OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES,

THE ATTORNEY GENERAL,

AND OTHER EXECUTIVE
OFFICERS OF THE FEDERAL
GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

EDITOR: Nathan A. Forrester
ASSOCIATE EDITOR: Kevin J. Barber

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(2016)

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FOREWORD

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

The Attorney General is responsible, "from time to time," to "cause to be edited, and printed in the Government Printing Office [Government Publishing Office], such of his opinions as he considers valuable for preservation in volumes." 28 U.S.C. § 521. The Official Opinions of the Attorneys General of the United States comprise volumes 1–43 and include opinions of the Attorney General issued through 1982. The Attorney General has also directed OLC to publish those of its opinions considered appropriate for publication on an annual basis, for the convenience of the Executive, Legislative, and Judicial Branches and of the professional bar and general public. These OLC publications now also include the opinions signed by the Attorney General. The first 39 published volumes of the OLC series covered the years 1977 through 2015. The present volume 40 covers 2016.

As always, the Office expresses its gratitude for the efforts of its paralegal and administrative staff—Elizabeth Farris, Melissa Golden, Richard Hughes, Marchelle Moore, Natalie Palmer, Joanna Ranelli, and Dyone Mitchell—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

Special Government Employee Serving as Paid Consultant to Saudi Company

A special government employee, retained to provide advice on behalf of the Department of Commerce to Middle Eastern countries that are reforming and harmonizing their laws, may accept a paid consulting position with a Saudi energy company without violating the Emoluments Clause, U.S. Const. art. I, § 9, cl. 8, because he does not hold an "Office of Profit or Trust under" the United States.

January 13, 2016

MEMORANDUM OPINION FOR THE
ASSISTANT GENERAL COUNSEL
ADMINISTRATION AND TRANSACTIONS
DEPARTMENT OF COMMERCE

Your Office has asked whether the Emoluments Clause of the Constitution would bar a special government employee of the Department of Commerce ("Department") from accepting a paid consulting position with a Saudi entity known as the King Abdullah City for Atomic and Renewable Energy ("KA-CARE"). *See* Memorandum for Karl Remón Thompson, Acting Assistant Attorney General, Office of Legal Counsel, from Barbara S. Fredericks, Assistant General Counsel for Administration, Department of Commerce, *Re: Applicability of Emoluments Clause to a Special Government Employee* (May 16, 2014) ("Commerce Memo"). The Emoluments Clause forbids anyone "holding any Office of Profit or Trust under" the United States from accepting, without congressional consent, "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. We orally advised your Office that the special government employee in question may accept the consulting position without violating the Emoluments Clause, because, on the facts described to us, he does not hold an "Office of Profit or Trust under" the United States. This memorandum opinion memorializes and further describes the basis for our advice.[1]

[1] Because we conclude that the employee in question does not hold an "Office of Profit or Trust under" the United States, we do not address in this memorandum opinion whether KA-CARE is an instrumentality of the Saudi Government, and thus whether the compensation and position the special government employee would receive from KA-CARE

I.

Your Office has explained that one of the Department's special government employees wishes to accept a paid consulting position with KA-CARE.[2] The Department hired the employee as an expert in the Commercial Law Development Program, a division of the Department that "helps achieve U.S. foreign policy goals by providing technical assistance (such as capability building, peer-to-peer best practices awareness, and empowerment of civil society organizations) to developing and post-conflict countries in helping to establish commercial legal reforms." Commerce Memo at 1; *see also About CLDP*, http://cldp.doc.gov/about-cldp (last visited Jan. 11, 2016). The employee, who is both an attorney and a scholar in Sharia law, assists the Commercial Law Development Program in its collaborations with Middle Eastern countries that are reforming and harmonizing their laws. Commerce Memo at 1. His duties are to "revise, update and build capacity to harmonize relevant laws and regulations so that they may help attract responsible international investment to the region," and to "provide legal expertise and advice to countries" in a manner that is sensitive to those countries' cultural norms. *Id.* The employee's assignments have included speaking at colloquia and seminars in the Middle East and reviewing proposed commercial laws for consistency with local customs, cultural sensitivities, and religious norms. Jacobi E-mail. The employee does not have discretionary authority to disburse federal funds or property. Commerce Memo at 1. Nor does he formulate federal policy, supervise other federal employees, or have access to classified materials. *Id.*

The Department hired the special government employee for a one-year term that may, but need not, be renewed, and for duties to be performed on an intermittent rather than full-time basis. *Id.*; *see also* 18 U.S.C.

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would be an "Emolument [or] Office . . . of any kind whatever, from any King, Prince, or foreign State."

[2] We describe KA-CARE in more detail below. For facts regarding KA-CARE, the Department's Commercial Law Development Program, and the responsibilities of the special government employee at issue, we rely chiefly on information submitted to us by the Department. *See* Commerce Memo; E-mail for Jane Nitze, Attorney-Adviser, Office of Legal Counsel, from Will Jacobi, Senior Attorney, Department of Commerce, *Re: Emoluments question* (Apr. 28, 2014, 8:55 AM) ("Jacobi E-mail").

§ 202(a) (defining "special Government employee" to include "an officer or employee of the executive . . . branch of the United States Government . . . who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis"). He receives assignments from the Commercial Law Development Program, with the length of an assignment generally varying from an hour to several days. Commerce Memo at 1; Jacobi E-mail. The employee is compensated at an hourly rate, files financial disclosure forms, and took an oath of office. Commerce Memo at 1.

KA-CARE was established by Saudi royal decree as an independent legal entity with the "aim of building a sustainable future for Saudi Arabia by developing a substantial alternative energy capacity fully supported by world-class local industries." *The Establishing Order*, https://www.kacare.gov.sa/en/about/Pages/royalorder.aspx (last visited Jan. 11, 2016); *see also* Commerce Memo at 1. The entity is substantially funded by the Saudi Government. Commerce Memo at 1. Its "highest authority" is the "supreme council," composed largely of high-ranking government officials, whose role is to "supervise and undertake the affairs" of KA-CARE and to "take all necessary decisions to achieve the purposes of the City." *Royal Decree Establishing King Abdullah City for Atomic and Renewable Energy* 6 (Feb. 2010) ("*Royal Decree*"), https://www.kacare.gov.sa/en/about/Documents/KACARE_Royal_Decree_english.pdf. Three senior executive officials—a president and two vice presidents—lead KA-CARE's day-to-day activities. *Id.*; *Leadership*, https://www.kacare.gov.sa/en/about/Pages/highmanagement.aspx (last visited Jan. 7, 2016); *see also* Commerce Memo at 1. The three senior executive officials are appointed by royal decree, *see Royal Decree* at 6; Commerce Memo at 1, but are not considered Saudi government officials under Saudi law, Commerce Memo at 1.

II.

The Emoluments Clause provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind

whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. As we recently explained, "[t]he Clause was intended to 'preserv[e] foreign Ministers & other officers of the U.S. independent of external influence' by foreign governments." *NOAA Employee's Receipt of the Göteborg Award for Sustainable Development*, 34 Op. O.L.C. 210, 211 (2010) (second alteration in original) (quoting 2 *The Records of the Federal Convention of 1787*, at 389 (Max Farrand ed., rev. ed. 1966) (notes of James Madison)).

Although the purpose of the Emoluments Clause is broad, "[its] text . . . makes clear that it applies only to a specified class of persons—i.e., those who hold offices of profit or trust under the United States—and not to all positions in the United States government." *Applicability of the Emoluments Clause to Non-Government Members of ACUS (II)*, 34 Op. O.L.C. 181, 185 (2010) ("*ACUS II*"). Our precedents reflect this textual limitation. For example, we have advised that members of the Federal Bureau of Investigation Director's Advisory Board do not hold "Office[s] of Profit or Trust" under the meaning of the Clause, notwithstanding the fact that they are entrusted with access to classified information. *See Application of the Emoluments Clause to a Member of the FBI Director's Advisory Board*, 31 Op. O.L.C. 154 (2007) ("*FBI Advisory Board*"). We likewise have advised that nongovernmental members of the Administrative Conference of the United States ("ACUS") do not hold "Office[s] of Profit or Trust," even though ACUS's "recommendations may 'have had (and were intended to have) a significant effect on the Government's administrative processes.'" *ACUS II*, 34 Op. O.L.C. at 190 (quoting *Applicability of the Emoluments Clause to Non-Government Members of ACUS*, 17 Op. O.L.C. 114, 117 (1993) ("*ACUS I*")); *see also Application of the Emoluments Clause to a Member of the President's Council on Bioethics*, 29 Op. O.L.C. 55 (2005) ("*Council on Bioethics*") (concluding that members of the President's Council on Bioethics do not hold offices of profit or trust, even though members advise the President on a range of bioethical issues).

In considering whether individuals hold "Office[s] of Profit or Trust under" the United States for purposes of the Emoluments Clause, we have relied on two different analytic frameworks. In some opinions, we have indicated that only those persons considered "Officers of the United States" for purposes of the Appointments Clause, U.S. Const. art. II,

§ 2, cl. 2, may hold an "Office of Profit or Trust" under the Emoluments Clause, and therefore focused our analysis on whether the relevant individuals were "Officers of the United States." *See, e.g.*, *FBI Advisory Board*, 31 Op. O.L.C. at 156 ("The threshold question . . . in determining whether a member of the Board holds an 'Office of Profit or Trust under [the United States]' is whether a position on the Board is an 'Office under the United States.'" (brackets in original)); *Council on Bioethics*, 29 Op. O.L.C. at 71 ("A position that carried with it no governmental authority (significant or otherwise) would not be an office for purposes of the Appointments Clause, and therefore, under that analysis . . . would not be an office under the Emoluments Clause[.]"); *see also Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96, 98 (1986) ("*Part-Time Consultant*") ("Prior opinions of this Office have assumed . . . that the persons covered by the Emoluments Clause were 'officers of the United States' in the sense used in the Appointments Clause."); *Delivery of an Insignia from the German Emperor to a Clerk in the Post-Office Department*, 27 Op. Att'y Gen. 219, 220–21 (1909) (reasoning that a clerk in the Post Office is an inferior officer within the meaning of the Appointments Clause, and so "[i]t follows" that he is subject to the Emoluments Clause).

In other opinions, we have indicated or assumed that the Emoluments Clause may apply to persons who are not "Officers of the United States" under the Appointments Clause, and evaluated individuals' status for Emoluments Clause purposes by considering a set of factors designed to "ensure that concerns about foreign corruption and influence are accounted for." *ACUS II*, 34 Op. O.L.C. at 187; *see, e.g.*, *The Advisory Committee on International Economic Policy*, 20 Op. O.L.C. 123 (1996) ("*IEP*") (concluding that members of a federal advisory committee do not hold offices of profit or trust based on consideration of several factors); *Applicability of Emoluments Clause to "Representative" Members of Advisory Committees*, 21 Op. O.L.C. 176 (1997) ("*Representative Members*") (extending *IEP*'s conclusion to members of a federal advisory committee chosen to present the views of private organizations and interests); *see also Authority of Foreign Law Enforcement Agents to Carry Weapons in the United States*, 12 Op. O.L.C. 67, 68 (1988) ("*Authority of Foreign Law Enforcement Agents*") ("[T]he Clause applies to all persons holding

an office of profit or trust under the United States, and not merely to that smaller group of persons who are deemed to be 'officers of the United States' for purposes of Article II, Section 2 of the Constitution."); *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 157 (1982) ("It is not clear . . . that the words 'any Office of Profit or Trust,' as used in the Emoluments Clause, should be limited to persons considered 'Officers' under the Appointments Clause. Both the language and the purpose of the two provisions are significantly different."). *See generally ACUS II*, 34 Op. O.L.C. at 184–87 (describing approaches historically adopted by our Office in defining the reach of the Emoluments Clause).[3]

Most recently, we declined to definitively pick one approach over the other when doing so was not necessary to resolve the question presented. In evaluating whether nongovernmental members of the Administrative Conference of the United States held "Office[s] of Profit or Trust" under the Emoluments Clause, we noted that such members would "plainly" not hold such offices under the first approach, "given the purely advisory functions of ACUS." *Id.* at 187. But we further explained that we did not "need" to "rest our decision on that ground," because nongovernmental members of ACUS "cannot be deemed to hold the kind of office to which the Emoluments Clause applies" even under the alternative multi-factor test. *Id.* We thus concluded that such persons were not covered by the Emoluments Clause, "even assuming that the Clause may apply in some instances to persons who do not hold an office under the Appointments Clause." *Id.* at 192.

We will follow the same approach here: we will not decide whether an "Office of Profit or Trust" for purposes of the Emoluments Clause must also be an "Office" for purposes of the Appointments Clause, or whether an "Office of Profit or Trust" is a broader category defined by a range of relevant factors, because under either approach, the special government

[3] The reach of the Emoluments Clause under this second approach, as well as the set of factors our Office has considered significant, have varied over time. *Compare, e.g.*, *ACUS II*, 34 Op. O.L.C. at 187–92 (concluding under range of factors that nongovernmental members of ACUS *do not* hold offices of profit or trust), *with ACUS I*, 17 Op. O.L.C. at 117 (concluding under range of factors that nongovernmental members of ACUS *do* hold offices of profit or trust).

employee at issue here does not occupy an "Office of Profit or Trust under" the United States.

A.

We explain first why the special government employee at issue would not be an "Officer[] of the United States" for purposes of the Appointments Clause. As an initial matter, the special government employee does not appear to exercise "delegated sovereign authority" of the United States, *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 78 (2007) ("*Officers of the United States*"), or to exercise "*significant authority* pursuant to the laws of the United States," *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 143 (1996) ("*Separation of Powers*") (quoting and adding emphasis to *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam)). He does not have authority to "administer, execute, or interpret the law," *Officers of the United States*, 31 Op. O.L.C. at 87; *see also Separation of Powers*, 20 Op. O.L.C. at 144 (members of a commission with purely advisory functions are not officers of the United States "because they 'possess no enforcement authority or power to bind the Government'" (quoting *Proposed Commission on Deregulation of International Ocean Shipping*, 7 Op. O.L.C. 202, 202–03 (1983))); to "issue regulations and authoritative legal opinions on behalf of the government," *Officers of the United States*, 31 Op. O.L.C. at 88; *see also Separation of Powers*, 20 Op. O.L.C. at 144 n.55 (discussing significance of judges' authority to issue final decisions); or to "receive and oversee the public's funds," *Officers of the United States*, 31 Op. O.L.C. at 90. Nor does he possess diplomatic authority, except in the very diffuse sense of performing consultative functions that may advance U.S. foreign policy goals. *Compare id.* at 91–92 (diplomatic offices have the "authority to speak and act on behalf of the United States toward or in other nations," in particular by exercising the delegated authority of the President to "'negotiate[] and sign[] a treaty'" (alterations in original) (quoting *Ambassadors and Other Public Ministers of the United States*, 7 Op. Att'y Gen. 186, 212 (1855))). As long as the special government employee is not engaged in actual negotiations with other countries, we do not believe the advice he might provide about how countries can attract international

investment or harmonize proposed legal reforms with their cultural and religious norms would qualify as the exercise of "delegated sovereign authority" or "significant authority" for Appointments Clause purposes.

Further, the special government employee does not appear to hold the essential features of a federal office—in particular, "tenure," "duration," and "continuous duties." *See Separation of Powers*, 20 Op. O.L.C. at 141–42 (quoting *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890)); *accord United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868) (duties of an officer are "continuing and permanent, not occasional or temporary"); *Officers of the United States*, 31 Op. O.L.C. at 100 ("The second element of a federal 'office,' necessary to make a position subject to the Appointments Clause, is that the position be 'continuing'"—not "personal, 'transient,' or 'incidental.'"). He serves under a one-year contract and receives assignments from the Commercial Law Development Program on a case-by-case basis; his duties, hours, and compensation are thus not continuing and permanent but depend entirely on a supervisory determination that his services are needed in a particular case. Put differently, "[h]e is an expert, selected as such. . . . He is selected for the special case. He has no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case." *Auffmordt*, 137 U.S. at 326–27 (deeming a merchant appraiser not to be a federal officer); *see also United States v. Germaine*, 99 U.S. (9 Otto) 508, 512 (1878) (deeming a surgeon not to be a federal officer because he was "only to act when called on by the Commissioner of Pensions in some special case"). The employee does receive an emolument from the federal government in the form of an hourly wage, but not a "continuing emolument," *see Auffmordt*, 137 U.S. at 327, in the form of a government salary or guaranteed work flow, and this Office has not treated receipt of such an emolument as a feature that, by itself, would render an individual an officer for Appointments Clause purposes, *see Officers of the United States*, 31 Op. O.L.C. at 120–21 ("In cases holding that temporary positions were not offices, courts have remarked that the pay provided was per diem or otherwise based on the amount of work done, rather than involving a salary."). Accordingly, we do not believe the special government employee is an "Officer[] of the United States" for purposes of the Appointments Clause. He therefore would not occupy an "Office of Profit or Trust" under our Office's precedents that hold that

only persons considered "Officers of the United States" under the Appointments Clause may hold "Office[s] of Profit or Trust" under the Emoluments Clause.

B.

We also believe that the special government employee at issue does not hold an "Office of Profit or Trust" for purposes of the Emoluments Clause under the approach that considers a range of factors. As noted above, the factors our Office has considered in assessing the reach of the Emoluments Clause under this approach are directed at ensuring that the "concerns about foreign corruption and influence [that underlie the Clause] are accounted for." *ACUS II*, 34 Op. O.L.C. at 187; *see also Authority of Foreign Law Enforcement Agents*, 12 Op. O.L.C. at 68 ("Th[e] [C]lause, adopted unanimously at the Constitutional Convention of 1787, was intended by the Framers to preserve the independence of officers of the United States from corruption and foreign influence. [It] must be read broadly in order to fulfill that purpose. Accordingly, the Clause applies to all persons holding an office of profit or trust under the United States, and not merely to that smaller group of persons who are deemed to be 'officers of the United States' for purposes of Article II, Section 2 of the Constitution."). Factors our Office has previously considered include whether an individual exercises "the type of discretion and authority that inheres in an office of profit or trust,"[4] whether he supervises other federal employees,[5] whether his duties are continuing and permanent,[6] and whether

[4] *ACUS II*, 34 Op. O.L.C. at 189; *see also IEP*, 20 Op. O.L.C. at 123 (considering whether a committee is "purely advisory" or "discharges . . . substantive statutory responsibilities" in assessing status of its members for purposes of the Emoluments Clause); *cf. Part-Time Consultant*, 10 Op. O.L.C. at 99 (concluding that a part-time consultant for the Nuclear Regulatory Commission was subject to the Clause in part because the Commission considered renewal of his contract "essential to the conduct of the agency's mission").

[5] *See ACUS II*, 34 Op. O.L.C. at 189 (noting that nongovernmental members of ACUS do not "exercise the type of supervisory power or decisional authority that would potentially be relevant to a conclusion that they are subject to the Emoluments Clause"); *cf. FBI Advisory Board*, 31 Op. O.L.C. at 154 (board members who "exercise no supervisory responsibilities over other persons or employees as a result of their positions" are not subject to the Clause).

he receives an emolument from the federal government.[7] We have also looked to whether an individual has a security clearance or access to classified information,[8] whether he is subject to federal conflict of interest statutes and regulations,[9] and whether he takes an oath of office,[10] although our recent advice indicates that these latter factors are less weighty than the former.[11] No single one of these factors has proven determinative; rather, we have considered them in combination to assess whether a person is subject to the Clause.

We believe that the special government employee at issue here does not hold an "Office of Profit or Trust" when the relevant factors are considered in their totality. As an initial matter, the special government employ-

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[6] *See IEP*, 20 Op. O.L.C. at 123 (members of a committee do not hold an "Office of Profit or Trust" in part because they "meet only occasionally"); *Field Assistant on the Geological Survey—Acceptance of an Order from the King of Sweden*, 28 Op. Att'y Gen. 598, 599 (1911) ("*Field Assistant*") (field assistant is outside the scope of the Clause in part because his duties do not require "continuous service," but rather "[o]nly occasional work").

[7] *See ACUS II*, 34 Op. O.L.C. at 187 (noting that nongovernmental members of ACUS "serve without compensation"); *IEP*, 20 Op. O.L.C. at 123 ("The members of the IEP Advisory Committee . . . serve without compensation.").

[8] *See ACUS II*, 34 Op. O.L.C. at 188 (pointing to lack of access to classified information as a relevant factor); *IEP*, 20 Op. O.L.C. at 123 (same); *Part-Time Consultant*, 10 Op. O.L.C. at 99 (pointing to a consultant's security clearance and potential access to sensitive or classified information in concluding that he is subject to the Clause).

[9] *See ACUS I*, 17 Op. O.L.C. at 117 (nongovernmental members of ACUS are subject to the Emoluments Clause in part because they are special government employees subject to federal conflict of interest laws); *Part-Time Consultant*, 10 Op. O.L.C. at 99 (a part-time consultant is subject to the Clause in part because he must conform to agency regulations regarding conflicts of interest and must "report . . . any change in his private employment or financial interests").

[10] *See IEP*, 20 Op. O.L.C. at 123 (pointing to oath of office as a relevant factor); *Part-Time Consultant*, 10 Op. O.L.C. at 99 (same).

[11] *See ACUS II*, 34 Op. O.L.C. at 188 (fact that nongovernmental members of an advisory board are special government employees subject to federal conflict of interest laws is "far from determinative" (citing *IEP*, 20 Op. O.L.C. at 123; *Representative Members*, 21 Op. O.L.C. at 177)); *id.* at 189 (taking an oath of office is, "for purposes of analyzing purely advisory bodies, . . . not particularly weighty"); *cf. FBI Advisory Board*, 31 Op. O.L.C. at 156–60 (members of FBI Director's Advisory Board, who have access to classified information and are obligated not to disclose it but do not have authority to originate, modify, or declassify classified information, do not hold "Office[s] of Profit or Trust").

ee does not, in our view, exercise "the type of discretion and authority that inheres in an office of profit or trust." *ACUS II*, 34 Op. O.L.C. at 189. His role is to assist the Commercial Law Development Program in its collaborations with Middle Eastern countries. Although that role may require him to offer his expert advice on how to attract international investment or harmonize proposed legal reforms with cultural and religious norms, it does not authorize him to formulate federal policy or to exercise diplomatic authority (i.e., to speak on behalf of or to represent the United States in international negotiations). Nor does it authorize him to exercise supervisory authority over other federal employees or to direct the disbursement of federal funds or property. *See id.* (although members of ACUS have authority over certain decisions of the Chairman, "[i]n light of ACUS's purely advisory function as well as its governance structure," pursuant to which nongovernmental members are likely to constitute a minority, "we do not believe its nongovernmental members exercise the type of supervisory power or decisional authority that would potentially be relevant to a conclusion that they are subject to the Emoluments Clause"). The special government employee, moreover, has no access to classified information. Commerce Memo at 1.

The special government employee also lacks the continuing and permanent duties that we have found to be a common feature of an office of profit or trust under the Emoluments Clause. *See, e.g.*, *ACUS II*, 34 Op. O.L.C. at 187 (nongovernmental members of ACUS are not subject to the Clause in part because they meet "only on an occasional basis"). He serves under a one-year contract, with duties performed on an intermittent basis upon assignment by the Commercial Law Development Program; his service, in short, is temporary and requires "[o]nly occasional work." *Field Assistant*, 28 Op. Att'y Gen. at 599.[12]

It is true that the special government employee is compensated for his services, took an oath of office, and files financial disclosure forms—

[12] To be clear, classification as a "special government employee" "without more . . . does not exempt [an individual] from the constitutional prohibition in the Emoluments Clause." *Part-Time Consultant*, 10 Op. O.L.C. at 99. Neither does it necessarily subject the individual to the obligations of the Emoluments Clause. *ACUS II*, 34 Op. O.L.C. at 188. In this case, the limited duration of the employee's position and the absence of continuous duties are factors that suggest that he does not hold an "Office of Profit or Trust."

factors our Office has indicated may be relevant in marking the bounds of the Emoluments Clause. But the presence of those factors here does not, in our view, make the employee's position an office of profit or trust. The receipt of compensation has not proven a dispositive factor, particularly where, as here, compensation is paid on an hourly or daily basis for services actually performed. *See id.* (field assistant does not hold an "Office of Profit or Trust" where, among other factors, he "is paid by the day when actually employed" and his annual compensation is capped). And while being entrusted with a position that requires taking an oath of office and filing financial disclosure forms may weigh in favor of finding that an office is covered by the Emoluments Clause, those factors are not particularly weighty, *see supra* note 11, and, in any event, do not alter our conclusion here in light of the limited discretion and authority the employee exercises, and the occasional and temporary nature of his duties, *see ACUS II*, 34 Op. O.L.C. at 188–89 (nongovernmental members of ACUS are not subject to the Emoluments Clause even though they traditionally have taken oaths of office and are special government employees subject to federal conflict of interest statutes and regulations).

III.

For the foregoing reasons, we conclude that the special government employee in question does not hold an "Office of Profit or Trust" within the meaning of the Emoluments Clause. We therefore believe that the Emoluments Clause would not bar him from accepting a paid consulting position with KA-CARE, regardless of whether doing so would constitute acceptance of an "Emolument [or] Office . . . of any kind whatever, from any King, Prince, or foreign State."

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

Continuation of Terminal Leave for Military Officer Appointed to Federal Civilian Position

An active duty military officer on terminal leave who meets the requirements of 5 U.S.C. § 5334a may continue on terminal leave status after his appointment or election to a position covered by 10 U.S.C. § 973(b)(2)(A).

March 24, 2016

MEMORANDUM OPINION FOR THE
PRINCIPAL DEPUTY GENERAL COUNSEL
DEPARTMENT OF HOMELAND SECURITY

You asked whether an active duty military officer on terminal leave may continue on terminal leave status after being appointed or elected to a position covered by 10 U.S.C. § 973(b)(2)(A), a provision that prohibits active duty military officers from holding certain civilian offices in the federal government.[1] We advised you orally and by e-mail that a military officer appointed or elected to such a position may continue on terminal leave status.[2] This opinion further memorializes and explains the basis for that advice. In brief, section 973(b)(2)(A) provides that an active duty military officer may hold a covered position if doing so is "otherwise authorized by law," and another statute, 5 U.S.C. § 5534a, specifically permits "[a] member of a uniformed service" on "terminal leave" to accept "a civilian office or position in the Government of the United States" and to "receive the pay of that office or position in addition to pay and allowances from the uniformed service for the unexpired portion of the terminal leave." In light of 5 U.S.C. § 5534a, an officer on terminal

[1] E-mail for Rosemary Hart, Office of Legal Counsel, from Joseph B. Maher, Principal Deputy General Counsel, Department of Homeland Security (June 23, 2015, 6:58 PM) ("Maher E-mail").

[2] *See* E-mail for Joseph B. Maher, Principal Deputy General Counsel, Department of Homeland Security, from Brian M. Boynton, Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 20, 2015, 2:33 PM). In reaching this conclusion, we also considered the views of the Department of Defense, as expressed in a telephone conversation on June 29, 2015 between Brian M. Boynton, Deputy Assistant Attorney General, Office of Legal Counsel; Paul S. Koffsky, Deputy General Counsel, Department of Defense; Steven T. Strong, Associate Deputy General Counsel, Department of Defense; Joseph B. Maher, Principal Deputy General Counsel, Department of Homeland Security; and Neal Swartz, Associate General Counsel, Department of Homeland Security.

leave status is in our view "authorized by law" to serve in a position covered by 10 U.S.C. § 973(b)(2)(A).

I.

We begin with the relevant background and statutory text. Section 973(b)(2)(A) of title 10 of the United States Code generally prohibits active duty military officers from holding certain high-level civilian offices in the federal government. In particular, it provides:

> Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—
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> (i) that is an elective office;
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> (ii) that requires an appointment by the President by and with the advice and consent of the Senate; or
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> (iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.

Paragraph 1 of section 973(b) explains that the prohibition on holding or exercising the functions of covered offices applies to "regular officer[s] of an armed force on the active-duty list (and . . . regular officer[s] of the Coast Guard on the active duty promotion list)," as well as to retired and reserve officers serving on active duty in certain circumstances.

Your question concerns the application of section 973(b)(2)(A)'s prohibition on federal civil office-holding to members of the military on terminal leave. "'Terminal leave' is 'a term of art originating during World War II' meaning 'a leave of absence granted at the end of one's period of service.'" *Rate of Accrual of Annual Leave by a Civilian Employee Appointed While on Terminal Leave Pending Retirement From One of the Uniformed Services*, 31 Op. O.L.C. 218, 218 (2007) (quoting *Terry v. United States*, 97 F. Supp. 804, 806 (Ct. Cl. 1951)). An officer on terminal leave is considered to be on active duty status. *See id.* at 219; *see also Madsen v. United States*, 841 F.2d 1011, 1013 (10th Cir. 1987) ("Terminal leave, or leave taken prior to discharge, is statutorily defined as active duty service." (citing 10 U.S.C. § 701(e) (1982))). Thus, a military officer on terminal leave is subject to section 973(b)(2)(A)'s general prohibition.

A different statute, 5 U.S.C. § 5534a, establishes rules for dual pay and employment during an officer's period of terminal leave. In relevant part, section 5534a provides:

> A member of a uniformed service who has performed active service and who is on terminal leave pending separation from, or release from active duty in, that service under honorable conditions may accept a civilian office or position in the Government of the United States, its territories or possessions, or the government of the District of Columbia, and he is entitled to receive the pay of that office or position in addition to pay and allowances from the uniformed service for the unexpired portion of the terminal leave.

As you pointed out in your request for advice, under one view of these statutes, "[section] 5534a serves as an affirmative authority [for military members on terminal leave to hold covered positions] that fits within the qualification of [section] 973(b)(2)(A) stating that its prohibition applies '[e]xcept as otherwise authorized by law.'" Maher E-mail. Under another view, "[section] 973[(b)(2)(A)] provides the more specific rule regarding military officers appointed to certain [civilian positions in the federal government] and would therefore prohibit continuation of military status (i.e., terminal leave) upon appointment" to a covered position. *Id.* The Department of Defense ("DoD") holds the latter view. For the reasons explained below, we believe the first is the better reading of the two statutes, and therefore conclude that an officer on terminal leave status is "authorized by law" to hold a position covered by section 973(b)(2)(A).

II.

A.

We first analyze the text of sections 973(b)(2)(A) and 5534a. The Supreme Court has explained that, where two statutes govern the same subject matter, "'the rule is to give effect to both if possible.'" *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)); *see also, e.g.*, *FCC v. NextWave Personal Commc'ns*, 537 U.S. 293, 304 (2003); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143–44 (2001); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995); *Ruckelshaus*

v. Monsanto Co., 467 U.S. 986, 1018 (1984). "Only where a harmonious construction of two statutes is impossible should one be construed as overriding or implicitly repealing the other." *Access of Department of Justice Inspector General to Certain Information Protected from Disclosure by Statute*, 39 Op. O.L.C. 12, 20 (2015) (citing *Mancari*, 417 U.S. at 551).

Although section 973(b)(2)(A) and section 5534a govern the same subject matter—whether active duty military officers may hold civilian positions in the federal government—they are not, in our view, irreconcilable. As described above, section 973(b)(2)(A) provides that active duty officers may not hold certain federal civilian offices "except as otherwise authorized by law." 10 U.S.C. § 973(b)(2)(A). Section 5534a permits active duty military members on terminal leave to accept civilian offices and to be paid as employees of the federal government. In other words, pursuant to section 5534a, active duty military members, including officers, who are on terminal leave are specifically "authorized by law" to hold civilian offices. Officers to whom section 973(b)(2)(A) would otherwise apply are therefore exempted from the statute's prohibition by virtue of their terminal leave status. In contrast, officers who are not on terminal leave and are not "otherwise authorized by law" to hold covered positions remain subject to section 973(b)(2)(A). So understood, section 973(b)(2)(A) and section 5534a do not conflict, but rather co-exist as part of a single, coherent statutory scheme.

As noted above, DoD disagrees with this interpretation. As we understand its position, DoD believes section 973(b)(2)(A)'s "otherwise authorized by law" exception covers only statutes that refer to specific civilian offices, and not statutes like section 5534a that authorize a class of active duty officers to hold civilian positions. Further, in DoD's view, section 973(b)(2)(A) is more specific than section 5534a and was enacted later in time. As a result, DoD believes that section 973(b)(2)(A) must be understood to override section 5534a. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (where "a general permission or prohibition is contradicted by a specific prohibition or permission . . . the specific provision is construed as an exception to the general one"); *Tenn. Gas Pipeline Co. v. FERC*, 626 F.2d 1020, 1022 (D.C. Cir. 1980) (finding that a "latter law" controls an earlier one (citing C. Dallas

Sands, 2A *Sutherland on Statutory Construction* § 51.03, at 300 (4th ed. 1972))).

We disagree with this position for a number of reasons. Most fundamentally, we believe section 973(b)(2)(A)'s "otherwise authorized by law" exception includes authorization under section 5534a. DoD is correct that Congress has enacted statutes specifically authorizing active duty officers to hold certain positions subject to section 973(b)(2)(A)'s prohibition. *See* 10 U.S.C. § 528 (authorizing military officers to hold certain positions in the Intelligence Community, including CIA Director); *see also id.* §§ 3017(b), 5036(c), 8017(b) (1982) (noting that, if an active duty military officer temporarily acted as Secretary of the Army, Navy, or Air Force, such service should not "be considered as the holding of a civil office within the meaning of section 973(b)"); *cf.* 40 U.S.C. § 311(c) (authorizing the Administrator of General Services to "use the services" of "armed services personnel" "[n]otwithstanding section 973 of title 10"). But nothing in the provision's text indicates that the "otherwise authorized by law" exception should be read to apply *only* to those statutes, and not to more general authorizations, as its plain language would suggest. The provision does not, for example, prohibit a military officer from holding a covered position "except as otherwise authorized by a statute expressly referring to section 973(b)," or "except as otherwise authorized by a statute referring to a specified position." The provision's "otherwise authorized by law" clause also does not list specific statutes authorizing active duty officers to hold particular civilian offices. *Cf.* 16 U.S.C. § 2403(b) ("It is unlawful for any person, unless authorized by a permit issued under this chapter . . . to dispose of any waste in Antarctica (except as otherwise authorized by the Act to Prevent Pollution from Ships)[.]"). Absent some basis in the language of section 973(b)(2)(A) to construe the phrase "otherwise authorized by law" narrowly, and in light of the principle that competing statutes should be interpreted harmoniously whenever possible, we see no reason to exclude section 5534a from the reach of section 973(b)(2)(A)'s exception.

Because 10 U.S.C. § 973(b)(2)(A) can be read in harmony with 5 U.S.C. § 5534a, there is no need to resort to the canons of statutory construction on which DoD relies—the "rule of relative specificity" and the principle that a later-enacted statute will control an earlier one. *See, e.g.*, *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335–36 (2002) ("It is true that specific statutory language should control

more general language when there is a conflict between the two. Here, however, there is no conflict."); *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007) ("We will not infer a statutory repeal unless the later statute expressly contradict[s] the original act or unless such a construction is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all." (alterations in original) (internal quotation marks omitted)). But even if those canons were applicable, neither would compel the reading of the relevant statutory provisions DoD advances.

We agree that section 973(b)(2)(A) is more specific than section 5534a with respect to the federal civilian positions it covers. It applies only to elected, presidentially appointed, and Executive Schedule offices, while section 5534a applies to all civilian offices and positions in the federal government. Additionally, section 973(b)(2)(A) applies only to "officer[s]" in the military, while section 5534a applies to all "member[s] of a uniformed service." But section 5534a is more specific with respect to the status of the active duty military members to whom it applies. Where section 973(b)(2)(A) applies to all "regular officer[s] of an armed force on the active-duty list (and . . . regular officer[s] of the Coast Guard on the active duty promotion list)," as well as to certain retired and reserve officers, *see* 10 U.S.C. § 973(b)(1), section 5534a applies only to members of the military on terminal leave. Section 5534a thus applies to a category of military members in a very specific situation: those who are nearing the end of their military service and are using the unexhausted portion of their accumulated leave prior to separation. As we have previously noted, where competing statutory provisions are "more specific" in one respect but "less specific" in another, the rule of relative specificity is unhelpful in resolving the conflict between them. *See Restrictions on Travel by Voice of America Correspondents*, 23 Op. O.L.C. 192, 195 n.2 (1999) ("We cannot resolve the issue by turning to the principle that, absent a clear intention to the contrary, a specific statute controls a general one. Although the statutes on which the State Department relies are the more specific ones on the question of safety, they are less specific on the question of VOA's freedom to report the news." (citation omitted)); *cf. Gulf War Veterans Health Statutes*, 23 Op. O.L.C. 49, 52 (1999) (finding the rule inconclusive where "the two provisions are at the same order of specificity"). Accordingly, we do not believe the rule of relative specificity would be dispositive here even if it applied.

We are also unpersuaded by DoD's reliance on the principle that a later enactment controls an earlier one. Although, as explained below, section 973(b) was amended to take its current form in 1983, the prohibition on military officers serving in federal civilian offices has existed in some form since 1870. The authorization for military members on terminal leave to hold civilian offices, in contrast—now section 5534a—originated in 1945. It is thus unclear how this "later in time" canon would apply here. Moreover, even if section 973(b)(2)(A) were in all relevant respects a later-enacted provision, we do not believe its priority of enactment would be sufficient to demonstrate that it was intended to override section 5534a. The Supreme Court has explained that while "a later enacted statute . . . can sometimes operate to amend or even repeal an earlier statutory provision . . . , 'repeals by implication are not favored' and will not be presumed unless the 'intention of the legislature to repeal [is] clear and manifest.'" *Defs. of Wildlife*, 551 U.S. at 662 (brackets in original) (quoting *Watt v. Alaska*, 451 U.S. 259, 267 (1981)). Here, DoD's reading would compel the conclusion that the 1983 amendment to section 973(b) implicitly repealed section 5534a, at least with respect to the military officers subject to section 973(b)(2)(A)'s prohibition and the federal civilian offices to which the prohibition applies. But nothing in the language of section 973(b)(2)(A) makes such an intent "clear and manifest."

We thus conclude that the text of section 973(b)(2)(A) and section 5534a supports the conclusion that military officers on terminal leave who satisfy the requirements of section 5534a may hold covered federal civilian offices notwithstanding the general prohibition in section 973(b)(2)(A).

B.

In light of the plain language of section 973(b)(2)(A)'s "otherwise authorized by law" exception, there is no need to consider the legislative history of section 973(b)(2)(A) and section 5534a. To the extent that that history is considered, however, it supports the conclusion drawn from the text of the provisions, and affirmatively suggests that Congress intended section 5534a to operate as an exception to section 973(b)(2)(A).

The prohibition on active duty military officers holding civilian positions dates back to the years immediately following the Civil War. In

1870, Congress enacted a statute providing that "it shall not be lawful for any officer of the Army of the United States on the active list to hold any civil office, whether by election or appointment, and any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the army, and his commission shall be vacated thereby." Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319. This prohibition appeared as section 1222 of the Revised Statutes and was made part of the United States Code in the 1925 edition as 10 U.S.C. § 576. *See* Rev. Stat. § 1222 (1st ed. 1875), 18 Stat. pt. 1, at 215 ("No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall be thereby vacated."); 10 U.S.C. § 576 (1925) (same).

Section 5534a originated in the post-World War II period. Facing an influx of soldiers returning from the war, Congress sought to ensure that members of the military would not be forced to choose between forfeiting unused leave and taking civilian positions in the federal government. A committee report accompanying the precursor to section 5534a explained that, under then-current law, "[a]lthough members of the armed forces on terminal leave may accept private employment without forfeiting the pay and allowances to which they are entitled while on terminal leave, they may not . . . accept employment in civilian positions under the Federal Government and receive compensation for such employment concurrently with the receipt of military pay and allowances." H.R. Rep. No. 79-1163, at 1 (1945). To address that problem, Congress enacted the Act of November 21, 1945. In relevant part, that law provided:

> Any person, who, subsequent to May 1, 1940, shall have performed active service in the armed forces, may, while on terminal leave pending separation from or release from active duty in such service under honorable conditions, enter or reenter employment of the Government of the United States, its Territories, or possessions, or the District of Columbia . . . and, in addition to compensation for such employment, shall be entitled to receive pay and allowances from the armed forces for the unexpired portion of such terminal leave at the same rates and to the same extent as if he had not entered or reentered such employment.

Pub. L. No. 79-226, sec. 1, § 2(a), 59 Stat. 584, 584; *see also* H.R. Rep. No. 79-1163, at 2 (explaining the purpose of the proposed legislation).

Notably, the committee report on the 1945 statute specifically cited the precursor to section 973(b)(2)(A)—section 1222 of the Revised Statutes—as one of the statutory obstacles to Army officers holding civilian positions in the federal government. *See* H.R. Rep. No. 79-1163, at 1 ("Section 1222 of the Revised Statutes also prohibits any officer of the Army on the active list from holding civilian office."). The report's reference to section 1222 suggests that, at least in the relevant House committee's view, the new provision was intended to override that limitation. And, citing this legislative history, the Comptroller General concluded in 1946 that the 1945 precursor to section 5534a did just that. *See* 25 Comp. Gen. 677, 679 (1946). As the Comptroller General explained:

> [A]n examination of the legislative history of the said act of November 21, 1945, discloses that the provisions of section 1222, along with the various statutes prohibiting dual employment and the receipt of double compensation, were particularly brought to the attention of the Congressional committee considering the proposed legislation. And that it was the intent of the Congress to authorize the benefits provided by the said 1945 statute notwithstanding the provisions of such laws, including section 1222, Revised Statutes, clearly appears from House Report 1163, accompanying S. 1036 (which, as amended by the House of Representatives, became the act of November 21, 1945), wherein specific mention is made of section 1222, Revised Statutes, as well as the dual employment and dual compensation statutes, as constituting existing legislation the provisions of which were intended to be avoided by enactment of the bill.

Id. [3]

The relevant statutory provisions were subsequently revised and transferred, but none of these changes suggests that Congress had a different view of the relationship between the two provisions. In 1956, the precursor to section 973(b) was amended and recodified as 10 U.S.C.

[3] The Comptroller General affirmed this position in 1965. *See* 45 Comp. Gen. 180, 181 (1965) ("In decision of March 28, 1946, 25 Comp. Gen. 677, we held that the provisions of [the Act of Nov. 21, 1945] supersede the provisions of section 1222, Revised Statutes[.]").

§ 3544(b). *See* Pub. L. No. 84-1028, 70A Stat. 1, 203 (1956). The language "[e]xcept as otherwise provided by law" was added at this time. According to the Historical and Revision Notes in the 1958 version of the United States Code, "the words 'Except as otherwise provided by law' [we]re inserted, since other laws enacted after the date of enactment of [10 U.S.C. § 576] authorize the performance of the functions of certain civil offices." 10 U.S.C. § 3544 (1958) (Historical and Revision Notes). Although this statement appears to refer to laws permitting Army officers to occupy particular civilian offices, it does not in our view suggest that the phrase "[e]xcept as otherwise provided by law" should be read—contrary to its plain language—to include *only* those statutes. Moreover, nothing in the legislative history of the 1956 recodification indicates an intent to alter the prior understanding—reflected in the legislative history of the Act of November 21, 1945 and the 1946 Comptroller General opinion relying on that history—that the terminal leave provision operated as an exception to the prohibition on Army officers serving in federal civilian positions.

In 1967, the terminal leave provision previously added in 1945 was revised and codified at 5 U.S.C. § 5534a. *See* Pub. L. No. 90-83, § 22, 81 Stat. 195, 199–200 (1967). The new section 5534a was in relevant parts the same as the current version. In 1968, the prohibition on active duty Army officers holding civilian offices, then codified at 10 U.S.C. § 3544(b), was expanded to cover officers of the Navy, Air Force, Marine Corps, and Coast Guard, and was recodified as 10 U.S.C. § 973(b). *See* Pub. L. No. 90-235, § 4(a)(5)(A), 81 Stat. 753, 759 (1968). At that time, section 973(b) provided:

> Except as otherwise provided by law, no officer on the active list of the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard may hold a civil office by election or appointment, whether under the United States, a Territory or possession, or a State. The acceptance of such a civil office or the exercise of its functions by such an officer terminates his military appointment.

Id.

In 1983, our Office concluded that 10 U.S.C. § 973(b) barred Judge Advocate General officers from being appointed as Special Assistant United States Attorneys to prosecute petty offenses on military reserva-

tions. *See* Memorandum for William P. Tyson, Director, Executive Office for United States Attorneys, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 10 U.S.C. § 973(b) to JAG Officers Assigned to Prosecute Petty Offenses Committed on Military Reservations* (May 17, 1983). In response to that decision, Congress amended section 973(b) to limit the offices that active duty military officers were prohibited from holding. *See* Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, sec. 1002(a), § 973(b)(2)(A), 97 Stat. 614, 655 (1983). Under the amended version, the prohibition on holding federal civilian offices applied, as it does today, only to an office that "is an elective office," that "requires an appointment by the President by and with the advice and consent of the Senate," or that "is a position in the Executive Schedule under sections 5312 through 5317 of title 5." *Id.* Congress also made clear that active duty officers assigned or detailed to federal civilian offices not covered by the prohibition could hold those offices or exercise their functions. *Id.* § 973(b)(2)(B). The legislative history of the 1983 amendment to section 973(b) confirms that the provision was narrowed in response to the OLC opinion. *See* S. Rep. No. 98-174, at 232–34 (1983); *see also* H.R. Rep. No. 98-352, at 233 (1983) (Conf. Rep.).[4] It makes no mention of any intention to displace the prior understanding that section 5534a provides an exception to the general prohibition on military officers holding federal civilian offices.

In sum, the legislative history of the 1945 statute that was the predecessor to section 5534a indicates that the provision was intended to create an exception to the general prohibition on military officers holding civilian

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[4] As the Committee report explained:

> The Committee has been advised by the Department of Defense that the Assistant Attorney General, Office of Legal Counsel, of the Department of Justice, has recently issued an opinion that the practice of appointing military commissioned officers as Special Assistant United States Attorneys is now considered to offend the prohibitions of section 973(b) of Title 10, United States Code. However, that same opinion suggests that legislation be sought to amend section 973(b) to permit the continuation of this longstanding and successful practice. The Department of Defense has requested such legislation.
>
> Therefore, the Committee recommends a provision to amend section 973(b) of Title 10 to permit the continuation of this practice of utilizing military attorneys as Special Assistant United States Attorneys.

S. Rep. No. 98-174, at 233.

offices in the federal government that had been in force since 1870. Nothing in the history of subsequent amendments to the two provisions provides any basis to conclude that Congress intended these amendments to achieve a different result.

C.

The conclusion that section 5534a provides an exception to the general prohibition of section 973(b)(2)(A) is also consistent with prior advice given by this Office. In a July 5, 1973 memorandum to the Attorney General, our Office considered whether the military appointment of General Alexander M. Haig, Jr., the Vice Chief of Staff of the Army, had terminated pursuant to section 973(b) when he "was called to the White House to assume many of the responsibilities formerly held by H.R. Haldeman." Memorandum for the Attorney General from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Status of General Alexander M. Haig, Jr.* (July 5, 1973) (internal quotation marks omitted). The facts surrounding General Haig's service in the White House were not clear at the time the memorandum was written. Among other things, the Office did not know "whether the as yet undisclosed arrangement between the President and General Haig had the effect of placing the General on terminal leave." *Id.* at 9. The memorandum concluded, however, that even "[i]f the facts that are developed show that General Haig was put on terminal leave by the President acting in the capacity of Commander in Chief, it would appear that 10 U.S.C. 973(b) was not violated." *Id.* at 3. The memorandum explained that the Comptroller General (in the 1946 opinion discussed above) had "interpreted the act of November 21, 1945, 59 Stat. 584, now 5 U.S.C. 5534a, as exempting officers on terminal leave from the prohibition of what is now 10 U.S.C. 973(b)." *Id.* at 7 (citing 25 Comp. Gen. 677); *see also id.* at 9 ("[T]he Comptroller General has ruled, as shown above, that by virtue of 5 U.S.C. 5534a, military officers on terminal leave are not subject to the prohibitions of 10 U.S.C. 973(b).").

The Office later provided informal advice to the Department of Defense about whether a Vice Admiral who was willing to retire from the military could be appointed to a position in the Department of the Interior before his active duty service concluded. Our Office "advised that 10 U.S.C. 973(b) would not be a barrier to the appointment if the Admiral were

placed on terminal leave since 5 U.S.C. 5534a makes an exception to the prohibition on military officers holding civil office if they are on terminal leave." Memorandum to Files from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Inquiry from DOD on exceptions to 10 U.S.C. 973(b)* (Oct. 30, 1973) (citing 25 Comp. Gen. 677 and 45 Comp. Gen. 180); *see also* Memorandum for the Files from Edward S. Lazowska, Office of the Assistant Solicitor General, *Re: Proposed Appointment of Major General Robert McGowan Littlejohn as War Assets Administrator* (July 2, 1946) (noting the restrictions on civilian federal employment imposed by section 1222 of the Revised Statutes, the predecessor to 10 U.S.C. § 973(b), but concluding that "as soon as General Littlejohn is placed on terminal leave pending his retirement from the Army he may accept appointment as Administrator . . . under the provisions of the act of November 21, 1945," the predecessor to 5 U.S.C. § 5534a).

Although these prior writings predated the 1983 amendment to section 973(b), we do not believe that that amendment—which narrowed the scope of section 973(b)—altered the provision in ways that are material to the question whether a military officer on terminal leave status is "otherwise authorized by law" to hold a covered civilian office.

III.

For the foregoing reasons, we conclude that an active duty military officer on terminal leave who meets the requirements of 5 U.S.C. § 5534a may continue on terminal leave status after his appointment or election to a position covered by 10 U.S.C. § 973(b)(2)(A).

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

Article 17 *Bis* of the Air Transport Agreement with the European Union

Article 17 *bis* of the Air Transport Agreement Between the United States of America and the European Community and Its Member States does not provide an independent basis upon which the United States may deny a permit to an air carrier of a Party to the Agreement if that carrier is otherwise qualified to receive such a permit.

April 14, 2016

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF TRANSPORTATION

You have asked whether Article 17 *bis** of the Air Transport Agreement between the United States of America and the European Community and Its Member States, signed on April 25 and 30, 2007, as amended (the "Agreement"), provides an independent basis upon which the United States may deny an air carrier of the European Union a permit to provide foreign air transportation services to and from the United States, assuming that the carrier is otherwise qualified to receive such a permit under Department of Transportation ("DOT" or "Department") authorities and the Agreement.[1] You have indicated that, in your view, Article 17 *bis* does not provide such an independent basis for denying a permit. *See* Letter for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Kathryn B. Thomson, General Counsel, Department of Transportation, *Re: DOT Legal Analysis of Article 17* bis *of the U.S.-EU Aviation Agreement* (Mar. 17, 2016) ("DOT Legal Analysis"). And the Department of State ("State Department" or "State")

* Editor's Note: As used here, the term *bis* "indicates a second article with the same number in a convention," as when "a treaty is amended and a new article on a subject already addressed is inserted next to the old article." James R. Fox, *Dictionary of International and Comparative Law* 36 (3d ed. 2003).

[1] The agreement between the Parties was initially signed in 2007. *See* Air Transport Agreement Between the United States of America and the European Community and Its Member States, Apr. 25–30, 2007, 46 I.L.M. 470 ("2007 ATA"). In 2010, this agreement was amended by the Protocol to Amend the Air Transport Agreement Between the United States of America and the European Community and Its Member States, Signed on 25 and 30 April 2007, June 24, 2010, 2010 O.J. (L 223) 3 ("2010 Protocol"). References in this opinion to the "Agreement" are to the 2007 ATA, as amended by the 2010 Protocol. References to the 2007 ATA and the 2010 Protocol are to those specific documents.

has indicated that it agrees with your conclusion. *See* Letter for Karl Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Brian J. Egan, Legal Adviser, Department of State (Apr. 13, 2016) ("State Legal Analysis"). Nonetheless, because this question is important to the Department of Transportation and likely to recur, the Secretary of Transportation asked you to solicit our opinion. *See* Letter for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Kathryn B. Thomson, General Counsel, Department of Transportation, *Re: Interpretation of Article 17* bis *of the US-EU Aviation Agreement* at 1 (Mar. 11, 2016).

We note at the outset the limited nature of your question. You have not asked for our views on the propriety of granting a permit to any particular foreign air carrier, and we do not express any views on that subject. Although you have advised us that there are ongoing permitting proceedings related to applications by Norwegian Air International and Norwegian UK, two foreign air carriers that seek to provide services under the Agreement, we express no view on whether the Secretary should or should not grant those carriers any relevant permits. We are also aware that DOT has various domestic authorities under which it evaluates permit applications. *See, e.g.*, 49 U.S.C. § 41301 *et seq.* You have asked us to assume that the requirements for granting a permit under these authorities have been satisfied, and we are not aware of any additional United States authorities that would be relevant to granting such a permit. The question we address is thus limited to interpreting the Agreement. That question is: Assuming an air carrier satisfies the relevant preconditions for a permit set forth elsewhere in the Agreement, may the Department nonetheless deny a permit application because, in its view, granting the permit would undermine the principles articulated in Article 17 *bis*? For the reasons set forth below, we agree with DOT and State that if an air carrier of a Party to the Agreement is otherwise qualified to receive a permit, Article 17 *bis* does not provide an independent basis upon which the United States may deny the carrier's application for a permit.

I.

We begin with the relevant background. In April 2007, the United States and the European Community and its Member States signed an Air Transport Agreement, which, among other things, sought "to build upon

the framework of existing agreements with the goal of opening access to markets and maximising benefits for consumers, airlines, labour, and communities on both sides of the Atlantic." 2007 ATA pmbl. Under the 2007 ATA, the Parties granted certain rights to each other "for the conduct of international air transportation by the[ir] airlines." *Id.* art. 3, ¶ 1.[2] These rights included "the right to fly across [the other Party's] territory without landing," "the right to make stops in [the other Party's] territory for non-traffic purposes," and, for airlines of the European Community and its Member States, "the right to perform international air transportation . . . from points behind the Member States via the Member States . . . to any point or points in the United States and beyond." *Id.* art. 3, ¶ 1(a)–(c). Article 4 of the 2007 ATA, entitled "Authorisation," provided:

> On receipt of applications from an airline of one Party, in the form and manner prescribed for operating authorisations and technical permissions, the other Party shall grant appropriate authorisations and permissions with minimum procedural delay, provided[:]
>
> (a) for a US airline, substantial ownership and effective control of that airline are vested in the United States, US nationals, or both, and the airline is licensed[] as a US airline and has its principal place of business in US territory;
>
> (b) for a Community airline, substantial ownership and effective control of that airline are vested in a Member State or States, nationals of such a State or States, or both, and the airline is licensed as a Community airline and has its principal place of business in the territory of the European [Community];
>
> (c) the airline is qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the Party considering the application or applications;
>
> and
>
> (d) the provisions set forth in Article 8 (Safety) and Article 9 (Security) ar[e] being maintained, and administered.

Id. art. 4.

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[2] The 2007 ATA defined "Party" as "either the United States or the European Community and its Member States." 2007 ATA art. 1, ¶ 6.

In order to further the "goal of continuing to open access to markets and to maximise benefits for consumers, airlines, labour, and communities on both sides of the Atlantic," the 2007 ATA also required the Parties to start "[s]econd stage negotiations" after provisional application of the 2007 ATA began. *Id.* art. 21, ¶ 1. These second stage negotiations resulted in a further agreement between the United States and the European Union, signed on June 24, 2010, to amend the 2007 ATA agreement. *See* 2010 Protocol.[3] Among other things, this 2010 Protocol added to the Agreement Article 17 *bis*, entitled "Social Dimension," which provided:

> 1. The Parties recognise the importance of the social dimension of the Agreement and the benefits that arise when open markets are accompanied by high labour standards. The opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties' respective laws.
>
> 2. The principles in paragraph 1 shall guide the Parties as they implement the Agreement, including regular consideration by the Joint Committee, pursuant to Article 18, of the social effects of the Agreement and the development of appropriate responses to concerns found to be legitimate.

2010 Protocol art. 4 (adding Agreement art. 17 *bis*).

The Joint Committee referenced in Article 17 *bis* is described in Article 18, which was part of the 2007 ATA and was amended by Article 5 of the 2010 Protocol. The Committee is required to meet at least once a year "to conduct consultations relating to this Agreement and to review its implementation." Agreement art. 18, ¶ 1. A Party may also request a meeting of the Joint Committee "to seek to resolve questions relating to the interpretation or application of th[e] Agreement." *Id.* ¶ 2. The Joint Committee is tasked with reviewing "the overall implementation of the Agreement, including . . . any social effects of the implementation of the Agreement," *id.* ¶ 3, and "develop[ing] cooperation" among the Parties by, among other things, "considering the social effects of the Agreement as it is imple-

[3] The 2010 Protocol noted that "the European Union replaced and succeeded the European Community as a consequence of the entry into force on December 1, 2009 of the Treaty of Lisbon." *Id.* pmbl. at 4.

mented and developing appropriate responses to concerns found to be legitimate," *id.* ¶ 4.

The 2010 Protocol also added (again among other provisions) Article 6 *bis*, which provides that "[u]pon receipt of an application for operating authorisation, pursuant to Article 4, from an air carrier of one Party, the aeronautical authorities of the other Party shall recognise any fitness and/or citizenship determination made by the aeronautical authorities of the first Party . . . as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters," absent "a specific reason for concern that, despite the determination made by the aeronautical authorities of the other Party, the conditions prescribed in Article 4 of this Agreement for the grant of appropriate authorisations or permissions have not been met." 2010 Protocol art. 2. The 2010 Protocol clarified that a "[c]itizenship determination" is "a finding that an air carrier . . . satisfies the requirements of Article 4 regarding its ownership, effective control, and principal place of business," and that a "[f]itness determination" is "a finding that an air carrier . . . has satisfactory financial capability and adequate managerial expertise to operate such services and is disposed to comply with the laws, regulations, and requirements that govern the operation of such services." *Id.* art. 1 (adding Agreement art. 1, ¶¶ 2 *bis*, 3 *bis*).

The United States, the European Union and its Member States, Iceland, and Norway later signed an agreement incorporating the provisions of the 2007 ATA and the 2010 Protocol and applying them to Iceland and Norway as if they were members of the European Union. *See* Air Transport Agreement Between the United States, European Union and Its Member States, Iceland, and Norway arts. 1–2, June 16–21, 2011, 2011 O.J. (L 283) 3.

II.

In our view, the text of the Agreement, reinforced by its purpose, makes clear that Article 17 *bis* does not provide an independent basis on which to deny an air carrier's application for a permit where the applicant is otherwise qualified to receive one under the Agreement. The interpretation of an international agreement begins with its text. *See Abbott v. Abbott*, 560 U.S. 1, 10 (2010) ("The interpretation of a treaty . . . begins with its text." (internal quotation marks omitted)); *Bank Melli Iran v.*

Pahlavi, 58 F.3d 1406, 1408 (9th Cir. 1995) ("Executive agreements . . . are interpreted in the same manner as treaties[.]"); *Air Can. v. U.S. Dep't of Transp.*, 843 F.2d 1483, 1486 (D.C. Cir. 1988) ("[We interpret] an international executive agreement . . . according to the principles applicable to treaties."); *see also* Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 340 ("Vienna Convention") ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."); Restatement (Third) of Foreign Relations Law § 325(1) (1987) ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.").

As noted above, Article 4 of the Agreement, entitled "Authorisation," sets forth the standards under which the Parties to the Agreement grant the authorizations and permissions necessary to enable carriers of another Party to operate in their jurisdictions. Article 4 provides that "[o]n receipt of applications from an airline of one Party, in the form and manner prescribed for operating authorisations and technical permissions, the other Party shall grant appropriate authorisations and permissions with minimum procedural delay, provided" that three conditions are satisfied: first, the airline must be a citizen of an appropriate state; second, the airline must be "qualified to meet the conditions prescribed under the laws and regulations normally applied to the operation of international air transportation by the Party considering the application or applications"; and third, the "provisions set forth in Article 8 (Safety) and Article 9 (Security)" must be "maintained, and administered." Agreement art. 4. Assuming these conditions are met (as we do for purposes of this opinion), the plain terms of Article 4 require the United States to grant the "appropriate authorisations and permissions" to the requesting carrier. *Id.*; *see id.* (if enumerated conditions are met, Parties "shall grant" authorizations to carriers of other Parties).

Notably, in contrast to its express references to Articles 8 and 9, Article 4 does not mention Article 17 *bis*, or make compliance with that article a precondition for grant of an authorization. The fact that Article 4 explicitly conditions the grant of the relevant authorizations or permissions on "the provisions set forth" in Articles 8 and 9 "being maintained

and administered" suggests that the drafters did not intend to condition a grant of authorization under Article 4 on the satisfaction of Article 17 *bis* or other unnamed articles. *Cf., e.g.*, 1 *Oppenheim's International Law* § 633, at 1279 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) ("The maxim *expressio unius est exclusio alterius* has been followed in the interpretation of treaties by international tribunals in a number of cases[.]"). Article 4 also does not refer to the "social dimension" or "labour standards" discussed in Article 17 *bis*, or suggest that either of these factors may be considered independently of Article 4's enumerated requirements in granting an authorization.[4] Thus, on its face, Article 4 mandates that Parties issue appropriate authorizations and permissions to air carriers of other Parties once the three specific conditions enumerated in Article 4 are satisfied, and none of these conditions references Article 17 *bis* or the factors it describes. This straightforward reading of Article 4 strongly suggests that Article 17 *bis* does not provide an independent basis for denying an air carrier's application for a permit where the carrier is otherwise qualified to receive one under the Agreement.

It is true that the Agreement does not expressly define the "appropriate authorisations and permissions" that must be granted. Agreement art. 4. In context, however, we think it clear that this phrase refers to the authorizations and permissions necessary to enable a foreign air carrier to operate within a particular jurisdiction—in the case of the United States, a permit issued by DOT. *See* 49 U.S.C. § 41301 (providing that a foreign air carrier may provide foreign air transportation only if it holds a relevant permit); *id.* § 41302 (providing the Secretary of Transportation authority to issue such permits); *see also* State Legal Analysis at 3 ("Article 4 imposes an obligation to issue a permit provided that the criteria in Article 4 are met."); DOT Legal Analysis at 5 (once fitness and safety criteria under the Agreement are satisfied, "DOT is legally required to grant" a carrier's application to provide services in the United States). The phrase "authorisations and permissions" is naturally read to refer back to the "operating authorisations and technical permissions" mentioned earlier in the same sentence; i.e., the kinds of authorizations and permissions necessary to "operat[e]" an airline in the relevant jurisdiction. *See* Agreement art. 4

[4] Because we assume that Article 4's enumerated requirements are satisfied, we do not consider whether the principles discussed in Article 17 *bis* could ever be relevant in determining whether those requirements are met.

("On receipt of applications from an airline of one Party, in the form and manner prescribed for operating authorisations and technical permissions, the other Party shall grant appropriate authorisations and permissions with minimum procedural delay[.]").

The term "appropriate," considered in isolation, might be taken to indicate that the Parties retain the discretion to deny authorizations or permissions if they conclude that issuing them would be "[in]appropriate," a reading that might suggest that the considerations set forth in Article 17 *bis* could independently be taken into account in deciding whether to issue a permit. In context, however, this is an implausible reading of that term. *See E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 534 (1991) ("[W]e begin with the text of the treaty and the context in which the written words are used." (internal quotation marks omitted)). As noted above, Article 4 mandates that authorizations and permissions be granted "with minimum procedural delay, provided" that certain conditions are satisfied. Agreement art. 4. It then enumerates and describes each condition, and subsequent articles discuss in great detail the specific requirements and procedures related to safety (Article 8) and security (Article 9). It would be fundamentally at odds with this explicit enumeration for the Parties to have indicated, with a single open-ended adjective inserted outside the enumerated list of conditions, that the Parties were also free to deny permits as not "appropriate" for other unspecified reasons. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes."). It is far more natural in context—and far more consistent with the text of Article 4 and the rest of the Agreement—to read the phrase "*appropriate* authorisations and permissions" to refer to those particular authorizations and permissions a carrier needs to operate in a specific jurisdiction. Agreement art. 4 (emphasis added). The Agreement gives qualified carriers of each Party the opportunity to offer services in the jurisdiction of any other Party, provided the listed conditions are met. *Id.* The specific authorizations and permissions necessary for them to do so may vary according to each Party's relevant laws and regulations. Referring to "appropriate authorisations and permissions" is a convenient way to capture, in a single phrase, whatever authorizations and permissions a carrier needs in a given jurisdiction to enable it to provide services consistent with the Agreement. *Cf. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("A provi-

sion that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

The text of Article 17 *bis* likewise fails to suggest that it provides a basis for denying a permit if the requirements referenced in Article 4 are satisfied. Paragraph 1 of Article 17 *bis* provides that the Parties "recognise" the importance of the social dimension of the Agreement "and the benefits that arise when open markets are accompanied by high labour standards," and then states that "[t]he opportunities created by the Agreement are not intended to undermine labour standards or the labour-related rights and principles contained in the Parties' respective laws." Agreement art. 17 *bis*, ¶ 1. Paragraph 1 is thus, on its face, simply a statement of the Parties' recognitions and intentions, and does not create any affirmative rights, obligations, or authorities. Paragraph 2 explains that the "principles in paragraph 1 shall guide the Parties as they implement the Agreement, including regular consideration by the Joint Committee, pursuant to Article 18, of the social effects of the Agreement and the development of appropriate responses to concerns found to be legitimate." *Id.* ¶ 2. DOT suggests that this provision is "essentially hortatory," and that the statement that the principles in paragraph 1 "shall guide" the Parties' implementation of the Agreement does not impose any obligation on the Parties. DOT Legal Analysis at 5. The State Department suggests that, under paragraph 2, if a Party had "concerns about some aspect of labor rights regarding its own implementation or the implementation of the Agreement by another Party," the Party "could consider on its own what, if any, action is appropriate (and consistent with the Agreement) or could potentially raise the issue with some or all other Parties." State Legal Analysis at 3. But, in State's view, paragraph 2 "does not authorize actions that would run counter to express legal obligations of the Parties under other provisions of the Agreement—such as the obligation at issue here, to grant a permit where Article 4's requirements are satisfied." *Id.* "In that context," State explains, "[p]aragraph (2) at most provides for the Joint Committee to consider labor-related concerns raised by the Parties." *Id.* We need not attempt to determine the precise meaning of paragraph 2, because in our view, no plausible reading of that provision would provide a basis for denying a permit to an air carrier otherwise

qualified under Article 4. As explained above, once the requirements enumerated in Article 4 are satisfied, Article 4 does not leave the Parties with any discretion to deny a permit, or to condition the grant of a permit on requirements that are not enumerated or referenced in Article 4 itself. *See supra* pp. 31–34. Thus, even if Article 17 *bis* were read more expansively than DOT or State suggests, as not simply authorizing but also *requiring* the Parties to take *all* possible actions consistent with the Agreement to respond to labor concerns whenever feasible, such actions could not include denying a permit when the requirements of Article 4 are met, because the Agreement does not allow the Parties to take such an action.[5]

This conclusion is reinforced by the amendment history of the Agreement. Article 17 *bis* was added to the Agreement in 2010. If the drafters had intended Article 17 *bis* to affect the permitting process described in Article 4, they could have said so expressly. Indeed, they included precisely such a clarification in Article 6 *bis*, which was also added in 2010. Article 6 *bis* sought to streamline the permit approval process in Article 4 by providing that, in many circumstances, Parties are required to accept the fitness and citizenship determinations made by the aeronautical authorities of other Parties. Consistent with this purpose, Article 6 *bis* expressly references Article 4 and makes clear that it is intended to affect the way applications under Article 4 are reviewed. *See* Agreement art. 6 *bis* ("Upon receipt of an application for operating authorisation, pursuant to Article 4, from an air carrier of one Party, the aeronautical authorities of the other Party shall recognise any fitness and/or citizenship determination made by the aeronautical authorities of the first Party . . . as if such a determination had been made by its own aeronautical authorities and not enquire further into such matters," with certain limited exceptions). This express reference to Article 4 suggests that when the drafters of the 2010 amendments intended the new provisions in the Agreement to affect the implementation of Article 4, they said so explicitly. Article 17 *bis*, however, does not mention Article 4. Nor does it expressly indicate—as other articles do—that it is intended to override other provisions in the Agreement. *Cf.* Agreement art. 6 ("Notwithstanding any other provision in this

[5] To be clear, we express no view on whether Article 17 *bis* can be interpreted in this more expansive manner.

Agreement, the Parties shall implement the provisions of Annex 4 in their decisions under their respective laws and regulations concerning ownership, investment and control."); *id.* art. 10, ¶ 10 ("Notwithstanding any other provision of this Agreement . . . ."); *id.* annex 1, § 3 ("Notwithstanding Article 3 of this Agreement . . . ."). Thus, like the text of Article 4, the text of Article 17 *bis* fails to indicate that it provides any basis for denying a permit if the requirements in Article 4 are satisfied.

This conclusion is also consistent with the general purposes of the Agreement. *See, e.g.*, *Abbott*, 560 U.S. at 9–10 (noting that a treaty interpretation inquiry is shaped by, *inter alia*, the text and purposes of the treaty); *id.* at 28–29, 46 (Stevens, J., dissenting) (interpreting a treaty by looking to the treaty's text and purpose); *Application of the Federal Water Pollution Control Act to the Former Panama Canal Zone*, 5 Op. O.L.C. 80, 81 (1981) ("Panama Canal Opinion") (noting that "[t]reaties are to be construed with the highest good faith with an eye to the manifest meaning of the whole treaty," and construing provisions "consistently and in keeping with the purpose of the Treaty" (internal quotation marks omitted)); Vienna Convention art. 31(1), 1155 U.N.T.S. at 340. The State Department, which led the negotiation of the Agreement on behalf of the United States, has indicated that "[t]he central purpose of the Agreement was to increase opportunities to provide air services between the Parties." State Legal Analysis at 4; *see also Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) (negotiating agency's views get "great weight"); Panama Canal Opinion, 5 Op. O.L.C. at 82 ("In interpreting a treaty and other international agreements, the construction placed upon it by the Department charged with supervision of our foreign relations should be given much weight."). This view is confirmed by the preamble of the Agreement, which states that, in entering into the Agreement, the Parties desired "to promote an international aviation system based on competition among airlines in the marketplace with minimum government interference and regulation," and intended to "open[] access to markets and maximis[e] benefits for consumers, airlines, labour, and communities on both sides of the Atlantic[.]" 2007 ATA pmbl.; *see also* 2010 Protocol pmbl. at 4 (noting that Parties intended "to build upon the framework established by [the 2007 ATA], with the goal of opening access to markets and maximising benefits for consumers, airlines, labour, and communities on both sides of the Atlantic"). The purpose of promoting open access by

airlines of one Party to the markets of the other Parties is served by the clear procedures set forth in Article 4, which limit each Party's discretion to deny permits to carriers of the other Parties, thereby ensuring that government interference with competition is "minim[ized]." To be sure, benefits to labor were relevant to the Parties and explicitly mentioned in the preamble, but these references, read in light of the preamble as a whole, suggest only that the Parties believed benefits to labor were among the benefits that flowed from open access to markets. *See generally* Agreement pmbl.; *see also* 2010 Protocol art. 6 ("The Parties commit to the shared goal of continuing to remove market access barriers *in order to* maximise benefits for consumers, airlines, labour, and communities on both sides of the Atlantic[.]" (emphasis added)).[6]

Finally, we also considered whether a provision concerning Article 17 *bis* in the current DOT appropriations bill, which is identical to a provision in the previous year's bill, alters our analysis. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, div. L, § 413, 129 Stat. 2242, 2906 (2015); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. K, § 415, 128 Stat. 2130, 2765 (2014). That provision states that "[n]one of the funds made available by this Act may be used to approve a new foreign air carrier permit . . . or exemption application . . . of an air carrier already holding an air operators certificate issued by a country that is party to the [Agreement] where such approval would contravene United States law or Article 17 bis" of the Agreement. Pub. L. No. 114-113, div. L, § 413(a), 129 Stat. at 2906. It then clarifies that "[n]othing in this section shall prohibit, restrict or otherwise preclude the Secretary of Transportation from granting a foreign air carrier permit or an exemption to such an air carrier where such

[6] Because we conclude that the text of the Agreement is clear, and consistent with the central purpose of the Agreement, we need not inquire into the negotiating history. *Cf. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) ("We must . . . be governed by the text . . . whatever conclusions might be drawn from the intricate drafting history . . . . The latter may of course be consulted to elucidate a text that is ambiguous. But where the text is clear, as it is here, we have no power to insert an amendment." (citations omitted)); *see also* Vienna Convention art. 32, 1155 U.N.T.S. at 340. Nevertheless, the State Department has informed us that it "believes that the negotiating history of the treaty confirms the conclusion that Article 17 *bis* does not constitute a basis for a Party to unilaterally deny a permit to an otherwise qualified carrier of another Party." State Legal Analysis at 4.

authorization is consistent with the [Agreement] and United States law." *Id.* § 413(b). Whatever the meaning or effect of this provision as a matter of domestic law, it does not affect our interpretation of the Agreement itself. As discussed above, the text of the Agreement is clear. The Departments of State and Transportation—the principal government entities involved in negotiating and implementing the Agreement on behalf of the United States—agree that Article 17 *bis* does not provide an independent basis upon which a Party to the Agreement may deny an application for a permit from an otherwise qualified carrier, and those views are entitled to great weight. *See Avagliano*, 457 U.S. at 184–85 ("Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) ("[T]he meaning given to [treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight."). And in any event, we do not read the DOT appropriations provision as purporting to alter the meaning of the Agreement itself.

III.

For the foregoing reasons, we conclude that Article 17 *bis* does not provide an independent basis upon which the United States may deny a permit to an air carrier of a Party to the Agreement if that carrier is otherwise qualified to receive such a permit.

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

Effect of Appropriations Rider on Access of DOJ Inspector General to Certain Protected Information

Section 540 of the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016, effectively prohibits the Department of Justice, for the remainder of fiscal year 2016, from denying the Department's Office of the Inspector General ("OIG") timely access to materials requested by OIG, or preventing or impeding OIG's access to such materials, pursuant to the Federal Wiretap Act (Title III of the Omnibus Crime Control and Safe Streets Act of 1968); Rule 6(e) of the Federal Rules of Criminal Procedure; or section 626 of the Fair Credit Reporting Act. As a result, the Department may (and must) disregard the limitations in those statutes in making disclosures to OIG for the remainder of the fiscal year.

April 27, 2016

MEMORANDUM OPINION FOR THE
DEPUTY ATTORNEY GENERAL

You have asked us to clarify the authority of the Department of Justice (the "Department") to disclose certain statutorily protected materials to its Office of the Inspector General ("OIG") in light of the enactment of the Commerce, Justice, Science, and Related Agencies Appropriations Act, 2016, Pub. L. No. 114-113, div. B, 129 Stat. 2242, 2286 (2015) ("CJS Appropriations Act").[1] In particular, you have asked whether the Department may, in light of that Act, disclose to OIG material protected from disclosure by the Federal Wiretap Act, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510–2522 ("Title III"); Rule 6(e) of the Federal Rules of Criminal Procedure ("Rule 6(e)"); or section 626 of the Fair Credit Reporting Act, 15 U.S.C. § 1681u ("FCRA"). As relevant, section 540 of the CJS Appropriations Act provides that the Department may not use fiscal year 2016 funds "to

[1] *See* E-mail for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Carlos Uriarte, Associate Deputy Attorney General, *Re: Request for OLC Opinion* (Mar. 9, 2016, 5:16 PM). We requested the views of several potentially affected entities, and received the views of OIG and the National Aeronautics and Space Administration ("NASA"). *See* E-mail for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from William M. Blier, General Counsel, OIG, *Re: Solicitation of Views*, att. (Mar. 23, 2016, 6:11 PM); E-mail for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from David G. Barrett, Associate General Counsel, NASA, *Re: Solicitation of Views* (Apr. 6, 2016, 9:41 AM).

deny [its] Inspector General . . . timely access to any records, documents, or other materials available to the [D]epartment . . . , or to prevent or impede that Inspector General's access to such records, documents, or other materials, under any provision of law, except a provision of law that expressly refers to the Inspector General and expressly limits the Inspector General's right of access." CJS Appropriations Act § 540, 129 Stat. at 2332. For the reasons set forth below, we conclude that this provision has the effect of barring the Department, for the remainder of fiscal year 2016, from denying OIG timely access to requested materials pursuant to Title III, Rule 6(e), or section 626 of FCRA, or from preventing or impeding OIG's access to such materials. As a result, the Department may (and must) disregard the limitations in those statutes in making disclosures to OIG for the remainder of the fiscal year.

I.

We begin with the relevant statutory background and governing legal principles. With the exception of the subsequently enacted CJS Appropriations Act, these statutes and principles are discussed in depth in this Office's recent opinion, *Access of Department of Justice Inspector General to Certain Information Protected from Disclosure by Statute*, 39 Op. O.L.C. 12 (2015) ("*IG Access*").

The Inspector General Act of 1978, 5 U.S.C. app. ("IG Act"), established an Office of Inspector General in a large number of federal agencies. 5 U.S.C. app. §§ 2(A), 8G(a)–(b), 12(2). In 1988, Congress extended that Act to the Department and established OIG. *See* Inspector General Act Amendments of 1988, Pub. L. No. 100-504, § 102(c), (f), 102 Stat. 2515, 2515, 2520–21 (codified as amended at 5 U.S.C. app. §§ 8E, 12(1)–(2)). The IG Act grants inspectors general several authorities with respect to the agencies within which their offices are established, including, in section 6(a)(1), the authority "to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act." 5 U.S.C. app. § 6(a)(1). Section 8E of the Act qualifies this authority in certain circumstances, providing that the Attorney General may "prohibit the Inspector General from carrying out or completing any audit or investigation, or from issuing a subpoena . . . if the Attorney

General determines that such prohibition is necessary to prevent the disclosure" of certain sensitive materials. *Id.* § 8E(a)(2). On its face, the IG Act thus "requires the Department to disclose 'all' materials [requested by OIG] that are available to the Department, relate to an OIG review of programs or operations within its investigative jurisdiction, and are not covered by a determination to withhold them under section 8E." *IG Access*, 39 Op. O.L.C. at 20.

As we explained in our *IG Access* opinion, however, the IG Act is "not in all circumstances the only statute that governs OIG's access to Department materials." *Id.* at 19. The three statutes about which you have asked—Title III, Rule 6(e), and FCRA—also govern access, including OIG's access, to certain highly sensitive Department materials. Title III provides that an investigative or law enforcement officer "violat[es]" the law by "willful[ly] disclos[ing]" the contents of a lawfully intercepted wire, oral, or electronic communication "beyond the extent permitted by" Title III. 18 U.S.C. § 2520(g). Rule 6(e) provides that "attorney[s] for the government" and other persons "must not disclose a matter occurring before [a] grand jury"—such as testimony that witnesses have delivered in confidential grand jury proceedings—except pursuant to a specific exception. Fed. R. Crim. P. 6(e)(2)(B). And section 626 of FCRA states that the Federal Bureau of Investigation ("FBI") "may not disseminate" consumer information obtained pursuant to a National Security Letter—which may include private banking and credit information collected from credit agencies, frequently without the consumer's knowledge—except under two enumerated exceptions. 15 U.S.C. § 1681u(g).

These statutes permit Department officials to disclose covered materials to OIG in "most, but not all, of the circumstances in which OIG might request [them]." *IG Access*, 39 Op. O.L.C. at 15; *see id.* at 21–69 (examining each statute in detail to identify the circumstances in which it permits disclosure to OIG). In particular, Title III and Rule 6(e) allow Department officials to disclose the contents of intercepted communications and grand jury materials to OIG in connection with any OIG investigation or review that relates to the Department's criminal law enforcement activities, and section 626 of FCRA allows the FBI to disclose protected consumer information to OIG if the disclosure could assist in the approval or conduct of foreign counterintelligence investigations. *See id.* at 68. But the statutes do not permit disclosures that "have either an attenuated or no

connection" with the Department's criminal law enforcement activities, or the approval or conduct of foreign counterintelligence investigations. *Id.* at 68. Accordingly, if OIG were to request access to protected materials in one of those limited circumstances in which Title III, Rule 6(e), or section 626 prohibits their disclosure, Department officials would face potentially conflicting statutory commands. On the one hand, the IG Act states that Department officials must grant OIG access to "all materials" that OIG requests and that fall within OIG's investigative jurisdiction; on the other hand, Title III, Rule 6(e), and section 626 state, respectively, that officials would "violat[e]" the law by disclosing, "must not disclose," or "may not disseminate" the requested materials. *See id.* at 19–20.

In our *IG Access* opinion, we resolved this conflict by applying two well-established legal principles. First, we observed that "in a range of contexts . . . the Supreme Court and this Office have declined to infer that Congress intended to override statutory limits on the disclosure of highly sensitive information about which Congress has expressed a special concern for privacy, absent a clear statement of congressional intent to that effect." *Id.* at 70. The Court and this Office had previously concluded that this principle required a clear statement before a statute could be construed to authorize the disclosure of information protected by Rule 6(e) or Title III—i.e., confidential material (such as witness testimony) developed in the course of grand jury proceedings, or the contents of private communications lawfully wiretapped by the government. *Id.* at 70–71. And we concluded in the *IG Access* opinion that "the logic of these opinions . . . extends to section 626 of FCRA" as well, given the "strict duty of confidentiality" and the "penalties for improper disclosure" imposed by section 626, as well as the "highly sensitive" nature of the information section 626 protects—i.e., private consumer banking and credit information obtained by the FBI from credit agencies, frequently without the consumer's knowledge. *Id.* at 73.

Second, we invoked the "rule of relative specificity," which holds that "'[w]here there is no clear [congressional] intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Id.* at 74 (alterations in original) (quoting *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974)). Title III, Rule 6(e), and section 626 of FCRA "address with greater specificity" than the IG Act "the type of information they regulate," "the precise conditions under

which disclosure" is permitted, and "the lawful recipients of information." *Id.* at 76–77. Accordingly, we concluded that, like the clear statement principle pertaining to highly sensitive information, the rule of relative specificity "require[d] a clear statement" before it could be inferred that "the general right of access granted by section 6(a)(1) [of the IG Act] takes precedence over the specific, carefully delineated limits on disclosure Congress set forth in" Title III, Rule 6(e), and section 626. *Id.* at 78.

Applying these two principles, we concluded that the IG Act does not contain such a clear statement. *Id.* at 79. The Act, we observed, "does not mention" any of the three withholding statutes, or

> contain general language addressing potential conflicts with other statutory confidentiality provisions, such as a statement that the inspector general's right of access shall apply 'notwithstanding any other law' or 'notwithstanding any statutory prohibition on disclosure'—language that might, at least in some circumstances, provide a clearer indication that the general access language was supposed to override more specific statutory protections of confidential information.

Id. at 79–80 (citing *Brady Act Implementation Issues*, 20 Op. O.L.C. 57, 62 (1996)). Although the IG Act grants inspectors general a right "to have access to *all* records" available to their respective agencies and within their investigative jurisdiction, the Supreme Court and this Office have repeatedly concluded that "'expansive modifiers'" like "all" and "any" do not, on their own, supply the kind of clear statement needed to overcome competing interpretive presumptions. *Id.* at 81 (quoting *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 220 n.4 (2008)); *see id.* at 81–82. And while we found "'plausible'" OIG's contention that certain language in section 6(b)(1) of the IG Act "implies that Congress intended access under section 6(a)(1) to be 'automatic' and free of any 'existing statutory restriction[s],'" we ultimately concluded that the "negative inference" that OIG identified was not "unequivocal enough to establish a clear manifestation of congressional intent," *id.* at 83–84, particularly in light of a statement in the Act's Senate report that each inspector general's right of access would be "'subject, of course, to the provisions of other statutes, such as the Privacy Act,'" *id.* at 86 (emphasis omitted) (quoting S. Rep. No. 95-1071, at 33–34 (1978)).

Our *IG Access* opinion also considered whether an appropriations rider in the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014) ("2015 Appropriations Act"), granted OIG access to information otherwise protected from disclosure by Title III, Rule 6(e), or section 626 of FCRA. Section 218 of the 2015 Appropriations Act stated:

> No funds provided in this Act shall be used to deny the Inspector General of the Department of Justice timely access to all records, documents, and other materials in the custody or possession of the Department or to prevent or impede the Inspector General's access to such records, documents and other materials, unless in accordance with an express limitation of section 6(a) of the Inspector General Act, as amended, consistent with the plain language of the Inspector General Act, as amended. The Inspector General of the Department of Justice shall report to the Committees on Appropriations within five calendar days any failures to comply with this requirement.

Id. § 218, 128 Stat. at 2200. We acknowledged that OIG had made "substantial" arguments that this rider required the Department to grant it access to materials otherwise protected by Title III, Rule 6(e), and section 626. *IG Access*, 39 Op. O.L.C. at 92. But we ultimately concluded that the rider did not override Title III, Rule 6(e), and section 626 in the limited circumstances in which those statutes bar OIG's access to protected information.

We began our analysis of section 218 by observing that there were "at least three conceivable constructions of the phrase 'express limitation of section 6(a) of the Inspector General Act.'" *Id.* at 93. First, this phrase could be interpreted to prohibit Department officials from denying OIG access to materials except under "limitations" on OIG's access that "appear in section 6(a) itself or that expressly refer to that section"—a reading that would have barred the Department from withholding materials from OIG under Title III, Rule 6(e), or section 626 of FCRA, as well as under section 8E of the IG Act itself. *Id.* Second, the provision could be interpreted—as OIG proposed—to refer to "only those limitations on disclosure that are specifically directed at disclosures to OIG under the IG Act, whether or not they explicitly refer to section 6(a)." *Id.* This reading would have permitted the Department to withhold records under section

8E, but not under Title III, Rule 6(e), or section 626. Third, the provision could be interpreted to "encompass all 'express' [statutory] limitations on disclosure that . . . are properly deemed to function as 'limitation[s] of section 6(a).'" *Id.* Under this reading, the Department would be permitted to withhold information under Title III, Rule 6(e), and section 626, as well as section 8E of the IG Act. *See id.*

We concluded that the first interpretation, although a natural reading of the phrase "express limitation of section 6(a)," was untenable. As noted above, this reading would have meant that the rider had implicitly repealed (among other things) section 8E of the IG Act itself, a provision that "does not refer explicitly to section 6(a)." *Id.* We thought that result implausible in light of the "strong presumption against implied repeals in appropriations acts," and because other parts of the rider made clear that it was intended to be consistent with the plain language of the Inspector General Act. *Id.*

Having found this natural reading of section 218's key phrase untenable, we went on to consider the second and third readings we had identified. The second interpretation, we noted, required reading the phrase "in accordance with an express limitation of section 6(a) of the [IG Act]" to mean "in accordance with a limitation that expressly addresses disclosures to OIG under the IG Act." *Id.* at 94. Although "not the most natural reading of section 218's text," this reading was in our view plausible because "section 6(a) is the principal provision in the IG Act that governs disclosures to OIG." *Id.* The third reading was likewise "reasonably grounded in the statutory text." *Id.* at 95. "Statutes like Title III, Rule 6(e), and section 626" of FCRA, we explained, "can be considered 'limitations of section 6(a)' in that they supersede section 6(a) in situations where both section 6(a) and one of those statutes would apply." *Id.* And they can be considered "express" limitations because "they explicitly contemplate . . . nondisclosure in the circumstances they address"—as opposed to, for example, general statutory provisions that implicitly authorize an agency to withhold information, or agency practices grounded in regulations or other non-statutory authorities. *Id.*

Although we thought that both the second and the third readings of section 218 were plausible, we concluded that the third was more consistent with the relevant principles of statutory interpretation. We noted that, in order to override the limitations on disclosure imposed by Title III, Rule

6(e), and section 626 of FCRA, section 218 would—consistent with the principles we had discussed earlier—need to "contain a clear congressional statement that it was intended to have that effect." *Id.* And while the second reading of the phrase "express limitation of section 6(a)" was "consonant with" certain "events surrounding [the rider's] enactment," *id.* at 97, it did not follow clearly from the phrase's plain language, but rather "require[d] reading unstated limitations into the rider's text," *id.* at 95. Further, as noted above, the phrase "express limitation of section 6(a)" was also susceptible to another plausible reading—the third reading—that allowed information to be withheld pursuant to Title III, Rule 6(e), and section 626. As a result, that phrase did not in our view "constitute a sufficiently clear statement to override the limitations on disclosure imposed by those statutes." *Id.*

This conclusion was reinforced by the fact that "section 218 appear[ed] in an appropriations act that post-dates the provisions in Title III, Rule 6(e) and section 626 of FCRA." *Id.* at 95–96. "[T]here is a 'very strong presumption' that appropriations measures do not 'amend substantive law,' a presumption that may be overcome only by 'unambiguous[]' evidence to the contrary." *Id.* at 96 (second alteration in original) (quoting *Calloway v. Dist. of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000)); *see Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189–91 (1978). We did not find such evidence in section 218, given that it did not "mention Title III, Rule 6(e), or section 626" or "state that the provision [was] intended to amend existing statutes in any way." *IG Access*, 39 Op. O.L.C. at 96. We also noted that the drafters' general statement that section 218 was "'designed to improve OIG access to Department documents and information'" was consistent with all of the readings we had considered, including the third reading, under which the rider functioned to "reaffirm and reinforce" the existing disclosure requirements in the IG Act by adding timeliness and reporting requirements, and adding the possibility of Anti-Deficiency Act consequences for failure to make required disclosures. *Id.* at 96–97 (quoting 160 Cong. Rec. H9345 (daily ed. Dec. 11, 2014)).

Several months after we issued the *IG Access* opinion, Congress enacted the Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (Dec. 18, 2015). Division B of that statute, the CJS Appropriations Act, appropriates funds to the Department of Justice and OIG, as well as several additional entities, "for the fiscal year ending Sep-

tember 30, 2016," commonly referred to as fiscal year 2016. CJS Appropriations Act § 5, 129 Stat. at 2244; *see id.* tit. II, 129 Stat. at 2296. Section 540 of the CJS Appropriations Act provides:

> No funds provided in this Act shall be used to deny an Inspector General funded under this Act timely access to any records, documents, or other materials available to the department or agency over which that Inspector General has responsibilities under the Inspector General Act of 1978, or to prevent or impede that Inspector General's access to such records, documents, or other materials, under any provision of law, except a provision of law that expressly refers to the Inspector General and expressly limits the Inspector General's right of access. A department or agency covered by this section shall provide its Inspector General with access to all such records, documents, and other materials in a timely manner. Each Inspector General shall ensure compliance with statutory limitations on disclosure relevant to the information provided by the establishment over which that Inspector General has responsibilities under the Inspector General Act of 1978. Each Inspector General covered by this section shall report to the Committees on Appropriations of the House of Representatives and the Senate within 5 calendar days any failures to comply with this requirement.

Id. § 540, 129 Stat. at 2332. In a joint explanatory statement, the statute's drafters explained simply that "[s]ection 540 requires agencies funded by the Act to provide Inspectors General with timely access to information." 161 Cong. Rec. H9745 (daily ed. Dec. 17, 2015); *see* Consolidated Appropriations Act, 2016 § 4, 129 Stat. at 2244 (stating that this explanatory statement "shall have the same effect . . . as if it were a joint explanatory statement of a committee of conference").

II.

As we explained in the *IG Access* opinion (and as discussed above), an appropriations act may be construed to override the limitations on disclosure contained in Title III, Rule 6(e), and section 626 of FCRA only if the act contains a "'clear'" and "'unambiguous[]'" statement that Congress intended it to have that effect. *IG Access*, 39 Op. O.L.C. at 97; *supra* pp. 45–46. We conclude that section 540 of the CJS Appropriations Act

contains such a clear and unambiguous statement, and therefore that it effectively bars the Department from withholding materials from OIG pursuant to Title III, Rule 6(e), or section 626 for the remainder of fiscal year 2016. As a result, the Department may (and must) disregard the limitations in those statutes in making disclosures to OIG during the remainder of that year.

To start, there is no question that section 540 on its face imposes a restriction on the Department's use of fiscal year 2016 funds to deny, prevent, or impede OIG's access to Department materials. The first part of that provision states that "[n]o funds provided in this Act shall be used" to deny, prevent, or impede the access of "an Inspector General funded under this Act" to materials "available to the department or agency over which the Inspector General has responsibilities under the Inspector General Act of 1978." The "Act" referred to in section 540 is the CJS Appropriations Act, which appropriates funds both to the Department generally and to OIG specifically for fiscal year 2016. *See* Consolidated Appropriations Act, 2016 § 3, 129 Stat. at 2244 ("Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this Act shall be treated as referring only to the provisions of that division."); CJS Appropriations Act tit. II, 129 Stat. at 2296, 2297 (appropriating funds to "the Department of Justice," including $93,709,000 "[f]or necessary expenses of the Office of Inspector General"). And the Department of Justice is the "department . . . over which" OIG has responsibilities under the IG Act. *See* 5 U.S.C. app. §§ 4(a), 8E(b). Section 540 thus prohibits the Department from using any "funds provided in [the CJS Appropriations Act]" to deny, prevent, or impede OIG's access to materials "available to the [D]epartment."

It is likewise clear that the plain language of this funding restriction bars the Department from using fiscal year 2016 funds to withhold materials from OIG pursuant to Title III, Rule 6(e), or section 626 of FCRA. Section 540 states that the Department may not use fiscal year 2016 funds

> to deny [OIG] timely access to any records, documents, or other materials available to the [D]epartment . . . , or to prevent or impede [OIG's] access to such records, documents, or other materials, *under any provision of law*, except a provision of law that expressly refers to the Inspector General and expressly limits the Inspector General's right of access.

CJS Appropriations Act § 540 (emphasis added). Title III, Rule 6(e), and section 626 are plainly "provision[s] of law." *See, e.g.*, *Republic of Iraq v. Beaty*, 556 U.S. 848, 856 (2009) (stating that a federal statute is "indisputably" a "provision of law"); *Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 867 (D.C. Cir. 1981) (stating that Rule 6(e) is "by any definition . . . a statute"). By withholding materials pursuant to any of those provisions, the Department would be "deny[ing]" or "prevent[ing]" access "under" such provisions. *See, e.g.*, *Webster's New World College Dictionary* 1574 (5th ed. 2014) (defining "under" in similar context to mean "because of"); *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010) (referring to "deny[ing] writs of habeas corpus *under* [28 U.S.C.] § 2254" (emphasis added)); *IG Access*, 39 Op. O.L.C. at 95 (referring to "withholding *under* Title III, Rule 6(e), and section 626" (emphasis added)). And Rule 6(e) and section 626 do not "refer to[]" inspectors general at all, let alone "expressly limit[]" their access, while the sole provision of Title III that refers to inspectors general does not impose any limit on their right of access. *See* 18 U.S.C. § 2520(f) (requiring the head of a department or agency to "notify the Inspector General with jurisdiction over the department or agency" if the head determines that disciplinary action is not warranted for a violation of Title III, and to "provide the Inspector General with the reasons for such determination").

Furthermore, by prohibiting the Department from using fiscal year 2016 funds to withhold materials pursuant to Title III, Rule 6(e), or section 626 of FCRA, the appropriations rider effectively prohibits the Department from withholding materials pursuant to those statutes for the remainder of fiscal year 2016. This is because in order to withhold materials from OIG during fiscal year 2016, the Department would invariably need to use funds appropriated by the CJS Appropriations Act—if nothing else, because withholding would take time for which a Department employee would be compensated by the CJS Appropriations Act, or entail the use of resources (such as electricity, paper, or a computer) funded by the Act. *See* CJS Appropriations Act tit. II, 129 Stat. at 2296 (appropriating funds for "salaries and expenses"); *McHugh v. Rubin*, 220 F.3d 53, 57 (2d Cir. 2000) ("Even the simple act . . . of processing applications in accordance with a straightforward categorical rule (for example, 'all applications shall be denied') would involve the use of appropriated funds."); *Env't Def. Ctr. v. Babbitt*, 73 F.3d 867, 871–72

(9th Cir. 1995) ("The use of any government resources—whether salaries, employees, paper, or buildings—to accomplish a final listing would entail government expenditure.").[2] And incurring an obligation of appropriated funds to withhold covered materials might well violate not only section 540 but also the Anti-Deficiency Act, 31 U.S.C. § 1341 *et seq.*, a statute that subjects federal officers and employees who expend or obligate funds in excess of appropriated amounts to administrative and, in the case of knowing and willful violations, criminal penalties. *See id.* §§ 1341(a), 1349(a), 1350; *Applicability of the Antideficiency Act to a Violation of a Condition or Internal Cap Within an Appropriation*, 25 Op. O.L.C. 33, 35 (2001) (concluding that "when Congress has expressly prohibited the expenditure of any funds for a particular purpose" within an appropriation, a violation of that condition "would generally constitute a violation of the Antideficiency Act").

Moreover, for at least three reasons, we believe section 540's prohibition on using fiscal year 2016 funds to withhold these materials from

[2] We recognize that funds that are not "provided in" the CJS Appropriations Act, such as funds held over from a previous fiscal year, are not subject to section 540. CJS Appropriations Act § 540. And it is possible that some Department employees with custody of materials OIG requests might be paid with such funds. However, we understand that the vast majority of the Department's salaries and operations are funded by annual appropriations. *See, e.g.*, *id.* tit. II (appropriating funds for, among other things, "Salaries and Expenses" for "General Administration," the United States Parole Commission, "General Legal Activities," the Antitrust Division, United States Attorneys, the Foreign Claims Settlement Commission, the Community Relations Service, the United States Marshals Service, the National Security Division, the FBI, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco, Firearms, and Explosives, and the Federal Prison System). We further understand that these annually appropriated salaries include the salaries of supervisory and senior leadership officials who have general authority to obtain access to materials related to matters they supervise, and, in light of section 540, the authority and obligation to obtain such access in order to disclose requested materials to OIG without regard to the restrictions in Title III, Rule 6(e), or section 626 of FCRA. *See id.*; 28 U.S.C. §§ 509, 510; *see also* 5 U.S.C. § 301. Thus, even if OIG requested materials from the Department in the narrow circumstances in which such materials are protected from disclosure to OIG by Title III, Rule 6(e), or section 626, and even if none of the Department employees with custody of those materials were paid with fiscal year 2016 funds or used resources supported by such funds to process the request, OIG's request could always be elevated to a supervisory official who was paid with fiscal year 2016 funds and had the authority to obtain and disclose the materials notwithstanding the restrictions in Title III, Rule 6(e), or section 626.

OIG—unlike the analogous provisions in the IG Act or section 218 of the 2015 Appropriations Act—is "'clear'" and "'unambiguous[],'" and therefore satisfies the clear statement rules described in our *IG Access* opinion. *IG Access*, 39 Op. O.L.C. at 83, 95, 97. First, in our view, the only plausible construction of section 540 is that it forbids the use of fiscal year 2016 funds to withhold materials from OIG pursuant to Title III, Rule 6(e), or section 626 of FCRA. As just discussed, section 540 states that the Department may not use such funds to withhold materials from OIG "under any provision of law" except a provision that expressly limits inspector general access, and under no reasonable construction does that language permit the Department to use fiscal year 2016 funds to withhold materials under Title III, Rule 6(e), or section 626. Thus, unlike section 218 of the 2015 Appropriations Act, section 540 is not "susceptible to alternative interpretations, one of which would permit withholding under Title III, Rule 6(e), and section 626," and it therefore cannot be construed in a manner consistent with those statutes. *Id.* at 95; *see The Last Best Beef, LLC v. Dudas*, 506 F.3d 333, 339 (4th Cir. 2007) (stating that where an appropriations rider is "in absolute contradiction with" an earlier-enacted statute, and an agency "simply cannot comply simultaneously" with both enactments, the agency is "bound to follow Congress's last word on the matter even in an appropriations law" (internal quotation marks omitted)).

Second, unlike both section 218 and the IG Act, section 540 expressly "address[es] potential conflicts with other statutory confidentiality provisions." *IG Access*, 39 Op. O.L.C. at 80; *see id.* at 96. It specifies that the Department may not use fiscal year 2016 funds to "deny [OIG] timely access . . . under any provision of law," subject to one exception. CJS Appropriations Act § 540. That language is similar to statutory grants of access "notwithstanding any other law" that we have previously found sufficient, at least in some circumstances, to override competing limitations on disclosure. *See, e.g.*, *Brady Act Implementation Issues*, 20 Op. O.L.C. at 62 (stating that the Brady Act's grant of access "notwithstanding any other law" overrides the limitations on disclosure found in the Privacy Act); *IG Access*, 39 Op. O.L.C. at 79–80. And it confirms that Congress specifically intended to override other statutory limitations, and did not merely countermand them inadvertently through broad language. *Cf. Ali*, 552 U.S. at 220 n.4 (noting that "circumstances may counteract the effect of expansive modifiers" like "all" and "any"); *Hill*, 437 U.S. at

190 (explaining that the presumption against implied repeals applies with special force to appropriations acts because otherwise "every appropriations measure would be pregnant with prospects of altering substantive legislation" and legislators would be required "to review exhaustively the background of every authorization before voting on an appropriation").

Third, section 540 sets forth only one circumstance in which it would permit the Department to use fiscal year 2016 funds to withhold materials from OIG: where a provision of law "expressly refers to the Inspector General and expressly limits the Inspector General's right of access." CJS Appropriations Act § 540. That narrow exception would be largely superfluous if section 540 did not otherwise prohibit the Department from using such funds to withhold (and thus, in effect, bar the Department from withholding) materials available to the Department pursuant to statutory provisions. And the inclusion of this one exception implies that Congress did not intend to allow others. *See, e.g.*, *Hill*, 437 U.S. at 188 (stating that because Congress "create[d] a number of limited 'hardship exemptions'" to the Endangered Species Act, "we must presume that these were the only 'hardship cases' Congress intended to exempt"); *cf. IG Access*, 39 Op. O.L.C. at 83–84 (describing as "plausible" OIG's argument that the IG Act overrode other statutory prohibitions on disclosure based on a negative inference from section 6(b)(1) of the IG Act, but concluding that "the inference OIG invoke[d]" was not sufficiently strong to provide a "clear manifestation of congressional intent" (internal quotation marks omitted)). Moreover, section 8E(a) of the IG Act falls comfortably within the exception's scope. *See* 5 U.S.C. app. § 8E(a)(2) (stating that the Attorney General "may prohibit *the Inspector General* from carrying out or completing any audit or investigation, or from issuing any subpena, . . . *to prevent the disclosure* of" certain sensitive information (emphases added)). A straightforward interpretation of section 540 thus does not invite the result we thought "implausible" when construing section 218 of the 2015 Appropriations Act—namely, an implied partial repeal of a section of the IG Act itself. *IG Access*, 39 Op. O.L.C. at 93.

Finally, to return to the question you asked, it follows directly from this prohibition on withholding that the Department may (and must) disregard the limitations in Title III, Rule 6(e), and section 626 of FCRA when it makes disclosures to OIG. As discussed above, for the remainder of the fiscal year, section 540 effectively bars the Department from withholding

materials from OIG under Title III, Rule 6(e), or section 626. And in so doing, section 540 effectively overrides the limitations in those statutes with respect to disclosures to OIG during that period. It is therefore plainly permissible—and indeed required—for the Department to disregard those limitations in making disclosures to OIG for the remainder of the fiscal year.

III.

For the foregoing reasons, we conclude that section 540 of the CJS Appropriations Act effectively prohibits the Department, for the remainder of fiscal year 2016, from denying OIG timely access to materials requested by OIG, or preventing or impeding OIG's access to such materials, pursuant to Title III, Rule 6(e), or section 626 of FCRA. As a result, the Department may (and must) disregard the limitations in those statutes in making disclosures to OIG for the remainder of the fiscal year. We note that, upon obtaining materials from the Department, OIG will be required to "ensure compliance with statutory limitations on disclosure relevant to the information" contained in those materials. CJS Appropriations Act § 540. We have not considered the nature of the Department's and OIG's obligations after fiscal year 2016 with respect to materials to which OIG obtains access under section 540.

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

Emergency Statutes That Do Not Expressly Require a National Emergency Declaration

The National Emergencies Act's coverage is not limited to statutes that expressly require the President to declare a national emergency, but rather extends to any statute "conferring powers and authorities to be exercised during a national emergency," unless Congress has exempted such a statute from the Act.

August 24, 2016

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

The National Emergencies Act ("NEA"), Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1651), states that "[a]ny provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect . . . only when the President . . . specifically declares a national emergency." 50 U.S.C. § 1621(b). You have asked whether this and other provisions of the NEA apply to statutes that grant powers and authorities in a national emergency, but do not expressly require the President to declare such an emergency.[1]

We have previously issued conflicting guidance on this question. In a 1978 opinion, we stated that the NEA applied to—and thus that the President was required to declare a national emergency before invoking—section 6 of the Davis-Bacon Act, 40 U.S.C. § 276a-5 (1976), a statute

[1] In considering this question, we requested and received the views of the Department of Defense, the Department of Energy, the Department of Homeland Security, and the Department of Commerce. *See* E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Robert S. Taylor, Acting General Counsel, Department of Defense, *Re: OLC Opinion on National Emergencies Act*, att. (May 17, 2016, 1:09 PM); E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Eric Fygi, Deputy General Counsel, Department of Energy, *Re: OLC Opinion on National Emergencies Act* (May 3, 2016, 10:34 AM); E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Joseph Maher, Principal Deputy General Counsel, Department of Homeland Security, *Re: OLC Opinion on National Emergencies Act*, att. (May 3, 2016, 10:34 AM); E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Lauren Sun, Counsel to the General Counsel, Department of Commerce, *Re: Department of Commerce Response on National Emergencies Act* (Apr. 15, 2016, 4:28 PM).

that granted powers "[i]n the event of a national emergency" but did not expressly require the President to declare the emergency. *Wage and Price Standards in Government Procurement*, 2 Op. O.L.C. 239, 243 (1978) ("*Wage and Price Standards*"). In 1982, in contrast, in footnote 78 of an opinion entitled *Legal Authorities Available to the President to Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Products*, we advised that section 710(e) of the Defense Production Act, 50 U.S.C. app. § 2160(e) (1982), was "not subject to the provisions of the National Emergencies Act" because it did not "expressly require the President to declare a national emergency in order to" exercise the powers it granted. 6 Op. O.L.C. 644, 674 n.78 (1982) ("*Severe Energy Supply Interruption*").

For the reasons set forth below, we conclude that the NEA's coverage is not limited to statutes that expressly require the President to declare a national emergency, but rather extends to *any* statute "conferring powers and authorities to be exercised during a national emergency," unless Congress has exempted such a statute from the Act. 50 U.S.C. § 1621(b). To the extent that footnote 78 of our 1982 *Severe Energy Supply Interruption* opinion is inconsistent with this conclusion, we no longer adhere to it.

I.

The NEA, enacted in 1976, consists of five titles. Title I is backward-looking: It terminated most powers and authorities that the Executive possessed "as a result of the existence of any declaration of national emergency in effect on September 14, 1976," the date of the statute's enactment. 50 U.S.C. § 1601. Title I thus has limited continuing application.

Title II of the NEA—which consists of 50 U.S.C. §§ 1621 and 1622—prescribes rules for the declaration and termination of national emergencies. Section 1621(a) grants the President authority to "declare [a] national emergency" with respect to statutes "authorizing the exercise, during the period of a national emergency, of any special or extraordinary power." *Id.* § 1621(a); *see also id.* (requiring that such a declaration be transmitted to Congress and published in the *Federal Register*). Section 1621(b) states that "[a]ny provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and

remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with [the NEA]." *Id.* § 1621(b). Section 1622 provides that the President or Congress may terminate "[a]ny national emergency declared by the President in accordance with [the NEA]," and that such an emergency shall in any event "terminate on the anniversary of the declaration of that emergency," unless the President timely issues "a notice stating that such emergency is to continue in effect." *Id.* § 1622(a), (d). Once a national emergency declared by the President terminates, "any powers or authorities exercised by reason of said emergency shall cease to be exercised." *Id.* § 1622(a); *see also id.* (listing three exceptions to this requirement).

Titles III and IV—which consist of 50 U.S.C. §§ 1631 and 1641 respectively—set forth requirements that the President and other officers must follow once the President has declared a national emergency. Section 1631 provides that "[w]hen the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act." *Id.* § 1631. Section 1641 states that "[w]hen the President declares a national emergency, or Congress declares war," the President and each executive agency must maintain a file and index of, and transmit to Congress, certain orders, rules, and regulations "issued during such emergency or war issued pursuant to such declarations." *Id.* § 1641(a)–(b). In addition, the President must periodically transmit to Congress "a report on the total expenditures incurred by the United States Government . . . which are directly attributable to the exercise of powers and authorities conferred by such declaration." *Id.* § 1641(c).

Last, title V exempts several listed statutes from the NEA's requirements. *See id.* § 1651(a). It also directs congressional committees to issue a report and recommendations within nine months of the NEA's enactment. *Id.* § 1651(b).

At least two types of statutes grant powers or authorities to the Executive during national emergencies. Some statutes provide that certain specified powers or authorities may be exercised during a "national emergency" that has been "declared by the President" or "proclaimed by the President." *See, e.g.*, 10 U.S.C. § 12302(a) (authorizing the secretaries of

the military departments and the Coast Guard to order units in the Ready Reserve to active duty "[i]n time of national emergency declared by the President"); 14 U.S.C. § 367(3) (authorizing the Coast Guard temporarily to retain enlisted personnel beyond their terms of enlistment "during a period of . . . national emergency as proclaimed by the President"). We will refer to these statutes as *declared national emergency statutes*. Other statutes provide that particular powers or authorities may be exercised during a "national emergency," without expressly requiring that the emergency be declared or proclaimed by the President or any other officer or entity. *See, e.g.*, 10 U.S.C. § 871(b) (permitting the commutation of certain court-martial sentences "[i]n time of . . . national emergency"); 14 U.S.C. § 331 (authorizing the secretary of the department in which the Coast Guard is operating to order any regular officer on the retired list to active duty "[i]n time of . . . national emergency"). We will refer to these statutes as *national emergency statutes*.[2]

As noted above, we have previously issued conflicting statements concerning whether the NEA's requirements are applicable only to declared national emergency statutes, or to both declared national emergency statutes and national emergency statutes. In our 1978 *Wage and Price Standards* opinion, we stated that "under Title II of the [NEA], a Presidential declaration of national emergency [was] required in order to" invoke section 6 of the Davis-Bacon Act, a national emergency statute. 2 Op. O.L.C. at 243; *see* 40 U.S.C. § 276a-5 (1976) (granting the President authority to suspend provisions of the Davis-Bacon Act "[i]n the event of a national emergency"). In 1982, in contrast, we indicated that only those statutes that "expressly require the President to declare a national emergency"—that is, declared national emergency statutes—are "subject to the provisions of the [NEA]." *Severe Energy Supply Interruption*, 6 Op. O.L.C. at 674 n.78.

II.

To resolve the conflict in our prior opinions, we now consider whether the NEA's provisions apply only to declared national emergency statutes or to both declared national emergency statutes and national emergency

[2] We do not address whether the NEA applies to statutes other than declared national emergency statutes and national emergency statutes.

statutes. In Part II.A, we conclude that the NEA's text unambiguously extends to both types of statutes. In Part II.B, we consider the NEA's legislative history and find that it reinforces that conclusion.

A.

We begin with the text of the NEA. *See Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) ("As in any statutory construction case, '[w]e start, of course, with the statutory text.'" (alteration in original) (quoting *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006))). As we noted earlier, the NEA's first forward-looking provision, 50 U.S.C. § 1621, contains two subsections: subsection (a) states that "[w]ith respect to Acts of Congress authorizing the exercise, *during the period of a national emergency*, of any special or extraordinary power, the President is authorized to declare such national emergency," 50 U.S.C. § 1621(a) (emphasis added); and subsection (b) states that "[a]ny provisions of law conferring powers and authorities to be exercised *during a national emergency* shall be effective and remain in effect . . . only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency," *id.* § 1621(b) (emphasis added). The language of each of these subsections straightforwardly extends to national emergency statutes. National emergency statutes are both "Acts of Congress authorizing the exercise, during the period of a national emergency, of . . . special or extraordinary power[s]" and "provisions of law conferring powers and authorities to be exercised during a national emergency"—indeed, they often use precisely or nearly those terms. *See, e.g.*, 10 U.S.C. § 2208(*l*)(2) (authorizing the Secretary of Defense to waive certain notification requirements "during a period of . . . national emergency"); 7 U.S.C. § 4208 (waiving certain provisions with respect to the acquisition or use of farmland for national defense purposes "during a national emergency"). And neither subsection of section 1621 contains any language limiting section 1621's coverage to statutes that themselves require a presidential declaration of emergency: section 1621(a) does not state, for instance, that it applies only to statutes granting powers "during the period of a national emergency *declared by the President*," and section 1621(b) does not state that it applies to provisions of law conferring powers and authorities to be exercised "during a national emergency *declared by the President*."

This straightforward reading of section 1621(a) and (b) is reinforced by the fact that both subsections would be almost entirely superfluous if they extended only to declared national emergency statutes. There would be no need for subsection (a) to "authorize[]" the President to declare national emergencies only with respect to declared national emergency statutes, because statutes that apply "during a national emergency *declared by the President*" already implicitly authorize such declarations. (If they did not, they would have been inoperative prior to the NEA's enactment.) Similarly, there would be no need for subsection (b) to prohibit the President from exercising powers or authorities granted by declared national emergency statutes except "when the President . . . specifically declares a national emergency," because those statutes already require a presidential declaration of national emergency as a precondition to their operation. *See, e.g.*, 10 U.S.C. § 155(f)(4) (suspending limitations on tours of duty "during a national emergency declared by the President"). To interpret the provisions of section 1621 as limited to declared national emergency statutes would thus violate the basic principle that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 556 U.S. 303, 314 (2009) (alteration in original) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)).

By their plain terms, then, both subsections of 50 U.S.C. § 1621 apply to national emergency statutes. Subsection (a) authorizes the President to declare a national emergency "[w]ith respect to" national emergency statutes, 50 U.S.C. § 1621(a), and subsection (b) requires the President to declare a national emergency "in accordance with subsection (a)" before any "powers and authorities" conferred by a national emergency statute for use in the event of a national emergency may be exercised, *id.* § 1621(b).

It follows from this conclusion that the other forward-looking provisions of the NEA also apply to national emergency statutes. This is because each of those provisions is expressly tied to the declaration of a national emergency under section 1621 or to the statutory powers or authorities triggered by such a declaration. The first additional forward-looking provision, 50 U.S.C. § 1622, states that the President or Congress may terminate "[a]ny national emergency declared by the President in accordance with" title II of the NEA, and that upon such termination "any

powers or authorities exercised by reason of said emergency shall cease to be exercised." *Id.* § 1622(a). Section 1621 forms part of title II of the NEA, and, as we have just discussed, section 1621(b) requires the President to "declare[]" a national emergency "in accordance with" section 1621(a) before any powers and authorities conferred by a national emergency statute for use in the event of a national emergency may be exercised. As a result, such powers and authorities can only be exercised "by reason of" an emergency declared under title II of the NEA. *Id.* § 1622(a). Section 1622 thus authorizes the President or Congress to terminate any emergency triggering the exercise of powers and authorities conferred by a national emergency statute, thereby causing those powers and authorities to "cease to be exercised." *Id.*

The next provision of the NEA, 50 U.S.C. § 1631, provides that "[w]hen the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act." *Id.* § 1631. National emergency statues make "powers or authorities . . . available . . . for use in the event of an emergency," *see, e.g.*, 10 U.S.C. § 871(b) (permitting the commutation of certain court-martial sentences "[i]n time of . . . national emergency"); and (as we have said), under section 1621(b) of the NEA, the President must "declare[] a national emergency" in order to invoke a national emergency statute. Accordingly, section 1631 provides that the President and other officers cannot exercise powers or authorities conferred by a national emergency statute "unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act." 50 U.S.C. § 1631.

Finally, 50 U.S.C. § 1641 states that "[w]hen the President declares a national emergency, or Congress declares war," the President and executive agencies must maintain and transmit to Congress all rules, regulations, and significant orders "issued during such emergency or war . . . pursuant to such declarations." *Id.* § 1641(a)–(b). It also provides that the President must periodically report to Congress any federal expenditures "directly attributable to the exercise of powers and authorities conferred by such declaration." *Id.* § 1641(c). Because the President must declare a national emergency in order to exercise powers or authorities conferred by a national emergency statute for use in the event of a national emergency,

any rules, regulations, or significant orders issued in reliance on those powers or authorities are issued "pursuant to" such a declaration. *Id.* § 1641(a); *see Webster's Third New International Dictionary* 1848 (1966) (defining "pursuant to" to mean "in the course of carrying out; in conformance to or agreement with"). And, for the same reason, any expenditures incurred by the United States Government when exercising such powers and authorities are "directly attributable to the exercise of powers and authorities conferred by such declaration." 50 U.S.C. § 1641(c). The President and executive agencies therefore must report such orders, regulations, rules, and expenditures in accordance with the requirements of section 1641.

In sum, the plain language of section 1621 makes clear that the NEA applies to national emergency statutes, as well as declared national emergency statutes. As a result, each forward-looking provision of the NEA unambiguously extends to both types of statutes as well. If it chooses, of course, Congress can exempt particular national emergency statutes or declared national emergency statutes from the scope of the NEA. However, we have no occasion to consider here whether any particular statute is so exempt.

B.

Because the NEA's provisions unambiguously apply to national emergency statutes, it is unnecessary for us to examine the statute's legislative history. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms."). But to the extent the legislative history is relevant, it too indicates that Congress intended the NEA's provisions to apply to national emergency statutes.

Both the NEA's House report and testimony delivered prior to its enactment by Antonin Scalia, who was then the Assistant Attorney General for the Office of Legal Counsel, indicate that Congress intended titles II and III of the NEA to apply to national emergency statutes. The House report states:

> [Title II] of the bill provides, for the first time, explicit provision for the President to make the declaration of national emergency which

> certain statutes require. . . . This clarifies an existing problem as to emergency statutes. At present this power can be implied with respect to some statutes—for example, those which state that certain laws are deemed to be in effect "during any . . . period of national emergency declared by the President[" provide], in so many words, [that the President] may declare such an emergency; and *some statutes dependent upon the existence of states of emergency do not specifically say who shall declare them*. . . . When the Act fully takes effect, emergency provisions will only be implemented by the President in accordance with the terms of Title II and Title III of the amended bill.

H.R. Rep. No. 94-238, at 6 (1975) (second ellipsis in original) (emphasis added). This passage, which repeats almost verbatim testimony that Assistant Attorney General Scalia had delivered one month earlier, makes clear that Congress did not intend for the NEA to be limited to statutes "which state that certain laws are deemed to be in effect 'during any . . . period of national emergency declared by the President'"—that is, declared national emergency statutes. *Id.*; *see National Emergencies Act: Hearings Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary on H.R. 3884*, 94th Cong. 91 (1975) ("NEA Hearings") (statement of Assistant Attorney General Scalia) (similar). Rather, as the House report also explains, the NEA was designed to ensure that "statutes dependent upon the existence of states of emergency [that] *do not specifically say who shall declare them*"—that is, national emergency statutes—"will only be implemented by the President in accordance with the terms of Title II and Title III" of the NEA. H.R. Rep. No. 94-238, at 6 (emphasis added); *see* NEA Hearings at 91. The House report and Assistant Attorney General Scalia's testimony thus indicate that Congress intended that the President would implement national emergency statutes "only . . . in accordance with" titles II and III of the NEA.

A subsequent passage from the House report reaffirms this intention. That passage (which again borrows nearly verbatim from Assistant Attorney General Scalia's testimony) explains that in some cases, "changes in law automatically take effect during times of national emergency," but that title III of the NEA would "change this by establishing that *no* provision of law shall be triggered by a declaration of national emergency unless and until the President specifies that provision as one of those

under which he or other officers will act." H.R. Rep. No. 94-238, at 7–8 (emphasis added); *see* NEA Hearings at 93 (similar). The report (and Assistant Attorney General Scalia's testimony) cite two statutes as "[e]xamples" of the provisions that would be affected by title III of the NEA in this manner, and one of those statutes—37 U.S.C. § 202(e)—was a national emergency statute. H.R. Rep. No. 94-238, at 8 n.3; *see* NEA Hearings at 93; 37 U.S.C. § 202(e) (1970) (altering the pay of certain rear admirals who served in active duty "in time of . . . national emergency"). The inclusion of this statute as one of two such examples strongly suggests that the drafters expected the NEA to apply to national emergency statutes.

In footnote 78 of our *Severe Energy Supply Interruption* opinion, we identified two pieces of legislative history as supporting the contrary view that statutes that do not "expressly require the President to declare a national emergency" are "not subject to the provisions of" the NEA. 6 Op. O.L.C. at 674 n.78. On closer examination, however, we do not think either of these passages from the legislative history supports such a conclusion.

First, the *Severe Energy Supply Interruption* opinion quoted a sentence from Assistant Attorney General Scalia's testimony, repeated in both the NEA's House report and its principal Senate report, stating that "[l]aws like the Defense Production Act of 1950, which do not require a Presidential declaration of emergency for their use, are not affected by this title [*i.e.*, Title I]—even though they may be referred to in a lay sense as 'emergency' statutes." *Id.* (second alteration in original) (quoting NEA Hearings at 91); *see* H.R. Rep. No. 94-238, at 5; S. Rep. No. 94-1168, at 4 (1976). The opinion recognized that this statement "refers only to Title I of the NEA," but nevertheless appears to have inferred from it that laws that "do not require a Presidential declaration of emergency for their use" are categorically exempt from the NEA. *Severe Energy Supply Interruption*, 6 Op. O.L.C. at 674 n.78. The basis for this inference, however, is unclear. As Assistant Attorney General Scalia explained in the sentence preceding the passage quoted in the *Severe Energy Supply Interruption* opinion, his statement was based on the particular terms of title I, which at the time he delivered his testimony expressly stated that title I applied only to those statutes relying on "'a general declaration of emergency made by the President *pursuant to a statute authorizing him to declare a*

national emergency.'" NEA Hearings at 90–91 (emphasis added) (quoting H.R. 3884, 94th Cong. § 101(b) (as introduced in House, Feb. 27, 1975)).[3] That language was removed from the NEA before it was enacted, however, *see* 50 U.S.C. § 1601(a)–(b) (terminating powers and authorities exercised pursuant to "a general declaration of emergency made by the President"), and even in the draft discussed by Assistant Attorney General Scalia it was applicable to title I alone. This passage thus sheds no light on whether the enacted versions of titles II, III, and IV—the forward-looking parts of the NEA with which we are concerned—apply to national emergency statutes.

Second, the *Severe Energy Supply Interruption* opinion quoted and relied upon two sentences from the NEA's Senate report to support its conclusion. The first sentence states that "'[t]he provisions of Title II . . . are designed to insure congressional oversight of Presidential actions *pursuant to declarations of a national emergency authorized by an act of Congress*.'" 6 Op. O.L.C. at 674 n.78 (emphasis and alterations in original) (quoting S. Rep. No. 94-1168, at 4). This statement remains true, however, even if the NEA applies to national emergency statutes, because by the Act's terms, *any* statute that falls within the scope of 50 U.S.C. § 1621 may be invoked only "'pursuant to declarations of a national emergency authorized by an act of Congress.'" *Id.* (emphasis removed); *see* 50 U.S.C. § 1621(b) (prohibiting the President from invoking statutes

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[3] Indeed, Assistant Attorney General Scalia made this statement in part to draw a contrast between titles I and II of the draft bill. The relevant portion of his testimony reads, in full:

> Any emergency declared after the date of enactment of this legislation would not be terminated by title I, but would instead fall under the limiting scheme created by title II. Moreover, title I would only affect those statutes whose conferral of powers is expressly conditioned upon a Presidential declaration of national emergency. This is made clear by section 101(b), which defines the phrase "any national emergency in effect" to mean only "a general declaration of emergency made by the President pursuant to a statute authorizing him to declare a national emergency."
>
> Thus, laws like the Defense Production Act of 1950, which do not require a Presidential declaration of emergency for their use, are not affected by this title—even though they may be referred to in a lay sense as "emergency" statutes.

NEA Hearings at 90–91. Furthermore, one paragraph after this discussion of title I, Assistant Attorney General Scalia proceeded to separately describe the provisions and effects of title II. *See id.* at 91.

unless he "specifically declares a national emergency" in accordance with the NEA). The opinion also quoted a sentence from the Senate report stating that the NEA "'is directed solely to Presidential *declarations of emergency*.'" *Severe Energy Supply Interruption*, 6 Op. O.L.C. at 674 n.78 (emphasis in original) (quoting S. Rep. No. 94-1168, at 4). But in context, this sentence only clarifies that the NEA does not apply to or limit authorizations based on national emergencies declared by Congress: the immediately preceding sentence explains that "[t]he provisions of this bill are not meant to supersede existing provisions of law which authorize declarations of emergency by the Congress." S. Rep. No. 94-1168, at 4.

The NEA's legislative history, then, contains two strong indications that Congress intended the Act to extend to national emergency statutes. Neither of the passages cited in our 1982 *Severe Energy Supply Interruption* opinion suggests that Congress intended to limit the NEA to declared national emergency statutes, and we have not found any other legislative history that supports such a reading. The NEA's legislative history thus reinforces what its text plainly provides: that the provisions of the NEA extend to declared national emergency statutes and national emergency statutes alike.[4]

III.

For the foregoing reasons, we conclude that the NEA's coverage is not limited to statutes that expressly require the President to declare a national emergency. Rather, the NEA applies to any statute "conferring powers and authorities to be exercised during a national emergency," unless Congress has exempted such a statute from the Act. 50 U.S.C. § 1621(b).

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

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[4] We note that neither we nor any of the agencies with which we consulted in preparing this opinion identified any administrative practice conducted in reliance on the interpretation of the NEA set forth in our *Severe Energy Supply Interruption* opinion. *See supra* note 1. We also have not found any basis for concluding that Congress acquiesced in or ratified that interpretation.

Statutory Mandate to Propose Legislation in Response to Medicare Funding Warning

The Recommendations Clause bars Congress from enacting laws that purport to prevent the President from recommending legislation that he judges "necessary and expedient."

The Recommendations Clause bars Congress from enacting laws that purport to require the President to recommend legislation even if he does not judge it "necessary and expedient."

Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, which requires the President to submit "proposed legislation" in response to a Medicare funding warning under section 801(a)(2), contravenes the Recommendations Clause and may be treated as advisory and non-binding.

August 25, 2016

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 ("Medicare Modernization Act"), provides that "[i]f there is a medicare funding warning under section 801(a)(2) of the [Medicare Modernization Act] made in a year, the President shall submit to Congress . . . proposed legislation to respond to such warning." *Id.* § 802(a) (codified at 31 U.S.C. § 1105(h)(1)). We previously advised you that section 802 conflicts with the President's duty under the Recommendations Clause to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient," U.S. Const. art. II, § 3, and that the President may therefore continue to treat this provision as "advisory and not binding," *e.g.*, Office of Management and Budget, *Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2010* at 197 (2009) ("FY 2010 Budget Submission"). This memorandum opinion memorializes and further explains the basis for our advice.

In Part I, we describe the relevant provisions of the Medicare Modernization Act and summarize the Executive Branch's statements regarding section 802. In Part II, we discuss the scope of the Recommendations Clause. As we explain, while the Clause expressly states only that the President has the authority and duty to recommend to Congress those

measures that he judges necessary and expedient, our Office has long maintained that the Clause—like other provisions of Article II that assign responsibilities to the President—implicitly bars Congress from enacting legislation that would prevent the President from exercising, or that would usurp, that authority and duty. Accordingly, as we explain in Part II.A, we believe the Clause bars Congress from enacting laws that purport to prevent the President from recommending legislation that he judges "necessary and expedient." And as we explain in Part II.B, we believe the Clause also bars Congress from enacting laws that purport to require the President to recommend legislation even if he does *not* judge it "necessary and expedient." In Part III, we apply this interpretation of the Recommendations Clause to section 802, explaining that because it purports to direct the President to "submit to Congress . . . proposed legislation to respond to [a medicare funding] warning" without regard to whether the President considers such legislation "necessary and expedient," it conflicts with the Recommendations Clause.

I.

The Medicare Modernization Act, enacted in 2003, made a variety of reforms to the Medicare system. Among other provisions, the Act contains several measures designed to contain the costs of Medicare expenditures. *See* Medicare Modernization Act tit. VIII. Section 801 of the Act provides that if Medicare trustees determine in two consecutive annual reports that the portion of total Medicare expenses funded from general revenues, as opposed to dedicated Medicare financing sources, is projected to exceed 45 percent for the fiscal year in which the report is submitted or for any of the succeeding six fiscal years, that determination "shall be treated as a medicare funding warning." *Id.* § 801(a)(2); *see id.* § 801(a)(1)(B), (c)(1)–(4). Section 802(a) added a new subsection (h) to 31 U.S.C. § 1105, the statute governing the President's annual budget submission. That new subsection provides that "[i]f there is a medicare funding warning under section 801(a)(2) of the [Medicare Modernization Act] made in a year, the President shall submit to Congress, within the 15-day period beginning on the date of the budget submission to Congress under [31 U.S.C. § 1105(a)] for the succeeding year, proposed legislation to respond to such warning." 31 U.S.C. § 1105(h)(1); *see also* Medicare Modernization Act § 802(b) (stating that "[i]t is the sense of

Congress" that "legislation submitted pursuant to section 1105(h) of title 31, United States Code, in a year should be designed to eliminate excess general revenue medicare funding . . . for the 7-fiscal-year period that begins in such year"). Sections 803 and 804 provide that, once the President submits a proposal pursuant to section 802, members of each House of Congress "shall introduce such proposal (by request), the title of which [shall be] 'A bill to respond to a medicare funding warning.'" Medicare Modernization Act §§ 803(a)(1), 804(a)(1). "Such bill" must then be referred to the appropriate committees for consideration. *Id.* §§ 803(a)(1)–(2), 804(a)(1)–(2); *see also id.* §§ 803(b)–(d), 804(b)–(e) (setting forth certain expedited procedures for consideration of bills to respond to a medicare funding warning).

Upon signing the Medicare Modernization Act in 2003, President Bush stated that the Executive Branch would construe section 802 "in a manner consistent with the President's constitutional authority . . . to recommend for the consideration of the Congress such measures as the President judges necessary and expedient." *Statement on Signing the Medicare Prescription Drug, Improvement, and Modernization Act of 2003* (Dec. 8, 2003), 2 Pub. Papers of Pres. George W. Bush 1698, 1698 (2003). President Bush later responded to a medicare funding warning by submitting draft legislation to Congress. *See* H.R. 5480, 110th Cong. (2008). In response to a subsequent medicare funding warning, President Obama's first budget submission stated that "[i]n accordance with the Recommendations Clause of the Constitution, the President considers th[e] requirement [in section 802] to be advisory and not binding," but that "[n]evertheless, the President has put forth Budget proposals that would . . . address the warning conditions." FY 2010 Budget Submission at 197–98. President Obama's subsequent budget submissions have included similar language.[1]

[1] *See* Office of Management and Budget, *Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2017* at 29 (2016); Office of Management and Budget, *Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2016* at 29–30 (2015); Office of Management and Budget, *Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2015* at 30 (2014); Office of Management and Budget, *Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2014* at 57 (2013); Office of Management and Budget, *Analytical Perspectives, Budget of the U.S. Government, Fiscal Year 2013* at 65–66 (2012).

II.

The Recommendations Clause provides that the President "shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3. Although the express terms of the Clause state only that the President has the duty and the authority to recommend measures he judges necessary and expedient, this Office has long maintained that the Clause implicitly prohibits Congress from enacting legislation that would prevent the President from exercising, or would usurp, that duty and authority. Accordingly, we have maintained for over half a century that Congress may not enact statutes, commonly known as "muzzling laws," that purport to prevent the President from recommending legislation he thinks necessary and expedient. *See, e.g.*, *Constitutionality of a Joint Resolution Requiring the President to Propose a Balanced Budget Every Year*, 1 Op. O.L.C. Supp. 161, 161 (Aug. 16, 1955) ("*Constitutionality of Joint Resolution*") ("It appears too clear for serious question that a legislative fiat which seeks to remove the President's unlimited judgment in communicating with the Congress is in violation of the [Recommendations Clause]."); *Lobbying by Executive Branch Personnel*, 1 Op. O.L.C. Supp. 240, 246 (Oct. 10, 1961) ("[A] literal interpretation of 18 U.S.C. § 1913 which would prevent the President or his subordinates from formally or informally presenting his or his administration's views to the Congress . . . as to the need for new legislation or the wisdom of existing legislation . . . would raise serious doubts as to the constitutionality of the statute."); *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 Op. O.L.C. 126, 147 (1999) ("*Authority to Enter Settlements*") (stating that "Congress . . . is powerless to restrict the President's discretionary exercise of" his "power to make recommendations to Congress"). And for more than thirty years, we have also taken the position that Congress may not enact statutes that purport to require the President to recommend legislation even if he does not consider it necessary and expedient. *See, e.g.*, Memorandum for Michael J. Horowitz, Counsel to the Director and General Counsel, Office of Management and Budget, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Chicago School Case* at 18 (Aug. 9, 1984) ("*Chicago School Case*") (concluding that "Art. II, § 3 insulates the President from any compulsion to submit legislative pro-

posals that he does not judge to be necessary or expedient"); *Constitutional Issues Raised by Commerce, Justice, and State Appropriations Bill*, 25 Op. O.L.C. 279, 283 (2001) ("Under the Recommendations Clause, Congress cannot compel the President to submit legislative proposals to Congress.").

We believe these longstanding views are sound. First, as we explain in Part II.A, it is in our judgment straightforward to conclude from the text of the Recommendations Clause—as well as from the Clause's purpose and longstanding practice—that Congress may not enact laws that purport to prohibit the President from carrying out his duty to recommend to Congress "such Measures as he shall judge necessary and expedient." Although this conclusion does not directly bear on the constitutionality of section 802, it provides important background for our later discussion. Second, as we explain in Part II.B, we believe that the Recommendations Clause also prevents Congress from enacting statutes that purport to direct the President to recommend legislation regardless of whether he judges it necessary and expedient. Such statutes would usurp the President's textually committed responsibility to "judge" that the "Measures" he recommends to Congress are "necessary and expedient," and for the bulk of the Nation's history Congress has refrained from enacting, or the Executive has resisted, laws of this kind.

A.

We begin with the prohibition on muzzling laws, which we believe flows directly from the Clause's text. By providing that the President "shall" recommend to Congress "such Measures as he shall judge necessary and expedient," U.S. Const. art. II, § 3, the Recommendations Clause imposes a "duty" on the President to make such recommendations, George Washington, First Inaugural Address in the City of New York (Apr. 30, 1789), *reprinted in* 1 James D. Richardson, *A Compilation of the Messages and Papers of the Presidents* 51, 52 (1896); *see Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (stating that the Recommendations Clause assigns the President the "function[]" of "recommending . . . laws he thinks wise"). Laws that prevent the President from recommending legislation to Congress, even if the President judges such legislation necessary and expedient, would disable the President from carrying out that constitutionally assigned duty. Such laws therefore

contravene the plain text of the Clause. *See Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2094 (2015) (stating that a statute is "unlawful when it 'prevents the Executive Branch from accomplishing its constitutionally assigned functions'" (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977))); *Schick v. Reed*, 419 U.S. 256, 266 (1974) (explaining that the pardon power "flows from the Constitution alone . . . and . . . cannot be modified, abridged, or diminished by the Congress").

The Clause's drafting history and evident purpose reinforce this straightforward textual construction. As originally proposed by the Committee of Detail at the Constitutional Convention, the Recommendations Clause stated that the President "*may* recommend . . . such measures as he shall judge necessary, and expedient." 2 Max Farrand, *The Records of the Federal Convention of 1787* at 185 (1911) ("Farrand") (emphasis added). On the floor of the Convention, however, Gouverneur Morris moved to amend the text to its present, mandatory form "in order to make it the *duty* of the President to recommend, & thence prevent umbrage or cavil at his doing it." *Id.* at 405; *see* James Madison, *Notes of Debates in the Federal Convention of 1787* at 526 (Norton re-issue 1987). The Convention approved the amendment without objection. 2 Farrand at 405. The Clause's drafters thus appear to have drafted the Clause to "squelch any congressional objections to the President's *right* to recommend legislation." *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 908 n.7 (D.C. Cir. 1993). And as early commentators explained, the drafters chose to "requir[e]" the President to propose legislation in this manner because they believed that, "[f]rom the nature and duties of the executive department, he must possess more extensive sources of information . . . than can belong to congress," and so must be uniquely equipped "at once to point out the evil [that merits a legislative response], and to suggest the remedy." Joseph Story, *Commentaries on the Constitution of the United States* § 1555 (1833) ("Story"); *see Clinton v. City of New York*, 524 U.S. 417, 438 n.27 (1998) ("Art. II, § 3, enables the President 'to point out the evil, and to suggest the remedy.'" (quoting Story § 1555)).[2] Laws that prevent

[2] *See also* 1 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* app. at 344 (1803) ("Tucker") (explaining that "any inconveniences resulting from new laws, or for the want of adequate laws upon any subject, more immediately occur to those who are entrusted with the administration of the government,

the President from recommending legislation contradict this objective by denying him the "right to recommend legislation," and thus the ability to share with Congress his expertise and judgment concerning the need for new laws.

Historical practice lends further support to the conclusion that Congress may not forbid the President from recommending legislation. We have identified no law enacted in the first 120 years after the Constitution's ratification that purported to restrict the President's authority to recommend legislation he deems necessary and expedient. While it is possible that some laws of this kind were enacted, our research suggests that they were, at a minimum, uncommon. We have identified a handful of instances in the last century in which Congress has enacted such laws, but in those cases Presidents have consistently raised constitutional objections to, and refused to comply with, the laws at issue. In 1912, for instance, President Taft announced that he would not interpret an appropriations rider that purported to restrict the form and timing of the Executive Branch's budget requests to have "the effect of forbidding the President . . . to communicate to Congress recommendations as to expenditures and revenue," because such a restriction would "abridge the executive power in a manner forbidden by the Constitution." *Copy of Letter Sent by the President to the Secretary of the Treasury Relative to the Submission of a Budget to Congress* 5 (Sept. 19, 1912); *see* Act of Aug. 23, 1912, Pub. L. No. 62-299, § 9, 37 Stat. 360, 415. The following year, President Taft announced that he was submitting a budget recommendation in apparent defiance of the rider "pursuant to th[e] constitutional requirements" contained in the Recommendations Clause. 49 Cong. Rec. 3985 (Feb. 26, 1913). In 1966, President Johnson stated that he would construe as advisory a rider that purported to prohibit executive officers from using ap-

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than to others, less immediately concerned therein"); William Rawle, *A View of the Constitution of the United States of America* 172 (2d ed. 1829) ("Rawle") ("[S]upplied by his high functions with the best means of discovering the public exigencies, and promoting the public good, [the President] would not be guiltless to his constituents if he failed to exhibit on the first opportunity, his own impressions of what it would be useful to do, with his information of what had been done."); Edward Dumbauld, *The Constitution of the United States* 311 (1964) ("The duty to furnish information and recommend measures to Congress makes it plain that it is not an officious intrusion upon the functions of the legislative branch, violative of the principle of separation of powers, when the President proposes a program of lawmaking to meet the needs of the nation.").

propriated funds to formulate particular budget requests because the rider "clearly intrude[d] upon the Executive function of preparing the annual budget." *Statement by the President Upon Signing the Department of Agriculture and Related Agencies Appropriations Bill* (Sept. 8, 1966), 2 Pub. Papers of Pres. Lyndon B. Johnson 980, 981 (1966); *see* Department of Agriculture and Related Agencies Appropriations Act, 1967, Pub. L. No. 89-556, tit. I, 80 Stat. 689, 690 (1966). In 1987, President Reagan objected to a provision enacted in 1985 and amended in 1987 that purported to bar the President's budget proposal from containing deficits in excess of a specified amount. *See* Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, § 106(f), 101 Stat. 754, 782; Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, § 241(b), 99 Stat. 1038, 1063. The President said that this provision "must be viewed as merely precatory" in light of "the President's plenary power under [the Recommendations Clause] to submit to the Congress any legislation he deems necessary and expedient." *Statement on Signing the Bill to Increase the Federal Debt Ceiling* (Sept. 29, 1987), 2 Pub. Papers of Pres. Ronald Reagan 1096, 1097 (1987); *see also Statement on Signing the Omnibus Budget Reconciliation Act of 1990* (Nov. 5, 1990), 2 Pub. Papers of Pres. George Bush 1553, 1555 (1990) (raising a Recommendations Clause objection to a bill further amending this provision). And since 1998, each President has objected on Recommendations Clause grounds to, and indicated that he would construe as advisory, an annual appropriations rider purporting to withhold payment from any person who prepares or submits a budget request for certain programs based on the assumption that Congress will enact proposals for new "user fees."[3]

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[3] *See Statement on Signing the Omnibus Appropriations Act, 2009* (Mar. 11, 2009), 1 Pub. Papers of Pres. Barack Obama 216, 217 (2009) (objecting to section 713 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2009, Pub. L. No. 111-8, div. A, 123 Stat. 526, 555); *Statement on Signing the Consolidated Appropriations Act, 2004* (Jan. 23, 2004), 1 Pub. Papers of Pres. George W. Bush 126, 127 (2004) (objecting to section 721 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2004, Pub. L. No. 108-199, div. A, 118 Stat. 4, 34); *Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999* (Oct. 23, 1998), 2 Pub. Papers of Pres. William J. Clinton 1843, 1848 (1998) (objecting to section 754 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agen-

Moreover, as noted above, our Office has for decades consistently maintained that muzzling laws violate the Recommendations Clause. In 1955, for example, we objected to a bill that would have provided that "the estimated expenditures contained in the Budget for the fiscal year for which presented shall not exceed the estimated receipts during such fiscal year." H.R.J. Res. 346, 84th Cong. (1955). We indicated that this provision would violate the Recommendations Clause by removing the President's "absolute discretion as to the character of . . . recommendations he may choose to transmit" and "frustrat[ing] the President's responsibility of advising the Congress of the needs of the nation, the measures for fulfilling those needs, as his judgment dictates, and the required appropriations therefor." *Constitutionality of Joint Resolution*, 1 Op. O.L.C. Supp. at 161; *see supra* note 3. In 1961, the Office advised the Criminal Division that there would be "serious doubts as to the constitutionality" of 18 U.S.C. § 1913, a statute that restricts the use of federal funds to lobby Congress, if it were construed to "prevent the President or his subordinates from formally or informally presenting his or his administration's

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cies Appropriations Act, 1999, Pub. L. No. 105-277, div. A, 112 Stat. 2681, 2681-33 to -34 (1998)); *see also Statement on Signing the Consolidated Appropriations Act, 2004*, 1 Pub. Papers of Pres. George W. Bush at 127 (2004) (also objecting on Recommendations Clause grounds to a separate provision, section 404 of the Transportation, Treasury, and Independent Agencies Appropriations Act, 2004, Pub. L. No. 108-199, div. F, 118 Stat. 279, 333, which provided that "[n]o funds made available by this Act shall be used to transmit a fiscal year 2005 request for United States Courthouse construction" that did not meet certain specified requirements).

We note that these user fee provisions—as well as the statutes to which President Reagan objected in 1987 and a bill to which our Office objected in 1955—purported only to prohibit the President from recommending certain measures as part of "the Budget" or "[t]he budget transmitted pursuant to" 31 U.S.C. § 1105(a). *E.g.*, Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1999 § 754; Balanced Budget and Emergency Deficit Control Act § 241(b); H.R.J. Res. 346, 84th Cong. (1955). Thus, these statutes may have left open the possibility that the President could recommend such measures through requests separate from his "[b]udget." Nonetheless, the Executive Branch treated each of these statutes as, at minimum, akin to muzzling laws, in that they purported to prohibit the President from including in his budget certain provisions he may have deemed "necessary and expedient." *See, e.g.*, *Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999*, 2 Pub. Papers of Pres. William J. Clinton at 1848 (1998) (stating that "[s]ection 754 of the Agriculture/Rural Development appropriations section constrains my ability to make a particular type of budget recommendation to the Congress" and so "would interfere with my constitutional duty under the Recommendations Clause").

views to the Congress . . . as to the need for new legislation." *Lobbying by Executive Branch Personnel*, 1 Op. O.L.C. Supp. at 246. And in 1966, the Office advised the Bureau of the Budget that the agriculture appropriations rider that President Johnson later stated he would construe as advisory was of "doubtful constitutionality" in view of the Recommendations Clause because it purported to "limit the President's authority . . . [to] formulat[e] a budget estimate in excess of a stipulated amount." Memorandum for the Files from Nathan Siegel, Office of Legal Counsel, *Re: Enrolled Bill; Department of Agriculture Appropriation Act for fiscal year ending June 30, 1967 (H.R. 14596)* at 2 (Sept. 1, 1966). The Office has raised similar objections on numerous occasions in the decades since.[4]

In sum, the plain language and apparent purpose of the Recommendations Clause, together with consistent and longstanding historical practice, all support the conclusion that the Clause prohibits Congress from enacting legislation that purports to bar the President from recommending legislative measures to Congress that he judges necessary and expedient.[5]

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[4] *See, e.g.*, Letter for Lloyd Cutler, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel at 3–4 (July 20, 1994) (objecting to a provision of a trade bill that would have required the President "to forbear from transmitting legislation to implement [a] free trade agreement for at least sixty days after signing such an agreement"); Memorandum for Bruce C. Navarro, Acting Assistant Attorney General, Office of Legislative Affairs, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: S. 2411*, att. at 2 (June 6, 1990) (objecting to a provision of a trade bill that would have "prohibit[ed] the President from proposing decreases in duties on textiles, textile products, and nonrubber footwear"); Letter for James C. Miller III, Director, Office of Management and Budget, from John R. Bolton, Assistant Attorney General, Office of Legislative Affairs at 4 (Sept. 25, 1987) (advising that the budget restriction to which President Reagan objected in 1987 must be construed as precatory in light of the President's "unfettered discretion to submit any budget he wishes"); *see also Participation in Congressional Hearings During an Appropriations Lapse*, 19 Op. O.L.C. 301, 304 (1995) (stating that Congress's refusal to permit executive officials to participate in a congressional hearing is not unconstitutional "[s]o long as the President retains a means of making legislative recommendations").

[5] Although to our knowledge no court has disagreed with this conclusion, the D.C. Circuit stated in *Ass'n of American Physicians & Surgeons* that "the Recommendation Clause is less an obligation than a right," which the President "need not exercise . . . with respect to any particular subject or, for that matter, any subject." 997 F.2d at 908. To the extent that the court was suggesting that the Clause does not impose any duty on the President to recommend legislation, we respectfully disagree. As we have explained, the plain language of the Clause provides that the President "*shall* . . . recommend to [Con-

B.

We next address laws that purport to require the President to propose legislation to Congress, regardless of whether the President judges such legislation necessary and expedient. The language of the Recommendations Clause does not expressly address such laws. But for the reasons explained below, we believe that the Clause's text, its purpose, and long-standing historical practice support the conclusion that such laws are unconstitutional.

1.

We begin, again, with the text of the Clause. As we have noted, the Clause imposes on the President a duty to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3. By its plain terms, this duty has two parts: the President must "recommend to [Congress's] Consideration such Measures as . . . [are deemed] necessary and expedient," and he must "judge" which measures satisfy that standard. By imposing the latter responsibility, the Clause assigns to the President the "obligation to judge personally which recommendations should be made to Congress." *Authority to Enter Settlements*, 23 Op. O.L.C. at 160; *see id.* ("Through [the Recommendations Clause], the Constitution expressly commits the President to exercise his personal discretion in making legislative recommendations to Congress."). Laws purporting to compel the President to recommend legislation to Congress, regardless of whether the President judges the enactment of such legislation necessary or expedient, would prevent the President from fulfilling that obligation, by requiring the President to recommend

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gress's] consideration such Measures as he shall judge necessary and expedient," and the Clause's drafters, as well as commentators dating to the Founding era, described it as imposing a "duty" or "requir[ement]" on the President. 2 Farrand at 405; Story § 1555; Rawle at 172. Nonetheless, we express no view on the D.C. Circuit's ultimate conclusion that the application of the Federal Advisory Committee Act ("FACA") to a presidential task force does not raise a serious constitutional question under the Recommendations Clause. *See Ass'n of Am. Physicians & Surgeons*, 997 F.2d at 908. Unlike the statutes discussed in this opinion, FACA does not purport to prohibit the President from recommending legislation, or require him to recommend legislation even if he does not judge it necessary and expedient, but instead contains publicity requirements that arguably affect the President's ability "to receive confidential advice on proposed legislation." *Id.* at 906.

legislation that he has not judged necessary and expedient. Moreover, such laws would effectively arrogate to Congress the authority to make that judgment, by requiring the President to recommend measures that Congress, and not the President, has judged necessary and expedient. These statutes would thus appear not only to "prevent[]" the President from carrying out his own "'constitutionally assigned function[],'" *Zivotofsky*, 135 S. Ct. at 2094, but also to enable "Congress in effect [to] exercise" that function, *id.* at 2095. In both respects these laws therefore appear to violate the Recommendations Clause. *See Section 609 of the FY 1996 Omnibus Appropriations Act*, 20 Op. O.L.C. 189, 195 (1996) (stating that Congress may neither "'prevent[] the Executive Branch from accomplishing its constitutionally assigned functions'" nor "attempt to exercise itself one of the functions that the Constitution commits solely to the Executive").

We recognize that the language of the Clause does not expressly state that the President has a duty to judge that *every* measure he recommends to Congress is "necessary and expedient." It does not provide, for instance, that the President shall recommend "*only* such Measures as he shall judge necessary and expedient." Accordingly, it could be argued that the Clause requires the President to recommend those measures he thinks necessary and expedient, but does not prohibit him from making other recommendations, including recommendations mandated by Congress. *See* Patricia A. Davis et al., Cong. Research Serv., RS22796, *Medicare Trigger* 5–6 (Feb. 8, 2016) (stating that the Clause does not "prevent Congress from directing the President to submit legislative recommendations" so long as it does not "prevent[] the President from submitting his own legislative proposal[s]" (emphasis omitted)). *But see id.* at 6 (stating that Congress may not "attempt[] to dictate the contents of a required legislative proposal").

In our view, however, this construction of the Clause is significantly less plausible than the one we have historically adopted. To start, the Recommendations Clause is the sole provision of the Constitution that addresses the President's authority and duty to make recommendations to Congress. It delineates with some specificity the type of measures the President shall recommend (those that are deemed "necessary and expedient"), and the officer who shall select those measures (the President). In contrast, no provision of the Constitution expressly empowers Congress to

require the President to recommend legislation. It is therefore reasonable to infer that the Recommendations Clause sets forth the sole circumstance in which the President may be required to recommend measures to Congress: when the President "judge[s] [them] necessary and expedient." U.S. Const. art. II, § 3.

Moreover, a number of other provisions in the Constitution are structured similarly to the Recommendations Clause—directing "such" action or result "as" a particular officer or entity determines is appropriate—and in each instance of which we are aware, the Supreme Court has construed such provisions to grant the named officer or entity exclusive authority to make the specified determination. The Court has said, for example, that the clause in Article II, Section 1 stating that "[e]ach State shall appoint, in *such* Manner *as* the Legislature thereof may direct, a Number of Electors," U.S. Const. art. II, § 1, cl. 2 (emphases added), leaves it "to the legislature *exclusively* to define the method of" appointing presidential electors, and so "operate[s] as a limitation upon the state in respect of any attempt to circumscribe the legislative power," as well as a barrier against "congressional and federal influence." *McPherson v. Blacker*, 146 U.S. 1, 25, 27, 35 (1892) (emphasis added). Similarly, the Court has held that Article III, in providing that "[t]he judicial Power . . . shall be vested in . . . *such* inferior Courts *as* the Congress may from time to time ordain and establish," U.S. Const. art. III, § 1 (emphases added), grants Congress "the *sole* power of creating the tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them," and thus prevents courts from "go[ing] beyond [a] statute, and assert[ing] an authority with which they may not be invested by it." *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) (emphasis added). The Court has given a similar construction to several other, comparably worded grants of authority in the Constitution.[6] These cases suggest that

[6] *See Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996) (stating that the requirement that an "actual Enumeration [of each state's population] shall be made . . . in *such* Manner *as* [Congress] shall by Law direct," U.S. Const. art. I, § 2, cl. 3 (emphases added), "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration'"); *Cook v. United States*, 138 U.S. 157, 182 (1891) (stating that the requirement that "when [a crime is] not committed within any State, the Trial shall be at *such* Place or Places *as* the Congress may by Law have directed," U.S. Const. art. III, § 2,

the Recommendations Clause, in granting the President authority to recommend "such Measures as he shall judge necessary and expedient," likewise assigns the President the "exclusive[]" or "sole" responsibility to decide which measures the President shall recommend to Congress.

This interpretation of the Clause also accords with the construction generally given other grants of authority in Article II. The Supreme Court and the Executive Branch have repeatedly concluded that where Article II assigns a duty to the President, the President alone has discretion to execute that duty, and Congress may not command the President to exercise that discretion in a particular circumstance. For example, the Attorney General has determined that the Appointments Clause, which provides that the President "shall nominate . . . Officers of the United States," U.S. Const. art. II, § 2, cl. 2, "leav[es] to the President . . . the designation of the particular individuals who are to fill [an] office," and so bars Congress from "control[ling] the President's discretion to the extent of compelling him to commission a designated individual." *Issuance of Commission in Name of Deceased Army Officer*, 29 Op. Att'y Gen. 254, 256 (1911); *see Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 483, 487 (1989) (Kennedy, J., concurring in the judgment) (similar). The Supreme Court has held that the Reception Clause, by providing that the President "shall receive Ambassadors and other public Ministers," U.S. Const. art. II, § 3, empowers "the President *alone* to receive ambassadors" and "recognize other nations," and accordingly prohibits Congress from "command[ing] the President to state a recognition position inconsistent with his own." *Zivotofsky*, 135 S. Ct. at 2085, 2095 (emphasis added). And this Office has concluded that the Take Care Clause, by providing that the President "shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, gives the Executive "exclusive authority to prosecute violations of the law," and so "gives rise to the corollary that neither the Judicial nor

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cl. 3 (emphases added), "impose[s] no restriction as to the place of trial, except that the trial cannot occur until congress designates the place, and may occur at any place which shall have been designated by congress previous to the trial"); *Ex parte Siebold*, 100 U.S. 371, 397–98 (1879) (stating that the Appointments Clause, by providing that "Congress may by Law vest the Appointment of *such* inferior Officers, *as* they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments," U.S. Const. art. II, § 2, cl. 2 (emphases added), makes "the selection of the appointing power, as between the functionaries named, . . . a matter resting in the discretion of Congress").

Legislative Branches may . . . direct[] the Executive Branch to prosecute particular individuals." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 115 (1984).

We think it follows from these Article II precedents that the Recommendations Clause likewise vests the President with "exclusive authority" to decide which measures he shall recommend to Congress. It is true, of course, that the ability to make recommendations to Congress—unlike the authority to nominate officers, receive ambassadors, or enforce the laws—is widely shared with other persons. *See Ass'n of Am. Physicians & Surgeons*, 997 F.2d at 908 ("Only the President can ensure that the laws be faithfully executed, but anyone in the country can propose legislation."). But the President's authority to judge which measures "[h]e"—that is, the President—"shall . . . recommend" to Congress is unique, and consequential, and vested by the Recommendations Clause in him alone. U.S. Const. art. II, § 3; *see supra* note 2 and accompanying text (discussing early commentators who observed that the President is uniquely well equipped to identify problems and propose remedial legislation). Under the Court's and the Executive Branch's precedents, Congress therefore may not attempt to control that authority by requiring the President to recommend particular measures to Congress.

2.

The evident purpose of the Recommendations Clause also supports this reading. As we have discussed, the Clause's drafters chose to obligate the President to recommend measures to Congress in order to ensure that Congress would benefit from the President's expertise and judgment concerning the need for new legislation. *See supra* note 2 and accompanying text. Commentators since the Founding era have offered several reasons why the President is uniquely equipped to facilitate "wise deliberations and mature decisions" by Congress, including that "any inconveniences resulting from new laws, or for the want of adequate laws upon any subject, more immediately occur to those who are entrusted with the administration of the government, than to others, less immediately concerned therein," 1 Tucker app. at 344; that "[t]he true workings of the laws" and "the defects in the nature or arrangements of the general sys-

tems [of industry and government] . . . are more readily seen, and more constantly under the view of the executive, than they can possibly be of any other department," Story § 1555; and that the President is "supplied by his high functions with the best means of discovering the public exigencies, and promoting the public good," Rawle at 172.

This objective would be at least partly undermined if the President could be compelled to recommend legislation that he did not "judge necessary and expedient." Such legislation would not reflect the President's expertise concerning "the want of adequate laws," 1 Tucker app. at 344, or his judgment as to "the best means of . . . promoting the public good," Rawle at 172. Yet the President would nonetheless be compelled to take steps that would promote the passage of that legislation. He would be required to devote the finite resources of the Executive Branch to formulating that legislation, rather than other laws he deemed necessary and expedient. Through his endorsement, he would be required to lend the legislation the prestige and weight of the Presidency. And the President would be required to falsely assert that he recommended that Congress enact such legislation, potentially causing members of Congress and the public to believe his support was genuine and in fact derived from his expertise and judgment—a result we do not think implausible, given that laws requiring the President to recommend legislation are sometimes buried in omnibus measures, and supporters of a bill would have little incentive to clarify that the President was speaking under compulsion. Rather than advancing "wise deliberations and mature decisions," such compelled recommendations would thus increase the likelihood that Congress would enact laws the President thought unnecessary or even detrimental to the public interest—a result contrary to the one the Clause was designed to achieve.

Furthermore, compelled recommendations of this kind could impair the President's ability to effectively recommend measures he *did* judge necessary and expedient. If, for example, Congress could require the President to recommend legislation advancing a particular aim, yet the President believed that legislation advancing a contrary aim was "necessary and expedient," the President would be compelled to submit two competing and inconsistent recommendations. The submission of two dueling recommendations would inevitably dilute the force and effectiveness of the President's true recommendation, and might well confuse some members

of Congress and the public. As a result, Congress would be less likely to discern the President's actual view regarding "[t]he true workings of the laws," Story § 1555, and "the best means of . . . promoting the public good," Rawle at 172, and the legislation the President judged necessary and expedient would be less likely to be enacted.

Indeed, for similar reasons, both the Supreme Court and the Executive Branch have recognized that where the Constitution assigns the President the affirmative authority to speak, it must also prohibit Congress—as "a matter of both common sense and necessity," *Zivotofsky*, 135 S. Ct. at 2095—from compelling the President to make statements with which he disagrees. Thus, in *Zivotofsky*, the Court held that because the President has the exclusive authority to make statements of diplomatic recognition, Congress may not "command the President to state a recognition position inconsistent with his own," even if that compelled statement "would not itself constitute a formal act of recognition." *Id.* "If the power over recognition is to mean anything," the Court explained, "it must mean that the President not only makes the initial, formal recognition determination but also that he may maintain that determination in his and his agent's statements." *Id.* at 2094–95. Similarly, the Executive Branch has long maintained that the President's "exclusive authority to conduct negotiations on behalf of the United States with foreign governments" implicitly precludes Congress from directing the President to engage in particular negotiations or take particular diplomatic positions, because such laws would prevent the United States from "speak[ing] with one voice." *Message to the Senate Returning Without Approval the Bill Prohibiting the Export of Technology for the Joint Japan-United States Development of FS-X Aircraft* (July 31, 1989), 2 Pub. Papers of Pres. George Bush 1042, 1043 (1989).[7] Here too, we think that the President's authority to recommend measures he thinks necessary and expedient "could be undermined," and the purpose underlying the Clause subverted, if Congress could require the President to "present[] a contradictory recommendation to Congress." *Authority to Enter Settlements*, 23 Op. O.L.C. at 161.

[7] *Cf. Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (stating that because the First Amendment guarantees individuals "the right to proselytize religious, political, and ideological causes," it "must also guarantee the concomitant right to decline to foster such concepts").

3.

Historical practice, while not uniform, also generally supports the view that Congress cannot require the President to recommend legislation regardless of whether he judges that legislation necessary and expedient. We have not located any laws requiring the President to recommend legislation that were enacted by Congress during the first nearly 150 years after the Constitution's ratification.[8] It is of course possible that Congress enacted some laws of this kind, but (as before) our research suggests that they were, at minimum, uncommon during that period. Moreover, we have identified a number of statements from the same period suggesting that members of Congress interpreted the Recommendations Clause to vest the President with exclusive discretion to determine what measures he would recommend to Congress. For example, in 1835, Senator Benton proposed a resolution requesting that the President identify the appropriations necessary to purchase certain specified military items. Cong. Globe, 23d Cong., 2d Sess. 233 (Feb. 12, 1835). Senator Poindexter objected that it was improper to "make a call on any executive officer, any head of a department, for anything but facts," because the Recommendations Clause directed the President to "treat of these [appropriations] matters in his annual message to Congress, if he considered that they were deserving of notice," and the resolution was subsequently withdrawn. 11 Reg. Deb. 455–56 (Feb. 16, 1835). In 1865, when discussing a bill that would have required members of the Executive Branch to answer questions posed to them by Congress, Representative Morrill stated that the President "*alone* is made the judge of what information or measures are 'necessary and expedient' for him to communicate," and that members of Congress

[8] In 1789, Congress enacted a statute providing that "it shall be the duty of the Secretary of the Treasury to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit." Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 65. This statute did not require any officer to make *recommendations* to Congress, much less recommendations of legislation. Indeed, the House of Representatives rejected language in a prior draft of the statute that would have required the President to "digest and *report* plans," 1 Annals of Cong. 592, 607 (June 25, 1789) (emphasis added), because members were concerned that directing the Secretary to report legislation to Congress would raise Origination Clause concerns, *see, e.g.*, *id.* at 593 (statement of Rep. Tucker) ("How can [a bill for raising revenue] originate in this House, if we have it reported to us by the Minister of Finance?").

therefore could not "bring the House to a direct vote upon the necessity and expediency." Cong. Globe, 38th Cong., 2d Sess. 422 (Jan. 25, 1865) (emphasis added).[9] And while these legislative proposals might themselves suggest that some members of Congress held a contrary view, we have not located any comparable statements, even by the bills' supporters, articulating a different view of the Recommendations Clause.

The Budget and Accounting Act, 1921, Pub. L. No. 67-13, 42 Stat. 20, might at first seem to be an example of a law, supported by both Congress and the Executive, that required the President to recommend legislation even if he did not think it necessary and expedient. Among other things, that legislation required the President to "transmit to Congress on the first day of each regular session, the Budget," which was to contain "[e]stimates of the expenditures and appropriations necessary in [the President's] judgment for the support of the Government for the ensuing fiscal year." *Id.* § 201(a) (codified as amended at 31 U.S.C. § 1105(a)(5)). President Wilson vetoed an earlier version of this legislation, but not on Recommendations Clause grounds, 50 Cong. Rec. 8609–10 (June 4, 1920), and President Harding subsequently signed it, 61 Cong. Rec. 2500 (June 13, 1921). Presidents since have attempted to meet its requirements.

On close examination, however, we do not believe that the Budget and Accounting Act supports the conclusion that Congress may require the President to recommend legislation. As an initial matter, because it is difficult to imagine a situation in which the federal government would not need funding legislation, it is not clear that the Executive Branch's general compliance with the Act suggests that it believes that Congress can *compel* it to propose legislation: the Act may simply represent a case in

[9] *See also, e.g.*, 71 Cong. Rec. 3975 (Sept. 26, 1929) (statement of Sen. Reed) (stating, in response to another Senator's complaint that the President had offered his views on a pending bill, that "[i]t is the plain meaning of th[e] language in the [Recommendations Clause] that it is for the President's judgment to settle the time and the subject of his recommendations"); 33 Cong. Rec. 980 (Jan. 19, 1900) (statement of Sen. Teller) (stating that "I have not any doubt that we have a right to call on the President for information," but that by virtue of the State of the Union and Recommendations Clauses "it is discretionary with him what he sends"); Cong. Globe, 30th Cong., 1st Sess., app. at 110 (Jan. 19, 1848) (statement of Rep. Hall) (arguing that the State of the Union and Recommendations Clauses entitle the President to "judge for *himself* the obligations of [his] duty" to "furnish [Congress] with information," and that Congress can "advise him, but [not] direct him . . . as to his proper course of conduct" (emphasis added)).

which Congress legislated procedures for recommending legislation—a budget of some form—that both the Executive and Congress agree will always be "necessary and expedient." Moreover, no provision of the Act required the President to recommend any legislation he did not believe "necessary and expedient." As we have noted, section 201(a) of the Act required the President to propose a budget containing "[e]stimates of the expenditures and appropriations *necessary in [the President's] judgment* for the support of the Government for the ensuing fiscal year" (emphasis added). This provision thus required the President to propose appropriations only if he deemed them "necessary," a requirement that is consistent with the President's constitutional duty to recommend legislation that "he shall judge necessary and expedient." U.S. Const. art. II, § 3; *see also* Budget and Accounting Act § 202(b) (codified as amended at 31 U.S.C. § 1105(c)) (stating that if the President's budget estimates a surplus, the President "shall make such recommendations *as in his opinion the public interests require*" (emphasis added)). Sections 202(a) and 203(b) of the Act required the President, in case of an estimated budget deficit, to "make recommendations to Congress for new taxes, loans, or other appropriate action to meet the estimated deficiency." Budget and Accounting Act §§ 202(a), 203(b) (codified as amended at 31 U.S.C. §§ 1105(c), 1107). But both provisions are open to the reading that the President could decline to "recommend[]" any "action" if he did not believe one was "appropriate," and both left the President free to propose actions other than legislation if he deemed them appropriate.[10]

In the middle of the twentieth century, Congress did begin to enact statutes requiring the President to recommend legislation of Congress's choosing. As far as we are aware, the Executive did not object to these requirements at first. In 1948, for example, Congress enacted a law requiring the President to "recommend to the Congress legislation with respect to the disposal of the Government-owned rubber-producing facilities." Rubber Act of 1948, Pub. L. No. 80-469, § 9(a), 62 Stat. 101, 105.

[10] We express no view on whether sections 202(a) and 203(b), to the extent that they are construed to require the President to propose *some* "appropriate action," are consistent with the Recommendations Clause or any other provision of the Constitution. We simply note that, even on that reading, they are not examples of laws requiring the President to recommend legislation.

The President raised no objection to this statute under the Recommendations Clause and appears subsequently to have complied with it. *See* Memorandum for the Attorney General from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, *Re: R.F.C. Plan for Disposal of Government-owned Rubber-producing Facilities* (Apr. 8, 1953) (discussing the President's legislative recommendation pursuant to the Rubber Act). Over the succeeding three decades, Congress enacted numerous other laws requiring members of the Executive Branch to recommend specified legislation. *See, e.g.*, Clean Water Act of 1977, Pub. L. No. 95-217, sec. 72, § 516(e), 91 Stat. 1566, 1609; Federal Employees' Compensation Act Amendments of 1960, Pub. L. No. 86-767, sec. 209, § 35(b), 74 Stat. 906, 909; Act of Sept. 2, 1958, Pub. L. No. 85-861, sec. 2(A), § 123(b), 72 Stat. 1437, 1437; Act of June 19, 1951, Pub. L. No. 82-51, sec. 1(j), § 4(k)(7), 65 Stat. 75, 81–82. We are unaware of an instance from the 1950s through the 1970s in which the Executive Branch lodged an objection to this kind of requirement on Recommendations Clause grounds.

Beginning in 1981, however, the Executive began to object to such requirements. That year, our Office advised that "a statutory direction to the President to include any particular request in the budget he submits to Congress would be of doubtful constitutionality" under the Recommendations Clause. Memorandum for Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Section 108(a)(1) of H.R. 3499 as Revised in Conference*, att. at 1 (Oct. 9, 1981). In 1984, we explained to the Office of Management and Budget that we had "concluded on more than one occasion that bills that purport to require the President to submit specific budget proposals—notwithstanding his disagreement with them—would unconstitutionally infringe on the President's Art. II, § 3 power to make whatever legislative recommendations he deems appropriate." *Chicago School Case* at 18. Since then, each President has maintained that laws requiring the President to recommend legislation to Congress violate the Recommendations Clause and should be construed as advisory. *See, e.g.*, *Statement on Signing the Omnibus Appropriations Act, 2009*, 1 Pub. Papers of Pres. Barack Obama at 217 (2009); *Statement on Signing the Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992* (May 28, 1992), 1 Pub. Papers of Pres.

George Bush 838, 838 (1992); *Statement on Signing the Military Construction Appropriations Act, Fiscal Year 1989* (Sept. 27, 1988), 2 Pub. Papers of Pres. Ronald Reagan 1230, 1230 (1988–89); *Presidential Signing Statements*, 31 Op. O.L.C. 23, 31 (2007) (observing that President George W. Bush objected to laws requiring the Executive to recommend legislation "in approximately 67 of his 126 constitutional signing statements" prior to January 26, 2007, and that his objections on the subject were "indistinguishable from President Clinton's"). And this Office has expressed the same view in several published opinions and numerous comments on bills pending in Congress.[11]

In sum, for nearly 150 years after the Constitution's ratification, Congress appears not to have enacted any law requiring the President to recommend legislation even if he did not judge that legislation necessary and expedient. And although for a few decades Congress did enact such laws without meeting resistance from the Executive, since 1981 the Executive has consistently maintained that laws of this kind are unconstitutional. On balance, then, historical practice confirms our view that the Recommendations Clause is best read to prohibit Congress from enacting laws that require the President to recommend legislation regardless of whether he judges it necessary and expedient.

III.

Application of these principles to section 802 of the Medicare Modernization Act is straightforward. Section 802 does not prohibit the President from recommending legislation. But it does purport to require the President to recommend legislation regardless of whether he believes it is necessary and expedient. As noted above, section 802(a) added to 31 U.S.C. § 1105 a provision that reads:

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[11] *See, e.g.*, *Authority to Enter Settlements*, 23 Op. O.L.C. at 160 (stating that the Clause "expressly commits the President to exercise his personal discretion in making legislative recommendations to Congress"); *Constitutional Issues Raised by Commerce, Justice, and State Appropriations Bill*, 25 Op. O.L.C. at 283 ("Under the Recommendations Clause, Congress cannot compel the President to submit legislative proposals to Congress."); *Presidential Signing Statements*, 31 Op. O.L.C. at 31 (stating that "the Constitution vests the President with discretion to [recommend legislation] when he sees fit").

> If there is a medicare funding warning under section 801(a)(2) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 made in a year, the President shall submit to Congress, within the 15-day period beginning on the date of the budget submission to Congress under subsection (a) for the succeeding year, proposed legislation to respond to such warning.

31 U.S.C. § 1105(h)(1).

This provision is drafted in mandatory terms that do not permit the President to decline to "submit . . . proposed legislation" if he concludes that no such legislation would be necessary and expedient. Section 802 does not, for example, state that the President must submit "any" proposals for legislation, or submit proposals "as appropriate"—language that would permit him to decline to recommend measures that he does not judge necessary or expedient. *Cf., e.g.*, Medicare Modernization Act § 109(d)(2) ("Not later than June 1, 2006, the Secretary shall submit to Congress a report on the results of the study described in paragraph (1), including any recommendations for legislation."); 15 U.S.C. § 3117(b) ("The President shall recommend in the President's Budget, as appropriate, new programs or modifications to improve existing programs concerned with private capital formation."). Indeed, it is clear that section 802 requires the President to submit an actual proposed bill. The "proposed legislation" submitted by the President must be introduced in both houses of Congress, with the addition only of a title, within three legislative days after the President submits his proposal, and each House must then refer "[s]uch bill" to the appropriate committees for consideration. Medicare Modernization Act §§ 803(a)(1)–(2), 804(a)(1)–(2); *see id.* §§ 803(b)–(d), 804(b)–(e) (setting forth expedited procedures for consideration of bills to respond to a medicare funding warning).

Because section 802 requires the President to recommend that Congress enact legislation to respond to a medicare funding warning, regardless of whether the President judges any such legislation necessary and expedient, it falls squarely within the scope of our analysis above. We therefore conclude that section 802 violates the Recommendations Clause. As a result, it is permissible for the President to continue to treat section 802 as "advisory and not binding," FY 2010 Budget Submission at 197, as Presidents have done with similar requirements in the past, *see, e.g.*, *Statement on Signing the Military Construction Appropriations Act, Fiscal Year*

1989, 2 Pub. Papers of Pres. Ronald Reagan at 1230 (1988–89) (explaining that provisions purporting to "command the President" to recommend legislation "have been consistently treated as advisory, not mandatory").

IV.

For the foregoing reasons, we conclude that section 802 of the Medicare Modernization Act contravenes the Recommendations Clause and may be treated as advisory and non-binding.

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

Obligating Carryover Funds in Violation of OMB Zero-Dollar Apportionment Rule

At least in circumstances where an agency fails to submit an apportionment request for carryover funds to the Office of Management and Budget before the start of a fiscal year, the automatic zero-dollar apportionment effected by section 120.57 of OMB Circular A-11 is a valid apportionment for purposes of the Anti-Deficiency Act. As a result, in such circumstances, 31 U.S.C. § 1517 would prohibit an agency from expending or obligating funds exceeding that apportionment of zero.

September 29, 2016

MEMORANDUM OPINION FOR THE
ASSISTANT GENERAL COUNSEL
ADMINISTRATION AND TRANSACTIONS
DEPARTMENT OF COMMERCE

For purposes of federal fiscal law, an "apportionment" specifies the amount of money in an appropriation account an agency can obligate or expend during a particular period of time, or on a particular project or function. *See* 31 U.S.C. § 1512. The Anti-Deficiency Act ("ADA" or "Act") gives the President the authority to apportion the appropriations available to federal agencies. *Id.* § 1513(b)(1). The President has delegated this authority to the Office of Management and Budget ("OMB"). Exec. Order No. 6166, § 16 (June 10, 1933), *as amended by* Exec. Order No. 12608, § 2 (Sept. 9, 1987), 3 C.F.R. 245 (1987 comp.). The ADA also provides that United States Government officers and employees may not make or authorize expenditures or obligations of funds "exceeding . . . an apportionment." 31 U.S.C. § 1517(a)(1). You have asked whether an official would violate this provision of the Act if she obligated appropriated funds in violation of an OMB rule that automatically apportions certain kinds of funds in the amount of zero dollars.[1]

[1] *See* Letter for Karl Remón Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Rafael A. Madan, Acting Assistant General Counsel for Administration, Department of Commerce (Sept. 18, 2015) ("Commerce Letter"). In preparing this opinion, we also received the views of OMB. *See* Letter for Karl Remón Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Ilona Cohen, General Counsel, Office of Management and Budget (Jan. 8, 2016) ("OMB Letter"). At our request, both the Department and OMB supplemented their initial views

The OMB rule at issue, which appears in section 120.57 of OMB Circular A-11,[2] imposes an automatic zero-dollar apportionment for carryover funds—i.e., unobligated balances that remain available from a prior fiscal year—until and unless OMB issues an account-specific apportionment for the same funds. You have explained that, in your view, while OMB's rule is formally structured as an apportionment, it is in effect a prohibition on agencies' obligating carryover funds in advance of later, account-specific apportionments. As you point out, the text of the ADA suggests, and at least one federal court of appeals has held, that while the ADA expressly forbids obligations in advance of appropriations, it does not similarly bar obligations in advance of apportionments. Relying on that reading of the ADA, you contend that section 120.57 improperly eliminates this distinction between appropriations and apportionments under the Act; converts a violation of an administrative rule that temporarily precludes the use of funds pending an account-specific apportionment into a full-blown ADA violation; and wrongly imposes ADA penalties on agencies for using carryover funds even after they have made clear that there is a programmatic need to use them. OMB disagrees, explaining that in its view, section 120.57 constitutes a fully valid apportionment that "achieve[s] the most effective and economical use" of carryover funds, as the ADA itself requires. *See* 31 U.S.C. § 1512(a). As a result, OMB asserts, any obligation or expenditure made in excess of the zero-dollar apportionment set forth in section 120.57 would violate the ADA.

As explained in more detail below, we conclude that, at least in circumstances where an agency fails to request a non-zero apportionment of carryover funds before the start of a fiscal year, section 120.57 effects a valid apportionment for purposes of the ADA. Nothing in the ADA for-

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by e-mail. *See* E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Angelia Talbert-Duarte, Department of Commerce, *Re: DOC Opinion Request* (Feb. 12, 2016, 9:36 AM) ("Talbert-Duarte E-mail"); E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Heather V. Walsh, Office of Management and Budget, *Re: DOC Opinion Request* (May 12, 2016, 9:37 AM) ("Walsh E-mail"); E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Andrea Torczon, Department of Commerce, *Re: DOC Opinion Request* (June 2, 2016, 9:57 AM) ("Torczon E-mail").

[2] OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget* (July 2016) ("Circular A-11"), https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2016.pdf.

bids automatic zero-dollar apportionments, or requires OMB to issue account-specific apportionments in non-zero amounts. And even if the requirement that OMB apportion carryover funds to achieve "the most effective and economical use" of those appropriations imposes a substantive standard whose violation could render an apportionment ineffective under the ADA, we believe OMB's application of section 120.57 in the circumstances described above would meet that "effective and economical use" standard. Further, under such circumstances, we do not think automatically imposing a zero-dollar apportionment on carryover funds impermissibly eliminates any feature of the ADA, improperly punishes violations of an administrative rule, or improperly imposes ADA penalties on agencies obligating or expending funds at a time when the ADA suggests that they should be able to use them. As a result, in the circumstances described, an agency's obligation of carryover funds in excess of the rule's zero-dollar apportionment would be an expenditure "exceeding . . . an apportionment" in violation of the ADA.

This opinion has two parts. In Part I, we discuss the relevant statutory and factual background. In Part II, we explain our reasons for concluding that section 120.57 effects a valid apportionment under the ADA.

I.

A.

The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Anti-Deficiency Act "reinforces and elaborates on this constitutional limitation." Memorandum for Judith R. Starr, General Counsel, Pension Benefit Guaranty Corporation, from Troy A. McKenzie, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether the Pension Benefit Guaranty Corporation May Enter Into and Incrementally Fund Multiyear Leases Exceeding Five Years* at 3 (Sept. 30, 2015). A key provision of the Act, 31 U.S.C. § 1341, states that officers and employees of the United States Government may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation," or "involve [the] government in a contract or obligation for the payment

of money before an appropriation is made unless authorized by law." *Id.* § 1341(a)(1)(A), (B).

The ADA also requires appropriated funds to be "apportioned." *Id.* § 1512(a). As suggested above, apportionment is "an administrative process by which . . . appropriated funds are distributed to agencies in portions over the period of their availability." 2 Government Accountability Office ("GAO"), *Principles of Federal Appropriations Law* 6-116 (3d ed. 2006) ("*Federal Appropriations Law*").[3] The purpose of apportionment is "to minimize the potential for engaging in expenditures that exceed congressional appropriations." *United States Marshals Service Obligation to Take Steps to Avoid Anticipated Appropriations Deficiency*, 23 Op. O.L.C. 105, 106 (1999). Consistent with that goal, the ADA requires "appropriation[s] available for obligation for a definite period" to be apportioned "to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period," and "appropriation[s] for an indefinite period"—the kind of appropriation at issue here—to be apportioned "to achieve the most effective and economical use" of those appropriations. 31 U.S.C. § 1512(a).

As noted above, the President has the responsibility to make written apportionments for the Executive Branch, *id.* § 1513(b)(1), and has delegated this responsibility to OMB, Exec. Order No. 6166, § 16. In exercising this delegated authority, OMB has the discretion to apportion funds by time periods, activities, functions, projects, objects, or some combination thereof. 31 U.S.C. § 1512(b)(1)–(2). In the case of carryover funds—i.e., "unobligated balances that are available from the prior fiscal year(s) in multi-year and no-year accounts," Circular A-11, *supra* note 2, § 120.2—the ADA requires agency heads to submit apportionment requests to OMB no later than forty days before the beginning of the next fiscal year. 31 U.S.C. § 1513(b)(1)(A). OMB, in turn, must apportion the funds not later than twenty days before the start of the fiscal year. *Id.* § 1513(b)(2)(A).

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[3] Although the legal interpretations and opinions of the GAO and the Comptroller General are not binding on Executive Branch agencies, they "'often provide helpful guidance on appropriations matters and related issues.'" *State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments*, 36 Op. O.L.C. 77, 89 n.8 (2012) (quoting *Applicability of Government Corporation Control Act to "Gain Sharing Benefit" Agreement*, 24 Op. O.L.C. 212, 216 n.3 (2000)).

In a provision that resembles, but does not fully parallel, section 1341's prohibition on expenditures and obligations in excess or advance of appropriations, section 1517 of title 31 states that government officers and employees "may not make or authorize an expenditure or obligation *exceeding* . . . an apportionment." *Id.* § 1517(a)(1) (emphasis added). Unlike section 1341, section 1517 does not also expressly bar entering into a contract or making an obligation *before* an apportionment is made. In light of the textual difference between these provisions, at least one federal court of appeals has held that while the ADA prohibits expenditures that "exceed" an existing apportionment, it does not prohibit expenditures made in advance of a later apportionment. *See Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1451 (Fed. Cir. 1997). Agency heads must report violations of section 1517 immediately to the President and Congress, and transmit a copy of those reports to the Comptroller General. 31 U.S.C. § 1517(b). Officials who violate the section are subject to administrative and criminal penalties, including suspension without pay, removal from office, and, in the case of knowing and willful violations, a fine and possible imprisonment. *Id.* §§ 1518, 1519.

Circular A-11 implements the ADA's apportionment provisions by giving instructions to agencies about the apportionment process. Section 120.57 of the Circular addresses the apportionment of carryover funds. That provision, in question-and-answer form, states:

> Must I request that funds apportioned in one fiscal year be apportioned in the next fiscal year if the funds were not obligated and remain available?
>
> Yes. When budgetary resources remain available (unexpired) beyond the end of a fiscal year, you must submit a new apportionment request for the upcoming fiscal year. You cannot incur obligations in any year absent an approved apportionment for that year. For instance, if OMB apportioned $1 million for a no-year [account] in [Fiscal Year ("FY")] 2012 and you obligated no funds, you must still submit an FY 2013 request and receive OMB approval of that request before incurring obligations in FY 2013. Until you receive a written apportionment from OMB, the amount of carryover apportioned is zero dollars. In addition, apportioned anticipated or estimated resources are not available for obligation until the resources are realized.

Circular A-11, § 120.57. Circular A-11 contrasts the apportionment effected by section 120.57, as well as other kinds of "automatic apportionments," with "written apportionments" in which OMB approves an agency's request for an apportionment in a specific amount. *Id.* § 120.2.[4] OMB also sometimes refers to these "written apportionments" as "account-specific apportionments." *See* OMB Letter at 2.

B.

We understand that your request for advice was prompted by a situation that arose during Fiscal Year 2014 involving the National Oceanic and Atmospheric Administration ("NOAA"), an operating unit within the Department of Commerce ("Department"). NOAA has a no-year fund called the "Fisheries Enforcement Asset Forfeiture Fund" ("Fisheries Enforcement AFF" or "Fund"), which consists generally of sums received by NOAA as fines, penalties, and forfeitures of property for violations of marine resource laws, along with transferred amounts that are "available until expended." *See* Department of Commerce Appropriations Act, 2012, Pub. L. No. 112-55, div. B, § 110, 125 Stat. 552, 591, 602 (2011) (establishing the Fund).[5] Because Fiscal Year 2014 began on October 1, 2013, OMB's statutory deadline to apportion the unobligated carryover amounts in the Fund fell on September 11, 2013. *See* 31 U.S.C. § 1513(b)(2)(A). In anticipation of that deadline, the ADA required the Department to submit an apportionment request to OMB by August 22, 2013. *See id.* § 1513(b)(1)(A). NOAA submitted an initial request to the Department's internal Office of Budget ("OB") in August. Commerce Letter at 2. However, due to subsequent back-and-forth between OB and NOAA, the Department did not submit its apportionment request to OMB until December 2013. *Id.* OMB approved a final version of the apportionment request several months later, on April 11, 2014. *Id.* This final

[4] As Circular A-11 explains, "[a]n *automatic apportionment* is approved by the OMB Director in the form of a Bulletin or provision in Circular A-11, and typically describes a formula that agencies will use to calculate apportioned amounts. An automatic apportionment is in contrast to the written apportionments, which typically include specific amounts, and which are approved by an OMB Deputy Associate Director (or designee)." *Id.* § 120.2.

[5] A no-year appropriation is an appropriation "that is available for obligation for an indefinite period." 1 *Federal Appropriations Law* at 2-14 (3d ed. 2004).

version apportioned the unobligated carryover funds in the Fisheries Enforcement AFF by project. *Id.* The apportionment therefore nominally covered the full fiscal year, even though two quarters of that year had already passed when the apportionment was approved. Until OMB issued this account-specific apportionment in April, however, section 120.57 of Circular A-11 was in effect with respect to the relevant funds. As a result, between October 1, 2013, and April 11, 2014, NOAA was operating under an automatic zero-dollar apportionment for the Fisheries Enforcement AFF. NOAA nonetheless "obligated" funds from the Fisheries Enforcement AFF during Fiscal Year 2014 "before the [account-specific] apportionment was issued." *Id.* "The total Fisheries Enforcement AFF obligations during that time," however, "did not exceed the final apportionment amount for FY 2014" that OMB approved in April. *Id.*

Your opinion request asks us to address whether an agency official violates section 1517 when she obligates funds in violation of OMB's automatic zero-dollar apportionment under the circumstances just described. *Id.* at 1, 4 ("I am charged with determining whether NOAA's violation of OMB's rule, [section] 120.57 of OMB Circular A-11, of itself constitutes a violation of the ADA."). As in prior situations involving ADA questions prompted by past conduct, we decline to address whether particular past actions violated the ADA. *See Online Terms of Service Agreements with Open-Ended Indemnification Clauses Under the Anti-Deficiency Act*, 36 Op. O.L.C. 112, 114 (2012). We will, however, use the features of the scenario you have described to provide general guidance in response to your question. *See id.*

II.

As noted above, section 120.57 states in relevant part that "[u]ntil [an agency] receive[s] a written apportionment from OMB, *the amount of carryover apportioned* [for a given fiscal year] *is zero dollars*." Circular A-11, § 120.57 (emphasis added). By its terms, this provision purports to make a default, automatic apportionment of zero dollars in carryover funds until and unless an agency receives a different written apportionment from OMB. Section 120.57 is thus, as OMB explains, an exercise of its delegated statutory authority to apportion appropriations. *See* OMB Letter at 2 ("[Section] 120.57[] is . . . an application of 31 U.S.C. § 1513, which requires that the President (and, by delegation, OMB) apportion

appropriations."). Assuming section 120.57 is a valid exercise of that authority, it would appear straightforward to conclude that obligations or expenditures made in excess of this zero-dollar apportionment would violate the ADA. *See* 31 U.S.C. § 1517(a)(1).

And on its face, the automatic apportionment in section 120.57 does not exceed the limits of OMB's authority to apportion funds under the ADA. Nothing in the ADA, and no other authority of which we are aware, prevents OMB from using categorical rules that operate automatically to apportion funds in preset amounts, or requires it to issue apportionments on an account-specific basis. Indeed, OMB often relies on automatic, categorical apportionments: another provision of the Circular automatically apportions newly enacted full-year appropriations on a pro rata basis, *see* Circular A-11, § 120.41, and OMB frequently issues automatic apportionments of amounts provided in continuing resolutions, *see, e.g.*, OMB Bulletin No. 15-03, *Apportionment of the Continuing Resolution(s) for Fiscal Year 2016* (Sept. 30, 2015), https://www.whitehouse.gov/sites/default/files/omb/bulletins/2015/15-03.pdf (last visited ca. Sept. 2016); *see also* 2 *Federal Appropriations Law* at 6-141 (3d ed. 2006) (noting OMB's practice of issuing automatic apportionments in the context of continuing resolutions). We are likewise aware of nothing in the ADA that would preclude OMB from apportioning carryover funds in the amount of zero dollars in the circumstances at issue here.[6] And while the ADA does require apportionments to be "in writing," 31 U.S.C. § 1513(b)(1), OMB's automatic-apportionment rules—including the one that appears in section 120.57—satisfy this requirement, because they are set forth in writing in Circular A-11 or in OMB Bulletins.

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[6] The ADA does provide that "[i]n apportioning or reapportioning an appropriation, a reserve may be established only—(A) to provide for contingencies; (B) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (C) as specifically provided by law." 31 U.S.C. § 1512(c)(1). However, we understand that OMB has never considered the zero-dollar apportionments of carryover funds effected by section 120.57 to create "reserves." As discussed below, *see infra* p. 98, the purpose of the zero-dollar apportionment in section 120.57 is not to "set aside" budgetary resources that might otherwise be used, or be required to be used, in order to "provide for contingencies," "effect savings," or for some other purpose. GAO, *A Glossary of Terms Used in the Federal Budget Process* 25 (Sept. 2005) (defining "reserve"). Rather, the purpose of section 120.57 is simply to ensure that carryover funds will not be used during those portions of their period of availability when they are not needed.

Automatic apportionments further the purposes of the ADA by (among other things) helping OMB meet the deadlines set forth in that statute. As we explained above, the ADA requires OMB to apportion appropriated funds by a set date—in the case of carryover funds, no later than twenty days before the beginning of the fiscal year for which those funds are available. By requiring apportionments to be in place before the fiscal year starts, these deadlines help ensure that the underlying purposes of the apportionment process are served—"prevent[ing] obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period" in the case of time-limited appropriations, and ensuring that appropriations are used "effective[ly] and economical[ly]" in the case of appropriations available for an indefinite period. 31 U.S.C. § 1512(a). Automatic apportionments make it possible for OMB to meet these statutory deadlines even when doing so would otherwise be difficult, such as when Congress provides temporary funding for agency operations through short-term continuing resolutions, or when an agency fails to submit a specific apportionment request prior to the statutory deadline. *See* Walsh E-mail.

As was just noted, 31 U.S.C. § 1512(a) requires OMB to apportion appropriations for an indefinite period to achieve "the most effective and economical use" of those appropriations. *See also* 2 *Federal Appropriations Law* at 6-121 (3d ed. 2006) (identifying this provision as the applicable requirement for no-year funds). OMB agrees that "[a]ll apportionments, including the one in section 120.57, are subject to the requirements of section 1512(a)." Walsh E-mail. It is less clear that if an OMB apportionment failed to meet these requirements, it would then be invalid, such that agencies could make obligations or expenditures in excess of the purported apportionment without violating the ADA. We need not resolve this question, however, because we believe that application of the automatic zero-dollar apportionment in section 120.57 in the circumstances at issue here satisfies the "effective and economical use" standard.

To begin with, in requiring every appropriation to be apportioned by certain time periods, projects, or a combination thereof, 31 U.S.C. § 1512(b)(1), the ADA makes clear that the official designated to make an apportionment subject to those requirements must do so "as the official considers appropriate," *id.* § 1512(b)(2). The ADA thus gives OMB substantial discretion in making each apportionment, consistent with the

requirement that the apportionment achieve the most effective and economical use of the funds. And we think that OMB's exercise of this discretion in section 120.57 was sound. OMB has explained that when an agency "has not requested the use of carryover funds at the beginning of the fiscal year"—as was the case with respect to the Fisheries Enforcement AFF—OMB presumes that the agency "has no present programmatic need for [those] funds." Walsh E-mail. In our view, it is reasonable for OMB to assume both that agencies are best positioned to evaluate their own fiscal needs, and that they have an incentive to seek any necessary funds for their own operations. It is also reasonable for OMB to assume that agencies understand that the ADA itself requires them to submit apportionment requests for carryover funds forty days prior to the start of a fiscal year, and requires OMB to complete the apportionments twenty days later. *See* 31 U.S.C. § 1513(b)(1)(A), (b)(2)(A). In light of these considerations, we think it is similarly reasonable to presume that if an agency fails to request funds before the start of a fiscal year, it has no present need for those funds. And in that situation, it makes further sense that imposing a default zero-dollar apportionment would not only allow OMB to comply with its statutory apportionment deadline, but also achieve the most "effective and economical use" of the relevant carryover funds, by ensuring that they are not used during a period when they are not needed.[7]

As we understand its position, the Department does not dispute that section 120.57 is, by its terms, an "apportion[ment]." Circular A-11, § 120.57; *see, e.g.*, Talbert-Duarte E-mail ("[W]e recognize that OMB structured § 120.57 as an apportionment of zero."). Rather, we take the Department's argument to be that, whatever its formal structure, the substantive effect of section 120.57 is to prevent agencies from obligating or expending funds in advance of an account-specific apportionment.

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[7] Because we consider only the application of section 120.57 in circumstances where an agency has failed to submit an apportionment request for carryover funds before the start of a fiscal year, we express no view on whether OMB could justify an automatic apportionment of zero dollars by operation of section 120.57 under any other circumstances, including where an agency submits an apportionment request by the agency's forty-day deadline, where the agency submits a request after the forty-day deadline but before OMB's twenty-day deadline, or where the agency submits its request after OMB's twenty-day deadline but before the start of the fiscal year.

See Commerce Letter at 1 (Although "[the] OMB prohibition is structured as an automatic apportionment of carryover amounts at zero," "[a]s a consequence of this structure, an agency official who obligates funds in advance of an apportionment violates the OMB rule by exceeding the automatic apportionment amount of zero."); Talbert-Duarte E-mail ("From the perspective of an agency official to whom the [apportionment rule in section 120.57] applies, the purpose and effect of the rule is the same—there can be no obligation before there is an apportionment of an actual dollar amount."). According to the Department, this is problematic for three reasons, which we consider in turn.

First, the Department contends that, by creating a situation in which agencies can never obligate carryover funds before they are apportioned, "the statutory distinction between [section] 1341"—which prohibits obligations and expenditures both in advance and in excess of appropriations—"and [section] 1517"—which prohibits obligations and expenditures only in excess of apportionments—"is entirely erased." Talbert-Duarte E-mail; *see id.* (noting that OMB itself states that "[b]y operation of § 120.57, an agency will never be in 'advance of' an apportionment of carryover, because it will always have an apportionment" (quoting OMB Letter at 2)). This argument rests on the premise that, as the Federal Circuit has held, section 1517 does not bar obligations or expenditures in advance of an apportionment. *See Cessna Aircraft*, 126 F.3d at 1451. We will assume for purposes of this opinion that this conclusion is correct. Even with this assumption, we do not think the Department's argument is convincing. The Department in effect asserts that the ADA prevents OMB from creating a situation in which an agency will never find itself without an apportionment, because it would then never have the opportunity to obligate or expend funds in advance of an apportionment. But as we explained above, nothing in the ADA bars automatic apportionments, requires that apportionments be account-specific, or requires that apportionments always be made in non-zero amounts. *See supra* p. 97. Thus, so long as an automatic apportionment meets the standards for apportionment in the ADA, *see supra* p. 98 (discussing standards), it is a valid apportionment, even if it precludes agencies from ever being without an apportionment. Indeed, such a result seems fully consistent with the ADA's statutory design. As discussed earlier, Congress specifically created deadlines for apportionments of carryover funds, seeking to ensure

that they would be completed before the start of any fiscal year. If agencies and OMB adhered to their statutory deadlines, there would—at least in the ordinary course—never be a situation in which an agency had available carryover funds without an apportionment. Thus, the mere fact that OMB has created an automatic-apportionment mechanism that ensures that an apportionment will always be in effect does not by itself make section 120.57 invalid, and in fact accords with congressional design.

The Department's second argument is that section 120.57 should be considered a kind of administrative rule that "temporarily precludes the use of funds as a matter of administrative control" while enabling "OMB to comply with [its statutory] deadlines," rather than an "apportionment that prescribes [the relevant funds'] use in definite amounts by time periods or activities"—violation of which would trigger potential penalties under the ADA. Torczon E-mail. The Department appears to suggest that, if an OMB rule is merely designed to temporarily prevent agencies from using funds for purposes of administrative control and to ensure OMB's own ADA compliance, rather than to actually apportion funds under the standards set forth in the ADA, it would not be appropriate to subject agency officials to ADA penalties for violating that rule. *Cf.* Talbert-Duarte E-mail ("[T]he question we are raising does not concern a 'zero dollar' apportionment in a specific situation where programmatic needs dictate that amounts are not necessary for a particular time period. Our question concerns only the automatic, across-the-board application of [section] 120.57."); Torczon E-mail (While "agencies and OMB are required to comply with the time deadlines established for submitting and approving apportionments," "[a] violation of the deadlines . . . is not a reportable violation of the [ADA], and we question the appropriateness of factoring the deadlines into the analysis of the issue we raise regarding a reportable violation of section 1517."). We need not decide whether a rule that merely precluded the use of funds as a matter of administrative control and deadline compliance would be a valid apportionment under the ADA, however, because, at least as applied in situations where an agency fails to submit an apportionment request before the start of a fiscal year, we do not believe section 120.57 is such a rule. For the reasons explained above, *see supra* pp. 96–99, OMB's automatic zero-dollar apportionment for carryover funds complies with the ADA's formal

requirements for apportionments, and represents a reasonable exercise of OMB's apportionment discretion. If an agency fails to request an apportionment before the start of a fiscal year, it is reasonable to presume that the agency has no programmatic need for the relevant funds during that year. There is thus no basis to conclude that a rule setting a zero-dollar apportionment in such a situation is merely an administrative control measure that prevents obligations and expenditures until OMB has time to make an account-specific apportionment.

Finally, the Department argues that OMB's "blanket presumption of no programmatic need" is "inapposite in at least many cases where an agency is actively engaged in the apportionment process with OMB." Torczon E-mail. The Department acknowledges that, in the situation involving NOAA that gave rise to its opinion request, "internal revisions and delays within the Department . . . caused the [proposed Fisheries Enforcement AFF] apportionment to be submitted late to OMB." *Id.* But it points out that "issues raised by sequestration (among other things) delayed the apportionment further for several months *after* submission to OMB." *Id.* OMB's rationale for its zero-dollar apportionment, the Department suggests, may make sense prior to the point at which an agency makes a request for a non-zero apportionment, but not during the period *after* such a request is made, but before the account-specific apportionment process is completed. *See id.* The Department thus contends that, whether because OMB's rule would not "achieve the most effective and economical use" of the funds during that period, or because the rule would impermissibly undermine Congress's decision not to subject obligations and expenditures in advance of apportionments to ADA penalties, violation of the rule after a request has been submitted should not give rise to penalties under the ADA. *See id.*

Again, we disagree. For the reasons we have explained, it is in our view reasonable for OMB to presume that, if a request for a non-zero apportionment of carryover funds is not pending at the start of a fiscal year, the agency has no current need for those funds. An agency's belated request for a non-zero apportionment might call into question the continuing factual accuracy of OMB's assumption after the request is made. But we do not think such a belated request somehow undermines the validity of the initial default apportionment. The ADA itself makes the start of each fiscal year the critical time for making apportionments for carryover

funds. *See* 31 U.S.C. § 1513(b)(2)(A). It is therefore reasonable for OMB to set apportionments based on its analysis of the appropriate apportionment as of the start of the fiscal year. The ADA does reflect the possibility that circumstances might change during a fiscal year, by requiring OMB to review apportionments at least four times a year. *See id.* § 1512(d). But the ADA does not provide any specific instructions about what OMB must do if it determines that an apportionment is no longer appropriate after one of its reviews, let alone provide a specific timeline for providing a revised apportionment. The Act thus appears to leave those matters to OMB's discretion to "apportion an appropriation . . . as [it] considers appropriate." *Id.* § 1512(b)(2). In light of that discretion and the statutory focus on the start of the fiscal year, we do not think the passing of several months between an agency's belated apportionment request for carryover funds and OMB's issuance of a new account-specific apportionment would render the original, default apportionment invalid at any point during the period in which the belated request was pending.[8]

III.

For the reasons set forth above, we conclude that, at least in circumstances where an agency fails to submit an apportionment request for carryover funds before the start of a fiscal year, the automatic zero-dollar apportionment in section 120.57 of OMB Circular A-11 is a valid appor-

[8] The Department also argues that, in light of the potential penalties involved, the question whether violation of section 120.57 constitutes an ADA violation "should be examined with an eye to the familiar rule of statutory construction commonly known as the rule of lenity." Commerce Letter at 3–4; *see also Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, 31 Op. O.L.C. 54, 69 (2007) (explaining that the rule of lenity holds that "if ambiguity remains in a criminal statute after textual, structural, historical, and precedential analyses have been exhausted, the narrower construction should prevail"). However, we do not believe this question involves sufficient statutory ambiguity to justify application of the rule of lenity. Rather, for the reasons explained above, we think it clear that, applying ordinary tools of statutory construction to the relevant provisions in the ADA, section 120.57 effects a valid apportionment under that statute. *See Lockhart v. United States*, 136 S. Ct. 958, 968 (2016) ("We have used the lenity principle to resolve ambiguity in favor of the defendant only . . . when the ordinary canons of statutory construction have revealed no satisfactory construction.").

tionment for purposes of the ADA. As a result, in such circumstances, 31 U.S.C. § 1517 would prohibit an agency from expending or obligating funds exceeding that apportionment.

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

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