OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES,

THE ATTORNEY GENERAL,

AND OTHER EXECUTIVE
OFFICERS OF THE FEDERAL
GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

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VOLUME 44

2020

WASHINGTON
2024

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(2020)

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FOREWORD

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

The Attorney General is responsible, "from time to time," to "cause to be edited, and printed in the Government Publishing Office, such of his opinions as he considers valuable for preservation in volumes." 28 U.S.C. § 521. The Official Opinions of the Attorneys General of the United States comprise volumes 1–43 and include opinions of the Attorney General issued through 1982. The Attorney General has also directed OLC to publish those of its opinions considered appropriate for publication on an annual basis, for the convenience of the Executive, Legislative, and Judicial Branches and of the professional bar and general public. These OLC publications now also include the opinions signed by the Attorney General, except for certain Attorney General opinions published in *Administrative Decisions Under Immigration and Nationality Laws of the United States*. The first 43 published volumes of the OLC series covered the years 1977 through 2019. The present volume 44 covers 2020.

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

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OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Ratification of the Equal Rights Amendment

Congress has constitutional authority to impose a deadline for ratifying a proposed constitutional amendment. It exercised this authority when proposing the Equal Rights Amendment and, because three-fourths of the state legislatures did not ratify before the deadline that Congress imposed, the Equal Rights Amendment has failed of adoption and is no longer pending before the States. Accordingly, even if one or more state legislatures were to ratify the proposed amendment, it would not become part of the Constitution, and the Archivist could not certify its adoption under 1 U.S.C. § 106b.

Congress may not revive a proposed amendment after a deadline for its ratification has expired. Should Congress wish to propose the amendment anew, it may do so through the same procedures required to propose an amendment in the first instance, consistent with Article V of the Constitution.

January 6, 2020

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION[*]

You have asked for our views concerning the legal status of the Equal Rights Amendment ("ERA"). Consistent with Article V of the Constitution, two-thirds of both Houses passed a joint resolution proposing the ERA, which would become part of the Constitution when ratified by three-fourths of the States. *See* 86 Stat. 1523 (1972) ("ERA Resolution"). Consistent with the last seven amendments adopted before 1972, Congress conditioned ratification on a deadline, requiring that the necessary number of States (thirty-eight) approve the amendment within seven years. *See id*. As that deadline approached, only thirty-five States had ratified the ERA, and several had sought to rescind their initial approvals. Congress took the unprecedented step of voting, with a simple majority in each House, to extend the deadline by three years, until June 30, 1982. *See* 92 Stat. 3799 (1978). That new deadline came and went, however,

[*] Editor's note: On January 26, 2022, this Office concluded that this opinion "is not an obstacle either to Congress's ability to act with respect to ratification of the [Equal Rights Amendment] or to judicial consideration of . . . questions" regarding the constitutional status of the ERA. *Effect of 2020 OLC Opinion on Possible Congressional Action Regarding Ratification of the Equal Rights Amendment*, 46 Op. O.L.C. __, at *3 (Jan. 26, 2022).

without additional ratifications. The ERA thus failed to secure the necessary ratifications within either of Congress's deadlines.

Nearly four decades later, ERA supporters have renewed their push to ratify the amendment. Some have urged Congress to restart the ratification process by proposing it anew. *See, e.g.*, Remarks of Justice Ruth Bader Ginsburg, Georgetown University Law Center (Sept. 12, 2019) ("[T]he ERA fell three States short of ratification. I hope someday it will be put back in the political hopper, starting over again, collecting the necessary number of States to ratify it.").[1] Others, however, have urged the outstanding States to ratify the long-expired ERA Resolution, arguing that the congressional deadline was invalid or could be retroactively nullified by Congress. In 2017, Nevada voted to ratify the ERA, *see* S.J. Res. 2, 79th Leg. (Nev. 2017), and in 2018, Illinois did the same, *see* S.J. Res. Const. Amend. 0004, 100th Gen. Assemb. (Ill. 2018). If the ratification period remains open, and if the efforts by five States to rescind their earlier ratifications are disregarded, then thirty-seven States could be credited with having voted to ratify the ERA. After falling just short of ratifying the ERA during its 2019 session, the Virginia legislature is expected to vote again early this year.

Congress has charged the Archivist of the United States with the responsibility to publish a new constitutional amendment upon receiving the formal instruments of ratification from the necessary number of States. Whenever the National Archives and Records Administration ("NARA") receives "official notice" that an amendment to the Constitution "has been adopted," the Archivist "shall forthwith cause the amendment to be published" along with a certificate identifying the States that ratified the amendment and declaring "that the [amendment] has become valid, to all intents and purposes, as a part of the Constitution of the United States." 1 U.S.C. § 106b. In view of this responsibility, NARA has received inquiries from Members of Congress and from several States

[1] https://www.facebook.com/georgetownlaw/videos/justice-ginsburg-to-address-new-georgetown-law-students/2325195750861807 (remarks starting at 1:03:35); *see also* Marcia Coyle, *Partisan Divisions Are 'Not Serving Our Country Well,' Justice Ginsburg Says*, Nat'l L.J. (Sept. 12, 2019), https://www.law.com/nationallawjournal/2019/09/12/partisan-divisions-are-not-serving-our-country-well-justice-ginsburg-says (quoting Justice Ginsburg's remarks on the ERA).

asking about the status of the ERA. Accordingly, you have asked for our views on the legal status of the proposed amendment.[2]

We conclude that Congress had the constitutional authority to impose a deadline on the ratification of the ERA and, because that deadline has expired, the ERA Resolution is no longer pending before the States. The Supreme Court has upheld Congress's authority to impose a deadline for ratifying a proposed constitutional amendment. *See Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921) ("Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt."). Although Congress fixed the ratification deadline in the proposing clause of the ERA Resolution, rather than in the proposed amendment's text, that choice followed established practice. After incorporating ratification deadlines in the text of four amendments, *see* U.S. Const. amends. XVIII, XX–XXII, Congress placed deadlines in the resolutions proposing each of the next four amendments. Both Houses of Congress, by the requisite two-thirds majorities, adopted the terms of the ERA Resolution, including the ratification deadline, and the state legislatures were well aware of that deadline when they considered the resolution. We therefore do not believe that the location of the deadline alters its effectiveness.

The more difficult question concerns whether Congress, having initially specified that state legislatures must ratify the proposed amendment within seven years, may modify that deadline. In 1977, this Office advised that Congress could extend the ERA's deadline before it had expired. *See* Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Extending the Time Period for Ratification of the Proposed Equal Rights Amendment* (Oct. 31, 1977) ("*Constitutionality of ERA Extension*").[3] We recognized that "respectable arguments can be

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[2] *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Gary M. Stern, General Counsel, National Archives and Records Administration (Dec. 12, 2018).

[3] The 1977 opinion is not published in the *Opinions of the Office of Legal Counsel*, but it was reprinted in connection with Assistant Attorney General Harmon's November 1, 1977, congressional testimony. *See Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 7–27 (1978).

made on both sides of this question," *id.* at 7, but we viewed Congress's authority to fix the deadline in the first instance as including a power to modify it even after the States had begun to vote on ratification, *see id*. at 20–21. We acknowledged, however, that there would be a "strong argument" that Congress's authority to extend a pending deadline would not include "reviving a proposed amendment" after the deadline had expired. *Id.* at 5–6.

Although we disagree with the 1977 opinion's conclusion that Congress may extend a ratification deadline on an amendment pending before the States, we agree in any event that Congress may not revive a proposed amendment after the deadline has expired. The Constitution authorizes Congress to propose amendments for ratification, but it does not contemplate any continuing role for Congress during the ratification period. *See* U.S. Const. art. V. Even if Congress could validly extend the ERA's ratification deadline before its expiration, that deadline expired decades ago. Should the people of the United States wish to adopt the ERA as part of the Constitution, then the appropriate path is for Congress (or a convention sought by the state legislatures) to propose that amendment once more, in a manner consistent with Article V of the Constitution.

I.

Congress proposed the ERA to the States after five decades of deliberation over whether such an amendment was necessary to secure equal rights for women or might instead cut back on existing protections. The first ERA proposal was introduced in 1923. It would have provided that "[m]en and women shall have equal rights throughout the United States and every place subject to its jurisdiction" and that Congress could "enforce this article by appropriate legislation." S.J. Res. 21, 68th Cong. (1923); *see also* H.R.J. Res. 75, 68th Cong. (1923). The measure faced opposition from traditionalists and some leaders of the women's movement, including many who feared that the amendment would invalidate labor laws that protected women. *See* Mary Frances Berry, *Why ERA Failed: Politics, Women's Rights, and the Amending Process of the Constitution* 56–60 (1986). The proposal did not advance in 1923, but it was reintroduced repeatedly over the next fifty years, and it was the subject

of multiple committee hearings.[4] The amendment appears to have first reached the Senate floor in July 1946, where it fell short of the required two-thirds majority by a vote of 38 to 35. *See* 92 Cong. Rec. 9404–05 (1946). The Senate would go on to approve the proposal by the required supermajority on two occasions, in 1950 and 1953. *See* 99 Cong. Rec. 8974 (1953); 96 Cong. Rec. 872–73 (1950). On both occasions, however, the House did not act on the measure.

After languishing for decades, the ERA gained momentum during the 91st Congress. *See* H.R.J. Res. 264, 91st Cong. (1969). In 1970, Representative Martha Griffiths obtained the necessary signatures for a discharge petition to move the resolution out of the House Judiciary Committee, and the House approved the resolution by an overwhelming margin. *See* 116 Cong. Rec. 28004, 28036–37 (1970). The Senate, however, did not take a final vote on the resolution. *See* S. Rep. No. 92-689, at 4–5 (1972). Notably, in the debates over the ERA, opponents had seized on the absence of a ratification deadline. *See, e.g.*, 116 Cong. Rec. 28012 (1970) (remarks of Rep. Celler); *see also* 116 Cong. Rec. 36302 (1970) (remarks of Sen. Ervin) (proposing to amend the earlier resolution to include a seven-year deadline for ratification).

In the 92nd Congress, the resolution finally met with bicameral success. The House adopted the ERA Resolution by the requisite two-thirds majority on October 12, 1971. 117 Cong. Rec. 35815 (1971). The Senate did the same on March 22, 1972. 118 Cong. Rec. 9598 (1972).

The ERA Resolution reads in its entirety:

> JOINT RESOLUTION
>
> Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each*

[4] *See, e.g.*, H.R.J. Res. 42, 79th Cong. (1945); S.J. Res. 8, 77th Cong. (1941); S.J. Res. 65, 75th Cong. (1937); H.R.J. Res. 1, 75th Cong. (1937); S.J. Res. 1, 73d Cong. (1933); H.R.J. Res. 55, 71st Cong. (1929); S.J. Res. 64, 70th Cong. (1928); S.J. Res. 11, 69th Cong. (1925); *Equal Rights for Men and Women: Hearings on S.J. Res. 65 Before a Subcomm. of the S. Comm. on the Judiciary*, 75th Cong. (1938); *Equal Rights Amendment: Hearing on S.J. Res. 64 Before a Subcomm. of the S. Comm. on the Judiciary*, 70th Cong. (1929).

> *House concurring therein)*, That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:
>
> "ARTICLE —
>
> "SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
>
> "SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
>
> "SEC. 3. This amendment shall take effect two years after the date of ratification."

86 Stat. at 1523.

The proposing clause of the ERA Resolution contains a ratification deadline, which required that "the legislatures of three-fourths of the several States" ratify the amendment "within seven years from the date of its submission by the Congress," resulting in a deadline of March 22, 1979. *Id*. In 1971, Representative Griffiths, the ERA's lead sponsor, defended the inclusion of the deadline, describing it as "customary," as intended to meet "one of the objections" previously raised against the resolution, and as a "perfectly proper" way to ensure that the resolution "should not be hanging over our head forever." 117 Cong. Rec. at 35814–15. The report of the Senate Judiciary Committee similarly explained: "This is the traditional form of a joint resolution proposing a constitutional amendment for ratification by the States. The seven year time limitation assures that ratification reflects the contemporaneous views of the people." S. Rep. No. 92-689, at 20; *see also* Ruth Bader Ginsburg, *Ratification of the Equal Rights Amendment: A Question of Time*, 57 Tex. L. Rev. 919, 921 (1979) (stating that ERA supporters "thought the stipulation innocuous, a 'customary' statute of limitations, not a matter of substance worth opposing" (footnote omitted)). Congress therefore made the deliberate choice to subject the proposed amendment to a seven-year ratification deadline.

After Congress adopted the ERA Resolution, the Acting Administrator of the General Services Administration transmitted certified copies of the full text of the resolution to the States with a request that each governor

submit the proposed amendment "to the legislature of your state for such action as it may take." *Constitutionality of ERA Extension* at 3; *see, e.g.*, Letter for George C. Wallace, Governor, State of Alabama, from Rod Kreger, Acting Administrator, General Services Administration (Mar. 24, 1972).[5] Twenty-two States ratified the ERA by the end of 1972.[6] The political winds shifted, however, and only thirteen more States ratified within the next five years.[7] During those years, four States voted to re-

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[5] As we have previously recognized, "Section 106b and its antecedents have long been understood as imposing a ministerial, 'record-keeping' duty upon the executive branch." *Congressional Pay Amendment*, 16 Op. O.L.C. 85, 98 (1992). From 1791 to 1951, the Secretary of State reported on the ratification of new amendments, a practice that Congress formally endorsed in 1818. *See* Act of Apr. 20, 1818, ch. 80, § 2, 3 Stat. 439. The Administrator of General Services held the duty from 1951 to 1984. *See* Pub. L. No. 82-248, ch. 655, sec. 2(b), § 106b, 65 Stat. 710, 710 (1951). In 1984, the role was transferred to the Archivist. *See* Pub. L. No. 98-497, § 107(d), 98 Stat. 2280, 2291 (1984).

[6] The States were Hawaii, New Hampshire, Delaware, Iowa, Idaho, Kansas, Nebraska, Texas, Tennessee, Alaska, Rhode Island, New Jersey, Colorado, West Virginia, Wisconsin, New York, Michigan, Maryland, Massachusetts, Kentucky, Pennsylvania, and California. S. Con. Res. 39, 6th Leg. (Haw. 1972); H.R. Con. Res. 1, 1972 Sess. Gen. Ct. (N.H. 1972); S. Con. Res. 47, 126th Gen. Assemb. (Del. 1972); S.J. Res. 1008, 64th Gen. Assemb. (Iowa 1972); S.J. Res. 133, 41st Leg. (Idaho 1972); H.R. Con. Res. 1155, 1972 Sess. Leg. (Kan. 1972); Legis. Res. 86, 82d Leg. (Neb. 1972); S. Con. Res. 1, 62d Leg. (Tex. 1972); H.R.J. Res. 371, 87th Gen. Assemb. (Tenn. 1972); H.R.J. Res. 125, 7th Leg. (Alaska 1972); S. Res. 3482, 1972 Jan. Sess. Gen. Assemb. (R.I. 1972); S. Con. Res. 74, 195th Leg. (N.J. 1972); H.R. Con. Res. 1017, 48th Gen. Assemb. (Colo. 1972); S.J. Res. 3, 60th Leg. (W. Va. 1972); Enrolled J. Res. 52, 1972 Spec. Sess. Gen. Assemb. (Wis. 1972); S. Con. Res. 9748, 179th Leg. (N.Y. 1972); S.J. Res. GG, 76th Leg. (Mich. 1972); H.R.J. Res. LLL, 76th Leg. (Mich. 1972); Res. 35, 1972 Sess. Gen. Assemb. (Md. 1972); Res. Ratifying the Proposed Amend. to the Const. of the U.S. Prohibiting Discrimination on Account of Sex, 167th Gen. Ct. (Mass. 1972); H.R.J. Res. 2, 1972 1st Extra. Sess. Gen. Assemb. (Ky. 1972); J. Res. 2, 1972 Sess. Gen. Assemb. (Pa. 1972); S.J. Res. 20, 1972 Sess. Leg. (Cal. 1972).

[7] Eight States ratified the ERA in 1973: Wyoming, South Dakota, Oregon, Minnesota, New Mexico, Vermont, Connecticut, and Washington. H.R.J. Res. 2, 42d Leg. (Wyo. 1973); S.J. Res. 1, 48th Leg. (S.D. 1973); S.J. Res. 4, 57th Legis. Assemb. (Or. 1973); H.R. Res. 1, 68th Leg. (Minn. 1973); H.R.J. Res. 2, 31st Leg. (N.M. 1973); H.R.J. Res. 8, 1973 Sess. Gen. Assemb. (Vt. 1973); H.R.J. Res. 1, 1973 Jan. Sess. Gen. Assemb. (Conn. 1973); H.R.J. Res. 10, 43d Leg. (Wash. 1973). Three ratified in 1974: Maine, Montana, and Ohio. J. Res. to Ratify the Equal Rights Amend. to the Federal Const., 106th Leg., 1st Spec. Sess. (Me. 1974); H.R.J. Res. 4, 43d Leg. (Mont. 1974); H.R.J. Res. 11, 110th Gen. Assemb. (Ohio 1974). North Dakota ratified the ERA in 1975. S. Con. Res. 4007, 44th Legis. Assemb. (N.D. 1975). Indiana did so in 1977. H.R.J. Res. 2, 100th Gen. Assemb. (Ind. 1977).

scind their earlier ratifications.[8] A fifth State, South Dakota, later adopted a resolution providing that its prior ratification would be withdrawn if the requisite number of the States failed to ratify the ERA within the seven-year period. S.J. Res. 2, 54th Leg. (S.D. 1979).

As the seven-year deadline approached, Congress considered resolutions that would take the historically unprecedented step of extending the ratification deadline. *See* H.R.J. Res. 638, 95th Cong., 1st Sess. (1977); H.R.J. Res. 638, 95th Cong., 2d Sess. (1978). Congress had never before sought to adjust the terms or conditions of a constitutional amendment pending before the States. A subcommittee of the House Judiciary Committee conducted hearings over six days during which government officials, legal scholars, and political activists expressed differing views over whether Congress could validly extend the ratification deadline, whether it could adopt such a resolution by only a simple majority vote, and whether States could validly rescind their earlier ratifications. *See Equal Rights Amendment Extension: Hearings on H.J. Res. 638 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. (1978) ("*House Extension Hearings*"). The witnesses included future Justice Ruth Bader Ginsburg, who was then a professor at Columbia Law School, and John Harmon, who was the Assistant Attorney General for this Office. A subcommittee of the Senate Judiciary Committee also conducted hearings. *See Equal Rights Amendment Extension: Hearings on S.J. Res. 134 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Cong. (1979) ("*Senate Extension Hearings*").

In connection with these hearings, Assistant Attorney General Harmon released an opinion, which he had provided to the Counsel to the President, concluding that the proposed extension of the ERA would likely be constitutional. *See Constitutionality of ERA Extension* at 1. The opinion advised that "respectable arguments can be made on both sides of this question," since Article V "can be viewed as envisioning a process whereby Congress proposes an amendment and is divested of any power once the amendment is submitted to the States for ratification." *Id.* at 7.

[8] Kentucky voted to rescind its ratification in 1972. H.R.J. Res. 20, 1978 Sess. Gen. Assemb. (Ky. 1978). Nebraska did the same in 1973, Legis. Res. 9, 83d Leg. (Neb. 1973); Tennessee in 1974, S.J. Res. 29, 88th Gen. Assemb. (Tenn. 1974); and Idaho in 1977, H. Con. Res. 10, 44th Leg. (Idaho 1977).

Nevertheless, the opinion ultimately concluded that Congress's authority to "establish a 'reasonable' time in which ratification may occur," *id.*, may be subject to modification by a later Congress at least where the deadline has not yet expired, *see id.* at 5–8, 16–17. The opinion reasoned that the ERA's deadline was not in the proposed amendment's actual text and therefore concerned only a "subsidiary matter[] of detail" that Congress could revise by a simple majority vote of both Houses. *Id.* at 22–23 (quoting *Dillon*, 256 U.S. at 376).

In 1978, the House and Senate, acting by simple majorities, adopted a resolution extending the deadline for the ERA's ratification. 92 Stat. at 3799.[9] The ERA's supporters had initially sought to extend the ratification deadline by an additional seven years, but a compromise extended the deadline by just over three years, to June 30, 1982. *See* H.R. Rep. No. 95-1405, at 1 (1978). Although this Office had advised that the President need not sign a resolution concerning a constitutional amendment, *see Constitutionality of ERA Extension* at 25, President Carter chose to sign the extension resolution to demonstrate his support. *See* Equal Rights Amendment, Remarks on Signing H.J. Res. 638 (Oct. 20, 1978), 2 *Pub. Papers of Pres. Jimmy Carter* 1800 (1978) (acknowledging that "the Constitution does not require the President to sign a resolution concerning an amendment to the Constitution").

Several States and state legislators challenged the validity of the resolution extending the ratification deadline, and a federal district court held that Congress had exceeded its authority in passing the extension resolution. *See Idaho v. Freeman*, 529 F. Supp. 1107, 1150–54 (D. Idaho 1981), *vacated as moot*, 459 U.S. 809 (1982). According to the district court, "[o]nce the proposal has been formulated and sent to the states, the time period could not be changed any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa." *Id.* at 1153. The Supreme Court allowed briefing on appeals from the district court, granted certiorari before judgment in the court of appeals, and stayed the district court's judgment. *See Nat'l Org. for Women, Inc. v. Idaho*, 455 U.S. 918 (1982). But before the Court was able to address the validity of Congress's deadline extension on the merits, the

[9] The votes in the House and Senate were 233–189 and 60–36. 124 Cong. Rec. 26264, 34314 (1978).

extended deadline expired without ratifications by any additional States. The Court then vacated the district court's judgment and remanded the cases with instructions to dismiss the complaints as moot. *See Nat'l Org. for Women, Inc. v. Idaho*, 459 U.S. 809 (1982).

After the expiration of the 1982 deadline, many of the ERA's supporters acknowledged that the ratification effort had failed and would have to begin anew. *See* Berry, *Why ERA Failed* at 81 ("In the aftermath of ERA's defeat, proponents began to assess the reasons for failure."); *see also* Adam Clymer, *Time Runs Out for Proposed Rights Amendment*, N.Y. Times, July 1, 1982, at A12 ("The drive to ratify the proposed Federal equal rights amendment . . . failed tonight in the states, still three legislatures short of the 38 that would have made it the 27th Amendment to the Constitution."); Marjorie Hunter, *Leaders Concede Loss on Equal Rights*, N.Y. Times, June 25, 1982, at A1 ("Leaders of the fight for an equal rights amendment officially conceded defeat today."). The ERA's supporters in Congress offered new resolutions to reintroduce the ERA, which, if approved by two-thirds majorities, would have restarted the ratification process. *See* 128 Cong. Rec. 16106 (1982) (statement of Rep. Schroeder) (announcing that she, along with "200 Members of the House and 51 Members of the Senate," had "reintroduced the equal rights amendment," and analogizing the new proposal to "the phoenix rising from the ashes"); *id*. at 16108–09 (statement of Rep. Rodino) (acknowledging that the previously proposed ERA "failed of ratification as of June 30," arguing that "what we need to do is to really go forward once again," and introducing a resolution to "begin the battle anew"); *see also* Berry, *Why ERA Failed* at 82 ("The supporters of ERA in Congress . . . did not give up the effort either. They announced on July 14, that they had fifty-one cosponsors in the Senate and 201 in the House to reintroduce ERA.").

In January 1983, Joint Resolution 1 was introduced in the House, proposing the ERA for ratification by state legislatures with a new seven-year deadline. *See* H.R.J. Res. 1, 98th Cong. (1983). The House voted on the resolution, but it fell short of the necessary two-thirds majority. *See* 129 Cong. Rec. 32668, 32684–85 (1983). In the following decades, similar resolutions were regularly introduced. *See, e.g.*, H.R.J. Res. 1, 101st Cong. (1989); S.J. Res. 1, 101st Cong. (1989); S.J. Res. 40, 103d Cong. (1993); H.R.J. Res. 41, 106th Cong. (1999); S.J. Res. 7, 109th Cong.

(2005); H.R.J. Res. 69, 112th Cong. (2011); S.J. Res. 6, 115th Cong. (2017). None, however, was adopted. In the current Congress, similar resolutions were introduced in the House on January 29, 2019, *see* H.R.J. Res. 35, 116th Cong., and in the Senate on March 27, 2019, *see* S.J. Res. 15, 116th Cong. Two-thirds passage of either of those resolutions in both chambers of Congress would restart the ratification process by re-proposing the ERA to the States.

Separately, ERA supporters in recent years have sought to revive the expired ERA Resolution from 1972, contending either that the original deadline was legally invalid or that Congress may retroactively nullify the deadline decades after the original proposal's expiration. *See* Allison L. Held et al., *The Equal Rights Amendment: Why the ERA Remains Legally Viable and Properly Before the States*, 3 Wm. & Mary J. Women & L. 113 (1997).[10] In the current Congress, several proposed resolutions would purport to void the deadline in the ERA Resolution. *See* S.J. Res. 6, 116th Cong. (2019); H.R.J. Res. 79, 116th Cong. (2019); H.R.J. Res. 38, 116th Cong. (2019). The House Judiciary Committee voted on November 13, 2019, to report one of those resolutions favorably. *See* H.R.J. Res. 79, 116th Cong. (2019) (as amended).[11]

In seeking to revive the ERA, supporters have urged several States to ratify the ERA as proposed in the ERA Resolution. *See, e.g.*, Kristina Peterson, *Equal Rights Amendment Could Soon Be Back in Congress*, Wall St. J. (July 3, 2019), https://www.wsj.com/articles/equal-rights-amendment-could-soon-be-back-in-congress-11562155202. In March 2017, Nevada's legislature approved it. S.J. Res. 2, 79th Leg. (Nev. 2017). In May 2018, the Illinois legislature did the same. S.J. Res. Const. Amend. 0004, 100th Gen. Assemb. (Ill. 2018). The Virginia legislature

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[10] *See also* Maggie Astor, *The Equal Rights Amendment May Pass Now. It's Only Been 96 Years*, N.Y. Times (Nov. 6, 2019), https://www.nytimes.com/2019/11/06/us/politics/virginia-ratify-equal-rights-amendment.html ("'It's been extended by Congress, so if you can extend it, you can certainly strike it,' said Representative Jackie Speier of California, the lead sponsor of a bipartisan House resolution to repeal the deadline."); Dana Canedy, *Advocates of Equal Rights Amendment Resume Their Fight*, N.Y. Times, May 4, 2003, § 1, at 41 ("Supporters contend they can challenge the deadline if they can now find three more states to vote in favor of the amendment.").

[11] *See also* Press Release, H. Comm. on the Judiciary, *House Judiciary Committee Passes Resolution Removing Ratification Deadline for the ERA* (Nov. 13, 2019), https://democrats-judiciary.house.gov/news/documentsingle.aspx?DocumentID=2147.

narrowly failed to approve the amendment in 2019, but ERA supporters will try again this year.[12] If the ratification votes from 1972 to 1977 remain valid, and the five rescissions of those ratifications are disregarded, then thirty-seven of the States may be viewed as having approved the ERA Resolution. In that case, the approval by Virginia, or by another state legislature, would require a determination as to whether the ERA Resolution remains pending, notwithstanding the congressional deadline. The passage of House Joint Resolution 79, or a similar resolution, would likewise require a determination as to whether Congress may revive the ERA Resolution by retroactively removing the earlier deadline. Accordingly, you have requested our opinion on these matters.

II.

Congress required that the ERA Resolution be ratified within a fixed period, and whether the effective deadline was in 1979 or 1982, that time has come and gone. The ERA Resolution thus has expired unless the deadline was somehow invalid in the first place. Yet in *Dillon*, the Supreme Court squarely upheld Congress's authority to set a ratification deadline, 256 U.S. at 374–76, and that conclusion is consistent not only with Article V of the Constitution, but with the history of the seven amendments proposed and ratified since *Dillon*. For the last four of those amendments, Congress placed the deadline in the proposing clause—the clause containing the procedural rules for ratification that, like the amendment itself, has always been adopted by two-thirds of both Houses of Congress. As Chief Justice Hughes suggested in his controlling opinion in *Coleman v. Miller*, 307 U.S. 433 (1939), a ratification deadline may be included "either in the proposed amendment or in the resolution of submission," *id.* at 452, and there is no reason in law or historical practice to draw any other conclusion. Because Congress lawfully conditioned the

[12] *See* Jenna Portnoy, *ERA Bill Dies for Good in GOP-Controlled Virginia House of Delegates*, Wash. Post (Feb. 21, 2019), https://www.washingtonpost.com/local/virginia-politics/virginia-house-kills-era-ratification-bill/2019/02/21/82920204-3560-11e9-854a-7a14d7fec96a_story.html (noting the narrow failure); Rachel Frazin, *Virginia Targets Historic Push on Equal Rights Amendment for Women*, The Hill (Dec. 1, 2019), https://thehill.com/homenews/state-watch/472295-virginia-targets-historic-push-on-equal-rights-amendment-for-women (noting that joint resolutions to ratify the ERA have been prefiled in both houses for consideration in the upcoming session).

States' ratification of the ERA upon a deadline, and because the deadline expired, the proposed amendment has necessarily failed.

A.

The Founders established a process for amending the Constitution that requires substantial agreement within the Nation to alter its fundamental law. As James Madison explained in *The Federalist*, the Founders chose to ensure a broad consensus in favor of any amendment to "guard[] . . . against that extreme facility which would render the Constitution too mutable," while at the same time avoiding "that extreme difficulty which might perpetuate its discovered faults." *The Federalist* No. 43, at 296 (James Madison) (Jacob E. Cooke ed., 1961); *see also id.* No. 85, at 592 (Alexander Hamilton) ("[W]henever . . . ten [of thirteen] states[] were united in the desire of a particular amendment, that amendment must infallibly take place." (footnote omitted)). The Constitution requires supermajorities in Congress (or of state legislatures) to propose an amendment. U.S. Const. art. V. It then raises the bar for ratification even higher by requiring three-fourths of the States—acting either through their legislatures or through ratifying conventions—to approve the amendment. *See id.*

The infrequency with which the Constitution has been amended attests not just to the genius of the original design but also to the difficulty inherent in securing the broad consensus required by Article V. In connection with promises made during the state ratifying conventions for the original Constitution, the First Congress in 1789 proposed twelve amendments to the States. *See* 1 Stat. 97 (1789); *see also, e.g.*, David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 110–15 (1997). By 1791, three-fourths of the States had approved ten of those twelve articles—the Bill of Rights. *See* U.S. Const. amends. I–X; *see also* 1 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 339–40 (2d ed. 1836). In the nearly 230 years since then, the States have ratified only seventeen additional amendments. *See* U.S. Const. amends. XI–XXVII.

Article V of the Constitution sets forth the procedures for proposing and ratifying constitutional amendments:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the

> Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Id. art. V.

The process for proposing amendments is one of only two instances where the Constitution requires both Houses of Congress to act by a supermajority.[13] The other is when Congress seeks to override the President's veto of a bill or other form of joint resolution. *See id.* art. I, § 7, cls. 2–3.[14] The Founders thus established a high bar by requiring that two-thirds of both Houses agree upon the terms of any amendment to be proposed to the States and that three-fourths of the States ratify the amendment on those terms.

The Constitution further grants Congress the authority to specify "one or the other Mode of Ratification" in the States, either by the legislatures thereof or by state conventions chosen for that purpose. *Id.* art. V. In

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[13] The Constitution alternatively provides that a supermajority (two-thirds) of the state legislatures may petition Congress to convene a convention for proposing amendments. U.S. Const. art. V. The Founders believed that this process would likely be unnecessary unless Congress had become corrupted. *See, e.g.*, 1 *The Records of the Federal Convention of 1787*, at 202–03 (Max Farrand ed., 1911); 1 *Blackstone's Commentaries* 371 (St. George Tucker ed., 1803) (observing that the convention process "will probably never be resorted to, unless the federal government should betray symptoms of corruption," and describing the convention process as a "radical and effectual remedy"). As a historical matter, the state legislatures have never successfully petitioned for such a convention, and every amendment proposed to the States to date has come from Congress in the first instance.

[14] The Constitution requires a two-thirds majority in the Senate to convict a civil officer in an impeachment trial, U.S. Const. art. I, § 3, cl. 6, and to give advice and consent to ratification of a treaty, *id.* art. II, § 2, cl. 2. It requires two-thirds of either House to concur in the expulsion of one of its Members. *Id.* art. I, § 5, cl. 2.

adopting the Constitution, the people "deliberately made the grant of power to Congress in respect to the choice of the mode of ratification of amendments." *United States v. Sprague*, 282 U.S. 716, 733 (1931); *see also* 4 Elliot, *Debates in the Several State Conventions* at 177 (statement of James Iredell) ("Any amendments which either Congress shall propose, or which shall be proposed by such general convention, are afterwards to be submitted to the legislatures of the different states, or conventions called for that purpose, as Congress shall think proper[.]"). Congress therefore exercises discretion in determining not just the substance of the amendment, but which of the two modes of ratification is to be used. *See Sprague*, 282 U.S. at 732 (recognizing that "the choice of mode rests solely in the discretion of Congress").

In making such determinations, Congress has specified the mode of ratification in the proposing clause included within every resolution proposing a constitutional amendment. For every successful amendment, both Houses of Congress approved the proposing clause at the same time as the text of the proposed amendment, and they did so by a two-thirds vote. Congress included such a clause in the very first set of amendments proposed to the States, ten of which were ratified in 1791 as the Bill of Rights (and one of which was ratified in 1992 as the Twenty-Seventh Amendment). The resolution recited that Congress was proposing twelve articles "to the legislatures of the several states, as amendments to the constitution of the United States, all or any of which articles, *when ratified by three fourths of the said legislatures*, to be valid to all intents and purposes, as part of the said Constitution." 1 Stat. at 97 (emphasis added). In every subsequent amendment proposed to the States, Congress has included a proposing clause reciting the intended mode of ratification.[15]

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[15] *See* 1 Stat. 402 (1794) (Eleventh Amendment); 2 Stat. 306 (1803) (Twelfth Amendment); 2 Stat. 613 (1810) (proposed Titles of Nobility Amendment); 12 Stat. 251 (1861) (proposed Article the Thirteenth); 13 Stat. 567 (1865) (Thirteenth Amendment); 14 Stat. 358 (1866) (Fourteenth Amendment); 15 Stat. 346 (1869) (Fifteenth Amendment); 36 Stat. 184 (1909) (Sixteenth Amendment); 37 Stat. 646 (1912) (Seventeenth Amendment); 40 Stat. 1050 (1917) (Eighteenth Amendment); 41 Stat. 362 (1919) (Nineteenth Amendment); 43 Stat. 670 (1924) (proposed Child Labor Amendment); 47 Stat. 745 (1932) (Twentieth Amendment); 48 Stat. 1749 (1933) (Twenty-First Amendment); 61 Stat. 959 (1947) (Twenty-Second Amendment); 74 Stat. 1057 (1960) (Twenty-Third Amendment); 76 Stat. 1259 (1962) (Twenty-Fourth Amendment); 79 Stat. 1327 (1965) (Twenty-Fifth Amendment); 85 Stat. 825 (1971) (Twenty-Sixth Amendment); 86 Stat. 1523 (1972)

The proposing clause for the Bill of Rights not only specified the mode of ratification but also contained a procedural instruction authorizing the state legislatures either to ratify "all" twelve proposed articles or to ratify "any of" them individually. 1 Stat. at 97. This proposing clause was debated by the House and the Senate and considered of a piece with the substantive proposed amendments. *See* 4 *Documentary History of the First Federal Congress of the United States of America* 35–45 (Charlene Bangs Bickford & Helen E. Veit eds., 1986). Although the early resolutions proposing amendments did not include deadlines for ratification, seven-year deadlines were included in the texts of what became the Eighteenth, Twentieth, Twenty-First, and Twenty-Second Amendments. *See* U.S. Const. amends. XVIII, § 3; XX, § 6; XXI, § 3; XXII, § 2. When proposing the Twenty-Third Amendment in 1960, Congress included a similar seven-year deadline in the proposing clause, *see* 74 Stat. 1057 (1960), and every subsequent proposed amendment has also included, in its proposing clause, a requirement that the amendment be ratified within seven years. *See* 76 Stat. 1259 (1962) (Twenty-Fourth Amendment); 79 Stat. 1327 (1965) (Twenty-Fifth Amendment); 85 Stat. 825 (1971) (Twenty-Sixth Amendment); 86 Stat. at 1523 (proposed ERA); 92 Stat. 3795 (1978) (proposed D.C. Congressional Representation Amendment). Each of these deadlines was adopted as part of the same resolution that proposed each amendment by the required two-thirds majorities of both Houses of Congress.

B.

Article V does not expressly address how long the States have to ratify a proposed amendment. The "article says nothing about the time within which ratification may be had—neither that it shall be unlimited nor that it shall be fixed by Congress." *Dillon*, 256 U.S. at 371. The text does direct that "[t]he Congress, *whenever* two thirds of both Houses *shall deem it necessary*, shall propose Amendments to this Constitution[.]" U.S. Const. art. V (emphases added). This language authorizes Congress to propose amendments for ratification *when* two-thirds majorities in each chamber deem it necessary, thereby implying that Congress may propose

(proposed ERA); 92 Stat. 3795 (1978) (proposed D.C. Congressional Representation Amendment).

amendments *for the period* that the requisite majorities deem necessary. *See Dillon*, 256 U.S. at 375 ("[I]t is only when there is deemed to be a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently."). Article V thus requires Congress to make a judgment concerning the needs of the moment and, from that, the Supreme Court has inferred the power to set a deadline by which the States must ratify, or reject, Congress's judgment. *See id.* at 375–76.

The Court reached this conclusion in *Dillon*, which upheld Congress's authority to impose a deadline for ratifying the Eighteenth Amendment, which established Prohibition. *See* U.S. Const. amend. XVIII, §§ 1–2. In section 3 of the Amendment, Congress conditioned its effectiveness upon the requirement that it be ratified within seven years. *See id.* § 3 ("This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."). The Senate had previously considered proposing ratification deadlines for the Fourteenth and Fifteenth Amendments. *See* Cong. Globe, 40th Cong., 3d Sess. 912–13, 1309–14 (1869); Cong. Globe, 39th Cong., 1st Sess. 2771 (1866). But the Eighteenth Amendment was the first amendment to include one.

In *Dillon*, a prisoner detained in violation of the National Prohibition Act (which was enacted pursuant to federal power authorized by the Eighteenth Amendment) argued that the presence of the deadline invalidated the amendment because "Congress has no constitutional power to limit the time of deliberation or otherwise attempt to control what the legislatures of the States shall do in their deliberation." Br. for Appellant at 4, *Dillon v. Gloss*, 256 U.S. 368 (1921) (No. 251). In rejecting this claim, the Court observed that "some" of the first seventeen amendments had been ratified "within a single year after their proposal and all within four years." *Dillon*, 256 U.S. at 372. Four other proposed amendments, however, had failed to obtain the necessary votes from the States and "lain dormant for many years," leaving it an "open question" whether they "could be resurrected." *Id.* at 372–73. To avoid such future uncertainty, the Court explained, Congress fixed a seven-year deadline for the ratification of the Prohibition amendment. *Id.* at 373; *see also* 55 Cong. Rec. 5557 (1917) (remarks of Sen. Ashurst) (expressing support for a provision

"limiting the time in the case of this amendment or any other amendment to 10, 12, 14, 16, 18, or even 20 years, so that we will not hand down to posterity a conglomerate mass of amendments floating around in a cloudy, nebulous, hazy way").

In upholding Congress's authority to impose deadlines, the Court recognized that Article V does not expressly address the timing of ratification. *See Dillon*, 256 U.S. at 371. It nevertheless read the text to imply a degree of contemporaneity between an amendment's proposal and its ratification, which "are not treated as unrelated acts but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time." *Id.* at 374–75. The Court inferred that the approval of three-fourths of the States needs to be "sufficiently contemporaneous . . . to reflect the will of the people in all sections at relatively the same period." *Id.* at 375. Thus, "an alteration of the Constitution proposed today has relation to the sentiment and the felt needs of today," and "if not ratified early while that sentiment may fairly be supposed to exist, it ought to be regarded as waived, and not again to be voted upon, unless a second time proposed by Congress." *Id*. at 375 (quoting, with alterations, John Alexander Jameson, *A Treatise on Constitutional Conventions* § 585, at 634 (4th ed. 1887)).[16] The Court therefore concluded that "the fair inference or implication from article V is that the ratification must be within some reasonable time after the proposal." *Dillon*, 256 U.S. at 375.[17]

Having viewed Article V as implicitly including a requirement of contemporaneity, *Dillon* rejected the argument that Congress lacks the power

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[16] The *Dillon* Court necessarily rejected Jameson's contention that, although Article V gives Congress the powers to propose an amendment and to express the mode of ratification, it does not grant Congress the power "to prescribe conditions as to the time within which amendments are to be ratified, and hence to do so would be to transcend the power given." Jameson, *A Treatise on Constitutional Conventions* § 585, at 634.

[17] In *Congressional Pay Amendment*, this Office concluded that "*Dillon* is not authoritative on the issue whether Article V requires contemporaneous ratification" in the absence of any congressional deadline, because the Eighteenth Amendment contained a deadline. 16 Op. O.L.C. at 92–93. Finding no time limit in Article V, we concluded that the Twenty-Seventh Amendment, which was proposed without a deadline in 1789, had been adopted in 1992. *See id.* at 97, 105. Because the ERA Resolution contained a deadline (which has expired), we do not need to consider in this opinion the 1992 opinion's reading of *Dillon*.

to set the reasonable time for ratification. *See id.* at 375–76. The Court reasoned that, "[a]s a rule[,] the Constitution speaks in general terms, leaving Congress to deal with subsidiary matters of detail as the public interests and changing conditions may require; and article V is no exception to the rule." *Id.* at 376 (footnote omitted). Therefore, "[w]hether a definite period for ratification shall be fixed so that all may know what it is and speculation on what is a reasonable time may be avoided, is, in our opinion, a matter of detail which Congress may determine[.]" *Id.* The Court concluded that Congress has the authority to impose a deadline upon the ratification process, reasoning that such a power is "an incident of its power to designate the mode of ratification" under Article V. *Id*.

C.

Unlike with the Eighteenth Amendment, Congress placed the ratification deadline for the ERA Resolution in the proposing clause, rather than in the text of the proposed amendment. But that judgment was entirely consistent with the four preceding amendments, and with *Dillon*'s recognition that a deadline is related to the mode of ratification, which has always been included in the proposing clause. In placing the ERA's deadline in the proposing clause, Congress followed a practice that started with the Twenty-Third Amendment. *See* 74 Stat. at 1057 (resolving "that the following article is hereby proposed . . . which shall be valid to all intents and purposes as part of the Constitution only if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by Congress"). Congress took the same course in the proposing clauses of the Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments. *See* 76 Stat. at 1259; 79 Stat. at 1327; 85 Stat. at 825. There is no reason for deadlines declared in proposing clauses to be any less binding on the ratification process than those included in the text of proposed amendments.

In *Dillon*, the Supreme Court held that Congress's decision to fix "a definite period for ratification" is "a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification" under Article V. 256 U.S. at 376. In the first resolution proposing constitutional amendments, Congress identified the mode of ratification in the resolution's proposing clause, separate from the text of the proposed amendments themselves. *See supra* Part II.A. Congress has specified the

mode of ratification in the proposing clause of every resolution proposing a constitutional amendment since then. *See supra* note 15. Each time, two-thirds of both Houses of Congress approved these measures. Insofar as Congress and the States have relied upon proposing clauses to specify the mode of ratification since 1789, we think it clear that Congress may exercise its integrally related authority to set a deadline in precisely the same manner. Chief Justice Hughes suggested as much when he observed that the Child Labor Amendment did not include a ratification deadline "either in the proposed amendment or in the resolution of submission." *Coleman*, 307 U.S. at 452.

As we recognized in 1977, "[t]he history of congressional use of a seven-year limitation demonstrates that Congress moved from inclusion of the limit in the text of proposed amendments to including it within the proposing clauses . . . without ever indicating any intent to change the substance of their actions." *Constitutionality of ERA Extension* at 15. After the Court's 1921 decision in *Dillon* confirmed the validity of the Eighteenth Amendment's ratification deadline, Congress included a seven-year deadline in the Twentieth, Twenty-First, and Twenty-Second Amendments. *See* U.S. Const. amend. XX, § 6 ("This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."); *id.* amend. XXI, § 3 ("This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."); *id.* amend. XXII, § 2 ("This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress."). By including such a provision in the amendment itself, Congress ensured that approvals secured after the seven-year deadline would be ineffective. Even if three-fourths of the States later ratified the amendment—and it therefore became "valid to all Intents and Purposes, as Part of [the] Constitution," *id.* art. V—the amendment, by its own terms, would be legally inert.

Members of Congress recognized, however, that these textual deadlines came at a cost. With each amendment, the Nation's highest law became

increasingly cluttered with extraneous sections imposing conditions on ratification that had no prospective effect. Once three-fourths of the States ratified amendments within the prescribed deadlines, the deadlines, having already fulfilled their purpose, were nonetheless added to the constitutional text. To avoid exacerbating that problem, Congress adopted an alternative way of setting a ratification deadline when it proposed the Twenty-Third Amendment. Rather than including the deadline in the amendment's text, Congress put it in the proposing clause specifying the mode of ratification. *See* 74 Stat. at 1057. As Senator Kefauver had explained:

> The general idea was that it was better not to make the 7-year provision a part of the proposed constitutional amendment itself. It was felt that that would clutter up the Constitution. . . . We wanted to put the 7-year limitation in the preamble. So the intention of the preamble is that it must be ratified within 7 years in order to be effective.

101 Cong. Rec. 6628 (1955); *see also Appointment of Representatives: Hearing on S.J. Res. 8 Before a Subcomm. of the S. Comm. on the Judiciary*, 84th Cong. 34 (1955) (letter from Prof. Noel Dowling) ("The 7-year limitation is put in the resolution rather than in the text of the amendment. There is no doubt about the power of Congress to put it there; and it will be equally effective. The usual way, to be sure, has been to write the limitation into the amendment; but we hope such an unnecessary cluttering up of the Constitution can be ended.").[18]

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[18] In connection with the Twentieth Amendment, Representative Emanuel Celler had proposed placing the seven-year deadline in the proposing clause, but that approach drew objections. 75 Cong. Rec. 3856–57 (1932). Representative Lamar Jeffers protested that, "[i]f the gentleman wants his amendment in the Constitution, it should go in a new section, or section 6. As he has now offered it, it would be of no avail, as he is offering it as a part of the proposal clause and not as a part of the proposed constitutional amendment." *Id.* at 3856; *see also id.* (statement of Rep. Ramseyer) ("The eighteenth amendment carried that 7-year provision as section 3, and it was that provision that the Supreme Court held to be valid. . . . I think we should play safe, inasmuch as the Supreme Court has held the provision valid."); *see also Constitutionality of ERA Extension* at 10–11 (discussing this history). We have not identified the expression of any similar concern with respect to the Twenty-Third or any subsequent Amendment, and, as discussed below, we believe this concern is misplaced.

Congress thereafter adopted the Twenty-Third Amendment resolution, including the seven-year deadline, by a two-thirds majority of both Houses. 106 Cong. Rec. 12571, 12858 (1960); *see* 74 Stat. at 1057. The States promptly ratified the amendment within ten months. *See* Certification of Amendment to Constitution of the United States Granting Representation in the Electoral College to the District of Columbia, 26 Fed. Reg. 2808 (Apr. 3, 1961). And Congress repeated the very same course by including deadlines in the proposing clauses for the Twenty-Fourth, Twenty-Fifth, and Twenty-Sixth Amendments. *See* 76 Stat. at 1259; 79 Stat. at 1327; 85 Stat. at 825.[19] In 1977, we observed that Congress appears to have adopted this approach without any discussion about potentially placing the deadlines elsewhere. *See Constitutionality of ERA Extension* at 14–15. And we have found no indication that Members of Congress (or any court) seriously questioned the binding nature of a deadline stated in a resolution's proposing clause rather than the text of its proposed amendment.

In the case of the ERA Resolution, Congress again included a ratification deadline in the proposing clause. Members suggested that, by this time, it had become the customary way of setting a deadline. *See, e.g.*, S. Rep. No. 92-689, at 20 (1972) (describing the deadline as part of the "traditional form of a joint resolution proposing a constitutional amendment for ratification by the States" and stating that it "has been included in every amendment added to the Constitution in the last 50 years"). The deadline was widely understood to be a necessary part of the legislative compromise that resulted in the resolution's passage. Prominent ERA opponents had faulted an earlier version of the resolution for the absence of a deadline. *See, e.g.*, 116 Cong. Rec. at 28012 (remarks of Rep. Celler, Chairman of the House Judiciary Committee) (decrying the fact that, without a deadline, "[t]his amendment could roam around State legislatures for 50 years" and arguing that the "customar[y]" seven-year deadline should be added); *id.* at 36302 (remarks of Sen. Ervin) (proposing a

[19] In proposing the Twenty-Third and Twenty-Fourth Amendments, Congress provided that the amendment would be valid "*only if* ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission" (emphasis added). Starting with the Twenty-Fifth Amendment, Congress replaced "only if" with "when." As we recognized in 1977, this change did not alter the meaning of the resolution or the binding nature of the deadline. *See Constitutionality of ERA Extension* at 15.

seven-year deadline and noting that "we still have floating around some unratified amendments that were submitted at the time of the original submission of the Bill of Rights"). And ERA supporters confirmed that, while they expected prompt ratification, the seven-year deadline would impose a binding time limit. *See* 117 Cong. Rec. at 35814–15 (remarks of Rep. Griffiths) (recognizing that the deadline will ensure that the resolution "should not be hanging over our head forever"); 118 Cong. Rec. at 9552 (remarks of Sen. Hartke) (recognizing that if the ERA is not "ratified within 7 years," then "we must begin the entire process once again"). In proposing the ERA to the States with a deadline, Members of Congress thus recognized that the deadline was a binding condition upon its ratification.

Apart from the seven-year deadline in the proposing clause, the ERA Resolution included a separate timing requirement—a delay on effectiveness for two years after ratification—in section 3 of the text of the proposed amendment. But this distinction did not make the seven-year deadline any less mandatory than the two-year delay. Unlike with ratification deadlines, Congress has never placed an amendment's delayed effective date in a proposing clause. Nor is it clear that it could effectively do so, because Article V declares that a proposed amendment "shall be valid to all Intents and Purposes, as Part of [the] Constitution, *when ratified*." U.S. Const. art. V (emphasis added). Including the two-year delay in the amendment itself could be necessary to amend the effect that Article V would otherwise have on the amendment's effective date.

After Congress proposed the ERA Resolution, state legislatures considered whether to ratify it subject to all of the conditions imposed by Congress, including the seven-year deadline. Of the thirty-five state legislatures that ratified between 1972 and 1977, twenty-five expressly voted upon a state measure that included the text of the ERA Resolution in its entirety (and hence the deadline). *See Senate Extension Hearings* at 739–54, 756–61. Five others did not expressly vote on the entire text of the ERA Resolution, but the seven-year deadline was otherwise repeated in the measures that they approved. *See id.* at 739–40, 742–43, 746–47, 752–54, 758. And South Dakota's legislature expressly provided that its ratification would be formally withdrawn if the ERA were not adopted within the seven-year deadline. S.J. Res. 2, 54th Leg. (S.D. 1979). Accordingly, the States that ratified the ERA Resolution plainly did so with

the knowledge of the timing condition and with the understanding that the seven-year deadline was part and parcel of the amendment proposal.

Although some ERA supporters have recently questioned the enforceability of the deadline, no one involved with the ERA around the time of its proposal seems to have done so. As the original ratification period neared its end, Congress weighed extending the deadline precisely to avoid the failure of the amendment. For instance, Representative Elizabeth Holtzman, the primary sponsor of the extension resolution, testified that "[t]he cosponsors of [the] resolution have every hope that the equal rights amendment will be ratified before March 22, 1979, but do believe there might be need for an insurance policy *to assure that the deadline will not arbitrarily end all debate on the ERA*." *House Extension Hearings* at 4 (emphasis added). And while this Office advised that Congress could extend the deadline, we nonetheless recognized that the proposed amendment would otherwise expire. *See Constitutionality of ERA Extension* at 15.

Even more telling, the Supreme Court necessarily recognized the enforceability of the deadline by finding that the legal controversy over the ERA extension became moot when the extended deadline lapsed. After the district court in *Idaho v. Freeman* held that Congress could not extend the deadline, the federal government and others sought review in the Supreme Court. *See, e.g.*, Pet. of Adm'r of Gen. Servs. for Writ of Cert. Before J., *Carmen v. Idaho*, No. 81-1313 (U.S. Jan. 22, 1982); Pet. for Writ of Cert. Before J., *Nat'l Org. for Women, Inc. v. Idaho*, No. 81-1283 (U.S. Jan. 8, 1982). Although the Court accepted review, the June 1982 deadline expired before it could hear argument. At that point, the Acting Solicitor General urged the Court to dismiss the case as moot because "the Amendment has failed of adoption no matter what the resolution of the legal issues presented." Mem. for Adm'r of Gen. Servs. Suggesting Mootness at 3, *Nat'l Org. for Women, Inc. v. Idaho*, Nos. 81-1282 et al. (U.S. July 9, 1982). Other parties objected to that conclusion on prudential grounds, but none argued that the deadline was unenforceable.[20] The

[20] *See, e.g.*, Response of Nat'l Org. for Women, Inc., et al., to Mem. for Adm'r of Gen. Servs. Suggesting Mootness at 3–5, *Nat'l Org. for Women, Inc. v. Idaho*, Nos. 81-1282 et al. (U.S. July 23, 1982) (arguing that notwithstanding the expiration of the deadline, the Court should address whether the validity of the extension presented a political question); Response of Washington Appellees and Respondents to Mem. for Adm'r of Gen. Servs.

Supreme Court remanded with instructions "to dismiss the complaints as moot." *Nat'l Org. for Women*, 459 U.S. at 809. In so doing, the Court necessarily adopted the view that Congress had validly imposed a ratification deadline that had expired. *See* Response of Nat'l Org. for Women, Inc., et al., to Mem. for Adm'r of Gen. Servs. Suggesting Mootness at 3, *Nat'l Org. for Women, Inc. v. Idaho*, Nos. 81-1282 et al. (July 23, 1982) ("Even an unexplained ruling that this case is moot would necessarily signal implicit acceptance of [the Acting Solicitor General's] position, particularly in light of this Court's stay of January 25.").

All of this history confirms that the deadline in the proposing clause of the ERA Resolution was a valid and binding exercise of Congress's authority to set a deadline on ratification. Congress in 1972 required the ERA to be ratified by a certain date as an incident to its authority to set the mode of ratification. *See Dillon*, 256 U.S. at 376. Two-thirds of both Houses of Congress approved the amendment with that accompanying condition, and the state legislatures that ratified did so as well. Under the text and structure of Article V, and consistent with the Court's opinion in *Dillon*, that condition was legally effective. Because the deadline lapsed without ratifications from the requisite thirty-eight States, the ERA Resolution is no longer pending before the States, and ratification by additional state legislatures would not result in the ERA's adoption.

III.

Although the ERA Resolution expired decades ago, there remains the question whether Congress may revive the ERA ratification process. As noted above, the House Judiciary Committee has favorably reported a joint resolution "[r]emoving the deadline for the ratification of the equal rights amendment," which would purport to make the ERA "valid to all intents and purposes as part of the United States Constitution whenever ratified by the legislatures of three-fourths of the several States." H.R.J. Res. 79, 116th Cong. (as ordered to be reported by H. Comm. on the

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Suggesting Mootness at 4, *Nat'l Org. for Women, Inc. v. Idaho*, Nos. 81-1282 et al. (U.S. Aug. 10, 1982) ("One might think that a scheme to secure ratification past the expiration of the second deadline is patently ludicrous. However, it also seemed ludicrous prior to 1978 to suggest an extension of time for the ratification of a constitutional amendment by a simple majority vote.").

Judiciary, Nov. 13, 2019); *see also supra* note 11 and accompanying text. We therefore must consider whether this pending resolution, if adopted by both Houses of Congress, would reopen the ratification of the ERA Resolution.

Congress, of course, could restart the amendment process by reproposing the ERA to the States. We do not believe, however, that Congress in 2020 may change the terms upon which the 1972 Congress proposed the ERA for the States' consideration. Article V does not expressly or implicitly grant Congress such authority. To the contrary, the text contemplates no role for Congress in the ratification process after it proposes an amendment. Moreover, such a congressional power finds no support in Supreme Court precedent. While the controlling opinion in *Coleman* suggested that Congress—and not the Court—may judge what constitutes "a reasonable limit of time for ratification," the opinion concerned only those instances "when the limit has not been fixed in advance." 307 U.S. at 454 (opinion of Hughes, C.J.). By its own terms, that opinion does not extend to the circumstances of the ERA, where Congress fixed a deadline before the proposal went to the States and that period has now expired.

A.

Those who believe that the ERA Resolution may be revived argue that Congress's authority under Article V would allow simple majorities in each House to eliminate the earlier ratification deadline and thereby extend the ratification process. *See* 165 Cong. Rec. H8741 (daily ed. Nov. 8, 2019) (statement of Rep. Speier) (identifying Article V as the constitutional authority for House Joint Resolution 79). Relying upon Congress's prior action to extend the ERA deadline, they argue that, since the deadline rests in the proposing clause rather than the amendment's text, it is open to congressional revision at any time, including decades after its expiration. *See, e.g.*, Held, 3 Wm & M. J. Women & L. at 128–29; Astor, *supra* note 10 ("'It's been extended by Congress, so if you can extend it, you can certainly strike it,' said Representative Jackie Speier of California, the lead sponsor of a bipartisan House resolution to repeal the deadline."). They contend not only that this approach would permit the States to ratify the ERA Resolution long after the deadline, but that the thirty-five ratifications from the 1970s, as well as the two from the 2010s,

would count towards the thirty-eight necessary to complete ratification.[21] Despite Congress's having proposed the ERA Resolution to the States with an express deadline, and the state legislatures' having voted upon it with that understanding, this contingent of ERA supporters believes that a concurrent resolution of Congress could void that earlier widespread understanding.

We do not believe that Article V permits that approach. Congress's authority to fix a "definite period for ratification" is "an incident of its power to designate the mode of ratification." *Dillon*, 256 U.S. at 376. Congress may fix such a deadline for a proposed amendment "so that all may know what it is and speculation on what is a reasonable time may be avoided." *Id*. Congress would hardly be setting a "*definite* period for ratification" if a later Congress could simply revise that judgment, either by reducing, extending, or eliminating the deadline that had been part of the proposal transmitted to the States. While Congress need not set any ratification deadline, once it has done so, "that determination of a time period becomes an integral part of the proposed mode of ratification." *Idaho v. Freeman*, 529 F. Supp. at 1152–53. "Once the proposal has been formulated and sent to the states, the time period could not be changed any more than the entity designated to ratify could be changed from the state legislature to a state convention or vice versa." *Id.* at 1153.

When Congress "propose[s]" an amendment, it also selects the "Mode of Ratification." U.S. Const. art. V. The power to "propose" authorizes Congress to set the terms upon which the amendment will be considered by others, namely the States. *See* 2 Noah Webster, *American Dictionary of the English Language* s.v. PROPOSE (1828) (defining the transitive verb *propose*: "To offer for consideration, discussion, acceptance or adoption; as, to *propose* a bill or resolve to a legislative body[.]"); 2 Samuel Johnson, *A Dictionary of the English Language* s.v. To PROPOSE (6th ed. 1785) ("To offer to the consideration."). Once Congress has "propose[d]" an amendment and selected the mode of ratification as "may be proposed by the Congress," the States then determine whether

[21] Notably, these proponents further argue that States may not rescind their earlier ratifications, which means that a resolution would amend the terms of the proposal upon which the state legislatures voted between 1972 and 1977 and purportedly lock them into their earlier votes upon different terms, without any input from, or opportunity for reconsideration by, those legislatures. *See, e.g.*, Held, 3 Wm & M. J. Women & L. at 131–34.

the proposal will be ratified. U.S. Const. art. V. As we recognized in our 1992 opinion concerning the Twenty-Seventh Amendment, "[n]othing in Article V suggests that Congress has any further role. Indeed, the language of Article V strongly suggests the opposite[.]" *Congressional Pay Amendment*, 16 Op. O.L.C. 85, 102 (1992).[22] The power to propose is thus a prospective power, and does not entail any authority to modify the terms of a proposed amendment once it has been offered for the consideration of the States.

Consistent with the Constitution's federal structure, Congress and the state legislatures are "separate legislative bodies representing separate sovereignties and agencies of the people." Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 Yale L.J. 677, 689 (1993). Congress has the responsibility to propose the text of an amendment and the terms under which the States may ratify it, but once it has done so, Congress may not directly regulate the States in the performance of their distinct constitutional responsibilities. *Cf. Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) (recognizing that the Founders made a "decision to withhold from Congress the power to issue orders directly to the States"). If anything, Article V operates in precisely the opposite direction by authorizing the state legislatures themselves to require Congress to call a constitutional convention to propose new amendments.[23] Article V goes

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[22] *See also* 56 Cong. Rec. 446 (1917) (statement of Rep. Lenroot) ("Article V expressly provides that once this proposed amendment has gone from the halls of Congress and rests with the States, when ratified by the States it becomes a part of the Constitution."); Walter Dellinger, *Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386, 398 (1983) (The Constitution "requires no additional action by Congress or by anyone else after ratification by the final state."); Grover Rees III, *Throwing Away the Key: The Unconstitutionality of the Equal Rights Amendment Extension*, 58 Tex. L. Rev. 875, 899 (1980) (arguing that Article V requires only "proposal by Congress" and "ratification by the states," not "final 'acceptance' by Congress").

[23] As noted above, *see supra* note 13, the Founders expressed concern that the national government might block necessary amendments, and they therefore included in Article V a mechanism to ensure that the States could amend the Constitution even over the objection of Congress by allowing two-thirds of the state legislatures to direct Congress to convene a convention to propose such new constitutional amendments. *See Federalist* No. 85, at 593 (Alexander Hamilton) ("By the fifth article of the plan the congress will be *obliged*, 'on the application of the legislatures of two thirds of the states . . . to call a convention for proposing amendments.'").

on to confirm that Congress lacks any continuing authority over ratification by providing that the States' ratification of what Congress proposed is self-executing. Upon the approval of "three fourths" of the state legislatures or of state ratifying conventions, the amendment "shall be valid to all Intents and Purposes, as Part of th[e] Constitution." U.S. Const. art. V. In other words, the amendment becomes immediately effective, and Article V contemplates no additional role for Congress in modifying the proposal or in accepting or approving ratifications by the States.

For these reasons, constitutional commentators have long recognized that "Congress may not withdraw an amendment once it has been proposed." *Constitutionality of ERA Extension* at 18 n.22; *see also* Lester Bernhardt Orfield, *The Amending of the Federal Constitution* 51–52 (1942) ("The practice has been to regard such a withdrawal as ineffectual. The theory apparently is that each affirmative step in the passage of an amendment is irrevocable."); Charles K. Burdick, *The Law of the American Constitution* 39 (1922) ("It seems safe to assert that Congress, having once submitted a proposed constitutional amendment to the States, cannot thereafter withdraw it from their consideration[.]"); Jameson, *A Treatise on Constitutional Conventions* § 585 at 634 ("[T]he Federal Constitution, from which Congress alone derives its power to submit amendments to the States, does not provide for recalling them upon any event or condition; and . . . the power to recall cannot be considered as involved in that to submit, as necessary to its complete execution. It therefore cannot exist."). Similarly, we believe that Article V does not authorize Congress to adjust the terms of an amendment previously proposed to the States, whether it seeks to alter the mode of ratification or the deadline for ratification.

Recognizing congressional authority to modify the terms of a proposed constitutional amendment would present numerous questions that lack answers in the text of the Constitution or the history of past amendments. Could Congress modify a substantive provision within a pending amendment, or is its modification power limited to procedural terms? Could a later Congress hostile to a pending amendment shorten the deadline or declare it expired (and if so, how would such a power differ from a power to withdraw the pending amendment)? Must Congress adopt such changes by the same two-thirds vote of both Houses by which an amendment is proposed, or would a simple majority vote of each House suffice? And

must the President sign the joint resolution modifying a proposal, or would the modification become immediately effective without presentment? *Compare* U.S. Const. art. I, § 7, cls. 2–3, *with Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381 n.*, 382 (1798). In concluding that Congress could extend the ERA's deadline, our 1977 opinion hazarded answers to all of these questions, while recognizing the absence of any authoritative guidance from the Constitution, caselaw, or historical practice. *See Constitutionality of ERA Extension* at 16–26. We think that the better inference to draw from the Constitution's silence is that there is no modification authority in the first place. If Congress wants to remove a ratification deadline from a proposed amendment, then it must propose an entirely new constitutional amendment, giving the States a new opportunity to consider that proposal. Article V does not provide for any other supervisory mechanism by which Congress can adjust those terms.

B.

Although the text of Article V does not contemplate any further role for Congress after it has proposed a constitutional amendment, the Supreme Court suggested one exception in *Coleman*, where a majority of justices concluded that, when a proposed amendment contains no deadline, then Congress, not the courts, should have the responsibility for deciding whether the States had ratified the amendment within a reasonable time. In *Coleman*, members of the Kansas legislature had challenged the State's 1937 ratification of the Child Labor Amendment based, in part, on the ground that it was untimely because Congress had proposed the amendment in 1924. *See* 307 U.S. at 436. In addressing that question, the Court fractured on whether *Dillon*'s requirement that an amendment be ratified within a "reasonable time" was a matter subject to judicial resolution. There was no majority opinion, but two separate opinions, joined by a total of seven justices, agreed that where a proposed amendment lacked any deadline, what constituted a "reasonable time" for ratification was a nonjusticiable political question.

Chief Justice Hughes's controlling opinion, which was joined by Justices Stone and Reed and styled as the "Opinion of the Court," concluded that the political branches, and not the Court, should decide whether an amendment had been ratified within a "reasonable time." *See Coleman*, 307 U.S. at 454 (opinion of Hughes, C.J.). In so ruling, he reasoned that

"the question of a reasonable time in many cases would involve . . . an appraisal of a great variety of relevant conditions, political, social and economic," and these conditions were "appropriate for the consideration of the political departments of the Government." *Id.* at 453–54. The Chief Justice advised that Congress should address that question "when, in the presence of certified ratifications by three-fourths of the States, *the time arrives for the promulgation of the adoption of the amendment*." *Id.* at 454 (emphasis added). Justice Black, joined by Justices Roberts, Frankfurter, and Douglas, would have gone further and treated any congressional proclamation that an amendment had been ratified as "final" and "'conclusive upon the courts.'" *Id.* at 457 (Black, J., concurring) (quoting *Leser v. Garnett*, 258 U.S. 130, 137 (1922)).[24]

Neither of these *Coleman* opinions identified any textual foundation for any power of Congress to "promulgate" an amendment ratified by three-fourths of the States. The dissenting justices criticized the majority opinions for addressing a point that had not been "raised by the parties or by the United States appearing as amicus curiae." *Id.* at 474 (Butler, J., dissenting). And *Coleman*'s conclusion has been frequently criticized as

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[24] Justice Black's separate opinion, which would appear to view every question about the adoption of a constitutional amendment as a political question, is difficult to square with *Dillon* and several other cases where the Supreme Court has addressed the validity of congressional action on constitutional amendments. *See, e.g.*, *National Prohibition Cases*, 253 U.S. 350 (1920) (holding that the requirements of Article V were met in connection with the adoption of the Eighteenth Amendment); *Sprague*, 282 U.S. at 716 (rejecting the claim that Congress was obliged to call a convention to propose the Eighteenth Amendment); *Hollingsworth*, 3 U.S. at 381 n.*, 382 (stating that "[t]he negative of the President applies only to the ordinary cases of legislation," and thus holding that the Eleventh Amendment had been "constitutionally adopted"). As then-Circuit Judge John Paul Stevens recognized, "since a majority of the [*Coleman*] Court refused to accept [Justice Black's] position in that case, and since the Court has on several occasions decided questions arising under article V, even in the face of 'political question' contentions, that argument is not one which a District Court is free to accept." *Dyer v. Blair*, 390 F. Supp. 1291, 1299–1300 & n.20 (N.D. Ill. 1975) (Stevens, J.) (footnote omitted). In contrast with cases involving the requirements of Article V, the Court has treated questions about whether a State has ratified an amendment as nonjusticiable. *See Leser*, 258 U.S. at 137 (holding a State official's "duly authenticated" acknowledgement of ratification to be "conclusive upon the courts"); *cf. White v. Hart*, 80 U.S. 646, 649 (1871) (suggesting, in dictum, that the Court could not review Congress's decision to require Georgia to ratify the Fourteenth and Fifteenth Amendments as a condition of regaining representation in Congress after the Civil War).

lacking foundation in the text, caselaw, or historical practice of congressional amendments. *See, e.g.*, *Congressional Pay Amendment*, 16 Op. O.L.C. at 99 ("[C]ongressional promulgation is neither required by Article V nor consistent with constitutional practice."); Dellinger, 97 Harv. L. Rev. at 403 ("[T]he *Coleman* Court largely manufactured the anticipated event of congressional promulgation to which it was deferring."); Rees, 58 Tex. L. Rev. at 887 ("*Coleman* was a very bad decision when handed down, and the Court almost certainly would decide it differently today.") (footnote omitted). Nothing in Article V suggests that Congress has any role in promulgating an amendment after it has been ratified by the requisite number of state legislatures or conventions. To the contrary, *Dillon* held that the ratification of the Eighteenth Amendment was "consummated" on the date that the thirty-sixth State had ratified it, and not thirteen days later when the Acting Secretary of State had proclaimed it under the statutory predecessor to 1 U.S.C. § 106b. *See Dillon*, 256 U.S. at 376. The Court in *Dillon* did not suggest that there was any need for Congress to promulgate the amendment, and Congress did not purport to do so.

Chief Justice Hughes's opinion would create a strange situation in which state legislatures voting on an amendment would not know until after the fact—and potentially long after the fact—whether a future Congress would conclude that their ratifications had occurred within a "reasonable time." *See Congressional Pay Amendment*, 16 Op. O.L.C. at 95 ("In order to be able to carry out its function in the ratification process, any state that is contemplating ratification must know whether an amendment is in fact pending before it. That is not a matter of degree; the proposed amendment is either pending or not."). Such a scenario would not only be a constitutional anomaly, it would directly conflict with Article V's command that, "when ratified" by three-fourths of the States, an amendment "*shall be valid* to all Intents and Purposes, as Part of this Constitution." U.S. Const. art. V (emphasis added).[25]

[25] In addition, the *Coleman* rule would suggest that Congress could block a constitutional amendment that was proposed, over Congress's objection, by a convention called by the States, simply by declaring that the States had not ratified it within a "reasonable time." And because Congress's decision to block the amendment would be a political question, no court could second-guess that determination. That would vitiate the States' affirmative power under Article V to bypass Congress. *See supra* notes 13 and 23.

Chief Justice Hughes's analysis relied upon the role that Congress had played in the "special circumstances" surrounding the ratification of the Fourteenth Amendment during Reconstruction. *Coleman*, 307 U.S. at 449–50. There, Secretary of State George Seward had responded to irregularities in the ratifications of Ohio and New Jersey by issuing a conditional certification of the amendment "if the resolutions of the legislatures of Ohio and New Jersey . . . are to be deemed as remaining in full force and effect." Proclamation No. 11, 15 Stat. 706, 707 (1868). The House and Senate responded by adopting a concurrent resolution declaring the Fourteenth Amendment to be part of the Constitution. *See* Proclamation No. 13, 15 Stat. 708, 709–10 (1868). One week later, the Secretary of State issued a second proclamation "in execution of" the States' ratifications and the concurrent resolution certifying the Fourteenth Amendment. *Id.* at 710–11.

Based on that one episode, Chief Justice Hughes concluded that Congress could determine the timeliness of Kansas's ratification if and when Congress exercised its promulgation authority after three-fourths of the States had submitted ratifications. But that vision of Congress's role in the ratification process was "inconsistent with both the text of Article V of the Constitution and with the bulk of past practice." *Congressional Pay Amendment*, 16 Op. O.L.C. at 102. As Professor Walter Dellinger later observed, "[t]he action of the Reconstruction Congress with respect to the fourteenth amendment was literally unprecedented." Dellinger, 97 Harv. L. Rev. at 400. Congress had played no official role in promulgating the first thirteen amendments or any amendment since. Indeed, only two of the other twenty-six amendments have been the subject of any congressional action at all, and in neither case was Congress's action deemed necessary to promulgate the amendment.[26] Accordingly, the notion of a

[26] The Fifteenth Amendment, like the Fourteenth, was plagued with Reconstruction irregularities, and the Senate initially referred to committee a joint resolution declaring the Amendment to be valid and part of the Constitution, but it later passed a simple resolution requesting the views of the Secretary of State. Cong. Globe, 41st Cong., 2d Sess. 1444, 1653 (1870). The Secretary of State thereafter proclaimed the Fifteenth Amendment on March 30, 1870. *See* Proclamation No. 10, 16 Stat. 1131 (1870). The House then adopted its own resolution declaring the amendment's validity, Cong. Globe, 41st Cong., 2d Sess. 5441 (1870), but the Senate never took up the measure. With respect to the Twenty-Seventh Amendment, the Archivist certified the ratification in reliance upon the opinion of this Office. *See* Certification of Amendment to the Constitution of

freestanding authority of Congress to determine the validity of a constitutional amendment after the States have submitted their ratifications finds little support in the text of Article V, historical practice, or other Supreme Court precedent.

Moreover, to the extent that Chief Justice Hughes's *Coleman* opinion (joined by only two other Justices) represents a precedential holding of the Court, *see Marks v. United States*, 430 U.S. 188, 193 (1977), it still would not authorize Congress to revive the long-expired ERA Resolution. *Coleman* addressed whether an amendment, which had been proposed thirteen years earlier, could still be ratified within a "reasonable time," and the Court held that the political branches, not the Court, must decide that question. *See Coleman*, 307 U.S. at 454 (opinion of Hughes, C.J.). Although Chief Justice Hughes contemplated that, where an amendment's proposal lacked a ratification deadline, Congress could determine timeliness after the States had ratified the amendment, he did not suggest that Congress could nullify a deadline it had previously imposed on the States.

To the contrary, the Chief Justice repeatedly emphasized that Congress had not imposed any deadline on the Child Labor Amendment. His opinion stated that "[n]o limitation of time for ratification is provided *in the instant case* either in the proposed amendment or in the resolution of submission." *Id.* at 452 (emphasis added). The Court assumed that the question of "what is a reasonable time" may be "an open one *when the limit has not been fixed in advance*" by Congress. *Id.* at 454 (emphasis added). But it concluded that, even if an amendment would lapse after some period, "it does not follow that, whenever Congress has not exercised that power, the Court should take upon itself the responsibility of deciding what constitutes a reasonable time and determine accordingly the validity of ratifications." *Id.* at 452–53. The opinion thus repeatedly made clear that the Court was addressing the case where Congress did not include a deadline when proposing the amendment. Nothing in *Coleman* supports the view that when Congress proposed an amendment and included a time limit "in the resolution of submission," *id.* at 452, it would later be free to revise that judgment.

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the United States Relating to Compensation of Members of Congress, 57 Fed. Reg. 21,187 (1992). The House and the Senate later passed separate versions of concurrent resolutions that would have confirmed the amendment's validity. *See* H.R. Con. Res. 320, 102d Cong. (1992); S. Con. Res. 120, 102d Cong. (1992).

C.

Apart from *Coleman* itself, the proponents of reviving the ERA ratification process rely heavily upon Congress's 1978 decision to modify the ERA's original deadline before it expired. The precedent of the ERA extension, however, is a thin reed. The action reflected something that Congress had never done before in our Nation's history, and the only federal court to review the measure held it unconstitutional. *See Idaho v. Freeman*, 529 F. Supp. at 1153. Although this Office at the time issued an opinion recognizing Congress's authority to extend the deadline, we recognized that it was "difficult to conclude with certainty that [the extension resolution] is or is not constitutional," and that "respectable arguments can be made on both sides of this question." *Constitutionality of ERA Extension* at 1, 7. Since then, this Office has adopted a narrower view of *Coleman* than the one reflected in our 1977 opinion, but even if we adhered to all of the reasoning in the 1977 opinion, we do not believe that opinion would support reviving the ERA Resolution nearly forty years after the deadline expired.

In *Constitutionality of ERA Extension*, this Office concluded that, when the ratification deadline was not placed in the text of the proposed constitutional amendment, but only in the proposing clause, that condition on ratification should be treated as equivalent to a statute subject to congressional modification. *See id.* 7–8, 15–16. The Office relied on *Coleman* as recognizing a congressional authority "years after an amendment has been proposed . . . to determine the reasonableness of the intervening time period" and to modify a deadline placed in the proposing clause. *Id.* at 7–8. At the same time, our opinion admitted that there was an argument that "Art[icle] V itself can be viewed as envisioning a process whereby Congress proposes an amendment and is divested of any power once the amendment is submitted to the States for ratification," and that, "[a]s suggested by the language of the *Coleman* opinion, the question of a time limit is no longer open once a time limit is imposed by the proposing Congress." *Id.* at 7.

This Office later read Article V to further limit Congress's role in proposing amendments. In *Congressional Pay Amendment,* we rejected the proposition that *Coleman* had recognized an exclusive congressional authority to determine when a constitutional amendment had been validly

ratified. *See* 16 Op. O.L.C. at 101–02. In a footnote, our 1992 opinion questioned the 1977 opinion's interpretation of *Coleman*, although we suggested that the extension of the ERA ratification deadline might be viewed as the "'reproposal' of a constitutional amendment" (a purely congressional action) rather than "the certification of a ratified amendment" (an action in which Article V gives Congress no role). *Id.* at 102 n.24. At the same time, we opined that, "[t]o the extent that our earlier opinions suggest that Congress alone must make the determination of the adoption of a constitutional amendment, we reject them today." *Id.* For the reasons discussed above, we also take a narrower view of *Coleman* than the one advanced in our 1977 opinion, and we do not believe that the decision supports the authority of Congress to revise a deadline included in an amendment previously proposed to the States.

Yet even under the reasoning of *Constitutionality of ERA Extension*, there was a distinction between congressional action to extend a pending ratification deadline and action to revive it after the fact. That opinion concluded that, under *Coleman*, Congress might reconsider whether a seven-year deadline was a "reasonable time" for ratification, but the opinion simultaneously suggested that any such authority could not survive the deadline's expiration. As we observed, "[c]ertainly if a time limit had expired before an intervening Congress had taken action to extend that limit, a strong argument could be made that the only constitutional means of reviving a proposed amendment would be to propose the amendment anew by two-thirds vote of each House and thereby begin the ratification process anew." *Constitutionality of ERA Extension* at 5–6. The Acting Solicitor General effectively took the same view in Supreme Court litigation about the extension of the ERA Resolution, defending the extension until the deadline expired, but then acknowledging that the effort to ratify the ERA had come to an end. *See* Mem. for Adm'r of Gen. Servs. Suggesting Mootness at 3–4, *Nat'l Org. for Women* ("[T]he amendment has failed of adoption . . . . Even if all of the ratifications remain valid, the rescissions are disregarded, and Congress is conceded the power to extend the ratification period as it did here, only 35 of the necessary 38 states can be regarded as having ratified the Amendment.").

The proponents of the 1978 ERA extension also relied upon Congress's general authority to extend statutes of limitations. As Justice Ginsburg explained in 1979, "[i]n form and function, the seven-year provision is a

statute of limitations. Generally, statutes of limitations may be extended should the legislature determine that its initial estimate was inaccurate." Ginsburg, 57 Tex. L. Rev. at 927 n.43; *see also House Extension Hearings* at 129 (testimony of Prof. Ruth Bader Ginsburg) ("It is the general rule that extensions [of] statutes of limitation may be directed by the legislature. . . . If the objective was simply to exclude [stale] claims, an extension of the limitation period for a reasonable time is well-accepted and fully comports with constitutional constraints.").[27] It is true that Congress may extend a limitations period, sometimes even after pending claims have expired. *See Chase Secs. Corp. v. Donaldson*, 325 U.S. 304 (1945); *Campbell v. Holt*, 115 U.S. 620 (1885); *see also Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) ("[T]he length and indeed even the very existence of a statute of limitations upon a federal cause of action is entirely subject to congressional control."). But Congress changes the terms of a statute of limitations only by enacting a new law, and that change is adopted through the same constitutionally required procedures as the prior one. *See* U.S. Const. art. I, § 7. There is no constitutional shortcut that would permit revisions without adoption by both Houses and presentment to the President. By the same token, we do not believe that Congress may change the terms upon which an amendment has been proposed to the States except by following the same procedures that were required in connection with the earlier proposal, namely proposal by two-thirds majorities and a new round of consideration by the States.

Because Congress and the state legislatures are distinct actors in the constitutional amendment process, the 116th Congress may not revise the terms under which two-thirds of both Houses proposed the ERA Resolution and under which thirty-five state legislatures initially ratified it. Such an action by this Congress would seem tantamount to asking the 116th Congress to override a veto that President Carter had returned during the 92nd Congress, a power this Congress plainly does not have. *See Pocket Veto Case*, 279 U.S. 655, 684–85 (1929) ("[I]t was plainly the object of

[27] We again note that, several months ago, Justice Ginsburg publicly stated her view that the ERA "fell three States short of ratification" and the ratification process must begin anew: "I hope someday [the ERA] will be put back in the political hopper, *starting over again*, collecting the necessary number of States to ratify it." *See supra* note 1 and accompanying text (emphasis added).

the [relevant] constitutional provision that there should be a timely return of the bill, which . . . should enable Congress *to proceed immediately with its reconsideration* [.]" (emphasis added)). Because the 1972 ERA Resolution has lapsed, the only constitutional way for Congress to revive the ERA, should it seek to do so, would be for two-thirds of both Houses of Congress to propose the amendment anew for consideration by the States.

IV.

In view of our foregoing conclusions, it is unnecessary for us to consider whether the earlier ratifications of the ERA by five state legislatures were validly rescinded. *See supra* note 8 and accompanying text. The question of a State's authority to rescind its ratification, before an amendment has been ratified by three-fourths of the States, is a significant one that has not been resolved. *See* Ginsburg, 57 Tex. L. Rev. at 920 (describing the doctrine of rescission as "the most debatable issue" concerning the ERA's legal status shortly after the 1978 extension). In *Constitutionality of ERA Extension*, we concluded that the Constitution does not permit rescissions, even if Congress had changed the ratification deadline after the State had voted upon the amendment. *See id.* at 28–49; *see also Power of a State Legislature to Rescind Its Ratification of a Constitutional Amendment*, 1 Op. O.L.C. 13, 15 (1977).

The district court in *Idaho v. Freeman* disagreed, however, reasoning that *Dillon*'s interpretation of Article V requires a contemporaneous consensus of the people of the United States, and therefore implies that a state legislature, as the representative of one portion of the people, remains free to change its position until three-fourths of the States have agreed in common to support ratification. *See* 529 F. Supp. at 1146–50. The Supreme Court did not reach the question before the extended deadline expired. Although we have disagreed in this opinion with some of the conclusions in the 1977 opinion, we believe that the expiration of the ERA Resolution makes it unnecessary for us to revisit this question. Regardless of the continuing validity of the five States' ratifications, three-fourths of the States did not ratify the amendment before the deadline that Congress set for the ERA Resolution, and therefore, the 1972 version of the ERA has failed of adoption.

V.

For the reasons set forth above, we conclude that the ERA Resolution has expired and is no longer pending before the States. Even if one or more state legislatures were to ratify the 1972 proposal, that action would not complete the ratification of the amendment, and the ERA's adoption could not be certified under 1 U.S.C. § 106b. In addition, we conclude that when Congress uses a proposing clause to impose a deadline on the States' ratification of a proposed constitutional amendment, that deadline is binding and Congress may not revive the proposal after the deadline's expiration. Accordingly, should Congress now "deem [the ERA] necessary," U.S. Const. art. V, the only constitutional path for amendment would be for two-thirds of both Houses (or a convention sought by two-thirds of the state legislatures) to propose the amendment once more and restart the ratification process among the States, consistent with Article V of the Constitution.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Publication of a Report to the President on the Effect of Automobile and Automobile-Part Imports on the National Security

The President may direct the Secretary of Commerce not to publish a confidential report to the President under section 232 of the Trade Expansion Act of 1962, notwithstanding a recently enacted statute requiring publication within 30 days, because the report falls within the scope of executive privilege and its disclosure would risk impairing ongoing diplomatic efforts to address a national-security threat and would risk interfering with Executive Branch deliberations over what additional actions, if any, may be necessary to address the threat.

January 17, 2020

MEMORANDUM OPINION FOR THE
DEPUTY COUNSEL TO THE PRESIDENT

In February 2019, the Secretary of Commerce submitted a report to the President under section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, advising him that imports of certain automobiles and automobile parts threaten to impair the national security and recommending action to address that threat. Although section 232 authorized the President to impose tariffs in response, the President deferred a decision on that remedy and instead directed the United States Trade Representative ("USTR") to pursue negotiations with foreign countries that are the sources of those imports. Section 232 contemplates that the Secretary will eventually publish his report to the President, *see id.* § 1862(b)(3)(B), but the Secretary has kept the report confidential while USTR's negotiations continue. In a recent appropriations act, however, Congress sought to accelerate the report's disclosure by requiring the Secretary to publish it by January 19, 2020. Commerce, Justice, Science, and Related Agencies Appropriations Act, 2020, Pub. L. No. 116-93, div. B, § 112, 133 Stat. 2317, 2385, 2395–96 (Dec. 20, 2019).

You have asked whether the President may direct the Secretary to withhold the report beyond the statutory deadline while negotiations continue and the President considers what additional measures may be necessary to address the national-security threat. We conclude that the Executive Branch may rely on the constitutional doctrine of executive privilege to decline to release the report at the deadline. The report is a

confidential presidential communication, the disclosure of which would risk impairing ongoing diplomatic efforts to address a national-security concern. Disclosure would also risk interfering with Executive Branch deliberations over what additional actions, if any, may be necessary to address the threat. Although Congress may have a legitimate interest in ultimately reviewing the report to understand the basis for the President's exercise of his section 232 authority, that generalized interest does not overcome the constitutionally rooted confidentiality interests that justify withholding the report until the resolution of diplomatic negotiations and action by the President.[1]

I.

A.

Section 232 of the Trade Expansion Act delegates to the President the authority to adjust imports in order to ensure that the Nation's domestic industrial capacity remains sufficient for the requirements of national security. *See* 19 U.S.C. § 1862(d). The statute broadly authorizes the President to take "action" that "in the judgment of the President . . . must be taken to adjust" imports "so that such imports will not threaten to impair the national security." *Id.* § 1862(c). Before the President may take such an action, however, the Secretary of Commerce must conduct, on request or his own motion, an "appropriate investigation to determine the effects on the national security of imports of the article." *Id.* § 1862(b)(1)(A). Within 270 days after the Secretary initiates the investigation, he "shall submit to the President a report on the findings of such investigation" and his recommendations "for action or inaction" under section 232. *Id.* § 1862(b)(3)(A). If the Secretary finds that the relevant imports "threaten to impair the national security," then the President has 90 days to decide whether he agrees with that finding. *Id.* § 1862(c)(1)(A). If the President does, then he shall "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that

[1] In preparing this opinion, we consulted with the Office of the General Counsel of the Department of Commerce and the Office of the General Counsel of USTR.

such imports will not threaten to impair the national security." *Id.* § 1862(c)(1)(A)(ii).

The President's authority under section 232 to adjust imports includes a range of options that may be used alone or in combination. He may impose a tariff or quota on imports of the article in question. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 561 (1976); *The President's Power to Impose a Fee on Imported Oil Pursuant to the Trade Expansion Act of 1962*, 6 Op. O.L.C. 74, 75–77 (1982). The President may also launch negotiations for agreements with other countries to address the threatened impairment of the national security. *See* 19 U.S.C. § 1862(c)(3)(A). The statute provides for the President to implement any such action within 15 days of that decision. *Id.* § 1862(c)(1)(B).[2] No later than 30 days after the decision, the President shall also report to Congress on "the reasons why the President has decided to take action, or refused to take action," under the statute. *Id.* § 1862(c)(2).

If the President chooses to pursue negotiations, and those negotiations do not remove the threat to national security, then the statute contemplates that the President may direct additional measures. If, after 180 days, no international agreement has been reached, or if any agreement "is not being carried out or is ineffective," then the President "shall take such other actions as the President deems necessary to adjust the imports of [the] article so that such imports will not threaten to impair the national

[2] We have repeatedly recognized that the President has authority to modify action he has taken to adjust imports under section 232 and its predecessors without a new investigation. *See, e.g.*, *Presidential Authority to Adjust Ferroalloy Imports Under § 232(b) of the Trade Expansion Act of 1962*, 6 Op. O.L.C. 557, 562 (1982) ("*Ferroalloy Imports*"); *Restrictions on Oil Imports*, 43 Op. Att'y Gen. 20, 21–23 (1975) (Saxbe, Att'y Gen.). The Court of International Trade recently concluded that the President lacks authority to modify his initial action, except insofar as he directs additional actions following unsuccessful negotiations under section 232(c)(3). *See Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267, 1274–76 & n.15 (Ct. Int'l Trade 2019). That conclusion has not yet been tested in an appellate court.

Editor's note: On July 13, 2021, the U.S. Court of Appeals for the Federal Circuit reversed the Court of International Trade's decision and held, consistent with this Office's longstanding view, that section 232 "permits the President to announce a continuing course of action within the statutory time period and then modify the initial implementing steps in line with the announced plan of action." *Transpacific Steel LLC v. United States*, 4 F.4th 1306, 1318–19 (Fed. Cir. 2021).

security." *Id.* § 1862(c)(3)(A). The statute provides that the President shall publish in the *Federal Register* notice of any such action taken, and similarly that he shall publish a determination to take no additional action. *Id.* § 1862(c)(3)(A), (B).

Section 232 contemplates that the Secretary of Commerce will publish the results of his investigation, except as necessary to protect classified or proprietary information. First, section 232 requires publication of "a report" "[u]pon the disposition of each request, application, or motion" for an investigation under section 232(b). *Id.* § 1862(d)(1); *see also* Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232(d), 76 Stat. 872, 877 (original version of this provision).[3] Second, the statute requires that "[a]ny portion of the report submitted by the Secretary" to the President "which does not contain classified information or proprietary information shall be published in the Federal Register." 19 U.S.C. § 1862(b)(3)(B). We understand that the Department of Commerce implements these requirements by publishing an executive summary of the Secretary's report in the *Federal Register* and making the full report, except for classified and proprietary information, available for public inspection. *See* 15 C.F.R. § 705.10(c). Although section 232 requires the report's publication "upon the disposition" of the Secretary's investigation, the statute does not set any deadline for publication. Nor does section 232 address the timing of publication when, as here, the President acts on the report's recommendations by directing negotiations with foreign countries.

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[3] Section 232 succeeded two other statutes conferring similar authority on the President. *See* Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, § 8, 72 Stat. 673, 678–79; Trade Agreements Extension Act of 1955, Pub. L. No. 84-86, § 7, 69 Stat. 162, 166. Both statutes authorized the President to adjust imports of an article based upon the investigation and recommendation of a subordinate regarding whether the imports threaten national security. Section 8(d) of the 1958 Act required publication of "[a] report" "upon the disposition" of the investigation. 72 Stat. at 679. Section 7 of the 1955 Act did not address publication. 69 Stat. at 166. The 1955 Act charged the Director of the Office of Defense Mobilization with the investigation and recommendation. *See id.* Congress transferred this function to the Secretary of the Treasury in the Trade Act of 1974, Pub. L. No. 93-618, § 127(d)(1), 88 Stat. 1978, 1993 (Jan. 3, 1975). President Carter transferred this function to the Secretary of Commerce in section 5 of Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273, 69,274 (Dec. 3, 1979), and Congress codified the Secretary of Commerce's role in 1988, *see* Omnibus Trade and Competitiveness Act, Pub. L. No. 100-418, § 1501, 102 Stat. 1107, 1258.

B.

On May 23, 2018, the Secretary of Commerce initiated an investigation under section 232 into the effects on the national security of imports of certain automobiles and automobile parts. *See* Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Automobiles, Including Cars, SUVs, Vans and Light Trucks, and Automotive Parts, 83 Fed. Reg. 24,735 (May 30, 2018). On February 17, 2019, the Secretary submitted a report to the President containing the results of that investigation.

On May 17, 2019, the President issued a proclamation noting his concurrence in "the Secretary's finding that automobiles and certain automobile parts are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States." Proclamation No. 9888, 84 Fed. Reg. 23,433, 23,434 (May 21, 2019). As described in the proclamation, the report found that the United States' defense-industrial base depends upon the American-owned automotive sector for the development of technologies vital to the national security. *See id.* ¶¶ 2–3, 84 Fed. Reg. at 23,433. Imports of automobiles and automobile parts, however, have displaced American-owned production, in part because of foreign protective barriers that disadvantaged American-owned manufacturers. *See id.* ¶¶ 3–5, 84 Fed. Reg. at 23,433. The resulting displacement in the American-owned automotive industry threatened to weaken U.S. technological leadership in an area vital to the national defense. *See id.* ¶¶ 6–8, 84 Fed. Reg. at 23,433–34. Accordingly, the Secretary concluded that "the present quantities and circumstances of automobile and certain automobile parts imports threaten to impair the national security" of the United States. *Id.* ¶ 9, 84 Fed. Reg. at 23,434.

While concurring in the Secretary's finding, the President chose not to invoke his section 232 authority to impose tariffs or quotas on imports of automobiles or automobile parts. The Secretary had recognized that "successful negotiations could allow American-owned automobile producers to achieve long-term economic viability" and "develop cutting-edge technologies that are critical to the defense industry." *Id.* ¶ 11, 84 Fed. Reg. at 23,434. The President thus directed USTR to "pursue negotiation of agreements contemplated in 19 U.S.C. 1862(c)(3)(A)(i) to ad-

dress the threatened impairment of the national security with respect to imported automobiles and certain automobile parts from the European Union, Japan, and any other country the Trade Representative deems appropriate." *Id.* cl. 1, 84 Fed. Reg. at 23,435.[4] USTR advises that negotiations remain ongoing, but have not yet produced an agreement that addresses the national-security threat. We are also advised that the President has not yet decided what, if any, "other actions" to take under section 232(c)(3)(A) to adjust imports of automobiles and automobile parts, including whether to impose tariffs or quotas on those imports. In view of pending international negotiations and Executive Branch deliberations, the Secretary of Commerce has not yet published his report.

On December 20, 2019, Congress enacted the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2020, as part of a consolidated appropriations act. The Act purports to direct the Secretary of Commerce to publish his February 2019 report to the President within 30 days. In particular, section 112 of the Act states:

> Not later than thirty days after the date of the enactment of this Act, using amounts appropriated or otherwise made available in this title for the Bureau of Industry and Security for operations and administration, the Secretary of Commerce shall—
>
> (1) publish in the Federal Register the report on the findings of the investigation into the effect on national security of imports of automobiles and automotive parts that the Secretary initiated on May 23, 2018, under section 232(b) of the Trade Expansion Act of 1962 (19 U.S.C. 1862(b)), as required under paragraph (3)(B) of that section; and
>
> (2) submit to Congress any portion of the report that contains classified information, which may be viewed only by Members of Congress and their staff with appropriate security clearances.

Pub. L. No. 116-93, div. B, § 112, 133 Stat. at 2395–96. Upon signing the Act, the President noted that certain provisions, including section 112, "purport to mandate or regulate the dissemination of information that may

[4] The cited provision, section 232(c)(3)(A)(i), refers to agreements that "limit[] or restrict[] the importation into, or the exportation to, the United States of the article that threatens to impair national security."

be protected by executive privilege." Statement on Signing the Consolidated Appropriations Act, 2020, 2019 Daily Comp. Pres. Doc. No. DCPD201900881, at 2 (Dec. 20, 2019). Accordingly, the President determined that his Administration would "treat these provisions consistent with the President's constitutional authority to control information, the disclosure of which could impair national security, foreign relations, the deliberative processes of the executive branch, or the performance of the President's constitutional duties." *Id.*

Section 112's 30-day deadline for publishing the report in the *Federal Register* falls on January 19, 2020. Section 112(2) is not at issue because the report contains proprietary information but not any classified information. The question, then, is whether the President's constitutional authority to control privileged information permits him to direct the Secretary not to comply with the publication deadline in section 112(1) at this time.

II.

Section 112 purports to require the Secretary of Commerce to publish his report to the President by January 19, 2020, even though the Executive Branch remains engaged in active deliberations and ongoing international negotiations about the very subject addressed in the report. That requirement implicates confidentiality interests rooted in the doctrine of executive privilege. Executive privilege is a "constitutionally based" "corollary of the executive function vested in the President by Article II of the Constitution," and it empowers the President to withhold confidential information from the other Branches and the public when necessary to support that function. *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154 (1989) ("*Congressional Requests*"); *see also United States v. Nixon*, 418 U.S. 683, 705–06 (1974). Because the Secretary's report falls within the scope of executive privilege, it is presumptively protected from disclosure.

A.

The Secretary's report is protected by executive privilege. It is a quintessential privileged presidential communication—a report from a Cabinet Secretary to the President advising him of the officer's opinions and

recommending decisions by the President. The report is also protected by the deliberative process component of executive privilege, because it reflects a recommendation made in connection with deliberations over the President's final decision. In addition, disclosure of the full report at this time could compromise the United States' position in ongoing international negotiations. The Executive Branch accordingly has strong confidentiality interests in the report.

1.

The presidential communications component of executive privilege clearly applies to confidential advice that an agency head provides to the President. The courts have recognized that the privilege covers "documents or other materials that reflect presidential decisionmaking and deliberations and that the President believes should remain confidential." *In re Sealed Case*, 121 F.3d 729, 744 (D.C. Cir. 1997). In *United States v. Nixon*, the Supreme Court explained that this privilege protects "the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking" by ensuring that the President and his advisers are "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." 418 U.S. at 708. The privilege for presidential communications is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.*

The report at issue is a confidential communication to the President containing a Cabinet Secretary's advice on decisions delegated by statute to the President—whether automobile and automobile-part imports "threaten to impair the national security" and whether they should be adjusted to remove that threat. 19 U.S.C. § 1862(b)(3)(A). The report is therefore a core presidential communication. *See, e.g.*, *Loving v. Dep't of Def.*, 550 F.3d 32, 39 (D.C. Cir. 2008) ("easily" holding that "memoranda from the Army and Defense Secretaries directly to the President advising him" on his statutory review of a court-martial death sentence "fall squarely within the presidential communications privilege"). The presidential communications privilege applies to the report in its entirety. *See Sealed Case*, 121 F.3d at 745–46.

This conclusion is not affected by the fact that the report reflects the exercise of statutory authority delegated to the President pursuant to Congress's constitutional powers to impose "Taxes, Duties, Imposts and Excises" and to "regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cls. 1, 3. The presidential communications component of executive privilege protects the President's power to faithfully execute all of the laws. Communications related to the President's independent constitutional functions may raise "particularly strong" confidentiality concerns, *Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1, 2 (2007) (Clement, Act'g Att'y Gen.), but the privilege applies equally to communications concerning the execution of statutes, *see, e.g.*, *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, 3 (2008) (Mukasey, Att'y Gen.); *Assertion of Executive Privilege for Memorandum to the President Concerning Efforts to Combat Drug Trafficking*, 20 Op. O.L.C. 8, 8 (1996) (Reno, Att'y Gen.).

Indeed, this Office has previously advised that executive privilege protects the confidentiality of communications regarding the President's use of his section 232 authority. On April 2, 1980, President Carter imposed a gasoline-conservation fee under the authority of section 232 following an investigation by the Secretary of the Treasury (who was previously responsible for investigations under section 232). *See* Proclamation No. 4744, 45 Fed. Reg. 22,864 (Apr. 3, 1980).[5] After a House subcommittee subpoenaed documents related to the President's decision, this Office advised that the President had the constitutional authority to protect the confidentiality of Executive Branch deliberations, including those related to his decision to issue the section 232 proclamation. *See* Memorandum for the Attorney General from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: The Constitutional Privilege for Executive Branch Deliberations: The Dispute with a House Subcommittee over Documents Concerning the Gasoline Conservation Fee* at 9–12 (Jan. 13, 1981). The ability of the President to receive such advice from an agency

[5] The fee was invalidated by a district court. *See Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 618–19 (D.D.C. 1980). This Office later described the fee as "clearly . . . the type of presidential action . . . not authorized by § 232." *Ferroalloy Imports*, 6 Op. O.L.C. at 561.

head directly implicates his power to "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.

2.

The deliberative process component of executive privilege also applies to the Secretary of Commerce's report. This aspect of executive privilege likewise has constitutional roots. *See, e.g.*, *Assertion of Executive Privilege with Respect to Prosecutorial Documents*, 25 Op. O.L.C. 1, 2 (2001) (Ashcroft, Att'y Gen.). It "covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *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)). The privilege protects materials that are "predecisional" and "deliberative" in nature, though it does not extend to "purely factual" material. *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1113 (D.C. Cir. 2004) (quoting *Sealed Case*, 121 F.3d at 737).

The report, almost by definition, comprises predecisional and deliberative material. Under section 232, the report presents the Secretary's "findings," after his investigation, on whether the imports in question threaten the national security. 19 U.S.C. § 1862(b)(3)(A). The Secretary is required, based on those findings, to make "recommendations . . . for action or inaction" by the President and, ultimately, to "advise the President" regarding whether the relevant imports threaten to impair the national security and what action the President should take. *Id.*[6] The report is predecisional because it "precedes, in temporal sequence," the President's ultimate findings and policy decisions under section 232; and it is deliber-

[6] Some of the material in the report is "purely factual," which would generally not be protected by the deliberative process privilege. *Judicial Watch*, 365 F.3d at 1113. In this context, however, disclosing that material would still reveal significant substantive aspects of the Secretary's confidential advice to the President. We think that this factual material is likely "inextricably intertwined with policy-making processes" and thus protected as deliberative. *Id.* at 1121 (quoting *Soucie v. David*, 448 F.2d 1067, 1078 (D.C. Cir. 1971)). Regardless, such factual material would be independently protected as a presidential communication, which characterizes the report in its entirety.

ative because it "was written as part of the process by which" the President comes to those decisions under section 232. *Abtew v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895, 898–99 (D.C. Cir. 2015) (Kavanaugh, J.) (internal quotation marks omitted). The Secretary's report served the predecisional and deliberative functions contemplated by section 232. Proclamation No. 9888, ¶¶ 2–11, 84 Fed. Reg. 23,433–44 (summarizing the report).[7]

The Executive Branch's interest in protecting the confidentiality of this deliberative material is especially strong because the deliberative process remains ongoing. *See Rein v. U.S. Patent & Trademark Office*, 553 F.3d 353, 373 (4th Cir. 2009) (deliberative communications related to "ongoing patent reexaminations" were "naturally" protected by deliberative process privilege); *Congressional Requests*, 13 Op. O.L.C. at 160 ("information concerning ongoing deliberations need rarely be disclosed"); *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 31 (1981) (Smith, Att'y Gen.) ("the interference with the President's ability to execute the law is greatest while the decisionmaking process is ongoing"). The President has not decided what, if any, "other actions" to take to adjust imports to address the national-security threat identified by the Secretary. 19 U.S.C. § 1862(c)(3)(A).

The statute continues to authorize the President to take action to adjust imports of automobiles and automobile parts under section 232. Following the Secretary's initial transmission of the report, the President had 90 days to decide whether he concurred in the Secretary's findings and to determine what action to take in response. *Id.* § 1862(c)(1)(A). Once the President decided to address the threat by ordering negotiations, he had 15 days to implement that action. *Id.* § 1862(c)(1)(B). Because the resulting negotiations did not produce an agreement within 180 days, the President is now authorized to "take such other actions as the President deems necessary to adjust imports of such article so that such imports will not threaten to impair the national security." *Id.* § 1862(c)(3)(A).

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[7] The proclamation's summary of and quotation from certain portions of the report did not waive or forfeit executive privilege over the remainder of the report. *See Sealed Case*, 121 F.3d at 741 (explaining that an "all-or-nothing approach has not been adopted with regard to executive privileges generally," so "release of a document only waives these privileges for the document or information specifically released, and not for related materials").

There is, however, no statutory deadline for the President to exercise that power. Congress specifically amended the statute in 1988 to add some specific deadlines for the President to act in response to the Secretary's report—the 90- and 15-day periods noted above. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1501(3), 102 Stat. 1107, 1258. But in contrast with the President's initial determination, which must be made "[w]ithin 90 days" and "implement[ed] . . . by no later than" 15 days after the determination, 19 U.S.C. § 1862(c)(1)(A), (B), the statute does not set any further deadline for presidential action after the conclusion of the 180-day negotiation period. In giving the President the discretion to take "such other actions as the President deems necessary" after that period, *id.* § 1862(c)(3)(A), Congress did not require the President to act within any particular timeframe. It instead provided him with discretion to shape an appropriate action, including with respect to continuing the international negotiations that are the basis for invoking this part of section 232. Here, the decision-making process expressly contemplated by section 232 remains ongoing, giving the Executive Branch a strong confidentiality interest in predecisional, deliberative material relevant to the ongoing process of deciding how to exercise that authority.

3.

Finally, the disclosure of the report implicates well-established confidentiality interests in protecting information the disclosure of which would risk damaging ongoing diplomatic negotiations. Given the President's role "as Commander-in-Chief and as the Nation's organ for foreign affairs," *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), executive privilege is at its most potent when applied to national-security and diplomatic materials. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988); *Nixon*, 418 U.S. at 710. We have long recognized that "the President has the power to withhold from [Congress] information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest." Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Executive Privilege to Withhold Foreign Policy and National Security Information* at 7 (Dec. 8, 1969).

Many of the earliest assertions of what we now call executive privilege involved protecting the secrecy of information to avoid undermining the President's conduct of diplomacy.

The report at issue plainly implicates information in the field of foreign relations and national security. "Presidential action under [section 232] . . . is closely linked to questions of national security, and also to the foreign relations of the United States." Memorandum for John W. Dean III, Counsel for the President, from Ralph E. Erickson, Assistant Attorney General, Office of Legal Counsel, *Re: Mandatory Oil Import Program*, att. at 11 (Mar. 3, 1972). We have accordingly described recommendations to the President under section 232 as reflecting "confidential advice given to the President in the field of national security." *Id.* at 13. Section 232, moreover, expressly contemplates that the President may choose, as a means of addressing a national-security threat, to negotiate agreements with foreign countries. 19 U.S.C. § 1862(c)(1), (3). Consistent with this statutory design, the report here identifies a threatened impairment of the national security and recommends diplomatic negotiations. *See* Proclamation No. 9888, ¶¶ 11, 14–15, 84 Fed. Reg. at 23,434–35. The report contains detailed analysis concerning the nature of the problem at the heart of those negotiations and therefore bears directly upon the United States' objectives in the negotiations. It is also suggestive of what measures the United States believes might satisfy those objectives, including what other measures the Secretary believes the United States should be prepared to take to adjust imports of automobiles and automobile parts. The report in these respects is akin to a set of diplomatic instructions, and USTR has advised us that disclosing the report at this time could negatively affect the position of the United States in ongoing negotiations.

As Attorney General Reno observed, "[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). In our prior opinions, we have described examples of withholdings of diplomatic instructions and related documents by the Washington, Adams, Jackson, Polk, and Fillmore Administrations. *See History of Refusals by Executive Branch Officials to Provide Information Demanded by Con-*

gress: Part I—Presidential Invocations of Executive Privilege Vis-à-Vis Congress, 6 Op. O.L.C. 751, 753–54, 756–57, 762–64 (1982) ("*History of Refusals*"). President Washington, for example, withheld from the Senate in 1794 certain diplomatic correspondence with France, and he withheld from the House of Representatives in 1796 various documents related to the negotiation of the Jay Treaty. *See id.* at 753–54. As Washington explained in declining to produce instructions to one of his diplomatic representatives, "a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated" would have an obvious adverse impact on negotiations to which such matters pertain. Message to the House of Representatives (Mar. 30, 1796), *reprinted in* 1 *A Compilation of the Messages and Papers of the Presidents* 194–95 (James D. Richardson ed., 1896) ("*Messages and Papers*"). Washington made that objection even though the House resolution excepted any documents pertaining to "existing negotiations." *Id.* at 194.

Presidents likewise have repeatedly resisted demands for the disclosure of material that would damage ongoing negotiations. In 1832, President Jackson declined to disclose correspondence regarding discussions between the United States and the Republic of Buenos Aires "so long as the negotiation shall be pending." Message to the House of Representatives (Dec. 28, 1832), *reprinted in* 2 *Messages and Papers* at 608–09.[8] In 1848, President Polk argued that his objections to disclosing materials related to negotiations with Mexico "are much stronger than those which existed" when President Washington withheld the Jay Treaty materials because the negotiations "have not been terminated, and may be resumed." Message to the House of Representatives (Jan. 12, 1848), *reprinted in* 4 *Messages and Papers* at 567 (1897). Other Presidents have echoed Jackson's and Polk's views. *See, e.g.*, *History of Refusals*, 6 Op. O.L.C. at 765 (describing President Fillmore's withholding of documents related to a claim against Mexico that "was still being negotiated"); *id.* at 770 (describing

[8] In 1833, President Jackson also declined to divulge to the Senate a "conditional arrangement" made between commissioners appointed by Jackson and the State of Maine while the United States negotiated with Great Britain regarding the northeastern boundary. Message to the President of the Senate (Mar. 2, 1833), *reprinted in* 2 *Messages and Papers* at 637; *see also History of Refusals*, 6 Op. O.L.C. at 757. Jackson's reasons for withholding this information are not entirely clear, but it appears that he may have intended to avoid affecting the progress of ongoing negotiations with Great Britain.

President Hoover's view that "[t]he Executive was under a duty, in order to maintain amicable relations with other nations, not to publicize every negotiating position and statement which preceded final agreement" on a treaty). The Executive Branch thus has a strong and historically well-founded interest in delaying publication of the report for so long as it may affect ongoing diplomatic negotiations.

B.

In concluding that executive privilege applies to the report, we have considered potential counterarguments arising out of the origins and nature of the report. Specifically, we recognize that the report was drafted in connection with a statutory process that contemplates its eventual public disclosure, and that publication could be viewed as a condition on the President's exercising the authority delegated under section 232. We do not believe, however, that either the statutory origin of the report or its connection to the President's exercise of delegated authority means that executive privilege is inapplicable.

1.

Even before the enactment of section 112 of the appropriations act, section 232 provided that the Secretary of Commerce would both create and eventually publish the report. 19 U.S.C. § 1862(b)(3)(A)–(B), (d)(1). Accordingly, it could be argued that executive officials do not have any confidentiality interests in the report because, even though it was addressed to the President, they prepared the report knowing it would eventually be disclosed. We do not think this fact makes privilege unavailable. First, by requiring that the report be disclosed now, section 112 requires a different kind of disclosure than was contemplated at the time the report was drafted. Second, even with respect to the eventual disclosure contemplated under section 232, the publication mandate does not make executive privilege categorically unavailable. To the contrary, executive privilege remains available for statutory reports so long as their disclosure would impair established Executive Branch confidentiality interests.

As a threshold matter, the question is not whether the report should be disclosed, but when. At the time the report was submitted, section 232 governed publication, but that statute does not require, and has never

required, the Secretary's report to the President to be disclosed on any particular timeline. Instead, the statute simply says that the unclassified portions of such reports "shall be published in the Federal Register," and that "[u]pon the disposition of each" investigation, the Secretary shall publish "a report on such disposition." 19 U.S.C. § 1862(b)(3)(B), (d)(1). The statutory requirement to publish the Secretary's report to the President dates from the 1988 amendments, which codified the Department of Commerce's then-existing regulations requiring publication of the report upon the disposition of the investigation. 15 C.F.R. § 359.10(c) (1988). A "disposition" of the investigation does not occur until the President has decided whether to adjust imports. *See Presidential Authority to Adjust Ferroalloy Imports Under § 232(b) of the Trade Expansion Act of 1962*, 6 Op. O.L.C. 557, 562–63 (1982) (recognizing that the President's decision "to retain the [Commerce] Report for further study or to return it to the Commerce Department for further evaluation would not constitute a final disposition" for purposes of the publication requirement); *see also* H.R. Rep. No. 87-1818, at 41 (1962) ("Section 232(d) requires a report to be made and published on each *final* disposition of any request for investigation under section 232(b)." (emphasis added)). Section 232, and the Department of Commerce's administration of it, are therefore sufficient to protect the Executive Branch's confidentiality interests in the report unless or until the President has made his decision.

Consistent with section 232's framework, the Secretary of Commerce (like those officials previously responsible for conducting such national-security investigations) has typically published the report to the President only after the decisional process has concluded. When the Secretary's investigation concludes that the imports in question do not threaten national security, then the publication of the report necessarily occurs at the conclusion of the deliberative process, because the President may act only if the Secretary finds a national-security threat. In such cases, the submission of the Secretary's report represents the final decision and the conclusion of the deliberative process. *See* 19 U.S.C. § 1862(b)(3)(A).

By contrast, when a section 232 investigation finds that imports do present a national-security threat, the general practice appears to have been to disclose the report only after the President decides whether and how to adjust imports. In February 1959, for example, the Director of the Office of Civil and Defense Mobilization, who exercised the Secretary's

authority under section 232's statutory predecessor, *see supra* note 3, advised the President of his determination that imports of crude oil and its derivatives threatened to impair the national security and promised that, "[a]s required by the statute, a report of this investigation will be made and published shortly." Memorandum for the President from Leo A. Hoegh, Director, Office of Civil and Defense Mobilization, *reprinted in Small Business Problems Created by Petroleum Imports: Hearings Before Subcomm. No. 4 of the Select Comm. on Small Bus.*, 87th Cong. app. II, at 920–22 (1962) ("*Petroleum Imports Hearings*").[9] President Eisenhower imposed import restrictions in Proclamation No. 3279 on March 10, 1959, 24 Fed. Reg. 1781 (Mar. 12, 1959), but the Director did not submit his statutory report to Congress until the following July. *Report of Investigation of Imports of Crude Oil and Its Derivatives and Products* (July 21, 1959), *reprinted in Petroleum Imports Hearings* app. II, at 925–30.

Similarly, on January 14, 1975, the Secretary of the Treasury submitted a report to President Ford advising him that imports of crude oil and related products threatened to impair the national security. *See* Effects of Imported Articles on the National Security, 40 Fed. Reg. 4457, 4457 (Jan. 30, 1975). The Secretary did not publish that report until a week after the President's January 23 proclamation imposing supplemental fees on the imports, Proclamation No. 4341, 40 Fed. Reg. 3965 (Jan. 27, 1975). More recently, the Secretary of Commerce has typically waited until months after the President's decision before publishing a summary of the report in the *Federal Register*.[10] That practice is consistent with the Executive

[9] The Office of Defense Mobilization was renamed the Office of Defense and Civilian Mobilization in Reorganization Plan No. 1 of 1958. *See* 23 Fed. Reg. 4991, 4991 (July 1, 1958). The Trade Agreements Extension Act vested this office with the investigation and recommendation function. *See* Pub. L. No. 85-686, § 8, 72 Stat. at 678; *see also supra* note 3.

[10] *See, e.g.*, Summary of Secretarial Report Under Section 232 of the Trade Expansion Act of 1962, as Amended, on the Effect of Imports of Crude Oil on the National Security, 65 Fed. Reg. 46,427, 46,427 (July 28, 2000) (President decided to take no action on March 24, 2000); Summary of Secretarial Report Under Section 232 of the Trade Expansion Act of 1962, as Amended, 60 Fed. Reg. 30,514, 30,515 (June 9, 1995) (President decided to take no action on February 16, 1995); Presidential Decision; Petroleum Section 232 National Security Import Investigation, 54 Fed. Reg. 6556, 6557 (Feb. 13, 1989) (President decided to take no action on January 3, 1989); Presidential Decision; Anti-Friction Bearing Section 232 National Security Import Investigation, 54 Fed. Reg. 1974, 1975 (Jan. 18, 1989) (President decided to take no action on November 28, 1988).

Branch's longstanding confidentiality interest in delaying the report's disclosure until its findings have been fully considered and the President has made his decision. The Secretary's February 2019 report on automobile and automobile-part imports thus was issued at a time when the Executive Branch had a legitimate confidentiality interest in delaying the release of the report until after the President had made a decision whether to adjust imports to respond to the underlying national-security threat.

Moreover, even if the terms of section 232 and prior practice did not demonstrate such solicitude for protecting the ongoing decision-making process, executive privilege still applies to reports called into being by federal statutes. As a constitutional prerogative of the President, executive privilege may not be eliminated by statute. *See, e.g.*, *U.S. Dep't of Justice v. Julian*, 486 U.S. 1, 13 (1988) (if a privilege is "constitutionally rooted," Congress may not "determine for itself which privileges the Government may avail itself of and which it may not"); Memorandum for Peter J. Wallison, Counsel to the President, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 3 n.6 (Sept. 8, 1986) ("Congress cannot override executive privilege by statutory enactment"). Thus, Congress may not eliminate the confidentiality of Executive Branch deliberations by directing officials to communicate their opinions to the President through publicly available reports.

For this reason, the Department of Justice has regularly objected to proposed legislation that would require the disclosure of materials prepared pursuant to statute. *See, e.g.*, Letter for Paul D. Ryan, Speaker, U.S. House of Representatives, from Stephen E. Boyd, Assistant Attorney

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We have identified only two examples of earlier publication. In 1979, the Department of the Treasury published a section 232 report about oil imports over a year before President Carter issued a proclamation acting on the report's recommendations. *See* Effect of Oil Imports on National Security, 44 Fed. Reg. 18,818 (Mar. 29, 1979); Proclamation No. 4744, 45 Fed. Reg. 22,864 (Apr. 3, 1980); *see also Indep. Gasoline Marketers Council*, 492 F. Supp. at 616 (reviewing chronology). (At the time, section 232 did not impose any deadline on the President to act in response to Treasury's report. 19 U.S.C. § 1862(b) (1976); *see also Ferroalloy Imports*, 6 Op. O.L.C. at 562.) In 2018, the Department of Commerce released (but did not publish in the *Federal Register*) two section 232 reports about imports of steel and aluminum, both within a month of their completion and before the President had concurred with them and taken responsive action. *See* Press Release, Secretary Ross Releases Steel and Aluminum 232 Reports in Coordination with White House (Feb. 16, 2018).

General, Office of Legislative Affairs (Dec. 11, 2017) (objecting to section 108(a) of H.R. 4243, the VA Asset and Infrastructure Review Act of 2017); *cf. Loving*, 550 F.3d at 35, 39–41 (applying executive privilege to documents "prepared for the President in connection with his statutory review of [a] death sentence"); *Congressional Requests for Information from Inspectors General Concerning Open Criminal Investigations*, 13 Op. O.L.C. 77, 83–87 (1989) ("*Inspector General Requests*") (construing the Inspector General Act to permit agency heads to withhold privileged information when disclosing statutory reports to Congress). This Office has long objected to so-called "direct reporting" requirements based upon the applicability of executive privilege to statutory reports. *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, 43–46 (2008). Likewise, we have explained that Congress may not require disclosure of legal advice provided within the Executive Branch, free from any constraint of privilege, simply by subjecting all such advice to a statutory reporting requirement. *See, e.g.*, *Constitutionality of the OLC Reporting Act of 2008*, 32 Op. O.L.C. 14 (2008) (Mukasey, Att'y Gen.) (objecting on constitutional grounds to a bill that would have required disclosure of "authoritative" legal interpretations issued within the Department of Justice).

Congress itself has recognized that the Executive Branch may have legitimate confidentiality interests in the contents of statutorily required reports, *see, e.g.*, *Inspector General Requests*, 13 Op. O.L.C. at 85–87 (reviewing legislative history of the Inspector General Act acknowledging such interests), including in reports bearing on delegated statutory authority to regulate foreign commerce. Congress acknowledged some such interests by excluding classified information from the publication requirement in section 232(b)(3)(B).[11] To take another example from

[11] In fact, the Department of Justice objected on privilege grounds to a proposed version of section 232(b)(3)(B) that would have provided that the Secretary of Commerce's report to the President "may be classified only if public disclosure of such report, or of such portion of such report, would clearly be detrimental to the security of the United States." Memorandum for John C. Filippini, Chief, Legislative Unit, Antitrust Division, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: S. 490, "Omnibus Trade Act of 1987"* at 4 (Apr. 14, 1987); *see also* Letter for Howard A. Baker, Jr., Chief of Staff for the President, from Arnold I. Burns, Deputy Attorney General at 2 (June 16, 1987) (describing this objection); H.R. Rep. No. 100-576, at 711

a related statute, Congress authorized the withholding of any "information . . . determine[d] to be confidential" upon publication of certain reports for the President in various provisions of the Trade Act of 1974. 19 U.S.C. §§ 2252(f)(3), 2274(b), 2354(b), 2401c(b), 2436(a)(4). As further explained in Part II.A.1 above, executive privilege may apply to the Secretary of Commerce's report even though it was prepared pursuant to statutory direction.

2.

We further conclude that executive privilege applies even though the requirement for the eventual disclosure of the report could be viewed as a condition on the Executive Branch's exercise of delegated statutory authority under section 232. The new publication requirement imposed by section 112 does not reflect a condition imposed upon a choice within the discretion of the Executive Branch. Section 112 is not conditional: it commands the Secretary of Commerce to publish the preexisting report within 30 days. 133 Stat. at 2395–96. Section 112 does not give the Executive Branch the option of avoiding publication by declining to conduct a section 232 investigation or to invoke the President's authority under section 232. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981) (Congress may not "surpris[e] participating States with post-acceptance or 'retroactive' conditions" on federal funding). The statutory provision addresses a preexisting report and requires publication within 30 days.

Even apart from the retroactive nature of this disclosure requirement, we have recognized limits on Congress's authority to impose conditions upon the President's exercise of delegated congressional authority. *See, e.g.*, *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 275–76 (1996). This principle would apply with particular force where, as here, a statute purports to require the disclosure of information implicating foreign affairs and national security. *See Constitutionality of Proposed Statutory Provision Requiring Prior Congres-*

(1988) (noting deletion of the "clearly detrimental" requirement). Although the Department did not object more broadly to the publication requirement, that is likely because the Executive Branch had a general practice of disclosing unclassified portions of section 232 reports for more than two decades, upon the disposition of the investigations.

sional Notification for Certain CIA Covert Actions, 13 Op. O.L.C. 258, 261–62 (1989) ("*Congressional Notification for Covert Actions*"). We need not address how this principle would apply to publication of the report at issue, however, because section 112 is not a condition on the exercise of delegated authority, but a freestanding disclosure requirement imposed on a preexisting report.

III.

Our determination that the Secretary of Commerce's report falls within the scope of executive privilege does not conclude the analysis. In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the Supreme Court assessed a claim that a federal statute impermissibly infringed upon executive privilege by asking whether there were "adequate justifications" for the statute's "intrusion into executive confidentiality." *Id.* at 452. The Court applied a balancing test that it viewed as similar to that applied in *United States v. Nixon*, measuring "Congress' purposes in enacting" the statute against the degree to which disclosure would intrude upon Executive Branch confidentiality interests. *Id.* (citing *United States v. Nixon*, 418 U.S. 683). Here, we believe that Congress has not demonstrated an adequate justification for requiring the disclosure of the report now, before the deliberative process has concluded and while disclosure of the report could threaten ongoing international negotiations.

In *Nixon v. Administrator*, the Court upheld a statute that provided government archivists with custody over and access to President Nixon's records. In so doing, the Court considered the interests served by the statute, which ensured that the incumbent President would have "access to records of past decisions that define or channel current governmental obligations" and that the records would otherwise be preserved for historical purposes. *See* 433 U.S. at 452–53. In weighing these justifications against the "limited intrusion" on executive confidentiality, the Court estimated that only a small fraction of the papers (one-half of one percent) would be covered by privilege and emphasized that the statute preserved the former President's ability to claim privilege before the public release of any particular records, since the only access at issue was that of government archivists. *See id.* at 449–52.

By contrast with the records law at issue in that case, section 112 targets a single, privileged document and requires near-immediate public

release. Section 112(1) provides that the Secretary shall publish the report "as required under paragraph (3)(B)" of section 232(b) within 30 days. Because section 232 already requires eventual public disclosure, section 112's legal effect is simply to accelerate the required publication. In testifying on the proposed disclosure provision that would become section 232(b)(3)(B), Senator Byrd stated that it would "increase[] the visibility of the entire section 232 process" by enabling Congress and the public "to know the basis on which . . . decisions are made" under the statute. *Hearing on S. 1871 Before the S. Comm. on Fin.*, 99th Cong. 25 (1986). But the congressional or public interest in understanding the basis for the President's decision under section 232 is a weak justification for requiring disclosure of a privileged document before the President has made that decision.

The President's May 2019 proclamation already provided a substantial explanation for the basis of his concurrence in the Secretary's finding that imports of automobiles and automobile parts threaten the national security. "American-owned producers' share of the domestic automobile market," the President explained, "has contracted sharply, declining from 67 percent . . . in 1985 to 22 percent . . . in 2017." Proclamation No. 9888, ¶ 4, 84 Fed. Reg. at 23,433. Quoting the Secretary's report, the President explained that "[t]he contraction of the American-owned automotive industry, if continued, will significantly impede the United States' ability to develop technologically advanced products that are essential to our ability to maintain technological superiority to meet defense requirements and cost effective global power projection." *Id.* ¶ 8, 84 Fed. Reg. at 23,434. The President also separately submitted to Congress a letter that, as section 232 requires, provided a "written statement of the reasons why the President has decided to take action" to adjust imports. 19 U.S.C. § 1862(c)(2); *see* Letter to Congressional Leaders on the Effects of Imports of Automobiles and Certain Automobile Parts on the National Security of the United States, 2019 Daily Comp. Pres. Doc. No. DCPD201900400 (June 14, 2019). These explanations already go a substantial way toward explaining the basis for the President's initial decision.

We do not doubt that Congress may also have a legitimate interest in reviewing the Secretary's report to understand how the President has exercised his authority under section 232. Some members of Congress

have introduced bills that would alter the President's authority under section 232 to adjust imports. *See* Trade Security Act of 2019, S. 365, 116th Cong. (2019); Bicameral Congressional Trade Authority Act of 2019, S. 287, 116th Cong. (2019). But it is hard to see how Congress's legislative interest would be significantly advanced by mandating disclosure of the report now, as opposed to after the conclusion of international negotiations and the President's decision-making process. As then–Assistant Attorney General Barr explained in an analogous context, the fact that Congress may have a legitimate interest in being informed about a matter after the fact—there, the conduct of a covert action abroad—does not mean that Congress may require disclosure of such a matter when disclosure would threaten to harm the national security. *See Congressional Notification for Covert Actions*, 13 Op. O.L.C. at 261–62.

To the extent that Congress seeks public disclosure of the report now, before the President has made a decision, in order to influence his future decision, we do not believe that would present a legitimate justification for intruding upon the confidentiality of the Executive Branch. Congress has no constitutional role in executing the laws. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986) ("[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."); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826–27 (D.C. Cir. 1993) (holding that Congress could not require the presence of non-voting congressional appointees on the Federal Election Commission). Congress thus may not demand disclosure of information as a means of facilitating congressional participation in the execution of the law. *See Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. at 30 (when "'oversight' is used as a means of participating directly in an ongoing process of decision within the Executive Branch, it oversteps the bounds of the proper legislative function"). While Congress may enact legislation either to curtail the President's statutory authority to adjust automobile imports or to adjust imports itself, we do not believe that Congress may seek to participate in an ongoing decision-making process by requiring the Executive Branch to disclose confidential information.

In sum, the immediate publication of the Secretary's report would serve a generalized informational interest that would seem to provide little

justification for immediate publication. We are presented with the reverse, in some sense, of the balance struck in *United States v. Nixon*, where the Supreme Court held that a "generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial." 418 U.S. at 713. Here, we similarly conclude that the generalized interest in immediate disclosure of the report does not justify infringing on the Executive Branch's strong, specific, and continuing interest in maintaining the confidentiality of the report. *See Nixon v. Adm'r*, 433 U.S. at 452. The Executive Branch may rely on the constitutional doctrine of executive privilege to decline to release the report at the statutory deadline, and the President therefore may direct the Secretary of Commerce not to disclose it at this time.

IV.

This conclusion does not mean that the Secretary of Commerce's report should remain confidential forever. Whether the Executive Branch may withhold information on privilege grounds depends upon the facts. *See United States v. Nixon*, 418 U.S. at 694, 697, 713 (highlighting that the materials at issue were sought for use in a pending criminal trial). The President may reasonably decide to withhold the report now, based upon the ongoing decision-making process and international negotiations. At the same time, section 232 contemplates disclosure in the future, and the Executive Branch has a longstanding practice of disclosing these reports upon the disposition of the relevant matters. But insofar as the deliberative process remains ongoing and disclosure would risk impairing ongoing negotiations, we believe that the President may direct the withholding of the report at this juncture, notwithstanding section 112's publication requirement.

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House Committees' Authority to Investigate for Impeachment

The House of Representatives must expressly authorize a committee to conduct an impeachment investigation and to use compulsory process in that investigation before the committee may compel the production of documents or testimony in support of the House's power of impeachment.

The House had not authorized an impeachment investigation in connection with impeachment-related subpoenas issued by House committees before October 31, 2019, and the subpoenas therefore had no compulsory effect.

The House's adoption of Resolution 660 on October 31, 2019, did not alter the legal status of those subpoenas, because the resolution did not ratify or otherwise address their terms.

January 19, 2020

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

On September 24, 2019, Speaker of the House Nancy Pelosi "announc[ed]" at a press conference that "the House of Representatives is moving forward with an official impeachment inquiry" into the President's actions and that she was "directing . . . six Committees to proceed with" several previously pending "investigations under that umbrella of impeachment inquiry."[1] Shortly thereafter, the House Committee on Foreign Affairs issued a subpoena directing the Secretary of State to produce a series of documents related to the recent conduct of diplomacy between the United States and Ukraine. *See* Subpoena of the Committee on Foreign Affairs (Sept. 27, 2019). In an accompanying letter, three committee chairmen stated that their committees jointly sought these documents, not in connection with legislative oversight, but "[p]ursuant to the House of Representatives' impeachment inquiry."[2] In the following

[1] Nancy Pelosi, Speaker of the House, *Press Release: Pelosi Remarks Announcing Impeachment Inquiry* (Sept. 24, 2019), www.congress.gov/116/meeting/house/110281/documents/HHRG-116-JU00-20191204-SD156.pdf ("Pelosi Press Release").

[2] Letter for Michael R. Pompeo, Secretary of State, from Eliot L. Engel, Chairman, Committee on Foreign Affairs, U.S. House of Representatives, Adam Schiff, Chairman, Permanent Select Committee on Intelligence, U.S. House of Representatives, and Elijah E. Cummings, Chairman, Committee on Oversight & Reform, U.S. House of Representatives at 1 (Sept. 27, 2019) ("Three Chairmen's Letter").

days, the committees issued subpoenas to the Acting White House Chief of Staff, the Secretary of Defense, the Secretary of Energy, and several others within the Executive Branch.

Upon the issuance of these subpoenas, you asked whether these committees could compel the production of documents and testimony in furtherance of an asserted impeachment inquiry. We advised that the committees lacked such authority because, at the time the subpoenas were issued, the House had not adopted any resolution authorizing the committees to conduct an impeachment inquiry. The Constitution vests the "sole Power of Impeachment" in the House of Representatives. U.S. Const. art. I, § 2, cl. 5. For precisely that reason, the House itself must authorize an impeachment inquiry, as it has done in virtually every prior impeachment investigation in our Nation's history, including every one involving a President. A congressional committee's "right to exact testimony and to call for the production of documents" is limited by the "controlling charter" the committee has received from the House. *United States v. Rumely*, 345 U.S. 41, 44 (1953). Yet the House, by its rules, has authorized its committees to issue subpoenas only for matters within their *legislative* jurisdiction. Accordingly, no committee may undertake the momentous move from legislative oversight to impeachment without a delegation by the full House of such authority.

We are not the first to reach this conclusion. This was the position of the House in the impeachments of Presidents Nixon and Clinton. In the case of President Nixon, following a preliminary inquiry, the House adopted a formal resolution as a "necessary step" to confer the "investigative powers" of the House "to their full extent" upon the Judiciary Committee. 120 Cong. Rec. 2350–51 (1974) (statement of Rep. Rodino); *see* H.R. Res. 803, 93d Cong. (1974). As the House Parliamentarian explained, it had been "considered necessary for the House to specifically vest the Committee on the Judiciary with the investigatory and subpena power to conduct the impeachment investigation." 3 Lewis Deschler, *Deschler's Precedents of the United States House of Representatives* ch. 14, § 15.2, at 2172 (1994) (Parliamentarian's Note).[3] The House followed

[3] Although volume 3 of *Deschler's Precedents* was published in 1979, our citations of *Deschler's Precedents* use the continuously paginated version that is available at www.govinfo.gov/collection/precedents-of-the-house.

the same course in the impeachment of President Clinton. After reviewing the Independent Counsel's referral, the Judiciary Committee "decided that it must receive authorization from the full House before proceeding on any further course of action." H.R. Rep. No. 105-795, at 24 (1998). The House again adopted a resolution authorizing the committee to issue compulsory process in support of an impeachment investigation. *See* H.R. Res. 581, 105th Cong. (1998). As Representative John Conyers summarized in 2016: "According to parliamentarians of the House past and present, the impeachment process does not begin until the House actually votes to authorize [a] Committee to investigate the charges."[4]

In marked contrast with these historical precedents, in the weeks after the Speaker's announcement, House committees issued subpoenas without any House vote authorizing them to exercise the House's authority under the Impeachment Clause. The three committees justified the subpoenas based upon the Rules of the House, which authorize subpoenas for matters within a committee's jurisdiction. But the Rules assign only "legislative jurisdiction[]" and "oversight responsibilities" to the committees. H.R. Rules, 116th Cong., Rule X, cl. 1 (Jan. 11, 2019) ("Committees and their legislative jurisdictions"), cl. 2 ("General oversight responsibilities"); *see also* H.R. Rule X, cls. 3(m), 11. The House's legislative power is distinct from its impeachment power. *Compare* U.S. Const. art. I, § 1, *with id.* art. I, § 2, cl. 5. Although committees had that same delegation during the Clinton impeachment and a materially similar one during the Nixon impeachment, the House determined on both occasions that the Judiciary Committee required a resolution to investigate. Speaker Pelosi purported to direct the committees to conduct an "official impeachment inquiry," but the House Rules do not give the Speaker any authority to delegate investigative power. The committees thus had no delegation authorizing them to issue subpoenas pursuant to the House's impeachment power.

In the face of objections to the validity of the committee subpoenas that were expressed by the Administration, by ranking minority members in the House, and by many Senators, among others, on October 31, 2019, the House adopted Resolution 660, which "directed" six committees "to continue their ongoing investigations" as part of the "existing House of

[4] *Impeachment Articles Referred on John Koskinen (Part III): Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 3 (2016).

Representatives inquiry into whether sufficient grounds exist" to impeach President Trump. H.R. Res. 660, 116th Cong. § 1 (2019). Resolution 660's direction, however, was entirely prospective. The resolution did not purport to ratify any previously issued subpoenas or even make any mention of them. Accordingly, the pre-October 31 subpoenas, which had not been authorized by the House, continued to lack compulsory force.[5]

I.

Since the start of the 116th Congress, some members of Congress have proposed that the House investigate and impeach President Trump. On January 3, 2019, the first day of the new Congress, Representative Brad Sherman introduced a resolution to impeach "Donald John Trump, President of the United States, for high crimes and misdemeanors." H.R. Res. 13, 116th Cong. (2019). The Sherman resolution called for impeachment based upon the President's firing of the Director of the Federal Bureau of Investigation, James Comey. *See id.* Consistent with settled practice, the resolution was referred to the Judiciary Committee. *See* H.R. Doc. No. 115-177, *Jefferson's Manual* § 605, at 324 (2019).

The Judiciary Committee did not act on the Sherman resolution, but it soon began an oversight investigation into related subjects that were also the focus of a Department of Justice investigation by Special Counsel Robert S. Mueller, III. On March 4, 2019, the committee served document requests on the White House and 80 other agencies, entities, and individuals, "unveil[ing] an investigation . . . into the alleged obstruction of justice, public corruption, and other abuses of power by President Trump, his associates, and members of his Administration."[6] Those document requests did not mention impeachment.

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[5] This opinion memorializes the advice we gave about subpoenas issued before October 31. We separately addressed some subpoenas issued after that date. *See, e.g.*, Letter for Pat A. Cipollone, Counsel to the President, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel (Nov. 7, 2019) (subpoena to Mick Mulvaney); Letter for Pat A. Cipollone, Counsel to the President, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel (Nov. 3, 2019) (subpoena to John Eisenberg); *Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context*, 43 Op. O.L.C. 286 (2019).

[6] U.S. House of Representatives Committee on the Judiciary, *Press Release: House Judiciary Committee Unveils Investigation into Threats Against the Rule of Law* (Mar. 4,

After the Special Counsel finished his investigation, the Judiciary Committee demanded his investigative files, describing its request as an exercise of legislative oversight authority. *See* Letter for William P. Barr, Attorney General, from Jerrold Nadler, Chairman, Committee on the Judiciary, U.S. House of Representatives at 3 (May 3, 2019) (asserting that "[t]he Committee has ample jurisdiction under House Rule X(*l*) to conduct oversight of the Department [of Justice], undertake necessary investigations, and consider legislation regarding the federal obstruction of justice statutes, campaign-related crimes, and special counsel investigations, among other things"). The committee's subsequent letters and public statements likewise described its inquiry as serving a "legislative purpose." *E.g.*, Letter for Pat Cipollone, White House Counsel, from Jerrold Nadler, Chairman, Committee on the Judiciary, U.S. House of Representatives at 3–6 (May 16, 2019) (describing the "legislative purpose of the Committee's investigation" (capitalization altered)).

Over time, the Judiciary Committee expanded the description of its investigation to claim that it was considering impeachment. The committee first mentioned impeachment in a May 8, 2019, report recommending that the Attorney General be held in contempt of Congress. In a section entitled "Authority and Legislative Purpose," the committee stated that one purpose of the inquiry was to determine "whether to approve articles of impeachment with respect to the President or any other Administration official." H.R. Rep. No. 116-105, at 12, 13 (2019).[7]

2019), https://democrats-judiciary.house.gov/news/documentsingle.aspx?DocumentID=1502; *see also* Letter for the White House, c/o Pat Cipollone, from Jerrold Nadler, Chairman, Committee on the Judiciary, U.S. House of Representatives (Mar. 4, 2019).

[7] On June 11, 2019, the full House adopted Resolution 430. Its first two clauses authorized the Judiciary Committee to file a lawsuit to enforce subpoenas against Attorney General William Barr and former White House Counsel Donald McGahn and purported to authorize the Bipartisan Legal Advisory Group to approve future litigation. *See* H.R. Res. 430, 116th Cong. (2019). The next clause of the resolution then stated that, "in connection with any judicial proceeding brought under the first or second resolving clauses, the chair of any standing or permanent select committee exercising authority thereunder has any and all necessary authority under Article I of the Constitution." *Id.* The resolution did not mention "impeachment" and, by its terms, authorized actions only in connection with the litigation authorized "under the first or second resolving clauses." On the same day that the House adopted Resolution 430, Speaker Pelosi stated that the House's Democratic caucus was "not even close" to an impeachment inquiry. *Rep. Nancy Pelosi (D-CA)*

The committee formally claimed to be investigating impeachment when it petitioned the U.S. District Court for the District of Columbia to release grand-jury information related to the Special Counsel's investigation. *See* Application at 1–2, *In re Application of the Comm. on the Judiciary, U.S. House of Reps.*, No. 19-gj-48 (D.D.C. July 26, 2019); *see also* Memorandum for Members of the Committee on the Judiciary from Jerrold Nadler, Chairman, *Re: Lessons from the Mueller Report, Part III: "Constitutional Processes for Addressing Presidential Misconduct"* at 3 (July 11, 2019) (advising that the Committee would seek documents and testimony "to determine whether the Committee should recommend articles of impeachment against the President or any other Article I remedies, and if so, in what form").[8] The committee advanced the same contention when asking the district court to compel testimony before the committee by former White House Counsel Donald McGahn. *See* Compl. for Declaratory and Injunctive Relief ¶1, *Comm. on the Judiciary, U.S. House of Reps. v. McGahn*, No. 19-cv-2379 (D.D.C. Aug. 7, 2019) (contending that the Judiciary Committee was "now determining whether to recommend articles of impeachment against the President based on the obstructive conduct described by the Special Counsel").

In connection with this litigation, Chairman Nadler described the committee as conducting "formal impeachment proceedings." David Priess & Margaret Taylor, *What if the House Held Impeachment Proceedings and Nobody Noticed?*, Lawfare (Aug. 12, 2019), www.lawfareblog.com/what-if-house-held-impeachment-proceedings-and-nobody-noticed (chronicling the evolution in Chairman Nadler's descriptions of the investigation). Those assertions coincided with media reports that Chairman Nadler had privately asked Speaker Pelosi to support the opening of an impeachment inquiry. *See, e.g.*, Andrew Desiderio, *Nadler: 'This is Formal Impeachment Proceedings*,' Politico (Aug. 8, 2019), www.politico.com/story/2019/08/08/nadler-this-is-formal-impeachment-proceedings-1454360

Continues Resisting Impeachment Inquiry, CNN (June 11, 2019), transcripts.cnn.com/TRANSCRIPTS/1906/11/cnr.04.html.

[8] While the House has delegated to the Bipartisan Legal Advisory Group the ability to "articulate[] the institutional position of" the House, it has done so only for purposes of "litigation matters." H.R. Rule II, cl. 8(b). Therefore, neither the group, nor the House counsel implementing that group's directions, could assert the House's authority in connection with an impeachment investigation, which is not a litigation matter.

(noting that Nadler "has privately pushed Speaker Nancy Pelosi to support a formal inquiry of whether to remove the president from office"). On September 12, the Judiciary Committee approved a resolution describing its investigation as an impeachment inquiry and adopting certain procedures for the investigation. *See* Resolution for Investigative Procedures Offered by Chairman Jerrold Nadler, H. Comm. on the Judiciary, 116th Cong. (Sept. 12, 2019), docs.house.gov/meetings/JU/JU00/20190912/109921/BILLS-116pih-ResolutionforInvestigativeProcedures.pdf.

Speaker Pelosi did not endorse the Judiciary Committee's characterization of its investigation during the summer of 2019. But she later purported to announce a formal impeachment inquiry in connection with a separate matter arising out of a complaint filed with the Inspector General of the Intelligence Community. The complaint, cast in the form of an unsigned letter to the congressional intelligence committees, alleged that, in a July 25, 2019, telephone call, the President sought to pressure Ukrainian President Volodymyr Zelenskyy to investigate the prior activities of one of the President's potential political rivals. *See* Letter for Richard Burr, Chairman, Select Committee on Intelligence, U.S. Senate, and Adam Schiff, Chairman, Permanent Select Committee on Intelligence, U.S. House of Representatives at 2–3 (Aug. 12, 2019). After the Inspector General reported the existence of the complaint to the intelligence committees, the President declassified the official record of the July 25 telephone call and the complaint, and they were publicly released on September 25 and 26, respectively.

On September 24, the day before the release of the call record, Speaker Pelosi "announc[ed]" that "the House of Representatives is moving forward with an official impeachment inquiry" and that she was "direct[ing] . . . six [c]ommittees to proceed with their investigations under that umbrella of impeachment inquiry." Pelosi Press Release, *supra* note 1. In an October 8, 2019, court hearing, the House's General Counsel invoked the Speaker's announcement as purportedly conclusive proof that the House had opened an impeachment inquiry. Tr. of Mot. Hrg. at 23, *In re Application of the Comm. on the Judiciary* ("We are in an impeachment inquiry, an impeachment investigation, a formal impeachment investigation because the House says it is. The speaker of the House has specifically said that it is.").

On September 27, Chairman Engel of the Foreign Affairs Committee issued a subpoena to Secretary of State Pompeo "[p]ursuant to the House of Representatives' impeachment inquiry." Three Chairmen's Letter, *supra* note 2, at 1. That subpoena was the first to rely on the newly proclaimed "impeachment inquiry." A number of subpoenas followed, each of which was accompanied by a letter signed by the chairmen of three committees (Foreign Affairs, Oversight and Reform, and the Permanent Select Committee on Intelligence ("HPSCI")). Although the September 27 letter mentioned only the "impeachment inquiry" as a basis for the accompanying subpoena, subsequent letters claimed that other subpoenas were issued both "[p]ursuant to the House of Representatives' impeachment inquiry" and "in exercise of" the committees' "oversight and legislative jurisdiction."[9]

Following service of these subpoenas, you and other officials within the Executive Branch requested our advice with respect to the obligations of the subpoenas' recipients. We advised that the subpoenas were invalid because, among other reasons, the committees lacked the authority to conduct the purported inquiry and, with respect to several testimonial subpoenas, the committees impermissibly sought to exclude agency counsel from scheduled depositions. In reliance upon that advice, you and other responsible officials directed employees within their respective

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[9] *E.g.*, Letter for John Michael Mulvaney, Acting Chief of Staff to the President, from Elijah E. Cummings, Chairman, Committee on Oversight & Reform, U.S. House of Representatives, Adam B. Schiff, Chairman, Permanent Select Committee on Intelligence, U.S. House of Representatives, and Eliot L. Engel, Chairman, Committee on Foreign Affairs, U.S. House of Representatives at 1 (Oct. 4, 2019); Letter for Mark T. Esper, Secretary of Defense, from Adam B. Schiff, Chairman, Permanent Select Committee on Intelligence, U.S. House of Representatives, Eliot L. Engel, Chairman, Committee on Foreign Affairs, U.S. House of Representatives, and Elijah E. Cummings, Chairman, Committee on Oversight & Reform, U.S. House of Representatives at 1 (Oct. 7, 2019); Letter for Gordon Sondland, U.S. Ambassador to the European Union, from Adam B. Schiff, Chairman, Permanent Select Committee on Intelligence, U.S. House of Representatives, Elijah E. Cummings, Chairman, Committee on Oversight & Reform, U.S. House of Representatives, and Eliot L. Engel, Chairman, Committee on Foreign Affairs, U.S. House of Representatives at 1 (Oct. 8, 2019); Letter for James Richard "Rick" Perry, Secretary of Energy, from Eliot L. Engel, Chairman, Committee on Foreign Affairs, U.S. House of Representatives, Adam B. Schiff, Chairman, Permanent Select Committee on Intelligence, U.S. House of Representatives, and Elijah E. Cummings, Chairman, Committee on Oversight & Reform, U.S. House of Representatives at 1 (Oct. 10, 2019).

departments and agencies not to provide the documents and testimony requested under those subpoenas.

On October 8, 2019, you sent a letter to Speaker Pelosi and the three chairmen advising them that their purported impeachment inquiry was "constitutionally invalid" because the House had not authorized it.[10] The House Minority Leader, Kevin McCarthy, and the Ranking Member of the Judiciary Committee, Doug Collins, had already made the same objection.[11] Senator Lindsey Graham introduced a resolution in the Senate, cosponsored by 49 other Senators, which objected to the House's impeachment process because it had not been authorized by the full House and did not provide the President with the procedural protections enjoyed in past impeachment inquiries. S. Res. 378, 116th Cong. (2019).

On October 25, 2019, the U.S. District Court for the District of Columbia granted the Judiciary Committee's request for grand-jury information from the Special Counsel's investigation, holding that the committee was conducting an impeachment inquiry that was "preliminar[y] to . . . a judicial proceeding," for purposes of the exception to grand-jury secrecy in Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure. *See In re Application of the Comm. on the Judiciary, U.S. House of Reps.*, 414 F. Supp. 3d 129 (D.D.C. 2019), *aff'd*, 951 F.3d 589 (D.C. Cir. 2020), *vacated as moot*, 142 S. Ct. 46 (2021). In so holding, the court concluded that the House need not adopt a resolution before a committee may begin an impeachment inquiry. 414 F. Supp. 3d at 167–70. As we discuss below, the district court's analysis of this point relied on a misreading of the historical record.

Faced with continuing objections from the Administration and members of Congress to the validity of the impeachment-related subpoenas, the House decided to take a formal vote to authorize the impeachment inquiry. *See* Letter for Democratic Members of the House from Nancy Pelosi, Speaker of the House (Oct. 28, 2019). On October 31, the House adopted a resolution "direct[ing]" several committees "to continue their

[10] Letter for Nancy Pelosi, Speaker, U.S. House of Representatives, et al., from Pat A. Cipollone, Counsel to the President at 2–3 (Oct. 8, 2019).

[11] *See* Letter for Nancy Pelosi, Speaker, U.S. House of Representatives, from Kevin McCarthy, Republican Leader, U.S. House of Representatives at 1 & n.1 (Oct. 3, 2019); Mem. Amicus Curiae of Ranking Member Doug Collins in Support of Denial at 5–21, *In re Application of the Comm. on the Judiciary* (D.D.C. Oct. 3, 2019).

ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America." Resolution 660, § 1. The resolution also adopted special procedures for impeachment proceedings before HPSCI and the Judiciary Committee.

II.

The Constitution vests in the House of Representatives a share of Congress's legislative power and, separately, "the sole Power of Impeachment." U.S. Const. art. I, § 1; *id.* art. I, § 2, cl. 5. Both the legislative power and the impeachment power include an implied authority to investigate, including by means of compulsory process. But those investigative powers are not interchangeable. The House has broadly delegated to committees its power to investigate for legislative purposes, but it has held impeachment authority more closely, granting authority to conduct particular impeachment investigations only as the need has arisen. The House has followed that approach from the very first impeachment inquiry through dozens more that have followed over the past 200 years, including every inquiry involving a President.

In so doing, the House has recognized the fundamental difference between a legislative oversight investigation and an impeachment investigation. The House does more than simply pick a label when it "debate[s] and decide[s] when it wishes to shift from legislating to impeaching" and to authorize a committee to take responsibility for "the grave and weighty process of impeachment." *Trump v. Mazars USA, LLP*, 940 F.3d 710, 737, 738 (D.C. Cir. 2019), *vacated and remanded*, 591 U.S. 848 (2020); *see also* 940 F.3d at 757 (Rao, J., dissenting) (recognizing that "the Constitution forces the House to take accountability for its actions when investigating the President's misconduct"). Because a legislative investigation seeks "information respecting the conditions which the legislation is intended to affect or change," *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927), "legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events," *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc). By contrast, an impeachment inquiry must evaluate

whether a civil officer did, or did not, commit treason, bribery, or another high crime or misdemeanor, U.S. Const. art. II, § 4, and it is more likely than a legislative oversight investigation to call for the reconstruction of past events.

Thus, the House has traditionally marked the shift to an impeachment inquiry by adopting a resolution that authorizes a committee to investigate through court-like procedures differing significantly from those used in routine oversight. *See, e.g.*, *Jefferson's Manual* § 606, at 324 (recognizing that, in modern practice, "the sentiment of committees has been in favor of permitting the accused to explain, present witnesses, cross-examine, and be represented by counsel" (citations omitted)); *see also* Cong. Research Serv., R45983, *Congressional Access to Information in an Impeachment Investigation* 15 (Oct. 25, 2019) ("[D]uring both the Nixon and Clinton impeachment investigations, the House Judiciary Committee adopted resolutions affording the President and his counsel the right to respond to evidence gathered by the committee, raise objections to testimony, and cross-examine witnesses[.]").[12] A House resolution authorizing the opening of an impeachment inquiry plays a highly significant role in directing the scope and nature of the constitutional inquest that follows.

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[12] The House Judiciary Committee permitted President Nixon's counsel to submit and respond to evidence, to request to call witnesses, to attend hearings and examinations, to object to the examination of witnesses and the admissibility of testimony, and to question witnesses. *See* H.R. Rep. No. 93-1305, at 8–9 (1974); 3 *Deschler's Precedents* ch. 14, § 6.5, at 2045–47. Later, President Clinton and his counsel were similarly "invited to attend all executive session and open committee hearings," at which they were permitted to "cross examine witnesses," "make objections regarding the pertinency of evidence," "suggest that the Committee receive additional evidence," and "respond to the evidence adduced by the Committee." H.R. Rep. No. 105-795, at 25–26; *see also* 18 *Deschler's Precedents* app. at 549 (2013) (noting that, during the Clinton impeachment investigation, the House made a "deliberate attempt to mirror [the] documented precedents and proceedings" of the Nixon investigation). In a departure from the Nixon and Clinton precedents, the House committees did not provide President Trump with any right to attend, participate in, or cross-examine witnesses in connection with the impeachment-related depositions conducted by the three committees before October 31. Resolution 660 similarly did not provide any such rights with respect to any of the public hearings conducted by HPSCI, limiting the President's opportunity to participate to the Judiciary Committee, which did not itself participate in developing the investigative record upon which the articles of impeachment were premised. *See* H.R. Res. 660, 116th Cong. § 4(a); 165 Cong. Rec. E1357 (daily ed. Oct. 29, 2019) ("Impeachment Inquiry Procedures in the Committee on the Judiciary").

Such a resolution does not just reflect traditional practice. It is a constitutionally required step before a committee may exercise compulsory process in aid of the House's "sole Power of Impeachment." U.S. Const. art. I, § 2, cl. 5. In this Part, we explain the basis for this conclusion. First, we address the constitutional distinction between the House's power to investigate for legislative purposes and for impeachment purposes. We next explain why an impeachment inquiry must be authorized by the House itself. Finally, we review the historical record, which confirms, across dozens of examples, that the House must specifically authorize committees to conduct impeachment investigations and to issue compulsory process.

A.

The Constitution vests several different powers in the House of Representatives. As one half of Congress, the House shares with the Senate the "legislative Powers" granted in the Constitution (U.S. Const. art. I, § 1), which include the ability to pass bills (*id*. art. I, § 7, cl. 2) and to override presidential vetoes (*id*. art. I, § 7, cl. 3) in the process of enacting laws pursuant to Congress's enumerated legislative powers (*e.g.*, *id.* art. I, § 8), including the power to appropriate federal funds (*id*. art. I, § 9, cl. 7). But the House has other, non-legislative powers. It is, for instance, "the Judge of the Elections, Returns and Qualifications of its own Members." *Id.* art. I, § 5, cl. 1. And it has "the sole Power of Impeachment." *Id.* art. I, § 2, cl. 5.

The House and Senate do not act in a legislative role in connection with impeachment. The Constitution vests the House with the authority to accuse civil officers of "Treason, Bribery, or other high Crimes and Misdemeanors" that warrant removal and disqualification from office. U.S. Const. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 7; *id.* art. II, § 4. As Alexander Hamilton explained, the members of the House act as "the inquisitors for the nation." *The Federalist* No. 65, at 440 (Jacob E. Cooke ed., 1961). And Senators, in turn, act "in their judicial character as a court for the trial of impeachments." *Id.* at 439; *see also The Federalist* No. 66, at 445–46 (defending the "partial intermixture" in the impeachment context of usually separated powers as "not only proper, but necessary to the mutual defense of the several members of the government, against each other"; noting that dividing "the right of accusing" from "the right of judging"

between "the two branches of the legislature . . . avoids the inconvenience of making the same persons both accusers and judges"). The House's impeachment authority differs fundamentally in character from its legislative power.

With respect to both its legislative and its impeachment powers, the House has corresponding powers of investigation, which enable it to collect the information necessary for the exercise of those powers. The Supreme Court has explained that "[t]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain*, 273 U.S. at 174. Thus, in the legislative context, the House's investigative power "encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes." *Watkins v. United States*, 354 U.S. 178, 187 (1957); *see also Scope of Congressional Oversight and Investigative Power with Respect to the Executive Branch*, 9 Op. O.L.C. 60, 60 (1985) ("Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws."). The Court has further recognized that the House also has implied powers to investigate in support of its other powers, including its power of impeachment. *See, e.g.*, *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880); *see also In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1445 (11th Cir. 1987) (the House "holds investigative powers that are ancillary to its impeachment power"); *Mazars USA*, 940 F.3d at 749 (Rao, J., dissenting) ("The House . . . has a separate power to investigate pursuant to impeachment[.]").

Because the House has different investigative powers, establishing which authority has been delegated has often been necessary in the course of determining the scope of a committee's authority to compel witnesses and testimony. In addressing the scope of the House's investigative powers, all three branches of the federal government have recognized the constitutional distinction between a legislative investigation and an impeachment inquiry.

1.

We begin with the federal courts. In *Kilbourn*, the Supreme Court held that a House committee could not investigate a bankrupt company indebted to the United States because its request exceeded the scope of the

legislative power. According to the Court, the committee had employed investigative power to promote the United States' interests as a creditor, rather than for any valid legislative purpose. *See* 103 U.S. at 192–95. At the same time, the Court conceded that "the whole aspect of the case would have been changed" if "any purpose had been avowed to impeach the [S]ecretary" of the Navy for mishandling the debts of the United States. *Id.* at 193. But, after reviewing the resolution authorizing the actions of the committee, the Court confirmed that the House had not authorized any impeachment inquiry. *Id.*

In a similar vein, the D.C. Circuit distinguished the needs of the House Judiciary Committee, which was conducting an impeachment inquiry into the actions of President Nixon, from those of the Senate Select Committee on Presidential Campaign Activities, whose investigation was premised upon legislative oversight. *See Senate Select Comm.*, 498 F.2d at 732. The court recognized that the impeachment investigation was rooted in "an express constitutional source" and that the House committee's investigative needs differed in kind from the Senate committee's oversight needs. *Id.* In finding that the Senate committee had not demonstrated that President Nixon's audiotapes were "critical to the performance of its legislative functions," the court recognized "a clear difference between Congress's *legislative* tasks and the responsibility of a grand jury, *or any institution engaged in like functions*," such as the House Judiciary Committee, which had "begun an inquiry into presidential impeachment." *Id.* (emphases added).

More recently, the D.C. Circuit acknowledged this same distinction in *Mazars USA*. As the majority opinion explained, "the Constitution has left to Congress the judgment whether to commence the impeachment process" and to decide whether the conduct in question is "better addressed through oversight and legislation than impeachment." 940 F.3d at 739. Judge Rao's dissent also recognized the distinction between a legislative oversight investigation and an impeachment inquiry. *See id.* at 757 ("The Framers established a mechanism for Congress to hold even the highest officials accountable, but also required the House to take responsibility for invoking this power."). Judge Rao disagreed with the majority insofar as she understood Congress's impeachment power to be the sole means for investigating past misconduct by impeachable officers. But both the majority and the dissent agreed with the fundamental proposition that the

Constitution distinguishes between investigations pursuant to the House's impeachment authority and those that serve its legislative authority (including oversight).

2.

The Executive Branch similarly has long distinguished between investigations for legislative and for impeachment purposes. In 1796, the House "[r]esolved" that President Washington "be requested to lay before th[e] House a copy of the instructions" given to John Jay in preparation for his negotiation of a peace settlement with Great Britain. 5 Annals of Cong. 759–62 (1796). Washington refused to comply because the Constitution contemplates that only the Senate, not the House, must consent to a treaty. *See id.* at 760–61. "It d[id] not occur" to Washington "that the inspection of the papers asked for, c[ould] be relative to any purpose under the cognizance of the House of Representatives, *except that of an impeachment*." *Id.* at 760 (emphasis added). Because the House's "resolution ha[d] not expressed" any purpose of pursuing impeachment, Washington concluded that "a just regard to the constitution . . . forb[ade] a compliance with [the House's] request" for documents. *Id.* at 760, 762.

In 1832, President Jackson drew the same line. A select committee of the House had requested that the Secretary of War "furnish[]" it "with a copy" of an unratified 1830 treaty with the Chickasaw Tribe and "the journal of the commissioners" who negotiated it. H.R. Rep. No. 22-488, at 1 (1832). The Secretary conferred with Jackson, who refused to comply with the committee's request on the same ground cited by President Washington: he "d[id] not perceive that a copy of any part of the incomplete and unratified treaty of 1830, c[ould] be 'relative to any purpose under the cognizance of the House of Representatives, except that of an impeachment, which the resolution has not expressed.'" *Id.* at 14 (reprinting Letter for Charles A. Wickliffe, Chairman, Committee on Public Lands, U.S. House of Representatives, from Lewis Cass, Secretary of War (Mar. 2, 1832)).

In 1846, another House select committee requested that President Polk account for diplomatic expenditures made in previous administrations by Secretary of State Daniel Webster. Polk refused to disclose information but "cheerfully admitted" that the House may have been entitled to such

information if it had "institute[d] an [impeachment] inquiry into the matter." Cong. Globe, 29th Cong., 1st Sess. 698 (1846).[13] Notably, he took this position even though some members of Congress had suggested that evidence about the expenditures could support an impeachment of Webster.[14] In these and other instances, the Executive Branch has consistently drawn a distinction between the power of legislative oversight and the power of impeachment. *See Mazars USA*, 940 F.3d at 761–64 (Rao, J., dissenting) (discussing examples from the Buchanan, Grant, Cleveland, Theodore Roosevelt, and Coolidge Administrations).

3.

House members, too, have consistently recognized the difference between a legislative oversight investigation and an impeachment investigation. *See* 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, such as the authority . . . to . . . conduct

[13] In denying the congressional request before him, President Polk suggested, in the equivalent of dictum, that, during an impeachment inquiry, "all the archives and papers of the Executive departments, public or private, would be subject to the inspection and control of a committee of their body." Cong. Globe, 29th Cong., 1st Sess. 698 (1846). That statement, however, dramatically understates the degree to which executive privilege remains available during an impeachment investigation to protect confidentiality interests necessary to preserve the essential functions of the Executive Branch. *See Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context*, 43 Op. O.L.C. at 288 & n.1. In a prior opinion, this Office viewed Polk as acknowledging the continued availability of executive privilege, because we read Polk's preceding sentence as "indicat[ing]" that, even in the impeachment context, "the Executive branch 'would adopt all wise precautions to prevent the exposure of all such matters the publication of which might injuriously affect the public interest, except so far as this might be necessary to accomplish the great ends of public justice.'" Memorandum for Elliot Richardson, Attorney General, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Immunity from Coercive Congressional Demands for Information* at 22–23 (July 24, 1973) (quoting Polk's letter).

[14] *See, e.g.*, Cong. Globe, 29th Cong., 1st Sess. 636 (1846) (statement of Rep. Ingersoll) ("Whether . . . [Webster's] offences will be deemed impeachable misdemeanors in office, conviction for which might remove him from the Senate, and disqualify him to hold any office of honor, trust, or profit, under the United States, will remain to be considered."); Todd Garvey, *The Webster and Ingersoll Investigations*, *in* Morton Rosenberg, The Constitution Project, *When Congress Comes Calling* 289 (2017).

impeachment proceedings." (emphases added)); Cong. Research Serv., *Congressional Access to Information in an Impeachment Investigation* at 1 (distinguishing between "*legislative* investigation[s]" and "[m]uch more rare[]" "*impeachment* investigation[s]").

For instance, in 1793, when debating the House's jurisdiction to investigate Secretary of the Treasury Alexander Hamilton, some members argued that the House could not adopt a resolution of investigation into Hamilton's conduct without adopting the "solemnities and guards" of an impeachment inquiry. *See, e.g.*, 3 Annals of Cong. 903 (1793) (statement of Rep. Smith); *id.* at 947–48 (statement of Rep. Boudinot) (distinguishing between the House's "Legislative capacity" and its role as "the grand inquest of the Nation"); *see also Mazars USA*, 940 F.3d at 758 (Rao, J., dissenting) (discussing the episode). In 1796, when the House debated whether to request the President's instructions for negotiating the Jay Treaty, Representative Murray concluded that the House could not meddle in treatymaking, but acknowledged that "the subject would be presented under an aspect very different" if the resolution's supporters had "stated the object for which they called for the papers to be an impeachment." 5 Annals of Cong. 429–30 (1796).

Similarly, in 1846, a House select committee agreed with President Polk's decision not to turn over requested information regarding State Department expenditures where the House did not act "with a view to an impeachment." H.R. Rep. No. 29-684, at 4 (1846) (noting that four of the committee's five members "entirely concur with the President of the United States" in deciding not to "communicate or make [the requested documents] public, except with a view to an impeachment" and that "[n]o dissent from the views of that message was expressed by the House"); *see also Mazars USA*, 940 F.3d at 761 (Rao, J., dissenting). To take another example, in 1879, the House Judiciary Committee distinguished "[i]nvestigations looking to the impeachment of public officers" from "an ordinary investigation for legislative purposes." H.R. Rep. No. 45-141, at 2 (1879).

Most significantly, during the impeachments of Presidents Nixon and Clinton, the House Judiciary Committee determined that the House must provide express authorization before any committee may exercise compulsory powers in an impeachment investigation. *See infra* Part II.C.1. Thus, members of the House, like the other branches of government, have

squarely recognized the distinction between congressional investigations for impeachment purposes and those for legislative purposes.

B.

Although the House of Representatives has "the *sole* Power of Impeachment," U.S. Const. art. I, § 2, cl. 5 (emphasis added), the associated power to conduct an investigation for impeachment purposes may, like the House's other investigative powers, be delegated. The full House may make such a delegation by adopting a resolution in exercise of its authority to determine the rules for its proceedings, *see id.* art. I, § 5, cl. 2, and each House has broad discretion in determining the conduct of its own proceedings. *See, e.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 551–52 (2014); *United States v. Ballin*, 144 U.S. 1, 5 (1892); *see also* 1 *Deschler's Precedents* ch. 5, § 4, at 305–06. But the House must actually exercise its discretion by making that judgment in the first instance, and its resolution sets the terms of a committee's authority. *See Rumely*, 345 U.S. at 44. No committee may exercise the House's investigative powers in the absence of such a delegation.

As the Supreme Court has explained in the context of legislative oversight, "[t]he theory of a committee inquiry is that the committee members are serving as the representatives of the parent assembly in collecting information for a legislative purpose" and, in such circumstances, committees "are endowed with the full power of the Congress to compel testimony." *Watkins*, 354 U.S. at 200–01. The same is true for impeachment investigations.[15] Thus, Hamilton recognized, the impeachment

[15] When the House first considered impeachment in 1796, Attorney General Charles Lee advised that, "before an impeachment is sent to the Senate, witnesses must be examined, in solemn form, respecting the charges, before a committee of the House of Representatives, to be appointed for that purpose." Letter for the House of Representatives from Charles Lee, Attorney General, *Re: Inquiry into the Official Conduct of a Judge of the Supreme Court of the Northwestern Territory* (May 9, 1796), *reprinted in* 1 Am. State Papers: Misc. 151 (Walter Lowrie & Walter S. Franklin eds., 1834). Because the charges of misconduct concerned the actions of George Turner, a territorial judge, and the witnesses were located in faraway St. Clair County (modern-day Illinois), Lee suggested that the "most solemn" mode of prosecution, an impeachment trial before the Senate, would be "very inconvenient, if not entirely impracticable." *Id.* Lee informed the House that President Washington had directed the territorial governor to arrange for a criminal prosecution before the territorial court. *See id.* The House committee considering the

power involves a trust of such "delicacy and magnitude" that it "deeply concerns the political reputation and existence of every man engaged in the administration of public affairs." *The Federalist* No. 65, at 440. The Founders foresaw that an impeachment effort would "[i]n many cases . . . connect itself with the pre-existing factions" and "inlist all their animosities, partialities, influence and interest on one side, or on the other." *Id.* at 439. As a result, they placed the solemn authority to initiate an impeachment in "the representatives of the nation themselves." *Id.* at 440. In order to entrust one of its committees to investigate for purposes of impeachment, the full House must "spell out that group's jurisdiction and purpose." *Watkins*, 354 U.S. at 201. Otherwise, a House committee controlled by such a faction could launch open-ended and untethered investigations without the sanction of a majority of the House.

Because a committee may exercise the House's investigative powers only when authorized, the committee's actions must be within the scope of a resolution delegating authority from the House to the committee. As the D.C. Circuit recently explained, "it matters not whether the Constitution would give Congress authority to issue a subpoena if Congress has given the issuing committee no such authority." *Mazars USA*, 940 F.3d at 722; *see* Dolan, *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."). In evaluating a committee's authority, the House's resolution "is the controlling charter of the committee's powers," and, therefore, the committee's "right to exact testimony and to call for the production of documents must be found in this language." *Rumely*, 345 U.S. at 44; *see also Watkins*, 354 U.S. at 201 ("Those instructions are embodied in the authorizing resolution. That document is the committee's charter."); *id.* at 206 ("Plainly [the House's] committees are restricted to the missions delegated to them . . . . No witness can be compelled to make disclosures on matters outside that area."); *Exxon Corp. v. FTC*, 589 F.2d 582, 592 (D.C. Cir. 1978) ("To issue a valid subpoena, . . . a committee or

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petition about Turner agreed with Lee's suggestion and recommended that the House take no further action. *See Inquiry into the Official Conduct of a Judge of the Supreme Court of the Northwestern Territory* (Feb. 27, 1797), *reprinted in* 1 Am. State Papers: Misc. at 157.

subcommittee must conform strictly to the resolution establishing its investigatory powers[.]"); *United States v. Lamont*, 18 F.R.D. 27, 32 (S.D.N.Y. 1955) (Weinfeld, J.) ("No committee of either the House or Senate, and no Senator and no Representative, is free on its or his own to conduct investigations unless authorized. Thus it must appear that Congress empowered the Committee to act, and further that at the time the witness allegedly defied its authority the Committee was acting within the power granted to it."). While a committee may study some matters without exercising the investigative powers of the House, a committee's authority to compel the production of documents and testimony depends entirely upon the jurisdiction provided by the terms of the House's delegation.

In *Watkins*, the Supreme Court relied upon those principles to set aside a conviction for contempt of Congress because of the authorizing resolution's vagueness. The uncertain scope of the House's delegation impermissibly created "a wide gulf between the responsibility for the use of investigative power and the actual exercise of that power." 354 U.S. at 205. If the House wished to authorize the exercise of its investigative power, then it needed to take responsibility for the use of that power, because a congressional subpoena, issued with the threat of a criminal contempt citation, necessarily placed "constitutional liberties" in "danger." *Id.*

The concerns expressed by the Court in *Watkins* apply with equal, if not greater, force when considering the authority of a House committee to compel the production of documents in connection with investigating impeachment. As John Labovitz, a House impeachment attorney during the Nixon investigation, explained: "[I]mpeachment investigations, because they involve extraordinary power and (at least where the president is being investigated) may have extraordinary consequences, are not to be undertaken in the same manner as run-of-the-mill legislative investigations. The initiation of a presidential impeachment inquiry should itself require a deliberate decision by the House." John R. Labovitz, *Presidential Impeachment* 184 (1978). Because a committee possesses only the authorities that have been delegated to it, a committee may not use compulsory process to investigate impeachment without the formal authorization of the House.

C.

Historical practice confirms that the House must authorize an impeachment inquiry. *See, e.g.*, *Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015) (recognizing that "[i]n separation-of-powers cases," the Court has placed "significant weight" on "accepted understandings and practice"); *Noel Canning*, 573 U.S. at 514 (same). The House has expressly authorized every impeachment investigation of a President, including by identifying the investigative committee and authorizing the use of compulsory process. The same thing has been true for nearly all impeachment investigations of other executive officials and judges. While committees have sometimes studied a proposed impeachment resolution or reviewed available information without conducting a formal investigation, in nearly every case in which the committee resorted to compulsory process, the House expressly authorized the impeachment investigation. That practice was foreseen as early as 1796. When Washington asked his Cabinet for opinions about how to respond to the House's request for the papers associated with the Jay Treaty, the Secretary of the Treasury, Oliver Wolcott Jr., explained that "the House of Representatives has no right to demand papers" outside its legislative function "[e]xcept when an Impeachment is proposed *& a formal enquiry instituted*." Letter for George Washington from Oliver Wolcott Jr. (Mar. 26, 1796), *reprinted in* 19 *The Papers of George Washington: Presidential Series* 611–12 (David R. Hoth ed., 2016) (emphasis added).

From the very first impeachment, the House has recognized that a committee would require a delegation to conduct an impeachment inquiry. In 1797, when House members considered whether a letter contained evidence of criminal misconduct by Senator William Blount, they sought to confirm Blount's handwriting but concluded that the Committee of the Whole did not have the power of taking evidence. *See* 7 Annals of Cong. 456–58 (1797); 3 Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* § 2294, at 644–45 (1907). Thus, the committee "rose," and the House itself took testimony. 3 *Hinds' Precedents* § 2294, at 646. Two days later, the House appointed a select committee to "prepare and report articles of impeachment" and vested in that committee the "power to send for persons, papers, and records." 7 Annals

of Cong. at 463–64, 466; 3 *Hinds' Precedents* § 2297, at 648.[16] As we discuss in this section, we have identified dozens of other instances where the House, in addition to referring proposed articles of impeachment, authorized formal impeachment investigations.

Against this weighty historical record, which involves nearly 100 authorized impeachment investigations, the outliers are few and far between.[17] In 1879, it appears that a House committee, which was expressly authorized to conduct an oversight investigation into the administration of the U.S. consulate in Shanghai, ultimately investigated and recommended that the former consul-general and former vice consul-general be impeached. In addition, between 1986 and 1989, the Judiciary Committee considered the impeachment of three federal judges who had been criminally prosecuted (two of whom had been convicted). The Judiciary Committee pursued impeachment before there had been any House vote, and issued subpoenas in two of those inquiries. Since then, however, the Judiciary Committee reaffirmed during the impeachment of President Clinton that, in order to conduct an impeachment investigation, it needed an express delegation of investigative authority from the House. And in all subsequent cases the House has hewed to the well-established practice of authorizing each impeachment investigation.

The U.S. District Court for the District of Columbia recently reviewed a handful of historical examples and concluded that House committees may conduct impeachment investigations without a vote of the full House. *See In re Application of the Comm. on the Judiciary*, 414 F. Supp. 3d at 167–70. Yet, as the discussion below confirms, the district court misread the lessons of history.[18] The district court treated the House Judiciary

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[16] After the House impeached Senator Blount, the Senate voted to dismiss the charges on the ground that a Senator is not a civil officer subject to impeachment. *See* 3 *Hinds' Precedents* § 2318, at 678–80.

[17] A 2007 overview concluded that "[t]here have been approximately 94 identifiable impeachment-related inquiries conducted by Congress[.]" H.R. Doc. No. 109-153, at 115 (2007). Since 2007, two more judges have been impeached following authorized investigations.

[18] The district court's erroneous conclusions rested upon the arguments offered by the House Judiciary Committee, which relied principally upon the judicial outliers from the 1980s, a misunderstanding of the Nixon impeachment inquiry, and a misreading of the committee's subpoena power under the House Rules. *See* Application at 33–34, *In re Application of the Comm. on the Judiciary* (D.D.C. July 26, 2019); Reply of the Commit-

Committee's preliminary inquiries in the Clinton and Nixon impeachments as investigations, without recognizing that, in both cases, the committee determined that a full House vote was necessary before it could issue subpoenas. The district court also treated the 1980s judicial inquiries as if they represented a rule of practice, rather than a marked deviation from the dozens of occasions where the House recognized the need to adopt a formal resolution to delegate its investigative authority. As our survey below confirms, the historical practice with respect to Presidents, other executive officers, and judges is consistent with the structure of our Constitution, which requires the House, as the "sole" holder of impeachment power, to authorize any impeachment investigation that a committee may conduct on its behalf.

1.

While many Presidents have been the subject of less formal demands for impeachment, at least eleven have faced resolutions introduced in the House for the purpose of initiating impeachment proceedings.[19] In some cases, the House formally voted to reject opening a presidential impeachment investigation. In 1843, the House rejected a resolution calling for an investigation into the impeachment of President Tyler. *See* Cong. Globe,

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tee on the Judiciary, U.S. House of Representatives, in Support of Its Application for an Order Authorizing the Release of Certain Grand Jury Materials, at 16 n.19, *In re Application of the Comm. on the Judiciary* (D.D.C. Sept. 30, 2019). HPSCI and the Judiciary Committee later reiterated these arguments in their reports, each contending that Executive Branch officials had "obstructed" the House's impeachment inquiry by declining to comply with the pre-October 31 impeachment-related subpoenas. H.R. Rep. No. 116-335, at 168–72, 175–77 (2019); H.R. Rep. No. 116-346, at 10, 13–16 (2019). But those reports asserted that the pre-October 31 subpoenas were authorized because the committees misunderstood the historical practice concerning the House's impeachment inquiries (as we discuss in Part II.C) and they misread the committees' subpoena authority under the House Rules (as we discuss in Part III.A).

[19] *See, e.g.*, Cong. Globe, 27th Cong., 3d Sess. 144, 146 (1843) (John Tyler); Cong. Globe, 39th Cong., 2d Sess. 320 (1867) (Andrew Johnson); 28 Cong. Rec. 5627, 5650 (1896) (Grover Cleveland); 76 Cong. Rec. 399–402 (1932) (Herbert Hoover); H.R. Res. 607, 82d Cong. (1952) (Harry Truman); H.R. Res. 625, 93d Cong. (1973) (Richard Nixon); H.R. Res. 370, 98th Cong. (1983) (Ronald Reagan); H.R. Res. 34, 102d Cong. (1991) (George H.W. Bush); H.R. Res. 525, 105th Cong. (1998) (Bill Clinton); H.R. Res. 1258, 110th Cong. (2008) (George W. Bush); H.R. Res. 13, 106th Cong. (2019) (Donald Trump).

27th Cong., 3d Sess. 144–46 (1843). In 1932, the House voted by a wide margin to table a similar resolution introduced against President Hoover. *See* 76 Cong. Rec. 399–402 (1932). In many other cases, the House simply referred impeachment resolutions to the Judiciary Committee, which took no further action before the end of the Congress. But, in three instances before President Trump, the House moved forward with investigating the impeachment of a President.[20] Each of those presidential impeachments advanced to the investigative stage only after the House adopted a resolution expressly authorizing a committee to conduct the investigation. In no case did the committee use compulsory process until the House had expressly authorized the impeachment investigation.

The impeachment investigation of President Andrew Johnson. On January 7, 1867, the House adopted a resolution authorizing the "Committee on the Judiciary" to "inquire into the official conduct of Andrew Johnson . . . and to report to this House whether, in their opinion," the President "has been guilty of any act, or has conspired with others to do acts, which, in contemplation of the Constitution, are high crimes or misdemeanors." Cong. Globe, 39th Cong., 2d Sess. 320–21 (1867); *see also* 3 *Hinds' Precedents* § 2400, at 824. The resolution conferred upon the committee the "power to send for persons and papers and to adminis-

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[20] In 1860, the House authorized an investigation into the actions of President Buchanan, but that investigation was not styled as an impeachment investigation. *See* Cong. Globe, 36th Cong., 1st Sess. 997–98 (1860) (resolution establishing a committee of five members to "investigat[e] whether the President of the United States, or any other officer of the government, ha[d], by money, patronage, or other improper means, sought to influence the action of Congress" or "by combination or otherwise, . . . attempted to prevent or defeat, the execution of any law"). It appears to have been understood by the committee as an oversight investigation. *See* H.R. Rep. No. 36-648, at 1–28 (1860). Buchanan in fact objected to the House's use of its legislative jurisdiction to circumvent the protections traditionally provided in connection with impeachment. *See* Message for the U.S. House of Representatives from James Buchanan (June 22, 1860), *reprinted in* 5 *A Compilation of the Messages and Papers of the Presidents* 625 (James D. Richardson ed., 1897) (objecting that if the House suspects presidential misconduct, it should "transfer the question from [its] legislative to [its] accusatory jurisdiction, and take care that in all the preliminary judicial proceedings preparatory to the vote of articles of impeachment the accused should enjoy the benefit of cross-examining the witnesses and all the other safeguards with which the Constitution surrounds every American citizen"); *see also Mazars USA*, 940 F.3d at 762 (Rao, J., dissenting) (discussing the episode).

ter the customary oath to witnesses." Cong. Globe, 39th Cong., 2d Sess. 320 (1867). The House referred a second resolution to the Judiciary Committee on February 4, 1867. *Id.* at 991; 3 *Hinds' Precedents* § 2400, at 824.[21] Shortly before that Congress expired, the committee reported that it had seen "sufficient testimony . . . to justify and demand a further prosecution of the investigation." H.R. Rep. No. 39-31, at 2 (1867). On March 7, 1867, the House in the new Congress adopted a resolution that authorized the committee "to continue the investigation authorized" in the January 7 resolution and to "send for persons and papers" and administer oaths. Cong. Globe, 40th Cong., 1st Sess. 18, 25 (1867); 3 *Hinds' Precedents* § 2401, at 825–26. The committee recommended articles of impeachment, but the House rejected those articles on December 7, 1867. *See* Cong. Globe, 40th Cong., 2d Sess. 67–68 (1867). In early 1868, however, the House adopted resolutions authorizing another investigation, with compulsory powers, by the Committee on Reconstruction and transferred to that committee the evidence from the Judiciary Committee's earlier investigation. *See* Cong. Globe, 40th Cong., 2d Sess. 784–85, 1087 (1868); 3 *Hinds' Precedents* § 2408, at 845.

On February 21, 1868, the impeachment effort received new impetus when Johnson removed the Secretary of War without the Senate's approval, contrary to the terms of the Tenure of Office Act, which Johnson (correctly) held to be an unconstitutional limit on his authority. *See* Cong. Globe, 40th Cong., 2d Sess. 1326–27 (1868); 3 *Hinds' Precedents* § 2408–09, at 845–47; *see also Myers v. United States*, 272 U.S. 52, 176 (1926) (finding that provision of the Tenure of Office Act "was invalid"). That day, the Committee on Reconstruction reported an impeachment resolution to the House, which was debated on February 22 and passed on

[21] The district court's recent decision in *In re Application of the Committee on the Judiciary* misreads *Hinds' Precedents* to suggest that the House Judiciary Committee (which the court called "HJC") began investigating President Johnson's impeachment without any authorizing resolution. According to the district court, "a resolution 'authoriz[ing]' HJC 'to inquire into the official conduct of Andrew Johnson' was passed *after* HJC 'was already considering the subject.'" 414 F. Supp. 3d at 168 (quoting 3 *Hinds' Precedents* § 2400, at 824). In fact, the committee was "already considering the subject" at the time of the February 4 resolution described in the quoted sentence because, as explained in the text above, the House had previously adopted a separate resolution authorizing an impeachment investigation. *See* Cong. Globe, 39th Cong., 2d Sess. 320–21 (1867); 3 *Hinds' Precedents* § 2400, at 824.

February 24. Cong. Globe, 40th Cong., 2d Sess. 1400 (1868); 3 *Hinds' Precedents* §§ 2409–12, at 846–51.

The impeachment investigation of President Nixon. Although many resolutions were introduced in support of President Nixon's impeachment earlier in 1973, the House's formal impeachment inquiry arose in the months following the "Saturday Night Massacre," during which President Nixon caused the termination of Special Prosecutor Archibald Cox at the cost of the resignations of his Attorney General and Deputy Attorney General. *See* Letter Directing the Acting Attorney General to Discharge the Director of the Office of Watergate Special Prosecution Force (Oct. 20, 1973), *Pub. Papers of Pres. Richard Nixon* 891 (1973). Immediately thereafter, House members introduced resolutions calling either for the President's impeachment or for the opening of an investigation.[22] The Speaker of the House referred the resolutions calling for an investigation to the Rules Committee and those calling for impeachment to the Judiciary Committee. *See* Office of Legal Counsel, U.S. Dep't of Justice, *Legal Aspects of Impeachment: An Overview* at 40 (Feb. 1974) ("*Legal Aspects of Impeachment*"); 3 *Deschler's Precedents* ch. 14, § 5, at 2020.

Following the referrals, the Judiciary Committee "beg[a]n an inquiry into whether President Nixon ha[d] committed any offenses that could lead to impeachment," an exercise that the committee considered "preliminary." Richard L. Madden, *Democrats Agree on House Inquiry into Nixon's Acts*, N.Y. Times, Oct. 23, 1973, at 1. The committee started collecting publicly available materials, and Chairman Peter Rodino Jr. stated that he would "set up a separate committee staff to 'collate' investigative files from Senate and House committees that have examined a variety of charges against the Nixon Administration." James M. Naughton, *Rodino Vows Fair Impeachment Inquiry*, N.Y. Times, Oct. 30, 1973, at 32.

Although the committee "adopted a resolution permitting Mr. Rodino to issue subpoenas without the consent of the full committee," James M. Naughton, *House Panel Starts Inquiry on Impeachment Question,* N.Y. Times, Oct. 31, 1973, at 1, no subpoenas were ever issued under that purported authority. Instead, the committee "delayed acting" on the im-

[22] *See, e.g.*, H.R. Res. 625, 631, 635, and 638, 93d Cong. (1973) (impeachment); H.R. Res. 626, 627, 628, 636, and 637, 93d Cong. (1973) (Judiciary Committee or subcommittee investigation).

peachment resolutions. James M. Naughton, *House Unit Looks to Impeachment*, N.Y. Times, Dec. 2, 1973, at 54. By late December, the committee had hired a specialized impeachment staff. *A Hard-Working Legal Adviser: John Michael Doar*, N.Y. Times, Dec. 21, 1973, at 20. The staff continued "'wading through the mass of material already made public,'" and the committee's members began considering "the areas in which the inquiry should go." Bill Kovach, *Vote on Subpoena Could Test House on Impeachment*, N.Y. Times, Jan. 8, 1974, at 14; *see also* Staff of the H. Comm. on the Judiciary, 93d Cong., Rep. on Work of the Impeachment Inquiry Staff as of February 5, 1974, at 2–3 (1974) (noting that the staff was "first collecting and sifting the evidence available in the public domain," then "marshaling and digesting the evidence available through various governmental investigations"). By January 1974, the committee's actions had consisted of digesting publicly available documents and prior impeachment precedents. That was consistent with the committee's "only mandate," which was to "study more than a dozen impeachment resolutions submitted" in 1973. James M. Naughton, *Impeachment Panel Seeks House Mandate for Inquiry*, N.Y. Times, Jan. 25, 1974, at 1.

In January, the committee determined that a formal investigation was necessary, and it requested "an official House mandate to conduct the inquiry," relying upon the "precedent in each of the earlier [impeachment] inquiries." *Id.* at 17. On January 7, Chairman Rodino "announced that the Committee's subpoena power does not extend to impeachment and that . . . the Committee would seek express authorization to subpoena persons and documents with regard to the impeachment inquiry." *Legal Aspects of Impeachment* at 43; *see also* Richard L. Lyons, *GOP Picks Jenner as Counsel*, Wash. Post, Jan. 8, 1974, at A1, A6 ("Rodino said the committee will ask the House when it reconvenes Jan. 21 to give it power to subpoena persons and documents for the inquiry. The committee's subpoena power does not now extend to impeachment proceedings, he said."). As the House Parliamentarian later explained, the Judiciary Committee's general authority to conduct investigations and issue subpoenas "did not specifically include impeachments within the jurisdiction of the Committee on the Judiciary," and it was therefore "considered necessary for the House to specifically vest the Committee on the Judiciary with the investigatory and subpena power to conduct the impeachment investigation." 3 *Deschler's Precedents* ch. 14, § 15.2, at 2172 (Parliamentarian's Note).

On February 6, 1974, the House approved Resolution 803, which "authorized and directed" the Judiciary Committee "to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America." H.R. Res. 803, 93d Cong. § 1. The resolution specifically authorized the committee "to require . . . by subpena or otherwise . . . the attendance and testimony of any person" and "the production of such things" as the committee "deem[ed] necessary" to its investigation. *Id.* § 2(a).

Speaking on the House floor, Chairman Rodino described the resolution as a "necessary step" to confer the House's investigative powers on the Judiciary Committee:

> We have reached the point when it is important that the House explicitly confirm our responsibility under the Constitution.
>
> We are asking the House of Representatives, by this resolution, to authorize and direct the Committee on the Judiciary to investigate the conduct of the President of the United States . . . .
>
> As part of that resolution, we are asking the House to give the Judiciary Committee the power of subpena in its investigations.
>
> *Such a resolution has always been passed by the House. . . . It is a necessary step if we are to meet our obligations.*
>
> . . . .
>
> . . . The sole power of impeachment carries with it the power to conduct a full and complete investigation of whether sufficient grounds for impeachment exist or do not exist, and *by this resolution these investigative powers are conferred to their full extent upon the Committee on the Judiciary*.

120 Cong. Rec. 2350–51 (1974) (emphases added). During the debate, others recognized that the resolution would delegate the House's investigative powers to the Judiciary Committee. *See, e.g.*, *id.* at 2361 (statement of Rep. Rostenkowski) ("By delegating to the Judiciary Committee the powers contained in this resolution, we will be providing that committee with the resources it needs to inform the whole House of the facts of this case."); *id.* at 2362 (statement of Rep. Boland) ("House Resolution 803 is intended to delegate to the Committee on the Judiciary the full extent of the powers of this House in an impeachment proceeding[]—both as to the

persons and types of things that may be subpenaed and the methods for doing so."). Only after the Judiciary Committee had received authorization from the House did it request and subpoena tape recordings and documents from President Nixon. *See* H.R. Rep. No. 93-1305, at 187 (1974).[23]

The impeachment investigation of President Clinton. On September 9, 1998, Independent Counsel Kenneth W. Starr, acting under 28 U.S.C. § 595(c), advised the House of Representatives that he had uncovered substantial and credible information that he believed could constitute grounds for the impeachment of President Clinton. 18 *Deschler's Precedents* app. at 548–49 (2013). Two days later, the House adopted a resolution that referred the matter, along with Starr's report and 36 boxes of evidence, to the Judiciary Committee. H.R. Res. 525, 105th Cong. (1998). The House directed that committee to review the report and "determine whether sufficient grounds exist to recommend to the House that an impeachment inquiry be commenced." *Id.* § 1. The Rules Committee's Chairman emphasized that the House would need to adopt a subsequent resolution if it decided to authorize an impeachment inquiry: "[T]his resolution does not authorize or direct an impeachment inquiry. . . . It merely provides the appropriate parameters for the Committee on the Judiciary . . . to . . . make a recommendation to the House as to whether we should commence an impeachment inquiry." 144 Cong. Rec. 20021 (1998) (statement of Rep. Solomon).

On October 7, 1998, the Judiciary Committee did recommend that there be an investigation for purposes of impeachment. As explained in the accompanying report: "[T]he Committee decided that *it must receive authorization from the full House before proceeding* on any further course of action. Because impeachment is delegated solely to the House of Rep-

[23] A *New York Times* article the following day characterized House Resolution 803 as "formally ratif[ying] the impeachment inquiry begun by the committee [the prior] October." James M. Naughton, *House, 410-4, Gives Subpoena Power in Nixon Inquiry*, N.Y. Times, Feb. 7, 1974, at 1. But the resolution did not grant after-the-fact authorization for any prior action. To the contrary, the resolution "authorized and directed" a future investigation, including by providing subpoena power. In the report recommending adoption of the resolution, the committee likewise described its plans in the future tense: "It is the intention of the committee that its investigation will be conducted in all respects on a fair, impartial and bipartisan basis." H.R. Rep. No. 93-774, at 3 (1974).

resentatives by the Constitution, the full House of Representatives should be involved in critical decision making regarding various stages of impeachment." H.R. Rep. No. 105-795, at 24 (emphasis added). The committee also observed that "a resolution authorizing an impeachment inquiry into the conduct of a president is consistent with past practice," citing the resolutions for Presidents Johnson and Nixon and observing that "numerous other inquiries were authorized by the House directly, or by providing investigative authorities, such as deposition authority, to the Committee on the Judiciary." *Id.*

The next day, the House voted to authorize the Judiciary Committee to "investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach William Jefferson Clinton, President of the United States of America." H.R. Res. 581, 105th Cong. § 1 (1998). The resolution authorized the committee "to require . . . by subpoena or otherwise . . . the attendance and testimony of any person" and "the production of . . . things," and to require the furnishing of information "by interrogatory." *Id.* § 2(a). "On November 5, 1998," as part of its investigation, "the Committee presented President Clinton with 81 requests for admission," which the Committee explained that it "would have . . . compelled by subpoena" had President Clinton not complied. H.R. Rep. No. 105-830, at 77, 122 (1998). And the Committee then "approved the issuance of subpoenas for depositions and materials" from several witnesses. 144 Cong. Rec. D1210–11 (daily ed. Dec. 17, 1998).

In discussing the Clinton precedent, the district court in *In re Application of the Committee on the Judiciary* treated the D.C. Circuit's approval of the disclosure of Starr's report and associated grand-jury information as evidence that the Judiciary Committee may "commence an impeachment investigation" without a House vote. 414 F. Supp. 3d at 168–69 & n.36. But the D.C. Circuit did not authorize that disclosure because of any pending House investigation. It did so because a statutory provision required an independent counsel to "advise the House of Representatives of any substantial and credible information which such independent counsel receives . . . *that may constitute grounds for an impeachment*." 28 U.S.C. § 595(c) (emphasis added). And the D.C. Circuit viewed the report as reflecting "information of the type described in 28 U.S.C. § 595(c)." *In re Madison Guar. Sav. & Loan Ass'n*, Div. No. 94-1 (D.C.

Cir. Spec. Div. July 7, 1998), *reprinted in* H.R. Doc. No. 105-331, pt. 1, at 10 (1998). The order authorizing the transmission of that information *to the House* did not imply that any committee was conducting an impeachment investigation. To the contrary, after the House received the information, "no person had access to" it until after the House adopted a resolution referring the matter to the Judiciary Committee. H.R. Rep. No. 105-795, at 5. And the House then adopted a second resolution (Resolution 581) to authorize a formal investigation. In other words, the House voted to authorize the Judiciary Committee both to review the Starr evidence and to conduct an impeachment investigation. Neither the D.C. Circuit nor the Judiciary Committee suggested that any committee could have taken such action on its own.

2.

The House has historically followed these same procedures in considering impeachment resolutions against Executive Branch officers other than the President. In many cases, an initial resolution laying out charges of impeachment or authorizing an investigation was referred to a select or standing committee.[24] Following such a referral, the designated committee

[24] As with Presidents, many of these resolutions remained with the committees until they expired at the end of the Congress. Several merely articulated allegations of impeachment. *See, e.g.*, H.R. Res. 1028, 115th Cong. (2018) (Deputy Attorney General Rod Rosenstein); H.R. Res. 417, 114th Cong. (2015) (Administrator of the Environmental Protection Agency Regina McCarthy); H.R. Res. 411, 113th Cong. (2013) (Attorney General Eric Holder); H.R. Res. 333, 110th Cong. (2007) (Vice President Richard Cheney); H.R. Res. 629, 108th Cong. (2004) (Secretary of Defense Donald Rumsfeld); H.R. Res. 805, 95th Cong. (1977) (United Nations Ambassador Andrew Young); H.R. Res. 274, 95th Cong. (1977) (Commissioner of the Federal Trade Commission Paul Dixon); H.R. Res. 881, 94th Cong. (1975) (U.S. Attorney Jonathan Goldstein and Principal Assistant U.S. Attorney Bruce Goldstein); H.R. Res. 647, 94th Cong. (1975) (Ambassador to Iran Richard Helms); H.R. Res. 547, 94th Cong. (1975) (Special Crime Strike Force Prosecutor Liam Coonan). Others called for an investigation. *See, e.g.*, H.R. Res. 589, 110th Cong. (2007) (Attorney General Alberto Gonzales); H.R. Res. 582, 105th Cong. (1998) (Independent Counsel Kenneth Starr); H.R. Res. 102, 99th Cong. (1985) (Chairman of the Board of Governors of the Federal Reserve System Paul Volcker); H.R. Res. 101, 99th Cong. (1985) (same and others); H.R. Res. 1025, 95th Cong. (1978) (Attorney General Griffin Bell); H.R. Res. 1002, 95th Cong. (1978) (same); H.R. Res. 569, 93d Cong. (1973) (Vice President Spiro Agnew); H.R. Res. 67, 76th Cong. (1939) (Secretary of Labor Frances Perkins and others); 28 Cong. Rec. 114, 126 (1895) (Ambassador to

reviewed the matter and considered whether to pursue a formal impeachment inquiry—it did not treat the referral as stand-alone authorization to conduct an investigation. When a committee concluded that the charges warranted investigation, it reported to the full House, which then considered whether to adopt a resolution to authorize a formal investigation.

For example, in March 1867, the House approved a resolution directing the Committee on Public Expenditures "to inquire into the conduct of Henry A. Smythe, collector of the port of New York." Cong. Globe, 40th Cong., 1st Sess. 132 (1867); *see also id.* (noting that the resolution had been modified following debate "so as to leave out that part about bringing articles of impeachment"). Weeks later, the House voted to authorize an impeachment investigation. *Id.* at 290 (authorizing the investigating committee to "send for persons and papers"). The House followed this same procedure in 1916 for U.S. Attorney H. Snowden Marshall. H.R. Res. 90, 64th Cong. (1916) (initial resolution referred to the Judiciary Committee); H.R. Res. 110, 64th Cong. (1916) (resolution approving the investigation contemplated in the initial resolution). And the process repeated in 1922 for Attorney General Harry Daugherty. H.R. Res. 425, 67th Cong. (1922) (referring the initial resolution to the committee); H.R. Res. 461, 67th Cong. (1922) (resolution approving the investigation contemplated in the initial resolution).

In a few instances, the House asked committees to draft articles of impeachment without calling for any additional impeachment investigation. For example, in 1876, after uncovering "unquestioned evidence of the malfeasance in office by General William W. Belknap" (who was then Secretary of War) in the course of another investigation, the House approved a resolution charging the Committee on the Judiciary with the responsibility to "prepare and report without unnecessary delay suitable articles of impeachment." 4 Cong. Rec. 1426, 1433 (1876). When a key witness left the country, however, the committee determined that additional investigation was warranted, and it asked to be authorized "to take

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Great Britain Thomas Bayard); 16 Cong. Rec. 17–19 (1884) (U.S. Marshal Lot Wright); Cong. Globe, 40th Cong., 1st Sess. 778–79 (1867) (Minister to Great Britain Charles Francis Adams). On occasion, the House voted to table these resolutions instead of referring them to a committee. *See, e.g.*, H.R. Res. 545, 105th Cong. (1998) (resolution of impeachment for Independent Counsel Kenneth Starr); H.R. Res. 1267, 95th Cong. (1978) (resolution of impeachment for Ambassador to the United Nations Andrew Young).

further proof" and "to send for persons and papers" in its search for alternative evidence. *Id.* at 1564, 1566; *see also* 3 *Hinds' Precedents* §§ 2444–45, at 902–04.

In some cases, the House declined to authorize a committee to investigate impeachment with the aid of compulsory process. In 1873, the House authorized the Judiciary Committee "to inquire whether anything" in testimony presented to a different committee implicating Vice President Schuyler Colfax "warrants articles of impeachment of any officer of the United States not a member of this House, or makes it proper that further investigation should be ordered in his case." Cong. Globe, 42d Cong., 3d Sess. 1545 (1873); *see* 3 *Hinds' Precedents* § 2510, at 1016–17. No further investigation was authorized. A similar sequence occurred in 1917 in the case of an impeachment resolution offered against members of the Federal Reserve Board. *See* 54 Cong. Rec. 3126–30 (1917) (impeachment resolution); H.R. Rep. No. 64-1628, at 1 (1917) (noting that following the referral of the impeachment resolution, the Committee had reviewed available information and determined that no further proceedings were warranted). In 1932, the House referred to the Judiciary Committee a resolution calling for the investigation of the possible impeachment of Secretary of the Treasury Andrew Mellon. H.R. Res. 92, 72d Cong. (1932); *see also* 3 *Deschler's Precedents* ch. 14, § 14.1, at 2134–39. The following month, the House approved a resolution discontinuing any investigation of the charges. 75 Cong. Rec. 3850 (1932); *see also* 3 *Deschler's Precedents* ch. 14, § 14.2, at 2139–40.

Most recently, in the 114th Congress, the House referred to the Judiciary Committee resolutions concerning the impeachment of the Commissioner of the Internal Revenue Service, John Koskinen. *See* H.R. Res. 494, 114th Cong. (2015); H.R. Res. 828, 114th Cong. (2016). Shortly after an attempt to force a floor vote on one of the resolutions, Koskinen voluntarily appeared before the committee at a hearing. *See Impeachment Articles Referred on John Koskinen (Part III): Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 2 (2016). The ranking minority member, Representative John Conyers, observed that, despite the title, "this is not an impeachment hearing" because, "[a]ccording to parliamentarians of the House past and present, the impeachment process does not begin until the House actually votes to authorize this Committee to investigate the charges." *Id.* at 3; *see also id.* at 30 (similar statement by

Rep. Johnson). During the hearing, Commissioner Koskinen offered to provide a list of supporting witnesses who could be cross-examined "if the Committee decided it wanted to go to a full-scale impeachment process, which I understand this is not." *Id.* at 45. Two months later, one of the impeachment resolutions was briefly addressed on the floor of the House, and again referred to the Judiciary Committee, but without providing any investigative authority. *See* 162 Cong. Rec. H7251–54 (daily ed. Dec. 6, 2016). The committee never sought to compel the appearance of Koskinen or any other witness, and the committee does not appear to have taken any further action before the Congress expired.

In his 1978 book on presidential impeachment, former House impeachment attorney John Labovitz observed that there were a "few exceptions," "mostly in the 1860s and 1870s," to the general rule that "past impeachment investigations ha[ve] been authorized by a specific resolution conferring subpoena power." Labovitz, *Presidential Impeachment* at 182 & n.18. In our review of the history, we have identified one case from that era where a House committee commenced a legislative oversight investigation and subsequently moved, without separate authorization, to consider impeachment.[25] But the overwhelming historical practice to the contrary confirms the Judiciary Committee's well-considered conclusions in 1974 and 1998 that a committee requires specific authorization from the House before it may use compulsory process to investigate for impeachment purposes.

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[25] In 1878, the Committee on Expenditures in the State Department, which was charged with investigative authority for "the exposing of frauds or abuses of any kind," 7 Cong. Rec. 287, 290 (1878), was referred an investigation into maladministration at the consulate in Shanghai during the terms of Consul-General George Seward and Vice Consul-General O.B. Bradford, *id.* at 504, 769. Eventually, the committee began to consider Seward's impeachment, serving him with a subpoena for testimony and documents, in response to which he asserted his privilege against self-incrimination. *See* 3 *Hinds' Precedents* § 2514, at 1023–24; H.R. Rep. No. 45-141, at 1–3 (1879). The committee recommended articles of impeachment, but the House declined to act before the end of the Congress. *See* 8 Cong. Rec. 2350–55 (1879); 3 *Hinds' Precedents* § 2514, at 1025. During this same period, the Committee on Expenditures reported proposed articles of impeachment against Bradford but recommended "that the whole subject be referred to the Committee on the Judiciary" for further consideration. H.R. Rep. No. 45-818, at 7 (1878). The House agreed to the referral, but no further action was taken. 7 Cong. Rec. at 3667.

3.

The House has followed the same practice in connection with nearly all impeachment investigations involving federal judges. Committees sometimes studied initial referrals, but they waited for authorization from the full House before conducting any formal impeachment investigation. Three cases from the late 1980s departed from that pattern, but the House has returned during the past three decades to the historical baseline, repeatedly ensuring that the Judiciary Committee had a proper delegation for each impeachment investigation.

The practice of having the House authorize each specific impeachment inquiry is reflected in the earliest impeachment investigations involving judges. In 1804, the House considered proposals to impeach two judges: Samuel Chase, an associate justice of the Supreme Court, and Richard Peters, a district judge. *See* 3 *Hinds' Precedents* § 2342, at 711–16. There was a "lengthy debate" about whether the evidence was appropriate to warrant the institution of an inquiry. *Id.* at 712. The House then adopted a resolution appointing a select committee "to inquire into the official conduct" of Chase and Peters "and to report" the committee's "opinion whether" either of the judges had "so acted, in their judicial capacity, as to require the interposition of the constitutional power of this House." 13 Annals of Cong. 850, 875–76 (1804); 3 *Hinds' Precedents* § 2342, at 715. A few days later, another resolution "authorized" the committee "to send for persons, papers, and records." 13 Annals of Cong. at 877; *see also* 3 *Hinds' Precedents* § 2342, at 715. At the conclusion of its investigation, the committee recommended that Chase, but not Peters, be impeached. 3 *Hinds' Precedents* § 2343, at 716. The House thereafter agreed to a resolution impeaching Chase. *Id.* at 717. Congress recessed before the Senate could act, but, during the next Congress, the House appointed an almost identical select committee, which was "given no power of investigation." *Id.* §§ 2343–44, at 717–18. The committee recommended revised articles of impeachment against Chase, which were again adopted by the House. *Id.* § 2344, at 718–19. In 1808, the House again separately authorized an investigation when it considered whether Peter Bruin, a Mississippi territorial judge, should be impeached for "neglect of duty and drunkenness on the bench." *Id.* § 2487, at 983–84. A member of the House objected "that it would hardly be dignified for the Congress to proceed to an impeachment" based on the territorial legisla-

ture's referral and proposed the appointment of a committee "to inquire into the propriety of impeaching." *Id.* at 984; *see* 18 Annals of Cong. 2069 (1808). The House then passed a resolution forming a committee to conduct an inquiry, which included the "power to send for persons, papers, and records" but, like most inquiries to follow, did not result in impeachment. 18 Annals of Cong. at 2189; 3 *Hinds' Precedents* § 2487, at 984.

Over the course of more than two centuries thereafter, members of the House introduced resolutions to impeach, or to investigate for potential impeachment, dozens more federal judges, and the House continued, virtually without exception, to provide an express authorization before any committee proceeded to exercise investigative powers.[26] In one 1874 case, the Judiciary Committee realized only after witnesses had traveled from Arkansas that it could not find any resolution granting it compulsory powers to investigate previously referred charges against Judge William Story. *See* 2 Cong. Rec. 1825, 3438 (1874); 3 *Hinds' Precedents* § 2513,

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[26] *See, e.g.*, 3 *Hinds' Precedents* § 2489, at 986 (William Van Ness, Mathias Tallmadge, and William Stephens, 1818); *id.* § 2490, at 987 (Joseph Smith, 1825); *id.* § 2364, at 774 (James Peck, 1830); *id.* § 2492, at 990 (Alfred Conkling, 1830); *id.* § 2491, at 989 (Buckner Thurston, 1837); *id.* § 2494, at 993–94 (P.K. Lawrence, 1839); *id.* §§ 2495, 2497, 2499, at 994, 998, 1003 (John Watrous, 1852–60); *id.* § 2500, at 1005 (Thomas Irwin, 1859); *id.* § 2385, at 805 (West Humphreys, 1862); *id.* § 2503, at 1008 (anonymous justice of the Supreme Court, 1868); *id.* § 2504, at 1008–09 (Mark Delahay, 1872); *id.* § 2506, at 1011 (Edward Durell, 1873); *id.* § 2512, at 1021 (Richard Busteed, 1873); *id.* § 2516, at 1027 (Henry Blodgett, 1879); *id.* §§ 2517–18, at 1028, 1030–31 (Aleck Boarman, 1890–92); *id.* § 2519, at 1032 (J.G. Jenkins, 1894); *id.* § 2520, at 1033 (Augustus Ricks, 1895); *id.* § 2469, at 949–50 (Charles Swayne, 1903); 6 Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States* § 498, at 685 (1936) (Robert Archbald, 1912); *id.* § 526, at 746–47 (Cornelius H. Hanford, 1912); *id.* § 527, at 749 (Emory Speer, 1913); *id.* § 528, at 753 (Daniel Wright, 1914); *id.* § 529, at 756 (Alston Dayton, 1915); *id.* § 543, at 777–78 (William Baker, 1924); *id.* § 544, at 778–79 (George English, 1925); *id.* § 549, at 789–90 (Frank Cooper, 1927); *id.* § 550, at 791–92 (Francis Winslow, 1929); *id.* § 551, at 793 (Harry Anderson, 1930); *id.* § 552, at 794 (Grover Moscowitz, 1930); *id.* § 513, at 709–10 (Harold Louderback, 1932); 3 *Deschler's Precedents* ch. 14, § 14.4, at 2143 (James Lowell, 1933); *id.* § 18.1, at 2205–06 (Halsted Ritter, 1933); *id.* § 14.10, at 2148 (Albert Johnson and Albert Watson, 1944); H.R. Res. 1066, 94th Cong. (1976) (certain federal judges); H.R. Res. 966, 95th Cong. (1978) (Frank Battisti); *see also* 51 Cong. Rec. 6559–60 (1914) (noting passage of authorizing resolution for investigation of Daniel Wright); 68 Cong. Rec. 3532 (1927) (same for Frank Cooper).

at 1023. In order to "cure" that "defect," the committee reported a privileged resolution to the floor of the House that would grant the committee "power to send for persons and papers" as part of the impeachment investigation. 2 Cong. Rec. at 3438. The House promptly agreed to the resolution, enabling the committee to "examine" the witnesses that day. *Id.*

In other cases, however, no full investigation ever materialized. In 1803, John Pickering, a district judge, was impeached, but the House voted to impeach him without conducting any investigation at all, relying instead upon documents supplied by President Jefferson. *See* 3 *Hinds' Precedents* § 2319, at 681–82; *see also* Lynn W. Turner, *The Impeachment of John Pickering*, 54 Am. Hist. Rev. 485, 491 (1949). Sometimes, the House authorized only a preliminary inquiry to determine whether an investigation would be warranted. In 1908, for instance, the House asked the Judiciary Committee to consider proposed articles impeaching Judge Lebbeus Wilfley of the U.S. Court for China. In the ensuing hearing, the Representative who had introduced the resolution acknowledged that the committee was not "authorized to subpoena witnesses" and had been authorized to conduct only "a preliminary examination," which was "not like an investigation ordinarily held by the House," but was instead dedicated solely to determining "whether you believe it is a case that ought to be investigated at all."[27] In many other cases, it is apparent that—even

[27] *Articles for the Impeachment of Lebbeus R. Wilfley, Judge of the U.S. Court for China: Hearings Before a Subcomm. of the H. Comm. on the Judiciary*, 60th Cong. 4 (1908) (statement of Rep. Waldo); *see also id.* at 45–46 (statement of Rep. Moon) ("This committee conceives to be its duty solely, under the resolution referring this matter to them, to examine the charges preferred in the petition . . . and to report thereon whether in its judgement the petitioner has made out a prima facie case; and also whether . . . Congress should adopt a resolution instructing the Judiciary Committee to proceed to an investigation of the facts of the case."); 6 *Cannon's Precedents* § 525, at 743–45 (summarizing the Wilfley case, in which the Judiciary Committee ultimately reported that no formal investigation was warranted). The case of Judge Samuel Alschuler in 1935 similarly involved only a preliminary investigation—albeit one with actual investigative powers. The House first referred to the Judiciary Committee a resolution that, if approved, would authorize an investigation of potential impeachment charges. *See* 79 Cong. Rec. 7086, 7106 (1935). Six days later, it adopted a resolution that granted the committee investigative powers in support of "the preliminary examinations deemed necessary" for the committee to make a recommendation about whether a full investigation should occur. *Id.* at 7393–94. The committee ultimately recommended against a full investigation. *See* H.R. Rep. No. 74-1802, at 2 (1935).

when impeachment resolutions had been referred to them—committees conducted no formal investigation.[28]

In 1970, in a rhetorical departure from well-established practice, a subcommittee of the Judiciary Committee described itself as investigating the impeachment of Justice William O. Douglas based solely upon an impeachment resolution referred to the Judiciary Committee. *See* 116 Cong. Rec. 11920, 11942 (1970); 3 *Deschler's Precedents* ch. 14, §§ 14.14–14.16, at 2151–64; *see also* Labovitz, *Presidential Impeachment* at 182 n.18 (noting that "[t]he Douglas inquiry was the first impeachment investigation in twenty-five years, and deviation from the older procedural pattern was not surprising"). Yet, the subcommittee did not resort to any compulsory process during its inquiry, and it did not recommend impeachment. 3 *Deschler's Precedents* ch. 14, §§ 14.15–14.16, at 2158–63. Accordingly, the committee did not actually exercise any of the investigative powers of the House.

In the late 1980s, the House Judiciary Committee considered the impeachment of three district-court judges without any express authorization from the House: Walter Nixon, Alcee Hastings, and Harry Claiborne. *See In re Application of the Comm. on the Judiciary*, 414 F. Supp. 3d at 168 (discussing these investigations). All three judges had been criminally prosecuted, and two had been convicted. *See* H.R. Rep. No. 101-36, at 12–13 (1989) (describing Nixon's prosecution and conviction); H.R. Rep.

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[28] *See, e.g.*, 18 Annals of Cong. 1885–86, 2197–98 (1808) (Harry Innes, 1808; the House passed a resolution authorizing an impeachment investigation, which concluded that the evidence accompanying the resolution did not support impeachment); 3 *Hinds' Precedents* § 2486, at 981–83 (George Turner, 1796; no apparent investigation, presumably because of the parallel criminal prosecution recommended by Attorney General Lee, as discussed above); *id.* § 2488, at 985 (Harry Toulmin, 1811; the House "declined to order a formal investigation"); 40 Annals of Cong. 463–69, 715–18 (1822–23) (Charles Tait, 1823; no apparent investigation beyond examination of documents containing charges); 3 *Hinds' Precedents* § 2493, at 991–92 (Benjamin Johnson, 1833; no apparent investigation); *id.* § 2511, at 1019–20 (Charles Sherman, 1873; the Judiciary Committee received evidence from the Ways and Means Committee, which had been investigating corruption in Congress, but the Judiciary Committee conducted no further investigation); 6 *Cannon's Precedents* § 535, at 769 (Kenesaw Mountain Landis, 1921; the Judiciary Committee reported that "charges were filed too late in the present session of the Congress" to enable investigation); 3 *Deschler's Precedents* ch. 14, § 14.6, at 2144–45 (Joseph Molyneaux, 1934; the Judiciary Committee took no action on the referral of a resolution that would have authorized an investigation).

No. 100-810, at 7–8, 29–31, 38–39 (1988) (describing Hastings's indictment and trial and the subsequent decision to proceed with a judicial-misconduct proceeding in lieu of another prosecution); H.R. Rep. No. 99-688, at 9, 17–20 (1986) (describing Claiborne's prosecution and conviction). In the Claiborne inquiry, the committee does not appear to have issued any subpoenas. *See* H.R. Rep. No. 99-688, at 4 (noting that the committee sent "[i]nvitational letters to all witnesses," who apparently cooperated to the Committee's satisfaction). The committee did issue subpoenas in the Nixon and Hastings investigations, yet no witness appears to have objected on the ground that the committee lacked jurisdiction to issue the subpoenas, and at least one witness appears to have requested a subpoena.[29] In those two cases, though, the Judiciary Committee effectively compelled production without any express authorization from the House.[30]

In the years after these outliers, the Judiciary Committee returned to the practice of seeking specific authorization from the House before conducting impeachment investigations. Most notably, as discussed above, the Judiciary Committee "decided that it *must receive authorization from the full House* before proceeding" with an impeachment investigation of President Clinton. H.R. Rep. No. 105-795, at 24 (emphasis added). And the House has used the same practice with respect to federal judges.[31]

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[29] *See* H.R. Rep. No. 100-810, at 11 & n.14 (stating that, in the Hastings investigation, a committee subpoena had been issued for William Borders, who challenged the subpoena on First, Fourth, Fifth, and Eighth Amendment grounds); H.R. Rep. No. 100-1124, at 130 (1989) (noting the issuance of "subpoenas *duces tecum*" in the investigation of Judge Nixon); 134 Cong. Rec. 27782 (1988) (statement of Rep. Edwards) (explaining the subcommittee's need to depose some witnesses pursuant to subpoena in the Nixon investigation); *Judge Walter L. Nixon, Jr., Impeachment Inquiry: Hearing Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 530–606 (1988) (reprinting deposition of Magistrate Judge Roper).

[30] The House did pass resolutions authorizing funds for investigations with respect to the Hastings impeachment, *see* H.R. Res. 134, 100th Cong. (1987); H.R. Res. 388, 100th Cong. (1988), and resolutions authorizing the committee to permit its counsel to take affidavits and depositions in both the Nixon and Hastings impeachments, *see* H.R. Res. 562, 100th Cong. (1988) (Nixon); H.R. Res. 320, 100th Cong. (1987) (Hastings).

[31] In the post-1989 era, as before, most of the impeachment resolutions against judges that were referred to the Judiciary Committee did not result in any further investigation. *See, e.g.*, H.R. Res. 916, 109th Cong. (2006) (Manuel Real); H.R. Res. 207, 103d Cong.

Thus, in 2008, the House adopted a resolution authorizing the Judiciary Committee to investigate the impeachment of Judge G. Thomas Porteous, Jr., including the grant of subpoena authority. *See* H.R. Rep. No. 111-427, at 7 (2010); H.R. Res. 1448, 110th Cong. (2008); 154 Cong. Rec. 19502 (2008). After the Congress expired, the House in the next Congress adopted a new resolution re-authorizing the inquiry, again with subpoena authority. *See* H.R. Res. 15, 111th Cong. (2009); 155 Cong. Rec. 568, 571 (2009). Several months later, another district judge, Samuel Kent, pleaded guilty to obstruction of justice and was sentenced to 35 months of incarceration. *See* H.R. Rep. 111-159, at 9–13 (2009). The House then adopted a resolution directing the Judiciary Committee to investigate impeachment, again specifically granting subpoena authority. *See id.* at 13; H.R. Res. 424, 111th Cong. (2009); 155 Cong. Rec. at 12211–13.

Thus, the House's longstanding and nearly unvarying practice with respect to judicial impeachment inquiries is consistent with the conclusion that the power to investigate in support of the House's "sole Power of Impeachment," U.S. Const. art. I, § 2, cl. 5, may not be exercised by a committee without an express delegation from the House. In the cases of Judges Nixon and Hastings, the Judiciary Committee did exercise compulsory authority despite the absence of any delegation from the House. But insofar as no party challenged the committee's authority at the time, and no court addressed the matter, these historical outliers do not undermine the broader constitutional principle. As the Supreme Court observed in *Noel Canning*, "when considered against 200 years of settled practice," a "few scattered examples" are rightly regarded "as anomalies." 573 U.S. at 538. They do not call into question the soundness of the House's otherwise consistent historical practice, much less the constitutional requirement that a committee exercise the constitutional powers of the House only with an express delegation from the House itself.

III.

Having concluded that a House committee may not conduct an impeachment investigation without a delegation of authority, we next con-

(1993) (Robert Collins); H.R. Res. 177, 103d Cong. (1993) (Robert Aguilar); H.R. Res. 176, 103d Cong. (1993) (Robert Collins).

sider whether the House provided such a delegation to the Foreign Affairs Committee or to the other committees that issued subpoenas pursuant to the asserted impeachment inquiry. During the five weeks between the Speaker's announcement on September 24 and the adoption of Resolution 660 on October 31, the committees issued numerous impeachment-related subpoenas. *See supra* note 9. We therefore provided advice during that period about whether any of the committees had authority to issue those subpoenas. Because the House had not adopted an impeachment resolution, the answer to that question turned on whether the committees could issue those subpoenas based upon any preexisting subpoena authority.

In justifying the subpoenas, the Foreign Affairs Committee and other committees pointed to the resolution adopting the Rules of the House of Representatives, which establish the committees and authorize investigations for matters within their jurisdiction. The committees claimed that Rule XI confers authority to issue subpoenas in connection with an impeachment investigation. Although the House has expanded its committees' authority in recent decades, the House Rules continue to reflect the long-established distinction between legislative and non-legislative investigative powers. Those rules confer legislative oversight jurisdiction on committees and authorize the issuance of subpoenas to that end, but they do not grant authority to investigate for impeachment purposes. While the House committees could have sought some information relating to the same subjects in the exercise of their legislative oversight authority, the subpoenas they purported to issue "pursuant to the House of Representatives' impeachment inquiry" were not in support of such oversight. We therefore conclude that they were unauthorized.

A.

The standing committees of the House trace their general subpoena powers back to the House Rules, which the 116th Congress adopted by formal resolution. *See* H.R. Res. 6, 116th Cong. (2019). The House Rules are more than 60,000 words long, but they do not include the word "impeachment." The Rules' silence on that topic is particularly notable when contrasted with the Senate, which has adopted specific "Rules of Procedure and Practice" for impeachment trials. S. Res. 479, 99th Cong.

(1986).[32] The most obvious conclusion to draw from that silence is that the current House, like its predecessors, retained impeachment authority at the level of the full House, subject to potential delegations in resolutions tailored for that purpose.

Rule XI of the Rules of the House affirmatively authorizes committees to issue subpoenas, but only for matters within their legislative jurisdiction. The provision has been a part of the House Rules since 1975. *See* H.R. Res. 988, 93d Cong. § 301 (1974). Clause 2(m)(1) of Rule XI vests each committee with the authority to issue subpoenas "[f]or the purpose of carrying out any of its functions and duties under this rule and rule X (including any matters referred to it under clause 2 of rule XII)." Rule XI, cl. 2(m)(1); *see also* Rule X, cl. 11(d)(1) (making clause 2 of Rule XI applicable to HPSCI). The committees therefore have subpoena power to carry out their authorities under three rules: Rule X, Rule XI, and clause 2 of Rule XII.

Rule X does not provide any committee with jurisdiction over impeachment. Rule X establishes the "standing committees" of the House and vests them with "their legislative jurisdictions." Rule X, cl. 1. The jurisdiction of each committee varies in subject matter and scope. While the Committee on Ethics, for example, has jurisdiction over only "[t]he Code of Official Conduct" (Rule X, cl. 1(g)), the jurisdiction of the Foreign Affairs Committee spans seventeen subjects, including "[r]elations of the United States with foreign nations generally," "[i]ntervention abroad and declarations of war," and "[t]he American National Red Cross" (Rule X, cl. 1(i)(1), (9), (15)). The rule likewise spells out the jurisdiction of the Committee on Oversight and Reform (Rule X, cl. 1(n), cl. 3(i)), and the jurisdiction of the Judiciary Committee (Rule X, cl. 1(*l*)). Clause 11 of Rule X establishes HPSCI and vests it with jurisdiction over "[t]he Central Intelligence Agency, the Director of National Intelligence, and the National Intelligence Program" and over "[i]ntelligence and intelligence-related activities of all other departments and agencies." Rule X, cl. 11(a)(1), (b)(1)(A)–(B).

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[32] Unlike the House, "the Senate treats its rules as remaining in effect continuously from one Congress to the next without having to be re-adopted." Richard S. Beth, Cong. Research Serv., R42929, *Procedures for Considering Changes in Senate Rules* 9 (Jan. 22, 2013). Of course, like the House, the Senate may change its rules by simple resolution.

The text of Rule X confirms that it addresses the *legislative* jurisdiction of the standing committees. After defining each standing committee's subject-matter jurisdiction, the Rule provides that "[t]he various standing committees shall have general oversight responsibilities" to assist the House in its analysis of "the application, administration, execution, and effectiveness of Federal laws" and of the "conditions and circumstances that may indicate the necessity or desirability of enacting new or additional legislation," as well as to assist the House in its "formulation, consideration, and enactment of changes in Federal laws, and of such additional legislation as may be necessary or appropriate." Rule X, cl. 2(a)(1)–(2). The committees are to conduct oversight "on a continuing basis" "to determine whether laws and programs addressing subjects within the jurisdiction of a committee" are implemented as Congress intends "and whether they should be continued, curtailed, or eliminated." Rule X, cl. 2(b)(1). Those are all functions traditionally associated with legislative oversight, not the separate power of impeachment. *See supra* Part II.A. Clause 3 of Rule X further articulates "[s]pecial oversight functions" with respect to particular subjects for certain committees; for example, the Committee on Foreign Affairs "shall review and study on a continuing basis laws, programs, and Government activities relating to . . . intelligence activities relating to foreign policy," Rule X, cl. 3(f). And clause 4 addresses "[a]dditional functions of committees," including functions related to the review of appropriations and the special authorities of the Committee on Oversight and Reform, Rule X, cl. 4(a)(1), (c)(1). But none of the "[s]pecial oversight" or "[a]dditional" functions specified in clauses 3 and 4 includes any reference to the House's impeachment power.

The powers of HPSCI are addressed in clause 11 of Rule X. Unlike the standing committees, HPSCI is not given "[g]eneral oversight responsibilities" in clause 2. But clause 3 gives it the "[s]pecial oversight functions" of "review[ing] and study[ing] on a continuing basis laws, programs, and activities of the intelligence community" and of "review[ing] and study[ing] . . . the sources and methods of" specified entities that engage in intelligence activities. Rule X, cl. 3(m). And clause 11 further provides that proposed legislation about intelligence activities will be referred to HPSCI and that HPSCI shall report to the House "on the nature and extent of the intelligence and intelligence-related activities of the various departments and agencies of the United States." Rule X, cl. 11(b)(1), (c)(1);

see also H.R. Res. 658, 95th Cong. § 1 (1977) (resolution establishing HPSCI, explaining its purpose as "provid[ing] vigilant *legislative oversight* over the intelligence and intelligence-related activities of the United States" (emphasis added)). Again, those powers sound in legislative oversight, and nothing in the Rules suggests that HPSCI has any generic delegation of the separate power of impeachment.

Consistent with the foregoing textual analysis, Rule X has been seen as conferring legislative oversight authority on the House's committees, without any suggestion that impeachment authorities are somehow included therein. The Congressional Research Service describes Rule X as "contain[ing] the legislative and oversight jurisdiction of each standing committee, several clauses on committee procedures and operations, and a clause specifically addressing the jurisdiction and operation of the Permanent Select Committee on Intelligence." Michael L. Koempel & Judy Schneider, Cong. Research Serv., R41605, *House Standing Committees' Rules on Legislative Activities: Analysis of Rules in Effect in the 114th Congress* 2 (Oct. 11, 2016); *see also* Dolan, *Congressional Oversight Manual* at 25 (distinguishing a committee inquiry with "a legislative purpose" from inquiries conducted under "some other constitutional power of Congress, such as the authority" to "conduct impeachment proceedings"). In the chapter of *Deschler's Precedents* devoted to explaining the "[i]nvestigations and [i]nquiries" by the House and its committees, the Parliamentarian repeatedly notes that impeachment investigations and other non-legislative powers are discussed elsewhere. *See* 4 *Deschler's Precedents* ch. 15, § 1, at 2283; *id.* § 14, at 2385 n.12; *id.* § 16, at 2403 & n.4.

Rule X concerns only legislative oversight, and Rule XI does not expand the committees' subpoena authority any further. That rule rests upon the jurisdiction granted in Rule X. *See* Rule XI, cl. 1(b)(1) ("Each committee may conduct at any time such investigations and studies as it considers necessary or appropriate in the exercise of its responsibilities under rule X."). Nor does Rule XII confer any additional jurisdiction. Clause 2(a) states that "[t]he Speaker shall refer each bill, resolution, or other matter that relates to a subject listed under a standing committee named in clause 1 of rule X[.]" Rule XII, cl. 2(a). The Speaker's referral authority under Rule XII is thus limited to matters within a committee's Rule X legislative jurisdiction. *See* 18 *Deschler's Precedents* app. at 578

("All committees were empowered by actual language of the Speaker's referral to consider only 'such provisions of the measure as fall within their respective jurisdictions under Rule X.'"). Accordingly, the Speaker may not expand the jurisdiction of a committee by referring a bill or resolution falling outside the committee's Rule X authority.[33]

In reporting Resolution 660 to the House, the Rules Committee expressed the view that clause 2(m) of Rule XI gave standing committees the authority to issue subpoenas in support of impeachment inquiries. *See* H.R. Rep. No. 116-266, at 18 (2019). But the committee did not explain which terms of the rule provide such authority. To the contrary, the committee simply asserted that the rule granted such authority and that the text of Resolution 660 departed from its predecessors on account of amendments to clause 2(m) that were adopted after the "Clinton and Nixon impeachment inquiry resolutions." *Id.* Yet clause 2(m) of Rule XI was adopted two decades before the Clinton inquiry.[34] Even with that authority in place, the Judiciary Committee recognized in 1998 that it "*must* receive authorization from the full House before proceeding" to investigate President Clinton for impeachment purposes. H.R. Rep. No. 105-795, at 24 (emphasis added). And, even before Rule XI was adopted, the House had conferred on the Judiciary Committee a materially similar form of investigative authority (including subpoena power) in 1973.[35] The

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[33] Nor do the Rules otherwise give the Speaker the authority to order an investigation or issue a subpoena in connection with impeachment. Rule I sets out the powers of the Speaker. She "shall sign . . . all writs, warrants, and subpoenas of, or issued by order of, the House." Rule I, cl. 4. But that provision applies only when the House itself issues an order. *See Jefferson's Manual* § 626, at 348.

[34] Clause 2(m) of Rule XI was initially adopted on October 8, 1974, and took effect on January 3, 1975. *See* H.R. Res. 988, 93d Cong. The rule appears to have remained materially unchanged from 1975 to the present (including during the time of the Clinton investigation). *See* H.R. Rule XI, cl. 2(m), 105th Cong. (Jan. 1, 1998) (version in effect during the Clinton investigation); *Jefferson's Manual* § 805, at 586–89 (reprinting current version and describing the provision's evolution).

[35] At the start of the 93rd Congress in 1973, the Judiciary Committee was "authorized to conduct full and complete studies and investigations and make inquiries within its jurisdiction as set forth in [the relevant provision] of the Rules of the House of Representatives" and was empowered "to hold such hearings and require, by subpena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memorandums, papers, and documents, as it deems necessary." H.R. Res. 74, 93d Cong. §§ 1, 2(a) (1973); *see also* Cong. Research Serv., R45769, *The Impeach-*

Judiciary Committee nevertheless recognized that those subpoena powers did not authorize it to conduct an impeachment inquiry about President Nixon. In other words, the Rules Committee's recent interpretation of clause 2(m) (which it did not explain in its report) cannot be reconciled with the Judiciary Committee's well-reasoned conclusion, in both 1974 and 1998, that Rule XI (and its materially similar predecessor) do not confer any standing authority to conduct an impeachment investigation.

In modern practice, the Speaker has referred proposed resolutions calling for the impeachment of a civil officer to the Judiciary Committee. *See Jefferson's Manual* § 605, at 324. Consistent with this practice, the Speaker referred the Sherman resolution (H.R. Res. 13, 116th Cong.) to the Judiciary Committee, because it called for the impeachment of President Trump. Yet the referral itself did not grant authority to conduct an impeachment investigation. House committees have regularly received referrals and conducted preliminary inquiries, without compulsory process, for the purpose of determining whether to recommend that the House open a formal impeachment investigation. *See supra* Part II.C. Should a committee determine that a formal inquiry is warranted, then the committee recommends that the House adopt a resolution that authorizes such an investigation, confers subpoena power, and provides special process to the target of the investigation. The Judiciary Committee followed precisely that procedure in connection with the impeachment investigations of Presidents Nixon and Clinton, among many others. By referring an impeachment resolution to the House Judiciary Committee, the Speaker did not expand that committee's subpoena authority to cover a formal impeachment investigation. In any event, no impeachment resolution was ever referred to the Foreign Affairs Committee, HPSCI, or the Committee on Oversight and Reform. Rule XII thus could not provide any authority to those committees in support of the impeachment-related subpoenas issued before October 31.

Accordingly, when those subpoenas were issued, the House Rules did not provide authority to any of those committees to issue subpoenas in connection with potential impeachment. In reaching this conclusion, we

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ment Process in the House of Representatives 4 (updated Nov. 14, 2019) (noting that, before Rule XI vested subpoena power in standing committees, the Judiciary Committee and other committees had often been given subpoena authority "through resolutions providing blanket investigatory authorities that were agreed to at the start of a Congress").

do not question the broad authority of the House of Representatives to determine how and when to conduct its business. *See* U.S. Const. art. I, § 5, cl. 2. As the Supreme Court has recognized, "'all matters of method are open to the determination'" of the House, "as long as there is 'a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained,' and the rule does not 'ignore constitutional restraints or violate fundamental rights.'" *Noel Canning*, 573 U.S. at 551 (quoting *United States v. Ballin*, 144 U.S. 1, 5 (1892)). The question, however, is not "what rules Congress may establish for its own governance," but "rather what rules the House has established and whether they have been followed." *Christoffel v. United States*, 338 U.S. 84, 88–89 (1949); *see also Yellin v. United States*, 374 U.S. 109, 121 (1963) (stating that a litigant "is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted in" the relevant rule); *United States v. Smith*, 286 U.S. 6, 33 (1932) ("As the construction to be given to the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one."). Statements by the Speaker or by committee chairmen are not statements of the House itself. *Cf. Noel Canning*, 573 U.S. at 552–53 (relying on statements and actions of the Senate itself, as reflected in the Journal of the Senate and the Congressional Record, to determine when the Senate was "in session"). Our conclusion here turned upon nothing more, and nothing less, than the rules and resolutions that had been adopted by a majority vote of the full House.[36]

The text of those provisions determined whether the House had delegated the necessary authority. *See id.* at 552 ("[O]ur deference to the Senate cannot be absolute. When the Senate is without the *capacity* to act, under its own rules, it is not in session even if it so declares."). Thus, the

[36] The Judiciary Committee has also invoked House Resolution 430 as an independent source of authority for an impeachment inquiry. *See* Tr. of Mot. Hrg. at 91–92, *In re Application of the Comm. on the Judiciary*; *see also* Majority Staff of H. Comm. on the Judiciary, 116th Cong., *Constitutional Grounds for Presidential Impeachment* 39 (Dec. 2019). As discussed above, however, that resolution did not confer any investigative authority. Rather, it granted "any and all necessary authority under Article I" only "in connection with" certain "judicial proceeding[s]" in federal court. H.R. Res. 430, 116th Cong. (2019); *see supra* note 7. The resolution therefore had no bearing on any committee's authority to compel the production of documents or testimony in an impeachment investigation.

Supreme Court has repeatedly made clear that a target of the House's compulsory process may question whether a House resolution has actually conferred the necessary powers upon a committee, because the committee's "right to exact testimony and to call for the production of documents must be found in [the resolution's] language." *Rumely*, 345 U.S. at 44; *see also Watkins*, 354 U.S. at 201. In *Rumely*, the Court expressly rejected the argument that the House had confirmed the committee's jurisdiction by adopting a resolution that merely held the witness in contempt after the fact. As the Court explained, what was said "after the controversy had arisen regarding the scope of the resolution . . . had the usual infirmity of *post litem motam*, self-serving declarations." 345 U.S. at 48. In other words, even a vote of the full House could not "enlarge[]" a committee's authority after the fact for purposes of finding that a witness had failed to comply with the obligations imposed by the subpoena. *Id.*

Here, the House committees claiming to investigate impeachment issued subpoenas before they had received *any* actual delegation of impeachment-related authority from the House. Before October 31, the committees relied solely upon statements of the Speaker, the committee chairmen, and the Judiciary Committee, all of which merely asserted that one or more House committees had already been conducting a formal impeachment inquiry. There was, however, no House resolution actually delegating such authority to any committee, let alone one that did so with "sufficient particularity" to compel witnesses to respond. *Watkins*, 354 U.S. at 201; *cf. Gojack v. United States*, 384 U.S. 702, 716–17 (1966). At the opening of this Congress, the House had not chosen to confer investigative authority over impeachment upon any committee, and therefore, no House committee had authority to compel the production of documents or testimony in furtherance of an impeachment inquiry that it was not authorized to conduct.

B.

Lacking a delegation from the House, the committees could not compel the production of documents or the testimony of witnesses for purposes of an impeachment inquiry. Because the first impeachment-related subpoena —the September 27 subpoena from the Foreign Affairs Committee— rested entirely upon the purported impeachment inquiry, *see* Three Chairmen's Letter, *supra* note 2, at 1, it was not enforceable. *See, e.g.*,

Rumely, 345 U.S. at 44. Perhaps recognizing this infirmity, the committee chairmen invoked not merely the impeachment inquiry in connection with subsequent impeachment-related subpoenas but also the committees' "oversight and legislative jurisdiction." *See supra* note 9 and accompanying text. That assertion of dual authorities presented the question whether the committees could leverage their oversight jurisdiction to require the production of documents and testimony that the committees avowedly intended to use for an unauthorized impeachment inquiry. We advised that, under the circumstances of these subpoenas, the committees could not do so.

Any congressional inquiry "must be related to, and in furtherance of, a legitimate task of the Congress." *Watkins*, 354 U.S. at 187. The Executive Branch need not presume that such a purpose exists or accept a "make-weight" assertion of legislative jurisdiction. *Mazars USA*, 940 F.3d at 725–26, 727; *see also Shelton v. United States*, 404 F.2d 1292, 1297 (D.C. Cir. 1968) ("In deciding whether the purpose is within the legislative function, the mere assertion of a need to consider 'remedial legislation' may not alone justify an investigation accompanied with compulsory process[.]"). Indeed, "an assertion from a committee chairman may not prevent the Executive from confirming the legitimacy of an investigative request." *Congressional Committee's Request for the President's Tax Returns Under 26 U.S.C. § 6103(f)*, 43 Op. O.L.C. 151, 171 (2019). To the contrary, "a threshold inquiry that should be made 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); *see also Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 159 (1989) (recognizing that the constitutionally mandated accommodation process "requires that each branch explain to the other why it believes its needs to be legitimate").

Here, the committee chairmen made clear upon issuing the subpoenas that the committees were interested in the requested materials to support an investigation into the potential impeachment of the President, not to uncover information necessary for potential legislation within their respective areas of legislative jurisdiction. In marked contrast with routine oversight, each of the subpoenas was accompanied by a letter signed by

the chairs of three different committees, who transmitted a subpoena "[p]ursuant to the House of Representatives' impeachment inquiry" and recited that the documents would "be collected as part of the House's impeachment inquiry," and that they would be "shared among the Committees, as well as with the Committee on the Judiciary as appropriate." *See supra* note 9 and accompanying text. Apart from their token invocations of "oversight and legislative jurisdiction," the letters offered no hint of any legislative purpose. The committee chairmen were therefore seeking to do precisely what they said—compel the production of information to further an impeachment inquiry.

In reaching this conclusion, we do not foreclose the possibility that the Foreign Affairs Committee or the other committees could have issued similar subpoenas in the bona fide exercise of their legislative oversight jurisdiction, in which event the requests would have been evaluated consistent with the longstanding confidentiality interests of the Executive Branch. *See Watkins*, 354 U.S. at 187 (recognizing that Congress's general investigative authority "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste"); *McGrain*, 273 U.S. at 179–80 (observing that it is not "a valid objection to the investigation that it might possibly disclose crime or wrongdoing on [the Attorney General's] part"). Should the Foreign Affairs Committee, or another committee, articulate a legitimate oversight purpose for a future information request, the Executive Branch would assess that request as part of the constitutionally required accommodation process. But the Executive Branch was not confronted with that situation. The committee chairmen unequivocally attempted to conduct an impeachment inquiry into the President's actions, without the House, which has the "sole Power of Impeachment," having authorized such an investigation. Absent such an authorization, the committee chairs' passing mention of "oversight and legislative jurisdiction" did not cure that fundamental defect.

C.

We next address whether the House ratified any of the previous committee subpoenas when it adopted Resolution 660 on October 31, 2019—after weeks of objections from the Executive Branch and many members of Congress to the committees' efforts to conduct an unauthorized impeachment inquiry. Resolution 660 provides that six committees of the

House "are directed to continue their ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America." Resolution 660, § 1. The resolution further prescribes certain procedures by which HPSCI and the Judiciary Committee may conduct hearings in connection with the investigation defined by that resolution.

Resolution 660 does not speak at all to the committees' past actions or seek to ratify any subpoena previously issued by the House committees. *See Trump v. Mazars USA, LLP*, 941 F.3d 1180, 1182 (D.C. Cir. 2019) (Rao, J., dissenting from the denial of rehearing en banc); *see also Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context*, 43 Op. O.L.C. 286, 290 (2019). The resolution "direct[s]" HPSCI and other committees to "continue" their investigations, and the Rules Committee apparently assumed, incorrectly in our view, that earlier subpoenas were legally valid. *See* H.R. Rep. No. 116-266, at 3 ("All subpoenas to the Executive Branch remain in full force."). But the resolution's operative language does not address any previously issued subpoenas or provide the imprimatur of the House to give those subpoenas legal force.

And the House knows how to ratify existing subpoenas when it chooses to do so.[37] On July 24, 2019, the House adopted a resolution that expressly "ratif[ied] and affirm[ed] all current and future investigations, as well as *all subpoenas previously issued* or to be issued in the future," related to certain enumerated subjects within the jurisdiction of standing or select committees of the House "as established by the Constitution of the United States and rules X and XI of the Rules of the House of Representatives." H.R. Res. 507, 116th Cong. § 1 (2019) (emphasis added). There, as here, the House acted in response to questions regarding "the validity of . . . [committee] investigations and subpoenas." *Id.* pmbl. Despite that recent

[37] Even if the House had sought to ratify a previously issued subpoena, it could give that subpoena only prospective effect. As discussed above, the Supreme Court has recognized that the House may not cite a witness for contempt for failure to comply with a subpoena unsupported by a valid delegation of authority at the time it was issued. *See Rumely*, 345 U.S. at 48; *see also Exxon*, 589 F.2d at 592 ("To issue a valid subpoena, . . . a committee or subcommittee must conform strictly to the resolution establishing its investigatory powers[.]").

model, Resolution 660 contains no comparable language seeking to ratify previously issued subpoenas. The resolution directs certain committees to "continue" investigations, and it specifies procedures to govern future hearings, but nothing in the resolution looks backward to actions previously taken. Accordingly, Resolution 660 did not ratify or otherwise authorize the impeachment-related subpoenas issued before October 31, which therefore still had no compulsory effect on their recipients.

IV.

Finally, we address some of the consequences that followed from our conclusion that the committees' pre-October 31 impeachment-related subpoenas were unauthorized. First, because the subpoenas exceeded the committees' investigative authority and lacked compulsory effect, the committees were mistaken in contending that the recipients' "failure or refusal to comply with the subpoena [would] constitute evidence of obstruction of the House's impeachment inquiry." Three Chairmen's Letter, *supra* note 2, at 1.[38] As explained at length above, when the subpoenas were issued, there was no valid impeachment inquiry. To the extent that the committees' subpoenas sought information in support of an unauthorized impeachment inquiry, the failure to comply with those subpoenas was no more punishable than were the failures of the witnesses in *Watkins*, *Rumely*, *Kilbourn*, and *Lamont* to answer questions that were beyond the scope of those committees' authorized jurisdiction. *See Watkins*, 354 U.S. at 206, 215 (holding that conviction for contempt of Congress was invalid because, when the witness failed to answer questions, the House had not used sufficient "care . . . in authorizing the use of compulsory process" and the committee had not shown that the information was pertinent to a subject within "the mission[] delegated to" it by the House); *Rumely*, 345 U.S. at 42–43, 48 (affirming reversal of conviction for contempt of Congress because it was not clear at the time of questioning that "the committee was authorized to exact the information which the witness withheld"); *Kilbourn*, 103 U.S. at 196 (sustaining action brought by witness for false imprisonment because the committee "had no lawful

[38] The letters accompanying other subpoenas, *see supra* note 9, contained similar threats that the recipients' "failure or refusal to comply with the subpoena, including at the direction or behest of the President," would constitute "evidence of obstruction of the House's impeachment inquiry."

authority to require Kilbourn to testify as a witness beyond what he voluntarily chose to tell"); *Lamont*, 18 F.R.D. at 37 (dismissing indictment for contempt of Congress in part because the indictment did not sufficiently allege, among other things, "that the [Permanent Subcommittee on Investigations] . . . was duly empowered by either House of Congress to conduct the particular inquiry" or "that the inquiry was within the scope of the authority granted to the [sub]committee"). That alone suffices to prevent noncompliance with the subpoenas from constituting "obstruction of the House's impeachment inquiry."

Second, we note that whether or not the impeachment inquiry was authorized, there were other, independent grounds to support directions by the Executive Branch that witnesses not appear in response to the committees' subpoenas. We recently advised you that executive privilege continues to be available during an impeachment investigation. *See Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context*, 43 Op. O.L.C. at 287–90. The mere existence of an impeachment investigation does not eliminate the President's need for confidentiality in connection with the performance of his duties. Just as in the context of a criminal trial, a dispute over a request for privileged information in an impeachment investigation must be resolved in a manner that "preserves the essential functions of each branch." *United States v. Nixon*, 418 U.S. 683, 707 (1974). Thus, while a committee "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." *Exclusion of Agency Counsel from Congressional Depositions in the Impeachment Context*, 43 Op. O.L.C. at 289.

Accordingly, we recognized, in connection with HPSCI's impeachment investigation after October 31, that the committee may not compel an Executive Branch witness to appear for a deposition without the assistance of agency counsel, when that counsel is necessary to assist the witness in ensuring the appropriate protection of privileged information during the deposition. *See id.* at 289–90. In addition, we have concluded that the testimonial immunity of the President's senior advisers "applies in an impeachment inquiry just as it applies in a legislative oversight inquiry." Letter for Pat A. Cipollone, Counsel to the President, from

Steven A. Engel, Assistant Attorney General, Office of Legal Counsel at 2 (Nov. 3, 2019).

Thus, even when the House takes the steps necessary to authorize a committee to investigate impeachment and compel the production of needed information, the Executive Branch continues to have legitimate interests to protect. The Constitution does not oblige either branch of government to surrender its legitimate prerogatives, but expects that each branch will negotiate in good faith with mutual respect for the needs of the other branch. *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."); *see also* Memorandum for the Heads of Executive Departments and Agencies from President Ronald Reagan, *Re: Procedures Governing Responses to Congressional Requests for Information* (Nov. 4, 1982). The two branches should work to identify arrangements in the context of the particular requests of an investigating committee that accommodate both the committee's needs and the Executive Branch's interests.

For these reasons, the House cannot plausibly claim that any Executive Branch official engaged in "obstruction" by failing to comply with committee subpoenas, or directing subordinates not to comply, in order to protect the Executive Branch's legitimate interests in confidentiality and the separation of powers. We explained thirty-five years ago that "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 of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 140 (1984). 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." *Id.* at 140 n.42. We have reaffirmed those fundamental conclusions in each of the subsequent decades.[39]

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[39] *See, e.g.*, *Attempted Exclusion of Agency Counsel from Congressional Depositions of Agency Employees*, 43 Op. O.L.C. 131, 145 (2019) ("[I]t would be unconstitutional to

The constitutionally required accommodation process, of course, is a two-way street. In connection with this investigation, the House committees took the unprecedented steps of investigating the impeachment of a President without any authorization from the full House; without the procedural protections provided to Presidents Nixon and Clinton, *see supra* note 12; and with express threats of obstruction charges and unconstitutional demands that officials appear and provide closed-door testimony about privileged matters without the assistance of Executive Branch counsel. Absent any effort by the House committees to accommodate the Executive Branch's legitimate concerns with the unprecedented nature of the committees' actions, it was reasonable for Executive Branch officials to decline to comply with the subpoenas addressed to them.

V.

For the reasons set forth above, we conclude that the House must expressly authorize a committee to conduct an impeachment investigation and to use compulsory process in that investigation before the committee may compel the production of documents or testimony in support of the House's "sole Power of Impeachment." U.S. Const. art. I, § 2, cl. 5. The House had not authorized such an investigation in connection with the impeachment-related subpoenas issued before October 31, 2019, and the subpoenas therefore had no compulsory effect. The House's adoption of

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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."); *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) ("[T]he criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege."); *see also Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, 28 Op. O.L.C. 79, 80–82 (2004) (explaining that the Executive Branch has the constitutional authority to supervise its employees' disclosure of privileged and other information to Congress).

Resolution 660 did not alter the legal status of those subpoenas, because the resolution did not ratify them or otherwise address their terms.

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Applicability of Section 410 of the Amtrak Reform and Accountability Act of 1997 to the Gateway Development Commission

New Jersey's proposed diversion of a portion of its annual payment to Amtrak to a bridge project subject to the authority of the Gateway Development Commission, an interstate entity established by New York and New Jersey, would violate section 410 of the Amtrak Reform and Accountability Act of 1997, which prohibits States from carrying out an interstate compact by using state or federal funds made available for Amtrak.

February 13, 2020

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF TRANSPORTATION

You have asked whether the interstate compact provision in the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134, § 410, 111 Stat. 2570, 2587–88 ("Amtrak Reform Act"), would prohibit New Jersey from diverting a portion of its annual payment to Amtrak to a bridge project subject to the authority of the Gateway Development Commission ("GDC" or "Commission"), which is an entity established by New York and New Jersey. This memorandum memorializes our prior conclusion that the proposed redirection of funds would have violated the terms of the Amtrak Reform Act. Section 410 of the Act prohibits States from carrying out an interstate compact by using state or federal funds made available for Amtrak. We concluded that the two States entered into an interstate compact to form the GDC and that the proposed diversion was therefore subject to the limitations of the Amtrak Reform Act.

New York and New Jersey created the GDC by passing reciprocal legislation last year. *See* Gateway Development Commission Act, 2019 N.J. Sess. Law Serv. ch. 195 (West) (July 22, 2019) ("N.J. Act"); Gateway Development Commission Act, 2019 N.Y. Sess. Laws ch. 108 (McKinney's) (July 22, 2019) ("N.Y. Act"). The States established the GDC to "facilitate" the expansion and renovation of rail lines in the Northeast Corridor ("NEC"), the rail system running from the District of Columbia through Massachusetts. *See* N.J. Act §§ 2, 4(a); N.Y. Act § 2, ¶ 1; 49 U.S.C. § 24905(a), (c)(1). In so doing, the States empowered the GDC to exert control over the use of funds committed to projects it is authorized

to facilitate.[1] *See* N.J. Act § 4; N.Y. Act § 3. Each State conditioned its legislation on the other State's enactment of legislation with "identical effect." *See* N.J. Act § 30(a); N.Y. Act § 10(a). Both laws further provided that each State must receive the "concurre[nce]" of the other State to amend or repeal its laws. N.J. Act § 25; N.Y. Act § 8. Under the terms of that legislation, each State has three representatives on the Commission; Amtrak also holds one seat.

In 2019, New Jersey Transit ("NJT"), the State's public transportation agency, requested a variance that would have allowed it to meet its financial obligations to an NEC bridge project subject to the GDC's authority by diverting a portion of the annual baseline capital charge payments that NJT otherwise would have owed to Amtrak.[2] *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Steven G. Bradbury, General Counsel, U.S. Department of Transportation at 1 (Oct. 1, 2019) ("Bradbury Letter"). The variance would have required the approval of the Northeast Corridor Commission ("NEC Commission"), *see id.*, which is a federal-state body established by Congress to promote rail planning and cooperation across the NEC, *see* 49 U.S.C. § 24905. The NEC Commission has adopted a Cost Allocation Policy, which permits rail owners and operators to request variances from the Commission's requirements for their baseline capital charges. *See* Northeast Corridor Commuter and Intercity Rail Cost Allocation Policy § 5.5.2.1–.2 (as amended June 19, 2019) ("Cost Allocation Policy"); *see also id.* § 1 (describing the Passenger Rail Investment and Improvement Act of 2008's direction to the NEC Commission "to create a cost-sharing arrangement for NEC infrastructure"). Members representing the Department of Transportation, "including the Office of the Secretary, the Federal

[1] The state laws define "facilitate" to mean "the planning, designing, financing, acquisition, development, redevelopment, expansion, construction, reconstruction, replacement, approval of works, lease, leaseback, licensing, consigning, asset management, optimization, rehabilitation, repair, alteration, improvement, extension, management, ownership, use and effectuation of the matters described in [each of the acts]." N.J. Act § 3; N.Y. Act § 2, ¶ 2(e).

[2] As part of phase one of the "passenger rail transportation project between Penn Station, Newark, New Jersey and Penn Station, New York, New York," referred to as the "Gateway Program," the bridge project is a component of the "Project" subject to the GDC's authority under the legislation enacted by the States. *See* N.J. Act § 3; N.Y. Act § 2, ¶ 2(h)(i).

Railroad Administration, and the Federal Transit Administration," serve on the NEC Commission, 49 U.S.C. § 24905(a)(1)(B), and thus were charged with considering whether the requested variance was permissible.

In the Amtrak Reform Act, Congress "grant[ed] consent to States with an interest in . . . intercity passenger rail service . . . to enter into interstate compacts to promote the provision of the service," including by retaining existing services, commencing new services, and performing capital improvements. Amtrak Reform Act § 410(a) (codified at 49 U.S.C. § 24101 note). While authorizing the compacts to facilitate the use of certain federal and state funds for intercity passenger rail service, Congress imposed a restriction to protect funding for Amtrak. Under the terms of the statute, "[a]n interstate compact established by States under subsection (a) may provide that, in order to carry out the compact, the States may . . . use any Federal or State funds made available for intercity passenger rail service (*except funds made available for Amtrak*)." *Id.* § 410(b)(2) (emphasis added). The question therefore was whether the GDC was created by an "interstate compact," and if so, whether NJT's proposed variance would have diverted "funds made available for Amtrak" to carry out a rail service project subject to the GDC's authority.

The Amtrak Reform Act does not define the phrase "interstate compact," but the term "compact" has significance under the Compact Clause of the Constitution, which provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." U.S. Const. art. I, § 10, cl. 3. Where a statute employs a term with "a well-known meaning . . . in the law of this country," we presume that Congress used the words "in that sense unless the context compels to the contrary." *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911); *see also U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 461–62 (1978) (positing that "the Framers used the words 'treaty,' 'compact,' and 'agreement' as terms of art, for which no explanation was required").[3] Here, the words of the statute itself confirm that

[3] *See also Neder v. United States*, 527 U.S. 1, 21 (1999) ("[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." (internal quotation marks omitted)); *cf. Steele v. United States*, 267 U.S. 505, 507 (1925) (noting that the Court interprets "officer of the United States" in a statute in light of its constitutional meaning unless relevant context indicates

Congress has employed the term "[c]ompact" in its constitutional sense. Section 410(a) is entitled, "Consent to Compacts," and the statute provides that "Congress grants consent to States . . . to enter into interstate compacts" according to its terms. Amtrak Reform Act § 410(a). Plainly, Congress understood the statute to be a grant of the consent that Article I, Section 10, Clause 3 of the Constitution requires for States to enter into "Compact[s]" with each other.

The Supreme Court has held that not every interstate agreement constitutes an "Agreement or Compact" subject to the Compact Clause. *See Virginia v. Tennessee*, 148 U.S. 503, 519 (1893). According to the Court, an agreement falls within the scope of the Clause only if it "tend[s] to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." *Id.* The "pertinent inquiry," the Court has explained, "is one of potential, rather than actual, impact upon federal supremacy." *Multistate Tax Comm'n*, 434 U.S. at 472. Under these precedents, "[i]nterstate agreements interfere with federal power . . . if: (1) they involve a subject matter which the Congress is competent to regulate . . . and (2) they purport to impose some legal obligation or disability" on state or federal governments or private parties. *Applicability of the Compact Clause to Use of Multiple State Entities Under the Water Resources Planning Act*, 4B Op. O.L.C. 828, 830–31 (1980) ("*Applicability of the Compact Clause*") (citing *Multistate Tax Comm'n*, 434 U.S. at 467–71; *Wharton v. Wise*, 153 U.S. 155, 171 (1894)).

The Court has also held that Congress's decision to authorize an interstate agreement on a subject matter that is within the scope of federal legislative authority would itself suffice to bring the agreement within the Compact Clause due to its inherent potential to impact federal supremacy. *See Cuyler v. Adams*, 449 U.S. 433, 440–41 (1981) (holding that "where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause"); *see also*

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otherwise); *United States v. Smith*, 124 U.S. 525, 531–32 (1888) (interpreting a statutory reference to "public officers" based upon the constitutional meaning of "officer[]," U.S. Const. art. II, § 2, cl. 2); *United States v. Mouat*, 124 U.S. 303, 306–07 (1888) (relying on the constitutional definition of "Officers of the United States" when interpreting the statutory phrase "officers of the navy").

Wash. Metro. Area Transit Auth. v. One Parcel of Land in Montgomery Cty., 706 F.2d 1312, 1317 n.9 (4th Cir. 1983) (suggesting that, even if a state agreement would not independently qualify as an Article I "Compact," congressional consent turns a state agreement touching on an area of Congress's legislative power into federal law). An agreement between two or more States may therefore constitute an interstate compact for constitutional purposes where it has been expressly authorized by an act falling within the appropriate scope of congressional authority.

Applying these precedents, we concluded that New York and New Jersey entered into an interstate agreement subject to the Compact Clause by enacting the reciprocal state laws establishing the GDC. The GDC has "several of the classic indicia of a compact," including the existence of a "joint organization or body" with regulatory authority, the inability of each State to "modify or repeal [the compact] unilaterally," and interstate "reciprocation." *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 472 U.S. 159, 175–76 (1985). The two States established the GDC as a governmental body, for public purposes. The GDC exercises governmental authority—it acts as a coordinating agency for federal, state, and private funding, and it has authority to enter into binding contracts with federal, state, and private entities; to acquire property for the projects, including through eminent domain; and to levy tolls and fees payable by project users. *See* N.J. Act § 4(a); N.Y. Act § 2, ¶ 1; *see also* N.J. Act §§ 4(a)(1)–(6), 7, 8; N.Y. Act § 2, ¶¶ 3, 6, 7. Each State further obligated itself to commit funds to rail projects that the GDC is authorized to facilitate. N.J. Act § 20; N.Y. Act § 2, ¶ 19.

In addition, while the two States did not sign a formal writing to embody their agreement, they did much the same thing by enacting reciprocal laws, on the same day, that were conditioned upon the other State's approval of a law with identical effect. N.J. Act § 30(a); N.Y. Act § 10(a); *see also Multistate Tax Comm'n*, 434 U.S. at 470 ("Agreements effected through reciprocal legislation may present opportunities for enhancement of state power at the expense of the federal supremacy similar to the threats inherent in a more formalized 'compact.'"). The state laws expressly require that each State must receive the "concurre[nce]" of the other State to amend or repeal its own law. N.J. Act § 25; N.Y. Act § 8.

The two States not only entered into an interstate agreement, but the agreement is one with the potential to encroach on "federal supremacy,"

even beyond the agreement's mere connection to a subject matter within the scope of Congress's constitutional authority to legislate. *See Multistate Tax Comm'n*, 434 U.S. at 468–70; *Virginia v. Tennessee*, 148 U.S. at 519. The GDC laws "impose some legal obligation or disability" on the state governments related to the regulation of rail operations. *Applicability of the Compact Clause*, 4B Op. O.L.C. at 830–31. There is no question that Congress is "competent to regulate" the field of interstate rail operations. *Id.* The Amtrak Reform Act itself recognizes that "intercity rail passenger service is an essential component of a national intermodal passenger transportation system." Amtrak Reform Act § 2. In addition, the compact imposes "legal obligation[s] or disabilit[ies]" on the States by requiring them to fund the Commission's projects, empowering the Commission to exercise regulatory powers across state lines, and requiring the States to engage in "joint . . . operation[s]" that involve interstate rail operations within the scope of federal legislative power. *See Applicability of the Compact Clause*, 4B Op. O.L.C. at 831.[4]

The proposed variance demonstrated that the GDC's authority may directly impinge upon federal equities. New Jersey had proposed to meet its financial obligations for a bridge project subject to the GDC's authority by diverting funds from Amtrak, and as you explained, such a diversion, if permitted, would have decreased Amtrak's available "good repair" funds, which could have created a shortfall requiring replenishment from other federal or state sources. *See* Bradbury Letter at 1, 3; Amtrak-NJT BCC Variance Request for Portal North Bridge, Resolution 2019-R-## (May 16, 2019) ("Draft Variance Request") (proposing a draft NEC

[4] In these respects, the GDC is quite different from the multistate administrative bodies that the Supreme Court has held to stand outside the Compact Clause. *See Multistate Tax Comm'n*, 434 U.S. at 471–72; *New York v. O'Neill*, 359 U.S. 1, 11 (1959) ("The Constitution of the United States does not preclude resourcefulness of relationships between States on matters as to which there is no grant of power to Congress and as to which the range of authority restricted within an individual State is inadequate."). In *Multistate Tax Commission*, for instance, the Court held that the States could establish such a body, even absent congressional consent, where the commission lacked any "delegation of sovereign power," could issue only "advisory" regulations, could be "withdraw[n] [from] at any time," and did not otherwise intrude on federal supremacy. 434 U.S. at 457, 473–76. By contrast here, as we have explained, the GDC exercises delegated state authority to take binding action across state lines, such as condemning property and levying tolls, and the reciprocal agreement occupies a field—interstate rail transit—that falls directly within Congress's legislative purview.

Commission resolution). Accordingly, we believe that the States' reciprocal laws establishing the GDC constitute an interstate compact under the Compact Clause.

Under Supreme Court precedent, the States' reciprocal laws further qualify as an interstate compact by virtue of Congress's express authorization of the formation of "interstate compacts" promoting intercity passenger rail service. *See* Amtrak Reform Act § 410(a). An agreement may qualify as an interstate compact where Congress has consented to it by "authorizing joint state action in advance" and the matter is "an appropriate subject for congressional legislation." *Cuyler*, 449 U.S. at 440–41. The Amtrak Reform Act here provides express consent to New York and New Jersey to enter into a compact to provide intercity rail services, and that is plainly an appropriate subject for congressional legislation under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States[.]"). Accordingly, even if the state laws establishing the GDC did not embody a potential intrusion on federal sovereignty, the federal law authorizing the agreement should itself be sufficient to bring it within the scope of the Compact Clause.

Having determined that the States entered into an interstate compact, we then considered whether NJT's proposal to divert funds that otherwise would have gone to Amtrak would have violated the terms of Congress's consent to that compact. In the Amtrak Reform Act, Congress authorized States to "use any Federal or State funds made available for intercity passenger rail service (*except funds made available for Amtrak*)." Amtrak Reform Act § 410(b)(2) (emphasis added); *see generally Cuyler*, 449 U.S. at 439–40 (Congress may condition its consent for compacts "on the States' compliance with specified conditions"). Consequently, NJT may not use any federal or state "funds made available for Amtrak" to fulfill its alternate funding obligations for projects that the GDC is authorized to facilitate.

We believe that NJT's proposed variance would have constituted a diversion of state "funds made available for Amtrak." Federal appropriations law speaks of funds being "made available" when they have been appropriated to be spent by a government entity for an authorized purpose, during an authorized period of time. *See, e.g.*, 3 Government Accountability Office, *Principles of Federal Appropriations Law* 3-9 (4th

ed. 2017). The Amtrak Reform Act, however, does not apply simply to federal funds, but also to state funds, and the statute is specifically intended to regulate how the States make funding decisions in connection with interstate compacts relating to rail service. Accordingly, we do not believe that funds may be viewed as being "made available" for Amtrak only when Congress has appropriated them for that purpose as a matter of federal appropriations law.

Instead, we think that the question whether state funds have been "made available" should turn on the ordinary meaning of the phrase, which refers to funds that would otherwise be provided to Amtrak. *See* 1 *Oxford English Dictionary* 812 (2d ed. 1989) ("available": "capable of being made use of, at one's disposal, within one's reach"); *Webster's Third New International Dictionary* 150 (1993) ("available": "capable of use for the accomplishment of a purpose; immediately utilizable"; "that is accessible or may be obtained . . . : at disposal, esp. for sale or utilization"). The Fifth Circuit approached the phrase in a similar way in connection with the Individuals with Disabilities Education Act ("IDEA"), *see* IDEA Amendments for 1997, Pub. L. No. 105-17, § 101, 111 Stat. 37, 68 (codified at 20 U.S.C. § 1412(a)(18)(A)), which conditions federal funding on a prohibition against a State's reducing the amount of state financial support "made available" for special education and related services. *See Tex. Educ. Agency v. U.S. Dep't of Educ.*, 908 F.3d 127, 132–33 (5th Cir. 2018). The court accepted that the phrase referred to funds that were "capable of being used, not actually used," *id.*, and concluded that the State had breached that condition by appropriating fewer funds for that purpose in that year than the prior one, *id.* at 130, 132–35.

Where a State has committed under relevant agreements to make future payments to Amtrak, under federal law or otherwise, we believe that those funds have been "made available" for Amtrak. If funds were "made available" to Amtrak only when the state funds had been actually expended, or otherwise transferred to Amtrak, then the prohibition on state use of funds "made available for Amtrak" would have little effect, because such amounts that had already been transferred to Amtrak could hardly be diverted.

Under this standard, New Jersey's assumption of funding obligations to Amtrak "made [those funds] available for Amtrak" within the meaning of the Amtrak Reform Act. NJT's underlying obligation to Amtrak resulted

from the NEC's Cost Allocation Policy, a congressionally mandated "policy for determining and allocating costs, revenues, and compensation for [NEC] commuter rail passenger transportation." *See* 49 U.S.C. § 24905(c)(1)(A). That Policy obligated New Jersey, as a participant in the NEC Commission, to make certain defined capital contributions. *See* Cost Allocation Policy § 1.6.1–.2. The Policy set requirements for the prioritization of baseline capital charges, which the NEC Commission calculates annually for each participant. *See id.* § 5.5.1–.2. NJT recognized that this prioritization formula would, in the absence of a variance, require that the NJT funds at issue be provided "to Amtrak." *See* Memorandum for the Northeast Corridor Commission, from Joseph Quinty, NJ Transit, *Re: BCC Variance Request* at 1 (May 16, 2019) ("Quinty Memorandum"). The proposed variance would have enabled NJT to divert a portion of its payments set aside for NEC-related capital costs to pay down a portion of NJT's obligations to the aforementioned bridge project, ranging from $16 to $20 million per year, covering the period from 2019 through 2033. *Id.*; *see also* Portal North Bridge Variance Request at 1 (updated May 16, 2019) ("Variance Request Form") (explaining that the requested variance covered a fifteen-year period and included a $20 million reduction—or credit—applied to NJT's annual baseline capital charge obligation to Amtrak for fiscal years 2019 through 2029, followed by a $19 million credit for fiscal year 2030, reduced by $1 million annually through fiscal year 2033). Because NJT's request would have reduced the funds provided to Amtrak, we believe that the proposed variance would have presented precisely the kind of diversion prohibited by the Amtrak Reform Act.

We see two possible counterarguments, but we do not view either to be persuasive. First, one could argue that the NEC Commission's approval of a variance from the Cost Allocation Policy itself would reduce the amount of funds that NJT would be obliged to pay to Amtrak in the future. Under this reasoning, New Jersey's redirection of resources would not in fact reduce any funds "made available" to Amtrak; those reductions would arise solely from the discretionary decision by the NEC Commission. We think, however, that this argument ignores the fact that it was New Jersey itself that had requested a *variance* from its obligations for the purpose of meeting its new funding commitments under the GDC laws for the bridge project. Because the Amtrak Reform Act prohibits a State from entering

into an interstate agreement that will take funds away from Amtrak, we think it similarly applies to prevent New Jersey from making a variance request to the NEC Commission that would have the same effect.

Second, because NJT's variance proposal addressed funding over a fifteen-year period, it could be said that the request concerned the projected expenditure of funds, and not simply funds that have already been "made available" to Amtrak. *See* Quinty Memorandum at 1. NJT calculated the future funding, beyond fiscal year 2019, that Amtrak would have been expected to receive based on NJT's *actual* payment obligations for fiscal year 2019 but a "*projected* . . . total payment amount" for fiscal year 2020. Variance Request Form at 1 (emphasis added). For the years following fiscal year 2020, the NEC Commission had not yet specified even the projected annual baseline capital charge spending obligations for each rail operator, so NJT's variance request for fiscal years 2021 through 2033 was based on NJT's assumptions regarding its annual future BCC obligations. *See id.* Nonetheless, the statutorily authorized NEC Cost Allocation Policy bound NJT to provide an agreed-upon amount of funding to Amtrak for infrastructure repairs, before diverting funds to third-level backlog projects such as the Portal North Bridge project. *See* Cost Allocation Policy § 5.5.2.1 (prioritizing basic infrastructure projects ahead of major backlog projects); Draft Variance Request arts. (B)–(D) (summarizing the Cost Allocation Policy requirement and asserting that the Portal North Bridge project is a "Major Backlog" project). Even though only current fiscal year funds are presently "available" for Amtrak, the future obligations are "expected," *see* Cost Allocation Policy § 4.2.1(2)–(3), and the current policy continues to bind parties until such time as the NEC Commission adopts a replacement policy.[5] Under the Amtrak Reform Act, NJT could not lawfully divert funds for use on projects the GDC is authorized to facilitate that, under the current Cost

[5] *See* Cost Allocation Policy § 2.2–.4; *see also id.* § 2.6 (providing for the imposition of financial penalties for parties who do not meet their payment obligations under the policy); 49 U.S.C. § 24905(c)(1)–(2) (requiring "Amtrak and public authorities providing commuter rail passenger transportation on the Northeast Corridor" to implement agreements, based on cost allocation policies, that are enforceable by the Surface Transportation Board); Cost Allocation Policy app. § 1.4.2.3 (providing that "if the policy expires, then the last year for which fully allocated costs were calculated according to the policy . . . will be used as the basis for calculating the current-year costs").

Allocation Policy, would have been "available" to Amtrak in future years. *See, e.g.*, *id.* § 2.2; Amtrak Reform Act § 410(b)(2) ("An interstate compact established by States under subsection (a) may provide that, in order to carry out the compact, the States may . . . use any Federal or State funds made available for intercity passenger rail service (except funds made available for Amtrak)."). Should the NEC Commission revise its Cost Allocation Policy in the future in a way that reduces NJT's obligations to Amtrak, then New Jersey may have more funds to direct toward GDC-facilitated projects. But under the Cost Allocation Policy as it currently exists, NJT was seeking a variance that would take away funds expected to be "made available" for Amtrak.

NJT's request made clear that, absent the proposed variance, Amtrak would have been the recipient of the capital charges that NJT owes. Variance Request Form at 1. Because NJT had been obligated to make these payments to Amtrak under the NEC policy's prioritization requirements, we believe that the funds had been "made available" for Amtrak within the meaning of the Amtrak Reform Act. A diversion of these funds thus would have contravened the prohibition on using "funds made available for Amtrak" to "carry out the [interstate] compact." Amtrak Reform Act § 410(b)(2). Accordingly, we advised that the NJT's proposed variance would have been contrary to federal law.[6]

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[6] The NEC Commission ultimately approved a baseline capital charge variance that, like NJT's initial proposal, reprioritized baseline capital charges from basic infrastructure to backlog projects but, unlike NJT's proposal, stipulated that "the Gateway Development Commission is not authorized to receive or control the funds (or credit of funds) that are the subject" of the request. Resolution to Approve the NJT/Amtrak BCC Variance Request for Portal North Bridge, Resolution 2019-R-18 (Sept. 12, 2019).

Exclusion of Religiously Affiliated Schools from Charter-School Grant Program

A provision of the Elementary and Secondary Education Act of 1965 that excludes religiously affiliated charter schools from participating in the Expanding Opportunity Through Quality Charter Schools Program discriminates on the basis of religious status in violation of the Free Exercise Clause.

February 18, 2020

MEMORANDUM OPINION FOR THE
PRINCIPAL DEPUTY GENERAL COUNSEL
DEPARTMENT OF EDUCATION

You have asked about the constitutionality of a statute that excludes religiously affiliated charter schools from participating in the Expanding Opportunity Through Quality Charter Schools Program. We conclude that the restriction unconstitutionally discriminates on the basis of religious status under *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017).

The charter-school program was added to the Elementary and Secondary Education Act of 1965 ("ESEA"), Pub. L. No. 89-10, 79 Stat. 27, by the No Child Left Behind Act of 2001, Pub. L. No. 107-110, sec. 501, §§ 5201–5211, 115 Stat. 1425, 1788–1800 (2002). After further amendment, the program statute now appears at ESEA §§ 4301–4311, and is codified at 20 U.S.C. §§ 7221–7221j. The statute defines a "charter school" as a "public school" that is "exempt from significant State or local rules that inhibit the flexible operation and management of public schools," but that is nonetheless "operated under public supervision and direction." 20 U.S.C. § 7221i(2)(A)–(B). A charter school must be both "nonsectarian in its programs, admissions policies, employment practices, and all other operations" and "not affiliated with a sectarian school or religious institution." *Id.* § 7221i(2)(E). Under the program, the Department of Education provides grants to entities such as state educational agencies or charter-school support organizations. *Id.* § 7221b(a)–(b). These entities in turn make subgrants to "eligible applicants" so that they can create or operate charter schools. *Id.* § 7221b(b)(1). An "eligible applicant," or "developer," can be "an individual or group of individuals (including a public or private nonprofit organization)." *Id.* § 7221i(5)–(6).

Thus, while a "charter school" is a "public school" operated under "public supervision and direction," *id.* § 7221i(2)(B), it may be created or operated by an individual or private nonprofit organization.

You have asked whether the provision of the ESEA limiting eligibility for this program to schools "not affiliated with a sectarian school or religious institution," *id.* § 7221i(2)(E), violates the Free Exercise Clause of the First Amendment. Under Supreme Court precedent, the framework for analyzing that question depends 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." *Religious Restrictions on Capital Financing for Historically Black Colleges and Universities*, 43 Op. O.L.C. 191, 196 (2019) ("*Religious Restrictions*"). That distinction derives from the Supreme Court's decisions in *Trinity Lutheran*, which struck down a Missouri policy "of denying grants to any applicant owned or controlled by a church, sect, or other religious entity," 582 U.S. at 455, and *Locke v. Davey*, 540 U.S. 712 (2004), which upheld a Washington statute denying certain scholarship funds to "any student who is pursuing a degree in theology," *id.* at 716 (quoting statute). The Court deemed the former restriction to be impermissible discrimination on the basis of religious status, but the latter to be a permissible limit on the use of public funds for explicitly devotional religious activity. *See Religious Restrictions*, 43 Op. O.L.C. at 195–96, 207–10.

As we have explained, the difference between status-based religious discrimination (which is presumptively unconstitutional) and use-based limits on allocating government benefits (which may be permissible under *Locke*) is informed by the distinction the Supreme Court has drawn between funding restrictions that permissibly define the scope of a government program and unconstitutional conditions on the use of federal funds. *Id.* at 196. While the government may "retain a legitimate interest in defining the program to exclude certain religious uses" of funds, it may not, as a general matter, create a religious-funding restriction so broad that "it sweeps beyond 'defining the limits of the federally funded program to defining the recipient.'" *Id.* at 197 (quoting *U.S. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.* ("*AOSI*"), 570 U.S. 205, 218 (2013)).

In our *Religious Restrictions* opinion, we applied this framework to a statutory funding condition that denied federal loan support to capital-

improvement projects at a university "in which a substantial portion of its functions is subsumed in a religious mission." *Id.* at 207 (quoting 20 U.S.C. § 1066c(c)). We concluded that the restriction was status-based religious discrimination. We reasoned that the condition denied federal support to "projects that have no direct connection to the religious activities of" a university "simply because of the religious mission of the institution"—even to projects that had no "inherent religious character." *Id.* at 207–08. This reasoning turned on the breadth of the restriction in question and its tenuous connection to the purpose of limiting funding to secular activities.

The religious-affiliation restriction in the ESEA broadly prohibits charter schools in the program from associating with religious organizations. No charter school may be "affiliated" with any "sectarian school or religious institution." 20 U.S.C. § 7221i(2)(E). Generally speaking, one entity is "affiliated" with another if the two have a close association, such as when they have formally distinct business operations but are under common ownership or control. *See Black's Law Dictionary* 67 (9th ed. 2009) (defining "affiliated," with reference to a corporation, to mean "related to another corporation by shareholdings or other means of control"); 1 *Oxford English Dictionary* 216 (2d ed. 1989) ("[t]o attach a smaller institution *to*, or connect it *with*, a larger one as a branch thereof"); *Webster's Third New International Dictionary* 35 (2002) (defining "affiliate" as "a company effectively controlled by another or associated with others under common ownership or control"); *accord Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009). The restriction therefore would not only prohibit a religious institution from owning or operating a charter school but also preclude the owners or operators of a charter school that otherwise satisfies federal requirements from closely associating with a religious institution.

That is discrimination on the basis of religious status. Like the provision discussed in our *Religious Restrictions* opinion, the categorical prohibition on religious affiliation in the charter-school program sweeps well beyond ensuring that the activities of the program in question remain nonsectarian. A religious institution would have to divest itself of its religious character before it could own or operate a charter school in the program. The restriction would also preclude the owners or operators of a secular charter school from expressing their religious beliefs through

closely associating with a distinct religious organization. All that would be true even if the religious institution and the charter school maintained separate operations, took care to preserve the nonsectarian character of the charter school's curriculum and operations, and submitted to public supervision and direction in operating the school. *See* 20 U.S.C. § 7221i(2)(E). The restriction therefore goes beyond assuring the nonsectarian character of the charter-school program itself. Instead, it is aimed at the religious character of individuals and organizations that seek to create, own, or operate nonsectarian charter schools run under public supervision.

The conclusion that this statute discriminates on the basis of religious status is underscored by unconstitutional-conditions cases involving the right to free speech. The Supreme Court has observed that the possibility of affiliating with other organizations sometimes permits "an organization bound by a funding condition to exercise its First Amendment rights outside the scope of the federal program." *AOSI*, 570 U.S. at 219. But here that is impossible, because the charter-school statute proscribes the act of affiliation itself. The prohibition on affiliation burdens the exercise of religion: it prohibits a related, but distinct, religious organization from participating in the program, and it prohibits those who own or operate charter schools from achieving a close association with such a religious organization. *Compare FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 399–401 (1984) (striking down a provision of the Public Broadcasting Act of 1967 that prohibited television and radio stations from receiving certain grants from the Corporation for Public Broadcasting if they engaged in editorializing, because the statute did not permit a television or radio station to receive federal funds even if the station set up "a separate affiliate" to pursue its editorializing activities with non-federal funds), *with Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 & n.6 (1983) (rejecting a constitutional challenge to a provision of the Internal Revenue Code that denied tax-exempt status to a nonprofit organization that engaged in lobbying because the nonprofit organization could separately incorporate an affiliate to lobby and still be eligible for a tax exemption). It is one thing for the program to require the curriculum of a charter school to be nonsectarian. Because a charter school is under "public supervision and direction," 20 U.S.C. § 7221i(2)(B), this requirement directly concerns how public moneys are

used. It is something else entirely to forbid a religious institution from setting up or operating a charter school that otherwise meets federal requirements, or to prohibit the developer or operator of such a charter school from having an affiliation with a religious institution, which places a burden on those of faith based on religious identity outside the charter-school program itself. "[T]he Free Exercise Clause protects against indirect coercion or penalties on the free exercise of religion, not just outright prohibitions." *Trinity Lutheran*, 582 U.S. at 463 (internal quotation marks omitted).

Government-funding "[r]estrictions based on religious status are presumptively unconstitutional." *Religious Restrictions*, 43 Op. O.L.C. at 196; *see Trinity Lutheran*, 582 U.S. at 466 (applying the "most rigorous" scrutiny to a funding restriction based on religious status (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993))). It is true that "the need to comply with the Establishment Clause may justify restrictions that would otherwise amount to impermissible religious discrimination." *Religious Restrictions*, 43 Op. O.L.C. at 197. But 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," *id.* at 200, as the charter-school program is here, *see* 20 U.S.C. § 7221i(2)(E) (requiring charter school to be "nonsectarian in its programs, admissions policies, employment practices, and all other operations"). As we recognized in *Religious Restrictions*, the Supreme Court has sometimes suggested that even a religiously neutral government-aid program involving direct government subsidies must have protections that "ensure that funds are not diverted to a religious use," 43 Op. O.L.C. at 201, in order to comply with the Establishment Clause. But even if that principle retains vitality today—and we have our doubts, *see id.* at 201–02—the statute here has such a safeguard, because it mandates that a charter school's programs and practices be nonsectarian and be under public supervision.

The status-based religious discrimination here cannot be justified by the Establishment Clause concerns that sometimes arise when a government singles out a religious entity to carry out a governmental function—here, the operation of what the statute defines as a "public school." *See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982). In *Kiryas*

Joel, the Supreme Court invalidated a state statute that had drawn a school district around a village occupied almost exclusively by practitioners of Satmar Hasidism, a strict form of Judaism, based on the Court's perception that the statute in question was a "special and unusual" legislative act intended to confer particular benefits on the Satmar community. 512 U.S. at 702; *see also id.* at 716 (O'Connor, J., concurring in part and concurring in the judgment) (viewing the law as "singl[ing] out a particular religious group for favorable treatment"); *Grendel's Den*, 459 U.S. at 117, 127 (invalidating a state statute that allowed a church to veto the zoning license of a liquor store within 500 feet of the church). The program here, if it did not exclude religiously affiliated charter schools, would raise no such concerns because it is otherwise neutral toward religion. Religiously affiliated charter schools would receive no special benefit or authority and would have to meet the same standards as other charter schools to participate in the program. *See, e.g.*, 20 U.S.C. § 7221b(f)(1)(A)(vi), (x), (2)(F), (G).

ESEA's charter-school program is not unusual in that regard. Many federal statutes, including ones administered by the Department of Education, allow a religious organization to partner with the federal government on the same basis as a secular organization in carrying out a particular social service program. *See, e.g.*, Exec. Order No. 13,279, § 2(g) (Dec. 12, 2002), 67 Fed. Reg. 77,141 (Dec. 16, 2002), *as amended by* Exec. Order No. 13,559, § 1(b) (Nov. 17, 2010), 75 Fed. Reg. 71,319, 71,320 (Nov. 22, 2010) ("Faith-based organizations should be eligible to compete for Federal financial assistance used to support social service programs and to participate fully in the social service programs supported with Federal financial assistance without impairing their independence, autonomy, expression outside the programs in question, or religious character."); 2 C.F.R. § 3474.15(b)(1) ("A faith-based organization is eligible to contract with grantees and subgrantees, including States, on the same basis as any other private organization, with respect to contracts for which such other organizations are eligible."). These kinds of arrangements do not violate the Establishment Clause. *See generally, e.g.*, *Direct Aid to Faith-Based Organizations Under the Charitable Choice Provisions of the Community Solutions Act of 2001*, 25 Op. O.L.C. 129 (2001).

Forbidding charter schools under the program from affiliating with religious organizations discriminates on the basis of religious status. The mere "interest in 'skating as far as possible from religious establishment concerns,'" *Religious Restrictions*, 43 Op. O.L.C. at 208 (quoting *Trinity Lutheran*, 582 U.S. at 466), cannot suffice to support such discrimination. Accordingly, the religious non-affiliation requirement in 20 U.S.C. § 7221i(2)(E) violates the Free Exercise Clause of the First Amendment. Should the Department of Education establish a policy not to enforce this provision, it 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).

HENRY C. WHITAKER
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Transmission of Electoral-College Certificates by "Registered Mail"

Sections 6, 11, and 12 of the electoral-college provisions in title 3 of the U.S. Code require state officials to transmit their selection and vote certificates to the Archivist of the United States by United States Postal Service registered mail.

The electoral-college provisions do not require the Archivist to reject certificates that he receives even if state officials have transmitted them by some other means.

February 27, 2020

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
NATIONAL ARCHIVES AND RECORDS ADMINISTRATION[*]

In the Constitution's system for selecting the President and Vice President of the United States, each State must appoint electors, who cast votes to determine who fills the offices. *See* U.S. Const. art. II, § 1, cl. 2; *id.* amend. XII. Every State currently provides that the electors are to be appointed based upon the results of the State's presidential election. Upon the electors' appointment, each state governor is "to communicate by registered mail" a selection certificate identifying the electors to the Archivist of the United States. 3 U.S.C. § 6. After the electors within each State meet and cast their votes on the appointed day, the electors, and in some instances the State's secretary of state, must send sealed certificates reflecting those votes to the Archivist, again "by registered mail." *Id.* §§ 11–12.

You have asked whether those statutory references to "registered mail" mean that the state officials must send their certificates through the United States Postal Service's ("USPS") registered-mail service, or whether they may use equivalent commercial carriers or other USPS mail services, such as certified mail. If the state officials are required to use registered mail, but instead use some other service, you have asked whether the Archivist must refuse to accept the certificates because they have been sent by an unauthorized means.

[*] Editor's note: The Electoral Count Reform Act of 2022, Pub. L. No. 117-328, div. P, title I, 136 Stat. 4459, 5233–41, made a number of changes to chapter 1 of title 3 of the U.S. Code, including by eliminating references to "registered mail."

We conclude that federal law does require state officials to send their electoral certificates by USPS's registered-mail service. The plain language of the statute requires the use of registered mail, and this interpretation is supported by the history of the statute, Congress's decision to amend other statutory provisions, and the relevant judicial precedent. But the statute places no restrictions on the Archivist's acceptance of the States' certificates. Instead, it calls for him to request duplicate copies only if he does not "receive[]" a State's vote certificates. 3 U.S.C. §§ 12, 13. The statute therefore does not require the Archivist to reject certificates sent by an unauthorized means. By refusing receipt, the Archivist would thwart the statutory scheme, which seeks to ensure that the States reliably transmit the certificates to the Archivist for the purpose of keeping the official records and, in the case of the certificates of the electors' votes, as duplicates of the vote certificates sent to the President of the Senate.

I.

Article II, Section 1 of the Constitution, as amended by the Twelfth Amendment, establishes the process for selecting the President and Vice President. *See* U.S. Const. art. II, § 1, cls. 2–4; *id.* amend. XII. Each State appoints, in the manner its legislature sees fit, a number of "Electors" equal to the number of Senators and Representatives it has in Congress. *Id.* art. II, § 1, cl. 2. (In addition, under the Twenty-Third Amendment, the District of Columbia appoints three electors.) The electors in each State meet and vote for the President and Vice President. *Id.* amend. XII. The electors then transmit their votes to the President of the Senate, who counts the votes in a meeting of both Houses of Congress. *Id.* The candidates who receive the most electoral votes for President and Vice President, respectively, win those offices, so long as the votes constitute a majority of the appointed electors. *Id.*

Congress has further prescribed the timing and manner of these elections in chapter 1 of title 3 of the U.S. Code, which is entitled "Presidential Elections and Vacancies" and governs the activities of the electoral college and the selection of the President and Vice President. *See* 3 U.S.C. §§ 1–21. Absent an electoral dispute, a State must appoint its electors on the Tuesday after the first Monday in November of a presidential election year. *Id.* §§ 1–2. After a State appoints its electors, the State's governor

must "communicate by registered mail under the seal of the State to the Archivist" a certificate listing the names of the electors and the number of votes cast for each person on the ballot. *Id.* § 6.

The electors meet in their respective States to vote "on the first Monday after the second Wednesday in December." *Id.* § 7. The electors from each State execute six vote certificates, listing their votes for the President and the Vice President, which they then seal and certify. *Id.* §§ 9–10. The electors must "forthwith forward" one certificate "by registered mail" to the President of the Senate. *Id.* § 11. They must "forward" two certificates "by registered mail" to the Archivist, one to "be held subject to the order of the President of the Senate" and the other to be retained as a record "open to public inspection." *Id.* Two certificates also go to the State's secretary of state, again for purposes of providing a duplicate copy and a public record. *Id.* The sixth certificate goes to the district judge in the district where the electors have met, also to be preserved in case of need. *Id.*

If none of a State's vote certificates reach the President of the Senate or the Archivist by the fourth Wednesday in December, the President of the Senate (or the Archivist if the President of the Senate is absent) requests, "by the most expeditious method available," that the secretary of state of that State "immediately" send one of his certificates to the President of the Senate "by registered mail." *Id.* § 12. If neither the President of the Senate nor the Archivist has received a State's vote certificate by the fourth Wednesday in December, the President of the Senate (or the Archivist if the President of the Senate is absent) must send a messenger to retrieve by hand the sixth vote certificate from the district judge in the district where the electors met. *Id.* § 13. Finally, the President of the Senate opens the certificates and counts the votes in the House of Representatives, with all the Members of Congress present, on January 6. *Id.* § 15.

II.

You have asked whether references to "registered mail" in 3 U.S.C. §§ 6, 11, and 12 mean that state officials must, in fact, transmit certain certificates "by registered mail." We conclude that these statutory requirements mean what they say—both the selection certificates and the vote certificates must be sent through USPS's registered-mail service. Not

only does the plain language of the statute require this result, but all of the other relevant principles of statutory interpretation confirm that the text reflects a deliberate choice by Congress to require the use of registered mail.

A.

We begin with the text of the statute. "When the words of a statute are unambiguous, . . . this first canon is also the last[.]" *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). Congress first required the States in 1928 to send their electoral certificates "by registered mail" to the President of the Senate and to the U.S. Secretary of State, who then performed the record-keeping duties now performed by the Archivist.[1] *See* Pub. L. No. 70-569, §§ 2, 4–5, 45 Stat. 945, 946–47 (1928). When Congress introduced these requirements, it specifically and repeatedly used the phrase "registered mail." *See id.*[2]

There is no ambiguity here. At the time the statute was adopted, "registered mail" referred to a specific service offered by USPS (then called the Post Office Department) that provided special safety measures to assure delivery. *See Webster's New International Dictionary of the English Language* 1796–97 (1917) (defining "registered . . . mail" as "mail the addresses of the sender and consignee of which are, on payment of a special fee, registered in the post office and the transmission and delivery of which are attended to with certain formalities for the sake of security"); *see also Funk & Wagnalls New Standard Dictionary of the English Language* 2077 (1925) (defining "registered letter" as "a letter . . . of which the addresses of the consignor and consignee are entered in a register at the transmitting office, and which upon payment of a special fee obtains the benefit of extra safeguards to insure the safe transmission and delivery of its contents"); 5 *The Century Dictionary and Cyclopedia* 3421 (1911)

[1] In 1951, Congress substituted the Administrator of General Services for the Secretary of State. *See* Pub. L. No. 82-248, §§ 5–9, 65 Stat. 710, 711–12 (1951). In 1984, Congress created the National Archives and Records Administration and transferred the electoral-college duties from the Administrator to the Archivist. National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107(e)(1)–(3), 98 Stat. 2280, 2291–92.

[2] These provisions were included without any relevant substantive changes when Congress enacted title 3 of the U.S. Code as positive law in 1948. Pub. L. No. 80-771, 62 Stat. 672, 673–74 (1948).

(defining "[r]egistered letter" as "a letter the address of which is registered at a post-office for a special fee, in order to secure its safe transmission, a receipt being given to the sender and by each postmaster and employee through whose hands it passes").

We have found no indication that there was any other general use of the term "registered mail."[3] To the contrary, at the time, federal law criminalized the establishment of "any private express for the conveyance of letters or packets," except by special messenger. *See* 18 U.S.C. §§ 304–309 (1925). No entity other than USPS offered a service by the name "registered mail" in 1928 or provided the mail delivery required by the electoral-college provisions. Congress's reference to "registered mail" therefore would have plainly been understood at the time to refer to a particular service offered by USPS.

USPS introduced registered-mail service in 1855.[4] The service had well-understood attributes by 1928, as shown by the detailed Postal Laws and Regulations then in effect. *See* Post Office Dep't, *Postal Laws and Regulations of the United States of America* §§ 859–1076 (1924). USPS kept registered mail "separate from ordinary matter" and "properly protected from accident or theft," using special envelopes, jackets, and pouches. *Id.* §§ 894–95, 1058. At each step of the transmission process, postal workers created receipts, establishing a chain of custody so that employees would be "prepared at any time to make affidavit stating that any particular registered piece was properly dispatched, delivered as a hand piece, or received, and its condition." *Id.* § 932; *see id.* §§ 882, 900, 922, 934, 1062.

Registered mail remains much the same today. USPS describes registered-mail service as "the most secure service" that it offers. United States

[3] Although the legislative history discussing these provisions is sparse, at no time did any member of Congress mention any entity other than the "post office" or any specific service other than "registered mail," with the other references being simply to the "mail." *See Providing for the Meeting of Electors of President and Vice President and for the Issuance and Transmission of the Certificates of Their Selection and of the Result of Their Determination, and for Other Purposes: Hearing on H.R. 7373 Before the H. Comm. on Election of President, Vice President, and Representatives in Congress*, 70th Cong. 1, 2, 4, 5 (1928) ("1928 House Hearing"); 69 Cong. Rec. 8827 (1928) (statement of Sen. Samuel Bratton).

[4] *See Significant Years in U.S. Postal History*, https://about.usps.com/publications/pub100/pub100_076.htm (last visited Jan. 6, 2020).

Postal Service, *Mailing Standards of the United States Postal Service, Domestic Mail Manual* § 503.2.1.1 (Jan. 26, 2020) ("DMM"). USPS requires that registered mail be kept in "a locked drawer, cabinet, safe, or registry section" until dispatched for transport or delivery in a special pouch, container, or envelope. United States Postal Service, *Registered Mail*, Handbook DM-901 §§ 3-3.3.2, 5-2.1 (Apr. 2010) ("Handbook DM-901"). USPS still keeps registered mail "separate from ordinary mail," *id.* § 7-3.1.1, and continues to utilize "a system of receipts to monitor the movement of the mail from the point of acceptance to delivery," DMM § 503.2.1.1. And USPS instructs employees to "[h]andle" registered mail "so that individual responsibility can be assigned at all times." Handbook DM-901 § 7-3.2.2. USPS warns customers that because "[r]egistered [m]ail is kept highly secured and is processed manually," it does not travel as quickly as mail sent by other services. *What is Registered Mail®?* (May 19, 2019), https://faq.usps.com/s/article/What-is-Registered-Mail. And USPS recently trademarked "registered mail," which precludes any other carrier from offering a service under that same name. REGISTERED MAIL, Registration No. 5,306,691.

The phrase "registered mail" had a specific and well-understood meaning in 1928, and, even if private companies now offer similar services, the term—which remains in 3 U.S.C. §§ 6, 11, and 12—retains the same meaning and the same association with USPS today.

B.

The history of the electoral-college statute indicates that, consistent with the plain meaning of the term, Congress deliberately chose "registered mail" in order to refer to the specific means of delivery offered by USPS. Before the 1928 statute, Congress had required the States to "communicate"—with no means specified—their selection certificates to the U.S. Secretary of State. *See* Act of Feb. 3, 1887, ch. 90, § 3, 24 Stat. 373, 373. And, after the electors in each State had voted, they were required to "appoint" a person to "deliver" one of their vote certificates to the President of the Senate and to send another vote certificate to him "by the post-office." Rev. Stat. § 140 (2d ed. 1878), 18 Stat., pt. 1, at 23 (repl. vol.); *see* 1928 House Hearing, *supra* note 3, at 1 (statement of Rep. Hatton Sumners) (describing how, under the old method, "one [vote certificate] is delivered to a messenger who brings it to Washington");

69 Cong. Rec. 8827 (statement of Sen. Samuel Bratton) ("[The new bill] dispenses with the necessity of presidential electors coming to the Capital in person to bring the returns.").

The 1928 statute altered those existing procedures by, among other things, eliminating the requirement that one vote certificate be hand-delivered to the President of the Senate. At the same time, the statute imposed more specific requirements about how to send the selection certificates (to the U.S. Secretary of State) and mail the vote certificates (now to the President of the Senate and, for the first time, the U.S. Secretary of State), now requiring both kinds of certificates to be sent by registered mail. These changes updated the process for collecting the electors' votes, while maintaining the security of that process. *See* 1928 House Hearing, *supra* note 3, at 1 (statement of Rep. Hatton Sumners) ("The purpose of this bill is to provide for the use of the mail in order to bring these certificates to Washington[.]"); S. Rep. No. 70-986, at 1–2 (1928) ("The purpose of [the bill] is to modernize, to make more safe and less expensive the method of assembling the certificates[.]"); H.R. Rep. No. 70-750, at 1 (1928) (same); 69 Cong. Rec. 8827 (statement of Sen. Samuel Bratton) ("[The change] is in the interest of economy and is perfectly safe as an administrative measure."). The 1928 amendments thus reflected a deliberate decision to require the use of registered mail in transmitting the certificates.

C.

Congress's deliberate choice to require the use of registered mail is confirmed by other statutory provisions, both within the electoral-college statute and in the broader body of federal law. Numerous other provisions of federal law distinguish between "registered mail" and other delivery services. The most natural interpretation of these laws is that, where Congress has required the use of registered mail, the law does not permit the use of another service.

The electoral-college statute itself confirms the distinction between registered mail and other forms of communication. For instance, 3 U.S.C. § 6 requires the state governors to send the selection certificates to the Archivist "by registered mail," but the very same provision allows the governors to inform the Archivist about the resolution of disputes over electors' appointments by "communicat[ing] . . . a certificate of such determination

in form and manner as the same shall have been made." To take another example, 3 U.S.C. § 12 provides that, if the President of the Senate and the Archivist do not receive the vote certificates by the fourth Wednesday in December, then the relevant federal officials must notify the State's secretary of state "by the most expeditious method available," and the secretary of state must respond by sending the vote certificate "by registered mail." Congress thus plainly knew and marked the difference between registered mail and other forms of communication in the electoral-college statute. *See Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353–54 (2013) (similar).

In addition, Congress has repeatedly amended federal law to permit the use of mail services other than registered mail for certain communications required by statute. Congress previously required the use of registered mail in a number of different statutes.[5] After USPS introduced certified-mail service in 1955, Congress considered a bill that would have "authorize[d] the use of certified mail for the transmission or service of anything required by Federal law to be transmitted or served by registered mail." Letter for E. Robert Seaver, Assistant to the Deputy Attorney General, from Frederick W. Ford, Acting Assistant Attorney General, Office of Legal Counsel at 1 (Oct. 26, 1956). As the Director of the Postal Services testified not long thereafter, such legislation was necessary, if Congress wanted to allow the use of certified mail, because "the old statutes . . . bound" people "to use [registered-mail] service whether they need it or not." *Optional Use of Certified Mail by Government Agencies: Hearing on H.R. 8542, H.R. 8543, and H.R. 10996 Before the H. Comm. on Post Office and Civil Serv.*, 86th Cong. 5, 15 (1960) ("Certified Mail Hearing").

Such legislation, however, was never enacted. As the Postmaster General explained in a letter to the Speaker of the House:

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[5] *See, e.g.*, Grain Futures Act, Pub. L. No. 67-331, § 6(b), 42 Stat. 998, 1002 (1922); Pub. L. No. 69-740, § 3, 44 Stat. 1372, 1373 (1927); Longshoremen's and Harbor Workers' Compensation Act, Pub. L. No. 69-803, § 19(b), (c), (e), 44 Stat. 1424, 1435 (1927); Pub. L. No. 70-573, 45 Stat. 953, 954 (1928); Pub. L. No. 71-325, § 6(c), 46 Stat. 531, 534 (1930); Pub. L. No. 73-1, §§ 208, 301, 48 Stat. 1, 4, 5 (1933).

> The view has been expressed that it would be unwise to enact a general authorization for the use of certified mail in addition to registered mail for the transmission or service of documents and other matter. Accordingly, each department and agency has examined the laws under its administration and has advised with respect to the specific laws which should be amended to include authorization for the service or transmission of documents and other matter, by certified mail, in addition to registered mail.

Letter for Sam Rayburn, Speaker of the House of Representatives, from Arthur E. Summerfield, Postmaster General, Post Office Department, *in* Certified Mail Hearing at 5–6.

Consistent with the recommendations of the Executive Branch, over the next few years, Congress enacted several laws to amend certain statutes to authorize the use of certified mail in addition to registered mail. *See, e.g.*, Pub. L. No. 85-207, sec. 18, 71 Stat. 481, 484 (1957); Pub. L. No. 85-259, 71 Stat. 583, 583 (1957); Technical Amendments Act of 1958, Pub. L. No. 85-866, sec. 89(b), (c), 72 Stat. 1606, 1665–66; Pub. L. No. 86-106, sec. 17, § 148, 73 Stat. 239, 242 (1959); Pub. L. No. 86-199, 73 Stat. 427, 427 (1959). During this same period, Congress considered, but did not enact, three different bills that would have amended, among other things, the electoral-college provisions to allow the use of either registered or certified mail. *See* S. 3461, 85th Cong. § (a)(1) (1958); H.R. 11602, 85th Cong. § (a)(1) (1958); S. 652, 86th Cong. § (a)(1) (1959).

These efforts culminated in 1960, when USPS recommended and Congress passed a bill that amended 56 different statutory references to "registered mail." *See* Pub. L. No. 86-507, 74 Stat. 200 (1960). The amended provisions included a registered-mail requirement enacted on the same day as the electoral-college provisions, *id.* § 1(45), 74 Stat. at 203, but Congress made no changes to the electoral-college provisions. Congress thus understands the distinction between registered and certified mail and has decided whether and when to modify the registered-mail requirements to allow for other services.

In addition, when Congress amended sections 6, 11, and 12 of title 3 in 1984 to substitute the Archivist for the Administrator of General Services, it made no changes to the registered-mail requirements. Pub. L. No. 98-497, § 107(e)(1)–(3), 98 Stat. at 2291–92. Congress's decision to leave

untouched the registered-mail requirements when it amended sections 6, 11, and 12 means that those requirements continue to apply here, as similar requirements do elsewhere, *see, e.g.*, 15 U.S.C. § 2073(a); 28 U.S.C. § 2344; 29 U.S.C. §§ 1813(c), 1853(c); 42 U.S.C. §§ 300gg-22(b)(2)(E)(i), 6104(e)(1) (all requiring transmission by registered mail).

In light of Congress's treatment of other registered-mail requirements, we cannot read the electoral-college provisions as broadly as those provisions Congress expressly amended to authorize alternative transmission methods, such as certified mail. As the Supreme Court has explained: "We cannot ignore Congress' decision to amend [other] provisions but not make similar changes [here]. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009); *see EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991); *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 492–93 (3d Cir. 2014). Here, we presume Congress meant for the registered-mail provisions to mean something different from those that were amended. Accordingly, state officials must use registered mail and may not use other delivery providers or other USPS services.

D.

There is little judicial precedent on statutory registered-mail requirements. But what there is supports the view that a requirement to use "registered mail" mandates transmission by USPS's registered-mail service. In *Johnson v. Burken*, 930 F.2d 1202 (7th Cir. 1991), the court considered an Illinois state law originally enacted in 1929 that required plaintiffs suing nonresident motorists to send a copy of the complaint to the defendants "by registered mail," *see* 1929 Ill. Laws 646–47 (now codified as amended at 625 Ill. Comp. Stat. 5/10-301(b)). The court rejected the argument that transmission by certified mail was sufficient, holding that although the "difference" between the two "may seem slight," "[c]ertified mail is not registered mail." 930 F.2d at 1206. The court said it had no "power of statutory revision" to "equate" the two, absent evidence that the Illinois legislature anticipated such an application. *Id.* at 1206–07. Just so here: registered mail means registered mail.

The Supreme Court has not directly addressed this issue, but the Court implied the same result in *Fleisher Engineering & Construction Co. v. United States ex rel. Hallenbeck*, 311 U.S. 15 (1940). There the Supreme

Court considered a statute that gave a subcontractor the right to sue a contractor for uncompensated labor or materials if the subcontractor gave the contractor written notice. *Id.* at 16 & n.1. The statute further instructed that such notice "shall be served . . . by registered mail." *Id.* (quoting 40 U.S.C. § 270b(a) (1940)). Although the "actual receipt of the notice and the sufficiency of its statements" had not been challenged by the contractor, the Court appeared to conclude, without discussion, that the proffered notice did not comply with the statute's service requirement because it had not been sent by registered mail. *Id.* at 16–18.

More recently, a dissenting opinion by Justice Thomas in *Henderson v. United States*, 517 U.S. 654 (1996), addressed a registered-mail requirement. The Suits in Admiralty Act ("SAA") required a plaintiff seeking to sue the federal government to "forthwith serve a copy" of his complaint on the U.S. Attorney for the district and to mail the Attorney General "a copy thereof by registered mail." Pub. L. No. 66-156, § 2, 41 Stat. 525, 526 (1920). Decades later, Rule 4 of the Federal Rules of Civil Procedure imposed a general 120-day time limit for service of process. Fed. R. Civ. P. 4(j) (1988). *Henderson* presented the question whether the 120-day rule set aside the SAA's forthwith-service requirement. The Court held that it did, concluding that the requirement amounted to a procedural rule, rather than a jurisdictional and therefore substantive one, that Rule 4 displaced. *Henderson*, 517 U.S. at 668–72. Though the majority did not discuss the meaning of the SAA's registered-mail requirement, it noted that the government had conceded at oral argument that either registered mail or certified mail would be sufficient under Rule 4. *Id.* at 667–68.[6]

Justice Thomas, joined by Chief Justice Rehnquist and Justice O'Connor, dissented. Because the provision waived sovereign immunity, he

[6] The government's concession at oral argument in *Henderson* did not rest on its interpretation of the registered-mail requirement in the SAA. By that time, Rule 4 had been amended to allow the use of registered or certified mail in serving the United States. *See* Fed. R. Civ. P. 4(d) (1988). Rather than an interpretation of the statutory text, then, the government's argument represented the view that the SAA's registered-mail requirement was procedural and that, at least for purposes of serving the United States, using certified mail would not alter substantive rights. *See* Tr. of Oral Arg. 28–29, 46–48, 53, *Henderson*, 517 U.S. 654 (No. 95-232) (The government's view that either registered or certified mail sufficed "wouldn't be an interpretation of the statute alone. That is, it would be an interpretation of the statute in conjunction with the Federal rule, in conjunction with the Rules Enabling Act[.]").

viewed the entire SAA provision, including the registered-mail requirement, to be jurisdictional, and thus incapable of being modified by Rule 4. *Id.* at 673–76 (Thomas, J., dissenting). That view of the SAA, Justice Thomas recognized, "may" cause a court's jurisdiction to "turn upon the plaintiff's use of registered mail." *Id.* at 678 n.4. In the face of the government's proposition at oral argument that, "in this day and age, certified and registered mail are practical equivalents for the purposes for which this requirement was designed," Tr. of Oral Arg. 29, *Henderson*, 517 U.S. 654 (No. 95-232), Justice Thomas still thought the SAA mandated using registered mail. "Though this may seem like an odd requirement from our modern perspective," he said, "the most sensible textual reading of the Act is still that Congress sought to impose a specific method of service in SAA cases without regard to the rules governing service generally." *Henderson*, 517 U.S. at 678 n.4 (Thomas, J., dissenting). "Congress is free," he noted, "to amend the statute if it determines that the SAA has fallen out of date with modern mailing practices." *Id.* Though the electoral-college provisions are not jurisdictional, there is also no separate procedural rule that purports to update their registered-mail requirements. Thus, the same reasoning regarding the interpretation of the registered-mail requirements applies here.

E.

For these reasons, we believe that "registered mail," as used in 3 U.S.C. §§ 6, 11, and 12, means the specific registered-mail service provided by USPS. Under those provisions, state officials must transmit their selection certificates and vote certificates by way of USPS as registered mail.

Since 1928, there have been significant changes in the availability of commercial carriers and the forms of service offered by USPS. But such changes do not overcome the meaning of the statutory text. *See Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 88–89 (2017) (explaining that changes in industry practice do not allow a court to "rewrite a constitutionally valid statutory text" to address a question Congress did not face). USPS continues to offer registered-mail service in a manner akin to that which was offered in 1928. Though other commercial carriers now offer services providing safeguards analogous to those registered mail provided in 1928 (and provides today), those services are not "registered

mail" as provided by the statute.[7] And for the same reason, it is of no moment that USPS offers other services (as it did in 1928), because they are not "registered mail" and, in fact, they do not provide the same kinds of safeguards. Certified mail, for example, provides the sender with a record of delivery but does not require postal workers to create a chain of custody. DMM § 503.3.1.1. Indeed, certified mail is "dispatched and handled in transit as ordinary mail." *Id.* USPS's tracking system also falls short of the safeguards provided by registered mail in 1928. It provides only date-and-time information at several points in the delivery process, based on scans by postal employees who handle mail being tracked with all other mail. *Id.* § 503.7.1.1; *USPS Tracking®–The Basics*, https://faq.usps.com/s/article/USPS-Tracking-The-Basics (last visited Feb. 14, 2020). The service remains distinct from that offered by registered mail.

We recognize that the National Archives and Records Administration has previously advised state officials that they may use "registered mail or commercial carrier" to send electoral certificates to the Archivist (but not for the certificates that they must send to the President of the Senate, the secretary of state of the State, or the Chief Judge of the District Court). Office of the Federal Register, National Archives and Records Administration, *Electoral College Instructions to State Officials: Responsibilities of States in the Presidential Election* 3–4 (undated instructions for 2016 election). The agency has given this advice in part because USPS does not allow the sender to receive real-time updates about registered mail as it is being delivered and because USPS does not provide a guaranteed delivery date for registered mail. *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Gary M. Stern, General Counsel, National Archives and Records Administration at 2, 5 (Sept. 16, 2019). In addition, you have explained that USPS employs certain security measures, like irradiating packages, for items being sent to Washington, D.C., which may slow down the delivery process or damage the items. *See id.* at 5. For these and additional reasons, the Archivist reasonably believes that providing States with the option to use a variety of carriers and services furthers Congress's goal of ensuring that electoral certificates will arrive at the seat of government in a timely manner.

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[7] *See, e.g.*, FedEx Custom Critical®, *Surface Expedite Exclusive Use*, https://customcritical.fedex.com/us/services/surfaceexpedite/exclusive.shtml (last visited Feb. 14, 2020); *UPS Express Critical®*, https://www.upsexpresscritical.com/cfw (last visited Feb. 14, 2020).

We appreciate these practical concerns, and Congress could well take them into account in revising the statute. But they are not sufficient to overcome the plain text of the provisions' references to "registered mail" and the other aspects of statutory construction discussed above. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13–14 (2000) ("It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome . . . is a task for Congress[.]"). So long as federal law requires delivery by registered mail, state officials are obliged to transmit their selection certificates and vote certificates accordingly.

III.

Having concluded that state officials must send their certificates by USPS registered mail, we next address whether the Archivist may accept a State's certificates sent by a different means. Because the relevant provisions place no restrictions on the Archivist's ability to accept the certificates delivered to him and impose no penalties for failure to comply with the registered-mail provisions, we believe that the Archivist may accept such certificates that are not sent by registered mail.

Congress enacted the electoral statutory scheme to ensure that it has the proper vote certificates in its possession by January 6 to allow it to determine the results of the election. *See* 3 U.S.C. § 15. To that end, the electoral-college provisions impose strict procedural deadlines and provide redundancy by ensuring that multiple copies of the vote certificates will be available to Congress. When Congress amended the statute to require transmission by registered mail, it also increased the number of vote certificates that the electors must create. Rather than the previous three vote certificates, Congress now requires that the electors sign and seal six certificates, *id.* § 9, and distribute those certificates among four different people in diverse positions in state and federal government, *id.* § 11. As one Congressman said, the scheme is "overprotect[ive]." 1928 House Hearing, *supra* note 3, at 5 (statement of Rep. Hatton Sumners).

But despite these numerous procedural details, none of the electoral-college provisions speaks to the Archivist's acceptance (or rejection) of electoral certificates that are not sent by registered mail. The statute's "registered mail" requirement imposes a duty on state officials, not the Archivist. The statute does not address the Archivist's responsibilities

should he receive electoral certificates sent by another means. Instead, the statute obligates the Archivist (or the President of the Senate) to seek backup copies of the certificates only when he does not *receive* them, irrespective of the mode of delivery. Section 12 directs the Archivist (if the President of the Senate is absent) to request a duplicate certificate from the state secretary of state if "no certificate of vote and list[s] . . . from any State *shall have been received* by the President of the Senate or by the Archivist." 3 U.S.C. § 12 (emphasis added). Similarly, section 13 directs the Archivist (again if the President of the Senate is absent) to send a messenger to the district judge if "no certificates of votes from any State *shall have been received* at the seat of government." *Id.* § 13 (emphasis added). These provisions require that the certificates be "received"; they do not address the means of delivery. The Archivist's duties under sections 12 and 13 are triggered by the failure to receive the certificates, not the failure of a state official to send the certificates through registered mail, the proper method of transmission.

Judicial precedent supports the general proposition that the violation of a procedural requirement relating to a method of transmission, at least when taken alone, need not stand in the way when the purpose of that requirement has been achieved by a different means. Again, the Court's analysis in *Fleisher Engineering* is instructive. Although the statute's notice-by-registered-mail requirement had not been satisfied, the Court nevertheless affirmed the subcontractor's right to sue, holding that the structure of the statute indicated that "a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue and the provision as to the manner of serving notice." *Fleisher Engineering*, 311 U.S. at 18. The Court held that the purpose of the "provision as to manner of service was to assure receipt of the notice," which the contractor had conceded in the case, and "not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received." *Id.* at 18–19. "In the face of such receipt, the reason for a particular mode of service fails." *Id.* at 19.

Other court decisions are to similar effect. Courts, for instance, have rejected contract claims premised upon the absence of notice by registered mail, where the contracting party admits to having received actual notice through other means. *See Sports Center, Inc. v. Riddell, Inc.*, 673 F.2d

786, 792 (5th Cir. 1982) ("The only variance is that the notice was by regular mail rather than by registered mail. Since it is shown that the notice was received, in the context of this case, the mode of postal delivery is insignificant."); *Cardiomed, Inc. v. Kardiothor, Inc.*, No. 91-4032, 1991 WL 224245, at *3–4 (10th Cir. Oct. 31, 1991) ("The purpose of providing for service of a notice by personal delivery or registered mail is to assure receipt of the notice and avoid disputes about receipt. . . . Under the circumstances [where the party received notice], Cardiomed got what it bargained for in the agreement.").[8] In *Finer Foods, Inc. v. U.S. Department of Agriculture*, 274 F.3d 1137, 1139 (7th Cir. 2001), the court rejected the argument that the court lacked personal jurisdiction because the Department of Agriculture had received a petition for review by fax rather than by mail, as the Hobbs Act required (although in that case the notice appears also to have been mailed, but not received in view of security screening imposed after the 9/11 attacks).

Taken as a whole, these precedents establish that where a party in fact receives notice, the court may treat the purposes of the statutory or contractual provision as having been fulfilled, even if the sender did not comply with a registered-mail requirement. We think that a similar principle should govern the circumstances in which the Archivist receives a State's electoral certificates through a means other than by registered mail. Nothing suggests that the registered-mail requirements are "jurisdictional," such that a failure to honor them would require that the certificates be rejected. The 1928 amendments were designed to ensure the safe transmission of the States' electoral certificates to the President of the Senate and the Archivist, while eliminating the expense occasioned by the use of special messengers. Although the arrival of vote certificates by some means other than registered mail might raise concerns about the authenticity of those certificates, Congress assigned to itself—rather than to the Archivist—the duty to resolve any such objections. 3 U.S.C. § 15 (prescribing the process by which Congress will resolve "all objections so made to any vote or paper from a State"). Accordingly, there does not seem to be any legal reason why the Archivist would be required to reject the proffered certificates out of hand.

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[8] There was no basis for the Seventh Circuit to apply this principle in *Johnson v. Burken*, discussed above, in which the complaint sent by certified (rather than registered) mail was not received by the defendant. *See* 930 F.2d at 1204.

IV.

For these reasons, we conclude that 3 U.S.C. §§ 6, 11, and 12 require state officials to transmit their selection and vote certificates to the Archivist by USPS registered mail. The electoral-college provisions do not require the Archivist to reject certificates that he receives even if state officials have transmitted them by some other means.

LIAM P. HARDY
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Office of Legal Counsel

Authority to Recover Travel Payments Made in Violation of Federal Regulations

Where the recipient of a travel payment violating the Federal Travel Regulation or the Federal Acquisition Regulation is a contractor that has fully performed its contract obligations, an agency may recover the payment only if the violation was plain on the face of the regulation. Where the recipient of such a payment is a government employee, the agency is generally entitled to recover the unlawful payment from the responsible certifying official or from the employee who received the payment, even if the violation was not plain.

Where the requirements of 5 U.S.C. § 5584 or the Federal Claims Collection Standards are satisfied, an agency may waive or end collection action on a claim against a recipient contractor or employee. Where the standards of 31 U.S.C. § 3528(b)(1) for relieving a certifying official of liability are satisfied, an agency need not attempt to collect from the certifying official.

July 16, 2020

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

You have asked whether the Department of Health and Human Services ("HHS") may recover certain travel payments to contractors and employees that, in the view of HHS's Office of Inspector General ("OIG"), violated the Federal Travel Regulation ("FTR"), 41 C.F.R. § 300-1.1 *et seq.*, or the Federal Acquisition Regulation ("FAR"), 48 C.F.R. § 1.000 *et seq.*[1]

We conclude that, where the recipient of a travel payment violating federal regulations is a contractor that has fully performed its contract obligations, an agency may recover the payment from the contractor only if the regulatory violations were, or should have been, clear to the contractor. Where the recipient is a government employee, on the other hand,

[1] *See* Letter for Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, from Robert P. Charrow, General Counsel, HHS, *Re: Request for Advice in Connection with OIG Report Regarding Government Travel* (July 16, 2018). Consistent with our practice of not opining on the legality of past actions, we do not here express any view whether any of the travel payments identified by HHS OIG in fact violated the FTR or the FAR. *See, e.g.*, *Online Terms of Service Agreements with Open-Ended Indemnification Clauses Under the Anti-Deficiency Act*, 36 Op. O.L.C. 112, 114 (2012).

the agency is generally entitled to recover the unlawful payment, even if the violation was not plain. An agency has discretion not to attempt collection of a claim against a recipient contractor or employee, at least where requirements of the Federal Claims Collection Standards, 31 C.F.R. § 900.1 *et seq.*, or of 5 U.S.C. § 5584 are satisfied.

Alternatively, an agency may recover a travel payment that violates federal regulations from the official who *certified* the payment voucher, but, if the requirements of 31 U.S.C. § 3528(b)(1) are satisfied, the agency need not attempt administrative collection. A travel payment's inconsistency with federal regulations does not render the official who *disbursed* the payment liable. Nor may any other employee who benefited from the payment be held liable, unless a statute specifically authorizes the agency to subject its employees to liability for unlawful payments.[2]

These conclusions may well seem, at once, too lenient and too harsh. An employee who receives the benefit of an improper payment but not the payment itself will escape liability, while an employee who certifies the payment but receives no personal benefit will be potentially liable. Here, however, we do no more than identify the allocation of potential liability that is already established in fiscal law. In reaching our conclusions, we do not condone an employee's undertaking travel at an impermissible cost to the government, nor do we suggest that, on the facts of particular cases, the government would have to press its claims against certifying officials.

I.

In July 2018, HHS OIG completed an audit of government-funded travel by Thomas E. Price when he was Secretary of HHS. HHS OIG, A-12-17-00002, *The Office of the Secretary of Health and Human Services Did Not Comply with Federal Regulations for Chartered Aircraft and Other Government Travel Related to Former Secretary Price* (July 11, 2018) ("Audit Report"). The audit determined that, on 12 occasions, HHS paid for Secretary Price to take charter flights when comparable commercial

[2] In reaching these conclusions, we solicited and considered the views of the Civil Division and the Justice Management Division of the Department of Justice, the Department of the Treasury, the General Services Administration, and the Office of Management and Budget.

flights were available. *Id.* at 11. Each of those payments, the audit concluded, violated one or more provisions of the FTR, *id.* at 10, 16, including 41 C.F.R. § 301-10.261(a), which mandates the use of "scheduled commercial airline service" for "official travel" unless such service is not "reasonably available" or is more costly than a chartered flight, and 41 C.F.R. § 301-10.262(b), which provides that, absent an emergency, a senior legal official within an agency "must authorize . . . in advance and in writing" any chartered flight by a "senior Federal official." The audit also found that three of the payments violated the FAR, *see* Audit Report at 13–14, because the payment either went to a charter airline that was not the lowest bidder, without any written justification, 48 C.F.R. § 15.101-1(c), or was made after soliciting only one bid, again without any written justification, *id.* § 6.303-1(a).

The audit also identified three instances in which Secretary Price, in alleged violation of the FTR, began or ended a trip at his home in Georgia rather than at his duty station in Washington, D.C. Audit Report at 18–21.[3] In addition, the audit found that, on several occasions, Secretary Price or other HHS officials received reimbursements for miscellaneous expenses that were not properly reimbursable. *Id.* at 23–25. All told, the audit concluded, HHS paid $392,787 in violation of the FTR and the FAR, of which Secretary Price voluntarily reimbursed $51,887. *Id.* at 7, 27–28.[4] The audit recommended that HHS "determine and take appropriate administrative actions to recoup" the remaining $340,900. *Id.* at 27–28.

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[3] Technically, the audit concluded that these payments violated the HHS Travel Policy Manual, which provides that "[t]ravel should be from the Official [Duty] Station to the [Temporary Duty] location." *Id.* § 3.1.1 (rev. ed. Nov. 1, 2014). But this provision of the HHS Manual simply restates an FTR requirement. *See* 41 C.F.R. § 300-3.1 (defining "official travel" as "[t]ravel under an official travel authorization from an employee's official station or other authorized point of departure to a temporary duty location and return [therefrom]"); *see also id.* §§ 301-10.7 and -10.8. We therefore view the audit, by necessary implication, as having determined that the payments violated not only the HHS Manual but also the FTR.

[4] A current or former employee may reimburse an unlawful payment from which he benefited. *See* 2 Government Accountability Office, *Principles of Federal Appropriations Law* 6-222 to -223 (3d ed. 2006). Because you have not asked specifically about voluntary reimbursements, we do not address them further in this opinion.

II.

We begin with a general discussion about the collection of government claims. For purposes of the Federal Claims Collection Act ("FCCA"), 31 U.S.C. § 3711 *et seq.*, Congress has defined a government "claim" as "any amount of funds or property that has been determined by an appropriate official of the Federal Government to be owed to the United States by a person, organization, or entity other than another Federal agency." 31 U.S.C. § 3701(b)(1). Congress has identified the Director of the Office of Management and Budget ("OMB") as the official who "shall settle" most potential claims. *Id.* § 3702(a)(4). For "claims involving expenses incurred by Federal civilian employees for official travel and transportation," however, the Administrator of General Services "shall settle" the claim. *Id.* § 3702(a)(3). As used in section 3702, the term "settle" means "to administratively determine the validity of [a] claim." *Adams v. Hinchman*, 154 F.3d 420, 422 (D.C. Cir. 1998) (per curiam) (quoting General Accounting Office, *Principles of Federal Appropriations Law* 11-6 (1982) ("GAO Redbook 1st")); *see Ill. Sur. Co. v. United States ex rel. Peeler*, 240 U.S. 214, 219 (1916) ("The word 'settlement' in connection with public transactions and accounts has been used from the beginning to describe administrative determination of the amount due."). Claims-settlement authority includes the authority to make "both factual and legal determinations." *Adams*, 154 F.3d at 422 (quoting GAO Redbook 1st at 11-6). Both the Director of OMB and the Administrator of General Services have delegated their respective claims-settlement authorities to "the Executive Branch agency out of whose activity the claim arose." OMB, Determination with Respect to Transfer of Functions Pursuant to Public Law 104-316, att. A (Dec. 17, 1996) ("OMB Delegation"); *see Matter of Alexander J. Qatsha*, GSBCA No. 15494-RELO, 01-1 BCA ¶ 31,364 (explaining that, under General Services Administration regulations, "claims of or against the United States Government which involve [travel] expenses" must be "adjudicated by the agency involved" (citing 48 C.F.R. § 6104.401(c))).

An agency determination that it has a valid claim gives rise to obligations under the FCCA and its implementing regulations, the Federal Claims Collection Standards ("FCCS"), 31 C.F.R. § 900.1 *et seq.* The FCCA provides that "[t]he head of an executive, judicial, or legislative agency . . . shall try to collect a claim of the United States Government

for money or property arising out of the activities of, or referred to, the agency." 31 U.S.C. § 3711(a)(1). As authorized by section 3711(d)(2), the Attorney General and the Secretary of the Treasury have jointly promulgated the FCCS. Under those regulations, an agency must "aggressively collect" a valid claim. 31 C.F.R. § 901.1(a). If an agency's collection attempt fails, the agency may refer the claim to the Department of Justice for potential litigation (or to the Secretary of the Treasury for administrative collection). *See* 31 U.S.C. § 3711(g)(2)(A)(i); 31 C.F.R. §§ 285.12(d)(2)(i)(A), 901.1(e)(1), 904.1(a).

In specified circumstances, however, the FCCA and FCCS authorize an agency to "compromise" or "end collection action on" a valid claim. 31 U.S.C. § 3711(a)(2)–(3); *see* 31 C.F.R. §§ 902.2(a), 903.3(a). Other statutory provisions identify additional circumstances in which an agency may compromise or waive particular types of claims. Relevant here, for example, is 5 U.S.C. § 5584, which, in the circumstances discussed below, *see infra* p. 173, authorizes the Director of OMB to "waive[] in whole or in part" a claim against an agency employee "arising out of an erroneous payment of travel, transportation or relocation expenses." *Id.* § 5584(a)(1), (g)(2).[5] As with the claims-settlement authority discussed above, the Director of OMB has delegated that waiver authority to "the Executive Branch agency that made the erroneous payment." OMB Delegation, att. A.

III.

We first address whether, if an agency has contracted and paid for goods or services in violation of federal regulations, the agency may or must attempt to recover that payment, either from the contractor that received it or from any agency employee.

A.

An agency has a valid claim to recover a payment that it previously made under a fully performed contract only if the contract's unlawfulness was, or should have been, clear to the contractor. One element of any

[5] Section 5584 of title 5 currently has two subsections (g). Whenever we refer to subsection (g) in this opinion, we are referring to the second of the two.

valid government contract is "authority on the part of the government representative who entered or ratified the agreement to bind the United States." *Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997). The scope of a government agent's authority "may be explicitly defined by Congress or be limited by [an agency] . . . properly exercis[ing] . . . the rule-making power." *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947). A contract that violates a statute or regulation, then, may be invalid because the government agent who purported to enter into the contract lacked the authority to do so. But when a contractor has fully performed its obligations under a contract that violates a statute or regulation, courts invalidate the contract only if the unlawfulness of the agreement was "plain on the face of the statute [or] the regulations." *Gould, Inc. v. United States*, 67 F.3d 925, 929 (Fed. Cir. 1995); *see also Rockies Exp. Pipeline LLC v. Salazar*, 730 F.3d 1330, 1337 (Fed. Cir. 2013). Courts assess whether illegality is "plain" by viewing the contract and the relevant statutory or regulatory provisions through "*the bidder's eyes*." *United States v. Amdahl Corp.*, 786 F.2d 387, 395 (Fed. Cir. 1986) (emphasis in original) (quoting *Trilon Educ. Corp. v. United States*, 578 F.2d 1356, 1360 (Ct. Cl. 1978)).[6]

The HHS OIG Audit Report addressed potential regulatory violations concerning charter-flight expenses. Absent unusual circumstances, however, the violations of the particular FTR and FAR provisions at issue in connection with government travel will not be "plain on the face" of those regulations. The FTR does not categorically bar charter flights. To the contrary, charter flights are permitted when (i) "[n]o scheduled commercial airline service is reasonably available (i.e., able to meet [the employee's] departure and/or arrival requirements within a 24-hour period, unless . . . extraordinary circumstances require a shorter period)," 41

[6] Upholding a fully performed contract in the absence of plain illegality is distinct from awarding compensation under a *quantum meruit* theory. *See Gould*, 67 F.3d at 929–30 (describing, as separate arguments, a contractor's claims that (i) despite a statutory violation, the contract was valid because the illegality was not plain, and (ii) even if the express contract was invalid, the contractor was entitled to compensation under an implied contract because it provided value to the government). In the former case, the contractor is entitled to the contract price (or contractually specified liquidated damage); in the latter, the contractor is entitled only to the fair market value of the goods or services supplied. *See Amdahl*, 786 F.2d at 395.

C.F.R. § 301-10.261(a)(1), or "[t]he cost of [a charter flight] is less than the cost of the city-pair fare for scheduled commercial airline service or the cost of the lowest available full coach fare if a city-pair fare is not available," *id.* § 301-10.261(a)(2); and (ii) when the traveler is a senior federal official, a senior legal official within the agency has authorized the flight "in advance and in writing," *id.* § 301-10.262(b). The FTR itself will not give charter airlines notice of what departure and arrival needs an agency official has, whether any commercial flights would meet those needs, or whether agency lawyers authorized the flights. Similarly, the FAR does not categorically bar the award of a sole-source contract or other contract to a bidder that does not have the lowest offer. Instead, both sole-source and non-lowest-bidder awards are permissible if the agency (among other required procedures) "justifies . . . the use of such [an award] in writing." 48 C.F.R. §§ 6.303-1(a)(1), 15.101-1(c). The FAR itself will not give charter airlines notice of what written justification an agency has, or has not, included in its contract files.[7]

Even if an agency has a valid claim against a contractor, the FCCA and FCCS permit an agency, in certain circumstances, to "compromise" or "end collection action on" that claim. 31 U.S.C. § 3711(a)(2)–(3); 31 C.F.R. § 900.1(a). Specifically, under the FCCS, an agency may compromise a claim that "does not exceed $100,000," 31 C.F.R. § 902.1(a), if any of the following conditions are met: (i) "[t]he debtor is unable to pay the full amount in a reasonable time"; (ii) "[t]he Government is unable to collect [that amount] within a reasonable time"; (iii) "[t]he cost of collecting [that amount] does not justify the enforced collection"; or (iv) "[t]here is significant doubt concerning the Government's ability to prove its case in court," *id.* § 902.2(a); *see* 31 U.S.C. § 3711(a)(2). Similarly, an agency may "terminate collection" of a claim that "do[es] not exceed $100,000," 31 C.F.R. § 903.1(a), in any of six specified situations, including where the "[c]osts of collection are anticipated to exceed the amount recoverable" and where "[t]he debt is legally without merit or enforcement . . . is barred by any applicable statute of limitations," *id.* § 903.3(a)(3)–(4); *see*

[7] Although written justifications generally must be made public within 14 days, 48 C.F.R. § 6.305(a), that requirement does not apply "if posting the justification would disclose the executive agency's needs and disclosure of such needs would . . . create . . . security risks," *id.* § 6.305(f), which, depending upon the circumstances, may be the case where a contract is related to a cabinet official's travel.

31 U.S.C. § 3711(a)(3).[8] Moreover, if an agency determines that those compromise or termination requirements are met but the claim exceeds $100,000, the agency need not attempt collection but rather "shall refer" the claim to the Department of Justice for a final decision on whether to compromise or end collection action on the claim. 31 C.F.R. §§ 902.1(b), 903.1(b). Thus, even if an agency determines that it has a valid claim to recover contract payments made in violation of federal regulations, the agency is not obligated, in these circumstances, to attempt collection.

B.

We next consider whether an agency may or must seek to recover contract payments that violate federal regulations from any of the agency employees involved in the payments.

In relevant part, 31 U.S.C. § 3528 provides:

> (a) A certifying official certifying a [payment] voucher is responsible for—
>
> . . . .
>
> (4) repaying a payment—
>
> (A) illegal, improper, or incorrect because of an inaccurate or misleading certificate;
>
> (B) prohibited by law; or
>
> (C) that does not represent a legal obligation under the appropriation or fund involved[.]

The Comptroller General refers to all payments covered by that provision as "improper payments." 2 Government Accountability Office, *Principles of Federal Appropriations Law* 9-88 (3d ed. 2006) ("GAO Redbook 3d").

As with a claim against a contractor, an agency must first determine whether a claim against a certifying official is valid. Congress has provided that the Comptroller General "shall settle"—that is, determine the validity of—claims against "accountable official[s]," 31 U.S.C. § 3526(c)(1), including those who certify payment vouchers and disburse

[8] Even if those requirements are met, however, an agency is barred from compromising or ending collection activity with respect to a claim "that appears to be fraudulent, false, or misrepresented by a party with an interest in the claim." 31 U.S.C. § 3711(b)(1); *see* 31 C.F.R. § 900.3(a).

funds, *see Comptroller General's Authority to Relieve Disbursing and Certifying Officials from Liability*, 15 Op. O.L.C. 80, 80 (1991) ("*Comptroller General's Authority*"). Congress has also purported to make those settlement determinations "conclusive on the executive branch." 31 U.S.C. § 3526(d). Despite these provisions, we have advised that, even if the Comptroller General purports to make a settlement determination, an agency must decide for itself whether a potential claim against a certifying official has legal merit. *Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, 20 Op. O.L.C. 214, 229 (1996) ("*Involvement of the GPO*"). If the Comptroller General were involved in making such a determination, an agent subject to congressional control, *see* 31 U.S.C. § 703(e)(1)(B), would have a role in deciding whether a particular payment is covered by section 3528(a)(4). That would violate the separation of powers, since "exercis[ing] judgment concerning facts that affect the application of [an] Act" and "interpret[ing] the provisions of [that] Act to determine precisely what" is required or prohibited are "the very essence of 'execution' of the law." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986); *see also Comptroller General's Authority*, 15 Op. O.L.C. at 83. Because Congress may not constitutionally vest the Comptroller General with the claims-settlement authority provided under section 3526, an agency must decide for itself whether it has a valid claim against a certifying official.

We turn, then, to how section 3528(a)(4) applies to payments that violate federal regulations. Section 3528(a)(4) embodies the longstanding principle that an accountable official, including a certifying official, is strictly liable for improper payments. *See United States v. Prescott*, 44 U.S. (3 How.) 578, 588 (1845); 2 GAO Redbook 3d at 9-7 (noting that the liability of an accountable official "is automatic and arises by operation of law at the moment . . . an erroneous payment is made"). Section 3528(b)(1)(A) underscores that principle, providing that a certifying official "may" be relieved of liability if "the official did not know, and by reasonable diligence and inquiry could not have discovered," that the payment was improper. Thus, if a payment is covered by section 3528(a)(4), the official who certified the payment is liable for repaying it, even if he did not act negligently.

Section 3528(a)(4) covers payments "prohibited by law." 31 U.S.C. § 3528(a)(4)(B). To say that a payment violates either the FTR or the

FAR, however, is not necessarily to say that the payment is prohibited by statute. As the Supreme Court has recognized, a statute simply vesting an agency with rulemaking authority "does not prohibit anything," including conduct that violates the regulations eventually promulgated under the statute. *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 395 (2015). A payment that violates the FTR or the FAR, therefore, is not prohibited by the statutes that authorize those regulations and set forth broad objectives for them to achieve. *See* 5 U.S.C. §§ 5706–07; 41 U.S.C. § 1303(a)(1). Likewise, the Purpose Act—which requires that appropriations be paid only for those objects provided by law, 31 U.S.C. § 1301(a)—does not necessarily prohibit travel expenses paid in violation of the FTR or the FAR. Travel expenses may satisfy the Purpose Act by "mak[ing] a direct contribution to the agency's mission" even if they violate the FTR or the FAR. *See State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments*, 36 Op. O.L.C. 77, 88 (2012).

We think, though, that some payments made in violation of the FTR or the FAR are "prohibited by law" under section 3528(a)(4)(B) because the term "law" is broad enough to encompass not only statutes but also binding agency regulations. *See Hamlet v. United States*, 63 F.3d 1097, 1105 (Fed. Cir. 1995) (explaining when a regulation is "entitled to the force and effect of law" in personnel actions). The statutory history of section 3528 strongly suggests that "law" is not limited to statutes. As enacted in 1941, the original version of section 3528 made certifying officials liable for payments "prohibited by law," while purporting to authorize the Comptroller General to relieve such officials from liability if (among other conditions) "the payment was not contrary to any *statutory provision* specifically prohibiting payments of the character involved." Act of Dec. 29, 1941, Pub. L. No. 77-389, § 2, 55 Stat. 875, 875–76 (emphasis added). When Congress uses two different terms in a single statutory section, there is a strong "presum[ption] that Congress intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358 (2014). The enacting Congress's use of "statutory provision" in one place and "law" in another strongly suggests it did not mean for "law" to refer only to statutes.

When Congress enacted title 31 of the United States Code as positive law, it repealed the original version of section 3528 and replaced it with the current version, which contemplates relief if (among other conditions)

"no *law* specifically prohibited the payment." *See* Act of Sept. 13, 1982, Pub. L. No. 97-258, sec. 1, § 3528(b)(2)(B), 96 Stat. 877, 966 (emphasis added). The 1982 Act thus removed the material variation between "law" and "statutory provision" that existed under the 1941 Act. But the 1982 Act expressly stated that it "may not be construed as making a substantive change in the laws replaced." *Id.* sec. 4(a), 96 Stat. at 1067. Thus, "prohibited by law" as used in section 3528(a)(4)(B) should be given the same meaning that the phrase had under the 1941 Act—a meaning that encompasses more than just statutes. *See Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 282 (2014) (when determining whether a statutory preemption provision applied to common-law rules, discounting omission of the terms "rule[s]" and "standard[s]" from a recodified version of the provision in light of Congress's direction that the "recodification did not effect any 'substantive change'" (alterations in original)). This conclusion is also consistent with the longstanding principle that the scope of a government agent's authority may either be "explicitly defined by Congress or be limited by [an agency's] properly exercis[ing] . . . the rule-making power." *Merrill*, 332 U.S. at 384. We therefore conclude that section 3528(a)(4)(B) provides for the recovery of unauthorized payments that violate either statutes or regulations with the force and effect of law.

Both the FTR and the FAR are regulations that, for purposes of section 3528(a)(4)(B), have the force and effect of law. A regulation that is "binding on [an] agency itself " can have the "'force and effect of law,'" "'regardless of whether [it] was published or promulgated under the standards set out in the APA,'" and regardless of whether it is "binding on the public." *Farrell v. Dep't of Interior*, 314 F.3d 584, 590–91 (Fed. Cir. 2002) (second alteration in original) (quoting *Hamlet*, 63 F.3d at 1105); *see Authority of the Environmental Protection Agency to Hold Employees Liable for Negligent Loss, Damage, or Destruction of Government Personal Property,* 32 Op. O.L.C. 79, 84–85 (2008) ("*Authority of the EPA*"). To determine whether a regulation aimed primarily at agencies is binding, courts assess "whether the [issuing] agency intended the statement to be binding," *Farrell*, 314 F.3d at 590, as evidenced by (among other factors) "the agency's own characterization of its action" and its "publication or lack thereof in the Federal Register or the Code of Federal Regulations," *Tozzi v. Dep't of Health & Human Servs.*, 271 F.3d 301, 310 (D.C. Cir. 2001) (internal quotation marks omitted). Both the FTR and the FAR state

that they are binding on federal agencies. *See* 41 C.F.R. § 300-2.22; 48 C.F.R. § 1.202. And both are published in the Code of Federal Regulations. *See* 41 C.F.R. § 300-1.1 *et seq.*; 48 C.F.R. § 1.000 *et seq.* Thus, both those regulations are binding on agencies and should be considered "law" for purposes of section 3528(a)(4)(B).

Further, at least some provisions of the FTR and the FAR "prohibit[]" payments within the meaning of section 3528(a)(4)(B). The FTR states that an "agency may pay *only* those expenses essential to the transaction of official business," which the FTR defines to include (but not to be limited to) the "transportation expenses" specified in "part 301-10 of this chapter." 41 C.F.R. § 301-2.2 (emphasis added). An authorization to pay *only* specified transportation expenses is substantively identical to a prohibition against paying all other transportation expenses. The FAR, meanwhile, provides that "[a] contracting officer shall not . . . award [a] contract without providing for full and open competition *unless*" the officer takes certain steps, including "justif [ying] . . . the use of such [an award] in writing." 48 C.F.R. § 6.303-1(a) (emphasis added). A provision making sole-source contracts impermissible *unless* certain criteria are satisfied is a prohibition against such contracts where the criteria remain unsatisfied. At least some payments that violate the FTR and the FAR are therefore "prohibited by law" within the meaning of section 3528(a)(4)(B),[9] and an agency has a valid claim against an official who certified such a payment.[10]

In certain circumstances, though, an agency need not attempt to collect a valid claim against a certifying official. Section 3528(b) provides (in relevant part):

> (1) The Comptroller General may relieve a certifying official from liability when the Comptroller General determines that—

[9] The FTR recognizes expressly that "[t]he certifying officer assumes ultimate responsibility under 31 U.S.C. § 3528" for payments that violate the FTR. 41 C.F.R. § 301-71.203.

[10] We agree with the Comptroller General, however, that an agency does not have a valid claim against a certifying official for "any amounts recovered from the recipient" of an unlawful payment. 2 GAO Redbook 3d at 9-31. Nor does an agency have a valid claim for any amounts "not recovered [from the recipient] because of a compromise" authorized by the FCCA and FCCS. 31 U.S.C. § 3711(c); *see* 2 GAO Redbook 3d at 9-130 to -131.

> (A) the certification was based on official records and the official did not know, and by reasonable diligence and inquiry could not have discovered, the correct information; or
>
> (B) (i) the obligation was incurred in good faith;
>
> (ii) no law specifically prohibited the payment; and
>
> (iii) the United States Government received value for payment.

This provision, we have advised, violates the separation of powers in three ways: by authorizing the Comptroller General, an "agent of Congress," to "issue interpretations of the law that are binding on the executive branch"; by "usurp[ing] the Executive's prosecutorial discretion"; and by "prevent[ing] the President from exercising his inherent supervisory authority over the conduct of executive branch [certifying] officers." *Comptroller General's Authority*, 15 Op. O.L.C. at 82–83 (relying on *Bowsher*, 478 U.S. at 732–33).

By stating that section 3528(b)(1) intrudes on "prosecutorial discretion," we necessarily acknowledged that the Executive Branch may decide not to pursue a claim against a certifying official. And, despite its deficiencies, section 3528(b)(1) embodies congressional intent, as well as longstanding practice before *Bowsher*, as to when not pursuing such a claim would be appropriate. In light of that intent and practice, we conclude that, when an agency has a valid claim against a certifying official, it may look to the relief standards of section 3528(b)(1) for guidance in determining whether to attempt collection or to forgo collection efforts.[11] If the agency concludes (among other things) that "the obligation was incurred in good faith," then the agency has discretion to cease collection efforts under the FCCA. 31 U.S.C. § 3528(b)(1)(B)(i). These relief standards do not define the limits of an agency's enforcement discretion, but they serve as appropriate guideposts for exercising that discretion.

We believe that the agency's discretion in that regard is consistent with the FCCA. As a general matter, an agency is presumed to be able to exercise enforcement discretion absent clear statutory language to the

[11] We note that, with respect to certifying officials within the Department of Justice, the Attorney General has already directed Department officials to "consult the standards of . . . 31 U.S.C. § 3528(b)(1)" when deciding whether to attempt collection. Department of Justice Order No. 1401, at 6 (Mar. 11, 2015) ("DOJ Order 1401").

contrary. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 833–34 (1985); *cf. Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (recognizing the "deep-rooted nature of law-enforcement discretion, even in the presence of seemingly mandatory legislative commands"). The FCCA provides that an agency "shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency." 31 U.S.C. § 3711(a)(1). The implementing regulations further provide that agencies "shall aggressively collect all debts arising out of activities of . . . that agency." 31 C.F.R. § 901.1(a). But we do not read these provisions to eliminate all agency discretion in deciding whether to collect on such a claim. "'[S]hall' is not a term that invariably admits of no exceptions without regard to the circumstances." Memorandum for Jeh Charles Johnson, General Counsel, Department of Defense, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Obligation of the Department of Defense to Acquiesce or Nonacquiesce in* Witt v. Department of the Air Force, *527 F.3d 806 (9th. Cir. 2008)* at 13 (Mar. 25, 2010) (citing *Town of Castle Rock*, 545 U.S. at 759–60). We think that an agency has discretion to decline to pursue collection when it is relying on the same factors that, in section 3528(b)(1), Congress found sufficient to support a decision to extinguish liability entirely against a certifying official.

We turn, then, to the proper interpretation of section 3528(b)(1)'s standards for relieving certifying officials from liability—one of which is that "no law specifically prohibited the payment." 31 U.S.C. § 3528(b)(1)(B)(ii). The reference to "law" in the provision concerning the relief of certifying officials should be construed, in light of the statutory history discussed above, as referring only to statutes, and not to violations of the FTR or the FAR. *See supra* p. 164. That reading, we acknowledge, bucks the presumption that words are used consistently throughout a statute. But that presumption may be rebutted by clear "indications that the same [word] used in different parts of the same statute means different things." *Barber v. Thomas*, 560 U.S. 474, 484 (2010). Such clear evidence exists here because the statute originally referred to "statutory provision[s]" and Congress expressly stated, when it replaced that phrase with "law," that it did not intend any "substantive change" Act of Sept. 13, 1982, § 4(a), 96 Stat. at 1067. Because a payment that violates the FTR or the FAR is not necessarily prohibited by any statute, *see supra* p. 163, such a payment may satisfy subparagraph (B)(ii).

Turning from officials who certify payment vouchers to those who actually disburse payments, we consider 31 U.S.C. § 3325, which provides (in relevant part):

> (a) A disbursing official in the executive branch of the United States Government shall—
>
> (1) disburse money only as provided by a voucher certified by—
>
> (A) the head of the executive agency concerned; or
>
> (B) an officer or employee of the executive agency having written authorization from the head of the agency to certify vouchers;
>
> (2) examine a voucher if necessary to decide if it is—
>
> (A) in proper form;
>
> (B) certified and approved; and
>
> (C) computed correctly on the facts certified; and
>
> (3) except for the correctness of computations on a voucher or pursuant to payment intercepts or offsets pursuant to [31 U.S.C. §§ 3716 or 3720A] be held accountable for carrying out clauses (1) and (2) of this subsection.

As noted above, although a separate provision purports to vest the Comptroller General with authority to settle claims against an "accountable official," an agency must itself decide whether a potential claim against such an official is valid. *See supra* p. 162 (discussing 31 U.S.C. § 3526(c)(1)). And as subsection (a)(3) of section 3325 makes clear, an agency has a valid claim against a disbursing official only if he failed to perform one of the duties set forth in subsections (a)(1) or (a)(2). Neither of those subsections requires a disbursing official to ensure that a payment is consistent with any provision outside section 3325. Accordingly, a contract payment's inconsistency with the FTR or the FAR does not give rise to a valid claim against the official who disbursed the payment.[12]

[12] This conclusion is consistent with 31 U.S.C. § 3527(c), which addresses "reliev[ing] a present or former disbursing official . . . for a deficiency in an account because of an illegal, improper, or incorrect payment." A payment that violates subsections (a)(1) or (a)(2) of section 3325 is an "illegal" one for which a disbursing official may be held liable under subsection (a)(3) of that section.

Next, we address whether an agency has a valid claim against other agency employees, including those who benefited from goods or services purchased in violation of the FTR or the FAR. No government-wide statute directly subjects employees other than certifying officials to liability for improper payments. *See* 2 GAO Redbook 3d at 9-12. And Congress has specifically authorized at least one agency to extend such liability to other employees. *See* 10 U.S.C. § 2773a(a) ("The Secretary of Defense may designate any civilian employee . . . as an employee . . . [who] may be held accountable through personal monetary liability for an illegal, improper, or incorrect payment made by the Department of Defense."). That strongly suggests that an agency's general rulemaking authority under 5 U.S.C. § 301 (or a similar "housekeeping" provision) does not include the authority to subject employees other than certifying officials to liability for improper payments.[13] *See Authority of the EPA*, 32 Op. O.L.C. at 85–86 n.5.

The history behind 10 U.S.C. § 2773a is especially powerful evidence that an agency needs specific statutory authority to make employees liable for improper payments. Beginning in 1998, Department of Defense ("DoD") regulations made certain employees other than "certifying and disbursing officers . . . pecuniarily liable for erroneous payments resulting from the negligent performance of their duties." 5 DoD Financial Management Reg. No. 7000.14-R, ch. 33, ¶ 3302 (Aug. 1998) ("DoD 7000.14-R"). In reviewing those regulations, the Comptroller General concluded that, "absent statutory authority, an agency may not administratively impose pecuniary liability on federal employees" for improper payments. *Matter of Department of Defense—Authority to Impose Pecuniary Liability by Regulation*, B-280764, 2000 WL 812093, at *3 (Comp. Gen. May 4, 2000) ("*Pecuniary Liability*"). The Comptroller General relied on such

[13] An agency's authority under 5 U.S.C. § 301 or another "housekeeping" provision does, however, include the authority to "set[] standards of care for employee use of government property and to impose liability for breaches of those standards." *Authority of the EPA*, 32 Op. O.L.C. at 81. Section 301 authorizes each executive department to "prescribe regulations for . . . the custody, use, and preservation of its records, papers, and property." Some organic statutes vest other agencies with similar authority. *Authority of the EPA*, 32 Op. O.L.C. at 83. Congress has never separately and specifically given any department or agency the authority to subject certain employees to liability for misuse of government property, and there is thus no indication that departments and agencies lack such authority under section 301 or similar statutory provisions.

cases as *United States v. Gilman*, 347 U.S. 507 (1954), in which the Court held that the United States could not recover indemnification from an employee whose negligence had caused a third party's injuries, resulting in a finding of liability against the United States. The Court noted that "a complex of relations between federal agencies and their staffs [was] involved," that "[t]he selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised," and that this "function is more appropriately for those who write the laws, rather than those who interpret them." *Id.* at 511–13. The Comptroller General found no statutory authority underpinning the DoD regulations, *Pecuniary Liability*, 2000 WL 812093, at *6, and thus necessarily concluded that 5 U.S.C. § 301, the "housekeeping" provision applicable to DoD, did not supply the requisite authority. *See also Matter of Veterans Affairs—Liability of Alexander Tripp*, B-304233, 2005 WL 1940183, at *2 (Comp. Gen. Aug. 8, 2005) (concluding that the Department of Veterans Affairs, which also has housekeeping authority under 5 U.S.C. § 301, may not subject employees to liability for improper payments).[14] Two years later, Congress responded to *Pecuniary Liability* by enacting 10 U.S.C. § 2773a, but that statute enabled only DoD to extend liability for improper payments beyond certifying and disbursing officials.[15] And, indeed, HHS has not subjected any of its employees to such

[14] DOJ Order 1401 could be understood as a rule, issued pursuant to 5 U.S.C. § 301, that purports to extend liability for improper payments. The Order defines "Accountable Officers" to include employees other than certifying and disbursing officials. DOJ Order 1401, at 4. And the Order provides that any "Accountable Officer may be held personally liable for the physical loss or deficiency of public funds or for an erroneous or improper payment of funds for which the officer is accountable." *Id.* at 5. But a loss or payment "for which [an] officer is accountable" could mean a loss or payment for which, under existing statutory authority, an officer may be subjected to liability. Under that reading, only certifying and disbursing officials could be held liable for improper payments, while a broader class of employees could be held liable for physical losses. *See* 2 GAO Redbook 3d at 9-36 (interpreting 31 U.S.C. § 3527 as authorizing agencies to subject employees other than certifying and disbursing officials to liability for physical losses). In light of our conclusions here, we would read DOJ Order 1401 to have this narrower application in the case of improper payments.

[15] Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, div. A, § 1005, 116 Stat. 2458, 2631–32 (2002). At points, 10 U.S.C. § 2773a tracks almost verbatim the language of the DoD regulations at issue in *Pecuniary Liability*. *Compare* 10 U.S.C. § 2773a(b), *with* 5 DoD 7000.14-R, ch. 33, ¶ 331001 (Aug. 1998). The Comptroller General accordingly understands 10 U.S.C. § 2773a as a direct response

liability. We therefore conclude that an agency does not have a valid claim against an employee who benefited from an improper payment, unless Congress has specifically authorized the agency to extend liability to the employee.[16]

We acknowledge that, taken together, these conclusions are not intuitive. Certifying officials, who do not personally benefit from payments made in violation of federal regulations, are strictly liable for those payments, though agencies are not always obligated to seek recovery from those officials. Employees who *do* personally benefit, on the other hand, are generally not liable at all. Those conclusions, however, follow directly from the governing statutes, which have long been understood to impose strict liability on certifying officials but do not provide for recovery from employees who may benefit from improper payments.

IV.

Although the bulk of the payments addressed by the Audit Report went to charter airlines, HHS OIG also concluded that HHS improperly reimbursed Secretary Price and other agency officials a total of $2,960 for travel expenses not reimbursable under the FTR. Audit Report at 23. We now address whether an agency may or must seek to recover reimbursements that it paid to employees in violation of the FTR.

An agency employee is strictly liable for repaying a payment from his agency that violates a statute or regulation. *See Balick v. Office of Pers. Mgmt.*, 85 F.3d 586, 589 (Fed. Cir. 1996); *see also, e.g.*, *Matter of Robert W. Webster—Attorney's Fee for Construction Contract*, 63 Comp. Gen. 68, 70 (1983) (concluding that agencies may recover reimbursements that violate the FTR from employees who received them through no fault of their own). Nevertheless, in certain circumstances, an agency may waive its claim against an employee.

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to that decision. *See Matter of Department of Defense Accountable Officials—Local Nationals Abroad*, B-305919, 2006 WL 771405, at *2 n.3 (Comp. Gen. Mar. 27, 2006); *see also* Maj. Michael L. Norris, *Liability of Accountable Officers*, 2006-Jan. Army Law. 167, 170 (also characterizing 10 U.S.C. § 2773a as a direct response to *Pecuniary Liability*).

[16] This conclusion does not mean that an employee would not be liable if, for example, he or she induced, though fraud or other misrepresentation, an agency to make an unlawful payment. But we have no occasion to address such questions here.

Under 5 U.S.C. § 5584, the head of an agency may "waive[] in whole or in part" a claim of the United States "arising out of an erroneous payment of travel . . . expenses" if the following conditions are met: (i) collecting from the recipient employee "would be against equity and good conscience and not in the best interest of the United States"; (ii) there is no "indication of fraud, misrepresentation, fault, or lack of good faith on the part of the employee or any other person having an interest in obtaining a waiver"; and (iii) the employee's "application for waiver is received [within the] 3 years immediately following the date on which the erroneous payment . . . was discovered." *Id.* § 5584(a)(1), (b)(1), (b)(5), (g)(2).[17] Thus, if an employee requests a waiver and the requirements set forth in section 5584 are met, an agency may, but is not obligated to, waive a claim for an unlawful travel reimbursement.[18]

Finally, we address whether an agency has a valid claim against an official who certified an unlawful travel reimbursement.[19] Because the FTR has the force and effect of law and prohibits payments not specifically authorized by the regulation, a reimbursement that violates the FTR generally constitutes "a payment . . . prohibited by law" for purposes of 31 U.S.C. § 3528(a)(4)(B). Therefore, when an agency determines that a reimbursement violates the FTR, the agency generally has a valid claim against the responsible certifying official. A certifying official may not be held liable, however, if the agency already recovered the reimbursement from the recipient employee. *See* 2 GAO Redbook 3d at 9-31 to -32. Nor may a certifying official be held liable if the agency waived its claim against the employee. *See* 5 U.S.C. § 5584(d) ("In the audit and settlement of the accounts of any accountable official, full credit shall be given for

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[17] For claims aggregating $1,500 or less, the waiver authority is vested directly in the head of the agency. 5 U.S.C. § 5584(a)(2). For greater claims, the authority is, as relevant here, vested in the Director of OMB. *Id.* § 5584(a)(1), (g)(2). As noted above, however, the Director of OMB has delegated that waiver authority to "the Executive Branch agency that made the erroneous payment." OMB Delegation, att. A.

[18] The compromise and termination provisions of the FCCA and FCCS also apply to claims arising out of unlawful travel reimbursements. *See* 5 U.S.C. § 5584(f) ("This section does not affect any authority under any other statute to litigate, settle, compromise, or waive any claim of the United States.").

[19] For the reasons set forth above, a travel reimbursement's inconsistency with the FTR does not give rise to a valid claim against the official who disbursed the reimbursement funds. *See supra* pp. 169–70.

any amounts with respect to which collection by the United States is waived under this section."); 2 GAO Redbook 3d at 9-130. Further, if an agency determines that the relief requirements of 31 U.S.C. § 3528(b)(1) are satisfied, it need not attempt to collect from a certifying official.

V.

As a general matter, where an agency has made a payment that violates the FTR or the FAR to a contractor that has fully performed its contract obligations, the agency may recover the payment only if the violation was plain on the face of the regulation. On the other hand, an agency may generally recover a payment that violates the FTR or the FAR from the responsible certifying official or from the employee who received the payment, even if the regulatory violation was not clear. Where the requirements of 5 U.S.C. § 5584 or the FCCS are satisfied, an agency may waive or end collection action on a claim against a recipient contractor or employee. And where the standards of 31 U.S.C. § 3528(b)(1) for relieving a certifying official of liability are satisfied, an agency need not attempt to collect from the certifying official.

Please let us know if we may be of further assistance.

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

Use or Disclosure of E-mails Hacked by a Foreign Adversary

Neither the Wiretap Act nor the Stored Communications Act prohibits federal law enforcement officers from using or disclosing e-mails that were originally acquired by a foreign adversary's unlawful hacking into electronic storage in the United States and later obtained by the federal government through authorized foreign-intelligence activities.

August 28, 2020

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked whether the Wiretap Act, 18 U.S.C. §§ 2510–2523, or the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701–2713, restricts how federal law enforcement officers may use or disclose certain e-mails that were acquired in a foreign-intelligence operation. We understand that the federal government obtained these e-mails in the course of conducting authorized foreign-intelligence activities, which resulted in the acquisition of a number of documents from a foreign source through a means that would not itself be regulated or limited by the Wiretap Act or the SCA. The Department of Justice has been advised by U.S. intelligence officials that the foreign source acquired the e-mails from a foreign adversary, which, there is reason to believe, had unlawfully hacked into e-mail accounts in the United States. Because the foreign adversary originally acquired those e-mails in violation of federal law, you have asked whether the Wiretap Act or the SCA restricts the use or disclosure of those e-mails by federal law enforcement officials in connection with investigations they are conducting.[1]

The Wiretap Act contains strict protections governing the use of wire, oral, and electronic communications that are intercepted while in transit. The SCA restricts unauthorized access to stored electronic communications. Based upon the facts as we understand them, neither the Wiretap

[1] Because the federal government had no involvement in the original hacking of the e-mails, the Fourth Amendment to the U.S. Constitution does not restrict the government's use or disclosure of the information. *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (recognizing that the Fourth Amendment "is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official" (internal quotation marks omitted)).

Act nor the SCA prohibits the use or disclosure of the e-mails in question by federal officers. The Wiretap Act's prohibitions on the use or disclosure of intercepted communications apply only to communications acquired by a contemporaneous interception, not to those acquired by hacking into computer servers that store communications. At the same time, while the SCA prohibits unauthorized access to those servers, it does not contain a separate prohibition on how a hacker, much less an unrelated third party, may use or disclose e-mails that were acquired by such an illegal intrusion.

I.

The Wiretap Act was originally enacted by title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 211, and updated in relevant parts by title I of the Electronic Communications Privacy Act of 1986 ("ECPA"), Pub. L. No. 99-508, 100 Stat. 1848. The statute prohibits the interception of wire, oral, and electronic communications, as well as their subsequent use and disclosure, subject to various conditions and exceptions. *See* 18 U.S.C. § 2511. The Wiretap Act regulates the use and disclosure of intercepted electronic communications even when the person who acquired them had no role in their interception. Except as otherwise authorized, the statute bars, among other things, any person from "intentionally disclos[ing], or endeavor[ing] to disclose, to any other person," or "intentionally us[ing], or endeavor[ing] to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of [section 2511(1)]." *Id.* § 2511(1)(c)–(d). There are a number of exceptions to this restriction, both as a matter of statute, *see, e.g.*, *id.* § 2517, and under the First Amendment, *see Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001). But generally speaking, the Wiretap Act imposes restrictions on how law enforcement officers may make use of communications intercepted in violation of its provisions.

The Wiretap Act's restriction on use or disclosure, however, applies only to communications that were "intercept[ed]" in violation of section 2511(1). 18 U.S.C. § 2511(1)(c)–(d). The term "intercept" means "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other

device." *Id.* § 2510(4). And an "electronic communication" is defined as including "any transfer" of information "transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system." *Id.* § 2510(12). As the Ninth Circuit has recognized, "the ordinary meaning of 'intercept' . . . is 'to stop, seize, or interrupt in progress or course before arrival.'" *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 878 (9th Cir. 2002) (quoting *Webster's Ninth New Collegiate Dictionary* 630 (1985)). That plain-language understanding is consistent with the statutory definition of "intercept," which speaks of the acquisition of the contents of an "electronic . . . communication," which in turn is defined as a "transfer" of electronic information.

Every federal court of appeals to address the issue has read "intercept" as requiring that a communication be acquired contemporaneously with its transmission. *See Boudreau v. Lussier*, 901 F.3d 65, 78 (1st Cir. 2018); *Luis v. Zang*, 833 F.3d 619, 627–29 (6th Cir. 2016); *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 113 (3d Cir. 2003); *United States v. Steiger*, 318 F.3d 1039, 1047–49 (11th Cir. 2003); *Konop*, 302 F.3d at 878; *Steve Jackson Games, Inc. v. U.S. Secret Serv.*, 36 F.3d 457, 461–62 (5th Cir. 1994). As the Sixth Circuit has explained, "[t]he term 'intercept' . . . applies only to electronic communications, not to electronic storage." *Luis*, 833 F.3d at 627; *see* 18 U.S.C. § 2510(17) (defining "electronic storage" as "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof " and "any storage of such communication by an electronic communication service for purposes of backup protection of such communication"). Thus, the Wiretap Act's prohibitions apply only to electronic information acquired during its "transfer." The prohibitions "do[] not apply to the acquisition of electronic signals that are no longer being transferred," i.e., those maintained in electronic storage. *Luis*, 833 F.3d at 627. In short, the Wiretap Act's prohibitions on subsequent use and disclosure capture only those electronic communications caught "in flight." *Id.*

This interpretation of the term "intercept" is consistent with the statutory history and historical practice. Before Congress enacted the ECPA, which extended the Wiretap Act to cover electronic communications, courts had read "intercept" to cover only acquisition contemporaneous with transmission. *See, e.g.*, *United States v. Turk*, 526 F.2d 654, 658 (5th Cir. 1976). When it enacted the ECPA in 1986, Congress retained that

definition—except with respect to wire communications, the definition of which was amended to "include[] any electronic storage of such [wire] communication." Pub. L. No. 99-508, sec. 101(a)(1)(D), § 2510(1), 100 Stat. at 1848. The ECPA did not include electronic storage in the definitions of either oral or electronic communications. *See* 18 U.S.C. § 2510(2), (12) (1988). The ECPA thus expanded the prior construction of "intercept" "with respect to wire communications only." *Konop*, 302 F.3d at 877 (emphasis omitted). Congress's omission of the storage component from the definitions of oral and electronic communications suggests that oral and electronic communications are not "intercept[ed]" when they are accessed in storage.

Were there any doubt, in 2001, Congress further amended the Wiretap Act by eliminating "electronic storage" from the definition of wire communication. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, sec. 209, § 2510(1), 115 Stat. 272, 283. This, too, reinforced the contemporaneity requirement. "By eliminating storage from the definition of wire communication, Congress essentially reinstated the pre-ECPA definition of 'intercept.'" *Konop*, 302 F.3d at 878. The apparent purpose of the amendment "was to reduce protection of voice mail messages to the lower level of protection provided other electronically stored communications." *Id.* (citing H.R. Rep. 107-236, pt. 1, at 158–59 (2001)). That amendment thus illustrated that "intercept" refers to the acquisition of a contemporaneous transfer of an electronic communication, rather than the acquisition of a communication that has already arrived and been preserved in electronic storage.

Reading "interception" as requiring contemporaneous acquisition is also consistent with the structure of title 18. The Wiretap Act concerns "wire and electronic communications interception." *See* 18 U.S.C. ch. 119 (chapter heading). The SCA concerns unauthorized access to "stored wire and electronic communications." *See* 18 U.S.C. ch. 121 (chapter heading). These distinct regimes include very different substantive requirements for, and procedural mechanisms by which, law enforcement officers may access or acquire electronic communications while they are being transferred versus while they are stored. *Compare id.* §§ 2516, 2518 (authorization and procedures for government interception of electronic communications), *with id.* § 2703 (same, for government acquisition of communications in electronic storage). In particular, "[t]he level of pro-

tection provided stored communications under the SCA is considerably less than that provided communications covered by the Wiretap Act." *Konop*, 302 F.3d at 879. If "acquisition of a stored electronic communication were an interception under the Wiretap Act, the government would have to comply with the more burdensome, more restrictive procedures of the Wiretap Act to do exactly what Congress apparently authorized it to do under the less burdensome procedures of the SCA." *Id.* Even if there could be circumstances where the Wiretap Act and the SCA overlap, *see id.* at 889 (Reinhardt, J., concurring in part and dissenting in part), Congress plainly intended that a different regime would apply to stored electronic communications.

We note that this conclusion presumes that a stored electronic communication is an "electronic communication" under the Wiretap Act in the first place. Yet under one reading of the statute, "[o]nce the transmission of the communication has ended, the communication ceases to be a communication at all. The former communication instead becomes part of 'electronic storage.'" *Luis*, 833 F.3d at 627. Some courts, however, have concluded that even though an interception requires contemporaneous acquisition, in large part because "electronic communication" is defined as a communication in "transfer," an electronic communication can nevertheless include a stored communication. *See Konop*, 302 F.3d at 876; *Steiger*, 318 F.3d at 1047. And the SCA separately refers to an "electronic communication while it is in electronic storage," which seems to preclude the conclusion that the two categories are mutually exclusive. 18 U.S.C. § 2701(a); *see also id.* § 2703(a) (referring to an "electronic communication[] that is in electronic storage"). It may be that this textual oddity has no happy resolution. The Wiretap Act, after all, "is famous (if not infamous) for its lack of clarity." *Steve Jackson Games*, 36 F.3d at 462. In any event, regardless of the resolution of this point, the bottom-line conclusion of the First, Third, Fifth, Sixth, Ninth, and Eleventh Circuits remains the same: an "interception" requires the acquisition of a communication contemporaneous with its transmission.

Because the Wiretap Act's prohibitions on the use or disclosure of intercepted electronic communications apply only to communications acquired through a contemporaneous interception, those prohibitions do not apply to federal officers' use or disclosure of the e-mails in question. Although some cases may present technical questions concerning what constitutes contemporaneity based upon the technology at issue, *cf. Unit-*

ed States v. Councilman, 418 F.3d 67, 69 (1st Cir. 2005) (en banc) (concluding that messages in "temporary, transient electronic storage" constituted electronic communications in transit), we understand that here, the foreign hackers obtained the e-mails by accessing e-mail accounts where the e-mails were already being held in electronic storage. The e-mails in question were not acquired contemporaneously with their transmission. The Wiretap Act thus poses no bar on their use or disclosure by the investigators.[2]

II.

The SCA, enacted by title II of the ECPA, prohibits unauthorized access to electronic communications facilities. *See* 18 U.S.C. § 2701(a). Specifically, the SCA prohibits any person from "intentionally access[ing] without authorization a facility through which an electronic communication service is provided" and from "intentionally exceed[ing] an authori-

[2] Even if the restrictions in sections 2511(c) and (d) could apply to the e-mails at issue, the Wiretap Act contains exceptions for certain uses and disclosures by investigative and law enforcement officers. *See* 18 U.S.C. § 2517(1), (2). Evaluating the applicability of those exceptions would require consideration of whether the federal investigators obtained the e-mails "by any means authorized by this chapter," and determinations about the meaning of the phrases "investigative or law enforcement officer" and "appropriate to the proper performance of [their] official duties." *Id.*; *see Title III Electronic Surveillance Material and the Intelligence Community*, 24 Op O.L.C. 261, 263–70 (2000) (discussing the meaning of "investigative or law enforcement officer" and "appropriate to the proper performance of [their] official duties"); *compare Forsyth v. Barr*, 19 F.3d 1527, 1543 (5th Cir. 1994) (interpreting "by any means authorized by this chapter"), *with Berry v. Funk*, 146 F.3d 1003, 1012 (D.C. Cir. 1998) (disagreeing with *Forsyth*'s interpretation), *and Chandler v. U.S. Army*, 125 F.3d 1296, 1300 (9th Cir. 1997) (reading *Forsyth* narrowly). We need not address those questions here because the Wiretap Act's prohibitions apply only to electronic communications that were acquired during their transmission.

In addition, the Supreme Court has held that the First Amendment in some circumstances protects disclosure of intercepted communications notwithstanding sections 2511(c) and (d). *See Bartnicki*, 532 U.S. at 535 (concluding that the government could not constitutionally punish "disclosures of lawfully obtained information of public interest by one not involved in the initial illegality"). We similarly need not resolve what force, if any, those First Amendment concerns would have here. *See Boehner v. McDermott*, 484 F.3d 573, 579 (D.C. Cir. 2007) (en banc) (concluding that, under *United States v. Aguilar*, 515 U.S. 593 (1995), "those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information").

zation to access that facility," and "thereby obtain[ing], alter[ing], or prevent[ing] authorized access to a wire or electronic communication while it is in electronic storage in such system." *Id.* The SCA also contains restrictions on disclosure by providers of electronic communication services and remote computing services. *See id.* § 2702(a).

By its terms, section 2701 applies only to unauthorized "access" of a facility. Accessing a facility in this sense "requires an intrusion into an electronic communication system." *Walker v. Coffey*, 956 F.3d 163, 168 (3d Cir. 2020). "Designed to prohibit 'hacking' into electronic communication facilities, section 2701 does not cover nonintrusive procurements of electronic communications." *Id.* Unlike the Wiretap Act's protections for intercepted communications, section 2701 does not prohibit the subsequent use or disclosure of electronic communications that have been unlawfully accessed while in electronic storage. As a number of district courts have explained, the "SCA punishes the act of accessing a 'facility through which an electronic communication service is provided' in an unauthorized manner"; it "does not punish disclosing and using the information obtained therefrom." *Cardinal Health 414, Inc. v. Adams*, 582 F. Supp. 2d 967, 976 (M.D. Tenn. 2008); *see also Cousineau v. Microsoft Corp.*, 6 F. Supp. 3d 1167, 1172 (W.D. Wash. 2014); *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 973 (C.D. Cal. 2010); *In re Am. Airlines, Inc., Privacy Litig.*, 370 F. Supp. 2d 552, 558–59 (N.D. Tex. 2005); *Sherman & Co. v. Salton Maxim Housewares, Inc.*, 94 F. Supp. 2d 817, 820 (E.D. Mich. 2000); *Wesley Coll. v. Pitts*, 974 F. Supp. 375, 389 (D. Del. 1997), *aff 'd*, 172 F.3d 861 (3d Cir. 1998); *Educ. Testing Serv. v. Stanley H. Kaplan, Educ. Ctr., Ltd.*, 965 F. Supp. 731, 740 (D. Md. 1997). Section 2702 restricts the disclosure of the contents of communications while in electronic storage, but that restriction applies only to persons or entities that provide electronic communication services or remote computing services to the public. 18 U.S.C. § 2702(a)(1)–(3). Accordingly, "a person who does not provide an electronic communication service can disclose or use with impunity the contents of an electronic communication unlawfully obtained from electronic storage." *Sherman & Co.*, 94 F. Supp. 2d at 820 (internal quotation marks and alteration omitted).[3]

[3] The Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, similarly prohibits "access[ing] a computer without authorization or exceeding authorized access," as well as

Just as the SCA's general prohibition is limited to unauthorized access, rather than use, of a stored communication, the SCA does not require the exclusion of evidence that was obtained in violation of that prohibition, even when law enforcement agents themselves committed the violation (without otherwise violating the Fourth Amendment). The statute expressly provides that the damages remedies and sanctions under the statute "are the only judicial remedies and sanctions for nonconstitutional violations of this chapter." 18 U.S.C. § 2708. As a result, violations of the SCA, standing alone, are not subject to the exclusionary rule. *See United States v. Perrine*, 518 F.3d 1196, 1202 (10th Cir. 2008) ("[V]iolations of the ECPA do not warrant exclusion of evidence."); *Steiger*, 318 F.3d at 1049; *United States v. Smith*, 155 F.3d 1051, 1056 (9th Cir. 1998) ("[T]he Stored Communications Act expressly rules out exclusion as a remedy."). Communications obtained in violation of the SCA may be used as evidence in a criminal proceeding because the statute does not restrict how law enforcement agents may use or disclose such communications.

Here, federal law enforcement officers received certain e-mails from U.S. intelligence officials, who in turn had acquired them in connection with authorized foreign-intelligence activities. Although there is reason to believe that foreign hackers themselves originally acquired the e-mails in violation of the SCA, those hackers were in no way working in concert with, or at the direction of, the federal government, and section 2701 does not constrain the downstream use or disclosure of stored communications. Section 2702 similarly does not apply, since it governs disclosures by persons or entities providing an "electronic communication service" or a "remote computing service" concerning information maintained by their respective services. 18 U.S.C. § 2702(a). Accordingly, the SCA does not restrict how federal law enforcement officers may use or disclose the recovered e-mails.

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trafficking in passwords, transmitting computer viruses, and threatening to damage computers, *id.* § 1030(a). Like the SCA, the CFAA "does not address the *use* of information after access." *WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 205 (4th Cir. 2012); *see also, e.g.*, *Orbit One Commc'ns, Inc. v. Numerex Corp.*, 692 F. Supp. 2d 373, 385 (S.D.N.Y. 2010) ("The CFAA expressly prohibits improper 'access' of computer information. It does not prohibit misuse or misappropriation."). In addition, the CFAA contains an exception for "any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States . . . or of an intelligence agency of the United States." 18 U.S.C. § 1030(f).

III.

For these reasons, we conclude that neither the Wiretap Act nor the SCA prohibits federal law enforcement officers from using or disclosing e-mails that were originally acquired by a foreign adversary's unlawful hacking into electronic storage in the United States and later obtained by the federal government through foreign-intelligence activities.

Please let us know if we may be of further assistance.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Congressionally Mandated Notice Period for Withdrawing from the Open Skies Treaty

In establishing a mandatory waiting period for withdrawing from a treaty, section 1234(a) of the National Defense Authorization Act for Fiscal Year 2020 unconstitutionally interferes with the President's exclusive authority to execute treaties and to conduct diplomacy.

September 22, 2020

MEMORANDUM OPINION FOR THE LEGAL ADVISOR TO THE NATIONAL SECURITY COUNCIL

The United States is a party to the Open Skies Treaty, which allows state parties to conduct unarmed surveillance flights over the territory of the other parties. Treaty on Open Skies, Mar. 24, 1992, *reprinted in* S. Treaty Doc. No. 102-37 (Aug. 12, 1992) ("OST"); 2 *Pub. Papers of Pres. William J. Clinton* app. A, at 2213 (Nov. 3, 1993). Article XV of the Treaty gives each party the right to withdraw after providing notice, at least six months in advance, to a Treaty depositary and to the other state parties. In section 1234(a) of the National Defense Authorization Act for Fiscal Year 2020 ("FY 2020 NDAA"), Congress sought to require the Executive Branch to notify four congressional committees, at least 120 days in advance of sending the notice, that withdrawal is in the best interests of the United States national security and that the other state parties to the Treaty have been consulted about the United States' planned withdrawal. Pub. L. No. 116-92, § 1234(a), 133 Stat. 1198, 1648 (2019).

On May 22, 2020, the Secretary of State and the Secretary of Defense jointly provided notice to congressional leadership of the President's decision that the United States would withdraw from the Treaty. *See* Letter for Nancy Pelosi, Speaker of the House, U.S. House of Representatives, from Michael R. Pompeo, Secretary of State, and Mark T. Esper, Secretary of Defense (May 22, 2020) ("Notification Letter"); *see also* Press Release, Michael R. Pompeo, U.S. Dep't of State, *Press Statement on the Treaty on Open Skies* (May 21, 2020), https://2017-2021.state.gov/on-the-treaty-on-open-skies. Consistent with section 1234(a), the Secretaries confirmed that withdrawal was in the best interests of the United States national security and that the Department of State had consulted extensively with other state parties. But they further explained that the

President had directed that the notice of withdrawal be sent immediately, without waiting for the 120 days called for by section 1234(a). Notification Letter at 2.

Before the President gave that direction, you asked whether section 1234(a)'s mandatory congressional-notice period is constitutional. We advised that the notice period unconstitutionally interferes with the President's exclusive authority to execute treaties and to conduct diplomacy, a necessary incident of which is the authority to execute a treaty's termination right. Congress may not intrude upon the President's authority to speak as the voice of the United States in executing a treaty by imposing the notice-and-wait provision called for under section 1234(a). This memorandum memorializes the basis for that conclusion.

I.

President George H.W. Bush signed the Open Skies Treaty on behalf of the United States in Helsinki, Finland, on March 24, 1992, along with representatives of the Russian Federation and other nations. *See* Message to the Senate Transmitting the Treaty on Open Skies (Aug. 12, 1992), 2 *Pub. Papers of Pres. George Bush* 1345, 1345–46 (1992) ("OST Message"). The Treaty allows each state party to conduct a limited number of unarmed observation flights over the territory of other parties. *See* OST arts. I–IX. Data obtained from these flights may then be shared among the parties. *See id.* art. IX, § IV; *see also id.* art. X, ¶ 5 (allowing the Open Skies Consultative Commission to develop "arrangements for the sharing and availability of data"). The Treaty was intended, among other things, to "improve openness and transparency," "to enhanc[e] security," "to facilitate the monitoring of compliance with existing or future arms control agreements," and "to strengthen the capacity for conflict prevention and crisis management." *Id.* pmbl.

The idea for the Open Skies Treaty originated in the early years of the Cold War, but it did not enter into force until a good deal later. President Eisenhower first proposed the idea for a regime of mutual unarmed reconnaissance flights in 1955, as a confidence-building measure between the superpowers. But it was not until 1989, as the Cold War entered its last years, that President George H.W. Bush began negotiating a multilateral agreement for such a regime. *See Treaty on Open Skies*, S. Exec.

Rep. No. 103-5, at 2 (1993). President Bush signed the agreement in 1992 and submitted it to the Senate for advice and consent. OST Message at 1345.

In considering whether to recommend that the Senate provide its advice and consent to ratification, the Senate Committee on Foreign Relations observed that the Treaty "will be of marginal direct benefit to the United States" and that there was a "general consensus within the United States Government that the treaty will not provide any significant information gains to this nation." S. Exec. Rep. No. 103-5, at 16. The Treaty's original impetus had been "overtaken" in part by the advent of satellite technology, which offered better data-acquisition capabilities. *See id.* at 2–3. In addition, the Senate Armed Services Committee expressed concern about "the cost-effective use of Department of Defense resources under the Treaty" and viewed the "overall cost-benefit to the U.S." as "questionable." *Id.* at 142–43, 15. Nonetheless, the Committee on Foreign Relations concluded that the Treaty was "not likely to jeopardize United States national security," *id.* at 16, and the Senate consented to the Treaty subject to two conditions (neither of which bears on withdrawal). *See* 139 Cong. Rec. 19,913 (1993). On November 2, 1993, President Clinton signed the instrument of ratification.[1] The Treaty did not finally enter into force, however, until January 1, 2002, *see* Treaty Affairs Staff, Office of the Legal Adviser, U.S. Dep't of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2020* § 2, at 2, after the requisite number of nations had acceded to it, *see* OST art. XVII, ¶ 2. At present, 34 states, including the United States, are parties to the Treaty.

The Open Skies Treaty is of unlimited duration. *Id.* art XV, ¶ 1. But it provides that a state party "shall have the right to withdraw from this Treaty," and that a party intending to withdraw "shall provide notice of its decision to withdraw to either Depositary at least six months in advance of the date of its intended withdrawal and to all other States Parties." *Id.* art. XV, ¶ 2. Should a state party provide such notice, the Treaty directs

[1] *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1995: Hearings Before the Subcomm. on the Dep'ts of Commerce, Just. & State, the Judiciary & Related Agencies of the H. Comm. on Appropriations*, 103d Cong. 207 (1994).

the two depositary governments (Canada and Hungary, *see id.* art. XVII) to convene a conference of the state parties "to consider the effect of the withdrawal on this Treaty." *Id.* art. XV, ¶ 3.

In recent years, United States military officials expressed concerns that the Treaty's implementation had undermined the national security of the United States. Some observed that Russia received a much greater advantage than the United States from the overflight rights.[2] Others complained that Russia had regularly breached its obligations under the Treaty and thereby undermined its benefits.[3] For these and other reasons, United States officials discussed the possibility of withdrawing.[4]

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[2] *See, e.g.*, *Hearing to Consider the Nomination of General Joseph F. Dunford, Jr., USMC, for Reappointment to the Grade of General and Reappointment to Be Chairman of the Joint Chiefs of Staff Before the S. Comm. on Armed Servs.*, 115th Cong. 49 (2017) ("Dunford Hearing") (statement of Gen. Dunford) (calling "compelling" the argument that "Russia gets more benefit from [OST] flights than does the United States"); *Worldwide Threats: Hearing Before the H. Comm. on Armed Servs.*, 114th Cong. 13 (2015) (statement of Lt. Gen. Vincent R. Stewart, Dir., Def. Intelligence Agency) ("The Open Skies construct was designed for a different era. I am very concerned about how it's applied today."); *Russian Arms Control Cheating: Violation of the INF Treaty and the Administration's Responses One Year Later: Joint Hearing Before the Subcomm. on Strategic Forces of the H. Comm. on Armed Servs. & the Subcomm. on Terrorism, Nonproliferation & Trade of the H. Comm. on Foreign Affairs*, H.A.S.C. No. 114-70, 114th Cong. 15 (2015) ("Russian Arms Control Hearing") (according to the head of U.S. Strategic Command, the "treaty has become a critical component of Russia's intelligence collection capability directed at the United States," and Russian overflights create "vulnerabilities" for the United States); *see also* Senator Tom Cotton, *The Open Skies Treaty Is Giving Russia Spying Capabilities. End It.*, Wash. Post (Dec. 10, 2019), https://www.washingtonpost.com/opinions/2019/12/10/open-skies-treaty-is-giving-russia-spying-capabilities-end-it ("[T]he Open Skies Treaty no longer serves to reduce tensions or build trust, if it ever did. Instead it gives Russia a spying capability it wouldn't otherwise possess, which jeopardizes U.S. security.").

[3] *See, e.g.*, U.S. Dep't of State, *Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments* 30 (Apr. 2016) ("Russia continues not to meet its treaty obligations [under the OST.]"); U.S Dep't of State, *Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments* 26–27 (Aug. 2012) (observing that, on multiple occasions, "the United States, Romania, Canada," and other nations have raised concerns about Russia's noncompliance with the Treaty).

[4] *See, e.g.*, Dunford Hearing at 48–49 (statement of Gen. Dunford) ("we don't believe the treaty should be in place if the Russians aren't complying"); *Review of the Fiscal Year 2017 State Department Budget Request: Hearing Before the S. Comm. on Foreign Rela-*

At the same time, some Members of Congress expressed concern that the United States' withdrawal from the Treaty would undermine national security or disrupt relations with the United States' allies. *See, e.g.*, 165 Cong. Rec. S5915 (daily ed. Oct. 21, 2019) (statement of Sen. Menendez) ("Withdrawing from the Open Skies Treaty would be perceived as casting . . . further doubt on the status of the U.S. commitment to Ukraine's security and would advance the Russian narrative that the United States is an unreliable partner in the region."); Letter for Robert C. O'Brien, National Security Adviser, White House, from Eliot L. Engel, Chairman, Committee on Foreign Relations, U.S. House of Representatives at 1 (Oct. 7, 2019) ("Th[e] treaty has provided important military transparency for its 34 signatory countries" and "[w]ithdrawal risks dividing the transatlantic alliance and would further undermine America's reliability as a stable and predictable partner when it comes to European security[.]"); Press Release, Senator Deb Fischer, *Fischer, Fortenberry, Bacon Applaud Open Skies Funding in FY2019 Defense Funding Bill* (Sept. 14, 2018) ("The Open Skies Treaty . . . contributes significantly to greater transparency and stability across many key regions of the globe, which benefits both the United States and our allies and partners.").

Against this backdrop, the House Armed Services Committee in 2019 proposed including a provision in the FY 2020 defense authorization bill that would have restricted the President's discretion to withdraw from the Treaty.[5] In response, the Department of Justice objected that such a meas-

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tions, 114th Cong. 148 (2016) (statement of Sen. Barrasso) (asking whether "this treaty has outlived its original intention and the United States should withdraw"); Russian Arms Control Hearing at 16–17 (statement of Rep. Bridenstine) (raising the possibility that "maybe we don't need [the OST] anymore"); *see also* Cotton, *supra* note 2 ("Withdrawing from Open Skies . . . would allow us to restrict Russian spy flights over the most sensitive U.S. military installations without damaging our ability to monitor theirs" and would free up funding that could be "better spent on tools that increase the combat effectiveness and survivability of U.S. troops.").

[5] The House bill would have generally barred the obligation of any of "the funds authorized to be appropriated by this Act or otherwise made available to the Department of Defense for fiscal year 2020" to support "any action to suspend, terminate, or withdraw the United States from the Open Skies Treaty." H.R. 2500, 116th Cong. § 1231(c)(1) (2019). The bill would have made an exception if the Secretary of State and the Secretary of Defense jointly certified to Congress either that "Russia is in material breach of its obligations under the Open Skies Treaty and is not taking steps to return to compliance with such obligations, and all other state parties to the Open Skies Treaty concur in such

ure would unconstitutionally intrude on the President's exclusive power to withdraw from a treaty. *See* Letter for Adam Smith, Chairman, Committee on Armed Services, U.S. House of Representatives, from Prim F. Escalona, Principal Deputy Assistant Attorney General, Office of Legislative Affairs at 8–9 (Nov. 27, 2019), https://www.justice.gov/ola/page/file/1222061/download (second document).

Congress nonetheless enacted a revised version of this restriction in section 1234(a) of the NDAA, which provides:

> Not later than 120 days before the provision of notice of intent to withdraw the United States from the Open Skies Treaty to either treaty deposit[a]ry pursuant to Article XV of the Treaty, the Secretary of Defense and the Secretary of State shall jointly submit to the congressional defense committees, the Committee on Foreign Affairs of the House of Representatives, and the Committee on Foreign Relations of the Senate a notification that—(1) such withdrawal is in the best interests of the United States national security; and (2) the other state parties to the Treaty have been consulted with respect to such withdrawal.

FY 2020 NDAA § 1234(a), 133 Stat. at 168. In signing the FY 2020 NDAA into law, the President reiterated the Department's constitutional concerns and advised that he would apply section 1234(a) only to the extent "such advance certification or notification is feasible and consistent with [his] exclusive constitutional authorities" to conduct the Nation's foreign relations. Statement on Signing the National Defense Authorization Act for Fiscal Year 2020, 2019 Daily Comp. Pres. Doc. No. 880, at 1 (Dec. 20, 2019) ("NDAA Signing Statement").

In May 2020, you asked for this Office's views on whether the United States may submit a notice of withdrawal from the Open Skies Treaty without complying with the advance-notice requirement of section 1234(a). We advised that this 120-day waiting period unconstitutionally restricts the President's authority to execute the rights of the United States under treaties and to conduct diplomacy, and that the President could

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determination of the Secretaries"; or that "withdrawing from the Open Skies Treaty would be in the best interests of United States national security and the other state parties to the Open Skies Treaty have been consulted with respect to such withdrawal." *Id.* § 1231(c)(2).

therefore submit a notice of withdrawal immediately. Consistent with the President's signing statement, we advised that, as a matter of interbranch comity, the President should comply with the terms of the waiting period insofar as it would be feasible and consistent with the diplomatic objectives of the United States.

On May 22, 2020, the Secretary of State and the Secretary of Defense advised Congress that the President had determined that it was no longer in the national security interest for the United States to remain a party to the Open Skies Treaty. *See* Notification Letter at 1. The secretaries explained that, since at least 2011, Russia has regularly violated the Treaty's terms, thereby undermining the central confidence-building object of the Treaty. *Id*. For example, Russia has limited the flight distance that state parties may fly during missions over Kaliningrad; Russia prohibits Treaty flights within 10 kilometers of portions of the Russian–Georgian border; and Russia in September 2019 denied overflight of a Russian military exercise—all of which violated the Treaty. *Id.* Although the United States derives no intelligence benefit from the Treaty, Russia gains valuable intelligence from its overflights, which it can use to target critical civilian infrastructure in the United States and Europe. *Id.* Finally, Russia attempts to advance its "expansionist propaganda" through the Treaty by prohibiting flights near Georgia and by providing for an open-skies refueling airfield within Ukraine, in Russian-occupied Crimea. *Id.*

The secretaries confirmed that, consistent with section 1234(a), the Department of State had consulted extensively with other state parties to the Treaty about the prospect of United States withdrawal. *Id.* at 2. As the secretaries explained, "[t]hose consultations have been tailored to help State[] Parties understand and mitigate the risks from their own continued participation in the Treaty, and to lay the foundation for providing overhead imagery to fill any gaps resulting from the United States' withdrawal." *Id.* Although those consultations would continue, the secretaries advised that the President had determined that waiting an additional 120 days before submitting the notice of withdrawal would be contrary to the national security. *Id.* Because Congress could not constitutionally require the President to wait 120 days before executing an authority vested in the President by the Constitution, the President had directed the Secretary of State to submit the notice immediately. *Id.* at 2–3.

II.

In enacting section 1234(a), Congress sought to regulate the President's authority to withdraw the United States from the Open Skies Treaty. Article II of the Constitution vests the President with the authority to exercise the right of the United States under a treaty to withdraw from the agreement. That proposition, while occasionally disputed during the early Republic, has since become firmly entrenched in the practice of our government. *See Authority to Withdraw from the North American Free Trade Agreement*, 42 Op. O.L.C. 133, 139–45 (2018) ("*NAFTA Withdrawal*"); *id.* at 144 ("In view of the[] historical examples of presidential action, combined with what has usually been congressional acquiescence, there can no longer be serious doubt that the President may terminate a treaty in accordance with its terms.").[6] As the Chief Executive, the President bears the constitutional responsibility to execute the laws and treaties of the United States. *See, e.g.*, *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109 (1801) (recognizing that "the execution of a contract between nations is to be demanded from, and, in the general, superintend-

[6] *Accord* Memorandum for Robert F. Hoyt, General Counsel, U.S. Dep't of the Treasury, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: President's Authority to Terminate or Amend a Certain Congressional-Executive Agreement* at 5 (May 9, 2008); *Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty*, 20 Op. O.L.C. 389, 395 n.14 (1996) ("[T]he executive branch has taken the position that the President possesses the authority to terminate a treaty in accordance with its terms by his unilateral action[.]"); Memorandum for Cyrus Vance, Secretary of State, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Reservation to SALT II Conditioning Termination on Senate Approval* at 1 (Nov. 13, 1979); *Goldwater v. Carter*, 617 F.2d 697, 699–708 (D.C. Cir. 1979) (en banc) (per curiam) (upholding President Carter's authority to terminate a mutual defense treaty with the Republic of China according to the treaty's terms), *vacated*, 444 U.S. 996 (1979); Restatement (Fourth) of the Foreign Relations Law of the United States § 113(1) (Am. Law Inst. 2018) ("According to established practice, the President has the authority to act on behalf of the United States in . . . withdrawing the United States from treaties . . . on the basis of terms in the treaty allowing for such action (such as a withdrawal clause)[.]"); Louis Henkin, *Foreign Affairs and the United States Constitution* 213–14 (2d ed. 1996) (explaining that it is now "accepted that the President has the authority to denounce or otherwise terminate a treaty"); Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 Duke L.J. 1615, 1623 (2018) (observing that the Senate "knows that presidents claim authority to invoke withdrawal clauses unilaterally" and "routinely consents to treaties containing such clauses").

ed by the executive of each nation"). And as the Nation's sole diplomatic representative, the President is the one voice who speaks for the United States before foreign states. *See, e.g.*, *Zivotofsky v. Kerry*, 576 U.S. 1, 14 (2015); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003) (recognizing that the President must have the "capacity . . . to speak for the Nation with one voice in dealing with other governments" (internal quotation marks and alteration omitted)). Both of these powers underscore that the President has the authority and discretion to execute the United States' right to withdraw from a treaty.

Because a statute that purports to restrict the President from exercising that right would raise serious constitutional questions, we consider first whether section 1234(a) in fact does so. Section 1234(a) implicitly acknowledges that the President may withdraw the United States from the Open Skies Treaty by its terms in presuming that the President may provide "notice of intent to withdraw" to the depositaries of the treaty. *See* FY 2020 NDAA § 1234(a). The statute, however, would require not the President, but his subordinates, the Secretary of State and the Secretary of Defense, to provide 120 days' notice of any such decision and to make certain certifications based on it. *See id.* The structure of the statute is a bit awkward, because the secretaries are obliged to inform Congress in advance of a presidential decision of which they may have no control or potentially even knowledge. Given this mismatch between the statutory reporters and the presidential decision-maker, an argument could be made that the statute requires only that the secretaries use their best efforts to provide notice should the President give them the information and time to do so. Such a reading might avoid the constitutional question presented by an absolute restriction on the President's discretion to withdraw the United States from the Open Skies Treaty.

We do not think that the question is so easy, however, because the President himself must take care that his subordinates faithfully comply with the law. As the Supreme Court has explained, "Article II confers on the President the general administrative control of those executing the laws. It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's famous phrase." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492–93 (2010) (internal quotation marks and citation omitted). That responsibility includes not just complying with the law, but ensuring that his subordinates do as well. Although the President could surely communicate the

notice of withdrawal himself, or through other subordinates, he ordinarily would rely upon the Secretary of State to transmit that decision and would seek the advice of both secretaries before doing so. We presume that Congress enacted the statute against the backdrop of these relationships. *See, e.g.*, *Proposed Executive Order Entitled "Federal Regulation,"* 5 Op. O.L.C. 59, 61 (1981). Since the President would have discretion to provide the secretaries with the required notice, we believe that if the statute were constitutional, then he should take care to avoid creating a circumstance where they would fail to comply. We therefore read section 1234(a) as effectively imposing a requirement that the President not submit the notice of withdrawal until 120 days after Congress receives notice of the President's intent and the secretaries have made the required certifications. The question remains whether such a restriction is constitutional.

III.

The decision to withdraw from the Open Skies Treaty implicates the President's exclusive constitutional authorities to execute a treaty of the United States and to conduct the Nation's diplomacy. The Constitution vests the President with all of the "executive Power" of the United States, U.S. Const. art. II, § 1, cl. 1, and it assigns to the President "plenary powers . . . as the head of the State in [the Nation's] relations with foreign countries." *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 Op. Att'y Gen. 484, 489–90 (1940) (Jackson, Att'y Gen.); *see also, e.g.*, *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (describing the "exclusive competence of the Executive Branch in the field of foreign affairs"). Although Congress may legislate on topics that affect foreign affairs, Congress's authority does not extend to regulating the President's decision to exercise a right of the United States to withdraw from a treaty. Accordingly, section 1234(a) unconstitutionally restricts the President's discretion to withdraw the United States from the Open Skies Treaty.

A.

The Constitution vests the President with the "executive Power" of the United States. U.S. Const. art. II, § 1, cl. 1. As the Supreme Court recent-

ly observed, "the entire 'executive Power' belongs to the President alone." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020). The Constitution further confers upon the President express powers relating to foreign affairs, including the power to direct the military as "Commander in Chief," U.S. Const. art. II, § 2, cl. 1; to "make" treaties, after receiving the advice and consent of the Senate, *id.* art. II, § 2, cl. 2; to appoint "Ambassadors," "public Ministers and Consuls," *id.*; and to receive "Ambassadors and other Public Ministers," *id.* art. II, § 3. Taken together, these provisions grant the President the authority and discretion to implement a treaty by notifying foreign powers of the United States' exercise of its right to withdraw from the treaty.

The Constitution entrusts the President with the "vast share of responsibility for the conduct of our foreign relations." *Garamendi*, 539 U.S. at 429. That responsibility includes the "exclusive authority to conduct diplomacy on behalf of the United States." Memorandum for Jennifer G. Newstead, Legal Adviser, U.S. Dep't of State, from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Statutory Restrictions on the PLO's Diplomatic Activities* at 7 (Sept. 11, 2018) ("*PLO's Diplomatic Activities*").[7] The President, for instance, has the "'exclusive authority to determine the time, scope, and objectives' of international negotiations." *Prohibition of Spending for Engagement of*

[7] *Accord Prohibition of Spending for Engagement of the Office of Science and Technology Policy with China*, 35 Op. O.L.C. 116, 120–21 (2011); *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 267 (1996); *see also, e.g.*, *In re Hennen*, 38 U.S. (13 Pet.) 230, 235 (1839) ("As the executive magistrate of the country, [the President] is the only functionary intrusted with the foreign relations of the nation."); S. Doc. No. 56-231, pt. 8, at 21 (1901) ("The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations, and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success."); 10 Annals of Cong. 613 (1800) (statement of then-Rep. John Marshall) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."); Letter for Edmond Charles Genet from Thomas Jefferson, Secretary of State (Nov. 22, 1793), 27 *The Papers of Thomas Jefferson* 414, 415 n. (1997) (explaining, in a letter approved by President Washington and his Cabinet that, because the President is "the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such, they have a right and are bound to consider as the expression of the nation").

the Office of Science and Technology Policy with China, 35 Op. O.L.C. 116, 121 (2011) ("*Engagement of OSTP with China*") (internal quotation marks omitted); *see also Earth Island Inst. v. Christopher*, 6 F.3d 648, 652 (9th Cir. 1993) ("[A] statute's requirement that the Executive initiate discussions with foreign nations violates the separation of powers[.]"). It is "imperative" that, "[i]n the conduct of negotiations with foreign governments," the "United States speak with one voice," and the Constitution's overriding design is that this "one voice is the President's." *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 40 (1990) (quoting Message to the Senate Returning Without Approval the Bill Prohibiting the Export of Technology for the Joint Japan-United States Development of FS-X Aircraft (July 31, 1989), 2 *Pub. Papers of Pres. George Bush* 1042, 1043 (July 31, 1989)).

The Constitution also assigns to the President the responsibility to make treaties. The President has "the sole power to negotiate treaties." *Zivotofsky*, 576 U.S. at 13. The Senate must provide its advice and consent before a treaty may be valid. U.S. Const. art. II, § 2, cl. 2. But even when the Senate consents, the President still must decide to bring the treaty into effect by ratifying the treaty. *See, e.g.*, *Relevance of Senate Ratification History to Treaty Interpretation*, 11 Op. O.L.C. 28, 32 (1987) (observing that, even after the Senate provides consent, "the President may . . . refuse to ratify the treaty"); Restatement (Fourth) of the Foreign Relations Law of the United States § 303 reporter's note 5 (Am. Law Inst. 2018) ("Restatement (Fourth)") (explaining that, after the Senate approves a treaty, then the ensuing "decision whether to ratify the treaty—and to take the associated steps to bring the treaty into legal force for the United States—is vested wholly in the President"). Whether to ratify a treaty is itself a judgment that falls within the executive power of the President.

The President's exclusive authority over diplomacy extends not only to the making of treaties, but to their maintenance as well. The Supreme Court has long recognized that "the execution of a contract between nations is to be demanded from, and, in the general, superintended by the executive of each nation." *Schooner Peggy*, 5 U.S. at 109; *see also United States v. The Amistad*, 40 U.S. (15 Pet.) 518, 571–72 (1841) (recognizing that the President's responsibility to execute the laws "is, if possible, more imperative" with respect to the execution of treaties than statutes, "since the execution of treaties being connected with public and foreign

relations, is devolved upon the executive branch"); *Goldwater v. Carter*, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring in judgment) (recognizing the President's "duty to execute" treaty provisions). We have thus recognized that "[i]t belongs exclusively to the President to interpret and execute treaties," and that this power "necessarily includes the power to determine whether, and how far, the treaty remains in force." *Constitutionality of Legislative Provision Regarding ABM Treaty*, 20 Op. O.L.C. 246, 248–49 (1996).

The President's power to withdraw from an international agreement follows from these constitutional authorities. Deciding whether to withdraw from a treaty is not only a quintessentially executive decision, but it is also one that invariably requires the conduct of diplomacy. *See, e.g.*, Vienna Convention on the Law of Treaties art. 67, ¶ 2, *opened for signature* May 23, 1969, 115 U.N.T.S. 331 (requiring that a decision to withdraw be communicated by formal diplomatic notice).[8] Withdrawal from a treaty is a diplomatic act reserved for the President and committed to his judgment. *See NAFTA Withdrawal*, 42 Op. O.L.C. at 146 ("The diplomatic responsibility for communicating that notice would rest squarely with the President."); *see also Constitutionality of the Rohrabacher Amendment*, 25 Op. O.L.C. 161, 166 (2001) (recognizing the President's "responsibility for treaty interpretation and enforcement, and the authority to place the United States in breach of a treaty or even to terminate it, should the President find that advisable"); S. Comm. on Foreign Relations, 106th Cong., *Treaties and Other International Agreements: The Role of the United States Senate* 201 (Comm. Print 2001) (noting that "the termination of the outstanding international obligation seems to reside in the President since he alone is able to communicate with foreign powers").

The President's responsibility to execute the United States' right of withdrawal necessarily includes discretion to determine whether and when he should do so. President Carter, for example, gave effect to his decision to recognize the People's Republic of China as a sovereign by terminating a mutual defense treaty with Taiwan. *See Goldwater*, 617 F.2d at 707–08.

[8] Although the United States has not ratified the Vienna Convention on the Law of Treaties, we have recognized that many of its provisions reflect customary international law. *See, e.g.*, *Authority of the President Under Domestic and International Law to Use Military Force Against Iraq*, 26 Op. O.L.C. 143, 164 n.24 (2002); *Trade Act Restrictions on the Extension of Most-Favored-Nation Rights*, 11 Op. O.L.C. 128, 134 n.13 (1987).

As the D.C. Circuit explained, determining how to maintain international relationships is "a field in which the President, not Congress, has responsibility under our Constitution." *Id.* at 708. The decision to terminate a treaty often requires "immediate action," and the President must make "active policy determination[s] as to the conduct of the United States in regard to a treaty in response to numerous problems and circumstances as they arise." *Id.* at 706–07. The decision is likewise an aspect of the President's "'unique role in communicating with foreign governments,' and Congress may not compel the President to contradict [the] message" he chooses to send in doing so. *PLO's Diplomatic Activities* at 8 (quoting *Zivotofsky*, 576 U.S. at 21).

The Supreme Court's decision in *Zivotofsky* reinforces the conclusion that the President's authority to exercise the United States' right to withdraw from a treaty is exclusive. There, the Court considered the constitutionality of a federal statute that allowed U.S. citizens born in Jerusalem to list their place of birth as "Israel," in conflict with the President's policy at the time not to recognize Israeli sovereignty over that city. *See Zivotofsky*, 576 U.S. at 5–7. The Court concluded that the statute was unconstitutional because the President has the exclusive authority to recognize foreign sovereigns, a power that flows from the President's constitutionally delineated powers to receive and appoint ambassadors, and from the "lack of any similar power vested in Congress." *Id.* at 14. The statute unconstitutionally interfered with the President's recognition authority, which requires the Nation to "speak with one voice" regarding such decisions. *Id.* (internal quotation marks and alteration omitted). "It was an improper act," the Court explained, "for Congress to 'aggrandize[e] its power at the expense of another branch' by requiring the President to contradict an earlier recognition decision in an official document issued by the Executive Branch." *Id.* at 31–32 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991)). "To allow Congress to control the President's communication," the Court continued, "is to allow Congress to exercise that exclusive power itself." *Id.* at 32.

We think that the same conclusion follows here. The Constitution grants the President the power to execute the treaties of the United States, and it does not provide Congress with any parallel responsibility. Just as the recognition power is an exclusive power of the President arising as an incident to his other constitutional authorities, *see id.* at 14, his power to

exercise the United States' right to terminate a treaty is an exclusive power that is part of the President's executive power, treaty-making power, and diplomatic power. No less than the power to recognize foreign sovereigns, the decision to withdraw from a treaty "is a topic on which the Nation must speak with one voice." *Id.* (internal quotation marks and alteration omitted). We think that, when the President has spoken for the Nation on the international plane, Congress may not enact legislation that delays or obstructs that decision with a conflicting diplomatic message. As in *Zivotofsky*, if we were to acknowledge Congress's power to regulate the conditions and timing of the President's decision to exercise the United States' right of withdrawal from a treaty, we would be accepting the proposition that Congress may itself exercise that exclusive power of the President.

B.

Section 1234(a) contravenes an exclusive power of the President, and it may not be justified as the exercise of any concurrent power of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Congress "clearly possesses significant article I powers in the area of foreign affairs, including with respect to questions of war and neutrality, commerce and trade with other nations, foreign aid, and immigration." *Legislation Prohibiting Spending for Delegations to U.N. Agencies Chaired by Countries That Support International Terrorism*, 33 Op. O.L.C. 221, 225–26 (2009) ("*Delegations to U.N. Agencies*"). And there may well be cases where Congress's exercise of those powers would permissibly affect the foreign relations of the United States. But section 1234(a) does not present any conflict between an authority of the President and a congressional regulation of war, foreign commerce, immigration, or any other power of Congress. To the contrary, the statute directly regulates the actions of the Executive Branch, and specifically seeks to restrict its authority to communicate with foreign nations about the execution of a right of the United States under an existing treaty.

Section 1234(a) likewise is not an exercise of Congress's authority to adopt laws to implement treaties as part of our domestic law. *See Bond v. United States*, 572 U.S. 844, 855 (2014). Rather, section 1234(a) purports to regulate the President's actions on the international stage by operating directly upon his subordinates on a decision whether to take diplomatic

action. The power of Congress to implement a treaty does not itself imply a power to direct the President to engage in diplomacy or control the manner by which the President executes the rights of the United States under treaties.

Nor may section 1234(a) be justified on the ground that Congress may adopt measures that create obligations under our domestic law supplementing or even conflicting with treaty obligations. Because an act of Congress is equivalent under our domestic law to that of a self-executing treaty, when Congress exercises its regulatory authorities, it may modify a treaty's domestic effect through the enactment of subsequent legislation. *See, e.g.*, *Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty*, 20 Op. O.L.C. 389, 391–92 (1996) ("*Validity of Agreements*"). But again, section 1234(a) does not purport to alter the domestic effect of the Open Skies Treaty; rather, it seeks to regulate the actions of the Executive Branch on the international plane.[9]

Finally, section 1234(a) is not a reasonable condition imposed upon the President's diplomatic relations in exchange for Congress's offer to expedite consideration of its approval of the resulting agreement. In the context of so-called "fast-track" trade agreements, we have recognized that Congress may agree "to consider legislation implementing an agreement on an expedited basis only on the condition that the President comply with certain requirements that are otherwise constitutional." *Trade Act Restrictions on the Extension of Most-Favored-Nation Rights*, 11 Op. O.L.C. 128, 128 n.1 (1987) ("*Trade Act Restrictions*"); *see also* Memorandum for L. Anthony Sutin, Acting Assistant Attorney General, Office of Legislative Affairs, from William Michael Treanor, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Trade and Tariff Act (S. 2400)* at 3 (Aug. 19, 1998) ("Congress may impose reasonable and relevant consultation and notification requirements" in exchange for granting "fast-track treatment to trade agreements"). In such cases, Congress does not prohibit the President from exercising his diplomatic authorities, but simply offers him expedited legislative consideration of

[9] Similarly, section 1234(a) cannot be justified as an exercise of Congress's power to authorize the President in advance to pursue negotiations that modify an international agreement. *See Validity of Agreements*, 20 Op. O.L.C. at 395–401.

domestic legislation to implement a trade agreement in return for meeting reasonable conditions negotiating the agreement in the first place.[10] The President always retains his "independent authority" to bypass those congressional requirements in negotiating an agreement, at the price of foregoing fast-track procedures. *Trade Act Restrictions*, 11 Op. O.L.C. at 128 n.1. In marked contrast, however, section 1234(a) does not offer the President any choice or advantage, but is an attempt to delay the United States' submission of its notice of withdrawal.

In sum, section 1234(a) invades the exclusive authority of the President. Article XV provides that the United States may withdraw unilaterally on six months' notice, *see* OST art. XV, ¶ 2, but section 1234(a) provides for a delay in withdrawing until ten months after the President makes the withdrawal decision, and only following advance consultation with the other state parties, *see* FY 2020 NDAA § 1234(a), 133 Stat. at 168. Congress therefore has sought to burden the President's discretion to execute the Treaty according to its terms. Congress "may not constitutionally 'dictate the modes and means by which the President engages in international diplomacy.'" *Engagement of OSTP with China*, 35 Op. O.L.C. at 122 (quoting *Delegations to U.N. Agencies*, 33 Op. O.L.C. at 226); *see also PLO's Diplomatic Activities* at 7 (recognizing that Congress may not contravene "the exclusive authority to conduct diplomacy on behalf of the United States"). If Congress cannot determine the "modes" or "means" of the President's diplomacy, it may not compel, restrict, or delay the President's diplomatic conduct in the first instance, including in questions of timing, and especially when that conduct involves the exercise of a right provided for under a treaty. Worse yet, one of these conditions (consulting with the state parties) is itself a diplomatic activity that lies within the discretion of the President. By enacting section 1234(a), Congress injected itself into the decision whether and when to terminate a treaty, thereby interfering with the President's ability to take the sort of "decisive," *Zivotofsky*, 576 U.S. at 15, or "immediate action,"

[10] Even where the President is offered a choice, there are cases where such conditions may be unconstitutional. *See, e.g.*, *Publication of a Report to the President on the Effect of Automobile and Automobile-Part Imports on the National Security*, 44 Op. O.L.C. 40, 59–60 (2020); *Section 609 of the FY 1996 Omnibus Appropriations Act*, 20 Op. O.L.C. 189, 196–98 (1996). But reasonable conditions on otherwise appropriate domestic legislation do not unconstitutionally interfere with the powers of the President.

Goldwater, 617 F.2d at 706, that the Constitution authorizes the President to undertake in the conduct of foreign affairs.

IV.

Our conclusion is reinforced by the historical practice of the United States' withdrawal from treaties. *See, e.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 537 (2014). We have not identified any direct precedent for a law like section 1234(a). Although there are examples in which Congress claimed a role in the withdrawal of treaties over the centuries, the modern practice stands decidedly to the contrary, and even those earlier examples do not support the conclusion that Congress may require the United States to remain in a treaty longer than the President deems in the national interest.

A.

Section 1234(a) appears almost unique in our Nation's history. Although Congress has claimed at times an authority to direct the President to exercise the country's right to withdraw from a treaty, we are not aware of prior instances where Congress has adopted a law purporting to prohibit or delay such a presidential decision. In recent cases, the Supreme Court has repeatedly looked askance at novel structures that seek to alter the separation of powers. *See Zivotofsky*, 576 U.S. at 23 (placing "significant weight upon historical practice" in concluding that the President had exclusive constitutional authority to recognize foreign governments (quoting *Noel Canning*, 573 U.S. at 514)); *see also Seila Law*, 140 S. Ct. at 2201 ("'Perhaps the most telling indication of [a] severe constitutional problem' with an executive entity 'is [a] lack of historical precedent' to support it." (quoting *Free Enterprise Fund*, 561 U.S. at 505)). As in those cases, the absence of any precedent for a restriction like section 1234(a) speaks loudly.

We have identified two modern instances where Members of Congress proposed measures to restrict the President from withdrawing from a treaty. In both cases, this Office objected on constitutional grounds, and the measures were not adopted. In 1979, the Office reviewed a Senate proposal that would have conditioned its approval of an agreement arising out of the Strategic Arms Limitations Talks ("SALT") on a reservation

that the President could exercise the right to terminate the treaty "only with the approval of the Senate." Memorandum for Cyrus Vance, Secretary of State, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Reservation to SALT II Conditioning Termination on Senate Approval* at 1 (Nov. 13, 1979). Article XIX of the agreement permitted termination if the United States determined that "extraordinary events related to the subject matter of [the treaty] have jeopardized its supreme interests." *Id.* We viewed the Senate's proposal to be unconstitutional because determining whether "extraordinary events" had "jeopardized" the country's interests was a determination to be made exclusively by the President. *See id.* at 2. Any attempt to impose such a limit "by the Senate through a reservation to the treaty, or through a Senate resolution, or even through *legislation passed by both Houses of Congress* to require Senate approval as a condition to the exercise of that presidential authority would be unconstitutional." *Id.* (emphasis added). The Senate did not adopt the proposal (or ultimately approve the agreement).[11]

In 1988, the Office raised a similar objection in reviewing a bill entitled the Anti-Terrorism Sanctions Act of 1988, which would have required the President to "terminate, withdraw, or suspend any portion of any trade agreement or treaty" with certain countries found to support international terrorism. 134 Cong. Rec. 4334 (1988). The bill would have allowed the President to "waive all, or any portion of" its provisions if such a waiver were in the best interests of the United States. *Id.* Any waiver, however, would have become effective "only after the close of the thirty-day period [beginning] on the date on which the President submits to the Congress

[11] The Senate's draft resolution of ratification did not include the requirement for Senate approval. *See The SALT II Treaty*, S. Exec. Rep. No. 96-14, at 72–78 (1979). As late as November 15, 1979, some members of the Senate still urged its inclusion, but agreed to postpone resolution of the issue until the D.C. Circuit rendered its decision in the then-pending *Goldwater* litigation. *See* 125 Cong. Rec. 32,525 (1979) (statement of Sen. Goldwater). The D.C. Circuit issued its decision on November 30, 1979, *see Goldwater*, 617 F.2d at 697, but subsequent events obviated further discussion after the Soviet Union invaded Afghanistan and President Carter requested the Senate postpone consideration of SALT II, *see* Letter to the Majority Leader of the Senate Requesting a Delay in Senate Consideration of the Treaty (Jan. 3, 1980), 1 *Pub. Papers of Pres. Jimmy Carter* 12 (1980). Ultimately, the SALT II treaty was never ratified. *See, e.g.*, 132 Cong. Rec. 3500 (1986).

written notice of such waiver." *Id.* Again, the Office found this bill to be "unconstitutional because it require[d] the President to terminate treaties or executive agreements." Memorandum for Thomas M. Boyd, Acting Assistant Attorney General, Office of Legislative Affairs, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, att. at 1 (June 16, 1988) (attaching draft Letter for Lloyd Bentsen, Chairman, Committee on Finance, U.S. Senate, from Thomas M. Boyd, Acting Assistant Attorney General, Office of Legislative Affairs). Moreover, the bill was "not saved from unconstitutionality by the waiver provision." *Id.* at 2. We explained that, "[s]ince the power to terminate treaties and other international agreements is vested exclusively in the President, Congress does not have the constitutional power to condition his exercise of that power in any way." *Id*. Again, that bill was not enacted.[12]

B.

Although section 1234(a) appears to be unique among statutes in restricting the President's authority over treaty withdrawal, the historical practice proves more equivocal when it comes to determining what role Congress may play in the termination of treaties. As early as the Washington Administration, the Founders divided over the responsibility for treaty

[12] Although section 1234(a) is novel on the subject of treaty withdrawal, it bears similarities to other statutory provisions that require congressional notification before the exercise of certain executive actions. Where these notification provisions burden areas within the exclusive constitutional authority of the President, the Executive Branch has raised similar constitutional objections. *See, e.g.*, *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 258–61 (1989) (objecting to a notice provision that would prohibit the expenditure of certain funds for covert activities "if the President [had] not first notified the appropriate congressional committees of the proposed expenditure" because it would "requir[e] the President to relinquish his constitutional discretion in foreign affairs"); *Inspector General Legislation*, 1 Op. O.L.C. 16, 18 (1977) (concluding that a requirement that the President notify Congress before removing an inspector general "constitute[d] an improper restriction on the President's exclusive power to remove Presidentially appointed executive officers"); *see also* Statement on Signing the Intelligence Authorization Act, Fiscal Year 1990 (Nov. 30, 1989), 2 *Pub. Papers of Pres. George Bush* 1609, 1610 (1989) (objecting to a similar provision because "its obvious effect is to burden [the] exercise" of the President's removal authority, and therefore, "while I intend to communicate my reasons in the event I remove an Inspector General, I shall do so as a matter of comity rather than statutory obligation").

termination, and there are examples before the Civil War where Congress and the Senate played a role in the process. *See NAFTA Withdrawal*, 42 Op. O.L.C. at 139–42. "Although the President's authority to act unilaterally to terminate a treaty is now well established, there are a number of early examples involving alternative procedures for treaty termination, including 'direct congressional action, congressional authorization or direction of presidential action, and senatorial authorization or approval.'" *Id.* at 139 (quoting Restatement (Fourth) § 113 cmt. c). These early examples include one instance where Congress purported to abrogate a treaty directly and a handful of others where Congress or the Senate affirmatively requested or directed that the President terminate a treaty or other international agreement. In some cases, the President agreed to take such measures, but in others, he raised constitutional objections and declined to do so.

By the end of the nineteenth century, however, the practice turned more strongly in the President's favor. "Beginning with President McKinley in 1899, and growing over time, Presidents increasingly assumed the authority to terminate a treaty without approval by the Senate or the full Congress." *Id.* at 143. In our prior opinion, we discussed numerous examples of treaty terminations, *id.* at 143–44, and cited several other cases where Presidents had unilaterally terminated other kinds of international agreements, *id.* at 147–50.[13] These examples reinforce that the President's authority under the Constitution to exercise the right of the United States to terminate a treaty arises as an incident to the President's authority over the execution of treaties and diplomacy.

The historical practice may not be uniform, but we think that the most salient lesson arises from what the history does not contain. Although Presidents from time to time have acted consistently with congressional requests to terminate treaties, we are not aware of any instance in which a treaty has been allowed to endure based upon congressional action contra-

[13] Additional examples reinforce the trend towards unilateral presidential termination. *See* 5 Green Haywood Hackworth, *Digest of International Law* § 509, at 329–32 (1943) ("Hackworth") (discussing the termination of an anti-smuggling convention with Mexico in 1927 "without the direction of either the Senate alone or both Houses of Congress;" the U.S. withdrawal from a commercial convention in 1933 "without action by the Senate or both Houses of Congress;" and the unilateral termination of an agreement with Japan by President Roosevelt in 1939).

ry to the President's wishes. *See Goldwater*, 617 F.2d at 706. Section 1234(a), however, purports to have this exact effect by requiring the country to remain a party to the Treaty for at least four months longer than the President has otherwise determined to be appropriate. And like the *Goldwater* court, we find the absence of any historical analogue to be telling evidence that section 1234(a) unconstitutionally restricts the President. *Cf. Zivotofsky*, 576 U.S. at 23.

1.

As we explained in the *NAFTA Withdrawal* opinion, "[w]hile it would have been convenient had the Founders squarely addressed treaty termination in the constitutional text itself, we are left with no such clarity, and the appropriate division of authority between the President and Congress was hotly debated at the very start of the Republic." 42 Op. O.L.C. at 139. In 1793, President Washington proclaimed United States neutrality in revolutionary France's conflict with Great Britain and other European powers. *See* Neutrality Proclamation (Apr. 22, 1793), 1 *A Compilation of the Messages and Papers of the Presidents, 1789–1897*, at 156–57 (James D. Richardson ed., 1896) ("*Papers of the Presidents*"). The Neutrality Proclamation raised a question about whether neutrality was consistent with the United States' treaties of alliance and amity with France, which had been adopted during the Revolutionary War, and obligated the United States, among many other things, to guarantee the security of French possessions in the West Indies. *See* Treaty of Alliance, U.S.-Fr., Feb. 6, 1778, 8 Stat. 6; *see also* Treaty of Amity and Commerce, U.S.-Fr., Feb. 6, 1778, 8 Stat. 12.

Following the Neutrality Proclamation, Washington's cabinet debated whether the United States should formally suspend or terminate those treaties. Secretary of the Treasury Alexander Hamilton and Secretary of War Henry Knox argued that suspension or termination was permissible under international law, but Secretary of State Thomas Jefferson and Attorney General Edmund Randolph disagreed.[14] None of the cabinet

[14] *Compare* Letter for George Washington from Alexander Hamilton and Henry Knox (May 2, 1793), 14 *The Papers of Alexander Hamilton* 367, 372–85 (Harold C. Syrett ed., 1969), *with* Thomas Jefferson, Opinion on the Treaties with France (Apr. 28, 1793), 25 *The Papers of Thomas Jefferson* 608, 609–17 (John Catanzariti ed., 1992), *and* Letter for

officers, however, seems to have questioned that the President could suspend or terminate the treaties himself, if it were appropriate. To the contrary, in publicly defending the Neutrality Proclamation, Hamilton opined that, "though treaties can only be made by the President and Senate, their activity may be continued or suspended *by the President alone*." Alexander Hamilton, *Pacificus* No. 1 (June 29, 1793), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 42 (Harold C. Syrett ed., 1969).[15]

President Washington took a similarly broad view of the President's authority in this area during a 1796 dispute with the House of Representatives over whether that body could request a copy of the President's diplomatic instructions to his emissary, Chief Justice John Jay. Message to the House of Representatives (Mar. 30, 1796), 1 *Papers of the Presidents* 194. President Washington explained that the House could not constitutionally demand those papers because it lacked any legitimate legislative purpose, since "the power of making treaties is exclusively vested in the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur; and that every treaty so made and promulgated thenceforward became the law of the land." *Id.* at 195. President Washington's message reflected the view that the House did not have any ongoing role in the implementation or the termination of the Jay Treaty.

Although these examples reflect an understanding that the Executive alone is responsible for the maintenance of treaties, Congress during the

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George Washington from Edmund Randolph (May 6, 1793), 12 *The Papers of George Washington* 534, 537–43 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005).

[15] James Madison, who was then in the House of Representatives, disagreed, arguing that the treaty power was "legislative" not "executive" in character and that the President's neutrality proclamation had usurped Congress's power to declare war. *See* James Madison, *Helvidius* No. 1 (Aug. 24, 1793), *reprinted in* 15 *The Papers of James Madison* 66, 69 (Thomas A. Mason et al. eds., 1985). In 1801, Jefferson took a similar view in his Manual of Parliamentary Practice. *See* Thomas Jefferson, *A Manual of Parliamentary Practice* § 599 (Samuel Harrison Smith ed., 1801) (citing the 1798 example, but no other authority, for the proposition that, "[t]reaties being declared, equally with the laws of the U. States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded"); *see also Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 261 (1796) (Iredell, Circuit Justice) (declaring that "Congress . . . alone" had the power to "void" a treaty based on a breach by another party to the treaty, which would require the circuit justice to "forbear any share in executing it as a judge").

Adams Administration took a step in the other direction when it adopted a measure to abrogate the treaties with France—the only case where Congress acted to directly abrogate a treaty, rather than to request that the President himself take such an action. In 1798, as relations with France deteriorated following the XYZ Affair, Congress enacted a series of measures to authorize the Quasi-War with France, one of which included a declaration that "the treaties concluded between the United States and France," including the treaty of alliance, "shall not henceforth be regarded as legally obligatory on the government or citizens of the United States." Act of July 7, 1798, ch. 67, 1 Stat. 578, 578. There was some debate within Congress about whether that step fell within Congress's power. *See* David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 251–52 (1997). President Adams, however, implemented the joint resolution after signing it into law. *See* Proclamation Revoking the Exequaturs of the French Consuls (July 13, 1798), 9 *The Works of John Adams, Second President of the United States* 170, 171–72 (1854).

At the time, and in the years since, there has been disagreement about whether the 1798 Act actually terminated the treaties with France or merely abrogated their *domestic* legal effects. *See NAFTA Withdrawal*, 42 Op. O.L.C. at 140 & n.5. President Adams apparently did not submit any notice of withdrawal from the treaties.[16] And French representatives took the position in later negotiations that the legislative act had not effectively released the United States from its international obligations. *See* 5 John Bassett Moore, *A Digest of International Law* § 774, at 357–58 (1906); 5 John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* 4430–31 (1898). Later authors similarly opined that the 1798 Act had only domes-

[16] *See* Memorandum for the Senate Committee on Foreign Relations from Vita Bite, Congressional Research Service, *Re: Precedents for U.S. Abrogation of Treaties* (Feb. 25, 1974) ("*Abrogation Precedents*"), *reprinted in* S. Comm. on Foreign Relations, 95th Cong., *Treaties and Other International Agreements: The Role of the United States Senate* 44, 54 (Comm. Print 1978) ("*Treaties Report*") ("[I]t does not appear that [President Adams] took any steps to give France notice that the treaties had been denounced by the United States."); David Gray Adler, *The Constitution and the Termination of Treaties* 152–59 (1986) (arguing that the 1798 statute did not validly terminate the international-law obligations of the United States under the treaty because President Adams did not provide notice).

tic effect. *See* Samuel B. Crandall, *Treaties: Their Making and Enforcement* § 185, at 463 (2d ed. 1916) ("Crandall") ("An abrogation by Congress . . . while necessarily binding on the courts of this country, and sufficient to terminate the operation of the treaty as municipal law, will seldom be accepted by the other contracting parties as conclusive."); 2 Francis Wharton, *A Digest of International Law* § 137a, at 60 (1886) ("This annulling act . . . whatever might be its municipal effect, by itself could not internationally release the United States from its obligations to France."). *But see Hooper v. United States*, 22 Ct. Cl. 408, 425–26 (1887) (concluding the opposite).

To the extent that the 1798 Act did abrogate the treaties of alliance and amity themselves, it might perhaps be viewed as a necessary incident to Congress's decision to authorize the Quasi-War with France, which fell within Congress's enumerated power to "declare War." *See NAFTA Withdrawal*, 42 Op. O.L.C. at 140; *see also Jones v. Walker*, 13 F. Cas. 1059, 1062 (C.C.D. Va. 1793) (No. 7507) (Jay, Circuit Justice) (stating that the decision about whether a treaty of peace should be voided is committed "to congress" because it is "necessarily incident to the right of making war"); Letter for Edmund Pendleton from James Madison (Jan. 2, 1791), 13 *The Papers of James Madison* 342, 344 (Charles F. Hobson and Robert A. Rutland eds., 1981) (raising "a question" about whether "in case the President & Senate be competent in ordinary Treaties, the Legislative authority be requisite to annul a *Treaty of peace*, as being equipollent to a Declaration of war, to which that authority alone, by our Constitution, is competent"); William Rawle, *A View of the Constitution of the United States of America* 68 (Philip H. Nicklin ed., 2d ed. 1829) ("Congress alone possesses the right to declare war; and the right to qualify, alter, or annul a treaty being of a tendency to produce war, is an incident to the right of declaring war."). The 1798 example thus might present a distinct question from whether Congress may otherwise regulate the President's authority to execute the withdrawal provision of a treaty.

Whatever the correct understanding of the 1798 Act, Congress has never taken the same action again, and that action occurred during an era in which the division of authority between Congress and the President on this issue was still "hotly debated." *NAFTA Withdrawal*, 42 Op. O.L.C. at 139. The Nation's early historical practice thus does not yield

a clear or consistent understanding of the relative powers of Congress and the President. *See id.* at 139–41.

2.

Apart from the 1798 Act, there are several other instances where Congress adopted a law that purported to direct the President to take steps to withdraw from a treaty. In two cases, the President acted consistently with the laws; in other instances, he demurred.

In 1883, Congress directed President Arthur to terminate portions of an 1871 treaty with Great Britain. J. Res. No. 22 of Mar. 3, 1883, § 2, 22 Stat. 641, 641 (resolving that "the President be and he hereby is, directed to give and communicate to the Government of Her Brita[n]nic Majesty such notice of such termination" of articles 18 through 25 of the treaty). President Arthur's Administration delivered the notice, apparently without objection. Letter for J.R. Lowell, Minister to the U.K., from Frederick T. Frelinghuysen, Secretary of State (Apr. 5, 1883), Office of the Historian, U.S. Dep't of State, *Papers Relating to the Foreign Relations of the United States*, https://history.state.gov/historicaldocuments/frus1883/d222. Similarly, in 1915, Congress enacted a statute providing that certain "articles in treaties and conventions" were "in conflict with the provisions" of the Seaman's Act, and accordingly that "the President be, and he is hereby, requested and directed . . . to give notice . . . that . . . all such treaties and conventions between the United States and foreign Governments will terminate." Seaman's Act, ch. 153, § 16, 38 Stat. 1164, 1184 (1915). President Wilson acted consistently with Congress's direction. *See* Crandall § 184, at 460; *see also* 5 Hackworth § 508, at 309–12 (reprinting diplomatic correspondence on the matter).

In other instances, however, Presidents have raised constitutional objections to such congressional directives. In 1879, President Hayes vetoed a bill that purported to direct him to terminate two articles of the 1868 Burlingame Treaty with China. 8 Cong. Rec. 2275 (1879) (reprinting the President's message regarding the veto of "House bill No. 2423, entitled 'An act to restrict the immigration of Chinese to the United States'"). President Hayes objected that the bill amounted to a direction by Congress to "modify[] existing treaties," a power he believed "not lodged by the Constitution in Congress, but in the President, by and with the advice

and consent of the Senate, as shown by the concurrence of two-thirds of that body." *Id.* at 2276.[17] Since President Hayes stated that "denunciation of a part of a treaty" would result in "denunciation of the whole treaty," he objected to a congressional directive that he thought would have required him to terminate the treaty in its entirety. *Id.*

Similarly, in 1920, President Wilson considered an act that directed the President to give notice that the provisions of treaties that impose "any . . . restriction on the United States [regarding certain tonnages and duties] will terminate on the expiration of such periods as may be required for the giving of such notice." Merchant Marine Act of 1920, ch. 250, § 34, 41 Stat. 988, 1007. President Wilson, citing the precedent set by President Hayes, refused to comply on the grounds that "the power of modifying an existing treaty, whether by adding or striking out provisions, is a part of the treaty-making power under the Constitution," and "its exercise is not competent for Congress." Press Release, U.S. Dep't of State (Sept. 24, 1920), *in* 5 Hackworth § 509, at 323–24.

In 1986, over President Reagan's veto, Congress enacted into law the Comprehensive Anti-Apartheid Act of 1986 ("CAAA"), which provided that "[t]he Secretary of State shall terminate" an air services agreement with South Africa. Pub. L. No. 99-440, § 306(b)(1), 100 Stat. 1086, 1100. The Secretary of State later did comply with the statute. *See S. African Airways v. Dole*, 817 F.2d 119, 121 (D.C. Cir. 1987). But at the same time, this Office objected that it was "constitutionally impermissible" for Congress to purport to require the President "to abrogate . . . international treaties and agreements." Memorandum for the Attorney General from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Presidential Signing Statements* at 3 (Oct. 10, 1986). In addition, President Reagan vetoed the statute in part because it contained

[17] Citing the 1798 Act respecting the treaties with France, President Hayes also said that "[t]he authority of Congress to terminate a treaty with a foreign power by expressing the will of the nation no longer to adhere to it, is . . . free from controversy under our Constitution." 8 Cong. Rec. 2276 (1879). But in context, President Hayes appears to have been referring to Congress's authority to annul the domestic legal effects of a treaty. *See id.* (reprinting President Hayes's observation that "the ordinary legislation of Congress" may have domestic effects, but that such legislation has never "been regarded as an abrogation, even for the moment, of [a] treaty," and that, "[o]n the contrary, the treaty in such case still subsists between the Governments"); *see also* David Gray Adler, *The Constitution and the Termination of Treaties* 175–76 (1986) (discussing the incident).

"provisions that infringe on the President's constitutional prerogative to articulate the foreign policy of the United States." Message to the House of Representatives Returning Without Approval a Bill Concerning Apartheid in South Africa (Sept. 26, 1986), 2 *Pub. Papers of Pres. Ronald Reagan* 1278, 1279 (1986).[18]

Taken together, we do not believe that these few cases in which Congress sought to direct treaty termination are sufficient to support the constitutionality of section 1234(a). The fact that Presidents in some instances acted consistently with congressional directives does not establish that the directives themselves were constitutionally permissible. *See, e.g.*, *Myers v. United States*, 272 U.S. 52, 170 (1926) (purported "general acquiescence by the Executive [to] the power of Congress" did not render congressional exercise of its power constitutional). This is especially so, given that the Executive Branch lodged contemporaneous objections to some of those restrictions. *See Seila Law*, 140 S. Ct. at 2201–02 (discounting the relevance of historical precedents for a constitutionally questionable arrangement to which the Executive Branch had mounted constitutional objections). The few examples where the President complied with the directives may further indicate nothing more than that the President agreed with those measures as a matter of policy. Moreover, whatever the value of these examples, the precedents set by President Hayes, President Wilson, and President Reagan reflect a contrary and longstanding view that Congress lacks the authority to require the President to terminate a treaty.

3.

There are also a number of occasions where Congress and the President acted together to terminate a treaty. In 1846, Congress authorized President Polk, at his request, to submit a notice of termination from a

[18] Some Members of Congress also acknowledged that the CAAA improperly infringed on the President's exclusive authorities in foreign affairs. *See* 132 Cong. Rec. 27,665 (1986) (statement of Sen. Hatch) ("[W]e ought to go with the President. I think we ought to let him conduct foreign policy. I do not think we, in our zeal to act like civil rights reformers in America, should intervene with that type of foreign policy."); *id.* at 27,671 (statement of Sen. Helms) (stating that the President "deserves to be given a chance to do his constitutional duty—that is, to conduct the foreign policy of this country," and that overriding the veto of the CAAA would "den[y]" him the chance to do so).

treaty with Great Britain "at his discretion." J. Res. No. 4 of Apr. 27, 1846, 9 Stat. 109, 109–10; Crandall § 184, at 458.[19] President Polk's Administration delivered the notice. *See* Crandall § 184, at 459; *see also Notice for the Joint Occupancy of Oregon to Terminate*, 71 Niles' Nat'l Reg. 17, 17 (1846). Although President Polk's Secretary of State explained to the U.S. ambassador to Great Britain that "Congress [has] spoken their will upon the subject in their joint resolution, and to this it is [the President's] and your duty to conform," S. Doc. No. 29-489, at 15 (1846), the resolution expressly left the matter to the President's discretion.

In another case, in 1854, President Pierce announced his desire to terminate a Navigation Treaty with Denmark, and the Senate adopted a resolution authorizing that step. *Abrogation Precedents* at 55. As with President Polk, some legislators questioned whether congressional involvement was necessary. Memorandum for the Secretary of State from Herbert J. Hansel, Legal Adviser, U.S. Dep't of State, *Re: President's Power to Give Notice of Termination of U.S.-ROC Mutual Defense Treaty* (Dec. 15, 1978), *reprinted in Treaties Report* at 395, 404. In 1864, President Lincoln, without first seeking congressional authorization, gave notice that the United States was withdrawing from a treaty concerning armaments on the Great Lakes. After he did so, Congress, via joint resolution, "ratif[ied]" the President's action, although President Lincoln, without further congressional involvement, revoked the notice of withdrawal. *See NAFTA Withdrawal*, 42 Op. O.L.C. at 142.

In 1865, Congress authorized the President to terminate the 1854 Reciprocity Treaty with Great Britain, which President Johnson subsequently did. J. Res. No. 6 of Jan. 18, 1865, 13 Stat. 566; *see also* 67 Cong. Rec. 10,424 (1926) (describing the termination of the treaty after transmission of notice by the United States). Later, when a controversy arose with Great Britain about the construction of an article in an 1842 treaty, President Grant deferred to Congress on the question of whether the article should be terminated, saying that it was "for the wisdom of Congress to determine whether the Article . . . is to be any longer re-

[19] Three members of the House took the position that the House had no constitutional authority to authorize the President to terminate this treaty. *See* H.R. Rep. No. 29-34, at 1–3 (1846).

garded as obligatory on the government of the United States or as forming part of the Supreme Law of the Land," and that he would take no action without "an expression of the wish of Congress."[20] President Grant nonetheless suspended the operation of the treaty without obtaining congressional approval for six months before the dispute was finally resolved through a subsequent agreement with Great Britain. *See* Message to Congress (Dec. 23, 1876), 28 *The Papers of Ulysses S. Grant* 100 (John Y. Simon ed., 2005); Crandall § 185, at 464.

Similarly, in 1911, President Taft gave notice to Russia of his intent to terminate a commercial treaty according to its terms, and then submitted a resolution for "ratification and approval" of his action to the Senate. 48 Cong. Rec. 453 (1911). Congress enacted a joint resolution that "adopted and ratified" the President's action. Pub. Res. No. 62-13, 37 Stat. 627 (1911); Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 Tex. L. Rev. 773, 795 (2014).

These examples reflect episodes, nearly all in the nineteenth century, where Presidents accepted or invited congressional involvement in treaty termination. But they do not support an affirmative power of Congress to regulate the President's action over his objection. We think that the clearest lesson from history is the one that bears most directly on the constitutionality of section 1234(a): as the D.C. Circuit has observed, "in no situation has a treaty been continued in force over the opposition of the President." *Goldwater*, 617 F.2d at 706. Accordingly, these historical instances of shared responsibility do not support the constitutionality of a legislative measure that requires the President to act contrary to what is, in his judgment, in the best interests of the United States regarding the exercise of the United States' right to withdraw from a treaty.

V.

Section 1234(a) of the 2020 NDAA unconstitutionally interferes with the President's exclusive authority to execute treaties and to conduct diplomacy, a necessary incident of which is the authority to exercise the United States' right to withdraw from a treaty. We therefore advised that

[20] Message to Congress (June 20, 1876), *in* 27 *The Papers of Ulysses S. Grant* 147, 150 (John Y. Simon ed., 2005); *see also* Crandall § 185, at 463–64.

the provision could not constitutionally require the Executive Branch to defer providing notice of the intent to withdraw from the Open Skies Treaty.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Reimbursing the Attorney's Fees of Current and Former Federal Employees Interviewed as Witnesses in the Mueller Investigation

The Department of Justice Representation Guidelines authorize, on a case-by-case basis, the reimbursement of attorney's fees incurred by a current or former federal government employee interviewed as a witness in the Mueller Investigation under threat of subpoena about information the person acquired in the course of his government duties.

October 7, 2020

MEMORANDUM OPINION FOR THE
ACTING ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

You have asked for our opinion on the scope of the Attorney General's authority to reimburse the attorney's fees of federal employees who were interviewed as witnesses in connection with the investigation by Special Counsel Robert S. Mueller, III into possible Russian interference in the 2016 presidential election ("Mueller Investigation"). The Civil Division reviews requests for such reimbursement under longstanding Department of Justice ("Department") regulations. *See* 28 C.F.R. §§ 50.15–50.16. You have asked specifically how certain elements of section 50.15 apply to the Mueller Investigation: (1) whether a person interviewed as a witness in the Mueller Investigation under threat of subpoena should be viewed as having been "subpoenaed," *id*. § 50.15(a); (2) whether a witness interviewed about information acquired in the course of the witness's federal employment appears in an "individual capacity," *id*.; and (3) what factors should be considered in evaluating whether the reimbursement of the attorney's fees of such a witness is "in the interest of the United States," *id*. § 50.15(a)(4).

We conclude that, under the regulation, the Attorney General or his designee may authorize the reimbursement of attorney's fees incurred by current and former federal employees interviewed during the Mueller Investigation under threat of subpoena concerning information obtained during the course of performing their federal duties. We also conclude that such witnesses generally appear in their individual, not official, capacity. These conclusions are consistent with how the Department has

treated requests for attorney's fees under the now-lapsed Independent Counsel statute, which was the model for the Special Counsel regulations. *See* Memorandum for Dick Thornburgh, Attorney General, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, *Re: Reimbursement of Attorney Fees for Private Counsel Representing Former Government Officials in Federal Criminal Proceedings* at 9 (Oct. 18, 1989) ("Barr Memorandum"). When the Department last addressed a similar question, then-Deputy Attorney General Eric Holder determined that "for purposes of analyzing representation and reimbursement requests" a Special Counsel investigation is "closely analogous" to an Independent Counsel investigation and should "be treated" as such. Memorandum for the Deputy Attorney General from Robin E. Jacobsohn, Deputy Assistant Attorney General, Civil Division, *Re: Retroactive Reimbursement of Private Counsel Fees in Connection with Federal Criminal Proceedings* at 4 n.3 (Dec. 8, 2000) ("Holder Memorandum") (approved by the Deputy Attorney General). We agree with that conclusion and believe that it should apply to the Mueller Investigation as well.

As we explain below, it will often be in the interest of the United States to provide reimbursement of such attorney's fees, at least for any person who was a mere witness and not a subject or target of the investigation.[1] The Mueller Investigation, like the Independent Counsel investigations on which the Special Counsel regulation was modeled, operated in a politicized, publicized, and highly contentious environment, and addressed the actions of a number of senior government officials, including the President. Such investigations often require current and former federal employees to incur substantial attorney's fees simply because they witnessed sensitive government deliberations in the course of doing their jobs. Absent reimbursement, the prospect of incurring such fees would deter individuals from serving in key government positions and from perform-

[1] While we understand that a number of current and former federal employees interviewed by the Special Counsel are expected to make requests for reimbursement of attorney's fees, we are informed that to date the Department has received only one such formal request. *See* Letter for Scott Schools, Associate Deputy Attorney General, from Dana J. Boente, Acting Assistant Attorney General, National Security Division at 1 (Jan. 2, 2018). We understand that the Civil Division has deferred consideration of whether Mr. Boente should be reimbursed for attorney's fees until he resubmits his request in light of the fact that the Mueller Investigation has concluded.

ing their duties. Reimbursing the attorney's fees of these witnesses therefore would generally be in the interest of the United States, at least for witnesses who were not a subject or a target of the investigation.

I.

The Attorney General has promulgated regulations providing for the appointment of a Special Counsel, who may be tasked with undertaking particularly sensitive investigations of high-ranking Executive Branch officials. *See* 28 C.F.R. pt. 600; *see also Office of Special Counsel*, 64 Fed. Reg. 37,038 (July 9, 1999). Those regulations were intended to replace authorities under the lapsed Independent Counsel statute. *See* Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 591–599); *see also* Independent Counsel Reauthorization Act of 1994, Pub. L. No. 103-270, 108 Stat. 732 (1994) (extending authorities through 1999); *see generally Morrison v. Olson*, 487 U.S. 654 (1988). Like an Independent Counsel, a Special Counsel exercises federal prosecutorial power with a degree of autonomy; although a Special Counsel is subject to the supervision of the Attorney General, a regulation makes him removable only for cause. *Compare* 28 U.S.C. § 596(a)(1), *with* 28 C.F.R. §§ 600.6, 600.7(b), (d).

On May 17, 2017, Acting Attorney General Rod J. Rosenstein appointed Robert S. Mueller, III to serve as Special Counsel to investigate "any links and/or coordination between the Russian government and individuals associated with the campaign of President Donald Trump," and related matters. Att'y Gen. Order No. 3915-2017 (May 17, 2017). In addition to the principal subject of the investigation, the Special Counsel also investigated whether the President had obstructed justice in connection with Russia-related investigations. *See* 2 Report on the Investigation into Russian Interference in the 2016 Presidential Election 1 (Mar. 2019) ("Mueller Report"), https://www.justice.gov/storage/report.pdf.

The Special Counsel's Office was well-resourced and its probe wide-ranging. The Special Counsel "assembled a team that at its high point included 19 attorneys"; "three paralegals"; and "an administrative staff of nine." 1 Mueller Report at 13. These individuals "were co-located with and worked alongside" approximately 40 agents of the Federal Bureau of Investigation ("FBI"), as well as intelligence analysts, forensic accountants, a paralegal, and professional staff assigned by the FBI to assist the

Special Counsel's investigation. *Id*. During the investigation, the Special Counsel "issued more than 2,800 subpoenas under the auspices of a grand jury sitting in the District of Columbia; executed nearly 500 search-and-seizure warrants; obtained more than 230 orders for communication records . . . ; obtained almost 50 orders authorizing use of pen registers; made 13 requests to foreign governments pursuant to Mutual Legal Assistance Treaties; and interviewed approximately 500 witnesses, including almost 80 before a grand jury." *Id*. As of May 2019, when the Special Counsel resigned, the Special Counsel's Office had spent about $16 million on the investigation, and other components of the Department had contributed another $15.5 million in support. U.S. Dep't of Justice, *Special Counsel Office's Statement of Expenditures, May 17, 2017 Through February 25, 2020*, at 2–3 (undated), https://www.justice.gov/sco/page/file/1266756/download.

The Special Counsel's investigation of obstruction of justice devoted substantial resources to interviewing federal employees, including many in the White House and some from the Department, concerning their conversations with the President and senior White House staff. The Special Counsel investigated, for example, the President's dealings with James Comey, the former Director of the FBI, including the President's response to Comey's March 20, 2017, congressional testimony, and the decision to terminate him. *See* 2 Mueller Report at 38–41, 52–77. The Special Counsel also probed the President's subsequent deliberations concerning the Special Counsel investigation and the recusal of Attorney General Jefferson B. Sessions III with respect to that investigation. *Id*. at 63–96, 107–11. All of these inquiries, and many others, entailed interviews with numerous current and former government employees concerning knowledge acquired in the course of their official duties. All told, we understand that the Special Counsel interviewed at least 40 current and former government employees, including many who worked in senior positions at the White House and the Department. With the exception of former National Security Advisor Michael Flynn, none of those employees was charged with any criminal offense.

In March 2019, the Special Counsel concluded his investigation and submitted to Attorney General William P. Barr the confidential, two-volume Mueller Report summarizing his conclusions, charging decisions, and the evidence the investigation had produced. *See* 28 C.F.R. § 600.8(c)

("At the conclusion of the Special Counsel's work, he or she shall provide the Attorney General with a confidential report explaining the prosecution or declination decisions reached by the Special Counsel."). We understand that you expect several current and former government employees interviewed in connection with the Mueller Investigation to seek reimbursement of attorney's fees they incurred in connection with those interviews. *See supra* note 1.

II.

Congress has authorized the Attorney General to dispatch "[t]he Solicitor General, or any officer of the Department of Justice, . . . to attend to the interests of the United States" in any federal or state proceeding. 28 U.S.C. § 517. The Department provides representation automatically for federal employees who are subject to legal process in their official capacities—that is, when the government itself is the real party in interest, in the sense that court-ordered relief would be paid from the Treasury of the United States or direct federal employees in the performance of their official duties. *See* Memorandum for the Deputy Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Reimbursement of Anne M. Burford for Private Counsel Fees* at 3 n.3 (May 3, 1983) ("Olson Memorandum"); *see also Graham v. Kentucky*, 473 U.S. 159, 165–66 (1985).

The Attorney General's authority also includes the power "to represent the personal interests of [federal] officers and employees who are sued in their personal capacities" where such interests "coincide" with "the interests of the United States." *Representation of Government Employees in Cases Where Their Interests Diverge from Those of the United States*, 4B Op. O.L.C. 528, 531 (1980). If "private and public interests coincide, the representation of private interests is tantamount to representation of the interests of the United States." *Id*. The prototypical instance of this convergence is when a federal employee is sued in his individual capacity for actions taken in the course and scope of his employment, such as a suit under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that seeks damages for allegedly unconstitutional conduct taken under color of the employee's federal office. "In such proceedings, the United States ordinarily has interests substantially identical to those of the employee in establishing the lawfulness of authorized

conduct on behalf of the United States and in relieving the employee of the threat and burden of litigation that might otherwise chill the performance of official duties." Barr Memorandum at 9. After all, "[n]o man of common prudence would enter the public service if he knew that the performance of his duty would render him liable to be plagued to death with lawsuits, which he must carry on at his own expense." *Case of Captain Wilkes*, 9 Op. Att'y Gen. 51, 52 (1857). At the same time, we have recognized that the Attorney General should not provide representation to vindicate interests that are "purely personal." *Representation of White House Employees*, 4B Op. O.L.C. 749, 753 (1980). Examples of purely personal interests include "the interests in avoiding federal criminal prosecution, civil liability to the United States[,] or adverse administrative action by a federal agency." *Id*.

The Attorney General's authority to represent federal employees includes the authority to "attend to the interests of the United States by authorizing the retention of private counsel at government expense, or the reimbursement of counsel fees incurred." Barr Memorandum at 12 n.15; *see also* Memorandum for Glen E. Pommerening, Assistant Attorney General for Administration, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Authority for Employment of Outside Legal Counsel* at 1 (Mar. 4, 1976) ("Scalia Memorandum"). "The conclusion that the Attorney General has such implied authority is based on that fact that he possesses not only representational authority, *see* 28 U.S.C. § 517, but executive authority as well, *see* 28 U.S.C. § 509, and the latter may be used in furtherance of the former." *Reimbursing Justice Department Employees for Fees Incurred in Using Private Counsel Representation at Congressional Depositions*, 14 Op. O.L.C. 132, 135 (1990) ("*Reimbursing Justice Department Employees*"). Reimbursement of attorney's fees paid to private counsel, rather than representation by government attorneys, may be warranted when representation of the federal employee would serve the interest of the United States, but government attorneys themselves may have a conflict of interest or otherwise be unable to provide representation. For example, it may serve the interest of the United States to represent an employee in a federal criminal investigation, but the government itself would have a conflict of interest in representing the employee; in such a case, it may be appropriate for the employee to retain a private attorney and for the government to reimburse

the employee's attorney's fees. *See* Scalia Memorandum at 6; Barr Memorandum at 16–17.

The Attorney General has implemented these principles in regulations known as the "Representation Guidelines." *See* 28 C.F.R. §§ 50.15–50.16. Section 50.15(a) of the Representation Guidelines provides for representation of current and former federal employees:

> [A] federal employee (hereby defined to include present and former Federal officials and employees) may be provided representation in civil, criminal and Congressional proceedings in which he is sued, subpoenaed, or charged in his individual capacity, not covered by § 15.1 of this chapter, when the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General or his designee determines that providing representation would otherwise be in the interest of the United States.

Id. § 50.15(a).[2] Subsection (a)(4) applies to federal criminal proceedings, such as the Mueller Investigation. *See id*. §§ 600.1, 600.4(a). It provides:

> Representation generally is not available in federal criminal proceedings. Representation may be provided to a federal employee in connection with a federal criminal proceeding only where the Attorney General or his designee determines that representation is in the interest of the United States and subject to applicable limitations of § 50.16. In determining whether representation in a federal criminal proceeding is in the interest of the United States, the Attorney General or his designee shall consider, among other factors, the relevance of any non-prosecutorial interests of the United States, the importance of the interests implicated, the Department's ability to protect those interests through other means, and the likelihood of a conflict of interest between the Department's prosecutorial and representational responsibilities. If representation is authorized, the Attorney General or his designee also may determine whether represen-

[2] Section 15.1 of title 28 of the Code of Federal Regulations governs instances in which the United States is substituted as the defendant for a federal employee sued for actions taken in the course and scope of his employment, thus making the suit one against the United States itself and individual representation unnecessary. *See* 28 U.S.C. § 2679(b)(1), (d).

> tation by Department attorneys, retention of private counsel at federal expense, or reimbursement to the employee of private counsel fees is most appropriate under the circumstances.

Id. § 50.15(a)(4).

Section 50.16 governs the retention of private counsel for the employee. The Department may approve the retention of counsel in advance and pay attorney's fees as they are incurred. *Id*. § 50.16(c). Or the Department may reimburse after the fact the attorney's fees an employee has incurred. *Id*. § 50.16(d). Reimbursement is limited to "legal work that is determined to be in the interest of the United States" and is not available "for legal work that advances only the individual interests of the employee." *Id*. § 50.16(d)(1). In particular, "[r]eimbursement shall not be provided if the United States decides to seek an indictment of or to file an information against the employee seeking reimbursement, on a criminal charge relating to the conduct concerning which representation was undertaken." *Id*. § 50.16(d)(4).

III.

You have asked how certain elements of the Representation Guidelines should apply to requests for reimbursement of attorney's fees incurred by federal employees interviewed as witnesses in the Mueller Investigation concerning information obtained during the course of their federal duties. Specifically, you have asked: (1) whether such a witness interviewed under threat of subpoena should be viewed as "subpoenaed," 28 C.F.R. § 50.15(a); (2) whether such a witness appears in his "individual capacity," *id*.; and (3) what factors should be considered in evaluating "the interest of the United States," *id*. § 50.15(a)(4), in reimbursing those fees. We address each question in turn.

A.

Section 50.15(a) provides that a present or former federal employee "may be provided representation in civil, criminal and Congressional proceedings in which he is sued, subpoenaed, or charged in his individual capacity." *Id*. § 50.15(a). The word "subpoenaed" clearly embraces a witness who is served with a subpoena. We think that the term also ap-

plies to a witness who submits to an interview under express or implied threat of subpoena.

At first blush, section 50.15 might be read to require the formal service of a complaint, subpoena, or charge before an employee qualifies for representation. But we do not think the regulation requires such formality. A federal employee who submits to an interview under threat of subpoena may reasonably be considered to have been "subpoenaed" because he has complied with the request under threat of the potential penalties that would attach to a refusal to comply with the threatened subpoena. Similarly, we understand that the Civil Division has sometimes provided representation under the regulation when a federal employee has been threatened with a personal-capacity suit and requires representation.

Just as the Representation Guidelines permit representation of an employee credibly threatened with a lawsuit, we think the regulation also permits representation for an interview conducted under threat of subpoena. It is common practice for an investigator with subpoena authority to negotiate for a witness's voluntary appearance in lieu of the need for formal testimony in compliance with a subpoena. In federal criminal investigations, for instance, Department attorneys are encouraged to consider seeking the voluntary cooperation of a witness before issuing a grand jury subpoena. *See* U.S. Dep't of Justice, *Justice Manual* § 9-11.254 (2018) (providing that "[b]efore issuing a grand jury subpoena, prosecutors should consider . . . whether a voluntary request . . . is available to obtain the information sought"). In congressional inquiries, the Executive Branch similarly expects congressional committees to seek the voluntary appearances of witnesses prior to the issuance of a subpoena, as part of the "constitutionally mandated accommodation process." *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, 6 (2017) ("*Authority to Pay for Private Counsel*"); *see also Response to Congressional Requests for Information Regarding Decisions Made under the Independent Counsel Act*, 10 Op. O.L.C. 68, 81 (1986) (explaining that "rarely do congressional requests for information result in a subpoena of an Executive Branch official" because "[i]n most cases the informal process of negotiation and accommodation . . . is sufficient to resolve any dispute"). We think it would be implausible to read the Representation Guidelines to be inapplicable in

these common circumstances, in which the government interests at stake are not substantively different from when an employee is served with a formal subpoena.

This conclusion is supported by Civil Division practice. In a 1995 memorandum, the Director of the Torts Branch explained that "[w]e have construed the 'subpoena' requirement to encompass situations where the employee appears voluntarily but would be subject to a subpoena but for his or her voluntary appearance." Memorandum for Frank W. Hunger, Assistant Attorney General, Civil Division, from Helene M. Goldberg, Director, Torts Branch, Civil Division, *Re: Payment of Private Counsel Fees in Connection with Whitewater Investigation* at 2 n.1 (Aug. 10, 1995) ("Whitewater Memorandum"). Since then, we understand that the Civil Division has generally, although not uniformly, adhered to this view.[3] For example, in 2000, the Civil Division approved several requests for reimbursement of attorney's fees incurred by federal employees who appeared as witnesses in connection with congressional inquiries without any indication that a congressional subpoena was ever issued.[4] Moreover, in several instances the Civil Division has reimbursed employees for retaining a private attorney for a voluntary interview given to federal criminal investigators in lieu of testimony before a grand jury after the employee received a subpoena for such testimony.[5] It would make little

[3] We are aware of one instance in which the Civil Division expressed a contrary view. *See* Letter for Beth Nolan, Counsel to the President, from Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division at 2 (June 1, 2000) ("Mr. McLarty's request for reimbursement is granted to the extent he seeks reimbursement of private counsel fees and costs incurred subsequent to being served with a subpoena . . . but denied to the extent he seeks reimbursement of private counsel fees and costs incurred prior to being served with a subpoena.").

[4] *See, e.g.*, Letter for Beth Nolan, Counsel to the President, from Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division (Aug. 3, 2000) (granting in part request from White House Counsel's Office to reimburse attorney's fees incurred by former Deputy Assistant to the President and Deputy Director of Presidential Personnel).

[5] *See* Memorandum for Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division, from Helene M. Goldberg, Director, Torts Branch, Civil Division at 2 (Nov. 15, 2000) (granting reimbursement request of Department of Interior employee who "was served with a grand jury subpoena" and "agreed to an interview in lieu of [a] grand jury appearance"); Memorandum for Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division, from Helene M. Goldberg, Director, Torts Branch, Civil Division at 2 (Nov. 15, 2000) (same); Memorandum for Stuart E. Schiffer, Deputy Assistant Attorney

sense to read section 50.15(a) to authorize the reimbursement of attorney's fees for a voluntary interview conducted after formal issuance of a subpoena, but not for one conducted under credible threat of subpoena.

We thus do not construe the term "subpoenaed" to require issuance of a formal subpoena before the regulation becomes applicable. A contrary conclusion would establish a perverse incentive for federal employees to decline to cooperate and instead to trigger the issuance of formal subpoenas, which could result in additional attorney's fees, potentially at the expense of the United States.[6]

B.

Section 50.15(a) also covers representation when a current or former federal employee is subpoenaed "in his individual capacity." We believe

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General, Civil Division, from Helene M. Goldberg, Director, Torts Branch, Civil Division at 3 (Aug. 3, 2000) (same with respect to request of former Deputy Assistant to the President and Deputy Director of Presidential Personnel). These memoranda briefly present the facts of the requests and convey the recommendations of the Director of the Torts Branch as to whether the Civil Division should approve them. A note-to-file affixed to each memorandum and bearing the same date indicates that each request was approved at least in part.

[6] Even if a person were not "subpoenaed" within the meaning of section 50.15(a), the Attorney General would still have the authority under 28 U.S.C. § 517 to provide representation if it were in the interest of the United States to do so. Representation, including the reimbursement of private-counsel fees, may be provided outside the framework of the Representation Guidelines. *See Reimbursing Justice Department Employees*, 14 Op. O.L.C. at 134–37 & n.3. For instance, although the regulation covers only the representation of "present and former Federal officials and employees," 28 C.F.R. § 50.15(a), the Attorney General may also represent non-governmental employees where it is in the interest of the United States to do so. *See Hall v. Clinton*, 285 F.3d 74, 80 (D.C. Cir. 2002) (holding that the Department may represent the First Lady under 28 U.S.C. § 517 "even if" she were a deemed a "purely private citizen at all times relevant"); Constitutional Torts Staff, Torts Branch, Civil Division, U.S. Dep't of Justice, *The Fundamentals of Individual Capacity Representation of Federal Employees in Civil and Criminal Proceedings* 32 (Oct. 2018) (noting that "representation also may be provided to non-government employees under the general authority of 28 U.S.C. § 517"). And nothing in the Representation Guidelines is to the contrary; the regulations do not prohibit representing federal employees who have not been subpoenaed, but merely authorize representation to be provided to subpoenaed employees. 28 C.F.R. § 50.15(a). As a result, nothing in the Representation Guidelines precludes the Attorney General from authorizing representation under the statute even for a witness who was not "subpoenaed."

that when an investigator, such as the Special Counsel, seeks information from such a person concerning matters within his personal knowledge, that person generally appears in his individual capacity, even when that information was acquired during the course of the performance of the witness's federal duties.

In determining whether a suit is brought against a government official in his official or individual capacity, the Supreme Court has examined "[t]he identity of the real party in interest." *Lewis v. Clarke*, 581 U.S. 155, 163 (2017). "In an official-capacity claim," the Court has explained, "the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself." *Id*. at 162. "This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation." *Id*.; *see also Hafer v. Melo*, 502 U.S. 21, 25 (1991) (explaining that "official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent" (internal quotation marks and citations omitted)). "Personal-capacity suits, on the other hand, seek to impose *individual* liability upon a government officer." *Hafer*, 502 U.S. at 25 (emphasis added).

We think the meaning of "individual capacity" in 28 C.F.R. § 50.15(a) tracks this distinction: a witness appears in his personal capacity when he is personally threatened with potential liability from a subpoena. The typical instance in which a federal employee receives government representation under this regulation, after all, is a constitutional tort suit against that employee under *Bivens*, which seeks to recover damages from the employee personally. Though such suits arise from actions taken by the employee in the course and scope of his government employment, such suits are nonetheless considered to be against the employee in his individual capacity. *See FDIC v. Meyer*, 510 U.S. 471, 485–86 (1994). Notably, the regulation does not apply to suits in which the United States has been substituted as the defendant for a federal employee sued for actions taken in course and scope of his employment, *supra* note 2, which relieves the employee of personal liability. That exemption underscores that the regulation is concerned with proceedings in which a person is exposed to personal liability as a result of his official conduct as a government employee. And we have previously used the concept of whether such a person faces a threat of personal liability to distinguish official-capacity

from individual-capacity proceedings under the Representation Guidelines. *See* Memorandum for Peter J. Wallison, Counsel to the President, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Federal Retirement Thrift Investment Board* at 1 (Sept. 24, 1986) (equating "personal capacity" under the Representation Guidelines with whether the employee's "personal resources" were at stake); Memorandum for Glen L. Archer, Jr., Assistant Attorney General, Tax Division, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority of Tax Division to Pay Legal Fees of Private Counsel* at 2 (Feb. 28, 1984) (similar).

A person interviewed in connection with the Mueller Investigation would generally be appearing in his individual capacity even if the person were conveying information he acquired in the course of performing his official government duties. Such information would generally be information in that individual's personal knowledge, not information to be provided by virtue of his government office. In the case of a former employee, for example, the Special Counsel in most instances could not seek testimony from his successor in office, because the successor would not have personal knowledge of the matters being investigated. And should the person unlawfully refuse to provide the information, it would be he, and not the federal government, who would be subject to potential liability for civil and criminal contempt. *See* 18 U.S.C. § 401; 28 U.S.C. § 1826.

Consider, for example, the Special Counsel's request to interview Dana J. Boente. Mr. Boente served as the Acting Deputy Attorney General from February 8, 2017, to April 25, 2017. Special Counsel Mueller sought to interview Mr. Boente "because of his positions and his roles . . . [in] events in which *he* participated." Letter for Chad A. Readler, Acting Assistant Attorney General, Civil Division, from Scott Schools, Associate Deputy Attorney General at 1 (Jan. 12, 2018) (emphasis added); *see also* Letter for Scott Schools, Associate Deputy Attorney General, from Dana J. Boente, Acting Assistant Attorney General, National Security Division at 1 (Jan. 2, 2018) ("Special Counsel Robert Mueller has asked to interview *me*[.] In the event *I* do not submit to an interview, Special Counsel Mueller would have the authority to issue a subpoena for *my* testimony[.]" (emphases added)). In other words, the Special Counsel sought information from Mr. Boente, not from the Office of the Depu-

ty Attorney General. And had the Special Counsel served Mr. Boente with a subpoena, the obligation to testify (and any penalties for a failure to do so) would run against Mr. Boente personally—not the federal government. Thus, the real party in interest would be the witness, Mr. Boente.

This conclusion does not mean that a federal employee subpoenaed in his official, rather than, individual, capacity would be ineligible for government representation. There are examples of official-capacity subpoenas. A custodian of records belonging to a federal agency who provides information about the records or the manner in which they are maintained, for example, does so in his official capacity as a representative of the agency. *See, e.g.*, 20 C.F.R. § 423.3; 37 C.F.R. § 205.22(a)(1); 44 C.F.R. § 5.83; 45 C.F.R. § 4.2; *see also* 28 C.F.R. § 0.77(j) (instructing the Assistant Attorney General for Administration to accept service of subpoenas "directed to the Attorney General in his official capacity"). But "[r]epresentation of employees in their *official capacities* is provided automatically, without reference to the representation guidelines." Olson Memorandum at 3 n.3. We are not aware that the Special Counsel, who received broad access to the records of the federal government, compelled witnesses or testimony from any person in an official government capacity. But if the Special Counsel did so, the witness's official-capacity status would automatically entitle the witness to government representation without regard to the Representation Guidelines.

C.

The fact that a witness is subpoenaed to testify in his individual capacity about information acquired during the course of his federal employment does not alone justify reimbursing his attorney's fees. The Department must also determine that reimbursement would be in the "interest of the United States." 28 U.S.C. § 517; 28 C.F.R. § 50.15(a)(4). Although we are not in a position to make that determination as to any particular witness, you have asked us for guidance on how the Department should evaluate whether it is in the interest of the United States to reimburse the attorney's fees of witnesses interviewed in connection with the Mueller Investigation about information they acquired in the course of their government employment.

1.

The Representation Guidelines provide that government representation "generally is not available in federal criminal proceedings." 28 C.F.R. § 50.15(a)(4). This presumption reflects the fact that in federal criminal proceedings, the interest of the United States "ordinarily can be expected to be represented fully by the federal prosecutor, who is answerable in the executive branch hierarchy to the Attorney General, who in turn is directly accountable to the President." Barr Memorandum at 10. That is especially true when the person seeking representation is a subject or target of the criminal investigation.[7] In such an instance, the interest of the United States lies in favor of enforcing the law against the subject or target, rather than assisting the person in avoiding criminal liability. *Id*. at 13–14. But even in federal criminal proceedings, there may be "situations in which representation of an employee who is a witness . . . would be completely consistent with the interests of the prosecution and in which it would be in the United States' interest to provide representation." *Id*. at 14. For example, "for Administration officials simply, and properly, doing their jobs" who are asked to provide information acquired in the course of their government duties, representation may be warranted to avoid the "specter of personal liability for attorneys fees." *Id*. at 18 (internal quotation marks omitted).

Accordingly, the Representation Guidelines recognize that there are circumstances where it is in the interest of the United States to represent current and former government employees in federal criminal proceedings. They establish no fixed formula governing that determination. Instead, they provide for consideration of, "among other factors, the relevance of any non-prosecutorial interests of the United States, the importance of the interests implicated, the Department's ability to protect

[7] The Department's *Justice Manual* explains that "[a] 'target' is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant," and "[a] 'subject' . . . is a person whose conduct is within the scope of the grand jury's investigation." U.S. Dep't of Justice, *Justice Manual* § 9-11.151 (Jan. 2020). The Representation Guidelines also note that "[a]n employee is the subject of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime." 28 C.F.R. § 50.15(a)(5).

those interests through other means, and the likelihood of a conflict of interest between the Department's prosecutorial and representational responsibilities." 28 C.F.R. § 50.15(a)(4).

2.

In analyzing the interests at stake when current or former government employees appear as witnesses in Special Counsel investigations, we are guided by the parallels to investigations conducted by Independent Counsels. The Department's Special Counsel regulations "replace[d] the procedures set out in the Independent Counsel Reauthorization Act of 1994." *Office of Special Counsel*, 64 Fed. Reg. at 37,038.

This Office has previously recognized that the United States has a strong interest in reimbursing current or former government officials who incur attorney's fees as a result of appearing as witnesses in Independent Counsel investigations. In 1989, we analyzed whether it was in the interest of the United States to reimburse attorney's fees incurred by former President Ronald Reagan and former Deputy Assistant Attorney General Michael Dolan. We observed that Mr. Dolan had incurred substantial attorney's fees for little reason other than he was "caught in a power struggle between Congress and the executive branch" that was the subject of the Independent Counsel investigation, which examined whether Department officials had committed perjury in connection with congressional testimony concerning federal environmental regulation. Barr Memorandum at 18 (internal quotation marks omitted). In such circumstances, the United States has a strong interest in avoiding the chilling effects that the prospect of liability for attorney's fees would have on "Administration officials simply, and properly, doing their jobs," which is akin to "the chilling effect of liability that support[s] indemnification of federal officers in *Bivens* actions." *Id*. (internal quotation marks omitted).

In accordance with this advice, the Department has a long practice of reimbursing the attorney's fees of current or former federal employees who appeared as witnesses in connection with Independent Counsel investigations. During the George H.W. Bush Administration, the Civil Division approved reimbursement requests from at least 14 employees of the White House and Central Intelligence Agency who were witnesses for the Independent Counsel in the Iran-Contra investigation. *See* Memorandum for the Deputy Attorney General from Donald M. Remy, Deputy

Assistant Attorney General, Civil Division, *Re: Implementation of Representation Guidelines in Federal Criminal Proceedings* at 1, 3–4 (June 3, 1998). During the Clinton Administration, the Civil Division approved reimbursement requests from at least 9 employees who appeared in connection with numerous Independent Counsel investigations and congressional inquiries.[8] Early in the George W. Bush Administration, the Civil Division approved a reimbursement request from a former employee in the Clinton White House who appeared as a witness in an Independent Counsel investigation. *See* Letter for Jeffrey S. Jacobovitz from Stuart E.

[8] *See* Letter for Karen Sprecher Keating, Associate Solicitor, Department of the Interior, from Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division (Nov. 15, 2000) (granting in part request of Deputy Assistant Secretary in connection with Independent Counsel investigation); Letter for Karen Sprecher Keating, Associate Solicitor, Department of the Interior, from Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division (Nov. 15, 2000) (granting in part request of Assistant to the Deputy Chief of Staff to the Secretary of Interior in connection with Independent Counsel investigation); Letter for John J. Kelleher, Chief Counsel, Department of the Treasury, from Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division (Nov. 15, 2000) (granting request from Secret Service agent in connection with Independent Counsel investigation); Letter for Beth Nolan, Counsel to the President, from Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division (Aug. 28, 2000) (granting request from former Special Assistant to the President and Assistant to the Chief of Staff in connection with Independent Counsel investigation); Letter for Sam E. Hutchinson, Associate General Counsel, Department of Housing and Urban Development, from Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division (Aug. 24, 2000) (granting in part request from former Special Assistant to the Secretary of Housing and Urban Development in connection with Independent Counsel investigation); Letter for Beth Nolan, Counsel to the President, from Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division (Aug. 3, 2000) (granting in part request from former Deputy Assistant to the President and Deputy Director of Presidential Personnel in connection with Independent Counsel investigation and three congressional inquiries); Letter for Beth Nolan, Counsel to the President, from Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division (June 1, 2000) (granting request from former Deputy Assistant to the President and Press Secretary to the First Lady in connection with five Independent Counsel investigations and four congressional inquiries); Letter for Beth Nolan, Counsel to the President, from Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division (June 1, 2000) (granting in part request from former Chief of Staff, Counselor, and Assistant to the President in connection with five Independent Counsel investigations and six congressional inquiries); Letter for Beth Nolan, Counsel to the President, from Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division (June 1, 2000) (granting request from former Director of White House Special Projects and Executive Assistant to the Chief of Staff in connection with Independent Counsel investigation and congressional inquiry).

Schiffer, Deputy Assistant Attorney General, Civil Division (Mar. 8, 2001) (granting request of former Director of White House Gift Office and staff member of the Office of the Social Secretary). In each instance, the Civil Division concluded that the witness should be reimbursed where it appeared from all available information that the questioning addressed matters occurring in the course of his government duties, where the witness was neither a subject nor a target of the investigation, and where there was no indication that he had acted inconsistently with the interest of the United States.

3.

Considering this practice, and the factors set forth in the Representation Guidelines, we think that government representation, and reimbursement of attorney's fees, will generally be in the interest of the United States for persons interviewed in Special Counsel investigations, such as the Mueller Investigation, concerning information acquired in the course of performing their government duties, where the witness was not a subject or target of the investigation.

We see no reason to distinguish Independent Counsel investigations from Special Counsel investigations for this purpose. Special Counsel Mueller conducted his investigation under the auspices of regulations that provided autonomy similar to that exercised by Independent Counsels before him to investigate politically sensitive criminal matters. A Special Counsel is invested with the "full power" of a United States Attorney, 28 C.F.R. § 600.6, just as an Independent Counsel exercised "all investigative and prosecutorial functions and powers of the Department of Justice," 28 U.S.C. § 594(a). That power is subject to supervision; a Special Counsel is generally supervised by the Attorney General, *see* 28 C.F.R. § 600.7, just as the Independent Counsel statute provided the Attorney General "several means of supervising or controlling," *Morrison v. Olson*, 487 U.S. 654, 696 (1988), an Independent Counsel. But that supervisory power is limited in ways that closely parallel the Independent Counsel statute. Like the Independent Counsel statute, the Special Counsel regulations permit the Attorney General to remove the Special Counsel only for cause. *Compare* 28 U.S.C. § 596(a)(1) ("An independent counsel . . . may be removed from office . . . only for good cause, physical or mental disability (if not prohibited by law protecting

persons from discrimination on the basis of such a disability), or any other condition that substantially impairs the performance of such independent counsel's duties."), *with* 28 C.F.R. § 600.7(d) ("The Attorney General may remove a Special Counsel for misconduct, dereliction of duty, incapacity, conflict of interest, or for other good cause, including violation of Departmental policies.").

Moreover, the Special Counsel regulations exempt the Special Counsel from the "day-to-day" supervision of any official within the Department. 28 C.F.R. § 600.7(b). The Attorney General may overrule the Special Counsel only where an "action is so inappropriate or unwarranted under established Departmental practices that it should not be pursued," giving "great weight to the views of the Special Counsel," and should the Attorney General overrule the Special Counsel, he is obliged at the conclusion of the investigation to explain that decision to Congress. *Id.*; *see also id.* § 600.9(a)(3). Although the Special Counsel's independence is a matter of regulation, rather than statute, so long as these regulations remain in effect, they insulate the Special Counsel from many of the usual mechanisms of control and accountability, similar to the Independent Counsel. For this reason, then-Deputy Attorney General Holder determined, shortly after the adoption of the Special Counsel regulations, that "for purposes of analyzing representation and reimbursement requests" a Special Counsel investigation is "closely analogous" to investigations under the Independent Counsel statute and should "be treated" as such. Holder Memorandum at 4 n.3.

Independent Counsels and Special Counsels are not only similar in their insulation from supervisory control, but also with respect to the distinctive, politically sensitive matters that occasion their appointment and shape the character of their investigation. Both kinds of special prosecutor are appointed when the Department may have a conflict of interest, typically because there is a need to investigate a senior government official, including even the President. *Compare* 28 C.F.R. § 600.1, *with* 28 U.S.C. § 591. These prosecutors operate in a publicized, politicized, and contentious environment. Like an Independent Counsel, a Special Counsel is given a public charge to investigate an especially sensitive matter or group of matters, given substantial independence to pursue those subjects, and invariably faced with substantial political pressure to produce results. Armed with vast powers and resources, and a singular focus, Special

Counsels have the incentive and means to leave no stone unturned, which often requires interviewing a wide range of witnesses who acquired relevant information in the ordinary course of their jobs as government employees.

As the Department has long recognized in Independent Counsel investigations, these dynamics give the United States a strong "non-prosecutorial interest," 28 C.F.R. § 50.15(a)(4), in ensuring that its employees who are called upon to provide information acquired as a result of their federal employment have a lawyer available at government expense. We have repeatedly recognized that the United States has a considerable interest in protecting "its employees from the burden of undergoing potentially hostile questioning and incurring legal fees as a result of actions taken in good faith" on behalf of the government, which could otherwise "chill the employees' exercise of their official duties." *Authority to Pay for Private Counsel*, 41 Op. O.L.C. at 17; Barr Memorandum at 9–10 (similar); *Indemnification of Treasury Department Officers and Employees*, 15 Op. O.L.C. 57, 62 (1991) (similar); *Department of Justice Representation in Federal Criminal Proceedings*, 6 Op. O.L.C. 153, 153–54 (1982) (similar). "[P]roviding counsel to employees facing such burdens serves important government interests in ensuring that Executive Branch employees acting in good faith may discharge their official duties and discretionary functions rigorously, without concern about potential reprisals or legal fees." *Authority to Pay for Private Counsel*, 41 Op. O.L.C. at 17. And because a Special Counsel's charge is to fulfill a broad prosecutorial mandate, and not to account for the investigation's burdens on the federal workforce, it is not likely that a Special Counsel will "adequately represent[]" this interest of the United States. Barr Memorandum at 11 n.13.

The Mueller Investigation unquestionably operated in a fraught and high-profile political environment. It was conducted by determined, experienced, and well-resourced prosecutors under significant political and public scrutiny. The Special Counsel brought multiple charges for false statements for lying to government investigators, e.g., Superseding Information, *United States v. Manafort*, No. 17-cr-201-1 (D.D.C. filed Sept. 14, 2018); Superseding Information, *United States v. Gates*, No. 17-cr-201-2 (D.D.C. filed Feb. 2, 2018); Information, *United States v. Papadopoulos*, No. 17-cr-182 (D.D.C. filed Oct. 3, 2017), and multiple charges for crimes that were separate from the principal purpose of the investiga-

tion, e.g., Superseding Indictment, *United States v. Manafort*, No. 18-cr-83 (E.D. Va. filed Feb. 22, 2018) (charging 16 counts related to false individual income tax returns, 7 counts of failure to file reports of foreign bank and financial accounts, 5 counts of bank fraud conspiracy, and 4 counts of bank fraud). All told, the investigation consumed nearly $32 million in government resources. *See supra* Part I. And as noted, the Special Counsel interviewed no fewer than 40 federal government employees, who, with one exception, were not charged with any offense. The breadth and depth of such investigations creates a danger of forcing many federal employees to incur attorney's fees for little reason other than doing their jobs.

We recognize that, in an ordinary federal criminal investigation, it generally is not in the interest of the United States to pay the attorney's fees of witnesses simply because those witnesses acquired relevant information in the course of government employment. Most witnesses do not need a lawyer to cooperate with investigators. But we cannot ignore that a Special Counsel investigation is not an ordinary criminal investigation. A careful and prudent government employee—with no interest or incentive to dissemble—may reasonably feel at personal risk in submitting to an interview and providing information to the Special Counsel, given the history of such interviews leading to further investigation of the witnesses themselves. Owing to the breadth of the federal criminal code, federal prosecutors have enormous charging discretion over a wide range of conduct. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 Colum. L. Rev. 583, 608–18 (2005). "Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting). Many witnesses interviewed by the Special Counsel's investigators were high-ranking Administration officials close to the President. The Special Counsel's singular, high-profile mandate, and the politically fraught context in which he operated, mean that witnesses might have reasonably feared that the Special Counsel would "pick[] the man and then search[] the law books . . . to pin some offense on him." *Id.* at 728 (quoting Robert H. Jackson, Attorney General, *The Federal Prosecutor* 5 (Apr. 1, 1940) (address at Second Annual Conference of United

States Attorneys)). In this context, such witnesses might reasonably seek the advice and assistance of a lawyer, to be scrupulously careful that "the employee provides accurate and complete information" and to support the employee "in the face of potentially hostile questions," interests that we have recognized would similarly justify the reimbursement of attorney's fees in congressional investigations. *Authority to Pay for Private Counsel*, 41 Op. O.L.C. at 16.

The Representation Guidelines do not permit the reimbursement of attorney's fees for "legal work that advances only the individual interests of the employee." 28 C.F.R. § 50.16(d)(1). Witnesses interviewed by the Special Counsel who may now seek reimbursement of attorney's fees no doubt had personal interests in seeking representation. But "these interests are not 'purely personal'; they are 'incidental' to, and in many cases overlap with, the substantial government interests implicated" in providing government representation. *Authority to Pay for Private Counsel*, 41 Op. O.L.C. at 19–20 (quoting *Reimbursing Justice Department Employees*, 14 Op. O.L.C. at 137). These incidental personal benefits do not change the important governmental interests advanced by reimbursing attorney's fees: to avoid the substantial burdens that Special Counsel investigations place on the good-faith labors of government employees.

4.

To be clear, we do not believe that reimbursement should be provided simply because a government official incurred attorney's fees appearing as a witness in connection with the Mueller Investigation. The Civil Division still must conclude that doing so is in the interest of the United States, considering all the facts and circumstances of the specific request.

Most notably, if a witness were suspected of wrongdoing, then the calculus may change significantly. Reimbursing a witness who was, for example, a subject or the target of the Special Counsel's investigation itself, may well be inappropriate. Providing government representation to such a person would conflict with the strong prosecutorial interests of the United States. *Cf.* 28 C.F.R. § 50.16(d)(4) ("Reimbursement shall not be provided if the United States decides to seek an indictment of or to file an information against the employee seeking reimbursement, on a criminal charge relating to the conduct concerning which representation was undertaken."). Similarly, if the witness declined to cooperate with the inves-

tigation or affirmatively obstructed it, such facts would weigh against reimbursement of attorney's fees. *See* Memorandum for Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division, from Helene M. Goldberg, Director, Torts Branch, Civil Division, at 2 (Feb. 23, 2001) (recommending that the Department deny reimbursement because the witness offered "evasive" and "unbelievable" answers); Letter for Nancy A. Healy, Chief, Civil Litigation Unit, Federal Bureau of Investigation, from Stuart E. Schiffer, Deputy Assistant Attorney General, Civil Division (Jan. 26, 2001) (denying reimbursement because the witness had failed to cooperate fully with a Special Counsel investigation). As always, the question is whether the representation was in the interest of the United States. *Cf.* 28 C.F.R. § 50.16(c)(2)(iv) ("Federal payment to private counsel for an employee will cease if . . . the Department of Justice . . . [d]etermines that continued representation is not in the interest of the United States."). The United States unquestionably has a strong interest in ensuring that its employees facilitate enforcement of the law, an interest that may justify denying an attorney's fees request by an employee who failed to do so.

IV.

We conclude that the Representation Guidelines authorize, on a case-by-case basis, the reimbursement of attorney's fees incurred by a current or former federal government employee interviewed as a witness in the Mueller Investigation under threat of subpoena about information the person acquired in the course of his government duties. We also conclude that such a witness generally appears in his individual capacity for purposes of the Representation Guidelines. Finally, consistent with the Department's treatment of Independent Counsel investigations, we conclude that the United States generally has a strong interest in ensuring that its employees have representation in connection with Special Counsel proceedings, which often will support reimbursing attorney's fees incurred by employees interviewed as witnesses in such proceedings, and not as subjects or targets.

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

Executive Branch Participation in the Cyberspace Solarium Commission

In our tripartite constitutional structure, any commission performing federal functions must reside within a single one of the three branches of government.

The Cyberspace Solarium Commission is properly viewed as a Legislative Branch entity, because congressional appointees compose the majority of the Commission's membership, the Commission exercises the investigative authorities of a congressional committee, and the Commission's ultimate mission is to advise Congress.

The Executive Branch officials serving on the Commission should act with one unified voice, subject to executive supervision, in advising the Commission and should maintain the confidentiality of Executive Branch information when sharing their information and expertise with the Commission.

October 9, 2020

MEMORANDUM OPINION FOR THE LEGAL ADVISOR
NATIONAL SECURITY COUNCIL

The John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, 132 Stat. 1636 (2018) ("FY 2019 NDAA"), created the Cyberspace Solarium Commission ("Commission") to "develop a consensus on a strategic approach to defending the United States . . . against cyber attacks." *Id.* § 1652(a)(1), 132 Stat. at 2140–41. The fourteen-member Commission consisted of representatives from both the Legislative Branch and the Executive Branch: four senior Executive Branch officers who served ex officio and ten appointees from Congress. *Id.* § 1652(b)(1)(A), 132 Stat. at 2141. The Commission was required to provide a report to Congress with recommendations related to the proper "core objectives" for cyber defense and to "various strategic options to defend the United States."[1] *Id.* § 1652(f)(1)–(2), (k)(1), 132 Stat. at 2142, 2146. The Director of National Intelligence ("DNI"), Secretary of Defense, and Secretary of Homeland Security were then required to provide their assessment of the report within 60 days of receiving it. *Id.* § 1652(*l*), 132 Stat. at 2146.

[1] The Commission publicly released the report on March 11, 2020, but was not required by statute to formally submit the report to Congress until April 30. *See* Cyberspace Solarium Commission, Final Report (Mar. 2020), https://www.solarium.gov/report.

The structure of the Commission raised a number of questions under the constitutional separation of powers, which bore upon whether and how the Executive Branch members of the Commission could participate in its work. This memorandum memorializes this Office's oral advice provided to the Executive Branch members of the Commission, regarding the organization of the Commission's operations, votes by Executive Branch officials about the Commission's business, and the Executive Branch contributions to the Commission's final report.

Commissions with members appointed by both the Legislative and Executive Branches have been established on many prior occasions, but the Executive Branch has long recognized that such "hybrid" commissions present constitutional concerns.[2] Although these commissions may lawfully exercise advisory functions, where they exercise the authority of the government, they must do so within the confines of the Constitution's tripartite structure and reside in one branch. Here, congressional appointees composed the majority of the Commission's membership, the Commission exercised the investigative authorities of a congressional committee, and the Commission's ultimate mission was to advise Con-

[2] *See, e.g.*, Statement on Signing the Bill Establishing a Commission on the Bicentennial of the United States Constitution (Sept. 29, 1983), 2 *Pub. Papers of Pres. Ronald Reagan* 1390 (1983) ("[B]ecause of the constitutional impediments contained in the doctrine of the separation of powers, I understand" that the Chief Justice and the congressional members of the bicentennial commission "will be able to participate only in ceremonial or advisory functions of the Commission, and not in matters involving the administration of the act."); *Constitutionality of Resolution Establishing United States New York World's Fair Commission*, 39 Op. Att'y Gen. 61, 62 (1937) (Cummings, Att'y Gen.) (objecting to a congressional commissioner that would plan and appoint commissioners for the New York World's Fair as "amount[ing] to an unconstitutional invasion of the province of the Executive"); *Participation of Members of Congress in the Ronald Reagan Centennial Commission*, 33 Op. O.L.C. 193, 195 (2009) ("*Ronald Reagan Commission*") (identifying constitutional concerns with commissions with members from multiple branches engaging in responsibilities that "extend beyond providing advice or recommendations . . . or participating in ceremonial activities"); Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Incursions into Areas of Executive Responsibility* at 3–4 (Oct. 31, 1984) ("*Congressional Incursions*") (describing the Department's repeated "strong[]" opposition to congressional creation of commissions with Legislative and Executive Branch appointees as "inconsistent with the tripartite system of government established by the Framers of our Constitution" (internal quotation marks omitted)).

gress. The Commission thus was properly viewed as a Legislative Branch entity.

We recognized that the Commission, as a Legislative Branch entity, could benefit from participation of its Executive Branch members, but we advised that those members should carry out their advisory functions not as free agents, but as executive officers subject to supervision by their departments, and ultimately, the President. Because the Commission's Executive Branch members represent the interests of the Executive Branch in performing their work, we advised that they should not provide independent statements in assessing the Commission's work and that the commission members should not vote individually on the Commission's final report or any of its subpoenas. The Commission's report and its subpoenas were the official actions of a Legislative Branch entity. While the Executive Branch members could, in principle, have adopted and advanced common positions on those actions, the Commission's procedures and the need to release its report promptly made it impracticable for them to do so. We therefore advised the Executive Branch officials not to vote, consistent with their accountability to the Executive Branch.

We further construed statutory provisions providing for the Executive Branch to provide staff and office space to the Commission to be discretionary, rather than mandatory, because the separation of powers imposes constraints upon Congress's ability to enlist the Executive's staff and physical resources. Finally, we advised that the Commission's Executive Branch members and staff were obliged to preserve Executive Branch confidentiality interests. We explained that they should evaluate requests for information in light of the accommodation principles at play when congressional committees request information and support from the Executive Branch, and in light of any executive privilege concerns, particularly given the classified nature of some of the Commission's work, *see* FY 2019 NDAA § 1652(g)(3)(C), 132 Stat. at 2144. *See, e.g.*, *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) (requiring each branch to "seek optimal accommodation through a realistic evaluation of [their respective] needs . . . in the particular fact situation"). Such obligations, however, do not mean that the Executive Branch officers could not accommodate the Commission's legitimate interests in that regard, consistent with the assistance regularly provided by the Executive Branch to Congress.

I.

The FY 2019 NDAA established the Cyberspace Solarium Commission to gather evidence and prepare a report recommending a long-term strategy for defense against cyber attacks. *Id.* § 1652(a)(1), (f)(1)–(7), (k)(1), 132 Stat. at 2141–43, 2146. The Commission was modeled on President Dwight D. Eisenhower's Cold War-era "Project Solarium," which gathered three task forces of experts from public and private life to study strategies for guarding against a potential stockpiling of atomic weapons by the Soviet Union.[3]

Congress directed the Cyberspace Solarium Commission "[t]o define the core objectives and priorities" of a national cyber-defense strategy, "weigh the costs and benefits of various strategic options," "evaluate the effectiveness of the current national cyber policy," and "consider possible structures and authorities that need to be established, revised, or augmented within the Federal Government" to successfully guard against cyber attacks. FY 2019 NDAA § 1652(f), 132 Stat. at 2142–43. By statute, the Commission's fourteen members included the Principal Deputy DNI, the Deputy Secretary of Homeland Security, the Deputy Secretary of Defense, the Director of the Federal Bureau of Investigation, and ten congressional appointees who could be members of Congress. *Id.* § 1652(a)(1)–(2), (b)(1), 132 Stat. at 2141. On some prior occasions, Congress at least purported to specify whether a hybrid commission of this sort should be considered legislative or executive.[4] But it did not do so here.

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[3] *See* 164 Cong. Rec. S3927 (daily ed. June 13, 2018) (statement of Sen. Sasse, who had originally proposed an amendment to the FY 2018 NDAA that would have created the Cyberspace Solarium Commission, *see* 163 Cong. Rec. S5674 (daily ed. Sept. 13, 2017)); *see also* Memorandum of Discussion at the 144th Meeting of the National Security Council, Wednesday, May 13, 1953, *in* Dep't of State Pub. No. 9347, 15 *Foreign Relations of the United States, 1952–1954 (Korea)* 1012, 1016 (1984) (describing statement of President Eisenhower explaining the objectives of Project Solarium). President Eisenhower named the project after the White House solarium, where the idea was conceived. *See* William B. Pickett, *Introduction: The Solarium Exercise of June 1953*, *in George F. Kennan and the Origins of Eisenhower's New Look: An Oral History of Project Solarium* 3 (William B. Pickett ed., 2004).

[4] *See, e.g.*, FY 2019 NDAA § 1051(a)(1)–(4), (b), 132 Stat. at 1962–63 (establishing an advisory commission "in the executive branch" with legislative and executive appointees to produce reports and recommendations on the national security uses of artificial intelligence and machine learning); Evidence-Based Policymaking Commission Act of

To carry out its mission, the Commission was authorized to exercise investigative functions. The Commission was able to hold hearings, take testimony, receive evidence, and issue subpoenas requiring witness testimony and document production. *Id.* § 1652(g)(1)(A), 132 Stat. at 2143; *see also id.* § 1652(g)(1)(B), 132 Stat. at 2143. The statutes governing contempt of Congress were made applicable to failures to comply with the Commission's subpoenas. *Id.* § 1652(g)(1)(C), 132 Stat. at 2143. Separately, executive agencies were instructed, "to the extent authorized by law, [to] furnish such information, suggestions, estimates, and statistics" as are required for the Commission to carry out its duties. *See id.* § 1652(g)(3)(A)–(B), 132 Stat. at 2143–44; *see also, e.g.*, *id.* § 1652(g)(1)(A), 132 Stat. at 2143 (authorizing the Commission, "for the purpose of carrying out the provisions of this section," to require by subpoena testimony, books, records, correspondence, and documents as the Commission or "designated subcommittee or designated member considers necessary"). In addition, the statute specified that the Secretary of Defense "shall" provide the Commission with nonreimbursable administrative services, funds, staff, and facilities, *id.* § 1652(g)(4)(A), 132 Stat. at 2144, and that the DNI and the heads of other executive agencies "may" give the Commission administrative services and staff, *id.* § 1652(g)(4)(B), (C), 132 Stat. at 2144. *See also id.* § 1652(h)(1)(B), 132 Stat. at 2144 (authorizing the detailing of federal staff to the Commission).

The Commission was required to memorialize its recommendations in a "final report" to the congressional defense, intelligence, and homeland security committees, as well as to the Secretary of Defense, the Secretary of Homeland Security, and the DNI. *Id.* § 1652(k)(1), 132 Stat. at 2146. Within 60 days of receiving the report, the Secretaries and the DNI were each to "submit to the congressional intelligence committees and the congressional defense committees an assessment" of the report, including

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2016, Pub. L. No. 114-140, §§ 2, 3(a), 4, 130 Stat. 317, 317–18 (2016) (establishing an advisory commission "in the executive branch" with legislative and executive appointees to produce recommendations for amending federal agency data infrastructure, database security, and statistical protocols); *see also* Matthew E. Glassman & Jacob R. Straus, Cong. Research Serv., R40076, *Congressional Commissions: Overview, Structure, and Legislative Considerations* 10 (2017) ("In some instances, the establishment clause will identify the commission as 'established in the legislative branch.'").

"such comments" as each of the three officials "considers appropriate." *Id.* § 1652(*l*), 132 Stat. at 2146. The original deadline for the report was September 1, 2019, *see id.* § 1652(k)(1), 132 Stat. at 2146, but Congress extended the deadline to April 30, 2020. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1639, 133 Stat. 1198, 1750 (2019). On March 11, 2020, the Commission made the report available to the public, in anticipation of its formal submission to Congress in April. *See* Cyberspace Solarium Commission, Final Report (Mar. 2020), https://www.solarium.gov/report. The Commission was to terminate within 120 days of the report's formal submission to the congressional defense and intelligence committees. *See* FY 2019 NDAA § 1652(k)(2)(A), 132 Stat. at 2146. During that 120-day period, the Commission was able to wind down its activities and provide testimony to Congress on its report. *Id.* § 1652(k)(2)(B), 132 Stat. at 2146.

II.

A truly hybrid commission with Executive and Legislative Branch appointees creates separation of powers concerns because it lacks accountability to any single branch of government. As the Supreme Court has recognized, "[t]he Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983); *see also, e.g.*, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 329 (1816) ("The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments."); *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.* (1792) (reporting the decision of the Circuit Court for the District of New York, including Chief Justice Jay and Justice Cushing, which had observed "[t]hat by the Constitution of the United States, the government thereof is divided into *three* distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either" (emphasis added)). In our tripartite constitutional structure, any commission performing federal functions must reside within a single one of the three branches of government.

A.

This Office has long expressed constitutional concerns about hybrid commissions, which occupy a "no-man's land between . . . two branches," with commission members who risk being unaccountable to either of the political branches. Memorandum for John R. Bolton, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 3345, 99th Cong. 1st Sess.*, at 2 (Apr. 9, 1986); *see also Congressional Incursions* at 3–4 (describing such commissions as "inconsistent with the tripartite system of government established by the Framers of our Constitution" and detailing the Department's repeated "strong[]" opposition to congressional creation of hybrid commissions (internal quotation marks omitted)).[5]

The problems with hybrid commissions are two-fold. First, an entity with members representing two branches is not fully accountable to any governmental authority. The constitutional separation of powers is designed to diffuse power among different federal actors to better protect liberty. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (recognizing that the "purpose of separating and dividing the powers of government" was to "'diffus[e] power the better to secure liberty'" (alteration in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))). But "[t]he diffusion of power carries with it a diffusion of accountability." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010). To ensure that the government remains responsive to the people, the constitutional separation of powers "requires that each branch maintain its separate identity, and that functions and responsibilities be clearly assigned among the separate branches, so that each can be held accountable for its actions." Memorandum for William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, from Ralph W. Tarr, Acting Assistant Attor-

[5] *See, e.g.*, Statement on Signing a Bill Establishing a National Commission on Agricultural Trade and Export Policy (Aug. 30, 1984), 2 *Pub. Papers of Pres. Ronald Reagan* 1211, 1211–12 (1984) (urging that the commission "be composed either entirely of members selected by the legislative branch, if it is to serve primarily legislative functions, or entirely of members appointed by the President, if it is to serve the executive branch"); Statement on Signing the Patent Law Amendments Act of 1984 (Nov. 9, 1984), 2 *Pub. Papers of Ronald Reagan* 1816, 1817 (1984) (same).

ney General, Office of Legal Counsel, *Re: S. 519, 99th Cong. 1st Sess., the "Federal Employee Anti-Sex Discrimination in Compensation Act of 1985"* at 2 (July 2, 1985).

"The creation of a Commission that is not clearly legislative, judicial, or executive, tends to erode" this foundational restraint. *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 251 (1989) ("*Common Legislative Encroachments*") (internal quotation marks omitted). When a blended executive-legislative body ultimately reports to neither political branch, the public is left unable to determine where the blame for "a pernicious measure . . . ought really to fall." *See Free Enter. Fund*, 561 U.S. at 498 (internal quotation marks omitted) (quoting *The Federalist* No. 70, at 476 (Alexander Hamilton) (J. Cooke ed. 1961)). And "[w]hen citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 57 (2015) (Alito, J., concurring). Because a branchless entity would undermine the accountability that the separation of powers demands, the Constitution requires that every entity exercising the authority of the federal government be accountable to a single branch.

Second, once the nature of a hybrid commission is determined, that constitutional location determines the roles that its executive and legislative members may play. To the extent that a commission exercises executive powers, for instance, agents of the Legislative Branch may not participate, even in an advisory capacity. *See, e.g.*, *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991) ("If the power is executive, the Constitution does not permit an agent of Congress to exercise it."); *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (per curiam) (holding that congressional appointees may "perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law"); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993) (observing that even in a purely advisory role, the presence of ex officio congressional agents on an Executive Branch commission violated the separation of powers); *see also The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 160 n.95 (1996) ("*Separation of Powers*") ("[D]esignating a

member of Congress to serve on a commission with any executive functions, even in what was expressly labeled a ceremonial or advisory role, may render the delegation of significant governmental authority to the commission unconstitutional as a violation of the anti-aggrandizement principle." (citing *NRA Political Victory Fund*, 6 F.3d at 827)); *Common Legislative Encroachments*, 13 Op. O.L.C. at 251–52.

At the same time, if a commission is an arm of the Legislative Branch, then Executive Branch members may participate in an advisory role but, in that capacity, they do not cease to be subject to the supervision of the President. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020) ("The entire 'executive Power' belongs to the President alone," and "lesser [executive] officers must remain accountable to the President, whose authority they wield."); *see also, 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, 31 (2008) ("*Direct Reporting Requirement*") ("[S]tatutes that interfere with the President's ability to supervise, directly or through subordinate officials, the Executive Branch's communications with Congress raise serious constitutional concerns."). As discussed below, the structure of the Cyberspace Solarium Commission presented a number of concerns about the roles Executive Branch members may play in the Commission, in light of its constitutional location.

Thus, the threshold question in evaluating the structure of a hybrid commission is determining the branch in which the entity resides. This approach finds consistent support in our precedents. In *Status of the Commission on Railroad Retirement Reform for Purposes of the Applicability of Ethics Laws*, 13 Op. O.L.C. 285 (1989) ("*Railroad Retirement Reform Commission*"), we considered the Railroad Retirement Reform Commission, whose members were appointed variously by the President, congressional leaders, and the Comptroller General (an agent of Congress). *Id.* at 286. The commission was charged with submitting a report to Congress and to the President with legislative recommendations about the railroad retirement system. *Id.* In view of the statute's dual-reporting requirement, the Commission was "vested with '[o]bligations to two branches,'" but the "presence of such dual obligations" did not prevent its "characterization . . . as part of one branch." *Id.* at 287 n.5 (quoting *Bowsher*, 478 U.S. at 746 (Stevens, J., concurring in the judgment)). The

commission's obligation to report to Congress "without any prior review" by the Executive Branch would raise "serious constitutional questions," if the commission fell within the Executive Branch. *See id.* at 287–88. We thus construed the statute's dual-reporting requirement "as contemplating that the Commission's report would be prepared principally for Congress' benefit" and concluded that the commission should be deemed to fall outside the Executive Branch for purposes of laws governing conflicts of interest and financial disclosure. *See id.* at 289–90.

We reached a similar conclusion with respect to the National Gambling Impact Study Commission, an advisory commission with six members appointed by Congress and three by the President. *Applicability of 18 U.S.C. § 208 to National Gambling Impact Study Commission*, 23 Op. O.L.C. 29, 29 (1999) ("*National Gambling Impact Study Commission*"). We emphasized that the commission performed only "information-gathering and advisory functions, which need not be performed by the executive branch." *Id.* at 30 n.2. And we concluded that, because a majority of the commissioners were congressionally appointed and the commission operated like a congressional committee, it was "part of the legislative branch." *See id.* at 30 n.2, 35.

In yet another opinion, we considered the location of the Native Hawaiians Study Commission in order to determine whether the Hatch Act applied to its chairman. *See Applicability of the Hatch Act to the Chairman of the Native Hawaiians Study Commission*, 6 Op. O.L.C. 292, 294 (1982) ("*Native Hawaiians Study Commission*"). The commission there consisted solely of presidential appointees, but it had been initially funded by Senate appropriations and had been "established to advise Congress rather than the President." *Id.* We recognized that "a commission may have dual responsibilities—as in this case, advisory to Congress, fact-finding and reporting to the President—without necessarily losing its character as an executive entity." *Id.* While finding that the structure presented a "difficult question," we concluded "that the circumstances viewed as a whole point[ed] to the Commission as an entity within the Executive Branch." *Id.* at 295.

Finally, on several occasions, this Office has considered the status of commemorative commissions, which have "representatives of multiple branches participating in ceremonial events," but which also must exercise executive authority in the course of administering the events in ques-

tion. *Ronald Reagan Commission*, 33 Op. O.L.C. at 195. Those commissions have included members from the Legislative and Judicial Branches, and in light of "ample historical precedent," we have accepted that "[i]t is not unconstitutional for such commissions to perform advisory functions." *Id.* at 195 & n.1. But to the extent that these commissions perform executive functions—like "exercising operational control over a statutorily prescribed national commemoration"—then the participation of non-executive agents must end. *Id.* at 195–96.

Thus, in 1984, we advised that the Commission on the Bicentennial of the Constitution, whose members included the Chief Justice and congressional leaders, should establish an "executive committee composed of all non-advisory members of the Commission . . . legally responsible for discharging the purely executive functions of the Commission" to accommodate separation of powers concerns. *Appointments to the Commission on the Bicentennial of the Constitution*, 8 Op. O.L.C. 200, 207 (1984) ("*Bicentennial Commission*"). In 2010, we took the same course in advising that the Reagan Centennial Commission—a majority of which comprised members of Congress—could carry out the executive functions of planning and developing commemorative activities to honor President Reagan only by establishing a separate executive committee consisting solely of the Executive Branch members of the commission. *See* Memorandum for Robert F. Bauer, Counsel to the President, from Martin S. Lederman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Administration of the Ronald Reagan Centennial Commission* at 3–4 (May 7, 2010) ("Lederman Memo"). Following the approach of *Bicentennial Commission*, 8 Op. O.L.C. at 207, we construed the statute itself as "limit[ing] the exercise of the purely executive functions of the Commission to the five presidentially appointed commissioners" who would constitute the executive committee. Lederman Memo at 3 (internal quotation marks and citation omitted). With this executive committee in place, we advised that the full commission, with its majority of congressional appointees, was "limited to giving advice." *Ronald Reagan Commission*, 33 Op. O.L.C. at 200. In so doing, we essentially divided the Reagan Centennial Commission into two entities—one executive (consisting solely of Executive Branch representatives) and one advisory (consisting of both Executive Branch and Legislative Branch representatives). We therefore resolved the separation of powers concerns presented by

such a ceremonial commission by cabining the functions of the full commission in a manner consistent with its implicit location in the Legislative Branch. *See also Administration of the John F. Kennedy Centennial Commission*, 41 Op. O.L.C. 1, 1 (2017) (recommending that the John F. Kennedy Centennial Commission adopt the same "structure used to carry out the functions of the Ronald Reagan Centennial Commission").

Previous practice therefore buttresses our conclusion: Every seemingly hybrid commission still must be situated in one and only one branch of our tripartite constitutional structure.[6]

B.

We turn then to the Cyberspace Solarium Commission. Generally, "[t]he status within the government of an office created by statute is a matter of statutory interpretation." *Railroad Retirement Reform Commission*, 13 Op. O.L.C. at 285. But constitutional constraints prevent Congress from assigning purely executive duties to a legislative entity. *See Buckley*, 424 U.S. at 138–39. Because the FY 2019 NDAA did not specify where the Commission would reside, we consider the statutory context, the method of appointment of its members, and the powers that it exercis-

[6] *See also* Statement on Signing the National Defense Authorization Act for Fiscal Year 2020, 2019 Daily Comp. Pres. Doc. No. 880, at 3 (Dec. 20, 2019) (observing with respect to a number of provisions that "establish[ed], reauthorize[d] or add[ed] to the authorities of hybrid commissions or boards," including the Cyberspace Solarium Commission, that commissions with Legislative Branch and Executive Branch appointees "separate from the executive branch" are simply "legislative branch entities"); Statement on Signing the John S. McCain National Defense Authorization Act for Fiscal Year 2019, 2018 Daily Comp. Pres. Doc. No. 533, at 2 (Aug. 13, 2018) ("FY 2019 NDAA Signing Statement") ("While I welcome the creation of this commission, these legislative branch appointees preclude it, under the separation of powers, from being located in the executive branch. My Administration accordingly will treat the commission as an independent entity, separate from the executive branch."); Statement on Signing the National Defense Authorization Act for Fiscal Year 2017, 2016 Daily Comp. Pres. Doc. No. 863, at 3 (Dec. 23, 2016) ("Because the commission contains legislative branch appointees, it cannot be located in the executive branch consistent with the separation of powers."); Statement on Signing the Alyce Spotted Bear and Walter Soboleff Commission on Native Children Act, 2016 Daily Comp. Pres. Doc. No. 695, at 1 (Oct. 14, 2016) ("While I welcome the creation of this Commission, it cannot be located in the executive branch consistent with the separation of powers because it includes legislative branch appointees[.]").

es. Here, the relevant statutory indicia suggested that the Commission was located within the Legislative Branch.

Multiple factors supported this determination. First, the Commission's membership structure suggested that it was located in the Legislative Branch, because "the majority of the Commissioners were congressionally appointed." *National Gambling Impact Study Commission*, 23 Op. O.L.C. at 30 n.2; *see also* FY 2019 NDAA § 1652(b), 132 Stat. at 2141. The presence of members of Congress on the Commission counseled strongly against treating it as an Executive Branch entity. *See NRA Political Victory Fund*, 6 F.3d at 827 (holding that two congressional agents could not serve, even as non-voting members, on the eight-member Federal Election Commission). Members of Congress may neither serve as officers of the United States, *see* U.S. Const. art. I, § 6, cl. 2, nor appoint such officers, *see id.* art. II, § 2, cl. 2. But even for commissions whose members lack the authority of officers of the United States—either because the Legislative Branch appointees perform only advisory roles or the commission itself lacks significant authority under the laws of the United States—locating a commission in the Executive Branch if Congress appoints a majority of the members would raise concerns of congressional aggrandizement and the blurring of the separation of powers. *See, e.g.*, *Separation of Powers*, 20 Op. O.L.C. at 160 n.95. The fact that members of Congress appoint a majority of the members of the Commission thus counseled strongly in favor of the conclusion that it is a Legislative Branch entity.

Second, the nature of the Commission's powers supported this conclusion. The Commission's principal duty was to prepare a report that "define[d] the core objectives and priorities" of national cyber policy and "consider[ed] possible structures and authorities that need to be established, revised, or augmented within the Federal Government" to defend the United States from cyber-attacks. FY 2019 NDAA § 1652(f)(1), (7), 132 Stat. at 2142–43. The Commission authored and submitted the report to Congress without any review from the Executive Branch, other than the four Executive Branch commissioners, who made up a minority of the Commission's fourteen members. *Id.* § 1652(k)(1), 132 Stat. at 2146. The procedure for publication and assessment of the Commission's report also suggested that the report was prepared "principally for Congress' benefit." *Railroad Retirement Reform Commission*, 13 Op. O.L.C. at 289.

While the FY 2019 NDAA required submission of the Commission's final report to several Executive Branch officials in addition to multiple congressional committees, *see* FY 2019 NDAA § 1652(k)(1), 132 Stat. at 2146, the executive officials were provided with the report merely to facilitate their own further responses to Congress. *See id.* § 1652(*l*), 132 Stat. at 2146. Both sets of recommendations—the Commission's report, and the analysis of the executive officials required to respond—were therefore ultimately for Congress's consideration. And any testimony or briefing on the Commission's report was also to be provided to Congress, *see id.* § 1652(k)(2)(B), 132 Stat. at 2146, again indicating that its recommendations were directed toward the Legislative Branch. In this way, the Commission was designed to "function[] much as a congressional committee does when conducting an investigation or drafting a legislative proposal based on the information it has gathered." *National Gambling Impact Study Commission*, 23 Op. O.L.C. at 35.

The Commission exercised no purely executive powers. Indeed, the Commission was expressly given the subpoena power of an agent of Congress; the FY 2019 NDAA authorized the Commission to issue subpoenas and provided that any actions in contempt of its subpoenas should be governed by the statutory procedures applicable to contempt of Congress, 2 U.S.C. §§ 192–194. FY 2019 NDAA § 1652(g)(1)(C). We have previously advised that "[i]f Congress intends [a] Commission to be part of the Executive Branch," then we would expect it to exercise the kind of civil enforcement power given to executive agencies, rather than the contempt powers of Congress. *Proposed Commission on Deregulation of International Ocean Shipping*, 7 Op. O.L.C. 202, 204 (1983). The nature of the Commission's subpoena powers further confirmed that it was a legislative entity.

Finally, the FY 2019 NDAA exempted the Commission from the Federal Advisory Committee Act ("FACA") and Freedom of Information Act ("FOIA") requirements that typically apply to Executive Branch advisory commissions. FY 2019 NDAA § 1652(m), 132 Stat. at 2146. Ordinarily, "any committee" established by statute "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government" is subject to FACA. 5 U.S.C. app. § 3(2). FOIA likewise applies to most executive agencies. 5 U.S.C. § 552; *id.* § 551(1). Congress's choice to exempt the Commission from these re-

quirements, while not dispositive, bore upon the interpretive question. Notably, in the very same act in which it created the Commission, Congress expressly located another advisory commission "in the executive branch" without excepting it from FACA and FOIA requirements. FY 2019 NDAA § 1051(a) (National Security Commission on Artificial Intelligence). That contrast provided an additional indication of the Commission's location in the Legislative Branch.

For the reasons set forth above, we concluded, and advised, that the Commission should be viewed as a Legislative Branch entity.

III.

Our conclusion that the Commission was a Legislative Branch entity had separation of powers implications for the service of its Executive Branch members.[7] We advised that the Executive Branch officials serving on the Commission should act with one unified voice, subject to executive supervision, in advising the Commission. Although robust participation on a commission through the provision of advice, information, and staff and office resources is perfectly appropriate when that work promotes comity and is consistent with the interests of the Executive Branch, we advised that individual executive members should not participate in formal acts of the legislative commission, such as individualized voting or signing the Commission's final report; that they must preserve Executive

[7] The appointment by Congress of Executive Branch officers to a legislative entity presents a different constitutional question from when Congress vests the President with the power to appoint officials to serve on legislative commissions. *See, e.g.*, *Removal of Members of the Commission on Federal Laws for the Northern Mariana Islands*, 7 Op. O.L.C. 95, 102 (1983) (noting that, "[e]ven if we grant that the Commission is an arm of Congress," the President could still remove its members at will if Congress chose to vest appointment power in the President). Here, we addressed the separation of powers concerns that arose when a statute directed presidential appointees with pre-existing Executive Branch ties to serve ex officio in a position within the Legislative Branch. We did not disturb the longstanding historical practice of the President's appointing individuals to offices serving the entire Legislative Branch. *See, e.g.*, *Constitutionality of Bill Creating an Office of Congressional Legal Counsel*, 1 Op. O.L.C. Supp. 384, 389 (1976); *see also* 31 U.S.C. § 703(a)(1) ("The Comptroller General and Deputy Comptroller General are appointed by the President, by and with the advice and consent of the Senate."); 2 U.S.C. § 1801(a)(1) ("The Architect of the Capitol shall be appointed by the President by and with the advice and consent of the Senate for a term of 10 years.").

Branch confidentiality interests when advising the Commission; and that they should comply with commission requests to share Executive Branch resources, outside of the statutory process, only to the extent that the provision of resources would be consistent with Executive Branch interests.

The Executive Branch officers did not serve on the Commission as independent actors, but as representatives of one Executive Branch, which is subject to ultimate supervision by the President. *See* U.S. Const. art. II, § 1, cl. 1 (vesting the President with "*[t]he* executive Power" (emphasis added)); *id.* art. II, § 3 (charging the President with the duty to "take Care that the laws be faithfully executed"); *see also, e.g.*, *Seila Law*, 140 S. Ct. at 2197 ("The entire 'executive Power' belongs to the President alone"); *Myers v. United States*, 272 U.S. 52, 135 (1926) (highlighting that the President "may properly supervise and guide" subordinate officers "in order to secure . . . unitary and uniform execution of the laws"); *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."); *Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring) ("[The Founders] sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many."); *Direct Reporting Requirement*, 32 Op. O.L.C. at 31 ("[S]tatutes that interfere with the President's ability to supervise, directly or through subordinate officials, the Executive Branch's communications with Congress raise serious constitutional concerns."). Therefore, in serving on a Legislative Branch entity, Executive Branch members on the Commission remained agents of the Executive Branch.

We addressed a somewhat analogous situation in connection with the detail of Executive Branch law enforcement agents to congressional committees. There, we observed that when executive officials work for a congressional committee, "[t]he pertinent issue . . . is whether the President's ability to supervise his subordinates in the performance of their executive branch functions is unconstitutionally impaired." *Detail of Law Enforcement Agents to Congressional Committees*, 12 Op. O.L.C. 184, 186 (1988) ("*Detail of Law Enforcement Agents*"). And we warned that

congressional details potentially place executive officials "in the difficult position of serving two masters with conflicting interests—the legislative and executive branches." *Id.* at 184. To counteract these concerns, we advised that the Executive Branch members on detail could perform "only non-law enforcement, advisory functions," and even while performing those functions, they should "faithfully defend the interests of the executive branch" and preserve the confidentiality of Executive Branch information. *See id.* at 187–88.

So too here. In practice, the principle that Executive Branch officials must advance Executive Branch interests limited their participation in the Commission's work in several ways. First, the Executive Branch officials charged with assessing the Commission's final report were advised do so collectively, or at least in coordination with each other, rather than providing independent assessments in their separate capacities. And because members of the Commission were expected to cast their votes individually, we advised that the Executive Branch members should not vote on the final report or on commission decisions to issue subpoenas in the Commission's investigative capacity. Although the Executive Branch members could theoretically have adopted and advanced common positions with respect to matters on which they were expected to vote, the need for the Commission to release its report promptly made it impracticable for them to engage in the kinds of consultations necessary to do so.

This limitation, however, did not necessarily preclude Executive Branch members from robust participation in the formulation of the report. Just as Executive Branch officials may perform "advisory or research" functions while on detail to a congressional committee, *Detail of Law Enforcement Agents*, 12 Op. O.L.C. at 186, they could advise and provide information, expertise, and substantial resources to the Commission. But such input had to be consistent with the Executive Branch's understanding of its own interests. And any contributions to, and assessments of, the Commission's report had to be subject to the supervision of others in the Executive Branch. *Cf. Separation of Powers*, 20 Op. O.L.C. at 174–75 (objecting to requirements that reports be simultaneously submitted to the Executive and Legislative Branches, because such requirements "increase congressional leverage on the President and other officials of the executive branch" and thus potentially "interfer[e] with the President's fulfillment of his obligations under the Take Care Clause").

We therefore advised that the Executive Branch members could serve an advisory role and articulate a uniform position on the Commission's work, but they should not formally vote or sign the legislative commission's final report. We further advised that the Executive Branch officers assigned the statutory role of providing assessments of the Commission's report to Congress, *see* FY 2019 NDAA § 1652(*l*), 132 Stat. at 2146, did not act in their individual capacities, but rather remained subject to the ordinary mechanisms by which the President supervises and coordinates the position of the Executive Branch.

In addition, we advised that all Executive Branch members and staff should maintain the confidentiality of Executive Branch information when sharing their information and expertise with the Commission. Executive agencies should treat a legislative commission's requests for confidential Executive Branch information in the same way that the Executive Branch generally responds to requests for information from Congress. Like a congressional committee, the Commission was empowered to obtain the information necessary for its work through hearings, voluntary requests, and subpoenas. *See id.* § 1652(g)(1)(A)–(C), 132 Stat. at 2143. Executive agencies should similarly seek to accommodate legitimate requests consistent with the established accommodation process. *See, e.g.*, *Am. Tel. & Tel. Co.*, 567 F.2d at 127 (requiring each branch to "seek optimal accommodation through a realistic evaluation of [their respective] needs . . . in the particular fact situation"); *Attempted Exclusion of Agency Counsel from Congressional Depositions*, 43 Op. O.L.C. 131, 150 (2019) (describing "the constitutional balance" of providing Congress with information essential to oversight while preserving Executive Branch constitutional prerogatives); *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); *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 159 (1989); *see also Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2031 (2020) (referring to this practice with approval and noting ruefully that "Congress and the President [had] maintained this tradition of negotiation and compromise—without the involvement of this Court—until the present dispute"). And while the Commission may have had a legitimate need to obtain classified or sensitive national security information for its work, its requests needed to be measured like any other Legislative

Branch request for sensitive information, and they remained subject to the President's ultimate control over such information. *See, e.g.*, *Dep't of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

Finally, Executive Branch entities were advised that they should treat the FY 2019 NDAA's provisions requiring them to provide administrative assistance to the Commission (in the form of resources such as office space, computer facilities, and staff) as discretionary. Congress, of course, may appropriate funds to itself for the performance of its duties and the support of its agents. The anti-aggrandizement principle of the separation of powers, however, prohibits a congressional body from using any means other than the enactment of legislation to order the Executive Branch to execute legislation. *See Bowsher*, 478 U.S. at 733 ("[O]nce Congress makes it choice in enacting legislation, its participation ends."). As a Legislative Branch entity, the Commission could not be given the power to compel Executive Branch departments to provide office space, administrative support, and supplies on a nonreimbursable basis, *see* FY 2019 NDAA § 1652(g)(4), 132 Stat. at 2144.[8] *See, e.g.*, Letter for Heidi Heitkamp & Lisa Murkowski, U.S. Senate, from Stephen E. Boyd, Assistant Attorney General, Office of Legislative Affairs, *Re: Implementation of the Alyce Spotted Bear and Walter Soboleff Commission on Native Children* at 2 (Aug. 10, 2018) ("In order to avoid a constitutional issue, the Department will treat as permissive the directives to provide administrative support and detailees[.]"). Accordingly, we advised that the Executive Branch should provide the Commission with Executive Branch re-

[8] Several of the FY 2019 NDAA provisions providing for commission support used the mandatory "shall," rather than the discretionary "may." *See, e.g.*, FY 2019 NDAA § 1652(g)(3)(B), 132 Stat. at 2144 (providing that executive entities "*shall, to the extent authorized by law*, furnish" information to the Commission (emphasis added)); *id.* § 1652(g)(4)(A), 132 Stat. at 2144 ("The Secretary of Defense *shall provide* to the commission, on a nonreimbursable basis, such administrative services, funds, staff, facilities, and other support services *as are necessary for the performance of the Commission's duties*[.]" (emphases added)); *id.* § 1652(g)(4)(D), 132 Stat. at 2144 ("The Commission *shall receive* the full and timely cooperation of any official, department, or agency of the United States Government *whose assistance is necessary, as jointly determined by the [Commission] co-chairs*[.]" (emphases added)). But these provisions nonetheless authorized officials to exercise some judgment in determining whether certain resources would be made available, based on an analysis of whether the support was "necessary" or "authorized by law." To the extent that those provisions denied such discretion, they were required to yield to constitutional separation of powers principles.

sources—such as office space, access to computer networks, and e-mail addresses—only if it concluded that providing access to a resource would sufficiently advance Executive Branch interests to outweigh any potential risks from the resulting commingling of executive and legislative resources.

More specifically, we advised that the sharing of Executive Branch computer networks or the use of Executive Branch e-mail addresses to conduct commission business should be done in a manner that would not suggest an Executive Branch imprimatur. And if administrative assistance was to take the form of detailing personnel to the Commission, executive agencies were encouraged to consider whether the Executive Branch benefits to be gained by the personnel's service to the Commission would be sufficiently significant to outweigh any potential confidentiality or accountability considerations raised by their service to a legislative entity. *See Detail of Law Enforcement Agents*, 12 Op. O.L.C. at 185 (providing that, in detailing law enforcement agents to congressional committees on a voluntary basis, the Department should consider "whether the benefits to be gained by the law enforcement agencies are sufficiently extraordinary to outweigh the separation of powers and ethical concerns raised by the detail").

IV.

For the reasons set forth above, we concluded that the Commission had to be located within one branch of the tripartite federal constitutional structure. In addition, we advised that the statutory structure and context indicated that the Commission was most appropriately viewed as a Legislative Branch entity. Accordingly, as a constitutional matter, the Executive Branch members of the Commission were limited in the ways they could participate in the Commission's work; they were required to perform their commission responsibilities as Executive Branch representatives, consistent with the Executive Branch's confidentiality and policy interests.

STEVEN A. ENGEL
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Office of Legal Counsel

The Logan Act

The Logan Act, which bars U.S. citizens from engaging in certain communications with foreign governments without authority of the United States, was constitutional when enacted, and unless or until repealed by Congress, remains valid and enforceable.

December 18, 2020

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

In 1798, at the outset of the Quasi-War, Dr. George Logan traveled to France carrying a letter of introduction from Vice President Jefferson and what many viewed to be a message from the political opponents of President Adams.[1] President Adams believed that Logan's mission both undercut his constitutional authority over foreign affairs and encouraged the French to delay peace negotiations pending the upcoming U.S. presidential election. In a question that has been repeated in substance on multiple occasions since, the President asked: "Is this constitutional, for a party of opposition, to send embassies to foreign nations to obtain their interference in elections?" To T. Pickering, Secretary of State (Nov. 2, 1798), *in* 8 *The Works of John Adams* 615, 615 (Charles Francis Adams ed., 1853). Addressing the President's concerns, Congress adopted the Logan Act, which barred U.S. citizens from conducting private diplomacy without the authorization of the United States. Act of Jan. 30, 1799, ch. 1, 1 Stat. 613 (codified as amended at 18 U.S.C. § 953).

Well over two centuries later, Congress has kept the law on the books, even while the Logan Act remains in search of its first criminal conviction. Far from ignoring it, Congress has repeatedly codified, re-codified, and amended the law, most recently in 1994, and has relied on it as a model for additional legislation. The Supreme Court has cited it while construing other statutes. The State Department has administratively enforced its provisions. And in the political arena, many have invoked it while urging enforcement against unofficial diplomatic efforts with which

[1] Under the original constitutional framework, the runner-up in the electoral college became Vice President, which created a situation (rectified by the Twelfth Amendment) whereby the Vice President could be a political opponent of the President. In 1798, Vice President Jefferson was the leader of the Democratic-Republican party and the head of the political opposition to the Adams Administration.

they disagree. Others have periodically questioned the law's constitutionality, but in the absence of prosecutions, the courts have lacked occasion to definitively settle that question.

The Department of Justice has a duty to faithfully enforce the criminal statutes validly enacted by Congress. If constitutional, the Logan Act is one of those laws. But with limited precedents available, it may not always be easy for Department officials to know what to investigate. To provide guidance on these matters, you have asked us to examine the requirements of the Logan Act and to address whether the statute is constitutional on its face.

In its current form, the Logan Act bars a citizen of the United States (1) "without authority of the United States" (2) from "directly or indirectly commenc[ing] or carr[ying] on any correspondence or intercourse with any foreign government" (3) "with intent to influence the measures or conduct of any foreign government . . . in relation to any disputes or controversies with the United States, or to defeat the measures of the United States." 18 U.S.C. § 953. We believe that the statute, properly construed, is constitutional. Congress adopted the statute as a permissible exercise of its authority under the Necessary and Proper Clause to authorize prosecutions of those who seek to "usurp the Executive authority of this Government." 9 Annals of Cong. 2489 (1798–99) (resolution introduced by Rep. Griswold). Although the last indictment under the statute of which we are aware occurred more than 150 years ago, "[t]he failure of the executive branch to enforce a law does not result in its modification or repeal." *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113–14 (1953).

We also believe that the statute is consistent with the constitutional guarantees of due process and free speech. The Supreme Court has made clear that some ambiguity does not, standing alone, render a statute unduly vague under the Fifth Amendment. *See, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1214 (2018); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 21 (2010). The Logan Act's terms are not only susceptible of an intelligible construction, but its intent requirement also minimizes the risk of inadvertent violations. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007). And while the Logan Act surely regulates some forms of expression, it does not seek "to suppress ideas or opinions in the form of 'pure political speech,'" and leaves individuals free to "say anything they wish

on any topic." *Humanitarian Law Project*, 561 U.S. at 25–26. Its restrictions are "carefully drawn to cover only a narrow category of speech," *id.* at 26, namely communications with foreign governments made with an intent either to influence their activities on matters concerning U.S. diplomacy or to defeat U.S. endeavors. The statute is not materially different from other laws that regulate the interactions between U.S. citizens and foreign actors. We therefore conclude that the Logan Act falls within Congress's constitutional authority and, unless or until repealed, remains enforceable.

I.

A.

The Logan Act was enacted during a time of intense partisan strife over the young American Republic's relations with the revolutionary French government. Although the King of France had been an ally during the Revolutionary War, the United States maintained its neutrality during the wars of the French Revolution, declining to side with the French over the British. Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815*, at 181–89 (2009) ("Wood"); Stanley Elkins & Eric McKitrick, *The Age of Federalism* 336–41 (1993) ("Elkins & McKitrick"). In 1796, the French Directory authorized the seizure of American merchant ships trading with the British. Wood at 239; Elkins & McKitrick at 537–39. Seeking to resolve the conflict, President Adams sent envoys to Paris, but they were rebuffed and insulted by the French foreign minister, Talleyrand—a failed mission that was reported back in diplomatic correspondence. Wood at 240–43; Elkins & McKitrick at 549–50, 569–79. This so-called "XYZ Affair" inflamed anti-French sentiment within the United States, which drifted into the Quasi-War, a series of naval battles primarily in the Caribbean, while the Federalist allies of President Adams considered congressional measures to authorize a full-blown war against France. Wood at 243–46; Elkins & McKitrick at 581–90; *see also* Charles Warren, Assistant Attorney General, *Memorandum on the History and Scope of the Laws Prohibiting Correspondence with a Foreign Government, and Acceptance of a Commission to Serve a Foreign State in War* (1915), *reprinted in* S. Doc. No. 64-696, at 4 (1917) ("Warren Memorandum").

Against this backdrop, Dr. George Logan, a Pennsylvania Republican, sailed to France on an unofficial diplomatic mission in 1798. *See* Frederick B. Tolles, *George Logan of Philadelphia* 153–56 (1953) ("Tolles"). Logan carried a letter of introduction from Vice President Jefferson, and he was warmly greeted by the French Directory, which by then desired to avoid an expansion of the existing conflict. *Id.* at 155–56, 161–67.[2] Logan returned to the United States proclaiming the message that France sought a diplomatic resolution. *Id.* at 174–84.

Although Logan maintained that his sole aim was to avoid war, and that he disclaimed any public authority, President Adams and his political supporters believed Logan had acted with partisan intent. As this Office has explained, "Logan's mission was regarded by Congress as giving the French Government a choice whether to negotiate with the Federalist Party in power or the Republican Party who might assume power after the election of 1800, and thus as undercutting the authority of the President's envoys." Memorandum for Edwin O. Guthmann, Special Assistant for Public Information, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Tractors for Cuba* at 1 (June 20, 1961) ("Katzenbach Memorandum"). President Adams expressed the same sentiment, writing to Secretary of State Pickering that "[t]he object of Logan in his unauthorized embassy seems to have been, to do or obtain something which might give opportunity for the 'true American character to blaze forth in the approaching elections.'" To T. Pickering, Secretary of State, *in* 8 *The Works of John Adams* at 615; *see also* 9 Annals of Cong. 2499 (1798–99) (statement of Rep. Dana) ("[T]his unauthorized correspondence must have led to an opinion in the French Government that they had numerous friends in this country, and have encouraged them in their measures against us."); *id.* at 2504 (statement of Rep. Harper) ("It was wholly of a political nature, and arose wholly from political considerations. It was, in fact, a plain and direct interference with the powers of Government."); *id.* at 2716 (statement of Rep. Bayard) ("He went to represent a party against the Government.").

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[2] Logan also carried letters from Thomas McKean, another Republican and Chief Justice of Pennsylvania; Philippe-André Joseph de Létombe, French consul general and French consul in Philadelphia; and possibly Edmond Charles Genet, former French minister to the United States. *See* Tolles at 155–56; To T. Pickering, Secretary of State, *in* 8 *The Works of John Adams* at 615.

President Adams and Members of Congress viewed Logan's unofficial mission not merely as a partisan affront but also as a threat to the Executive Branch's control over the conduct of U.S. diplomacy. The Senate sent a message to the President objecting to France's "neglecting and passing by the constitutional and authorized agents of the Government" and sending diplomatic messages "through the medium of individuals without public character or authority." Address of the Senate to John Adams, President of the United States (Dec. 11, 1798), *in* 1 *A Compilation of the Messages and Papers of the Presidents: 1789–1897* ("*Messages and Papers*") 275, 276 (James D. Richardson ed., 1896). President Adams agreed, advising that "the officious interference of individuals without public character or authority is not entitled to any credit, yet it deserves to be considered whether that temerity and impertinence of individuals affecting to interfere in public affairs between France and the United States . . . ought not to be inquired into and corrected." Reply of the President (Dec. 12, 1798), *in* 1 *Messages and Papers* 277, 277.

Shortly thereafter, Representative Roger Griswold introduced a resolution in the House of Representatives to authorize a committee to draft a bill to bar interference in Executive Branch diplomacy. *See* 9 Annals of Cong. at 2488–89. As he explained, the "object" of the measure would be "to punish a crime which goes to the destruction of the Executive power of the Government," meaning "that description of crime which arises from an interference of individual citizens in the negotiations of our Executive with foreign Governments." *Id.* Such interference, he argued, usurped a power that "has been delegated by the Constitution to the President; and . . . the people of this country might as well meet and legislate for us, or erect themselves into a judicial tribunal, in place of the established Judiciary, as that any individual, or set of persons, should take upon him or themselves this power, vested in the Executive." *Id*. at 2494.[3] The House

[3] *See also, e.g.*, 9 Annals of Cong. at 2494 (statement of Rep. Griswold) ("I think it necessary to guard by law against the interference of individuals in the negotiation of our Executive with the Governments of foreign countries."); *id.* at 2499 (statement of Rep. Dana) ("It was not intended, by this resolution, to provide against all correspondence with foreign Governments, but against such only as ought to be carried on by the Executive; and when an individual undertakes to correspond in such a manner, it is then, and then only, that he usurps the Executive authority."); *id.* at 2521 (statement of Rep. N. Smith) ("But, it was said, the interference of an individual could not be improper, because he could not usurp the Executive authority. If the gentleman . . . will give himself the trouble

then authorized a committee to draft the bill, extending "penalties . . . to all persons, citizens of the United States, who shall usurp the Executive authority of this Government, by commencing or carrying on any correspondence with the Governments of any foreign Prince or State, relating to controversies or disputes which do or shall exist between such Prince or State and the United States." *Id.* at 2489, 2545–46.

After the committee drafted the bill, the House extensively debated the measure. Again, members described the law as essential protection against interference with the Executive Branch's diplomatic authority. *See, e.g.*, *id.* at 2588 (statement of Rep. Bayard) ("The object of this law is to prevent these private interferences altogether, since the Constitution has placed the power of negotiation in the hands of the Executive only."); *id.* at 2598 (statement of Rep. Edmond) ("[I]t will be wise and prudent, at this time, to frame a law to prevent individuals from interfering with the Executive authority, in a manner injurious to the community."); *id.* at 2607 (statement of Rep. Griswold) ("Its object must be known to be to prevent all interference with the Executive power in our foreign intercourse."); *id.* at 2637 (statement of Rep. Rutledge) ("[I]n all well constituted Governments, it is a fundamental principle, that the Government should possess exclusively the power of carrying on foreign negotiations."); *id.* at 2677 (statement of Rep. Isaac Parker) ("This bill . . . is founded upon the principle that the people of the United States have given to the Executive Department the power to negotiate with foreign Governments, and to carry on all foreign relations, and that it is therefore an usurpation of that power for an individual to undertake to correspond with any foreign Power on any dispute between the two Governments, or for any State Government, or any other department of the General Govern-

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of reading the Constitution, he will find that the carrying on of all foreign intercourse is placed in the hands of the Executive, as fully as the Legislature is possessed of all legislative power, or the Judiciary, of judicial. When an individual, therefore, attempts to negotiate with a foreign Government on national concerns, he is certainly doing the business of the Executive."); *id.*at 2544–45 (statement of Rep. N. Smith) ("It is true the Government would not be bound to adopt any of these [private] treaties, but they will be obliged to sit down and form an opinion on them. Thus, the power of carrying on foreign negotiations would be taken from the Executive, and placed in the hands of any individual who might choose to enter upon the business, which would be defeating a power placed in the President by the Constitution of the United States, and which is so guarded that even he cannot exercise it without the concurrence of the Senate.").

ment, to do it."). The House thereafter adopted the bill on January 17, 1799. *Id.* at 2721. The Senate approved the measure the next week, 8 Annals of Cong. 2205–06 (1799), and the President signed it into law on January 30, 1799, 1 Stat. 613.

B.

In its original form, the Logan Act prohibited a U.S. citizen, "without the permission or authority of the government of the United States," from "commenc[ing], or carry[ing] on, any verbal or written correspondence or intercourse with any foreign government" with "intent to influence the measures or conduct of any foreign government . . . in relation to any disputes or controversies with the United States, or defeat the measures of the government of the United States." 1 Stat. at 613. A violation was punishable by a sentence of imprisonment of "not less than six months, nor exceeding three years," and a fine of up to $5,000. *Id*. Over the past two centuries, Congress has repeatedly revisited the Logan Act, all the while keeping that prohibition in place.

Congress first amended the statute in the 1870s in the course of adopting the Revised Statutes of the United States. *See* Rev. Stat. § 5335 (1st ed. 1875), 18 Stat. pt. 1, at 1041. In 1909, in the course of revising the federal penal code and otherwise "omit[ting] redundant and obsolete enactments" and "embod[ying] in the revision such changes in the substance of existing law as . . . were necessary and advisable," S. Rep. No. 60-10, pt. 1, at 6 (1908), Congress made minor amendments that included extending the statute's reach to all territory subject to the jurisdiction of the United States, *see* Pub. L. No. 60-350, § 5, 35 Stat. 1088, 1088–89 (1909); *see also* H.R. Rep. No. 80-304, at 3 (1947) (explaining that the Criminal Code of 1909 "omitted redundant and obsolete laws").[4] Congress re-codified the Logan Act in 1926 as section 5 of title 18 in the newly formed U.S. Code. Pub. L. No. 69-440, 44 Stat. pt. 1, at 459

[4] The Logan Act previously applied to "[e]very citizen of the United States, whether actually resident or abiding within the same, or in any foreign country." Rev. Stat. § 5335. The 1909 amendments changed that phrase to "[e]very Citizen of the United States, whether actually resident or abiding within the same, *or any place subject to the jurisdiction thereof*, or in any foreign country." Pub. L. No. 60-350, § 5, 35 Stat. at 1088 (emphasis added). Senator Bacon specifically raised the prospect of omitting the Logan Act from the recodification. 42 Cong. Rec. 1531–33 (1908).

(1926). Six years later, Congress amended the law to implement grammatical changes recommended by the Attorney General. Pub. L. No. 72-96, 47 Stat. 132 (1932); *see also* H.R. Rep. No. 72-1045, at 1 (1932) (quoting a letter from Attorney General William Mitchell); S. Rep. No. 72-380, at 1 (1932) (same).

In 1948, Congress again amended the Logan Act, in connection with a general revision and codification of title 18, *see* Pub. L. No. 80-772, § 953, 62 Stat. 683, 744 (1948), and moved the statute to its current section, 18 U.S.C. § 953. The House Report described the bill as making "[m]inor changes of arrangement and in phraseology" to the Logan Act and omitting an explicit reference to those who counsel, advise, or assist in a violation, because title 18's definition of a "principal" would now cover such persons. H.R. Rep. No. 80-304, at A76. The House Report separately observed that the recodification had dropped several federal offenses that were now "obsolete," or "superseded by later law," *id.* at A233, but the Logan Act was not among the deleted offenses. Most recently, as part of the Violent Crime Control and Law Enforcement Act of 1994, Congress amended the statute to eliminate a $5,000 statutory cap on the fine for a violation. Pub. L. No. 103-322, sec. 330016(1)(K), § 953, 108 Stat. 1796, 2147.

Congress has not only affirmatively retained the Logan Act, but also rejected or failed to act on numerous attempts at repeal. In 1802, the House of Representatives first considered repealing the measure along with other initiatives from the Adams Administration, but the proposal was defeated. *See* 11 Annals of Cong. 185–87 (1802). Attempts to repeal the Logan Act have occurred periodically ever since, including earlier this year. *See, e.g.*, H.R. 6784, 116th Cong. (2020) (attempted repeal); H.R. 7269, 96th Cong. (1980) (same); S. 762, 55th Cong. (1897) (same); S. 1483, 54th Cong. (1896) (same); *see also* H.R. 6511, 114th Cong. (2016) (attempt to amend the Logan Act to clarify its application to the President-elect or anyone acting on the President-elect's behalf).

In 1977, the Senate debated and rejected an effort to repeal the Logan Act as part of a broader congressional effort to revise title 18 of the U.S. Code. *See* S. 1437, 95th Cong. (as reported by S. Comm. on the Judiciary, Nov. 15, 1977). The Department of Justice expressly supported the repeal of the Logan Act. *See* Letter for Paul Simon, U.S. House of Representatives, from Denis J. Hauptly, Task Force on Criminal Code Revision,

Office for Improvements in the Administration of Justice, U.S. Dep't of Justice, at 1 (June 7, 1978) ("Hauptly Letter"), *in Revision of the Federal Criminal Code: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 96th Cong. 3277, 3277 (1982). After Senator Edward Kennedy introduced the title 18 revision, Senator James Allen objected to the removal of the Logan Act as "an important omission." 124 Cong. Rec. 1367 (1978). Senator Kennedy responded that only "archaic" provisions were to be dropped, such as the crime of "seducing a female passenger aboard a ship, the Logan Act, and so forth," but Senator Allen retorted, "[t]he Senator thinks that ought to be permitted?" *Id*. Senator Allen introduced an amendment to retain the Logan Act, because without it "every man in the country or every woman in the country would be a secretary of state," and because the law serves as "a deterrent to individuals, whether they be in an official capacity, outside of the State Department or the President, from seeking to carry on foreign negotiations." *Id.* at 1371. Senator Allen specifically objected to the actions of "some Senators going abroad and, apparently, seeking to advocate policies contrary to the policy of the U.S. Government." *Id.* Faced with this objection, Senator Kennedy demurred, and the Senate agreed to restore the Logan Act to the proposed revision. *Id.* at 1371, 1457. Ultimately, the bill to revise and recodify title 18 lapsed at the end of the 95th Congress. Other attempts to repeal the Logan Act as part of a recodification of title 18 fell short as well. *See, e.g.*, S. 1630, 97th Cong. (as referred to S. Comm. on the Judiciary, Sept. 17, 1981); H.R. 6915, 96th Cong. (1980) (as referred to H. Comm. on the Judiciary, Mar. 25, 1980); S. 1722, 96th Cong. (as reported by S. Comm. on the Judiciary, Jan. 17, 1980).

Beyond retaining the Logan Act in the federal code, Congress has also relied on the statute when drafting new laws. Congress added the Logan Act to the criminal code for the governments of the Louisiana Territory, Act of Mar. 26, 1804, ch. 38, § 7, 2 Stat. 283, 285, and the Territory of Florida, Act of Mar. 30, 1822, ch. 13, § 9, 3 Stat. 654, 657. In 1863, Congress enacted legislation that, in the words of Senator Charles Sumner, was "somewhat similar in character" to the bill enacted "during the troubles between the United States and the Republic of France." Cong. Globe, 37th Cong., 3d Sess. 214–15 (1863). The legislation applied the Logan Act's substantive prohibition to correspondence or intercourse "with the present pretended rebel Government," the Confederacy. Act of

Feb. 25, 1863, ch. 60, § 1, 12 Stat. 696, 696. Following the attack on the RMS *Lusitania* that precipitated U.S. entry into World War I, Congress adopted a provision "[t]o punish acts of interference with the foreign relations . . . of the United States," Pub. L. No. 65-24, 40 Stat. 217, 217 (1917), prohibiting false statements under oath "in relation to any dispute or controversy between a foreign government and the United States," when the person knows or has reason to believe the statement "will, or may be used to influence the measures or conduct of any foreign government . . . to the injury of the United States," *id.* tit. VIII, § 1, 40 Stat. at 226 (codified as amended at 18 U.S.C. § 954). That provision, too, tracked the Logan Act. *See* Dep't of Justice, *Recommendations by the Attorney General for Legislation Amending the Criminal and Other Laws of the United States with Reference to Neutrality and Foreign Relations* 22 note (1916) ("The phraseology used in the bill submitted herewith is substantially copied from that used in section 5 of the Federal Penal Code, which was originally known as the Logan Act.").

C.

Although Congress has maintained the Logan Act in substantially the same form since 1799, no one has yet been convicted of violating it. The United States has charged two people under the statute, and a court-martial convicted a service member of a parallel offense. Yet despite the scant prosecution history, the statute has never been a dead letter. To the contrary, it has been repeatedly relied upon by federal courts in construing other statutes, administratively enforced by the State Department, and invoked in too many political debates to mention.

1.

The first Logan Act indictment of which we are aware came shortly after the statute's enactment. In 1803, a grand jury indicted a Kentucky farmer, Francis Flournoy, for writing an article in a Frankfort, Kentucky, newspaper in support of an alliance between an independent Western United States and France. Charles Warren, *Odd Byways in American History* 168–76 (1942). The article railed against oppression by Flournoy's "native rulers, the Eastern Americans," whom he considered "inimical to [the] prosperity and happiness" of the other states and territo-

ries. A Western American, Letter to the Editor, Guardian of Freedom, Mar. 2, 1803, at 1, 2. Speaking in favor of France, he argued "that 'tis better to have a friend for a master . . . than an enemy." *Id.* Flournoy was subsequently indicted for violating the Logan Act. *See* Warren, *Odd Byways in American History* at 173–74 (reprinting the indictment of Flournoy). But he apparently fled Kentucky, and no further prosecution followed. *See id.* at 174–75.

That same year, a Senate committee recommended that the Jefferson Administration pursue criminal charges against several prominent American lawyers who had advised the Spanish government with respect to French condemnations of U.S. ships in Spanish ports. Charles Pinckney, the U.S. minister to Spain, reported that Spain had relied on the legal opinions of those lawyers in rebuffing his efforts to compensate U.S. citizens; Pinckney included the opinions in question with his correspondence. From Charles Pinckney (Aug. 2, 1803), *in* 5 *The Papers of James Madison: Secretary of State Series* 260, 265–68 (David B. Mattern et al. eds., 2000); Mr. Pinckney to the Secretary of State (Aug. 2, 1803), *in* 2 *American State Papers: Foreign Relations* ("*American State Papers*") 597, 598–99 (1832).[5] Both Secretary of State Madison and Minister Pinckney believed that the lawyers' assistance had violated the Logan Act.[6] After President Jefferson reported the matter to the Senate, *see* To

[5] *See* Jared Ingersoll, William Rawle, J.B. McKean, & P.S. Duponceau, Abstract Question (Nov. 15, 1802), *in* 2 *American State Papers* 605; Edward Livingston, Answer of the Attorney General of the District of New York to the Same Question (Nov. 3, 1802), *in* 2 *American State Papers* 605.

[6] *See* To Charles Pinckney (Feb. 6, 1804), *in* 6 *The Papers of James Madison: Secretary of State Series* 438, 440 (Mary A. Hackett et al. eds., 2002) ("It was probably unknown to the Spanish Government that the lawyers in giving the opinion to which it attaches so much value, violated a positive statute of their own Country forbidding communications of any sort with foreign Governments or Agents on subjects to which their own Government is a party[.]"); From Charles Pinckney (Apr. 8, 1804), *in* 7 *The Papers of James Madison: Secretary of State Series* 12, 16 (David B. Mattern et al. eds., 2005) ("Some of the inclosures, & particularly the Gentlemen of the Laws opinions, will no doubt surprise you, so far at least as respects their consenting to give any opinion at all. I recollected that a few years since, a Question had arisen, how far a Citizen had a right, or ought to interfere in questions depending between, or in negociation with a foreign Government & their own, & that a Law had been passed about it, but not being able to find the Law in the Collection here, . . . I could not exactly describe its extent, nor could I say whether it was still in force." (footnote omitted)).

the Senate of the United States (Dec. 21, 1803) (with attachments), *in* 2 *American State Papers* 596, 596–608, a Senate committee opined that the lawyers had violated the statute, 1 *Journal of the Executive Proceedings of the Senate of the United States of America* 468, 468 (1828) ("[Y]our committee noticed certain unauthorized acts and doings of individuals, contrary to law, and highly prejudicial to the rights and sovereignty of the United States, tending to defeat the measures of the government thereof[.]"). The committee recommended requesting that the President seek the Attorney General's opinion whether the evidence supported prosecution, and, if so, commencing a prosecution. *Id.* at 469–70. The full Senate never acted on the resolution, with one Senator indicating that it was "not . . . within the province of their duty to do so." *Id.* at 470. And the Jefferson Administration did not otherwise move forward with a prosecution.[7]

Another Logan Act indictment came in 1852, when a grand jury indicted Jonas Phillips Levy for writing a letter to President Arista of Mexico advocating the rejection of a treaty negotiated between the United States and Mexico. *See* General Observations Relative to the Tehuantepec Route and the Garay Grant (June 20, 1853), *in* 9 *Diplomatic Correspondence of the United States: Inter-American Affairs: 1831–1860* ("*Diplomatic Correspondence*") 135 n.1 (William R. Manning ed., 1937).[8] The treaty

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[7] There are several other instances in which the Jefferson Administration considered potential Logan Act prosecutions. *See, e.g.*, From Jacob Wagner (Sept. 24, 1805), *in* 10 *The Papers of James Madison: Secretary of State Series* 370, 371 (Mary A. Hackett et al. eds., 2014) ("I have looked at the Logan Act and have satisfied myself that it could not be made to bear upon the purchasers at N. Orleans of the W. Florida lands."); To Levi Lincoln (June 24, 1804), *in* 43 *The Papers of Thomas Jefferson* 642, 643 (James P. McClure ed., 2017) ("Thus it seems a citizen invites a belligerent to come on our coast to protect a commerce, in which he is interested, from the other belligerent. [A]nother citizen may with equal right, to protect his commerce with the other belligerent, invite him also on our coast, and thus make that the principal theater of war, and defeat all the measures of the government for the preservation of peace and neutrality. [I]s not this a criminal correspondence under the act of Jan. 1799?"); From Thomas Jefferson (Aug. 28, 1801), *in* 2 *The Papers of James Madison: Secretary of State Series* 70, 71 (Mary A. Hackett et al. eds., 1993) ("You will be sensible that in [Joseph Allen Smith's] assumption of diplomatic functions he has not shewn much diplomatic subtlety. He seems not afraid of Logan's law in our hands."). During the Madison Administration, Attorney General Richard Rush advised that the Logan Act did not itself prohibit commerce with British ships along the American coast. *See* Richard Rush, Attorney General, *Intercourse with the Enemy* (July 28, 1814), *in* 28 Annals of Cong. 1821, 1823 (1814–15) (app.).

[8] As reported in the *Richmond Enquirer*:

would have authorized a group of U.S. citizens to build a railway connecting the Gulf of Mexico and the Pacific Ocean, but Levy had procured a separate authorization from the Mexican Congress that he encouraged President Arista to sign. *See* Tomas P. Levy to Mariano Arista, President of Mexico (Nov. 7, 1851), *in* 9 *Diplomatic Correspondence* 439 n.1. He warned President Arista "of the pending danger, of your Govt and loss of your Territory" if Mexico ratified the treaty. *Id.*; *see* Robert P. Letcher, United States Minister to Mexico, to Daniel Webster, Secretary of State of the United States (Dec. 14, 1851), *in* 9 *Diplomatic Correspondence* 438. With the support of Secretary of State Daniel Webster, the United States indicted Levy for violating the Logan Act. *See* Daniel Webster, Secretary of State of the United States, to Robert P. Letcher, United States Minister to Mexico (Jan. 31, 1852), *in* 9 *Diplomatic Correspondence* 109. The prosecution later moved to dismiss the indictment, however, after President Arista refused to cooperate and share Levy's letter. *See* General Observations Relative to the Tehuantepec Route and the Garay Grant, *in* 9 *Diplomatic Correspondence* at 136 n.1; Robert P. Letcher, United States

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> Mr. Jonas P. Levy, who has been arrested on the charge of holding political correspondence with the Mexican Government, and endeavoring to defeat the purposes of the U. States, claims to have himself purchased from the Mexican Government the right to construct and use a road across the Isthmus of Tehuantepec. Therefore, he no doubt attempted to defeat the ratification of the Tehuantepec Treaty, which, as is supposed by our Government, will enable the Tehuantepec Company to go on with their enterprize.
>
> . . . .
>
> Mr. Levy, it appears, deemed it quite necessary to the validity of his own alleged grant, that the Tehuantepec treaty should be rejected. It is quite probable that Mr. Levy had some influence in the defeat of the treaty, and it may cost the Tehuantepec company a considerable sum to get over the difficulty.
>
> Some weeks ago, a notice was officially published purporting to be a warning to American citizens that they rendered themselves liable to punishment, under existing laws, by intriguing with foreign governments against the objects on this government. The case of Levy was then in view.

U.S. Supreme Court and Mrs. Gaines' Cause—Letter of Lieut. Maury—Mr. Levy and the Mexican Government—The Tehuantepec Treaty, Rich. Enquirer, Feb. 6, 1852, at 2. The newspaper article described the statute as "an obsolete law of 1799" and advised that a North Carolina congressman, Abraham Venable, "will bring a bill to repeal the law." *Id.*; *see also The Arrest of Mr. Levy—History of the Case—The Nicaragua Route*, N.-Y. Daily Times, Feb. 5, 1852, at 3; S. Press, Feb. 5, 1852, at 2 (reprinting the indictment of Levy).

Minister to Mexico, to Daniel Webster, Secretary of State of the United States (Apr. 4, 1852), *in* 9 *Diplomatic Correspondence* 486; *see also* Jeremy Duda, *A Foreign Affair*, History Today: History Matters (June 13, 2017), https://www.historytoday.com/history-matters/foreign-affair.

During the Civil War, there were a number of recorded instances in which Logan Act prosecutions were considered against U.S. citizens for engaging in diplomatic communications with the United Kingdom. The *Federal Cases* reporter records that Judge Peleg Sprague of the District of Massachusetts charged juries investigating potential Logan Act violations. In 1861, he observed that "a member of the British parliament declared, in the most public manner, that he had received many letters from the Northern states of America, urging parliament to acknowledge the independence of the Southern Confederacy." *In re Charge to Grand Jury—Treason & Piracy*, 30 F. Cas. 1049, 1050–51 (C.C.D. Mass. 1861) (No. 18,277). The Logan Act "was especially designed to prevent such unwarrantable interference with the diplomacy and purposes of our government." *Id.* at 1051. He similarly charged in 1863: "We have seen it stated in such form as to arrest attention, that unauthorized individuals have entered into communication with members of parliament and foreign ministers and officers, in order to influence their conduct in controversies with the United States, or to defeat the measures of our government." *In re Charge to Grand Jury—Treason*, 30 F. Cas. 1042, 1046 (D. Mass. 1863) (No. 18,274). "It ought to be known," he continued, "that such acts have long been prohibited by law." *Id.* We have not identified any record, however, of either grand jury's bringing charges.

2.

Separate from prosecutions, the Supreme Court and lower federal courts have repeatedly addressed the statute in the course of deciding cases involving other federal laws. For instance, in *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909), the Supreme Court held that the antitrust laws did not apply to extraterritorial conduct. In the course of so holding, Justice Holmes, writing for the Court, explained that the general presumption against the extraterritorial application of federal law could be overcome "[i]n cases immediately affecting national interests," of which "[a]n illustration from our statutes is found with regard to criminal correspondence with foreign governments." *Id.* at 356 (citing the Logan Act);

see also EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 258 (1991) (citing the Logan Act as an example of Congress using a clear statement to legislate with extraterritorial application).

The Supreme Court has also cited the Logan Act as an example of Congress's constitutional authority to regulate the actions of its citizens abroad. *See Skiriotes v. Florida*, 313 U.S. 69, 74 (1941) (citing "the statute relating to criminal correspondence with foreign governments" as one illustration of a criminal statute that by its nature applies to citizens abroad); *Blackmer v. United States*, 284 U.S. 421, 437 n.3 (1932) ("Illustrations of acts of the Congress applicable to citizens abroad are . . . the provisions relating to criminal correspondence with foreign governments." (citation omitted)). In *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), the Court held that the Smith Act had preempted Pennsylvania's anti-sedition act; in dissent, Justice Reed examined the federal interests at stake and observed that the "States are barred by the Constitution from entering into treaties and by 18 U.S.C. § 953 [i.e., the Logan Act] from correspondence or intercourse with foreign governments with relation to their disputes or controversies with this Nation." *Id.* at 516 n.5 (Reed, J., joined by Burton and Minton, JJ., dissenting). The Logan Act has similarly been relied upon in numerous lower court decisions.[9]

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[9] *See, e.g.*, *United States v. De León*, 270 F.3d 90, 94 (1st Cir. 2001) (citing the Logan Act as an example of Congress's power to legislate with extraterritorial effect); *ITT World Commc'ns, Inc. v. FCC*, 699 F.2d 1219, 1231 (D.C. Cir. 1983) (concluding the district court had misread a complaint under the Administrative Procedure Act as alleging only a violation of the Logan Act), *rev'd on other grounds*, 466 U.S. 463 (1984); *Agee v. Muskie*, 629 F.2d 80, 103, 112–13 (D.C. Cir. 1980) (MacKinnon, J., dissenting) (endorsing the government's argument that Agee's passport could be revoked because his conduct had violated the Logan Act), *rev'd sub nom. Haig v. Agee*, 453 U.S. 280 (1981); *Briehl v. Dulles*, 248 F.2d 561, 587 (D.C. Cir. 1957) (Bazelon, J., joined by Edgerton, C.J., dissenting) (citing the Logan Act as a less restrictive alternative to imposing travel restrictions on persons who support the Communist movement); *United States v. Craig*, 28 F. 795, 801 (C.C.E.D. Mich. 1886) (observing that under the Logan Act "every citizen of the United States, whether resident within the same, or *in any foreign country*, who shall carry on any criminal correspondence with a foreign government, may be punished by fine and imprisonment"); *United States v. Elliott*, 266 F. Supp. 318, 326 (S.D.N.Y. 1967) (rejecting the argument that 18 U.S.C. § 956 had been abrogated by desuetude and citing *Waldron*'s similar conclusion concerning the Logan Act); *Waldron v. Brit. Petrol. Co.*, 231 F. Supp. 72, 88–89, 89 n.30 (S.D.N.Y. 1964) (rejecting the argument that the Logan Act had been abrogated by desuetude and expressing the view that the statute may be unconstitutionally vague); *Martin v. Young*; 134 F. Supp. 204, 207 (N.D. Cal. 1955)

Outside of Article III courts, military prosecutors have invoked the Logan Act as a model for court-martial charges. In 1950, a member of the U.S. Air Force was convicted in part for "commenc[ing] correspondence with an agency of a foreign government . . . with intent to defeat the measures of the United States." ACM 2878, Mueller (BR), 3 CMR(AF) 314, 316. The airman had contacted the Soviet embassy in Switzerland and later tried to convey various intelligence and classified information. After his arraignment, he objected that the relevant specification "was too vague and incomplete and that it did not properly state an offense." *Id.* at 323. The Board of Review observed that the specification was "designed and modeled to conform in substance to the offense denounced by 18 USC 953" and rejected the vagueness challenge. *Id.* at 323–24. The Logan Act also featured in a habeas corpus proceeding challenging the pending court-martial of a U.S. Army private who was charged with aiding the enemy based on actions taken while a prisoner of war during the Korean War. *See Martin v. Young*, 134 F. Supp. 204 (N.D. Cal. 1955). In concluding that the court-martial lacked jurisdiction over an offense committed by the private prior to a break in his military service, a federal district court held that the conduct described in the specifications stated a violation of the Logan Act, among other offenses, and therefore could only be tried in an Article III court. *See id.* at 206–07.

3.

Because the Logan Act protects the Executive Branch's control over diplomatic communications, the State Department has long played a role

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(concluding that conduct described in a court-martial specification stated a violation of the Logan Act that could be tried in an Article III court); *United States v. Peace Info. Ctr.*, 97 F. Supp. 255, 261 (D.D.C. 1951) (comparing the Foreign Agents Registration Act of 1938 to the Logan Act and describing them both as "matters [that] are equally within the field of external affairs of this country, and, therefore, within the inherent regulatory power of the Congress"); *United States v. Bryan*, 72 F. Supp. 58, 62 (D.D.C. 1947) (using the Logan Act as an example of possible legislation that would justify investigating un-American and subversive activities); *Burke v. Monumental Div., No. 52*, 286 F. 949, 952 (D. Md. 1922) (comparing the sentiments of a union when one of its members helped a railroad company during negotiations to the sentiment of Congress that led to the Logan Act), *aff'd*, 298 F. 1019 (4th Cir. 1924) (per curiam), *aff'd*, 300 F. 1003 (4th Cir.) (per curiam), *rev'd with directions to dismiss for lack of jurisdiction*, 270 U.S. 629 (1926) (per curiam).

in authorizing communications or in employing available diplomatic tools to police violations. In 1925, for example, the State Department advised a U.S. citizen, Eldon R. James, that the government did not need to consent to his appointment by the King of Siam as a minister plenipotentiary, unless it was his "intention to advise the Siamese Government with respect to any disputes or controversies which might be pending between that Government and the United States," in which case, he must send "an official letter to the Secretary of State, requesting the permission of this Government so to do." 4 Green Haywood Hackworth, *A Digest of International Law* § 413, at 610 (1942) ("Hackworth") (quoting the Under Secretary of State's response to James). In 1934, the State Department adopted Departmental Order 601, which required U.S. citizens seeking to "counsel, advise, or assist foreign governments" in matters before the State Department "to make full disclosure under oath of the circumstances of their employment." *Id.* The State Department similarly promulgated regulations thereafter to ensure "a uniform practice in considering requests that American citizens be permitted to counsel, advise, or assist foreign governments, officers, or agents thereof in matters coming before the Department." 22 C.F.R. § 3.1 (1958); *e.g.*, Letter for Secretary of State, from Franklin F. Russell, Legal Advisor to the Emperor of Ethiopia's Representative in Eritrea, *Re: Logan Act* (May 5, 1958). The State Department administered those regulations until 1960. *See* 25 Fed. Reg. 13,138, 13,138 (Dec. 21, 1960) (revoking 22 C.F.R. pt. 3).

In addition, the State Department has invoked the Logan Act to prevent interference with U.S. diplomacy. In 1805, the State Department relied in part upon the Logan Act to request the withdrawal of the Spanish minister, the Marquis de Yrujo, who had evidently sought to hire a Philadelphia newspaper editor to advocate for Spanish interests in opposition to the United States. *See* 4 John Bassett Moore, *A Digest of International Law* § 640, at 509 (1906) ("Moore") ("The Government of the United States strongly censured his action, especially on the ground that it constituted a violation of the act of Congress commonly known as the 'Logan statute.' . . . It was on this ground of an attempt to tamper with the press that the recall of the marquis was asked for." (footnote omitted)); *see also* John W. Foster, *A Century of American Diplomacy* 219 (1901) ("[The Secretary of State] directed our minister in Madrid to ask for his recall, alt-

hough the chief ground for the request was his attempt to bribe a Philadelphia editor to publish attacks upon the government.").

In 1861, Secretary of State William H. Seward invoked the Logan Act in dismissing the British consul at Charleston, Robert Bunch, after intercepting dispatches reflecting his correspondence with the Confederacy. *See* 5 Moore § 700, at 20–22. According to Secretary Seward, Bunch "was clearly and distinctly in violation" of the Logan Act because "the only authority in this country to which any diplomatic communication whatever can be made is the government of the United States itself." Mr. Seward to Mr. Adams (Oct. 23, 1861), *in* S. Exec. Doc. No. 37-1, vol. 1, at 164, 165–66 (1861); *see also* 5 Moore § 700, at 21 ("Mr. Seward, in saying that Mr. Bunch had violated a law of the United States, alluded to the so-called Logan Act[.]").[10]

The State Department has also sought to enforce the Logan Act by restricting the foreign travel of U.S. citizens. In 1917, shortly after the United States entered World War I, the State Department denied passports to private citizens seeking to attend the Stockholm Peace Conference. Secretary of State Lansing warned that such attendance would violate the Logan Act. *See Gompers Rebuffs New Peace Scheme*, N.Y. Times, May 25, 1917, at 9; *Warns Americans to Take No Part in Peace Conclave*,

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[10] The Logan Act was similarly implicated in a 1915 incident in which an American journalist, James F.J. Archibald, was found carrying letters from the German and Austrian embassies in the United States to their home capitals. *See* The Ambassador in Great Britain (Page) to the Secretary of State (Aug. 31, 1915), *in Foreign Relations of the United States, 1915 Supplement: The World War* ("*Foreign Relations of the United States*") 932 (1928). The correspondence included a proposal by the Austrian Ambassador to instigate strikes in American factories supporting the war effort. The Ambassador in Great Britain (Page) to the Secretary of State (Sept. 1, 1915), *in Foreign Relations of the United States* 932, 932–33. Secretary of State Robert Lansing instructed the U.S. Ambassador in Austria-Hungary to request the recall of the Austrian Ambassador over the incident, *see* The Secretary of State to the Ambassador in Austria-Hungary (Penfield) (Sept. 8, 1915), *in Foreign Relations of the United States* 933, 933–34, and the Department of Justice considered charging Archibald under the Logan Act, *see* Warren, *Odd Byways in American History* at 175; *Officials Confer on Archibald Case*, Wash. Times, Sept. 14, 1915, at 1; *see also* Report by the Secretary of State to the President (Oct. 29, 1888), *in Foreign Relations of the United States* pt. 2, at 1670 (1889) (recommending that the Attorney General investigate whether Charles F. Murchison, a U.S. citizen, violated the Logan Act by engaging in certain correspondence with the British minister, Lord Sackville, and further recommending the dismissal of Lord Sackville over the incident).

N.Y. Times, May 24, 1917, at 1.[11] Similarly, in *Agee v. Muskie*, 629 F.2d 80 (D.C. Cir. 1980), *rev'd sub nom. Haig v. Agee*, 453 U.S. 280 (1981), the State Department revoked the passport of Philip Agee, a former agent of the Central Intelligence Agency ("CIA"), who, among other things, had reportedly advised agents of the Iranian government in connection with the Iran hostage crisis. *See* 629 F.2d at 112–13 (MacKinnon, J., dissenting). A D.C. Circuit panel held that the Secretary of State lacked the authority to revoke passports on national security grounds, but in dissent, Judge MacKinnon agreed with the government that Agee's passport could be denied, among other reasons, because his conduct had violated the Logan Act. *See id.* The Supreme Court subsequently reversed the D.C. Circuit, albeit without addressing the potential Logan Act violation.

Although our focus here has been upon instances in which government officials have affirmatively relied upon the Logan Act, there are numerous other instances where public officials or others have accused American citizens of contravening its prohibitions, particularly during times of diplomatic controversy.[12] Despite the absence of criminal convictions, the

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[11] The State Department stated that it would not "invoke the Logan act against persons attending conferences and conventions of an unofficial character, here or abroad, where peace in the abstract was to be discussed, and where the conference did not seek to interfere in the action of Governments as involved in the final terms of peace in the present war," although "no passports will be issued to delegates to gatherings like the projected Socialist conference at Stockholm, some of the delegates to which have at least a quasi-official status conferred by Governments now hostile to the United States." *Gompers Rebuffs New Peace Scheme*, N.Y. Times, May 25, 1917, at 9.

[12] *See generally, e.g.*, Daniel B. Rice, *Nonenforcement by Accretion: The Logan Act and the Take Care Clause*, 55 Harv. J. on Legis. 443 (2018) (cataloguing examples); David Detlev Vagts, *The Logan Act: Paper Tiger or Sleeping Giant?*, 60 Am. J. Int'l L. 268, 271–80 (1966) (same). Members of Congress have also regularly invoked the Logan Act in congressional debates. *See, e.g.*, 153 Cong. Rec. 9041–42 (2007) (Rep. Burton accusing the Speaker of the House of violating the Logan Act by meeting with the Syrian president); 134 Cong. Rec. 19,672 (1988) (Rep. Broomfield discussing the Logan Act in response to Jesse Jackson's negotiations over the release of American hostages in Lebanon); 133 Cong. Rec. 32,152–56, 32,872–73 (1987) (Members of Congress debating whether the Speaker of the House had violated the Logan Act in communications with Daniel Ortega Saavedra of Nicaragua); 130 Cong. Rec. 10,501, 10,556–62 (1984) (Rep. Gingrich criticizing members of Congress for writing a letter to Nicaraguan president); 122 Cong. Rec. 4216, 4919 (1976) (Sen. Goldwater accusing former President Nixon of violating the Logan Act); 107 Cong. Rec. 8538–43 (1961) (Members of Congress debating whether the Tractor Committee's attempts to trade for prisoners in Cuba violated the

Logan Act has not been moribund, but instead has remained in the background of federal law, having been invoked by all three branches of the U.S. government.

II.

We turn now to the scope of the Logan Act. We interpret the statute both to provide guidance about its reach and to evaluate potential constitutional questions. *See United States v. Stevens*, 559 U.S. 460, 474 (2010) ("[I]t is impossible to determine whether a statute reaches too far without first knowing what the statute covers." (quoting *United States v. Williams*, 553 U.S. 285, 293 (2008))). In its current form, the statute reads as follows:

> Any citizen of the United States, wherever he may be, who, without authority of the United States, directly or indirectly commences or carries on any correspondence or intercourse with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States, shall be fined under this title or imprisoned not more than three years, or both.
>
> This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury which he may have sustained from such government or any of its agents or subjects.

18 U.S.C. § 953.

To establish a violation, the United States must show that a U.S. citizen (1) "without authority of the United States," (2) "directly or indirectly commence[d] or carrie[d] on . . . correspondence or intercourse with any foreign government or any officer or agent thereof," (3) "with intent to influence the measures or conduct of any foreign government . . . in relation to any disputes or controversies with the United States, or to

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Logan Act); 106 Cong. Rec. 8625 (1960) (Sen. Fulbright discussing the Logan Act's application to the activities of special pressure groups in areas of foreign policy); Rice, 55 Harv. J. on Legis. at 443 (cataloguing examples).

defeat the measures of the United States."[13] The statute excepts from that prohibition acts by citizens who are seeking redress for private injuries suffered at the hands of a foreign government or "its agents or subjects." We consider in turn each element of the Logan Act and then the exception.

A.

The Logan Act currently prohibits citizens from engaging in certain communications with a foreign government "without authority of the United States." The original text differed slightly, prohibiting acts without "authority of *the government* of the United States." 1 Stat. at 613 (emphasis added). We interpret the "authority of the government of the United States" to refer to the legal prerogative of the Executive Branch to conduct the Nation's diplomacy, and believe that the current phrasing, "without authority of the United States," has the same meaning.

At the time it was adopted, the Logan Act required that a person receive "authority" from a responsible official within the "government of the United States."[14] Although "government of the United States" in other contexts may refer to the government as a whole, we think that this phrase plainly referred to the authority of the Executive Branch—the locus of the power to conduct diplomacy under the Constitution.[15] Article II vests the

[13] Although the Logan Act applies only to U.S. citizens, anyone who "aids, abets, counsels, commands, induces or procures" a violation would be "punishable as a principal." 18 U.S.C. § 2(a).

[14] Then, as now, "authority" referred to a person's "[l]egal power" to act. 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) ("Johnson's Dictionary") (def. 1); *accord* 1 Noah Webster, *An American Dictionary of the English Language* (1828) ("Webster's Dictionary") (def. 1: "Legal power, or a right to command or to act[.]"); 1 John Ash, *The New and Complete Dictionary of the English Language* (2d ed. 1795) ("Ash's Dictionary") ("Power, dominion, legal power, influence, credit, testimony, support, credibility."); Thomas Dyche, *A New General English Dictionary* (17th ed. 1794) ("Dyche's Dictionary") ("power, influence, rule, credit, support, countenance, testimony, credibility").

[15] The term "government of the United States" appears several times in the Constitution, each time referring specifically to the federal government as a whole. *See, e.g.*, U.S. Const. art. I, § 8, cl. 17 (referring to the capital district as "the Seat of the Government of the United States"); *id.* art. I, § 8, cl. 18 (vesting Congress with the authority to make necessary and proper laws for the execution of "all other Powers vested by this Constitu-

President with the power to "appoint Ambassadors, [and] other public Ministers and Consuls," U.S. Const. art. II, § 2, cl. 2, and to "receive Ambassadors and other public Ministers," *id.* art. II, § 3. The first Congress charged the Department of State (originally the "Department of Foreign Affairs") with the responsibility for directing the diplomatic correspondence of the United States and "such other matters respecting foreign affairs, as the President" may assign to the Department. Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29. As then-Secretary of State Jefferson advised French Minister Edmond Charles Genet, the President is "the only channel of communication between this country and foreign nations, it is from him alone that foreign nations or their agents are to learn what is or has been the will of the nation, and whatever he communicates as such they have a right and are bound to consider as the expression of the nation." To Edmond Charles Genet (Nov. 22, 1793), *in* 27 *The Papers of Thomas Jefferson* 414, 414 (John Catanzariti ed., 1997).

Jefferson's sentiment was repeated on multiple occasions during the early Republic. Shortly before adoption of the Logan Act, Attorney General Charles Lee opined that "[a] foreign minister here is to correspond with the Secretary of State on matters which interest his nation, and ought not to be permitted to do it through the press in our country." *Diplomacy*, 1 Op. Att'y Gen. 74, 75 (1797). The foreign minister's "intercourse is to be with the Executive of the United States only, upon matters that concern his mission or trust," and the breach of that principle would be a "contempt of *the government*, for which he is reprehensible by the President." *Id.* (emphasis added). John Marshall recognized the same during his brief stint in Congress. *See* 10 Annals of Cong. 613 (1800) (statement of Rep. Marshall) ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."); *accord* S. Comm. on Foreign Relations, 14th Cong., Rep. of Feb. 15, 1816, *reprinted in* S. Doc. No. 56-231, pt. 8, at 24 (1901) ("The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success."). The

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tion in the Government of the United States"); *id.* art. II, § 1, cl. 3 (requiring electors to transmit their sealed votes to "the Seat of the Government of the United States").

Supreme Court confirmed that principle as well. *See Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988) ("The Court also has recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.'" (quoting *Haig*, 453 U.S. at 293–294)); *see also, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 14, 21 (2015) (affirming the President's "unique role in communicating with foreign governments," whereas "Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation"); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414, 429 (2003) (observing that the executive power includes the "vast share of responsibility for the conduct of our foreign relations" and "independent authority in the areas of foreign policy and national security" (internal quotation marks omitted)); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 766 (1972) (plurality opinion) (acknowledging "the exclusive competence of the Executive Branch in the field of foreign affairs"); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) ("The power to admit new States resides in Congress. The President, on the other hand, is the constitutional representative of the United States in its dealings with foreign nations."); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (quoting Rep. Marshall). Accordingly, within the context of the Logan Act, the phrase "authority of the government of the United States" means the authority vested in the Executive Branch.

Were there any doubt, the Logan Act's legislative history would confirm that Congress viewed the phrase in the same way.[16] The House resolution authorizing the drafting of the bill was directed against "all persons, citizens of the United States, who shall usurp *the Executive authority* of this Government." 9 Annals of Cong. at 2489 (emphasis added); *see also id.* at 2494 (statement of Rep. Griswold) ("I think it necessary to guard by law against the interference of individuals in the negotiation of our Executive with the Governments of foreign countries. . . . This power has been delegated by the Constitution to the Presi-

[16] We address the legislative history here and elsewhere in this opinion because some courts find it relevant to construing statutes, and because such history, like dictionaries, may bear upon contemporaneous usage in 1799. But "Congress left the authoritative record of its deliberations in the text of the statute," and it is the plain meaning of that language that governs our interpretation. *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 158, 174 (2018).

dent[.]"). When the bill came to the floor of the House, the Members of Congress showed a common understanding that the "authority" in question was executive. *See, e.g.*, *id.* at 2588 (statement of Rep. Bayard) ("The object of this law is to prevent these private interferences altogether, since the Constitution has placed the power of negotiation in the hands of the Executive only."); *id.* at 2598 (statement of Rep. Edmond) ("[I]t will be wise and prudent, at this time, to frame a law to prevent individuals from interfering with the Executive authority, in a manner injurious to the community."); *see also supra* Part I.A.

At the time, the Members debated the subordinate question of whether the President could rely upon agents who had not been appointed with the Senate's advice and consent. Members sought to clarify the general reference to "government of the United States" on this point. *See, e.g.*, 9 Annals of Cong. at 2584 (statement of Rep. Sewall) (proposing insertion of "empowered or employed by the President of the United States, or other lawful authority," in order to confirm that the President could send emissaries to foreign countries without the Senate's advice and consent); *id.* (statement of Rep. Nicholas) (asserting that the President lacks authority to name diplomats other than with the Senate's advice and consent); *id.* at 2585 (statement of Rep. Gallatin) (arguing that "[i]f there are any cases, allowed by the Constitution, in which the President may authorize a Minister, without the concurrence of the Senate, he will, in doing so, act under the authority of the Government of the United States, and come within the tenor of this bill").[17] But in the end the phrase remained as first proposed, prohibiting action without "the authority of the government of the United States."

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[17] *See also* 9 Annals of Cong. at 2585–86 (statement of Rep. Bayard) (arguing that "the word 'Government' is here to be understood according to the subject matter," and therefore means "lawful authority," which the President might derive from a statute or the Constitution); *id.* at 2586 (proposed amendment by Rep. Dawson to limit the authority of the President or any officer of the United States to employ persons "except those appointed under the Constitution" to communicate with foreign governments); *id.* (statement of Rep. Pinckney) (calling Dawson's proposed amendment "useless" because "[a]ll power with respect to negotiations with foreign Governments, is placed in the hands of the Executive by the Constitution, and no act of Congress can alter the Constitution," so that "[i]f the President negotiates consistently with the Constitution, he acts under the Constitution, and the act is an act of the Government" and the "House can neither give nor take away power on this subject").

In its current form, the operative phrase prohibits action "without authority of the United States," but this alteration did not change its meaning. In 1875, Congress, in the course of adopting the Revised Statutes, dropped "of the United States," thereby prohibiting acts without "authority of the Government." Rev. Stat. § 5335. During the 1948 recodification of title 18, Congress went back in the other direction, rendering the phrase as "without authority of the United States." Pub. L. No. 80-772, § 953, 62 Stat. at 744. But "[u]nder established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley v. United States*, 490 U.S. 545, 554 (1989) (quoting *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 199 (1912), and applying the canon to the 1948 recodification of federal law). No such clear statement appears in either the 1875 codification or 1948 recodification. To the contrary, the juxtaposition of the two amendments indicates that Congress viewed "the United States," "the Government," and "the government of the United States" as all referring to one and the same thing.

By longstanding practice, and consistent with ordinary meaning, a person does not require a formal appointment within the Executive Branch to take action with the "authority of the United States." Since the Washington Administration, the President has sent emissaries to foreign governments to conduct missions on the President's behalf, even without an appointment as an ambassador or other officer of the United States.[18] We think that the Executive Branch may similarly take the lesser step of authorizing U.S. citizens to engage in intercourse with foreign powers on diplomatic matters, even without any formal delegation. Such persons do not act "without authority of the United States" under the Logan Act,

[18] *See, e.g.*, *Ambassadors and Other Public Ministers of the United States*, 7 Op. Att'y Gen. 186, 204–06 (1855) (collecting examples of delegations to negotiate treaties without "any authorizing act of Congress, any preparatory specific appropriation, nor even a commission by and with the advice and consent of the Senate"); Memorandum for Edward L. Morgan, Deputy Counsel to the President, from Thomas E. Kauper, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Assigning the Personal Rank of "Ambassador"* at 2 (July 16, 1969) ("As early as October 1789, President Washington requested Gouverneur Morris to proceed to London and to converse with the British Government on certain points. There was no Senatorial advice and consent to this assignment. Since then there has been a large number of instances in which Presidents have assigned persons diplomatic missions without the advice and consent of the Senate." (citation omitted)).

because they have received license to engage in diplomatic activity from the Executive Branch, which in the field of diplomacy exercises the authority of the United States.

The original version of the Logan Act made this conclusion abundantly clear by providing that it did not reach those acting with "the *permission* or authority of the government of the United States." 1 Stat. at 613 (emphasis added). Congress, however, removed the word "permission" in the course of the 1948 recodification. *See* Pub. L. No. 80-772, § 953, 62 Stat. at 744. But as noted above, minor revisions effectuated during a recodification of the laws are presumed to be non-substantive changes, and the Court has specifically applied that canon to the 1948 recodification. *See Finley*, 490 U.S. at 554. Here, there is no indication that Congress, in dropping "permission," narrowed the statute's exception for citizens who engage in foreign communications with the license of the Executive Branch. To the contrary, the House Report described the amendments to the Logan Act as "[m]inor changes of arrangement and in phraseology" unless otherwise specified. H.R. Rep. No. 80-304, at A76. We therefore do not read the recodification to prohibit acts by private citizens done with the permission of the Executive Branch.

This conclusion is supported by Executive Branch practice and precedent. Both before and after the 1948 recodification, the State Department had a practice of authorizing private persons to communicate with foreign governments, so that they might avoid violating the Logan Act. From 1934 through 1960, the State Department maintained regulations for approving requests to represent or assist foreign governments in matters before the Department. *See* 4 Hackworth § 413, at 610; 22 C.F.R. pt. 3 (1958); *see also* Memorandum for Paul A. Sweeney, First Assistant, Office of Legal Counsel, from Nathan Siegel, Office of Legal Counsel, *Re: Letter of Franklin F. Russell to the Department of State Concerning the "Logan Act"* at 2 (Oct. 2, 1958) (memorializing advice concerning the procedures by which the State Department should authorize a U.S. citizen to represent a foreign sovereign in connection with potential disputes with the United States). Even after rescinding these regulations, the State Department has granted ad hoc permissions, including to Members of Congress, to engage in foreign correspondence that otherwise would raise Logan Act concerns. *See, e.g.*, Letter from Robert J. McCloskey, Assistant Secretary of State for Congressional Relations (Sept. 29, 1975)

("McCloskey Letter") ("[T]he executive branch, although it did not in any way encourage the Senators to go to Cuba, was fully informed of the nature and purpose of their visit, and had validated their passports for travel to that country."), *as reprinted in* Eleanor C. McDowell, *Digest of United States Practice in International Law: 1975* ("McDowell") 750, 750 (1976). This Office similarly has recognized that the Executive Branch may authorize a person to conduct diplomacy on behalf of the United States even without an Executive Branch appointment. *See* Memorandum for the Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Reply to Congressman Michel* at 1 (June 22, 1961) ("I think the current negotiations [with Cuba] might be of doubtful legality except for the fact that the President has indicated that he has no objection to them.").

There has been no single mode or formality for such authorizations. In some cases, the President, the Secretary of State, or a responsible official has expressly licensed the person's actions. In others, authorization has been implied from an invitation to join an official mission or through the grant of a passport or visa approval for a specific, stated purpose. But the "authority of the United States" must come from the Executive Branch because it is the President and his subordinates who exercise the "authority of the United States" in conducting diplomacy.

In view of the separation of powers, a recurring Logan Act question has been whether and how Members of Congress may engage with foreign governments. In many cases, such communications will not raise any Logan Act concerns because they are made with the consent and support of the Executive Branch, through congressional delegations assisted by the State Department. The Logan Act more broadly does not "appear to restrict members of the Congress from engaging in discussions with foreign officials in pursuance of their legislative duties under the Constitution." McCloskey Letter, *as reprinted in* McDowell at 750. But the permissible scope of such communications is narrow. In the instance addressed by the McCloskey Letter, the State Department had validated the passports of two Senators for travel to Cuba, and one of the Senators confirmed: "I made it clear that I had no authority to negotiate on behalf of the United States—that I had come to listen and learn." *Id.* (quoting Senator George McGovern). When a Member of Congress solicits information necessary to perform a legitimate legislative function, without

more, such requests for information would not involve diplomacy on behalf of the United States—and thus likely would not be made with the intent to influence the foreign government with respect to a dispute or controversy with the United States or to defeat a measure of the United States.

The legislative duties of a Member, however, do not include moving beyond such targeted communications to negotiating with foreign governments. As we have discussed, the Logan Act reflects the constitutional reality "that foreign policy [i]s the province and responsibility of the Executive," *Egan*, 484 U.S. at 529 (quoting *Haig*, 453 U.S. at 293–294), and the statute seeks to prevent "all persons, citizens of the United States, who shall usurp *the Executive authority* of this Government," 9 Annals of Cong. at 2489 (emphasis added).[19] Accordingly, while the Executive Branch, in the interest of comity and to promote the Nation's foreign relations, often authorizes diplomatic activity by Members of Congress, the statute's prohibition on diplomacy "without authority of the United States" requires that activity to be authorized by the "Executive authority" vested in the President.

B.

The second element of the statute requires a citizen to commence or carry on "any correspondence or intercourse with any foreign government

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[19] *See, e.g.*, 9 Annals of Cong. at 2494 (statement of Rep. Griswold) ("I think it necessary to guard by law against the interference of individuals in the negotiation of our Executive with the Governments of foreign countries. . . . This power has been delegated by the Constitution to the President[.]"); *id.* at 2590 (statement of Rep. W. Claiborne) ("Our foreign relations ought doubtless to be managed by the Executive department, and if any other character attempts to interfere in that business, his interference could certainly have no weight[.]"); *id.* at 2677 (statement of Rep. Isaac Parker) ("[T]his bill . . . is founded upon the principle that the people of the United States have given to the Executive Department the power to negotiate with foreign Governments, and to carry on all foreign relations, and that it is therefore an usurpation of that power for an individual to undertake to correspond with any foreign Power on any dispute between the two Governments, or for any State Government, or any other department of the General Government, to do it."); *see also id*. at 2498 (statement of Rep. Gallatin) ("[I]t would be extremely improper for a member of this House to enter into any correspondence with the French Republic, because this country is at present in a peculiar situation; for though, as we are not at war with France, an offence of this kind would not be high treason, yet it would be as criminal an act, as if we were at war[.]"); *supra* note 3 and accompanying text.

or any officer or agent thereof." We read these terms to encompass communications, whether written or spoken, that are directed to a foreign government, officer, or agent, whether in public or in private. They do not extend to the general public advocacy of an idea or a point of view, because such statements do not amount to correspondence or intercourse "with" a foreign interlocutor.[20] The terms "correspondence or intercourse," moreover, connote a reciprocal exchange. Thus, an open letter to a foreign government or a public denunciation of a foreign-government official is not "correspondence or intercourse," unless the circumstances suggest an effort to commence a reciprocal exchange with the speaker.

The words "correspondence" and "intercourse" imply communication directed to a particular recipient. Early dictionaries define "correspondence" as "[i]ntercourse; reciprocal intelligence," 1 Johnson's Dictionary (def. 2), or "an intercourse by letter or otherwise," Dyche's Dictionary.[21] Those dictionaries likewise define "intercourse" as "exchange" or "[c]ommunication: followed by *with*."[22] *See also* Warren Memorandum at 10–11 (collecting definitions of "correspondence" and "intercourse"). A person does not communicate "with" a foreign government simply by publishing an editorial on a foreign policy topic or making a speech expressing an opinion about foreign affairs.[23] To implicate the Logan Act,

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[20] Title 18 of the U.S. Code defines "foreign government" to include "any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States." 18 U.S.C. § 11.

[21] *Accord* 1 Webster's Dictionary (def. 2: "Intercourse between persons at a distance, by means of letters sent and answers received."); *id.* (def. 4: "Friendly intercourse; reciprocal exchange of offices or civilities; connection."); 1 Ash's Dictionary ("intercourse, . . . intercourse by letters").

[22] 1 Johnson's Dictionary (defs. 1, 2); *accord* 1 Webster's Dictionary (def. 1: "Communication; . . . connection by reciprocal dealings between persons or nations, either in common affairs and civilities, in trade, or correspondence by letters."); *id.* (def. 2: "Silent communication or exchange."); 1 Ash's Dictionary ("Communication, commerce, exchange[.]"); Dyche's Dictionary ("exchange, mutual communication").

[23] For this reason, we do not believe that Flournoy's publication of an editorial violated the statute. *See* Warren, *Odd Byways in American History* at 173 ("It is difficult to imagine by what metaphysical ingenuity the United States Attorney, Joseph Hamilton Daveiss, convinced himself that the mere writing of a letter for publication in a newspaper could be construed to constitute the carrying on directly or indirectly of any verbal or written correspondence or intercourse with a foreign government, within the prohibition of that statute."); From Harry Toulmin (Apr. 5, 1803), *in* 4 *The Papers of James Madison:*

the communication must be specifically directed at a foreign government or official (although such an effort may be indirect, as well as direct).

The definitions of "correspondence" and "intercourse" overlap significantly, leading Assistant Attorney General Charles Warren to observe that they are "interchangeable or synonymous." Warren Memorandum at 11; *see also* Letter for Mary G. Kilbreth, from H.M. Daugherty, Attorney General (May 2, 1922) ("Daugherty Letter"), *reprinted in Senator France Given "Benefit of the Doubt": Attorney General Daugherty Declines to Prosecute*, Woman Patriot, May 15, 1922, at 5 (describing "correspondence" and "intercourse" as synonyms in the Logan Act). That conclusion receives further support from Members in the original House debate who employed the terms interchangeably. *See* 9 Annals of Cong. at 2591 (statement of Rep. Bayard) ("In order to establish a crime by this bill, what is to be proved? First, that there are disputes subsisting between the United States and the foreign nation with whom the *correspondence* is said to have taken place; that this *intercourse* has really existed[.]" (emphases added)); *id.* at 2596 (statement of Rep. Gallatin) ("[I]f that is the case, . . . we ought undoubtedly to pass a law to make it criminal to carry on any *correspondence*, without respect to the intention. We are told that it is improper for a man to carry on a written *correspondence* to obtain a restoration of captured property, because under cover of this he may carry on an *intercourse* dangerous to the interests of the country, and that, therefore, he ought to be punished for carrying on a harmless *correspondence*, because it might possibly be criminal." (emphases added)).

Alternatively, we might read "correspondence" and "intercourse" to refer respectively to written and oral communication. Such an interpretation would avoid superfluity, and dictionaries do suggest this potential distinction—that correspondence means communication by letter and

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Secretary of State Series 478, 479 (Mary A. Hackett et al. eds., 1998) (calling the indictment "a flagrant perversion of the meaning of an act of congress big with mischief & even more inauspicious to the freedom of the press, than the odious and far famed sedition law"). Further, such an interpretation would raise serious First Amendment concerns because it would suggest that the Logan Act did seek "to suppress ideas or opinions in the form of 'pure political speech,'" and that individuals could not "say anything they wish on any topic." *Humanitarian Law Project*, 561 U.S. at 25–26; *see infra* Part III.C. We think though that the words of the statute readily exclude such a constitutionally difficult interpretation.

intercourse means oral communication.[24] But it ultimately does not matter whether there is any material difference between the terms, because the statute certainly covers both written and oral communications. *See, e.g.*, To Charles Pinckney, *in* 6 *The Papers of James Madison* at 440 (describing the Logan Act as "forbidding communications of any sort with foreign Governments or Agents on subjects to which their own Government is a party"). Indeed, the original text of the Logan Act was explicit on this point, including the phrase "verbal or written" to qualify "correspondence or intercourse," 1 Stat. at 613, although that phrase was later removed in the 1948 recodification, Pub. L. No. 80-772, § 953, 62 Stat. at 744, without any apparent substantive intention. Therefore, we think that the Logan Act prohibits written and oral communications with foreign governments or officials that otherwise satisfy the statute, no matter the means of communication.

We do not think, however, that the statute requires that the communications involve a mutual exchange of views. In a publicly released letter, Attorney General Daugherty suggested that "correspondence or intercourse" may require more than just a unilateral communication. The Attorney General was responding to a complaint brought against Senator Joseph France, who had sent cables to the British, German, and Russian leaders, among others, proposing that they urge the United States to reverse its decision not to participate in a diplomatic conference in Genoa, Italy. *See Usurpation of Executive Authority: The Case Against Senator France*, Woman Patriot, May 1, 1922, at 1; *Seeks Prosecution of Senator France*, N.Y. Times, Apr. 15, 1922, at 1. In the letter, Attorney General Daugherty stated that "[i]t is not clear" that the Senator's actions "constitute either a commencing or a carrying on of a correspondence or intercourse" because "[t]hey invite merely a public act by the conference at Genoa requesting this country to participate in its deliberations" and "do not call for or require any reply or future exchange of communication." Daugherty Letter, *reprinted in Senator France Given "Benefit of the*

[24] *See, e.g.*, 1 Webster's Dictionary (def. 1 of *intercourse*: "Communication; . . . connection by reciprocal dealings between persons or nations, either in common affairs and civilities, in trade, or *correspondence by letters*." (emphasis added)); *id.* (def. 2 of *correspondence*: "Intercourse between persons at a distance, by means of letters sent and answers received."); 1 Ash's Dictionary (def. of *correspondence*: "intercourse, . . . intercourse by letters"); Dyche's Dictionary (def. of *correspondence*: "intercourse by letter or otherwise").

Doubt", Woman Patriot, May 15, 1922, at 5. Yet the Logan Act prohibits a citizen from "commenc[ing]" with "any correspondence" with a foreign government, without necessarily requiring the correspondence to continue. Thus, where a U.S. citizen opens a dialogue with a particular foreign official in relation to any disputes or controversies with the United States, such a communication may "commence" a "correspondence" under the statute, whether or not the citizen in fact receives a response. But commencing a correspondence does presuppose at least the future prospect of a reciprocal exchange. The mutuality of the communication thus may bear upon whether the communication was the start of a private diplomatic effort directed to a foreign official or government, rather than an open letter or a statement of opinion.

C.

The Logan Act's third element requires that the communication involve an "intent to influence the measures or conduct of any foreign government . . . in relation to any disputes or controversies with the United States, or to defeat the measures of the United States." Intent may be discerned from the nature of the correspondence or intercourse, including "from the facts, circumstances, and surroundings at the time of the transaction and from the defendant's prior course of dealing." Warren Memorandum at 11.

Attorney General Levi Lincoln advised in 1804 that "the words 'in relation to any disputes or controversies with the US,' are as general and comprehensive as could be used, and from their force extending to all our national controversies, they ought not to be limited, unless the subject matter or the reason of the thing shall require it." From Levi Lincoln, *in* 43 *The Papers of Thomas Jefferson* at 649. If the United States is in a specific dispute or controversy with another country, then any intent to interfere in those negotiations, whether to help or to hinder, would satisfy this intent element. Assistant Attorney General Warren similarly read the phrase to "refer[] to all questions which are at the time the subject of diplomatic or official correspondence or negotiation between the United States and the foreign country." Warren Memorandum at 11; *see* Memorandum for Joseph F. Dolan, Assistant Deputy Attorney General, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re: "Logan Act" (18 U.S.C. 953)—Application to Release of Cuban Prisoners* at 1 (Dec. 19, 1962) ("Schlei Memorandum") (recognizing that

the Logan Act prohibits "interference of individual citizens in the negotiations of our Executive with foreign governments" (quoting 9 Annals of Cong. at 2489 (statement of Rep. Griswold)). He went on to advise that "[i]t is highly important to the welfare of the country that there shall be no interference with the President's constitutional and statutory functions, and especially no attempt to influence or intermeddle in official foreign negotiations carried on by him, through private negotiations with foreign officials in relation to the same subject matter." Warren Memorandum at 12.

We agree that the statute covers "*any* disputes or controversies" (emphasis added) that are the subject of diplomacy with the United States. Underlying even amicable negotiations, there can be competing interests or claims of right and thus a matter of controversy. It is not sufficient, however, that the matter involve a foreign government and be the subject of general debate, or that it relate to a controversy between a private actor and a foreign government. Thus, this Office advised that private negotiations to free Cubans captured in the failed Bay of Pigs invasion did not violate the Logan Act because there was no "dispute or controversy between the United States and the Government of Cuba with respect to the 'Bay of Pigs' prisoners, or any measures of the Government of Cuba in relation to the United States which would be affected by the proposed exchange, or, indeed, of any negotiations between the two governments on the subject." Schlei Memorandum at 1–2.[25] A different question could

[25] The Department repeated that sentiment in several letters signed by Attorney General Kennedy or then-Assistant Attorney General Katzenbach. *See* Memorandum for Byron R. White, Deputy Attorney General, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Senate Resolution 152* at 1 (Aug. 10, 1961) (disputing that the Tractors for Freedom Committee negotiations that were conducted "with the full knowledge of the Government" involved the intent covered by the Logan Act); Letter for Robert H. Michel, U.S. House of Representatives, from Robert F. Kennedy, Attorney General (June 22, 1961), *reprinted in* 107 Cong. Rec. 11220 (1961) ("[I]t does not appear that the negotiations now in progress by the Tractors for Freedom Committee involve any interference with negotiations between the Governments of the United States and Cuba, or any intent to influence the measures or conduct of the Cuban government 'in relation to any disputes or controversies with the United States' or to 'defeat the measures of the United States.'"); Katzenbach Memorandum at 1 ("[I]t does not appear that there is any dispute or controversy between the United States and Cuba over Cuba's right to hold these men prisoners, or any intent by the Committee to defeat the measures of the United States."); *see also* Letter for Michael A. Feighan, Acting

arise in a case involving U.S. hostages whose release was the subject of active negotiations with the State Department, but as discussed in the next section, in such cases, the family members of the hostages (or their agents) could communicate with the foreign government based upon the exception for those seeking redress for private injuries.

The Logan Act also prohibits correspondence and intercourse conducted with the intent "to defeat the measures of the United States." In contrast with the "dispute or controversy" provision, this provision requires an intent to "defeat" the U.S. objective, not merely to influence a foreign government "in relation to" a matter in controversy. At the same time, the provision sweeps more broadly than the "dispute or controversy" provision because it applies to any effort to frustrate or obstruct U.S. measures, even in the absence of a dispute or controversy involving the United States. The requirement therefore covers all attempts to interfere with or undermine U.S. policies, positions, laws, treaties, and negotiations. But as with the "dispute or controversy" provision, the "measures" in question must be sufficiently concrete to come within the statute's reach. For instance, in *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 88 (S.D.N.Y. 1964), a civil antitrust case, the defendant accused the plaintiff of violating the Logan Act in negotiating a contract with the National Iranian Oil Company. The district court found a triable issue over whether "the expressed United States policy with respect to the importation of Iranian oil," the market at issue, was sufficiently "definitive" or "clear" to constitute a "measur[e] of the United States." *Id.* at 88–89.[26] The Logan Act therefore requires that the correspondence or intercourse at issue be intended to influence that foreign government in relation to a matter subject to specific controversy with the United States or be intended to invite that government to act contrary to a policy or action previously undertaken by the United States.

Chairman, Subcommittee No. 1 of the House Committee on the Judiciary, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel (June 11, 1963) (similar, regarding negotiations by James Donovan).

[26] In connection with the United States' decision not to attend the Genoa conference, Attorney General Daugherty also opined: "It is doubtful whether there was any existing dispute or controversy, within the meaning of the statute, or any specific measures of the United States on the subject-matter involved; and the benefit of this doubt must be extended to Senator France[.]" Daugherty Letter, *reprinted in Senator France Given "Benefit of the Doubt"*, Woman Patriot, May 15, 1922, at 6.

D.

The final sentence of the Logan Act contains an exception for the vindication of private rights. It excepts citizens who seek redress from a foreign government for any injury caused by that government, its agents, or its subjects. *See* 18 U.S.C. § 953 ("This section shall not abridge the right of a citizen to apply, himself or his agent, to any foreign government or the agents thereof for redress of any injury . . . ."). The statute thus does not prohibit citizens (or their agents) from communicating with a foreign government where the purpose of that communication is to obtain redress for "any injury" that the citizen has personally suffered. The exception preserves the injured citizen's right to engage in self-help and petition the foreign government for compensation, including in its courts. It would apply even if the communications might otherwise fall within the scope of the Logan Act's prohibition because, for instance, the State Department was separately working to obtain redress on behalf of U.S. citizens in the matter.

Although the exception has existed since the Logan Act's original passage, there is limited concrete evidence of past practice. In 1950, Secretary of State Dean Acheson advised that this exception allowed Colonial Airlines to participate in a hearing before a Canadian regulator. *See Colonial Airlines Told Logan Act Not Involved in Case Before Canadian Transit Board*, 22 Dep't of State Bulletin No. 548, at 29 (1950). After the airline invoked the Logan Act as a reason not to participate, Secretary Acheson responded that "the Logan Act is no more applicable to this case than to any other judicial or administrative proceeding abroad involving an American citizen and the provisions of an international agreement." *Id.* He noted that if Colonial Airlines had a genuine concern, it could have sought the State Department's permission to appear, and "we certainly would have told them that we had no objection to their appearing to take all necessary steps to protect their rights." *Id.*

In another example, when Senators John Sparkman and George McGovern visited Cuba in 1975, they urged Fidel Castro to return a ransom paid by Southern Airways for a hijacked plane and to let the parents of Luis Tiant, a pitcher for the Boston Red Sox, visit him in the United States. The Department of State advised that these discussions "appear[ed] to fall within the second paragraph of [18 U.S.C. § 953],"

indicating that such communications to seek private redress were consistent with the exception to the Logan Act, presumably on the theory that they were made on behalf of the injured parties.

III.

We now address the Logan Act's constitutionality. The Supreme Court has addressed the statute in dictum several times, without ever suggesting a constitutional infirmity. *See, e.g.*, *Arabian Am. Oil Co.*, 499 U.S. at 258; *Am. Banana Co.*, 213 U.S. at 356; *Skiriotes*, 313 U.S. at 74. Other federal courts have done the same. *See supra* note 9. The one exception came in *Waldron*, the civil antitrust case, in which the district court raised "a doubtful question with regard to the constitutionality" of the Logan Act based on "the statute's use of the vague and indefinite terms, 'defeat' and 'measures.'" 231 F. Supp. at 89. A House committee later cited *Waldron* in expressing similar concerns. *See* H. Comm. on Standards of Off. Conduct, 95th Cong., *Manual of Offenses and Procedures: Korean Influence Investigation* 18–19 (Comm. Print 1977). And in 1978, a Department of Justice task force on revising the criminal code advised that the Logan Act "is quite possibly unconstitutional," with the caveat that it had "undertaken no exhaustive analysis of the constitutional questions since [its] position on repeal of the Act [was] based on policy considerations." Hauptly Letter at 1.

This Office has repeatedly construed and applied the Logan Act without ever suggesting any constitutional difficulty except for once, where we stated in passing that "it is unclear under what enumerated power of Congress the statute was enacted." *See* Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Possible Criminal Charges Against American Citizen Who Was a Member of the al Qaeda Terrorist Organization or the Taliban Militia* at 10 (Dec. 21, 2001). Over the years, some academics have endorsed *Waldron*'s suggestion that the statute is void for vagueness; others have cited desuetude; and still others have concluded that the statute may unconstitutionally restrict speech.[27]

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[27] *See, e.g.*, Kevin M. Kearney, Comment, *Private Citizens in Foreign Affairs: A Constitutional Analysis*, 36 Emory L.J. 285, 339–49 (1987) (vagueness and First Amend-

We have considered each of these questions and believe the statute to be facially constitutional. Because our analysis is limited to a facial challenge, we do not address any as-applied challenge that could alter the constitutional calculus in a particular case.

A.

We consider first potential challenges based upon structural concerns. Despite the contrary dictum in one opinion of this Office, we conclude that the Logan Act is a valid act of Congress pursuant to the Necessary and Proper Clause. Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. By its terms, the Necessary and Proper Clause enables Congress to enact legislation that is "necessary and proper" not only to carry out its own enumerated powers but also to assist in the execution of the powers vested in "*any* Department or Officer" of the government. Although this power does not authorize Congress to interfere with the President's execution of his Article II powers, *see, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 135 (1976) (per curiam), it expressly permits Congress to legislate in aid of that authority. Thus, we think that the Necessary and Proper Clause provides Congress with authority to adopt those measures necessary to protect and make effective the diplomatic power vested in the President.

As discussed above, the Logan Act protects the constitutional authority of the Executive Branch by empowering it to seek criminal penalties, in the words of the original House resolution, on "all persons, citizens of the United States, who shall usurp the Executive authority of this Government" by carrying on unauthorized diplomacy. 9 Annals of Cong. at 2489; *see also United States v. Peace Info. Ctr.*, 97 F. Supp. 255, 261 (D.D.C. 1951) (describing the Logan Act as "within the field of external affairs of

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ment); Curtis C. Simpson III, Comment, *The Logan Act of 1799: May It Rest In Peace*, 10 Cal. W. Int'l L.J. 365, 380–82 (1980) (desuetude, vagueness, and First Amendment); Vagts, 60 Am. J. Int'l L. at 293–300 (vagueness and First Amendment); *see also* Noah Feldman, Opinion, *Logan Act Is Too Vague to Prosecute Flynn. Or Anyone.*, Bloomberg (Feb. 15, 2017), https://www.bloomberg.com/opinion/articles/2017-02-15/logan-act-is-too-vague-to-prosecute-flynn-or-anyone; Steve Vladeck, *The Iran Letter and the Logan Act*, Lawfare (Mar. 10, 2015), https://www.lawfareblog.com/iran-letter-and-logan-act.

this country, and, therefore, within the inherent regulatory power of the Congress"); Letter for Richard S. Schweiker, U.S. Senate, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, at 2 (Apr. 16, 1976) ("Clearly Congress enacted this legislation on the basis of the Federal Government's pervasive involvement in and jurisdiction over foreign relations."). Congress thus had affirmative authority under the Necessary and Proper Clause to pass the Logan Act.[28]

The Logan Act also remains valid notwithstanding its limited history of enforcement. The doctrine of desuetude has been taken, at times, to suggest that laws may be impliedly repealed through sustained disuse, and that subsequent enforcement could violate the Due Process Clause. *See Cent. Nat'l Bank of Mattoon v. U.S. Dep't of Treasury*, 912 F.2d 897, 906 (7th Cir. 1990) ("There have been occasional suggestions . . . that the sudden revival of a long forgotten law carrying harsh penalties . . . might encounter a defense of desuetude. But if there is such a defense it is surely reserved for more extreme cases than this one."); *Jamgotchian v. State Horse Racing Comm'n*, 269 F. Supp. 3d 604, 618 (M.D. Pa. 2017) ("Desuetude is a civil law doctrine rendering a statute abrogated by reason of its long and continued non-use." (quoting *United States v. Elliott*, 266 F. Supp. 318, 325 (S.D.N.Y. 1967))); *United States v. Moon Lake Elec. Ass'n*, 45 F. Supp. 2d 1070, 1083 (D. Colo. 1999) ("[T]he civil law doctrine of 'desuetude,' assuming its viability in American jurisprudence, requires a showing of 'long and continued non-use' of a statute that is 'basically obsolete.'" (quoting *Elliott*, 266 F. Supp. at 325–26)).

But federal law does not actually recognize the abrogation of statutes by desuetude. The Supreme Court has stated that "failure of the executive branch to enforce a law does not result in its modification or repeal. The repeal of laws is as much a legislative function as their enactment." *John R. Thompson Co.*, 346 U.S. at 113–14 (citations omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 336 (2012) ("A statute is not repealed by nonuse or desuetude. . . . If 10, 20, 100, or 200 years pass without any known cases applying the

[28] We note that the Logan Act has also been justified under Congress's power to "[t]o define and punish . . . Offences against the Law of Nations," U.S. Const. art. I, § 8, cl. 10. *See* l Francis Wharton, *A Treatise on the Criminal Law* § 274, at 299 (8th ed. 1880). But we do not think it necessary here to consider whether private diplomacy was, or could reasonably have been, viewed by Congress to violate the law of nations.

statute, no matter: The statute is on the books and continues to be enforceable until its repeal." (footnote omitted)). Decisions to exercise prosecutorial discretion and forgo prosecutions in past cases could not repeal the Logan Act by implication. *See Waldron*, 231 F. Supp. at 89 n.30 ("The Court finds no merit in plaintiff's argument that the Logan Act has been abrogated by desuetude."); *cf. Haig*, 453 at 309 n.61 ("The Government is entitled to concentrate its scarce legal resources on cases involving the most serious damage to national security and foreign policy."); *Wayte v. United States*, 470 U.S. 598, 608 (1985) (rejecting constitutional claims based on selective prosecution, and noting that such a claim is judged according to "ordinary equal protection standards").

Nor, in fact, has the Logan Act truly laid dormant. As discussed above, Congress has repeatedly codified, re-codified, and amended it since 1799, including as recently as 1994 when Congress changed the punishment. The statute has arisen repeatedly in congressional debates, been the subject of numerous congressional reports, survived multiple attempts at repeal, and periodically claimed a prominent place in public discourse. And the statute has been both discussed in judicial decisions and relied upon as a basis for Department of State regulations and practices, the expulsion of foreign consular officers, and at least one court-martial decision. Thus the Logan Act remains enforceable.

B.

We next consider whether the Logan Act is void for vagueness. Under the Due Process Clause of the Fifth Amendment, a criminal statute may not be "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see also United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (similar). Statutes must provide "relatively clear guidelines as to prohibited conduct" and "objective criteria" to evaluate potential violations. *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525–26 (1994).

At the same time, "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise." *United States v. Harriss*, 347 U.S. 612, 618 (1954); *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)

("[A]ll agree that a facial challenge must fail where the statute has a plainly legitimate sweep." (internal quotation marks omitted)). And although a statute with terms that might "interfere[] with the right of free speech or of association" calls for "a more stringent vagueness test," the law does not require "perfect clarity and precise guidance," particularly where a scienter requirement reduces the risks of inadvertent violations. *Humanitarian Law Project*, 561 U.S. at 19, 21 (internal quotation marks omitted). In this context, vagueness concerns arise when statutory terms involve "wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Williams*, 553 U.S. at 306. Under these standards, we believe that the Logan Act's reasonably precise elements and its strict scienter requirement refute any claim of vagueness.[29]

In *Waldron*, the court expressed concerns with the Logan Act's "use of the vague and indefinite terms, 'defeat' and 'measures,'" because "[n]either of these words is an abstraction of common certainty or possesses a definite statutory or judicial definition." 231 F. Supp. 72 at 89.

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[29] The question of vagueness was in fact discussed during the House's initial consideration of the measure. *Compare, e.g.*, 9 Annals of Cong. at 2512 (statement of Rep. Gallatin) (calling the resolution "perfectly vague and uncertain"), *id.* at 2595 (statement of Rep. Gallatin) (objecting "on account of the vagueness of" the intent requirement), *id.* at 2637 (statement of Rep. Gallatin) (objecting to the bill "because, under the pretence of punishing certain offences which ought to be punished, it is expressed in so general a manner as to include a number of acts which ought not to be punished; because it is drawn in the loosest possible manner; and wants that precision and correctness which ought always to characterize a penal law"), *id.* at 2638 (statement of Rep. Gallatin) (arguing that some Members of the House were trying to "pass a sort of general bill, giving merely authority to the courts without defining how it is to be applied, and leave them to punish or not punish, as they judge proper; to explain and define the law as they please; or, in other words, our Government is to become a Government, not of law, but of men!"), *and id.* at 2690 (statement of Rep. Livingston) ("A penal law ought to be so clear to the meanest capacity, that no doubt should exist of its construction . . . . Can gentlemen recur to this law and seriously declare that they have a clear idea of the precise acts upon which it is designed to operate?"), *with id.* at 2499 (statement of Rep. Dana) (contending that opponents of the resolution "did not seem fully to understand the import of the words used"), *id.* at 2647 (statement of Rep. Edmond) (describing the bill as "definite and correct"), *and id.* at 2678 (Rep. Isaac Parker) (expressing that certain ambiguity in the bill could be resolved "[i]f the whole scope of the bill was attended to," but introducing a clarifying amendment anyway). That debate, of course, does not itself resolve the constitutional question.

We disagree, however, that the phrase "defeat the measures of the United States" is constitutionally problematic. The terms in the phrase are susceptible to reasonable definition and appear elsewhere in the federal criminal code. Several criminal laws prohibit acts "to defeat," for instance, the provisions of the bankruptcy code, competitive-service examinations, or the purposes of the Department of Housing and Urban Development.[30] Other criminal provisions are contingent on the relationship between conduct and certain "measures," such as the making of a false statement "to influence the measures or conduct of any foreign government . . . to the injury of the United States." 18 U.S.C. § 954. The Espionage Act of 1917 prohibits disseminating information concerning "any works or measures undertaken for or connected with, or intended for the fortification or defense of any place," 18 U.S.C. § 794(b), and the Genocide Convention Implementation Act of 1987 bars "measures intended to prevent births within" a national, ethnic, racial, or religious group, 18 U.S.C. § 1091(a)(5). We thus do not believe that a prohibition on foreign communications intended "to defeat the measures of the United States" fails to provide fair notice. To the contrary, the statute covers foreign communications with the intent to frustrate or obstruct an objective of the United States. And for the reasons explained above, we view the other operative terms in the Logan Act to be readily understandable. *See supra* Part II.

Although the Logan Act may require greater clarity because it is a statute that regulates speech, the possibility of some uncertain applications does not render the statute void. In *Humanitarian Law Project*, the Court

[30] *See, e.g.*, 18 U.S.C. § 152(5), (7) ("intent to defeat the provision of title 11" in the context of bankruptcy); *id.* § 1012 ("intent to defraud [the] Department [of Housing and Urban Development] or with intent to unlawfully defeat its purposes"); *id.* § 1917 ("willfully and corruptly—(1) defeats, deceives, or obstructs an individual in respect of his right of examination . . . for the administration of the competitive service"); *id.* § 2232(b) ("for the purpose of impairing or defeating the court's continuing in rem jurisdiction"); *cf. also* Act of Feb. 25, 1863, ch. 60, § 1, 12 Stat. at 696 ("if any person . . . shall, without the permission or authority of the Government of the United States, and with the intent to defeat the measures of the said Government, . . . hold or commence, directly or indirectly, any correspondence or intercourse, written or verbal, with the present pretended rebel Government"). In the context of the bankruptcy code, the Sixth Circuit has interpreted the phrase "willfully attempted in any manner to evade *or defeat* such tax," 11 U.S.C. § 523(a)(1)(C) (emphasis added), to "cast a wide net" and include "attempts to thwart payment of taxes." *In re Gardner*, 360 F.3d 551, 557 (6th Cir. 2004).

rejected a vagueness challenge to 18 U.S.C. § 2339B, which prohibits "knowingly provid[ing] material support or resources to a foreign terrorist organization," *id.* § 2339B(a)(1), defined to include "training," "expert advice or assistance," "service," and "personnel," *id.* § 2339A(b)(1). The petitioners there sought to provide "monetary contributions, other tangible aid, legal training, and political advocacy" to two terrorist organizations and claimed that the statute was unconstitutionally vague as applied to them. *See Humanitarian Law Project*, 561 U.S. at 10. The Court recognized that it had previously found unconstitutionally vague statutes "that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings." *Id.* at 20 (quoting *Williams*, 553 U.S. at 306). By contrast, the material-support statute "does not require similarly untethered, subjective judgments," even if it "may not be clear in every application." *Id.* at 21. Like the material-support statute, the Logan Act contains terms capable of objective application.[31]

In *Humanitarian Law Project*, the Court also recognized that the statute's *mens rea* requirement "further reduces any potential for vagueness." *Id.* The Court in other cases has similarly found "that scienter requirements alleviate vagueness concerns." *Carhart*, 550 U.S. at 149; *see, e.g.*, *id.* at 150 ("The scienter requirements narrow the scope of the Act's prohibition and limit prosecutorial discretion."); *Skilling v. United States*, 561 U.S. 358, 412 (2010) ("[T]he statute's *mens rea* requirement further blunts any notice concern." (citation omitted)); *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982) ("[A] scienter requirement may mitigate a law's vagueness, especially with respect to

[31] The Logan Act similarly bears little resemblance to the recent trio of cases where the Court has held unconstitutionally vague statutes that impose penalties or sanctions based upon whether a generic version of the criminal offense causes a "serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), or "substantial risk that physical force against the person or property of another may be used," *id.* §§ 16(b), 924(c)(3)(B). *See Davis*, 139 S. Ct. at 2325–27; *Dimaya*, 138 S. Ct. at 1213–16; *Johnson*, 576 U.S. at 595–97. Those statutes require a court to evaluate not the riskiness of a particular defendant's actions but the abstract, hypothetical facts of an "ordinary case" under the incorporated criminal provisions. *See, e.g.*, *Johnson*, 576 U.S. at 597–98; *see also Welch v. United States*, 578 U.S. 120, 124 (2016) ("*Johnson* thus cast no doubt on the many laws that require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." (internal quotation marks omitted)).

the adequacy of notice . . . that [the] conduct is proscribed."); *Colautti v. Franklin*, 439 U.S. 379, 395 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*."). Here too the Logan Act contains a requirement of intentional conduct that narrows the statute's prohibition and protects against the risk of inadvertent violations.

The Supreme Court reached a similar conclusion in upholding a prohibition in the Espionage Act of 1917 concerning communications with a foreign government. In *Gorin v. United States*, 312 U.S. 19 (1941), the Court rejected a vagueness challenge, in large part because of an intent element similar to that found in the Logan Act.[32] The Court found "no uncertainty in this statute," explaining that "[i]n each of these sections the document or other thing protected is required also to be 'connected with' or 'relating to' the national defense." *Id.* at 26–27. "The obvious delimiting words in the statute," the Court continued, "are those requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.'" *Id.* at 27–28. This requisite scienter ensures "those prosecuted . . . have acted in bad faith." *Id.* at 28. Although the Logan Act may not require identical "bad faith" in all circumstances, the scienter requirement ensures that the statute applies only when a defendant intends to interfere with the core foreign-relations prerogatives of the Executive Branch.

Accordingly, we think that any violation of the Logan Act would require proof of objective, incriminating facts: Either the defendant acted

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[32] *See, e.g.*, Espionage Act of 1917, Pub. L. No. 65-24, tit. I, § 2(a), 40 Stat. 217, 218 ("Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to . . . communicate, deliver, or transmit, to any foreign government, . . . or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blue print, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by imprisonment for not more than twenty years[.]") (codified as amended at 18 U.S.C. § 794(a)); *see also id.* tit. I, § 1(a), 40 Stat. at 217 ("[W]hoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation . . . .") (codified as amended at 18 U.S.C. § 793(a)).

with the authority of the United States, or not. Either the defendant engaged in correspondence or intercourse with a foreign government, or not. And when it comes to the subjects of those communications, the statute's scienter requirement blunts concern for any ambiguity that may arise in particular cases concerning, for instance, whether the foreign country is engaged in a dispute or controversy with the United States. Taken together, these statutory elements provide sufficient notice of what the law proscribes, and establish minimum standards to guide enforcement. Even if certain conduct may raise questions on the margins, the Logan Act nonetheless encompasses a "general class of offenses" that fall "plainly within its terms." *Harriss*, 347 U.S. at 618.

C.

Finally, we consider whether the Logan Act is consistent with the Free Speech Clause of the First Amendment. The Supreme Court has repeatedly upheld statutes that regulate the communications of U.S. citizens with foreign actors in an effort to advance the national security and foreign relations of the United States. Although the Logan Act in part regulates expression, Congress has not "sought to suppress ideas or opinions in the form of 'pure political speech.'" *Humanitarian Law Project*, 561 U.S. at 26. U.S. citizens may "say anything they wish on any topic," *id.* at 25, including by engaging in public discussion and independent advocacy on all topics that implicate the foreign policy of the United States. What they may not do is communicate with a foreign government with an intent to influence its conduct with respect to the specifically delineated matters or to defeat U.S. measures. This prohibition surely restrains expression in some instances, which may warrant heightened scrutiny, but we think that Congress may, consistent with the First Amendment, prohibit U.S. citizens from communicating with a foreign government in the manner prohibited by the Logan Act.

As with the issue of vagueness, the Supreme Court's decision in *Humanitarian Law Project* provides helpful guidance. The Court there addressed whether the First Amendment permitted the government to bar the plaintiffs from providing material support to terrorist organizations in the form of speech. The Court treated the provision, as applied to the activities in which the plaintiffs wished to engage, as a content-based regulation of speech because the petitioners "want[ed] to speak" to the

foreign terrorist organizations, "and whether they may do so under § 2339B depends on what they say." *Id.* at 27. As such, the Court subjected the law to rigorous scrutiny based upon the nature of the prohibited expression and the law's fit with the underlying governmental interests. *See id.* at 28; *see also Nat'l Inst. of Family & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (describing *Humanitarian Law Project* as applying strict scrutiny).

Applying that standard, the Court rejected the constitutional claim. The Court recognized that "the Government's interest in combating terrorism is an urgent objective of the highest order," and that the challenge involved "sensitive and weighty interests of national security and foreign affairs." *Humanitarian Law Project*, 561 U.S. at 28, 33–34. The organizations had "committed terrorist acts against American citizens abroad, and the material-support statute addresses acute foreign policy concerns involving relationships with our Nation's allies." *Id.* at 34. Although the plaintiffs claimed to support only the legitimate, peaceful objectives of those organizations, Congress could reasonably conclude that any assistance "to a designated foreign terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization," *id.* at 36, and would "serve[] to legitimize and further their terrorist means," *id.* at 30. The government also had a diplomatic interest in barring material support to avoid "straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks." *Id.* at 32.

At the same time, the Court emphasized that the material-support statute, as applied to the plaintiffs' activities, did not impose any burden upon pure speech. The plaintiffs could "say anything they wish on any topic," "[t]hey may speak and write freely," and they may engage in "independent advocacy or expression of any kind." *Id.* at 25–26 (internal quotation marks omitted).[33] The statute did not regulate "independent speech," even

[33] In an example touching upon foreign diplomatic communications, the Court emphasized that although the plaintiffs were barred from directly instructing the terrorist organizations on how to petition the United Nations for humanitarian relief, *Humanitarian Law Project*, 561 U.S. at 21–22, the statute did not prevent the plaintiffs from "advocat[ing] before the United Nations" themselves, *id.* at 26. We do not read the Court's description of a kind of speech not covered by the material-support statute as expressing the view that Congress could not restrict diplomatic activity before an international organization or a foreign government.

if that speech would benefit a foreign terrorist organization, and it did not prohibit material support to any domestic organization. *Id.* at 39. The statute instead was "carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations." *See id.* at 26. Given the weighty interests underlying the material-support statute, the Court believed that this narrowly drawn prohibition on speech passed constitutional muster.

Humanitarian Law Project is consistent with other cases upholding restrictions on U.S. citizens' speech with, or on behalf of, foreign actors. In a variety of contexts, the Court has recognized constraints on speech in the international sphere to protect the national security and foreign relations interests of the United States, and authorized restrictions even on some domestic speech. Thus, in *Haig*, the Court rejected a First Amendment challenge to the Department of State's revocation of the passport of a former CIA agent who was traveling to foreign countries for the avowed "purpose of obstructing intelligence operations and the recruiting of intelligence personnel." 453 U.S. at 308–09. Agee sought to travel to foreign countries to consult with local diplomatic officials to identify and expose undercover CIA sources.[34] The Court recognized that the State Department had revoked Agee's passport "in part on the content of his speech," *id.* at 308, but found "no governmental interest" to be "more compelling than the security of the Nation," and the "[p]rotection of the foreign policy of the United States" similarly to be "a governmental interest of great importance," *id.* at 307. Agee remained "as free to criticize the United States Government as he was when he held a passport" (subject to his obligation to protect classified information), *id.* at 309, but the Court rejected the claim that the First Amendment would bar the revocation.

The Supreme Court has similarly sustained the Foreign Agents Registration Act of 1938 ("FARA"), 22 U.S.C. § 611 *et seq.*, which regulates domestic speech when made on behalf of foreign governments or other

[34] As discussed above in Part I.C.3, the D.C. Circuit had voided the State Department's decision over a dissent that found the action justified because Agee's activities violated the Logan Act. *See Agee*, 629 F.2d at 112–13 (MacKinnon, J., dissenting) (indicating that an alleged violation of the Logan Act had been one of the government's initial justifications for revoking the respondent's passport and restraining his speech).

foreign principals. Although FARA does not prohibit domestic speech outright, it requires an agent of a foreign power to register with the Attorney General and publicly disclose that certain speech is made on behalf of a foreign principal, and it imposes criminal penalties based upon a willful failure to do so. *See id.* §§ 612, 614, 618(a); *see also* 18 U.S.C. § 2386 (requiring registration of certain organizations subject to foreign control and engaging in political activity). FARA has repeatedly been upheld. *See Meese v. Keene*, 481 U.S. 465, 477–85 (1987) (rejecting a First Amendment challenge to past FARA provisions regarding political propaganda); *Att'y Gen. v. Irish People, Inc.*, 684 F.2d 928, 935 (D.C. Cir. 1982) ("[I]t is well settled that FARA is constitutional.").[35] As the Court has acknowledged, FARA is intended "to protect the national defense, internal security, and foreign relations of the United States by requiring public disclosure" of the activities of foreign governments and other foreign principals. *Meese*, 481 U.S. at 469 (alteration omitted) (quoting Pub. L. No. 77-532, 56 Stat. 248, 248 (1942) (codified at 22 U.S.C. § 611 note)); *see also Viereck v. United States*, 318 U.S. 236, 241 (1943) ("The general purpose of the legislation was to identify agents of foreign principals who might engage in subversive acts or in spreading foreign propaganda, and to require them to make public record of the nature of their employment.").

Although a disclosure requirement of this kind "neither prohibits nor censors the dissemination of advocacy materials by agents of foreign principals," *Meese*, 481 U.S. at 478, and thus necessarily burdens speech less than an outright prohibition, even such a lesser burden might well be unconstitutional in an entirely domestic context. The Court has had little difficulty striking down similar registration requirements regarding domestic speech. *See, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) (holding that a village's registration

[35] *See also, e.g.*, *Att'y Gen. v. Irish People, Inc.*, 595 F. Supp. 114, 120–21 (D.D.C. 1984), *aff'd in part and rev'd in part on other grounds*, 796 F.2d 520 (D.C. Cir. 1986); *Att'y Gen. v. Irish N. Aid Comm.*, 530 F. Supp. 241, 253 (S.D.N.Y. 1981), *aff'd*, 668 F.2d 159 (2d Cir. 1982); *Att'y Gen. v. Irish N. Aid Comm.*, 346 F. Supp. 1384, 1389–91 (S.D.N.Y.), *aff'd mem.*, 465 F.2d 1405 (2d Cir. 1972); *Peace Info. Ctr.*, 97 F. Supp. at 262–64; *cf. United States v. Auhagen*, 39 F. Supp. 590, 591 (D.D.C. 1941). Notably, in *Peace Information Center*, the district court drew an express comparison to the Logan Act in upholding FARA against First Amendment and vagueness challenges. 97 F. Supp. at 263–64.

requirement for door-to-door canvassers violated the First Amendment); *Thomas v. Collins*, 323 U.S. 516 (1945) (striking down a statute requiring labor union organizers to register with the state). These decisions demonstrate that the government's national-security and foreign-affairs interests in regulating foreign actors may permit restrictions on the domestic speech of U.S. citizens that would not be tolerated absent such a foreign connection.[36]

Finally, we note that Congress has prohibited the disclosure of certain categories of national-security information with the intent or belief that it will be used to injure the United States or to the advantage of any foreign nation. *See* Espionage Act of 1917, 18 U.S.C. § 793; *see also id.* § 798(a) (prohibiting the disclosure of certain forms of classified information when done "in any manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United States"). These statutes have routinely been upheld against First Amendment challenges. *See, e.g.*, *United States v. Morison*, 844 F.2d 1057, 1070 (4th Cir. 1988) ("Sections 793(d) and (e) unquestionably criminalize [the transfer of national defense information] by a delinquent governmental employee and, when applied to a defendant in the position of the defendant here, there is no First Amendment right implicated."); *United States v. Kim*, 808 F. Supp. 2d 44, 56 (D.D.C. 2011) ("Because § 793(d) makes it unlawful to communicate national defense information to those not entitled to receive it, courts have held that the First Amendment affords no protection for this type of conduct even though it clearly involves speech."); *see also Haig*, 453 U.S. at 308 ("[R]epeated disclosures of intelligence operations and names of intelligence personnel . . . [that] have the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel . . . are clearly not protected by the Constitution."); *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per

[36] The Supreme Court has similarly recognized a First Amendment right to receive "communist political propaganda" from a foreign government free from a requirement that the recipient expressly request that the correspondence be delivered. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965). We do not think, however, that *Lamont* speaks to the constitutionality of the Logan Act insofar as the government's interest in regulating a citizen's private diplomatic correspondence with a foreign government implicates far weightier issues than the government's interest in regulating the information that a citizen seeks to receive from a foreign government.

curiam) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service."); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) ("No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."). Once again, they demonstrate that Congress may regulate and prohibit speech to further vital national security interests.

Against the backdrop of this precedent, we believe that the Logan Act is consistent with the First Amendment. The Logan Act was enacted for the avowed purpose of protecting the Executive Branch's authority in managing our Nation's foreign relations. *See supra* Part II.A. And the Supreme Court has repeatedly confirmed the President's "unique role in communicating with foreign governments," *Zivotofsky*, 576 U.S. at 21, and "that foreign policy [i]s the province and responsibility of the Executive," *Egan*, 484 U.S. at 529 (quoting *Haig*, 453 U.S. at 293–94); *see also Louisiana*, 363 U.S. at 35 ("The President . . . is the constitutional representative of the United States in its dealings with foreign nations."); *Curtiss-Wright*, 299 U.S. at 319 ("The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." (quoting 10 Annals of Cong. at 613 (statement of Rep. Marshall))).[37] Like the foreign travel restrictions at issue in *Haig*, the Logan

[37] *See also, e.g.*, *Prohibition of Spending for Engagement of the Office of Science and Technology Policy with China*, 35 Op. O.L.C. 116, 120 (2011) ("The President's exclusive prerogatives in conducting the Nation's diplomatic relations are grounded in both the Constitution's system for the formulation of foreign policy, including the presidential powers set forth in Article II of the Constitution, and in the President's acknowledged preeminent role in the realm of foreign relations throughout the Nation's history." (footnote omitted)); *Legislation Prohibiting Spending for Delegations to U.N. Agencies Chaired by Countries That Support International Terrorism*, 33 Op. O.L.C. 221, 230 (2009) (The President alone can decide "whether, how, when, and through whom to engage in foreign diplomacy."); *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 267 (1996) ("It is . . . well settled that the Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other States."); *Issues Raised by Foreign Relations Authorizations Bill*, 14 Op. O.L.C. 37, 39 (1990) ("[T]he courts, the Executive, and Congress have all concurred that the President's constitutional authority specifically includes the exclusive authority to represent

Act is justified by "a governmental interest of great importance" since it also involves the "[p]rotection of the foreign policy of the United States." 453 U.S. at 307.

At the same time, the Logan Act does not unduly restrict the freedom of U.S. citizens to speak on issues of foreign policy. The statute regulates only efforts to communicate with foreign governments with the intent to influence their conduct as it relates to specific disputes or controversies involving the United States or to defeat the measures of the United States. It does not bar criticism of the President's foreign policy generally or the manner in which he has carried on relations with foreign governments. It does not prevent anyone from expressing his views concerning the diplomatic efforts that the United States or a foreign government should pursue, so long as those views are not expressed through correspondence or intercourse with foreign officials. And the Logan Act does not regulate "independent speech" by persons or any communications with "domestic organizations." *Humanitarian Law Project*, 561 U.S. at 39. Although private speakers who disclaim a connection to the U.S. government might argue that their diplomatic efforts do not interfere with the right of the United States to conduct foreign policy with one voice, "the considered judgment of Congress and the Executive" stands to the contrary. *Id.* at 36. The statute is narrowly drawn to restrict the kind of speech that Congress has determined threatens to usurp the authority of the Executive Branch to conduct the diplomatic relations of the United States. We therefore believe that the Logan Act is facially consistent with the First Amendment.[38]

IV.

Congress enacted the Logan Act to protect the President's foreign affairs power from interference. The statute was constitutional when enacted, and unless or until repealed by Congress, remains valid and enforceable by the Department.

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the United States abroad."); *Authority to Participate in International Negotiations*, 2 Op. O.L.C. 227, 228 (1978) ("Negotiation is a necessary part of the process by which foreign relations are conducted, and the power to conduct foreign relations is given to the President by the Constitution.").

[38] We thus think that the Logan Act would withstand a facial challenge in which a court applied strict scrutiny. It follows that the statute would survive if a court determined that a lower standard of review were appropriate.

Please let us know if we may be of any further assistance.

STEVEN A. ENGEL
Assistant Attorney General
Office of Legal Counsel

Unauthorized Disclosures About Prosecutorial Decision-Making and the Whistleblower Protection Act

Unauthorized disclosures about lawful prosecutorial decision-making are not likely to be protected by the Whistleblower Protection Act, because they generally will not reveal any of the categories of governmental wrongdoing that the statute identifies.

December 23, 2020

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked whether the Whistleblower Protection Act ("WPA"), 5 U.S.C. § 2302(b)(8)(A), would prohibit the Department of Justice from taking any adverse employment action against an attorney or other employee who leaks to the press confidential information concerning prosecutorial decision-making. Your question arose in connection with a leak in a particular criminal investigation. Because such leaks are a recurring problem, you have asked for more general guidance concerning the applicability of the WPA in connection with adverse employment action for leaking this kind of confidential information to the press.

The general answer is that the WPA does not protect a Department attorney or other employee who leaks confidential information about a pending criminal matter. Except when the employee reasonably believes that the disclosure reveals a violation of laws or rules, or exposes serious wrongdoing (as defined by the statute), an attorney may not invoke the WPA to avoid the consequences of publicly disclosing such information in violation of Department policies.[1] The fact that an attorney strongly disagrees with a Department decision or believes the decision to be contrary to the public interest would not itself justify protection. This conclusion is not only consistent with the plain language and judicial interpretation of the statute. It is also reinforced by the fact that prosecutorial deliberations implicate core executive functions and executive privilege. Separation of powers concerns thus militate against any interpretation of

[1] A Department attorney may have a separate ethical duty under the rules of professional responsibility to protect the disclosure of confidential information relating to the attorney's work for the Department. *See, e.g.*, D.C. Bar, Rules of Professional Conduct, Rule 1.6 (Confidentiality of Information). We do not address the bar discipline to which attorneys may be exposed if they violate this duty of confidentiality.

the WPA that would deprive the accountable Executive Branch officials of control over this information.

I.

Section 2302(b)(8)(A), as relevant here, prohibits the taking of, or threatening to take, any "personnel action" against a Department employee because of "any disclosure of information" which the employee "reasonably believes evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety," except where such disclosure is "specifically prohibited by law" or where the information is classified. 5 U.S.C. § 2302(b)(8)(A); *see also id.* § 2302(a)(2)(A) (defining personnel action). A similar provision, section 2302(b)(8)(B), governs disclosures to inspectors general and other agency officials designated to receive disclosures, and to the Office of Special Counsel.[2] In both instances, the statute makes clear that a protected "disclosure" excludes any "communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences" the kind of unlawful conduct or other wrongdoing identified in the statute. 5 U.S.C. § 2302(a)(2)(D).

The issue of leaks within the Department (and elsewhere in the federal government) is a recurring one. Department policies require employees to protect non-public, sensitive information concerning a pending investigation. *See, e.g.*, *Confidentiality and Media Contacts Policy*, Justice Manual §§ 1-7.000–.900. The Department's policies balance the competing interests in securing the right of a person under investigation to fair process and privacy, the government's ability to administer justice and to promote public safety, and the public interest in information about the Department's work. *See id.* § 1-7.001. The policies require that any disclosures to the media concerning a pending investigation be approved in advance by the appropriate United States Attorney or Assistant Attorney General.

[2] The only difference is that section 2302(b)(8)(B) does not protect a disclosure of a violation of section 2302 itself. Section 2302(b)(8)(C), on the other hand, protects disclosures to Congress using significantly different language and raises distinct issues that we do not discuss in this opinion.

See id. § 1-7.400. The policies, however, while binding on employees as an administrative matter, do not trump the WPA or satisfy its exception for disclosures "specifically prohibited by law." *See Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 384 (2015) (holding that "specifically prohibited by law" excludes disclosures prohibited by agency rules and regulations).

That said, certain aspects of prosecutorial deliberations are categorically unprotected by the WPA. The WPA does not protect a disclosure of grand-jury information, because Federal Rule of Criminal Procedure 6(e) was adopted by statute and, therefore, disclosure of such information is "specifically prohibited by law." *See* Pub. L. No. 95-78, § 2, 91 Stat. 319, 319–20 (1977); *see also Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1113 (D.C. Cir. 2007) (holding that Rule 6(e) counts as a "statute" for purposes of exemption 3 of the Freedom of Information Act because "it has been positively enacted by Congress"). In addition, as noted, the WPA does not protect disclosures involving classified information. *See* 5 U.S.C. § 2302(b)(8)(A) (exempting from protection information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs").

II.

Apart from these categorically unprotected disclosures, whether the WPA protects a disclosure of prosecutorial deliberations will depend upon whether the employee could reasonably believe that the disclosure reflects certain kinds of unlawful or egregious conduct.

The Federal Circuit, in reviewing the administrative decisions of the Merit Systems Protection Board, has recognized that whether an individual has "a reasonable belief" that a disclosure is protected "is determined by an objective test: whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee would reasonably conclude that the actions of the government evidence wrongdoing as defined in the Whistleblower Protection Act." *Young v. MSPB*, 961 F.3d 1323, 1328 (Fed. Cir. 2020) (citing *Giove v. Dep't of Transp.*, 230 F.3d 1333, 1338 (Fed. Cir. 2000)). In most cases, including the one prompting your question, the disclosures of prosecutorial deliberations will not plausibly evidence a "violation of any law, rule, or regulation." 5 U.S.C. § 2302(b)(8)(A)(i). In such a case, the disclosure

would be protected only if the employee had a reasonable belief that it evinced "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." *Id.* § 2302(b)(8)(A)(ii).

We think that, under this standard, disclosures concerning prosecutorial deliberations and the conduct of Department investigations will usually not qualify as protected disclosures. The statute expressly does not protect "policy decisions that lawfully exercise discretionary authority" and do not evidence the wrongdoing covered by the statute. 5 U.S.C. § 2302(a)(2)(D). The decision whether to prosecute is a quintessential exercise of discretionary authority. Even if an attorney believes that the Department has brought, or has failed to bring, a prosecution against a person for a reason contrary to the public interest, such a decision will not rise to the kind of wrongdoing the disclosure of which would be protected by this portion of the statute unless the wrongdoing is so clear and significant as not to be subject to reasonable debate.

A.

A disagreement over prosecutorial decision-making or the conduct of an investigation generally does not evidence "gross mismanagement" or a "gross waste of funds." "Gross mismanagement" requires "a management action or inaction that creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission." *Embree v. Dep't of the Treasury*, 70 M.S.P.R. 79, 85 (1996). Mere "debatable differences of opinion concerning policy matters are not protected disclosures." *White v. Dep't of the Air Force*, 391 F.3d 1377, 1382 (Fed. Cir. 2004). "Rather, for a lawful agency policy to constitute 'gross mismanagement,' an employee must disclose such serious errors by the agency that a conclusion the agency erred is not debatable among reasonable people." *Id.* Even when disagreements are not debatable, they will not invariably rise to the level of importance required for protection. "The matter must also be significant." *Id.*; *see also Daniels v. MSPB*, 832 F.3d 1049, 1056 (9th Cir. 2016) (agency directive "represents a policy decision," such that communications concerning that directive "do not qualify as disclosures under the plain text of the WPA").

As with "gross mismanagement," the Merit Systems Protection Board has viewed a "gross waste of funds" to require misconduct that is "a more

than debatable" discretionary decision. *Fisher v. EPA*, 108 M.S.P.R. 296, 303 (2008). The expenditure must be "significantly out of proportion to the benefit reasonably expected to accrue to the government" and will typically reveal "blatant wrongdoing or negligence." *See id.*; *see also, e.g.*, *Ward v. MSPB*, 981 F.2d 521, 527 (Fed. Cir. 1992) (holding unprotected a disclosure about a decision to send employees to a conference abroad because "the decision whether to send" the employees "was a matter within the discretion" of agency officials).

We think that a disclosure about prosecutorial decision-making is not likely to satisfy these standards. As the Supreme Court has observed, a decision to prosecute or not "often involves a complicated balancing of a number of factors which are particularly within" the Department's expertise. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). No objective standards are readily apparent to judge any such decision to have been indisputably and egregiously incorrect. In most cases, reasonable people will be able to debate the merits of proceeding with that particular criminal prosecution, including what charges, if any, to bring; whether to continue investigating, or continue investigating other targets; whether to pursue civil or administrative actions instead of criminal charges; and so forth. It would require misconduct or a waste of resources that is serious before such a disclosure could be characterized as evidencing "gross mismanagement" or a "gross waste of funds." *Cf. Coons v. Sec'y of the Treasury*, 383 F.3d 879, 890 (9th Cir. 2004) (holding protected a disclosure that the Internal Revenue Service "processed a large, fraudulent refund for a wealthy taxpayer" under "highly irregular circumstances"). If the question may be reasonably debated by a disinterested observer with knowledge of the essential facts—as will typically be the case in the context of leaks about particular criminal matters—the disclosure of such deliberations would not be protected on these grounds.

B.

We similarly do not believe that disclosures about prosecutorial decision-making and the law enforcement investigations that precede them will generally evince an "abuse of authority" within the meaning of 5 U.S.C. § 2302(b)(8)(A)(ii). An "abuse of authority" is "an arbitrary or capricious exercise of power by a Federal official or employee that ad-

versely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons." *Sanders v. Dep't of Justice*, 65 M.S.P.R. 595, 600 (1994), *aff'd,* 73 F.3d 380 (table) (Fed. Cir. 1995). Prosecutorial deliberations are neither likely to involve a Department official or employee obtaining any "personal gain or advantage" from the decision, nor to evidence an "exercise of power adversely affecting [the] rights" of someone other than the target of the investigation. *Doyle v. Dep't of Veterans Affairs*, 273 F. App'x 961, 964 n.2 (Fed. Cir. 2008). A decision not to prosecute may incidentally result in an advantage to "preferred other persons," but such a decision should generally be viewed as evidence of an *exercise* of prosecutorial authority, rather than an *abuse* of that authority. *See Hansen v. MSPB*, 746 F. App'x 976, 979, 982 (Fed. Cir. 2018) (disagreement with supervisor's personnel decisions was a "policy dispute" rather than an abuse of authority, and "[a] communication concerning policy decisions that lawfully exercise discretionary authority is not a protected whistleblower disclosure" (citation omitted)). The Department's lawful exercise of discretionary authority is not "arbitrary and capricious" simply because a person involved in the deliberations thinks the decision mistaken. The wrongdoing must not be susceptible of reasonable debate to be the kind of extraordinary misconduct the disclosure of which the WPA protects.

C.

Finally, we believe that disclosures of prosecutorial deliberations are unlikely, in most cases, to concern a "substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A)(ii). For a disclosure to be protected on this ground, it must evidence a "harm" that is "likely to occur in the immediate or near future"—not a "speculative or improbable" harm that is "likely to manifest only in the distant future." *Chambers v. Dep't of the Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008). The potential consequences of any such harm must be both "substantial and specific." *Id.* A serious harm that is quite unlikely to occur, or unlikely to occur at any discernible time, is not the sort of harm that meets this standard. *See, e.g.*, *Standley v. MSPB*, 715 F. App'x 998, 1003 (Fed. Cir. 2017) (disclosures about the Department of Defense's "degradation in capability to detect nuclear blasts in space could affect public health and safety," but putative whistleblower "had not alleged quantifiable potential harm . . . to

show that such an occurrence is more than a possibility occurring at an undefined point in the future" (internal quotation marks and citation omitted)). And a harm, even if serious and imminent, that is not traceable to the action or inaction evidenced in the disclosure also would not suffice. *See, e.g.*, *Auston v. MSPB*, 371 F. App'x 96, 102 (Fed. Cir. 2010) (affirming MSPB finding that disclosure was not protected as a result of employee's "failure to make specific allegations that the alleged understaffing in the [sterile processing department of a VA hospital] was resulting in unhygienic equipment" that would pose a substantial and specific threat to public health).

Typically, a disclosure about prosecutorial decision-making will not be one that poses a "substantial and specific danger to public health or safety." As the Federal Circuit has observed:

> Law enforcement activities generally serve to increase public safety. The budget provided for law enforcement, however, limits the extent of protection. Allocating the budget to different aspects of law enforcement necessarily balances the risks and benefits affected; this balancing represents a quintessential management decision. Any such policy decision related to the allocation or distribution of law enforcement funding, therefore, could potentially be said to create a risk to public safety.

Chambers, 515 F.3d at 1368. But since Congress "did not intend . . . to categorically classify any danger arising from law enforcement" as a substantial and specific threat to public safety, additional "parameters" are needed to "define disclosure of a danger to public health or safety." *Id.*; *see also id.* ("[G]eneral criticism by an employee of the Environmental Protection Agency that the agency is not doing enough to protect the environment would not be protected under this subsection. However, an allegation by a Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate would fall within the whistle blower protections." (quoting S. Rep. No. 95-969, at 21 (1978))). Because criminal investigations are backward-looking—focused upon whether a person has committed a criminal offense that prosecutors can establish in a criminal proceeding—prosecutorial deliberations will rarely evidence a "substantial and specific danger to public health or safety" likely to occur in the future.

III.

We therefore conclude that, under the prevailing precedent, the WPA does not protect disclosures about prosecutorial decision-making that do not involve clear evidence of wrongdoing. In addition, such disclosures implicate two constitutional considerations: the principle of unreviewable prosecutorial discretion and the separation of powers concerns arising from disclosures of information protected by executive privilege. Both concerns strongly support interpreting the WPA in a manner that would preserve the Department's ability to prevent the disclosure of prosecutorial deliberations that do not evidence serious misconduct.

A.

We have previously recognized the need to construe whistleblower statutes to avoid intruding into the realm of prosecutorial discretion, which is "a special province of the Executive," *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999). In 2005, we concluded that this principle militates against applying environmental whistleblower statutes to Department attorneys, where an Assistant United States Attorney ("AUSA") "alleges adverse employment actions arising from the [Department's] disagreement with the AUSA's recommendations concerning prosecution of environmental law violations." Memorandum for Peter D. Keisler, Assistant Attorney General, Civil Division, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of Environmental Whistleblower Statutes to Department of Justice Attorneys* at 11 (Jan. 27, 2005) ("*Environmental Statutes*"). In reaching that conclusion, we explained that "[a] whistleblower complaint arising out of a disagreement between" a prosecutor and a Department official "during a prosecutorial decisionmaking process . . . involves prosecutorial activity that lies within the exclusive province of the Executive Branch . . . . A whistleblower complaint based upon prosecutorial activities would necessarily entail review of those prosecutorial activities, and it seems inevitable that in adjudicating such a complaint the Labor Department and the courts would ultimately review the underlying prosecutorial decisionmaking process itself." *Id.* at 10.

A similar conclusion is warranted here. If the WPA generally protected disclosures about prosecutorial decision-making, it would "threaten[] to

chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte v. United States*, 470 U.S. 598, 608 (1985). For this reason, courts typically "have refrained from reviewing, and have provided immunity for, prosecutorial decisions," in order to "ensure that the Executive Branch is not burdened in the performance of one of its core constitutional functions." *Environmental Statutes* at 12. Accordingly, absent any "clear statement" of congressional intent to intrude upon "traditionally sensitive areas" implicating the separation of powers, we would construe section 2302(b)(8)(A) not to reach the disclosures about prosecutorial decision-making. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks and citation omitted); *Environmental Statutes* at 14.[3]

B.

We have also long viewed whistleblower provisions that inhibit the Executive Branch's power to control the confidentiality of information as raising separation of powers concerns. *See, e.g.*, *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 100 (1998). The Executive's confidentiality interest is "not limited to classified information, but extend[s] to all deliberative process or other information protected by executive privilege." *Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, 28 Op. O.L.C. 79, 80 (2004). Two aspects of such information are implicated by the disclosures at issue here.

First, disclosures about prosecutorial decision-making implicate the deliberative process component of executive privilege. That component "extends to all Executive Branch deliberations." *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, 9 (2008); *see also United States v. Nixon*, 418 U.S. 683, 705 (1974). It applies to "delibera-

[3] In the *Environmental Statutes* opinion, we reserved the question whether the more general WPA protections would apply to disclosures about prosecutorial decision-making. *Environmental Statutes* at 10 n.9. We do not conclude here that such disclosures are categorically unprotected, but we believe that considerations similar to those discussed in that opinion warrant construing the WPA's categories of protected disclosures narrowly to avoid trenching on executive prerogatives.

tive memoranda . . . containing advice and recommendations concerning whether or not . . . particular prosecutions should be brought," because "[t]he need for confidentiality is particularly compelling in regard to the highly sensitive prosecutorial decision of whether to bring criminal charges." *Assertion of Executive Privilege with Respect to Prosecutorial Documents*, 25 Op. O.L.C. 1, 1 (2001). The disclosure of information revealing the deliberations preceding prosecutorial or investigative decisions would impede the ability of the Attorney General and other Department decision-makers to enforce the law, by chilling "candid and confidential advice and recommendations in making investigative and prosecutorial decisions." *Id*.

Second, such disclosures are protected by the law enforcement component of executive privilege, which applies to information concerning Executive Branch investigations. *See Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 75–78 (1986). "[T]he Executive's ability to enforce the law would be seriously impaired, and the impermissible involvement of other branches in the execution and enforcement of the law would be intolerably expanded, if the Executive were forced to disclose sensitive information on case investigations and strategy from open enforcement files." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 118 (1984).[4] Unrestrained disclosures of information in law enforcement files by Department attorneys would raise these same concerns.

We thus construe section 2302(b)(8)(A) not to reach disclosures revealing either information protected by the law enforcement privilege or

[4] The deliberative process and law enforcement components of executive privilege are not absolute, but absent affirmative wrongdoing, the confidentiality interests are not likely to be overcome when they involve sensitive information about specific prosecutions. *See* Memorandum for Victor Kramer, Counselor to the Attorney General, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Amendment to 28 C.F.R. § 50.2 on Unauthorized Disclosures of Information Acquired During a Criminal Investigation* at 6 n.8 (Feb. 29, 1980) ("A Department of Justice employee may have access to information about criminal investigations, and his statements are likely to be credited by outsiders; indeed, such statements can be almost as damaging to potential defendants as an official announcement by the Department with the same content. For this reason, the Department has a substantial interest in restricting statements made by its employees about criminal investigations.").

information reflecting prosecutorial deliberations protected by the deliberative component of executive privilege. These constitutional considerations strengthen our conclusion that the protections of section 2302(b)(8)(A) will not, in most cases, reach disclosures of lawful prosecutorial decision-making that do not reveal unarguable wrongdoing within the Department.

IV.

We conclude that disclosures about lawful prosecutorial decision-making are not likely to be protected by the WPA, because they generally will not reveal any of the categories of governmental wrongdoing that the statute identifies. *See* 5 U.S.C. § 2302(b)(8)(A)(i)–(ii).

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