from compulsion to testify before the [c]ommittee on these matters," *id*., and he declined to testify.

The foregoing historical record demonstrates that the immunity of senior presidential advisers from congressional testimony is longstanding and has been repeatedly asserted against the requests of Congress. These examples do not indicate that senior presidential advisers have always declined to testify before Congress. The practice of asserting testimonial immunity—just like the practice of asserting executive privilege—has long reflected the "spirit of dynamic compromise" that reflects the "efficient and effective functioning" of the political branches of government. *United States v. Am. Tel. & Tel. Co*., 567 F.2d 121, 127 (D.C. Cir. 1977). Presidents have occasionally made senior advisers available to accommodate congressional requests, even while defending their legal authority to

decline such requests. But these accommodations between the political branches do not compromise the underlying immunity of the President or his senior presidential advisers from compelled congressional testimony. Nor do they nullify the many instances where Presidents have successfully asserted immunity and affirmatively directed their immediate aides not to testify before Congress.

C.

While the Executive Branch has asserted for 75 years that senior presidential advisers may decline to testify before Congress, and has formally asserted an immunity for nearly 50 years, neither the Supreme Court nor any court of appeals has specifically addressed the question. This is because disputes over congressional demands for information from the Executive Branch are inherently political, and the historical practice has been to resolve such questions in the political arena. When such conflicts have arisen, Congress has either acceded to the President's claims of immunity or the Executive Branch has accommodated the congressional interest in some fashion. Only one district court has ever addressed the testimonial immunity of the President's senior advisers, and that decision did not come until 2008. *See Comm. on the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008). Although the district court held that presidential advisers were not entitled to absolute immunity from compelled congressional testimony, the court of appeals stayed that decision pending appeal, and the parties settled without any appellate decision on the merits.

Nonetheless, this Office has recognized that the Executive Branch's longstanding position is consistent with related Supreme Court precedent. *See Immunity of the Director of the Office of Political Strategy*, 38 Op. O.L.C. at 10–11. In *Gravel v. United States*, 408 U.S. 606 (1972), the Court held that legislative aides share in the constitutional immunity enjoyed by Members of Congress under the Speech or Debate Clause. *Id.* at 616–17. The Court reasoned that the Clause "was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch," and "protect[ion] . . . against prosecutions that directly impinge upon or threaten the legislative process." *Id.* at 616. Because "it is literally impossible . . . for Members of Congress to perform their legislative tasks

without the help of aides and assistants," the Court recognized that such aides "must be treated as the [Members'] alter egos." *Id*. at 616–17. For purposes of immunity, the Court concluded, Members of Congress and their aides should be "treated as one." *Id*. at 616 (internal quotation marks omitted). The same logic applies with respect to the President and his senior advisers. The failure to recognize the extension of the President's immunity from compelled congressional testimony to senior advisers would call into question the well-established extension of derivative immunity to congressional staffers.

It is true that in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court declined to extend *Gravel*'s alter-ego reasoning to a civil suit for damages against senior presidential advisers, and instead concluded that such advisers are entitled only to qualified immunity in those civil actions. *Id*. at 810–11, 813–15. *Harlow* thus distinguished the President's immediate advisers from the President himself, whom the Court held (in another decision issued the same day) to be absolutely immune from civil suits based on official acts. *See Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982). Yet we have previously declined to extend *Harlow* to the context of testimonial immunity because the prospect of compelled congressional testimony raises separation of powers concerns that are not present in a civil damages lawsuit brought by a private party. *Immunity of the Director of the Office of Political Strategy*, 38 Op. O.L.C. at 11–13. Compelled congressional testimony "threatens to subject presidential advisers to coercion and harassment, create a heightened impression of presidential subordination to Congress, and cause public disclosure of confidential presidential communications in a way that the careful development of evidence through a judicially monitored [proceeding] does not." *Id*. at 12. In a private lawsuit, the court "acts as a disinterested arbiter of a private dispute, not as a party in interest to the very lawsuit it adjudicates," and it "is charged with impartially administering procedural rules designed to protect witnesses from irrelevant, argumentative, harassing, cumulative, privileged, and other problematic questions." *Id*. at 11. By contrast, congressional hearings involving the President's immediate advisers contain none of those assurances, and they threaten the President's autonomy and ability to receive sound and candid advice in a way that private civil damages suits do not. *Cf.* Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1429 (1974) (stating that as compared to a civil action,

"[t]he need to protect aides and subordinates from reprisals on Capitol Hill and in the media of public debate is a thousand-fold greater in the case of congressional hearings, which are often the preserves of individual Senators and Congressmen not all of whom are invariably characterized by judicious self-restraint").

We recognize that in *Miers*, a federal district court read *Harlow* to imply that senior presidential advisers do not enjoy absolute immunity from congressionally compelled testimony. *See Miers*, 558 F. Supp. 2d at 100–03. But we believe that the court did not adequately consider the different and heightened separation of powers concerns bearing upon the testimony of the President's immediate advisers before Congress. Moreover, the district court's decision was stayed pending appeal. *See Comm. on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 910–11 (D.C. Cir. 2008) (per curiam). The case settled and the appeal was dismissed before any further action by the court of appeals. *Comm. on the Judiciary of the U.S. House of Representatives v. Miers*, No. 08-5357, 2009 WL 3568649, at *1 (D.C. Cir. Oct. 14, 2009). For the reasons set forth above, and in greater detail in our 2014 opinion, *Immunity of the Director of the Office of Political Strategy*, 38 Op. O.L.C. at 11–16, we respectfully disagree with the district court's conclusion in *Miers* and adhere to this Office's long-established position that the President's immediate advisers are absolutely immune from compelled congressional testimony.

II.

Having reaffirmed the existence of the testimonial immunity of the President's immediate advisers, we now consider its application to Mr. McGahn, the former Counsel to the President. Plainly, the Counsel to the President qualifies as an immediate adviser to the President. As Attorney General Reno recognized, "the Counsel serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony." Reno Opinion, 23 Op. O.L.C. at 4. Indeed, we have recognized the Counsel's immunity from congressional testimony on multiple occasions. *See, e.g.*, *Immunity of the Former Counsel*, 31 Op. O.L.C. at 192 ("[T]he Counsel to the President 'serves as an immediate adviser to the President and is therefore immune from compelled congressional testimony.'" (quoting Reno Opinion, 23 Op. O.L.C. at 4)); *Immunity of*

the Counsel to the President, 20 Op. O.L.C. at 309 ("There is no question that the Counsel to the President falls within Assistant Attorney General Rehnquist's description of the type of Presidential advisers who are immune from testimonial compulsion."); *Congressional Demand for Deposition of Counsel*, *supra* note 1, at 2 ("I believe the Counsel to the President possesses an absolute privilege not to testify with regard to any matters relating to his official duties as legal adviser to the President.").

In addition, we have recognized that testimonial immunity continues after the tenure of a particular Counsel to the President. As we explained in 2007, "[s]eparation of powers principles dictate that former presidents and former senior presidential advisers remain immune from compelled congressional testimony about official matters that occurred during their time as President or senior presidential advisers." *Immunity of the Former Counsel*, 31 Op. O.L.C. at 192–93. The Supreme Court has explicitly recognized this principle in the context of executive privilege. The privilege must outlast the tenure of a particular President because, absent a guarantee of lasting confidentiality, "a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 449 (1977) (adopting the view of the Solicitor General); *see also United States v. Johnson*, 383 U.S. 169 (1966) (applying the Speech or Debate Clause to a former Member of Congress).

In concluding that the former Counsel to the President retained her testimonial immunity, we relied upon the actions of former President Truman, who explained his own refusal to appear and testify before the House Committee on Un-American Activities in the following terms: "[I]f the doctrine of separation of powers and the independence of the Presidency is to have any validity at all, it must be equally applicable to a President after his term of office has expired when he is sought to be examined with respect to any acts occurring while he is President." *Immunity of the Former Counsel*, 31 Op. O.L.C. at 193 (quoting *Texts of Truman Letter and Velde Reply*, N.Y. Times, Nov. 13, 1953, at 14 (reprinting Nov. 12, 1953, letter by President Truman)). It is "just as important to the independence of the Executive that the actions of the President should not be subjected to the questioning by the Congress after he has completed his term of office as that his actions should not be questioned while he is serving as President." *Id.* (quoting *Text of Address*

by Truman Explaining to Nation His Actions in the White Case, N.Y. Times, Nov. 17, 1953, at 26). Because the immunity of senior presidential advisers derives from the immunity of the President, this same logic extends to them as well.

Our 2007 conclusion in *Immunity of the Former Counsel* was consistent with the analysis of the immunity interests of former officials during the George H.W. Bush and Nixon Administrations. *See* Letter for Arthur B. Culvahouse, O'Melveny & Myers, from C. Boyden Gray, Counsel to the President at 1 (June 17, 1992) ("[I]t is long-standing White House policy not to assent to formal testimony to Congressional committees by former White House officials about matters occurring during their White House service."). It is true that the President does not have the same need for the daily advice and assistance of his former advisers, as with his current advisers, yet the confidentiality interests associated with the advisers' former role remain just as strong. *See* Cramton Memorandum, *supra* note 1, at 5–6 ("If advice from a staff member were protected from congressional and public scrutiny only for so long as the staff member remained employed in the White House, the protection would be significantly reduced. It would only be a question of time when staff turnovers or a change in administration would remove the shield.").

Even more significantly, the risk to the separation of powers and to the President's autonomy posed by a former adviser's testimony on official matters continues after the conclusion of that adviser's tenure. *See id*. at 6 ("[T]he same considerations that were persuasive to former President Truman would apply to justify a refusal to appear by such a former staff member, if the scope of his testimony is to be limited to his activities while serving in that capacity."). Accordingly, consistent with our prior precedents, we find no material distinction between the compelled congressional testimony of current and former senior advisers to the President. Mr. McGahn's departure as Counsel to the President does not alter his immunity from compelled congressional testimony on matters related to his service to the President.

III.

In this instance, the Committee seeks to question Mr. McGahn concerning matters addressed in the report of Special Counsel Robert S. Mueller,

III, on the Investigation into Russian Interference in the 2016 Presidential Election. The Chairman of the Committee has suggested that the White House's voluntary cooperation with this investigation and the President's decision not to assert executive privilege over the Special Counsel's report may undermine any claim that Mr. McGahn is immune from compelled testimony. Nadler Letter at 1. However, the concept of immunity is distinct from, and broader than, the question whether executive privilege would protect a witness's response to any particular question. *See* Rehnquist Memorandum at 4 (recognizing the "distinction between a claim of absolute immunity from even being sworn as a witness, and a right to claim privilege in answer certain questions in the course of one's testimony as a witness").[3] The President does not waive an adviser's immunity from compelled congressional testimony by authorizing disclosure of any particular information. To the contrary, Presidents have frequently authorized aides to share information as an accommodation to Congress, notwithstanding claims of immunity.

The immunity from compelled congressional testimony implicates fundamental separation of powers principles that are separate from the confidentiality of specific information. *See supra* Part I.A. The constitutional interest in protecting the autonomy and independence of the Presidency remains the same no matter whether the compelled testimony from a presidential adviser would implicate public or potentially privileged matters. The President does not waive his own immunity from compelled congressional testimony by making public statements on a given subject. It follows then that the derivative immunity of senior presidential advisers is not waived either.

Were the rule otherwise, Presidents could not offer partial accommodations to Congress without waiving all privileges or immunities bearing upon the subject. Such a rule would severely hinder the "spirit of dynamic compromise" and "implicit constitutional mandate to seek optimal accommodation" that currently facilitates resolution of inter-branch

[3] The Reno Opinion described the testimonial immunity as "a separate legal basis that would support a claim of executive privilege for the entirety of the Counsel's testimony, thereby eliminating any need for her to appear at the hearing." 23 Op. O.L.C. at 4. We think that the Rehnquist Memorandum's distinction between an immunity and a privilege reflects the more precise formulation, but the distinction appears to be merely a semantic one.

disputes over information. *Am. Tel. & Tel. Co.*, 567 F.2d at 127. And such a rule would stand in marked contrast to many instances of historical practice in which senior advisers declined to testify before Congress, but instead offered accommodations through informal meetings or written responses. *See, e.g.*, Schmults Letter at 2–3; Weddington Letter at 1–2. Yet no one has viewed such accommodations, or the testimony of other executive advisers on similar subjects, to constitute a general waiver of immunity.

The Chairman's suggestion that Mr. McGahn can no longer claim immunity appears to be based upon the assumption that the President waived executive privilege by authorizing Mr. McGahn and his senior aides to cooperate with the Special Counsel's investigation. But the question of privilege is distinct from the issue of immunity. And in any event, the premise of the Committee's position is incorrect. The sharing of information between one arm of the Executive Branch and another does not compromise the President's interest in confidentiality. Indeed, in *Nixon v. Administrator of General Services*, the Supreme Court rejected a separation of powers objection to the disclosure of presumptively confidential information because "[t]he Executive Branch remains in full control of the Presidential materials, and . . . the materials can be released only when release is not barred by some applicable privilege inherent in that branch." 433 U.S. at 444. Information that was shared with the Special Counsel was shared *within* the Executive Branch. Such voluntary sharing does not waive confidentiality or the underlying privilege.

This conclusion is consistent with past assertions of executive privilege. In *Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7 (2008), Attorney General Michael Mukasey advised that the President could assert executive privilege against Congress over memoranda recording interviews of White House witnesses with Department of Justice investigators. *Id.* at 9–13. As he explained, "[w]ere future presidents, vice presidents or White House staff to perceive that such voluntary cooperation would create records that would likely be made available to Congress (and then possibly disclosed publicly outside of judicial proceedings such as a trial), there would be an unacceptable risk that such knowledge could adversely impact their willingness to cooperate fully and candidly in a voluntary interview." *Id.* at 11. Implicit in that

explanation was the understanding that the White House's voluntary cooperation with the Department's investigation did not constitute a waiver of privilege against third parties outside the Executive Branch. So, too, the White House's voluntary cooperation with the Special Counsel's investigation did not effect a waiver of privilege, much less a waiver of testimonial immunity.

In contrast with the White House's cooperation with the Special Counsel, the Attorney General's public release of a redacted version of the Special Counsel's report (with the President's consent) does extinguish the Executive Branch's confidentiality interests in the precise information that has already been revealed. But, as the D.C. Circuit has held, the "release of a document only waives [executive] privileges for the document or information specifically released, and not for related materials." *In re Sealed Case*, 121 F.3d at 741; *see id*. ("[An] all-or-nothing approach has not been adopted with regard to executive privileges generally, or to the deliberative process privilege in particular."). As Assistant Attorney General Scalia explained, the purposes underlying executive privilege "would be jeopardized if harmful information had to be disclosed merely because the President permitted the release of related information that could be revealed safely." Scalia Memorandum, *supra* note 1, at 6–7. Such a result "would have the effect of requiring the concealment of much information which would be released, merely because it was connected with sensitive information." *Id*. at 7.

Thus, the public disclosure of particular information does not waive the Executive Branch's confidentiality interests over the subject matters involved in the prior disclosure. *See, e.g.*, *Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1, 8 (2007) (Clement, Act'g Att'y Gen.) ("The Department[of Justice]'s accommodation with respect to some White House-Department communications does not constitute a waiver and does not preclude the President from asserting executive privilege with respect to White House materials or testimony concerning such communications."). Consequently, the public disclosure of the Special Counsel's report did not constitute a general waiver concerning Mr. McGahn's communications with the President on those subjects or on any other subjects. And in any event, as discussed above, the disclosure's impact on executive privilege with

respect to particular subjects does not ultimately bear on Mr. McGahn's underlying immunity from compelled testimony.

IV.

Because Congress may not constitutionally compel Mr. McGahn to testify about his official duties, the President may lawfully direct him not to appear in response to the House Judiciary Committee's subpoena. Should the President provide that direction, Mr. McGahn may not constitutionally be penalized, civilly or criminally, for following it.

The Department of Justice has long recognized "that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984) ("*Prosecution for Contempt*"); *see also Application of 28 U.S.C. § 458 to Presidential Appointment of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995) ("[T]he criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege."). As Assistant Attorney General Olson explained, "the Constitution does not permit Congress to make it a crime for an official to assist the President in asserting a constitutional privilege that is an integral part of the President's responsibilities under the Constitution." *Prosecution for Contempt*, 8 Op. O.L.C. at 140. To do so "would be to deter the President from asserting executive privilege and to make it difficult for him to enlist the aid of his subordinates in the process," thereby "burden[ing] and immeasurably impair[ing] the President's ability to fulfill his constitutional duties." *Id.* at 134, 137. Assistant Attorney General Walter Dellinger adhered to that reasoning in 1995, recounting that the "application of the contempt statute against an assertion of executive privilege would seriously disrupt the balance between the President and Congress." *Application of 28 U.S.C. § 458 to Presidential Appointment of Federal Judges*, 19 Op. O.L.C. at 356.

This Office has further confirmed that the same "principles . . . similarly shield a current or former senior adviser to the President from prosecution for lawfully invoking his or her immunity from compelled congressional testimony." *Whether the Department of Justice May Prosecute*

White House Officials for Contempt of Congress, 32 Op. O.L.C. 65, 68 (2008). Subjecting a senior presidential adviser to prosecution for asserting a good-faith claim of testimonial immunity would equally impose upon the President "the untenable position of having to place a subordinate at the risk of a criminal conviction and possible jail sentence in order for the President to exercise a responsibility he found necessary to the performance of his constitutional duty." *Id*. (quoting *Prosecution for Contempt*, 8 Op. O.L.C. at 136). In sum, "[t]o seek criminal punishment for those who have acted to aid the President's performance of his duty would be . . . inconsistent with the Constitution." *Id*. at 69 (quoting *Prosecution for Contempt*, 8 Op. O.L.C. at 142).

We similarly believe that Congress could not lawfully exercise any inherent contempt authority against Mr. McGahn for asserting immunity. The constitutional separation of powers bars Congress from exercising its inherent contempt power in the face of a presidential assertion of executive privilege. An attempt to exercise inherent contempt powers in such a circumstance would be without precedent and "would immeasurably burden the President's ability to assert the privilege and to carry out his constitutional functions." *Prosecution for Contempt*, 8 Op. O.L.C. at 136. This is so because, as Assistant Attorney General Olson concluded, "the same reasoning that suggests that the [criminal contempt] statute could not constitutionally be applied against a Presidential assertion of privilege applies to Congress' inherent contempt powers as well." *Id*. at 140 n.42. Congress may not impede the President's ability to carry out his constitutionally assigned functions by "arrest[ing], bring[ing] to trial, and punish[ing] an executive official who asserted a Presidential claim of executive privilege." *Id*. The same rationale applies equally to an exercise of inherent contempt powers against a senior aide who has complied with a presidential direction that he not provide testimony to a congressional committee.

V.

The immunity of the President's immediate advisers from compelled congressional testimony on matters related to their official responsibilities has long been recognized and arises from the fundamental workings of the separation of powers. This immunity applies to the former White House

Counsel. Accordingly, Mr. McGahn is not legally required to appear and testify about matters related to his official duties as Counsel to the President.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees

Congress may not constitutionally prohibit agency counsel from accompanying agency employees called to testify about matters that potentially involve information protected by executive privilege. Such a prohibition would impair the President's constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch's communications with Congress.

Congressional subpoenas that purport to require agency employees to appear without agency counsel are legally invalid and are not subject to civil or criminal enforcement.

May 23, 2019

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL AND THE COUNSEL TO THE PRESIDENT

On April 2, 2019, the House Committee on Oversight and Reform (the "Committee") issued subpoenas seeking to compel testimony in two separate investigations from two witnesses: John Gore, Principal Deputy Assistant Attorney General for the Department's Civil Rights Division, and Carl Kline, the former head of the White House Personnel Security Office. The Committee sought to question both witnesses about matters that potentially involved communications that were protected by executive privilege. Although the Committee's Rule 15(e) permitted the witnesses to be accompanied at the depositions by private counsel, who would owe duties to the witnesses themselves, the rule purported to bar the presence of agency counsel, who would represent the interests of the Executive Branch.[1] Despite some efforts at accommodation on both sides, the Committee continued to insist that agency counsel could not attend the witnesses' depositions. In response to your requests, we advised that a congressional committee may not constitutionally compel an Executive Branch witness to testify about potentially privileged matters while depriving the witness of the assistance of agency counsel. Based upon our

[1] Tracking the text of the Committee's rule, which excludes "counsel . . . for agencies," we speak in this opinion of "agency counsel," but our analysis applies equally to all counsel representing the interests of the Executive Branch, no matter whether the witness works for an "agency," as defined by statute. *See, e.g.*, *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 156 (1980) (holding that the Office of the President is not an "agency" for purposes of the Freedom of Information Act).

advice, Mr. Gore and Mr. Kline were directed not to appear at their depositions without agency counsel. This memorandum explains the basis for our conclusions.

When this issue last arose, during the Obama Administration, this Office recognized "constitutional concerns" with the exclusion of agency counsel, because such a rule "could potentially undermine the Executive Branch's ability to protect its confidentiality interests in the course of the constitutionally mandated accommodation process, as well as the President's constitutional authority to consider and assert executive privilege where appropriate." *Authority of the Department of Health and Human Services to Pay for Private Counsel to Represent an Employee Before Congressional Committees*, 41 Op. O.L.C. 4, 8 n.6 (2017) ("*Authority to Pay for Private Counsel*"). This Office, however, was asked to address only the retention of private counsel for a deposition and thus did not evaluate these constitutional concerns.

Faced squarely with the constitutional question here, we concluded that Congress may not compel an Executive Branch witness to appear without agency counsel and thereby compromise the President's constitutional authority to control the disclosure of privileged information and to supervise the Executive Branch's communications with congressional entities. The "Executive Branch's longstanding general practice has been for agency attorneys to accompany" agency employees who are questioned by congressional committees conducting oversight inquiries. *Id.* at 6. When an agency employee is asked to testify about matters within the scope of his official duties, he is necessarily asked to provide agency information. The agency must have the ability to protect relevant privileges and to ensure that any information provided on its behalf is accurate, complete, and properly limited in scope. Although private counsel may indirectly assist the employee in protecting privileged information, counsel's obligation is to protect the personal interests of the employee, not the interests of the Executive Branch. The Committee, therefore, could not constitutionally bar agency counsel from accompanying agency employees called to testify on matters within the scope of their official duties. In light of this constitutional infirmity, we advised that the Committee subpoenas purporting to require the witnesses to appear without agency counsel were legally invalid and not subject to civil or criminal enforcement.

I.

Congress generally obtains the information necessary to perform its legislative functions by making requests and issuing subpoenas for documents and testimony through its organized committees. *See, e.g.*, *Barenblatt v. United States*, 360 U.S. 109, 116 (1959); *Watkins v. United States*, 354 U.S. 178, 187–88 (1957). Committees typically seek the information they need from the Executive Branch first by requesting documents and sometimes voluntary interviews. Following such requests, a committee may proceed with a hearing at which Members of Congress ask questions of the witness, and such a hearing is usually open to the public. When Executive Branch employees appear—either at a voluntary interview or a hearing—agency counsel or another agency representative traditionally accompany them. *See, e.g.*, *Representation of White House Employees*, 4B Op. O.L.C. 749, 754 (1980).

Congressional committees have only rarely attempted to collect information by compelling depositions conducted by committee staff. *See* Jay R. Shampansky, Cong. Research Serv., 95-949 A, *Staff Depositions in Congressional Investigations* 1–2 & n.3 (updated Dec. 3, 1999) ("*Staff Depositions*"). Historically, these efforts were confined to specific investigations that were limited in scope. *See, e.g.*, *Inquiry into the Matter of Billy Carter and Libya: Hearings Before the Subcomm. to Investigate the Activities of Individuals Representing the Interests of Foreign Governments of the S. Comm. on the Judiciary*, 96th Cong. 1708–10, 1718–27, 1742 (1980) (discussing issues related to Senate resolution authorizing depositions by staff members). Recently, however, committees have made increasing use of depositions, and the House of Representatives has adopted an order in the current Congress that permits depositions to go forward without the presence of any Member of Congress. *See* H. Res. 6, 116th Cong. § 103(a)(1) (2019).

Although Executive Branch witnesses have sometimes appeared and testified at staff depositions, the Executive Branch has frequently objected to the taking of compelled testimony by congressional staff members. These objections have questioned whether committees may properly authorize staff to depose senior executive officials, whether Members of Congress must be present during a committee deposition, and whether the procedures for such depositions adequately protect the President's ability

to protect privileged Executive Branch information. *See, e.g.*, H. Comm. on International Relations, 104th Cong., Final Report of the Select Subcommittee to Investigate the United States Role in Iranian Arms Transfers to Croatia and Bosnia 54–56 (Comm. Print 1997) (summarizing the White House's position that its officials would not "be allowed to sit for staff depositions, because to do so would intrude upon the President's 'deliberative process'"); *see also* Letter for Henry Waxman, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, from Dinah Bear, General Counsel, Council on Environmental Quality at 1 (Mar. 12, 2007) ("Allowing Committee staff to depose Executive Branch representatives on the record would be an extraordinary formalization of the congressional oversight process and would give unelected staff powers and authorities historically exercised only by Members of Congress participating in a public hearing."); Letter for Henry A. Waxman, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives, from Stephanie Daigle, Associate Administrator, U.S. Environmental Protection Agency at 2 (Apr. 12, 2007) ("[T]he use of formal interviews by Committee counsel, transcribed by a court reporter, rather than the customary informal briefings, have the potential to be overly adversarial and to intimidate Agency staff."). No court has addressed whether Congress may use its oversight authority to compel witnesses to appear at staff depositions conducted outside the presence of any Member of Congress. Courts have recognized, however, that Congress's ability to "delegate the exercise of the subpoena power is not lightly to be inferred" because it is "capable of oppressive use." *Shelton v. United States*, 327 F.2d 601, 606 n.14 (D.C. Cir. 1963); *cf. United States v. Bryan*, 339 U.S. 323, 332 (1950) (concluding, in the context of a criminal contempt-of-Congress citation, that "respondent could rightfully have demanded attendance of a quorum of the Committee and declined to testify or to produce documents so long as a quorum was not present").

The question we address here arose out of the Committee's effort to compel two Executive Branch witnesses, Mr. Gore and Mr. Kline, to appear at depositions subject to the restrictions of Committee Rule 15(e). In relevant part, Rule 15(e) provides as follows:

> No one may be present at depositions except members, committee staff designated by the Chair of the Committee or the Ranking Minority Member of the Committee, an official reporter, the witness,

> and the witness's counsel. Observers or counsel for other persons, or for agencies under investigation, may not attend.

H. Comm. on Oversight & Reform, 116th Cong., Rule 15(e). In both instances, the Committee sought Executive Branch information, including matters that implicated executive privilege, but it asserted the authority to compel the witness to answer questions without the assistance of agency counsel. We summarize here the efforts at accommodation made by the Executive Branch and the Committee in connection with the disputes.

A.

The Committee subpoenaed Mr. Gore to testify about privileged matters concerning the Secretary of Commerce's decision to include a citizenship question on the 2020 United States Census. On March 7, 2019, Mr. Gore voluntarily appeared before the Committee, with the assistance of Department counsel, for a transcribed interview on the same topic. Mr. Gore answered all of the Committee's questions, except for those that were determined by Department counsel to concern confidential deliberations within the Executive Branch. The Department's interest in protecting this subject matter was particularly acute because the Secretary of Commerce's decision was subject to active litigation, and those challenges were pending in the Supreme Court. *See Dep't of Commerce v. New York*, No. 18-966 (U.S.) (argued Apr. 23, 2019). Some of the information sought by the Committee had previously been held by a federal district court to be protected by the deliberative process privilege, as well as other privileges, in civil discovery.

On April 2, the Committee served Mr. Gore with a deposition subpoena in an effort to compel responses to the questions that he did not answer during his March 7 interview. Committee staff advised that Committee Rule 15(e) required the exclusion of the agency counsel who had previously represented Mr. Gore. On April 9, the Department explained that the Committee's effort to bar Department counsel would unconstitutionally infringe upon the prerogatives of the Executive Branch. *See* Letter for Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives, from Stephen E. Boyd, Assistant Attorney General, Office of Legislative Affairs at 2–3 (Apr. 9, 2019). Because the Committee sought information from Mr. Gore relating to his official

duties, the Department explained that agency counsel must be present to ensure appropriate limits to Mr. Gore's questioning, to ensure the accuracy and completeness of information provided on behalf of the Department, and to ensure that a Department official was not pressed into revealing privileged information. *Id.* The Attorney General determined that Mr. Gore would not appear at the deposition without the assistance of Department counsel. *Id.* at 3.

On April 10, 2019, the Committee responded by disputing the Department's constitutional view, contending that Committee Rule 15(e) had been in place for more than a decade and reflected an appropriate exercise of Congress's authority to determine the rules of its own proceedings. *See* Letter for William P. Barr, Attorney General, from Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives at 2–3 (Apr. 10, 2019) ("April 10 Cummings Letter") (citing U.S. Const. art. I, § 5, cl. 2). The Committee advised that Mr. Gore could be accompanied by his private counsel, *id.* at 2, and offered to allow Department counsel to wait in a separate room during the deposition, *id.* at 3. The Committee stated that, if necessary, Mr. Gore could request a break during the deposition to consult with Department counsel. *Id.*

On April 24, 2019, the Department reiterated its constitutional objection and explained that the Committee's proposed accommodation would not satisfy the Department's need to have agency counsel assist Mr. Gore at the deposition. *See* Letter for Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives, from Stephen E. Boyd, Assistant Attorney General, Office of Legislative Affairs at 1 (Apr. 24, 2019). Mr. Gore therefore did not appear on the noticed deposition date.

B.

The Committee subpoenaed Mr. Kline to testify concerning the activities of the White House Personnel Security Office in adjudicating security clearances during his time as head of the Office. On March 20, 2019, the current White House Chief Security Officer, with representation by the Office of Counsel to the President ("Counsel's Office"), briefed the Committee's staff on the White House security clearance process for nearly 90 minutes and answered questions from a Member of Congress

and staff. On April 1, 2019, the White House offered to have Mr. Kline appear voluntarily before the Committee for a transcribed interview.

Instead, the Committee subpoenaed Mr. Kline on April 2, 2019. The Committee indicated that Committee Rule 15(e) would bar any representative from the Counsel's Office from attending Mr. Kline's deposition. On April 18, 2019, the Counsel's Office advised the Committee that a representative from that office must attend to represent the White House's interests in any deposition of Mr. Kline. *See* Letter for Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives, from Michael M. Purpura, Deputy Counsel to the President at 2 (Apr. 18, 2019). The Counsel's Office relied on the views concerning the exclusion of agency counsel that were articulated by the Department in its April 9, 2019, letter to the Committee. *Id.* The Counsel's Office explained that the President has the authority to raise privilege concerns at any point during a deposition, and that this could occur only if an attorney from the Counsel's Office accompanied Mr. Kline. *Id.*

On April 22, 2019, the Committee responded, stating, as it had in correspondence concerning Mr. Gore, that its rules were justified based upon Congress's constitutional authority to determine the rules of its proceedings. *See* U.S. Const. art. I, § 5, cl. 2. The Committee asserted that Committee Rule 15(e) had been enforced under multiple chairmen. *See* Letter for Pat Cipollone, Counsel to the President, from Elijah E. Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives at 3 (Apr. 22, 2019) ("April 22 Cummings Letter"). The Committee advised that Mr. Kline could be accompanied by his private counsel, and, as with Mr. Gore, offered to permit attorneys from the Counsel's Office to wait outside the deposition room in case Mr. Kline requested to consult with them during the deposition. *Id.*

In an April 22, 2019, reply, the Counsel's Office explained that, in light of the Committee's decision to apply Rule 15(e), the Acting Chief of Staff to the President had directed Mr. Kline not to attend the deposition for the reasons stated in the April 18, 2019, letter. *See* Letter for Elijah Cummings, Chairman, Committee on Oversight and Reform, U.S. House of Representatives, from Michael M. Purpura, Deputy Counsel to the President at 1 (Apr. 22, 2019). The Committee and the Counsel's Office subsequently agreed to a voluntary transcribed interview of Mr. Kline with the participation of the Counsel's Office. Mr. Kline was interviewed on

May 1, 2019. He answered some of the Committee's questions, but at the direction of the representative from the Counsel's Office, he did not address particular matters implicating privileged information.

II.

Under our constitutional separation of powers, both Congress and the Executive Branch must respect the legitimate prerogatives of the other branch. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."); *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127, 130–31 (D.C. Cir. 1977) ("[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."). Here, the Committee sought to apply Committee Rule 15(e) to compel Executive Branch officials to testify about potentially privileged matters while barring agency counsel from the room. We concluded that the Committee could not constitutionally compel such an appearance for two reasons. First, the exclusion of agency counsel impairs the President's ability to exercise his constitutional authority to control privileged information of the Executive Branch. Second, the exclusion undermines the President's ability to exercise his constitutional authority to supervise the Executive Branch's interactions with Congress.

A.

Committee Rule 15(e) unconstitutionally interferes with the President's right to control the disclosure of privileged information. Both the Supreme Court and this Office have long recognized the President's "constitutional authority to protect national security and other privileged information" in the exercise of the President's Article II powers. *Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, 28 Op. O.L.C. 79, 80 (2004) ("*Authority of Agency Officials*"); *see Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988) (the President's "authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President [as Commander in Chief] and exists

quite apart from any explicit congressional grant"); *United States v. Nixon*, 418 U.S. 683, 705–06 (1974) ("Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings."). That authority is "not limited to classified information, but extend[s] to *all* . . . information protected by [executive] privilege," including presidential and attorney-client communications, attorney work product, deliberative process information, law enforcement files, and national security and foreign affairs information. *Authority of Agency Officials*, 28 Op. O.L.C. at 81 (emphasis added).[2] Protection of such information is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Nixon*, 418 U.S. at 708. It ensures that "high Government officials and those who advise and assist them in the performance of their manifold duties" can engage in full and candid decision-making, *id.* at 705, 708, and it is necessary to protect sensitive security and other information that could be used to the public's detriment.

The President may protect such privileged information from disclosure in the Executive's responses to congressional oversight proceedings. *See Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974). As we have explained, "[i]n the congressional oversight context, as in all others, the decision whether and under what circumstances to disclose classified information" or other forms of privileged information "must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President." *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 100 (1998) ("*Whistleblower Protections*"). Thus, "Congress may not vest lower-ranking personnel in the Executive branch with a 'right' to furnish national security or other privileged information to a

[2] Although some of these components, such as deliberative process information, parallel aspects of common law privileges, each falls within the doctrine of executive privilege. *See, e.g.*, *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 101–102 n.34 (1998); *Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (Reno, Att'y Gen.) (observing that "[e]xecutive privilege applies" to certain White House documents "because of their deliberative nature, and because they fall within the scope of the attorney-client privilege and the work-product doctrine").

member of Congress without receiving official authorization to do so." *Authority of Agency Officials*, 28 Op. O.L.C. at 80 (quoting March 9, 1998, Statement of Administration Policy on S. 1668, 105th Cong.); *see Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007*, 32 Op. O.L.C. 27, 43 (2008) ("*Direct Reporting Requirement*") ("We have long concluded that statutory provisions that purport to authorize Executive Branch officers to communicate directly with Congress without appropriate supervision . . . infringe upon the President's constitutional authority to protect against the unauthorized disclosure of constitutionally privileged information."). Because "statutes may not override the constitutional doctrine of executive privilege," they may not "prohibit the supervision of the disclosure of any privileged information, be it classified, deliberative process or other privileged material." *Authority of Agency Officials*, 28 Op. O.L.C. at 81. It necessarily follows that congressional committees' rules of procedure may not be used to override privilege or the Executive's ability to supervise the disclosure of privileged information.

The foregoing principles governed our analysis here. In order to control the disclosure of privileged information, the President must have the discretion to designate a representative of the government to protect this interest at congressional depositions of agency employees. When employees testify about information created or received during their employment, they are disclosing the Executive Branch's information. The same thing is true for former employees.[3] Yet, in many cases, agency employees will have only limited experience with executive privilege and may not have the necessary legal expertise to determine whether a question implicates a protected privilege. Moreover, the employees' personal interests in avoiding a conflict with the committee may not track the longer-term interests of the Executive Branch. Without an agency representative at the deposition to evaluate which questions implicate executive privilege, an employee may be pressed—wittingly or unwittingly—into revealing protected information such as internal deliberations, attorney-client com-

[3] *See, e.g.*, *Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1 (2007) (Clement, Act'g Att'y Gen.) (concluding that the President may assert executive privilege with respect to testimony by two former White House officials).

munications, or national security information. *See Nixon*, 418 U.S. at 705–06; *Senate Select Comm.*, 498 F.2d at 731. Or the agency employee may be pressed into responding to inquiries that are beyond the scope of Congress's oversight authority. *See Barenblatt*, 360 U.S. at 111–12 ("Congress may only investigate into those areas in which it may potentially legislate or appropriate [and] cannot inquire into matters which are within the exclusive province of one of the other branches of the Government.").

Even if the President has not yet asserted a particular privilege, excluding agency counsel would diminish the President's ability to decide whether a privilege should be asserted. The Executive Branch cannot foresee every question or topic that may arise during a deposition, but if questions seeking privileged information are asked, agency counsel, if present, can ensure that the employee does not impermissibly disclose privileged information. *See* Memorandum for Rudolph W. Giuliani, Associate Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Demand for Deposition of Counsel to the President Fred F. Fielding* at 2 (July 23, 1982) ("A witness before a Congressional committee may be asked—under threat of contempt—a wide range of unanticipated questions about highly sensitive deliberations and thought processes. He therefore may be unable to confine his remarks only to those which do not impair the deliberative process."). The President, through his subordinates, must be able to intervene *before* that information is disclosed, lest the effectiveness of the privilege be diminished. *See* Memorandum for Peter J. Wallison, Counsel to the President, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 2 (Sept. 8, 1986) (agency counsel attending congressional interviews can advise "about the sensitivity of particular information and, if need be, . . . terminate the interview to avoid disclosure of privileged information"). Accordingly, Committee Rule 15(e) unduly interferes with the President's supervision of the disclosure of privileged information by barring agency counsel from the deposition of an agency employee concerning official activities.

These concerns were readily apparent in connection with the subpoenas of Mr. Gore and Mr. Kline. In both instances, the Committee sought information about communications among senior Executive Branch officials regarding official decisions. There was no doubt that the depositions

would implicate matters in which the Executive Branch had constitutionally based confidentiality interests. Indeed, in Mr. Gore's March 7 interview, the Committee repeatedly asked him questions concerning potentially privileged matters—some of which a federal court had already held were protected by privilege in civil discovery. *See New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 548 n.19 (S.D.N.Y. 2019) (summarizing discovery orders). And the Committee then noticed the deposition precisely to compel answers to such questions. *See* April 10 Cummings Letter at 3 ("The Department is well aware of the scope of the deposition, based on the issues raised at Mr. Gore's March 7 interview and the list of 18 [previously unanswered] questions provided by Committee staff."). In Mr. Kline's May 1 interview, the witness was similarly instructed not to answer a number of questions implicating the Executive Branch's confidentiality interests. Prohibiting agency counsel from attending the depositions would have substantially impaired the Executive Branch's ability to continue to protect such privileged information and to make similar confidentiality determinations in response to new questions. The Committee's demands that the witnesses address questions already deemed unanswerable by agency counsel indicated that the exclusion of agency counsel would have been intended, in no small part, to circumvent Executive Branch mechanisms for preserving confidentiality.

B.

Committee Rule 15(e) also interferes with the President's authority to supervise the Executive Branch's interactions with Congress. The Constitution vests "[t]he executive Power" in the President, U.S. Const. art. II, § 1, cl. 1, and requires him to "take Care that the Laws be faithfully executed," *id.* § 3. This power and responsibility grant the President the "constitutional authority to supervise and control the activity of subordinate officials within the executive branch." *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 132 (1993) (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992)); *see also Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 637 (1982) ("*Constitutionality of Reporting Statute*"). As we have previously explained, "the right of the President to protect his control over the Executive Branch [is] based on the fundamental principle that the President's relationship with his subordinates must

be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities." *Authority of HUD's Chief Financial Officer to Submit Final Reports on Violations of Appropriations Laws*, 28 Op. O.L.C. 248, 252 (2004) ("*Authority of HUD's CFO*") (quoting *Constitutionality of Reporting Statute*, 6 Op. O.L.C. at 638–39).

The President's authority to supervise his subordinates in the Executive Branch includes the power to control communications with, and information provided to, Congress on behalf of the Executive Branch. *See Direct Reporting Requirement*, 32 Op. O.L.C. at 31, 39; *Authority of Agency Officials*, 28 Op. O.L.C. at 80–81; *cf. United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467–68 (1951) (upholding "a refusal by a subordinate of the Department of Justice to submit papers to the court in response to its subpoena *duces tecum* on the ground that the subordinate [wa]s prohibited from making such submission by" a valid order of the Attorney General). At a minimum, this responsibility includes the power to know about, and assert authority over, the disclosures his subordinates make to Congress regarding their official duties.

Congressional efforts to prevent the President from supervising the Executive Branch's interactions with Congress interfere with the President's ability to perform his constitutional responsibilities. We have long recognized that statutes, "if construed or enforced to permit Executive Branch officers to communicate directly with Congress without appropriate supervision by the President or his subordinates, would violate the constitutional separation of powers and, specifically, the President's Article II authority to supervise Executive Branch personnel." *Direct Reporting Requirement*, 32 Op. O.L.C. at 31–32, 39 (citing *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 31 (1984); *Authority of HUD's CFO*, 28 Op. O.L.C. at 252–53; *Authority of Agency Officials*, 28 Op. O.L.C. at 80–82). It is on this basis that the Department has consistently resisted congressional attempts to require, by statute, that Executive Branch officials submit information to Congress in the form of reports without prior opportunity for review by their superiors. *See, e.g.*, *id.* at 34–39 ("[S]tatutory reporting requirements cannot constitutionally be applied to interfere with presidential supervision and control of the communications that Executive Branch officers . . . send to Congress.");

Authority of HUD's CFO, 28 Op. O.L.C. at 252–53; *Access to Classified Information*, 20 Op. O.L.C. 402, 403–05 (1996); *Inspector General Legislation*, 1 Op. O.L.C. 16, 18 (1977).

Information sought in congressional depositions is no different. An agency employee testifying about official activities may be asked to disclose confidential information, yet the employee may lack the expertise necessary to protect privileged information on his own. Nor will an employee's private counsel always adequately protect such information. Private counsel may not have the expertise to recognize all situations raising issues of executive privilege, and in any event, recognizing such situations and protecting privileged information is not private counsel's job. Private counsel's obligation is to protect the personal interests of the employee, not the interests of the Executive Branch. An agency representative, by contrast, is charged with protecting the Executive Branch's interests during the deposition—ensuring that the information the employee provides to Congress is accurate, complete, and within the proper scope, and that privileged information is not disclosed. The Committee's rule prohibiting agency counsel from accompanying an agency employee to a deposition would effectively, and unconstitutionally, require that employee to report directly to Congress on behalf of the Executive Branch, without an adequate opportunity for review by an authorized representative of the Executive Branch.

C.

Having concluded that the Committee could not constitutionally bar agency counsel from accompanying Mr. Gore or Mr. Kline to depositions, we further advised that the subpoenas that required them to appear without agency counsel, over the Executive Branch's objections, exceeded the Committee's lawful authority and therefore lacked legal effect. The Committee could not constitutionally compel Mr. Gore or Mr. Kline to appear under such circumstances, and thus the subpoenas could not be enforced by civil or criminal means or through any inherent contempt power of Congress.

This conclusion is consistent with our treatment of referrals to the Department of contempt-of-Congress citations for criminal prosecution under 2 U.S.C. §§ 192 and 194. We have opined that "the criminal contempt of Congress statute does not apply to the President or presidential

subordinates who assert executive privilege." *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995); *see also Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress*, 32 Op. O.L.C. 65, 65–69 (2008) (concluding that the Department cannot take "prosecutorial action, with respect to current or former White House officials who . . . declined to appear to testify, in response to subpoenas from a congressional committee, based on the President's assertion of executive privilege"); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 101–102 (1984) ("*Prosecution for Contempt*") (finding that "the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official" who followed presidential instructions to "assert[] the President's claim of executive privilege"). Nor may Congress "utilize its inherent 'civil' contempt powers to arrest, bring to trial, and punish an executive official who assert[s] a Presidential claim of executive privilege." *Prosecution for Contempt*, 8 Op. O.L.C. at 140 n.42. The fundamental constitutional principles underlying executive privilege would be vitiated if any Executive Branch employee following a direction to invoke the privilege could be prosecuted for doing so.

Similarly, we believe it would be unconstitutional to enforce a subpoena against an agency employee who declined to appear before Congress, at the agency's direction, because the committee would not permit an agency representative to accompany him. As discussed above, having an agency representative present at a deposition of an agency employee may be necessary for the President to exercise his authority to supervise the disclosure of privileged information, as well as to ensure that the testimony provided is accurate, complete, and properly limited in scope. Therefore, agency employees, like Mr. Gore and Mr. Kline, who follow an agency instruction not to appear without the presence of an agency representative are acting lawfully to protect the constitutional interests of the Executive Branch.

III.

In reaching this conclusion, we considered the contrary arguments advanced by the Committee in its April 10 and April 22 letters. The Com-

mittee's principal argument was that prohibiting agency counsel from attending depositions of agency employees poses no constitutional concern because Congress has the authority to "determine the Rules of its Proceedings." U.S. Const. art. I, § 5, cl. 2; *see* April 10 Cummings Letter at 2–3; April 22 Cummings Letter at 3. But congressional rulemaking authority "only empowers Congress to bind itself." *Chadha*, 462 U.S. at 955 n.21 (positing that the Constitution's provision of several powers like procedural rulemaking where each House of Congress can act alone reveals "the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances"). Such rulemaking authority does not grant Congress the power to compel testimony from agency officials under circumstances that interfere with the legitimate prerogatives of the Executive Branch.

Congress's authority to make rules governing its own procedures does not mean that the constitutional authorities of a co-equal branch of government are checked at the door. *See Barenblatt*, 360 U.S. at 112 (noting that when engaging in oversight, Congress "must exercise its powers subject to the limitations placed by the Constitution on governmental action"). To the contrary, Congress "may not by its rules ignore constitutional restraints." *United States v. Ballin*, 144 U.S. 1, 5 (1892). Congress may not, by statute, override the President's constitutional authority to control the disclosure of privileged information and to supervise Executive Branch employees. *See Direct Reporting Requirement*, 32 Op. O.L.C. at 43–44; *Whistleblower Protections*, 22 Op. O.L.C. at 100. It necessarily follows that a committee may not accomplish the same result by adopting a rule governing its own proceedings.

The Committee also justified Committee Rule 15(e) on the ground that it has been in place for a decade. *See* April 10 Cummings Letter at 3; April 22 Cummings Letter at 3. But congressional committee use of depositions is a relatively recent innovation, and historically such "[d]epositions have been used in a relatively small number of major congressional investigations." *Staff Depositions* at 1. Moreover, committees proposing the use of depositions have previously faced objections that they may improperly "circumvent the traditional committee process" of hearings and staff interviews and may "compromise the rights of deponents." *Id.* at 2; *see supra* pp. 133–34. Accordingly, the Committee's

limited previous use of depositions from which agency counsel were excluded does not reflect a "long settled and established practice," much less one that has been met by acquiescence from the Executive Branch. *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (internal quotation marks and brackets omitted).

In addition, the Committee claimed that Rule 15(e) serves the purpose of "ensur[ing] that the Committee is able to depose witnesses in furtherance of its investigations without having in the room representatives of the agency under investigation." April 10 Cummings Letter at 2; April 22 Cummings Letter at 3. But that assertion does no more than restate the rule's effect, without advancing any legitimate rationale for excluding the agency's representatives, much less one sufficient to alter the constitutional calculus. The Committee here did not seek information concerning the private affairs of agency employees or articulate any particularized interest in excluding agency counsel. In fact, agency counsel appeared at the staff interviews of both Mr. Gore and Mr. Kline. In view of the President's clear and well-established interests in protecting privileged information and supervising the Executive Branch's interactions with Congress, the Committee offered no countervailing explanation for why it would be necessary to exclude any agency representative from these two depositions.

Indeed, the Committee has not explained why, as a general matter, the House needs to exclude agency counsel from depositions of agency officials. Agency representatives routinely accompany and support agency employees during congressional hearings and staff interviews. *See Authority to Pay for Private Counsel*, 41 Op. O.L.C. at 6 ("When congressional committees seek to question employees of an Executive Branch agency in the course of a congressional oversight inquiry of the agency, the Executive Branch's longstanding general practice has been for agency attorneys to accompany the witnesses."); *Reimbursing Justice Department Employees for Fees Incurred in Using Private Counsel Representation at Congressional Depositions*, 14 Op. O.L.C. 132, 133 (1990) ("[W]hen Department employees are asked in their official capacities to give oral testimony for a congressional investigation (whether at a hearing, interview or deposition), a Department counsel or other representative will normally accompany the witness."); *Representation of White House Employees*, 4B Op. O.L.C. at 754 ("[L]egitimate governmental interests"

are "[o]rdinarily . . . monitored by agency counsel who accompany executive branch employees called to testify before congressional committees."). There is no basis for believing that this routine practice diminishes the Committee's ability to acquire any information it may legitimately seek.[4]

In defending the exclusion of agency counsel, the Committee pointed out that the witnesses may bring their private counsel to the depositions. April 10 Cummings Letter at 2; April 22 Cummings Letter at 3. But allowing agency employees to be accompanied by private counsel is no substitute for the presence of agency counsel. In addition to imposing unnecessary burdens on agency employees by requiring the retention of private counsel, the practice does not adequately protect the agency's interests. As explained above, the President must be able to supervise who discloses Executive Branch information and under what conditions. An employee's private counsel, however, represents the interests of the employee, not the agency, and "the attorney owes a fiduciary duty and a duty of confidentiality to the employee, not the agency." *Authority to Pay for Private Counsel*, 41 Op. O.L.C. at 8; *see also Representation of White House Employees*, 4B Op. O.L.C. at 754 ("[A]ny counsel directed to represent governmental interests must be controlled by the Government, and private counsel retained by employees to represent personal interests should not be permitted to assert governmental interests or privileges."). Even if the private counsel may sometimes assist the agency employee in protecting agency information, the Committee cannot require the Executive Branch to rely upon the private counsel to make such judgments. Private counsel is not likely to know as well as agency counsel when a line of questioning, especially an unanticipated one, might intrude upon the Executive Branch's constitutionally protected interests.

[4] In a similar vein, agency employees are routinely represented by agency counsel in connection with depositions in civil litigation and, where appropriate, agency counsel will instruct agency employees not to answer questions that implicate privilege. Further, as the Supreme Court recognized in *Touhy*, 340 U.S. 462, the head of an agency may properly bar subordinate officials from disclosing privileged agency information, and departments have accordingly enacted so-called *Touhy* regulations to ensure that privileged information is appropriately protected by agency officials in civil discovery. *See, e.g.*, 28 C.F.R. §§ 16.21–16.29 (Department of Justice *Touhy* regulations). Just as agency counsel may properly participate in ensuring appropriate disclosures in depositions in civil litigation, agency counsel may properly do so in congressional depositions.

Finally, we concluded that the Committee's proposed accommodation—to make a separate room available for agency counsel at the two depositions—was insufficient to remedy these constitutional concerns. *See* April 10 Cummings Letter at 3; April 22 Cummings Letter at 3. That practice would put the onus on the agency employee and his private counsel to divine whether the agency would have privilege concerns about each question, and then "request a break during the deposition to consult with" agency counsel. April 10 Cummings Letter at 3; *see* April 22 Cummings Letter at 3. Because this practice would leave such judgments entirely up to the employee and his private counsel, as well as depend on the discretion of the Committee's staff to grant the requested break, it would not adequately ensure that the agency could make the necessary decisions to protect privileged information during the course of the deposition. It also would prevent the Executive Branch from ensuring that the testimony provided was accurate, complete, and properly limited in scope.

We recognize that there is at least one circumstance—an appearance before a grand jury—where a witness's attorney must remain in a separate room during questioning. *See* Fed. R. Crim. P. 6(d)(1); *United States v. Mandujano*, 425 U.S. 564, 581 (1976). However, grand juries can hardly provide a model for congressional depositions, because they operate under conditions of extreme secrecy, and there is a long-established practice of excluding *all* attorneys for witnesses before the grand jury. *See, e.g.*, *In re Black*, 47 F.2d 542, 543 (2d Cir. 1931); *Latham v. United States*, 226 F. 420, 422 (5th Cir. 1915). Committee Rule 15(e) not only lacks the historical pedigree of grand-jury proceedings, but the information collected in congressional depositions is not inherently confidential. Indeed, the Committee does not even have a categorical objection to allowing witnesses to be accompanied by counsel. Rather, the rule permits witnesses to be accompanied by counsel of their choice, provided that counsel does not represent the agency as well. This targeted exclusion underscores the separation of powers problems.[5]

[5] Indeed, the federal courts have recognized that "[t]here is a clear difference between Congress's legislative tasks and the responsibility of a grand jury." *Senate Select Comm.*, 498 F.2d at 732; *see also Nixon*, 418 U.S. at 712 n.19 (distinguishing the "constitutional need for relevant evidence in criminal trials," on the one hand, from "the need for relevant evidence in civil litigation" and "congressional demands for information," on the other). Congressional depositions appear more akin to depositions in civil litigation, rather than

IV.

For the foregoing reasons, we concluded that the Committee's prohibition on agency counsel's attendance at depositions impermissibly infringed on the President's constitutional authority to protect information within the scope of executive privilege and to supervise the Executive Branch's communications with Congress. Although the Executive Branch must facilitate legitimate congressional oversight, the constitutionally mandated accommodation process runs both ways. *See Am. Tel. & Tel. Co.*, 567 F.2d at 127, 130–31. Just as the Executive must provide Congress with information necessary to perform its legislative functions, Congress through its oversight processes may not override the Executive Branch's constitutional prerogatives. *See Barenblatt*, 360 U.S. at 112. Here, the constitutional balance requires that agency representatives be permitted to assist agency officials in connection with providing deposition testimony, including on matters that implicate privileged information. Thus, we advised that the subpoenas purporting to compel Mr. Gore and Mr. Kline to appear without agency counsel exceeded the Committee's authority and were without legal effect.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

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grand juries, and in civil litigation it is well established that attorneys "representing the deponent" and attorneys representing "any party to the litigation" have "the right to be present" at a deposition. Jay E. Grenig & Jeffrey S. Kinsler, *Handbook of Federal Civil Discovery and Disclosure* § 5:29 (4th ed. 2018).

Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)

The provisions in 26 U.S.C. § 6103 protecting confidentiality of tax returns prohibited the Department of the Treasury from complying with a request by the Chairman of the House Ways and Means Committee for the President's tax returns. The text of section 6103(f), the statutory exception under which the request was made, does not require the Committee to state any purpose for its request. But Congress could not constitutionally confer upon the Committee the right to compel the Executive Branch to disclose confidential information without a legitimate legislative purpose. Under the facts and circumstances, the Secretary of the Treasury reasonably and correctly concluded that the Committee's asserted interest in reviewing the Internal Revenue Service's audits of presidential returns was pretextual and that its true aim was to make the President's tax returns public, which is not a legitimate legislative purpose.

Because section 6103(a) prohibited the disclosure of the tax returns sought in the Chairman's request, as well as in the corresponding subpoenas, the Department of the Treasury's refusal to provide the information did not violate either 26 U.S.C. § 7214(a)(3) or 2 U.S.C. § 192.

June 13, 2019

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY[*]

The Internal Revenue Code requires that the Department of the Treasury keep tax returns and related information confidential, subject to certain exceptions, and makes the unauthorized disclosure of such information a federal crime. *See* 26 U.S.C. §§ 6103(a), 7213(a). You have asked for our advice about one exception, which provides that the Secretary of the Treasury "shall furnish" tax-return information "[u]pon written

[*] Editor's note: In June 2021, after President Trump had left office, the House Committee on Ways and Means submitted a new request under section 6103(f) for similar tax information of the former President. Our Office concluded in a July 30, 2021, opinion that the Committee's new request was valid. The 2021 opinion applies a "differ[ent]" "mode of analysis" than this earlier opinion, "particularly with respect to the proper standard of review in assessing whether the Committee's asserted reasons for its request are pretextual or genuine." *Ways and Means Committee's Request for the Former President's Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1)*, 45 Op. O.L.C. __, at *18–19 (July 30, 2021). The 2021 opinion further states that this opinion's assessment of the Committee's legislative purpose "failed to give due weight to Congress's status as a co-equal branch of government with legitimate needs for information in order to exercise its constitutional authorities." *Id.* at *19.

request from the chairman of the Committee on Ways and Means of the House of Representatives." *Id.* § 6103(f)(1).

On April 3, 2019, the Chairman of the House Committee on Ways and Means, Representative Richard Neal, requested the last six years of President Trump's individual tax returns, as well as those of eight associated business entities. *See* Letter for Charles P. Rettig, Commissioner, Internal Revenue Service, from Richard E. Neal, Chairman, Committee on Ways and Means, U.S. House of Representatives at 1–2 (Apr. 3, 2019) ("April 3 Neal Letter"). He also requested the audit histories and work papers associated with each return. *Id.* The Chairman's request, however, did not make any mention of his longstanding campaign to acquire and publish the President's confidential tax returns.

During the prior Congress, Chairman Neal, who was then the Committee's Ranking Member, repeatedly urged the Committee to invoke section 6103(f) to make the President's tax returns "available to the public," declaring that "Committee Democrats remain steadfast in [their] pursuit to have [President Trump's] individual tax returns disclosed to the public." H.R. Rep. No. 115-309, at 8 (2017) (dissenting views); H.R. Rep. No. 115-73, at 8 (2017) (dissenting views). Before the midterm elections, Chairman Neal (as well as other members of his party) promised that, if they won a majority in the House, then the Chairman would wield his authority to demand the President's tax returns.[1]

After becoming Chairman, he followed up on this promise by requesting that the Internal Revenue Service ("IRS") disclose the President's tax returns. In lieu of his prior focus on making the returns public, he asserted that the Committee required six years of President Trump's tax returns because it was "considering legislative proposals and conducting oversight related to our Federal tax laws, including, but not limited to, the extent to which the IRS audits and enforces the Federal tax laws against a President." April 3 Neal Letter at 1. To that end, Chairman Neal claimed that "[i]t is necessary for the Committee to determine the scope of any

[1] *See* Richard Rubin, *Trump's Tax Returns in the Spotlight if Democrats Capture the House*, Wall St. J., Oct. 3, 2018, https://www.wsj.com/articles/trumps-tax-returns-in-the-spotlight-if-democrats-capture-the-house-1538575880; *see also, e.g.*, John Wildermuth, *Pelosi: Trump's tax returns are fair game if Democrats win House*, S.F. Chron., Oct. 11, 2018, https://www.sfchronicle.com/politics/article/Pelosi-Trump-s-tax-returns-are-fair-game-if-13297954.php (quoting Minority Leader Pelosi: "Demanding the president's tax returns 'is one of the first things we'd do—that's the easiest thing in the world.'").

such examination and whether it includes a review of underlying business activities required to be reported on the individual income tax return." *Id*. The Chairman did not explain why, if the Committee were sincerely interested in understanding how the IRS audits presidential tax returns, he needed to review President Trump's tax returns for many years before his presidency. Nor did the Chairman request any information concerning the IRS's actual policies or practices governing presidential audits or the audit histories for any President other than President Trump.

In view of these marked discrepancies in the public record, Treasury, quite reasonably, concluded that Chairman Neal had not articulated the real reason for his request. The Chairman's request that Treasury turn over the President's tax returns, for the apparent purpose of making them public, amounted to an unprecedented use of the Committee's authority and raised a serious risk of abuse. As you explained, Treasury was committed to complying with the law, but under the circumstances, it questioned whether the Chairman's request was lawful. Accordingly, you requested this Office's advice about whether Treasury should fulfill the request. *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Brent J. McIntosh, General Counsel, Department of the Treasury at 1 (May 2, 2019).

Given your desire to accommodate the Chairman's deadlines, we agreed to provide our conclusions, with a more detailed opinion to follow. We advised that, although the text of section 6103(f) does not require the Committee to state any purpose for its request, Congress could not constitutionally confer upon itself the right to compel a disclosure by the Executive Branch of confidential information that does not serve a legitimate legislative purpose. *See* Letter for Brent J. McIntosh, General Counsel, Department of the Treasury, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel at 1 (May 6, 2019) ("Engel Letter"). While the Executive Branch should accord due deference and respect to congressional requests, the Executive need not treat the Committee's assertion of the legitimacy of its purpose as unquestionable. *Id.* The President stands at the head of a co-equal branch of government, and he is separately accountable to the people for the faithful performance of his responsibilities. Treasury thus had the responsibility to confirm for itself that the Chairman's request serves a legitimate legislative end. *Id.*

Under the circumstances, we agreed that it was reasonable to conclude that the Committee's asserted interest in the IRS's audit of presidential

returns was pretextual, and that the true aim was to make the President's tax returns public. *Id.* We found strong support for that conclusion in the "manner by which the Committee has conducted its stated investigation, the lack of fit between the requested documents and the proffered reasons, and the many statements by the Chairman and other Members of Congress explaining their purpose for pursuing the tax returns." *Id.* The Supreme Court has made clear that "there is no congressional power to expose for the sake of exposure," *Watkins v. United States*, 354 U.S. 178, 200 (1957), and transmitting information "to inform the public . . . is not a part of the legislative function," *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979). In the absence of a legitimate legislative purpose, the disclosure of the President's tax returns to the Chairman was barred by section 6103(a) and the Constitution. Engel Letter at 1. This opinion explains the basis for those conclusions.

I.

A.

For several decades before 1976, federal tax returns were generally considered "public" records, but they were open to inspection only under regulations or order of the President; while often available to governmental entities, they were nearly always unavailable to the public. *See* 1 Office of Tax Policy, Department of the Treasury, *Report to the Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions* 17–20 (Oct. 2000). By the mid-1970s, Congress had become "increasingly concerned about the disclosure and use of information gathered from and about citizens by [federal] agencies." *Id.* at 20. Government officials had misused tax returns for political purposes, and the absence of genuine confidentiality was thought to impair voluntary compliance with the tax system. *See id.* at 21; *see also* S. Rep. No. 94-938, at 317–18 (1976) (describing questions about "whether the present extent of actual and potential disclosure" presented an "abuse of privacy" that "would seriously impair the effectiveness of our country's very successful voluntary assessment system which is the mainstay of the Federal tax system"); Staff of the Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1976*, JCS-33-76, at 314 (Dec. 29, 1976) ("Apparently, tax information had been obtained by the White

House pertaining to a number of well known individuals for use for non-tax purposes."); 122 Cong. Rec. 24,013 (1976) (statement of Sen. Weicker) (observing that tax returns had become a "generalized governmental asset" and the IRS was acting like a "lending library" to the rest of the government).

In the Tax Reform Act of 1976, Congress established that "[r]eturns and return information shall be confidential, . . . except as authorized by this title." 26 U.S.C. § 6103(a). Returns and return information (collectively, "tax information") are defined broadly.[2] Under this confidentiality rule, government officials with legitimate access to tax information may not disseminate it without additional authorization. A willful unauthorized disclosure is a felony, *see id.* § 7213(a)(1)–(2), and any person who willfully inspects tax information without authorization commits a misdemeanor, *see id*. § 7213A. It is also a felony to willfully solicit tax information, or to willfully "print or publish" it "in any manner not provided by law." *Id.* § 7213(a)(3)–(4). In addition, a taxpayer whose information has been mishandled may seek civil damages against the United States or the private persons responsible in certain circumstances. *Id.* § 7431.

The Secretary and the IRS Commissioner are the "gatekeepers of federal tax information." *Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997); *see* 26 U.S.C. § 7801(a)(1) (providing that the Commissioner performs his duties under the Secretary's supervision); Treas. Order No. 150-10 (Apr. 22, 1982) (delegating general authority to administer the tax laws to the Commissioner). The Secretary may prescribe the manner, time, and place for inspection and disclosure, 26 U.S.C. § 6103(p)(1), and must maintain records of such requests, as well as of the returns inspected or disclosed, *id*. § 6103(p)(3). Congress has further imposed strict confidentiality safeguards on all entities that receive tax information. *Id.* § 6103(p)(4).

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[2] Returns are "any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary . . . , and any amendment or supplement thereto." 26 U.S.C. § 6103(b)(1). Return information includes "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return." *Id*. § 6103(b)(2)(A).

Congress has identified "thirteen tightly drawn categories of exceptions" to the confidentiality of return information. *EPIC v. IRS*, 910 F.3d 1232, 1237 (D.C. Cir. 2018); see 26 U.S.C. § 6103(c)–(o); *see also Congressional Access to Tax Returns Under 26 U.S.C. § 6103(f)*, 1 Op. O.L.C. 85, 90–91 (1977) (noting that section 6103 was "designed to tighten the rules for disclosure" and "to restrict even congressional access to tax information"). Some exceptions are phrased in mandatory terms. *See, e.g.*, 26 U.S.C. § 6103(f)(1), (j)(1) ("the Secretary shall furnish"). Others are permissive. *See, e.g.*, *id.* § 6103(h)(5) ("the Secretary may disclose").

In this matter, Chairman Neal invoked the exception for the congressional tax committees, which provides that, "[u]pon written request" of the Chairman of the House Committee on Ways and Means, the Chairman of the Senate Finance Committee, or the Chairman of the Joint Committee on Taxation, "the Secretary shall furnish such committee with any return or return information specified in such request." *Id.* § 6103(f)(1). If the tax information would identify a particular taxpayer, then it shall be disclosed only "in closed executive session" (i.e., out of public view), absent the taxpayer's consent. *Id.* But the three tax committees may submit the tax information to the full Senate or the full House in public session, resulting in public disclosure. *Id.* § 6103(f)(4)(A). This authority differs from that available to other congressional committees, which when authorized by a House or Senate resolution may inspect tax information in closed executive session, *id.* § 6103(f)(3), and may transmit such information to the full House or Senate only in closed executive session, *id.* § 6103(f)(4)(B), preventing public disclosure.

The tax committees often rely upon section 6103(f)(1) to inspect tax information, but such requests typically seek "statistical data to inform the drafting of tax legislation." Letter for Richard E. Neal, Chairman, Committee on Ways and Means, U.S. House of Representatives, from Steven T. Mnuchin, Secretary of the Treasury at 1 (Apr. 23, 2019) ("April 23 Mnuchin Letter"); *see, e.g.*, Staff of the Joint Committee on Taxation, *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 2018*, JCX-21-19, at 3 (May 14, 2019) (recording "bulk master file data" disclosures to congressional committees). We have identified only one instance in the four decades since the Tax Reform Act of 1976 when a tax committee publicly

disclosed information about specific taxpayers that it had obtained under section 6103(f). In 2014, the Committee investigated allegations of IRS misconduct concerning discrimination against certain conservative organizations in reviewing their tax-exempt status. The Committee obtained tax information about these organizations in connection with its investigation, and some of that information was publicly released when the Committee included it in a criminal referral.[3] There were, however, no indications that the Committee had requested the organizations' tax information for the purpose of publicly disclosing it.

Congressional committees published personally identifiable tax information on three other notable occasions before the 1976 reforms, but in those instances, the Executive Branch released the information voluntarily. First, in 1924, the Joint Committee on Internal Revenue Taxation sought and obtained tax information about alleged participants in the Teapot Dome scandal. *See* S. Res. 185, 68th Cong., 65 Cong. Rec. 3702 (1924). That information was later published in the *Congressional Record*. *See* 69 Cong. Rec. 9842–43 (1928). The disclosure was made pursuant to a Treasury regulation, not section 6103(f)(4). *See Inspection of Returns*, T.D. 3566, 26 Treas. Dec. Int. Rev. 54, 58 ¶ 13 (1924) ("Inspection of any return shall be afforded to any committee . . . by the Secretary of the Treasury upon application duly made by the chairman of such committee, pursuant to a resolution of Congress or either House[.]").[4] Second, in 1970, information about Students for a Democratic Society that had been obtained under a Treasury regulation was released in a report by the Committee on Internal Security.[5] Third, in 1973, President Nixon chose to release "his tax returns for every year from 1968 to 1972" to the Joint Committee on Internal Revenue Taxation. Joseph J. Thorn-

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[3] *See* George K. Yin, *Preventing Congressional Violations of Taxpayer Privacy*, 69 Tax Law. 103, 108–14 (2015); *see also Markup of Referral to the Hon. Eric H. Holder, Jr., Att'y Gen., of Former Internal Revenue Service Exempt Organizations Division Director Lois G. Lerner for Possible Criminal Prosecution for Violations of One or More Criminal Statutes Based on Evidence the Committee Has Uncovered in the Course of the Investigation of IRS Abuses*, H. Comm. on Ways & Means, 113th Cong., at 81 (Apr. 9, 2014) (statement of Rep. Kind) (expressing concern about creating a "very troubling precedent" that the Committee could "start releasing this stuff publicly").

[4] *See also* Yin, *Preventing Congressional Violations of Taxpayer Privacy*, 69 Tax Law. at 121 & n.89.

[5] *See id*. at 136 & n.166.

dike, *JCT Investigation of Nixon's Tax Returns*, Tax Notes, June 13, 2016, at 1527, 1531. The Joint Committee later made public a staff report containing tax information that Nixon had voluntarily disclosed. *Id.* at 1533. Chairman Neal therefore has accurately stated that his request for President Trump's tax information is without any precedent. *See infra* note 17 and accompanying text.

B.

Chairman Neal's April 3 letter represents the culmination of a sustained effort over more than two years to seek the public release of President Trump's tax returns. During the 2016 presidential campaign, then-candidate Trump chose not to publicly release his tax returns. The President's decision became a campaign issue, with his Democratic opponent charging that "[h]e refuses to do what every other presidential candidate in decades has done."[6]

After the 2016 election, the minority Members of the House continued to press for the President's tax returns. On January 12, 2017, a group of 21 Ranking Members of House committees (including Ranking Member Neal) sent a letter to Speaker Paul Ryan requesting help in obtaining the returns.[7] Three weeks later, Representative Bill Pascrell, Jr., requested that the Ways and Means Committee obtain the President's tax returns under section 6103(f)(1) and then vote in closed session "to submit [them] to the House of Representatives—thereby, if successful, making them available to the public."[8] The refrain was picked up by, among others, Minority Leader Nancy Pelosi, who called for the Committee "to demand Trump's tax returns from the Secretary of the Treasury" and to

[6] CNN, *The Situation Room* (television broadcast Aug. 12, 2016), http://www.cnn.com/TRANSCRIPTS/1608/12/sitroom.01.html.

[7] Letter for Paul Ryan, Speaker, U.S. House of Representatives, from Elijah E. Cummings, Ranking Member, Committee on Oversight and Government Reform, U.S. House of Representatives, et al. at 6 (Jan. 12, 2017), https://oversightdemocrats.house.gov/sites/evo-subsites/democrats-oversight.house.gov/files/documents/2017-01-12.Ranking%20Members%20to%20Speaker%20Ryan%20Re.Trump_.pdf.

[8] Letter for Kevin Brady, Chairman, Committee on Ways and Means, U.S. House of Representatives, from Bill Pascrell, Jr., Member, Committee on Ways and Means, U.S. House of Representatives at 2 (Feb. 1, 2017), https://pascrell.house.gov/news/documentsingle.aspx?DocumentID=2195.

"hold a committee vote to make those tax returns public."[9] She emphasized the unique authority of the Ways and Means Committee, explaining that "[t]hey can ask for the president's tax returns, and then by a vote in their committee, they can decide where they should be released to the public[.]"[10]

On March 9, 2017, Representative Pascrell introduced a resolution of inquiry that purported to "direct[]" the Secretary under section 6103(f) to provide the House with ten years of President Trump's tax returns, from 2006 through 2015. *See* H.R. Res. 186, 115th Cong. (as introduced, Mar. 9, 2017). Ranking Member Neal was an original co-sponsor of the resolution, which soon acquired 92 co-sponsors, including every Democrat then on the Ways and Means Committee and 19 of the 25 current majority members.[11] On party lines, the Committee reported the resolution unfavorably on March 30, 2017, characterizing it as an "abuse of authority" and "an invasion of privacy." H.R. Rep. No. 115-73, at 3. The Committee explained that section 6103(f) "does not authorize the House of Representatives to receive confidential tax returns and return information from the Secretary of the Treasury, as H. Res. 186 directs." *Id*. at 2–3. Rather, requests under section 6103(f) must be made pursuant to "our legislative responsibility to oversee the tax code." *Id*. at 3. "[T]he purpose of this resolution," however, "is to single out one individual," and, if the resolution were followed, it "would be the first time the Committee exercised its authority to wade into the confidential tax information of an individual with no tie to any investigation within our jurisdiction." *Id*.

Ranking Member Neal and Representative Pascrell filed dissenting views to express "strong[] oppos[ition]" to the unfavorable report. *Id.* at

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[9] *Transcript of House Democratic Leadership Press Conference at 2017 Issues Conference* (Feb. 8, 2017), https://pelosi.house.gov/news/press-releases/transcript-of-house-democratic-leadership-press-conference-at-2017-issues.

[10] Press Conference, Minority Leader Nancy Pelosi, Reacting to Resignation of National Security Advisor Michael Flynn (Feb. 14, 2017), https://pelosi.house.gov/news/press-releases/transcript-of-pelosi-ranking-democrats-press-conference-reacting-to-resignation.

[11] *Compare* H.R. Res. 186, 115th Cong. at 1–2 (as reported, Mar. 30, 2017) (listing co-sponsors), *with* H.R. Rep. No. 115-73, at 4 (listing Committee Members in 2017), *and* Chairman Richard Neal, Ways & Means Committee, *Committee Members*, https://waysandmeans.house.gov/about/committee-members (last visited June 13, 2019) (listing current Committee Members).

7–8. They complained that the President had "rebuked over 40 years of tradition and refused to release his individual tax returns to the public." *Id*. They reiterated that, "[s]tarting in February [2017], Committee Democrats began pressing Committee Republicans to use the authority under Section 6103 to obtain President Trump's tax returns and make them available to the public." *Id*. at 8. In their view, the Committee should invoke section 6103(f) to acquire the returns, then use section 6103(f)(4)(A) to submit them "to the House," when, "[p]rocedurally, . . . the tax return and return information would become available to the public." *Id.* They expressed their "sincerest hope that President Trump will release his tax returns to the American public as virtually all presidents have done since Richard Nixon." *Id*. And they proclaimed that "Committee Democrats remain steadfast in our pursuit to have [the President's] individual tax returns disclosed to the public." *Id.*

Throughout the rest of the 115th Congress, House Democrats repeatedly attempted to force the public release of the President's tax returns. On April 5, 2017, Minority Leader Pelosi held another press conference about the President's failure to release his tax returns, at which Ranking Member Neal acknowledged: "This is not about the law, this is about custom and practice. It's a settled tradition [that] candidates reach the level of expectation that they're supposed to release their tax forms."[12] Over the next several months, House Members offered at least a half-dozen privileged resolutions to try to force the release of the tax returns.[13] In July 2017, Representative Pascrell introduced another resolution of inquiry, *see* H.R. Res. 479, 115th Cong. (July 27, 2017), which the Committee reported unfavorably in September 2017, *see* H.R. Rep. No. 115-309, at 4. As with the earlier resolution, the Committee concluded that "[d]irecting the Secretary of the Treasury to now break current law by violating the confidentiality of tax return information is profoundly misguided." *Id.* at 3. Ranking Member Neal and Representative Pascrell again filed dis-

[12] *Pelosi Remarks at Press Conference on Demanding a Vote Requiring President Trump to Release Tax Returns* (Apr. 5, 2017) (remarks of Ranking Member Neal), https://pelosi.house.gov/news/press-releases/pelosi-remarks-at-press-conference-on-demanding-a-vote-requiring-president-trump.

[13] *See* April 23 Mnuchin Letter app. B, at 8–33; Rep. Bill Pascrell, *President Trump's Tax Returns*, https://pascrell.house.gov/issues/president-trumps-tax-returns (last visited June 13, 2019).

senting views on behalf of "Committee Democrats" who "remain[ed] steadfast in [their] pursuit to have [the President's] individual tax returns disclosed to the public." *Id.* at 7, 8. During 2018, House Democrats continued to seek the release of the President's tax returns in public statements, letters, and amendments to pending bills.[14]

Shortly before the mid-term elections, Minority Leader Pelosi and Ranking Member Neal promised that they would continue their pursuit of the President's tax returns if their party won a majority in the House. In October 2018, Leader Pelosi stated that "[d]emanding the president's tax returns 'is one of the first things we'd do—that's the easiest thing in the world.'"[15] And Representative Neal said he intended to "get the documents" if he became the Chairman of the Committee.[16] He did, however, express some hesitation about precisely how he would proceed, conceding that "[t]his has never happened before, so you want to be very meticulous."[17] After the Democrats won the majority in the mid-term elections, incoming-Speaker Pelosi predicted that the Ways and Means Committee would pursue the tax returns, but she "cautioned that securing them is 'a little more challenging than you might think.'"[18]

To sum up, throughout 2017 and 2018, Chairman Neal and other Members of Congress made clear their intent to acquire and release the Presi-

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[14] *See* April 23 Mnuchin Letter app. B, at 35–37; Rep. Bill Pascrell, *President Trump's Tax Returns*, https://pascrell.house.gov/issues/president-trumps-tax-returns (last visited June 13, 2019).

[15] John Wildermuth, *Pelosi: Trump's tax returns are fair game if Democrats win House*, S.F. Chron., Oct. 11, 2018, https://www.sfchronicle.com/politics/article/Pelosi-Trump-s-tax-returns-are-fair-game-if-13297954.php.

[16] *See* Richard Rubin, *Trump's Tax Returns in the Spotlight if Democrats Capture the House*, Wall St. J., Oct. 3, 2018, https://www.wsj.com/articles/trumps-tax-returns-in-the-spotlight-if-democrats-capture-the-house-1538575880.

[17] *Id.*; *see also* Lauren Fox, *Leading Democrat on House Ways and Means would ask for Trump's tax returns*, CNN, Oct. 12, 2018, https://www.cnn.com/2018/10/12/politics/house-ways-mean-tax-returns-richard-neal/index.html ("'It is not cut and dry,' Neal said, noting that there was still plenty of discussion ahead for how and when to request the returns officially.").

[18] John Wagner, *Pelosi says she expects a House committee will 'take the first steps' toward obtaining Trump's tax returns*, Wash. Post, Dec. 13, 2018, https://www.washingtonpost.com/powerpost/pelosi-says-she-expects-a-house-committee-will-take-the-first-steps-toward-obtaining-trumps-tax-returns/2018/12/13/fbc02660-feec-11e8-862a-b6a6f3ce8199_story.html.

dent's tax returns. They offered many different justifications for such an action, suggesting that releasing the returns would "honor tradition," show "what the Russians have on Donald Trump," reveal a potential "Chinese connection," inform tax reform legislation, provide the "clearest picture of his financial health," and expose any alleged emoluments received from foreign governments.[19] But oversight of "the extent to which the IRS audits and enforces the Federal tax laws against a President" had never been the focus of their demands. April 3 Neal Letter at 1.

C.

After Representative Neal became Chairman, he confirmed that the Committee would pursue the public release of President Trump's tax returns, because "the public has reasonably come to expect that presidential candidates and aspirants release those documents," but he cautioned that "[w]e need to approach this gingerly and make sure the rhetoric that is used does not become a footnote to the court case."[20] On February 7,

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[19] *See* April 23 Mnuchin Letter app. A, at 3–4; *see also, e.g.*, *id.* app. B, at 2 (quoting Ranking Member Neal: the tax returns would "help protect against violations of the Emoluments Clause of the Constitution and conflicts of interest, including with foreign adversaries such as Russia"); *id.* app. B, at 7 (quoting Rep. Pascrell: "Why won't Republican members of Congress use their authority in the law to provide oversight and make sure the president and his family are not hiding financial ties that could cause conflicts in the decision-making?"); *id.* app. B, at 8, 11 (quoting resolutions introduced by Reps. Pascrell and Eshoo: "disclosure of the President's tax returns could help those investigating Russian influence in the 2016 election"); *id.* app. B, at 15 (quoting Ranking Member Neal and Rep. Pascrell: "Tax returns provide the clearest picture of a president's financial health" and will allow the public "to gain a more complete understanding of how tax reform will benefit President Trump and his vast business empire."); *id.* app. B, at 19 (quoting Leader Pelosi discussing the "Chinese connection" and explaining, "there's concerns about recent actions by the Chinese government, in relation to the Trump Organization"); *id.* app. B, at 21 (quoting Leader Pelosi: "We think [the returns] will show us some connection that will be useful in the investigation of what do the Russians have on Donald Trump politically, personally, financially."); *id.* app. B, at 22 (quoting Rep. Jeffries: "The release of the President's tax returns will help the American people better understand the extent of Trump's financial ties to Putin's Russia."); *id.* app. B, at 31 (quoting Leader Pelosi: "By blatantly refusing to reveal his tax returns, the President fails to fulfill his promise to the American people, honor tradition, and be transparent about his financial history.").

[20] Mark Sullivan, *Powerful Ways and Means chairman Neal to pursue Trump's tax returns*, Telegram & Gazette, Jan. 23, 2019, https://www.telegram.com/news/20190123/

2019, the Subcommittee on Oversight held a hearing to consider "whether a President, vice president, or any candidate for these office[s] should be required by law to make their tax return available to the public." *Legislative Proposals and Tax Law Related to Presidential and Vice-Presidential Tax Returns: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 116th Cong., Serial No. 116-3, at 8 (Feb. 7, 2019) (statement of Subcommittee Chairman Lewis). As one Member explained on television that day, the subcommittee hearing was intended to "lay the foundation for the public purpose to acquire access to these returns."[21]

On April 3, 2019, Chairman Neal announced that the Committee had "completed the necessary groundwork for a request of this magnitude" and that he felt "certain we are within our legitimate legislative, legal, and oversight rights."[22] Two days later, Chairman Neal explained that the Committee had "constructed" a "case" for the tax returns that he hoped "would stand up under the critical scrutiny of the federal courts."[23]

The Chairman explained this "case" in his April 3 letter formally requesting the returns. Invoking 26 U.S.C. § 6103(f), the Chairman requested that, within one week, the IRS produce the President's individual tax returns and those of eight associated business entities for the past six years (tax years 2013 through 2018). April 3 Neal Letter at 1–2. The letter also requested information about the returns' audit histories and all associated "administrative files (workpapers, affidavits, etc.)." *Id.* According to the Chairman, "the Committee is considering legislative proposals and conducting oversight related to our Federal tax laws, including, but not limited to, the extent to which the IRS audits and enforces the Federal tax laws against a President." *Id*. at 1. The Chairman recognized that IRS policy subjects every President's individual income tax returns to a man-

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powerful-ways-and-means-chairman-neal-to-pursue-trumps-tax-returns. Chairman Neal also stated: "We are now in the midst of putting together the case." *Id.*

[21] MSNBC, *All In with Chris Hayes* (transcript of television broadcast Feb. 7, 2019), http://www.msnbc.com/transcripts/all-in/2019-02-07 (statement of Rep. Dan Kildee).

[22] Chairman Richard Neal, Ways & Means Committee, *Neal Statement on Requesting President Trump's Tax Returns* (Apr. 3, 2019).

[23] Sunlen Serfaty et al., CNN, *Republicans Warn Trump Tax Request 'Sets A Dangerous Standard' and Accuse Dems of Weaponizing IRS* (Apr. 5, 2019), https://www.cnn.com/2019/04/04/politics/trump-tax-returns-request-republicans-congress/index.html.

datory audit. *Id.*[24] He said the requested documents were "necessary" for the Committee "to determine the scope of any such examination and whether it includes a review of underlying business activities required to be reported on the individual income tax return." *Id.* The Chairman did not address what the Committee would do with the tax returns upon their receipt. *See id.* at 1–2.

After the Secretary informed Chairman Neal that he would consult with the Department of Justice about the novel request, the Chairman advised that the Executive could not "second guess the motivations of the Committee or its reasonable determinations regarding its need for the requested tax returns and return information." Letter for Charles P. Rettig, Commissioner, Internal Revenue Service, from Richard E. Neal, Chairman, Committee on Ways and Means, U.S. House of Representatives at 2 (Apr. 13, 2019) ("April 13 Neal Letter"). In his view, the Committee was entitled to a presumption of regularity and "concerns about what the Committee may do with the tax returns and return information are baseless." *Id.* He set a new deadline of April 23 to "provide the requested tax returns and return information." *Id.*

On April 23, the Secretary informed the Committee that Treasury was continuing its consultations with the Department of Justice and would decide the request by May 6. *See* April 23 Mnuchin Letter at 1. The Secretary noted that the Chairman's section 6103(f) request was "categorically different" from the "overwhelming majority of [congressional] requests for tax return information," which "seek statistical data to inform the drafting of tax legislation." *Id.* Here, by contrast, the Committee "seeks the returns of a single individual taxpayer for an asserted purpose that is at odds with what you and many others have repeatedly said is the request's intent: to publicly release the President's tax returns." *Id.* The Secretary detailed his concerns about the Chairman's interpretation of section 6103(f) and the apparently pretextual justification for the request. *Id.* at 4–5. In support, the Secretary attached 47 pages of appendices, which chronicled "a long-running, well-documented effort to expose the President's tax returns for the sake of exposure." *Id.* at 3; *see also id.* apps. A & B. As the Secretary summarized:

[24] Under IRS policy since 1977, "[i]ndividual income tax returns for the President and Vice President are subject to mandatory examinations [i.e., audits]." Internal Revenue Manual § 3.28.3.4.3, ¶ 1 (Jan. 1, 2019).

> Because Congress may only conduct investigations to further a legitimate legislative purpose, Congressional investigations ordinarily begin with a legislative purpose, and that purpose defines the scope of the documents that are pertinent to the Committee's investigation. But here, by the Committee's own admission, the Committee's investigation began in the opposite direction. The Committee started with the documents it planned to obtain and release (the President's tax returns), and then it sought—in Chairman Neal's words—to "construct[]" a "case" for seeking the documents that would appear to be in furtherance of a legitimate legislative purpose.
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> The Committee knew that exposure for the sake of exposure would not be a legitimate purpose, and so the Committee could no longer rely upon prior statements to that effect.

Id. app. A, at 4–5 (footnotes omitted). Despite those concerns, the Secretary explained that, "[t]o the extent the Committee wishes to understand, for genuine oversight purposes, how the IRS audits and enforces the Federal tax laws against a President," Treasury stood ready to "provid[e] additional information on the mandatory audit process." *Id*. at 5.

On May 6, Treasury formally denied the Committee's request. *See* Letter for Richard E. Neal, Chairman, Committee on Ways and Means, U.S. House of Representatives, from Steven T. Mnuchin, Secretary of the Treasury at 1 (May 6, 2019) ("May 6 Mnuchin Letter"); Letter for Richard E. Neal, Chairman, Committee on Ways and Means, U.S. House of Representatives, from Charles P. Rettig, Commissioner of Internal Revenue (May 6, 2019). The Secretary had concluded that the Committee's proffered reason was pretextual. In reliance on this Office's advice, he further concluded that the Committee's true purpose—the public disclosure of the President's tax returns—fell outside Congress's constitutional power of inquiry, and that section 6103(f) would not authorize disclosure. *Id*. The Secretary renewed his "offer to provide information concerning the Committee's stated interest in how the IRS conducts mandatory examinations of Presidents." *Id*.

Four days later, the Committee served subpoenas on the Secretary and the IRS Commissioner seeking the President's tax returns. *See, e.g.*, Subpoena to the Honorable Steven T. Mnuchin, Secretary, Department of the Treasury, Schedule A (May 10, 2019). In an accompanying letter,

Chairman Neal denied the charge of pretext and reiterated his claim that the Committee was conducting oversight related to "the extent to which the IRS audits and enforces the Federal tax laws against a President." Letter for Charles P. Rettig, Commissioner, Internal Revenue Service, and Steven T. Mnuchin, Secretary of the Treasury, from Richard E. Neal, Chairman, Committee on Ways and Means, U.S. House of Representatives at 2 (May 10, 2019) ("May 10 Neal Letter"). Although the Chairman expressed concern about "the President's ability to influence" the audit process, he rejected the Secretary's offer of an accommodation that would supply information responsive to that concern, stating that information concerning the IRS's audit practices "is not a substitute for the requested tax returns." *Id.* at 3.

On May 17, the Secretary and the IRS Commissioner declined to produce the records in response to the subpoenas based on the earlier conclusion that the Committee lacked a legitimate legislative purpose. *See* Letter for Richard E. Neal, Chairman, Committee on Ways and Means, U.S. House of Representatives, from Steven T. Mnuchin, Secretary of the Treasury at 1 (May 17, 2019) ("May 17 Mnuchin Letter"); Letter for Richard E. Neal, Chairman, Committee on Ways and Means, U.S. House of Representatives, from Charles P. Rettig, Commissioner of Internal Revenue at 1 (May 17, 2019) ("May 17 Rettig Letter"). The Secretary had previously "offered to work with the Committee to accommodate its stated interest in understanding how the IRS audits and enforces the Federal tax laws against a President by providing the Committee with additional information on the mandatory audit process." May 17 Mnuchin Letter at 1. But the Committee had declined those offers. The Secretary reiterated that this accommodation "would provide information that directly bears upon what the Committee has stated to be its legislative interest in this subject." *Id*. In a separate letter, the IRS Commissioner provided some of that information in order to inform the Committee that its stated concerns about improper influence on the audit process were unfounded. May 17 Rettig Letter at 1–2.[25]

[25] After repeatedly rejecting the Secretary's offered accommodation, Chairman Neal reversed course on May 22 and invited Treasury to provide whatever additional information it chose. *See* E-mail for Office of Legislative Affairs, Department of the Treasury, et al., from Staff Director, Subcommittee on Oversight, Committee on Ways and Means (May 22, 2019) ("It is unclear from the [Department's] letters exactly what type of

II.

The plain language of 26 U.S.C. § 6103(f)(1) does not require a tax committee to provide any purpose in support of its request for tax information.[26] Yet the Committee has repeatedly labored to justify its request for six years of the President's returns.[27] The Committee's perceived need to articulate such a justification reflects the fact that the Constitution limits the power that Congress may confer upon its agents. Because each House establishes congressional committees solely to carry out its legislative functions, the Committee may request confidential information from the Executive Branch only to further a legitimate legislative purpose.

While the Executive Branch should accord due deference and respect to a committee's request, the Committee's stated purpose in the April 3 letter blinks reality. It is pretextual. No one could reasonably believe that the Committee seeks six years of President Trump's tax returns because

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additional information Treasury and the IRS intend to provide to [the] Committee. If there are documents or other written materials that Treasury and the IRS would like to provide, please feel free to send those documents to me. If the intent is to provide a briefing, Committee staff is available to meet this week in our offices."). On June 10, senior IRS officials provided the Committee's staff with a three-hour briefing on the presidential audit process, and Treasury offered to continue to address the Committee's stated interest if it had further questions about the audit process. *See* Letter for Richard E. Neal, Chairman, Committee on Ways and Means, U.S. House of Representatives, from Frederick W. Vaughan, Deputy Assistant Secretary, Office of Legislative Affairs, Department of the Treasury (June 10, 2019).

[26] By contrast, other exceptions under section 6103 do expressly require a showing of purpose. *See, e.g.*, 26 U.S.C. § 6103(d)(1) (permitting disclosure to state tax officials "for the purpose of, and only to the extent necessary in, the administration of [state tax] laws"), (j)(1) (permitting disclosure to certain officials in the Department of Commerce "for the purpose of, but only to the extent necessary in, the structuring of censuses and national economic accounts and conducting related statistical activities authorized by law"), (k)(5) (permitting disclosure to state agencies regulating tax return preparers "only for purposes of the licensing, registration, or regulation of tax return preparers").

[27] *See* April 3 Neal Letter at 1 (stating that the Committee's request was "necessary . . . to determine the scope of any [mandatory presidential audit] examination and whether it includes a review of underlying business activities required to be reported on the individual income tax return"); April 13 Neal Letter at 1 (stating, in response to the Secretary's suggestion that the Committee lacked a legitimate legislative purpose, that the "request is in furtherance of consideration . . . of legislative proposals and oversight related to our Federal tax laws"); May 10 Neal Letter at 1 (subheading: "The Committee Has a Legitimate Legislative Purpose").

of a newly discovered interest in legislating on the presidential-audit process. The Committee's request reflects the next assay in a longstanding political battle over the President's tax returns. Consistent with their long-held views, Chairman Neal and other majority members have invoked the Committee's authority to obtain and publish these returns. Recognizing that the Committee may not pursue exposure for exposure's sake, however, the Committee has devised an alternative reason for the request.

The Committee's request presents a stark legal question. When faced with a congressional request for confidential taxpayer information, must the Secretary close his eyes and blindly accept a pretextual justification for that request? Or must the Secretary implement the statute in a manner faithful to constitutional limitations? We believe that the Executive's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, permits only one answer. Where, as here, there is reason to doubt the Committee's asserted legislative purpose, Treasury may examine the objective fit between that purpose and the information sought, as well as any other evidence that may bear upon the Committee's true objective. In doing so, Treasury acts as part of a politically accountable branch with a constitutional duty to resist legislative intrusions upon executive power and therefore does not act under the same institutional constraints as the Judiciary. Here, because the Committee lacked a legitimate legislative purpose, its request did not qualify for the statutory exception to taxpayer confidentiality, and the law required Treasury to deny that request.

A.

Congress granted the Ways and Means Committee the authority to obtain confidential tax information under section 6103(f). It is axiomatic, however, that "Congress cannot grant to an officer under its control what it does not possess." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). The Committee's authority under section 6103(f) therefore may not exceed the constitutional limitations on congressional power, which require that any committee investigation must serve a legitimate legislative purpose.

The Constitution vests certain "legislative Powers" in Congress. U.S. Const. art. I, § 1. Those legislative powers do not expressly include the "power to investigate," but such a power is "inherent in the power to

make laws." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 (1975); *see also McGrain v. Daugherty*, 273 U.S. 135, 161 (1927) ("In actual legislative practice, power to secure needed information . . . has long been treated as an attribute of the power to legislate."). Thus, "Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws." *Scope of Congressional Oversight and Investigative Power with Respect to the Executive Branch*, 9 Op. O.L.C. 60, 60 (1985); *see also Quinn v. United States*, 349 U.S. 155, 160 (1955) (the investigative power is "co-extensive with the power to legislate"). Congress's investigative authority also "comprehends probes into departments of the Federal Government to expose corruption, inefficiency, or waste." *Watkins v. United States*, 354 U.S. 178, 187 (1957). But this "power to investigate must not be confused with any of the powers of law enforcement." *Quinn*, 349 U.S. at 161.

The Supreme Court further has made clear that, "broad as is this power of inquiry, it is not unlimited," because any congressional inquiry "must be related to, and in furtherance of, a legitimate task of the Congress." *Watkins*, 354 U.S. at 187; *see Eastland*, 421 U.S. at 504 n.15 (the "boundaries" of Congress's power to investigate "are defined by its source"); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *see also* Alissa M. Dolan et al., Cong. Research Serv., RL30240, *Congressional Oversight Manual* 25 (Dec. 19, 2014) ("A committee's inquiry must have a legislative purpose or be conducted pursuant to some other constitutional power of Congress[.]"). As relevant here, the Court has articulated one significant constraint on Congress's investigative powers. "[T]here is no congressional power to expose for the sake of exposure." *Watkins*, 354 U.S. at 200. In other words, "there is simply 'no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress.'" *Doe v. McMillan*, 412 U.S. 306, 330 (1973) (quoting *Watkins*, 354 U.S. at 187); *see also, e.g.*, *Quinn*, 349 U.S. at 161 ("[T]he power to investigate . . . cannot be used to inquire into private affairs unrelated to a legislative purpose."); *McGrain*, 273 U.S. at 173 ("[N]either house is invested with 'general' power to inquire into private affairs and compel disclosure[.]"); *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1881) (neither the House nor the Senate "possesses the general power of making inquiry into the private affairs of the citizen").

Although Congress's investigative authority is sometimes described as including a so-called "informing function," that function is merely "the power of the Congress to inform *itself* " of the facts needed to carry out legislative affairs. *Watkins*, 354 U.S. at 216 (emphasis added). The informing function does not grant Congress an independent authority to obtain and publicize confidential information. As the Court has made clear, "[v]aluable and desirable as it may be in broad terms, the transmittal of such information . . . in order to inform the public . . . is not a part of the legislative function." *Hutchinson v. Proxmire*, 443 U.S. 111, 133 (1979); *see Miller v. Transamerican Press, Inc*., 709 F.2d 524, 531 (9th Cir. 1983) ("The 'informing function' of Congress is that of informing itself about subjects susceptible to legislation, not that of informing the public."); *McSurely v. McClellan*, 553 F.2d 1277, 1285–86 (D.C. Cir. 1976) (en banc) ("disseminat[ing] to the public beyond 'the legitimate legislative needs of Congress'" is not encompassed within Congress's "legislative activity"). The Court has therefore explained that "neither the investigatory nor, indeed, the informing function of Congress authorizes any 'congressional power to expose for the sake of exposure.'" *McMillan*, 412 U.S. at 330 (quoting *Watkins*, 354 U.S. at 200). And this Department has issued an opinion making the same point, observing that "Congress's legislative function does not imply a freestanding authority to gather information for the sole purpose of informing 'the American people.'" *Assertion of Executive Privilege Over Deliberative Materials Generated in Response to Congressional Investigation Into Operation Fast and Furious*, 36 Op. O.L.C. 1, 11 (2012) (Holder, Att'y Gen.).

Because Congress may not authorize its agents to wield powers in excess of its own, section 6103(f) could not confer upon a tax committee a right to obtain confidential information that did not serve a legitimate legislative purpose. Congress could enact legislation that makes tax returns available to the public at large, but it has chosen instead to make them confidential and to prohibit Treasury from releasing them to unauthorized persons. Lacking any role in implementing the laws itself, Congress may confer upon its agents a right to request and receive confidential information only to the extent necessary to serve a legitimate legisla tive end. *See Bowsher*, 478 U.S. at 733–34 ("[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing

new legislation."). Therefore, despite the mandatory language of section 6103(f), we believe that the Constitution requires that the Committee establish a legitimate legislative purpose in support of its request for the President's tax returns.[28]

B.

While implicitly recognizing the need for a legislative purpose, Chairman Neal contends that the Executive may not "question or second guess" the Committee's "reasonable determinations regarding its need for the requested tax returns and return information." April 13 Neal Letter at 2. But the same constitutional limitations that constrain the Committee's investigative authority prevent the Executive from treating the Chairman's word on the matter as unquestionable. Just as Congress may not empower its agents to exceed the boundaries of legitimate legislative power, an assertion from a committee chairman may not prevent the Executive from confirming the legitimacy of an investigative request. Were it otherwise, the Secretary of the Treasury would effectively be delegating his own obligation to faithfully execute the laws to the committee chairman.

Section 6103 charges the Secretary with the "duty of protecting return information from disclosure to others *within the federal government*, and to the public at large." *Tax Analysts v. IRS*, 117 F.3d 607, 613 (D.C. Cir. 1997) (emphasis added). Treasury is the repository of federal tax information, which consists largely of returns "filed with the Secretary," 26 U.S.C. § 6103(b)(1), and other information "received by, recorded by, prepared by, furnished to, or collected by the Secretary," *id.* § 6103(b)(2)(A). The Secretary is also charged with disclosing return information to those authorized to receive it. The exceptions to the general rule of taxpayer confidentiality are themselves phrased as instructions to "[t]he Secretary" (and his delegees). *Id.* § 6103(c)–(o). Thus, the Secretary must decide, in the first instance, whether a request meets the "pre-

[28] The Congressional Research Service apparently agrees with this conclusion. *See* David H. Carpenter et al., Cong. Research Serv., LSB10275, *Congressional Access to the President's Federal Tax Returns* 2 (updated May 7, 2019) (recognizing that, despite the "plain language of Section 6103(f)," requests for tax returns under that provision "must further a 'legislative purpose' and not otherwise breach relevant constitutional rights or privileges").

conditions" for any exception, and, if so, how to exercise his statutory authority. *EPIC v. IRS*, 910 F.3d 1232, 1242 (D.C. Cir. 2018). The statutory scheme would make little sense (and would provide scant guarantee of taxpayer confidentiality) if a requester were the sole arbiter of whether an exception had been satisfied.

This framework remains the same no matter whether the relevant limit on the request flows from the statute or from the Constitution. The need for Treasury to exercise judgment in making those decisions is necessarily at its peak when deferring to the request would effectively surrender the Executive's obligations to a Member of Congress. When separating powers under the Constitution, the Founders' "primary fears were directed toward congressional self-aggrandizement." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 131 (1996); *see also Mistretta v. United States*, 488 U.S. 361, 411 n.35 (1989) (noting the "special danger recognized by the Founders of congressional usurpation of Executive Branch functions"). The tripartite structure of the federal government was intended to act as a "self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam). Thus, Congress and its agents are forbidden from exercising authority beyond the legislative process and "from intervening in the decision making necessary to execute the law." *The Constitutional Separation of Powers*, 20 Op. O.L.C. at 131.

Allowing a congressional committee to dictate when Treasury must keep tax information confidential and when it must disclose such information would impermissibly intrude on executive power by ceding control to the Committee over ensuring that section 6103 is implemented in a manner consistent with the constitutional limitations. *See, e.g.*, *Bowsher*, 478 U.S. at 733–34 (declaring unconstitutional a statute purporting to allow the Comptroller General, a congressional agent, to "command[] the President himself to carry out . . . the directive of the Comptroller General"). In order to comply with the duty to faithfully execute the laws, U.S. Const. art. II, § 3, and to protect the Executive against legislative encroachments, Treasury must have the authority to determine whether a congressional request to disclose confidential tax information under section 6103(f) is within the appropriate scope of Congress's constitutional authority, and in particular, whether the request has been made in furtherance of a legitimate legislative purpose.

This approach to section 6103 is consistent with how the Executive Branch addresses congressional requests for information in connection with congressional oversight. This Office has long advised that "a threshold inquiry that should be made [by the Executive] upon receipt of *any* congressional request for information is whether the request is supported by any legitimate legislative purpose." *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 74 (1986) (emphasis added). As then-Assistant Attorney General William Barr explained, the Executive Branch will assess its "interest in keeping [requested] information confidential" only after "it is established that Congress has a legitimate legislative purpose for its oversight inquiry." *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154 (1989). As a result, "Congress' duty to articulate its need for particular materials—to 'point[] to . . . specific legislative decisions that cannot responsibly be made without access to materials uniquely contained in' the privileged document it has requested"—is a mainstay of the accommodation process. *Id.* at 159 (quoting *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 733 (D.C. Cir. 1974) (en banc)); *see also Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 31 (1981) (Smith, Att'y Gen.) (describing the Executive Branch's obligation to accommodate "[i]n cases in which the Congress has a legitimate need for information that will help it legislate").

In many circumstances, Treasury will not need to engage in close scrutiny of a congressional committee's request under section 6103(f), because the underlying, legitimate purpose will be self-evident. But the separation of powers dictates that a congressional request cannot require the agency to close its eyes to overwhelming evidence that a congressional committee's stated purpose is a pretext for an illegitimate one. If a committee does not provide any purpose to justify its request, then Treasury may request that the committee provide one. Given the criminal penalties for the unauthorized and willful inspection or disclosure of tax information, *see* 26 U.S.C. §§ 7213, 7213A, Treasury officials are within their rights to assure themselves that any disclosures are appropriately authorized.

That Treasury has the duty to implement section 6103 in a manner consistent with constitutional limitations should hardly generate controversy.

Indeed, this approach is not only consistent with the constitutional separation of powers, but it also furthers the purposes underlying section 6103 itself. Congress reformed the system of taxpayer confidentiality in 1976 precisely to prevent the kinds of politically motivated abuses of authority that Congress feared would compromise the integrity of the federal tax-return system. *See, e.g.*, S. Rep. No. 94-938, at 317. Treasury's review of a congressional committee request, particularly one involving personally identifiable tax information, helps ensure against any breaches of those protections for the personal privacy of taxpayers.

C.

In urging Treasury not to "second guess" the Committee's request for the President's tax returns, Chairman Neal contends that "the Supreme Court has consistently noted that the motivations underlying Congressional action are not to be second guessed, *even by the courts*." April 13 Neal Letter at 2 (emphasis added). That assertion rests upon a misunderstanding of the Court's precedents. The courts have never abdicated their responsibility to review the authority underlying the congressional subpoena. But even where courts have expressed reluctance to probe congressional motivations in political disputes, they have done so for reasons that do not apply to review by the Executive Branch. Simply deferring to Congress's assertions would constitute an abdication of the Executive Branch's own constitutional responsibilities.

The Supreme Court has specifically rejected the proposition that a court may not police the boundaries of congressional inquiries. In *Watkins*, for example, the Supreme Court declined to "assume . . . that every congressional investigation is justified by a public need that overbalances any private rights affected." 354 U.S. at 198. The House Un-American Activities Committee had claimed to be inquiring into Communist infiltration in labor. *Id.* at 212–14. But the Court found otherwise. After "[l]ooking at the entire hearings," it found "strong reason to doubt that the subject revolved about labor matters," noting that the title of the published transcript referred to "Communist Activities" without any reference to labor, and that "six of the nine witnesses had no connection with labor at all." *Id.* at 213. Significantly, the Court rejected the committee's argument that its inquiry must be sustained so long as there *could* have been any legislative purpose to support the committee's inquiry. *Id.* at 204.

Similarly, in *Kilbourn*, although Congress asserted a purpose for its investigation (enforcing the payment of a debt), the Court did not treat that asserted purpose as conclusive. Instead, the Court examined the House resolution and concluded that the committee's purpose was not a valid *legislative* purpose because it was more judicial in nature. 103 U.S. at 194. And in *United States v. Rumely*, 345 U.S. 41 (1953), the Court affirmed the reversal of a conviction for contempt of Congress because the Court refused to read a committee's authority to investigate lobbying activities as extending to an individual who did not directly lobby Congress. *Id.* at 47. And it did so even though the resolution authorizing the inquiry and the Chairman's statement of purpose "ma[de] plain" that the committee sought "to probe the sources of support of lobbyists," including those who sought to influence "directly *or indirectly*, the passage or defeat of any legislation by the Congress," *id.* at 53–54 (Douglas, J., concurring) (emphasis added). The Court refused to be "that blind court . . . that does not see what all others can see and understand" and does not "know that there is wide concern, both in and out of Congress, over some aspects of the exercise of the congressional power of investigation." *Id.* at 44 (internal quotation marks and brackets omitted).

Moreover, when affirming the legitimacy of legislative purposes, courts have sometimes noted that there had not been any suggestion of a potentially improper purpose. In *McGrain*, for instance, the Court inferred from Senate resolutions that an investigation's object was "to obtain information for legislative purposes," but the Court expressly noted that "[i]t is not as if an inadmissible or unlawful object were affirmatively and definitely avowed" in the authorizing resolutions or committee proceedings. 273 U.S. at 177, 180. And in *United States v. American Telephone & Telegraph Co.*, 551 F.2d 384 (D.C. Cir. 1976), the court observed that the parties conceded that a House subcommittee was "inquiring into a suitable area of federal legislation," and expressly noted the absence of any "allegation that Congress is seeking to 'expose for the sake of exposure.'" *Id.* at 393 (quoting *Watkins*, 354 U.S. at 200).

Where courts have declined to engage in searching inquiries about congressional motivation, they have phrased their reluctance in terms of the institutional limits on the Judicial Branch. As the Supreme Court has explained: "In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts

are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951) (footnote omitted). As a result, "*courts* should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province." *Id.* (emphasis added); *see also, e.g.*, *Watkins*, 354 U.S. at 200 ("Such is not *our* function.") (emphasis added); *Barenblatt*, 360 U.S. at 132 ("So long as Congress acts in pursuance of its constitutional power, *the Judiciary* lacks authority to intervene on the basis of the motives which spurred the exercise of that power." (emphasis added)); *Eastland*, 421 U.S. at 509 ("The wisdom of congressional approach or methodology is not open to *judicial* veto.") (emphasis added).[29]

The Court's decisions in this area rest upon institutional constraints on the Judiciary that militate in favor of deference to the decisions of the political branches of government. Absent a threat to an identified constitutional right, "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018) ("Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny."); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 673 (1892) (deeming "forbidden by the respect due to a coördinate branch of the government" "[j]udicial action" requiring a belief in a "deliberate conspiracy" by the

[29] A district court recently applied the same judicial presumption in declining to block the enforcement of a different House committee's subpoena to Mazars USA LLP, an accounting firm, for financial records relating to President Trump and associated business entities. *See Trump v. Comm. on Oversight & Reform of the U.S. House of Representatives*, 380 F. Supp. 3d 76 (D.D.C. 2019), *appeal docketed*, No. 19-5142 (D.C. Cir. May 21, 2019). The district court recognized that Congress's investigative powers have limits, and that there is no congressional authority to expose for the sake of exposure. *Id.* at 91. Yet the district court reasoned that "[w]hen a court is asked to decide whether Congress has used its investigative power improperly, its analysis must be highly deferential to the legislative branch." *Id.* Whether or not the district court correctly applied this presumption in a case involving a congressional subpoena to a private party, its posture of deference does not bear upon our conclusion that Treasury, as part of a co-equal political branch, has an independent duty to determine accurately whether the Committee's section 6103(f) request furthers a legitimate legislative purpose.

Senate and House of Representatives "to defeat an expression of the popular will").

Separated from the democratic process, the federal courts are not well equipped to second-guess the action of the political branches by close scrutiny of their motivations. This is why the Supreme Court has recognized that, so long as Congress "acts in pursuance of its constitutional power, *the Judiciary* lacks authority to intervene on the basis of the motives which spurred the exercise of that power." *Barenblatt*, 360 U.S. at 132 (emphasis added). "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Beach Communications*, 508 U.S. at 314 (internal quotation marks and citation omitted).

These same limitations do not apply to the Executive Branch, which operates as a politically accountable check on the Legislative Branch. The Founders separated the President from the Congress, giving him "a separate political constituency, to which he alone was responsible," and "the means to resist legislative encroachment" upon his duty to execute the laws. *Freytag v. Comm'r*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring in part and concurring in the judgment); *see also The Constitutional Separation of Powers*, 20 Op. O.L.C. at 128 (explaining that the Executive's "independent constitutional obligation to interpret and apply the Constitution" is "of particular importance in the area of separation of powers, where the issues often do not give rise to cases or controversies that can be resolved by the courts . . . due in part to the limits of jurisdiction and justiciability"). The head of the Executive Branch, who is elected separately from Congress, ultimately must answer to the people for the manner in which he exercises his authority. The separation of powers would be dramatically impaired were the Executive required to implement the laws by accepting the legitimacy of any reason proffered by Congress, even in the face of clear evidence to the contrary. In order to prevent the "special danger . . . of congressional usurpation of Executive Branch functions," *Mistretta*, 488 U.S. at 411 n.35, we believe that Treasury must determine, for itself, whether the Committee's stated reason reflects its true one or is merely a pretext.

III.

Applying the foregoing legal framework, we concluded that the Secretary reasonably and correctly found that the Committee lacked a legitimate purpose for seeking six years of the President's tax information. The Committee's asserted purpose—to consider legislation regarding the IRS's practices in auditing presidential tax filings—was implausible. The objective mismatch between the Committee's stated purpose, on the one hand, and the particular information that the Committee demanded, on the other, provided strong evidence of pretext. In addition, the nature of the request, the long series of events that preceded it, and Chairman Neal's pointed failure to renounce his oft-proclaimed purpose of publicly releasing the President's tax returns all confirm that the Committee's purpose was the constitutionally impermissible one of forcing the public disclosure of the President's tax returns.

A.

According to Chairman Neal, the Committee requested President Trump's tax information to "consider[] legislative proposals and conduct[] oversight related to our Federal laws, including, but not limited to, the extent to which the IRS audits and enforces the Federal tax laws against a President." April 3 Neal Letter at 1. To achieve that purpose, he reasoned, "[i]t is necessary for the Committee to determine the scope of any such examination and whether it includes a review of underlying business activities required to be reported on the individual income tax return." *Id*. The Committee therefore claimed to be interested in the IRS's conduct of audit policy, not the President's underlying business affairs. But the Committee had requested the individual returns of Donald J. Trump and those of eight associated business entities for the past six years (2013 through 2018); information related to audits of any of those returns; and all administrative files for those returns. *Id*. at 1–2.

Although a review by the Committee of the IRS's performance of its duties would appear, on its face, to be an example of routine oversight, *see Watkins*, 354 U.S. at 187, we agree with the Secretary that the Committee's request does not objectively "fit" this stated purpose. April 23 Mnuchin Letter at 4. First, many of the requested documents are barely relevant to reviewing the IRS's auditing of the President's tax returns.

The tax returns themselves precede any audit and do not include any information about the audit processes. At the same time, as the Secretary repeatedly noted, the Committee had expressed no interest in the actual IRS documents that would provide the best evidence of its policies and procedures relating to presidential audits. If the Committee were sincerely interested in IRS policies and practices, then it surely would have started by requesting that Treasury provide information about those policies. As the Secretary explained, "[a]lthough the IRS has conducted mandatory examinations of Presidents' tax returns since 1976, the Committee does not request additional information about those policies or ask whether those policies and procedures have changed over time." *Id.*[30] Senator Grassley, who as Chairman of the Senate Finance Committee has the same powers as Chairman Neal under section 6103(f), made precisely the same point: "If Democrats are truly interested in finding out the level of scrutiny given to a President's tax returns, why not simply just ask the IRS to describe its audit procedure? That is a very straightforward question[.]" 165 Cong. Rec. S2259 (daily ed. Apr. 4, 2019).

While the Committee requested the "administrative files" accompanying the President's tax returns, which would include audit-related information, Chairman Neal's press release mentioned only the President's tax returns in its title ("Neal Statement on Requesting President Trump's Tax Returns"), mentioned the returns three additional times in its text, and never addressed the other documents. *See supra* note 22. The Committee's lack of interest in the IRS's audit policies and procedures, or in the audits themselves, speaks volumes.

Second, the Committee requested six years of the President's tax returns, but only the last two years correspond to his time in office. Chairman Neal was candid in stating that he would have gone back even further, but he believed such a judgment would be hard to defend in court. According to Chairman Neal, "[t]he six-year decision was reached *because the IRS advises you should retain six years of your tax records*. . . . And we thought if this were to end up in court we didn't want an issue, for example if you were requesting eight years, where it would be thrown

[30] Indeed, it was not until after Treasury had denied both the Committee's request and the follow-on subpoenas that the Committee's staff agreed to receive a briefing from Treasury supplying such information. *See supra* note 25.

out based on a technicality."[31] Although Chairman Neal's concern for a taxpayer's retention of his records would not seem to have any bearing upon a request directed towards the IRS, what is perfectly clear is that his stated rationale had no connection at all with the IRS audit procedures supposedly under investigation. Nor does his reason for choosing six rather than eight years reflect any interest in *presidential* tax returns, as Donald Trump was not President in 2011, any more than he was in 2013 or 2016.

Third, the Committee's exclusive focus on a single taxpayer, President Trump, belies its stated interest in investigating an IRS audit program that has applied to all Presidents and Vice Presidents since 1977. Chairman Neal justified the Committee's exclusive interest in President Trump on the ground that he is "unique," owing to the "volume of his tax returns" and his businesses. May 10 Neal Letter at 2. But it seems doubtful that the Committee, if it genuinely sought to evaluate the effectiveness of IRS's presidential-audit program, would decide at the outset to rely on a sample consisting of only one conceded outlier.

Furthermore, audits take time. By limiting itself to the returns of "the only President for whom the audit process necessarily remains ongoing," April 23 Mnuchin Letter at 4, the Committee simply increased the chances that it would see fewer completely audited returns than it would if it had included, say, those for President Obama and Vice President Biden between 2013 and 2016. Focusing on older presidential and vice presidential returns would also have been more consistent with IRS policy by avoiding potential interference with any current audit activities. *See* Internal Revenue Manual § 11.3.4.4, ¶ 13 (Jan. 1, 2019) (providing that "[r]ecords relating to cases that are under active investigation may be disclosed if, in the opinion of the appropriate functional head, no serious adverse effect on the administration of the tax laws will result from disclosure of the open case records"). By choosing an unrepresentative sample of presidential and vice presidential returns, the Committee made it even less likely that the Committee could learn anything bearing upon legislative changes to the IRS's program. Nor, with information about

[31] Erica Werner, Damian Paletta, and Jeff Stein, *White House maneuvers to block release of Trump's tax returns*, Wash. Post, Apr. 4, 2019, https://www.washingtonpost.com/business/economy/white-house-maneuvers-to-block-release-of-trumps-tax-returns/2019/04/04/047b19e0-56f4-11e9-8ef3-fbd41a2ce4d5_story.html (emphasis added).

only one person and his businesses, would the Committee even begin to be able to assess whether the IRS's policies and procedures are being applied in an evenhanded manner in the presidential-audit program.

Thus, an objective assessment of the request confirms the Secretary's observation that "the terms of the Committee's request" did not "fit the Committee's asserted purpose" of investigating "the extent to which the IRS audits and enforces the Federal tax laws against a President." April 23 Mnuchin Letter at 4.

B.

At the same time, the Committee's request appeared to be "perfectly tailored" to accomplish the Chairman's longstanding and avowed goal, namely "to obtain and expose the President's tax returns." April 23 Mnuchin Letter at 4. As explained above, Chairman Neal and other Members have engaged in a prolonged campaign to force public disclosure, repeatedly urging the Committee to invoke section 6301(f) to serve that cause. They pledged to "remain steadfast in [their] pursuit of" public disclosure of the returns. H.R. Rep. No. 115-309, at 8 (dissenting views); H.R. Rep. No. 115-73, at 8 (dissenting views). They made the promised disclosure a recurring issue and, after the election, pledged to accomplish that goal.

During these political debates, Chairman Neal and his political allies asserted many reasons for reviewing the President's tax returns, *see supra* note 19 and accompanying text, yet many of them would fall outside the jurisdiction of the Ways and Means Committee, which is the only House committee that could release the returns to the public. By contrast, the Ways and Means Committee does have jurisdiction to review IRS audit practices. On April 5, Chairman Neal candidly acknowledged that the Committee had sought to "construct[]" a "case" for acquiring the returns that would "stand up under the critical scrutiny of the federal courts." *See supra* note 23. That is transparently the reason why the Committee now claims an interest in presidential-audit practices.

In his correspondence with Treasury, Chairman Neal asserted that any "concerns about what the Committee may do with the tax returns . . . are baseless." April 13 Neal Letter at 2. But his letter did not deny the Committee's plan. Chairman Neal said only that Treasury "must assume that

the Committee Members . . . will act properly in the conduct of their official duties." *Id.* He neither made any promises against publicly releasing the tax returns nor renounced his previously "steadfast" "pursuit" of their public release. We do not disagree that a committee may make "a valid legislative inquiry" even though there is "no predictable end result" as to where the investigation would lead. *Id.* (quoting *Eastland*, 421 U.S. at 509). But congressional investigations must start with a legitimate subject of inquiry. By contrast, here, as the Secretary recognized, the Committee began precisely "in the opposite direction" by deciding the documents it sought to obtain and seeking, "in Chairman Neal's words—to 'construct[]' a 'case' for seeking the documents." April 23 Mnuchin Letter app. A, at 4. There is one and only one "predictable end result" of the Committee's inquiry: the public exposure of the President's tax returns.

Under the circumstances, we do not believe that Treasury was required to "blind" itself to the "wide concern, both in and out of Congress," about the nature of the Committee's request. *Rumely*, 345 U.S. at 44 (internal quotation marks omitted); *see also* 165 Cong. Rec. S2260 (daily ed. Apr. 4, 2019) (statement of Sen. Grassley) (concluding that the April 3 request was "very, very short" of "hav[ing] a legitimate legislative purpose"); Letter for Richard E. Neal, Chairman, Committee on Ways and Means, U.S. House of Representatives, from Kevin Brady, Ranking Member, Committee on Ways and Means, U.S. House of Representatives (May 10, 2019) ("[I]t has become obvious that your supposed legislative purpose is just a pretext, and your request is merely a means to access and make public the tax returns of a single individual for purely political purposes. This is not a legitimate legislative purpose[.]") (footnote omitted). The openly partisan nature of this dispute would understandably make the courts wary of interceding.[32] But Treasury had no such choice. It could

[32] *Cf. Raines v. Byrd*, 521 U.S. 811, 833 (1997) (Souter, J., concurring in judgment) (noting that judicial intervention in disputes between the political branches "risk[s] damaging the public confidence that is vital to the functioning of the Judicial Branch . . . by embroiling the federal courts in a power contest nearly at the height of its political tension"); *Goldwater v. Carter*, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring in the judgment) (explaining that case was nonjusticiable because, among other things, "we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum"); *Gravel v. United States*, 408 U.S. 606, 640 (1972)

not abstain or declare the matter nonjusticiable. It was required to faithfully carry out its duties, either by releasing the tax information in response to a legitimate request or by maintaining its confidentiality under section 6103(a). There could be no middle ground.

For all the foregoing reasons, we believe that the Secretary reasonably and correctly concluded that the Committee's stated purpose was pretextual and its actual purpose was simply to provide a means for public disclosure of the President's tax returns. Given that Congress may not pursue public disclosure for its own sake, *see, e.g.*, *Hutchinson*, 443 U.S. at 133; *McMillan*, 412 U.S. at 330; *Watkins*, 354 U.S. at 200, disclosure was not authorized under section 6103(f), and section 6103(a) therefore required Treasury to maintain confidentiality of the requested tax information.

IV.

Because section 6103(a) prohibited the disclosure of the tax returns sought in Chairman Neal's April 3 request, as well as in the corresponding subpoenas, Treasury's refusal to provide the information did not violate either 26 U.S.C. § 7214(a)(3) or 2 U.S.C. § 192.

Under 26 U.S.C. § 7214(a)(3), it is a crime for "[a]ny officer or employee of the United States acting in connection with any revenue law of the United States" to "fail[] to perform any of the duties of his office or employment" "with the intent to defeat the application of any provision" of the Internal Revenue Code. Treasury's denial to the Committee of the requested information did not violate that statute. Far from a *failure* to perform any "duties" in connection with the revenue law, the Secretary and other officials at Treasury faithfully implemented their duties under section 6103(a) in response to a request for a disclosure that would not be authorized under section 6103(f). In addition, given the statute's intent requirement, they did not act with an "intent to defeat the application of" section 6103(f), when they acted in good faith after consulting with you and with this Office.

For similar reasons, Treasury officials did not violate the contempt-of-Congress provision, 2 U.S.C. § 192, by failing to turn over confidential

(Douglas, J., dissenting) ("The federal courts do not sit as an ombudsman refereeing the disputes between the other two branches.").

records in response to a Committee subpoena that lacks a valid legislative purpose. This Office has recognized that the Department of Justice will not prosecute an Executive Branch official under section 192 for refusing to provide information to Congress in order to protect executive prerogatives. *See, e.g.*, *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. 131, 144–45 (2019); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 101–02 (1984); *see also Prosecutorial Discretion Regarding Citations for Contempt of Congress*, 38 Op. O.L.C. 1, 1 (2014) ("[A] U.S. Attorney to whom a contempt of Congress citation is referred retains traditional prosecutorial discretion regardless of whether the contempt citation is related to an assertion of executive privilege.").

The same rationale applies to a determination that federal law does not authorize Treasury to share the President's tax information with the Committee. The Committee's power to conduct investigations is itself limited by the need for the inquiry to be in support of a legitimate legislative purpose. *See, e.g.*, *Watkins*, 354 U.S. at 187. Because the Committee's request lacked a legitimate legislative purpose and therefore exceeded its constitutional power of inquiry, Congress may not use its subpoena power to enforce an unconstitutional demand for information. The subpoenas were effectively null and void. And, given the lack of an applicable statutory exception, compliance with the subpoenas would have been prohibited by section 6103(a). Accordingly, the refusal by the Treasury officials to comply with the subpoenas did not violate 2 U.S.C. § 192.

V.

For these reasons, we advised that the Committee's request for the President's tax information under 26 U.S.C. § 6103(f) should be denied. Congress could not constitutionally confer upon the Committee the right to compel disclosure by the Executive Branch of confidential information that did not serve a legitimate legislative purpose. While the Executive Branch should accord due deference and respect to congressional requests, Treasury was not obliged to accept the Committee's stated purpose without question, and based on all the facts and circumstances, we agreed that the Committee lacked a legitimate legislative purpose for its

request. In the absence of such a legitimate purpose, 26 U.S.C. § 6103(a) barred Treasury from disclosing the President's tax information in response to the Chairman's letter or the subsequent subpoenas.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Testimonial Immunity Before Congress of the Assistant to the President and Senior Counselor to the President

The Assistant to the President and Senior Counselor to the President is absolutely immune from compelled congressional testimony in her capacity as a senior adviser to the President.

July 12, 2019

LETTER OPINION FOR THE COUNSEL TO THE PRESIDENT

On June 26, 2019, the Committee on Oversight and Reform of the House of Representatives issued a subpoena seeking to compel Kellyanne Conway, Assistant to the President and Senior Counselor to the President, to testify on July 15. The Committee knew that the Executive Branch has long maintained that the President's senior advisers may not be compelled to appear before Congress, but the Committee issued the subpoena based upon its disagreement with that position. You have asked us to confirm that testimonial immunity applies here. As explained below, we conclude that Ms. Conway is absolutely immune from compelled congressional testimony in her capacity as a senior adviser to the President.

The Committee seeks Ms. Conway's testimony concerning claims by the Office of Special Counsel ("OSC") that she violated the Hatch Act in connection with media appearances and posts on her Twitter account. OSC has statutory authority to investigate violations of the Hatch Act, which bars federal employees from using their "official authority or influence for the purpose of interfering with or affecting the result of an election." 5 U.S.C. § 7323(a)(1). On May 29, 2019, OSC provided your office with a report concluding that Ms. Conway had "violated the Hatch Act by using her official position to influence the 2018 midterm elections and 2020 presidential election through both media appearances and social media." *Report of Prohibited Political Activity Under the Hatch Act*, OSC File Nos. HA-19-0631, HA-19-3395, at 4 (May 30, 2019) ("OSC Report"). On June 11, you responded by detailing a number of "grave legal, factual, and procedural errors" in the report and requesting that it be withdrawn. *See* Letter for Henry Kerner, Special Counsel, from Pat A. Cipollone, Counsel to the President at 1 (June 11, 2019) ("June 11 Cipollone Letter"). Two days later, OSC formally referred the report to the

President, made the report public, and recommended that Ms. Conway be dismissed. The President did not accept OSC's recommendation.

On June 13, the Committee on Oversight and Reform invited Ms. Conway to testify. You declined that invitation based on the well-settled precedent, "consistently adhered to by administrations of both political parties," "for members of the White House staff to decline invitations to testify before congressional committees." Letter for Elijah E. Cummings, Chairman, Committee on Oversight and Reform, from Pat A. Cipollone, Counsel to the President (June 24, 2019). The Committee responded on June 26 by issuing the subpoena. Representative Elijah Cummings, the Committee's Chairman, characterized as "baseless" the Executive Branch's position that the President's senior advisers are "absolutely immune" from compelled congressional testimony, stating that "Congress has never accepted the claim that White House advisors are absolutely immune." Opening Statement, *Hearing on "Violations of the Hatch Act Under the Trump Administration"* at 2 (June 26, 2019) (internal quotation marks omitted).

This Office recently addressed in detail the testimonial immunity of senior presidential advisers in an opinion concerning the former Counsel to the President. Recognizing that the Executive Branch has invoked this immunity for nearly 50 years, we reaffirmed that "Congress may not constitutionally compel the President's senior advisers to testify about their official duties." *Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. 108, 108 (2019) ("*Immunity of the Former Counsel*"). This testimonial immunity is rooted in the separation of powers and derives from the President's status as the head of a separate, co-equal branch of government. *See id.* at 110–14. Because the President's closest advisers serve as his alter egos, compelling them to testify would undercut the "independence and autonomy" of the presidency, *id.* at 111, and interfere directly with the President's ability to faithfully discharge his responsibilities. Absent immunity, "congressional committees could wield their compulsory power to attempt to supervise the President's actions, or to harass those advisers in an effort to influence their conduct, retaliate for actions the committee disliked, or embarrass and weaken the President for partisan gain." *Immunity of the Director of the Office of Political Strategy and Outreach from Congressional Subpoena*, 38 Op. O.L.C. 5, 8 (2014) ("*Immunity of the Director of the Office*

of Political Strategy"). Congressional questioning of the President's senior advisers would also undermine the independence and candor of Executive Branch deliberations. *See Immunity of the Former Counsel*, 43 Op. O.L.C. at 113–14.

Ms. Conway qualifies as a senior presidential adviser entitled to immunity. Our opinions have recognized that this immunity extends to "those trusted members of the President's inner circle 'who customarily meet with the President on a regular or frequent basis,' and upon whom the President relies directly for candid and sound advice." *Immunity of the Director of the Office of Political Strategy*, 38 Op. O.L.C. at 7 (quoting Memorandum for John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971)). After serving as the President's campaign manager in 2016, Ms. Conway joined the Administration as one of his principal advisers. *See, e.g.*, Michael D. Shear & Maggie Haberman, *Trump Rewards His Campaign Manager With Role of Counselor*, N.Y. Times, Dec. 23, 2016, at A16 (quoting the President-elect describing her as a "close adviser" and "part of my senior team"). Ms. Conway remains among the President's "closest" and "most senior" aides. *See* June 11 Cipollone Letter at 1, 3. We understand that she meets with the President on a daily basis and on a wide range of issues, including communications matters and various areas of domestic policy. She maintains an office in the West Wing, travels frequently with the President, and often speaks on television on his behalf. Ms. Conway participates in sensitive internal deliberations with the President and other top advisers on critical issues. As a member of the President's inner circle, she may not be compelled by a congressional committee to testify about matters related to her official duties. *See Immunity of the Former Counsel*, 43 Op. O.L.C. at 108, 129.

The subject of the subpoenaed testimony plainly concerns Ms. Conway's official duties. The OSC Report claims that her public statements on television and social media amounted to the use of her "official authority or influence" to affect an election within the meaning of the Hatch Act, 5 U.S.C. § 7323(a)(1). *See* OSC Report at 2, 6. The very premise of the report is that Ms. Conway's public statements arose in the course of her official duties. *Id.* at 6 (claiming that she gave the interviews in ques-

tion "in her official capacity," "[c]onsistent with her duties in the Administration"); *id.* at 14 (claiming that "the bulk of the" Twitter posts "were related to her official duties"). Whether or not OSC was correct in believing that Ms. Conway used "official authority or influence" in violation of the Hatch Act, there is no question that the Committee seeks Ms. Conway's testimony in connection with matters related to her White House duties.

Although Chairman Cummings has stated that the Committee wishes to question Ms. Conway about her public statements on television and social media—rather than her confidential communications with the President—that distinction does not bear upon the applicability and purpose of Ms. Conway's immunity. In contrast with the doctrine of executive privilege, testimonial immunity is based upon the role of the White House official, not the confidentiality of the particular communications at issue. *See Immunity of the Former Counsel*, 43 Op. O.L.C. at 111. While the immunity in part serves the confidentiality interests of the President, it more fundamentally protects the independence and autonomy of the office. *See id.* at 111, 125. Therefore, the Committee's interest in questioning Ms. Conway about public, rather than confidential, matters is not material to the applicability of the immunity itself.

Nor does the Committee's stated interest in allegations concerning potential Hatch Act violations affect the applicability of testimonial immunity. Congress frequently claims an interest in investigating allegations of official impropriety, yet the Executive Branch has never suggested such an interest negates testimonial immunity. To the contrary, the White House has repeatedly invoked immunity in such cases. *See, e.g.*, *id.* at 118 (discussing a White House Counsel's refusal to testify about corruption allegations against a cabinet officer); *id.* (discussing a former White House Counsel's refusal to testify about U.S. attorney resignations in 2007). And in 2014, this Office specifically advised that testimonial immunity would apply in response to a subpoena issued by the Committee concerning potential Hatch Act violations. *See Immunity of the Director of the Office of Political Strategy*, 38 Op. O.L.C. at 5, 21. Testimonial immunity would provide scant protection if it gave way whenever a congressional committee attempted to compel testimony based on claims of improper or unlawful activity by those advisers or other Executive Branch officials.

We conclude that Ms. Conway may not be compelled to testify before the Committee on Oversight and Reform about the allegations in OSC's report. The President may lawfully direct her not to appear on July 15, and she may not be penalized for following such a direction. *See Immunity of the Former Counsel*, 43 Op. O.L.C. at 128–29.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Religious Restrictions on Capital Financing for Historically Black Colleges and Universities

The restriction in 20 U.S.C. § 1066c(c) on the Department of Education's authority to guarantee loans for capital improvements at historically black colleges and universities "in which a substantial portion of its functions is subsumed in a religious mission" violates the Free Exercise Clause of the First Amendment.

The remaining restrictions in the statute can, and must, be construed to avoid further conflict with the Free Exercise Clause. We thus read section 1066c(c) and 20 U.S.C. § 1068e(1) to deny loans under the program only for facilities that are predominantly used for devotional religious activity, or for facilities that are part of an HBCU, or part of a department or branch of an HBCU, that offers only programs of instruction devoted to vocational religious education.

August 15, 2019

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
DEPARTMENT OF EDUCATION

Under the Historically Black Colleges and Universities Capital Financing Program, the Department of Education guarantees loans that fund capital improvements at historically black colleges and universities ("HBCUs"). *See* 20 U.S.C. ch. 28, subch. III, pt. D, §§ 1066–1066g ("Part D"). Congress provided, however, that such loans may not be made "for any educational program, activity or service related to sectarian instruction or religious worship or provided by a school or department of divinity or to an institution in which a substantial portion of its functions is subsumed in a religious mission." *Id.* § 1066c(c). Congress separately barred the Department of Education from using appropriations for HBCU programs, including the capital-financing program, for "a school or department of divinity or any religious worship or sectarian activity." *Id.* § 1068e(1).

Your office has asked whether those restrictions are consistent with the Free Exercise Clause of the First Amendment. *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Steven Menashi, Acting General Counsel, Dep't of Education at 1 (Dec. 11, 2017) ("ED Letter").[1] The Supreme Court set forth the framework for

[1] In addition to your office's views on this question, we also considered those of other components of the Department of Justice. *See* Memorandum for the Office of Legal

reviewing such restrictions in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017), and *Locke v. Davey*, 540 U.S. 712 (2004). Those cases establish that the government may not deny generally available funding to a sectarian institution because of its religious character. Religious institutions have the right to participate in such programs on the same terms as secular institutions. At the same time, the government does have general discretion to choose what activities to fund, and that includes the discretion not to fund certain religious uses of funds, such as the training of clergy.

Applying these standards to the restrictions at issue here, we agree that the final portion of section 1066c(c), which denies loans under this program to an institution "in which a substantial portion of its functions is subsumed in a religious mission," discriminates based on the religious character of an institution and does not comply with the Free Exercise Clause. We also agree that the balance of the restrictions can, and must, be construed to avoid further conflict with the Free Exercise Clause. We thus read sections 1066c(c) and 1068e(1) to deny loans under the program only for facilities that are predominantly used for devotional religious activity, or for facilities that are part of an HBCU, or part of a department or branch of an HBCU, that offers only programs of instruction devoted to vocational religious education. *See* 20 U.S.C. § 1003(15). So construed, those restrictions do not deny loan support because of an HBCU's religious character.

I.

The HBCU capital-financing program authorizes the Secretary of Education "to enter into insurance agreements . . . to guarantee the full pay-

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Counsel, from Beth Williams, Assistant Attorney General, Office of Legal Policy, and Jennifer Dickey, Counsel, Office of Legal Policy, *Re: December 11, 2017 Opinion Request from the Department of Education Office of General Counsel* (Jan. 19, 2018) ("OLP Memo"); Memorandum for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from John M. Gore, Acting Assistant Attorney General, Civil Rights Division, *Re: Department of Education opinion request regarding exclusion of religious schools from Historically Black Colleges and Universities Capital Financing Program* (Jan. 24, 2018) ("CRT Memo"); E-mail for Henry C. Whitaker, Office of Legal Counsel, from Brinton Lucas, Civil Division, *Re: HBCU capital financing opinion request* (Jan. 19, 2018 4:59 PM) ("CIV E-mail").

ment of principal and interest on qualified bonds." 20 U.S.C. § 1066b(a). The Secretary designates a "qualified bonding authority" to issue bonds backed by the federal government; the bonding authority then uses the bond proceeds to fund loans to HBCUs for certain capital projects. *Id*. § 1066b(b). The loans are thus made directly by the bonding authority, but the Department of Education guarantees the repayment of the loan. The agreement between the Department of Education and the current bonding authority, Rice Financial Products Company ("Rice Financial"), makes Rice Financial responsible for most aspects of the program's day-to-day administration, including "all aspects of" evaluating proposals, approving construction schematics and schedules, validating cost estimates, disbursing funds, and collecting interest payments. *See* Agreement to Insure as Between the Department of Education of the United States and Rice Securities, LLC, d/b/a Rice Financial Products Company, Designated Bonding Authority at 21 (Aug. 19, 2009) ("Bond Agreement"). Rice Financial is also responsible for ensuring that capital-improvement loans are allocated "among as many" qualifying HBCUs "as possible." *Id.*

An HBCU is defined as "any historically Black college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans," and that meets other accreditation standards. 20 U.S.C. § 1061(2). More than 100 institutions of higher education qualify as HBCUs. E-mail for Henry C. Whitaker, Office of Legal Counsel, from Jed Brinton, Dep't of Education, *Re: HBCU capital financing program* (Jan. 30, 2018 10:35 AM) ("Jan. 30 Brinton E-mail").

In establishing the HBCU capital-financing program in 1992, Congress found that "a significant part of the Federal mission in education has been to attain equal opportunity in higher education for low-income, educationally disadvantaged Americans and African Americans," 20 U.S.C. § 1066(1), and that "the Nation's historically Black colleges and universities . . . have an unparalleled record of fostering the development of African American youth," *id*. § 1066(2). Congress also found that, for a variety of reasons, HBCUs "often lack access to the sources of funding necessary to undertake the necessary capital improvements." *Id*. § 1066(4). "Federal assistance to facilitate low-cost capital," Congress found, "will enable such colleges and universities to continue and expand their educational mission and enhance their significant role in American higher education." *Id*. § 1066(6).

The HBCU capital-financing program funds a broad range of capital projects, including the repair, renovation, or acquisition of a classroom facility, library, laboratory, dormitory, "or other facility customarily used by colleges and universities for instructional or research purposes or for housing students, faculty, and staff." *Id*. § 1066a(5)(A). The program also covers administrative facilities, student centers, equipment, health centers, and more. *Id*. § 1066a(5)(B)–(H). You have informed us that recent, representative projects have included academic buildings, wellness centers, and student unions, and that loans are project-specific rather than institution-specific. E-mail for Henry C. Whitaker, Office of Legal Counsel, from Jed Brinton, Dep't of Education, *Re: HBCU capital financing program* (Jan. 19, 2018 5:28 PM). "[A]bout half of the more than 100 HBCUs have significant religious roots" and several are denominational seminaries. Jan. 30 Brinton E-mail.

As noted, the program is subject to two religious-funding restrictions. First, no loans may be made under Part D "for any educational program, activity or service related to sectarian instruction or religious worship or provided by a school or department of divinity or to an institution in which a substantial portion of its functions is subsumed in a religious mission." 20 U.S.C. § 1066c(c). Second, "[t]he funds appropriated under section 1068h of [title 20] may not be used . . . for a school or department of divinity or any religious worship or sectarian activity." *Id*. § 1068e(1).[2] Rice Financial's Bond Agreement entrusts it with responsibility to ensure that each qualifying institution and capital-improvement loan satisfies these statutory requirements, which are incorporated into the agreement. *See* Bond Agreement at 7, 10, 21.

II.

The Religion Clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting

[2] The restriction in section 1068e(1) applies to several other education programs, including benefits for HBCUs, American Indian-controlled colleges and universities, and other institutions. *See generally* 20 U.S.C. § 1068h. In addition, a separate provision states that "[n]o *grant* may be made under this chapter," which includes Part D, "for any educational program, activity, or service related to sectarian instruction or religious worship." *Id*. § 1062(c)(1) (emphasis added). That provision has no apparent application to the bond insurance program authorized by Part D.

the free exercise thereof." U.S. Const. amend. I. These Clauses generally "require the state to be a neutral in its relations with groups of religious believers and non-believers," and mandate that government power "is no more to be used so as to handicap religions than it is to favor them." *Everson v. Bd. of Educ*., 330 U.S. 1, 18 (1947). That neutrality principle is not absolute. Government officials may publicly acknowledge religion, such as through legislative prayer, consistent with longstanding traditions and practices of this country. *See, e.g.*, *Town of Greece v. Galloway*, 572 U.S. 565, 575–76 (2014). The government may also accommodate religious practice through laws that explicitly refer to, and account for, the exercise of religion. *See, e.g*., *Cutter v. Wilkinson*, 544 U.S. 709, 719–20 (2005). And in some instances, the Clauses may require such an accommodation. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–90 (2012). But a permissible accommodation stands on a very different footing from "[a] law burdening religious practice that is not neutral or not of general application." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Such laws "must undergo the most rigorous of scrutiny" under the Free Exercise Clause. *Id.*

As the Supreme Court recently made clear in *Trinity Lutheran*, the nondiscrimination principle of the Free Exercise Clause is applicable to government benefit programs. The government may not "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Trinity Lutheran*, 582 U.S. at 459 (quoting *Everson*, 330 U.S. at 16 (emphasis in original)); *see Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion) (recognizing that the government may not "discriminat[e] in the distribution of public benefits based upon religious status or sincerity").

In *Trinity Lutheran*, a Missouri program offered grants to organizations for purchasing playground surfaces made from recycled tires. 582 U.S. at 453. Although the parties agreed that the Establishment Clause would not bar churches from participating in the program, Missouri had expressly excluded them. *Id*. at 454. Because the Missouri program "expressly discriminate[d] against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character," the

Court subjected the program to "the most exacting scrutiny." *Id*. at 462. Missouri asserted that this discrimination was justified by its desire to "skat[e] as far as possible from religious establishment concerns," but the Court held that a "policy preference" of "'achieving greater separation of church and State than is already ensured under the Establishment Clause'" was insufficient to justify excluding religious organizations. *Id*. at 466 (quoting *Widmar v. Vincent*, 454 U.S. 263, 276 (1981)).

In reaching that conclusion, *Trinity Lutheran* distinguished *Locke*, which rejected a Free Exercise Clause challenge to a state scholarship program operated by the state of Washington. The program in *Locke* prohibited awarding scholarships to students pursuing a "degree in theology," which the Court assumed to mean a degree that was "'devotional in nature or designed to induce religious faith.'" 540 U.S. at 716 (quoting position taken in both sides' briefs). *Locke* held that Washington could constitutionally choose not to fund devotional education in order to advance the State's "antiestablishment interests" in "not funding the religious training of clergy." *Id.* at 722 & n.5. Such interests could justify treating religious degrees as different from other degrees, even though the Establishment Clause itself would not have barred such funding. *Locke* emphasized that the program did "not require students to choose between their religious beliefs and receiving a government benefit." *Id.* at 720–21. The scholarships remained available to students attending religious schools, so long as they pursued an academic degree other than devotional theology. *Id.* at 724–25. Thus, as the Court later explained in *Trinity Lutheran*, the student in *Locke* "was not denied a scholarship because of who he *was*; he was denied a scholarship because of what he proposed *to do*—use the funds to prepare for the ministry." 582 U.S. at 464 (emphasis in original).

Under the framework set forth in *Trinity Lutheran*, the constitutionality of a religious-funding restriction will turn on whether the restriction is based upon an institution's religious status or whether it is based upon how the federal support would be used. Restrictions based on religious status are presumptively unconstitutional, whereas restrictions that limit government support for religious activities or uses may be permissible under *Locke*. This distinction is broadly consistent with how the Supreme Court has distinguished between Congress's permissible discretion to allocate federal funds and unconstitutional conditions on the use of those

funds. Congress may determine the programs the federal government chooses to fund. *See, e.g.*, *U.S. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 215–16 (2013); *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983). And Congress's "power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use." *Rust v. Sullivan*, 500 U.S. 173, 195 n.4 (1991). At the same time, Congress may not condition funding for a federal program on a basis that infringes a person's constitutionally protected freedoms, including the freedom of speech or the free exercise of religion. *See Alliance for Open Soc'y*, 570 U.S. at 217–18; *Trinity Lutheran*, 582 U.S. at 464–65. A funding condition may infringe on individual constitutional rights when it sweeps beyond "defining the limits of the federally funded program to defining the recipient." *Alliance for Open Soc'y*, 570 U.S. at 218. But even when the government establishes a secular, neutral aid program, the government may retain a legitimate interest in defining the program to exclude certain religious uses.

We apply this framework for evaluating the constitutionality of the religious-funding restrictions at issue in this opinion. We are mindful, however, that this area of law is still being developed. *See, e.g.*, *Espinoza v. Mont. Dep't of Revenue*, 435 P.3d 603 (Mont. 2018) (ruling that the Montana Department of Revenue could not award a tax credit for a donation to an organization that funded scholarships to religious schools, under a Montana constitutional provision that restricted state support of religion more broadly than the federal Establishment Clause), *cert. granted*, 139 S. Ct. 2777 (mem.) (2019) (No. 18-1195); *Morris Cty. Bd. of Chosen Freeholders v. Freedom From Religion Found.*, 139 S. Ct. 909, 911 (2019) (Kavanaugh, J., statement respecting denial of certiorari) (noting that "this Court decided *Trinity Lutheran* only recently, and there is not yet a robust post-*Trinity Lutheran* body of case law in the lower courts" on some important open questions).

III.

The Supreme Court has recognized that the need to comply with the Establishment Clause may justify restrictions that would otherwise amount to impermissible religious discrimination. *See, e.g.*, *Widmar*, 454

U.S. at 271. Consistent with that understanding, both *Trinity Lutheran* and *Locke* addressed whether the religious-funding restrictions in question were required by the Establishment Clause before turning to the Free Exercise Clause. *See Trinity Lutheran*, 582 U.S. at 458 ("The parties agree that the Establishment Clause . . . does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program."); *Locke*, 540 U.S. at 719 ("Under our Establishment Clause precedent, the link between government funds and religious training is broken by the independent and private choice of recipients."); *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 885 n.9 (1995) (Souter, J., dissenting) (describing section 1066c(c) as an effort to comply with the Court's Establishment Clause precedents). Accordingly, we begin our analysis by considering whether the Establishment Clause requires any of the religious-funding restrictions in sections 1066c(c) and 1068e(1).

A.

The Supreme Court has long recognized that the government may extend "general . . . benefits to all its citizens without regard to their religious belief." *Everson*, 330 U.S. at 16. The Establishment Clause does not forbid the government from providing services, such as school busing, on the basis of religion-neutral criteria, even if those services facilitate religious activity. *Id.* at 16–18. "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Id.* at 18.

In the decades since *Everson*, the Court has repeatedly reaffirmed that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (quoting *Rosenberger*, 515 U.S. at 839, and adding emphasis); *see also Mitchell*, 530 U.S. at 809–10 (plurality opinion); *id.* at 838 (O'Connor, J., concurring in the judgment). The "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. at 839. The neutrality principle runs throughout the Court's decisions, and is broadly

consistent with a tradition of federal support for religious institutions that dates from the time of the Founding.[3]

The Supreme Court has thus repeatedly upheld programs that even-handedly allocate benefits to a broad class of groups without regard to religious beliefs or practices. *See Good News Club*, 533 U.S. at 114; *Mitchell*, 530 U.S. at 809–14 (plurality opinion); *id*. at 837 (concurring opinion); *Agostini v. Felton*, 521 U.S. 203, 230–31 (1997); *Rosenberger*, 515 U.S. at 840–43; *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 487–88 (1986); *Mueller v. Allen*, 463 U.S. 388, 398–99 (1983); *Widmar*, 454 U.S. at 273–75; *Bd. of Educ. v. Allen*, 392 U.S. 236, 238, 243–44 (1968); *Everson*, 330 U.S. at 17–18; *Cochran v. La. State Bd. of Educ.*, 281 U.S. 370, 374–75 (1930); *see also Walz v. Tax Comm'n*, 397 U.S. 664, 672–73 (1970). And this Office too has placed great weight on the neutrality of a government aid program in evaluating whether it is consistent with the Establishment Clause. *See 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, 104 (2003) ("*Old North Church*") (concluding that the Department of the Interior could provide grants to renovate a still-active house of worship, as part of a general historic preservation program); *Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy*, 26 Op. O.L.C. 114, 122 (2002) ("*Seattle Hebrew Academy*") (opining that FEMA could provide funds for reconstruction after an earthquake to a Hebrew secondary school, as part of a general disaster relief program).

Apart from the religious-funding restrictions, the HBCU capital-financing program fully complies with that baseline requirement of religious neutrality. The statute employs secular criteria to determine which

[3] From its earliest days, the federal government has, for example, funded religious education for Indians, provided land grants to religious organizations, and offered tax exemptions to religious bodies. *See, e.g.*, *Walz v. Tax Comm'n*, 397 U.S. 664, 677–78 (1970) (citing early statutes); *Rosenberger*, 515 U.S. at 858–63 (Thomas, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38, 100 (1985) (Rehnquist, J., dissenting); Donald L. Drakeman, *Church, State, and Original Intent* 305–14 (2010); David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 12–13 (1997); Robert L. Cord, *Separation of Church and State: Historic Fact and Current Fiction* 25, 61–82 (1982).

projects may receive government support, and those projects may be undertaken by religious and nonreligious HBCUs alike. The only express statutory requirements for the capital-financing program are that the beneficiaries be HBCUs, *see* 20 U.S.C. § 1066a(1), and that the loans be for one of the "capital projects" listed in section 1066a(5), none of which refers to religious practice or the religious character of the institution. Your office has informed us that the Department and the designated bonding authority, Rice Financial, apply certain other criteria designed to measure the financial risk of the loans, but that those criteria, too, are entirely religion-neutral. The credit criteria set forth in Rice Financial's agreement with the Department are based solely on financial risk and make no mention of religion. *See* Bond Agreement at 82–83.

The Establishment Clause permits the government to include religious institutions, along with secular ones, in a generally available aid program that is secular in content. There is nothing inherently religious in character about loans for capital improvement projects; this is not a program in which the government is "dol[ing] out crosses or Torahs to [its] citizens." *Am. Atheists, Inc. v. City of Detroit Downtown Dev. Auth.*, 567 F.3d 278, 292 (6th Cir. 2009). None of the capital projects identified in the statute—which range from sewers to student centers—is necessarily religious. 20 U.S.C. § 1066a(5). The program is little different from "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," which may be provided to religious and secular institutions alike without violating the Establishment Clause. *Old North Church*, 27 Op. O.L.C. at 104 (quoting *Everson*, 330 U.S. at 17–18); *see Seattle Hebrew Academy*, 26 Op. O.L.C. at 123–24. Nor is it of great significance that some fraction of HBCUs may use these benefits to engage in religious education. The Supreme Court "has long recognized that religious schools pursue two goals, religious instruction, and secular education." *Allen*, 392 U.S. at 245. It is entirely consistent with the Establishment Clause for Congress to support the secular educational functions of religious schools. *Id.* at 245–46. Because the HBCU capital-financing program is a secular, neutral aid program, we do not believe that it would violate the Establishment Clause without the religious-funding restrictions, and therefore, those restrictions are not constitutionally required.

B.

Although the religious neutrality of a secular government aid program should be sufficient to ensure compliance with the Establishment Clause, the Supreme Court has not been entirely consistent on that matter. In the 1970s and early 1980s, the Court struck down a number of neutral programs that provided aid to sectarian schools for secular purposes on the ground that such aid could be diverted to religious activities. *See, e.g.*, *Meek v. Pittenger*, 421 U.S. 349 (1975); *Aguilar v. Felton*, 473 U.S. 402 (1985). The Court has since expressly overruled several of those decisions. *See, e.g.*, *Mitchell*, 530 U.S. at 835 (plurality opinion) (overruling *Meek*); *id.* at 837 (O'Connor, J., concurring in the judgment, joined by Breyer, J.) (same); *Agostini*, 521 U.S. at 235 (overruling *Aguilar*). But a majority of the Court has yet to hold that neutrality, standing alone, suffices to allow a government benefit program to comply with the Establishment Clause.

In *Mitchell*, four Justices endorsed the bright-line rule that secular government aid does not violate the Establishment Clause. *See* 530 U.S. at 809–14; *see also Wallace*, 472 U.S. at 98–114 (Rehnquist, J., dissenting). As Justice Thomas explained for the plurality, "[i]f the religious, irreligious, and areligious are all alike eligible for government aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *Mitchell*, 530 U.S. at 809. Justice O'Connor, however, declined to join the plurality; while she agreed with the *Mitchell* plurality's "recognition that neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges," it was, in her view, only "one of several factors" that should be considered when evaluating such challenges. *Id.* at 838–39. In particular, she left open the possibility that a religion-neutral government program could violate the Establishment Clause if, among other things, it permitted "actual diversion of government aid to religious indoctrination." *Id.* at 840, 867; *see also Old North Church*, 27 Op. O.L.C. at 107–13 (examining other factors). Of relevance to our current inquiry, Justice O'Connor suggested that a "statutory prohibition on 'the making of any payment . . . for religious worship or instruction'" would appropriately ensure that funds are not diverted to a religious use. *Mitchell*, 530 U.S. at 849. As the necessary fifth vote supporting the outcome endorsed by the *Mitchell* plurality, Justice O'Connor's concur-

rence in *Mitchell* could be viewed as controlling. *See Marks v. United States*, 430 U.S. 188, 193 (1977). Subsequently, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), Justice O'Connor was in the five-member majority, which held that a school voucher program—one the Court characterized as allowing diversion of government funds to religious activities only as a result of "true private choice," *id*. at 653—did not require any religious-funding restrictions in order to comply with the Establishment Clause. *See id*. at 653–60; *id*. at 663 (O'Connor, J., concurring) (joining the Court's opinion in full but writing separately to highlight that the Court's decision "marks" no "dramatic break from the past"). But the HBCU capital-financing program, under which the Department guarantees loans for individual capital-improvement projects that the Department approves, does not fit neatly into that category.

The ongoing significance of Justice O'Connor's concurrences remains unclear. Even if her view of the Establishment Clause controlled, however, we do not believe that it would require any of the religious-funding restrictions in the HBCU capital-financing program. First, the government aid in the HBCU program only flows to religious ends based upon, and with the mediation of, private choices. *See Zelman*, 536 U.S. at 672 (O'Connor, J., concurring); *Mitchell*, 530 U.S. at 842 (O'Connor, J., concurring in the judgment); *Indirect Aid to Faith-Based Organizations Under the Charitable Choice Provisions of the Community Solutions Act of 2001*, 25 Op. O.L.C. 127, 128 (2001). As with many government programs, no benefits are disbursed unless private institutions apply to receive them and meet the neutral criteria for allocation. An HBCU, which is a private institution, proposes, constructs, and retains control over the capital project in question. Moreover, the initial loan applications are submitted not to the government, but to the designated bonding authority (also a private entity), which must approve each loan. *See* Bond Agreement at 23, 29–30. Thus, in addition to running the day-to-day operations of the program, the bonding authority has an effective veto over each application. The bonding authority, in turn, is obliged to allocate the loans broadly among all HBCUs, regardless of religious affiliation. *See id*. at 21. Although not identical to a classic voucher program, these layers of intervening choice help sever the "link between government funds and religious training." *Locke*, 540 U.S. at 719; *see also Am. Atheists*, 567 F.3d at 295 (noting that, while the private choice of a formal voucher

program "is one way to break the link between government and religion, it is not the only way").

Second, because the loans are being made by a private entity, rather than the government itself, religious-funding restrictions are unnecessary to avoid the "special Establishment Clause dangers" that Justice O'Connor perceived when "the government makes direct money payments to sectarian institutions." *Mitchell*, 530 U.S. at 843 (opinion concurring in the judgment) (quoting *Rosenberger*, 515 U.S. at 842). The Establishment Clause does not require the government, for example, to restrict to secular uses the considerable economic benefits of tax deductions and exemptions that are generally available to religious and nonreligious organizations alike, given that tax deductions and exemptions provide at most "indirect economic benefits" to religious organizations. *Walz*, 397 U.S. at 674; *see Zelman*, 536 U.S. at 665–68 (O'Connor, J., concurring) (discussing tax deductions and tax exemptions, as in *Walz* and *Mueller*). That same principle is reflected in *Rosenberger*, in which the Court did not rely on the presence of restrictions against diversion in rejecting an Establishment Clause challenge to the university's paying a third-party contractor to print a religious student newspaper as part of a program providing "printing services to a broad spectrum of student newspapers." 515 U.S. at 843. The Court characterized this benefit as "incidental to the government's provision of secular services for secular purposes on a religion-neutral basis" and noted that "no public funds flow directly to" the religious newspaper's "coffers." *Id.* at 842, 843–44. Here, likewise, the Department makes no direct monetary payments to any religious institution, but instead guarantees the private financing of HBCU capital projects by insuring bonds issued by a private lender. Because this program does not transfer money directly to religious organizations, it is less likely to require religious-use restrictions on Establishment Clause grounds. *See Steele v. Indus. Dev. Bd. of Metro. Gov't Nashville*, 301 F.3d 401, 413 (6th Cir. 2002) (holding that a similar bond program is "analogous to an indirect financial benefit conferred by a religiously neutral tax or deduction" and thus does not violate the Establishment Clause).[4]

[4] The Solicitor General, in an amicus brief in *Locke*, included the HBCU program among several federal programs that were "distinguishable from the private-choice

Finally, these same attributes of the HBCU program—that a private lender provides the loans, initially reviews and ultimately approves loan applications, and uses neutral and non-religious criteria—also mitigate any public perception that the government is endorsing religion, another concern expressed by Justice O'Connor in her *Mitchell* concurrence, *see* 530 U.S. at 842–43. The program is not a per-capita aid program like the one in *Mitchell*, in which government agencies disbursed funds directly to religious schools based on their enrollment numbers. Consistent with Justice O'Connor's analysis in *Mitchell*, we believe the above factors are such that "[n]o reasonable observer is likely to draw . . . an inference that the State itself is endorsing a religious practice or belief," *id*. at 843 (quoting *Witters*, 474 U.S. at 493), despite the absence of any religious-funding restrictions. Accordingly, even if Justice O'Connor's concern about diversion of funds to religious activities remained valid and controlling, we do not believe that the Establishment Clause would require the religious-funding restrictions in sections 1066c(c) and 1068e(1).

C.

We recognize that *Tilton v. Richardson*, 403 U.S. 672, 683 (1971), and *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 762 (1973), might be read to say that the Establishment Clause requires the religious-funding restrictions in sections 1066c(c) and 1068e(1). In *Tilton*, the Court ruled that a college or university educational facility built with a federal construction grant could not be used for sectarian instruction or religious worship, even twenty years after receipt of the grant. 403 U.S. at 683. And in *Nyquist*, the Court prohibited New York from providing "direct money grants" for the "maintenance and

program" at issue in that case because they involved the provision of "direct financial aid" to organizations. Brief for the United States as Amicus Curiae Supporting Respondent, *Locke v. Davey*, No. 02-1315, 2003 WL 22087613, at *20 n.4 (U.S. 2003). We agree that the HBCU program is distinct from a voucher program, because the decision to guarantee each particular loan in the HBCU program is made by the government (although as noted the designated bonding authority, Rice Financial, also plays an important role in approving each loan). At the same time, the program does not constitute "direct" funding in all respects, because no public funds flow directly to a religious institution.

repair" of facilities at religious schools, as part of a program for all nonpublic elementary and secondary schools. 413 U.S. at 762.

In our *Old North Church* and *Seattle Hebrew Academy* opinions, however, we expressed doubt about whether *Tilton* and *Nyquist* remained good law. We noted that "*Tilton* and *Nyquist* are in considerable tension" with more recent Supreme Court cases recognizing that the government does not violate the Establishment Clause when it provides religious organizations with access to government property—and indeed that the government may in some cases be required by the First Amendment to provide such access. *Old North Church*, 27 Op. O.L.C. at 114 (citing *Good News Club*, 533 U.S. 98; *Widmar*, 454 U.S. 263; *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Lamb's Chapel*, 508 U.S. at 384); *see also Seattle Hebrew Academy*, 26 Op. O.L.C. at 129 (same). That observation rings even truer fifteen years later, as the Supreme Court has continued to develop its First Amendment precedents. *Tilton* and *Nyquist* "essentially sanction discrimination between private institutions that are identically situated but for their religious status—and in that respect are in tension with the Court's free exercise jurisprudence." *Old North Church*, 27 Op. O.L.C. at 115; *see also Am. Atheists, Inc.*, 567 F.3d at 299 (noting that a broad reading of *Tilton* "would bring the decision into tension, if not outright conflict, with later cases"). Under *Trinity Lutheran*, status-based religious discrimination triggers strict constitutional scrutiny. 582 U.S. at 458. If *Tilton* and *Nyquist* were still good law, any general education program that provided aid to educational institutions would risk violating *Trinity Lutheran* if it excluded devotional institutions, but also would risk violating *Tilton* and *Nyquist* if it did not.

Moreover, "many of the legal principles that supported those decisions have been discarded." *Old North Church*, 27 Op. O.L.C. at 116. *Tilton* and *Nyquist* were, for example, largely premised on the notion that aid to a "pervasively sectarian" institution, even when channeled to religious uses through intervening private choice or when used solely for nonreligious functions, "inescapably results in the direct and substantial advancement of religious activity." *Meek*, 421 U.S. at 366. The Supreme Court has since repudiated that doctrine. *See Mitchell*, 530 U.S. at 835–36 (plurality opinion); *id.* at 837 (O'Connor, J., joined by Breyer, J.); *Agostini*, 521 U.S. at 223–26. Indeed, in *Trinity Lutheran*, the Court struck down

the Missouri policy that denied eligibility to churches, the most "pervasively sectarian" of institutions, for grants for playground surfaces, notwithstanding Justice Sotomayor's observation in dissent that this holding contradicted *Tilton* and *Nyquist*. *See Trinity Lutheran*, 582 U.S. at 475 (Sotomayor, J., dissenting) ("The Church's playground surface—like a Sunday School room's walls or the sanctuary's pews—[is] integrated with and integral to its religious mission."). Accordingly, we do not believe that *Tilton* and *Nyquist* justify the conclusion that the Establishment Clause requires the prohibitions in sections 1066c(c) and 1068e(1).

IV.

Because the Establishment Clause does not compel the religious-funding prohibitions in sections 1066c(c) and 1068e(1), it cannot justify the burdens those provisions impose on the free exercise of religion. That is not the end of the matter, however, because *Locke* upheld a limited restriction on the funding of religious activities—based upon the antiestablishment interest in not using taxpayer funds to pay for the training of clergy—even though the restriction was not required by the Establishment Clause. *See* 540 U.S. at 718–19, 721–22; *see also Trinity Lutheran*, 582 U.S. at 458. As we have observed, *see supra* Part II, under *Locke* and *Trinity Lutheran*, the Free Exercise Clause question turns on whether the government has permissibly exercised its discretion to determine the scope of a government program—which may exclude certain religious uses—or whether it has impermissibly excluded otherwise qualified applicants because of their religious character.

The HBCU religious-funding restrictions fall into three broad categories. One denies loans under the program "to an institution in which a substantial portion of its functions is subsumed in a religious mission." 20 U.S.C. § 1066c(c). Two others deny program loans to facilities that are used for certain religious activities: no loans may be "used . . . for . . . any religious worship or sectarian activity," *id.* § 1068e(1), and no loans may be "made . . . for any educational program, activity or service related to sectarian instruction or religious worship," *id.* § 1066c(c). Finally, two restrictions deny program loans to "school[s] or department[s] of divinity," as that phrase is defined in the statute. *Id.* §§ 1003(15), 1066c(c), 1068e(1).

A.

We begin with the provision of the HBCU program that presents the most evident constitutional difficulty: the restriction on providing program loans "to an institution in which a substantial portion of its functions is subsumed in a religious mission." *Id.* § 1066c(c). Although the statute does not define what it means for a substantial portion of an institution's functions to be "subsumed in a religious mission," the phrase appears to derive from *Hunt v. McNair*, 413 U.S. 373 (1973), which observed that under the Court's precedent at the time (since discarded, *see supra* Part III.C), government aid violates the Establishment Clause "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *Id.* at 743; *see also Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 394 n.12 (1985) (quoting and applying same language from *Hunt*). Consistent with the Supreme Court's then-prevailing view, this statutory provision prohibits federal support for any pervasively sectarian institution—i.e., one that is "devoted to the inculcation of religious values and belief," including one that provides "integrated secular and religious education." *Meek*, 421 U.S. at 366.

We agree with your office that this provision unconstitutionally discriminates on the basis of an institution's religious character. ED Letter at 2–3; *accord* CRT Memo at 5; OLP Memo at 2–3; CIV E-mail. Here, as in *Trinity Lutheran*, the final restriction of section 1066c(c) does not merely define a secular government program to exclude religious activities, but instead defines and excludes the recipient based upon its religious identity. The restriction excludes an HBCU from eligibility for the program, simply because the school's functions are bound up in a "religious mission"; it directly targets organizations that are religious in nature. 20 U.S.C. § 1066c(c). That restriction thus sweeps more broadly than the restriction at issue in *Locke*. In *Locke*, the Supreme Court upheld the scholarship restrictions because they did not exclude sectarian institutions and allowed students to use the scholarships at "pervasively religious schools" with mandatory courses in "devotional theology," so long as they offered degrees in subjects that the State had chosen to fund. *Locke*, 540 U.S. at 724–25. The restriction here, however, would deny loans under the program for capital projects that have no direct connection to

the religious activities of an HBCU, simply because of the religious mission of the institution.

The HBCU capital-financing program guarantees loans for a broad range of capital projects, including repair, renovation, or acquisition of a classroom facility, library, laboratory, dormitory, "or other facility customarily used by colleges and universities for instructional or research purposes or for housing students, faculty, and staff." 20 U.S.C. § 1066a(5)(A). The program covers administrative facilities, student centers, equipment, health centers, and more, such as improvements to physical infrastructure, including roads and sewer drainage systems. *Id.* § 1066a(5)(B)–(H). Such projects need not have any inherent religious character, and *Trinity Lutheran* teaches that they do not acquire one merely because a religious institution carries them out. The final restriction of section 1066c(c) therefore "imposes a penalty on the free exercise of religion," *Trinity Lutheran*, 582 U.S. at 462, and requires organizations to "choose between their religious beliefs and receiving a government benefit," *id*. at 464 (quoting *Locke*, 540 U.S. at 720–21).

In short, the final prohibition in section 1066c(c) "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character." *Id.* at 462. Although antiestablishment interests might justify a use-based religious-funding restriction under *Locke*, the Court in *Trinity Lutheran* specifically rejected an interest in "skating as far as possible from religious establishment concerns" as a basis for categorically excluding a religious organization from a generally available funding program. *Id.* at 466. Accordingly, the portion of the statute that denies program loans to "an institution in which a substantial portion of its functions is subsumed in a religious mission" is unconstitutional. 20 U.S.C. § 1066c(c).

B.

We consider next the funding restrictions concerning "religious worship," "sectarian activity," and "sectarian instruction," which are contained, in slightly different form, in section 1066c(c) and section 1068e(1). Section 1066c(c) provides that loans under the HBCU capital-financing program may not be "made . . . for any educational program, activity or service related to sectarian instruction or religious worship." Section 1068e(1) provides that "[t]he funds appropriated under section

1068h," including the funds that guarantee HBCU capital-financing loans, "may not be used . . . for . . . any religious worship or sectarian activity." We agree with your office that these restrictions can and must be construed to avoid unconstitutionality. ED Letter at 2–4.

1.

Section 1068e(1) provides that the Department funds "may not be used . . . for . . . any religious worship or sectarian activity." Congress did not define "religious worship" and "sectarian activity," but we believe the provision is best construed to preclude the funding of projects directly tied to devotional activities. "Sectarian" activities would ordinarily be defined as ones that "support[] a particular religious group and its beliefs," *Black's Law Dictionary* 1557 (10th ed. 2014), or as activities that have "the characteristics of one or more sects [especially] of a religious character," *Webster's Third New International Dictionary* 2052 (2002). And even without the adjective "religious" preceding it, the term "worship" would ordinarily be defined as a "form of religious devotion, ritual, or service showing reverence, esp[ecially] for a divine being." *Black's Law Dictionary* at 1844. The terms "religious worship" and "sectarian activity" do not cover an *institution* merely because it has a religious character or religious affiliation: they cover only *activities* with a devotional religious character.

Under Supreme Court precedent, the government may constitutionally decline to support such activities. In both *Locke*, 540 U.S. at 722 & n.5, and *Trinity Lutheran*, 582 U.S. at 465, the Court noted that, even in providing a broadly secular aid program, the government has a legitimate interest in avoiding using taxpayer funds to support "church leaders," which "lay at the historic core of the Religion Clauses." *Locke* cited historical evidence suggesting that "[m]ost States that sought to avoid an establishment of religion around the time of the founding placed in their constitutions formal prohibitions against using tax funds to support the ministry." 540 U.S. at 723. Such support included funds to "erect or support any place of worship." *Id*. (quoting Pa. Const. art. II (1776), *in* 5 *Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3081, 3082 (1909)). That discussion reflects that the government's interest in avoiding support for religious activities extends to worship, prayer, and devotional religious education.

The prohibition in section 1068e(1) on funding "any religious worship or sectarian activity" therefore fits the mold of *Locke* rather than *Trinity Lutheran*: it restricts financing based on the religious use of the underlying project, rather than the religious character of the recipient. The provision avoids support for projects primarily devoted to religious worship, the training of clergy, and other explicitly devotional activities. But it does not preclude a religious HBCU from receiving loans for general educational activities separate from such projects, even if the educational activities include some religious elements. By supporting an HBCU's educational mission, the restriction "goes a long way toward including religion in its benefits." *Locke*, 540 U.S. at 724. At the same time, it avoids supporting capital-improvement projects that predominantly support worship, prayer, and other devotional religious activities. It is thus a lawful exercise of Congress's discretion to define a federal aid program, rather than a penalty on the free exercise of religion. Congress may permissibly decline to subsidize religious activity, just as Congress may decline to fund other constitutionally protected activities, such as lobbying. *See Regan*, 461 U.S. at 548–49.

Constitutional concerns would arise if the restriction were construed to deny funding for capital-improvement projects for religious institutions more broadly. To avoid these concerns, we must construe the restriction narrowly. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895))). If, for example, section 1068e(1) prohibited a loan to repair an HBCU's roads or sewers, simply because some classrooms are devoted to the training of clergy or some churches line those roads or use those sewers, then that restriction would be tantamount to denying a loan simply because an institution is religious in character. But we do not believe the statute must be read in that manner: a project loan cannot reasonably be described as being "for" religious worship or sectarian activity simply because it may advance an institution's religious or sectarian mission to some degree. A loan, however, may be "for" such purposes if the project is to build or repair a campus chapel, a prayer room, or a classroom devoted to the training of clergy. We think that a loan is "for" such purposes if it would finance a capital-improvement

project for facilities predominantly devoted to religious worship or devotional activity, not those with an insubstantial or incidental connection to those activities.

Restricting funding closely tied to explicitly religious activities is consistent with federal government practice. Although the Establishment Clause does not forbid all such aid, *see, e.g.*, *Old North Church*, 27 Op. O.L.C. at 102–03, Congress has enacted a number of religious-funding restrictions.[5] The President too has directed agencies to permit religious organizations to participate in federally funded social-service programs on the condition that they not "use direct Federal financial assistance . . . to support or engage in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization)." Exec. Order No. 13559, § 1(b) (Nov. 17, 2010), 75 Fed. Reg. 71,319, 71,320 (Nov. 22, 2010), *amending* Exec. Order

[5] *See, e.g.*, Act of June 18, 1896, ch. 398, 29 Stat. 321, 345; 20 U.S.C. § 122 ("No part of the appropriations made by Congress for the Howard University shall be used, directly or indirectly, for the support of the theological department of said university, nor for the support of any sectarian, denominational, or religious instruction therein[.]"); *id*. § 1011k(c) ("[N]o project assisted with funds under subchapter VII . . . shall ever be used for religious worship or a sectarian activity or for a school or department of divinity."); *id*. § 1137(c) ("No institutional payment or allowance under section 1134b(b) or 1135d(a) of this title shall be paid to a school or department of divinity as a result of the award of a fellowship under subpart 1 or 2 of this part, respectively, to an individual who is studying for a religious vocation."); *id*. § 7885 ("Nothing contained in this chapter shall be construed to authorize the making of any payment under this chapter for religious worship or instruction."); 25 U.S.C. § 1803(b) ("Funds provided pursuant to this subchapter shall not be used in connection with religious worship or sectarian instruction."); *id*. § 1813(e) ("No construction assisted with funds under this section shall be used for religious worship or a sectarian activity or for a school or department of divinity."); *id.* § 2502(b)(2) ("Funds provided under any grant made under this chapter may not be used in connection with religious worship or sectarian instruction."); *id*. § 3306(a) ("None of the funds made available under this subchapter may be used for study at any school or department of divinity or for any religious worship or sectarian activity."); 34 U.S.C. § 12161(d)(2)(D) ("Such community-based organization . . . may not use such funds to provide sectarian worship or sectarian instruction."); 42 U.S.C. § 290kk-2 ("No funds provided under a designated program shall be expended for sectarian worship, instruction, or proselytization."); *id*. § 9858k(a) ("No financial assistance provided under this subchapter, pursuant to the choice of a parent under section 9858c(c)(2)(A)(i)(I) of this title or through any other grant or contract under the State plan, shall be expended for any sectarian purpose or activity, including sectarian worship or instruction.").

No. 13279, § 2(g) (Dec. 12, 2002), 67 Fed. Reg. 77,141 (Dec. 16, 2002).[6] The Department has issued regulations consistent with these orders. *See* 34 C.F.R. § 75.52(c)(1) (2018) ("A private organization that engages in explicitly religious activities, such as religious worship, instruction, or proselytization, must offer those activities separately in time or location from any programs or services supported by a grant from the Department"); *id*. § 76.52(c)(1) (same for subgrants from States).

The federal government also has a history of supporting religion and religious practice. As we have observed, *see supra* note 3, the federal government since the time of the Founding has employed chaplains, funded religious education for Indians, and provided land grants to religious organizations and tax exemptions to religious bodies. But the federal government has in many instances excluded explicitly religious activities, including religious instruction, from more general funding programs, and thus has long asserted an interest in avoiding the funding of religious instruction akin to that recognized by the Court in *Locke*. That history reflects that there is "play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause does not prohibit Congress from enacting. *Trinity Lutheran*, 582 U.S. at 458; *Locke*, 540 U.S. at 718.

There is also no indication that the religious-funding restrictions in the HBCU capital-financing program were motivated by religious animus. No matter how narrowly drawn, a religious-funding restriction stemming from "hostility toward religion," *Locke*, 540 U.S. at 721, is unconstitutional. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731–32 (2018). Such animus concerns have been raised with the so-called "Baby Blaine" amendments that began to appear in state constitutions in the 19th century. Those provisions generally prohibited state-sponsored financial support for religious schools and emerged from a climate of anti-Catholic hostility. *See Mitchell*, 530 U.S. at 828 (plurality opinion); *Locke*, 540 U.S. at 723 n.7. But the restrictions at issue here emerged not in the 19th century, but rather in the late 1980s and early 1990s, when Supreme Court precedent could be

[6] When these two orders were amended in certain respects in 2018, the language quoted above was left undisturbed. Exec. Order No. 13831, § 2 (May 3, 2018), 83 Fed. Reg. 20,715, 20,715 (May 8, 2018).

read to forbid a government, even in a religion-neutral funding program, from supporting religious educational institutions.[7] *See Rosenberger*, 515 U.S. at 885 n.9 (Souter, J., dissenting). Indeed, as we have noted, *see supra* Part IV.A, the text of these restrictions—the best available evidence of legislative intent—derives directly from then-applicable Supreme Court precedent. It was only later that the Court overruled cases like *Aguilar*, *Ball*, *Meek*, and *Wolman v. Walter*, 433 U.S. 229 (1977), which had read the Establishment Clause to proscribe financial support for religious educational institutions even in government programs that were entirely neutral with respect to religion. *See Mitchell*, 530 U.S. at 835 (plurality opinion) (overruling *Wolman* and *Meek*); *id*. at 837 (O'Connor, J., concurring in the judgment) (same); *Agostini*, 521 U.S. at 235 (overruling *Aguilar* and *Ball*). What evidence we have thus suggests that Congress's motive for these restrictions was likely grounded in a legitimate desire to conform the statute to the Supreme Court's then-prevailing Establishment Clause precedent, not in religious animus.

In short, section 1068e(1), in restricting loans under the program for "any religious worship or sectarian activity," is constitutional as we have construed it.

2.

Section 1066c(c) parallels that part of section 1068e(1), but it may sweep more broadly, because it applies to any program "related to" sectarian instruction or religious worship, and "related to" is often read expansively. *See, e.g.*, *Coventry Health Care of Mo., Inc. v. Nevils*, 581 U.S. 87, 95–96 (2017).

We agree with your office that we should construe this provision to avoid conflict with the Free Exercise Clause. ED Letter at 3–4. The relevant portion of section 1066c(c), on its face, denies loans under the program for certain religious "program[s], activit[ies] or service[s]" and therefore appears to be primarily a restriction on the Department's guaranteeing loans for facilities used for religious activities. This provision

[7] *See* Higher Education Amendments of 1986, Pub. L. No. 99-498, sec. 301(a), § 357(1), 100 Stat. 1268, 1307 (now codified at 20 U.S.C. § 1068e(1)); Higher Education Amendments of 1992, Pub. L. No. 102-325, sec. 704, § 724(c), 106 Stat. 448, 745 (now codified at 20 U.S.C. § 1066c(c)).

illustrates that the line between a restriction that permissibly denies funding to religious uses, and one that denies funding based on religious status, can be difficult to draw. *See Trinity Lutheran*, 582 U.S. at 469 (Gorsuch, J., concurring). If a facially use-based religious-funding restriction is given too broad a sweep, it might well amount to status-based religious discrimination. For example, even the entirely secular programs or activities of a religious HBCU could be viewed as "related to" the sectarian instruction or religious worship that takes place elsewhere within the institution. But to deny guaranteed loans to a religious HBCU for secular facilities or functions would deny support in a manner not tightly connected to any religious use of those funds. The broader the restriction, the more it risks penalizing the free exercise of religion and discriminating based on religious status under *Trinity Lutheran*, like the restriction that we have already concluded is unconstitutional. *See supra* Part IV.A. To consider all activities of a religious school to be "related to" sectarian instruction, and prohibit funding for the school on that basis, would risk collapsing the distinction between religious status and religious use recognized in *Locke* and *Trinity Lutheran*.

Here, however, a saving construction is reasonably available. Section 1066c(c) contains three "Religious Activity prohibition[s]." The other two are directed at broad features of the institution: programs, activities, and services provided by a "school or department of divinity" and those provided by "an institution in which a substantial portion of its functions is subsumed in a religious mission." 20 U.S.C. § 1066c(c). By contrast, it is plausible to view the prohibition on funding "any educational program, activity or service related to sectarian instruction or religious worship" as more narrowly focused on features of the discrete projects being funded, rather than features of the institution as a whole. If the term "related to" were read broadly—say, to cover general programs and services provided by a religious institution—it would largely swallow the two prohibitions covering institutional features. Moreover, since the financing program is focused on supporting particular capital-improvement projects, it is also plausible to view the discrete "program, activity or service" being aided as "related to" sectarian instruction or religious worship only when the discrete project being financed is itself religious. *See id.* § 1066a(5). As we have discussed in analyzing the other use-based funding restrictions in the statute, *see supra* Part IV.B.1, we think a project is religious in that sense when it is devoted predominantly to religious activities.

We therefore construe the prohibition on loaning money to programs "related to sectarian instruction or religious worship" as applying only to loans that fund discrete projects that bear a specific and direct relation to sectarian instruction or worship, in that they will be used predominantly for such functions. *Cf. Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 146 (2002) (noting that the Court has "recognized that the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminacy'"); *Hunt*, 413 U.S. at 743 (noting, in the Establishment Clause context, that a government program can have the effect of advancing religion "when it funds a *specifically* religious activity in an otherwise substantially secular setting" (emphasis added)). That reading brings section 1066c(c)'s first restriction in line with section 1068e(1)'s parallel restriction. Both provisions preclude guaranteed loans from funding facilities predominantly devoted to the prohibited religious functions, such as a new campus chapel or prayer room, but do not preclude funding a dormitory or dining hall—even one run by a religious institution. So construed, both restrictions narrowly advance the government's interest in not funding explicitly religious activities, such as worship or prayer. The statutes thus define the scope of this secular program to exclude loans for facilities used for sectarian instruction and religious worship in a manner consistent with the Free Exercise Clause.

C.

The final issue concerns the provisions that limit assistance to "a school or department of divinity." Section 1066c(c) restricts loans under the program for "any educational program, activity or service" offered by such an institution; section 1068e(1) restricts the use of "funds appropriated" under the HBCU program "for" such an institution.

If this provision categorically barred a "sectarian" or "denominational" school from receiving support, it would amount to a status-based religious discrimination under *Trinity Lutheran*. ED Letter at 2–3. The statute, however, defines a "school or department of divinity" based upon its program of instruction, rather than on its religious views or character. The term is defined as "an institution, or a department or a branch of an institution, the program of instruction of which is designed for the education of students" in order "(A) to prepare the students to become ministers of religion or to enter upon some other religious vocation . . . ; or (B) to

prepare the students to teach theological subjects." 20 U.S.C. § 1003(15). We construe the provision to be similar to the scholarship restriction upheld in *Locke*—a funding restriction that turns upon the educational program, rather than the religious character, of an institution.

The funding restriction here does not single out an HBCU simply because it has a religious mission. Rather, it targets schools or departments whose programs of instruction necessarily involve "the training of clergy." *Trinity Lutheran*, 582 U.S. at 465. The restriction applies to an "institution, or a department or a branch of an institution, *the* program of instruction of which is designed" for the religious training specified in the statute. 20 U.S.C. § 1003(15) (emphasis added). The use of the definite article suggests that the restriction applies only if the institution, or its department or branch, offers vocational religious education as its only program of instruction. *See Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1514 (2019) (citing *Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004) (interpreting "the definite article" in the phrase "the person" to mean that there is "generally only one proper respondent to a given prisoner's habeas petition")). This restriction is thus applicable only to an HBCU, or a department or branch of an HBCU, with programs of instruction wholly devoted to the training of clergy (or, potentially, as discussed below, non-devotional religious education). By contrast, an HBCU that offers other programs of instruction, in addition to vocational religious education, may seek loan support for any school or department that offers such separate programs.[8]

That seems to us the most natural reading of the statute. But it is, at a minimum, a permissible interpretation, and so construed the restrictions are similar to those upheld by the Supreme Court in *Locke*. As in *Locke*, the restrictions limit eligibility for assistance based upon the educational activities being supported. In *Locke*, the State of Washington prohibited the use of scholarships to fund degrees in "theology," which the Court understood to mean "degrees that are devotional or designed to induce religious faith." 540 U.S. at 716 (citations omitted). The Court sustained that restriction, even though a student pursuing such a degree in theology

[8] An HBCU may be eligible for a loan under the program even if it describes itself as a "divinity school" or if the majority of its programs involve the training of clergy or teachers of theology. Such a school, or a department or branch thereof, is ineligible only if it solely offers programs of instruction devoted to vocational religious education.

might well have received an education in secular subjects too. *Id*. at 720. The Court held that Congress could fund, or not fund, a "distinct category of instruction," *id*. at 721, and, as the Court later explained, the program there was "in keeping with" the government's "antiestablishment interest in not using taxpayer funds to pay for the training of clergy," *Trinity Lutheran*, 582 U.S. at 465.

If Washington could decline to provide scholarships to students pursuing degrees in theology, then we believe Congress could decline to support programs of education wholly devoted to vocational religious education. We recognize that, if an institution is entirely devoted to the religious training specified in the statute, then the restriction makes the school ineligible for guaranteed loans under the program. But that consequence does not seem different from *Locke*: the student there could not receive the state scholarship to pursue a theology degree, even though he may have studied non-religious subjects as well. *See Locke*, 540 U.S. at 726. Such a restriction is consistent with *Locke*'s holding that a government program may be defined in a way that excludes the training of clergy. Under this reading, however, an HBCU may still receive guaranteed loans under the program for the construction or repair of facilities, so long as the school, department, or branch in question has at least one other program of instruction, even if its programs of instruction otherwise involve religious training within the meaning of 20 U.S.C. § 1003(15).

The funding restriction here may be broader than in *Locke* in one respect. In *Locke*, the Court held that Washington could exclude scholarship funds from supporting "degrees that are devotional in nature or designed to induce religious faith." *Locke*, 540 U.S. at 716 (internal quotation marks omitted). Here, the restriction on loans for divinity schools or departments arguably sweeps beyond devotional education to include programs of instruction that "prepare the students to teach theological subjects," whether or not those programs are devotional in nature. 20 U.S.C. § 1003(15)(B). There may be some ambiguity concerning what it means to "prepare the students to teach theological subjects," since, as Justice Thomas has observed, "the study of theology does not necessarily implicate religious devotion or faith." *Locke*, 540 U.S. at 734 (dissenting opinion); *see also Webster's Third New International Dictionary* 2371 (2002) (defining "theology" to include "rational interpretation of religious faith, practice, and experience"); 17 *Oxford English Dictionary*

898 (2d ed. 1989) (defining "theology" as the "study or science which treats of God, His nature and attributes, and His relations with man and the universe"). The restriction thus could apply to programs in which theology is treated as a subject of scholarly interest, without any devotional affiliation or religious creed. Such restrictions could cover departments with Ph.D. programs in religious studies that approach theology through an academic lens—sociological, anthropological, philosophical, or otherwise—as well as through a devotional or sectarian lens.

We do not believe that a restriction on supporting the training of teachers of theology necessarily implicates the Free Exercise Clause. The Religion Clauses protect religious belief (and non-belief), not necessarily the academic study of religion. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[T]o have the protection of the Religion Clauses . . . claims must be rooted in religious belief."); *Davis v. Beason*, 133 U.S. 333, 342 (1890) ("The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."); *cf. Van Orden v. Perry*, 545 U.S. 677, 690–91 (2005) (plurality opinion) (holding that it was permissible for Texas to display the Decalogue on its State Capitol Grounds because "the ten Commandments have an undeniable historical meaning," and "[s]imply having religious content or promoting a message consistent with a religious doctrine" does not constitute an establishment of religion). The Free Exercise Clause protects an individual's or entity's status as a Catholic believer or as a Catholic church, but not necessarily as a historian studying the works of Thomas Aquinas or as a department of religious history.

Nor does prohibiting support for training teachers of theology seem to constitute status-based religious discrimination. The statute excludes support for a single subject—religious educational training—and does not broadly preclude a religious HBCU from receiving assistance for a range of secular activities. The restriction therefore resembles those cases in which the Supreme Court has held that the government need not subsidize particular categories of speech. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991). Just as the government may, for example, decline to provide tax exemptions to the portion of a nonprofit organization devoted to lobbying, *see Regan*, 461 U.S. at 546, the government may here decline to guarantee loans for the portion of an HBCU that provides degrees in

theology—a "distinct category of instruction." *Locke*, 540 U.S. at 721; *see id.* at 720 n.3 (rejecting argument that the funding restriction violated the freedom of speech).

Because we are not evaluating the restriction here in the context of a particular grant application, we need not and do not reach a definitive conclusion on how the religious-funding restriction would apply to non-devotional programs that "prepare the students to teach theological subjects." 20 U.S.C. § 1003(15). But we note that the application of the restriction to such programs raises different First Amendment questions.

V.

For these reasons, we conclude that the restriction on providing program loans "to an institution in which a substantial portion of its functions is subsumed in a religious mission," 20 U.S.C. § 1066c(c), violates the Free Exercise Clause. The remaining restrictions in section 1066c(c) and section 1068e(1) can and must be construed to withstand Free Exercise Clause scrutiny. Should the Department establish a policy not to enforce the unconstitutional portion of section 1066c(c), or should it provide support to an otherwise unqualified applicant, in contravention of this provision (or any other statute), the Department should report that decision to Congress within thirty days of establishing the policy. *See* 28 U.S.C. § 530D(a)(1)(A)(i), (b)(1), (e); *Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007*, 32 Op. O.L.C. 27, 28 n.2 (2008).

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

"Urgent Concern" Determination by the Inspector General of the Intelligence Community

A complaint from an intelligence-community employee about statements made by the President during a telephone call with a foreign leader does not involve an "urgent concern," as defined in 50 U.S.C. § 3033(k)(5)(G), because the alleged conduct does not relate to "the funding, administration, or operation of an intelligence activity" under the authority of the Director of National Intelligence. As a result, the statute does not require the Director to transmit the complaint to the congressional intelligence committees.

September 3, 2019

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE[*]

On August 26, 2019, the Inspector General of the Intelligence Community ("ICIG") forwarded to the Acting Director of National Intelligence ("DNI") a complaint from an employee within the intelligence community. The complainant alleged that unnamed "White House officials" had expressed concern that during a July 25, 2019, phone call, President Trump had sought to pressure the Ukrainian president to pursue investigations that might have the effect of assisting the President's re-election bid. According to the ICIG, such a request could be viewed as soliciting a foreign campaign contribution in violation of the campaign-finance laws. *See* Letter for Joseph Maguire, Acting Director of National Intelligence, from Michael K. Atkinson, Inspector General of the Intelligence Community, at 3 (Aug. 26, 2019) ("ICIG Letter"). In the ICIG's view, the complaint addresses an "urgent concern" for purposes of triggering statutory procedures that require expedited reporting of agency misconduct to the congressional intelligence committees. Under the applicable statute, if the ICIG transmits such a complaint to the DNI, the DNI has seven days to forward it to the intelligence committees. *See* 50 U.S.C. § 3033(k)(5)(C).

[*] Editor's note: This memorandum was originally issued in classified form on September 3, 2019. An unclassified version was signed on September 24, 2019, and publicly released in slip-opinion form on September 25, 2019. That unclassified version avoided references to certain details that remained classified at the time it was signed. After the underlying documents were themselves declassified, the September 3 memorandum was declassified in its entirety and publicly released on September 26, 2019.

The complaint does not arise in connection with the operation of any U.S. government intelligence activity, and the alleged misconduct does not involve any member of the intelligence community. Rather, the complaint arises out of a confidential diplomatic communication between the President and a foreign leader that the intelligence-community complainant received secondhand. The question is whether such a complaint falls within the statutory definition of "urgent concern" that the law requires the DNI to forward to the intelligence committees. We conclude that it does not. The alleged misconduct is not an "urgent concern" within the meaning of the statute because it does not concern "the funding, administration, or operation of an intelligence activity" under the authority of the DNI. *Id*. § 3033(k)(5)(G)(i). That phrase includes matters relating to intelligence activities subject to the DNI's supervision, but it does not include allegations of wrongdoing arising outside of any intelligence activity or outside the intelligence community itself.

Our conclusion that the "urgent concern" requirement is inapplicable does not mean that the DNI or the ICIG must leave such allegations unaddressed. To the contrary, the ICIG statute, 50 U.S.C. § 3033(k)(6), makes clear that the ICIG remains subject to 28 U.S.C. § 535, which broadly requires reporting to the Attorney General of "[a]ny information, allegation, matter, or complaint witnessed, discovered, or received in a department or agency . . . relating to violations of Federal criminal law involving Government officers and employees." 28 U.S.C. § 535(b). Accordingly, should the DNI or the ICIG receive a credible complaint of alleged criminal conduct that does not involve an "urgent concern," the appropriate action is to refer the matter to the Department of Justice, rather than to report to the intelligence committees under section 3033(k)(5). Consistent with 28 U.S.C. § 535, the ICIG's letter and the attached complaint have been referred to the Criminal Division of the Department of Justice for appropriate review.

I.

An "employee of an element of the intelligence community" (or an intelligence-community contractor) "who intends to report to Congress a complaint or information with respect to an urgent concern may report

such complaint or information to the" ICIG. 50 U.S.C. § 3033(k)(5)(A).[1] On August 12, 2019, the Office of the ICIG received a complaint purporting to invoke this provision. The complainant alleged that he or she had heard reports from White House officials that in the course of a routine diplomatic communication between President Trump and Ukrainian President Volodymyr Zelenskyy, President Trump had "sought to pressure the Ukrainian leader to take actions to help the President's 2020 reelection bid." ICIG Letter at 3 (quoting the complainant's letter). Specifically, the complainant allegedly heard that the President had requested that the Ukrainian government investigate the activities of one of the President's potential political rivals, former Vice President Joseph Biden, and his son, Hunter Biden. The complainant also allegedly heard that the President had requested Ukrainian assistance in investigating whether Russian interference in the 2016 U.S. presidential election originated in Ukraine, and that Ukrainian investigators meet with the President's personal lawyer, Rudolph Giuliani, as well as Attorney General William Barr regarding these matters. The complainant described this communication as arising during a scheduled call with the foreign leader that, consistent with usual practice, was monitored by approximately a dozen officials in the White House Situation Room. Having heard about the President's reported statements, the complainant expressed an intent to report this information to the intelligence committees.

When the ICIG receives a complaint about an "urgent concern," the statute provides that the ICIG then has 14 days to "determine whether the complaint or information appears credible." 50 U.S.C. § 3033(k)(5)(B). The ICIG determined that the complaint here involved an "urgent concern" under section 3033(k)(5) and that it appeared credible. *See* ICIG Letter at 5. As relevant here, the statutory definition of an "urgent concern" includes "[a] serious or flagrant problem, abuse, [or] violation of law . . . relating to the funding, administration, or operation of an

[1] Section 8H of the Inspector General Act of 1978 ("IG Act"), 5 U.S.C. app., parallels the urgent-concern provision of the ICIG statute, 50 U.S.C. § 3033(k)(5), and appears to provide another pathway to report an urgent concern to the ICIG or an appropriate inspector general. Because the complainant and the ICIG in this instance invoked only section 3033(k)(5), we address that provision in our opinion, but as discussed below, the DNI's reporting obligation would be the same under either provision. *See infra* Part II.A & n.6.

intelligence activity within the responsibility and authority of the Director of National Intelligence involving classified information." 50 U.S.C. § 3033(k)(5)(G)(i). According to the ICIG, the President's actions could involve a "serious or flagrant problem," "abuse," or violation of law, and the ICIG observed that federal law prohibits any person from soliciting or accepting a campaign contribution or donation from a foreign national. ICIG Letter at 3; *see, e.g.*, 52 U.S.C. § 30121(a).[2] The ICIG further noted that "alleged conduct by a senior U.S. public official to seek foreign assistance to interfere in or influence a Federal election" could "potentially expose [the official] to serious national security and counterintelligence risks." ICIG Letter at 3. Although the ICIG's preliminary review found "some indicia of an arguable political bias on the part of the Complainant in favor of a rival political candidate," the ICIG concluded that the complaint's allegations nonetheless appeared credible. *Id.* at 5.

The ICIG concluded that the matter concerns an intelligence activity within the DNI's responsibility and authority. He reasoned that the DNI is "the head of the Intelligence Community," "act[s] as the principal adviser . . . for intelligence matters related to national security," and oversees the National Intelligence Program and its budget. *Id.* at 4 (internal quotation marks omitted). In addition, the intelligence community, under the DNI's direction, "protect[s] against intelligence activities directed against the United States," including foreign efforts to interfere in our elections. *Id.* (internal quotation marks and ellipsis omitted).[3] The ICIG also found it

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[2] The ICIG determined that the allegation "appears credible" without conducting any detailed legal analysis concerning whether the allegation, if true, would amount to an unlawful solicitation of a campaign contribution. *See* ICIG Letter at 5. We likewise do not express a view on the matter in this opinion.

[3] The ICIG also noted that the complainant alleged that "officials from the Office of Management and Budget" had informed the "interagency" that "the President had issued instructions to suspend all security assistance to Ukraine," and that "there might be a connection" between the President's call with the Ukrainian president and this action. ICIG Letter at 4 n.12. The ICIG suggested that if the allegedly improper motives could be substantiated, then this decision "might implicate the Director of National Intelligence's responsibility and authority with regard to implementing the National Intelligence Program and/or executing the National Intelligence Program budget." *Id.* However, the ICIG did not further explain what role the DNI had in connection with Ukraine security assistance, how an alleged direction from the President would implicate the DNI's performance of his responsibilities, or whether an allegation of improper motive appeared credible.

relevant that the President has directed the DNI to issue a report, within 45 days of a federal election, assessing any information indicating that a foreign government interfered in that election. *Id*. at 4 n.14; *see* Exec. Order No. 13848, § 1(a) (Sept. 12, 2018). For these reasons, the ICIG concluded that the complaint involves an intelligence activity within the responsibility and authority of the DNI. ICIG Letter at 5.[4] He thus transmitted the complaint to the DNI on August 26, 2019.

II.

You have asked whether the DNI has a statutory obligation to forward the complaint to the intelligence committees. We conclude that he does not. To constitute an "urgent concern," the alleged misconduct must involve "the funding, administration, or operation of an intelligence activity within the responsibility and authority" of the DNI. 50 U.S.C. § 3033(k)(5)(G)(i). Similar to other aspects of the ICIG's responsibilities, the urgent-concern provision permits employees to bring to the intelligence committees' attention credible allegations of serious abuses arising from within the U.S. intelligence community.[5] This provision, however, does not cover every alleged violation of federal law or other abuse that comes to the attention of a member of the intelligence community. Where,

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[4] The complainant also alleged that unnamed officials within the Executive Office of the President had attempted to restrict access to records of the President's call with the Ukrainian president by placing the transcript into a computer system managed by the National Security Council Directorate for Intelligence Programs that was reserved for codeword-level intelligence programs. The complainant stated that some officials at the White House had advised that this action may have been an abuse of the system, but the ICIG did not discuss this allegation in concluding that the complaint stated an urgent concern.

[5] We have recognized constitutional concerns with statutory requirements that subordinate Executive Branch officials disclose classified information to congressional committees. *See, e.g.*, *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 100 (1998). In addition, the materials here concern diplomatic communications, and as Attorney General Janet Reno recognized, "[h]istory is replete with examples of the Executive's refusal to produce to Congress diplomatic communications and related documents because of the prejudicial impact such disclosure could have on the President's ability to conduct foreign relations." *Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti*, 20 Op. O.L.C. 5, 6 (1996) (Reno, Att'y Gen.). Addressing the statutory question in this opinion, however, does not require us to consider constitutional limits on congressional reporting requirements.

as here, the report concerns alleged misconduct by someone from outside the intelligence community, separate from any "intelligence activity" within the DNI's purview, the matter is not an "urgent concern" under the statute.

A.

Congress has specified certain procedures by which an intelligence-community employee may submit a complaint to Congress. Those procedures, which involve the ICIG, require that the subject of the complaint present an "urgent concern." In relevant part, an "urgent concern" is:

> A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to *the funding, administration, or operation of an intelligence activity* within the responsibility and authority of the Director of National Intelligence involving classified information, but does not include differences of opinions concerning public policy matters.

50 U.S.C. § 3033(k)(5)(G)(i) (emphasis added). The Inspector General Act contains a parallel provision that applies to complaints submitted to inspectors general within the intelligence community. *See* IG Act § 8H(i)(1)(A), 5 U.S.C. app. ("A serious or flagrant problem, abuse, violation of law or Executive order, or deficiency relating to *the funding, administration, or operations of an intelligence activity* involving classified information, but does not include differences of opinions concerning public policy matters." (emphasis added)).[6]

That definition undergirds the urgent-concern framework that applies when "[a]n employee of an element of the intelligence community . . . intends to report to Congress a complaint or information with respect to an urgent concern." 50 U.S.C. § 3033(k)(5)(A). The provision contemplates, as relevant here, that the employee first "report[s] such complaint

[6] The definition of "urgent concern" in the IG Act is not limited to intelligence activities that are specifically "within the responsibility and authority of the" DNI because the complaint procedures in section 8H are written to apply to multiple inspectors general within the intelligence community. *See* IG Act § 8H(a)(1)(A)–(D), 5 U.S.C. app. (including separate provisions for the Inspectors General for the Department of Defense, for the Intelligence Community, for the Central Intelligence Agency, and for the Department of Justice).

or information to the [ICIG]." *Id*. The ICIG then has 14 days to evaluate the credibility of the complaint "under subparagraph (A)" and determine whether to transmit it to the DNI. *Id*. § 3033(k)(5)(B). If the ICIG transmits the complaint to the DNI "under subparagraph (B)," then the DNI "shall, within 7 calendar days of such receipt, forward such transmittal to the congressional intelligence committees, together with any comments the [DNI] considers appropriate." *Id*. § 3033(k)(5)(C).

Each of those steps builds on the previous one, but they must all rest on a sound jurisdictional foundation. If the complaint does not involve an "urgent concern," as defined in the statute, then the remaining procedures are inapplicable. When the ICIG receives a complaint that is not an "urgent concern," then he has not received a report "under subparagraph (A)" and section 3033(k)(5)(B) does not trigger a reporting obligation. And when the DNI receives a transmittal that does not present an urgent concern, then the DNI is not required to forward it to the congressional committees, because the complaint is not one "under subparagraph (B)." *Id*. § 3033(k)(5)(C).

B.

The complainant describes a hearsay report that the President, who is not a member of the intelligence community, abused his authority or acted unlawfully in connection with foreign diplomacy. In the ICIG's view, those allegations fall within the urgent-concern provision because the DNI has operational responsibility to prevent election interference.[7] But even

[7] The ICIG cites no statute or executive order charging the DNI with operational responsibility for preventing foreign election interference. The DNI serves as the head of the intelligence community, the principal intelligence adviser to the President, and the official responsible for supervising the National Intelligence Program, who sets general objectives, priorities, and policies for the intelligence community. 50 U.S.C. §§ 3023(b), 3024(f)(1)(A), (f)(3)(A). The DNI thus surely has responsibility to coordinate the activities of the intelligence community and the provision of intelligence to the President and other senior policymakers concerning foreign intelligence matters. But the complaint does not suggest misconduct by the DNI or any of his subordinates in connection with their duties. Moreover, even if the DNI had general oversight responsibility for preventing foreign election interference, the DNI's oversight responsibilities do not appear to extend to the President. By statute, the DNI exercises his authority subject to the direction of the President, *see id*. §§ 3023(b), 3024(f)(1)(B)(i), (j), and the statute's definition of "intelligence community" conspicuously omits the Executive Office of the President, *see id.*

if so, it does not follow that the alleged misconduct by the President concerns "the funding, administration, or operation of an intelligence activity within the responsibility and authority" of the DNI because the allegations do not arise in connection with any such intelligence activity at all. 50 U.S.C. § 3033(k)(5)(G)(i). The complaint therefore does not state an "urgent concern."

We begin with the words of the statute. Section 3033(k)(5)(G) does not expressly define "intelligence activity," but the meaning of the phrase seems clear from context. The "intelligence activit[ies]" in question are ones over which the DNI has "responsibility and authority," which points to intelligence-gathering, counterintelligence, and intelligence operations undertaken by the intelligence community under the supervision of the DNI. *Id*. The National Security Act of 1947 commonly refers to "intelligence activities" as authorized activities undertaken by the intelligence community. Section 3024(c)(4), for instance, requires the DNI to "ensure the effective execution of the annual budget for intelligence and intelligence-related activities." *Id*. § 3024(c)(4). Section 3023(b)(3) authorizes the DNI to "oversee and direct the implementation of the National Intelligence Program," *id.* § 3023(b)(3), which itself is defined to include "all programs, projects, and *activities* of the intelligence community," *id*. § 3003(6) (emphasis added). Section 3094 conditions the use of appropriated funds "available to an intelligence agency . . . for an *intelligence or intelligence-related activity*," and defines an "intelligence agency" as "any department, agency, or other entity of the United States involved in intelligence or intelligence-related activities." *Id*. § 3094(a), (e)(1) (emphasis added). Sections 3091 and 3092 similarly contemplate the reporting to Congress of "intelligence activities" carried out by the U.S. government. *See id*. §§ 3091(a), 3092(a). In addition, in establishing the Office of the DNI, Congress was aware of the longstanding definition set forth in Executive Order 12333, which defines "[i]ntelligence activities"

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§ 3003(4). The DNI's charge to "ensure compliance with the Constitution and laws of the United States" applies to overseeing the "Central Intelligence Agency" and "other elements of the intelligence community." *Id*. § 3024(f)(4). Nevertheless, we need not reach any definitive conclusion on these matters, because even if foreign election interference would generally fall within the DNI's purview, the complaint does not concern an "intelligence activity within the responsibility and authority" of the DNI under section 3033(k)(5).

to "mean[] all activities that elements of the Intelligence Community are authorized to conduct pursuant to this order." Exec. Order No. 12333, § 3.5(g) (Dec. 4, 1981) (as amended). The "urgent concern" statute thus naturally addresses complaints arising out of the "funding, administration, or operation" of activities carried out by the intelligence community.

This meaning of "intelligence activities" is also consistent with the ICIG's authorities under other portions of section 3033. Just as an "urgent concern" must arise in connection with "an intelligence activity within the responsibility and authority" of the DNI, the ICIG's jurisdiction and reporting obligations are keyed to those "programs and activities within the responsibility and authority of" the DNI. 50 U.S.C. § 3033(b)(1), (b)(3)(A), (b)(4)(A), (d)(1), (e)(1), (e)(2), (g)(2)(A), (k)(1)(B)(vii), (k)(2)(A). That language parallels the language that commonly defines the purview of inspectors general. *See* IG Act § 4(a)(1), 5 U.S.C. app. (generally authorizing inspectors general to conduct investigations "relating to the programs and operations" of the agency). Such language has been consistently construed to permit inspectors general to oversee an agency's implementation of its statutory mission, but not to extend to performing the agency's mission itself. *See Inspector General Authority to Conduct Regulatory Investigations*, 13 Op. O.L.C. 54, 58–67 (1989).

Consistent with that view, the D.C. Circuit concluded that the Department of Transportation's inspector general exceeded his authority when he "involved himself in a routine agency investigation" as opposed to "an investigation relating to abuse and mismanagement in the administration of the DOT or an audit of agency enforcement procedures or policies." *Truckers United for Safety v. Mead*, 251 F.3d 183, 189–90 (D.C. Cir. 2001). The Fifth Circuit reached a similar conclusion regarding an inspector general's authority to engage in regulatory compliance investigations, expressly endorsing the approach taken by this Office's 1989 opinion. *See Burlington N. R.R. Co. v. Office of Inspector General*, 983 F.2d 631, 642–43 (5th Cir. 1993). Similarly here, the ICIG has the authority to review the DNI's exercise of his responsibility to coordinate and oversee the activities of the intelligence community—including, for instance, reviewing whether the DNI has appropriately discharged any authorities concerning preventing foreign election interference. But the ICIG does not himself have the authority to investigate election interference by foreign actors, because such an investigation would not involve an activi-

ty or program of the intelligence community under the DNI's supervision. We do not believe that the subjects of "urgent concern" reports to the ICIG are broader than other matters that fall within the investigative and reporting authority of the ICIG.

In establishing the office of the ICIG, Congress created an accountable and independent investigator who, subject to the general supervision of the DNI, would review the activities of members of the intelligence community. The ICIG is charged with "conduct[ing] independent investigations, inspections, audits, and reviews on programs and activities within the responsibility and authority" of the DNI. 50 U.S.C. § 3033(b)(1). The ICIG is also charged with overseeing and uncovering wrongdoing in the operations of programs under the DNI's supervision. But the ICIG's responsibility "to promote economy, efficiency, and effectiveness" in the administration of such programs, and "to prevent and detect fraud and abuse," *id*. § 3033(b)(2), must necessarily concern the programs themselves. Although the DNI and the intelligence community collect intelligence against foreign threats, the ICIG's responsibility is to watch the watchers in the performance of their duties, not to investigate and review matters relating to the foreign intelligence threats themselves.[8]

Throughout section 3033, the assumption, sometimes explicit and sometimes tacit, is that the ICIG's authority extends to the investigation of U.S. government intelligence activities, not to those foreign threats that are themselves the concerns of the intelligence community. Thus, the ICIG has a statutory right of "access to any employee, or any employee of a contractor, of any element of the intelligence community." *Id*. § 3033(g)(2)(B). Similarly, the ICIG should inform the congressional intelligence committees when an investigation "focuses on any current or former *intelligence community official* who" holds certain high-ranking

[8] To the extent relevant, the legislative history and statutory findings confirm that the provision relates only to problems within the intelligence community. In giving the ICIG jurisdiction to investigate "intelligence activities" within the DNI's purview, Congress explained that it "believe[d] that an IC/IG with full statutory authorities and independence can better ensure that the ODNI identifies problems and deficiencies *within* the Intelligence Community." H.R. Rep. No. 111-186, at 70–71 (2009) (emphasis added). Similarly, in establishing the "urgent concern" procedures in the IG Act, Congress made clear that the provision was designed to address "wrongdoing *within* the Intelligence Community." Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, tit. VII, § 701(b)(4), 112 Stat. 2396, 2413, 2414 (emphasis added).

positions, *id*. § 3033(k)(3)(A)(ii) (emphasis added), or when a matter requires a report to the Department of Justice of "possible criminal conduct by [such] a current or former [intelligence-community] official," *id*. § 3033(k)(3)(A)(iii). The ICIG's reporting responsibilities, however, do not concern officials outside the intelligence community, let alone the President.

In this case, the conduct that is the subject of the complaint does not relate to an "intelligence activity" under the DNI's supervision. The complainant alleges that the President made an inappropriate or potentially unlawful request on a routine diplomatic call with the Ukrainian president. But the President is not a member of the intelligence community, *see id*. § 3003(4), and his communication with a foreign leader involved no intelligence operation or other activity aimed at collecting or analyzing foreign intelligence. To the extent that the complaint warrants further review, that review falls outside section 3033(k)(5), which does not charge the ICIG (let alone every intelligence-community employee) with reporting on every serious allegation that may be found in a classified document. To the contrary, where the ICIG learns of a credible allegation of a potential criminal matter outside the intelligence community, the ICIG should refer the matter to the Department of Justice, consistent with 28 U.S.C. § 535.

We recognize that conduct by individuals outside of the intelligence community, or outside the government, can sometimes relate to "the funding, administration, or operation of an intelligence activity." 50 U.S.C. § 3033(k)(5)(G)(i). For instance, if an alleged violation of law involves a non-agency party who conspired with a member of the intelligence community or who perpetrated a fraud on an agency within the DNI's authority, that may well relate to "the funding, administration, or operation of an intelligence activity" because it would directly impact the operations or funding of the agency or its personnel. In 1990, then-Acting Deputy Attorney General William Barr acknowledged similar instances in which inspectors general could investigate "external parties." Letter for William M. Diefenderfer, Deputy Director, Office of Management and Budget, from William P. Barr, Acting Deputy Attorney General, at 2–3 (July 17, 1990). None of those circumstances, however, is present here. The alleged conduct at issue concerns actions by the President arising out of confidential diplomatic communications with the Ukrainian

president. Such matters simply do not relate to "the funding, administration, or operation of an intelligence activity within the responsibility and authority" of the DNI. 50 U.S.C. § 3033(k)(5)(G)(i).

III.

For the reasons set forth above, we conclude that the complaint submitted to the ICIG does not involve an "urgent concern" as defined in 50 U.S.C. § 3033(k)(5)(G). As a result, the statute does not require that the DNI transmit the complaint to the intelligence committees. Consistent with 28 U.S.C. § 535, however, the ICIG's letter and the attached complaint have been referred to the Criminal Division of the Department of Justice for appropriate review.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies

The President may direct independent regulatory agencies to comply with the centralized regulatory review process prescribed by Executive Order 12866.

October 8, 2019

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether the President may direct independent regulatory agencies to comply with the centralized regulatory review process of Executive Order 12866 of September 30, 1993, 3 C.F.R. 638 (1994) ("EO 12866"). EO 12866 requires all agencies to submit an annual regulatory plan and agenda to the Office of Information and Regulatory Affairs ("OIRA") in the Office of Management and Budget ("OMB"). But it exempts "independent regulatory agencies," as defined in 44 U.S.C. § 3502, from the rest of the order, which requires agencies to submit significant regulatory actions to OIRA for review. OMB has proposed that the President eliminate that exemption and require independent regulatory agencies to comply with all of EO 12866.[1]

Article II of the Constitution vests "[t]he executive Power" in the President, who "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id*. § 3. By vesting the executive power in the President alone, the Constitution ensures that "a President chosen by the entire Nation oversee[s] the execution of the laws." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). The President can hardly ensure that the laws are faithfully executed "if he cannot oversee the faithfulness of the officers who execute them." *Id*. at 484. The President's constitutional authority therefore extends to the supervision of all agencies that execute federal law, including so-called "independent" agencies.

Although the Supreme Court has held that Congress may insulate independent agencies to some degree from presidential supervision, the pro-

[1] In preparing this opinion, we have solicited and considered the views of the Office of Management and Budget. *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Neomi Rao, Administrator, OIRA, and Mark Paoletta, General Counsel, OMB (Mar. 7, 2018) ("OMB Letter").

posed executive action would not test any statutory limits. Congress has often provided that the heads of those agencies are removable only for particular causes, such as "inefficiency, neglect of duty, or malfeasance in office." *E.g.*, 15 U.S.C. § 41. But statutory restrictions on removal, standing alone, do not bar those agencies from complying with EO 12866; indeed, the terms of such good-cause restrictions presuppose that the President may supervise an agency head to ensure compliance with the duties of office and with principles of good governance. Other structural features associated with independent agencies, such as multi-member governance, independent litigating authority, or open-meeting requirements, likewise do not preclude those agencies from complying with EO 12866. We therefore conclude that the President may direct independent agencies to comply with EO 12866.

I.

Every President since Nixon has required systematic review of some rulemakings to ensure that federal regulations "achieve legislative goals effectively and efficiently" and do not "impose unnecessary burdens." Exec. Order No. 12044, 3 C.F.R. 152 (1979); *see* Curtis W. Copeland, Cong. Research Serv., RL32397, *Federal Rulemaking: The Role of the Office of Information and Regulatory Affairs* 5–6 (June 9, 2009) ("*Role of OIRA*") (describing Nixon, Ford, and Carter Administration programs); Harold Bruff, *Presidential Management of Agency Rulemaking*, 57 Geo. Wash. L. Rev. 533, 546–49 (1989) (same). In February 1981, President Reagan took what is widely viewed as the decisive step in establishing a "centralized mechanism for review of agency rulemakings," Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2277 (2001), by issuing Executive Order 12291, 3 C.F.R. 127 (1982) ("EO 12291"). EO 12291 required covered agencies to follow general policies in issuing new regulations, "to the extent permitted by law," including that "[r]egulatory action shall not be undertaken unless the potential benefits to society . . . outweigh the potential costs." *Id.* § 2(b). The order further required agencies to submit to OMB an analysis of the regulatory impact of any "major" rule, including its potential costs and benefits. *Id.* § 3(a)–(c). In 1985, President Reagan also ordered agencies to participate in an annual regulatory planning process. Exec. Order No. 12498, 3 C.F.R. 323 (1986).

In September 1993, President Clinton issued EO 12866 "to reform and make more efficient the regulatory process" and "to enhance planning and coordination with respect to both new and existing regulations." EO 12866, pmbl. Like its predecessor, EO 12866 directs covered agencies to follow certain general principles, including cost-benefit principles, when engaging in regulatory action, "unless a statute requires another regulatory approach." *Id.* § 1(a); *see id.* § 1(b)(6) (agencies should "adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs"). Section 4 directs agencies to participate, "to the extent permitted by law," in an annual regulatory planning process. Each agency, including "independent regulatory agencies," must submit to OIRA "an agenda of all regulations under development or review" and an annual plan "of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form." *Id.* § 4(b), (c). OIRA circulates each agency's plan to other affected agencies; if OIRA "believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in" EO 12866, it must notify the agency and the President's regulatory advisers. *Id.* § 4(c)(3), (5).

Section 6 of EO 12866 requires each agency, other than "independent regulatory agencies," to submit to OIRA, before publication, a draft of any proposed "significant regulatory action," together with an "assessment of the potential costs and benefits" of the proposed action and its legal basis. *Id.* § 6(a)(3)(B)(ii).[2] For any proposed regulatory action that is expected to be "economically significant," the agency must submit a more detailed analysis of the potential costs and benefits and of reasonably feasible potential alternatives. *Id.* § 6(a)(3)(C). Those requirements do not apply if an agency is "obligated by law to act more quickly," although an agency must schedule its rulemakings to permit OIRA review "to the extent practicable." *Id.* § 6(a)(3)(D). OIRA must complete its review within specified deadlines, *id.* § 6(b)(2), and an agency may not publish a

[2] The order defines a "regulatory action" as "any substantive action by an agency . . . that promulgates or is expected to lead to the promulgation of a final rule or regulation." EO 12866, § 3(e). A "rule" or "regulation," in turn, is defined as any "agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency," subject to certain exceptions. *Id.* § 3(d).

proposed or final rule pending OIRA review, "[e]xcept to the extent required by law," *id*. § 8. During the review process, OIRA may circulate the regulatory proposals to interested agencies and components of the Executive Office of the President, such as the National Economic Council. *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 Harv. L. Rev. 1838, 1854–59 (2013) ("*OIRA Myths and Realities*"). If OIRA believes that an agency should reconsider a proposed action, OIRA may return the action with "a written explanation for [the] return setting forth the pertinent provision of [EO 12866] on which OIRA is relying," and the agency may respond in writing if the agency disagrees. EO 12866, § 6(b)(3).

In practice, such "return letters" are rare. OIRA appears to have issued only seven during the period between 1994 and 2000, and only twenty-eight since July 2001—periods in which OIRA reviewed thousands of proposed agency actions. *See* OIRA, OMB, Executive Office of the President, *OIRA Return Letters*, www.reginfo.gov/public/do/eoReturnLetters (last visited Oct. 8, 2019); Copeland, *Role of OIRA* at 19. More commonly, OIRA, the agency, and any other interested agencies discuss suggestions in an iterative revision process, with any disagreements percolating up through interagency committees of increasingly senior officials. Section 7 of EO 12866 provides for the President, or the Vice President acting at the request of the President, to resolve any remaining "disagreements or conflicts between or among agency heads or between OMB and any agency," "[t]o the extent permitted by law."

OIRA is a repository of valuable rulemaking expertise, and its views carry significant weight. *See* Sunstein, *OIRA Myths and Realities*, 126 Harv. L. Rev. at 1854–55. A wide range of commentators has recognized that OIRA's regulatory review process, which draws on the expertise of the entire government, has come to provide an "essential mechanism to ensure unity and coherence in execution of the law." OMB Letter at 4.[3]

[3] *See, e.g.*, Letter for Ron Johnson, Chairman, and Thomas R. Carper, Ranking Member, Senate Committee on Homeland Security and Governmental Affairs, from Thomas Susman, Director, Governmental Affairs Office, American Bar Association ("ABA"), *Re: Support for S. 1067, the "Independent Agency Regulatory Analysis Act of 2015"* at 2–3 (July 23, 2015) (centralized review ensures that "regulatory policy . . . is responsive to the interests of the public as a whole"); Sunstein, *OIRA Myths and Realities*, 126 Harv. L. Rev. at 1850 (centralized review allows "extremely important and valuable" interagency coordination); Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63

An agency may not publish or proceed with a proposed action (unless otherwise required to do so by law) without addressing the concerns expressed by OIRA or others during the review process, or elevating any disagreements to the President. *See* EO 12866, § 8. But EO 12866 does not authorize OIRA "to 'approve' or 'disapprove' a draft rule." Copeland, *Role of OIRA* at 14. Section 9 provides that "[n]othing in this order shall be construed as displacing the agencies' authorities or responsibilities, as authorized by law." *See also* EO 12866, pmbl. (providing that the order "reaffirm[s] the primacy of Federal agencies in the regulatory decision-making process" and that regulatory review "shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies"). Therefore, the OIRA review process, while mandatory, is also a consultative one, improving regulatory outcomes while preserving an agency's statutory discretion.

In adopting EO 12291, the Reagan Administration considered applying OIRA's regulatory review process to "independent regulatory agenc[ies]," as defined in 44 U.S.C. § 3502. At the time, this Office approved the legality of such a direction. *See* Memorandum for David Stockman, Director, OMB, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Executive Order on Federal Regulation* at 7 (Feb. 12, 1981) ("Simms Memorandum"), *reprinted in Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 97th Cong. 152, 158 (1981) ("*Role of OMB Hearing*"). Even if Congress sought to limit "[p]residential supervision" of independent agencies "on matters of substantive policy," we advised that subjecting them to the proposed regulatory review process would be consistent with their independent

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Admin. L. Rev. 103, 110 (2011) (centralized review results in "better coordinated and coherent regulatory actions, and ultimately better decisionmaking"); American Bar Association Section of Administrative Law and Regulatory Practice, *Twenty-First Century Governance: Improving the Federal Administrative Process: A Report for the President-Elect of the United States*, 52 Admin. L. Rev. 1099, 1104–05 (2000) (centralized review fosters "efficient, coordinated, yet reasonably open administration" and "promote[s] good government"); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075, 1081 (1986) (centralized review "encourages policy coordination, greater political accountability, and more balanced regulatory decisions").

status, because the order would preserve the agencies' "substantive discretion to decide particular . . . rulemaking matters." Simms Memorandum at 10, 11. Ultimately, however, the Reagan Administration determined, for "policy reasons," not to include independent agencies, even though the Administration believed the President had the constitutional power to do so. *Role of OMB Hearing* at 93–94 (quoting C. Boyden Gray, Counsel to the Vice President); *see also* Peter L. Strauss & Cass Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 Admin. L. Rev. 181, 202 (1986) (same).

In EO 12866, President Clinton preserved the exemption for "independent regulatory agencies" from the centralized regulatory review process. EO 12866, § 3(b).[4] He did, however, require independent agencies to submit to OIRA annual regulatory agendas and plans, which summarize expected regulatory actions during the upcoming fiscal year. *Id.* § 4(b), (c). Sally Katzen, who was then the OIRA Administrator, later explained that the President's legal advisers believed it would have been lawful to apply the entirety of EO 12866 to independent agencies, but the Administration ultimately chose not to do so. Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 Admin. L. Rev. 103, 109 (2011).[5]

EO 12866 thus continues to exempt independent regulatory agencies from the centralized regulatory review process. In the statutory definition incorporated into EO 12866, Congress has identified nineteen such independent agencies and included a catch-all clause for "any other similar agency designated by statute":

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[4] EO 12291 and EO 12866 both cite 44 U.S.C. § 3502(10) for the definition of excluded independent regulatory agencies. EO 12291, § 1(d); EO 12866, §§ 3(b), 4(c). In 1995, Congress moved the relevant definition to 44 U.S.C. § 3502(5). *See* Paperwork Reduction Act of 1995, Pub. L. No. 104-13, sec. 2, 109 Stat. 163, 165.

[5] President George W. Bush amended EO 12866 twice, principally to reduce the Vice President's role, to instruct agencies to identify the specific market failure that any new regulations seek to remedy, and to expand OIRA's review of agency guidance documents. *See* Exec. Order No. 13258, 3 C.F.R. 204 (2003); Exec. Order No. 13422, 3 C.F.R. 191 (2008). President Obama revoked those modifications, *see* Exec. Order No. 13497, 3 C.F.R. 218 (2010), although OIRA continued its practice, which predated President Bush's orders, of reviewing agency guidance documents under EO 12866. *See* Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, from Peter R. Orszag, Director, OMB, M-09-13, *Re: Guidance for Regulatory Review* (Mar. 4, 2009).

> [T]he Board of Governors of the Federal Reserve System, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, the Federal Housing Finance Agency, the Federal Maritime Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Mine Enforcement Safety and Health Review Commission, the National Labor Relations Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Regulatory Commission, the Securities and Exchange Commission, the Bureau of Consumer Financial Protection, the Office of Financial Research, [the] Office of the Comptroller of the Currency, and any other similar agency designated by statute as a Federal independent regulatory agency or commission.

44 U.S.C. § 3502(5).[6] Consistent with the catch-all clause, Congress has deemed the U.S. International Trade Commission "an independent regulatory agency for purposes of chapter 35 of Title 44," which includes the provision quoted above. 19 U.S.C. § 1330(f). Congress has also identified other agencies as "independent" in their organic statutes. *See, e.g.*, 12 U.S.C. § 1752a(a) (National Credit Union Administration); *id.* § 2241 (Farm Credit Administration). We understand that some of those agencies regard themselves as independent regulatory agencies under section 3502(5).

II.

Our review of the President's authority to direct independent regulatory agencies requires consideration of the scope of his authority to supervise the Executive Branch. Before addressing independent agencies, we first examine the President's constitutional authority to direct the departments

[6] The statute expressly provides that the Federal Election Commission and the Government Accountability Office shall not be considered "independent regulatory agencies" even if otherwise covered by the catch-all clause. 44 U.S.C. § 3502(1)(A), (B). In 1995, Congress abolished the Interstate Commerce Commission ("ICC") and provided that references to the ICC, like the one in 44 U.S.C. § 3502(5), shall be "deemed to refer" to its successor, the Surface Transportation Board. ICC Termination Act of 1995, Pub. L. No. 104-88, § 205, 109 Stat. 803, 943.

and agencies that are currently subject to centralized regulatory review. The source of the President's authority to supervise those departments and agencies bears directly upon his authority to direct independent agencies, which are also within the Executive Branch.

A.

The "Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" *Free Enter. Fund*, 561 U.S. at 483 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)). Article II vests all of "[t]he executive Power" in the President and charges him alone with the responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* § 3. In carrying out that charge, the President must depend on "the assistance of subordinates," *Myers v. United States*, 272 U.S. 52, 117 (1926), and Article II includes specific provisions illustrating the President's supervisory authority. Thus, the President may "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," U.S. Const. art. II, § 2, cl. 1, and he appoints all "Officers of the United States" with the advice and consent of the Senate, subject to Congress's power to vest the authority to appoint inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments," *id.* art. II, § 2, cl. 2.

The Supreme Court has repeatedly explained that "Article II confers on the President 'the general administrative control of those executing the laws.'" *Free Enter. Fund*, 561 U.S. at 492 (quoting *Myers*, 272 U.S. at 164). As the Chief Executive, the President "may properly supervise and guide" subordinate officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." *Myers*, 272 U.S. at 135. According to Alexander Hamilton, executive officers "ought to be considered as the assistants or deputies of the chief magistrate; and, on this account, they ought to derive their offices from his appointment, at least from his nomination, and ought to be subject to his superintendence." *The Federalist* No. 72, at 487 (Jacob E. Cooke ed., 1961).

In providing for presidential control over the Executive Branch, the Constitution ensures not only that executive officers remain accountable

to the President, but also that the President remains accountable to the Nation. *See Printz v. United States*, 521 U.S. 898, 922 (1997) ("The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known."); *In re Aiken County*, 645 F.3d 428, 439 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ("What Article II *did* make emphatically clear from start to finish was that the president would be personally responsible for his branch." (quoting Akhil Reed Amar, *America's Constitution: A Biography* 197 (2005))).[7] Those principles are not empty formalities. The purpose "of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government, but to preserve individual freedom." *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting); *see also Bond v. United States*, 564 U.S. 211, 222 (2011) ("The structural principles secured by the separation of powers protect the individual as well."). The President's supervision of the Executive Branch guarantees the people's right to select, and hold accountable, the one person responsible for the execution of federal law.

B.

In 1981, this Office reviewed the proposed EO 12291 and confirmed that the President may require agencies to participate in the OMB review process. *See Proposed Executive Order Entitled "Federal Regulation*," 5 Op. O.L.C. 59, 60 (1981) ("EO 12291 Opinion"). We explained that the President has the "distinctive constitutional role" of supervising the execution of federal law, and he could not take care that the entire "mass of legislation" is executed faithfully, in a consistent and uniform manner, absent authority to guide and direct his subordinates. *Id*. at 60–61 (internal quotation marks omitted); *see also* Peter L. Strauss, *The Place of*

[7] *See also* 1 Annals of Cong. 462 (1789) (Rep. James Madison) ("It is evidently the intention of the Constitution, that the first Magistrate should be responsible for the executive department; so far therefore as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country."); 1 *Collected Works of James Wilson* 730 (Kermit L. Hall & Mark David Hall eds., 2007) ("In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counsellors. . . . He is the dignified, but accountable magistrate of a free and great people."); 2 *id*. at 873 ("[I]n the executive department, the principle of unity is adopted.").

Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 642 (1984) ("[T]he execution of not a single law but many inevitably raises questions of priority, conflict, and coordination . . . . Attending to these conflicts seems an inevitable aspect of a chief executive's function."). That is also true when agencies execute federal law by promulgating rules. *See, e.g.*, *Sierra Club v. Costle*, 657 F.2d 298, 405–06 (D.C. Cir. 1981) (recognizing that the President must be allowed to "control and supervise" rulemakings). Thus, under his constitutional authority to supervise the execution of federal law, the President may establish both general principles for agencies to follow in rulemaking, such as cost-benefit principles, *see* EO 12866, § 1(b), and administrative mechanisms to effectuate those principles, such as centralized regulatory review, *see id.* § 6.

The President may also require any agency to submit in writing an analysis of proposed agency action under the Opinions Clause, which authorizes the President to "require [an] Opinion, in writing," from the principal officers in the Executive Branch on "any Subject" relating to "the duties of their . . . offices." U.S. Const. art. II, § 2, cl. 1; *see also* EO 12291 Opinion, 5 Op. O.L.C. at 62. The Opinions Clause ensures that the President may obtain the advice he needs to order the affairs of the Executive Branch, including the counsel necessary to direct the heads of agencies in the exercise of their statutory functions. The Opinions Clause therefore sets him up as "Chief Administrator of the Executive Bureaucracy" and confirms that "[e]xecutive departments are accountable to the Chief Executive." Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647, 652, 658 (1996).[8] In the view of then-Professor Elena Kagan, the Opinions Clause "supports OMB review of at least executive agency (and perhaps independent agency) actions, so long as the ultimate decisionmaking power resides in the hands of agency officials; the [regu-

[8] *See also* Amar, *Some Opinions*, 82 Va. L. Rev. at 661 ("[T]he Opinion Clause clearly exemplifies the President's supervisory power over the executive departments."); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Law*, 104 Yale L. J. 541, 584 (1994) ("[T]he Opinions Clause empowers the President to obtain information in writing on government matters precisely so he will be able to issue binding orders to his subordinates."); Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 62 ("The duty to report is meaningful only if the President retains a measure of substantive authority over the doings of the agency.").

latory] review system then operates as a channel through which the President can obtain information from and offer advice to the relevant administrators." Kagan, *Presidential Administration*, 114 Harv. L. Rev. at 2325. By requiring his subordinates to provide their opinions on proposed regulatory actions, the President may receive the advice he needs to "properly supervise and guide the[] construction of the statutes" under which his subordinates act, *Myers*, 272 U.S. at 135, and thereby "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3.

C.

While the President must supervise the faithful execution of the laws, Congress has the authority to define the structure of the Executive Branch and the responsibilities of its officers. In our published 1981 opinion, we advised that "the President's exercise of supervisory powers must conform to legislation enacted by Congress," and "may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress." EO 12291 Opinion, 5 Op. O.L.C. at 61.[9] Yet it is equally true that Congress may not "impede the President's ability to perform his

[9] Our 1981 opinion recognized that "[i]n certain circumstances, statutes could invade or intrude impermissibly upon the President's 'inherent' powers," but concluded that "that issue [did] not arise" because Congress had not forbidden presidential direction under EO 12291. EO 12291 Opinion, 5 Op. O.L.C. at 61 n.3. In a later memorandum to OMB, this Office considered the scope of congressional authority to exempt independent agencies from regulatory review. *See* Memorandum for Preeta D. Bansal, General Counsel and Senior Policy Adviser, Office of Management and Budget, from David Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Regulatory Review and Coordination for Independent Agencies* at 11–17 (Sept. 3, 2009). We advised that "we certainly cannot rule out the possibility that precluding Presidential supervision in the context of a particular statutory regime might transgress whatever minimum quantum of supervisory authority is required under *Morrison*," *id*. at 16–17, but we declined to "resolve definitively the difficult and unsettled constitutional and statutory questions raised" by such a proposal, *id*. at 18. The Barron Memorandum cautioned that directing independent agencies under EO 12866 might be "legally controversial" and advised against any "definitive conclusion" absent a concrete examination of a particular agency's governing statutes. *Id*. at 1. As discussed below in Part III, we do not believe that any of the features generally associated with agency independence would restrict a presidential direction for independent agencies to comply with EO 12866. But under the terms of EO 12866 itself, if an agency (be it independent or otherwise) has a specific statutory provision that conflicts with the general directives under EO 12866, then that specific statutory provision will control. *See* EO 12866, § 9; *infra* Part IV.

constitutional duty" under the Take Care Clause. *Morrison*, 487 U.S. at 691; *see also* Statement on Signing a Bill Concerning the Protection of Marine Mammals (Oct. 9, 1981), 1 *Pub. Papers of Pres. Ronald Reagan* 914, 914 (1981) (noting that a statute exempting certain rulemakings from EO 12291 "should not be read to infringe in any way on the President's constitutional responsibility to supervise the Secretary of Commerce and the Secretary of the Interior in their execution of the law").

EO 12866, however, conflicts with no statute. On the contrary, the order directs that the regulatory review process "shall be conducted so as to meet applicable statutory requirements." EO 12866, pmbl. An agency must follow the order's overarching principles "unless a statute requires another regulatory approach," *id.* § 1(a), and several of its operative provisions contain similar caveats. For instance, the agency need not analyze and quantify potential economic costs where Congress has prohibited such consideration, *id.* § 6(a)(3)(C), and the agency must measure the rule against the President's priorities only "to the extent permitted by law," *id.* § 6(a)(3)(B)(ii).

EO 12866 also preserves the statutory discretion vested in the agency. In our 1981 opinion, we concluded that EO 12291 did "not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official." EO 12291 Opinion, 5 Op. O.L.C. at 61. So too, EO 12866 channels an agency's discretion by requiring the agency to follow the President's regulatory principles and to submit the proposed rule for OIRA's review. However, nothing in the order "shall be construed as displacing the agencies' authority or responsibilities, as authorized by law." EO 12866, § 9. The order allows OIRA to return a proposed regulatory action to an agency for reconsideration, *id.* § 6(b)(3), but the order does not authorize OIRA to veto a proposed action. OIRA exercises only a "power of consultation"—a significant power, to be sure, but not the "authority to reject an agency's ultimate judgment." EO 12291 Opinion, 5 Op. O.L.C. at 64. Thus, subject to the guidance set by the order, "the authority to make the ultimate decision rests where Congress has placed it—in the relevant agency." Strauss & Sunstein, *Role of the President*, 38 Admin. L. Rev. at 191.

EO 12866 similarly confirms that it is the President, rather than OMB, who exercises the final authority to direct agency action, with section 7 contemplating presidential resolution of any unresolved disputes. This is

consistent with the President's constitutional supervisory authority under Article II, which may not be delegated. *See Centralizing Border Control Policy Under the Supervision of the Attorney General*, 26 Op. O.L.C. 22, 24–25 (2002); *cf*. *Free Enter*. *Fund*, 561 U.S. at 496–97 ("[T]he President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch." (internal quotation marks omitted)). At the same time, the President "may tap advisers within the White House" (and within agencies) to assist him in implementing presidential policies within the Executive Branch. *Centralizing Border Control Policy*, 26 Op. O.L.C. at 26. EO 12866 designates OIRA to coordinate and implement regulatory policy, while ensuring that agencies retain the authority provided by the laws enacted by Congress, under the ultimate supervision of the President.

III.

The President's constitutional authority to direct traditional executive agencies under EO 12866 also extends to the "independent regulatory agenc[ies]" identified in 44 U.S.C. § 3502(5). All of those agencies remain part of the Executive Branch and subject to his superintendence. Although Congress has sought to limit the President's authority to remove the heads of some of those agencies, such limits on removal do not preclude the President from requiring the agencies to comply with EO 12866. Nor do the other hallmarks of agency "independence," such as multimember governance, independent litigating authority, or open-meeting requirements. The President has long required independent regulatory agencies to submit an annual regulatory plan and agenda under section 4 of EO 12866. Congress has not otherwise sought to shield such agencies, as a general matter, from complying with the order's other requirements, and we see no persuasive grounds to infer such an unstated limitation on the President's supervisory authority.

A.

We begin again with the text of the Constitution. The "executive Power" vested in the President and his constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 1, cl. 1; *id*. § 3, do

not vanish merely because the subordinate charged with executing the law may enjoy tenure or other protections. The "Constitution requires that a President chosen by the entire Nation oversee the execution of the laws." *Free Enter. Fund*, 561 U.S. at 499. Even when an officer heads an independent agency, the President's obligation to "take Care that the Laws be faithfully executed" still requires that he "oversee the faithfulness of the officers who execute them." *Id.* at 484; *see also id.* at 492 (quoting James Madison's observation in the First Congress that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws"); *Morrison*, 487 U.S. at 696 (recognizing that the President must have "sufficient control" over all officers who execute the law).

The Supreme Court has confirmed that the President must have some constitutional authority to remove all those executive officers whom he appoints, including the heads of independent agencies. *See Free Enter. Fund*, 561 U.S. at 493 ("As we explained in *Myers*, the President . . . must have some 'power of removing those for whom he can not continue to be responsible.'"). It is true that the Court has upheld some statutory limits on those removal powers. *See Wiener v. United States*, 357 U.S. 349, 353 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). But even the authority to remove an official for statutorily identified causes "presupposes that the officer or body that has the removal power must supervise the subordinate officer at least to the extent needed to determine whether 'cause' for removal exists." *Applicability of Executive Order 12674 to Personnel of Regional Fishery Management Councils*, 17 Op. O.L.C. 150, 156 n.19 (1993); *see also Morrison*, 487 U.S. at 692–93 (stating that the power to terminate an independent counsel for good cause allowed "ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act"). The President could not fulfill this responsibility without the power to review the work of independent agencies and, to some degree, to direct the faithful performance of their duties.

The Opinions Clause, likewise, supports presidential oversight of the "principal Officer in each of the executive Departments," including the independent agencies. U.S. Const. art. II, § 2, cl. 1. In *Free Enterprise Fund*, the Court had little trouble concluding that the Securities and Exchange Commission ("SEC")—whose members were assumed to have

tenure protection—"constitutes a 'Departmen[t]' for purposes of the Appointments Clause." 561 U.S. at 487, 511. In a footnote, the Court "express[ed] no view on" whether the Commission should be considered an "executive Departmen[t]" under the Opinions Clause. *Id*. at 511 n.11. But the Court previously declared that the "word 'department'" in the two clauses "clearly means the same thing, and the principal officer in the one case is the equivalent of the head of department in the other." *United States v. Germaine*, 99 U.S. (9 Otto) 508, 511 (1879); *see also Freytag v. Comm'r*, 501 U.S. 868, 918 (1991) (Scalia, J., concurring in part and concurring in the judgment) (finding it "quite likely that the 'Departments' referred to in the Opinions Clause . . . are the same as the 'Departments' in the Appointments Clause").[10] The President therefore may "require" the heads of independent regulatory agencies to give an opinion in writing on "any Subject relating to the duties of their respective Offices," U.S. Const. art. II, § 2, cl. 1, including opinions on the regulatory impact of significant actions, as required by section 6 of EO 12866. As discussed above, the Opinions Clause, consistent with the President's supervisory authority, further implies that the President may direct the head of an independent regulatory agency to consult with the President and his advisers prior to exercising the agency's discretion in the rulemaking process.

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[10] Indeed, that commonsense conclusion also follows from the Court's recognition that "[t]he object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments." *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329 (1816). During the Washington Administration, the Justices of the Supreme Court embraced that same understanding, advising that the Opinions Clause "seems to have been *purposely* as well as expressly limited to *executive* Departments," thereby implicitly excluding the judicial department. Letter from Justices of the Supreme Court to George Washington (Aug. 8, 1793), *reprinted in* 6 *The Documentary History of the Supreme Court of the United States, 1787–1800*, at 755 (Maeva Marcus ed., 1998). With only three "great departments" to choose from, it is apparent that independent agencies that execute federal law are part of the "executive Departments" and subject to the Opinions Clause. We note that the ratification history of the Twenty-Fifth Amendment may suggest a different reading for the "principal officers of the executive departments" mentioned there, but the 1967 ratification of that amendment does not illuminate the original meaning of Article II. *See Freytag*, 501 U.S. at 886–87 (citing pre-ratification evidence that "the principal officers" under the Twenty-Fifth Amendment were limited to members of the Cabinet); *id*. at 917 (Scalia, J., concurring in part and concurring in the judgment) (distinguishing "the principal officers" in the Twenty-Fifth Amendment from the similar language in the Opinions Clause).

These principles led us to conclude in 1981 that President Reagan could have applied EO 12291 to independent agencies. *See* Simms Memorandum at 10–12; *supra* Part I. We acknowledged that Congress often "intends the independent agencies to be free of Presidential supervision on matters of substantive policy," but we viewed EO 12291 as consistent with that legislative intent because the order preserved the agencies' "substantive discretion to decide particular . . . rulemaking matters." Simms Memorandum at 10, 11. Considering costs and benefits, where permitted by statute, and submitting proposed agency actions to OIRA would not "displace the agencies' ultimate discretion to decide what rule best fulfills their statutory responsibilities." *Id*. at 12.

We reached a similar conclusion in 1995, when we advised the White House that EO 12866 could be applied to the Social Security Administration ("SSA"), even though Congress had recently given the Commissioner a six-year term in office and statutory protection from removal. *See* 42 U.S.C. § 902(a)(3); *see also* 42 U.S.C. § 904(b)(1)(A) (requiring that the SSA's budget "be submitted by the President to the Congress without revision"). Our file memorandum recording this informal advice noted that the removal restriction, if valid, might limit the extent to which the President could "order[] the [SSA Commissioner] to take a particular substantive policy position" in a proposed action submitted for review under section 6 of EO 12866. Memorandum for the Files, *Re: OMB Review of Regulations of the Social Security Administration* at 5 (Aug. 7, 1995). But the President could nonetheless "tell the SSA to submit the proposed rule to OIRA, because that [directive] . . . would not displace the SSA's ultimate discretion to promulgate regulations it considers appropriate." *Id*. at 7. We noted that permitting at least that degree of supervision "may in fact be constitutionally compelled" under Article II. *Id*. Consistent with this Office's advice, EO 12866 continued to apply to the SSA, which we understand has participated in the regulatory review process in the years since. That history confirms that the presidential supervision under EO 12866 is consistent with statutory tenure protection. *See also supra* p. 237 (noting that President Clinton's legal advisers concluded that EO 12866 could be applied to independent regulatory agencies).

Thus, in the past, we have advised that both EO 12291 and EO 12866 could have been applied to independent agencies. Such advice is consistent with our longstanding view that the President "may exercise a

certain amount of managerial authority" over independent agencies and "under penalty of removal 'may exact reasonable efficiency and absolute integrity'" from independent agencies. *Applicability of Executive Privilege to Independent Regulatory Agencies*, 1 Op. O.L.C. Supp. 170, 172, 190 (Nov. 5, 1957) (quoting Robert E. Cushman, *The Independent Regulatory Commissions* 464 (1941)).[11] The President may "force an independent regulatory commission to comply with executive orders of general application unless Congress clearly indicates that such orders should not apply." *Id*. at 190 (quoting Cushman, *Independent Regulatory Commissions* at 465). The President's supervisory authority extends to all officers charged with executing the laws of the United States, and we will not lightly presume that Congress has sought to displace it.

B.

EO 12866 does not seek to displace any statutory mandate. To the contrary, the order itself is limited so that it requires agencies to follow its principles and procedures "unless a statute requires another regulatory approach," EO 12866, § 1(a), and only "to the extent permitted by law," *id*. § 6(a)(3)(B)(ii). To address how the order applies to independent agencies, we thus must consider whether the common statutory hallmarks of independence themselves would conflict with the kind of presidential supervision required by EO 12866's regulatory review process.

In doing so, we are guided by the principle that "a clear statement of congressional intent" is ordinarily required before a statute will be read in a manner that raises separation of powers concerns. *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air*

[11] In 1977, our Office also concluded that the President could issue an executive order that would require independent agencies to "perform [their quasi-legislative and judicial] functions efficiently and without undue delay" and "take into account the economic impact of their decisions," although we suggested that the President "probably cannot dictate the precise effect the agencies are to give to that impact," in view of what we called then, in a nod to *Humphrey's Executor*, "the agencies' quasi-legislative autonomy." Memorandum for Simon Lazarus, Associate Director, Domestic Council, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: President's Authority to Impose Procedural Reforms on the Independent Regulatory Agencies* at 2, 3 (July 22, 1977). In view of subsequent decisions of the Supreme Court, as well as opinions of this Office, we do not read *Humphrey's Executor* so broadly. *See infra* pp. 252–54.

Act, 21 Op. O.L.C. 109, 112 (1997); *see also, e.g.*, *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) ("We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion."); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) ("When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear."); *Applicability of Executive Privilege to Independent Regulatory Agencies*, 1 Op. O.L.C. Supp. at 190 (stating that Congress must "clearly indicate[]" that executive orders of general applicability do not apply to independent agencies if it seeks to impose such a limitation). We think it clear that any effort by Congress to insulate an executive officer from presidential supervision would raise such separation of powers concerns. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 499; *Morrison*, 487 U.S. at 691. That principle has particular force here because, on occasion, Congress has expressly sought to preclude OIRA review of some rulemakings. *See supra* Part II.C (citing President Reagan's 1981 signing statement regarding a bill that precluded the application of EO 12291); *see also* Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, div. C, tit. II, 125 Stat. 786, 894 (2011) (appropriating funds to OMB provided that "none of the funds . . . may be used for the purpose of reviewing any agricultural marketing orders or any . . . regulations under the provisions of the Agricultural Marketing Agreement Act of 1937"); Copeland, *Role of OIRA* at 25 (discussing these examples). Absent such a clear statement, we will not presume that Congress sought to limit the President's supervisory authority.

C.

We proceed to examine the distinctive statutory features commonly thought to define agency independence. Chief among those is tenure protection, which is often described as "[t]he distinguishing characteristic" that makes an agency "independent." Simms Memorandum at 8. Many independent agencies are headed by officials covered by such a provision. *See, e.g.*, 15 U.S.C. § 41 (members of the Federal Trade Commission "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office"); *id.* § 2053(a) (members of the Consumer Product Safety Commission "may be removed by the President for neglect of duty or malfeasance in office but for no other cause"); 42 U.S.C.

§ 7171(b)(1) (members of the Federal Energy Regulatory Commission "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office").[12] But the statutory limits on the President's authority to remove the head of an agency do not preclude the President from requiring independent agencies to comply with EO 12866, much less do so clearly. Requiring an agency to comply with EO 12866 would not conflict with those statutes, which do not preclude, and indeed presume, ongoing presidential supervision of the agency.

The Supreme Court's decision in *Humphrey's Executor* serves as the foundation for any argument to the contrary. In *Humphrey's Executor*, the Court addressed whether Congress could prohibit the removal without cause of members of the Federal Trade Commission ("FTC"). In contrast with a "purely executive" officer, such as the postmaster whose job was at issue in *Myers*, *Humphrey's Executor* concluded that the FTC exercised what it described as "quasi-legislative" and "quasi-judicial" functions, 295 U.S. at 629, and the Constitution did not grant the President an "illimitable power of removal" over such officers. *Id.*; *see also Wiener*, 357 U.S. at 353–54 (interpreting a statute to provide tenure protection to members of the War Claims Commission, an agency with adjudicative functions).

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[12] Several independent regulatory agencies are headed by officers who do not enjoy any express protection against removal without cause: the Commodity Futures Trading Commission, the Federal Communications Commission, the Office of Financial Research, and the SEC. *But cf. Free Enter. Fund*, 561 U.S. at 487 (assuming that SEC members can be removed only for cause); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (same). The President may remove the Comptroller of the Currency only "upon reasons to be communicated by him to the Senate," 12 U.S.C. § 2, but no statute purports to limit the permissible reasons for removal. And no statute expressly limits the President's authority to remove the three appointed (i.e., non-ex-officio) members of the Federal Deposit Insurance Corporation. In *Wiener*, the Supreme Court held that the President could remove members of the War Claims Commission only for cause even though Congress concededly "said nothing about it." 357 U.S. at 356. But we have questioned that conclusion and advised that "the executive branch should resist any further application" of *Wiener* outside the context of purely adjudicatory bodies. *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 170 (1996) ("*Separation of Powers*"); *see also Holdover and Removal of Members of Amtrak's Reform Board*, 27 Op. O.L.C. 163, 166 (2003) ("Because the removal power is a principal means by which the President carries out the executive power and takes care that the laws be faithfully executed, we do not believe that any restrictions on the President's removal power should be inferred.").

In the course of upholding the lawfulness of such a restriction, the Court in *Humphrey's Executor* spoke in sweeping terms about the congressional intent underlying the FTC Act:

> [T]he language of the [FTC Act], the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

295 U.S. at 625–26 (emphasis omitted); *see also id*. at 628 (stating that the FTC's duties "are performed without executive leave and, in the contemplation of the statute, must be free from executive control"). If this view were "taken at face value, the President's constitutional power to supervise" the "body of experts" at the independent agencies would be "limited to his power of appointment," Simms Memorandum at 9, and he could no more supervise their "quasi-judicial" and "quasi-legislative" work than he could the judgments of his appointees to the Article III courts. This view would not only preclude the President from requiring agencies to submit proposed regulations to OIRA, but it would also bar any presidential directives at all, including the well-established requirement that independent agencies submit an annual regulatory plan and agenda under section 4 of EO 12866.

We cannot read *Humphrey's Executor* so broadly. To begin with, the quoted passage is dictum. As then-Professor Kagan explained, the "question actually decided in the case was much narrower" than its reasoning, and "the Court did not hold that Congress could cut off agencies in all respects from the President." Kagan, *Presidential Administration*, 114 Harv. L. Rev. at 2325 n.311. The Court held only that Congress had validly limited the President's grounds for removing the Commissioner to

"inefficiency, neglect of duty, or malfeasance in office," 295 U.S. at 623, and that the President had violated the statute by removing him without citing any of those grounds.

Subsequent decisions confirm that independent agencies execute federal law and are part of the Executive Branch—not a "headless 'fourth branch' of the Government." President's Committee on Administrative Management, *Administrative Management in the Government of the United States* 36 (Jan. 1937); *see, e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) ("Agencies make rules . . . and conduct adjudications," but those activities "are exercises of—indeed under our constitutional structure they *must be* exercises of—the 'executive Power.'"); *Free Enter. Fund*, 561 U.S. at 510–11 (holding that the SEC is an executive "Department[]" under the Appointments Clause); *Morrison*, 487 U.S. at 690 n.28 ("[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree."); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (recognizing that agency rulemaking is an executive function, not a legislative function); *Buckley v. Valeo*, 424 U.S. 1, 125–28 (1976) (per curiam) (holding that members of the Federal Election Commission are executive officers, not officers of Congress); *Separation of Powers*, 20 Op. O.L.C. at 168 n.116 ("We do not think that the 'independent' regulatory agencies could be viewed today as within the legislative or judicial branches." (citing *Mistretta v. United States*, 488 U.S. 361, 387 n.14 (1989))); *Applicability of Executive Privilege to Independent Regulatory Agencies*, 1 Op. O.L.C. Supp. at 171–72 ("[*Humphrey's Executor*] cannot be invoked as a complete charter of independence of the regulatory commissions from executive control."). While *Humphrey's Executor* spoke of the "quasi-legislative" and "quasi-judicial" functions of independent agencies, 295 U.S. at 628–29, there can now be no doubt that independent agencies are part of the Executive Branch.

In addition, the dictum of *Humphrey's Executor* conflicts not only with subsequent decisions, but also with the very statute at issue in that case. The Court's claim that the FTC "shall be independent of executive authority, *except in its selection*," 295 U.S. at 625, is demonstrably incorrect. Congress gave the President authority to remove FTC Commissioners for "inefficiency, neglect of duty, or malfeasance in office," *id.* at 619, terms that presuppose presidential supervision of the actions of those whom he

may remove. Thus, the President's authority over the officers of the FTC continues well beyond the time of selection. The same is true of any independent agency whose head or heads are removable by the President for cause.

Humphrey's Executor also rested on an "outmoded view" of independent agencies as apolitical experts. Simms Memorandum at 10. "[I]ndependent agencies . . . have to make a slew of non-scientific legal and policy judgments—such as how to interpret governing statutes, how to exercise policy discretion under those statutes, and whom to charge for violations of the law." *Aiken County*, 645 F.3d at 442 n.2 (Kavanaugh, J., concurring). Indeed, "[i]t is now recognized that rulemaking may legitimately reflect political influences of certain kinds from a number of sources, including Congress and the affected public." Simms Memorandum at 10. It thus makes little sense to presume that Congress intended to divorce such agencies entirely from presidential supervision.

In the decades since *Humphrey's Executor*, Congress itself has ensured that independent agencies are not "independent of executive authority." 295 U.S. at 625. Under the Paperwork Reduction Act, Congress has required independent agencies to submit proposed information requests to OIRA for review. 44 U.S.C. §§ 3502(1), 3507(a), (f). Under the Congressional Review Act, independent agencies must submit "major rules" to Congress before the rules "can take effect." 5 U.S.C. §§ 801(a)(1)(A), 804(1). Consistent with EO 12866, the statute requires OIRA to review these regulations and determine whether they are "major" under the statute. *Id*. § 804(2). Congress has also required independent agencies to comply with the Regulatory Flexibility Act, *see id*. § 601(1), and the Data Quality Act, *see* Pub. L. No. 106-554, div. C, § 515, 114 Stat. 2763, 2763A-153 to -154 (2000)—the latter of which charged OMB with issuing guidelines to all agencies to ensure data quality and integrity. Accordingly, over the past 80 years, Congress has repeatedly confirmed that independent agencies are part of the Executive Branch and subject to "executive authority."

For these reasons, we do not believe that the vision of independence suggested by *Humphrey's Executor* accurately describes the current state of the law. At the same time, we acknowledge that the Court has suggested on occasion that removal restrictions provide an agency head with some measure of independence from the President. *See Free Enter*. *Fund*,

561 U.S. at 502 (suggesting that "simple disagreement with . . . policies or priorities" may not constitute cause for removal); *Fox Television Stations*, 556 U.S. at 523 (recognizing that "independent agencies" have been "sheltered . . . from the President"); *Mistretta*, 488 U.S. at 410–11 (describing for-cause limitations on removal as "specifically crafted to prevent the President from exercising 'coercive influence' over independent agencies").[13] And even some independent regulatory agencies without express tenure protection for their heads, such as the SEC, have historically enjoyed a broader degree of political independence than other executive agencies. *See Free Enter. Fund*, 561 U.S. at 547 (Breyer, J., dissenting) (noting the "political environment" protecting the independence of some agencies).

We believe, however, that those decisions are consistent with EO 12866, which "does not purport wholly to displace, but only to guide and limit, discretion which Congress has allocated to a particular subordinate official." EO 12291 Opinion, 5 Op. O.L.C. at 61. EO 12866 does not supplant an independent agency's discretion any more than it does for a "non-independent" agency. To the contrary, the order "reaffirm[s] the primacy of Federal agencies in the regulatory decision-making process" and directs that regulatory review "be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been

[13] Other decisions of the Supreme Court have suggested a broader concept of what constitutes "cause" for removal under particular statutes. *See Morrison*, 487 U.S. at 692 (describing the power to remove for cause as conferring "ample authority to assure" that a subordinate "is competently performing his or her statutory responsibilities"); *Bowsher*, 478 U.S. at 729 (stating that the terms in a for-cause removal provision "are very broad and, as interpreted by Congress, could sustain removal of a Comptroller General for any number of actual or perceived transgressions of the legislative will"). Our Office too has favored the broader understanding, in large part to avoid constitutional concerns. *See, e.g.*, *Separation of Powers*, 20 Op. O.L.C. at 169 n.117 ("[A] generous reading of the President's . . . power to remove an inferior officer may be essential to the constitutionality of removal restrictions."); Memorandum for Roger Pauley, Director, Office of Legislation, Criminal Division, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: S. 101, Lobbying Disclosure Act* at 1 (July 17, 1995) (legislation proposing "for cause" removal protection for an executive officer "might well be . . . unconstitutional" if it "were interpreted to bar the President from discharging the [officer] for failure to carry out the Administration's policies"). We have no occasion here to consider whether the refusal of an agency head to comply with a presidential directive under EO 12866 would constitute cause for removal.

entrusted to the Federal agencies." EO 12866, pmbl. Regardless of whether an agency is "independent," the President's authority to supervise all those who execute federal law must permit him, at the least, to require that agencies consult with his senior advisers to ensure that the agencies adhere to principles of sound governance and law. We therefore conclude that a for-cause limitation on removal does not preclude the President from applying the OIRA review process under EO 12866 to an independent agency.

D.

Congress has adopted other statutory mechanisms to provide independent regulatory agencies with a degree of insulation within the Executive Branch. Those mechanisms include fixed terms in office for the agency head, distinct from the President's term; composition as a multi-member bipartisan board with staggered terms of office; the authority to submit testimony or proposed budgets to Congress without OMB review; and independent litigating authority. *See* Marshall J. Breger & Gary J. Edles, *Independent Agencies in the United States* 93–95, 163–175 (2015); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 789–808 (2013); David E. Lewis & Jennifer L. Selin, *Sourcebook of United States Executive Agencies* 88–106 (2d ed. Oct. 2018). Those features are not universally shared by all the independent regulatory agencies in 44 U.S.C. § 3502(5), nor are they unique to those agencies. But they are common enough that we consider here whether any would conflict with the centralized review process of EO 12866. We conclude that they do not.

1. *Multi-member, Bipartisan Agency Governance*. The statutes structuring some independent regulatory agencies as multi-member boards, with staggered terms and bipartisan membership, do not limit the President's authority to require those agencies to comply with EO 12866. *See, e.g.*, 7 U.S.C. § 2(a)(2)(A) (establishing the Commodity Futures Trading Commission as "an independent agency of the United States Government" composed of "five Commissioners," "[n]ot more than three of [whom] shall be members of the same political party," each serving "a term of five years" expiring at staggered one-year intervals); 15 U.S.C. § 78d(a) (similar provisions for the SEC). Requiring an independent

regulatory agency to submit its proposed rules to OIRA for review is consistent with those structural features. The SEC, for example, will continue to be headed by a five-member, bipartisan board as required by statute, whether or not the President directs the Commission to comply with EO 12866.

One might argue that Congress chose to delegate rulemaking authority to an agency headed by a multi-member, bipartisan board "to minimize presidential interference." EO 12291 Opinion, 5 O.L.C. Op. at 61. But we would not overstate the degree of insulation. In most instances, the President retains the statutory authority to select the board's chair, ensuring that he may put his stamp on the agency's policymaking agenda.[14] In addition, EO 12866 preserves an agency's ultimate discretion and thus respects Congress's judgment to entrust particular rulemakings to a commission rather than a traditional executive agency. Subject to appropriate consultation, the commission still makes the final decision under EO 12866. We see no persuasive grounds to infer from the multi-member structure of an independent regulatory agency any additional limits on presidential supervision that would bar the application of EO 12866 to the agency.

2. *Independent Litigating Authority*. For similar reasons, EO 12866 would not conflict with the authority of an agency to litigate independently of the Department of Justice when the agency has been given such

[14] *See, e.g.*, 29 U.S.C. § 153(a) ("The President shall designate one member [of the National Labor Relations Board] to serve as Chairman of the Board."); 42 U.S.C. § 5841(a)(1) ("The President shall designate one member of the [Nuclear Regulatory] Commission as Chairman thereof to serve as such during the pleasure of the President."); 42 U.S.C. § 7171(b)(1) ("One of the members [of the Federal Energy Regulatory Commission] shall be designated by the President as Chairman."); 46 U.S.C. § 301(c)(1) ("The President shall designate one of the Commissioners [of the Federal Maritime Commission] as Chairman."); 47 U.S.C. § 154(a) ("The Federal Communications Commission . . . shall be composed of five commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman."); Reorg. Plan No. 10 of 1950, § 3, 64 Stat. 1265, 1266 (effective May 24, 1950) ("The functions of the [Securities and Exchange] Commission with respect to choosing a Chairman from among the commissioners composing the Commission are hereby transferred to the President."); Reorg. Plan No. 8 of 1950, § 3, 64 Stat. 1264, 1265 (effective May 24, 1950) ("The functions of the [Federal Trade] Commission with respect to choosing a Chairman from among the membership of the Commission are hereby transferred to the President.").

authority. *See, e.g.*, 12 U.S.C. § 5564 (Bureau of Consumer Financial Protection ("CFPB")). Such authority does not imply that there are any statutory limits upon presidential supervision of agency rulemaking. EO 12866's centralized review process applies only to regulatory actions that promulgate or are expected to lead to the promulgation of "a final rule or regulation." EO 12866, § 3(e); *supra* note 2. Thus, the order does not cover agency litigation decisions or decisions to seek judicial enforcement, and agencies with independent litigating authority will exercise that authority without OMB or OIRA review. In fact, Congress has given Cabinet departments independent litigating authority in limited circumstances, *see, e.g.*, 29 U.S.C. § 216(e)(3)(B) (Department of Labor), yet those agencies have long been subject to EO 12866.

3. *OMB Bypass Authority*. Congress has given some independent regulatory agencies the authority to bypass OMB by submitting reports, budgets, or testimony directly to Congress without prior OMB review. For the CFPB, for example, Congress provided that

> [n]o officer or agency of the United States shall have any authority to require the Director or any other officer of the Bureau to submit legislative recommendations, or testimony or comments on legislation, to any officer or agency of the United States for approval, comments, or review prior to the submission of such recommendations, testimony, or comments to the Congress[.]

12 U.S.C. § 5492(c)(4); *see also, e.g.*, 12 U.S.C. § 250 (similar provision covering the "the Securities and Exchange Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, . . . the Director of the Federal Housing Finance Agency, [and] the National Credit Union Administration"); 49 U.S.C. § 1303(d) (Surface Transportation Board). Although these statutes do not mention OMB by name, OMB has long operated the Executive Branch clearance processes that these statutes allow agencies to bypass. *See* OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget* (2017); OMB Circular No. A-19, *Legislative Coordination and Clearance* (1979). In other instances, Congress has effectively prohibited advance OMB review by directing that an independent regulatory agency's budget requests, prepared testimony, or legislative proposals be submitted concurrently to Congress whenever

they are submitted to OMB. *See, e.g.*, 7 U.S.C. § 2(a)(10)(A) (Commodity Futures Trading Commission); 15 U.S.C. § 2076(k)(1) (Consumer Products Safety Commission); 42 U.S.C. § 7171(j) (Federal Energy Regulatory Commission).

The Executive Branch has long objected to efforts to minimize presidential supervision of the agencies in testifying and submitting proposed legislation to Congress, treating those restrictions as an infringement of the President's Article II authority, including his Article II, Section 3 authority to recommend to Congress "such Measures as he shall judge necessary and expedient." *See, e.g.*, *Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007*, 32 Op. O.L.C. 27, 28 (2008) ("For decades, the Executive Branch has consistently objected to direct reporting requirements . . . on the ground that such requirements infringe upon the President's constitutional supervisory authority over Executive Branch subordinates and information."); *Authority of the Special Counsel of the Merit Systems Protection Board to Litigate and Submit Legislation to Congress*, 8 Op. O.L.C. 30, 34, 36 (1984) ("[T]he Special Counsel has proposed legislation authorizing him to submit directly to Congress legislative recommendations that he 'deems necessary to further enhance the ability of the office to perform its duties.'"; "The Special Counsel's proposal would severely impair the President's ability to perform his constitutional obligation to 'recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient.'"); *see also Separation of Powers*, 20 Op. O.L.C. at 174–75; *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 254–55 (1989); *Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 639–42 (1982). But even if these bypass statutes are constitutional, none of them speaks to OMB or OIRA review of an agency's proposed rulemakings; all of them apply only to budget requests, to proposed legislation and testimony, or to some combination thereof.

Congress's decision to enact such bypass statutes is further evidence that independent regulatory agencies are not, merely by virtue of tenure protection, entirely free from presidential supervision (contra the dictum in *Humphrey's Executor*). Congress has expressly sought to limit OMB's authority to coordinate the interagency clearance process in various re-

spects, but has not imposed any statutory restrictions on OMB's authority to conduct regulatory review. This only underscores that Congress left the latter untouched. We must presume that Congress "says what it means and means what it says" in these statutes. *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016). By their plain terms, these statutes do not purport to forbid requiring independent regulatory agencies to participate in the EO 12866 centralized review process.

Congress has also required two agencies to submit certain financial operating plans and forecasts to OMB, but then provided in a "rule of construction" that those requirements "may not be construed as implying" that OMB has "any jurisdiction or oversight over the affairs or operations" of the agencies. 12 U.S.C. § 1827(c)(3) (Federal Deposit Insurance Corporation); *see also id*. § 5497(a)(4)(E) (CFPB). By its own terms, that rule of construction simply precludes the inference that the agencies' submission of required documents otherwise implies OMB supervision. The rule of construction, like OMB bypass statutes generally, does not speak to or limit the President's authority under Article II to require an agency to participate in centralized regulatory review of the agency's proposed rulemakings.

4. *Sunshine Act*. Congress has required multi-member agencies to comply with the Government in the Sunshine Act, 5 U.S.C. § 552b, but the requirements of that law do not preclude application of EO 12866. The Sunshine Act applies to any "agency . . . headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate." *Id*. § 552b(a)(1). The Act requires that "every portion of every meeting" of such an agency "be open to public observation," subject to various exceptions, *id*. § 552b(b), and it defines a "meeting" as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business," *id*. § 552b(a)(2). The public is entitled to at least one week's advance notice of any such meeting. *Id*. § 552b(e)(1). The Act's requirements do not apply to formal rulemakings, *see id*. § 552b(c)(10); *Time, Inc. v. U.S. Postal Serv.*, 667 F.2d 329, 334 (2d Cir. 1981), but there is no comparable exception for informal rulemakings—the kind of rulemakings to which EO 12866 applies, *see* EO 12866, § 3(d)(1). Thus, the Act re-

quires covered agencies, such as the SEC and FTC, to meet in public whenever a quorum of agency members convenes to engage in notice-and-comment rulemaking.

The Sunshine Act's requirements would not preclude compliance with EO 12866, because most discussions between a covered agency and OIRA would likely not qualify as a "meeting." As the Supreme Court explained in *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984), Congress was cognizant in drafting the Sunshine Act that "the administrative process cannot be conducted entirely in the public eye." *Id.* at 469. The Act is therefore limited to "meetings" as defined above. *See id.* at 471 (holding that a "meeting" must involve deliberations "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions" (internal quotation marks omitted)). Many of the consultations that occur in the EO 12866 process likely would not meet that standard. As the Court explained, "'informal background discussions that clarify issues and expose varying views' are a necessary part of an agency's work," and the Act was not intended to "prevent such discussions." *Id.* at 469–70 (brackets omitted). A "meeting" also must involve "at least the number of individual agency members required to take action on behalf of the agency." 5 U.S.C. § 552b(a)(2). An exchange of views between OIRA and the staff of an agency (or its Chairman) during the EO 12866 process would not qualify. Thus, the Sunshine Act would be consistent with applying EO 12866 to independent agencies.

* * * * *

We thus conclude that none of the common statutory hallmarks of independent agencies would stand in the way of applying EO 12866 to such agencies. Nothing in the centralized regulatory review process is inconsistent with their traditional "independence." EO 12866 expressly preserves the substantive rulemaking discretion afforded to independent agencies, just as it preserves the substantive discretion enjoyed by non-independent agencies. It does so, however, within the framework of presidential supervision and OIRA administrative expertise that has promoted good administrative governance since the earliest days of the Reagan Administration.

Finally, we note that our conclusion is consistent with those of the Administrative Conference of the United States and the American Bar Association, both of which have long endorsed the President's authority to extend EO 12866 to independent agencies.[15] A 2017 report by the House Committee on Oversight and Government Reform similarly opined that the President "has always had the authority to extend OIRA review to independent agencies." *OIRA Insight, Reform, and Accountability Act*, H.R. Rep. No. 115-19, at 7 (2017). As a matter of practice, OMB advises that "[a] number of 'independent' agencies, including the SEC, CFTC, the FCC, and others have consulted with OIRA regarding best practices for regulatory reform and cost-benefit analysis," OMB Letter at 7, and as noted above, the SSA has formally complied with the regulatory review process. We do not suggest, of course, that separation of powers questions may be decided by popular vote, but the views of congressional committees, administrative law experts, and practitioners confirm our view that extending EO 12866 to independent regulatory agencies would not compromise the appropriate and lawful performance of their statutory responsibilities.

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[15] *See, e.g.*, Section of Administrative Law and Regulatory Practice, ABA, *Improving the Administrative State: A Report to the President-Elect of the United States* at 10 (2016); Letter for Ron Johnson, Chairman, and Thomas R. Carper, Ranking Member, Senate Committee on Homeland Security and Governmental Affairs, from Thomas M. Susman, Director, Governmental Affairs Office, ABA, *Re: Support for S. 1067, the "Independent Agency Regulatory Analysis Act of 2015"* (July 23, 2015); House of Delegates, ABA, *Recommendation: Presidential Review of Rulemaking* (Aug. 7–8, 1990); *Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure*, 54 Fed. Reg. 5207, 5208 & n.2 (Feb. 2, 1989); Strauss & Sunstein, *Role of the President*, 38 Admin. L. Rev. at 206–07 (reprinting recommendation of the Administrative Law Section of the ABA). Former officials from independent agencies have offered the same view. *See* Letter for Ronald H. Johnson, Chairman, Senate Committee on Homeland Security and Governmental Affairs, from Nancy Nord, Former Commissioner, Consumer Product Safety Commission, et al., at 1 (June 17, 2015) (letter from eight former members of independent agencies). A number of academics have done the same. *See also, e.g.*, Datla & Revesz, *Deconstructing Independent Agencies*, 98 Cornell L. Rev. at 837; Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. Pa. L. Rev. 1489, 1535 (2002); Kagan, *Presidential Administration*, 114 Harv. L. Rev. at 2324–25 & n.311; Strauss & Sunstein, *Role of the President*, 38 Admin. L. Rev. at 200.

IV.

For the foregoing reasons, we conclude that the President may require independent regulatory agencies to comply with the centralized regulatory review process prescribed by EO 12866. There is nothing in the statutory composition of independent agencies or in their other generally shared attributes that would preclude the full application of EO 12866 to them. We have not reviewed the organic statute of each independent agency and therefore do not rule out the possibility that a particular statutory provision of a particular agency—if constitutionally valid and sufficiently clear—may conflict with certain requirements of EO 12866. EO 12866 expressly contemplates, however, that it would yield to such a provision, and such a potential conflict would therefore pose no barrier to the general extension of EO 12866.

Should an independent agency identify a specific statutory provision that it believes requires modification of the processes and procedures of EO 12866, we would be happy to examine the matter. Please let us know if we may be of further assistance in that or in any other regard.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Appointment and Removal of Federal Reserve Bank Members of the Federal Open Market Committee

The statutory procedures for appointing and removing Federal Reserve Bank members of the Federal Open Market Committee are consistent with the Constitution, and would have continued to be so under proposed H.R. 6741, the Federal Reserve Reform Act of 2018.

October 23, 2019

MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

This memorandum memorializes our review of the constitutionality of an amendment in the nature of a substitute to H.R. 6741, the Federal Reserve Reform Act of 2018, which would have expanded the authority of the Federal Open Market Committee ("FOMC") and changed its structure for the first time in decades. The bill was reported as amended by the U.S. House Committee on Financial Services in the 115th Congress, but was not enacted. The FOMC is part of the Federal Reserve System and directs U.S. monetary policy, principally by setting the target for the "federal funds rate"—the interest rate at which banks lend money to one another overnight. Sections 4(1)(B) and 5 of H.R. 6741 would have permitted the FOMC to authorize emergency lending and to set the interest rate on certain reserves maintained on behalf of financial institutions. Sections 6 and 8 would have amended the membership of the FOMC and the process for selecting its members.

Currently, the FOMC consists of twelve members—the seven members of the Federal Reserve System's Board of Governors, a member drawn from the Federal Reserve Bank of New York, and four members drawn from geographical groups of other regional Federal Reserve Banks, who serve one-year terms on the FOMC on a rotating basis. Each of the five Reserve Bank members must be either a president or first vice president of a Reserve Bank. A Reserve Bank president or first vice president is selected by a subset of directors of the Reserve Bank, subject to the approval of the Board of Governors, and then may be designated to serve on the FOMC by the full membership of the combined boards of directors of the Reserve Banks in the geographical group to which the Reserve Bank

belongs. Like any other Reserve Bank president or first vice president, Reserve Bank FOMC members may be removed from their Reserve Bank positions either by the Board of Governors or by the boards of directors of their respective Reserve Banks, which in turn would have the effect of removing the president or first vice president from the FOMC.

The structure of the FOMC has long raised constitutional questions. In 1986, a district court considered, although ultimately rejected, an Appointments Clause challenge to the FOMC's structure. *See Melcher v. FOMC*, 644 F. Supp. 510 (D.D.C. 1986), *aff'd on other grounds*, 836 F.2d 561 (D.C. Cir. 1987). But H.R. 6741 would have heightened Appointments Clause concerns with the FOMC's structure by increasing the authority of the FOMC's Reserve Bank members. We thus considered the constitutionality both of the FOMC's basic structure as it exists today and of the changes the proposed legislation would have made to that framework.

We concluded that Reserve Bank representatives on the FOMC are "Officers of the United States" under the Appointments Clause. U.S. Const. art. II, § 2, cl. 2. More specifically, they are "inferior Officers" who are appointed to their Reserve Bank positions by the "Head[] of [their] Department[]," *id.*—the Board of Governors of the Federal Reserve System, which approves their appointments as Reserve Bank presidents or first vice presidents. Their appointments as Reserve Bank presidents or first vice presidents make them eligible for service as members of the FOMC, even though the boards of directors that select them for FOMC membership may not make appointments under the Appointments Clause. Because the duties of Reserve Bank presidents and first vice presidents are germane to the duties of FOMC members, those officers may serve on the FOMC on the strength of the Governors' approval of their earlier appointments.

We also concluded that the procedures for removing Reserve Bank FOMC members are constitutional. Reserve Bank FOMC members are subject to plenary removal and supervision by the Board of Governors, which tracks the default rule that an officer is subject to removal at will by the appointing official. Under the statute, Reserve Bank FOMC members may also be removed from their underlying bank positions by the Reserve Bank boards of directors. But this additional removal authority does not unconstitutionally interfere with the removal authority of the

Board of Governors, because the statute can be read and administered to require the Board to approve any removal of an FOMC Reserve Bank member.

For these reasons, we concluded that the basic structure of the FOMC is constitutional, both as it exists today and as it would have been amended by H.R. 6741. This memorandum memorializes our reasoning in support of those conclusions.[1]

I.

The Federal Reserve System consists of three overlapping entities: the Board of Governors, the twelve regional Federal Reserve Banks, and the FOMC. The Board of Governors has seven members, who are appointed by the President to fourteen-year terms with the advice and consent of the Senate. 12 U.S.C. §§ 241–242. The Board oversees the operations of the regional Reserve Banks, including by setting policies for Reserve Banks' lending of money to private banks and provision of other financial services. The Board also regulates certain private financial institutions and activities. For instance, the Board imposes notice and reporting requirements, establishes capital requirements and leverage limits for financial institutions, and conducts stress tests to ensure that those institutions have sufficient capital to survive under adverse economic conditions. *See, e.g.*, *id.* §§ 248–248b, 5361–5374.

The twelve regional Federal Reserve Banks execute the Federal Reserve System's policies. The Reserve Banks are owned by member commercial banks within their regional districts. *Id.* § 341. Each Reserve Bank is overseen by its own board of directors and operated on a day-to-day basis by a president and one or more vice presidents. *Id.* Among other functions, Reserve Banks review the soundness of financial institutions, including state depository institutions; serve as "bank[s] for banks" by offering lending and payment services to other financial institutions; execute orders to buy and sell government securities; and gather information used to formulate national monetary policy. *See* Board of Governors of the Federal Reserve System, *The Federal Reserve System:*

[1] In preparing this opinion, we consulted with the Office of the General Counsel of the Department of the Treasury and with the Office of the General Counsel of the Federal Reserve System Board of Governors.

Purposes & Functions 13–14 (10th ed. Oct. 2016) ("*Federal Reserve System*"), https://www.federalreserve.gov/aboutthefed/files/pf_complete.pdf.

The FOMC, in turn, oversees the Federal Reserve System's "open market operations"—that is, "the purchase and sale of Government securities in the domestic securities market," through which the Federal Reserve System expands or contracts the supply of money in the United States. *FOMC v. Merrill*, 443 U.S. 340, 343 (1979); *see* 12 U.S.C. § 263; *Federal Reserve System* at 15–17, 20–32. To increase the money supply, the FOMC directs purchases of federal securities from banks; the proceeds of those purchases increase the banks' cash reserves. *Merrill*, 443 U.S. at 343. Conversely, to decrease the money supply, the FOMC directs sales of securities, thereby decreasing banks' reserves. *Id.* at 343–44. This change in reserve volume affects the amounts of money that banks may loan and invest. When banks have more money to loan, the interest rates on loans become lower and borrowers enjoy cheaper access to capital. When banks have less money, the interest rates on loans become higher. This ease or difficulty of access to capital has a "substantial impact" on "investment activity in the economy as a whole," *id.*, which is why these "open market operations . . . are the most important monetary policy instrument of the Federal Reserve System," *id.* at 343; *see also Federal Reserve System* at 32–38.

The FOMC directs open-market operations primarily by setting the target for the federal funds rate. The FOMC executes that decision by directing the Federal Reserve Bank of New York to purchase or sell government securities until the federal funds rate meets the target. *See Federal Reserve System* at 32–38; David Zaring, *Law and Custom on the Federal Open Market Committee*, 78 Law & Contemp. Probs. 157, 163 (2015). In response to the financial crisis that began in 2007, the FOMC also employed other, less traditional monetary policy tools, such as directing the purchase of longer-term securities to place downward pressure on long-term interest rates. *See Federal Reserve System* at 21–22. H.R. 6741 would have expanded the FOMC's authority further. It would have required decisions of the Board of Governors to authorize emergency lending to be approved by a two-thirds vote of the FOMC (as well as the Secretary of the Treasury) and would have authorized the FOMC to set the interest rate on balances held by Reserve Banks as part of commercial

banks' required reserves. H.R. 6741, sec. 4(1)(B), § 343(3)(A); *id*. sec. 5, § 461(b)(12)(A).

The FOMC consists of the Board of Governors and representatives of the regional Reserve Banks. The seven Governors of the Federal Reserve System hold positions on the FOMC for their entire fourteen-year terms as Governors. 12 U.S.C. §§ 241–242, 263. The remaining five FOMC members are the president of the New York Federal Reserve Bank and the presidents of four other regional Reserve Banks, each of whom serves a one-year term on the FOMC. *Id.* § 263(a).[2] Each Reserve Bank president is initially selected to his Reserve Bank position by two classes of the directors of that Reserve Bank, with the approval of the Board of Governors, for a five-year term. *Id.* §§ 304, 305, 341. The full membership of the combined boards of directors of the Reserve Banks in each regional group, *see supra* note 2, then selects the FOMC member who will represent that regional group, 12 U.S.C. § 263(a). H.R. 6741 would have amended the membership of the FOMC to include the presidents of all twelve Reserve Banks, bringing the FOMC's total membership to nineteen. H.R. 6741, sec. 6, § 263(a). H.R. 6741 would also have amended the underlying method of appointment to the position of Reserve Bank president. Under the proposed legislation, the president of each Reserve Bank would have been selected by the Reserve Bank's entire board of directors instead of by only two classes of its directors. *Id.*, sec. 8, § 341. Each appointment of a Reserve Bank president would have remained subject to the approval of the Board of Governors. *Id.*

There are two methods of removing Reserve Bank presidents. First, the Board of Governors may "suspend or remove any officer or director of

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[2] The remaining four Reserve Bank members typically include, on a rotating basis, one of the presidents of the Reserve Banks of Boston, Philadelphia, and Richmond; one of the presidents of the Reserve Banks of Cleveland and Chicago; one of the presidents of the Reserve Banks of Atlanta, Dallas, and St. Louis; and one of the presidents of the Reserve Banks of Minneapolis, Kansas City, and San Francisco. *See* 12 U.S.C. § 263(a). In addition to the Reserve Bank presidents, the statute provides that the first vice president of each Reserve Bank is also eligible for appointment to the FOMC, *id.*, and H.R. 6741 would have continued to render them eligible to represent the Reserve Banks on the FOMC, H.R. 6741, sec. 6, § 263(a). Because the first vice presidents are appointed and removed in the same way as the Reserve Bank presidents, *see* 12 U.S.C. § 341, there is no difference in the relevant constitutional analysis, so we refer in this opinion simply to Reserve Bank presidents, the officials who typically serve on the FOMC.

any Federal reserve bank," so long as it communicates "the cause of such removal . . . in writing . . . to the removed officer or director and to said bank." 12 U.S.C. § 248(f). Second, the board of directors of an individual Reserve Bank may dismiss the Reserve Bank's officers "at pleasure." *Id.* § 341. Because the Reserve Bank presidents participate on the FOMC as representatives of their regional banks, removal from their positions as Reserve Bank presidents strips them of their duties on the FOMC as well. *See id.* § 263(a) (Reserve Bank FOMC members "shall be presidents or first vice presidents of Federal Reserve banks").

II.

The Appointments Clause of the Constitution, U.S. Const. art. II, § 2, cl. 2, provides the exclusive means of appointing "Officers of the United States." Principal officers must be nominated and appointed by the President with the advice and consent of the Senate. *Id.* Inferior officers must be appointed in the same manner, unless Congress by law vests their appointment in the President, the head of a department, or a court of law. *Id.* We conclude that Reserve Bank presidents serving on the FOMC are inferior officers of the United States. Congress has constitutionally provided for their appointments by requiring the approval of the selection of a Reserve Bank president by the Board of Governors, the constitutional head of the Federal Reserve System.

A.

FOMC members, including Reserve Bank members, have authority that may be exercised only by officers of the United States who are appointed in conformity with the Appointments Clause. That is because each member (1) "'exercis[es] significant authority pursuant to the laws of the United States'" and (2) "occup[ies] a 'continuing position' established by law." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *United States v. Germaine*, 99 U.S. (9 Otto) 508, 511 (1879); *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)); *see also Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 122 (2007) ("*Officers of the United States*") ("[A]n individual who will occupy a position to which has been delegated by legal authority a portion of the sovereign powers of the federal government, and which is 'continuing,' must be appointed pursuant to the Appointments [C]lause.").

The members of the FOMC satisfy the first aspect of the test for officer status because they exercise significant authority pursuant to the laws of the United States. *See Lucia*, 138 S. Ct. at 2051; *Officers of the United States*, 31 Op. O.L.C. at 78. The FOMC sets the government's monetary policy by ordering open-market transactions on the government's behalf, which is "the most important monetary policy instrument" of the United States. *Merrill*, 443 U.S. at 343. To implement that policy, the FOMC is empowered to order the Federal Reserve Bank of New York to buy or sell government securities. In addition, the FOMC exercises another form of sovereign authority: the power to make binding rules. *See Buckley*, 424 U.S. at 141; 12 U.S.C. § 263(b) (authorizing the FOMC to promulgate regulations that bind Reserve Banks). The FOMC has issued regulations governing the Reserve Banks' open-market operations, 12 C.F.R. §§ 270.1–.4, regulations regarding public access to information about FOMC proceedings, *id.* §§ 271.1–.9, and rules of procedure, *id.* §§ 272.1–.5. Such authority reflects "power lawfully conferred by the government to bind third parties, or the government itself, for the public benefit." *Officers of the United States*, 31 Op. O.L.C. at 87.

The FOMC's members satisfy the second aspect of the test for officer status because they occupy continuing positions established by law. *See Lucia*, 138 S. Ct. at 2051; *Officers of the United States*, 31 Op. O.L.C. at 100. A "continuing" position is one that is either a "permanent" position or a temporary position that is "not personal, 'transient,' or 'incidental.'" *Officers of the United States*, 31 Op. O.L.C. at 100. The FOMC is a permanent body with statutorily defined powers and duties. *See* Banking Act of 1933, Pub. L. No. 73-66, § 8, 48 Stat. 162, 168. Although the FOMC's Reserve Bank members serve on the FOMC for only one-year terms, 12 U.S.C. § 263(a), each Reserve Bank position on the FOMC is still permanent because the position itself, as opposed to its occupant, "is not limited by time or by being of such a nature that it will terminate by the very fact of performance." *Officers of the United States*, 31 Op. O.L.C. at 111 (internal quotation marks omitted).

In reaching this conclusion, we disagree with the district court in *Melcher v. FOMC*, which held that Reserve Bank members of the FOMC are not officers of the United States because they are "otherwise private individuals." 644 F. Supp. at 520. *Melcher* reasoned that Reserve Banks are private corporations and Reserve Bank FOMC members are "not appointed by or beholden to either branch of government." *Id.* at 518, 520.

But we have rejected the premise that the Appointments Clause does not apply to appointments outside the federal government of officials who exercise permanently delegated federal statutory functions in continuing positions. *See Officers of the United States*, 31 Op. O.L.C. at 121. *But see The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 145–48 (1996) ("*Separation of Powers*") (concluding that the Appointments Clause does not apply to private entities). And even if the Appointments Clause applies only to positions within the federal government, Reserve Bank presidents are assuredly federal officials *in their role as FOMC members*.[3] The FOMC, after all, is the statutorily created monetary-policy-making arm of the federal government. And Reserve Bank FOMC members are appointed (and may be removed at will) by the Board of Governors, *see infra* Parts II.B.2 and III, and therefore are "appointed by" and "beholden to" an establishment of the federal government. *Melcher*, 644 F. Supp. at 520. We thus think that the FOMC's Reserve Bank members serve in the federal government for constitutional purposes. They are officers of the United States who must be appointed under the Appointments Clause.

The fact that Reserve Bank members currently constitute only a minority on the FOMC does not bear on this conclusion. When federal sovereign authority is delegated to a body, all voting members of that body share in the authority; the officer status of some members does not turn on the

[3] We need not address whether the duties that Reserve Bank presidents perform, apart from membership on the FOMC, are otherwise so significant as to make them officers of the United States, or the constitutional status of the Reserve Banks more broadly. Although the Reserve Banks are established as private corporations, a statutory "disclaimer of . . . governmental status" does not control for constitutional purposes if the "practical reality" is that the entity "is not an autonomous private enterprise." *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 53–55 (2015); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392–99 (1995). Reserve Banks exhibit some features of private enterprises, but they are fiscal agents of the United States empowered by delegation from the Board of Governors—an establishment of the federal government—to supervise financial institutions and activities. 12 U.S.C. § 248(k). Some courts thus have described Reserve Banks as "plainly and predominantly fiscal arms of the federal government." *Fed. Reserve Bank of Boston v. Comm'r of Corps. & Taxation*, 499 F.2d 60, 62 (1st Cir. 1974); *see Fed. Reserve Bank of St. Louis v. Metrocentre Imp. Dist.*, 657 F.2d 183, 186 (8th Cir. 1981). *But cf. Scott v. Fed. Reserve Bank of Kansas City*, 406 F.3d 532 (8th Cir. 2005) (considering Reserve Banks private entities for certain statutory purposes); *Lewis v. United States*, 680 F.2d 1239 (9th Cir. 1982) (same). We need not address these questions to conclude that members of the FOMC are officers of the United States.

presence of others who may outvote them. Otherwise, no single member would be an officer, despite the power of that body to collectively exercise significant authority. We have accordingly "viewed the power to cast a vote on executive functions, even if that vote itself is not decisive, as the exercise of significant authority." Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Sheldon Bradshaw, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Secure Transportation for America Act of 2001, H.R. 3150*, at 3 (Oct. 19, 2001) (noting that "the fact that the improperly appointed member of the Board would constitute a minority of the [Transportation Security Oversight] Board members would [not] cure any Appointments Clause concerns"). Moreover, H.R. 6741 would have increased the role of Reserve Bank members and made them the majority of the FOMC. The proposed legislation would have also required a two-thirds vote of the FOMC to approve a decision by the Board of Governors to authorize emergency lending. H.R. 6741 thus put the constitutional status of Reserve Bank FOMC members into stark relief.

B.

Reserve Bank FOMC members are inferior officers under the Appointments Clause because they are subordinates of the Board of Governors. And the appointments of Reserve Bank FOMC members comport with the Appointments Clause. Their selections as Reserve Bank presidents are approved by the Board of Governors, which is the head of the Federal Reserve System and therefore may appoint inferior officers of the United States. U.S. Const. art. II, § 2, cl. 2. Although Reserve Bank FOMC members are designated to serve on the FOMC by officials who may not constitutionally appoint officers, the new duties that Reserve Bank presidents acquire as members of the FOMC are sufficiently germane to their underlying Reserve Bank positions that they may serve on the FOMC without new Article II appointments. That conclusion would have remained the same even under H.R. 6741.

1.

"Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether

one is an 'inferior' officer depends on whether he has a superior." *Edmond v. United States*, 520 U.S. 651, 662 (1997). To decide whether an officer has a superior, the Supreme Court has considered whether the officer is subject to the policy direction of another official, whether the officer can take "final" action without the approval of another officer, and whether an executive officer other than the President has the "power to remove [the] officer[]." *Id.* at 664–65.

An official who is invested with authority to make a final decision for the Executive Branch and who is not supervised by anyone other than the President is the prototypical principal officer. *See, e.g.*, *id.* at 663 ("'[I]nferior 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."); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1339 (D.C. Cir. 2012) (concluding that copyright royalty judges were principal officers given their "nonremovability and the finality of their decisions"); *Secretary of Education Review of Administrative Law Judge Decisions*, 15 Op. O.L.C. 8, 14 & n.11 (1991) (concluding that an administrative law judge who enjoyed "tenure protection" and "whose decision could not be reviewed by the Secretary . . . would appear to be acting as a principal officer of the United States"). By contrast, an officer who lacks final decision-making authority and who may be removed by other officers is an inferior officer. *See, e.g.*, *Edmond*, 520 U.S. at 664–65 (concluding that certain military judges were inferior officers because they were subject to administrative oversight, were "remov[able] . . . without cause," and had "no power to render a final decision"); *see also Separation of Powers*, 20 Op. O.L.C. at 150 ("an officer who is subject to control and removal by an officer other than the President should be deemed presumptively inferior").[4]

[4] In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court relied on other factors to define inferior officers, such as whether the officer performed only limited duties, had narrow jurisdiction, and had limited tenure. *Id.* at 671–73. Yet the Court's subsequent decision "in *Edmond* appeared to offer one overall standard for identifying inferior officers." *Special Master for Troubled Asset Relief Program Executive Compensation*, 34 Op. O.L.C. 219, 229 (2010) ("*Special Master for TARP*"). And *Edmond* specifically rejected reliance on the importance of an officer's duties in analyzing the question, explaining that the significance of one's duties "marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather . . . the line between officer and nonofficer." 520 U.S. at 662. The Court has since adhered to *Edmond*'s approach of

Under this rubric, we believe that Reserve Bank members of the FOMC are inferior officers. It is true that the FOMC, as a body, has final authority over open-market operations. *See* 12 U.S.C. § 263(a). But the work of Reserve Bank members on the FOMC is "directed and supervised at some level," *Edmond*, 520 U.S. at 663, by the Board of Governors, which has the authority to remove them at will. Because the power to remove is a "powerful tool for control," the Court has viewed the removability of an officer by someone other than the President to be strong evidence of inferior-officer status. *Id.* at 664; *see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010) (relying on removability and "the Commission's other oversight authority").

Here, the Board of Governors has statutory authority to "suspend or remove any officer or director of any Federal reserve bank," including any Reserve Bank FOMC member. 12 U.S.C. § 248(f). An agency head's statutory authority to remove a subordinate is plenary absent statutory language to the contrary under the "well approved principle of constitutional and statutory construction that the power of removal of executive officers [is] incident to the power of appointment." *Myers v. United States*, 272 U.S. 52, 119 (1926); *see also, e.g.*, *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). "This principle applies to the appointments by the President and by other Executive officers, such as department heads, who are appointing officials." *Removal of Members of the Commission on Federal Laws for the Northern Mariana Islands*, 7 Op. O.L.C. 95, 98 (1983).

Nothing in the statute limits the Board's removal authority. It is true that the Board of Governors must convey "the cause of such removal . . . in writing . . . to the removed officer or director and to said bank." 12 U.S.C. § 248(f). But we think that "cause" in this context means whatever

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examining whether an officer is supervised by someone other than the President, with a focus on whether the officer can make final decisions and be removed by a principal officer. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010); *Intercollegiate Broad. Sys.*, 684 F.3d at 1339. Although this Office has sometimes considered the *Morrison* factors in addition to *Edmond*, *see Special Master for TARP*, 34 Op. O.L.C. at 231–38, we think *Edmond* states the correct approach to analyzing the principal/inferior distinction. *Accord NLRB v. SW Gen., Inc.*, 580 U.S. 288, 315 n.2 (2017) (Thomas, J., concurring) ("Although we did not explicitly overrule *Morrison* in *Edmond*, it is difficult to see how *Morrison*'s nebulous approach survived [the Court's] opinion in *Edmond*.").

reasons (if any) the Board has for removing the officer, and therefore permits the Board to remove the officer at will. The requirement that the Board notify certain parties of the reasons for removal does not displace the default rule that the appointing authority retains plenary removal authority. Such a notification requirement parallels many statutes that require the President to "communicate [to Congress] the reasons for . . . removal" of a particular officer but impose no substantive constraint on the removal authority. *See, e.g.*, 10 U.S.C. § 139(a)(1); 22 U.S.C. § 3929(a)(2); 44 U.S.C. § 2103(a).

The structure of the Federal Reserve System is consistent with this conclusion. Congress no doubt intended to give the Federal Reserve System a degree of independence in providing that the members of the Board of Governors—as distinct from the presidents of the regional Reserve Banks—may be removed only "for cause." 12 U.S.C. § 242. In *Wiener v. United States*, 357 U.S. 349, 350, 355–56 (1958), the Supreme Court inferred, despite the absence of any explicit tenure protection in the statute, the existence of such protection for the members of the War Claims Commission based on what the Court perceived as Congress's intent to insulate the Commission from political influence in carrying out its adjudicative functions. But whatever the continuing vitality of *Wiener*'s "questionable" rationale, *Separation of Powers*, 20 Op. O.L.C. at 168 n.115, that rationale does not apply here. Subjecting the Reserve Bank FOMC members to removal at will does not threaten the mechanism Congress chose for protecting the independence of the Federal Reserve System as a whole. The members of the Board of Governors remain tenure-protected, even if their subordinates serving on the FOMC are not.

Principles of constitutional avoidance bolster this conclusion. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (statutes should be interpreted to avoid the reading that "would raise serious constitutional problems" where multiple readings are available). Under the statute, the President may remove members of the Board of Governors only for cause. *See* 12 U.S.C. § 242. If the Governors, in turn, could remove FOMC Reserve Bank members only for cause, then those members would be unconstitutionally insulated from presidential supervision with two layers of for-cause removal protection. The Supreme Court invalidated a similar structure in *Free Enterprise Fund*. There, the Court held unconstitutional tenure

protection for members of the Public Company Accounting Oversight Board, because they were removable only by members of the Securities and Exchange Commission, the members of which (the Court assumed) were likewise tenure protected. 561 U.S. at 487, 492–508. Inferring tenure protection for Reserve Bank FOMC members would raise grave constitutional questions for substantially the same reasons.

We recognize that Reserve Bank FOMC members have voting power on a body that is empowered to make final decisions on behalf of the federal government. H.R. 6741, by increasing their ranks from five to twelve, *see* sec. 6, § 263(a), would have increased the collective power of the Reserve Bank FOMC members in that regard, because it would have made them a majority on the FOMC, and therefore able to outvote the seven members of the Board of Governors. Be that as it may, we agree with the D.C. Circuit, which reached a similar conclusion with respect to copyright royalty judges supervised by the Librarian of Congress, that the plenary supervision that the Governors exercise over the Reserve Bank FOMC members is enough to make the latter inferior officers. *See Intercollegiate Broad. Sys.*, 684 F.3d at 1340–41 (severing removal protections of copyright royalty judges gave the Librarian of Congress the "direct ability to 'direct,' 'supervise,' and exert some 'control' over the Judges' decisions" such that they became inferior officers). Just as the power to remove is incident to the power to appoint, the power to supervise and direct is incident to the power to remove. *See Myers*, 272 U.S. at 135; *Proposed Executive Order Entitled "Federal Regulation,"* 5 Op. O.L.C. 59, 61 (1981) (noting that Congress is presumably aware that agency heads "perform their functions subject to presidential supervision on matters of both substance and procedure"). The Board's ability to supervise Reserve Bank FOMC members through the removal authority means that Reserve Bank members would have remained inferior officers, even if H.R. 6741 had made them a majority on the FOMC. *See, e.g.*, *Intercollegiate Broad. Sys.*, 684 F.3d at 1340–41.

We thus disagree with the suggestion of the court in *Melcher*, *see* 644 F. Supp. at 519–20, that Reserve Bank FOMC members are subject to dismissal by the Board of Governors only for cause. Instead, Reserve Bank FOMC members are subject to plenary supervision and control by their co-participants on the FOMC, the members of the Board of Governors, and therefore are inferior, rather than principal, officers.

2.

We further conclude that, as inferior officers, the FOMC's Reserve Bank members are appointed in conformity with the Appointments Clause. Congress may vest the appointment of inferior officers in the President, a head of a department, or a court of law. U.S. Const. art. II, § 2, cl. 2. Here, Congress has done so by providing for each FOMC Reserve Bank member to be selected to his position as president of a Reserve Bank with the approval of the Board of Governors, which is the collective head of a department (the Federal Reserve System). The Board of Governors does not, however, select which presidents serve on the FOMC; that function is performed instead by the boards of directors of the Reserve Banks, bodies that are not competent to appoint officers of the United States. *See* 12 U.S.C. § 263(a). We think that structure is nonetheless constitutionally permissible because the function of serving on the FOMC is germane to the duties of Reserve Bank presidents, and therefore assigning them the duties of FOMC membership does not require a new constitutional appointment.[5]

As a threshold matter, each Reserve Bank FOMC member's initial selection as a Reserve Bank president is consistent with the procedures identified in the Appointments Clause. The Supreme Court has long held that a subordinate to the head of a department may select an inferior officer if the department head approves the appointment. In *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (1868), the Court concluded that "a clerk in the office of the assistant treasurer of the United States" was a validly appointed officer because he was selected by "the assistant treasurer . . . with the approbation of the Secretary of the Treasury." *Id.* at 392. Even though the Secretary of the Treasury merely approved his subordinate's choice, the clerk was "appointed by the head of a department within the meaning of the constitutional provision upon the subject of the appointing power." *Id.* at 393–94; *see Free Enter. Fund*, 561 U.S. at 512 n.13 (noting that appointments made by the Chairman of the Securities

[5] We do not in this opinion address the constitutionality of the method of appointing Class A and B directors of the Reserve Banks, who are selected by regional member banks with little involvement by the Board of Governors. *See* 12 U.S.C. § 304. The proposed legislation would not have directly affected this longstanding method of selecting the directors of the Reserve Banks.

and Exchange Commission with "the approval of the Commission" would "satisf[y] the Appointments Clause" (internal quotation marks omitted) (citing, *e.g.*, *Hartwell*, 73 U.S. at 393–94)); *accord United States v. Mouat*, 124 U.S. 303, 307–08 (1888); *United States v. Sears*, 27 F. Cas. 1006, 1009 (C.C.D. Mass. 1812) (No. 16,247). *Hartwell* agreed with an even older tradition of Attorney General opinions approving similar appointments. *See Power of the Secretary of the Treasury to Remove Inspectors of Hulls and Boilers*, 10 Op. Att'y Gen. 204, 205–07 (1862) (concluding that an initial designation of inferior officers by a board consisting primarily of the Secretary's subordinates may have "narrowed and fettered" his "sphere of selection" to some degree, but that the Secretary's approval "g[a]ve[] force and effect to the designation and breathe[d] into the action of the designating board the breath of official life"); *Tenure of Office of Inspectors of Customs*, 1 Op. Att'y Gen. 459, 459 (1821) (recognizing that inspectors of customs were appointed by collectors of duties with "the approbation of the Secretary of the Treasury"). This Office has accordingly advised that, so long as a head of a department approves the selection of an inferior officer, the department head's subordinates may do much of the legwork of the appointment process. *See Assignment of Certain Functions Related to Military Appointments*, 29 Op. O.L.C. 132, 135–36 (2005) ("*Military Appointments*").

Under these established principles, Reserve Bank presidents are selected in a manner that allows them to exercise the authority of an officer of the United States. Six members of a Reserve Bank board of directors—three Class B directors and three Class C directors—make the initial selection of a Reserve Bank president. 12 U.S.C. § 341. Under H.R. 6741, all nine members of the board of directors would have made the initial selection. H.R. 6741, sec. 8, § 341. The directors' picks are then subject to the "approval of the Board of Governors." 12 U.S.C. § 341. The Board is collectively the head of a department, the Federal Reserve System, which "exercise[s] governmental authority without being subordinated to any broader unit within the executive branch." *Separation of Powers*, 20 Op. O.L.C. at 152–53. The Board's members are appointed by the President and are removable (for cause) only by the President; they report to no one else in the Executive Branch. *See* 12 U.S.C. §§ 241–242; Memorandum for the Files, from Harold F. Reis, Office of Legal Counsel, *Re: Application of Section 9(a) of the Hatch Act to a Federal Reserve Agent* at 9

(Mar. 6, 1964) (concluding that, for Appointments Clause purposes, and "consistent with the history of its establishment and on the basis of precedents, the Board of Governors of the Federal Reserve System constitutes a department and the Governors the head thereof"); *cf. Free Enter. Fund*, 561 U.S. at 512–13 (concluding that the multi-member Securities and Exchange Commission acting as a body is a head of a department under the Appointments Clause). Under *Hartwell*, the head of a department's approval of the Reserve Bank presidents makes their selections comport with the Appointment Clause.

Although the Board of Governors is limited to approving or rejecting the selections made by the Reserve Bank directors, the Board also supervises the directors, ensuring that, as the department head, it retains sufficient control and accountability over the directors' selections.[6] The Class C directors who select the Reserve Bank presidents are not only themselves appointed by the Board of Governors, but they are also removable by the Board at will. *See* 12 U.S.C. §§ 248(f), 305. While the other selectors are Class B directors elected by regional member banks of the Federal Reserve System, *id.* § 304—and H.R. 6741 would have added Class A directors—the Board of Governors can also fire those directors at will, *id.* § 248(f), and it generally supervises all Reserve Bank boards, *id.* § 248(j). Moreover, because each member of the FOMC must be approved by the Board of Governors, and there are no time limits or other restrictions on approving the selections, the Board could indefinitely reject proposed candidates until the directors propose Reserve Bank presidents to the Board's liking. These powers give the Board effective control over which Reserve Bank presidents are selected for its approval. They create sufficient "scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment," *Civil-Service Commission*, 13 Op. Att'y Gen. 516, 520 (1871), as the Ap-

[6] Different questions would arise if Congress required the Board of Governors to appoint Reserve Bank presidents from a list of individuals compiled by an entity not under the Board's control. *See, e.g.*, Letter for Richard Shelby, Chairman, Senate Committee on Rules and Administration, and Amy Klobuchar, Ranking Member, Senate Committee on Rules and Administration, from Samuel R. Ramer, Acting Assistant Attorney General, Office of Legislative Affairs at 1–2 (May 16, 2017) (observing that a bill that would have required the President to appoint the Register of Copyrights from a list of individuals generated by a seven-member panel consisting of persons not under presidential supervision would have violated the Appointments Clause).

pointments Clause requires. Reserve Bank presidents are therefore selected to their five-year terms consistent with the Appointments Clause.

Because Reserve Bank presidents are selected in that manner, they may be designated to serve on the FOMC without new constitutional appointments. An appointment to an underlying position makes an appointee constitutionally competent to perform not only the duties associated with that position, but also any duties that are "germane to the offices already held." *Shoemaker v. United States*, 147 U.S. 282, 301 (1893); *see Weiss v. United States*, 510 U.S. 163, 175–76 (1994); *id.* at 196 (Scalia, J., concurring in judgment). When an appointing authority selects an official for a position, that authority has judged the official competent to perform additional duties that are reasonably related to those already associated with that position. *See Separation of Powers*, 20 Op. O.L.C. at 158–59. In approving the selection of Reserve Bank presidents to their positions, the Board of Governors has implicitly concluded that the presidents would be competent to serve on the FOMC, as they compose the small pool of individuals—two for each of the twelve regional Reserve Banks—who are eligible to be tapped for the five FOMC positions currently set aside for Reserve Bank members. The president of the New York Reserve Bank invariably serves on the FOMC, and the other four Reserve Bank slots on the FOMC rotate among the eleven other Reserve Banks at predictable intervals. *See supra* note 2 and accompanying text. And since, under existing law, all Reserve Bank presidents are already eligible to serve on the FOMC, the provision in H.R. 6741 to give each of the twelve Reserve Banks a guaranteed slot on the FOMC, *see* H.R. 6741, sec. 6, § 263(a), likewise would have merely added germane duties to those already performed by the officials. The only significant proposed additions to the duties associated with service on the FOMC under the bill would have been directly related to monetary-policy-making functions already exercised by the FOMC: to require decisions of the Board of Governors to authorize emergency lending to be approved by a two-thirds vote of the FOMC and to authorize the FOMC to set the interest rate on balances held by Reserve Banks on behalf of commercial banks as part of their required reserves. *Id.* sec. 4(1)(B), § 343(3)(A); *id*. sec. 5, § 461(b)(12)(A). We thus think that FOMC service, under existing law or under H.R. 6741, fits comfortably "within the contemplation of those who were in the first place responsible for the[] appointment and confirmation," *Separation of*

Powers, 20 Op. O.L.C. at 158 (internal quotation marks omitted), of Reserve Bank presidents. They are therefore constitutionally eligible to serve on the FOMC without a new constitutional appointment and would have remained eligible even under H.R. 6741.[7]

III.

Finally, we conclude that the methods of removing Reserve Bank members of the FOMC are constitutional. To promote political accountability within the Executive Branch, the Constitution requires an appropriate officer to possess removal authority. Typically, as both a constitutional and a statutory matter, the removal authority lies with the appointing authority. *See, e.g.*, *Myers*, 272 U.S. at 119 (referring to the "well approved principle of constitutional and statutory construction that the power of removal of executive officers was incident to the power of appointment"); *Keim v. United States*, 177 U.S. 290, 293 (1900) (presuming that the department head who appointed an inferior officer had the power of removal). Although no statute expressly governs the removal of FOMC members, a Reserve Bank president may be removed at will from his Reserve Bank position either by the Board of Governors, 12 U.S.C. § 248(f), or by the Reserve Bank's board of directors, *id.* § 341. Removing a Reserve Bank president from that post would also, as a practical matter, remove him from the FOMC. The power of the Board of Governors to remove Reserve Bank presidents at will tracks the constitutional and statutory default: the Board of Governors, as the appointing authority, also has the removal power. The harder question is whether Congress may concurrently vest the removal authority of Reserve Bank FOMC members

[7] It would present a different question had Congress added eligibility for FOMC service for the first time to the duties of Reserve Bank presidents. Whether FOMC service is germane to the duties of Reserve Bank presidents would turn on a more detailed comparison of the duties performed by both positions. *See, e.g.*, *Application of the Appointments Clause to a Statutory Provision Concerning the Inspector General Position at the Chemical Safety and Hazard Investigation Board*, 30 Op. O.L.C. 92, 99–103 (2006). We need not decide that question here.

We also need not decide whether a Reserve Bank president who is never designated to serve on the FOMC is an officer of the United States, or the constitutional status of the Reserve Banks more broadly. *See supra* note 3. The decisive point here is that a Reserve Bank president has been adjudged by the Board of Governors, a proper appointing authority under the Appointments Clause, as competent to serve on the FOMC.

in the Reserve Banks' boards of directors. *See id.* (authorizing a Reserve Bank's board of directors "to dismiss at pleasure" its officers and employees). We conclude that the removal authority of the boards of directors may constitutionally be exercised only with the approbation of the Board of Governors; the relevant removal provisions may be read to require such approbation.

We do not believe that the Reserve Bank boards of directors could constitutionally dismiss Reserve Bank FOMC members without the approval of the Board of Governors. The Appointments Clause limits the authority to assign or delegate appointment-related powers to officials other than those identified by the Constitution as having that power. We have long advised, for instance, that the President alone may appoint officers by and with the advice and consent of the Senate. *See Military Appointments*, 29 Op. O.L.C. at 134–35. Congress may authorize the President to delegate to department heads the authority to appoint inferior officers who do not require Senate confirmation, because the Appointments Clause allows Congress to give that authority to department heads. *See id.*; *Delegation of the President's Power to Appoint Members of the National Ocean Research Leadership Council*, 21 Op. O.L.C. 38, 39 (1997). But the President's constitutionally assigned authority to appoint officers subject to the Senate's advice and consent is not delegable. *See Military Appointments*, 29 Op. O.L.C. at 134–35.

In recent years, we have similarly advised that the power to appoint inferior officers not subject to Senate confirmation may be delegated only to officials identified by the Appointments Clause as competent to appoint inferior officers. *See, e.g.*, E-mail for Robin M. Stutman, Executive Office for Immigration Review, from Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Question About Removals* (Oct. 14, 2010 12:39 PM). After all, "by naming three permissible repositories of appointment authority—the President, the Heads of the Departments, and the Courts of Law—the Excepting Clause implicitly indicates that the power may not be vested in some other person." *Military Appointments*, 29 Op. O.L.C. at 135.[8] That conclusion is consistent with

[8] The reasoning of our *Military Appointments* opinion anticipated our later advice that the power to appoint inferior officers may not be delegated to an official below the head of a department, although in that opinion we declined to "provide a definitive answer" to the question. 29 Op. O.L.C. at 135.

early opinions of the Attorney General holding that "Congress has no power whatever to vest the appointment of any employé, coming fairly within the definition of an inferior officer of the government, in any other public authority but the President, the heads of departments, or the judicial tribunals." *Appointment and Removal of Inspectors of Customs*, 4 Op. Att'y Gen. 162, 164 (1843); *accord Civil-Service Commission*, 13 Op. Att'y Gen. at 521–22. And it honors the structural and functional considerations on which the Clause is based. "The diffusion of power carries with it a diffusion of accountability." *Free Enter. Fund*, 561 U.S. at 497. Accountability is fostered by requiring, in the decision to appoint an inferior officer, the personal involvement of a department head directly accountable to the President. While the Appointments Clause "does not prohibit substantial involvement of subordinates in the appointment process," *Military Appointments*, 29 Op. O.L.C. at 135, it does preclude Congress and appointing officials from eliminating the need for any involvement in the appointment decision by the officials who have been constitutionally assigned that function.

Those same principles of political accountability apply to the power of a department head to remove inferior officers. When it comes to the supervision of an officer within the Executive Branch, the removal power is perhaps even more significant than the appointment authority. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." (internal quotation marks omitted)). Accordingly, we have advised that the authority to remove inferior officers may not be delegated to an agency official other than the department head, or another official constitutionally competent to appoint that officer in the first place. Although, unlike the power to appoint officers, the power of removal is not expressly enumerated in the Constitution, that power is frequently treated as a necessary correlate to the power to appoint. For example, we have long maintained that the President's power to remove officials appointed by and with the advice and consent of the Senate cannot be assigned to another official just as his appointment power may not be. *See, e.g.*, *Centralizing Border Control Policy Under the Supervision of the Attorney General*, 26 Op. O.L.C. 22, 24–25 (2002) ("*Centralizing Border Control Policy*"); *Relation of the President to the Executive Departments*, 7 Op.

Att'y Gen. 453, 465 (1855). We have conceived of both the power to appoint and the power to remove such officers as being among the non-delegable authorities "prescribed by the Constitution." *Centralizing Border Control Policy*, 26 Op. O.L.C. at 24–25 (internal quotation marks and emphasis omitted). Since the power to remove inferior officers is likewise "an incident of the power to appoint them," *Myers*, 272 U.S. at 161, we think that Congress similarly may not assign the power to remove inferior officers to officials other than those who may appoint inferior officers under the Appointments Clause. Such a delegation would improperly diffuse accountability for the supervision of inferior officers beyond the President and other appointing officials specified in the Appointments Clause.

Under these principles, we do not believe that Congress could constitutionally vest the authority to remove Reserve Bank FOMC members in the Reserve Bank boards of directors. The boards of directors are not heads of a department, courts of law, or the President.[9] Indeed, the boards may not even be part of the federal government. *See supra* note 3. Congress therefore may not constitutionally assign them the authority to remove inferior officers, such as Reserve Bank FOMC members.

We believe, however, that the Reserve Bank authorizing statute may be read and administered to avoid this unconstitutional result. Just as the Board of Governors' approval is required for the appointment of Reserve Bank presidents, so too should the statute be read to ensure that boards of directors exercise their removal power over Reserve Bank presidents subject to the approval of the Board of Governors. Read in isolation, 12 U.S.C. § 341 authorizes Reserve Bank boards of directors to "dismiss at pleasure" bank officers, including presidents serving on the FOMC. At the same time, the statute makes clear that all classes of directors are subservient to the Board of Governors, which can suspend or remove directors at will, *id.* § 248(f), and can "exercise general supervision" over Reserve Banks, *id.* § 248(j). These extensive supervisory powers would enable the Board of Governors to require

[9] We need not address constitutional restrictions on Congress's power to vest the authority to appoint or remove an Executive Branch official in a court of law or on other "interbranch" appointments and removals. *See, e.g.*, *Ex parte Siebold*, 100 U.S. 371, 398–99 (1880).

boards of directors to seek the approval of the Board of Governors before they remove FOMC Reserve Bank members. This reading of the statute would harmonize the Board of Governors' supervisory authority with the boards of directors' removal authority and prevent an unconstitutional result. *See Edward J. DeBartolo Corp.*, 485 U.S. at 575.

Although section 341 permits boards of directors to "dismiss at pleasure" Reserve Bank presidents, such language does not expressly foreclose a requirement that the Board of Governors approve any such dismissals. The statute provides that the boards of directors have the power to "appoint" Reserve Bank presidents, but makes clear that such authority is subject to approval by the Board of Governors. *See* 12 U.S.C. § 341. It is at least reasonable to read the statute to permit the Board of Governors to require its approval before boards of directors remove Reserve Bank presidents, given the longstanding interpretive principle that the power to remove is incident to the power to appoint. *See Keim*, 177 U.S. at 293; *Hennen*, 38 U.S. at 259; *Tenure of Office of Inspectors of Customs*, 1 Op. Att'y Gen. at 459 ("As the approbation of the Secretary of the Treasury is necessary to put them into office, I presume they cannot be put out of it without the like approbation."); *see also Power of the Secretary of the Treasury to Remove Inspectors of Hulls and Boilers*, 10 Op. Att'y Gen. at 207–09; *Appointment and Removal of Inspectors of Customs*, 4 Op. Att'y Gen. at 165. And if the Board of Governors administers the statute to require and make such approvals, that would satisfy the constitutional requirement that a competent appointing official retain ultimate authority to approve each removal. So construed and executed, the statute's removal provisions would be constitutional.

IV.

In sum, H.R. 6741 would have expanded the powers of the FOMC and the significance of its Reserve Bank members. The proposed legislation would have reinforced that all members of the FOMC are officers of the United States who must be appointed consistent with the Appointments Clause. But we concluded that members of the FOMC are appointed in a constitutional manner and that they would have continued to be so under the amendments proposed by H.R. 6741. The statute likewise can be read to avoid unconstitutionally assigning removal authority over FOMC members to the regional Reserve Banks' boards of directors by requiring

the approval of the Board of Governors for any such removal. We accordingly recommended no constitutional objections to this proposed legislation.

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

Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context

Congressional committees participating in an impeachment inquiry may not validly compel Executive Branch witnesses to testify about matters that potentially involve information protected by executive privilege without the assistance of agency counsel. Congressional subpoenas that purport to require Executive Branch witnesses to appear without agency counsel in these circumstances are legally invalid and are not subject to civil or criminal enforcement.

November 1, 2019

LETTER OPINION FOR THE COUNSEL TO THE PRESIDENT

On October 31, 2019, the House of Representatives voted to authorize certain committees to investigate "whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach" President Trump. H.R. Res. 660, 116th Cong. (2019). Although the House resolution directs the House Permanent Select Committee on Intelligence ("HPSCI") to conduct "open and transparent investigative proceedings" in connection with this inquiry, *id.* § 2 (title), we understand that HPSCI nonetheless insists that Executive Branch employees appear next week for closed-door depositions from which agency counsel would be excluded.

You have asked whether HPSCI or the other committees involved in the impeachment inquiry may validly compel Executive Branch witnesses to appear at such depositions. The HPSCI impeachment inquiry seeks information concerning presidential communications, internal Executive Branch deliberations, and diplomatic communications arising in connection with U.S. foreign relations with Ukraine. As a result, the depositions seek testimony from Executive Branch employees concerning matters potentially protected by executive privilege. Consistent with our prior advice, we conclude that the congressional committees participating in the impeachment investigation authorized by the resolution may not validly require Executive Branch witnesses to appear without the assistance of agency counsel in connection with such depositions. *See Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. 131, 138–44 (2019) ("*Exclusion of Agency Counsel*"). HPSCI could address this separation of powers problem by allowing agency counsel to assist the employee during the deposition.

Should the committee not do so, however, a subpoena purporting to require a witness to appear without such assistance would be invalid and not subject to civil or criminal enforcement. *See id.* at 144–45.

We have previously advised, in the context of legislative oversight investigations, that Congress may not prohibit agency counsel from accompanying employees called to testify about matters that potentially involve information protected by executive privilege. As we explained, "the exclusion of agency counsel impairs the President's ability to exercise his constitutional authority to control privileged information of the Executive Branch" and "his constitutional authority to supervise the Executive Branch's interactions with Congress." *Id.* at 138. The President has the constitutional authority to protect privileged information from disclosure in response to congressional investigations, and to do so effectively, he must be able to designate a representative to protect this interest at congressional depositions. *Id.* at 138–41. In addition, the President has the constitutional authority to control the activities of subordinate officials within the Executive Branch, which includes the power to control communications with, and information provided to, Congress on the Executive Branch's behalf. *Id.* at 142–44. Adherence to these principles ensures that Executive Branch employees called to testify before Congress do not improperly disclose privileged information, and that the information provided is consistent with the scope of Congress's investigative authority.

We believe that these same principles apply to a congressional committee's effort to compel the testimony of an Executive Branch official in an impeachment inquiry. Executive privilege protects the confidentiality and integrity of sensitive Executive Branch information absent a showing of sufficient legislative "need" in the context of an oversight investigation. *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 730–31 (D.C. Cir. 1974) (en banc). The privilege has also been recognized to protect information in connection with other kinds of proceedings, including criminal trials and grand-jury investigations.

As the Supreme Court recognized in *United States v. Nixon*, 418 U.S. 683 (1974), executive privilege "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.* at 708. While the privilege may yield to the "legitimate needs of the judicial process" in connection with a criminal trial, the Court recognized that "it is necessary to resolve those competing interests

in a manner that preserves the essential functions of each branch." *Id.* at 707. The D.C. Circuit has applied the same principle in connection with a grand-jury investigation, observing that privileged presidential communications "should not be treated as just another source of information" in such an inquiry, but should instead be provided to a grand jury only upon a demonstration of "why it is likely that evidence contained in presidential communications is important to the ongoing grand jury investigation and why this evidence is not available from another source." *In re Sealed Case*, 121 F.3d 729, 755–57 (D.C. Cir. 1997).

We believe that a congressional committee must likewise make a showing of need that is sufficient to overcome the privilege in connection with an impeachment inquiry. Although no judicial decision is directly on point, the D.C. Circuit suggested as much in *Senate Select Committee*, in which it contrasted the Senate committee's "oversight need" in support of "legislative tasks" with "the responsibility of a grand jury, *or any institution engaged in like functions*." 498 F.2d at 732 (emphasis added). The latter phrase referred to the House Committee on the Judiciary, which had "begun an inquiry into presidential impeachment." *Id.* The D.C. Circuit's recognition that an impeachment inquiry is similar to a grand-jury investigation implies the requirement of a similar showing of need. We need not settle on the precise standard in order to address your current inquiry, because we think it sufficient to recognize that a qualified executive privilege remains available, and a congressional committee must therefore make some showing of need to overcome the privilege. This conclusion follows from the Supreme Court's recognition that a dispute involving information subject to executive privilege should be resolved in a manner that "preserves the essential functions of each branch." *Nixon*, 418 U.S. at 707.[1]

[1] In a 1974 effort to summarize the then-available precedents, a "working paper prepared by the staff" of this Office observed that "[p]recedents relating to the subject of executive privilege in presidential impeachment are meager, confused and inconclusive." Office of Legal Counsel, U.S. Dep't of Justice, *Legal Aspects of Impeachment: An Overview* app. 3, at 1 (Feb. 1974). Where Executive Branch officials have addressed the issue, they have typically done so outside the context of a particular impeachment inquiry. While they have sometimes acknowledged that Congress's interest in information in connection with impeachment may be stronger than in the oversight context, they have not identified a consistent standard for evaluating such requests. *See id.* at 6–15, 22–32 (describing statements of past Presidents and Attorneys General); *see also, e.g.*, *Assertion*

While HPSCI may be able to establish an interest justifying its requests for information, the Executive Branch also has legitimate interests in confidentiality, and the resolution of these competing interests requires a careful balancing of each branch's need in the context of the particular information sought. *See United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) ("[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation."). Although HPSCI is willing to allow witnesses to appear with *personal* counsel, the accommodation process presupposes participation by appropriate representatives of the Executive Branch, which cannot occur when a committee seeks to exclude *agency* counsel from the room. *See Exclusion of Agency Counsel*, 43 Op. O.L.C. at 144 (explaining the differences between private counsel's and agency counsel's obligations and abilities). Accordingly, where, as here, a committee deposition is likely to inquire into privileged communications, the committee may not validly prevent an Executive Branch witness from receiving the assistance of agency counsel. *See id.* at 138–44.

Because the committee may not bar agency counsel from assisting an Executive Branch witness without contravening the legitimate prerogatives of the Executive Branch, a HPSCI subpoena requiring such a result would exceed the committee's lawful authority and thus could not be enforced. As we concluded in the oversight context, "it would be unconstitutional to enforce a subpoena against an agency employee who declined to appear before Congress, at the agency's direction, because the committee would not permit an agency representative to accompany him." *Id.* at 145. This conclusion followed from many earlier precedents of this Office, which recognized that "the Constitution does not permit Congress to make it a crime for an official to assist the President in asserting a

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of Executive Privilege by the Chairman of the Atomic Energy Commission, 1 Op. O.L.C. Supp. 468, 485 (1956) ("Even in [impeachment] there is no precedent to the effect that the executive privilege cannot validly be invoked."); *Position of the Executive Department Regarding Investigative Reports*, 40 Op. Att'y Gen. 45, 51 (1941) (identifying impeachment proceedings as a situation in which "the public interest" can justify disclosure of "pertinent" information "for the good of the administration of justice"). Subsequent judicial decisions, as discussed above, are consistent with our recognition that a qualified privilege applies in the context of an impeachment investigation, just as it does in a grand-jury investigation.

constitutional privilege that is an integral part of the President's responsibilities under the Constitution." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 140 (1984).[2] An Executive Branch employee does not violate the criminal contempt-of-Congress statute by declining to appear before a congressional committee based upon an instruction to protect the confidentiality interests of the Executive Branch and the separation of powers. HPSCI, of course, may readily avoid this problem by allowing the employee to receive the assistance of agency counsel during the deposition.

You have also asked whether the House's adoption of a resolution authorizing an impeachment inquiry would have any effect on existing subpoenas. As we have previously advised you, prior to October 31, 2019, the House had not vested any committee in the current Congress with the authority to issue subpoenas in connection with an impeachment inquiry. As a result, subpoenas issued before that date purporting to be "pursuant to" an impeachment inquiry were not properly authorized. Although House Resolution 660 "direct[s]" HPSCI and other committees to "continue their ongoing investigations," it does not purport to ratify any previously issued subpoena. Accordingly, while the Executive Branch may, and regularly does, accommodate congressional requests for information in the absence of a subpoena, the relevant committees would have to issue new subpoenas to impose any compulsory effect on recipients.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

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[2] *See also Testimonial Immunity Before Congress of the Former Counsel to the President*, 43 Op. O.L.C. 108, 129 (2019) ("The constitutional separation of powers bars Congress from exercising its inherent contempt power in the face of a presidential assertion of executive privilege."); *Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress*, 32 Op. O.L.C. 65, 65–69 (2008) (concluding that the Department cannot take "prosecutorial action, with respect to current or former White House officials who . . . declined to appear to testify, in response to subpoenas from a congressional committee, based on the President's assertion of executive privilege"); *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995) ("the criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege").

Designating an Acting Director of National Intelligence

In designating an Acting Director of National Intelligence, the President could choose anyone who is eligible under the Federal Vacancies Reform Act of 1998, even though 50 U.S.C. § 3026(a)(6) specifies that the Principal Deputy DNI "shall act for" the DNI during a vacancy.

The President could designate the Senate-confirmed Director of the National Counterterrorism Center as the Acting DNI, but that person could not perform the duties of the NCTC Director during his time as the Acting DNI because no person may "simultaneously serve" as NCTC Director and "in any other capacity in the executive branch," 50 U.S.C. § 3056(b)(2).

Because the incumbent NCTC Director was rendered unable to perform the duties of that office while serving as Acting DNI, the NCTC Director's first assistant would, in the absence of an alternative presidential designation, automatically serve as Acting NCTC Director under the Vacancies Reform Act.

November 15, 2019

MEMORANDUM FOR THE LEGAL ADVISOR
TO THE NATIONAL SECURITY COUNCIL

On July 28, 2019, Daniel R. Coats submitted his resignation as the Director of National Intelligence ("DNI"), effective August 15, 2019. On August 8, 2019, Susan M. Gordon, the Principal Deputy DNI, announced that she would resign at the same time as the DNI. In connection with these impending vacancies, you asked whether the President could invoke the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345–3349d, to authorize Joseph Maguire, the Director of the National Counterterrorism Center ("NCTC Director"), to serve as Acting DNI and whether someone else might then serve as Acting NCTC Director. We advised that the President could designate the NCTC Director as the Acting DNI, but because no person may "simultaneously serve" as NCTC Director and "in any other capacity in the executive branch," 50 U.S.C. § 3056(b)(2), Mr. Maguire could not perform the duties of the NCTC Director during his time as the Acting DNI. We further advised that, because Mr. Maguire would be legally disabled from serving as NCTC Director during that period, the Vacancies Reform Act would authorize someone else to serve as Acting NCTC Director.

This memorandum memorializes the reasoning underlying our advice. In reaching our conclusions, we considered the interaction between the

Vacancies Reform Act and the provisions of the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), 50 U.S.C. § 3003 *et seq.*, that establish the offices of the DNI and the NCTC Director. *First*, consistent with our prior opinions, we concluded that the Vacancies Reform Act would remain an available means for designating an Acting DNI, even though IRTPA specifies that the Principal Deputy DNI "shall act for" the DNI during a vacancy, *id.* § 3026(a)(6). *Second*, upon the Principal Deputy DNI's resignation, no officer would automatically become the Acting DNI under either IRTPA or the Vacancies Reform Act, and that would remain true even if someone else became the Acting Principal Deputy DNI, because the statutes do not allow a "double acting" arrangement. *Third*, the first person named in the operative order of succession, established by a 2013 presidential memorandum, could not serve as Acting DNI because she was on detail to the Office of the Director of National Intelligence ("ODNI") and was not otherwise eligible under 5 U.S.C. § 3345(a)(3). *Fourth*, the second person on the order of succession, the NCTC Director, was available to serve as Acting DNI, but, as contemplated in IRTPA and the 2013 presidential memorandum, could not perform the duties of the NCTC Director while serving as Acting DNI. *Finally*, because an incumbent NCTC Director is, by statute, rendered unable to perform the duties of that office while serving as Acting DNI, this was an unusual instance in which someone else could act in an already-encumbered position—here, become the Acting NCTC Director—while the incumbent served elsewhere in an acting capacity.

I.

In 2004, Congress enacted IRTPA, which established the position of the DNI to serve as the "head of the intelligence community" and "principal adviser to the President" and others on "intelligence matters related to . . . national security." 50 U.S.C. § 3023(a), (b) (codifying Pub. L. No. 108-458, sec. 1011(a), § 102(a), (b), 118 Stat. 3638, 3644). The DNI is appointed by the President with the advice and consent of the Senate. 50 U.S.C. § 3023(a)(1).

IRTPA also established the ODNI to assist the DNI in carrying out his duties. *Id.* § 3025(a), (b). Congress created several offices within the ODNI and authorized the DNI to establish additional offices and to hire staff members. *Id.* § 3025(c), (d). In practice, many of those on the

ODNI's staff are detailed from other agencies in the intelligence community. *See id.* § 3024(*l*)(1)–(2) (authorizing the DNI to prescribe mechanisms to encourage such details); ODNI, Who We Are, www.dni.gov/index.php/who-we-are/organizations (last visited Nov. 15, 2019) (noting that "[t]he ODNI is staffed by officers from across the [intelligence community]").

One of the ODNI's statutory officers is the Principal Deputy DNI, 50 U.S.C. § 3025(c)(2), who is appointed by the President with the advice and consent of the Senate, *id.* § 3026(a)(1). The Principal Deputy DNI "assist[s] the [DNI] in carrying out the duties and responsibilities of the [DNI]." *Id.* § 3026(a)(5). The statute further provides that the Principal Deputy DNI "shall act for, and exercise the powers of, the [DNI] . . . during a vacancy in the position of [DNI]." *Id.* § 3026(a)(6).

Another of the ODNI's statutory officers is the NCTC Director, *id.* § 3025(c)(11), who is also appointed by the President with the advice and consent of the Senate, *id.* § 3056(b)(1). The NCTC Director serves as the "principal adviser" to the DNI on "intelligence operations relating to counterterrorism" and has "primary responsibility within the United States Government for conducting net assessments of terrorist threats." *Id.* § 3056(f)(1). The NCTC Director "may not simultaneously serve in any other capacity in the executive branch." *Id.* § 3056(b)(2).

II.

We first explain who was eligible to serve as Acting DNI upon the resignations of both the DNI and the Principal Deputy DNI on August 15, 2019. We advised not only that the President could designate the NCTC Director as the Acting DNI, but also that he would become the Acting DNI by operation of the current order of succession, which was issued in 2013 as an advance exercise of the President's authority under the Vacancies Reform Act.

A.

Throughout the Executive Branch, the Vacancies Reform Act generally applies when a Senate-confirmed officer, such as the DNI or NCTC Director, "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a). By default, anyone serving

as "the first assistant" to the vacant office "shall" become the acting officer. *Id.* § 3345(a)(1). But the President "may" instead choose to designate, as the acting officer, someone who already holds an "office for which appointment is required to be made by the President, by and with the advice and consent of the Senate," *id.* § 3345(a)(2), or an "officer or employee" of the same agency who has served in a position with a sufficiently high level of compensation "for not less than 90 days" of the "365-day period preceding" the vacancy, *id.* § 3345(a)(3).

IRTPA states that the Principal Deputy DNI "shall act for" and "exercise the powers of" the DNI "during a vacancy in the position of" the DNI, 50 U.S.C. § 3026(a)(6), but IRTPA does not otherwise make the Vacancies Reform Act inapplicable to the position of DNI. In a series of opinions dating back to 2003, this Office has consistently explained that the Vacancies Reform Act remains available to the President as a means for designating an acting official even when an office-specific statute provides that someone else "shall" serve in that role. *See Designating an Acting Director of the Federal Housing Finance Agency*, 43 Op. O.L.C. 70, 73–80 (2019) ("*Acting Director of FHFA*"); *Designating an Acting Attorney General*, 42 Op. O.L.C. 182, 184–90 (2018); *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. 99, 102–10 (2017); *Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. 208, 208–11 (2007); *Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. 121, 121 & n.1 (2003). When another statute does so, we have explained, the Vacancies Reform Act ceases to provide the *exclusive* means of filling vacancies on an acting basis, but, without something more to displace the Vacancies Reform Act, it remains an available alternative to the other statute. *See Acting Director of FHFA*, 43 Op. O.L.C. at 73–75. Every court to address this question has agreed with our reasoning.[1] And we

[1] *See United States v. Castillo*, 772 F. App'x 11, 13 (3d Cir. 2019) (noting that district "courts have been asked to address the validity of [Matthew Whitaker's] designation [as the Acting Attorney General] and have, thus far, uniformly concluded that it was proper"); *Hooks v. Kitsap Tenant Support Servs., Inc.*, 816 F.3d 550, 556 (9th Cir. 2016) (addressing designation of Acting General Counsel of the NLRB; "neither the [Vacancies Reform Act] nor the [National Labor Relations Act] is the *exclusive* means of appointing an Acting General Counsel"; "the President is permitted to elect between these two statutory alternatives to designate an Acting General Counsel"); *United States v. Patara*, 365 F. Supp. 3d 1085, 1088–91 (S.D. Cal. 2019) (sustaining designation of Acting

think that the same conclusion applies to the DNI. Notwithstanding section 3026(a)(6)'s provision that the Principal Deputy DNI "shall act for" the DNI during a vacancy, the President may choose to designate as Acting DNI a different official who qualifies under the Vacancies Reform Act.

No other provision of IRTPA counsels a different result. In 2012, IRTPA was amended to authorize the President to fill vacancies in some ODNI offices with non-Senate-confirmed individuals drawn from other agencies in the intelligence community. *See* Intelligence Authorization Act for Fiscal Year 2012, Pub. L. No. 112-87, sec. 405(2), § 103(e), 125 Stat. 1876, 1889 (codified at 50 U.S.C. § 3025(e)). Congress achieved that result by expanding the third category of officials made eligible to serve as acting officials by the Vacancies Reform Act. *See* 5 U.S.C. § 3345(a)(3). As it applies to other agencies, section 3345(a)(3) limits the available pool to certain officials in the "Executive agency" where the vacancy occurs. *Id.* For the ODNI, however, section 3025(e) expands that pool to include officials within the entire "intelligence community." 50 U.S.C. § 3025(e). That expansion applies to all vacancies "within the Office of the Director of National Intelligence (other than that of the Director of National Intelligence)." *Id.*

Although Congress precluded resort to the expanded section 3345(a)(3) pool when selecting an Acting DNI, we cannot read that parenthetical as making the Vacancies Reform Act itself inapplicable to that position. To the contrary, by excepting the DNI from its tailored expansion of section 3345(a)(3), section 3025(e) implies that section 3345(a)(3) applies

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Attorney General); *Guedes v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 356 F. Supp. 3d 109, 139, 153–54 (D.D.C. 2019) (same), *aff'd on other grounds*, 920 F.3d 1 (D.C. Cir. 2019), *petition for cert. filed*, No. 19-296 (U.S. Aug. 29, 2019); *United States v. Santos-Caporal*, No. 18-cr-171, 2019 WL 468795, at *6–7 (E.D. Mo. Jan. 9, 2019) (same), *report and recommendation adopted by* 2019 WL 460563, at *1 (E.D. Mo. Feb. 6, 2019); *United States v. Smith*, No. 18-cr-115, 2018 WL 6834712, at *2 (W.D.N.C. Dec. 28, 2018) (same); *United States v. Peters*, No. 17-cr-55, 2018 WL 6313534, at *2–5 (E.D. Ky. Dec. 3, 2018) (same); *United States v. Valencia*, No. 17-cr-882, 2018 WL 6182755, at *2–4 (W.D. Tex. Nov. 27, 2018) (same), *appeal dismissed*, 940 F.3d 181 (5th Cir. 2019); *English v. Trump*, 279 F. Supp. 3d 307, 319–31 (D.D.C. 2018) (sustaining designation of Acting Director of the Bureau of Consumer Financial Protection), *appeal dismissed upon appellant's motion*, No. 18-5007, 2018 WL 3526296 (D.C. Cir. July 13, 2018).

to the DNI in its non-expanded form, which means that the President may select an Acting DNI from certain senior ODNI officers and employees. And section 3025(e) says nothing to alter the applicability of section 3345(a)(2), which enables the President to choose a Senate-confirmed officer to fill a vacancy when the Vacancies Reform Act is available.[2]

Congress could have easily excluded the DNI from coverage under the Vacancies Reform Act by, for instance, adding the DNI to the list of excluded offices in 5 U.S.C. § 3349c or specifying that section 3026(a)(6) applies notwithstanding the Vacancies Reform Act. *Cf.* 6 U.S.C. § 113(g)(1), (2) (specifying who shall serve as Acting Secretary of Homeland Security in certain circumstances "[n]otwithstanding chapter 33 of title 5"). But Congress took no such course. As a result, IRTPA is not the exclusive means of temporarily filling a vacancy in the position of DNI, regardless of whether there is an incumbent Principal Deputy DNI. Consistent with the opinions of this Office and the decisions of federal courts, the President would have discretion to designate as Acting DNI someone else who is eligible under the Vacancies Reform Act—either as an official in a Senate-confirmed position or as a senior ODNI official who satisfies the statute's pay and tenure requirements.

B.

The Principal Deputy DNI is the first assistant to the DNI. *See* 50 U.S.C. § 3026(a)(5), (6); *Designation of Acting Associate Attorney General*, 25 Op. O.L.C. 177, 179 (2001) ("[T]he phrase ['first assistant'] is a term of art that refers to the top deputy," and, "[u]nder this interpretation, the Principal Deputy would generally qualify as the 'first assistant.'"). Yet, because that position became vacant at the same time as the DNI, no one automatically became the Acting DNI under either IRTPA (50 U.S.C. § 3026(a)(6)) or the first-assistant provision of the Vacancies Reform Act (5 U.S.C. § 3345(a)(1)). Moreover, because an *Acting* Principal Deputy

[2] The legislative history of section 3025(e) does not indicate that Congress believed the exclusion of the DNI from the tailored expansion of section 3345(a)(3) would prevent the President from using the Vacancies Reform Act. A section-by-section analysis stated that the DNI would be excepted from the new authority and that, under section 3026(a)(6), "the Principal Deputy DNI is next in line." 157 Cong. Rec. 20160 (Dec. 14, 2011). The analysis noted that the amendment would not "modif[y] or preclude[] the utilization of sections 3345(a)(1) or (2) of title 5 to fill vacancies." *Id.*

DNI does not satisfy either of those statutory provisions, nobody will be eligible under them until a new Principal Deputy DNI is appointed by the President.

An Acting Principal Deputy DNI's ineligibility, by virtue of acting in that position, to become the Acting DNI is consistent with this Office's longstanding approach. More than forty years ago, we recognized "as a general rule of interpretation" that "a statute providing that a deputy shall perform the duties of the principal officer in case of a vacancy . . . should be construed as referring to an actual and not an acting deputy." Memorandum for John W. Dean III, Counsel to the President, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Acting Deputy Public Printer* at 2 (Jan. 26, 1973). In 1984, we explained that the "Office has consistently taken the position that statutes providing that a deputy shall perform the duties of his principal during absence or disability or in case of a vacancy refer to an actual and not to an acting deputy." Memorandum for D. Lowell Jensen, Associate Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Service of John C. Lawn as Acting Deputy Administrator of the Drug Enforcement Administration* at 3 (July 31, 1984). We have therefore "cautioned against a 'double acting' arrangement." *Id.*

Our rationale for continuing to disapprove double-acting arrangements is grounded in statutory text, executive practice, and common sense. In the Vacancies Reform Act, the reference in section 3345(a)(1) to "the first assistant to the [vacant] office" is best understood as a reference to an individual who has actually been appointed to—and is thus encumbering, for personnel-law purposes—the position of first assistant. In other words, only an individual encumbering the position of first assistant is *the* first assistant; the term does not include someone who holds another position but is temporarily performing the duties of the first assistant. That is consistent with the venerable principle that an office remains vacant even when someone has been assigned to perform its duties on a temporary basis. *See, e.g.*, *District Attorney—Temporary Appointment*, 16 Op. Att'y Gen. 538, 540 (1880) ("The office in no respects ceases to be vacant . . . for the reason that the [assignment] itself contemplates only a temporary mode of having the duties of the office performed."). And we construe analogous provisions similarly. Thus, for purposes of 50 U.S.C. § 3026(a)(6), only an individual appointed as, and encumbering the position of, Principal Deputy DNI is *the* Principal Deputy DNI.

Consistent with that view, when Presidents issue orders of succession as an advance exercise of their authority to name acting officials under the Vacancies Reform Act, they often specify that "[n]o individual who is serving in an office . . . in an acting capacity, by virtue of so serving, shall act as [the agency head] pursuant to this order."[3] In fact, such a proviso has been included in all four of the presidential memoranda that have established orders of succession for the DNI, going back to 2005.[4]

That practice is strongly supported by common sense. When a line of succession for one office lists several officials, we look for the first available official on the list. In doing so, we pay no heed to any underlying lines of succession that may exist for each of the listed officials. Thus, Congress has included fifteen Cabinet officials in the statutory line of succession to be Acting President when the offices of President and Vice President are vacant. *See* U.S. Const. art. II, § 1, cl. 6; 3 U.S.C. § 19(d)(1). Although Congress has specified that only officers appointed with the Senate's advice and consent will count as Cabinet officials for succession purposes, *see* 3 U.S.C. § 19(e), the line of succession for each Cabinet official typically includes multiple Senate-confirmed officers. For example, the order of succession for the office of Secretary of State includes literally hundreds of Senate-confirmed officers, from the Deputy Secretary of State to every Under Secretary, every Assistant Secretary,

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[3] *E.g.*, Providing an Order of Succession Within the Department of Justice, Exec. Order No. 13787, § 2(a) (Mar. 31, 2017), 82 Fed. Reg. 16723, 16723 (Apr. 5, 2017); Providing an Order of Succession Within the Department of the Treasury, Exec. Order No. 13735, § 3(a) (Aug. 12, 2016), 81 Fed. Reg. 54709, 54709 (Aug. 17, 2016); Providing an Order of Succession in the Environmental Protection Agency and Amending Certain Orders on Succession, Exec. Order No. 13261, §§ 3(a), 4(a)–(i) (Mar. 19, 2002), 67 Fed. Reg. 13243, 13243–44 (Mar. 21, 2002).

[4] *See* Presidential Memorandum for the Director of National Intelligence, Designation of Officers of the Office of the Director of National Intelligence to Act as Director of National Intelligence § 3(a) (Sept. 20, 2013), 78 Fed. Reg. 59159, 59159 (Sept. 25, 2013); Presidential Memorandum for the Director of National Intelligence, Designation of Officers of the Office of the Director of National Intelligence to Act as Director of National Intelligence § 4(a) (Mar. 8, 2011), 76 Fed. Reg. 13499, 13499 (Mar. 11, 2011); Presidential Memorandum for the Director of National Intelligence, Designation of Officers of the Office of the Director of National Intelligence to Act as Director of National Intelligence § 3(a) (Oct. 3, 2008), 73 Fed. Reg. 58869, 58869 (Oct. 8, 2008); Presidential Memorandum for the Director of National Intelligence, Designation of Officers of the Office of the Director of National Intelligence to Act as Director of National Intelligence § 4(a) (Dec. 20, 2005), 70 Fed. Reg. 76375, 76375 (Dec. 23, 2005).

and eventually every "Chief[] of Mission, in the order in which they shall have taken the oath of office." Providing an Order of Succession Within the Department of State, Exec. Order No. 13251, § 2(a)–(m) (Dec. 28, 2001), 67 Fed. Reg. 1599, 1599–60 (Jan. 11, 2002). But, whenever any of those officers is the Acting Secretary of State, the presidential line of succession skips that person and passes on to the Secretary of the Treasury. *See* 3 U.S.C. § 19(d)(1); *Operation of the Twenty-Fifth Amendment Respecting Presidential Succession*, 9 Op. O.L.C. 65, 69 (1985) (noting that "the acting heads of departments . . . are not Presidential successors").

Similarly, within the Department of Justice, if the President does not invoke the Vacancies Reform Act, the statutory order of succession for the office of Attorney General includes the Deputy Attorney General, the Associate Attorney General, the Solicitor General, and several Assistant Attorneys General. *See* 28 U.S.C. § 508(a), (b). Each of those offices has its own principal deputy who is the first assistant to that office for purposes of the Vacancies Reform Act. *See* 28 C.F.R. § 0.137(b). Yet, when there is only an *Acting* Deputy Attorney General, the first available person in the line for Acting Attorney General is the Associate Attorney General; when there is also only an *Acting* Associate, the next available person in the line is the Solicitor General; and so on.[5]

The bar on double-acting arrangements finds inferential support in judicial decisions. When the Attorney General and Deputy Attorney General both resigned on October 20, 1973, the Solicitor General became Acting Attorney General. The district court in *United States v. Halmo*, 386 F. Supp. 593 (E.D. Wis. 1974), recognized that the Solicitor General had become Acting Attorney General not by virtue of being Acting Deputy Attorney General—i.e., by acting as the "first assistant" mentioned in the then-applicable versions of 5 U.S.C. § 3345 and 28 U.S.C. § 508(a)—but rather as Solicitor General under 28 U.S.C. § 508(b). *See* 386 F. Supp. at 595. And a 2009 court of appeals decision implicitly applied the bar on

[5] Thus, our 2007 opinion explained that "when the positions of Deputy Attorney General and Associate Attorney General are vacant—as they are now"—"[t]he Solicitor General is first in line" to "act as Attorney General." *Authority of the President to Name an Acting Attorney General*, 31 Op. O.L.C. at 208. The opinion did not mention that, at the time, the Department had both an Acting Deputy Attorney General and an Acting Associate Attorney General.

double-acting arrangements by declining to treat an Acting Principal Deputy Assistant Secretary in the Department of the Interior as an Acting Assistant Secretary under section 3345(a)(1). *See Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132, 135 (2d Cir. 2009).[6]

C.

The Principal Deputy DNI's resignation alongside the DNI meant that neither section 3026(a)(6) nor section 3345(a)(1) was available for automatic accession to the role of Acting DNI. As a result, no one would have become the Acting DNI in the absence of presidential action under the Vacancies Reform Act. Since 2005, however, Presidents have exercised their authority under the Vacancies Reform Act to prescribe, in advance, an order of succession that would apply to the DNI.

The current order of succession specifies, when the DNI and the Principal Deputy DNI are both vacant, a line of four officials to serve as Acting DNI, unless the President chooses to depart from that list. *See* Presidential Memorandum for the Director of National Intelligence, Designation of Officers of the Office of the Director of National Intelligence to Act as Director of National Intelligence §§ 1, 3(c) (Sept. 20, 2013), 78 Fed. Reg. 59159, 59159 (Sept. 25, 2013) ("DNI Order of Succession"). The first position on the list is the Deputy DNI for Mission Integration. *Id.* § 1(a).[7]

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[6] In *Schaghticoke Tribal Nation*, the appellant contended that the Associate Deputy Secretary of the Interior had violated the Vacancies Reform Act by performing a function that regulations assigned to the Assistant Secretary of the Interior for Indian Affairs. 587 F.3d at 134–35. At the time, the position of the Assistant Secretary was vacant, and the duties of Principal Deputy Assistant Secretary for Indian Affairs—the first assistant to the Assistant Secretary—were being performed by another official. *See* Brief for Defendants-Appellees (2d Cir. May 6, 2009) (No. 08-4735), 2009 WL 8189661, at *79. The appellant argued that the Acting Principal Deputy Assistant Secretary was functioning as the Acting Assistant Secretary under 5 U.S.C. § 3345(a)(1)—effectively urging the court to recognize a double-acting arrangement. *See* Reply Brief for Plaintiff-Appellant (2d Cir. June 8, 2009) (No. 08-4735), 2009 WL 8189664, at *35–36. The Second Circuit declined to do so. Instead, it concluded that the "Principal Deputy position was vacant" and that there was no Acting Assistant Secretary for Indian Affairs under section 3345(a)(1). 587 F.3d at 135.

[7] The 2013 order refers to the Deputy DNI for "Intelligence Integration," but in a restructuring completed in July 2018, that position was redesignated as the Deputy DNI for "Mission Integration."

But the person who was serving in that position when the vacancies occurred was ineligible to serve as Acting DNI because she was on detail to the ODNI from another agency and did not have a separate appointment from the DNI as a Deputy DNI.

The Vacancies Reform Act generally permits the President to designate certain senior agency officials to act in a vacant office; when a Senate-confirmed officer "of an Executive agency . . . dies, resigns, or is otherwise unable to perform the functions and duties of the office . . . the President . . . may direct an officer or employee *of such Executive agency* to perform the functions and duties of the vacant office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(3) (emphasis added). Because the statute requires the official to be an officer or employee "of such Executive agency," it excludes someone who has merely been detailed to that agency from somewhere else and does not have any independent claim to be an officer or employee of the agency receiving the detail. That conclusion is consistent with how details generally work in the Executive Branch. *See, e.g.*, 5 C.F.R. § 317.903(a) (explaining that, for details of Senior Executive Service employees, there is an "expectation that the employee will return to the official position of record upon expiration of the detail" and "[f]or purposes of pay and benefits, the employee continues to encumber the position from which detailed"). It is also consistent with our conclusion in 1986 that, if the Army assigned lawyers from the Judge Advocate General Corps to the Department of Justice, they would need formal appointments from the Attorney General before they could represent the United States in litigation, because 28 U.S.C. § 516 reserves the conduct of litigation on behalf of the United States to "officers of the Department of Justice." *Assignment of Army Lawyers to the Department of Justice*, 10 Op. O.L.C. 115, 117 & n.2 (1986). Moreover, our conclusion is consistent with Congress's tailored expansion of section 3345(a)(3) for purposes of most ODNI positions covered by the Vacancies Reform Act, which reflected the fact that so many ODNI staff members are, in practice, detailees from other intelligence-community elements, thus shrinking the pool of senior agency officials who would otherwise be eligible under section 3345(a)(3). *See* 157 Cong. Rec. 20160 (Dec. 14, 2011) (section-by-section analysis of 2012 amendment, noting "the relatively small size of the ODNI" and "the fact that a significant number" of its personnel "are on detail to the office").

To be eligible to serve as Acting DNI under section 3345(a)(3), or under the order of succession invoking that provision, a detailee at the ODNI must have held a separate appointment within that "agency" for at least 90 days in the year preceding the vacancy. 5 U.S.C. § 3345(a)(3); *see* 50 U.S.C. § 3025(e) (modifying this aspect of section 3345(a)(3) only for vacancies in the ODNI "other than that of the [DNI]"); *see also* 50 U.S.C. § 3025(c)(14) (authorizing the DNI to "establish" additional "offices and officials" in the ODNI).[8] Because the Deputy DNI for Mission Integration did not satisfy this requirement, she was ineligible to serve as Acting DNI under section 3345(a)(3).

D.

The next officer on the current order of succession is the NCTC Director. *See* DNI Order of Succession § 1(b), 78 Fed. Reg. at 59159. Because the NCTC Director was appointed by the President with the advice and consent of the Senate, 50 U.S.C. § 3056(b)(1), he was eligible to serve as Acting DNI under 5 U.S.C. § 3345(a)(2).

The NCTC Director's service as Acting DNI does involve one statutory wrinkle. IRTPA provides that the NCTC Director "may not simultaneously serve in any other capacity in the executive branch." 50 U.S.C. § 3056(b)(2). We do not, however, read this provision as categorically forbidding the NCTC Director from serving as Acting DNI. Instead, section 3056(b)(2) permits the Director of NCTC to serve as Acting DNI, and to continue to hold the office of NCTC Director, so long as he does not, while Acting DNI, also perform the functions and duties of the NCTC Director. That conclusion follows from the way section 3056(b)(2) is phrased—as a restriction on *simultaneously serving* in any other capacity. It comports with the apparent purpose of the provision: to ensure that the person performing the functions and duties of the Director of NCTC does so with a degree of independence and without competing obligations. And it is consistent with the orders of succession for the DNI issued by Presi-

[8] The rate of pay for the ODNI position to which the detailee is separately appointed would also need to be "equal to or greater than the minimum rate of pay payable for a position at GS–15 of the General Schedule," 5 U.S.C. § 3345(a)(3)(B), even though, as a practical matter, the detailee could draw that salary only from the home agency, *see id.* §§ 5533, 5535.

dents George W. Bush and Barack Obama. In his 2011 and 2013 memoranda, President Obama expressly accounted for section 3056(b)(2) by specifying: "In the event that the Director of the National Counterterrorism Center acts as and performs the functions and duties of the DNI . . . , that individual shall not simultaneously serve as Director of the National Counterterrorism Center during that time, in accordance with 50 U.S.C. 3056." DNI Order of Succession § 3(d), 78 Fed. Reg. at 59159; Presidential Memorandum for the Director of National Intelligence, Designation of Officers of the Office of the Director of National Intelligence to Act as Director of National Intelligence § 4(d) (Mar. 8, 2011), 76 Fed. Reg. 13499, 13499 (Mar. 11, 2011). Although President Bush did not expressly acknowledge the prohibition on simultaneous service, he also included the NCTC Director in his 2008 order of succession. *See* Presidential Memorandum for the Director of National Intelligence, Designation of Officers of the Office of the Director of National Intelligence to Act as Director of National Intelligence § 1(e) (Oct. 3, 2008), 73 Fed. Reg. 58869, 58869 (Oct. 8, 2008).

IRTPA elsewhere contemplates a conceptually similar arrangement, whereby an officer may continue to hold another office but is legally disabled from exercising some of the duties of that office during service within the ODNI. Under the statute, a commissioned officer of the Armed Forces may serve as DNI or Principal Deputy DNI and continue to receive military pay and allowances but may not, while so "serving," be supervised or controlled by, or exercise supervision or control over, any officer or employee of the Department of Defense. 50 U.S.C. § 3026(c)(4), (6). In that instance, the commissioned officer will retain his military office but will be disabled from exercising certain duties or responsibilities of that office while serving at the ODNI. We think the same thing is true with respect to the restriction on dual service by the NCTC Director. Section 3056(b)(2) permits the NCTC Director to continue occupying that office, even while disabling him from performing his normal duties during any period in which he serves as Acting DNI.

In support of this conclusion, we again find instructive the 1986 opinion concerning the assignment of Army lawyers to the Department of Justice. In that opinion, then-Deputy Assistant Attorney General Samuel Alito concluded that the Posse Comitatus Act, which generally precludes "any part of the Army" from being used for law enforcement, 18 U.S.C.

§ 1385, "would not be implicated" if military personnel "were detailed on a full-time basis" to the Department of Justice and they then "functioned on a day-to-day basis in an entirely civilian capacity under the supervision of civilian personnel." *Assignment of Army Lawyers to the Department of Justice*, 10 Op. O.L.C. at 121. The opinion distinguished that situation from one in which military lawyers would be "assigned on a part-time basis to perform civilian law enforcement functions along with their regularly assigned military duties"—a situation that would raise "serious questions" under the Posse Comitatus Act. *Id.* For similar reasons, we believe that the prohibition on "simultaneous[] serv[ice]" in section 3056(b)(2) is not implicated when the President designates the NCTC Director to serve as Acting DNI, so long as, while so serving, the NCTC Director does not perform the functions and duties of that office.

Accordingly, we advised that, upon the resignations of the DNI and Principal Deputy DNI, the NCTC Director would become the Acting DNI without the need for further action by the President, as contemplated by the 2013 order of succession, which was promulgated as an advance exercise of the President's authority under the Vacancies Reform Act. Under section 3056(b)(2), however, he would be unable to exercise the functions and duties of the NCTC Director while serving as Acting DNI.

III.

We further considered whether anyone could serve as Acting NCTC Director while the incumbent served as Acting DNI. Because the NCTC Director is legally disabled by section 3056(b)(2) from performing the functions and duties of his own office while serving as Acting DNI, this presents an unusual situation in which the Vacancies Reform Act may be used to designate an Acting NCTC Director while there is still an incumbent in that office. We have generally advised that when one official serves in an acting capacity under the Vacancies Reform Act, another official may not be designated under that statute to act in the encumbered position. In other words, the agency may not "backfill" the position. In such cases, the incumbent officeholder will continue to occupy both positions, absent some legal restriction on joint service. That rationale, however, does not apply when, as with the NCTC Director, the incumbent is legally precluded from serving in both capacities at once.

Prior to the Vacancies Reform Act, we had recognized the general expectation that an acting officer will continue to occupy his own office and perform its duties even while he is temporarily acting in another office. *See, e.g.*, *Legality of Designation of Certain Acting Officials by the Secretary of Energy*, 2 Op. O.L.C. 113, 115 (1978) (noting the practical difficulties that may arise when an acting official can effectively perform the additional duties only "on a part-time basis"). Congress has long prescribed that someone "performing the duties of a vacant office" generally "may not receive pay in addition to the pay for his regular office." 5 U.S.C. § 5535(a).

The 1998 enactment of the Vacancies Reform Act did not alter that understanding. As we have recognized, "duties arising under the Vacancies Reform Act can be regarded as part and parcel" of the underlying office that makes one eligible to be an acting officer. *Designation of Acting Director of the Office of Management and Budget*, 27 Op. O.L.C. at 122 n.3. That is especially true when someone is a first assistant or other deputy to the vacant office, where day-to-day tasks often involve delegated functions of the principal and an important duty of the lower position is to be ready to stand in for the principal when needed. Thus, we have continued to read section 3345(a) as resting on the premise that an acting officer will ordinarily perform the duties of both his office and the vacant office. Otherwise, each application of the statute could begin a cascade of acting arrangements within an agency, as one official after another temporarily moves into a different position. We have also reasoned that, because almost all officials may delegate a significant portion of their duties, they can typically accommodate, at least for temporary periods, the need to carry out the duties of two positions. Put simply, an acting official remains able to perform the most important duties of each position, and he may be expected to delegate the exercise of the more mundane duties under his supervision. In such circumstances, the acting official may well be busier during the period of joint service, but he still encumbers (and receives the pay of) only the underlying position, which is not vacant.

By contrast, in this instance, the NCTC Director is temporarily precluded from performing the duties of that office, whether or not those duties are delegable. The Vacancies Reform Act applies when a Senate-confirmed officer of an Executive agency "dies, resigns, *or is otherwise unable* to perform the functions and duties of the office." 5 U.S.C.

§ 3345(a) (emphasis added). While serving as Acting DNI, the NCTC Director is "unable to perform the functions and duties of [his] office"—not because he is merely preoccupied or away from his usual desk, but because section 3056(b)(2) forbids him from doing so. The statutory prohibition thus resembles an ethical constraint that necessitates an across-the-board, but temporary, recusal. When an official must recuse, someone else is typically able to act in his place with respect to the matter concerned.[9] Here, there is no ethical constraint, but a statute mandates something functionally equivalent to a recusal, as a result of which someone else must perform the NCTC Director's duties.

Accordingly, when the NCTC Director became the Acting DNI, the Vacancies Reform Act permitted the designation of someone else as Acting NCTC Director. The President could have selected anyone who was eligible under section 3345(a)(2) or the expanded form of section 3345(a)(3) that applies to most ODNI offices under 50 U.S.C. § 3025(e). Instead, the President allowed the default under the Vacancies Reform Act to take effect. Russell Travers, the incumbent Deputy Director of the National Counterterrorism Center, who was the first assistant to the NCTC Director, became the Acting NCTC Director—just as he had in the period before Mr. Maguire was appointed as NCTC Director. *See* ODNI, Acting Director, National Counterterrorism Center, www.dni.gov/index.php/nctc-who-we-are/deputy-director-nctc (last visited Nov. 15, 2019). When Mr. Maguire ceases to serve as Acting DNI, he will be able to resume his duties as the NCTC Director (the position he still encumbers and for which he is being paid), at which time Mr. Travers will cease to be the Acting NCTC Director.

IV.

For the reasons set forth above, we concluded that, in designating an Acting DNI, the President could choose anyone who is eligible under the

[9] *See, e.g.*, *In re Grand Jury Investigation*, 916 F.3d 1047, 1056 (D.C. Cir. 2019) (concluding that the Deputy Attorney General had become "the Acting Attorney General" under 28 U.S.C. § 508(a) when "the Attorney General's single-issue recusal . . . created a vacancy that the Deputy Attorney General was eligible to fill"); *Muffley ex rel. NLRB v. Spartan Mining Co.*, 570 F.3d 534, 539 & n.1 (4th Cir. 2009) (affirming district court's conclusion that, when the General Counsel was recused from a case, a Deputy General Counsel properly carried out the General Counsel's functions under 5 U.S.C. § 3345(a)(1)).

Vacancies Reform Act. *See* 5 U.S.C. § 3345(a)(2), (3). The President could therefore select the Senate-confirmed NCTC Director, who may serve as Acting DNI subject to the time limits of the Vacancies Reform Act. *See id.* § 3346. The President could in turn invoke the Vacancies Reform Act to authorize someone to serve as Acting NCTC Director because, while serving as Acting DNI, the NCTC Director is rendered "unable to perform the functions and duties of" NCTC Director. *Id.* § 3345(a); *see* 50 U.S.C. § 3056(b)(2). Here, in the absence of an alternative presidential designation, the NCTC Director's first assistant would automatically serve in that role. *See* 5 U.S.C. § 3345(a)(1).

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

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