OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS

ADVISING THE

PRESIDENT OF THE UNITED STATES, THE ATTORNEY GENERAL

AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

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FOREWORD

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the executive, legislative, and judicial branches of the government, and of the professional bar and the general public. The first nineteen volumes of opinions published covered the years 1977 through 1995; the present volume covers 1996. The opinions included in Volume 20 include some that have previously been released to the public, additional opinions as to which the addressee has agreed to publication, and opinions to Department of Justice officials that the Office of Legal Counsel has determined may be released. A substantial number of Office of Legal Counsel opinions issued during 1996 are not included.

The authority of the Office of Legal Counsel to render legal opinions is derived from the authority of the Attorney General. Under the Judiciary Act of 1789 the Attorney General was authorized 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 the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General, rendering opinions to the various federal agencies, assisting the Attorney General in the performance of her function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25.

Opinions of the Attorney General in Volume 20

Opinions of the Office of Legal Counsel in Volume 20

OPINIONS

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents

Executive privilege may properly be asserted with respect to the entire set of White House Counsel's Office documents currently being withheld from the Committee on Government Reform and Oversight of the House of Representatives, pending a final Presidential decision on the matter. This would be a protective assertion of executive privilege designed to ensure the President's ability to make a final decision, after consultation with the Attorney General, as to which specific documents are deserving of a conclusive claim of executive privilege.

May 8, 1996

THE PRESIDENT
THE WHITE HOUSE

My Dear Mr. President: You have requested my legal advice as to whether executive privilege may properly be asserted in response to a subpoena issued to the Counsel to the President by the Committee on Government Reform and Oversight of the House of Representatives.

The subpoena covers a large volume of confidential White House Counsel's Office documents. The Counsel to the President notified the Chairman of the Committee today that he was invoking the procedures of the standing directive governing consideration of whether to assert executive privilege, President Reagan's memorandum of November 4, 1982, and that he specifically requested, pursuant to paragraph 5 of that directive, that the Committee hold its subpoena in abeyance pending a final Presidential decision on the matter. Memorandum for the Heads of Executive Departments and Agencies, *Re: Procedures Governing Responses to Congressional Requests for Information* at 2 (Nov. 4, 1982). This request was necessitated by the deadline imposed by the Chairman, the volume of documents that must be specifically and individually reviewed for possible assertion of privilege and the need under the directive to consult with the Attorney General, on the basis of that review, before presenting the matter to the President for a final determination. The Chairman rejected the request and indicated that he intends to proceed with a Committee vote on the contempt citation tomorrow.

Based on these circumstances, it is my legal judgment that executive privilege may properly be asserted with respect to the entire set of White House Counsel's Office documents currently being withheld from the Committee, pending a final Presidential decision on the matter. This would be a protective assertion of executive privilege designed to ensure your ability to make a final decision, after consultation with the Attorney General, as to which specific documents are deserving of a conclusive claim of executive privilege.

Sincerely,

JANET RENO
Attorney General

Assertion of Executive Privilege Regarding White House Counsel's Office Documents

Executive privilege may properly be asserted with respect to certain White House Counsel's Office documents that have been subpoenaed by the Committee on Government Reform and Oversight of the House of Representatives in connection with the Committee's investigation of the White House Travel Office matter.

May 23, 1996

THE PRESIDENT
THE WHITE HOUSE

My Dear Mr. President: You have requested my legal advice as to whether executive privilege may properly be asserted with respect to certain confidential White House Counsel's Office documents that are responsive to subpoenas issued by the Committee on Government Reform and Oversight of the House of Representatives. The subpoenas have been issued in connection with the Committee's investigation of the White House Travel Office matter.

By letter dated May 8, 1996, I advised you that, based on the circumstances described in that letter,

> executive privilege may properly be asserted with respect to the entire set of White House Counsel's Office documents currently being withheld from the Committee, pending a final Presidential decision on the matter. This would be a protective assertion of executive privilege designed to ensure your ability to make a final decision, after consultation with the Attorney General, as to which specific documents are deserving of a conclusive claim of executive privilege.

Protective Assertion of Executive Privilege Regarding White House Counsel's Office Documents, 20 Op. O.L.C. 1, 1 (1996).

The Counsel to the President has now identified the specific White House Counsel's Office documents with respect to which he recommends that you assert executive privilege. The documents are identified on an index of privileged documents attached to his memorandum to you dated May 23, 1996. His memorandum to you of May 8, 1996 describes the efforts the White House has made to accommodate the Committee's information needs.

The Office of Legal Counsel of the Department of Justice has reviewed the documents for which assertion of executive privilege has been recommended and is satisfied that they fall within the scope of executive privilege. I concur in that assessment.

The documents are in three categories. Most of the documents are analytical material or other attorney work-product prepared by the White House Counsel's Office in response to the ongoing investigation by the Committee. A second category consists of similar material prepared in connection with the ongoing criminal investigation by Independent Counsel Kenneth Starr. Finally, a small number of documents are analytical documents that do not concern either the Travel Office matter or these investigations, and which were prepared by the White House Counsel's Office in order to provide legal advice within the White House.

The Counsel to the President is appropriately concerned that the Committee's demand raises significant separation of powers concerns and that compliance with it beyond the accommodations already reached with the Committee would compromise the ability of his Office to advise and assist the President in connection with the pending Committee and Independent Counsel investigations. It would also have a chilling effect on the Office's discharge of its responsibilities in future congressional investigations, and in all of its other areas of responsibility. I agree that the ability of the White House Counsel's Office to serve the President would be significantly impaired if the confidentiality of its communications and work-product is not protected, especially where the confidential documents are prepared in order to assist the President and his staff in responding to an investigation by the entity seeking the documents. Impairing the ability of the Counsel's Office to perform its important functions for the President would in turn impair the ability of you and future Presidents to carry out your constitutional responsibilities.

The Supreme Court has expressly (and unanimously) recognized that the Constitution gives the President the power to protect the confidentiality of White House communications. This power is rooted in the "need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." *United States v. Nixon*, 418 U.S. 683, 705 (1974). "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708. Executive privilege applies to these White House Counsel's Office documents because of their deliberative nature, and because they fall within the scope of the attorney-client privilege and the work-product doctrine, *see Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Hickman v. Taylor*, 329 U.S. 495 (1947). Both the attorney-client privilege and the work-product doctrine are subsumed under executive privilege. *See Response to Congressional Requests for Information Regarding Decisions made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 78 & n.17 (1986); *Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481, 490 & n.17, 494 & n.24 (1982).

Under controlling case law, in order to justify a demand for confidential White House documents, a committee is required to demonstrate that the information

sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of legitimate legislative responsibilities of Congress. *See McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (Congress has oversight authority "to enable it efficiently to exercise a legislative function belonging to it under the Constitution"); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) ("Congress may only investigate into those areas in which it may potentially legislate or appropriate").

The confidential White House Counsel's Office documents for which privilege would be asserted are not contemporaneous documents concerning the White House Travel Office matter being investigated by the Committee, or even documents generated as part of the White House review of that matter, but rather were created in connection with other matters or the response of the White House to subsequent investigations of the Travel Office and other matters by the Committee and the Independent Counsel. Whatever may be the extent of Congress's authority to conduct oversight of the executive branch's response to oversight—a question that must be viewed as unresolved as a matter of law in light of the requirement that there be a nexus to Congress's legislative authority—it is clear that congressional needs for information in that context will weigh substantially less in the constitutional balancing than a specific need in connection with the consideration of legislation. As for documents concerning the White House response to an ongoing criminal investigation by an Independent Counsel, we can identify little, if any, legitimate legislative need for such information. In sum, based on the Office of Legal Counsel's review of the documents for which assertion of executive privilege has been requested, and conducting the balancing required by the case law, *see Senate Select Committee*, 498 F.2d at 729–30; *United States v. Nixon*, 418 U.S. at 706–07, I do not believe that access to these documents would be held by the courts to be "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Committee*, 498 F.2d at 731.

In conclusion, it is my legal judgment that executive privilege may properly be asserted in response to the Committee's subpoenas.

Sincerely,

JANET RENO
Attorney General

Assertion of Executive Privilege for Documents Concerning Conduct of Foreign Affairs with Respect to Haiti

Executive privilege may properly be asserted with respect to certain documents subpoenaed by the Committee on International Relations of the House of Representatives that concern the Administration's conduct of foreign affairs with respect to Haiti.

September 20, 1996

THE PRESIDENT
THE WHITE HOUSE

My Dear Mr. President: You have requested my legal advice as to whether executive privilege may properly be asserted with respect to documents that are the subject of a subpoena issued to the Executive Secretary of the National Security Council ("NSC") by the Committee on International Relations of the House of Representatives. The documents concern the Administration's conduct of foreign affairs with respect to Haiti.

The Counsel to the President and the National Security Adviser recommend that you assert executive privilege with respect to all but four of the subpoenaed documents. Several of the documents record diplomatic meetings or other communications between the President, the Vice President, the National Security Adviser, or the Deputy National Security Adviser and the President or Prime Minister of Haiti. Other documents constitute confidential communications from NSC or State Department officials to the President or the Vice President. The remaining documents reflect and constitute the deliberations of the NSC and its staff in connection with their advice and assistance to the President regarding his policy and activities in Haiti. I understand that efforts have been made to accommodate the Committee's information needs with respect to these documents, but they have proven unavailing. The Counsel to the President and the National Security Adviser are appropriately concerned that the Committee's demand raises significant separation of powers concerns and that compliance with it would compromise your ability to conduct the foreign affairs of the United States, as well as the ability of the NSC to advise and assist you in discharging that constitutional responsibility.

The Office of Legal Counsel of the Department of Justice has reviewed the documents for which assertion of executive privilege has been recommended and is satisfied that they fall within the scope of executive privilege. I concur in that assessment. The Supreme Court has confirmed that the Constitution gives the President the authority to assert executive privilege to protect the confidentiality of diplomatic communications, Presidential communications, and White House deliberative communications. *See generally United States v. Nixon*, 418 U.S. 683, 705–13 (1974); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 446–55 (1977). "The privilege is fundamental to the operation of Government and

inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. at 708.

More specifically, the Supreme Court has acknowledged the settled application of executive privilege with respect to "diplomatic secrets," such as the diplomatic communications with the leaders of Haiti that are subject to the Committee's subpoena, stating that "[a]s to th[is] area[ ] of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." *Id.* at 710; *see also id.* at 706. "[I]t is elementary that the successful conduct of international diplomacy . . . require[s] both confidentiality and secrecy. . . . [I]t is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its responsibilities in the field[ ] of international relations . . . ." *New York Times Co. v. United States*, 403 U.S. 713, 728–30 (1971) (Stewart, J., concurring).

As Assistant Attorney General William H. Rehnquist concluded almost thirty years ago, "the President has the power to withhold from [Congress] information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest." Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Executive Privilege to Withhold Foreign Policy and National Security Information* at 7 (Dec. 8, 1969). History is replete with examples of the Executive's refusal to produce to Congress diplomatic communications and related documents because of the prejudicial impact such disclosure could have on the President's ability to conduct foreign relations. *See* Memorandum from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, 6 Op. O.L.C. 751 (1982) (compiling historical examples).

It is equally well established that executive privilege applies to confidential communications to and from the President or Vice President and to White House and NSC deliberative communications. The Supreme Court has recognized "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *United States v. Nixon*, 418 U.S. at 708.

Under controlling case law, in order to justify a demand for material protected by executive privilege, a congressional committee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). And those functions must be in furtherance of legitimate legislative responsibilities of Congress. *See McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (Congress has over-

sight authority "to enable it efficiently to exercise a legislative function belonging to it under the Constitution").

"Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government." *Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959). The Committee has sought to justify its demand based on its need for information on "Administration policy toward human rights abuses in Haiti" and "the Administration's knowledge of death squad activities in Haiti over the last two years." Letter for Jack Quinn, Counsel to the President, from Benjamin A. Gilman, Chairman, Committee on International Relations at 2 (Sept. 19, 1996). However, the conduct of foreign affairs is an exclusive prerogative of the executive branch. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (the President is "the sole organ of the federal government in the field of international relations"); *Chicago and Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (the President is "the Nation's organ for foreign affairs"); 5 Paul L. Ford, *The Writings of Thomas Jefferson* 161 (New York, The Knickerbocker Press 1895) ("[t]he transaction of business with foreign nations is executive altogether"). Thus, there is a substantial question of the executive branch's conduct of foreign affairs or its deliberations relating thereto.

Although the question of Congress's oversight authority in this context must be viewed as unresolved as a matter of law, it is clear that congressional needs for information in this context will weigh substantially less in the constitutional balancing than a specific need in connection with the considerations of legislation. Based on the Office of Legal Counsel's review of the documents for which assertion of executive privilege has been requested, and conducting the balancing required by the case law, *see Senate Select Committee*, 498 F.2d at 729–30; *United States v. Nixon*, 418 U.S. at 706–07, I do not believe that access to these documents would be held by the courts to be "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Committee*, 498 F.2d at 731.

In conclusion, it is my legal judgment that executive privilege may properly be asserted in response to the Committee's subpoena.

Sincerely,

JANET RENO
Attorney General

Assertion of Executive Privilege for Memorandum to the President Concerning Efforts to Combat Drug Trafficking

Executive privilege may properly be asserted with respect to a memorandum to the President from the Director of the Federal Bureau of Investigation and the Administrator of the Drug Enforcement Administration containing confidential advice and recommendations regarding efforts to combat drug trafficking. The memorandum was subpoenaed by the Subcommittee on National Security, International Affairs and Criminal Justice of the Committee on Government Reform and Oversight of the House of Representatives.

September 30, 1996

THE PRESIDENT
THE WHITE HOUSE

My Dear Mr. President: You have requested my legal advice as to whether executive privilege may properly be asserted with respect to a document that was subpoenaed on September 27, 1996 by the Subcommittee on National Security, International Affairs and Criminal Justice of the Committee on Government Reform and Oversight of the House of Representatives.

The subpoenaed document is a memorandum to you from the Director of the Federal Bureau of Investigation ("FBI") and the Administrator of the Drug Enforcement Administration ("DEA"), containing confidential advice and recommendations regarding efforts to combat drug trafficking. The Subcommittee first requested this document on September 17, 1996. By letter dated September 27, 1996, the Deputy Counsel to the President informed the Subcommittee of the White House's concerns regarding the need to preserve the confidentiality of deliberative communications to the President and indicated that the Department of Justice is prepared to accommodate the Subcommittee's request by providing a briefing on the subject addressed by the memorandum.

The memorandum to you from the FBI Director and the DEA Administrator clearly falls within the scope of executive privilege. It is well established that executive privilege applies to confidential communications to the President. *See generally United States v. Nixon*, 418 U.S. 683, 705–13 (1974); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 446–55 (1977). The Supreme Court has recognized

> the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fun-

> damental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

United States v. Nixon, 418 U.S. at 708.

Under controlling case law, in order to justify a demand for material protected by executive privilege, a congressional committee is required to demonstrate that the information sought is "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). The only justification the Subcommittee has provided for access to this document is its oversight interest regarding counternarcotics policy. *See* Letter for the President, from William H. Zeliff, Jr., Chairman, Subcommittee on National Security, International Affairs and Criminal Justice (Sept. 17, 1996). It is clear that such a generalized interest weighs substantially less in the constitutional balancing than a specific need in connection with the consideration of legislation. *See* Letter for the President, from William French Smith, Attorney General, *Re: Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 30 (1981) ("[T]he interest of Congress in obtaining information for oversight purposes is, I believe, considerably weaker than its interest when specific legislative proposals are in question."). Accordingly, conducting the balancing required by the case law, *see Senate Select Committee*, 498 F.2d at 729–30; *United States v. Nixon*, 418 U.S. at 706–07, I do not believe that access to this Presidential communication would be held by the courts to be "demonstrably critical to the responsible fulfillment of the [Subcommittee's] functions." *Senate Select Committee*, 498 F.2d at 731.

In conclusion, it is my legal judgment that executive privilege may properly be asserted in response to the Subcommittee's subpoena.

Sincerely,

JANET RENO
Attorney General

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Whether the District of Columbia's Clean Air Compliance Fee May Be Collected From the Federal Government

The District of Columbia's Clean Air Compliance Fee is a tax and may not be imposed on the federal government, because the D.C. Council lacks authority to impose taxes on the property of the United States.

January 23, 1996

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

This memorandum responds to your request for our opinion on whether the District of Columbia ("District") may collect from the General Services Administration the Clean Air Compliance Fee ("Clean Air Fee" or "Fee") established by a District of Columbia statute, the Clean Air Compliance Fee Act of 1994 ("Act"), D.C. Act 10–387, *reprinted in* 42 D.C. Reg. 86 (1995).[1] As discussed below, we conclude that the District may not collect the Fee with respect to property owned by the United States. The Fee is a tax on such property, and such taxes are beyond the authority of the Council of the District of Columbia ("D.C. Council") under the District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code Ann. §§ 1–201 to 1–299.7 (1992) ("Self-Government Act").

I.

The following finding in the Act sets forth the D.C. Council's statement of the Act's purpose:

> By requiring payment from employment parking that is not subject to the parking sales and use tax and by allocating the revenues to the transit component of the [District's] Clean Air Regulatory Program the [District] will simultaneously discourage the use of single-occupancy vehicles for home-to-work travel while encouraging the use of car pools and transit, thereby reducing air pollution in compliance with requirements under the Clean Air Act.

Act § 2(5). In its operative provisions, the Act requires owners of real property in the District containing parking spaces that are used for commuting more than

[1] In considering this question, we have received the assistance of the Tax and Environment and Natural Resources Divisions of the Department of Justice and we have carefully considered the views submitted by the Office of the Corporation Counsel of the Government of the District of Columbia. *See* Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Garland Pinkston, Jr., Acting Corporation Counsel, Office of the Corporation Counsel (June 19, 1995) ("Corporation Counsel Letter").

two days per week and for which the District's parking sales and use tax is not collected to register the spaces and pay a Clean Air Fee calculated at a rate of $20 per month per space. *Id.* §§3–5. Penalties are prescribed for failure by property owners to register employment parking spaces or to pay the Fee. *Id.* §10. Property owners may seek reimbursement of the Fee from users of the parking spaces. *Id.* §4(b).

The Act provides that revenues from the Fee "shall be used to defray the cost of the transit component of the [District's] Clean Air Regulatory Program." *Id.* §11. The Act's legislative history makes it clear that the D.C. Council intended that the proceeds of the Fee would be used exclusively to subsidize mass transit: "The Committee [of the Whole of the D.C. Council] directs that the revenue collected from this fee be used to fund the District's payment to [the Washington Metropolitan Area Transit Authority ("WMATA")] as part of a mass transportation subsidy . . . ." Report to All Councilmembers, from David A. Clarke, Chairman, *Re: Bill 10–610, the "Clean Air Compliance Fee Act of 1994"* at 10 (July 5, 1994) ("Council Report").

The threshold, and ultimately dispositive, question presented here is whether the Clean Air Fee, to the extent it applies to property owned by the United States, is a "tax" or a "fee." This question would necessarily arise in connection with any fee imposed on the federal government by a state or local government, because the federal government is immune from state and local taxation. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819) ("[T]he states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."). It has long been established that a state or local government cannot impose a tax upon the United States, its agencies, or its instrumentalities "without a clear congressional mandate." *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954).

The "tax or fee" question arises in a unique context here because the federal government has divided the legislative authority for the District between Congress and the D.C. Council. As the District of Columbia Court of Appeals has summarized:

> The United States Constitution vests Congress with the exclusive legislative authority for the District of Columbia. U.S. Const. art. I, §8, cl. 17. In 1973, Congress passed the Self-Government Act to "relieve Congress of the burden of legislating upon essentially local District matters." D.C. Code 1981, §1–201(a). Subject to its retention of the ultimate legislative authority over the District of Columbia, Congress delegated certain specific legislative powers to the District of Columbia government. *Id.* . . . In addition [to "expressly reserv[ing] its right 'to exercise its constitutional authority

> as legislature for the District, by enacting legislation for the District on any subject' "], Congress placed several explicit limitations on the Council's legislative authority.

District of Columbia v. Greater Washington Cent. Labor Council, 442 A.2d 110, 113 (1982) (quoting Self-Government Act, § 1–206), *cert. denied*, 460 U.S. 1016 (1983).[2]

As in the cited District of Columbia Court of Appeals case, "[t]he specific limitation[ ] which [is] pertinent to the issue before us [is] enumerated in § 1–233." *Id.* Subsection (a)(1) of § 1–233 provides that "[t]he Council shall have no authority to . . . [i]mpose any tax on property of the United States or any of the several states." Thus, if the Clean Air Fee is a "tax on property of the United States," then the D.C. Council lacked the authority to impose it.[3]

II.

A tax is an "enforced contribution to provide for the support of government." *United States v. LaFranca*, 282 U.S. 568, 572 (1931). In distinguishing between government taxes and fees, courts have identified two different types of fees: "user or service fees" and "regulatory fees." The D.C. Council imposed the Clean Air Fee on owners of parking spaces in the District and directed that revenues from the Fee be used exclusively to subsidize the mass transit system. For the reasons set forth below, we conclude that the Fee does not qualify as either a "user or service fee" or a "regulatory fee" but is instead an "enforced contribution to provide for the support of government." *Id.*[4]

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[2] This Office has consistently expressed the same understanding of the limitations on the D.C. Council's authority. For example, in 1976 we opined that the legislative power of the D.C. Council

> is subject to careful reservations by the Congress of its own constitutional powers and to specific limitations included in title VI of the Home Rule Act. Indeed, the very grant of power in section 404(a) begins with the words, "[s]ubject to the limitations specified in title VI of this Act, . . ." Thus there are real limits on the Council's authority to act.
>
> The most specific of those title VI limitations are set forth in Section 602 [D.C. Code 1981, § 1–233] of the Home Rule Act.

Memorandum for Hugh M. Durham, Legislative Counsel, Office of Legislative Affairs, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: District of Columbia Enrolled Bill B–1–137, the District of Columbia Shop-Book Rule Act* at 2 (Feb. 18, 1976).

[3] The foregoing discussion indicates that principles of federal immunity from local taxation and limitations on the D.C. Council's authority are both implicated by the "tax or fee" question. If the Clean Air Fee is a "tax," then under either principle only Congress could authorize the imposition of the tax on the United States. It is important to recognize, however, that congressional authorization of the District's tax would require two analytically distinct steps, whereas congressional authorization of other state and local taxes requires only one. Congress may waive federal immunity against a properly enacted state or local tax, acting solely in its capacity as legislature for the United States. On the other hand, for Congress to authorize the District's Clean Air Fee, it must both waive federal immunity and either authorize the D.C. Council to impose the tax (acting as legislature for the United States) or impose the tax directly itself (acting as legislature for the District).

[4] In light of this conclusion, there is no need to consider the argument that the Clean Air Fee falls within the scope of the waiver of federal immunity against state and local taxation and regulation set forth in section 118 of the federal Clean Air Act, 42 U.S.C. §7418. *See* Corporation Counsel Letter at 3–7. For even if the Fee satisfies the terms of that waiver, it may not be imposed on the United States because its enactment was beyond the D.C.

A.

Central to the analysis of whether a government levy is a user or service fee or instead a tax is whether it is imposed to collect payment for a benefit or service provided by the government to the specific payor as a result of a voluntary act by the payor, or whether instead the payment is viewed as a mandatory contribution for the general support of the government. The clearest Supreme Court guidance on whether an exaction is a tax or a user or service fee is set forth in *National Cable Television Ass'n v. United States*, 415 U.S. 336 (1974). In considering whether a fee imposed by the Federal Communications Commission was a tax and therefore beyond the FCC's authority, the Court opined:

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. . . . A "fee" connotes a "benefit" . . . .

Id. at 340–41 (footnote omitted).

In *United States v. City of Huntington, W.Va.*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994), the court applied a facts-and-circumstances test to determine whether a so-called "municipal service fee," consisting of a "fire service fee" and a "flood protection fee," imposed upon property owners in Huntington, West Virginia, including federal agencies, was a tax upon the

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Council's authority under the Self-Government Act. Waivers of immunity apply only to properly enacted state and local measures.

Nor is there a need to ascertain the scope of the Clean Air Act waiver of federal immunity in order to conclude that there is no basis for construing that waiver as an implied repeal of the Self-Government Act's limitation on the authority of the D.C. Council. The District did not make this implied repeal argument in its submission to this Office, *see* Corporation Counsel Letter, but the argument was analyzed in a Congressional Research Service memorandum concerning the Clean Air Fee, *see* Memorandum by George Costello, American Law Division, Congressional Research Service, *Re: Application of District of Columbia "Clean Air Compliance Fee Act" to the Federal Government* at 6–7 (Mar. 24, 1995). We believe the argument has no merit. It is a well-established principle of statutory construction that "repeals by implication are strongly disfavored." *United States v. Fausto*, 484 U.S. 439, 452 (1988). "[A] later statute will not be held to have implicitly repealed an earlier one unless there is a clear repugnancy between the two." *Id.* at 453 (citations omitted). There is no repugnancy between the Self-Government Act and the subsequently enacted section 118 of the Clean Air Act. They address fundamentally different subjects: the latter addresses federal immunity (*i.e.*, the relationship between the federal government and state and local governments), while the former addresses D.C. Council legislative authority (*i.e.*, the relationship between Congress and the D.C. Council). Moreover, neither the text nor the legislative history of Clean Air Act section 118 contain the slightest indication that during its deliberations on waiving federal immunity Congress gave any thought to the legislative authority of the D.C. Council.

United States or was instead a fee for services rendered. The court stated that "[u]ser fees are payments given in return for a government-provided benefit. Taxes, on the other hand, are 'enforced contribution[s] for the support of government.'" *Id.* at 74 (quoting *United States v. LaFranca*, 282 U.S. at 572). The court held that the municipal service fee was "a thinly disguised tax" because the federal agencies' liability for the fee "arises from [their] status as property owners and not from their use of a City service." *Id.*

In *United States v. City of Columbia, Mo.*, 914 F.2d 151 (8th Cir. 1990), the court considered whether a levy charged by a city as part of the price of water and electricity was a tax or a fee. Even though the levy was described in the applicable city ordinance as being in lieu of a tax, the court held that the levy was part of the utility rate and was unlike a tax in many significant respects: it was not contained in a section dealing with the city's taxing power; it was charged to the customer as part of the price of electricity and water; and failure to pay the levy would result in termination of services rather than subject the customer to penalties. As for the levy's application to the federal government, the court said that

> [t]he United States' obligation to pay the [levy arose] only from its consensual purchase of the City's [water and electricity]; it d[id] not arise automatically, as does tax liability, from the United States' status as a property owner, resident, or income earner. When the United States purchases water, electricity, and related services, and then pays the utility bill, it does so as a vendee pursuant to its voluntary, contractual relationship with the City. The City imposes the charge not in its capacity as a sovereign, but as a vendor of goods and services.

Id. at 155–56 (citing *National Cable Television*, 415 U.S. at 340–41).

The results in *Columbia* and *Huntington* represent straightforward applications of the Supreme Court's approach in *National Cable Television*. In *Columbia*, the levy was held not to be a tax because the federal agency voluntarily used certain amounts of electricity and water and the levy was for the service actually provided to the agency. In contrast, in *Huntington* the assessment was not based on actual fire and flood services that had been provided on request, but rather represented a charge to property owners for fire and flood protection available to all inhabitants of the city; thus, it was a tax—a mandatory contribution for the support of government services provided to the entire public.

The Clean Air Fee cannot qualify as a user or service fee because the revenue from the Fee is used to provide an undifferentiated benefit to the entire public. The Fee is indistinguishable for present purposes from the assessment to support community-wide services that was held to be a tax in *Huntington*. It is not a

charge for any identifiable District services provided specifically to the owners of parking spaces upon their request. Rather, it is a charge to support the mass transit services the District provides to all inhabitants (permanent and temporary) of the District. Such services, as was the case with the "[f]ire and flood protection and street maintenance [services at issue in *Huntington*,] are core government services" available to all inhabitants of the city. *Huntington*, 999 F.2d at 73.

The court's rationale in *Huntington* is fully applicable here: If the argument that the Clean Air Fee is a user fee rather than a tax were to be accepted, then "virtually all of what now are considered 'taxes' could be transmuted into 'user fees' by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a 'police fee.'" *Id.* at 74. Taxes imposed on property owners are traditionally used to support government services for the whole community, and the Clean Air Fee is no different.

Moreover, in contrast to the levy held to be a fee in *Columbia*, the United States' obligation to pay the Clean Air Fee does not arise from any consensual purchase of a good or service from the District, but rather arises automatically from its status as a property owner. *See Columbia*, 914 F.2d at 155. The United States is in no respect acting "as a vendee pursuant to its voluntary, contractual relationship with the [District]." *Id.* at 156. In short, the District has "impose[d] the charge . . . in its capacity as a sovereign, [not] as a vendor of goods and services." *Id.* Also in contrast to the *Columbia* fee, the District will enforce the Fee through civil penalties, not the denial of any supposed benefit that the Fee makes possible.

B.

The case law concerning whether a government levy is a regulatory fee or a tax was summarized by then-Chief Judge Breyer of the First Circuit Court of Appeals in *San Juan Cellular Telephone v. Public Serv. Comm'n*, 967 F.2d 683 (1st Cir. 1992):

> Courts have had to distinguish "taxes" from regulatory "fees" in a variety of statutory contexts. . . . They have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community. The classic "regulatory fee" is imposed by an agency upon those subject to its regulation. It may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive. Or, it may serve such purposes indirectly by, for exam-

> ple, raising money placed in a special fund to help defray the agency's regulation-related expenses.
>
> Courts facing cases that lie near the middle of this spectrum have tended . . . to emphasize the revenue's ultimate use, asking whether it provides a general benefit to the public, of a sort often financed by a general tax, or whether it provides more narrow benefits to regulated companies or defrays the agency's costs of regulation.

Id. at 685 (citations omitted).

We believe that the Clean Air Fee is considerably closer to being a paradigmatic tax than a paradigmatic regulatory fee. In Judge Breyer's terms, the Fee "is imposed by a legislature [the Council] upon many, or all, citizens [all owners of employment parking spaces]. It raises money, contributed to a general fund, and spent for the benefit of the entire community [the account funding the District's subsidy for mass transit, which is a service available to the entire community]." *Id.* In other words, the Fee is imposed by a legislative body on property owners to raise revenue; it is not imposed by a "[regulatory] agency upon those subject to its regulation." *Id.* Moreover, the fact that the Fee applies only if the District's sales and use tax has not been imposed already on the parking service for the vehicle also suggests that the Fee is a tax, because it indicates that the Fee is intended to complement the parking tax. Indeed, the D.C. Council indicated as much in its report on the Act when it stated that "[t]he fee will only be imposed on persons who do not currently pay the District's parking tax." Council Report at 10.

The District's argument that the Clean Air Fee is a regulatory fee is as follows:

> We conclude that the District is required by the Federal Clean Air Act to reduce, eliminate and control sources of air pollution and that the monetary exaction imposed by the Clean Air Compliance Fee Act is designed to encourage the use of mass transit and decrease air pollution associated with automobile traffic. Inasmuch as the primary purpose of this exaction is the control and abatement of air pollution, we conclude that this exaction is a "fee" not a "tax."

Corporation Counsel Letter at 3.

As a threshold matter, it is open to question whether it is correct to view the Fee's primary purpose as being to regulate air pollution by automobile traffic rather than to raise revenue for mass transit that benefits the general public. The fact that the proceeds of the Fee are to be allocated entirely to support the mass transit system strongly suggests that the primary purpose of the Fee is to raise revenue to support government operations. *See* Act § 11; Council Report at 10. In addition, although discouraging the use of automobiles for commuting no doubt does serve

air pollution regulatory purposes, the actual reduction in automobile commuting that can be expected here, as a result of the imposition of the Fee, is indirect and speculative compared to the direct and immediate revenue impact and support for mass transit that will result.[5]

In any event, even assuming that the Clean Air Fee falls in the middle of the fee-tax spectrum, following Judge Breyer's focus on the revenue's ultimate use leads to the conclusion that this exaction is a tax. To accept the District's characterization would require that we conclude either that subsidizing mass transit is a regulation-related cost of the District's air pollution regulatory program or that the assumed regulatory impact of the Fee on air pollution (as a result of reduced automobile commuting and increased use of mass transit) is sufficient by itself to render it a regulatory fee notwithstanding the remaining aspects of the Fee that all suggest it is a tax. With respect to the first of these alternatives, while we do not doubt that encouraging the use of mass transit can have a beneficial effect on air pollution, the costs of a separate, non-regulatory government program that benefits the public as a whole are not the kind of costs that courts have viewed as defrayable by regulatory fees. *See supra* pp. 17–19. The subsidization of mass transit is not a regulatory cost, but rather a general government expense typically defrayed by taxes: subsidization of mass transit "provides a general benefit to the public, of a sort often financed by a general tax." *San Juan Cellular Telephone*, 967 F.2d at 685.

As for the second alternative, the simple response is that ascribing a regulatory purpose to a tax does not mean that it is not a tax. Taxes often have a significant regulatory purpose: "[A] tax is a powerful regulatory device; a legislature can discourage or eliminate a particular activity that is within its regulatory jurisdiction simply by imposing a heavy tax on its exercise." *Massachusetts v. United States*, 435 U.S. 444, 455–56 (1978). *See also National Cable Television Ass'n v. United States*, 415 U.S. 336, 341 (1974) ("The lawmaker may, in light of the 'public policy or interest served,' make the assessment heavy if the lawmaker wants to discourage the activity; or it may make the levy slight if a bounty is to be bestowed . . . . Such assessments are in the nature of 'taxes' . . . ."). Thus, the fact that discouraging automobile commuting is one of the stated reasons for the Clean Air Fee does not convert it from a tax into a regulatory fee when its revenue-raising purpose in support of separate, non-regulatory government operations is so direct and substantial. The foregoing analysis is supported by the decision

[5] *See, e.g.*, Statement of Art Lawson, Administrator, Office of Mass Transit, Department of Public Works, Before the Council of the District of Columbia Committee of the Whole at 1–2 (May 18, 1994). ("Although these measures will not on their own result in measurable reductions of automobile use within the District of Columbia it is the direction setting that is most important here. Additionally, these measures are important because they will generate desperately needed revenues to help fund the District's FY 1994 and 1995 WMATA operating budget. . . . [T]he District's subsidy to support WMATA was reduced by $7.2 million in the current budget year. This reduction left WMATA underfunded by approximately $7 million. The Committee on Regional Authorities proposed to make up the $7 million by implementing a series of transfer charges and fare increases on District Metrobus service. . . . [Councilwoman Mason] has proposed that the revenue from these bills be used to fund the WMATA deficits thereby making the fare and transfer charge proposals unnecessary."). *See also id.* at 6.

in *San Juan Cellular Telephone* and the cases cited in Judge Breyer's opinion in that case. In *San Juan*, the court held that a three percent of gross revenues charge imposed on a telephone company by the Puerto Rico Public Service Commission as a condition of the company's authorization to provide cellular telephone service was a regulatory fee. Judge Breyer stressed that the fee was assessed by a regulatory agency, was placed in a special fund, and was not to be used for a general purpose but rather to defray specific costs of regulation (investigative expenses, hiring of services, and acquisition of equipment). 967 F.2d at 686. His opinion distinguished the case before the court, as well as other cited examples of regulatory fees,[6] from those cases that had held charges to be taxes because the proceeds from the charges were used for general purposes or to raise general revenue.[7]

Schneider Transport, Inc. v. Cattanach is particularly instructive for our purposes. In that case, it was argued that truck registration fees imposed on trucking companies were "regulatory licensing fees." The Seventh Circuit rejected this argument, finding that "[a]lthough not denominated as such, the registration fees are imposed for revenue-raising purposes, a characteristic of any tax . . . [, and] [t]he fees are deposited in a segregated fund, the state transportation fund, for transportation purposes, including highway construction." 657 F.2d at 132 (citations omitted). Thus, as with the Clean Air Fee, the charge went beyond regulatory purposes and raised revenue to support a separate, non-regulatory government program.

Finally, we observe that our conclusion that the Clean Air Fee is not a regulatory fee does not conflict with Judge Breyer's statement that a regulatory fee "may serve regulatory purposes [by] deliberately discouraging particular conduct by making it more expensive." 967 F.2d at 685. The fact that some bona fide regulatory fees serve regulatory purposes in this way does not mean, of course, that every charge with a regulatory purpose that raises revenue beyond what would defray regulatory costs must be viewed as a fee rather than a tax. As discussed above, *supra* p. 19, taxes often have regulatory purposes. *See Massachusetts v. United States*, 435 U.S. at 455–56; *National Cable Television Ass'n v. United States*, 415 U.S. at 341.

Judge Breyer cited only one case involving this type of regulatory fee. 967 F.2d at 685 (citing *South Carolina ex rel. Tindal v. Block*, 717 F.2d 874 (4th Cir. 1983), *cert. denied*, 465 U.S. 1080 (1984)). *Block* concerned a charge imposed

[6] *See, e.g., Union Pac. R.R. v. Public Util. Comm'n*, 899 F.2d 854, 856 (9th Cir. 1990) (assessment helped defray utility commission's "cost of performing [its] regulatory duties"); *Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n*, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980) (NRC charge helped pay costs of environmental reviews, hearings, and administrative and technical support).

[7] *See id.* at 685 (citing *Schneider Transport, Inc. v. Cattanach*, 657 F.2d 128 (7th Cir. 1981) (charge on truck-owners used to pay for highway construction), *cert. denied*, 455 U.S. 909 (1982); *Keleher v. New England Tel. & Tel. Co.*, 947 F.2d 547 (2d Cir. 1991) (public utility companies using city streets charged fee tied to utility's gross revenues and not cost of regulating utility's use of city streets), *Robinson Protective Alarm Co. v. City of Philadelphia*, 581 F.2d 371, 376 (3d Cir. 1978) (charges on central alarm companies based on gross revenues and "added to the public fisc, rather than applied exclusively to contractual services owed" to the companies)).

by the Secretary of Agriculture on the proceeds of all milk sold commercially. The charge was remitted to the Commodity Credit Corporation ("CCC") as part of a milk price support program administered for the Secretary by the CCC. The purposes of the charge were "to encourage dairy farmers to reduce milk production and to offset a portion of the cost of the milk price support program." 717 F.2d at 876. Although *Block* principally concerned Administrative Procedure Act challenges to the Secretary's imposition of the charge on milk sales, the court's opinion also briefly discussed the allegation that the Secretary's charge was a tax and therefore was unconstitutional for two reasons: it did not originate in the House of Representatives, and Congress cannot delegate its authority to tax. The court easily concluded that the charge was not a tax because it was authorized by Congress pursuant to its commerce power rather than taxing power, citing *Wickard v. Filburn*, 317 U.S. 111 (1942), for the proposition that "[t]he imposition of assessments have long been held to be a legitimate means of regulating commerce." 717 F.2d at 887.[8]

Block does not support the position that the Clean Air Fee is a regulatory fee, because the charge addressed in that case differed from the Fee in two fundamental respects: it was imposed on regulated parties, not property owners, and, most significantly, the revenue raised from the charge was used only for the specific regulatory program of which it was a part, and to which the regulated parties were subject, not to support government operations in a separate, non-regulatory program that benefits the public generally.

C.

The "tax or fee" cases cited by the Office of the Corporation Counsel, *see* Corporation Counsel Letter at 2, included both user or service fee cases and regulatory fee cases. The cited cases are consistent with our conclusion that the Clean Air Fee is a tax and not a fee. For example, in *Valandra v. Viedt*, 259 N.W.2d 510 (S.D. 1977), the court held that a "mobile home license fee" was principally a tax because "85% of the fee collected [allocated to the county highway and bridge fund] is for revenue purposes and bears no relationship to the cost of administering the [mobile home] registration system," and only the fifteen percent allocated "to defray costs of titling, registration and for unusual use of the highway" was arguably a fee. *Id.* at 512. Similarly, the Clean Air Fee is allocated to support a mass transit system and is not tied to any governmental service or

[8] The two cases cited in this regard by the *Block* court each held that administrative sanctions imposed against farmers for exceeding marketing quotas were authorized under the commerce power and did not constitute taxes. *See United States v. Stangland*, 242 F.2d 843, 848 (7th Cir. 1957); *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943). The central rationale of the cases was that the charge in question "[was] not a charge on property for the purpose of raising revenue. Revenue may incidentally arise therefrom, but that fact does not divest the regulation of its commerce character and render it an exercise of the taxing power." *Rodgers*, 138 F.2d at 995. In contrast, the Clean Air Fee's production of revenue to subsidize mass transit is anything but incidental: the Fee is a charge on property for the purpose of raising revenue.

benefit specifically provided to owners of parking spaces. *See also Radio Common Carriers v. State*, 601 N.Y.S.2d 513, 516 (N.Y. 1993) ("Section 1150 . . . is in effect a tax. The monthly one dollar fee is not related to licensing or other services performed for the [fee-payor] by the state . . . . The money collected is added to the general state fisc . . . .").

Those of the cases cited by the Corporation Counsel that held that the charge in question was a fee generally differ from the present case in the critical respect that they involved payments to defray costs attributable to regulated parties. For example, in holding that a ten dollar criminal history records check charge paid by potential firearms buyers was a fee, the court in *In re Shooters Emporium, Inc.*, 135 B.R. 701 (Bnkr. S.D. Fla. 1992), stated that

> the nature of the payment is voluntary. Payment is required only if one desires to purchase a firearm. The purpose of the payment is for private benefit. Only people who pay the fee may purchase a firearm. Furthermore, this payment is clearly designed to recoup the costs of regulation from the people regulated, rather than to raise general revenues. This payment can not be reasonably construed to be an involuntary exaction for a public purpose.

Id. at 702–03.[9] In contrast to these cases, the Act makes clear that the Clean Air Fee is allocated to support mass transit; it does not defray costs attributable to parking space owners or any other regulated parties.

III.

For the reasons set forth above, we conclude that the Clean Air Fee is a tax. To the extent that the Fee is imposed on property owned by the United States, it is a "tax on property of the United States" and therefore beyond the authority of the D.C. Council under the Self-Government Act. The District may not collect the Fee from the federal government.

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Office of Legal Counsel

[9] *See also City of Vanceburg, Ky. v. Federal Energy Regulatory Comm'n*, 571 F.2d 630, 644 (D.C. Cir. 1977) (dam-use charges are "exacted against a licensee in exchange for a privilege which the licensee has requested or applied for and from which the licensee derives a special benefit"), *cert. denied*, 439 U.S. 818 (1978); *Strater v. Town of York*, 541 A.2d 938 (Me. 1988) (ten dollar charge for harbor usage); *Memphis Retail Liquor Dealers' Ass'n v. City of Memphis*, 547 S.W.2d 244 (Tenn. 1977) (emphasizing uniqueness of regulation of alcoholic beverage industry and common practice of regulating that industry through license taxes, holding that five percent inspection fee imposed on retailers was a fee even though it produced revenues that were 200 times the cost of regulation).

Immigration Emergency Fund

The $20 million that the Immigration and Naturalization Act makes available, in the Immigration Emergency Fund, for reimbursement of states and localities for certain immigration-related assistance is available annually, not just one time during the life of the IEF.

January 26, 1996

MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION

You have asked us whether the $20 million in the Immigration Emergency Fund for reimbursement of states and localities for certain immigration-related assistance is available annually or whether a total of $20 million is available from the account for such expenses. We conclude that the $20 million is available annually.

Section 404(b) of the Immigration and Nationality Act, *see* 8 U.S.C. §§ 1101–1537, created an Immigration Emergency Fund ("IEF" or "fund") that could be drawn upon to increase the Immigration and Naturalization Service's ("INS") enforcement activities, and to reimburse states and localities in providing assistance, as requested by the Attorney General in meeting an immigration emergency declared by the President. Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 113, 100 Stat. 3359, 3383 (codified as amended at 8 U.S.C. § 1101 note). A 1990 amendment expanded the use of the IEF by providing in sections 404(b)(2)(A)-(B) that up to $20 million in the IEF shall be available for the reimbursement of states and localities [1] "providing assistance as required by the Attorney General" when asylum applications in any INS district increase by at least 1000, when the lives, property, safety, or welfare of state or local residents are endangered, or "in any other circumstances as determined by the Attorney General." Immigration Act of 1990, Pub. L. No. 101–649, § 705, 104 Stat. 4978, 5087. The Attorney General may make such expenditures without a presidential determination that an immigration emergency exists. § 404(b)(2)(C).

Congress created the IEF as a "no-year fund." [2] As such, the appropriations to the IEF are not limited to use in any specific fiscal year and the funds within the IEF remain available for its purposes until expended. In stating that there "are authorized to be appropriated (for fiscal year 1991 and any subsequent fiscal year) to an immigration emergency fund . . . an amount sufficient to provide

[1] The specific reference to "all localities" in section 404(b)(2)(B), given the additional reference to section 404(b)(2)(A), must be read to encompass both states and localities.

[2] The standard language used to make a "no-year" appropriation is "'to remain available until expended.'" Office of General Counsel, General Accounting Office, 1 *Principles of Federal Appropriations Law* 5–6 (2d ed. 1991). When the IEF was first funded, in 1989, Congress appropriated $35 million "[f]or necessary expenses of the immigration emergency fund . . . to remain available until expended." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101–162, 103 Stat. 988, 1000 (1989).

for a balance of $35,000,000" in the IEF, Congress appears to have contemplated that it would appropriate money from time to time in subsequent fiscal years to replenish the fund to provide for a balance of $35 million. § 404(b)(1). Indeed, in subsequent years, Congress has appropriated monies that have totalled far more than $35 million. Congress appropriated $35 million to the IEF in 1989;[3] $6 million in 1993;[4] and $75 million in 1994.[5]

Section 404(b)(2)(B) states that "[n]ot more than $20,000,000 shall be made available for all localities under this paragraph." "This paragraph" refers to section 404(b)(2)(A), which states that "[f]unds which are authorized to be appropriated by paragraph (1), subject to the dollar limitation contained in subparagraph (B), shall be available" for the three purposes for which reimbursement to states and localities is permitted. The reference in that provision to "paragraph (1)," in turn, refers back to section 404(b)(1), the provision that anticipates appropriations in an unlimited number of subsequent fiscal years. Moreover, section 404(b)(1), by its terms, provides that the monies appropriated to the IEF are "to be used to carry out paragraph (2)," (for state and local assistance to the Attorney General) in addition to the specified uses in the case of an emergency declared by the President.

Because sections 404(b)(1), 404(b)(2)(A), and 404(b)(2)(B) are so intertwined, they must be read together as part of Congress's overall plan to establish an ongoing fund into which it would appropriate monies from time to time in any fiscal year it deems appropriate, to be used by the President and Attorney General for specified purposes. *See SEC v. Sloan*, 436 U.S. 103, 121–23 (1978). We believe that the language of section 404 is properly interpreted to provide that the $20 million is available in any fiscal year when the IEF's balance permits, and not just one time during the life of the IEF.[6]

Although we conclude that this construction is the most sensible reading of these provisions of section 404, we acknowledge that the question is not free from doubt because the provisions are less than explicit. Congress tied sections 404(b)(2)(A) and (B) to section 404(b)(1), thus indicating its intent that the $20 million be available for fiscal year 1991 and in any number of subsequent fiscal years. But it did not expressly state that the availability of the $20 million for states and localities is annual. Viewed in isolation, the phrase in section

[3] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, 103 Stat. at 1000.

[4] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103–121, 107 Stat. 1153, 1161 (1993).

[5] *See* Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Pub. L. No. 103–317, 108 Stat. 1724, 1732 (1994). In 1995, Congress rescinded $45 million of that $75 million appropriation. Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104–6, 109 Stat. 73, 83.

[6] We note that the Office of the General Counsel, Office of Management and Budget, also interprets section 404 to make the $20 million for state and local assistance available on an annual basis. Telephone conversation between Teresa Wynn Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, and Rosalyn Rettman, Associate General Counsel, Office of Management and Budget (Jan. 19, 1996).

404(b)(2)(B) that "[n]ot more than $20,000,000 shall be made available for all localities" might be read to put an overall limit on the amount of monies going to states and localities. However, as we explain above, when the statutory limitation is viewed in its entirety — "under this paragraph" — and in context with the necessary references to other pertinent parts of section 404, it is most reasonably interpreted to provide for annual availability.

To the extent some ambiguity in the statute exists, the issue is resolved by the legislative history on the establishment and functioning of the fund. A report accompanying H.R. 4300, 101st Cong. (1990), the enabling legislation for the IEF, states that:

> Under current law, the President must declare that an immigration emergency exists before any amounts in the fund can be spent. H.R. 4300 would require that amounts in the fund up to $20 million *annually* be used to reimburse state and local governments if the number of asylum applicants has increased by 1,000 during any calendar quarter after January 1, 1989.

H.R. Rep. No. 101–723, pt. 1, at 86 (1990) (emphasis added), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6766. This language demonstrates that Congress intended the $20 million for states and localities to be available annually, not just one time during the life of the IEF. Thus, it supports our conclusion that under the most reasonable reading of the statute, the $20 million available for states and localities under section 404(b)(2)(B) of the Immigration and Naturalization Act is available on an annual basis.

TERESA WYNN ROSEBOROUGH
Deputy Assistant Attorney General
Office of Legal Counsel

Assistance by State and Local Police in Apprehending Illegal Aliens

Subject to the provisions of state law, state and local police may constitutionally detain or arrest aliens for violating the criminal provisions of the Immigration and Naturalization Act.

State and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws.*

State and local police may detain aliens reasonably suspected of a criminal violation of the immigration laws for periods of as long as 45 to 60 minutes when detentions of that length are necessary to allow for the arrival of Border Patrol agents who are needed for the informed federal disposition of the suspected violations.

February 5, 1996

MEMORANDUM OPINION FOR THE UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF CALIFORNIA

I. BACKGROUND AND SUMMARY OF CONCLUSIONS

This responds to your memorandum to Seth Waxman, Associate Deputy Attorney General. In that memorandum, you requested a legal opinion from this Office concerning the circumstances in which state and local police in California can assist the Immigration and Naturalization Service ("INS") in enforcing the federal immigration laws.

Your request for opinion was triggered by certain difficulties that have arisen in connection with local law enforcement assistance in the immigration area, particularly in detaining aliens who have entered the United States unlawfully. In particular, you referred to a policy of the San Diego Police Force that limits the period for which its officers may detain alien suspects stopped on "reasonable suspicion" to a maximum of 20 minutes. Although state and local police have been authorized to detain alien suspects in some circumstances, the proper investigation, processing, and arrest of suspected immigration violators generally requires the presence and assistance of agents of the United States Border Patrol. At present, however, we understand that local police will detain such persons for only 20 minutes after Border Patrol assistance is requested. You advise that Border Patrol agents in your district are rarely able to reach the scene of apprehension within 20 minutes. As a result, the 20-minute detention limit may cause state officers to release illegal alien entrants when Border Patrol agents have not arrived at the scene within that time period. You have therefore suggested that city and county authorities consider expanding the permitted period of detention from 20 minutes to as much as one hour, as permitted by law.

* Editor's Note: See Editor's Note to Section II.B.

In addition to the matters raised in your initial opinion request, you have subsequently requested our legal opinion on several additional related issues. Set forth below is our analysis of those issues. Our conclusions on the chief issues you raise may be summarized as follows:

1. Subject to the provisions of state law, state and local police [1] may constitutionally detain or arrest aliens who have violated the criminal provisions of the Immigration and Naturalization Act ("INA"). State police lack recognized legal authority to arrest or detain aliens solely for purposes of *civil* deportation proceedings, as opposed to criminal prosecution. (Sections II.A-B).*

2. California law allows state police to enforce the criminal provisions of federal immigration law, although they may not make warrantless arrests for INA misdemeanor violations unless the offense occurs in their presence. When illegally entering aliens have reached a place of repose within the United States, the offense is completed and is no longer subject to warrantless arrest by California police. (Sections II.A, II.C3).

3. State police may stop and detain carloads of illegal alien suspects only in circumstances that satisfy the requirements of "reasonable suspicion." These requirements are inherently fact-specific and therefore not readily reduced to clear-cut rules. Nonetheless, several basic principles and considerations warrant emphasis. (Section II.C).

a. Persons may be detained for reasonable periods by state police on the basis of a reasonable suspicion of a criminal immigration law violation. The critical requirement for a reasonable suspicion detention is the existence of objective, articulable facts suggesting the commission of a criminal offense by the persons detained, rather than mere stereotypical assumptions, profiles, or generalities.

b. In particular, absent knowledge of an established federal policy of not prosecuting such offenses, state police may, in our opinion, legally detain alien suspects for disposition by federal agents when there is reasonable suspicion that the suspects have violated or are violating the two commonplace misdemeanor provisions of the INA, 8 U.S.C. § 1304(e) (lack of alien registration documents) or § 1325 (illegal entry), or other criminal provisions of the INA.

c. Written guidelines or policies adopted by state or local police forces may generate additional legal complications regarding otherwise valid detentions based on suspected violations of criminal immigration laws, insofar as such guidelines or policies state that suspects may only be detained based on reasonable suspicion of crimes that are unrelated to the immigration laws. Because any extended detention of a suspect must generally be based upon the law enforcement purposes served by the stop, a police force's official disclaimer of any immigration-related detention authority could undermine the validity of detaining suspects to await processing by Border Patrol officers.

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* Editor's Note: See Editor's Note to Section II.B.

[1] For purposes of brevity, state and local police will sometimes be referred to herein simply as "state police."

4. Under governing judicial precedents, state police in California may constitutionally detain alien suspects for periods of as long as 45 to 60 minutes in circumstances where detentions of that length are *necessary* to allow for the arrival of Border Patrol agents (exercising due diligence) who are needed for the informed federal disposition of reasonably suspected violations of the INA. (Section II.D).

a. We caution, however, that one Ninth Circuit panel opinion issued in 1994 suggests a somewhat more restrictive approach to the permissible duration of such detentions.

b. If the Border Patrol agents do not promptly arrest the suspects upon their arrival at the scene of a reasonable suspicion detention, it must be assumed that the additional period of detention required by them before effecting an arrest would be counted by a court in calculating the permissible length of such detentions (e.g., a permissible 40-minute detention by state police awaiting the arrival of Border Patrol agents might be rendered impermissibly lengthy if the agents detain the suspects for, e.g., an additional 30 minutes before effecting an arrest).

5. As a general rule, the involuntary vehicular transportation of validly detained aliens by state police to Border Patrol agents would be deemed an arrest and require probable cause rather than mere reasonable suspicion. (Section II.E).

a. In unusual circumstances where the Border Patrol's necessary assistance may be more promptly obtained by transporting validly detained suspects to the agents than by awaiting the arrival of the latter, we believe such transportation (limited to reasonably proximate locations) would be sustainable even in the absence of probable cause under the principles applied in several pertinent judicial opinions in California and the Ninth Circuit. It cannot be assumed, however, that all reviewing courts would uphold the validity of such involuntary transportation in the absence of probable cause.

b. Interrogation undertaken by Border Patrol agents following such localized transport of detainees should take place in an open, non-coercive setting; interrogation of such transported detainees inside a Border Patrol office or other police office would likely transform the detention into an arrest under controlling judicial precedents.

6. Under one recent Ninth Circuit precedent, the question whether state police may validly arrest alien suspects on probable cause that they have violated the INA's requirement that aliens carry registration documents, *see* 8 U.S.C. § 1304(e), may also depend upon whether they have reason to believe that federal officials *actually prosecute* suspects for such violations. This is significant because that misdemeanor provision may sometimes provide the only basis for the arrest. To the extent that arrests by California police nominally based on such INA misdemeanor charges are found to be a pretext for civil deportation proceedings, they are likely to be invalidated by the courts. (Section II.C.2).

7. There is established statutory authority for the deputation of state law enforcement officers as Deputy United States Marshals. This mechanism has been most commonly used to allow state officers to perform federal enforcement functions

in joint federal-state law enforcement task forces (e.g., anti-drug and fugitive pursuit task forces). (Section II.F).

a. Where the Attorney General has exercised her authority to delegate supplemental INA enforcement duties to the U.S. Marshals Service, state and local officers can be specially deputized as Special Deputy United States Marshals in order to perform supportive federal immigration enforcement functions.

b. Such arrangements were previously authorized by an Attorney General Order in August 1994, for a period of one year, in order to deal with a potential mass immigration emergency in the State of Florida.

II. ANALYSIS

A. *Validity and Scope of State Police Participation in Enforcing Federal Immigration Laws*

It is well-settled that state law enforcement officers are permitted to enforce federal statutes where such enforcement activities do not impair federal regulatory interests. *Ker v. California*, 374 U.S. 23 (1963); *Florida Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). This general principle extends to state enforcement of the Immigration and Naturalization Act as well. In *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983), for example, the Ninth Circuit held that "federal law does not preclude local enforcement of the criminal provisions of the [Immigration and Naturalization] Act." *Id.* at 475.

At the same time, federal law does not *require* state law enforcement agencies to assist in enforcing the INA. That the INA permits state police officers to make arrests and detentions, *see, e.g.*, 8 U.S.C. § 1324(c), does not mean that states must permit their police to do so. Rather, the INA enforcement authority of state police is subject to the provisions and limitations of state law.

In *People v. Barajas*, 81 Cal. App.3d 999, 147 Cal. Rptr. 195 (1978), the California Court of Appeal upheld the authority of California local police officers to make arrests for violations of 8 U.S.C. § 1325 (the illegal entry misdemeanor) and § 1326 (felony for alien to re-enter United States after deportation). In rejecting the defendant's argument that the arrest was illegal under INA warrant requirements, *see* 8 U.S.C. § 1357, the court determined that those requirements applied only to arrests by federal officers and then stated: "In the absence of a specific [federal] law regulating the mode of such an arrest, the legality of an arrest by local officers is determined by the law of arrest of the state in which it occurs, unless such law conflicts with the federal Constitution." 81 Cal. App.3d at 1006. Upholding the arrest under the "reasonable cause" standard of section 836 of the California Penal Code, the court stated:

> [The state officers'] knowledge of defendant's evasive conduct (use of a false name, claim to possession of a "green card" not on

> hand but at home, and lack of knowledge as to allow production of the card) during the April 28 incident, coupled with [the INS officer's] information, gave them ample probable cause to arrest for violation of 8 U.S.C. section 1325 or 1326.

Id. at 1007.

A 1984 opinion of the California Attorney General also concluded that neither federal nor California law bars state and local officials from assisting in the enforcement of federal immigration laws. *See* 67 Ops. Cal. Atty. Gen. 331, Opinion No. 83–902 (July 24, 1984). The opinion stated that, in the absence of federal statutory restrictions on such activity, "we would look to California law to determine the role state and local officials in California may play in that regard." *Id.* The opinion's central conclusion was that there is no legally enforceable *requirement* that California peace officers must report to the INS knowledge they might have concerning persons who have entered the United States illegally, although there is no prohibition against their doing so. More pertinently, the Attorney General's opinion did point out one particularly significant restriction of California law on INA enforcement by local police. In the case of *misdemeanor* violations, such as those covered by 8 U.S.C. §§ 1304(e) and 1325, an arrest may only be made when the officer has reasonable cause to believe that the person has committed the offense "*in his presence.*" 67 Ops. Cal. Atty. Gen. 331 n.10–11; Cal. Penal Code § 836 (emphasis added).

Subject to such restrictive state law provisions, it is recognized that state and local police may stop, detain, and arrest persons when there is reasonable suspicion or, in the case of arrests, probable cause that such persons have violated, or are violating, the federal immigration laws. *Gonzales*, 722 F.2d at 474; *Barajas*, 81 Cal. App.3d at 999; 67 Ops. Cal. Att'y Gen. 331, Op. No. 83–902.

We also note that the INA itself recognizes the authority of state officers to make arrests for criminal violations of federal immigration law. For example, 8 U.S.C. § 1324(c), governing the authority to arrest persons for bringing into the United States or harboring illegal aliens, provides as follows:

> No officer or person shall have authority to make any arrest for a violation of any provision of this section except officers and employees of the Service designated by the Attorney General, either individually or as a member of a class, *and all other officers whose duty it is to enforce criminal laws.* [emphasis added]

Moreover, in *Gonzales*, the Ninth Circuit explicitly rejected the claim that this state arrest authority does not extend to other criminal provisions of the INA, such as 8 U.S.C. §§ 1325 and 1326. *See* 722 F.2d at 475. The California Court of Appeal reached the same conclusion in *Barajas*. *See* 81 Cal. App.3d at 1006.

B. *Civil Enforcement/Deportable Aliens* *

Whether state officers may assist in enforcing the *civil* component of federal immigration law raises a separate issue. Deportation of aliens under the INA is a civil proceeding. For example, a lawfully admitted non-immigrant alien may become deportable if his visitor's visa expires or if his student status changes. In such circumstances, persons may become subject to civil deportation without having violated a criminal provision of the INA.

In *Gonzales*, the Ninth Circuit held that the authority of state officials to enforce the provisions of the INA "is limited to criminal violations." 772 F.2d at 476. The court based this distinction between the civil and criminal provisions of the INA on the theory that the former constitute a pervasive and preemptive regulatory scheme, whereas the latter do not.[2] Application of this rule would seem to preclude detentions by state officers based solely on suspicion of deportability (as opposed to *criminal* violations of the INA). *Accord Gates v. Superior Court*, 193 Cal. App.3d 205, 213, 238 Cal. Rptr. 592 (1987) ("The civil provisions of the INA constitute a pervasive regulatory scheme such as to grant exclusive federal jurisdiction over immigration, thereby preempting state enforcement.").

In an opinion issued in 1989,[3] this Office similarly recognized the distinction between the civil and criminal provisions of the INA for purposes of state law enforcement authority. We first expressed our belief that "the mere existence of a warrant of deportation for an alien does not provide sufficient probable cause to conclude that the criminal provisions [of the INA] have in fact been violated." 1989 OLC Op. at 8. We then concluded:

> Because 8 U.S.C. § 1251 makes clear that an alien who has lawfully entered this country, lawfully registered, and who has violated no criminal statute may still be deported for noncompliance with the noncriminal or civil immigration provisions, the mere existence of a warrant of deportation does not enable all state and local law enforcement officers to arrest the violator of those civil provisions.

Id. at 9.

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* Editor's Note: In 2002, the Office of Legal Counsel withdrew the advice set forth in this section.

[2] As the court stated:

> We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration. However, this case does not concern that broad scheme, but only a narrow and distinct element of it—the regulation of criminal immigration activity by aliens.

722 F.2d at 475.

[3] Memorandum for Joseph R. Davis, Assistant Director, Federal Bureau of Investigation, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Handling of INS Warrants of Deportation in Relation to NCIC Wanted Person File* at 5 (Apr. 11, 1989) ("1989 OLC Op.").

In that regard, 8 U.S.C. § 1357(a)(2) imposes substantial restrictions even upon the authority of *federal* officers to make warrantless arrests for purposes of civil deportation. It requires that the arresting officer reasonably believe the alien is in the United States illegally and that he is "likely to escape before a warrant can be obtained for his arrest." *See Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995) (asserting that even INS agents have no legitimate basis for a warrantless arrest of aliens subject to civil deportation unless the arresting officer reasonably believes that the alien is likely to escape before an arrest warrant can be obtained).

Taking all these authorities into account, we conclude that state and local police lack recognized legal authority to stop and detain an alien *solely on suspicion of civil deportability*, as opposed to a criminal violation of the immigration laws or other laws.

C. *Legal Authority and Standards for Detention or Arrest of Alien Suspects*

You have also asked for our opinion concerning the legal standards governing the detention of suspected illegal aliens under the circumstances most commonly confronted by police in the San Diego area. As an illustrative example of such circumstances, you have described the situation where a van or other vehicle carrying a number of possible illegal aliens is stopped by the police based on probable cause or reasonable suspicion that a state traffic violation or other criminal offense has been committed.[4] Although such circumstances clearly justify detention and processing of the driver and vehicle, the question arises as to what quantum or quality of indicators are necessary to sustain arrest or investigative detention of the alien passengers on the respective grounds of probable cause or reasonable suspicion. Additional issues concern the particular criminal provisions of the INA that may provide a valid basis for detention or arrest of alien suspects.

1. *General Principles and Permissible Considerations*

Courts have made clear that federal and state officers have authority briefly to detain persons based on reasonable suspicion that they have committed or are committing a violation of federal law, including the immigration laws. *See, e.g., Martinez v. Nygaard*, 831 F.2d 822, 827 (9th Cir. 1987) ("[T]o detain a worker short of an arrest, an INS officer must have an objectively reasonable suspicion that the particular worker is an illegal alien."). The general standards governing reasonable suspicion detentions of aliens transported in vehicles were recently summarized by the Ninth Circuit in *United States v. Rodriguez-Sanchez*, 23 F.3d 1488, 1492 (1994):

[4] We note that where state officials establish a fixed checkpoint for purposes of detecting illegal entry and related crimes, vehicles may be stopped for brief questioning even in the absence of any reasonable or individualized suspicion. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). The operation of such fixed checkpoints need not be authorized in advance by a judicial warrant, *id.* at 564–66, and need not be in immediate proximity to the national border (the checkpoint upheld in *Martinez-Fuerte* was 66 miles north of the Mexican border).

> Reasonable suspicion is not a mere phrase but has been given meaning such that suspicion is "reasonable" only if based on "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicle contains aliens who may be illegally in the country." [quoting from *United States v. Brignoni-Ponce*, 422 U.S. at 884]

For example, the Ninth Circuit upheld a state officer's reasonable suspicion detention of alien passengers in a parked vehicle in *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1395 (9th Cir. 1989). There, a Los Angeles police officer observed a parked van occupied by two men in the front seat and a number of others in the rear who appeared to be Hispanic males. Merchants in the area had previously reported suspicious activity around this van, notably the extensive comings and goings from the van after it would park on the street after 6 p.m., when the local patrolman would be off duty. The detaining officer was also aware that there was considerable heroin dealing in the area in question. The officer approached the van, noticed a list of names and numbers on the van's visor, and elicited a response from one of the passengers that he had recently crossed the U.S.-Mexico border and had paid money to be illegally transported into the United States. The officer then detained the van's occupants while he contacted the INS. The court upheld the detention against a challenge that it was not based upon a reasonable suspicion of illegal activity. *Id.* at 1394. Citing the circumstances described above, the court stated: "Taken together, these factors provide a founded suspicion that the occupants of a van fitting the description of appellant's van may have been engaged in illegal activity." *Id.* Significantly, the court did not find it necessary to establish that the officer had any particular *felony* violation in mind when he formed his reasonable suspicion.

In assessing alien detention issues, it must also be recognized that when police stop a vehicle on the basis of traffic offenses or other suspected crimes they may not ordinarily detain the vehicle's passengers beyond the period required for disposition of the matter that justified the initial stop. *See Martinez*, 831 F.2d at 827. However, observations made while investigating or processing the primary offense may provide independent basis for reasonable suspicion that either the driver or the passengers are violating the federal immigration laws, which would then justify further detention to investigate such violations within the bounds permitted by *Terry* and its progeny. *See United States v. Wilson*, 7 F.3d 828, 834 (9th Cir. 1993), *cert. denied*, 511 U.S. 1134 (1994).[5] Moreover, police would be permitted to inquire as to the immigration status of passengers in such a stopped vehicle as long as they do not unnecessarily prolong the length of the

[5] *See also United States v. Bloomfield*, 40 F.3d 910, 918 (8th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995), where the court held, "If, during a traffic stop, an officer develops a reasonable, articulable suspicion that a vehicle is carrying contraband, he has 'justification for a greater intrusion unrelated to the traffic offense.'" (citation omitted). The same reasoning would apply when a traffic stop leads to a reasonable suspicion that the vehicle is carrying illegal aliens.

initial detention for that purpose. The responses to such inquiries could then provide a basis for detention or arrest of the passengers by creating a reasonable suspicion or probable cause that they have committed an illegal entry or are aliens lacking proper registration documents.

Courts have also recognized that a reasonable suspicion created by one person may also support a reasonable suspicion as to others accompanying him in appropriate circumstances. Thus, the "traveling companion of a person whom the police reasonably suspected of illegally crossing the border" may also be detained on reasonable suspicion when there are indications that the accompanying individuals are acting in concert or complicity with the initial suspect. *See United States v. Tehrani*, 49 F.3d 54, 59–60 (2d Cir. 1995); *United States v. Patrick*, 899 F.2d 169, 172 (2d Cir. 1990). It follows that when state police have reasonable suspicion that a stopped driver may be engaged in transporting illegal aliens, a reasonable suspicion of related immigration violations may also be justified as to his passengers.

Reasonable suspicion determinations are based on the totality of circumstances in each case and are "not readily reduced to 'a neat set of legal rules.'" *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1416 (9th Cir. 1989). Reliable predictions of judicial rulings in this area are especially difficult within the Ninth Circuit, where different panels have reached inconsistent conclusions in applying the reasonable suspicion standard to extremely similar factual situations. *Compare United States v. Franco-Munoz*, 952 F.2d 1055 (9th Cir. 1991), *cert. denied*, 509 U.S. 911 (1993) (reasonable suspicion upheld where heavily-laden vehicle driven by male of Hispanic appearance was traveling in area known for alien smuggling) *with United States v. Rodriguez*, 976 F.2d 592 (9th Cir. 1992), *amended*, 997 F.2d 1306 (9th Cir. 1993) (similar fact pattern held *insufficient* to support reasonable suspicion). Nonetheless, we believe several general principles are both relevant and well-established in the caselaw as guidelines for the permissibility of stops and detentions of vehicles or their passengers in this context:

a. Reasonable suspicion must be based upon an "objective basis" and "specific, articulable facts," rather than on "broad profiles which cast suspicion on entire categories of people without any individualized suspicion of the particular person . . . ." *United States v. Garcia-Camacho*, 53 F.3d 244, 246 (9th Cir. 1995). These specific, articulable facts must provide "a rational basis for separating out the illegal aliens from American citizens and legal aliens." *Nicacio v. INS*, 797 F.2d 700, 705 (9th Cir. 1985).

b. Officers may not arbitrarily stop all persons of Mexican or Hispanic appearance (or that of any other particular nationality or ethnic group) to question them regarding immigration/citizenship status without any other specific grounds for reasonable suspicion that they are illegal aliens. *See United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Hernandez-Alvorado*, 891 F.2d at 1416. Likewise, Hispanic or foreign-sounding names do not in themselves provide a valid basis

for reasonable suspicion. *See Orhorhaghe v. INS*, 38 F.3d 488, 497–98 (9th Cir. 1994).

c. Neither the ramshackle appearance of the vehicle, nor the unkempt, ill-dressed, and nervous appearance of the passengers in itself provides a sound basis for reasonable suspicion. *See United States v. Ortega-Serrano*, 788 F.2d 299 (5th Cir. 1986).

d. As outlined by the Supreme Court in *Brignoni-Ponce*, 422 U.S. at 884–85, the following are some of the common factors that an officer *may* rely upon in combination with one another in determining whether a vehicle or its occupant aliens may be detained on reasonable suspicion of INA violations:

(1) characteristics of the area in which the vehicle is encountered (e.g., an established thoroughfare for alien smuggling);

(2) proximity of that area to the U.S. border;

(3) usual patterns of alien-smuggling traffic, including the time of day favored for such activity;

(4) knowledge that illegal border crossings have recently occurred in the area where the vehicle is spotted;

(5) the driver's extraordinary behavior or driving irregularities, such as a sudden and abrupt exit from the highway onto an exit ramp (*see Rodriguez-Sanchez*, 23 F.3d at 1493) or similarly striking evasive maneuvers that exceed the merely negligent;

(6) telltale characteristics of the vehicle or its passengers (e.g., "The vehicle may appear to be heavily loaded, it may have an extraordinary number of passengers, or the officers may observe persons trying to hide." *Brignoni-Ponce*, 422 U.S. at 885).

e. Other examples of the "more particularized information" that courts require to justify reasonable suspicion detentions of vehicles or passengers include the following, *see Hernandez-Alvarado*, 891 F.2d at 1417:

(1) tips from informants that a specific vehicle or address is being used for smuggling or concealing illegal aliens;

(2) evidence that a pickup or delivery of aliens is likely to be made in a particular place and at a particular time, derived from observable facts (e.g., large numbers of footprints leading to a highway on a known alien-smuggling route and then discontinuing at the same roadside point, *see United States v. Cortez*, 449 U.S. 411, 419–21 (1981);

(3) forms of particularized behavior associated with the evasive tactics used in illegal entry, such as manifestly coordinated evasive behavior and slouching or similar unusual movements designed to avoid detection of vehicular passengers, *see United States v. Garcia-Nunez*, 709 F.2d 559 (9th Cir. 1983); and

(4) persons manifestly conducting counter-surveillance or serving as lookouts.

2. *Detention on the Basis of Suspected Misdemeanor Violations and the "Pretext" Issue*

Both an alien's failure to carry alien registration documentation and a first offense of illegal entry into the United States constitute federal misdemeanors. *See* 8 U.S.C. §§1304(e)[6] and 1325. We are advised that these are the provisions of the INA that would most commonly provide the basis for a reasonable suspicion that transient aliens have committed or are committing a crime.

Reliable indications that the suspect is an alien, coupled with his failure to produce alien registration documentation or a "green card," may provide probable cause for an arrest under the lack of documentation provision of §1304(e). *See Mountain High Knitting, Inc.*, 51 F.3d at 218; *Martinez*, 831 F.2d at 828. In the former decision, however, the Ninth Circuit raised some doubts concerning reliance on §1304 as an independent basis for warrantless alien arrests. Without actually resolving the issue, the court indicated a strong predisposition to accept the aliens' contentions that the INS did not actually arrest them for violating the lack of documentation provision and that arrests on that basis were only a pretext for *civil* arrests on suspicion of illegal entry for purposes of deportation. *Mountain High Knitting, Inc.*, 51 F.3d at 218. On the basis of those contentions, the Ninth Circuit remanded the case for the district court to assess "whether reasonable INS officers would have arrested appellants solely for violating §1304(e) absent suspicion of illegal entry." *Id.* at 219.

With respect to §1325's illegal entry provision, the Ninth Circuit has held that, while the lack of documentation or "other admission of illegal presence may be some indication of illegal entry," it does not without more provide probable cause for a violation of 8 U.S.C. §1325(a). *Mountain High Knitting, Inc.*, 51 F.3d at 218; *Gonzales*, 722 F.2d at 476–77. The Ninth Circuit has also stressed the significance of the distinction between illegal *entry* (a crime that is subject to enforcement by state officers) and mere "illegal presence," which generally provides grounds only for civil deportation and is therefore not subject to non-federal enforcement. *Id.* That distinction has additional significance for purposes of California law, which requires that warrantless arrests for misdemeanors (such as a first illegal entry violation) may only be made when the offense is committed in the arresting officer's presence.[7]

These considerations have raised concerns as to the viability of these frequently-violated federal misdemeanor provisions as a basis for lawful detention or arrest of alien suspects by state officers. Subject to the particular factual circumstances and established federal prosecution practices, we nonetheless believe that Cali-

[6] The requirements of 8 U.S.C. §1304(e) apply only to aliens who have been registered and issued a registration receipt card. *See United States v. Mendez-Lopez*, 528 F. Supp. 972 (N.D. Okla. 1981). An alien's failure to register with INS after remaining in the United States for 30 days or longer is separately prohibited under 8 U.S.C. §1302. Violations of the latter section are punishable by up to six months imprisonment under 8 U.S.C. §1306 and consequently also constitute misdemeanors under California law.

[7] This requirement could present special problems in connection with the illegal entry misdemeanors—which have been considered complete and consummated (and thus no longer subject to an officer's personal observation) when the alien has reached a "place of repose" within the United States. *See Gates*, 193 Cal. App.3d at 216. This issue is discussed in further detail in section II.C.3, *infra*.

fornia police may validly rely upon the INA's misdemeanor offenses, as well as its felony offenses, in detaining alien suspects on reasonable suspicion of a federal criminal violation. We base this conclusion on several considerations.

Initially, we do not believe that the restrictive "pretext" holding in *Mountain High Knitting* should be considered generally applicable to investigative detentions of the type at issue here. Although *Mountain High Knitting* subjected a full-fledged *arrest* (based on probable cause of a § 1304(e) violation) to additional scrutiny for pretext, it does not purport to establish a general rule imposing this second layer of scrutiny upon the reasonable suspicion assessments that suffice to justify preventive detention.

By definition, a reasonable suspicion does not entail the same degree of specificity and certainty regarding the suspected offense as does a determination of probable cause.[8] In this regard, the courts have specifically upheld the validity of *Terry* detentions imposed by state officers in order to allow for the arrival of federal officers to make a more informed, expert assessment of probable cause. As explained by the Sixth Circuit in upholding a 45-minute detention of drug suspects to await arrival of trained DEA agents: "The sheriff's deputies were not trained as drug agents and needed the DEA agents' expertise to confirm or dispel their suspicions." *United States v. Winfrey*, 915 F.2d 212 (6th Cir. 1990), *cert. denied*, 498 U.S. 1039 (1991). This view is further confirmed by the Supreme Court's repeated observation that, in assessing the reasonableness of *Terry* stops, "the Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *United States v. Montoya de Hernandez*, 473 U.S. 531, 544 (1985); *Adams v. Williams*, 407 U.S. 143, 145 (1972). As a general rule, therefore, we do not believe that state officers can be expected to make subtle judgments concerning the vagaries of federal prosecution policy in exercising their authority to detain suspects on reasonable suspicion that a criminal violation of the INA has occurred. Such complex assessments may properly be left to the federal officers who are responsible for making probable cause and arrest determinations when they arrive at the scene of detention. Thus, unless the state and local police are privy to firm and specific information that federal officials will *not* prosecute INA misdemeanor violations, we believe they may impose investigative detention based on reasonable suspicion that an alien has not registered with the INS as required, is not in possession of required registration documentation, or has illegally entered the United States.

Although the lack of proper documentation does not, without more, provide probable cause for arrest based on an illegal entry violation, the Ninth Circuit has acknowledged that it "may be some indication of illegal entry." *Gonzales*,

[8] This point is well-illustrated in *Ramirez-Sandoval*, 872 F.2d at 1395, where the Ninth Circuit upheld a reasonable suspicion detention based upon circumstances which indicated merely that the occupants of a parked van "may well have been engaged in illegal activity."

722 F.2d at 477. Accordingly, we believe that in appropriate circumstances — e.g., where there are other objective indicators of illegal entry, such as the time, place, and circumstances of the suspect's movements — lack of proper documentation may provide grounds for *reasonable suspicion* that an alien has committed an illegal entry. Armed with such reasonable suspicion that a federal crime has occurred, it is appropriate and consistent with relevant precedent for state officers to detain the undocumented alien for a reasonable period pending an expert determination of probable cause and suitability for arrest by the Border Patrol or other INS agents. *See Winfrey*, 915 F.2d at 217–18. Again, however, such reasonable detention practices would be vulnerable to challenge on the "pretext" grounds invoked in *Mountain High Knitting* if federal authorities have made it clear that illegal entry misdemeanors will not be prosecuted and that the sole remedy to be pursued for such violations is civil deportation.

Additionally, it is not clear that the California Code's provision that warrantless misdemeanor *arrests* can only be made when the misdemeanor was committed in the officer's presence is necessarily applicable to otherwise valid *investigative detentions*. In terms, that provision applies only to arrests, *see* Cal. Penal Code § 836(a) (West 1994), and investigative detentions under *Terry* are legally distinct from full-fledged arrests. In that regard, the California Court of Appeal described the California standard for investigative detentions as follows:

> An investigative detention is justified when the facts and circumstances known or apparent to the officer, including specific or articulable facts, cause him to suspect (1) a *crime* has occurred and (2) the person he intends to detain is involved in the criminal activity. (*In re Tony C.* (1978), 21 Cal.3d 888, 893, 148 Cal. Rptr. 366, 582 P.2d 957.)

In re Carlos M., 220 Cal. App.3d 372, 380, 269 Cal. Rptr. 447, 452 (Cal. App. 4 Dist. 1990) (emphasis added). Significantly, the investigative detention standard requires only reasonable suspicion that a "crime" has occurred, and not necessarily a felony. Accordingly, while we would defer to the California legal authorities' interpretations of California law, we believe that alien suspects may be detained by state officers on reasonable suspicion of a misdemeanor violation of the INA even though the officer did not personally observe commission of the offense and therefore could not himself lawfully undertake a warrantless arrest of the suspect under California law. Although the state officers might not themselves be able to arrest the federal misdemeanor suspects — at least absent probable cause that a separate state felony has been committed — their authority to assist federal officers in doing so is well established.

3. *Illegal Entry as a Basis for Arrest—the Complete or Continuing Offense Issue*

As indicated above, special questions have been raised concerning the utility of the illegal entry statute, 8 U.S.C. § 1325(a), as a basis for detention or arrests by state officers. In *United States v. Rincon-Jimenez*, 595 F.2d 1192, 1194 (9th Cir. 1979), the Ninth Circuit held that illegal entry is not a continuing violation — that is, the offense is complete *for statute of limitations purposes* upon the alien's successful entry into the United States. In *Gonzales*, the Ninth Circuit indicated that *Rincon-Jimenez* also stands for the proposition that a § 1325 violation is also complete "at the time of entry" for purposes of determining whether the offense has been committed in the presence of an officer under applicable state law. *See* 722 F.2d at 475–76. Since § 1325 is a misdemeanor, a California officer cannot make a warrantless arrest for its violation unless it is committed in his presence. In light of these considerations, in *Gates v. Superior Court*, the court held: "Once an alien has reached a place of repose within the country, the misdemeanor of improper entry ends. At that point, an LAPD officer may not *arrest* for this offense because it did not occur in the officer's presence." 193 Cal. App.3d at 216 (emphasis added).

We should note, however, that aspects of the Supreme Court's opinion in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), cast some doubt upon the proposition that an illegal entry violation is complete upon entry and therefore cannot be considered a "continuing" crime that can be observed by an officer after the alien has cleared the border. In that opinion, the Court stated that the presence of an unregistered alien who had entered the United States illegally "without more, constitutes a crime" and that such an alien's "release within our borders would immediately subject him to criminal penalties." *Id.* at 1047. Notwithstanding the dissent's specific invocation of the holding in *Rincon-Jimenez*, *id.* at 1057 (White, J., dissenting), the Court stated, "We need not decide whether or not remaining in this country following an illegal entry is a continuing or a completed crime under § 1325." *Id.* at 1047. If the Court were to view an undetected illegal entry as a continuing crime, the "committed in the presence" requirement of California law would present no obstacle to warrantless arrests of illegal entrants by California officers.

Absent an authoritative clarifying decision on this issue, however, warrantless arrests by California state officers for illegal entry violations must be considered legally invalid when the alien has already completed his entry into the United States.

The law is not clear, however, as to exactly when an illegal entry is complete for purposes of determining whether it has occurred in the presence of the arresting officer. Without explanation, analysis, or citation of authority, the *Gates* opinion tersely states that an illegal entry is complete for that purpose when "an alien has reached a place of repose within the country," 193 Cal. App.3d at 216. Despite its lack of analysis, this statement remains the most authoritative interpretation of the California "in presence" requirement as applied to illegal entry viola-

tions. Applying that interpretation, we do not believe that aliens apprehended in the vehicle in which they have illegally crossed the border would be held to have reached a "place of repose" within the United States as long as the apprehension occurs before the aliens have been delivered to their immediate arrival destination within the United States. *Cf. United States v. Aslam*, 936 F.2d 751, 755 (2d Cir. 1991). Under those circumstances, we believe warrantless arrests would be permissible under the formulation adopted in *Gates*.

In any event, we believe that reasonable suspicion that such illegal entry has occurred enables state officers to detain such alien suspects for reasonable periods pending evaluation, processing, and possible arrest by Border Patrol officers. That raises the question of what constitutes a reasonable period for such purposes.

D. *Length of Detention Issues*

In light of the San Diego Police Force policy of limiting the detention of alien suspects (pending the arrival of Border Patrol assistance) to 20 minutes, you have inquired whether longer detention periods of, for example, one hour would be consistent with Fourth Amendment requirements.

Where the police have *probable cause to arrest* the alien suspect, periods of detention lasting one-hour or more would present no constitutional problem. *See United States v. Mondello*, 927 F.2d 1463, 1471 (9th Cir. 1991) (90-minute detention of drug suspect upheld where positive canine sniff test had already established probable cause). The pertinent time limitation in the arrest context is the requirement that the arrestee must generally[9] be given a probable cause hearing before a magistrate or judge within 48 hours after arrest. Thus, an alien suspect who may be legitimately regarded as under arrest may be detained for periods exceeding one-hour pending the arrival of Border Patrol agents or other necessary federal enforcement resources. However, where the detention follows a mere investigative stop based on reasonable suspicion under *Terry v. Ohio*, 392 U.S. 1 (1968)—for example, where probable cause for arrest is lacking and does not materialize during the stop—detention for an excessive length of time under the circumstances may violate the Fourth Amendment's standard of reasonableness.

In *United States v. Sharpe*, 470 U.S. 675, 685 (1985), the Supreme Court established that there is "no rigid time limitation on *Terry* stops," but that a stop may be excessive if it involves "delay unnecessary to the legitimate investigation of the law enforcement officers," *id.* at 687.[10] As the Court more fully explained in upholding a 20-minute detention:

[9] The temporal limitation on detention of an arrestee without a magistrate's or judge's determination of probable cause may sometimes be less than 48 hours (i.e., the delay must never be "unreasonable" under the circumstances) and sometimes more (i.e., when there is a "bona fide emergency or other extraordinary circumstance"). *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991).

[10] We do not believe that *United States v. Place*, 462 U.S. 696 (1983) establishes a hard rule that a detention for as long as 90 minutes, whether of luggage or person, is per se excessive and unreasonable. There, the Court held that the 90-minute detention of a suspect's luggage to arrange for a canine sniff test was excessive and unreason-

> While it is clear that "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion," we have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. Much as a "bright line" rule would be desirable, in evaluating whether an investigative detention is unreasonable, common sense and ordinary human experience must govern over rigid criteria.

Id. at 685 (quoting *United States v. Place*, 462 U.S. at 709 (citations omitted)).

The Court reiterated this pragmatic approach to the length-of-detention issue in *Montoya de Hernandez*, where it upheld the reasonableness of a *16-hour* border detention of a suspected alimentary canal drug-smuggler. As the Court stated:

> Here, respondent was detained incommunicado for almost 16 hours before inspectors sought a warrant; . . . . This length of time undoubtedly exceeds any other detention we have approved under reasonable suspicion. But we have also consistently rejected hard-and-fast time limits, *Sharpe*, *supra*; *Place*, *supra*, at 709, n.10. Instead, "common sense and ordinary human experience must govern over rigid criteria." *Sharpe*, *supra*, at 685.

473 U.S. at 542. However, the 16-hour detention in *Montoya de Hernandez* occurred in the border context, and the holding therefore should not be considered generally applicable to detentions outside the border area.

Thus, the Supreme Court has expressly rejected the imposition of rigid, arbitrary time limits upon the permissible duration of detention for *Terry* stops. Instead, the reasonableness of the detention is evaluated in light of the particular purpose of the stop in question and the time "reasonably needed" to take necessary and appropriate measures to achieve that purpose. The dispositive question is whether the detention is "*unnecessarily* prolonged." *Sharpe*, 470 U.S. at 685. [11]

Guided by these considerations, various federal courts have upheld *Terry* detentions ranging in length from 20 minutes to two hours. *E.g.*, *Sharpe*, 470 U.S.

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able under the circumstances. *Id.* at 709. The Supreme Court's subsequent opinion in *Sharpe*, however, expressly limited *Place*'s reach by stressing that in *Place* the police had possessed prior knowledge of the suspect's arrival time, could therefore have made advance arrangements for more expeditious processing, and thus had not acted diligently in pursuing their investigation. 470 U.S. at 684–85. *Sharpe* thus makes clear that the police's exercise of reasonable diligence, rather than any arbitrarily-drawn time limit, is the crucial factor in determining Fourth Amendment reasonableness in this context.

[11] *Sharpe*'s specific rejection of rigid, preconceived limitations on the duration of *Terry* stops is consistent with the Supreme Court's more recently-stated emphasis that Fourth Amendment requirements for prompt probable cause hearings following warrantless arrests do "not impose on the States a rigid procedural framework. Rather, individual States may choose to comply in different ways." *County of Riverside*, 500 U.S. at 53 (vacating as erroneous a Ninth Circuit panel's contrary holding that "no flexibility was permitted," *see id.* at 54).

at 687 (20-minute detention not unreasonable); *Bloomfield*, 40 F.3d at 917 (one-hour detention of motorist to await drug-sniffing dog held reasonable); *United States v. Adams*, 39 F.3d 1178 (4th Cir. 1994) (unpublished opinion) (45-minute detention upheld as reasonable); *United States v. Frost*, 999 F.2d 737, 741–42 (3d Cir.), *cert. denied*, 510 U.S. 1001 (1993) (detention of nearly one hour to await drug dog held reasonable); *Courson v. McMillian*, 939 F.2d 1479, 1491 (11th Cir. 1991) (30 minutes not unreasonable for an investigatory stop); *Jackson v. Wren*, 893 F.2d 1334 (6th Cir. 1990) (unpublished opinion) (detention for over two hours to await arrival of DEA agents upheld); *United States v. Hardy*, 855 F.2d 753, 761 (11th Cir. 1988), *cert. denied*, 489 U.S. 1019 (1989) (50-minute roadside detention to await drug dog held reasonable); *United States v. Davies*, 768 F.2d 893, 902 (7th Cir.), *cert. denied*, 474 U.S. 1008 (1985) (45-minute detention "for further questioning and advice from their superiors" held a valid investigative stop); *United States v. Willis*, 759 F.2d 1486, 1497 (11th Cir.), *cert. denied*, 474 U.S. 849 (1985); (25-minute detention upheld); *United States v. Borrero*, 770 F. Supp. 1178, 1189–91 (E.D. Mich. 1991) (70-minute detention by DEA agents at airport held reasonable).

It should be noted, however, that an opinion issued by a Ninth Circuit panel in 1994 suggests a more restrictive approach to the length-of-detention issue. In *United States v. $191,910.00 in U.S. Currency*, 16 F.3d 1051 (9th Cir. 1994) ("*Currency*"), Judge Reinhardt held that the 90-minute detention of a drug suspect's luggage, pending the arrival of a drug-sniffing dog, was in itself sufficient to invalidate the seizure under the Fourth Amendment. Relying heavily on the Supreme Court's baggage-detention ruling in *Place*—while seeking to minimize the Court's subsequent emphatic rejection of "rigid time limitations" in *Sharpe*[12]—the court adopted the view that the *Place* opinion established an "outer boundary of permissible seizures" that falls "somewhere short of 90 minutes." *Currency*, 16 F.3d at 1060.

We believe that this aspect of the *Currency* holding is irreconcilable with the Supreme Court's holdings in *Sharpe* and *Montoya de Hernandez*. As demonstrated in the quotes set forth above, the *Sharpe* opinion repeatedly and unmistakably emphasized that the constitutionality of *Terry* stops may not be mechanically measured against any pre-ordained time limitation. It held that the establishment of such a time limitation "is clearly and fundamentally at odds with our approach in this area." 470 U.S. at 686. Yet that is precisely what the panel purported to ordain in the *Currency* case ("the detention of Morgan's baggage violated the Fourth Amendment solely because of its length"). 16 F.3d at 1060.

[12] The *Currency* court's broad application of the *Place* ruling is incompatible with the Supreme Court's narrowing interpretation of that same ruling in the *Sharpe* opinion. *See supra* note 10. As the Court explained in *Sharpe*, "[I]n *Place*, we expressly rejected the suggestion that we adopt a hard-and-fast time limit for a permissible *Terry* stop." 470 U.S. at 686. This emphatic and unambiguous holding in *Sharpe* was studiously ignored by the panel opinion in the *Currency* case. *See* 16 F.3d at 1060 n.17.

Notwithstanding our view that *Currency's* adoption of a fixed time limit for *Terry* stops is erroneous—a limit that would fall "somewhere short of 90 minutes," but certainly no lower than 30 minutes[13]—that opinion has neither been overruled nor directly refuted by subsequent Ninth Circuit opinions. Accordingly, the approach reflected in the *Currency* opinion should be taken into account in formulating enforcement guidelines in this area. Moreover, it is significant to note that the *Currency* opinion imposed a 90-minute limitation on luggage detentions; it is reasonable to expect that that panel might be inclined to impose stricter limitations on detentions of persons.

However, considered in conjunction with the more authoritative Supreme Court holding in *Sharpe*, as well as more permissive Ninth Circuit opinions such as *Mondello*, we believe that the *Currency* opinion should be interpreted no more broadly than its holding specifically requires—i.e., that investigative detentions may not exceed 90 minutes in duration. To extrapolate a still more restrictive rule for the Ninth Circuit (e.g., a rule treating one-hour stops as per se unreasonable) would ascribe to the *Currency* opinion more weight than is warranted by its juridical authority relative to *Sharpe*, *Mondello*, and other less restrictive precedents. *Cf. County of Riverside*, 500 U.S. at 54–55 (where the Supreme Court rejected a comparably restrictive and "inflexible" Fourth Amendment interpretation by a Ninth Circuit panel).

We believe that the necessity of detaining immigration suspects until Border Patrol/INS agents arrive is analogous to the necessity of detaining drug suspects pending the arrival of DEA agents or drug-sniffing dogs for purposes of evaluating the duration of detention for reasonableness. In both situations, the purpose of the delay is to allow for the utilization of enhanced investigative or enforcement resources that are necessary to effectuate the legitimate purpose of the investigative detention. *See Winfrey*, 915 F.2d at 217 (45-minute detention of drug suspects by local officers to await arrival of federal DEA agents upheld, where "[t]he sheriff's deputies were not trained as drug agents and needed the DEA agents' expertise to confirm or dispel their suspicions"). Accordingly, the precedents upholding various periods of detention as reasonable to permit the arrival of DEA agents or drug-sniffing dogs provide valid guidelines for determining a reasonable period of detention in the immigrant suspect situations posed here as well. Based on those precedents, we believe that if Border Patrol agents exercising reasonable diligence require 45 minutes to one hour to reach the scene of detention, detentions of that length would be sustainable under *Sharpe* where there is reasonable suspicion that the detained aliens have violated the federal immigration laws. We caution, however, that when Border Patrol Agents do not promptly arrest the de-

[13] *See Mondello*, 927 F.2d at 1471, where another Ninth Circuit panel (Trott, J.) upheld the reasonableness of a 30-minute investigative stop to permit the arrival of drug-detecting dogs. There is no suggestion in *Currency* of disagreement with *Mondello*'s approval of a 30-minute *Terry* detention.

tainees, the additional period of detention required by them should be counted in calculating the permissible duration of detention.

Police Force Policies. We note that further complications may arise in this area from the language contained in written guidelines or policies used by state or local police forces. For example, if such guidelines specify that subjects may only be detained based on reasonable suspicion of criminal activity that is *unrelated to the immigration laws*, the legal basis for detentions pending the arrival of Border Patrol agents could be undercut. *Sharpe* requires that an extended *Terry* detention must be related to "the law enforcement purposes to be served by the stop," 470 U.S. at 685, and Border Patrol assistance is obviously not needed to deal with criminal activity unrelated to immigration status.

It is our understanding that the need for expanding the maximum alien-suspect *Terry* detention period from 20 minutes to as long as one-hour is premised upon the time required for Border Patrol agents to arrive on the scene to further investigate and process the INA violation. Under *Sharpe*, such extended detention must be related to the law enforcement purposes to be served by the stop or the further reasonable suspicions arising during the stop. However, if a Police Force policy states that detentions may only be made for *non-immigration* enforcement purposes, detentions imposed to await the Border Patrol would be vulnerable to challenge based on the limiting language of the policy. To minimize this complication, state and local police forces could be urged to modify their policies or guidelines to remove provisions indicating that *Terry* stops and detentions of undocumented aliens must be based on reasonable suspicion of criminal activity that is unrelated to immigration status or enforcement of federal immigration law.

In sum, we conclude that "reasonable suspicion" detention of undocumented aliens by local police for periods in the range of 45 to 60 minutes should comply with Fourth Amendment requirements when that much time is required to enable Border Patrol agents to arrive at the scene exercising reasonable diligence. This assessment presumes that the involved local police force does not disavow any purpose of assisting federal enforcement of the immigration laws in making such stops. Although the Supreme Court's *Sharpe* opinion expressly repudiates any rigid time limitation on reasonable stops under *Terry*, we caution that the Ninth Circuit panel opinion in the *Currency* case has held that stops of 90 minutes, and perhaps less, are per se unreasonable under the Fourth Amendment. Accordingly, we would not recommend adoption of a guideline establishing a period any greater than 45 to 60 minutes as a benchmark for maximum permissible detention periods. Moreover, any guidelines or benchmarks adopted in this area should stress that the maximum permissible period is premised upon the assumption that such a time period is *needed* to allow for the arrival and assistance of Border Patrol agents or other necessary support resources. Guidelines or rules should indicate that extended detention periods ranging roughly from fifteen minutes to an hour are only justified when that much time is genuinely needed to carry out

the permissible objectives of the stop. Allowing for the arrival of Border Patrol agents to properly handle the suspected violation of federal immigration law provides such justification.

E. *Transportation of Aliens by State/Local Police*

Given the difficulities of Border Patrol agents promptly reaching the scene where state officers have stopped alien suspects, you have asked whether it would be lawful for the state police to transport the suspects to the federal officials instead. The constitutional issue is whether such involuntary transportation would necessarily transform a valid investigative detention into an arrest that would violate the Fourth Amendment in the absence of probable cause.

In *Hayes v. Florida*, 470 U.S. 811 (1985), the Supreme Court held that the line between investigative detention and full-fledged arrest is crossed when the police "forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes." *Id.* at 816. Similarly, in *United States v. Recalde*, 761 F.2d 1448 (10th Cir. 1985), the court upheld the Fourth Amendment claims of a drug suspect who "was taken from a public highway without his consent and transported five miles to a police station, where he was placed in a small room for further investigation and questioning." *Id.* at 1456. The Ninth Circuit invoked the Supreme Court's opinion in *Dunaway v. New York*, 442 U.S. 200 (1979), to the same effect in *Gonzales v. City of Peoria*, 722 F.2d at 477:

> If the seizure involves anything more than the brief and narrowly-defined intrusion authorized by *Terry*, it must be justified by probable cause. *Dunway*, 442 U.S. at 212; *Brignoni-Ponce*, 422 U.S. at 882. *Dunway* makes absolutely clear that where the defendant is transported to the police station and placed in a cell or interrogation room he has been arrested, even if the purpose of the seizure is investigatory, rather than accusatory. Because such a seizure constitutes an arrest, it must be supported by probable cause.

Id. at 477 (some citations omitted). *See also United States v. Obasa*, 15 F.3d 603, 608–10 (6th Cir. 1994) (holding that a detention following a highway taxi stop ripened into an arrest when the defendant was searched, given *Miranda* warnings, and transported back to the airport police station). These opinions reflect the view that the involuntary transportation of *Terry* detainees to a confined and coercive setting for further interrogation or investigation transforms the detention into an arrest, and can therefore be sustained only on the basis of probable cause.

Other opinions, however, have recognized that special circumstances may sometimes permit the limited transportation of *Terry* detainees without entailing an

unconstitutional arrest. The circumstances justifying such transport were summarized by the Ninth Circuit in *United States v. Baron*, 860 F.2d 911 (1988), *cert. denied*, 490 U.S. 1040 (1989), following a survey of the precedents:

> The principles that we distill from these cases are that the police may move a suspect without exceeding the bounds of the *Terry*-stop when it is necessary for safety or security reasons, *when it is the least intrusive method available to achieve the legitimate goals of the stop*, and when moving the suspect does not make the circumstances of the detention so coercive that the detention becomes indistinguishable from an arrest.

Id. at 915–16 (citations omitted; emphasis added).

Several recent California opinions have also recognized that transportation of a detained suspect may be authorized on less than probable cause where it is reasonably necessary to accomplish quickly the purposes of the detention. *In re Carlos M.*, 220 Cal. App.3d 372, 269 Cal. Rptr. 447 (1990); *In re Starvon*, 29 Cal. Rptr.2d 471 (Cal. App. 2 Dist. 1994). In *In re Carlos M.*, the court rejected arguments that the handcuffing and forced transportation of a juvenile sexual assault suspect to a hospital for identification by the victim were beyond the scope of a *Terry* stop and transformed the detention into a de facto arrest. In so holding, the court stressed that the officers were unable to obtain the suspect's consent to the transport because he spoke only Spanish and the detaining officer spoke no Spanish. The court also noted that alternative arrangements for bringing the victim to the scene of the detention would have required a two-hour delay. Taking all these facts into account, the court concluded that the transportation of the detained suspect was reasonable.

The leading decisions invalidating transportation of detainees have frequently stressed the coercive atmosphere of the place to which the suspects are transported—i.e., "the coerciveness created by isolating a suspect in a private space controlled by the police," *Baron*, 860 F.2d at 916—rather than the act of transporting per se. We also consider it significant that both *Baron* and *In re Carlos M.* stressed the point that transporting detainees may be justified where it is the least intrusive means to achieve the legitimate goals of the investigative detention.

Where alien suspects are validly detained on reasonable suspicion of an immigration crime, the detention may be reasonably extended in order to permit Border Patrol agents to make an expert assessment of probable cause and propriety of arrest. *Cf. Winfrey*, 915 F.2d at 217–18. In some situations, the Border Patrol's assistance may be more promptly and safely obtained by transporting the aliens to the agents rather than by awaiting the latters' arrival (e.g., where their duty requirements make it unworkable for them promptly to leave a particular location when called by the state police). In those particular circumstances, we believe

that transporting the suspects a reasonable distance to the agents could properly be viewed as "the least intrusive method available to achieve the legitimate goals" of the detention, *Baron*, 860 F.2d at 915, and would not violate the Fourth Amendment. This conclusion assumes that the ensuing interrogation or assessment by the Border Patrol agents would take place in an unconfined or "noncoercive" location rather than in an enclosed or coercive setting such as a police station. *Compare Gonzales*, 722 F.2d at 477 (stressing that transporting suspects to police station and placing them in a cell or interrogation room results in an arrest, even if the purpose is "investigatory rather than accusatory").

F. *Deputation of State Officers to Enforce Federal Immigration Laws*

You have also inquired whether state and local law enforcement personnel may be formally deputized or cross-designated as federal officers by the Attorney General in order to enhance their authority to enforce the immigration laws. So deputized, such personnel would be empowered to make warrantless arrests of illegal immigration suspects and perform certain other INA enforcement tasks that they might not otherwise be authorized to do in their capacity as state officers. [14] We conclude that the state officials could be deputized for these purposes, but it would be in the capacity of Deputy U.S. Marshals exercising special authority to enforce the immigration laws conferred on the U.S. Marshals Service by the Attorney General. [15]

This office has previously opined that there is adequate statutory authority for special deputations of state and local law enforcement officials (including members of the State Militia) for purposes of assisting federal law enforcement in a mass immigration emergency. *See* Memorandum for David Nachtsheim, Emergency Planning Coordinator, Immigration and Naturalization Service, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Operation Distant Shore Draft Plan* (Oct. 15, 1993). By special deputations, we referred to temporary designations as Deputy U.S. Marshals under the provisions of 28 U.S.C. §§ 561(f) and 566(c).

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[14] Assuming state or local authorities agree to the federal deputation of their officers, and that such deputation is compatible with their status under California law, state law restrictions that would otherwise bar enforcement actions that Deputy U.S. Marshals are authorized to perform under federal law would be overriden by the Supremacy Clause in the case of state officers duly deputized under 28 U.S.C. §§566(c) or 561(f). *See* U.S. Const. art. VI, cl. 2.

[15] Individual state officers could also presumably be assigned on detail to the Department of Justice ("Department") or INS under the appropriate provisions of the Intergovernmental Personnel Act ("IPA"), 5 U.S.C. §§3372, 3374. It is our understanding that details under the IPA generally involve the temporary assignment of individual employees to full-time duty in a federal agency, rather than the conferring of special federal authority to be exercised within the context of the officer's ongoing state law enforcement duties. However, as further provided in the IPA, "The supervision of the duties of such an employee may be governed by agreement between the Federal agency and the State or local government concerned." 5 U.S.C. §3374(c). Accordingly, if the pertinent state and local officials were agreeable, we see no reason why the IPA could not be used as authority for detailing designated state officers to INA enforcement operations insofar as the Department, the INS, and the relevant state authorities considered it useful to do so.

Under such arrangements, we believe the Attorney General should first confer special authority to enforce the immigration laws upon the Director of the U.S. Marshals Service ("USMS") under the provisions of 8 U.S.C. § 1103.[16] The Director of the USMS ("DUSMS") could then, in turn, deputize state and local officials to assist him in his charge to enforce the immigration laws under the provisions of either 28 U.S.C. § 561(f)[17] or, more probably, 28 U.S.C. § 566(c). The Department of Justice regulations implementing those statutory provisions specifically provide that the DUSMS is authorized to deputize "[s]elected federal, state, or local law enforcement officers *whenever the law enforcement needs of the U.S. Marshals Service so require.*" 28 C.F.R. § 0.112(2) (1995) (emphasis added). Although the "law enforcement needs" of the USMS would not normally extend to alien interdiction, that jurisdictional gap would be filled by the Attorney General's special assignment of INA enforcement authority under 8 U.S.C. § 1103.

This very approach was followed in August 1994, when the Deputy Attorney General (exercising authority delegated to her by the Attorney General) issued an order empowering the DUSMS to deputize Florida law enforcement officials as Deputy U.S. Marshals so that they could exercise INS enforcement responsibilities in the event of an immigration emergency. Under the order (which was effective for a period of one year), INS enforcement authority was first delegated to U.S. Marshals and U.S. Deputy Marshals under 8 U.S.C. § 1103, including the power to detain and arrest, for deportation or exclusion, persons entering or present in the United States in violation of law. The order went on to authorize the DUSMS to deputize and designate Florida law enforcement officers to exercise those same INS enforcement powers — specifically including the authority to make warrantless arrests and detentions for purposes of deportation — "pursuant to the direction of officers of the [INS]." Provision was made for Florida law enforcement officers to be sworn in as Deputy U.S. Marshals "immediately upon the commencement of a mass immigration emergency." Whether or not such arrangements would be considered practicable or desirable in other areas of massive illegal immigration, we are not aware of any reason why they could not be lawfully undertaken pursuant to the same statutory authorities.

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Deputy Assistant Attorney General
Office of Legal Counsel

[16] Under 8 U.S.C. § 1103, the Attorney General is authorized to confer on any employee of the United States, with the consent of the head of the Department or other independent establishment that employs such person, "any of the powers, privileges, or duties conferred or imposed . . . upon Officers . . . of the [Immigration and Naturalization] Service."

[17] A persuasive case can be made that deputations based upon 28 U.S.C. § 561(f) are only permitted when the person to be deputized is made an *employee* of the USMS — a complicating administrative process that would seem impracticable in the case of state and local police personnel. Special deputations of state and local police personnel would therefore be more realistically grounded upon the authority of 28 U.S.C. § 566(c).

Authority of the President to Restrict Munitions Imports Under the Arms Export Control Act

Restricting the import of certain classes of Russian firearms and ammunition that are deemed an unacceptable risk to public safety is a legitimate use of the President's authority under the Arms Export Control Act to restrict the import of munitions in furtherance of United States foreign policy.

February 9, 1996

MEMORANDUM OPINION FOR THE SPECIAL ASSISTANT TO THE PRESIDENT AND LEGAL ADVISOR TO THE NATIONAL SECURITY COUNCIL

This letter addresses and explains the basis for the oral advice that we provided in early April 1995 regarding the President's authority under the Arms Export Control Act, 22 U.S.C. §§ 2751–2799aa–2, ("AECA") to restrict the import of certain munitions from the Russian Federation in furtherance of United States foreign policy. The question arises in connection with the Administration's plan, as part of a general program of eliminating Cold War restrictions on trade and economic cooperation with Russia, to take steps to remove Russia from the International Traffic in Arms Regulations ("ITAR") list, which provides that it is the policy of the United States to deny licenses for the import of defense articles originating in certain countries, including Russia. 27 C.F.R. § 47.52 (1995). Russia's presence on the ITAR list means American businesses are not granted licenses necessary to import Russian munitions. Once Russia is off the ITAR list, there would be no general prohibition on gun imports from Russia. We understand that the issue concerns the negotiation of voluntary export restraints with Russia to ensure that, once Russia is removed from the ITAR list, munitions imports from Russia would not jeopardize public safety.[1] The question has been raised whether the President possesses authority under the AECA to limit the import of munitions from Russia. We have concluded that restricting the import of Russian munitions to certain classes of firearms and ammunition is a legitimate use of the President's authority under the AECA to restrict the import of munitions in furtherance of United States foreign policy.

Section 38 of the AECA authorizes the President to control the import and the export of defense articles and defense services "[i]n furtherance of world peace and the security and foreign policy of the United States." 22 U.S.C. § 2778(a)(1). Section 38 further authorizes the President "to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services." *Id.* The Act generally requires a license as a condition

[1] We understand that the issue may also have been raised whether voluntary restraint agreements restricting imports of Russian munitions violate the General Agreement on Tariffs and Trade or World Trade Organization rules. We have taken no position on that issue.

of exporting or importing any defense articles so designated by the President. 22 U.S.C. §2778(b)(1)(B)(2).

By Executive Order 11958, as amended, the President has delegated his authority under section 38 to the Secretaries of State, Treasury, and Defense. Exec. Order. No. 11958, 3 C.F.R. 79 (1978), *reprinted as amended in* 22 U.S.C. §2751 note (1996). The delegation grants the Secretary of the Treasury primary responsibility for issuing and administering permanent import controls of defense articles and services, and grants the Secretary of State primary responsibility for issuing and administering regulations relating to the rest of section 38, including export restrictions. The Secretary of the Treasury's authority over imports is subject to the qualification that the Secretary "shall be guided by the views of the Secretary of State on matters affecting world peace, and the external security and foreign policy of the United States." *Id.* § 1(l)(2), 3 C.F.R. at 81, *reprinted as amended in* 22 U.S.C. §2751 note. We understand that, pursuant to this qualification, it has been the consistent practice of the Secretary of the Treasury to defer to the Secretary of State's views on these matters.

Pursuant to the delegation of authority, the Departments of State and Treasury issued regulations to implement the Act. *See* International Traffic in Arms Regulations, 22 C.F.R. pts. 120–130 (1995) (State Department regulations); Importation of Arms, Ammunition and Implements of War, 27 C.F.R. pt. 47 (1995) (Treasury Department regulations). The designation of defense articles subject to import restrictions is set forth in the U.S. Munitions Import List at 27 C.F.R. §47.21 and includes categories for firearms and ammunition.

We understand that one part of the Administration's trade negotiation with Russia involves the possible importation into the United States from Russia of arms for sporting and hunting purposes. The Administration intends to continue to prevent imports of certain classes of weapons that are deemed to pose an unacceptable risk to public safety. In our view, the AECA would authorize imposition of controls on such imports.

As previously stated, section 38 authorizes the President to control the import of defense articles "[i]n furtherance of world peace and the security and foreign policy of the United States." 22 U.S.C. §2778(a)(1). The Federal Circuit recently affirmed the President's authority under the AECA to prohibit the import of arms in furtherance of foreign policy objectives. *B-West Imports, Inc. v. United States*, 75 F.3d 633 (Fed. Cir. 1996). We understand that the Administration's objective in removing Russia from the ITAR list is to improve American-Russian trade relations, remove Cold War restrictions to economic cooperation, and expand economic opportunities for both countries. These objectives reflect significant United States foreign policy goals. Thus, there can be no doubt that the bilateral trade reform contemplated by the Administration is designed to further the foreign policy of the United States. Accordingly, the contemplated import controls fall squarely within the statutory authorization of section 38.

We note that it could be argued that protecting public safety — the reason for limiting the importation of munitions into the United States — is a domestic, not a foreign policy concern. Even assuming that protecting public safety is viewed as exclusively a domestic issue, we do not believe this calls into question the President's authority under section 38 (as delegated to the Secretaries of Treasury and State) to control import of munitions. United States foreign policy usually includes as one component the promotion of domestic goals or the avoidance of a negative impact on domestic concerns in the process of pursuing a foreign policy objective. Taking into account the domestic effects of foreign policy does not change the fact that it is foreign policy that is being set. *See, e.g., Missouri v. Holland*, 252 U.S. 416 (1920) (President possesses authority to promote foreign policy through treaty power even where object affected is a local concern). Indeed, it would be artificial as well as practically impossible to separate the two. So, for example, in committing American troops to a peacekeeping action, the President may consider domestic concerns in defining the purpose and length of time of American involvement. Similarly, in the present context, existing controls on imports — which were imposed in furtherance of foreign policy — are being relaxed — again in furtherance of foreign policy. The extent to which the United States is willing to ease trade restrictions in pursuance of its foreign policy objectives is limited to ensure that it does not jeopardize public safety.

Courts, in affirming the broad grant of authority to the President under the AECA to control the export and import of firearms on foreign policy grounds, have advised that "statutes granting the President authority to act in matters touching on foreign affairs are to be broadly construed:"

> In the external sector of the national life, Congress does not ordinarily bind the President's hands so tightly that he cannot respond promptly to changing conditions or the fluctuating demands of foreign policy. Accordingly, when Congress uses far-reaching words in delegating authority to the President in the area of foreign relations, courts must assume, unless there is a specific contrary showing elsewhere in the statute or in the legislative history, that the legislators contemplate that the President may and will make full use of that power in any manner not inconsistent with the provisions or purposes of the Act. In a statute dealing with foreign affairs, a grant to the President which is expansive to the reader's eye should not be hemmed in or "cabined, cribbed, confined" by anxious judicial blinders.

B-West Imports, Inc. v. United States, 75 F.3d at 636 (quoting *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 334 F.2d 622, 632 (Ct. Cl. 1964)); *see also Samora v. United States*, 406 F.2d 1095 (5th Cir. 1969). Finally, as the

court noted in *South Puerto Rico Sugar Co.* in sustaining the President's discretion to impose conditions on imports, Presidents acting under broad statutory grants of authority have "imposed and lifted embargoes, prohibited and allowed exports, suspended and resumed commercial intercourse with foreign countries" thereby reflecting "the historical authority of the President in the fields of foreign commerce and of importation into the country." 334 F.2d at 633, 634. The court specifically cautioned that "[i]t would be difficult, and probably unwise, to separate an executive choice in [the area of international economic relations] from the 'important, complicated, delicate and manifold problems' facing the President in the 'vast external realm.'" *Id.* at 630 (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)). In determining how far to open United States markets to Russian arms manufacturers, the President is faced with just such a delicate confluence of factors that requires that United States foreign policy integrate international commercial policy with domestic policy concerns.

For these reasons, we conclude that restricting the import of Russian munitions to certain classes of firearms and ammunition is a legitimate use of the President's authority under the AECA as delegated to the Secretaries of Treasury and State.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Alternatives for the Imposition of Conditions on the Certification of Drug Transit and Producing Countries

The President may impose certain conditions upon a drug producing or transit country seeking certification under section 490(b) of the Foreign Assistance Act of 1961. If he chooses to certify a country under section 490(b)(1)(B), he can withhold funds from the country to encourage compliance with a set of specified conditions. Alternatively, the President can determine not to certify a country in his annual certification report but inform the country that it might be recertified outside the annual cycle if it meets certain conditions. The first alternative offers greater flexibility to the President as, under the latter approach, the President is constrained in the exercise of his discretion by specific statutory requirements and his determination is subject to congressional review.

February 12, 1996

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked us to examine the question whether and how the President might impose certain conditions upon a drug producing or transit country seeking certification under section 490(b) of the Foreign Assistance Act of 1961. This memorandum evaluates two alternatives: (1) certification based upon "vital national interests," where the expenditure of foreign assistance funds is dependent upon the satisfaction of specified conditions; or (2) decertification and subsequent recertification once specified conditions have been met.

Background

Section 490(b) of the Foreign Assistance Act of 1961 ("FAA"), 22 U.S.C. § 2291j(b), describes requirements for the President's annual certification of major illicit drug producing or drug transit countries. Certification avoids the cutoff of most forms of FAA assistance to such countries under section 490(e). 22 U.S.C. § 2291j(e). Under section 490(b)(1)(A), the President may certify a drug producing or transit country if it has "cooperated fully" with the United States, or has taken "adequate steps" on its own to comply with the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *done* Dec. 20, 1988, S. Treaty Doc. No. 101–4 (1989), 28 I.L.M. 493. 22 U.S.C. § 2291j(b)(1)(A). Alternatively, under section 490(b)(1)(B), the President may certify a country that would not otherwise qualify under subsection (b)(1)(A), if he determines that such certification is in the "vital national interests" of the United States. [1] *Id.* § 2291j(b)(1)(B).

Certification under subsection (b)(1)(B) requires a description of the vital national interests involved, along with a statement balancing the risk to those national interests against the risks posed by the country's failure to cooperate with

[1] Hereinafter, this memorandum will refer to certifications made under sections 490(b)(1)(A) and 490(b)(1)(B) as (b)(1)(A) and (b)(1)(B) certifications, respectively.

the United States in narcotics matters. *Id.* § 2291j(b)(3). Congress may disapprove (b)(1)(B) certifications by enacting a joint resolution within 30 days of the annual certification reporting date. *Id.* § 2291j(d).

A country that is not certified — i.e. it is "decertified" — may subsequently be "recertified" under section 490(f). The President may "recertify" a country, making it again eligible for foreign assistance, in one of two ways: He may either certify the country under subsection (b)(1)(A) or (b)(1)(B) as part of his annual certification report. *Id.* § 2291j(f)(1). Or he may, at any other time, certify the country under subsection (b)(1)(B). *Id.* § 2291j(f)(2). In other words, only (b)(1)(B) recertifications — those made pursuant to the assertion of a vital national interest — may be made outside the annual certification cycle. Moreover, (b)(1)(B) recertifications made outside the annual cycle are more onerous than other (b)(1)(B) certifications. Not only must the President satisfy all other conditions for a (b)(1)(B) certification, but he must also certify either (1) that the country has undergone a fundamental change in government, or (2) that there has been a "fundamental change" in the conditions that were the basis for his prior determination not to certify.[2] *See id.* § 2291j(f)(2)(A). Thus, in effect, a (b)(1)(B) recertification made outside the annual cycle must satisfy the requirements of both subsections (b)(1)(A) and (b)(1)(B).[3]

Alternatives

1. *Certification Under (b)(1)(B), Expenditures Subject to Conditions*

Under this alternative, the President would make a vital national interests certification under section 490(b)(1)(B) for a particular country, as part of his annual certification report. At the same time, however, he would communicate to that country that its receipt of the foreign assistance available as a result of such certification would be contingent upon the satisfaction of certain conditions. If the country met these conditions, perhaps within some specified time frame, foreign assistance funds would be released. If it did not, such funds would be withheld.

It should be noted that, under this approach, the country remains certified, even if it does not meet the specified conditions. The statute does not provide a mechanism by which a country can be "decertified" once it has been certified, other than through the annual reporting process. Thus, the only way that the President may decertify a country is by refusing to certify it the following year.

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[2] The President need not make these additional certifications, if Congress enacts a joint resolution approving the President's decision to recertify under (b)(1)(B). *See id.* § 2291j(f)(2)(B).

[3] It appears that such recertifications are also subject to congressional review. *See id.* §§ 2291j(d), 2291j(g); 138 Cong. Rec. 28,545 (1992) (Report of House Committee on Foreign Affairs Task Force on International Narcotics Control, on International Narcotics Control Act of 1992 [subsequently enacted as Pub. L. No. 102–583, 106 Stat. 4914]) ("[S]ection 490(g) specifies congressional review procedures for recertification.").

However, the President does have considerable discretion over the expenditure of foreign assistance funds to certified countries. This discretion derives in part from his broad power over foreign affairs. The Constitution has long been interpreted to grant the President plenary authority to represent the interests of the United States in dealings with foreign States, subject only to limits specifically set forth in the Constitution or to such statutory limitations that the Constitution permits Congress to impose by exercise of its enumerated powers. [4]

Section 490 of the FAA imposes no statutory limitations on the President's discretion to withhold foreign assistance funds. On the contrary, section 490(b) states that, if the President certifies a country, foreign assistance to that country "*may* be obligated and expended." 22 U.S.C. §2291j(b)(1) (emphasis added). The use of the word "may" rather than "shall" implies some exercise of discretion by the President in the actual expenditure of such funds. Moreover, with respect to Agency for International Development ("AID") funds, courts have recognized that the FAA imposes no impediment to the President's discretionary withholding of such funds from statutorily eligible foreign recipients. [5] *See DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 281 (D.C. Cir. 1989) (provision in AID statute granting President discretion to furnish assistance permits President to withhold AID funds from foreign nongovernmental organizations ("NGOs"): " '[A]bsent a specific limitation on the Executive's authority to condition disb[u]rsal of United States funds to foreign NGOs, it must be assumed that the Congress has left intact' presidential authority to place conditions or to refuse funding to these organizations.") (quoting *Planned Parenthood Fed'n of Am. v. Agency for Int'l Dev.*, 670 F. Supp. 538, 544 (S.D.N.Y. 1987), *aff'd in relevant part*, 838 F.2d 649 (2d Cir. 1988), *cert. denied*, 500 U.S. 952 (1991)); *Planned Parenthood* (same).

Because the President has the authority to withhold funds from countries certified under (b)(1)(B), he can use that authority to encourage compliance with a set of specified conditions. In effect, then, the President can impose upon a country that does not meet those conditions the same sanctions that decertification would entail.

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[4] *See, e.g.*, U.S. Const. art. II, §2, cl. 2 (President's power to "make Treaties" and to "appoint Ambassadors . . . and Consuls"); *id.* art. II, §3 (President's power to "receive Ambassadors and other public Ministers"); *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) ("[The Supreme Court] has recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive.' " (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981))); *Alfred Dunhill of London Inc. v. Republic of Cuba*, 425 U.S. 682, 706 n.18 (1976) (plurality opinion) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch."); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (The President is "the constitutional representative of the United States in its dealings with foreign nations").

[5] Whether any of the other statutory provisions covered by the definition of "United States assistance," *see* 22 U.S.C. §2291(e)(4), contain explicit prohibitions against the exercise of executive discretion is a question we do not answer here. It is unclear whether such a prohibition, if it existed, could be interpreted to limit the President's legitimate exercise of his constitutional powers.

2. *Decertification and Recertification under (b)(1)(B)*

A second alternative is for the President not to certify a country in his annual certification report, but to inform the country that it might be recertified outside the annual cycle if it satisfies certain conditions. The principal difficulty with this approach, as we have already noted, is that recertification under section 490(f) is an onerous process that effectively requires a country to be able to satisfy the requirements of both (b)(1)(A) and (b)(1)(B). Moreover, recertification is subject to congressional review.

If this alternative were pursued, we would recommend that the President, at the time he submitted his annual certification report, cite the conditions for recertification as reasons for his determination not to certify a particular country. If the country subsequently met those conditions, the President would thus have set the stage to certify, under section 490(f)(2)(A)(ii), that "there has been a fundamental change in the conditions" which led to the country's initial decertification. 22 U.S.C. § 2291j(f)(2)(A)(ii).

Conclusion

Of the two alternatives outlined above, the first — certification with expenditures conditioned upon satisfaction of certain requirements — offers far greater flexibility for the President. Under the second alternative — decertification with recertification upon satisfaction of certain requirements — the President is constrained in the exercise of his discretion by specific statutory requirements, and his determination is subject to congressional review.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Brady Act Implementation Issues

The Attorney General may impose an expiration date on the validity of a check, conducted pursuant to the Brady Act by the national instant criminal background check system, that authorizes the transfer of a firearm.

Information from the national instant criminal background check system may be disclosed to law enforcement agencies to further their criminal investigations, but disclosures may not be made for the purpose of establishing firearms registries and non-consensual disclosures may not be made for employment and licensing purposes.

The Privacy Act places no restrictions on the Attorney General's express authority under the Brady Act to request information from federal agencies identifying individuals who fall within the categories of persons prohibited from possessing firearms.

February 13, 1996

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL BUREAU OF INVESTIGATION

This memorandum responds to your request for our advice concerning implementation of the Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, 107 Stat. 1536 (1993) ("Brady Act"). Specifically, you have asked three questions relating to the national instant criminal background check system ("NICS") mandated by the Brady Act:

> (I) May the Attorney General impose an expiration date on a NICS check that allows the transfer of a firearm?
> (II) May NICS be used for purposes other than conducting background checks on prospective firearms purchasers?
> (III) May the Attorney General request from federal agencies all information identifying individuals who fall within the categories of persons prohibited from possessing firearms?

We address each of these questions below.

You have also asked us to review a memorandum prepared by the Office of Policy Development ("OPD") that concludes that the Brady Act does not preempt states from imposing additional restrictions providing for waiting periods on the sale of firearms. We agree with the conclusion reached by OPD.

I. *The Attorney General May Impose An Expiration Date on a NICS Check*

Section 103 of the Brady Act provides for the establishment of NICS by the Attorney General. The system must be operational by the start of 1999. Firearms dealers will then be required to refer the proposed firearm transfer to that system to determine whether any legal impediment exists to the sale. 18 U.S.C. § 922(t)(1)

(1994). You have advised us that upon completion of the NICS check, the system would notify the firearm dealer of the results of the check by an indication that the transfer would be legal or not. You have asked whether the Attorney General has the authority to impose an expiration date on the validity of a NICS check that allows for the transfer of a firearm. As discussed below, we conclude that the Attorney General may impose an expiration date on a NICS check.

Section 103(b) of the Brady Act states that "the Attorney General shall establish a national instant criminal background check system that any licensee may contact . . . to be supplied immediately, on whether receipt of a firearm by a prospective transferee would violate section 922 of title 18, United States Code, or State law." 107 Stat. at 1541. Section 103(d) provides that "[o]n establishment of the system under this section, the Attorney General shall notify each licensee and the chief law enforcement officer of each State of the existence and purpose of the system and the means to be used to contact the system." *Id.* at 1541–42. Section 103(e)(2) authorizes the Attorney General to develop the computer software and design as necessary to "establish and operate the system in accordance with this section." *Id.* at 1542.

Although the Brady Act does not specifically provide for an expiration date for a NICS check that authorizes a firearm transfer, we believe that in carrying out her responsibilities under the Act, the Attorney General has the authority to impose, in effect, a "useful life" limitation on the validity of the check. Such an exercise of authority would be supported by the Act's legislative history.

The Supreme Court has acknowledged the legitimacy of the executive branch's completing the work of Congress, notwithstanding the lack of a specific direction by the legislative branch to do so. "The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). More recently, the Court stated: "As we emphasized in [*Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)], when an agency is charged with administering a statute, part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities." *Department of Treasury, Internal Revenue Serv. v. Federal Labor Relations Authority*, 494 U.S. 922, 933 (1990).

A decision by the Attorney General to impose an expiration date on a NICS check would be supported by the Brady Act's legislative history. The purpose of the Brady Act is to prevent convicted felons and other persons who are barred by law from purchasing guns from gun dealers. *See* H.R. Rep. No. 103–344, at 7 (1993). This purpose is served by the Attorney General establishing a national instant criminal background check system that is "capable of instant response to inquiries and use by licensed gun dealers . . . at the point of firearm purchase." *Id.* at 8. NICS will enable firearms dealers to determine "whether a proposed

transfer would be a prohibited one." *Id.* at 11. NICS "guarantees immediate delivery of a handgun to a proven law-abiding citizen." *Id.* at 33 (dissenting views).

These congressional statements reveal an intent that the NICS check be conducted close to the time of the proposed sale and that the Attorney General establish a system that will operate in that fashion. The purpose of the Brady Act, which is to prohibit the sale of firearms to certain individuals, is served by a system that requires a check to occur in close proximity to a firearm sale. If a NICS check could be requested at any time prior to a sale and the results of that check were to remain valid for an indefinite period of time, a purchaser could obtain a NICS check, wait to purchase the firearm, and then engage in conduct that would otherwise bar the purchase of the firearm. Imposing an expiration date on the NICS results would better ensure that firearm transfers are made to law-abiding citizens because the dealers would not be able to rely on stale information in transferring the weapon.

We now turn to your suggestion that the Attorney General impose an expiration date of thirty days following each NICS check. We believe that although a thirty day period might be reasonable, a forty-five or sixty day period might be more reasonable. Imposing a longer period of time would better afford an opportunity to those individuals who were unable to return to the firearms dealer because of health or other legitimate personal reasons.

II. *NICS May Be Accessed for Other Law Enforcement Purposes*

In establishing NICS, section 103 of the Brady Act directs the Attorney General to gather state criminal history records to include with the federal criminal records system and to obtain information on persons for whom receipt of a firearm would violate 18 U.S.C. § 922(g) or (n) or state law. You have advised us that the system will include, inter alia, records on dishonorable dischargees from Defense Department files, on drug users and mental defectives/commitments from Veterans Affairs Department and Defense Department files, and on drug users from the pilot license files of the Federal Aviation Administration. You have asked whether information from NICS may be disclosed to law enforcement agencies to further their investigations and to other agencies for employment and licensing purposes unrelated to firearm purchases. As discussed below, we believe NICS may be accessed by, or information therefrom may be disclosed to, law enforcement agencies. Disclosures for purposes of establishing firearms registries, however, are prohibited. Also, non-consensual disclosures for employment and licensing purposes are not authorized.

Under 28 U.S.C. § 534 (1994), the Attorney General has the authority to disseminate NICS information to authorized federal, state, and local officials for their official use. The disclosure, however, must satisfy the requirements of the Privacy

Act. Section 105 of the Brady Act states that the Act "shall not be construed to alter or impair any right or remedy" under the Privacy Act. 107 Stat. at 1543.

The Privacy Act provides, in relevant part, that:

> No agency shall disclose any record which is contained in a system of records . . . to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
> (1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;
> . . . .
> (3) for a routine use . . .;
> . . . .
> (7) to another agency . . . for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought.

5 U.S.C. § 552a(b) (1994).

The Privacy Act defines a "system of records" as a group of records under the control of an agency "from which information is retrieved by the name of the individual or by some identifying number." 5 U.S.C. § 552a(a)(5) (1994). Based upon your description, it is clear that NICS constitutes a "system of records" as that term is defined in the Privacy Act. Accordingly, only disclosures falling within an exception under the Act are permissible.

Section 552a(b)(1) provides a "need to know" exception and authorizes the intra-agency disclosure of information for necessary, official purposes. Under this exception, components of the Department of Justice needing to know the information in the performance of their official duties will be able to access NICS for that purpose.

Section 552a(b)(3) permits the disclosures pursuant to "routine use notices" published in the Federal Register. A "routine use" is defined as the use of information "for a purpose which is compatible with the purpose for which it was collected." 5 U.S.C. § 552a(a)(7). The purpose for which the information in NICS will be collected is a law enforcement purpose. As discussed earlier, the system will be used to prevent convicted felons and other ineligible persons from purchasing guns. We believe that disclosure of NICS information to law enforcement agencies to further their criminal investigations should be held to be compatible with the law enforcement purpose for which the information was collected.

Even if a "routine use" were not promulgated under § 552a(b)(3), law enforcement agencies would be able to access NICS or obtain NICS information pursuant to § 552a(b)(7), if the requests were submitted in writing and signed by the head of the agencies or authorized designees.

There are no exceptions in the Privacy Act that would permit the non-consensual disclosures of NICS information for non-law enforcement purposes. Accordingly, consent from the individual would be required to access NICS for purposes of employment and licensing inquiries. *

Section 103(i) of the Brady Act does not change our analysis or conclusion relating to NICS disclosures. Section 103(i) reads:

> PROHIBITION RELATING TO ESTABLISHMENT OF REGISTRATION SYSTEMS WITH RESPECT TO FIREARMS.—No department, agency, officer, or employee of the United States may—
>
> (1) require that any record or portion thereof generated by the system established under this section be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or political subdivision thereof; or
>
> (2) use the system established under this section to establish any system for the registration of firearms, firearm owners, or firearm transaction or dispositions, except with respect to persons, prohibited by section 922 (g) or (n) of title 18, United States Code or State law, from receiving a firearm.

107 Stat. at 1542. The clear intent of Congress in adopting this provision was to prohibit the establishment of a firearm registry. The title of the provision, the relation between subparagraphs (1) and (2), and the legislative history support our conclusion.

"Titles have a communicative function. . . . Since the title of an act is essentially a part of the act and is itself a legislative expression of the general scope of the bill, it is proper to consider it in arriving at the intent of the legislature." 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 47.03 (5th ed. 1992) ("Sutherland"). Here, the title explicitly limits the scope of the provision to the prohibition of the establishment of a firearm registry.

Likewise, the interrelation between subparagraphs (1) and (2) confirm our view that the provision is intended to prohibit the use of NICS in establishing a firearm registry. Section 103(i)(1) is a specific prohibition of a particular method in establishing a registry. Section 103(i)(2) establishes a general prohibition against using the system to establish a registry. Drafting a statute that includes a specific provi-

* Editor's Note: The Department of Justice published a Privacy Act System Notice for the NICS on 11/25/98 that exempts the NICS from the record access provisions of the Privacy Act, 63 Fed. Reg. 65,060 (1998). Privacy Act requests for non-exempt records must comply with the alternative procedure set forth in the notice.

sion followed by a general one can be explained as a common "technique designed to save the legislature from spelling out in advance every contingency in which the statute could apply." 2A Sutherland at § 47.17.

Finally, the legislative history supports the conclusion we have reached based on the text of the statute. The report of the House Committee on the Judiciary explained that section 103(i) "prohibits any Federal department, agency, officer, or employee from using the system or any part thereof to establish a registry of firearms, firearms owners, or firearms transactions" except with respect to persons falling within the ambit of 18 U.S.C. § 922(g) or (n). H.R. Rep. No. 103–344, at 20 (1993). The report thus confirms that the sole purpose of section 103(i) was to prohibit the use of NICS information for the purpose of establishing firearm registries.

III. *The Attorney General May Request Information From Federal Agencies*

The Brady Act directs that the Attorney General gather the necessary information in establishing NICS. Section 103(e)(1) states:

> AUTHORITY TO OBTAIN OFFICIAL INFORMATION.—Notwithstanding any other law, the Attorney General may secure directly from any department or agency of the United States such information on persons for whom receipt of a firearm would violate subsection (g) or (n) of section 922 of title 18, United States Code or State law, as is necessary to enable the system to operate in accordance with this section. On request of the Attorney General, the head of such department or agency shall furnish such information to the system.

107 Stat. at 1542.

Section 105 states that the Brady Act "shall not be construed to alter or impair any right or remedy" under the Privacy Act. 107 Stat. at 1543. You have asked whether the Privacy Act places any limitation on the Attorney General's express authority in section 103(e)(1) to request from federal agencies all information identifying individuals who fall within the categories of persons prohibited from possessing firearms. We do not believe that it does.

The plain meaning of the phrase "notwithstanding any other law," in section 103(e)(1) convinces us that Congress did not intend for the Privacy Act or any other law to prohibit the Attorney General from gathering the critical information necessary to create a registry of individuals prohibited from owning a firearm. NICS serves the Brady Act's fundamental purpose of identifying those individuals who are not permitted by law to own a firearm. Limiting the Attorney General in identifying those individuals would be contrary to the purpose of the Act. In our view, the effect of the "notwithstanding any other law" language in section

103(e)(1) is that the Privacy Act does not apply to disclosures by agencies to the Attorney General for the purpose of putting information *into* NICS. The effect of section 105 is that the Privacy Act regulates disclosures *out of* NICS.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Transactions Between the Federal Financing Bank and the Department of the Treasury

This opinion reviews a possible Federal Financing Bank sale of loan assets to the Civil Service Retirement and Disability Fund and other possible related transactions between the FFB and the Department of the Treasury, and concludes that the contemplated transactions would be permissible under existing law.

February 13, 1996

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

This memorandum responds to your request for advice concerning the legal issues raised by a possible Federal Financing Bank ("FFB" or "Bank") sale of loan assets to the Civil Service Retirement and Disability Fund ("CSRDF" or "Fund") and other related transactions between the FFB and the Department of the Treasury ("Treasury"). The FFB loan assets would be sold to the CSRDF in exchange for a portion of the United States debt obligations ("public debt obligations") Treasury has previously issued to the CSRDF pursuant to 5 U.S.C. § 8348 and chapter 31 of title 31, United States Code.

You have requested specific advice as to:

> (1) the FFB's authority to sell to the Fund loan assets evidencing indebtedness incurred by the United States Postal Service ("USPS") and Tennessee Valley Authority ("TVA");
>
> (2) the Treasury Secretary's ("Secretary") authority to invest Fund monies in obligations of the USPS and obligations of the TVA;
>
> (3) the FFB's authority to accept, in exchange for the USPS and TVA indebtedness, payment in the form of public debt obligations;
>
> (4) whether Treasury may legally enter into a transaction with the FFB whereby Treasury would secure the public debt obligations from the FFB in exchange for the cancellation by Treasury of FFB obligations of equivalent value held by Treasury;
>
> (5) whether the FFB may sell the public debt obligations to Treasury and whether the FFB may accept as payment for the public debt obligations the cancellation by Treasury of FFB obligations of equivalent value held by Treasury;

(6) the implications of the proposed transfer of public debt obligations to Treasury with respect to 31 U.S.C. §3101, the debt limit; and

(7) whether the USPS and TVA obligations the FFB proposes to sell to the CSRDF are subject to the debt limit.

For the reasons indicated below, we conclude that the transactions you contemplate would be permissible under existing law. We conclude that the Federal Financing Bank Act of 1973, Pub. L. No. 93–224, 87 Stat. 937 (codified as amended at 12 U.S.C. §§2281–2296) ("FFB Act"), empowers the FFB to sell obligations that were issued by "federal agencies," including obligations of the USPS and TVA. We also conclude that the Secretary is authorized to invest CSRDF monies in the USPS and TVA obligations the FFB intends to sell. In addition, we conclude that the FFB has the authority to receive payment for the USPS and TVA obligations in public debt obligations. Moreover, we conclude that Treasury has the authority to enter into a transaction with the FFB whereby Treasury would acquire the public debt obligations from the FFB in exchange for the cancellation by Treasury of FFB obligations of equivalent value held by Treasury. We also conclude that the FFB has the authority to accept the cancellation of the FFB obligations as payment for the public debt obligations. In addition, we conclude that the transaction between Treasury and the FFB would result in Treasury's acquiring the previously issued public debt obligations, thus freeing up debt issuance capacity under the debt limit and permitting the Secretary to issue additional public debt obligations to the public in a commensurate amount. Finally, we conclude that the USPS and TVA obligations the FFB proposes to sell to the CSRDF in exchange for the previously issued public debt obligations are not subject to the debt limit.

I. Background

Congress established the FFB in 1973 to "assure coordination of [federal and federally assisted borrowing] programs with the overall economic and fiscal policies of the Government, to reduce the costs of Federal and federally assisted borrowings from the public, and to assure that such borrowings are financed in a manner least disruptive of private financial markets and institutions." 12 U.S.C. §2281. In order to further these purposes, the FFB is authorized to purchase the obligations of federal agencies. *Id.* §2285(a).[1] As part of its regular financing activities, the FFB acquired as loan assets certain obligations of the USPS and TVA. Under the proposed transactions, the FFB would sell those loan assets to

[1] The FFB Act also provides that "[a]ny [f]ederal agency which is authorized to issue, sell, or guarantee any obligation is authorized to issue or sell such obligations directly to the Bank." *Id.*

the CSRDF in exchange for public debt obligations of equivalent value that are currently being held by that government-managed trust fund. Treasury would then enter into a transaction with the FFB whereby Treasury would purchase the public debt obligations received by the FFB in exchange for the cancellation by Treasury of FFB obligations of equivalent value held by Treasury. This series of transactions would result in Treasury's acquiring the public debt obligations that had been previously held by the CSRDF and the CSRDF's holding the USPS and TVA obligations that had been previously held by the FFB.

Your office believes that such a series of transactions would create debt issuance capacity under the debt limit in an amount equal to the public debt obligations that would be transferred to Treasury from the CSRDF. In addition, your office believes it has sufficient legal authority to undertake all the transactions described above. Moreover, your office holds the view that the USPS and TVA obligations that would be used to replace the public debt obligations previously held by the CSRDF would not count against the debt limit.

II. Legal Discussion

A. The FFB has the authority to sell the USPS and TVA obligations it holds as loan assets.

We believe the FFB has the authority to sell the USPS and TVA obligations it currently holds as loan assets. Section 6 of the FFB Act authorizes the FFB to "make commitments to purchase and sell, and to purchase and sell on terms and conditions determined by the Bank, any obligation which is issued, sold, or guaranteed by a [f]ederal agency." 12 U.S.C. § 2285(a); *see also Consolidated Aluminum Corp. v. TVA*, 462 F. Supp. 464, 469 (M.D. Tenn. 1978) ("The Federal Financing Bank may resell in the public markets any bonds of federal agencies which it holds.").

The USPS and TVA obligations the FFB contemplates selling to the CSRDF are "obligations" as that term is defined in the FFB Act. The FFB Act defines "obligation" as "any note, bond, debenture, or other evidence of indebtedness." 12 U.S.C. § 2282(2). According to your office, the USPS obligations the FFB intends to sell are indebtedness in the form of notes issued by the USPS under 39 U.S.C. § 2005. Your office has also informed us that the TVA obligations the FFB intends to sell are indebtedness in the form of bonds issued by the TVA under 16 U.S.C. § 831n–4. Accordingly, the USPS and TVA obligations the FFB contemplates selling qualify as "obligations" within the terms of the FFB Act.

Both the USPS and the TVA satisfy the FFB Act's definition of "[f]ederal agency." The FFB Act defines the term "federal agency" as "an executive department, an independent [f]ederal establishment, or a corporation or other entity established by the Congress which is owned in whole or in part by the United

States." 12 U.S.C. §2282(1). Section 201 of title 39, United States Code, the statutory provision establishing the USPS, provides that the USPS is "an independent establishment of the executive branch of the Government of the United States." The TVA, for its part, was created by Congress as a "body corporate," 16 U.S.C. §831, and its board of directors is "appointed by the President, by and with the advice and consent of the Senate." *Id.* §831a. The TVA has also been described by federal courts as "an agency of the Federal Government," *Ashwander v. TVA*, 297 U.S. 288, 315 (1936), "an instrumentality of the United States," *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 134 (1939) and "a wholly owned corporate agency and instrumentality of the United States." *United States ex rel. TVA v. An Easement And Right-Of-Way*, 246 F. Supp. 263, 269 (W.D. Ky. 1965), *aff'd*, 375 F.2d 120 (6th Cir. 1967).[2] In sum, since the loan assets the FFB contemplates selling are "obligations" that were "issued" by entities that qualify as "federal agencies" under the FFB Act, the FFB has the authority to sell them.

B. The loan assets the FFB contemplates selling to the CSRDF are suitable investments for that government-managed trust fund.

The legality of the proposed transactions will also depend on whether the USPS and TVA obligations the FFB intends to sell are suitable investments for the CSRDF. We conclude that they are. The statutes authorizing the USPS and TVA obligations in question both provide that obligations issued thereunder "shall":

> be lawful investments and may be accepted as security for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of any officer or agency of the [United States].

39 U.S.C. §2005(d)(3) (emphasis added); 16 U.S.C. §831n–4(d) (emphasis added). Congress incorporated this boilerplate trust fund investment eligibility language[3] in the statute authorizing the USPS to issue the obligations the FFB intends to sell in the Postal Reorganization Act, Pub. L. No. 91–375, sec. 2, §2005(d)(3), 84 Stat. 719, 740 (1970), several years after the initial enactment of the CSRDF's statutory investment provisions, which occurred in 1926. *See* Act

[2] This Office has previously opined that "[s]everal government corporations, such as the Tennessee Valley Authority . . . were intended to be '[f]ederal agencies' within the scope of [section 2282's] corporation coverage clause." *Authority of the Federal Financing Bank to Provide Loans to the Resolution Trust Corporation*, 14 Op. O.L.C. 20, 22 (1990).

[3] Congress has included this or similar language in several other statutes authorizing federal or congressionally created entities to borrow. *See, e.g.*, 12 U.S.C. §1435 (obligations issued by the Federal Home Loan Banks); 15 U.S.C. §713a–4 (bonds, notes, or debentures issued by the Commodity Credit Corporation); 12 U.S.C. §1723c (obligations of the Federal National Mortgage Association); 12 U.S.C. §2288(d) (obligations issued by the FFB).

of July 3, 1926, ch. 801, § 11, 44 Stat. 904, 910–11.[4] The language was similarly included in the statute authorizing the TVA obligations the FFB intends to sell when that statute was enacted into law in 1959. *See* Act of Aug. 6, 1959, Pub. L. No. 86–137, sec. 1, § 15d(d), 73 Stat. 280, 283. Although the CSRDF statute contains investment provisions delineating the types of obligations the Secretary is authorized to purchase on behalf of the CSRDF, these provisions essentially mirror boilerplate provisions contained in statutes governing the investments of other government-managed trust funds.[5] Moreover, although the CSRDF statute's investment provisions have been amended from time to time since they were initially enacted,[6] our review of the amendments reveals no expressed intention on the part of Congress to exempt the CSRDF from the effect of trust fund investment eligibility provisions such as those included in the relevant USPS and TVA statutes. Accordingly, we conclude that CSRDF monies may be invested in the USPS and TVA obligations the FFB intends to sell in addition to the obligations specifically delineated in 5 U.S.C. § 8348.[7]

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[4] Section 11, which appears to have been the first provision specifically delineating the types of obligations in which CSRDF monies could be invested, provided in relevant part:

> The Secretary of the Treasury shall invest from time to time, in interest-bearing securities of the United States or Federal farm-loan bonds, such portions of the "civil-service retirement and disability fund" as in his judgment may not be immediately required for the payment of annuities, refunds, and allowances as herein provided.

44 Stat. at 910–11.

[5] The CSRDF statute states:

> The Secretary shall immediately invest in interest-bearing securities of the United States such currently available portions of the Fund as are not immediately required for payments from the Fund. The income derived from these investments constitutes a part of the Fund.

5 U.S.C. § 8348(c). The statute further provides that the Secretary may invest CSRDF monies in public debt obligations which carry interest rates determined by the Secretary based on a formula set forth in the statute. *See id.* § 8348(d). In addition, the CSRDF statute authorizes the Secretary to "purchase other interest-bearing obligations of the United States, or obligations guaranteed as to both principal and interest by the United States, on original issue or at the market price only if he determines that the purchases are in the public interest." *Id.* § 8348(e). Language authorizing such investments is commonly found in the statutes setting forth investment criteria for government-managed trust funds. *See, e.g.*, 42 U.S.C. § 401(d) (Social Security Trust Funds); 42 U.S.C. § 1104(b) (Unemployment Trust Fund); 20 U.S.C. § 2009(b) (Harry S. Truman Memorial Scholarship Trust Fund); 20 U.S.C. § 5202(b) (Eisenhower Exchange Fellowship Program Trust Fund).

[6] The most notable changes in the CSRDF statute's investment provisions occurred in 1956, when Congress first expressly authorized the Secretary to purchase on behalf of the CSRDF public debt obligations that carry interest rates determined by the Secretary based on a statutory formula, *see* Civil Service Retirement Act Amendments of 1956, ch. 804, sec. 401, § 17(d), 70 Stat. 736, 759–60, and in 1961, when Congress required the Secretary to invest Fund monies in such public debt obligations unless he determines that it is in the public interest to invest the monies in other interest-bearing obligations of the United States. *See* Act of Oct. 4, 1961, Pub. L. No. 87–350, sec. 1(a), § 17(d), 75 Stat. 770, 770. The current wording of the CSRDF statute's investment provisions is essentially the same as it was in 1961. *See* 5 U.S.C. § 8348(c)-(e).

[7] The CSRDF statute's investment provisions do not prohibit the investment of CSRDF monies in the relevant USPS and TVA obligations. General rules of statutory construction dictate that, if possible, statutes on the same subject matter should be construed in harmony with one another. *See* 2B Norman J. Singer, *Sutherland Statutory Construction* § 51.02, at 122 (5th ed. 1992); *see also Watt v. Alaska*, 451 U.S. 259, 267 (1981). If that cannot be accomplished, "[i]t is an elementary tenet of statutory construction that '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.'" *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375 (1990) (quoting *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974)). Due to the boilerplate nature of the CSRDF statute's investment provisions, we believe we are not here confronted with the task of reconciling a specific statute against a general one, but are, instead, confronted with the task of reconciling two general statutes. Moreover, even if we were to accept the notion that the CSRDF statute's investment provisions are more specific, principles of statutory construction require that those provisions be construed in harmony with

Our conclusion concerning the relationship between the general trust fund investment eligibility language contained in the USPS and TVA statutes and the CSRDF is consistent with established federal case law, the longstanding practice and understanding of the Treasury and Justice Departments, and a 1985 Comptroller General opinion. In *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1244–45 (N.D. Cal. 1973), a federal district court determined that trust fund investment eligibility language resembling that which is contained in the USPS and TVA statutes mentioned above made obligations issued under statutes containing that language just as eligible for investment by government-managed trust funds benefiting American Indians as investments specifically mentioned in the trust fund statutes themselves. The court expressly cited as eligible for investment by "all [g]overnment managed trust funds" obligations issued pursuant to 16 U.S.C. § 831n–4, the provision of the United States Code under which the TVA obligations the FFB intends to sell were issued. *Manchester Band*, 363 F. Supp. at 1244. The court also found that its conclusion concerning the effect of the relevant trust fund investment eligibility language was "in accord with the intent of Congress." *Id.* at 1245.

In 1966, this Office opined that obligations of the federal land banks and the banks for cooperatives are eligible investments for all government-managed trust funds, where the statutes authorizing the issuance of such obligations contained language similar to that contained in the relevant USPS and TVA statutes. *See* Memorandum for Fred B. Smith, General Counsel, Department of the Treasury, from Frank M. Wozencraft, Assistant Attorney General, Office of Legal Counsel (Oct. 7, 1966).[8] In concluding that the specific trust fund investment eligibility language at issue was sufficient to authorize investment by all government-managed trust funds, this Office stated that statutory language essentially the same as that contained in the relevant USPS and TVA statutes "presents no problems of construction and plainly permits investments of the various Government trust funds in the affected securities whether or not the statutes creating the trusts themselves do so." *Id.* at 2.[9] Similarly, in a 1934 opinion, Attorney General Homer Cummings advised that, even though the specific trust fund statute at issue did not expressly authorize it, government-managed postal savings funds could be in-

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the trust fund investment eligibility language contained in the relevant USPS and TVA statutes. Because the CSRDF statute's investment provisions do not purport to supersede other statutes establishing that obligations issued thereunder are eligible investments for government-managed trust funds and the relevant USPS and TVA statutes demonstrate Congress's intention that obligations issued thereunder be eligible investments for all government-managed trust funds, the better interpretation is that the relevant USPS and TVA statutes have the effect of expanding the universe of authorized CSRDF investments.

[8] The pertinent trust fund investment eligibility language pertaining to obligations of the federal land banks and the banks for cooperatives provided that obligations issued by those entities "'shall be a lawful investment for all fiduciary and trust funds, and may be accepted as security for all public deposits.'" *Id.* at 1 (quoting section 27 of the Federal Farm Loan Act, ch. 245, 39 Stat. 360, 380 (1916), and section 1 of the Act of August 23, 1954, ch. 834, 68 Stat. 770, 771).

[9] The statutes to which this Office referred provided that the obligations issued thereunder "shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof." *Id.* at 2 & n.3.

vested in bonds issued under the Federal Farm Mortgage Corporation Act on account of trust fund investment eligibility language contained in that act which was similar to that contained in the relevant USPS and TVA statutes. *Investment of Postal Savings Funds in Bonds of Federal Farm Mortgage Corporation*, 37 Op. Att'y Gen. 479, 480 (1934).[10]

It has been Treasury's longstanding practice to invest monies contained in government-managed trust funds, including the CSRDF, in public debt obligations or other obligations that have been authorized by Congress as legal investments for all government-managed trust funds. *See Temporary Increase in Debt Ceiling: Hearings Before the House Comm. on Ways and Means*, 90th Cong. 52 (1967) (statement of Hon. Henry H. Fowler, Secretary of the Treasury) ("1967 Hearings").[11]

During the 1985 debt limit crisis, Secretary of the Treasury James Baker invested CSRDF monies in obligations issued by the FFB pursuant to 12 U.S.C. § 2288(a), which are not public debt obligations. That action was the subject of a congressional hearing at which a Comptroller General opinion was presented. *See Federal Financing Bank and the Debt Ceiling: Hearing Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong. 28–34 (1985) ("*Federal Financing Bank and the Debt Ceiling*"). In concluding that the investment and related transactions met all applicable legal requirements, the Comptroller General opinion stated that "12 U.S.C. § 2288(d) provides that the [FFB's] obligations 'shall be lawful investments, and may be accepted as security for all fiduciary, trust, and public funds, the investment of which shall be under the authority or control of the United States.'" Memorandum for the Honorable John J. LaFalce, Chairman, Subcommittee on Economic Stabilization, House Committee on Banking, Finance and Urban Affairs, from Milton J. Socolar, Comptroller General of the United States, B-138524, at 2 (Comp. Gen. 1985) ("Comp. Gen. Op."), *reprinted in Federal Financing Bank and the Debt Ceiling* at 32.

C. The FFB is authorized to receive payment for the loan assets it intends to sell to the CSRDF in public debt obligations.

In analyzing the proposed transactions, we must also consider whether it is permissible for the FFB to receive payment in the form of public debt obligations

[10] The pertinent trust fund investment eligibility language provided as follows: " 'Such bonds . . . may be accepted as security, for all fiduciary, trust, and public funds the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof.' " *Id.* (quoting Federal Farm Mortgage Corporation Act, ch. 7, § 4(a), 48 Stat. 344, 345 (1934)).

[11] In testimony before the House Ways and Means Committee, Secretary Fowler stated that, in practice, Treasury had refrained from investing monies contained in government-managed trust funds in participation certificates issued by the Export-Import Bank because, unlike the statute authorizing the issuance of Federal National Mortgage Association participation certificates, the statute authorizing the issuance of Export-Import Bank participation certificates did not contain a provision making them generally eligible for investment by government-managed trust funds. *Id.*; *see also id.* at 179–80.

for the USPS and TVA obligations it intends to sell. We conclude that the FFB is authorized to accept public debt obligations as a form of payment. As stated above, the FFB Act authorizes the FFB to sell obligations issued by federal agencies "on terms and conditions determined by the Bank." 12 U.S.C. §2285(a). We believe this broadly worded statutory authority allows the FFB reasonably to negotiate and determine the form of compensation to be received upon such a sale.[12] Accordingly, no significant legal issues appear to be raised by the FFB's plan to receive public debt obligations in exchange for the USPS and TVA obligations it intends to sell to the CSRDF.

In his 1985 opinion, the Comptroller General apparently concluded that no significant legal issues were raised by the FFB's acceptance of public debt obligations in exchange for the sale of its own obligations to the CSRDF. *See* Comp. Gen. Op. at 2, *reprinted in Federal Financing Bank and the Debt Ceiling* at 32. In view of the fact that we have found nothing in the FFB Act prohibiting the FFB's acceptance of public debt obligations in exchange for the loan assets it intends to sell, and in light of the Comptroller General's apparent view in 1985 that such activity did not raise legal issues, we see no reason why, under current conditions, the FFB should not be able to accept public debt obligations as compensation for the USPS and TVA obligations it intends to sell.

D. Treasury has the authority to enter into a transaction with the FFB whereby Treasury would purchase the public debt obligations received by the FFB in exchange for the cancellation by Treasury of FFB obligations of equivalent value held by Treasury.

We must also consider whether Treasury has the authority to enter into a transaction with the FFB whereby Treasury would purchase the public debt obligations received by the FFB in exchange for the cancellation by Treasury of FFB obligations of equivalent value held by Treasury. We conclude that Treasury has the authority to enter into such a transaction.

Treasury has the authority to redeem or purchase public debt obligations prior to maturity. Section 3111 of title 31, United States Code, states in pertinent part:

> An obligation may be issued under this chapter to buy, redeem, or refund, at or before maturity, outstanding bonds, notes, certificates of indebtedness, Treasury bills, or savings certificates of the United States Government. Under regulations of the Secretary of the Treasury, money received from the sale of an obligation and

[12] As noted above, the FFB Act also grants the FFB the authority to purchase obligations issued by federal agencies. *See* 12 U.S.C. §2285(a). Since the public debt obligations the FFB intends to receive in exchange for the USPS and TVA obligations were issued by Treasury, a "federal agency" under the FFB Act, it would appear that the FFB has the authority to purchase them from the CSRDF.

> other money in the general fund of the Treasury may be used in making the purchases, redemptions, or refunds.

31 U.S.C. §3111.

Treasury issued the public debt obligations currently being held by the CSRDF pursuant to 5 U.S.C. §8348 and chapter 31 of title 31, United States Code. *See* 5 U.S.C. §8348(d) ("The purposes for which obligations of the United States may be issued under chapter 31 of title 31 are extended to authorize the issuance at par of public-debt obligations for purchase by the Fund."). All forms of public debt obligations covered by 31 U.S.C. §3111 are authorized to be issued under chapter 31 of title 31, United States Code. *See* 31 U.S.C. §§3102–3105. Accordingly, although the CSRDF statute imposes greater limits on the Secretary's discretion to fashion terms and conditions of public debt obligations issued to the CSRDF than the statute setting forth the procedures for issuing public debt obligations in general, *compare* 5 U.S.C. §8348(d) *with* 31 U.S.C. §3121, the public debt obligations currently being held by the CSRDF are no less subject to the terms of §3111 than public debt obligations held by the general public. Whether a public debt obligation held by the CSRDF is a "bond," "note," or "certificate of indebtedness" for purposes of §3111 depends, therefore, on the instrument's term of maturity, which was determined upon its issuance, and not on its status as an investment of a government-managed trust fund. *Cf.* 31 U.S.C. §3102(a) (specifying that bonds authorized to be issued under that section may be issued either "to the public" or "to Government accounts."). Your office has informed us that, based on this analysis, the public debt obligations the FFB plans to acquire from the CSRDF are all covered by the provisions of 31 U.S.C. §3111.

As fashioned, §3111 does not expressly authorize Treasury to finance the redemption prior to maturity of previously issued public debt obligations with all possible instruments of value under its control. However, it is reasonable to interpret §3111 as not imposing strict limitations on the manner in which Treasury may redeem public debt obligations, but rather as merely providing express authority for the use by Treasury of two methods for raising the funds needed to effect such redemptions. A contrary interpretation of §3111 would produce the illogical result of barring Treasury from using other means at its disposal that, depending on the circumstances, might be less costly to the government or more fiscally and financially prudent than the methods expressly contemplated under the statute. Accordingly, we conclude that §3111 impliedly grants Treasury the authority to use the FFB obligations to finance its purchase of the public debt obligations.

Our conclusion that Treasury has implied authority under 31 U.S.C. §3111 to use a portion of its FFB obligation holdings to purchase prior to maturity the public debt obligations at issue is bolstered by the statutory authority granted to the Secretary pursuant to 31 U.S.C. §324 and 12 U.S.C. §2288(b). Section 324 of title 31, United States Code, provides in relevant part:

> (a) The Secretary of the Treasury may—
> (1) dispose of obligations—
>
> (A) acquired by the Secretary for the United States Government . . . .
>
> (b) The Secretary may dispose or extend the maturity of obligations under subsection (a) of this section *in the way, in amounts, at prices (for cash, obligations, property, or a combination of cash, obligations, or property), and on conditions the Secretary considers advisable and in the public interest.*

31 U.S.C. § 324 (emphasis added). Treasury acquired the FFB obligations it currently holds pursuant to 12 U.S.C. § 2288(b). That statute authorizes the FFB to "issue its obligations to the Secretary" and authorizes the Secretary to purchase any such obligations.[13] Accordingly, the FFB obligations currently being held by Treasury are "obligations . . . acquired by the Secretary for the United States Government," as those terms are used in 31 U.S.C. § 324. Subsection (b) of § 324 grants the Secretary broad authority to dispose of the FFB obligations he holds. We believe that authority includes the authority to use them as currency in acquiring the public debt obligations.

In addition to general authority to dispose of "obligations . . . acquired by the Secretary for the United States Government" under § 324, the Secretary has specific authority to dispose of the FFB obligations he holds. Section 2288(b) of title 12, United States Code, provides that "[t]he Secretary . . . may sell, *upon such terms and conditions and at such price or prices as he shall determine*, any of the obligations acquired by him under this subsection." 12 U.S.C. § 2288(b) (emphasis added). This broadly worded authority also provides support for the conclusion that the Secretary may dispose of the FFB obligations he holds in a manner that allows him to acquire the public debt obligations, as it appears to allow the Secretary reasonably to determine the terms and conditions of such a disposal.

We believe our conclusion that Treasury has the authority to use the FFB obligations it currently holds to purchase the public debt obligations it has previously issued to the CSRDF is again consistent with the 1985 Comptroller General opinion. In that opinion, the Comptroller General did not question Treasury's authority,

[13] In order to enable the FFB to support its financing activities, the FFB Act provides that, in addition to issuing up to $15 billion worth of its debt obligations to the public, "the [FFB] is . . . authorized to issue its obligations to the Secretary of the Treasury." 12 U.S.C. § 2288(b), *see also* H.R. Rep. No. 92-1478, at 5 (1972) ("The Bank's activities would be financed, in general, by . . . Bank obligations issued to the Secretary of the Treasury."). The same provision of the FFB Act that authorizes the FFB to issue its obligations to Treasury also authorizes Treasury to purchase and agree to purchase such obligations. 12 U.S.C. § 2288(b). No express limitation is placed on the amount of its own obligations that the FFB may issue to Treasury. Treasury currently holds approximately $67 billion worth of these obligations.

exercised in a similar manner, to purchase from the FFB prior to maturity the public debt obligations it had previously issued to the CSRDF. *See* Comp. Gen. Op. at 2, *reprinted in Federal Financing Bank and the Debt Ceiling* at 32.

Based on the authorities granted to the Secretary under 31 U.S.C. §§ 3111 and 324, and 12 U.S.C. § 2288(b), and the conclusions of the 1985 Comptroller General opinion, we conclude that Treasury would have the authority to purchase from the FFB prior to maturity the public debt obligations it has previously issued to the CSRDF pursuant to the transaction described above.

E. The FFB has the authority to sell the public debt obligations to Treasury and to accept the cancellation by Treasury of FFB obligations of equivalent value as payment for the public debt obligations.

Treasury's ability to complete the proposed transactions will also depend on whether the FFB has the authority to sell the public debt obligations and accept the cancellation by Treasury of FFB obligations of equivalent value as payment for the public debt obligations. We conclude that the FFB has such authority. As stated above, section 6 of the FFB Act grants the FFB the authority to sell obligations issued by federal agencies. 12 U.S.C. § 2285(a). The public debt obligations the FFB intends to sell to Treasury are "obligations" within the terms of the FFB Act, as they are represented in the form of notes, bonds, debentures, or other evidence of indebtedness. *Id.* § 2282(2). The public debt obligations also were issued by the Department of the Treasury, a "federal agency" as that term is defined in the FFB Act. *See id.* § 2282(1). In sum, the FFB Act grants the FFB the authority to sell the public debt obligations to Treasury. Moreover, as stated above, the FFB Act authorizes the FFB to sell obligations issued by federal agencies "on terms and conditions determined by the Bank." *Id.* § 2285(a). This broadly worded statutory authority allows the FFB reasonably to negotiate and determine the form of compensation to be received upon such a sale. Accordingly, the FFB may, consistent with this authority, require and accept the cancellation of a portion of its own indebtedness held by Treasury as payment for the public debt obligations. [14]

[14] The purchase authority provided to the FFB under section 6 of the FFB Act also authorizes the FFB to accept the cancellation of a portion of its own obligations held by Treasury as payment for the public debt obligations. By accepting the cancellation of the FFB obligations as payment for the public debt obligations, the FFB would be effectively purchasing such obligations. Because the FFB obligations are "obligations" that were issued by the FFB, a "federal agency" under the FFB Act, *see* 12 U.S.C. §§ 2282(1), 2283, the FFB has the authority to purchase them in the manner discussed above.

F. Transfer of the relevant public debt obligations to Treasury would reduce the amount of outstanding debt subject to limit by the amount of public debt obligations transferred.

In our analysis, we must also consider the effect on the debt limit of the proposed transfer of public debt obligations from the CSRDF to Treasury. We conclude that the transfer of these obligations to Treasury would effectively cancel them, reducing the amount of outstanding debt subject to limit and thus creating room under the debt limit for additional public borrowing. The relevant provision of the debt limit statute, 31 U.S.C. § 3101(b), provides:

> The face amount of obligations issued under this chapter and the face amount of obligations whose principal and interest are guaranteed by the United States Government (except guaranteed obligations held by the Secretary of the Treasury) may not be more than $4,900,000,000,000, outstanding at one time, subject to changes periodically made in that amount as provided by law through the congressional budget process described in Rule XLIX of the Rules of the House of Representatives or otherwise.

Quite simply, if transferred to Treasury, the public debt obligations in question would no longer be "outstanding" within the terms of the debt limit statute. Accordingly, the amount of outstanding debt subject to limit would be reduced by the amount of such public debt obligations. *See The Secretary of the Treasury's Authority With Respect to the Civil Service Retirement and Disability Fund*, 19 Op. O.L.C. 286, 291 n.9 (1995); *see also* Comp. Gen. Op. at 2, *reprinted in Federal Financing Bank and the Debt Ceiling* at 32 (Comptroller General opining that "when the [FFB] prepaid $5 billion of its debt with Treasury's own obligations, Treasury's outstanding debt was reduced by $5 billion. Therefore, Treasury was able to borrow an additional $5 billion from the public."). The borrowing capacity freed up by the transaction could be used to support additional Treasury borrowing up to the debt limit, if, as we indicate below, the loan assets the FFB intends to sell to the CSRDF as a replacement for the public debt obligations at issue are not themselves subject to the debt limit.

G. The USPS and TVA obligations the FFB intends to sell to the CSRDF in exchange for the transferred public debt obligations are not themselves subject to the debt limit.

In order to ensure that the series of transactions contemplated by Treasury would allow it legally to issue additional public debt obligations to the public in an amount less than or equal to the amount of public debt obligations secured from

the CSRDF through the FFB's sale of the loan assets, we must consider whether the USPS and TVA obligations that would replace the transferred public debt obligations as CSRDF investments are not themselves subject to the debt limit. Based on the express terms and the legislative history of the relevant USPS and TVA borrowing statutes, we conclude that they are not.

As its express terms suggest, the debt limit applies to debt issued directly by Treasury pursuant to chapter 31 of title 31 of the United States Code. It also applies to direct borrowing by certain other federal agencies and corporations which is guaranteed as to principal and interest by the United States. *See* H.R. Rep. No. 79–246, at 2–3 (1945); S. Rep. No. 79–106, at 2 (1945).[15] As indicated by his 1985 opinion, the Comptroller General holds the view that the phrase "obligations whose principal and interest is guaranteed by the United States Government" applies to the direct obligations of federal issuers other than Treasury if the statutes authorizing such issuers to borrow expressly provide for such guarantee or Congress has indicated its desire to provide the guarantee in the relevant legislative history. *See* Comp. Gen. Op. at 2–3, *reprinted in Federal Financing Bank and the Debt Ceiling at 32–33.*

The USPS and TVA obligations the FFB intends to sell are not subject to the debt limit. Obligations of the USPS and TVA are not issued by Treasury pursuant to chapter 31 of title 31 of the United States Code. Therefore, in order for the obligations the FFB intends to sell to be subject to the debt limit, they must be "obligations whose principal and interest are guaranteed by the United States Government." The statute authorizing the issuance of USPS obligations provides that such obligations shall "not be obligations of, nor shall payment of the principal thereof or interest thereon be guaranteed by, the Government of the United States, except as provided in section 2006(c) of this title." 39 U.S.C. § 2005(d)(5). Section 2006(c) provides, in turn, that obligations issued by the USPS shall be guaranteed as to principal and interest by the United States,

> *if and to the extent that*—
>
> (1) the [USPS] requests the Secretary . . . to pledge the full faith and credit of the Government of the United States for the payment of principal and interest thereon; and

[15] *See also Second Liberty Bond Act, as Amended—Participation Certificates Issued by Federal National Mortgage Association*, 42 Op. Att'y Gen. 341, 342 (1967) ("[B]y the act of April 3, 1945, c. 51, 59 Stat. 47, Congress brought the borrowings of certain agencies other than the Treasury within the overall debt limitation. . . . The [relevant] Committee reports . . . reveal that [the 1945 debt limit] amendment was adopted to embrace the borrowings of each of eight agencies, named in the reports, whose governing statutes provided that their obligations were fully and unconditionally guaranteed as to principal and interest by the United States. . . . From this brief history, it is clear that [the debt limit] is concerned with debt that arises from borrowing, and with nothing else."); 1967 Hearings at 40 (Secretary of the Treasury Henry H. Fowler testifying that "the history of [the 1945 act amending the statutory debt limit], which first brought so-called guaranteed obligations within the statutory debt limit, confirmed that Congress had in mind only certain obligations of certain agencies. The committee report named each Government agency then being affected. And there were cited the respective statutes authorizing the issuance of the so-called obligations.").

> (2) the Secretary, in his discretion, determines that it would be in the public interest to do so.

Id. § 2006(c) (emphasis added).

The legislative history of the statutory provisions discussed above provides:

> Obligations sold to the public would not be guaranteed by the United States and would not be within the debt ceiling unless the Postal Service requests the Secretary of the Treasury to pledge the full faith and credit of the United States and the Secretary determines that it would be in the public interest to do so.

H.R. Rep. No. 91–1104, at 10 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3659. Your office has informed us that the USPS obligations the FFB contemplates selling were not issued under the special conditions set forth in § 2006(c), but were, instead, issued pursuant to § 2005. Based on this representation, we conclude that such obligations are not subject to the debt limit.

Similarly, the statutory provision authorizing the issuance of the TVA obligations the FFB intends to sell to the CSRDF, 16 U.S.C. § 831n–4,[16] provides that obligations issued thereunder "shall not be obligations of, nor shall payment of the principal thereof or interest thereon be guaranteed by, the United States." 16 U.S.C. § 831n–4(b). Accordingly, the TVA obligations the FFB intends to sell to the CSRDF are also not subject to the debt limit.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

[16] Section 831n–4(a) of title 16 currently authorizes the TVA to issue up to $30 billion in debt obligations "to assist in financing its power program and to refund such [indebtedness]."

Legality of Government Honoraria Ban Following U.S. v. National Treasury Employees Union

No portion of § 501(b) of the Ethics in Government Act of 1978, which imposes an honoraria ban on all government employees, survives the Supreme Court's decision in *United States v. National Treasury Employees Union.*

February 26, 1996

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Last year, the Supreme Court held that section 501(b) of the Ethics in Government Act of 1978 — which imposes a government-wide ban on the receipt of honoraria by any government employee — violates the First Amendment. *United States v. National Treasury Employees Union*, 513 U.S. 454, 477 (1995) ("*NTEU*"). This memorandum examines, at the request of the Civil Division, the question what, if any, portion of section 501(b) survives the *NTEU* decision. As explained more fully below, we conclude that the answer to this question must be "none." Following the Supreme Court's invalidation of section 501(b) with respect to the vast majority of the statute's targeted audience, what remains is a very different statute from the one Congress enacted. We cannot know, nor should we speculate, whether Congress would have enacted an honoraria ban as limited in scope as that portion of section 501(b) which the Supreme Court declined to strike down. The special constitutional solicitude accorded First Amendment rights, moreover, cautions against any intrusion upon those rights without the prior reflective judgment of the legislature.

I.

In 1989, Congress enacted the Ethics Reform Act (the "Act"), Pub. L. No. 101–194, 103 Stat. 1716, 5 U.S.C. app. §§ 101–505, in an effort to reinforce standards of integrity within the federal government. Concluding that "substantial outside earned income creates at least the appearance of impropriety and thereby undermines public confidence in the integrity of government officials," Report of Bipartisan Task Force on Ethics on H.R. 3660, *reprinted at* 135 Cong. Rec. 30,740, 30,744 (1989) ("Bipartisan Task Force Report"), Congress amended section 501(b) of the Ethics in Government Act of 1978 to create the following "Honoraria Prohibition": "An individual may not receive any honorarium while that individual is a Member, officer, or employee." 5 U.S.C. app. § 501(b). The Act broadly defines "officer or employee" to include nearly all employees of the federal government. An "honorarium" is defined as "a payment of money

or any thing of value for an appearance, speech or article." [1] *Id.* § 505(3). Federal employees are thus prohibited from receiving compensation for a wide variety of expressive activities, whether or not these are related to their official duties.

Various individuals challenged the constitutionality of the honoraria ban in federal district court and their cases were consolidated into a single class action. The class was defined as "all Executive Branch employees 'below grade GS–16, who—but for 5 U.S.C. app. 501(b)—would receive honoraria.' " *NTEU*, 513 U.S. at 461. The district court granted the employees' motion for summary judgment, holding the statute "unconstitutional insofar as it applies to Executive Branch employees of the United States government"; it enjoined enforcement of the statute against any executive branch employee. *NTEU*, 788 F. Supp. 4, 13 (D.D.C. 1992). On appeal, the Court of Appeals affirmed, concluding that the government's concededly strong interest in protecting the integrity and efficiency of public service did not justify a substantial burden on speech which did not advance that interest. Determining that § 501(b)'s application to executive branch employees was severable, the Court of Appeals effectively rewrote the statute by striking the words " 'officer or employee' from section 501(b), *except* in so far as those terms encompass members of Congress, officers and employees of Congress, judicial officers and judicial employees." *NTEU*, 990 F.2d 1271, 1279 (D.C. Cir. 1993) (emphasis added).

By a vote of 6 to 3, the Supreme Court, in an opinion written by Justice Stevens, affirmed in part and reversed in part. The Court began its analysis with the affirmation that, even though respondent employees work for the federal government, "they have not relinquished 'the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest.' " *NTEU*, 513 U.S. at 465 (citing *Pickering v. Board of Educ. of Township High School Dist.*, 391 U.S. 563, 568 (1968)). Because respondents' expressive activities fell "within the protected category of citizen comment on matters of public concern," *id.* at 466, the Court applied *Pickering*'s familiar balancing test:

> When a court is required to determine the validity of such a restraint [on speech], it must "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Id. at 465–66 (citing *Pickering*, 391 U.S. at 568).

[1] A 1991 amendment to the definition of "honorarium" provides one example of some of the unusual distinctions made by the statute. Under the amended definition, which refers to "a series of appearances speeches, or articles," pay is prohibited for a *series* of articles only if a nexus exists between the author's employment and either the subject matter of the expression or the identity of the payor. *Id.* However, for an *individual* article or speech, pay is prohibited regardless of any such nexus.

Looking more closely at the far-reaching scope of the honoraria ban, the Court was clearly concerned with its widespread impact: It alternately characterized § 501(b) as a "wholesale deterrent to a broad category of expression by a massive number of potential speakers," *id.* at 454, "a sweeping statutory impediment to speech," which "chills potential speech before it happens," *id.* at 467, 468, a "large-scale disincentive to Government employees' expression," *id.* at 470, and a "crudely crafted burden on respondents' freedom to engage in expressive activities." *Id.* at 477. The heavy burden that the government bore in justifying the ban was not, the Court concluded, satisfied by the government's concerns about the potential for honoraria abuses and the need "to protect the efficiency of the public service." *Id.* at 474. These concerns were neither sustained by the record, which was devoid of evidence of honoraria misconduct by the vast rank and file of federal employees, nor supported by the text of the statute. The Court thus held that § 501(b) violated the First Amendment. *Id.* at 477.

Although it affirmed the D.C. Circuit's holding with respect to the invalidity of the honoraria ban, the Court rejected the lower court's "overinclusive" remedy. Instead, it granted full relief to respondents, enjoining enforcement of the ban as to "all Executive Branch employees below Grade GS–16," *id.* at 478, but refusing to decide the applicability of the ban to senior executive branch officials.[2] The Court noted that "the Government conceivably might advance a different justification for an honoraria ban limited to more senior officials, thus presenting a different constitutional question than the one we decide today." *Id.* Its "obligation to avoid judicial legislation" also prevented the Court from crafting a nexus requirement for the honoraria ban. How the ban should be limited—whether to cases involving an undesirable nexus between the speaker's official duties and the subject matter of the speaker's expression or to those involving some nexus to the identity of the payor—was not, the Court said, a matter for judicial determination. Rather, the task of drafting a narrower statute was properly left to Congress. *Id.* at 479.

In a separate concurrence, Justice O'Connor made clear her understanding that the majority's holding did not require invalidation of the entire statute. She argued that the statute was still "capable of functioning independently" with respect to its "principal targets"—high-level executive branch employees and employees of the legislative and judicial branches. *Id.* at 489 (O'Connor, J., concurring). Justice O'Connor would also have read a nexus requirement into the honoraria ban.

Dissenting Chief Justice Rehnquist, joined by Justices Scalia and Thomas, insisted that the honoraria ban was consistent with the First Amendment under the *Pickering* test. *Id.* at 501. Chief Justice Rehnquist noted that even if he agreed with the majority's conclusion that the ban violated the First Amendment, he

[2] The Court recognized that the class of respondents included one GS–16 employee to whom "[t]he rationale we have set forth for our holding does not necessarily apply." Noting, however, that the government did not request reversal of the lower court's judgment granting him relief, the Court left that part of the lower court's judgment intact. *Id.* at 478 n.23.

would not accept the majority's failure to include a nexus requirement in its remedy. Because the majority had limited its analysis "to only those applications of the honoraria ban where there is no nexus between the honoraria and Government employment," in the Chief Justice's view, the Court properly should have limited its remedy to such applications as well.[3] *Id.* at 502. Thus, like Justice O'Connor, the dissent would have "affirmed the injunction against the enforcement of § 501(b) as applied to Executive Branch employees below grade GS–16 who seek honoraria that are unrelated to their Government employment." *Id.* at 503.

II.

Our analysis of *NTEU* begins with its holding: as written, the honoraria ban of § 501(b) violates the First Amendment. While § 501(b) does not directly abridge speech or discriminate among speakers on the basis of the content or viewpoint of their messages, its prohibition on compensation "unquestionably imposes a significant burden on expressive activity." *NTEU*, 513 U.S. at 468. Whatever "speculative benefits," *id.* at 477, the honoraria ban may provide the government are insufficient to justify this "blanket burden on the speech of nearly 1.7 million federal employees." *Id.* at 474.

Finding § 501(b) to be an invalid abridgment of government employees' First Amendment rights, the Supreme Court explicitly prohibited its enforcement against the class of employees represented by the *NTEU* plaintiffs, *i.e.*, all executive branch employees below grade GS–16. That group, the Court recognized, consists of "an immense class of workers." *Id.* at 473. By enjoining application of the honoraria ban with respect to this class, the Court drastically curtailed the scope that even arguably could be given to § 501(b).

The question is whether any remaining applications of § 501(b)—for example, to employees of the legislative and judicial branches and to high-level executive officials—survive the *NTEU* decision. Under well-established canons of statutory construction, a portion of a statute that has been held invalid may be severed, leaving the rest to operate, if there is no evidence that the legislature considered the valid and invalid portions to be "conditions, considerations, or compensations for each other." 2 Norman J. Singer, Sutherland Statutory Construction § 44.06 (5th ed. 1992). Only if severance of the invalid provision would result in the creation of a law that the legislature would not have enacted, should the entire statute be invalidated. *Id.* § 44.04. "The final test [of severability] . . . is the traditional one: the unconstitutional provision must be severed unless the statute

[3] In a footnote, Chief Justice Rehnquist made clear that he "certainly could not condemn the Court for its refusal to rewrite the statute," but was simply challenging "the Court's failure to tailor its remedy to match its selective analysis." *Id.* at 502 n.8.

created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

However, the courts' "'duty . . . to maintain [a challenged] act in so far as it is valid,'" *id.* at 684 (citation omitted), is not unlimited. Three considerations lead us to the conclusion that an attempt to apply § 501(b) to anyone after *NTEU* would run afoul of the courts' "obligation to avoid judicial legislation." *NTEU*, 513 U.S. at 479.

1. As noted in *NTEU* itself, attempts to devise a constitutional construction of a partially invalid statute are deeply problematic if they require the courts "to tamper with the text of the statute, a practice we strive to avoid." *Id.* at 478. This principle has special force when a proposed "construction" would essentially redraft the statute by treating general language as if it contained words limiting the statute's scope. *See, e.g., Eubanks v. Wilkinson*, 937 F.2d 1118, 1125 (6th Cir. 1991). Even in the presence of a severability clause making explicit the congressional intention that a partly invalid statute should be upheld to the greatest extent possible, the Supreme Court has held that it could not "dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain." *Hill v. Wallace*, 259 U.S. 44, 70 (1922). Doing so would run the risk of "creat[ing] a program quite different from the one the legislature actually adopted," *Sloan v. Lemon*, 413 U.S. 825, 834 (1973), a danger that the *NTEU* Court explicitly cited in refusing to adopt the government's proposal to insert a nexus requirement into § 501(b)'s honoraria ban. 513 U.S. at 479.

We believe that any attempt to identify a surviving core to § 501(b) runs afoul of this principle, because what would be left is an entirely different statute from the one Congress intended to enact. While the absence of a severability clause from the Act does not in itself create a presumption against severability, *Alaska Airlines*, 480 U.S. at 686, nothing in the text or legislative history of the honoraria ban indicates that Congress was willing to limit the ban to high-level executive branch officials and legislative and judicial branch employees. The primary focus of the legislative history, as both the district court and the Court of Appeals recognized, was Congress' concern with the receipt of honoraria by its own members. *NTEU*, 788 F. Supp. at 13; *NTEU*, 990 F.2d at 1278. There is no evidence, however, that this was Congress' *exclusive* concern. While the discussion in the Bipartisan Task Force Report concentrates on potential honoraria abuses by Congress, the report nevertheless recommends "that honoraria be abolished *for all officers and employees of the government.*" Bipartisan Task Force Report, 135 Cong. Rec. at 30,744 (emphasis added). Some of the language in the Senate floor debate suggests that a general honoraria ban was the "heart" of the proposed legislation. *See* 135 Cong. Rec. at 29,660–61 (comments of Sen. Mitchell). Moreover, notwithstanding any preoccupation in the legislative history with an honoraria ban directed at Congress, the fact remains that the ban which Congress eventually *did* enact was not limited to its own members, but extended to a broad class

of government employees in coordinate branches.[4] Any saving "construction" of § 501(b) would unavoidably upset the decision Congress actually made to enact a honoraria ban extending across all three branches, and would require the courts to speculate as to which of the several possible narrower statutes — if any — Congress would have enacted if it had foreseen the decision in *NTEU*.

2. A decision upholding as still valid some applications of § 501(b) would not only create a provision the scope of which was the product of judicial, not legislative, creativity; it would also approve a regulatory scheme of vastly different practical proportions than the one that Congress envisioned when it enacted the statute. The honoraria ban that Congress understood itself to be enacting covered a very large number of persons, while any saving construction would reduce the group affected manyfold. Whatever the significance of attempting to reach the larger class for First Amendment analysis, Congress might reasonably have considered a broader approach more politically acceptable or even responsible. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144 (1938). The drastic reduction in the practical reach of the statute required after *NTEU* in itself suggests that the resulting honoraria ban is not one that is traceable to congressional intent. As the Supreme Court has noted, the general presumption in favor of statutory validity "may disappear where the statute in question has already been declared unconstitutional in the vast majority of its intended applications, and it can fairly be said that it was not intended to stand as valid . . . only in a fraction of the cases it was originally designed to cover." *United States v. Raines*, 362 U.S. 17, 23 (1960); *Adams v. Askew*, 511 F.2d 700, 704 (5th Cir. 1975). Precisely such a situation is presented here. The *NTEU* decision invalidated § 501(b) with respect to the vast majority of the applications Congress intended it to have. What we are left with is an entirely different statute from the one that Congress enacted.

3. The need to exercise caution and restraint in evaluating congressional intent is particularly acute where, as here, First Amendment rights are implicated. We hold no freedom more inviolable than our First Amendment right to freedom of speech. Because free and unfettered debate lies at the foundation of our republic, First Amendment rights "hold a preferred position in the hierarchy of the constitutional guarantees of the incidents of freedom." *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953).

Given the special constitutional solicitude granted First Amendment rights, a federal statute will ordinarily not be construed to infringe upon those rights absent a clear and affirmative expression of congressional intent. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979). While we may be able to speculate from the legislative history that Congress might have enacted an honoraria ban

[4] We note that, were we to agree that the legislative history's focus on the receipt of honoraria by members of Congress was dispositive of the question of congressional intent, such a position could, at most, support application of the statute to members of Congress, not to other legislative, judicial or executive branch employees. Justice O'Connor, who urged this application in her concurrence, cited no legislative history to support such an expansion. Rather, the legislative history she relied upon referred, again, only to members of Congress.

more limited than § 501(b), we cannot say with certainty that Congress would have done so, nor can we know what limitations Congress might have imposed or what rationale Congress might have offered. In *NTEU*, the Court refused to draw a line between "categories of speech covered by [the] overly broad statute, [where] Congress has sent inconsistent signals as to where the new line or lines should be drawn." 513 U.S. at 479 n.26. A judicial decision choosing where to draw the line between categories of speakers covered by the honoraria ban would be a similar and equally unacceptable "invasion of the legislative domain." *Id.* In the absence of any clear legislative intent to restrict application of the honoraria ban to high-level executive officials, and employees of the legislative and judicial branches, § 501(b) simply cannot stand.

III.

After *NTEU*, there can be no doubt that the honoraria ban imposes a significant burden on the First Amendment rights of federal government employees. Government protestations of possible honoraria abuses and administrative inefficiencies notwithstanding, the Supreme Court effectively eviscerated § 501(b) by prohibiting its application to executive branch employees below GS–16. Whether Congress would have enacted an honoraria ban limited to those government employees not included within the *NTEU* class is an open question. Certainly these remaining employees have First Amendment rights no less compelling than those of the *NTEU* class members, rights which cannot and should not be summarily abridged on the basis of speculation as to congressional intent. We thus conclude that § 501(b) does not survive the Supreme Court's ruling in *NTEU*.

WALTER DELLINGER
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Office of Legal Counsel

Constitutionality of Citizenship Requirement for Participation in Small Business Administration's 8(a) Program

The Small Business Administration's regulation imposing a citizenship requirement for participation in its 8(a) program for disadvantaged contractors is constitutional.

March 4, 1996

MEMORANDUM OPINION FOR THE ASSOCIATE GENERAL COUNSEL
U.S. SMALL BUSINESS ADMINISTRATION

You have requested our opinion as to the constitutionality of a regulation of the Small Business Administration ("SBA"), 13 C.F.R. § 124.103, that limits eligibility for the SBA's 8(a) program for disadvantaged contractors to businesses owned by U.S. citizens. [1] The SBA has defended the validity of its 8(a) citizenship requirement on the grounds that such a requirement is consistent with congressional intent. We agree with this conclusion, although we do so based upon a different legal analysis than the one relied upon by the SBA.

I.

Through the Small Business Act (the "Act"), 15 U.S.C. §§ 631-656, Congress established the 8(a) program to "promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals." 15 U.S.C. § 631(f)(2). The Act defines a "small business concern owned and controlled by socially and economically disadvantaged individuals" as "a small business concern . . . (i) which is at least 51 per centum unconditionally owned by — (I) one or more socially and economically disadvantaged individuals." *Id.* § 637(a)(4)(A). Included among the groups specifically identified as "socially disadvantaged" are "Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities." *Id.* § 631(f)(1)(C).

The Act mandates the creation of the SBA "to carry out the policies of this chapter," *id.* § 633(a), and it authorizes the Administrator of the SBA to "make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter." *Id.* § 634(b)(6). Pursuant to this authority, in 1979, the SBA promulgated regulations establishing ownership requirements for 8(a) applicants:

[1] Letter for Walter E. Dellinger, Assistant Attorney General, Office of Legal Counsel, from Eric S. Benderson, Associate General Counsel, U.S. Small Business Administration (July 19, 1995). It is our understanding that your request seeks advice with respect to a challenge to § 124.103 originally raised by Mr. Eugene Foley, whose correspondence to the SBA is attached to your request. Because Mr. Foley appears to challenge the constitutionality of § 124.103, our analysis is limited to the validity of the regulation under the Constitution.

> [I]n order to be eligible to participate in the 8(a) program, an applicant concern must be one which is at least 51 percent unconditionally owned by an individual(s) who is a citizen of the United States (specifically excluding permanent resident alien(s)) and who is determined by SBA to be socially and economically disadvantaged.

13 C.F.R. § 124.103.

In its preamble to the interim rule, the SBA justified the citizenship requirement as follows:

> [T]he individual's social disadvantage must be rooted in treatment which he or she has experienced in American society. Each of the statutorily designated groups has historically been abused in this country (e.g., the enslavement and subsequent disfranchisement of Blacks; the near-extermination of Native Americans). The 8(a) program is in large part designed to overcome the effects of such past injustices. It is not designed to assist newcomers to America who have been oppressed in foreign lands.

45 Fed. Reg. 79,413, 79,414 (1980).

II.

The Supreme Court has made clear that, while states are strictly limited by the Equal Protection Clause of the Fourteenth Amendment in their ability to make distinctions between citizens and aliens,[2] the federal government enjoys far broader authority to classify on the basis of alienage. "For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Mathews v. Diaz*, 426 U.S. 67, 81 (1976). As an aspect of its plenary power over naturalization and immigration, Congress "enjoys rights to distinguish among aliens that are not shared by the States." *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977).

However, the federal power over aliens is not "so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 101 (1976). While federal alienage classifications imposed by Con-

[2] In *Graham v. Richardson*, 403 U.S. 365 (1971), the Supreme Court held that Arizona and Pennsylvania statutes that imposed durational residency requirements on aliens seeking welfare benefits violated the Equal Protection Clause of the Fourteenth Amendment. State classifications based on alienage, the Court concluded, are "subject to close judicial scrutiny." 403 U.S. at 372. In reaching this conclusion, the Court identified aliens as a "suspect class," a "prime example of a 'discrete and insular' minority [citing *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938)] for whom such heightened judicial solicitude is appropriate." *Id.*

gress or the President are subject to "relaxed scrutiny," *Nyquist*, 432 U.S. at 7 n.8, and violate the Fifth Amendment only if they are "wholly irrational," *Mathews*, 426 U.S. at 83, similar restrictions established by executive agencies without clear statutory or presidential authorization may be entitled to less deference. *See Hampton*, 426 U.S. at 103.

Our examination of the citizenship requirement of § 124.103, whether evaluated under *Hampton v. Mow Sun Wong* or more standard equal protection or due process analyses, leads us to conclude that the regulation survives constitutional scrutiny.

A. *Hampton v. Mow Sun Wong*

In *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), the Supreme Court addressed the question whether discriminatory restrictions imposed by executive agencies should be subjected to more careful scrutiny than those imposed by Congress or the President. At issue in *Hampton* was a Civil Service Commission regulation that excluded aliens from the federal competitive civil service. Respondents challenged the regulation under both the Equal Protection and Due Process components of the Fifth Amendment.

The Court framed the issue before it in both equal protection and due process terms:

> The rule enforced by the Commission has its impact on an identifiable class of persons who, entirely apart from the rule itself, are already subject to disadvantages not shared by the remainder of the community. . . . The added disadvantage resulting from enforcement of the rule — ineligibility for employment in a major sector of the economy — is of sufficient significance to be characterized as a deprivation of an interest in liberty.

Hampton, 426 U.S. at 102. Rather than relying upon a standard equal protection or due process analysis, however, the Court instead crafted an alternative analytical approach, based upon due process: [3]

[3] The Court specifically rejected respondents' suggestion that it apply an equal protection analysis:

> Respondents argue that this scrutiny requires invalidation of the Commission rule under traditional equal protection analysis. It is true that our cases establish that the Due Process Clause of the Fifth Amendment authorizes that type of analysis of federal rules and therefore that the Clause has a substantive as well as a procedural aspect. However, it is not necessary to resolve respondents' substantive claim, if a narrower inquiry discloses that essential procedures have not been followed.

426 U.S. at 103. The dissent took issue with this "novel conception of the procedural due process guaranteed by the Fifth Amendment," 426 U.S. at 117 (Rehnquist, J., dissenting), chastising the majority for "inexplicably meld[ing] together the concepts of equal protection and procedural and substantive due process." *Id.* at 119.

> [W]e deal with a rule which deprives a discrete class of persons of an interest in liberty on a wholesale basis. By reason of the Fifth Amendment, such a deprivation must be accompanied by due process. . . . When the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest. If the agency which promulgates the rule has direct responsibility for fostering or protecting that interest, it may reasonably be presumed that the asserted interest was the actual predicate for the rule.

Id. at 102-03. Applying this analysis, the Court dismissed various justifications put forth by the Commission — those related to foreign affairs, treaty negotiations, and immigration and naturalization — as being outside the agency's legitimate area of responsibility. *Id.* at 115. The only proper concern of the agency — the promotion of an efficient federal service — was, the Court concluded, not a legitimate basis for such a broad exclusionary rule. *Id.*

As noted above, the test outlined in *Hampton* falls somewhere between a classic equal protection and due process analysis. Pursuant to the *Hampton* approach, where an agency adopts an alienage rule that has a serious impact on interests entitled to due process protection, and does so without clear statutory or presidential authorization, the agency must make some showing of statutory responsibility for the national interests it asserts as its goals. In our judgment, the SBA meets this requirement: the rule it wishes to adopt is directly related to its statutory task of administering the 8(a) program and is a reasonable means of doing so.

B. *Equal Protection*

The SBA's regulation also passes muster under a more conventional equal protection analysis. Notwithstanding the fact that "all persons, aliens and citizens alike," are protected by the Equal Protection component of the Fifth Amendment, Congress may nevertheless enact rules for aliens "that would be unacceptable if applied to citizens." *Mathews*, 426 U.S. at 80. Under *Mathews*, congressional statutes that discriminate against aliens are subject only to minimal review, the "wholly irrational" standard noted above.

Recently, the Supreme Court confirmed that this minimal standard applies also to equal protection challenges to restrictions imposed by executive agencies. In *Reno v. Flores*, 507 U.S. 292 (1993), the Court reviewed an Immigration and Naturalization Service regulation requiring unaccompanied alien juveniles to be placed in detention, pending deportation proceedings. Rejecting the alien juveniles' equal protection claim that they were being treated differently from juvenile

U.S. citizens awaiting federal juvenile delinquency proceedings, the Court summarily affirmed the rationality of the policy, stating simply: "[T]he difference between citizens and aliens is adequate to support the [disparate treatment]." 507 U.S. at 306.

Flores suggests that federal alienage classifications imposed by an executive agency are subject to the same minimal scrutiny under the Equal Protection component of the Fifth Amendment as is applied to congressional statutes. The SBA's asserted interest in its citizenship requirement—to ensure that the 8(a) program benefits members of groups that have historically been abused in the United States and not those who only have been oppressed in foreign lands—is sufficient to satisfy this minimal standard.

C. *Due Process*

Finally, we conclude that the regulation raises no issue under a standard procedural due process analysis because the Supreme Court's decisions establish that no constitutionally protected liberty or property interest is infringed by § 124.103. The Supreme Court has interpreted the "liberty" protected by procedural due process to include " 'not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life,. . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' " *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Generally, liberty interests include those "human abilities that do not depend on the government." *Scott v. Village of Kewaskum*, 786 F.2d 338, 340 (7th Cir. 1986). The 8(a) program, however, is a creature of government: it upends the concept of "liberty" to claim that there is a liberty interest in a statutory program conferring preferential treatment for government contracts. *Cf. id.* ("The due process clauses are designed to establish regular procedures for governmental intervention in private affairs, and so the claim to process is at its strongest when a person simply wishes to go about life—be it personal or economic life—without encountering the prohibition of the state."); *LRL Properties v. Portage Metro Housing Auth.*, 55 F.3d 1097 (6th Cir. 1995) (holding that property owners have no liberty interest in continued participation in Section 8 housing rental assistance program).

In *Hampton*, the Supreme Court found that aliens' "ineligibility for employment in a major sector of the economy"—the federal government—was a disadvantage "of sufficient significance to be characterized as a deprivation of an interest in liberty." 426 U.S. at 102. No comparably broad interest is implicated by an applicant's participation in the SBA's 8(a) program. By excluding aliens from the 8(a) program, the SBA is not imposing on them "a stigma or other disability"

that forecloses their freedom to take advantage of other business opportunities. *Roth*, 408 U.S. at 573.

Nor does exclusion from the 8(a) program impair any property interests. To hold a property interest in a government benefit, an applicant must "have a legitimate claim of entitlement to it." *Roth*, 408 U.S. at 577. The Supreme Court has never held that an applicant for a government benefit has a constitutionally protected property interest in receiving it. *See, e.g., Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 n.8 (1985). Thus, to the extent that participation in the 8(a) program can be considered a government "benefit," applicants have no property right to that benefit. *See Software Systems Assocs., Inc. v. Saiki*, 1993 WL 294782 (D.D.C. 1993) (finding that an applicant has no property interest in participation in SBA 8(a) program); *see also Blackburn v. City of Marshall*, 42 F.3d 925, 941 (5th Cir. 1995) ("[T]he mere existence of a governmental program or authority empowered to grant a particular type of benefit to one such as the plaintiff does not give the plaintiff a property right, protected by the due process clause, to receive the benefit, absent some legitimate claim of *entitlement*—arising from statute, regulation, contract, or the like—to the benefit.").

III.

We conclude that the citizenship requirement of 13 C.F.R. § 124.103 is constitutional. The SBA's asserted interest in its citizenship requirement satisfies both the criteria set forth in *Hampton* and the more conventional minimal rationality standard under the Equal Protection guarantee of the Fifth Amendment. The regulation is equally valid under Supreme Court decisions interpreting the Due Process guarantee of the Fifth Amendment.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Legal Authority to Approve Changes in Use of Property Under Section 414 of the Housing and Urban Development Act of 1969

The proposed sale of property at its fair market value in order to raise funds to build low and moderate income housing on different property constitutes a change in the use of property under section 414 of the Housing and Urban Development Act of 1969 and the terms of the deed of the 1974 sale of the property.

The Department of Housing and Urban Development and the General Services Administration could approve the proposed sale of property to a public body without violating section 414.

March 5, 1996

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

This memorandum responds to your request for our legal opinion on the proper interpretation of section 414 of the Housing and Urban Development Act of 1969, 40 U.S.C. § 484b as applied to a proposed transaction relating to certain property in the San Patricio area of San Juan, Puerto Rico. The transaction at issue involves property that was sold pursuant to section 414 on September 27, 1974, to the Puerto Rico Urban Renewal and Housing Corporation (known by its Spanish acronym "CRUV"), a public corporation in San Juan, Puerto Rico. During the succeeding twenty years, CRUV and its successor attempted without success to facilitate the development of low and moderate income housing on the property. CRUV's successor recently asked the United States for permission to sell the property at its fair market value without restriction concerning its use and to use the sale proceeds, in part, to build low and moderate income housing in other areas of Puerto Rico.

We have been asked to address whether the proposed transaction would constitute a change in the use of the property and if so, whether the United States could approve such change under the strictures of section 414. As discussed below, we conclude that the proposed sale would constitute a change in the use of the property, which under the terms of the deed must be approved by the appropriate agencies of the United States government. We believe that the Department of Housing and Urban Development ("HUD") and the General Services Administration ("GSA") could provide the required approval without violating section 414. We have not addressed, however, the policy implications of or merits in approving the proposed transaction.

I. Background

A. *Section 414*

At the time of the sale of the property to CRUV in 1974, section 414 of the Housing and Urban Development Act of 1969, 40 U.S.C. § 484b, stated in relevant part:

> (a) . . . any surplus real property . . . may in the discretion of the Administrator of General Services be transferred to the Secretary of Housing and Urban Development at his request for sale or lease by him at its fair value for use in the provision of housing to be occupied by families or individuals of low or moderate income, [and for related public facilities and for related commercial and industrial facilities approved by the Secretary.] Any such sale or lease of surplus land shall be made only to (1) a public body which will use the land in connection with the development of a low-rent housing project assisted under the United States Housing Act of 1937, or under a State or local program found by the Secretary of Housing and Urban Development to have the same general purposes as the Federal program under such Act, or (2) a purchaser or lessee who will use the land in connection with the development of housing (A) with respect to which annual payments will be made to the housing owner pursuant to section 1701s of Title 12, (B) financed with a mortgage which receives the benefit of the interest rate provided for in the proviso in section 1751(d)(5) of Title 12, or (C) with respect to which interest reduction payments will be made under section 1715z or 1715z-1 of Title 12 . . . .
>
> (b) As a condition to any sale or lease of surplus land under this section to a purchaser or lessee other than a public body, the Secretary shall obtain such undertakings as he may consider appropriate to assure that the property will be used in the provision of housing and related facilities to be occupied by families or individuals of low or moderate income for a period of not less than forty years. If during such period the property is used for any purpose other than the purpose for which it was sold or leased it shall revert to the United States (or, in the case of leased property, the lease shall terminate) unless the Secretary and the Administrator of General Services, after the expiration of the first twenty years of such period, have approved the use of the property for such other purpose. The Secretary shall notify the Committees on Banking and

> Currency and the Committees on Government Operations of the Senate and House of Representatives whenever any surplus land is sold or leased by him, or he and the Administrator of General Services approve a change in the use of any surplus land therefore sold or leased by him, pursuant to the authority of this section. [1]

Section 414 was originally adopted by Congress on December 24, 1969, as part of the Housing and Urban Development Act of 1969, Pub. L. No. 91–152, tit. IV, § 414, 83 Stat. 379, 400. The purpose of the 1969 Act was to extend existing housing and urban development programs, provide funding for these programs and to improve programs to make them more helpful to low- and moderate-income families. *See* House Comm. on Banking and Currency, 91st Cong., *Housing and Urban Development Act of 1969* (Comm. Print 1969); H.R. Conf. Rep. No. 91–740 (1969); H.R. Rep. No. 91–539 (1969); S. Rep. No. 91–392 (1969).

The statute was amended in 1978 and 1980 and repealed in 1983. The most notable changes in the 1978 amendment included the addition of language to subsection (a) allowing for the property to "be occupied predominantly by families or individuals of low and moderate income" and an expansion of the eligible housing programs that could provide assistance. Subsection (b) was modified by changing forty years to thirty years and requiring that the property be used "to the maximum practicable extent" for the required housing. The reporting requirements to Congress were also deleted. *See* Housing and Community Development Amendments of 1978, Pub. L. No. 95–557, § 317(a), (b), 92 Stat. 2080, 2100. The 1980 amendment added the Secretary of Agriculture as an eligible recipient of surplus property. *See* Housing and Community Development Act of 1980, Pub. L. No. 96–399, 94 Stat. 1614, 1669.

With the 1980 amendments, the statute stated in relevant part:

> (a) . . . any Federal surplus real property . . . may, in the discretion of the Administrator of General Services, be transferred to the Secretary of Housing and Urban Development or the Secretary of Agriculture at the request of either such Secretary for sale or lease by either Secretary at its fair value for use in the provision of housing to be occupied predominantly by families or individuals of low- or moderate-income, assisted under a Federal housing assistance program administered by the Secretary of Housing and Urban Development or the Secretary of Agriculture or under a State or local program found by the appropriate Secretary to have the same gen-

[1] The statute had been amended once since its original adoption, making minor changes not relevant to the issues here. *See* Housing and Urban Development Act of 1970, Pub. L. No. 91–609, 84 Stat. 1770, 1816.

> eral purpose, and for related public commercial or industrial facilities approved by the appropriate Secretary. . . .
>
> (b) As a condition of any disposition by the Secretary of Federal surplus real property under this section to an entity other than a public body, the Secretary shall obtain such undertakings as the Secretary may consider appropriate to assure that the property will be used, to the maximum practicable extent, in the provision of housing and related facilities to be occupied by families or individuals of low and moderate income for a period of not less than thirty years. If during such period the property is used for any purpose other than the purpose for which it was disposed of it shall revert to the United States (or, in the case of leased property, the lease shall terminate) unless the Secretary and the Administrator, after the expiration of the first twenty years of such period, have approved the use of the property for such other purposes.

Although section 414 was repealed in 1983, Congress provided that the terms of section 414 continue with regard to requests for transfer of surplus property that were made prior to enactment of the repealing statute. Supplemental Appropriations Act of 1984, Pub. L. No. 98–181, 97 Stat. 1153, 1175 (1983). Congress also provided that "section 414(b) . . . shall continue to apply, where applicable, to all property transferred by either Secretary pursuant to section 414." *Id.*

B. *San Patricio Property*

Between 1940 and 1943, the United States acquired through condemnation proceedings 52.86 acres of land located in the San Patricio area of San Juan, Puerto Rico. The property was used by the Department of Navy for defense housing purposes. In 1970, a report was filed by the Department of Navy with the GSA declaring the 52.86 acres of land, with improvements, to be surplus property. The improvements on the property consisted of 206 buildings, including 194 duplex housing units, miscellaneous structures, paved streets, gutters, sidewalks and utilities. Most of the buildings had been erected in 1941 and were in poor condition by 1970.

In a letter to the GSA Administrator, dated June 29, 1972, HUD formally requested the transfer of the 52.86 acres of San Patricio property for sale to the Commonwealth of Puerto Rico pursuant to section 414 of the Housing and Urban Development Act of 1969, 40 U.S.C. § 484b. Letter for Arthur F. Sampson, Administrator, GSA, from Samuel C. Jackson, Assistant Secretary for Community Planning and Management, HUD (June 29, 1972) ("Jackson June 29, 1972 Letter"). The letter listed certain information regarding the proposed sale as required

by GSA's regulations. As stated in those regulations, certain information was needed for use by "GSA in preparing and submitting a statement relative to the proposed transaction to the Senate and House Committees on Government Operations prior to the transfer of the property to HUD." 41 C.F.R. § 101–47–308–6(f)(7) (1974).

The information submitted in HUD's Jackson June 29, 1972 Letter included, in relevant part, "what reversionary provisions [would] be included in the deed." 41 C.F.R. § 101–47–308–6(f)(7) (1974). The letter stated:

> Section 414(b) does not require that reversionary provisions be included in the deed when the sale is to a public body; however, language will be included which will make clear the purposes for which the land is to be used.

Jackson June 29, 1972 Letter at 2. Also included in the letter was a summary of the proposed development plan for the property.

> The proposed development is medium to high density residential consisting of approximately 1,920 housing units, with supporting community and commercial facilities. Total Project cost is estimated to be $75 million. Housing is to be developed with Federal assistance under HUD's Public Housing, Section 235 and Section 236 Programs. . . .
>
> It is estimated that construction can begin within two years of the date of sale of the property. Planning and development of a project of this size will require several years, therefore a completion date for all construction is not estimated.

Id.

The letter also stated that HUD had determined the property's fair value for use in providing the required housing to be $1,655,000 and that HUD proposed to sell the property at that price. *Id.* at 1. The estimated fair market value of the San Patricio property as of July 20, 1972, was $2,964,500. Disposal Plan, Real Property and Related Personal Property (July 20, 1972).

GSA concluded that the proposed transfer to HUD was consistent with the requirements of surplus property sales. GSA notified HUD of the approval and that the congressional committees would have to review HUD's disposal plan. Letter for Office of Real Property, HUD, from Richard W. Austin, Assistant Commissioner, Office of Real Property, GSA (Aug. 7, 1972).

In a letter to the Chairpersons of the United States House and Senate Committees on Government Operations, the GSA Administrator advised Congress of the proposed transfer to HUD and subsequent sale to the Commonwealth of Puerto

Rico of 51.887 acres of San Patricio property.[2] Letters for Honorable Chet Holifield and Sam J. Ervin, Jr., Chairmen, House and Senate Committees on Government Operations, from Arthur F. Sampson, Acting Administrator, GSA (Aug. 25, 1972) ("Holifield & Ervin Aug. 25, 1972 Letters"). The letters, which were identical, disclosed virtually the same information that the Jackson June 29, 1972 Letter had provided to GSA. As for the reversionary provision, however, GSA simply stated that "[c]onveyances under Section 414 of the Housing and Urban Development Act of 1969, as amended, do not require reversionary provisions in the deed when disposal is to a public body." *Id.* at 2. GSA did not notify Congress that HUD nevertheless planned to convey the land conditionally.

In a letter dated October 17, 1972, GSA assigned to HUD 51.887 acres of the land with improvements ("the San Patricio property") for sale to the Commonwealth of Puerto Rico as HUD had previously requested. Letter for Samuel Jackson, Assistant Secretary for Community Planning and Management, HUD, from Albert Wilson, Director, Real Property Division, GSA (Oct. 17, 1972). Although GSA demanded in the letter that the sale to Puerto Rico be made subject to certain conditions, no mention was made of a need for a reversionary provision in the deed or that the land be conveyed conditionally as to its use. GSA did request that it be furnished with copies of the deed of conveyance.

In a deed dated September 27, 1974, HUD sold the San Patricio property to CRUV for $1,655,000, to be paid over an eight year period with the unpaid balance bearing an interest per annum of eight and one fourth percent. *See* Deed at 8–9. As set forth in the deed, the conveyance of the San Patricio property was premised upon certain conditions that were binding on CRUV and its successors. Some of the conditions relevant to the issues addressed here are set forth as part of the deed's paragraph entitled "Seventh" under the category "TERMS AND CONDITIONS." Five types of "Terms and Conditions" are listed in paragraphs lettered from "A" to "E." Some of the terms and conditions in category "E" are pertinent and read as follows:

> E. [CRUV] proposes to provide housing under the terms of the United States Housing Act of Nineteen Thirty Seven as amended, . . . so as to enable families of low and moderate income and the elderly or handicapped, to live in decent homes now beyond their means.

[2] The letter states that the property to be transferred consist of 51.887 acres of land with improvements. Almost an acre (*i.e.* .973) of the 52.86 acres initially requested by HUD was transferred to the Federal Aviation Administration ("FAA") instead of HUD. Accordingly, HUD received 51.887 acres of the San Patricio property for sale to CRUV. *See* Letter for Samuel Jackson, Assistant Secretary for Community Planning and Management, HUD, from Albert Wilson, Chief, Real Property Division, GSA (July 21, 1972); Segregation, Sale, Conveyance and Mortgage Deed at 6–7 (Sept. 27, 1974) ("Deed") (attached as Exhibit A).

After the sale to CRUV, a discrepancy between the deed and Registry of Property in Puerto Rico was discovered as to the acreage of the property conveyed. In a qualifying deed, dated February 25, 1975, the parties agreed to adopt the acreage figures appearing in the Registry (54.06 total acreage, 2.193 acreage given to the FAA, leaving a total acreage of 51.867 conveyed to CRUV). *See* Aclaratory Deed (Feb. 25, 1975).

> TO HAVE AND TO HOLD the [San Patricio] property provided, however, that this Deed is made and accepted upon the following conditions subsequent, which shall be binding upon and enforceable against [CRUV], its successors or assigns, as follows:
>
> One.—That for a period of forty (40) years from date of this deed, the [San Patricio] property herein conveyed shall be utilized for the development and rental of low-rent housing to be occupied by families or individuals of low or moderate income and for such other purposes as may be defined from time to time by the United States Department of Housing and Urban Development.
>
> Two.—That during the aforementioned period of forty (40) years [CRUV] will resell, lease, mortgage or encumber, or otherwise dispose of the [San Patricio] property or any part thereof or interest therein only as the United State [sic] Department of Housing and Urban Development or its successors, in accordance with the then-existing regulations, may authorize in writing.
>
> . . . .
>
> Five.—In the event of a breach of any of the conditions set forth above, whether caused by the legal or other inability of [CRUV], its successors or assigns, to perform any of the obligations herein set forth, all right, title, and interest in and to the [San Patricio] property shall, at the option of the United States of America, revert to and become the property of the United States of America; unless the [Secretary] and the Administrator of General Services, after the expiration of the first twenty (20) years of such period, approve the use of the property for such other purpose[s]; and the United States of America shall have an immediate right of entry thereon, and [CRUV], its successors or assigns, shall forfeit all right, title, and interest in and to the [San Patricio] property and in any and all of the tenements, hereditaments, and appurtenances thereunto belonging . . . .

Deed at 10–12.

Thereafter, in the deed's paragraph entitled "Ninth," CRUV made an additional representation concerning the construction of the low and moderate income housing on the San Patricio property:

> [CRUV] agrees that it will start construction of the proposed facility within three years following the execution of this Deed and will keep such developer activity within a reasonable period of time thereafter, now estimated to be ten years. Construction of initial and subsequent phases of the development of the property will proceed only upon prior approval of the United States Department of Housing and Urban Development.

Id. at 14.

After purchasing the San Patricio property, CRUV never developed the land as originally planned. Documents supplied to us by HUD and GSA contain references to a variety of problems faced by CRUV in its efforts to develop the property. For example, in a HUD memorandum dated February 10, 1987, the first 10 years of problems are summarized.

> No real acceptable solution has been reached in 10 years. Over this time, the circumstances have changed as the Section 8 New Construction Program was terminated. Alternate sources of funds for construction needed to be developed.
>
> . . . .
>
> After 10 years, nothing had been built because of a variety of reasons: lack of development money, utilities problems, neighborhood opposition, bureaucratic inertia, and changes in administration.

Memorandum for Thomas T. Demery, Assistant Secretary for Housing-Federal Housing Commissioner, HUD, from R. Hunter Cushing, Deputy Assistant Secretary for Multifamily Housing Programs, HUD (Feb. 1987)[3] ("Cushing Memorandum").

The documents reveal that a number of alternative development proposals were submitted by CRUV to HUD. Some proposals were accepted and some were rejected by HUD.[4] The documents also show that some proposals were prompted by threats of instituting a reversionary proceeding. The Cushing Memorandum states:

[3] The handwritten date of "Feb. 5, 1986" on the memorandum appears to not reference the date of the memorandum. The receipt stamp on the bottom of the memorandum appears to indicate a date of "February 10, 1987." In addition, the memorandum references events occurring subsequent to February 5, 1986.

[4] Apparently, efforts to develop the property were unsuccessful in part because of the amount of HUD subsidy that would have been required to support the low and moderate income housing proposals. *See* Letter for Karen Popp, Attorney-Advisor, Office of Legal Counsel, from Nelson A. Diaz, General Counsel, HUD at 3 (July 27, 1995) ("Diaz July 27, 1995 Letter").

> The sale documents and deed required development activities to begin in 3 years and be completed in 10 years, or the property was subject to a right of reversion in the United States. As the 10-year period approached without any development, Commonwealth and HUD officials met on numerous occasions to try to develop a plan for the site in order to avoid reversion.
>
> When Puerto Rican officials understood we were serious about starting the reversion process [after 10 years], they negotiated a new plan to develop half of the site with [Low and Moderate Income Housing] and the other half with Coast Guard family housing for some of its enlisted personnel. Half of the proceeds of the Coast Guard sale were earmarked to assist the [Low and Moderate Income Housing] part of the site. Puerto Rico developed a plan for the [Low and Moderate Income Housing] half and selected developers for the development. The Coast Guard secured funding for its half, signed a contract to buy it, and put down a $50,000 deposit.
>
> However, the plan never went forward. There was a change in administrations in Puerto Rico, and the new officials decided to rezone the site to park and recreational use to block development of any type.
>
> In December 1985, Puerto Rico, at our request, submitted another proposed plan for the site but it was unacceptable to HUD.

Id. at 1, 4.

The Cushing memorandum also made reference to a GSA letter dated March 7, 1986, which requested that HUD either facilitate the development of the property or exercise its reversionary rights under the deed. Letter for Angelo Sciosia, Director, Office of Surplus Land, HUD, from James J. Buckley, Acting Assistant Commissioner, Office of Real Property, GSA (Mar. 7, 1986). As set forth in that letter, GSA inspected a portion of the property in January 1985 and found that the property had not been developed. [5]

In addressing a then-current CRUV development proposal, the Cushing Memorandum discussed the alternative of pursuing the reversionary proceeding and the possible consequences.

[5] HUD advised CRUV in a letter dated June 26, 1986, that a request had been made of the HUD General Counsel to commence the reversion process. Letter for Jose Ariel Nazario, Secretary, Housing Department, Commonwealth of Puerto Rico, from R. Hunter Cushing, Deputy Assistant Secretary, Multifamily Housing Programs, HUD (June 26, 1986).

> This proposal will develop 450 new units at San Patricio, and 300 new units in Rio Bayamon — a noteworthy achievement.
>
> Our alternative is to refuse to modify our last position and continue with reversion which will entail protracted litigation during which no new units will be built. Furthermore, because of numerous legal interpretaters, our success in litigation is not assured. However, the Commonwealth seems to be willing to expend a lot of political currency to keep us at the negotiating table.
>
> . . . .
>
> Since we have never before done a section 414 reversion, we expect it will take several years.

Id. at 2.

In the end, HUD chose to pursue negotiating alternative proposals for the development of the property instead of seeking a reversion of the property. In a letter dated March 17, 1987, HUD approved the 1986 plan to develop 450 units on the San Patricio property and to sell other property to the United States Coast Guard. HUD advised CRUV that "[w]e will suspend the reversionary process begun earlier." Letter for Jose Ariel Nazario Alvarez, Secretary, Housing Department, Commonwealth of Puerto Rico, from Thomas T. Demery, Assistant Secretary for Housing-Federal Housing Commissioner, HUD at 2 (Mar. 17, 1987).

The 1986 plan approved by HUD involved the sale of the San Patricio property to a developer in Puerto Rico, the RECA Development Corporation ("RECA"). Problems arose in completing the plan as it related to the Coast Guard property and because of the substantial increase in fair market value enjoyed by the San Patricio property.[6] The delay from these problems extended into the early 1990's.

In 1991, CRUV was dissolved and the Office for the Liquidation of Assets ("OLA") in Puerto Rico acquired CRUV's debts and assets, including the San Patricio property.[7] *See* Proposal at 6. OLA's Special Trustee was tasked with the duty of liquidating CRUV's obligations in an effort to meet its debts. The Puerto Rico Department of Housing ("Vivienda") assumed CRUV's govern-

[6] In 1987, the San Patricio property was valued at $6.2 million for use in providing the required housing. A 1994 appraisal found the value for use at $10 million and without the restrictions at $20 million. *See* Puerto Rico Dept. of Housing, Proposal for the Disposition of Finca San Patricio for the Creation of a "Jibaro Housing Trust Fund" at 18–19 (Aug. 17, 1994) ("Proposal"). The increase in value has been attributed to the location of the property and inflation. The San Patricio property is on a bluff within walking distance of many existing urban facilities, services and employment opportunities and the most expensive housing development in Puerto Rico (single family homes in the $2 million plus range). *Id.* at 18.

[7] CRUV had made full payment of the purchase price plus interest for the San Patricio property by March, 1983. In the end, CRUV paid a total sum of $1,954,253.45 for the property. *See* Memorandum for Angelo M. Sciosia, Director, Office of Surplus Land & Housing, HUD, from Rafael Pieras-Lombardero, Area Counsel, HUD, Re: Status Report San Patricio Naval Reservation Project No. N–PR451B (Apr. 20, 1983).

mental responsibility in the area of developing affordable housing in Puerto Rico. *Id.* at 6–10.

OLA and Vivienda assumed the responsibility of facilitating the development of the San Patricio property. Negotiations with RECA continued. In 1992, an "Agreement to Sell and Purchase San Patricio Property" (the "Agreement") was drafted and allegedly agreed to by representatives of RECA, Vivienda, and HUD. The 1992 transaction contemplated a sale of the San Patricio property free of the restrictive use in providing low and moderate income housing with the proceeds being used by Vivienda to build the housing elsewhere.

The proposed transaction was never completed. HUD and Puerto Rico have taken the position that the Agreement is not valid. HUD's position is premised upon the assertion that GSA's approval for the sale is required under the deed. Puerto Rico has asserted that OLA's approval is also required. *See* Letter for Marcia Hale, Co-Chair, Interagency Working Group on Puerto Rico, Department of Commerce, from Nelson Diaz, General Counsel, HUD at 2 (Feb. 9, 1995) ("Diaz Feb. 9, 1995 Letter"). RECA filed an action on September 26, 1994 in the Superior Court of Puerto Rico seeking injunctive and declaratory relief. *Id.* The litigation is pending.[8]

As the dispute with RECA continued in Puerto Rico, Vivienda submitted a proposal to HUD for the sale of the San Patricio property. The proposal envisions a two step sale. In the first step, Vivienda and OLA would enter into a binding agreement for Vivienda to acquire the San Patricio property with its current deed restriction and to pay OLA for the current value of such use. Vivienda and OLA would forward a copy of the agreement to HUD. After obtaining GSA approval, HUD would authorize the removal of the deed restrictions on the use of the property. Upon removal of the deed restrictions, Vivienda would issue a Request for Proposals for the development of the site and sell the property at its fair market value.[9] The proceeds of this sale would be used by Vivienda, in part, to provide low and moderate income housing in other parts of Puerto Rico. Part of the money would be used to pay the expenses of Vivienda and OLA. The two-step approach in this transaction is required because OLA's authority is limited to liquidating CRUV's assets. *See* Diaz July 27, 1995 Letter at 1 n.1; Letter for Teresa Wynn Roseborough and Karen Popp, Office of Legal Counsel, Department of Justice, from Emily C. Hewitt, General Counsel, GSA at 2 n.3 (June 20, 1995) ("Hewitt June 20, 1995 Letter"); Vivienda Proposal at 35–52.

After consideration of Vivienda's proposed transaction, HUD and GSA arrived at differing views as to whether the United States could legally approve the transaction. As set forth below, we outline those differing views and address the legal issues under section 414 raised by the proposed transaction.

[8] This Opinion does not address the questions presented in the 1992 litigation.

[9] Earlier this year, HUD learned from Puerto Rico that RECA has indicated a willingness to purchase the San Patricio property. *See* Diaz Feb. 9, 1995 Letter. This result could resolve the pending litigation *Id.*

C. *The Positions of HUD and GSA*

HUD takes the position that the proposed transaction is lawful under section 414 of the Housing and Urban Development Act of 1969, 40 U.S.C. § 484b. GSA claims that the proposed transaction is not authorized by section 414.

Conceding that section 414 requires that the San Patricio property be "used" to provide low and moderate income housing, HUD first argues that the proposed transaction satisfies the "use" requirement. Specifically, HUD claims that selling the property at its fair market value and using the proceeds to build housing elsewhere is a proper "use" of the property in providing the required housing. Relying on this expansive view of the statutory term "use," HUD concludes that the proposal would not change the "use" of the property, only the method by which the property is used. *See* San Patricio, Summary of HUD Legal Position, Attachment to Letter for Honorable Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Emily C. Hewitt, General Counsel, GSA (Apr. 11, 1995).

GSA rejects the notion that the proposed sale is not a change in use of the property. GSA views the statutory term of "use" as requiring that the property be physically used by developing the required housing on the actual premises.

HUD next asserts that even if the proposed transaction constitutes a change in the property's use, HUD and GSA are authorized to approve such change under the terms of the deed, which are not inconsistent with section 414. As outlined above, the deed specifies in Condition Five of paragraph Seven that, after twenty years, HUD and GSA could approve a change in the use of the property. The same provision of the deed allows for reversion of the property at the United States' option in the event housing is not provided for the first forty years after conveyance to CRUV. Section 414, however, does not explicitly state that in a conveyance to a public body the United States can authorize a change in the use of the property. Subsection (b) of the statute does specify that in a sale to a non-public body the property shall revert back to the United States if the property is not used in providing the required housing, unless after twenty years a change in use has been approved by GSA and HUD.

HUD construes the statute as leaving the government with the option to insert a reversionary requirement and a provision allowing for a change in use when the sale is to a public body. HUD contends that the existence of section 414(b) simply makes the reversionary requirement mandatory for all sales to non-public bodies.

GSA views the explicitness of section 414(b) somewhat differently and finds "some" merit in the claim that "Congress's omission from subsection (b) of public bodies signifies a specific and purposeful limitation of the authority to approve changes in use." Letter for Teresa Wynn Roseborough and Karen Popp, Office of Legal Counsel, from Emily C. Hewitt, General Counsel, GSA at 1 n.1 (Aug. 9, 1995) ("Hewitt Aug. 9, 1995 letter"). GSA concedes, however, that the statute is ambiguous and that the legislative history does not lend support to this interpre-

tation. Citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 843 n.9 (1984), GSA joins HUD in concluding that considerable weight should be accorded to GSA's interpretation of the statute through its regulations.

GSA asserts that the current regulation, 41 C.F.R. § 101–47.308–6(l) (1994), which was adopted in 1982, is controlling because approval of the proposed transaction must comply with Condition Two of paragraph Seven of the deed. As set forth above, that condition requires HUD's approval "in accordance with the then-existing regulations," for a resell of the property. The current regulation at issue addresses the authority to change the use of the property in sales to non-public bodies. The regulations do not specify that the authority exists in sales to public bodies. GSA argues that the regulation establishes that GSA has interpreted section 414(b) as limiting the authority to approve changes in use to properties transferred to non-public bodies.

HUD disagrees. The previous version of the regulation at issue, which was adopted in 1971, did not limit the power to change the use to properties transferred to non-public bodies. On its face, the regulation appeared to recognize the authority to change the use of the property in any type of sale under section 414 and to require a reversionary right in all deeds of conveyance. HUD contends that this earlier regulation is evidence that GSA interpreted section 414 as HUD now does — the statute leaves the government with the option to insert a reversionary requirement and a provision allowing for a change in use when the sale is only to a public body. HUD also cites to the letters GSA wrote to Congress and HUD in approving the San Patricio transfer as further support of this interpretation. *See* letters *supra*. [10]

Finally, the parties addressed GSA's claim that even if the deed's provision for change of use authority is lawful under section 414, such approval authority is conditioned upon compliance by CRUV with the use requirements during the twenty year period. Stated differently, GSA argues that GSA and HUD may approve a change in the use of the property only if CRUV has been in compliance with the deed's conditions. GSA relies on the language in section 414, analogous real property disposal regulations and policy considerations in support of its argument.

In rejecting GSA's argument, HUD relies on the plain language of the statute, regulations and deed. HUD also argues that, in any event, CRUV's noncompliance was caused by exceptional circumstances and should not be a basis for denying a change in use. According to HUD, CRUV and its successor were unable to develop the property as required by the deed of conveyance despite its best efforts. These failures were caused in part by the lack of HUD funding required for the development.

[10] As for the 1982 change to the regulations, HUD rejects GSA's assertion that the change demonstrates a different GSA interpretation of section 414. HUD claims that the amended regulation simply adopted a rule more consistent with the statute: in a conveyance to a non-public body, the reversionary requirement is mandatory.

II. Legal Analysis

A. *Whether the Proposed Transaction Constitutes A Change In Use of the San Patricio Property*

The initial question presented is whether the proposed transaction constitutes a change in use of the property under section 414 and the deed. Section 414 authorized GSA to transfer surplus property to HUD "for sale or lease by him at its fair value for use in the provision of housing to be occupied by families or individuals of low or moderate incomes. . . . Any such sale or lease of surplus land shall be made only to (1) a public body which will use the land in connection with the development of a low-rent housing project." [11] In the sale of the property to CRUV, the deed required that the property be "utilized for the development and rental of low-rent housing to be occupied by families or individuals of low or moderate income." Deed at 10–11. HUD claims that the proposed transaction is not a change in the use of the property because the property will be "used" as an asset to sell at fair market value in order to raise money to build the housing on different property in Puerto Rico. We do not believe that HUD is correct.

> The plain meaning of the phrase "for use in the provision of housing" convinces us that Congress was referring to the physical use of the property — that is, that Congress intended as an initial matter that the property be used as the premises upon which the required housing must be built. Indeed, the legislation authorized HUD to sell the property below fair market value because of the use to which the property would be put. The discounted value was determined by the "use" of the property as the premises upon which the low and moderate housing would be built. Adopting HUD's construction that use in the provision of housing includes use as an asset to finance the construction of housing would belie the rationale of the statute's provision.

The primary guide to statutory interpretation is the plain meaning of the text. As stated by the Supreme Court in *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989):

> The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571

[11] Section 414(a) was amended by deleting the latter part of this phrase and currently reads in relevant part: "for sale or lease by either Secretary at its fair value for use in the provision of housing to be occupied predominantly by families or individuals of low- or moderate-income."

> (1982). In such cases, the intention of the drafters, rather than the strict language, controls.

This is not the "rare case[]" where the result that follows from the statute's text is "demonstrably at odds" with its underlying congressional purpose. *See Griffin*, 458 U.S. at 571. To the contrary, adopting the plain meaning of the language furthers the congressional intent of selling property at a discount because of its restricted usage. The legislative history supports the conclusion we have reached from a plain reading of the statute.

The House Committee on Banking, Housing, and Urban Affairs explained that the rationale for selling the property at a discounted value was to attract developers who could build housing on the property.

> The advantage to a developer in obtaining land through section 414 lies in the statute's authorization for the price of the land to be set by the Secretary at "fair value for use" rather than "fair market value."

H.R. Rep. No. 95–871, at 47 (1978).

In justifying the sale at a discount, the Senate Committee on Banking and Currency exhibited an expectation that the property itself would be developed:

> Existing law governing the disposal of surplus Federal land permits the Administrator of General Services to assign surplus real property to the Secretary of the Interior or the Secretary of Health, Education, and Welfare for subsequent sale or lease at less than market value to nonprofit organizations, the States or their subdivisions. Such property must be used for recreational, public health, or educational purposes. This section would allow a similar sale or lease of surplus land at reduced prices where the land is to be used for the development of low- and moderate-income housing. The price to be paid for all property (or the lease thereof) being so utilized shall be equal to the fair value (or fair rental value if it is to be leased) of such plot as determined by standard appraisal techniques, considering the use to which the property is to be put by the party acquiring the same. . . .
>
> Authority to provide sites as [sic] a reduced price for low- and moderate-income housing would not necessarily have an adverse budgetary impact since the amount of subsequent Federal subsidy required for this housing would be lessened due to lower initial land costs to the developer.

S. Rep. No. 91–392, at 35–36.

Subsequent materials also refer to the physical use of the property in explaining section 414. For example, in addressing the 1970 amendment to section 414, the House Committee on Banking, Finance, and Urban Affairs explained that section 414 authorized GSA to dispose of surplus "land" to HUD "for the construction of low- and moderate-income" housing. House Comm. on Banking, Finance, and Urban Affairs, 95th Cong., *Basic Laws and Authorities on Housing and Community Development* 23 n.1 (Comm. Print 1978).

In a joint explanatory statement of the House and Senate managers of the Committee of Conference, section 414 was described as providing property "at its fair value for use as housing . . . . [T]he disposition of federal surplus property is for the purpose of making land available for low and moderate income housing." House Subcomm. on Housing and Community Development, 95th Cong., *Compilation of the Housing and Community Development Amendments of 1978, Joint Explanatory Statement of the Managers of the Committee of Conference* 110 (Comm. Print 1978) ("Explanatory Statement of Managers"); *see also* H.R. Conf. Rep. No. 95–1792, at 81 (1978).

The legislative history plainly shows that in adopting section 414 Congress intended for the surplus property to be developed with the required low and moderate income housing. This history and the plain meaning of the statute belie any claim that the phrase "use in the provision of housing" includes a developer's sale of the property at a fair market value.

In addition, if "use in the provision of housing" included a sale at fair market value by the developer, the program established by section 414 would accomplish nothing more than what GSA could have done alone. If authorized, GSA would certainly have the ability to negotiate the sale of federal property at fair market value and to earmark the proceeds for housing without HUD and the developer as intermediaries to the sale. Such intermediaries would create inefficiencies and unnecessary expense. Indeed, in the end, the statute was repealed and the program abolished due, in part, to the recognition that GSA could sell surplus property directly to a developer for the construction of housing.

> Since its inception, this program has been infrequently used. Fourteen properties have been transferred since 1970. Nine additional properties are in the pipeline. This limited activity over such a long period does not justify the costs involved — staff, travel, etc. — in maintaining the program. Moreover, the program is administratively inefficient, since it interjects HUD and FmHA between GSA and the ultimate purchaser/lessee of the property involved.

S. Rep. No. 98–142, at 23 (1983)

Our conclusion is also supported by the plain meaning of section 414(b). As quoted above, section 414(b) requires that HUD assure that the property be "used" in providing housing to be occupied for a period of forty years (thirty as amended) by families of low and moderate income and that a reversion occur if the property is not so used. Certainly the property would have to be physically used during this period; disposing of the property could not satisfy the forty/thirty year requirement. Nor could the property be reverted back to the United States if it had been "used" in a sale at fair market value.

Even if the statute were ambiguous on this issue, GSA, the agency charged with administering the statute, has interpreted "use in the provision of housing" to require that the land be developed with the necessary housing. Regulations adopted by GSA mandate that when HUD submits a request to GSA for the transfer of surplus property for sale to another entity, HUD must specify:

> (5) [h]ow the property is to be used (i.e., single or multifamily housing units, the number of housing units proposed, types of facilities, and the estimated cost of construction); (6) [a]n estimate as to the dates construction will be started and completed; and (7) [w]hat reversionary provision will be included in the deed . . . .

41 C.F.R. § 101–47.308–6(f) (1994). HUD complied with these regulations in the conveyance at issue here. Likewise, the deed's requirement that the property be "utilized for the development and rental of low-rent housing," appears to contemplate the physical use of the property.[12] Because the proposed transaction involves the sale of the property to raise cash with which housing would be built elsewhere, we believe such use constitutes a change under the terms of section 414 and the deed.

[12] Indeed, in a different context, HUD has taken the same position we have reached: permitting a developer to sell the property at fair market value and using the proceeds to provide the required housing elsewhere is a change *in use of the property under the deed*. In 1992, an Agreement to sell the San Patricio property was allegedly agreed to by representatives of RECA, Vivienda, and HUD. The proposed sale, like the one at issue here, involved selling the property at fair market value with the proceeds going toward the building of low and moderate housing elsewhere in Puerto Rico. HUD took the position that the Agreement was not valid.

HUD's assertion was premised upon Condition Five of paragraph Seven of the deed, which requires the approval of GSA and HUD where, after twenty years, CRUV or its successor seeks to use the property for a purpose other than the provision of low or moderate income housing. *See* Deed at 10, ¶7(E)(One) and p. 11–12, ¶7(E)(Five). In relying on this condition of the deed, the crux of HUD's position is that the proposed transaction is a change in use of the property — that is, the property is not being used to provide the required housing. Otherwise, only Condition Two, Seventh paragraph, would apply to the transaction. Condition Two requires only HUD's approval if the property is resold for the purpose of providing the required housing. *Id.* at 10–11, ¶7(E)(Two); *see also* Letter for Karen Popp, Attorney-Advisor, Office of Legal Counsel, from Nelson A. Diaz, General Counsel, HUD at 4 n.1 (June 19, 1995) ("Diaz June 19, 1995 Letter") ("Paragraph No. 2 in the deed . . . only requires HUD approval of a sale of San Patricio by CRUV because a sale of the property, by itself, does not constitute a change in use as long as housing continues to be planned for the property.")

Indeed, HUD also concedes in the June 19, 1995, letter that the proposed transaction at issue here constitutes a change in the use of the property, requiring GSA and HUD approval. Diaz June 19, 1995 Letter at 4 ("All HUD proposes to do at this time is to implement [Condition Five] of the deed so that a sale and change in use of the San Patricio property can be approved by GSA and HUD.").

B. *Whether the United States May Approve A Change In Use of the San Patricio Property*

Having concluded that the proposed transaction constitutes a change in use of the property, we now turn to the remaining issue in dispute: whether section 414 permits a change in use of the property where the conveyance was to a public body.

HUD and GSA agree that the conveyance to CRUV was a sale to a public body and, consequently, that section 414(b) does not apply to the San Patricio conveyance. We also agree with these conclusions.[13] By its plain meaning, section 414(b) is limited to a conveyance made to a private entity.[14] Indeed, the repealing statute recognizes that section 414(b) applies only to qualifying conveyances. Pub. L. No. 98–181, 97 Stat. 1153, 1175 (1983); *see* discussion *supra* p. 4.

The explicitness of section 414(b)'s limitations as to private entity conveyances and the corresponding silence in the statute as to dispositions to public bodies create an issue of interpretation. Is a subsequent change of use statutorily prohibited when a public body purchased the property at fair market value for use in the provision of low and moderate income housing?

Here, the principle of *expressio unius est exclusio alterius* is not helpful in determining legislative intent. Under this maxim, the expression of one thing is the exclusion of another. *See, e.g., United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988). Applying this principle, one must conclude that reversion is required as to the private entity and optional as to the public body, and that the right to change the use of the property is permitted for a private entity and excluded as to the public body. These two conclusions, however, are mutually exclusive. If a change of use is not permissible as to public body conveyances, the conditions would run in perpetuity and a right of reverter would be required in the deed to enforce the perpetuity provision. Stated differently, a reversionary provision would be mandated in every deed of conveyance to a public entity, a concept that would be inconsistent with the application of the *expressio unius* maxim.

GSA concedes that the legislative history does not "lend specific support to [the] interpretation of the statute" reached by application of the *expressio unius* principle. We agree that the legislative history of section 414 is scant and certainly not illuminating as to this question. What little legislative history does exist is

[13] By its plain meaning, the last sentence of the original and first amended versions of section 414(b), which required notice to the congressional committees, applied to all surplus property sales. Our discussion of section 414(b) here is limited to the first two sentences of these earlier versions, which after the 1978 amendment, constituted the whole section.

[14] The legislative history does not detract in any way from the plain meaning of section 414(b). *See* S. Rep. No. 98–142, at 23 ("Section 414 presently provides that land conveyed to a private entity will revert to the United States if it is used for other purposes within thirty years (twenty years with Federal approval) after its transfer for use as low-and moderate-income housing."); H.R. Rep. No. 95–871, at 95 (414(b) applies "in the case of disposition of surplus property to an entity other than a public body"); Explanatory Statement of Managers at 225 (§414(b) makes specific requirements with respect to a conveyance "to an entity other than a public body").

ambiguous. For example, an earlier version of section 414(b), as it appeared in S. 2864, 91st Cong. (1969), provided:

> As a condition to any sale or lease of excess land under this section to a purchaser or lessee *other than a public body*, the Secretary shall obtain such undertakings as he may consider appropriate to assure that the property will be used in the provision of rental or cooperative housing to be occupied by families or individuals of low or moderate income for a period of not less than twenty years. The Secretary shall notify the Committees on Banking and Currency of the Senate and House of Representatives whenever any excess land is sold or leased by him pursuant to the authority of this section.

115 Cong. Rec. 26,728–29 (1969) (emphasis added).

In explaining the provision in S. 2864, the Senate Committee on Banking and Currency stated:

> Also, *any purchaser* under [section 414] must commit the property for use in low- and moderate-income rental or cooperative housing for at least 20 years. Notification of all sales or leases under this section shall be given to the Committees on Banking and Currency of the Senate and House of Representatives.

S. Rep. No. 91–392, at 36 (emphasis added). The Committee also stated:

> Subsection (b) would require, as a condition to *any sale or lease* of excess land, that the Secretary obtain such undertakings as he may consider appropriate to assure that the property will be used in the provision of rental or cooperative housing to be occupied by families or individuals of low or moderate income for a period of not less than 20 years. The Secretary must notify the Senate and House Committees on Banking and Currency whenever any excess land is sold or leased pursuant to this section.

Id. at 53 (emphasis added); 115 Cong. Rec. 26,707 (1969).

The Senate Committee report also contained a section on the views of Senator John Tower, which stated in relevant part:

> Section [414] presents yet another problem. Pursuant to that section, governmental lands may be sold to *individuals* at a cost below fair market value for use in low-cost housing. This conveyance is in fee and there is no reversion if the land is not used for low-cost

> housing after the initial 20 years. In reality, the purchaser is getting a windfall; the price which he pays the Federal Government could in many instances be much below the actual value of the land and after 20 years he can use it for any purpose he so desires. The Federal Government must pay fair market value when it acquires land, and it should receive the same when it sells lands.

Id. at 55 (emphasis added).

Thereafter, the proposed legislation was amended to require a forty year usage of the property with a mandatory reversion for noncompliance, but to permit a change in use after twenty years. This version of section 414(b) was eventually approved by Congress. H.R. Conf. Rep. No. 91–740, at 23. The report explained:

> The conference substitute retains the Senate provisions with amendments . . . (2) authorizing the Secretary of HUD to assure that the property will be used for low- and moderate-income housing for not less than 40 years, but permitting a changed use after the initial 20 years upon approval of the Secretary.

Id. at 35.

In a section by section summary of the adopted legislation, the House Committee on Banking and Currency described section 414(a) and then stated: "Subsection (b) requires that, as a condition to *any such sale or lease* of surplus real property, the Secretary must obtain" certain undertakings. House Comm. on Banking and Currency, 91st Cong., *Housing and Urban Development Act of 1969, Public Law No. 91–152 and Section-By-Section Summary* 39 (Comm. Print 1969) (emphasis added). It is unclear what is meant by "any such sale." The phrase could reference the whole discussion relating to a section 414(a) conveyance or the preceding sentence, which addresses only sales to private entities. The previous sentence states:

> Prior to any sale or lease to a purchaser other than a public body the Secretary must notify the governing body of the locality where the property is located and no sale or lease may be made if, within 90 days, the local governing body formally notifies the Secretary that it objects to the proposed sale or lease.

Id.

It is clear that the congressional statements highlighted above "were obviously not made with [our] narrow issue in mind and they cannot be said to demonstrate a Congressional desire." *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 168–69 (1945). At times, some of the statements appear to suggest that section 414(b) applies to all sales under section 414. These state-

ments, however, are difficult to reconcile with the plain meaning of section 414(b) and the other legislative history. In addition, one of the concerns addressed by section 414(b)'s reversionary requirement and corresponding change in use provision, as explained by Senator Tower, was that "individuals" not receive an unnecessary windfall. One could construe this as an indication that Congress was not concerned with a windfall bestowed upon a public body.

Without clearer direction from Congress, we agree with HUD and GSA that the statute and its legislative history are sufficiently ambiguous to make it appropriate to consider what, if any, interpretation has been provided by the agency charged with administering the statute.

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.

Chevron U.S.A. Inc., 467 U.S. at 842–43 (footnotes omitted) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)). The permissibility of an agency's interpretation depends upon whether the interpretation is "reasonable." *Id.* at 845.

On April 29, 1971, the Administrator of GSA issued regulations implementing the program established under section 414. In relevant part, the regulations stated:

> If the property conveyed under section 414(a) of the 1969 Housing Act, as amended, is used for any purpose other than the purpose for which it was sold or leased within a period of not less than 40 years of the conveyance, it shall revert to the United States (or, in the case of leased property, the lease shall terminate) unless the Secretary and the Administrator of General Services, after the expiration of the first 20 years of such period, approve the use of the property for such other purpose.

41 C.F.R. § 101–47.308–6(l) (1974). The regulations also required that in any HUD request to GSA for the transfer of surplus property, HUD had to specify "what reversionary provisions [would] be included in the deed." *Id.* § 101–47.308–6(f)(7).

We believe it is clear from the language of these regulations that GSA construed section 414 to permit the government the option of inserting a reversionary requirement and a provision allowing for a change in use in a deed conveying property to a public body. Indeed, the Administrator confirmed this interpretation in letters to Congress regarding the conveyance at issue here. He advised the House and Senate Committees that "[c]onveyances under Section 414 of the Housing and Urban Development Act of 1969, as amended, do not require reversionary provisions in the deed when disposal is to a public body." Holifield & Ervin

Aug. 25, 1972 Letters at 5. It does not appear that GSA informed Congress that HUD intended, nevertheless, to convey the land conditionally.

In addition, copies of the San Patricio property deed, which contained the reversionary requirement and corresponding change in use provision after a twenty year lapse, were given to GSA within a week of its execution. GSA never objected to the terms of the deed or claimed they were contrary to section 414 requirements.

We believe that GSA's interpretation of section 414 was correct. As previously discussed, the legislative history supports the view that section 414(b) was adopted to mandate a reversionary provision in conveyances to private entities as a means to preclude windfalls to individuals. Accordingly, it is reasonable to conclude that the silence as to public bodies creates an option as opposed to a requirement. "Windfalls" to governmental entities are of less concern than windfalls to private parties. It is also reasonable to conclude that the duration and nature of use restrictions in conveyances to public entities were options to be negotiated on a case by case basis with the affected public entity. The contrary construction, that conveyances to public entities were required to be burdened in perpetuity while private conveyances were not, seems an unlikely congressional intent. [15]

The modifications made to the regulations in 1982 do not change our conclusion. The regulations were amended, in relevant part, to provide:

> (1) If any property conveyed under section 414(a) of the 1969 HUD Act, as amended, *to an entity other than a public body* is used for any purpose other than the purpose for which it was sold or leased within a period of 30 years of the conveyance, it shall revert to the United States (or, in the case of leased property, the lease shall terminate) unless the appropriate Secretary and the Administrator of General Services, after the expiration of the first 20 years of such period, approve the use of the property for such other purpose.

41 C.F.R. § 101–47.308–6(l) (1993) (emphasis added). The other reference in the regulation as to reversionary provisions remained the same; it continued to require HUD to specify "[w]hat reversionary provisions [would] be included in the deed." *Id.* § 101–47.308–6(f)(7).

GSA contends that the addition of the language, " 'to an entity other than a public body,' " to paragraph (l) of the regulation represents a purposeful effort

[15] Another indication of the reasonableness of GSA's interpretation is the silence by Congress after being advised by the Administrator of GSA's interpretation. The regulations also informed Congress of GSA's interpretation. Although Congress amended the statute after being aware of the interpretation, the language relevant here was never modified. "Where an agency's statutory construction has been fully brought to the attention of the public and the Congress,'and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.' " *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (quoting *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979)); *see also FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 567–68, 570–71 (1976).

to clarify the "1971 regulation by unambiguously limiting the authority to approve changes in use to properties transferred to non-public bodies." Hewitt Aug. 9, 1995 Letter at 3. The language of the regulation, however, fails to achieve this "clarification." [16] Like section 414 itself, the 1982 regulation fails unambiguously to assert any limitations on conveyances to public bodies or any limitations on GSA and HUD's ability to permit changes in the use of such property. Given the clarity of the 1971 regulation, which was the regulation in force at the time of the original conveyance, and the ambiguity of the 1982 regulation, we do not believe that GSA is precluded by statute or regulation from approving a change in the use of the San Patricio property because it was conveyed to a public entity. [17] In the absence of a statutory or regulatory bar, we believe the terms of the deed are controlling. Under the deed, GSA and HUD may approve a change in use after September 27, 1994. Deed at 11, ¶7(E)(Five). [18]

We now turn to GSA's final claim that even if approval for a change of use is permissible, as a matter of law, the approval mechanism cannot be exercised in this case because of the noncompliance to date. [19] In support of this position, GSA refers to the language of section 414 and the compliance requirements of analogous real property disposal authorities.

We do not agree with GSA. The analogous regulations upon which GSA relies explicitly require compliance before a change in use is permitted. The statute,

[16] In addition, the 1982 changes appear to have been prompted by the passage of statutory amendments that were aimed at increasing sales of surplus property. In the notice of proposed rulemaking announcing the 1982 changes, GSA stated that the regulations were being changed to implement the 1978 and 1980 amendments to the statute, which expanded the scope of the program and reduced the restrictions. 41 C.F.R. pt. 101–47. Although the statutory amendments did not involve the language at issue here, the legislative history reveals that the statutory modifications were prompted by congressional intent to enhance utilization of the program.

In 1978, the House Committee on Banking, Finance and Urban Affairs stated that certain amendments were being made to section 414 "in order to facilitate the use of such property for housing. Activity under this program has been at a very low level and the committee hopes that these changes will result in greater utilization of surplus federal land and property for housing." Explanatory Statement of Managers at 181.

In a Senate report, the need for the 1978 amendments was explained as follows:

> Unfortunately, program activity has operated at a very low level--only five or six transfers of land have been made under section 414 since 1970. While part of the problem has been the low priority given in the past to using surplus land for housing, another major constraint has been the restrictive nature of the statutory provision under which the program must operate.

S. Rep. No. 95–871, at 47 (1978).

[17] Moreover, GSA has never revised the requirement that HUD specify in any transfer request "what reversionary provisions [would] be included in the deed." 41 C.F.R. §101–47.308–6(f)(7) (1974). The continuation of this provision without modification further supports the inference that, after the 1982 regulatory changes, reversionary provisions in deeds were optional for public body conveyances.

[18] Citing Condition Two of paragraph Seven, GSA contends that the proposed transaction is prohibited because the 1982 regulations specifically limit the right to change usage to private entities. GSA cites the 1982 regulations as relevant because Condition Two of the deed requires HUD approval, "in accordance with the then-existing regulations," for a resell of the property.

Arguably, because the proposal constitutes a change in use of the property, only Condition Five of the deed applies. *See* discussion *supra* (Condition Two applies to a resell when the property is not to be used for a different purpose.). Condition Five requires that both GSA and HUD approve the change of use. Condition Five does not have language limiting the authority to "then-existing regulations." Nevertheless, even if Condition Two of the deed were invoked by the proposed transaction at issue here, the current regulations are not a bar to the transfer.

[19] GSA also argues that, as a matter of policy, the changes of use should not be approved. We decline to comment on the policy implications raised by the proposed transaction at issue here.

regulations, and deed at issue here do not contain such an explicit condition. Nor is there language in these authorities or legislative history to support a prior compliance requirement. Indeed, the explicitness of the analogous regulations and the silence in the authorities at issue here support the absence of such a requirement in section 414 conveyances. The analogous authorities confirm that when prior compliance is intended, GSA uses explicit language to that effect. *Cf. Custis v. United States*, 511 U.S. 485, 491–92 (1994) (where Congress includes explicit language in certain statutes and omits similar language in a related statute, it is presumed that Congress acted intentionally in the disparate inclusion or exclusion).

Even if prior compliance were required, GSA concedes that compliance would not be a condition to a change in use where the noncompliance was caused by extenuating circumstances. HUD argues that the noncompliance in this matter was caused by extenuating circumstances. HUD refers to the 20 years of effort by CRUV and its successor to develop the property, the lack of HUD funding and the location of the property to support its claim that the noncompliance was not the result of any deliberate negligence by CRUV. We do not disagree that the failure to develop the property was caused by extraordinary circumstances. As outlined above, CRUV and its successor appear to have tried continuously to develop the property and often failed from faults other than their own. The proposed construction project was massive and was estimated in 1972 to cost $72 million. Indeed, GSA and HUD were aware from the beginning that the proposal to develop the property would require years of construction to complete. GSA even advised Congress that a completion date for all construction could not be estimated because of the size of the project.

The record also reveals CRUV's ongoing communication and cooperation with HUD in attempts to comply with the deed and section 414 as problems occurred. HUD and GSA were aware of the noncompliance and HUD continued to work with CRUV to provide the required housing. GSA requested that HUD either institute a reversionary action or facilitate compliance. HUD threatened to commence reversionary proceedings against CRUV. These threats apparently resulted in proposals that were acceptable to the United States. In the end, a conscious decision was made to drop the reversion action. Again, however, CRUV and HUD encountered problems in implementing the proposal. Thereafter, CRUV's successor made the proposal that is at issue here.

III. Conclusion

In sum, the proposed transaction would constitute a change in use of the San Patricio property under section 414. Because a change in use is not barred by

statute or regulation, the deed of conveyance is controlling. Under the deed, GSA and HUD may approve the proposed change at issue here.

H. JEFFERSON POWELL
Deputy Assistant Attorney General
Office of Legal Counsel

Eligibility of Citizens of Freely Associated States for HUD Financial Assistance

The Secretary of Housing and Urban Development may not make financial assistance, including assistance under section 8 of the United States Housing Act of 1937, available for the benefit of citizens of the Freely Associated States (Federated States of Micronesia, Marshall Islands, Republic of Palau) who have entered the Territory of Guam and the Commonwealth of the Northern Mariana Islands as non-immigrants pursuant to section 141 of the Compact of Free Association.

March 7, 1996

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

I am replying to your letter of October 3, 1995, in which you inquire whether section 214 of the Housing and Community Development Act of 1980 (codified as amended at 42 U.S.C. § 1436a) ("section 214") precludes the Secretary of Housing and Urban Development from making financial assistance under section 8 of the United States Housing Act of 1937 available for the benefit of citizens of the Freely Associated States (Federated States of Micronesia, Marshall Islands, Republic of Palau) who are present in the Territory of Guam and the Commonwealth of the Northern Mariana Islands pursuant to section 141 of the Compact of Free Association. We conclude that it does.

I.

Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f, provides for low-income housing assistance.[1] The basic statutory plan is that the Department of Housing and Urban Development ("HUD") enters into agreements with property owners establishing a "contract rent." Low-income tenants pay one-third of their monthly income toward that contract rent, and HUD pays the balance.

Section 214 of the Housing and Community Development Act of 1980, as amended by section 329(a) of the Omnibus Budget Reconciliation Act of 1981, provides in substance that the Secretary may not make financial assistance, including financial assistance under the United States Housing Act of 1937, available for the benefit of any alien, unless that alien is a resident of the United States and comes within several specified categories, comprising in particular aliens lawfully admitted for permanent residence and certain aliens whose presence in the United States is authorized by specific provisions of the Immigration and Nationality Act. 42 U.S.C. § 1436a(a), (b). Section 214(a)(1) specifically prohibits mak-

[1] Section 8 was enacted as a part of title II of the Housing and Community Development Act of 1974, Pub. L. No. 93–383, 88 Stat. 633, 653, which revised the Housing Act of 1937. According to section 201 of the 1974 Act, title II may be cited as "United States Housing Act of 1937."

ing financial assistance available to "alien visitors, tourists, diplomats and students who enter the United States temporarily with no intention of abandoning their residence in a foreign country."[2] 42 U.S.C. § 1436a(a)(1).

Section 141 of the Compact of Free Association, Pub. L. No. 99–239, 99 Stat. 1770, 1804 (1986) (Marshall Islands and Federated States of Micronesia) and Pub. L. No. 99–658, 100 Stat. 3672, 3682 (1986) (Palau),[3] provides in effect that citizens of the Freely Associated States may enter, lawfully engage in occupations and establish residence as nonimmigrants in the United States and its territories without having to comply with certain passport, visa, and labor certification requirements. Such persons are deemed to have the permission of the Attorney General to accept employment in the United States. On the other hand, the right of such persons to establish habitual residence in a territory or possession may be subjected to limitations. Section 141 does not confer on the citizens of the Freely Associated States the right to establish a residence for the purpose of naturalization.

II.

Section 214 precludes the Secretary from making financial assistance, including benefits under the Housing Act, available for the benefit of any alien unless the alien is a resident of the United States and falls within one of the following six specified categories:

> (1) an alien lawfully admitted for permanent residence as an immigrant as defined by section 1101(a)(15) and (20) of title 8 excluding, among others, alien visitors, tourists, diplomats, and students who enter the United States temporarily with no intention of abandoning their residence in a foreign country;
> (2) an alien who entered the United States prior to June 30, 1948, or such subsequent date as is enacted by law, has continuously maintained his or her residence in the United States since then, and is not ineligible for citizenship, but who is deemed to be lawfully admitted for permanent residence as a result of an exercise of discretion by the Attorney General pursuant to section 1259 of title 8;
> (3) an alien who is lawfully present in the United States pursuant to an admission under section 1157 of title 8 or pursuant to the

[2] In the original 1980 version of section 214(a) the prohibition was limited to foreign students. *See* 42 U.S.C. § 1436a(a) (Supp. IV 1980).

[3] We shall refer collectively to the Compacts of Free Association as "the Compact." They became effective as follows: Marshall Islands, October 21, 1986, Federated States of Micronesia, November 3, 1986, Proclamation No. 5564, 3 C.F.R. 146 (1987), *reprinted in* 48 U.S.C. § 1801 note (1994); Republic of Palau, October 1, 1994, Proclamation No. 6726, 3 C.F.R. 104 (1995).

> granting of asylum (which has not been terminated) under section 1158 of title 8;
> (4) an alien who is lawfully present in the United States as a result of an exercise of discretion by the Attorney General for emergent reasons or reasons deemed strictly in the public interest pursuant to section 1182(d)(5) of title 8;
> (5) an alien who is lawfully present in the United States as a result of the Attorney General's withholding deportation pursuant to section 1253(h) of title 8; or
> (6) an alien lawfully admitted for temporary or permanent residence under section 1255a of title 8.

42 U.S.C. § 1436a(a).

As a textual matter, none of the exceptions to section 214's prohibition on financial assistance covers citizens of the Freely Associated States who are present in the United States pursuant to section 141 of the Compact. The exceptions enumerated in subsections (2) through (6) all involve action by the Attorney General with respect to individuals and groups; thus, these subsections do not apply to citizens of the Freely Associated States who are present in the United States pursuant to section 141 of the Compact. Read literally, the exception enumerated in subsection (1) is also inapplicable. It covers "alien[s] lawfully admitted for permanent residence as . . . immigrant[s]," while section 141 of the Compact guarantees citizens of the Freely Associated States the right to "establish residence as . . . nonimmigrant[s]."

Congress's intent in enacting statutes is of course not always served by wooden interpretations of statutory texts, and we realize that arguments can be made that section 214 should not be read to exclude persons present in the United States under section 141 of the Compact. The scope of subsections (1) through (6) arguably suggests that Congress's intent in carving out exceptions to section 214's prohibition was to permit the Secretary as a general matter to provide financial assistance to aliens who are lawful residents of the United States. Citizens of the Freely Associated States are entitled under section 141 of the Compact to "establish residence" for an indefinite period or permanently, and when they do so they clearly have been "lawfully admitted" in many senses of that expression.[4] Furthermore, we note that the legislative history of section 214, and of the bills from which it is derived, include many statements to the effect that the legislation was designed to deny assistance for the benefit of *illegal aliens*.[5] Individuals re-

[4] Under section 141(b) of the Compact, the right of citizens of the Freely Associated States "to establish habitual residence in a territory or possession of the United States" may be limited by federal or (where authorized by Congress) territorial legislation. We are not aware that any such limitations have been enacted.

[5] *See* S. Rep. No. 97-87, at 34 (1981); S. Rep. No. 97-139, at 235 (1981), *reprinted in* 1981 U.S.C.C.A.N. 396, 531; H.R. Rep. No. 97-158, at 137 (1981) and the statements on the floor of the Senate of Senators Armstrong and Garn and at 127 Cong. Rec. 7912 and 13,608 (1981). *See also Housing and Community Development Amendments of 1981: Hearings on S. 1022 and S. 1074 Before the Subcomm. on Housing and Urban Affairs of the Senate*

siding in the United States under section 141 of the Compact are not present "illegally" as that term is used in ordinary English.

Although these arguments are not without force, we conclude that in the end they do not overcome the specificity of the statutory text. While the principle *expressio unius est exclusio alterius* is by no means an invariably accurate guide to statutory construction, in this case we believe that it supports what is in any case the most natural reading of the statute's language. Section 214 places a blanket prohibition on HUD financial assistance to aliens and then enumerates specific exceptions to that prohibition. Nothing in the language of any of the exceptions suggests that one of them is intended to be a catchall covering other, related categories of persons, while the detail with which Congress described the exceptions to the general prohibition points to the conclusion that Congress intended to define with precision the exceptions it was creating to the general rule.

The argument that the text and legislative history show that Congress could not have meant to deny HUD benefits to aliens whose presence in this country is not "illegal," furthermore, ignores the fact that Congress expressly stated that an open-ended list of legally-present aliens are covered by the section 214 prohibition. *See* 42 U.S.C. § 1436a(a)(1) (noting that the provision covers "*among others*, alien visitors, tourists, diplomats, and students who enter the United States temporarily with no intention of abandoning their residence in a foreign country") (emphasis added).[6]

The Government of the Federated States of Micronesia, one of the Freely Associated States, argues that applying section 214's prohibition to citizens of the Freely Associated States would violate section 172(a) of the Compact which provides:

> (a) Every citizen of [Palau,] the Marshall Islands or the Federated States of Micronesia who is not a resident of the United States shall enjoy the rights and remedies under the laws of the United States enjoyed by any non-resident alien.

Section 172(a), however, does not appear to apply in the present context. Section 172(a) concerns the rights of citizens of the Freely Associated States who do not reside in the United States and requires that their rights under United States law be equal to those enjoyed by any other non-resident alien. Aliens not residing in the United States cannot receive HUD financial benefits, *see* 42 U.S.C. § 1436a(a) (HUD assistance prohibited unless the "alien is a resident"), and thus the application of section 214 to bar assistance to Freely Associated States citizens does not treat them less favorably than other non-resident aliens.

Comm. on Banking, Housing, and Urban Affairs, 97th Cong. 443 (1981) (Statement of Sen. Armstrong); *id.* at 508 (Statement of Henry Eschwege, a witness from the General Accounting Office).

[6] The quoted language undercuts any claim that the references to "illegal aliens" in the legislative history demonstrate that the statutory prohibition is limited to persons whose presence in the United States is contrary to United States law.

The conclusion that in the several states section 214 bars HUD financial assistance to citizens of the Freely Associated States who have entered the United States pursuant to section 141 of the Compact seems harsh, and is perhaps anomalous in light of Congress's exclusion from the section 214 ban of most other categories of aliens who may lawfully remain within the United States indefinitely. However, we do not think that this conclusion leads to the sort of " 'absurd or futile results . . . plainly at variance with the policy of the legislation as a whole,' " *Pauley v. Bethenergy Mines, Inc.* 501 U.S. 680, 704 (1991) (citation omitted), that would justify a departure from the apparent meaning of the statutory text. The "policy of [section 214] as a whole" is to deny certain benefits to aliens as a general rule, while specifying exceptions to that rule. Citizens of the Freely Associated States whose residence in the United States rests on section 141 of the Compact are not within any of the specified exceptions and thus are subject to the general rule.

II.

Our general conclusion in part I does not in itself resolve the question of section 214's application to citizens of the Freely Associated States present in Guam and the Commonwealth of the Northern Mariana Islands.

Guam. Section 3(b)(7) of the United States Housing Act of 1937 defines the term "State" as follows:

> The term "State" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, the Trust Territory of the Pacific Islands, and Indian tribes.

42 U.S.C. § 1437a(b)(7). This definition indicates that Congress intended that the United States Housing Act, including section 8, apply to the area set forth in that definition. Since Guam is a territory of the United States, *see* section 3 of the Organic Act of Guam, 48 U.S.C. § 1421a, section 8 of the United States Housing Act applies to Guam.

Section 214, on the other hand, does not contain a definition of its geographic scope, and does not provide specifically that its prohibition on financial assistance extends to aliens living in a territory. Nevertheless, it is our conclusion that the geographic reach of section 214 is coextensive with that of the Housing Act. This conclusion is based on three considerations. First, the text of section 214 does not draw any distinction between aliens located in the states and those located in the territories. Second, we have not discovered any other indication of a congressional intent to draw such a distinction. Third, section 214 incorporates by

reference the Housing Act of 1937. *See* 42 U.S.C. § 1436a(b)(1). Consequently, in the absence of any showing to the contrary, the geographic coverage of section 214 is the same as that of the statute which it incorporates. The prohibition of section 214 thus applies to assistance benefiting aliens residing in Guam.

The Commonwealth of the Northern Mariana Islands. The Commonwealth of the Northern Mariana Islands ("CNMI") is a territory of the United States, but determining whether a federal law applies to the CNMI requires a different analysis from that which is applied to Guam.

In 1974, when section 8 of the Housing Act was enacted, the Northern Mariana Islands were a District of the Trust Territory of the Pacific Islands. Section 8 thus was applicable to the Northern Mariana Islands pursuant to section 3(b)(7) of the Housing Act of 1974.[7]

In 1976, the United States and the Northern Mariana Islands concluded a Covenant to establish the Commonwealth of the Northern Mariana Islands under the sovereignty of the United States. Pub. L. No. 94–241, 90 Stat. 263 (1976) (codified as amended at 48 U.S.C. § 1801 note (1994)). The Covenant became effective in relevant part in 1978. Section 502(a) of the Covenant was designed "to provide a workable body of law when the new government of the Northern Mariana Islands becomes operative." S. Rep. No. 94–433, at 76 (1975).[8] Section 502(a) provides in relevant part that the laws that provide federal services and financial assistance programs, as they apply to Guam, that are in existence on the effective date of section 502,[9] and subsequent amendments to such laws, apply to the CNMI, to the same extent that they apply to Guam. Section 8 of the United States Housing Act thus is applicable to the CNMI under section 502(a)(1) because it provides financial assistance and was applicable to Guam on January 9, 1978.[10] Although section 214 was enacted after section 502(a) became effective, it is applicable to the CNMI because it is a subsequent amendment to the Housing Act.[11]

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[7] The authority of Congress to enact legislation applicable to the Trust Territory was based on article 3 of the Trusteeship Agreement of July 18, 1947, pursuant to which the United States could

> apply to the trust territory, subject to any modifications which the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate to local conditions and requirements.

Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, art. 3, 61 Stat. 3301, 3302, 8 U.N.T.S. 189, 192.

[8] It should be noted, however, that section 502 deals only with the original introduction of federal law to CNMI. Subsequent congressional legislation applicable to the CNMI is governed by section 105.

[9] Section 502(a) became effective on January 9, 1978. Proclamation No. 4534, 3 C.F.R. 56 (1978), *reprinted in* 48 U.S.C. § 1801 note (1994).

[10] This conclusion does not change even if we assume that section 8 of the Housing Act is not a law providing financial assistance within the meaning of section 502(a)(1). Section 502(a)(2) renders applicable other federal laws "which are applicable to Guam and which are of general application to the several States as they are applicable to the several States." Section 8 would then be applicable to the CNMI as a law applicable to Guam which is of general application to the States.

[11] Under section 503(a) of the Covenant, the immigration and naturalization laws of the United States are not at present applicable to the CNMI. However section 503(a) does not render inapplicable to the CNMI all federal legislation that somehow affects aliens, but only those statutes that relate to the immigration of aliens and related

Continued

III.

Construing section 214 to apply to citizens of the Freely Associated States present in the United States is arguably in tension with the express exception of most other categories of lawful alien residents from section 214's scope. However, we do not think that this tension is sufficient to overcome the plain meaning of the statutory text, and we do not believe that the legislative history of which we are aware permits a departure from the text. If the text of section 214 does not reflect Congress's wishes, the remedy is legislative. We therefore conclude that the Secretary may not make financial assistance, including assistance under section 8 of the United States Housing Act of 1937, available for the benefit of citizens of the Freely Associated States who have entered Guam or the Commonwealth of the Northern Mariana Islands as non-immigrants pursuant to section 141 of the Compact of Free Association.

H. JEFFERSON POWELL
Deputy Assistant Attorney General
Office of Legal Counsel

issues such as the exclusion and deportation of aliens. To the extent that section 503(a) is relevant, it supports our conclusion that section 214, which does not address issues such as immigration and exclusion, applies to the CNMI.

The Advisory Committee on International Economic Policy

The Advisory Committee on International Economic Policy is not subject to the Emoluments Clause.

April 17, 1996

LETTER OPINION FOR THE DEPUTY LEGAL ADVISER
DEPARTMENT OF STATE

As you requested, we have reviewed the question whether members of the Advisory Committee on International Economic Policy ("IEP Advisory Committee") would occupy an "Office of Profit or Trust" within the meaning of the Emoluments Clause, U.S. Const. art. I, §9, cl. 8. As we have advised you before, we reject the sweeping and unqualified view, expressed on one occasion by our Office, that federal advisory committee members, as such, are subject to the Emoluments Clause. *See Applicability of 18 U.S.C. §219 to Members of Federal Advisory Committees*, 15 Op. O.L.C. 65, 68 (1991).

The members of the IEP Advisory Committee meet only occasionally, serve without compensation, take no oath, and do not have access to classified information; furthermore, the Committee is purely advisory, is not a creature of statute, and discharges no substantive statutory responsibilities. We therefore believe that the members of the IEP Advisory Committee do not occupy "Office[s] of Profit or Trust" under the Emoluments Clause. We do not address the argument that the Office of Government Ethics' longstanding test for determining who are Special Government Employees ("SGEs") should be substantially narrowed, so that members of State Department advisory committees would generally not qualify as SGEs, nor be subject, by reason of SGE status, to the Emoluments Clause, *see* Letter to Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Conrad K. Harper, Legal Adviser, Department of State (Feb. 13, 1995).

WALTER DELLINGER
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Office of Legal Counsel

The Constitutional Separation of Powers Between the President and Congress

This memorandum provides an overview of the constitutional issues that periodically arise concerning the relationship between the executive and legislative branches of the federal government. Although that relationship is shaped in part by the policy and political concerns of the President and Congress of the day, the political interaction between the President and Congress takes place within an enduring constitutional framework that confers powers and responsibilities on both elected branches. In this memorandum we discuss the general principles underlying separation of powers analysis, and we address certain specific questions that have arisen in the past. Any set of examples is necessarily illustrative rather than exhaustive, however, and the Office of Legal Counsel is always available to assist in reviewing legislation or other congressional action for potential separation of powers issues. *

May 7, 1996

MEMORANDUM OPINION FOR THE GENERAL COUNSELS
OF THE FEDERAL GOVERNMENT

Table of Contents

* This memorandum supersedes a 1989 memorandum that the Office of Legal Counsel provided to the General Counsels' Consultative Group. *See Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248 (1989). While we agree with many of the conclusions of that document, we have determined that subsequent decisions by the Supreme Court and certain differences in approach to the issues make it appropriate to revisit and update the Office's general advice on separation of powers issues.

Editor's Note: This memorandum was issued in 1996 but is being formally published in 2002. We caution that intervening Supreme Court decisions and "certain differences in approach to the issues" discussed herein may render portions of this memorandum inadequate as an expression of the Office's advice on separation of powers. Rather than drafting a superseding memorandum on separation of powers, divorced from a specific context, the Office will provide advice on separation of powers as questions are presented to it.

I. General Principles

The Constitution reflects a fundamental conviction that governmental "power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." *The Federalist No. 48*, at 332 (James Madison) (Jacob E. Cooke ed., 1961), *quoted in Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 273 (1991) ("*MWAA*"). The founders, not content to rely on paper definitions of the rights secured to the people, "viewed the principle of separation of powers as a vital check against tyranny." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam). In order to safeguard liberty, therefore, the Constitution creates three distinct branches of government—Congress, the President, and the federal judiciary—and assigns to them differing roles in the exercise of the government's powers. The resulting division of governmental authority is not a mere set of housekeeping rules indicating which branch presumptively performs which functions; it is, rather, a fundamental means by which the Constitution attempts to ensure free, responsible, and democratic government. *See MWAA*, 501 U.S. at 272 ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."). The constitutional separation of powers advances this central purpose by "assur[ing] full, vigorous, and open debate on the great issues affecting the people";[1] by "placing both substantive and procedural limitations on each

[1] *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

[branch]'';[2] and by maintaining a "system of . . . checks and balances" among the three branches.[3]

Although the structure of the Constitution is designed to obviate the danger to liberty posed by each of the branches,[4] the founders were particularly concerned with the Congress's potential for improvident or overreaching action: "the tendency of republican governments is to an aggrandizement of the legislat[ure] at the expense of the other departments." *The Federalist No. 49*, at 315–16 (James Madison) (Clinton Rossiter ed., 1961), *cited in United States v. Brown*, 381 U.S. 437, 444 n.17 (1965). Many specific aspects of the Constitution's separation of governmental powers embody the founders' "profound conviction . . . that the powers conferred on Congress were the powers to be most carefully circumscribed" and the founders' recognition of the particular " 'propensity' " of the legislative branch " 'to invade the rights of the Executive.' " *INS v. Chadha*, 462 U.S. 919, 947 (1983) (quoting *The Federalist No. 73*, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Executive branch lawyers thus have a constitutional obligation, one grounded not in parochial institutional interests but in our fundamental duty to safeguard the liberty of the people, to assert and maintain the legitimate powers and privileges of the President against inadvertent or intentional congressional intrusion. As Attorney General William Mitchell put it long ago:

> Since the organization of the Government, Presidents have felt bound to insist upon the maintenance of the Executive functions unimpa[i]red by legislative encroachment, just as the legislative branch has felt bound to resist interferences with its power by the Executive. To acquiesce in legislation having a tendency to encroach upon the executive authority results in establishing dangerous precedents.

Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 64 (1933).[5]

The Constitution, however, "by no means contemplates total separation of each of these three essential branches of Government." *Buckley*, 424 U.S. at 121. Instead, " '[w]hile the Constitution diffuses power the better to secure liberty, it

[2] *MWAA*, 501 U.S. at 272.

[3] *Morrison v. Olson*, 487 U.S. 654, 693 (1988). James Madison described the "policy" lying behind "distributions of power"—"the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other." *The Federalist No. 51*, at 349 (James Madison) (Jacob E. Cooke ed., 1961), *quoted in Buckley*, 424 U.S. at 122–23.

[4] *See INS v. Chadha*, 462 U.S. 919, 951 (1983) (the Constitution's separation of powers is designed to counteract the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power").

[5] The Attorney General noted that "[t]he first presidential defense of the integrity of the powers of the Executive under the Constitution was made by Washington himself" and that "[f]rom that day to this the Presidents, with very few exceptions, have felt the necessity for refusing to overlook encroachments upon the executive power." 37 Op. Att'y Gen. at 64.

also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.' " *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). The Constitution thus guards against "the accumulation of excessive authority in a single Branch" not by providing mutually exclusive lists of executive, legislative, and judicial powers, but by imposing on each of the three branches "a degree of overlapping responsibility, a duty of interdependence as well as independence." *Id.* at 381.[6] The constitutional boundaries between the powers of the branches must be determined "according to common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

Some general observations on the sources and methodology we employ in analyzing separation of powers questions are appropriate. We believe that the constitutional structure obligates the executive branch to adhere to settled judicial doctrine that limits executive and legislative power. While the Supreme Court's decisions interpreting the Constitution cannot simply be *equated* with the Constitution, we are mindful of the special role of the courts in the interpretation of the law of the Constitution. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The Supreme Court's decisions interpreting the constitutional separation of powers among Congress, the President, and the courts recognize the founders' basic concern over the "encroaching nature" of power, as well as their specific belief that Congress is potentially the most dangerous branch. "It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.' " *Mistretta*, 488 U.S. at 382 (quoting *Chadha*, 462 U.S. at 951). The Court's decisions have employed three distinct principles in resolving separation of powers disputes. First, where "[e]xplicit and unambiguous provisions of the Constitution prescribe and define . . . just how [governmental] powers are to be exercised," *Chadha*, 462 U.S. at 945, the constitutional procedures must be followed with precision. Second, where the effect of legislation is to vest Congress itself, its members, or its agents with " 'either executive power or judicial power,' " the statute is unconstitutional. *MWAA*, 501 U.S. at 274 (quoting *Hampton*, 276 U.S.

[6] The Supreme Court repeatedly has rejected the " 'archaic view of the separation of powers as requiring three airtight departments of government.' " *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977) (quoting *Nixon v. Administrator of Gen. Servs.*, 408 F. Supp. 321, 342 (D.D.C. 1976)). In doing so, the Court has noted that such a view is "inconsistent with the origins of th[e] doctrine" as well as with "the contemporary realities of our political system." *Id.* at 441; *see also id.* at 442 & n.5 (noting that James Madison in *The Federalist No. 47* and Justice Joseph Story in his famous treatise on the Constitution rejected the claim that the Constitution requires an absolute separation).

at 406).[7] Finally, legislation that affects the functioning of one of the other branches may be unconstitutional if it prevents the affected branch "from accomplishing its constitutionally assigned functions." *Nixon v. Administrator of Gen. Servs.*, 433 U.S. at 443 (legislation affecting the executive branch); *accord CFTC v. Schor*, 478 U.S. 833, 851, 856–57 (1986) (legislation affecting the judiciary).[8]

Our analyses are guided and, where there is a decision of the Court on point, governed by the Supreme Court's decisions on separation of powers. At the same time, the executive branch has an independent constitutional obligation to interpret and apply the Constitution.[9] That obligation is of particular importance in the area of separation of powers, where the issues often do not give rise to cases or controversies that can be resolved by the courts. This is due in part to the limits of jurisdiction and justiciability that Article III places on the courts. In addition, there may be legislation that violates one of the three principles outlined above and yet is unlikely to reach the courts in a form or context in which the judiciary will be able to identify or remedy the constitutional problem.[10] The Attorneys General and this Office have a long tradition of carrying out this constitutional responsibility, one that dates back to Attorney General Edmund Randolph's 1791 opinions on the constitutionality of a national bank. *See The Constitutionality of the Bank Bill* (1994) (reprinting, with commentary, the bank opinions), *reprinted in* H. Jefferson Powell, *The Constitution and the Attorneys General* 3 (1999).[11] We believe therefore that it is important in addressing separation of powers matters to give careful consideration to the views of our predecessors and to what seems to us to be the import of the Constitution's text, history, and structure.[12]

To be sure, respect for the legislative branch of the government requires a degree of deference to legislative judgments.[13] However, it is also the President's

[7] We shall refer to this theme in the Supreme Court's separation of powers jurisprudence as "the anti-aggrandizement principle."

[8] We refer to this line of reasoning as "the general separation of powers principle."

[9] Indeed, Article II specifically requires the President to take an oath or affirmation "to preserve, protect and defend the Constitution." U.S. Const. art. II, § 1, cl. 8.

[10] An example of such legislation would be an enactment that does not, when viewed in isolation, violate the constitutional principles we have identified, but as to which constitutional difficulties arise when the statute is examined in conjunction with other similar enactments. Because, absent a refusal by the executive to enforce any of these cumulative enactments, the courts may not have an opportunity to review the statute in its full context, it is incumbent upon the executive to object to such legislation before it becomes law. Burdensome reporting requirements may illustrate this problem. Even if no single reporting requirement violates the general separation of powers principle, *see Administrator of Gen. Servs.*, 433 U.S. at 443, the cumulative effect of many such requirements might prevent the executive from acting with the dispatch and efficiency that the Constitution intends and that, indeed, Congress expects.

[11] Persuaded by Secretary of the Treasury Hamilton's opinion defending the validity of the legislation, President Washington declined to accept the Attorney General's arguments that the bank bill was unconstitutional and signed it into law. The Supreme Court upheld the President's conclusion that Congress could charter a national bank in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

[12] For an example of an opinion that is, in our view, an exemplary model of the approach this Office should take in interpreting the Constitution. *See Article II, Section 2, Clause 3—Recess Appointments—Compensation (5 U.S.C. § 5503)*, 3 Op. O.L.C. 314 (1979).

[13] From the beginning of the Republic, the executive branch has interpreted the Constitution with a due regard for the constitutional views of Congress. *See, e.g.*, Thomas Jefferson, The Constitutionality of the Bill for Establishing

"duty to pass the executive authority on to his successor, unimpaired by the adoption of dangerous precedents." *Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. at 65.[14] Our constitutional analyses are informed by both of these concerns.[15]

A. Express Procedures: The Bicameralism and Presentment Requirements and the Appointments Clause

While the expression "separation of powers" does not appear in the Constitution, the Constitution does require both separation and interdependence on some matters by specifying, expressly and precisely, the procedures that must be followed. Where the constitutional text is unequivocal as to the manner in which the branches are to relate, any attempt to vary from the text's prescriptions is invalid.[16] The Court has identified two such express procedures relating to the separation of executive and legislative powers: the bicameralism and presentment requirements for legislation, and the Appointments Clause.

Congress's broad authority to take action that has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," *INS v. Chadha*, 462 U.S. at 952, is limited by the procedural requirements of Article I. With a few express exceptions found or rooted in the constitutional text, *see MWAA*, 501 U.S. at 276 n.21,[17] Article I requires that

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a National Bank (Feb. 15, 1791) (Opinion of the Secretary of State), *in* 5 *Writings of Thomas Jefferson* 284, 289 (Paul L. Ford ed., 1895) (arguing that the President should not veto a bill on constitutional grounds, "if the pro and the con hang so even as to balance his judgment," out of "a just respect for the wisdom of the legislature"). Respect for Congress also demands that the Executive, like the judiciary, construe statutes so as to avoid constitutional problems. *See, e.g., Appropriations Limitation for Rules Vetoed by Congress*, 4B Op. O.L.C. 731, 732 n.3 (1980) ("It is our practice to interpret statutes in ways that avoid constitutional infirmities, whenever possible.").

[14] Thus, for example, in declining to comply with a request from the House of Representatives that he deemed an intrusion on the treaty power, President Washington explained that "as it is essential to the due administration of the government, that the boundaries fixed by the [C]onstitution between the different departments should be preserved: A just regard to the Constitution and to the duty of my Office . . . forbids a compl[i]ance with your request." Message to the House of Representatives (Mar. 30, 1796), *reprinted in* 35 *Writings of George Washington* 5 (John C. Fitzpatrick ed., 1940).

[15] The correct resolution of separation of powers questions demands that due respect be given to two distinct constitutional axioms. The first axiom is that the Constitution's creation of a vigorous Executive and an independent judiciary must not be undermined by legislative encroachment. The second axiom is that the Constitution delegates to Congress broad power "[t]o make *all* Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Congress], and *all* other Powers vested by this Constitution in the Government of the United States, or in *any* department or officer thereof." U.S. Const. art. I, § 8, cl. 18 (emphasis added). The Necessary and Proper Clause thereby authorizes Congress not only to choose any appropriate means of exercising the legislative powers it has been delegated, but also "to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government" as a whole, *M'Culloch v. Maryland*, 17 U.S. at 420, including the powers vested in the President. In our analyses, we fully acknowledge the broad sweep of Congress's powers while insisting, as we must, that those powers cannot be legitimately employed so as to undermine the constitutional authority of the executive branch.

[16] In such circumstances "the balance" between the branches "already has been struck by the Constitution itself" in the text. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring).

[17] The House of Representatives has the power to impeach any civil officer of the United States, *see* U.S. Const. art. I, § 2, cl. 5; *id.* art. II, § 4, and the Senate has the power to try and, if convinced that the officer is guilty of "high Crimes and Misdemeanors," to remove him or her from office. *Id.* art. I, § 3, cls. 5, 6; *id.* art. II, § 4.

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Congress take such action "in accord with a single, finely wrought and exhaustively considered, procedure" — bicameral passage and presentation to the President followed by presidential signature, or bicameral repassage by a two-thirds majority. *Chadha*, 462 U.S. at 951; *see* U.S. Const. art. I, §§ 1, 7. The classic and often-repeated violation of this express textual requirement is the "legislative veto" mechanism invalidated in *Chadha*.[18]

The Supreme Court has applied a similar analysis to the Appointments Clause of Article II, Section 2. In *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976) (per curiam), the Court concluded that "Congress' power under [the Necessary and Proper] Clause is inevitably bounded by the express language of Art. II, § 2, cl. 2," and that consequently Congress cannot provide for the appointment of "Officers of the United States," except through a procedure that "comports with" the Appointments Clause.[19] Pursuant to the language of the Clause, principal officers must be appointed by the President with the advice and consent of the Senate, while Congress is limited in providing alternative means for the appointment of inferior officers to the "possible repositories for the appointment power." *Freytag v. Commissioner*, 501 U.S. 868, 884 (1991). Those repositories are "the President alone, . . . the Courts of Law, or . . . the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.

The rules of law derived from the requirements of bicameralism/presentment and the Appointments Clause have the clear and powerful effect of invalidating any inconsistent congressional action. Congress may not employ any mode of exercising legislative power other than through bicameralism and presentment. The Appointments Clause's list of those who may appoint officers is exclusive, and Congress cannot authorize *anyone* else to appoint officers of the United States. The major difficulty in applying the bicameralism/presentment and Appointments Clause requirements lies in determining whether a particular action falls within the scope of the prescribed procedures. In section II of this memorandum, we discuss questions that have arisen concerning the scope of both requirements.

The Senate also acts on its own in exercising its advice and consent powers with respect to treaties and the appointment of officers. Congress and congressional committees, furthermore, may take certain actions in aid of Congress's legislative tasks that have legal consequences for specific persons outside the legislative branch; a congressional committee, for example, may issue a subpoena to a witness. *See Lear Siegler, Inc. Energy Prods. Div. v. Lehman*, 842 F.2d 1102, 1108 (9th Cir. 1988), *modified as to attorney fees*, 893 F.2d 205 (9th Cir. 1989) (en banc). We disagree with the *Lear Siegler* court's application of this principle to the question before it.

[18] The statute at issue in *Chadha* provided for a one-house "veto" of certain decisions by the Attorney General. A two-house "veto" satisfies bicameralism but is inconsistent with the requirement of presentment, and soon after *Chadha* the Court summarily invalidated a statute employing this mechanism. *See United States Senate v. FTC*, 463 U.S. 1216 (1983) (mem.). These Supreme Court decisions vindicated the executive branch's long-held objections to any form of legislative "veto." *See* Memorandum for the Attorney General from President Franklin D. Roosevelt (Apr. 7, 1941), *reprinted in* Robert H. Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353, 1357–58 (1953) (concurrent resolution); *Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. at 60–62 (joint congressional committee); *Constitutional Issues Raised by Inter-American Convention on International Commercial Arbitration*, 4B Op. O.L.C. 509, 512–13 (1980) (one-house veto of "private" action).

[19] *Buckley* vindicated the long-standing constitutional view of the executive branch. *See, e.g., Constitutionality of Resolution Establishing United States New York World's Fair Commission*, 39 Op. Att'y Gen. 61 (1937).

B. The Anti-Aggrandizement Principle

Although the founders were concerned about the concentration of governmental power in any of the three branches, their primary fears were directed toward congressional self-aggrandizement,[20] and the Supreme Court's decisions call for careful scrutiny of legislation that has the purpose or effect of extending Congress's authority beyond the legislative process. Just as the textual requirement of bicameralism and presentment limits the means by which Congress may legislate, so the anti-aggrandizement principle limits the means by which Congress may influence the execution (or adjudication) of the laws.[21] The Constitution affords Congress great latitude in making policy choices through the process of bicameral passage and presentment. However, "once Congress makes its choice in enacting legislation, its participation ends," and "Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Bowsher v. Synar*, 478 U.S. at 733–34. While Congress may inform itself of how legislation is being implemented through the ordinary means of legislative oversight and investigation, the anti-aggrandizement principle forbids Congress, directly or through an agent subject to removal by Congress,[22] from intervening in the decision making necessary to execute the law. *See id.* at 733–34; *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994).[23]

In *Bowsher*, the Court held that a provision of the Gramm-Rudman Deficit Reduction Act was unconstitutional because it vested in the Comptroller General (an official "removable only at the initiative of Congress," 478 U.S. at 728) the power to make post-enactment decisions about how the executive branch should implement budget reduction legislation. The Court rejected the argument that self-aggrandizing legislation can be upheld when it is as a practical matter harmless or de minimis and dismissed as beside the point Justice White's vigorous argument

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[20] *See Mistretta*, 488 U.S. at 411 n.35 (distinguishing *Bowsher*, as resting on "the special danger recognized by the Founders of congressional usurpation of Executive Branch functions").

[21] The fact that the anti-aggrandizement principle does not rest on a particular provision of the Constitution does not make it any less important and legitimate a feature of the law of separation of powers than those features such as bicameralism and presentment that do have specific textual loci:

> The Framers regarded the checks and balances they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other. . . . This Court has not hesitated to enforce the principle of separation embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it.

Buckley v. Valeo, 424 U.S. at 122–23.

[22] "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." *Bowsher*, 478 U.S. at 726. An officer subject to removal by Congress is subordinate to Congress as a matter of constitutional law and must be viewed as an agent of Congress for separation of powers purposes. *Id.* at 730. The Constitution expressly prescribes the only means by which the houses of Congress may participate in the removal from an ongoing office of a non-legislative official—impeachment by the House and trial by the Senate. *Id.* at 723.

[23] *Bowsher* upheld the view of the Constitution long maintained by the executive branch. *See, e.g., Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. 56, 56 (1933) (unconstitutional for Congress to give a joint committee of Congress authority "to approve or disapprove executive acts").

that "[r]ealistic consideration of the nature of the Comptroller General's relation to Congress . . . reveals that the threat to separation of powers . . . is wholly chimerical." 478 U.S. at 774 (White, J., dissenting); *see also MWAA*, 501 U.S. at 269 n.15 (finding that "the likelihood that Congress" actually would exercise its authority to remove the members of the review board under consideration in *MWAA* was "irrelevant for separation-of-powers purposes"). In contrast, the Court upheld the validity of the laws challenged in *Morrison v. Olson* (independent counsel provisions of Ethics in Government Act of 1978) and *CFTC v. Schor*, 478 U.S. 833 (1986) (regulations implementing section of the Commodity Exchange Act), in part because the Court saw no reason to view those laws as examples of legislative aggrandizement.[24]

Like the express requirements of the bicameralism/presentment process and the Appointments Clause, the anti-aggrandizement principle puts a powerful constraint on congressional power: legislative action that falls within the scope of the principle is unconstitutional.[25] The complementary limit on the principle is that, as the Court understands it, the principle applies only to congressional action that amounts to *formal or direct* self-aggrandizement—for example, the placement of congressional agents on a body with prosecutorial or law enforcement powers—no matter how limited the power thereby seized by Congress. *See NRA Political Victory Fund*, 6 F.3d at 826–27. The Court reviews legislation that arguably increases Congress's power *indirectly* by weakening the Executive politically under the less stringent general separation of powers principle. *See Morrison*, 487 U.S. at 694. A significant difficulty in applying the anti-aggrandizement principle arises from the uncertain line between minor (but unconstitutional) aggrandizements and (constitutional) exercises of Congress's broad investigative and oversight powers.[26] In section II, we discuss some of the questions that have arisen.

[24] *Morrison*, 487 U.S. at 694 ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."); *Schor*, 478 U.S. at 856 ("Unlike *Bowsher*, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch.").

[25] The bicameralism/presentment and anti-aggrandizement requirements converge when Congress attempts to vest in itself or its agents the power to take action with legal effects outside the legislative branch by some means other than the textually prescribed procedure of bicameral passage of a bill and presentation to the President. Such an attempt is unconstitutional regardless of whether one views the attempt as a violation of the bicameralism/presentment requirement for legislation or as a self-aggrandizing intrusion into the sphere of activity of another branch. *See MWAA*, 501 U.S. at 274–77. However, the two requirements do not always work in tandem. A statute providing that the President can exercise additional authority over some issue with the approval of a single house of Congress would not amount to congressional self-aggrandizement but would violate the bicameralism requirement. Similarly, it is difficult to view the designation by statute of agents of Congress to be non-voting members of an extra-legislative decision-making body as leading to the exercise of legislative authority in violation of *Chadha*, but such designation may well run afoul of the anti-aggrandizement principle. *See, e.g., NRA Political Victory Fund*, 6 F.3d at 826–27.

[26] *Compare NRA Political Victory Fund*, 6 F.3d at 826–27 (unconstitutional for Congress to place agents within an entity exercising final decision-making authority) *with McGrain v. Daugherty*, 273 U.S. 135 (1927) (constitutional for Congress to issue subpoenas).

C. The General Separation of Powers Principle

Legislation that affects the constitutional separation of powers but is consistent with the requirements of bicameralism/presentment, the Appointments Clause, and the anti-aggrandizement principle is subject to less searching scrutiny.[27] While some older judicial opinions used language suggesting that any overlap between the powers wielded by the different branches is illegitimate,[28] the modern Supreme Court interprets the general principle of separation of powers in light of Madison's assertion that the separation necessary to free government is violated only "'where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department.'" *Nixon v. Administrator of Gen. Servs.*, 433 U.S. at 442 n.5 (quoting *The Federalist No. 47*, at 325–26 (James Madison) (Jacob E. Cooke ed., 1961)).[29] Therefore, "in determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* at 443; *cf. CFTC v. Schor*, 478 U.S. at 856–57 ("[T]he separation of powers question presented in this litigation is whether Congress impermissibly undermined . . . the role of the Judicial Branch."). An affirmative answer to the question of whether Congress has prevented the Executive or Judiciary from accomplishing its functions, furthermore, would not lead inexorably to the judicial invalidation of the statute: in that case, the Court has stated, it would proceed to "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Administrator of Gen. Servs.*, 433 U.S. at 443.[30]

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[27] Legislation impinging on the President's responsibilities in the areas of foreign affairs and national defense poses unique issues in the application of the general principle of separation of powers, requiring a more searching examination of the validity of congressional action.

[28] *See, e.g., Springer v. Philippine Islands*, 277 U.S. 189, 201 (1928) (discussing the "exclusive character of the powers conferred upon each of the three departments"). On the present Court, Justice Scalia adheres to a version of this view. *See, e.g., Morrison*, 487 U.S. at 703–04 (Scalia, J., dissenting) (criticizing the Court for focusing on "such relatively technical details as the Appointments Clause and the removal power" rather than on "the principle of separation of powers").

[29] Madison's language about "the *whole* power of [a] department" should not be construed in a woodenly literalistic manner. As the Supreme Court's decisions indicate, the point is that the principle of separation of powers safeguards the overall constitutional role and function of the affected branch. Indeed, this would seem to have been Madison's view as well: during the great debate in the First Congress over the President's authority to remove executive branch officers, Madison argued against congressional power to limit the President's authority on the ground that such limitations would distort the constitutionally ordained role of the Executive. *See Myers v. United States*, 272 U.S. 52, 131 (1926) (quoting Madison).

[30] Although most of the Court's decisions applying the general separation of powers principle have concerned legislation arguably interfering with the executive or judiciary, the Court's approach is applicable in other circumstances as well. For example, *United States v. Nixon*, 418 U.S. 683 (1974), addressed the argument that a subpoena duces tecum addressed to the President in the course of a criminal proceeding was a judicial encroachment on the Executive's autonomy. The Court rejected the argument, holding in the circumstances of the case that the President's "generalized interest in confidentiality" was outweighed by "the demonstrated, specific need [of the courts and the accused] for evidence in a pending criminal trial." *Id.* at 713. The threat to the President's constitutionally based interest posed by compelled disclosure in such (presumably rare) circumstances was slight, the Court concluded, while "the allowance of the privilege to withhold evidence . . . would . . . gravely impair the basic function of the courts." *Id.* at 712. The Court built on its reasoning in *United States v. Nixon* in formulating the

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The Court's current understanding of the general principle of separation of powers is illustrated by *Morrison v. Olson.*[31] There the Court concluded that the restrictions in the independent counsel statute on the Executive's supervisory and removal powers did not violate the principle. While the Court acknowledged that the statute rendered the independent counsel "free from Executive supervision to a greater extent than other federal prosecutors," it was unpersuaded that the limitations placed on that supervision meant that the President would not be able "to perform his constitutionally assigned duties." 487 U.S. at 696.[32] In light of the narrow range of the independent counsel's jurisdiction, her essential insulation from any significant policy-making role, and the well-established principle that Congress can limit the removal authority of a head of department when granting that officer the power to appoint subordinates, the Court concluded that the independent counsel statute did not fundamentally undermine the Executive's constitutional authority.

The Supreme Court's basic formulation of the general principle of separation of powers is consistent with the approach taken by most Attorneys General in the past, and it accords with what we find to be the most persuasive scholarship on the original understanding and early practice of the separation of powers under the United States Constitution.[33] However, given the very emphasis the general principle places on evaluating constitutional questions in light of the overall structure and functioning of the federal government, the principle's application to spe-

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test set out a few years later in *Administrator of General Services*, under which it examined the impact of an adverse decision on the constitutional functions of the executive and judicial branches.

[31] *See also Mistretta. Mistretta* upheld the validity of Congress's decision to create the Sentencing Commission as an independent entity within the judicial branch composed, in part, of Article III judges against the claim that the Commission violated the general separation of powers principle. 488 U.S. at 383. As in *Morrison*, the Court looked to the impact of the challenged legislation on the ability of the affected branch to fulfill its duties and concluded that the legislation posed no real threat to the integrity or authority of the judiciary. 488 U.S. at 384.

[32] The Court also addressed the statute's imposition of a for-cause requirement on the Attorney General's power to remove an independent counsel, arguably a violation of the rule of *Myers v. United States*, 272 U.S. 52 (1926) (holding unconstitutional a statute requiring Senate advice and consent to the presidential removal of certain postmasters). *Morrison* distinguished *Myers* as based on what we have called the anti-aggrandizement principle, 487 U.S. at 686 (like *Bowsher v. Synar*, *Myers* involved "Congress' attempt to involve itself in the removal of an executive official"), and rejected the argument that the constitutionality of a for-cause removal requirement depends on whether an official is classified as "purely executive," *id.* at 689. The proper inquiry, the Court concluded, was the compatibility of the restriction on the Executive's removal power with the general separation of powers principle that Congress cannot legislate in such a way that the President cannot carry out his constitutional functions. Ultimately, the Court was "simply [unable to] see how the President's need to control the [counsel's] exercise of . . . discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." *Id.* at 691–92.

[33] While we do not rest any conclusions on the potentially shifting ground of scholarly consensus, we note the existence of a number of impressive studies arguing that the principle of separation was originally understood to be flexible, open-ended, and consistent with a variety of actual institutional relationships among the three branches. Furthermore, it seems undeniable that early *practice* under the Constitution reflected a loose rather than strict understanding of the required separation. *See, e.g.*, Susan Low Bloch, *The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There was Pragmatism*, 1989 Duke L.J. 561; Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211 (1989); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 Geo. Wash. L. Rev. 474 (1989); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 93 Colum. L. Rev. 1 (1994); Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 Geo. Wash. L. Rev. 596 (1989).

cific questions is unavoidably difficult, and the answers we or the courts reach ordinarily should be viewed as quite specific to context.[34] Furthermore, although the general principle marks the boundary of the *law* of separation of powers, it is inappropriate for the Executive to regard this as defining the outer limit of proper separation of powers *policy* objections to legislation.[35] The Constitution's very structure suggests the importance of maintaining the hallmarks of "executive administration essential to effective action"[36] as well as the accountability to the public that stems from vesting ultimate authority in a single, politically responsible officer.[37] Several quite common types of legislation threaten the structural values protected by the general separation of powers principle even if the courts are unlikely to invalidate them. Examples of such legislation may include burdensome reporting requirements, attempts to dictate the processes of executive deliberation, and legislation that has the purpose or would have the effect of "micromanaging" executive action. Executive branch agencies should be careful to object to any legislation that unduly reduces the accountability of officials or agencies to the President, or that unnecessarily interferes with the flexibility and efficiency of executive decision making and action. Such legislation undercuts the constitutional purpose of creating an energetic and responsible executive branch.

II. Common Separation of Powers Issues

A. Bicameralism/Presentment Questions

The Supreme Court's holding in *INS v. Chadha* was emphatic: Congress can exercise "the legislative power of the Federal Government" *only* "in accord with a single, finely wrought and exhaustively considered, procedure"—passage by

[34] Once again, we note that the areas of foreign relations and national defense present unique considerations, in light of the President's much greater constitutional authority to act in those areas.

[35] In analyzing the validity of congressional action, we are mindful of the respect it is appropriate for the executive branch to pay to an equal and coordinate branch of the government. However, the executive branch is not bound by precisely the same rules of deference that guide the courts in exercising their power of judicial review. Judicial deference to the legislative choices embodied in statutes is one of the means by which the courts themselves avoid interfering improperly with the constitutional powers of the politically responsible branches. (In the case of most statutes, judicial review involves scrutinizing the legal and policy judgments of the President who signed the legislation into law as well as those of the Congress that enacted it.) The courts, it should be remembered, are also deferential to purely executive branch decisions, and for the same basic reason: the constitutional structure makes the President, like Congress, politically responsible. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices.").

[36] *Myers*, 272 U.S. at 134.

[37] Rejecting the argument that it was unsafe to delegate the executive power to a single official, Alexander Hamilton wrote that "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults, and destroy responsibility." *The Federalist No. 70*, at 476 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), *cited in In re Sealed Case*, 838 F.2d 476, 527 n.27 (D.C. Cir.) (Ginsburg, R.B., J., dissenting), *rev'd., Morrison v. Olson*, 487 U.S. 654 (1988). Then-Judge Ginsburg explained that "[t]he unity of the executive branch was intended to serve the ends of responsibility and accountability." *Id.*

both houses and presentment to the President.[38] 462 U.S. at 951. Applying that rule, the Court struck down a statutory mechanism in the Immigration and Nationality Act by which a single house of Congress could override decisions of the Attorney General. The effect of the Court's decision was to invalidate the similar "legislative veto" provisions found in many other statutes.[39] In addition to the classic legislative veto mechanism invalidated by *Chadha*, we think that the requirement of bicameralism and presentment is infringed whenever a single house, committee, or agent of Congress attempts to direct the execution of the laws, to determine the "final disposition of the rights of persons outside the legislative branch," or to promulgate rules or standards intended to bind the actions of executive or administrative officials that have not been approved by both houses and presented to the President. *See, e.g., Lear Siegler, Inc., Energy Prods. Div. v. Lehman*, 842 F.2d 1102, 1108 (9th Cir. 1988), *modified as to attorney fees*, 893 F.2d 205 (1989) (en banc);[40] *cf. Mistretta v. United States*, 488 U.S. at 396 (distinguishing Sentencing Guidelines from political policy making on the grounds that "they do not bind or regulate the primary conduct of the public").

For many decades, the congressional Joint Committee on Printing ("JCP") has attempted to exercise the legislative authority to promulgate rules and procedures binding on the executive branch's activities relating to printing, publication, and (more recently) data storage. In 1920, President Wilson vetoed an appropriations bill because it purported to confer on the JCP the power to promulgate regulations governing printing by executive officials or agencies: Congress has no power, he explained, to "endo[w] a committee of either House or a joint committee of both Houses with power to prescribe 'regulations' under which executive departments may operate." Veto Message on Legislative, Executive and Judicial Appropriation Bill, H.R. No. 764, 66th Cong., 2d Sess. 2 (1920), *reprinted in* 59 Cong. Rec. 7026 (1920); *see Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. 56, 62–63, 65 (1933) (quoting and endorsing President Wilson's reasoning). In 1984, we concluded that legislation granting the JCP authority to promulgate regulations that "would require executive departments to

[38] As a matter of practical reality, much of the federal government's legislative activity is undertaken by officers and agencies outside the legislative branch (in the form of regulations), but as a rule such entities act under statutory delegation from Congress. The delegating legislation is, for *Chadha* purposes, the congressional exercise of legislative power. *See Chadha*, 462 U.S. at 953 n.16.

[39] A statutory provision conditioning the Executive's ability to take action on approval by one or both houses of Congress or by a congressional committee is as invalid as a provision enabling one of these bodies to "veto" executive action, and for the same reason: it is a legislative attempt to exercise authority beyond the legislative sphere in a mode not conforming to the requirements of bicameralism and presentment. *See, e.g., American Fed'n of Gov't Employees v. Pierce*, 697 F.2d 303, 306 (D.C. Cir. 1982).

[40] We agree with the court of appeals in *Lear Siegler* that many separation of powers issues can properly be analyzed under either the *Chadha* rule (forbidding Congress to exercise *legislative* power except by bicameralism and presentment) or the anti-aggrandizement principle (forbidding Congress to exercise *executive* power). Attempts to resolve constitutional issues by categorizing an exercise of authority as "in its essence, 'legislative' or 'executive'," can be confusing and, in any event, miss the point that under either analysis, "the critical issue is whether Congress or its agent seeks to *control* . . . the execution of its enactments without respect to the Article I legislative process." 842 F.2d at 1108. In *MWAA*, the Supreme Court concluded that it was unnecessary to resolve the categorization issue because the exercise of authority was unconstitutional however it was viewed. 501 U.S. at 276.

submit annual plans outlining their intended activities and to seek advance approval of all projected goals, policies, strategies, purchases, publications, and means of distribution" with respect to printing, word processing, and data storage and retrieval was unconstitutional. *Constitutionality of Proposed Regulations of Joint Committee on Printing*, 8 Op. O.L.C. 42, 42 (1984). The proposed regulations would have established general rules binding upon the conduct of executive officials without those rules being approved by both houses of Congress and presented to the President, in plain violation of Article I's procedural requirements.[41] We have also advised that the statutory provision authorizing the JCP "unilaterally to create exceptions to the [statutory] rule that all printing must be accomplished through the GPO [Government Printing Office]" has no lawful force under *Chadha*. *Id.* at 51 & n.14; *see also Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. at 58–60 (bill subjecting Treasury Department decisions on tax refunds to review and disallowance by congressional joint committee would be unconstitutional).

The requirement of bicameralism and presentment also can be violated in more convoluted ways. Section 431 of the General Education Provisions Act, for example, subjected final regulations of the Department of Education to a forty-five day report-and-wait provision[42] and provided that the final regulation would not become effective if Congress "by concurrent resolution, find[s] that the final regulation is inconsistent with the Act . . . and disapprove[s] such final regulation." 20 U.S.C. § 1232(d) (Supp. IV 1980). Concurrent resolutions are not legislation within the meaning of the Constitution, *see* U.S. Const. art. I, § 7, cl. 3, because they are not presented to the President. Accordingly, Attorney General Civiletti advised the Secretary of Education that the subjection of the Education Department's delegated lawmaking authority to congressional control and revision by means other than those required by Article I was unconstitutional. "[O]nce a function has been delegated to the executive branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation." *Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President*, 4A Op. O.L.C. 21, 27 (1980) (opinion of the Attorney General).

Similarly, while Congress has near-plenary authority in deciding to grant, limit or withhold appropriations, the Department of Justice has long contended that the appropriations power may not be used to circumvent the restrictions the Constitution places on the modes of legislative action. *See, e.g., Authority of Congressional Committees to Disapprove Action of Executive Branch*, 41 Op. Att'y Gen. 230 (1955) (opining that legislation authorizing congressional committees to dis-

[41] We also determined that the proposed regulations were not authorized by any of the statutes concerning the JCP. *See* 8 Op. O.L.C. at 43–46. That point was not relevant to the constitutional analysis, however, since Congress cannot circumvent the bicameralism and presentment requirement by delegating legislative authority to a part or agent of itself even by means of a statute itself duly passed and presented.

[42] In themselves report-and-wait mechanisms usually are valid, as we discuss more fully later in this memorandum.

approve Defense Department contracts is unconstitutional). Several years before *Chadha*, for example, this Office advised that Congress could not validly provide for the indirect implementation of a legislative "veto" by an appropriations rider that would prospectively deny funding for the implementation of any regulation disapproved in the future by such a "veto." *See Appropriations Limitation for Rules Vetoed by Congress*, 4B Op. O.L.C. 731 (1980). Our reasoning in that opinion is equally applicable to appropriations provisions that attempt to cut off funding that would otherwise be available on the basis of any future expression of disapproval by Congress that does not take the form of new legislation. The same analysis would apply, as well, to a provision prohibiting the expenditure of funds for some purpose, but allowing a future expression of approval by committee action to remove the prohibition.

In carrying out its legitimate legislative functions, Congress "enjoys ample channels to advise, coordinate, and even directly influence an executive agency [including by] direct communication with the [agency]." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994). As a practical matter, therefore, congressional committees and individual members of Congress often are able to sway the decisions of the executive officials with whom they deal. In addition, congressional committees can exercise limited but legally coercive authority over persons outside the legislative branch through the power to issue subpoenas to compel testimony.[43] In light of the capacity of Congress to extend its influence beyond the legislative sphere by informal means that are sometimes troubling although not unlawful, it is imperative that the executive branch consistently assert the rule of constitutional law that formal control of executive decisionmaking and administration is subject to the requirements of Article I, and especially to the constitutional authority of the President to participate in the legislative process through the presentment mechanism. The executive branch has a constitutional obligation not to accede to legislative action that does not conform to Article I. Advising the Secretary of Education that she could validly implement departmental regulations despite a legislative "veto," Attorney General Civiletti wrote that "recognition of these concurrent resolutions as legally binding would constitute an abdication of the responsibility of the executive branch, as an equal and coordinate branch of government with the legislative branch, to preserve the integrity of its functions against constitutional encroachment." *Congress' Disapproval of Agency Regulations*, 4A Op. O.L.C. at 29.

[43] The Supreme Court has reasoned that the "congressional power of inquiry" is necessary to " 'enable [Congress] efficiently to exercise [the] legislative function[s] belonging to it under the Constitution.' " *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (quoting *McGrain v. Daugherty*, 273 U.S. 135, 160 (1927)) Like Congress's substantive powers to legislate, the power of inquiry is "subject to the limitations placed by the Constitution on governmental action," *id.* at 112, including the anti-aggrandizement and general separation of powers principles.

B. Appointments Clause and Related Questions

The Appointments Clause provides:

> [The President,] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the 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.[44] In *Buckley v. Valeo*, the Supreme Court held that the terms of the Appointments Clause set out the only means by which Congress may provide for the appointment of "Officers of the United States."[45] 424 U.S. at 124–37. Principal officers must be appointed by the President with the advice and consent of the Senate; inferior officers must be appointed in the same manner unless Congress by statute provides for their appointment by the President, the "Head[ ] of [a] Department[ ]," or the courts. *Id.* at 132;[46] *see also Freytag v. Commissioner*, 501 U.S. at 878 ("[T]he Constitution limits congressional discretion to vest power to appoint 'inferior Officers' to three sources."). Despite the apparent clarity of its language, however, the Appointments Clause has provided the occasion for many opinions of the Attorneys General and of this Office.[47]

1. Who is Required to Be an "Officer of the United States"? Not everyone who performs duties for the federal government is an "officer" within the meaning of the Appointments Clause. From the early days of the Republic, this term has been understood to embrace the ideas of "tenure, duration, emolument, and duties." *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868). Because

[44] As the language of the Appointments Clause suggests, offices in the constitutional sense "are only those established or recognized by the Constitution or by act of Congress." *Inventions International Exposition*, 18 Op. Att'y Gen. 171, 171 (1885); *see also id.* ("[T]he President cannot create an office.").

[45] The officers at issue in *Buckley* were the six voting members of the Federal Election Commission, four of whom were appointed by congressional officials and two by the President, subject to the approval of the Senate and the House of Representatives. The statutory scheme thus violated the Appointments Clause in two distinct ways, by vesting appointment power in officials not listed in the Clause and by subjecting presidential nominees to confirmation by the House. 424 U.S. at 126–27.

[46] *See Appointment of Assistant Secretary of State*, 6 Op. Att'y Gen. 1, 1 (1853) ("[W]ithout there be[ing] express enactment to the contrary . . . the appointment of any officer of the United States belongs to the President, by and with the advice and consent of the Senate.").

[47] We do not state anything novel in observing that the Appointments Clause sometimes presents difficult questions of interpretation. Attorney General Legaré remarked in an 1843 opinion that "[n]o points of our fundamental law are more difficult than those involved in this whole subject of appointments." *Appointment and Removal of Inspectors of Customs*, 4 Op. Att'y Gen. 162, 164 (1843).

Hartwell has long been taken as the leading statement of the constitutional meaning of "officer," [48] that statement is worth repeating in full:

> An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.
>
> The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe. A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

Id. at 393.

Hartwell and the cases following it specify a number of criteria for identifying constitutional officers, and in some cases it is not entirely clear which criteria the Court considered essential to its decision. Nevertheless, we believe that from the earliest reported decisions onward, the constitutional definition of officer has involved at least three necessary conditions.

a. Employment by the Government: The Distinction between Appointees and Independent Contractors. An officer's duties are permanent, continuing, and based upon responsibilities created through a chain of command rather than by contract. Underlying an officer is an "office," to which the officer must be appointed. As Chief Justice Marshall, sitting as circuit justice, wrote: "Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer." *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747). Chief Justice Marshall speaks here of being "employed under a contract"; in modern terminology the type of non-officer status he is describing is usually referred to as

[48] In an opinion discussing an Appointments Clause issue, Attorney General Kennedy referred to *Hartwell* as providing the "classical definition pertaining to an officer." *Communications Satellite Corporation*, 42 Op. Att'y Gen. 165, 169 (1962). *Hartwell* itself cited several earlier opinions, including *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice), *see* 73 U.S. at 393 n.†, and in turn has been cited by numerous subsequent Supreme Court decisions, including *United States v. Germaine*, 99 U.S. 508, 511–12 (1879), and *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890). These latter two decisions were cited with approval by the Court in *Buckley v. Valeo*, 424 U.S. at 125–26 & n.162.

that of independent contractor. In *Hartwell*, this distinction shows up in the opinion's attention to the characteristics of the defendant's employment being "continuing and permanent, not occasional or temporary," as well as the opinion's suggestion that with respect to an officer, a superior can fix and then change the specific set of duties, rather than having those duties fixed by a contract. 73 U.S. at 393.

The distinction between employees and persons whose relationship to the government takes some other form also appears in later decisions.[49] The question in *United States v. Germaine*, 99 U.S. 508 (1879), concerned whether a surgeon appointed by the Commissioner of Pensions "to examine applicants for pension, where [the Commissioner] shall deem an examination . . . necessary," *id.* at 508 (quoting Rev. Stat. § 4777), was an officer within the meaning of the Appointments Clause. The surgeon in question was "only to act when called on by the Commissioner of Pensions in some special case"; furthermore, his only compensation from the government was a fee for each examination that he did in fact perform. *Id.* at 512. The Court stated that the Appointments Clause applies to "all persons who can be said to hold an office under the government" and, applying *Hartwell*, concluded that "the [surgeon's] duties are *not* continuing and permanent and they *are* occasional and intermittent." *Id.* The surgeon, therefore, was not an officer of the United States.[50]

The Court employed the same reasoning in *Auffmordt v. Hedden*, 137 U.S. 310 (1890). Pursuant to statute, an importer dissatisfied with the government's valuation of dutiable goods was entitled to demand a reappraisement jointly conducted by a general appraiser (a government employee) and a "merchant appraiser" appointed by the collector of customs for the specific case. Despite the fact that the reappraisement decision was final and binding on both the government and the importer, *id.* at 329, the Court rejected the argument that the merchant appraiser was an "inferior Officer" whose appointment did not accord with the requirements of the Appointments Clause.

> He 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. . . . He has no claim or right to be designated, or to act except as he may be designated. . . . His position is without tenure, duration, con-

[49] In this memorandum, the term "officer" will be used to refer exclusively to "Officers of the United States" in the constitutional sense; other full-time government servants will be called "employees."

[50] *Germaine* clearly was discussing the concept of "officer" in the constitutional, and not simply a generic, sense: the alternative basis for the holding was that the surgeon was not an officer because he was appointed by the Commissioner who, as the head of a bureau within the Interior Department, could not be a "Head of Department" with the authority to appoint officers. *Id.* at 510–11.

> tinuing emolument, or continuous duties . . . . Therefore, he is not an 'officer,' within the meaning of the clause.

Id. at 326–27.

We believe that under its best reading, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), reflects and endorses this distinction, and that suggestions to the contrary misread the opinion. First, *Buckley* cites both *Germaine* and *Auffmordt* approvingly. *See id.* at 125–26 & n.162. Second, in several of its statements of the definition of "officers," *Buckley*, sometimes citing *Germaine* explicitly, says that the term applies to *appointees* or *appointed officials* who exercise significant authority under federal law, thus recognizing the possibility that non-appointees might sometimes exercise authority under federal law. *See, e.g., id.* at 131 ("Officers" are "all appointed officials exercising responsibility under the public laws."). It is true that at other points in its opinion, the *Buckley* Court used language that, taken in isolation, might suggest that the Appointments Clause applies to persons who, although they do not hold positions in the public service of the United States, exercise significant authority pursuant to federal law. *See id.* at 141. However, we think such a reading of *Buckley* is unwarranted. So understood, *Buckley* must be taken to have overruled, *sub silentio*, *Germaine* and *Auffmordt*—cases upon which it expressly relies in its analysis, *see id.* at 125–26 & n.162—and its repeated quotation of the *Germaine* definition of "officer" as "all persons who can be said to hold an office under the government" would make no sense. The apparently unlimited language of some passages has a simpler explanation: there was no question that the officials at issue in *Buckley* held "employment[s]," *Maurice*, 26 F. Cas. at 1214, under the federal government, and thus the question of the inapplicability of the Appointments Clause to persons not employed by the federal government was not before the Court.[51] The Supreme Court's decision in *Buckley*, we conclude, did not modify the long-settled principle that a person who is not an officer under *Hartwell* need not be appointed pursuant to the Appointments Clause.[52]

[51] The post-*Buckley* Supreme Court has often assessed the validity of statutes that would starkly pose Appointments Clause issues if, in fact, the Court had adopted the position that wielding significant authority pursuant to the laws of the United States, without more, requires appointment in conformity with that Clause. In none of these cases has the Court even hinted at the existence of an Appointments Clause issue. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) (upholding statutory requirement that registrants under a federal regulatory scheme submit to binding arbitration conducted by a panel of arbitrators who are private individuals not appointed by one of the methods specified in the Appointments Clause and are subject only to limited judicial review); *FERC v. Mississippi*, 456 U.S. 742 (1982) (upholding requirement that states enforce federal regulatory scheme relating to utilities); *Lake Carriers' Ass'n v. Kelley*, 456 U.S. 985 (1982) (mem.) (upholding statute that granted states authority to ban sewage emissions from all vessels), *aff'g* 527 F. Supp. 1114 (E.D. Mich. 1981) (three-judge panel); *Train v. National Resources Defense Council, Inc.*, 421 U.S. 60 (1975) (construing provision of Clean Air Act that gave states authority to devise and enforce plans for achieving congressionally defined national air quality standards).

[52] Some recent opinions of this Office have read *Buckley* more broadly as repudiating the historical understanding of the Appointments Clause and endorsing the proposition we reject here—that is, that all persons exercising significant federal authority, by virtue of that fact alone, must be appointed pursuant to the Appointments Clause. We are aware of four opinions in which our disagreement with this understanding of *Buckley* would cause us to reach a different conclusion on the Appointments Clause question presented. *See Constitutionality of Subsection 4117(b)*

b. The Exercise of Significant Authority. Chief Justice Marshall's observation that "[a]lthough an office is 'an employment,' it does not follow that every employment is an office," *United States v. Maurice*, 26 F. Cas. at 1214 points to a second distinction as well — although not one that was at issue in *Maurice* itself. An officer is distinguished from other full-time employees of the federal government by the extent of authority he or she can properly exercise. As the Court expressed this in *Buckley*:

> We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in *United States v. Germaine*, [means] that any appointee exercising *significant authority* pursuant to the laws of the United States . . . must . . . be appointed in the manner prescribed by [the Appointments Clause].

424 U.S. at 125–26 (emphasis added).[53] In contrast, "[e]mployees are lesser functionaries subordinate to officers of the United States." *Id.* at 126 n.162.

The distinction between constitutional officers and other employees is a long-standing one. *See, e.g., Burnap v. United States*, 252 U.S. 512, 516–19 (1920) (landscape architect in the Office of Public Buildings and Grounds was an employee, not an officer); *Second Deputy Comptroller of the Currency—Appointment*, 26 Op. Att'y Gen. at 628 (Deputy Comptroller of the Currency was "manifestly an officer of the United States" rather than an employee). At an early point, the Court noted the importance of this distinction for Appointments Clause analysis. *See Germaine*, 99 U.S. at 509.[54]

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of Enrolled Bill H.R. 5835, the "Omnibus Budget Reconciliation Act of 1990," 14 Op. O.L.C. 154, 155–56 (1990) (statutory scheme under which congressional delegations and physicians' organizations of certain states exercise "significant authority" violates Appointments Clause); *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207, 221–24 (1989) (provisions of False Claims Act authorizing *qui tam* suits by private parties violate Appointments Clause because *qui tam* relators exercise "significant governmental power"); *Representation of the United States Sentencing Commission in Litigation*, 12 Op. O.L.C. 18, 26 (1988) (private party acting as counsel for United States agency must be appointed pursuant to Appointments Clause); *Proposed Legislation to Establish the National Indian Gaming Commission*, 11 Op. O.L.C. 73, 74 (1987) (Appointments Clause problems raised where state and local officials given authority to waive federal statute). Our conclusion that the more limited historical understanding of the Appointments Clause is correct requires us to disavow the Appointments Clause holdings of those opinions. To the extent that our current reading of *Buckley* is inconsistent with the Appointments Clause reasoning of other opinions of this office, that reasoning is superseded. *See Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 249 (1989).

[53] *See Appointments in the Department of Commerce and Labor*, 29 Op. Att'y Gen. 116, 118–19, 122–23 (1911) (official authorized to perform all the duties of the Commissioner of Fisheries, who was appointed by the President and confirmed by the Senate, was an officer; scientists, technicians, and superintendent of mechanical plant in the Bureau of Standards were employees rather than officers); *Second Deputy Comptroller of the Currency—Appointment*, 26 Op. Att'y Gen. 627, 628 (1908) ("The officer is distinguished from the employee in the greater importance, dignity, and independence of his position"; official authorized to exercise powers of the Comptroller of the Currency in the absence of the Comptroller was clearly an officer.).

[54] The status of certain officials traditionally appointed in modes identical to those designated by the Appointments Clause is somewhat anomalous. For instance, low-grade military officers have always been appointed by the President and confirmed by the Senate and understood to be "Officers of the United States" in the constitutional sense. In *Weiss v. United States*, 510 U.S. 163, 170 (1994), the Supreme Court recently indicated its agreement with that

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The Supreme Court relied on the officer/employee distinction in its recent decision in *Freytag v. Commissioner*, 501 U.S. 868 (1991). In *Freytag*, the Court rejected the argument that special trial judges of the Tax Court are employees rather than officers because "they lack authority to enter a final decision" and thus arguably are mere subordinates of the regular Tax Court judges.[55] *Id.* at 881. The Court put some weight on the fact that the position of special trial judge, as well as its duties, salary, and mode of appointment, are specifically established by statute;[56] the Court also emphasized that special trial judges "exercise significant discretion" in carrying out various important functions relating to litigation in the Tax Court. *Id.* at 881–82.

Applying the same understanding of the distinction between officers and employees, this Office has concluded that the members of a commission that has purely advisory functions "need not be officers of the United States" because they "possess no enforcement authority or power to bind the Government." *Proposed Commission on Deregulation of International Ocean Shipping*, 7 Op. O.L.C. 202, 202–03 (1983). For that reason, the creation by Congress of presidential advisory committees composed, in whole or in part, of congressional nominees or even of members of Congress does not raise Appointments Clause concerns.

Since employees do not wield independent discretion and act only at the direction of officers, they do not in their own right "exercis[e] responsibility under the public laws of the Nation," *Buckley*, 424 U.S. at 131.[57] As a constitutional

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understanding. It is at least arguable, however, that the authority exercised by second lieutenants and ensigns is so limited and subordinate that their analogues in the civil sphere clearly would be employees. There are at least three possible explanations. (1) Congress may make anyone in public service an officer simply by requiring appointment in one of the modes designated by the Appointments Clause. The Clause, on this view, mandates officer status for officials with significant governmental authority but does not restrict the status to such officials. This apparently was the nineteenth-century view. *See, e.g., United States v. Perkins*, 116 U.S. 483, 484 (1886) (Cadet engineer at the Naval Academy was an officer because "Congress has by express enactment vested the appointment of cadet-engineers in the Secretary of the Navy and when thus appointed they become officers and not employees."). While recognizing that Congress may make anyone in the public service an officer, Attorney General Kennedy rejected the argument that Congress evinces and effectuates such an intention merely by providing for the public servant to be appointed by a method that coincidentally conforms with the Appointments Clause. *See Communications Satellite Corporation*, 42 Op. Att'y Gen. 165, 167 (1962) ("[I]t does not follow" from the Constitution that "every appointment authorized by law which is preceded by nomination and confirmation necessarily renders the appointee an officer."). (2) Certain officials are constitutional officers because in the early Republic their positions were of greater relative significance in the federal government than they are today. *Cf. Buckley*, 424 U.S. at 126 (postmasters first class and clerks of district courts are officers). (3) Even the lowest ranking military or naval officer is a potential commander of United States armed forces in combat—and, indeed, is in theory a commander of large military or naval units by presidential direction or in the event of catastrophic casualties among his or her superiors.

[55] In fact, as the Court pointed out, the chief judge of the Tax Court can assign special trial judges to render *final* decisions in certain types of cases, a power that the government conceded rendered them, in those circumstances, "inferior officers who exercise independent authority." The Court rejected the argument that special trial judges could be deemed inferior officers for some purposes and employees for others. *Freytag*, 501 U.S. at 882.

[56] The text of the Appointments Clause implies that offices in the sense of the Clause must be established in the Constitution or by statute. *See* U.S. Const. art. II, §2, cl. 2 (specifying certain officers and then referring to "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

[57] That an employee may not exercise *independent* discretion does not, of course, mean that his or her duties may not encompass responsibilities requiring the exercise of judgment and discretion under the ultimate control and supervision of an officer. In *Steele v. United States* (No. 2), 267 U.S. 505, 508 (1925), the Supreme Court noted that a "deputy marshal is not in the constitutional sense an officer of the United States," yet "is called upon to exercise great responsibility and discretion" in "the enforcement of the peace of the United States, as

matter, therefore, an employee may be selected in whatever manner Congress directs. Conversely, "any appointee" in federal service who "exercis[es] significant authority pursuant to the laws of the United States" must be an officer in the constitutional sense and must be appointed in a manner consistent with the Appointments Clause.[58] *Buckley*, 424 U.S. at 126. Congress and the President may not avoid the strictures of the Clause by vesting federal employees with the independent or discretionary responsibility to perform any "significant governmental duty." *Id.* at 141.[59]

c. Appointment to a Position of Employment within the Federal Government. Finally, *United States v. Hartwell*, 73 U.S. (6 Wall.) 385 (1868), and the other major decisions defining "Officers of the United States" all reflect the historical understanding that a constitutional officer is an individual who is appointed to his or her office by the federal government. The Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors.[60] In *Hartwell* the Court stated, "[a]n office is a public station, or employment, conferred by the appointment of government. . . . The employment of the defendant was in the public service of the United States." 73 U.S. at 393; *see also United States v. Germaine*, 99 U.S. 508, 510 (1879) (founders intended appointment pursuant to the Appointments Clause only for "persons who can be said to hold an office under the government about to be established under the Constitution"). It is a conceptual confusion to argue that federal laws delegating authority to state officials create federal "offices," which are then filled by (improperly appointed) state officials. Rather, the "public station, or employment" has been created by state law; the federal statute simply adds federal authority to a pre-existing state office. Accordingly, the substantiality of the delegated authority is immaterial to the Appointments Clause conclusion.[61] An analogous point applies

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that is embraced in the enforcement of federal law." But deputy marshals act at the direction of "the United States marshal under whom they serve," *id.*, who *is* an officer in the constitutional sense.

[58] *See Appointment and Removal of Inspectors of Customs*, 4 Op. Att'y Gen. 162, 164 (1843) (Congress may not provide for the appointment of "any employe[e], coming fairly within the definition of an inferior officer of the government," except by a mode consistent with the Appointments Clause).

[59] *Buckley* illustrates this last point. The FEC commissioners appointed by congressional officials were undoubtedly employees of the federal government but they could not constitutionally exercise the enforcement powers the statute attempted to grant them because their mode of appointment precluded them from being officers. 424 U.S. at 137–41.

[60] The delegation to private persons or non-federal government officials of federal-law authority, sometimes incorrectly analyzed as raising Appointments Clause questions, can raise genuine questions under other constitutional doctrines, such as the non-delegation doctrine and the general separation of powers principle. *Compare Confederated Tribes of Siletz Indians v. United States*, 841 F. Supp. 1479, 1486–89 (D. Or. 1994) (confusing Appointments Clause with separation of powers analysis in holding invalid a delegation to a state governor), *aff'd on other grounds*, 110 F.3d 688 (9th Cir.), *cert. denied*, 522 U.S. 1027 (1997), *with United States v. Ferry County*, 511 F. Supp. 546, 552 (E.D. Wash. 1981) (correctly dismissing Appointments Clause argument and analyzing delegation to county commissioners under non-delegation doctrine).

[61] *See Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1365 (9th Cir. 1986) ("[B]ecause the Council members do not serve pursuant to federal law," it is

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to delegations made to private individuals: the simple assignment of some duties under federal law, even significant ones, does not by itself pose an Appointments Clause problem.[62]

In our view, therefore, the lower federal courts have been correct in rejecting Appointments Clause challenges to the exercise of federally derived authority by state officials,[63] the District of Columbia City Council,[64] *qui tam* relators under the False Claims Act,[65] and plaintiffs under the citizen suit provisions of the Clean Water Act.[66] The same conclusion should apply to the members of multinational or international entities who are not appointed to represent the United States.[67] We believe that the Appointments Clause doubts sometimes voiced about

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"immaterial whether they exercise some significant executive or administrative authority over federal activity."), *cert. denied*, 479 U.S. 1059 (1987).

[62] One might also view delegations to private individuals as raising the same considerations as suggested by the distinction drawn earlier between appointee and independent contractor—so long as the statute does not create such tenure, duration, emoluments and duties as would be associated with a public office, the individual is not the occupant of a constitutional office but is, rather, a private party who has assumed or been delegated some federal responsibilities.

[63] *See, e.g., Seattle Master Builders*, 786 F.2d at 1364–66. The particular state officials at issue were serving on an entity created by an interstate compact established with the consent of Congress, but that fact is not significant for Appointments Clause purposes. The crucial point was that "[t]he appointment, salaries and direction" of the officials were "state-derived": "the states ultimately empower the [officials] to carry out their duties." *Id.* at 1365. The Supreme Court's recent decision in *New York v. United States*, 505 U.S. 144 (1992), which held that Congress cannot "commandeer" state officials to serve federal regulatory purposes, reenforces this conclusion. Where state officials do exercise significant authority under or with respect to federal law, they do so *as state officials*, by the decision and under the ultimate authority of the state.

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991), does not suggest a different conclusion. The constitutional issue in that case was the validity of a statutory provision subjecting the Airports Authority "to the veto power of" a Board of Review composed of members of Congress purportedly "acting 'in their individual capacities.'" *Id.* at 270. The Supreme Court held that the Board in fact acted as an agent of Congress and that the Board's veto power therefore represented an unconstitutional enlargement of congressional authority. *Id.* at 272–77. Nothing in the Court's opinion suggests that there would have been any constitutional problem if Congress had delegated the same power to the Authority subject to review by the executive branch.

[64] *See Techworld Dev. Corp. v. D.C. Preservation League*, 648 F. Supp. 106, 115–17 (D.D.C. 1986).

[65] We believe that *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 757–59 (9th Cir. 1993) (rejecting Appointments Clause challenge to False Claims Act), *cert. denied*, 510 U.S. 1140 (1994), reached the correct result but through an incorrect line of analysis. *See id.* at 758 (Clause not violated because of the relative modesty of the authority exercised by the relator). The better analysis, in our view, is that of the court in *United States ex rel. Burch v. Piqua Engineering, Inc.*, 803 F. Supp. 115 (S.D. Ohio 1992), which held that "because *qui tam* plaintiffs are not officers of the United States, the FCA does not violate the Appointments Clause." *Id.* at 120. We now disapprove the Appointments Clause analysis and conclusion of an earlier opinion of this Office, *Constitutionality of the Qui Tam Provisions of the False Claims Act*, 13 Op. O.L.C. 207 (1989) (arguing that the *qui tam* provisions violate the Clause).

[66] Here the Court phrased its analysis in terms of separation of powers, but the challenge to the statute was, at its core, based on the Appointments Clause. *See Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 624 (D. Md. 1987) (*Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), "does not stand for the proposition . . . that private persons may not enforce any federal laws simply because they are not Officers of the United States appointed in accordance with Article II of the Constitution.").

[67] At least where these entities are created on an ad hoc or temporary basis, there is a long historical pedigree for the argument that even the United States representatives need not be appointed in accordance with Article II. *See, e.g.*, Alexander Hamilton, *The Defence* No. 37 (Jan. 6, 1796), *reprinted in* 20 *The Papers of Alexander Hamilton* 13, 20 (Harold C. Syrett ed., 1974):

> As to what respects the Commissioners agreed to be appointed [under the Jay Treaty with Great Britain], they are not in a strict sense OFFICERS. They are *arbitrators* between the two Countries. Though in the Constitutions, both of the U[nited] States and of most of the Individual states, a particular mode of

legislation requiring the concurrence of state or local officials, Indian tribes, or private persons as a condition precedent to federal action are equally without merit.[68]

Determining whether an individual occupies a position of private employment or federal employment can pose difficult questions. The Supreme Court recently set forth rules for making this determination in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995). There, the Court found itself faced with the question of whether Amtrak is a private corporation or an agency of the government. Amtrak is chartered by Congress and incorporated under the District of Columbia Business Corporation Act. *Id.* at 383–85. The organic statute expressly provides that Amtrak "shall be operated and managed as a for-profit corporation, and is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. §24301(a)(2)–(3). The Court ruled that this provision "is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress' control . . . . But it is not for Congress to make the final determination of Amtrak's status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions." 513 U.S. at 392.

However, the Court held that an entity is "what the Constitution regards as the Government," if the entity is government-created and government-controlled. *Id.* Because Amtrak was created "by special law, for the furtherance of governmental objectives," it is government-created.[69] *Id.* at 400. Because federally appointed members of Amtrak's governing board hold "voting control" and there is no provision for this government control to sunset, Amtrak is government-controlled. *See id.* at 399–400. The Court contrasted Conrail, which it determined is not what the Constitution regards as the government. By statute the federal government appoints a voting majority of Conrail's board of directors. Nevertheless, the Court held that Conrail is not part of the government, because the government's voting control will shift to the private shareholders if Conrail's debt to the federal government falls below half of its total indebtedness and because "'[t]he responsibilities of the federal directors are not different from those of the other directors—to operate Conrail at a profit for the benefit of its shareholders'—which contrasts with the public-interest 'goals' set forth in Amtrak's

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appointing officers is designated, yet in practice it has not been deemed a violation of the provision to appoint Commissioners or special Agents for special purposes in a different mode.

The traditional view of the Attorneys General has been that the members of international commissions hold "an office or employment emanating from the general treaty-making power, and created by it and" the foreign nation(s) involved and that members are not constitutional officers. *Office—Compensation*, 22 Op. Att'y Gen. 184, 186 (1898).

[68] Some of our prior opinions express such concerns. Because that view, we now conclude, cannot be reconciled with Appointments Clause principles or caselaw, we expressly disavow it.

[69] The Court also referred to this as a "policy-implementing" role. *Id.* at 396. This is to distinguish government agencies and instrumentalities, such as Amtrak, from truly private corporations that, though created pursuant to statutory authority, do not implement any government policy, but instead pursue profit and the policies of their shareholders.

charter." *Id.* at 399 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974)).[70]

d. Summary. An appointee (1) to a position of employment (2) within the federal government (3) that carries significant authority pursuant to the laws of the United States is required to be an "Officer of the United States." Each of these three conditions is independent, and all three must be met in order for the position to be subject to the requirements of the Appointments Clause.

We recently applied this principle in determining whether the Appointments Clause represents a blanket proscription against participation by the federal government in binding arbitration. Typically, arbitrators are private individuals chosen by the parties to the dispute. In a binding arbitration, the decision of the arbitrators is mandatory upon the parties, subject only to limited judicial review. The view that the Appointments Clause prohibits federal government participation in binding arbitration proceeds from the misinterpretation of *Buckley* discussed above. We reasoned that although it is "beyond dispute that arbitrators exercise significant authority, at least in the context of binding arbitration involving the federal government,"[71] the standard binding arbitration mechanism does not implicate the Appointments Clause. Arbitrators

> are manifestly private actors who are, at most, independent contractors to, rather than employees of, the federal government. Arbitrators are retained for a single matter, their service expires at the resolution of that matter, and they fix their own compensation.

[70] In some passages, the Court spoke in terms of the First Amendment and individual rights, for instance:

> We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.

Id. at 400. We do not, however, believe that the Court meant to imply that it is within Congress's power to exempt federal instrumentalities from the Constitution's structural requirements, such as the Appointments Clause and the separation of powers doctrine, that apply to all other federal agencies. We believe instead that the references to individual rights are explained by two considerations. First, the issue in the case was whether Amtrak had violated the petitioner's First Amendment rights, and so did not raise any structural issues. Second, the Constitution imposes certain obligations on all government entities, state as well as federal. In other words, not all government entities, within *Lebron*'s definition, are part of the *federal* government; many are part of a state or local government or of an interstate compact. *See id.* at 397 (citing *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957) (per curiam)). These latter entities are not subject to the separation of powers doctrine or the Appointments Clause. Because the Court was concerned with all entities that the Constitution regards as within the government, not just the federal government, it naturally phrased its opinion in terms of the obligations that apply to all organs of government, not just the organs of the federal government. Ultimately, we can conceive of no principled basis for distinguishing between the status of a federal entity vis-a-vis constitutional obligations relating to individual rights and vis-a-vis the structural obligations that the Constitution imposes on federal entities. *See* Brief of Appellant United States, *Wilkinson v. Legal Servs. Corp.*, 80 F.3d 535 (D.C. Cir. 1996) (Nos. 95–5144, 91–5174). It therefore is not surprising that the Court did not consistently limit its language to individual rights. *See, e.g., Lebron*, 513 U.S. at 397 ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."). Thus, we do not believe that Congress may evade the "solemn obligations" of the doctrine of separation of powers by resorting to the corporate form any more than it may evade the obligations of the Bill of Rights through this artifice.

[71] *Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 Op. O.L.C. 208, 216 (1995).

> Hence, their service does not bear the hallmarks of a constitutional office — tenure, duration, emoluments, and continuing duties. Consequently, arbitrators do not occupy a position of employment within the federal government, and it cannot be said that they are officers of the United States. Because arbitrators are not officers, the Appointments Clause does not place any requirements or restrictions on the manner in which they are chosen.

19 Op. O.L.C. at 216.[72] The only case that to our knowledge addresses this question agreed with our analysis and conclusion, and held that the Appointments Clause does not prohibit the federal government from entering into binding arbitration. *See Tenaska Wash. Partners v. United States*, 34 F. Cl. 434, 440 (1995) ("[T]he OLC Memorandum is a thorough and persuasive analysis.").

2. Who May Be an Inferior Officer? Since all officers of the United States *may* be appointed by the President with the advice and consent of the Senate, the only Appointments Clause significance to the distinction between principal and inferior officers lies in Congress's ability to provide for the appointment of inferior officers by one of the alternative means listed in the Clause. The Supreme Court has observed that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn." *Morrison v. Olson*, 487 U.S. 654, 671 (1988). Unfortunately, the Court's own decisions provide only modest additional guidance. In *Morrison*, the Court declined to "attempt . . . to decide exactly where the line falls" because it found that the independent counsel "clearly falls on the 'inferior officer' side of that line." *Id.* at 671. The Court advanced several factors that pointed to that conclusion: (1) The counsel was removable by the Attorney General, thus making counsel "to some degree 'inferior' in rank and authority." *Id.* (2) The counsel's duties were limited, particularly with respect to policy making and administration. (3) The counsel's tenure was limited to the particular "mission that

[72] We nevertheless noted that it is possible for a theoretical binding arbitration mechanism to run afoul of the Appointments Clause. As indicated, arbitrators whose sole or collective decisions are binding on the government exercise significant authority. If any such arbitrator were to occupy a position of employment within the federal government, that arbitrator would be required to be appointed in conformity with the Appointments Clause. *See Freytag v. Commissioner*, 501 U.S. 868, 881 (1991). Thus, if a federal agency were to conduct binding arbitrations and to employ arbitrators with whom it provided all relevant attributes of an office, all such arbitrators would be required to be appointed in conformity with the Appointments Clause. *See* 19 Op. O.L.C. at 216.

she was appointed for." *Id.* at 672.[73] The Court's other recent Appointments Clause decisions shed little additional light on the subject.[74]

We agree with the court of appeals in *Silver v. United States Postal Service*, 951 F.2d 1033 (9th Cir. 1991), that the particular factors *Morrison* discussed do not constitute an exhaustive or exclusive list. *See id.* at 1040 ("The nature of each government position must be assessed on its own merits."). The *Silver* court noted that the official at issue in that case, the Postmaster General, "performs many tasks and has many responsibilities," but determined the office to be an inferior one because the Postmaster General "does not have 'control'" and "serv[es] at the pleasure of the" Board of Governors of the Postal Service. *Id.* This approach is consistent with the one we have taken in the past. For example, in concluding that United States Attorneys are inferior officers whose appointment could be vested in the Attorney General, we rejected the argument that the constitutional term "inferior" means "'petty or unimportant'"; instead, we concluded that the term connotes amenability to supervision by the superior "in whom the power of appointment is vested." *United States Attorneys—Suggested Appointment Power of the Attorney General—Constitutional Law (Article 2, § 2, cl. 2)*, 2 Op. O.L.C. 58, 58–59 (1978) (quoting *Collins v. United States*, 14 Ct. Cl. 568, 574 (1878)); *see also Department of Housing and Urban Development—Delegations of Authority—42 U.S.C. § 3533, 3535*, 2 Op. O.L.C. 87, 89 (1978) (deputy assistant secretary, who is subject to direction by an assistant secretary, is "unquestionably" an inferior officer). In determining whether an officer may properly be characterized as inferior, we believe that the most important issues are the extent of the officer's discretion to make autonomous policy choices and the location of the powers to supervise and to remove the officer. While an officer responsible only to the President for the exercise of significant discretion in decision making is probably a principal officer, an officer who is subject to control and removal by an officer other than the President should be deemed presumptively inferior.

[73] The Court also compared the independent counsel's status to that of other officials who had been considered inferior officers in earlier decisions. *See* 487 U.S. at 672–73 (discussing cases dealing with vice-consuls, election supervisors, and United States commissioners). The Court also took note of its "reference in *United States v. Nixon*, 418 U.S. 683, 694, 696 (1974), to the Office of Watergate Special Prosecutor—whose authority was similar to that of [the independent counsel]—as a 'subordinate officer'" and concluded that this characterization was "consistent" with its conclusion that independent counsels are inferior officers. *See* 487 U.S. at 673.

[74] *Buckley* simply asserted that the members of the FEC were "at the very least" inferior officers. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). In *Freytag*, no one claimed that the special trial judges at issue were principal, as opposed to inferior, officers; instead, the case involved the distinction between inferior officers and employees. *Freytag v. Commissioner*, 501 U.S. 868, 880–82 (1991). The military judges under review in *Weiss*, like all commissioned officers in the armed forces, were appointed with the advice and consent of the Senate. *Weiss v. United States*, 510 U.S. 163, 170 (1994). Justice Souter concurred in the Court's opinion on the understanding that the military judges at issue there are inferior officers. *Id.* at 182 (Souter, J., concurring). He reasoned that there were substantial points to be made on either side of the question whether they were principal or inferior officers and concluded that the Court should defer "to the political branches' [implicit] judgment" that the military judges were inferior officers. *Id.* at 194. Although Justice Souter's admonition that "it is ultimately hard to say with any certainty on which side of the line" between principal and inferior status a given officer may fall, *id.* at 193, is indubitably correct, the executive branch cannot invoke the principle of judicial deference he properly used to decide the issue in *Weiss*.

3. Who May Appoint Inferior Officers? The Appointments Clause does not define "Heads of Departments" or "Courts of Law," and questions have arisen about which entities are included by these terms within the "possible repositories for the appointment power." *Freytag v. Commissioner*, 501 U.S. 868, 884 (1991). Earlier Attorneys General have accorded these terms a broad construction. *See, e.g., Authority of Civil Service Commission to Appoint a Chief Examiner*, 37 Op. Att'y Gen. 227 (1933). The same is true of the courts,[75] which have held that the Tax Court,[76] a special division of a court of appeals created primarily for the purpose of appointing independent counsels,[77] and the Governors of the Postal Service (as a collective head of department),[78] can be vested with appointments power. The interpretive difficulties lie in determining exactly how broadly the term "Department" should be read.

We think that the "Departments" to which the Appointments Clause refers are not limited to those major divisions of the executive branch that are headed by members of the President's cabinet.[79] In 1933, Acting Attorney General Biggs opined that Congress could authorize the Civil Service Commission to appoint an inferior officer. *Authority of Civil Service Commission to Appoint a Chief Examiner*, 37 Op. Att'y Gen. 227 (1933). His opinion noted that the Commission "ha[d] certain independent executive duties to perform," was "responsible only to the Chief Executive," *id.* at 229, and was "not a subordinate Commission attached to one of the so-called executive departments," *id.* at 231. As "an independent division of the Executive Branch," he concluded, the Commission was a "Department" for Appointments Clause purposes and its three commissioners, collectively, "the 'head of a Department' in the constitutional sense." *Id.* The fact that the commissioners were not members of the Cabinet was not controlling,

[75] The exception to this broad reading of the Clause was *Buckley*'s unsurprising conclusion that "neither Congress nor its officers [are] included within the language 'Heads of Departments.'" *Buckley v. Valeo*, 424 U.S. 1, 127 (1976) (per curiam).

[76] *Freytag*, 501 U.S. at 892. The Court in *Freytag* concluded that it is constitutional for the chief judge of the Tax Court to appoint special trial judges because the Tax Court, though an Article I legislative court, "exercise[s] judicial power and perform[s] exclusively judicial functions" and thus is a "Court[] of Law" within the meaning of the Clause. *Id.* Justice Scalia argued in a concurring opinion that the Tax Court should be treated as a "Department" and the chief judge as its "Head." *Id.* at 914–22 (Scalia, J., concurring in part and concurring in the judgment). Justice Souter recently has suggested that the opinion of the Court in *Freytag* did not actually resolve the question of whether the judges of the Tax Court, including the chief judge, are principal officers. *Weiss v. United States*, 510 U.S. 163, 192 (1994) (Souter, J., concurring).

[77] *Morrison v. Olson*, 487 U.S. 654 (1988). In *Morrison*, the Court indicated that there is some "constitutional limitation on 'incongruous' interbranch appointments," *id.* at 677, despite the broad language the Appointments Clause uses in describing Congress's discretion on the subject. A statute vesting in a court the power to appoint officers acting in areas in which judges "have no special knowledge or expertise," *id.* at 676 n.13, for example, might create tension between the court's normal functions and "the performance of [its] duty to appoint." *Id.* at 676. We think that this limitation is probably of little practical significance with respect to *presidential* appointments in light of the fact that it is difficult to conceive a plausible argument that vesting the power in the President to appoint *any* officer (other, perhaps, than some legislative officers) could ever be constitutionally "incongruous."

[78] *Silver v. United States Postal Serv.*, 951 F.2d 1033, 1038 (9th Cir. 1991).

[79] The Appointments Clause thus differs from Section 4 of the Twenty-fifth Amendment, the language and history of which confirm that the "principal officers of the executive departments" it mentions are the members of the Cabinet. U.S. Const. amend. XXV, § 4; *see Freytag*, 501 U.S. at 886–87; *id.* at 917 (Scalia, J., concurring in part and concurring in the judgment).

the Acting Attorney General concluded, because the Cabinet itself is not a creation of the Constitution. *Id.* [80] We find this opinion persuasive and note that the Court's opinion in *Freytag* ultimately reserved the question of whether the heads of entities other than cabinet-level departments can be vested with the power to appoint inferior officers. *See Freytag*, 501 U.S. at 887 n.4.[81] *Cf. United States v. Germaine*, 99 U.S. 508 (1879) (Commissioner of Pensions, as head of a bureau within the Interior Department, was not a "Head of Department"). [82]

We would apply the reasoning of the 1933 opinion in concluding that it is constitutional for Congress to vest the power to appoint inferior officers in the heads of the so-called independent agencies — those agencies whose heads are not subject to removal at will by the President and that conventionally are understood to be substantially free of policy direction by the President. Except for the attenuated nature of the President's supervisory authority, most of the independent agencies are clearly analogous to major executive agencies. They exercise governmental authority without being subordinated to any broader unit within the executive branch, and Congress has implicitly characterized them as "Departments" for Appointments Clause purposes by permitting their heads to appoint officials

[80] "The Cabinet, as such, was not provided for by the Constitution and it follows therefore that the interpretation of the Constitution cannot depend upon such consideration." 37 Op. Att'y Gen. at 231; *accord Freytag*, 501 U.S. at 916–17 (Scalia, J., concurring in part and concurring in the judgment).

[81] While the opinion of the Court in *Freytag* rejected the argument that "every part of the Executive Branch is a department," 501 U.S. at 885, we do not think that the Court's reasoning is inconsistent with the 1933 Justice Department opinion. The Court's chief concern was that part of the Appointments Clause's purpose is to prevent "the dangers posed by an excessively diffuse appointment power." *Id.* The Court observed that "[g]iven the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint." *Id.* We do not think that our view that entities other than cabinet-level agencies can be "Departments" for the purposes of the Appointments Clause leads to this constitutionally troublesome result. We assume the continuing validity of *United States v. Germaine*, 99 U.S. 508 (1879), which held that the head of a bureau within an executive branch department was not the head of a department. Most of the discrete units of the executive branch in fact are subordinate to some larger executive agency, and therefore are not departments under *Germaine*. The Federal Bureau of Investigation, for example, wields far-reaching law enforcement authority, but as a component of the Justice Department it is not itself a "Department" for purposes of the Appointments Clause. Legislation authorizing the appointment of inferior officers by a subordinate officer within a department with the approval of the head of the department, *see United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 392–94 (1868); *see also Germaine*, 99 U.S. at 511 (explaining *Hartwell*), does not transgress this principle because for constitutional purposes the appointment should be deemed to be made by the department head. We also note that the four concurring Justices in *Freytag* expressly adopted the reading of the Appointments Clause set forth in the 1933 Attorney General's opinion: that "the term 'Departments' means all independent executive establishments." 501 U.S. at 919 (Scalia, O'Connor, Kennedy, & Souter, JJ., concurring in part and concurring in the judgment).

[82] The court of appeals in *Silver* found no constitutional problem with a statute vesting the power to appoint an inferior officer, the Deputy Postmaster General, in an entity consisting of the Governors of the Postal Service (principal officers who are collectively the "head of a Department") and the Postmaster General (an inferior officer appointed by the Governors). *See* 951 F.2d at 1036–41. This conclusion might be justified on either of two rationales. (1) As Justice Souter recently noted, it remains unresolved whether "the Appointments Clause envisions appointment of some inferior officers by other inferior officers," *Weiss v. United States*, 510 U.S. 163, 192–93 (1994) (Souter, J., concurring), and it may be that there is no constitutional objection to designating one or more inferior officers to be the head of a department with the power to make appointments. (2) It might be argued that although as a general matter the head of a department must be a principal officer and a collective head of department must consist of exclusively principal officers, the association of an inferior officer with a collective head of department in making a specific appointment is constitutionally harmless.

who plainly are inferior officers.[83] Nothing in the original history of the Clause suggests any intention to exclude from the scope of the Clause separate establishments that are not subject to plenary presidential control.[84] Finally, in reserving the question of appointments by "the head of one of the principal agencies," the *Freytag* Court itself included as examples of those agencies the "independent" FTC and the SEC as well as the clearly executive CIA, which suggests that the Court did not perceive a difference between the two types of agencies, at least in the Appointments Clause context. 501 U.S. at 887 n.4. We see no reason to exclude the independent regulatory agencies from the class of entities that are "Departments" for Appointments Clause purposes.

We note that, even accepting the reasoning of the 1933 Justice Department opinion, some entities may exercise governmental authority in so limited a manner that they need not be viewed as "Departments" even though their heads are responsible only to the President. For example, the Committee for Purchase from People Who Are Blind or Severely Disabled, the members of which are appointed by the President alone, 41 U.S.C. § 46(a), appears to exercise significant authority but is subordinate to no larger executive agency. *Id.* §§ 46–48c. Given the narrow scope of the Committee's powers, however, we do not think that the Committee necessarily should be analyzed as a collective head of a department for Appointments Clause purposes.

4. Legislation Lengthening the Tenure of an Officer. As the Court held in *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam), the Appointments Clause by its terms and its structure prohibits Congress from itself exercising the power to appoint "Officers of the United States." The text and structure of the Clause reflect a deliberate constitutional choice to deny to the legislature the power to select the individuals who exercise significant governing authority as non-legislative officers of the federal government. *See id.* at 129–31 (reviewing the debates in the Philadelphia convention).[85] This choice to exclude Congress as such from

[83] *See Freytag*, 501 U.S. at 918 (Scalia, J., concurring in part and concurring in the judgment) (noting that most inferior officers in independent agencies are appointed by neither the President nor a Cabinet official).

[84] In late-eighteenth century English, the term "department" had no specialized governmental or organizational meaning. For example, Dr. Johnson defined "department" as "[s]eparate allotment; province or business assigned to a particular person," 1 Samuel Johnson, *A Dictionary of the English Language* (1755), to which Webster added the gloss "in which a class of duties are allotted to a particular person." 1 Noah Webster, *American Dictionary* 58 (1828), *quoted in Freytag*, 501 U.S. at 920 (Scalia, J., concurring in part and concurring in the judgment) (founders chose "Department" to connote "separate organization"). In its foundational legislation, the First Congress used the word both for the Departments of Foreign Affairs (later, State) and War and for the Department of the Treasury, even though it pointedly did not term Treasury an "executive department" as it did State and War. *Compare* Act of July 27, 1789, ch. 4, 1 Stat. 28, 28–29 (establishing the Department of Foreign Affairs) *and* Act of Aug. 7, 1789, ch. 7, 1 Stat. 49, 49–50 (establishing the Department of War) *with* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65, 65–67 (establishing the Department of the Treasury). A substantial body of scholarship views this terminological choice as reflecting an intention to make Treasury at least partially independent of the President, although by means other than limiting the latter's removal power. *See* Lessig & Sunstein, *supra* note 33, at 27–29; Casper, *supra* note 33, at 240–42; Shane, *supra* note 33, at 615–16.

[85] *Buckley* noted that the Constitution expressly authorizes the selection of the Speaker of the House and the President *pro tempore* of the Senate from among the membership of those bodies, *see* U.S. Const. art. I, §2, cl.

Continued

the appointments process can be set at naught by means other than legislation overtly vesting in Congress the power of appointment. Accordingly, the executive branch has traditionally viewed statutes that constitute an effective exercise by Congress of the power to appoint as violations of the Appointments Clause.

This issue sometimes arises in connection with statutes that attempt to extend the tenure of an officer with a set term, thus potentially denying the President the power he or she would otherwise have to reappoint the officer or select someone else. In 1951, for example, the President requested the Justice Department's views on the validity of a statute extending the terms of the members of a commission. *See Displaced Persons Commission—Terms of Members*, 41 Op. Att'y Gen. 88 (1951). According to the original legislation creating the commission, the terms were to expire in June 1951, but prior to that date Congress amended the legislation to extend the commissioners' tenure to August 1952. Acting Attorney General Perlman advised the President that, while he did not think "there can be any question as to the power of the Congress to extend the terms of offices which it has created," this legislative power is subject "to the President's constitutional power of appointment and removal." *Id.* at 90. However, because the legislation did not attempt to restrict the President's authority to remove the commissioners at will, it was constitutionally harmless: the President remained free to exercise his appointment power simply by removing the incumbents from office at any time. *See id.* ("As so construed, the [extension legislation] presents no constitutional difficulties."); *see also Pension Agents and Agencies*, 14 Op. Att'y Gen. 147, 148–49 (1872) (discussing President's power to remove officer serving a term extended by statute).[86]

We think that the Department's 1951 opinion adopted the correct approach to this issue: while the power to lengthen the tenure of an incumbent officer is incident to Congress's general power to create, determine the duties of, and abolish offices,[87] that power cannot legitimately be employed to produce a result that is, practically speaking, a congressional reappointment to office. On this reasoning, the extension of tenure of officers serving at will raises no Appointments Clause problem, but lengthening the term of an officer who may be removed only for

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5; *id.* art. I, §3, cl. 5, and held that nothing in the Constitution forbids Congress from appointing non-members as legislative branch officials to "perform duties . . . in aid of those functions that Congress may carry out by itself." 424 U.S. at 127–28, 139.

[86] In this circumstance, Congress's action in lengthening an officer's term does not have the effect of usurping the power of appointment the Constitution vests in the President rather than in Congress. *Cf. In re Benny*, 812 F.2d 1133, 1142–43 (9th Cir. 1987) (Norris, J., concurring in the judgment):

> [T]he Appointments Clause precludes Congress from extending the terms of incumbent officeholders. I am simply unable to see any principled distinction between congressional extensions of the terms of the incumbents and more traditional forms of congressional appointments. Both implicate the identical constitutional evil—congressional selection of the individuals filling nonlegislative offices.

[87] *See Crenshaw v. United States*, 134 U.S. 99 (1890), *Civil Service Retirement Act—Postmasters—Automatic Separation from the Service*, 35 Op. Att'y Gen. 309, 314 (1927) ("If, as stated in [*Embry v. United States*, 100 U.S. 680, 685 (1879),] Congress may at any time add to or take from compensation fixed, it may also, it would seem, by analogy, at any time shorten or lengthen a term of office.").

cause would be constitutionally questionable.[88] However, this conclusion, which we think sound in principle, has been rejected by the courts in at least one context. The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98–353, 98 Stat. 333 (codified as amended in scattered sections of 28 U.S.C.), extended the tenure of bankruptcy judges, who can be removed only for cause, and that provision has been sustained repeatedly against constitutional challenge. The leading case, *In re Benny*, 812 F.2d 1133 (9th Cir. 1987), held that a statutory extension of tenure "becomes similar to an appointment" *only* "when it extends the office for a very long time." *Id.* at 1141; *see also In re Investment Bankers, Inc.*, 4 F.3d 1556, 1562 (10th Cir. 1993) (agreeing with *Benny* and noting that the contrary Appointments Clause argument "has been rejected by every court that has considered it"), *cert. denied*, 510 U.S. 1114 (1994). We do not find especially persuasive the reasoning of *Benny*,[89] and it is possible that the doctrine of *Benny* is limited to its factual context.[90] However, the reasoning set forth in *Benny* and the cases that follow it is susceptible to general application, and it is unclear that the courts could repudiate *Benny*'s conclusion with respect to other officers without undercutting the legitimacy of those cases.

The relevant precedents contemplate a continuum. At the one end is constitutionally harmless legislation that extends the term of an officer who is subject to removal at will. At the other end is legislation, constitutionally objectionable even under *Benny*, that enacts a lengthy extension to a term of office from which

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[88] In 1987, this Office issued an opinion that may be read to hold that legislation extending the term of any officer, even one serving at the pleasure of the President, is unconstitutional. *See Reappointment of United States Parole Commissioners*, 11 Op. O.L.C. 135 (1987) At the time it was issued, that opinion was directly contrary to long-standing executive branch precedent. *See, e.g., Displaced Persons Commission—Terms of Members*, 41 Op. Att'y Gen. at 90–91. We recently revisited the question presented in the 1987 opinion and concluded that it was in error. *See Constitutionality of Legislation Extending the Terms of Office of United States Parole Commissioners*, 18 Op. O.L.C. 166 (1994). We therefore reaffirmed the traditional view that legislation extending the term of an officer subject to removal at will does not violate the Appointments Clause and disavowed our 1987 suggestion to the contrary.

[89] *Benny* asserted that *Wiener v. United States*, 357 U.S. 349 (1958), implicitly rejected any Appointments Clause argument against term-extension legislation. 812 F.2d at 1141. We think that this overstates *Wiener*. *Wiener* dealt only with the President's removal power and did not consider any issue regarding the Appointments Clause. The date on which the President removed the plaintiff in *Wiener* from office was in fact *within* the term of office for which the plaintiff was originally appointed, although part of the backpay the plaintiff ultimately recovered was for a period after his original term would have expired. *See* 357 U.S. at 350–51 (term should have expired on March 1, 1954 as the law stood at the time plaintiff was appointed; President removed plaintiff on December 10, 1953; plaintiff recovered backpay for four months after March 1, 1954, because commission's authorization was extended after his appointment). The additional Supreme Court cases that *Benny* and other opinions have cited are distinguishable. *See, e.g., Benny*, 812 F.2d at 1141 (citing *Shoemaker v. United States*, 147 U.S. 282 (1893), which upheld legislation imposing additional duties on an officer); *In re Tom Carter Enters.*, 44 B.R. 605, 607 (C.D. Cal. 1984) (citing *Shoemaker* and cases dealing with issues under the Contracts Clause and the Philippine Organic Act). *Benny* also pointed out that the First Congress twice extended the tenure of the first Postmaster General. 812 F.2d at 1142. While we agree that this fact supports the argument that Congress generally possesses the power to extend terms, the original Postmaster General served at the pleasure of the President, and thus the First Congress's actions placed no practical limitation on the appointments power.

[90] The result reached in the *Benny* line of cases was as a practical matter much less troublesome than its reverse, which would have put in question an enormous number of decisions within the bankruptcy system. It is therefore possible to characterize these decisions as a sensible resolution of a legal quandary, which may have compromised constitutional logic but did so at no real cost to the ultimate purposes of the Constitution. However, while this view of the cases may be quite sensible from a political-science perspective, it leaves the constitutional law on the subject in some disarray.

the incumbent may be removed only for cause. Legislation along this continuum must be addressed with a functional analysis. Such legislation does not represent a formal appointment by Congress and, absent a usurpation of the President's appointing authority, such legislation falls within Congress's acknowledged authority — incidental to its power to create, define, and abolish offices — to extend the term of an office. As indicated, constitutional harm follows only from legislation that has the practical effect of frustrating the President's appointing authority or amounts to a congressional appointment.

Our recent opinion on legislation extending the terms of members of the United States Sentencing Commission is illustrative of this functional approach. After the Sentencing Commission had been appointed, Congress enacted legislation "to provide [that] a member of the United States Sentencing Commission may continue to serve until a successor is appointed or until the expiration of the next session of Congress." Act of Aug. 26, 1992, Pub. L. No. 102–349, 106 Stat. 933. Commissioners may be removed only for cause. 28 U.S.C. § 991(a). We concluded that the statute did not function to violate the President's appointment power. *See Whether Members of the Sentencing Commission Who Were Appointed Prior to the Enactment of a Holdover Statute May Exercise Holdover Rights Pursuant to the Statute*, 18 Op. O.L.C. 33 (1994). The statute left the President free to "nominate whomever he want[ed] at precisely the same time as he could before [the statute was enacted]." *Id.* at 42. We noted that the effect of the legislation could actually be to augment the President's power by giving him "the option of retaining the holdover officer until he chooses to nominate a successor." *Id.*

We acknowledged the argument that the statute might give Congress the opportunity to appoint, in effect, an incumbent to a new term because the President's removal authority is statutorily restricted and the Senate might refuse to confirm any presidential nominee in order to retain a congressionally favored incumbent. *Id.* But this argument was unavailing for two reasons. First, the argument is unduly speculative insofar as it hypothesizes contumacious conduct on the part of the Congress, and whatever danger such a possibility might entail was mitigated by the limitation on the period for which a holdover may continue to serve. Second, we noted that the holdover provision is unarguably valid as applied to Sentencing Commissioners who took office after the statute's enactment. We concluded that "[i]t is simply not persuasive to argue that the President's appointment power is effectively frustrated when incumbent commissioners hold over but not when subsequent commissioners hold over." *Id.*

We also found it significant that the holdover statute was neutral in its application. We reserved the question of whether a holdover statute "might amount to a prohibited congressional designation, even if the holdover period is for a short time," if the statute "would create or repeal holdover provisions for selective members of the same commission or for classes of members on the same commis-

sion, e.g., those appointed on a certain date or those from a particular political party." *Id.* at 46 n.8.

5. Legislation Imposing Additional Duties on an Officer. The executive branch has consistently maintained that a statute creating a new office and conferring it and its duties on the incumbent of an existing office would be unconstitutional under the Appointments Clause.[91] Congress's recognized authority to alter the duties and powers of existing offices could be employed to achieve substantially the same result if the legislature were unconstrained in the duties it could add to an office.[92] The Supreme Court accordingly has interpreted the Constitution to limit the legislature's discretion. The leading case, *Shoemaker v. United States*, 147 U.S. 282 (1893), concerned a statute that created a commission to select the land for Rock Creek Park in the District of Columbia. Three of the five members were to be appointed by the President and confirmed by the Senate; the persons holding two existing federal offices, the chief of engineers of the Army and the engineer commissioner of the District, were declared members ex officio. The Court rejected an Appointments Clause challenge to the assignment of the two engineers to the new commission:

> [W]e do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

Id. at 301. The legislation at issue was valid, the Court concluded, because the new duties assigned to the engineers "cannot fairly be said to have been dissimilar to, or outside of the sphere of," the engineers' existing responsibilities. *Id.*

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[91] *See, e.g.*, President Buchanan's signing statement dated June 25, 1860, relating to the Civil Appropriations Act for fiscal year 1861, *in* 5 James D. Richardson, *Messages and Papers of the Presidents, 1789–1897*, at 597–98 (1897) (construing Act to avoid the constitutional problem).

[92] The same possibility is not presented by Congress's power to reduce or limit the duties of an officer. Except with respect to (certain) constitutional officers, Congress has plenary authority to eliminate offices altogether, subject to the general separation of powers principle. The lesser-included power to take away part of an officer's authority does not in itself enable Congress to choose which individual will exercise authority and thus does not implicate the Appointments Clause. *Cf. United States v. San Jacinto Tin Co.*, 125 U.S. 273, 284 (1888) (Congress, as "the legislative body which created the office" of Attorney General, has the authority to put "restrictions . . . upon the exercise of [the Attorney General's] authority").

In *Crenshaw v. United States*, 134 U.S. 99 (1890), the Supreme Court upheld a statute that affected undergraduates ("cadet midshipmen") at the Naval Academy by redesignating them as "naval cadets" and restricting the circumstances in which they would be commissioned upon graduation. The Court concluded that "Congress did not thereby undertake to name the incumbent of any office. It simply changed the name, and modified the scope of the duties." *Id.* at 109.

The *Shoemaker* rule ensures "that Congress [is] not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office." *Weiss v. United States*, 510 U.S. 163, 174 (1994). For the imposition of new duties on an officer to be valid under *Shoemaker*, two requirements must be met. First, as in *Shoemaker* itself, the legislation must confer new duties on "*offices*, . . . [not] on any particular *officer*." *Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183, 1192 (D.D.C.), *appeal dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990). "Had the Chief of Engineers of the United States Army or the Engineer Commissioner of the District of Columbia resigned from office after the commission was established, he would no longer have served on the commission — the new Chief of Engineers or Engineer Commissioner would have taken over those duties." *Id.* at 1192–93 (discussing facts in *Shoemaker*). The statute at issue in *Olympic Federal*, in contrast, abolished certain offices (the three-person Federal Home Loan Bank Board) while simultaneously defining the duties of a new office (the Director of Office of Thrift Supervision ("OTS")) *and* designating as the first Director the holder of one of the abolished offices (the chair of the Federal Home Loan Bank Board). *See id.* at 1186. The *Olympic Federal* court correctly determined that by doing so the statute in effect appointed the particular individual who was chair of the old board to a new position. *Id.* at 1193.[93]

The second facet of the *Shoemaker* rule is the requirement that the new duties be "germane to the offices already held by" the affected officers. 147 U.S. at 301. This inquiry is necessarily case-specific. In *Weiss*, the Court examined closely the specific duties of military judges and the general responsibilities of military and naval officers and concluded that they are so intertwined that the selection by the Judges Advocate General of certain military and naval officers to serve for a time as military judges is consistent with the germaneness requirement. 510 U.S. at 174–76. In giving advice on this issue, we also have looked at the reasonableness of assigning the new duties "in terms of efficiency and institutional continuity," and we have asked whether "it could be said that [the officers'] functions . . . [with the additional duties] were within the contemplation of those who were in the first place responsible for their appointment and confirmation." 4B Op. O.L.C. at 541.

The *Weiss* decision may have weakened judicial enforcement of *Shoemaker*'s germaneness requirement by suggesting that some legislation that adds new duties

[93] The *Olympic Federal* court thought the legislation would have been valid if Congress had created a three-person directorate for the OTS and designated the members of the former board as the directors. The court reasoned that the germaneness requirement of *Shoemaker* would be satisfied because OTS was absorbing the duties of the old board as well as acquiring other, related ones. 732 F. Supp. at 1193. We reached a similar conclusion in 1980 in opining that Congress could merge the Court of Claims and the Court of Customs and Patent Appeals and designate the members of those courts to serve as members of the merged court. *See Legislation Authorizing the Transfer of Federal Judges from One District to Another*, 4B Op. O.L.C. 538, 541 (1980). The "merger situation . . . involves the end of one institution and the continuance of its major functions in another," and it was reasonable for Congress "to provide in this context for the relocation of experienced and capable judicial personnel, and for their continuing to perform the functions of the office to which they were originally appointed." *Id.*

is valid regardless of whether it satisfies the requirement. The opinion of the Court stressed the fact that "[i]n *Shoemaker*, Congress assigned new duties to two existing offices, each of which was held by a single officer. This no doubt prompted the [*Shoemaker*] Court's description of the argument as being that 'while Congress may create an office, it cannot appoint the officer.' . . . But here the statute authorized an indefinite number of military judges, who could be designated from among hundreds or perhaps thousands of qualified commissioned officers." 510 U.S. at 174. For that reason, the Court concluded, there was "no ground for suspicion here that Congress was trying to both create an office and also select a particular individual to fill the office." *Id.* The Court nevertheless went on to consider the germaneness issue and concluded that the duties of military judges are adequately related to the duties of the commissioned officers from whom the judges are selected. *Id.* at 174–76.

In a separate opinion, Justice Scalia argued that "'germaneness' is relevant whenever Congress gives power to confer new duties to anyone other than the few potential recipients of the appointment power specified in the Appointments Clause," because "taking on . . . nongermane duties . . . would amount to assuming a new 'Offic[e]' within the meaning of Article II, and the appointment to that office would have to comply with the strictures of Article II." *Id.* at 196 (Scalia, J., concurring in part and concurring in the judgment). We find Justice Scalia's reasoning persuasive and believe that in an appropriate setting the executive branch should urge the Court expressly to accept it. In light of the *Weiss* Court's detailed examination of the germaneness issue, this may not require the Court in fact to modify the doctrine of that case because it is unclear to us that the Court actually intended to hold germaneness constitutionally irrelevant in *Weiss*-type circumstances. The Court may instead simply have been emphasizing the fact that assignment of new and nongermane duties to a few specific officers not only violates the Appointments Clause per se, but also fails under the more general anti-aggrandizement principle of its decisions. We believe that it is appropriate, therefore, to review proposed new-duties legislation for germaneness even where the new duties are assigned to large or indefinite groups.

6. The Ineligibility and Incompatibility Clauses. The Constitution places two important restrictions on the universe of persons who may be appointed to serve as officers of the United States. U.S. Const. art. I, §6, cl. 2.[94] The Ineligibility Clause states that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United

[94]One possible restriction is notable for its absence from the Constitution: although Articles I and II and the Twelfth Amendment establish citizenship and age requirements for serving as a member of Congress, the President, or the Vice President (and also set varying minimum age requirements), *see* U.S. Const. art. I, §2, cl. 2 (Representatives); *id.* art. I, §3, cl. 3 (Senators); *id* art. II, §1, cl. 4 (the President); *id.* amend. XII (Vice President), the Constitution places no such limitations on anyone who becomes an officer through one of the processes prescribed by the Appointments Clause.

States, which shall have been created, or the Emoluments whereof shall have been increased during such time." *Id.* The Clause "restricts the President's power to appoint Members of Congress," and "[i]t has long been settled within the executive branch that the President, in exercising his powers of appointment under Article II, § 2, cl. 2, will not make an appointment in violation of the . . . clause." *Members of Congress Holding Reserve Commissions*, 1 Op. O.L.C. 242, 244 (1977). The most common problem under the Ineligibility Clause arises from legislation that creates a commission or other entity and simultaneously requires that certain of its members be Representatives or Senators, either *ex officio* or by selection or nomination by the congressional leadership. Unless the congressional members participate only in advisory or ceremonial roles, or the commission itself is advisory or ceremonial, the appointment of members of Congress to the commission would violate the Ineligibility Clause.[95]

The Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his continuance in Office." U.S. Const. art. I, § 6, cl. 2. The Clause is primarily a restriction on Congress and its members: the Incompatibility Clause "disqualifies individuals who have already been appointed from assuming or retaining seats in Congress." *Reserve Commissions*, 1 Op. O.L.C. at 244; *cf. Members of Congress Serving in the Armed Forces*, 40 Op. Att'y Gen. 301 (1943).[96] However, the President's duty to take care that the law of the Incompatibility Clause is observed requires him or her to ensure that appointments[97] and legislation creating governmental positions are consistent with the Clause. *See, e.g., Case of the Collectorship of New Orleans*, 12 Op. Att'y Gen. 449, 451 (1868) ("in view of the" Incompatibility Clause, an executive officer's acceptance of a seat in Congress "must be considered as having the legal character of a resignation of the office"); *Appointments to the Commission on the Bicentennial of the Constitution*, 8 Op. O.L.C. 200, 207–08 (1984) (providing advice about "various structural arrangements within the Commission that might be designed to respect the Incompatibility Clause").[98]

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[95] After *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994), it appears that designating a member of Congress to serve on a commission with any executive functions, even in what was expressly labeled a ceremonial or advisory role, may render the delegation of significant governmental authority to the commission unconstitutional as a violation of the anti-aggrandizement principle. *See id.* at 826–27.

[96] The Incompatibility Clause does not prohibit members of Congress from serving in positions that are not offices in the constitutional sense. *See, e.g., Proposed Commission on Deregulation of International Ocean Shipping*, 7 Op. O.L.C. 202, 202–03 (1983) (members of Congress may serve as members of a "purely advisory" commission because the members need not be officers).

[97] *Cf. Deputization of Members of Congress as Special Deputy U.S. Marshals*, 18 Op. O.L.C. 125, 125 n.1 (1994) (recognizing Incompatibility Clause requirement but finding it unnecessary to reach that issue).

[98] The suggestion in this Office's 1977 opinion on the Clause that "exclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress," *Reserve Commissions*, 1 Op. O.L.C. at 242, thus was an overstatement.

7. The Recess Appointments Clause. With respect to officers of the United States, the Constitution vests the President with the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. "A long line of opinions of the Attorneys General, going back to 1823, and which have been judicially approved, has firmly established that . . . [t]he President's power to make recess appointments . . . extends to all vacancies existing during the recess regardless of the time when they arose." *Recess Appointments—Compensation*, 3 Op. O.L.C. 314, 314 (1979) (citations omitted); *accord Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631 (1823).[99] Although there was some early uncertainty about the President's power to make appointments under the Recess Appointments Clause during intrasession recesses, that question was settled within the executive branch by an often-cited opinion of Attorney General Daugherty concluding that the President is so authorized. *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20 (1921). The most difficult problem of interpretation under the Clause today is determining how substantial an intrasession recess must be to give rise to the President's power.[100] Attorney General Daugherty concluded that a twenty-eight-day recess was sufficient, but cautioned that "the term 'recess' must be given a practical construction." *Id.* at 24–25. We agree with his view that the President has discretion to make a good-faith determination of whether a given recess is adequate to bring the Clause into play.[101] Giving advice on how the President may properly exercise that discretion has proven a difficult task. *See Recess Appointments During an Intrasession Recess*, 16 Op. O.L.C. 15 (1992) (eighteen-day recess a sufficient period, particularly in light of the fact that except for a brief formal session on January 3, the Senate would actually be absent for fifty-four days); *Recess Appointments*, 3 Op. O.L.C. at 316 (President may make recess appointments "during a summer recess of the Senate of a month's duration").

8. Acting and Interim Appointments. Early Attorneys General repeatedly opined that the President enjoyed a constitutional power of appointment empowering the President to make temporary or *ad interim* appointments to offices in cases of

[99] The most thorough judicial treatment of the issue, which quotes extensively from Attorney General Wirt's 1823 opinion, is *United States v. Allocco*, 200 F. Supp. 868 (S.D.N.Y. 1961), *aff'd*, 305 F.2d 704 (2d Cir. 1962), *cert. denied*, 371 U.S. 964 (1963).

[100] There must be a vacancy in order for the President to exercise the authority granted by the Recess Appointments Clause. *See Recess Appointments*, 3 Op. O.L.C. at 317 (the power to make a "recess appointment presupposes the existence of a vacancy," and an appointment cannot in itself remove an incumbent so as to create a vacancy). In many situations, whether a vacancy exists will depend on the correct interpretation of a holdover provision in the statute creating the office. The scanty case law on this issue — which is a matter of statutory construction rather than of constitutional law — is not easily reconciled. *Compare Staebler v. Carter*, 464 F. Supp. 585 (D.D.C. 1979), *with Mackie v. Clinton*, 827 F. Supp. 56 (D.D.C. 1993), *vacated as moot*, Nos. 93–5287 & 93–5289, 1994 WL 163761 (D.C. Cir. Mar. 9, 1994).

[101] "In this connection I think the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate. . . . But there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review." 33 Op. Att'y Gen. at 25.

need without conforming to the requirements of the Appointments or Recess Appointments Clause.[102] Their initial reaction to congressional legislation on the subject of vacancies was therefore to view it as having neither the purpose nor the effect of supplanting the President's preexisting constitutional authority. *See Office and Duties of Attorney General*, 6 Op. Att'y Gen. 326, 352 (1854) ("Perhaps the truer view of the question is to consider the . . . statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one."). After the enactment of the Vacancies Act of 1868, ch. 227, 15 Stat. 168, however, the Attorneys General treated the Act as providing the exclusive means of making temporary appointments to those offices covered by the statute. *See, e.g., Appointments Ad Interim*, 17 Op. Att'y Gen. 530 (1883); *Appointments Ad Interim*, 16 Op. Att'y Gen. 596, 596–97 (1880) (authority to fill vacancy in the office of Navy Secretary is "a statutory power," and when the power is exhausted, "the President is remitted to his constitutional power of appointment"). A 1904 opinion attempted to synthesize the older and the more recent views, treating as reasonable and legitimate Congress's wish to cabin presidential discretion to make interim appointments while the Senate is in session, but describing as a "fundamental right as Chief Executive" the President's authority "to make such a temporary appointment, designation, or assignment of one officer to perform the duties of another whenever the administration of the Government requires it." *Temporary Recess Appointments*, 25 Op. Att'y Gen. 258, 261 (1904); *see also Promotion of Marine Officer*, 41 Op. Att'y Gen. 291, 294 (1956) (President has the constitutional authority to appoint "key military personnel to positions of high responsibility" without following statutory procedures).

There is little modern case law on the President's power to make temporary appointments to offices requiring Senate confirmation.[103] The "leading" judicial decision is a brief per curiam court of appeals opinion denying a motion for a stay of the district court's mandate pending appeal, *Williams v. Phillips*, 482 F.2d 669 (D.C. Cir. 1973) (per curiam).[104] Because of its procedural posture, *Williams*

[102] *See, e.g., Appointment of Acting Purser*, 6 Op. Att'y Gen. 357, 365 (1854) (executive power of "filling up a vacancy by an appointment of one to act *ad interim*, and for a particular exigency, in a distant service" could be exercised to make temporary appointment of acting purser despite statutory prohibition on anyone acting as purser prior to Senate confirmation); *Executive Power of Appointment*, 4 Op. Att'y Gen. 248, 248 (1843) (appointment power is derived from the President's Take Care Clause duty, "an obligation imposed by the constitution, and from the authority of which no mere act of legislation can operate a dispensation," although President could not pay interim appointees without an appropriation).

[103] Indeed, at least one court has indicated a judicial willingness to defer to the views of the Attorney General on the President's authority to make temporary appointments. *See Olympic Federal Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183, 1197–98 (D.D.C.) ("The Attorney General is charged with responsibility for ensuring that only lawfully appointed officials act on behalf of the United States, and consequently his interpretation of law on this subject is entitled to great deference."), *appeal dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990).

[104] *Williams* was a challenge to the legality of actions taken by the acting director of the Office of Economic Opportunity on the ground that the President lacked authority to appoint an acting director of that office and to continue the interim appointment for over four months without submitting to the Senate any nomination to the position of director. The district court declared the President's action unlawful. The court of appeals refused to grant a stay of the district court's order because in its judgment the acting director had failed to show the requisite likelihood of success on the merits The brief discussion in *Williams* of the merits emphasized that Article II "unequivocally

did not actually resolve the constitutional issue, but it suggested somewhat obliquely that what non-statutory power the President possesses to make interim appointments to offices requiring Senate confirmation can be employed only for a "reasonable time required by the President to select persons for nomination." *Id.* at 671. Looking to the thirty-day period that was, at the time, permitted temporary appointments under the Vacancies Act for an indication of what a reasonable period would be, *Williams* concluded that even if the implied power existed, a four-and-a-half-month period without any nomination was unreasonable. *Id.* at 670–71.[105] Since *Williams* was decided, the Vacancies Act has been amended to provide for an initial appointment period of 120 days. Up to two extensions, each lasting 120 days, may be made depending on the specific circumstances of the vacancy. Moreover, the Vacancies Act also tolls the running of these periods when particular conditions obtain. *See* 5 U.S.C. § 3348.* Thus, the Vacancies Act allows temporary appointments, in appropriate circumstances, of durations well in excess of even one year. Accordingly, we would not currently view a four-and-a-half-month temporary appointment as necessarily exceeding a reasonable duration, provided that a nomination is submitted to the Senate.

On the assumption that *Williams* can be read to indicate that "[t]o keep the Government running calls for the designation of acting officials to fill vacancies in the absence of express statutory authority," *Department of Energy—Vacancies*, 2 Op. O.L.C. 113, 117 (1978) (citing *Williams*), we have argued that the reasonableness of a given interim appointment should be measured not by a per se rule but by a variety of pragmatic factors. Those factors include "the difficulty of finding suitable candidates," *id.* at 118, "the specific functions being performed by the [interim officer]; the manner in which the vacancy was created (death, long-planned resignation) . . . and particular factors affecting the President's choice [such as] a desire to appraise the work of [the interim officer] or the President's ability to devote attention to the matter." *Status of the Acting Director, Office of Management and Budget*, 1 Op. O.L.C. 287, 290 (1977). However, given the ambiguity of the *Williams* opinion, we have urged caution, even when the relevant department head has *statutory* authority to designate another official to serve in an acting capacity. *See Acting Officers*, 6 Op. O.L.C. 119, 121–22 (1982).

We recently revisited the vacancies question in relation to the United States Commission on Civil Rights. The Commission is headed by an eight-member

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requires an officer of the United States to be confirmed by the Senate unless different provision is made." The court nevertheless observed that "[i]t could be argued" that the President has "an implied power, in the absence of limiting legislation . . . to appoint an acting director for a reasonable period of time before submitting the nomination of a new director to the Senate" 482 F.2d at 670.

[105] Our opinions have struggled with the meaning of *Williams*. *See, e.g., Power of the President to Designate Acting Member of the Federal Home Loan Bank Board*, 1 Op. O.L.C. 150, 151–52 (1977) (court of appeals' opinion in *Williams* "can perhaps be read as disagreeing with" the argument that the President has no non-statutory authority or "as perhaps agreeing" that he does have such authority, "in the absence of a limiting statute," subject, of course, to the condition that he must submit a nomination within a reasonable time).

* Editor's Note: The Vacancies Act has been amended by the Federal Vacancies Reform Act of 1998, Pub. L. No. 105–277, Div. C, tit. I, § 151(a), 112 Stat. 2681.

committee that works on a part-time basis, while its day-to-day functioning is administered by a staff director. The statute creating the position of staff director vests the authority to appoint the staff director in the President, subject to the concurrence of a majority of the members of the Commission. In keeping with the Department of Justice's long-standing position, we concluded that, when confronted with a vacancy in the position of staff director, the President has constitutional authority to appoint an acting staff director, unless Congress had statutorily limited this authority. We stated:

> The President's take care authority to make temporary appointments rests in the twilight area where the President may act so long as Congress is silent, but may not act in the face of congressional prohibition. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Thus, the Vacancies Act, 5 U.S.C. §§ 3345–3348, constitutes a restriction on the President's authority, as opposed to a source of power. If it applies to a given position, the Vacancies Act constitutes the sole means by which a temporary appointment to that position may be made.

Memorandum for Neil Eggleston, Associate Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of an Acting Staff Director of the United States Commission on Civil Rights* at 3 (Jan. 13, 1994).

We concluded that Congress had not limited the President's constitutional authority with respect to the appointment of an acting staff director of the Civil Rights Commission. The Vacancies Act does not apply to the position of staff director.[106] In addition, the statute creating the position is silent on the subject of temporarily filling a vacancy in that position. Consequently, we concluded that the President was free to exercise his constitutional authority to appoint an acting staff director.[107]

9. Other Issues of Combined, Collective, and Interbranch Authority and the Appointments Clause. The Appointments Clause prohibits Congress or the President from obscuring the lines of authority and responsibility within the federal

[106] The Vacancies Act only applies to temporary appointments "[w]hen an *office*[]" is vacant. 5 U.S.C. §3346 (emphasis added). Because the staff director for the Commission on Civil Rights is not a constitutional officer, the Vacancies Act does not apply. *See Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183, 1195 (D.D.C.) (finding that "officer" as used in the Vacancies Act, 5 U.S.C. §3346, means "constitutional officer"), *appeal dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990). Indeed, since the Commission is an exclusively investigatory and advisory body, *see Hannah v. Larche*, 363 U.S. 420, 441 (1960), none of the positions at the Commission are constitutional offices. *See Statement on Signing the United States Commission on Civil Rights Act of 1983*, 2 Pub. Papers of Ronald Reagan 1634, 1635 (Nov. 30, 1983) (statement by the Department of Justice). Accordingly, the Vacancies Act does not apply to the Commission at all.

[107] A federal district court ruled to the contrary, but its decision has been vacated. *See George v. Ishimaru*, 849 F. Supp. 68 (D.D.C. 1994), *vacated as moot*, No. 94-5111, 1994 WL 517746 (D.C. Cir. Aug. 25, 1994).

government: the political branches cannot vest the power to perform "a significant governmental duty" of an executive, administrative, or adjudicative nature in any federal official who is not appointed in a manner consistent with the Clause. *Buckley v. Valeo*, 424 U.S. 1, 141 (1976) (per curiam). The Clause, however, does not prohibit creative combinations of officers and authorities as long as a person or body with legitimate appointing authority under the Clause has appointed—and therefore is accountable for—all federal officials with such power. *Cf. Weiss v. United States*, 510 U.S. 163, 191–92 (1994) (Souter, J., concurring); *Silver v. United States Postal Serv.*, 951 F.2d 1033, 1040–41 (9th Cir. 1991).

The Appointments Clause therefore does not forbid the exercise of authority by a decision-making body with a collective head that consists of principal officers and an inferior officer removable by them. *See Silver*, 951 F.2d at 1040–41. Nor is the Clause offended by the delegation of concurrent authority to a Senate-confirmed officer and her deputy when the latter is appointed by a head of department. *See Department of Housing and Urban Development—Delegations of Authority*, 2 Op. O.L.C. 87, 89–91 (1978). In both cases all of the officials performing significant governmental duties are validly appointed officers.

The exercise of authority by a group of principal officers, some of whom serve at the President's pleasure while others are removable by the President only for cause, presents no Appointments Clause issue: once again, the Clause's procedures for appointing federal officials so that they may wield "significant authority" have been met. The Clause's strictures are likewise satisfied by arrangements in which a head of department, pursuant to a statute, designates a subordinate to sit in his or her stead on a commission or board: if the designation by the head were authorized by statute, then it would itself be an appointment in conformity with the Clause, and even if it were not, the designee would be acting for or on behalf of the head of department, whose actions, for constitutional purposes, *are* the head's.

Finally, the Appointments Clause does not invalidate commissions composed of members or appointees from more than one branch of the government. *Mistretta v. United States*, 488 U.S. 361, 412 (1989), upheld the constitutionality of the Sentencing Commission, which includes at least three federal judges and the Attorney General as an *ex officio* non-voting member, while *Buckley* concluded that a commission consisting of a mixture of presidential appointees and members of Congress selected by the Speaker and President *pro tempore* can validly exercise "powers . . . essentially of an investigative and informative nature," 424 U.S. at 137. Interbranch entities are subject to constitutional review on other grounds, including the anti-aggrandizement and general separation of powers principles, but their interbranch nature does not in itself raise any Appointments Clause question.

C. Removal Power Issues

1. The Executive's Removal Power. The first great constitutional debate in the First Congress concerned the power to remove officers of the United States. A wide range of views was expressed over the respective roles—or lack thereof—of the President and Congress in removal matters,[108] but ultimately, as the Supreme Court has interpreted the "Decision of 1789," Congress rejected a legislative role in removal in favor of recognizing plenary presidential power over officers appointed by the President with the advice and consent of the Senate. *See Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986); *see also Myers v. United States*, 272 U.S. 52, 111–44 (1926) (discussing debates and subsequent acquiescence in the legislative decision).

The nineteenth-century Justices interpreted the First Congress's actions as illustrative of a more general principle that "the power of removal [is] incident to the power of appointment." *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839). Thus, it was determined that inferior officers appointed by a department head were not removable by the President (absent statutory authorization to do so) but by the secretary who appointed them and that a new appointment by the proper officer amounted to a removal of the previous incumbent by operation of law. *Id.* at 260–61; *accord The President and Accounting Offices*, 1 Op. Att'y Gen. 624 (1823). In *United States v. Perkins*, 116 U.S. 483 (1886), the Court held that "when Congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest." *Id.* at 485. Although the Court did not address any questions about presidential removal powers, its reasoning about Congress's authority to limit department heads' removal power could logically be applied to the President with respect to inferior officers whose appointment is vested by statute in the President alone.[109] The power to suspend an officer, finally, was held to be "an incident of the power of removal." *Burnap v. United States*, 252 U.S. 512, 515 (1920) (relying primarily on nineteenth-century precedents). The Court's conclusions in *Hennen*, *Perkins*, and *Burnap* remain good law.[110]

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[108] Professor Gerhard Casper has identified seven "major positions [in the First Congress] on the question of the location of the removal power," ranging from the view that the President has illimitable authority to remove any non-judicial officer to the argument that Congress has plenary discretion over removal issues under the Necessary and Proper Clause. *See* Casper, *supra* note 33, at 234–35.

[109] "The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto." *Perkins*, 116 U.S. at 485. The President similarly "has no constitutional prerogative" to make appointments without senatorial advice and consent "independently" of congressional authorization—that is, the President may make appointments without the advice and consent of the Senate only if Congress authorizes the President to do so. *See Myers*, 272 U.S. at 161–62 (noting without deciding the question).

[110] We do not read *Morrison v. Olson*, 487 U.S. 654 (1988), to cast any doubt on the continuing vitality of these decisions. *See id.* at 689 n.27, 690 n.29 (implicitly reaffirming *Perkins*).

The seminal twentieth-century cases on removal, *Myers* and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), both addressed the power to remove officers appointed by the President with the advice and consent of the Senate. *Myers* held unconstitutional a statute requiring Senate approval of the President's decision to remove certain postmasters. The Court based its holding in part on its interpretation of the "Decision of 1789" and on its understanding of the President's constitutional role. "Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. . . . Each head of a department is and must be the President's *alter ego* in the matters of that department where the President is required by law to exercise authority." 272 U.S. at 132–33. An illimitable removal power, *Myers* concluded, is a necessary incident to the President's power and responsibility to take care that the laws are faithfully executed. *Id.* at 163–64. [111]

Any suggestion in *Myers* that the Supreme Court would invalidate all limitations on the President's power to remove officers appointed with the advice and consent of the Senate was firmly repudiated less than a decade later by *Humphrey's Executor*. The case concerned the President's power to remove a member of the Federal Trade Commission ("FTC") on the grounds of policy differences, despite the existence of a for-cause removal provision in the statute establishing the Commission. [112] The Court dismissed *Myers* as inapposite because a postmaster is "an executive officer restricted to the performance of executive functions," and "the necessary reach of the decision" only "goes far enough to include all purely executive officers [and] no farther." 295 U.S. at 627–28. [113] By contrast, the Court examined the functions of the FTC and concluded that it was "an administrative body" exercising "quasi-legislative or quasi-judicial powers," rather than an agency of the executive branch. *Id.* at 628. The Court reasoned that Congress possesses the authority in creating such a body "to require [it] to act in discharge of [its] duties independently of executive control." *Id.* at 629. [114] In *Wiener v.*

[111] The Court dismissed the argument that the rationale for giving the President plenary removal authority over heads of department and other great officers of state simply did not apply to postmasters with the observation that Congress could extend civil service tenure protection to the latter simply by vesting their appointment "in the head[] of department[] to which they belong." 272 U.S. at 174.

[112] The statute establishing the FTC included a provision stating that a commissioner "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office," which the Court construed as intended "to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here." *Humphrey's Ex'r*, 295 U.S. at 623, 626.

[113] *Humphrey's Executor* expressly repudiated the language in *Myers* suggesting that the President's general executive powers and Take Care Clause responsibilities rendered it unconstitutional for Congress to reduce or eliminate presidential control over the administration of federal law. "In the course of the opinion [in *Myers*], expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of *stare decisis*. In so far as they are out of harmony with the views here set forth, these expressions are disapproved." *Humphrey's Ex'r*, 295 U.S. at 626.

[114] *See also id.* at 628:

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the [Federal Trade Commission Act, 15 U.S.C. §§ 41–42] in accordance with the

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United States, 357 U.S. 349 (1958), the Court extended the scope of *Humphrey's Executor* by inferring the existence of a for-cause limitation on the President's power to remove an officer with quasi-adjudicatory functions, even in the absence of an express statutory removal restriction. [115]

The rationale in *Humphrey's Executor* for upholding Congress's power "to forbid [the commissioners'] removal except for cause" was in fact identical to that for recognizing the President's plenary removal power over "purely executive officers." "[I]t is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." 295 U.S. at 629. The constitutionality of congressional limitations on presidential removal authority thus depended under *Humphrey's Executor* on the legitimacy of a legislative decision to reduce or eliminate the President's control over a particular agency or officer, and that in turn depended on the nature of the functions performed by the agency or officer. [116]

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court upheld a provision of the Ethics in Government Act that forbids the removal of an independent counsel appointed under the Act except for cause. The Court explained that under "[t]he analysis contained in our removal cases," the constitutional question is whether Congress has "interfere[d] with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed.'" *Id.* at 689–90. *Morrison* reasoned that the Attorney General retained adequate control over the independent counsel to safeguard "the President's ability to perform his constitutional duty." *Id.* at 691.

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legislative standard therein prescribed, and to perform other special duties as a legislative or as a judicial aid. . . . Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.

[115] The rationale of *Wiener*, which is essentially that *Congress* must have implied a for-cause removal restriction when *the Court* believes that the functions of the agency demand such tenure protection, 357 U.S. at 353–56, seems questionable. There would be nothing illogical in a legislative decision, for example, to protect against review or revision of the *decisions* of the agency, *see id.* 354–55, while placing the agency's *decisionmakers* within the control of the President. Congress has made such decisions from the beginning of the Republic. To the extent that *Wiener* assumes that control is and ought to be a binary matter—either plenary or non-existent—its reasoning is difficult to reconcile with more recent separation of powers decisions that reject such an either/or approach to presidential control. *See, e.g., Morrison v. Olson*, 487 U.S. 654 (1988). Despite these possible flaws in its logic, however, *Wiener's* holding continues to be followed. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (concluding that the members of the Federal Election Commission probably are removable only for cause despite the absence of an explicit statutory restriction on removal), *cert. dismissed*, 513 U.S. 88 (1994).

[116] Congress's decision was considered legitimate in *Humphrey's Executor* because the Court viewed the FTC as "a body of experts" "charged with the enforcement of no policy except the policy of the law" and concluded that "[s]uch a body cannot in any proper sense be characterized as an arm or an eye of the executive." 295 U.S. at 624, 628. We do not find the Court's reasoning in *Humphrey's Executor* completely persuasive. The Court's assertion about the FTC's "enforcement of no policy except the policy of the law," *id.* at 624, does not differentiate the FTC, except perhaps as a matter of degree, from the many undoubtedly executive agencies upon which Congress imposes mandatory duties. The Court also stated that an FTC member is "an officer who occupies no place in the executive department," but the Court may only have meant that the FTC is "an agency of the legislative or judicial departments of the government," *id.* at 628, in which case questions would arise under current constitutional doctrine as to the legitimacy of an Article I entity exercising law-making authority without following bicameralism and presentment, *see INS v. Chadha*, 462 U.S. 919 (1983), or of an Article III non-judicial entity "bind[ing] or regulat[ing] the primary conduct of the public," *Mistretta v. United States*, 488 U.S. 361, 396 (1989). We do not think that the "independent" regulatory agencies could be viewed today as within the legislative or judicial branches. *See id.* at 387 n.14 (SEC is "not located in the Judicial Branch").

Morrison's broader significance is defined by the office in question. The removal restriction upheld in *Morrison* concerned an inferior officer with a sharply limited and highly unusual function, the investigation of particular allegations about the conduct of high-ranking executive branch officials. In that context, although it declined to decide "exactly what is encompassed within the term 'good cause,'" the Court held that "because the independent counsel may be terminated for 'good cause,' the Executive . . . retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act." 487 U.S. at 692. The *Morrison* Court thus had no occasion to consider the validity of removal restrictions affecting principal officers, officers with broad statutory responsibilities, or officers involved in executive branch policy formulation. [117]

The Supreme Court's removal cases establish a spectrum of potential conclusions about specific removal limitations. At one end of the spectrum, restrictions on the President's power to remove officers with broad policy responsibilities in areas Congress does not or cannot shelter from presidential policy control clearly should be deemed unconstitutional. We think, for example, that a statute that attempts to limit the President's authority to discharge the Secretary of Defense would be plainly unconstitutional and that the courts would so hold. [118] As the Court stated in *Morrison*, *Myers* "was undoubtedly correct . . . in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." 487 U.S. at 690. [119] At the other end of the spectrum, we believe that for-cause and fixed-term limitations on the power to remove officers with adjudicatory duties affecting the rights of private individuals will continue to meet with consistent judicial approval: the contention that the essential role of the executive branch would be imperiled by giving a measure of independence to such officials is untenable under both precedent and principle.

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[117] A much older decision, *Shurtleff v. United States*, 189 U.S. 311 (1903), had held that a for-cause provision did not oust the President's power, derived from the power of appointment, to remove an officer at will, but after *Humphrey's Executor*, *Shurtleff* appeared confined to its factual setting (where the official's tenure had no fixed termination). *See Kalaris v. Donovan*, 697 F.2d 376, 395 & n.76 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983). *Bowsher*, however, cited *Shurtleff* in connection with a more general suggestion that "the enumeration of certain specified causes of removal" may not "exclud[e] the possibility of removal for other causes." 478 U.S. at 729. *Bowsher* and *Morrison* together suggest that a generous reading of the President's (or a department head's) power to remove an inferior officer for cause may be essential to the constitutionality of removal restrictions concerning even those officers whose functions are narrow.

[118] The Tenure of Office Act of 1867, ch. 154, 14 Stat. 430, expressly provided the Secretaries of War and the Navy, among others, with terms longer than that of the President who appointed them, subject only to presidential removal with the consent of the Senate. President Andrew Johnson's attempt to remove the Secretary of War was the legal basis for his impeachment and near-removal from office. The Act had been passed over President Johnson's constitutionally based veto.

[119] With respect to an officer serving at the President's pleasure, the President may remove the incumbent by direct order or by appointing his or her successor after receiving the advice and consent of the Senate. *See, e.g., Quackenbush v. United States*, 177 U.S. 20, 25 (1900); *Presidential Appointees—Resignation Subject to the Appointment and Qualification of a Successor*, 3 Op. O.L.C. 152 (1979).

Between these two extremes, the arguments are less clear, and it is imperative that the executive branch carefully examine removal limitations in pending legislation for their impact on the President's ability to exercise his or her constitutional powers and carry out his or her duties. In situations in which Congress does not enact express removal limitations, we believe that the executive branch should resist any further application of the *Wiener* rationale, under which a court may infer the existence of a for-cause limit on presidential removal, except with respect to officers whose only functions are adjudicatory.[120] In reviewing pending legislation, furthermore, we should be aware that legislative silence about the President's removal power over administrative agency officers invites judicial policy choices that may be contrary to those the President or Congress intended.

2. Congressional Removal Power. Unless it limits its own discretion by statute, Congress enjoys plenary authority to remove its own officers, as do the individual houses of Congress.[121] In addition, Congress has the general authority to legislate in ways that in fact terminate an executive branch officer's or employee's tenure by defunding a position, for example, or by legislating mandatory retirement rules that apply to incumbents.[122] The executive branch, however, has long maintained that the Constitution does not permit this legislative authority to be deployed abusively as a de facto removal power. *See Civil Service Retirement Act—Postmasters—Automatic Separation from the Service*, 35 Op. Att'y Gen. 309, 312–15 (1927) (deeming mandatory retirement statute constitutional because it could not fairly be viewed as an encroachment on the President's removal power). The Supreme Court's decisions confirm the executive position. In *Myers v. United States*, 272 U.S. 52 (1926), the Court at one point portrayed the issue before it in terms of congressional aggrandizement, *id.* at 161, and modern decisions have redescribed the enduring rationale of *Myers* in anti-aggrandizement terms. *See Morrison v. Olson*, 487 U.S. 654, 686 (1988) ("[T]he essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from 'draw[ing] to itself . . . the power to remove.'") (quoting *Myers*, 272 U.S. at 161); *Bowsher v. Synar*, 478 U.S. 714, 724–26 (1986). Legislation that can properly be described as exercising the power of removal is unconstitutional, therefore, because it amounts to an attempt on Congress's part "to gain a role in the removal of executive officials other than its established powers of impeachment and con-

[120] On the basis of precedent, and in light of the understandable tendency of Article III judges to value tenure protection positively, it is safe to assume that courts will continue to apply *Wiener* with respect to officials whose primary duties involve the adjudication of disputes involving private persons.

[121] The two houses of Congress also have complementary roles in the congressional power to impeach and remove any civil officer of the United States. *See* U.S. Const. art. I, §2, cl. 5; *id.* art. I, §3, cl. 6.

[122] Congress's authority in this regard is bounded, to be sure, by independent constitutional limitations such as the Bill of Attainder Clause, U.S. Const. art. I, §9, cl. 3. *See United States v. Lovett*, 328 U.S. 303 (1946) (provision in an appropriations statute prohibiting the payment of compensation to three specified executive branch employees because of their political beliefs was an unconstitutional bill of attainder).

viction." *Morrison*, 487 U.S. at 686.[123] We think, for example, that "ripper" legislation that ostensibly abolished an office while simultaneously proceeding to recreate it would be a transparent, and unconstitutional, attempt to remove the officer in question and therefore would violate the anti-aggrandizement principle. *See Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers Upon the Expiration of a Presidential Term*, 11 Op. O.L.C. 25, 26 (1987).

The executive branch also has resisted attempts by the Senate to "reconsider" the nomination of an officer to whose appointment that body has already given its advice and consent once the President has taken steps to complete the appointment. In 1931, for example, President Hoover declined to return to the Senate resolutions notifying him that it had confirmed three nominees to the Federal Power Commission. The President explained that "the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I cannot admit the power in the Senate to encroach upon Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination." Message to Senate, January 10, 1931, *quoted in United States v. Smith*, 286 U.S. 6, 28 n.3 (1932); *see also Smith*, 286 U.S. at 37–48 (discussing historical practice). Such senatorial action is both an unconstitutional attempt to remove the officer and a violation of the anti-aggrandizement principle, in that it is a legislative attempt to exercise power after the constitutionally prescribed role of the legislative body has been completed.[124]

D. Issues Involving the Boundaries of the Legislative Sphere

The Supreme Court decisions articulating the Court's anti-aggrandizement principle make it plain that Congress's formal authority is limited to the enactment of legislation and activities in aid of the legislative process such as investigation and oversight. The Gramm-Rudman Act's vesting in a congressional agent of the power to exercise policy-making control over the post-enactment decisions of executive officials is the paradigmatic example of congressional action in violation of this limitation. *See Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating the relevant provision of the Act). Respect for Congress's legitimate and broad authority to legislate is consistent with our duty as officials of the executive branch

[123] One could also describe the reasoning directly in terms of the impeachment and removal powers. *See* U.S. Const. art. I, §2, cl. 5 (giving House the "sole Power of Impeachment"); *id.* art. I, §3, cl. 6 (giving Senate the "sole Power to try all Impeachments"); *id.* art. II, §4 ("President, Vice President and all civil Officers" are subject to impeachment and removal). These powers stem from "[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define" the only means by which Congress may remove officers. *INS v. Chadha*, 462 U.S. 919, 945 (1983).

[124] In *Smith* the Supreme Court rejected a challenge to the right of one of President Hoover's appointees to sit on the Federal Power Commission, but based its holding on its construction of the Senate's rule permitting reconsideration. The Court thus did not reach the Executive's constitutional arguments. *See* 286 U.S. at 34 ("[W]e have, therefore, no occasion to consider the constitutional objection.").

to identify instances in which Congress transgresses the boundaries of its constitutional sphere of operations.

1. The Paradox of Congressional Agencies. From reading the bare text of the Constitution, one might not expect there to exist any formally separate entities within the legislative branch other than the two houses themselves. From an early date, however, Congress has created distinct agencies, under its special supervision, for various purposes. Some of these agencies, or the officers who head them, exercise authority that seems incompatible or at least difficult to reconcile with the Supreme Court's anti-aggrandizement decisions. Of special interest are the Smithsonian Institution (and its subordinate bureaus, such as the John F. Kennedy Center for the Performing Arts ("J.F.K. Center")), the Library of Congress, the General Accounting Office ("GAO") (headed by the Comptroller General), the Government Printing Office ("GPO"), and the Office of the Architect of the Capitol.[125] The head of each of these agencies exercises authority with respect to executive officials or private persons that could be seen as problematic under *Bowsher v. Synar*, 478 U.S. 714 (1986), which held unconstitutional the Comptroller General's exercise of controlling authority over executive branch budgeting.

We believe that many of the powers currently exercised by the presently existing congressional agencies may be deemed constitutionally harmless. Most of the functions undertaken by the Library of Congress, the basic accounting tasks of the GAO, and all of the duties of the Architect of the Capitol can comfortably be described as in aid of the legislative process. *See Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928). The activities undertaken by the Smithsonian and its bureaus also seem to fit under a broad construction of that concept, a construction that is supported by historical practice stretching far back into the antebellum Republic. *Cf. Springer*, 277 U.S. at 211 (Holmes, J., dissenting) ("Congress long ago established the Smithsonian Institution, to question which would be to lay hands on the Ark of the Covenant."). The GPO's involvement in executive branch printing is also supported by a substantial historical pedigree, *see* Act of June 23, 1860, 12 Stat. 117, but in the twentieth century the executive branch has repeatedly been compelled to resist congressional attempts to empower the GPO to exercise genuine discretion over executive decisions.[126] The review authority of the Librarian of Congress over the Copyright Arbitration Royalty Panel, *see* 17 U.S.C. §§ 801–803, is permissible because the Librarian's tenure is not protected by an explicit for-cause removal limitation, and we therefore infer that the

[125] The composition of the Smithsonian's Board of Regents and of the Board of Trustees of the J.F.K. Center presents a separate problem under *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), because members of Congress serve on these boards through appointment by the Speaker and the President *pro tempore*. *See* 20 U.S.C. § 42 (Regents of Smithsonian); *id.* § 76h(a) (Trustees of J.F.K. Center).

[126] Under the modern understanding of the separation of powers, we do not think that Congress validly can empower the GPO to play any role that is not purely ministerial with respect to the executive branch.

President has at least the formal power to remove the Librarian at will.[127] We note that the historical lineage of, and long-standing acquiescence of the Presidents in, these legislative agencies and most of their activities are important to our conclusion that those activities are constitutionally permissible: we think it highly doubtful that Congress constitutionally could create new legislative agencies with operational powers, or afford existing agencies novel powers, with respect to executive officials or private persons.

Our conclusion about the limits on Congress's authority to create legislative branch agencies with powers reaching beyond the legislative branch is consistent with the decision in *Hechinger v. Metropolitan Washington Airports Authority*, 36 F.3d 97 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995), where the court of appeals held unconstitutional Congress's response to the Supreme Court's decision in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) ("*MWAA*"). After *MWAA* struck down a congressionally constituted board with the power to review and reverse the decisions of the Airports Authority, Congress created a similar, congressionally controlled board of review with the power to delay, but not to control, the Authority's implementation of decisions. The court rejected the argument that the new board's powers were constitutional because of this distinction: the very purpose of this board was to bring congressional policy views to bear on the decisions of the Authority by enabling congressional agents to participate directly in the Authority's decision-making processes. Under the Supreme Court's rigorous understanding of the anti-aggrandizement principle, any such extension of legislative power beyond the legislative sphere is invalid. We therefore believe that *Hechinger* was correctly decided.

2. Reporting Requirements. Many statutes empower executive branch agencies to take certain actions only after a specified period following the provision of notice or of a report to Congress. The Department of Justice has long acknowledged the constitutionality of such report-and-wait provisions, *see, e.g., Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. 56, 63 (1933) ("No one would question the power of Congress to provide for delay in the execution of . . . an administrative order."), and the Supreme Court in *INS v. Chadha*, 462 U.S. 919 (1983), "specifically recognized" report-and-wait requirements "as a constitutionally acceptable alternative to the legislative veto." *Implementation of the Bid Protest Provisions of the Competition in Contracting Act*, 8 Op. O.L.C. 236, 246 (1984); *see Chadha*, 462 U.S. at 935 n.9, 955 n.19. While individual instances of congressional investigation and oversight may be objectionable on policy grounds, and in certain situations may involve information

[127] Formal removal authority is sufficient to render the Librarian subject to the President's control for constitutional purposes. *See Bowsher v. Synar*, 478 U.S. 714, 726–27 (1986). We think that under *Bowsher* the fact that a President is highly unlikely to remove a Librarian is legally irrelevant. *Id.* at 727 n.5.

with respect to which the President is constitutionally entitled to assert executive privilege, the conduct of investigation into, and oversight concerning, executive actions is generally well within the power of Congress. *See Buckley v. Valeo*, 424 U.S. 1, 137–38 (1976) (per curiam).[128] Report-and-wait provisions generally are constitutional means of assisting Congress in carrying out these legitimate activities.[129]

Simple reporting requirements, which again are sometimes objectionable on policy grounds, are clearly constitutional as a general matter. "Congress may at all times call on [the heads of executive departments] for information or explanation in matters of official duty." *Office and Duties of Attorney General*, 6 Op. Att'y Gen. 326, 344 (1854); *see Chadha*, 462 U.S. at 955 n.19; *see also Duties of the Attorney General*, 1 Op. Att'y Gen. 335, 336 (1820) (Congress could, by legislation, require the Attorney General to prepare a report on claims against the United States). In the past, this Office has made constitutional objections to so-called "concurrent" reporting provisions that require an executive agency to submit a given report simultaneously to the President and Congress. *See Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632 (1982); *Inspector General Legislation*, 1 Op. O.L.C. 16, 17 (1977). The argument is that such provisions interrupt the lines of responsibility within the executive branch and interfere with a presidential prerogative to control the presentation of the executive branch's views to Congress. On the other hand, advocates of such provisions might argue that a concurrent reporting provision does not, as a formal matter, enlarge congressional powers at the expense of the Executive, because the power to require information is well within Congress's legitimate legislative authority.

We think that concurrent reporting requirements are best analyzed under the general separation of powers principle. That principle first requires an inquiry into "the extent to which" a given reporting provision "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Adminis-*

[128] The Constitution presupposes that all executive branch action is taken under the legal authority of officers of the United States and that it is those officers (and not their subordinates) who are *constitutionally* responsible for those actions. *See* U.S. Const. art. II, § 4 (civil officers may be impeached). It is our view, therefore, that the executive branch is generally entitled to resist congressional demands that employees be questioned about their actions and that as a matter of constitutional comity Congress ordinarily is obligated to respect an executive decision to send a superior officer to present testimony and answer questions about the actions of a subordinate officer. (This does not apply to congressional investigations connected with impeachment or with other legitimate investigations into the actions of specific officers.). Although the details of executive responses to congressional demands for information have changed somewhat, the general principle that Congress ought not employ its powers of investigation to disrupt the lines of responsibility and authority within the executive branch is very old. *See* Thomas Jefferson, Opinion of the Cabinet (Apr. 2, 1792), *in* 1 *The Writings of Thomas Jefferson* 304 (Andrew A. Lipscomb ed., 1903) (advising President Washington "that neither the committee nor [the] House [of Representatives] had a right to call on the Head of a Department, who and whose papers were under the President alone, but that the committee should instruct their chairman to move the House to address the President").

[129] This is not to say that an unconstitutional report-and-wait provision cannot be imagined. A provision that imposed so lengthy a delay as to in effect nullify the Executive's power to take action substantively authorized by the Constitution or a statute might be invalid as a violation of the anti-aggrandizement or general separation of powers principle.

trator of Gen. Servs., 433 U.S. 425, 443 (1977) (citation omitted). Many conceivable concurrent reporting requirements, particularly ones touching on the President's responsibility for the conduct of foreign affairs and for national defense, would have a serious negative impact on the President's performance of his "constitutionally assigned functions." A statutory requirement that the Secretary of State report simultaneously to the President and Congress on the status of United States relations with a given foreign power, for instance, would fall within that description. [130] Similarly, legislation that attempted to impose concurrent reporting requirements across a broad spectrum of executive branch activities might well constitute so serious an interference with the President's fulfillment of his obligations under the Take Care Clause, U.S. Const. art. II, § 3, that it should be deemed invalid. The courts, however, might uphold the validity of a concurrent reporting requirement imposed for a legitimate congressional purpose on a specific agency with limited, domestic, and purely statutory duties.

As a practical political matter, concurrent reporting requirements clearly weaken the President's control over the executive branch and by doing so increase congressional leverage on the President and other officials of the executive branch. By doing so they impair the Constitution's " 'great principle of unity and responsibility in the Executive department.' " *Myers v. United States*, 272 U.S. 52, 131 (1926) (quoting James Madison *in* 1 Annals of Congress 499 (Joseph Gales ed., 1789)). For this reason, we think the presumption should be that the executive branch will object to any concurrent reporting provision in proposed legislation.

3. Congressional Agents in Non-Legislative Contexts. The Supreme Court's decisions make it clear that legislation placing members or agents of Congress on a board or commission that is outside the legislative branch is immediately suspect. The constitutional "location" of a given entity is not a matter of congressional fiat; Congress cannot define away an anti-aggrandizement problem simply by declaring that a given entity is within or without the legislative branch. [131] The question is, we think, a matter of the relationship between the entity's functions and the formal powers Congress can assert over and through it. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991), for example, the board at issue was the board of review of an entity, the Airports Authority, created by a compact between Virginia and the District of Columbia, and the review board members were appointed by the

[130] Moreover, such a provision ought to fail the courts' final test under general separation of powers analysis—whether the statute's impact on the executive "is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Administrator of Gen. Servs.*, 433 U.S. at 443. The hypothesized reporting requirement could seriously impair the President's ability to formulate foreign policy and conduct negotiations and addresses an area in which Congress's constitutional authority is limited.

[131] The result in *Bowsher v. Synar*, 478 U.S. 714 (1986), for example, would not be changed by a statute providing that the General Accounting Office is an executive branch agency. Through the Comptroller General, an official removable by Congress, the legislature would still be exercising ultimate authority over executive decisions. In fact, the Comptroller General does have obligations to the executive branch as well as to Congress. *See Bowsher*, 478 U.S. at 746 (Stevens, J., concurring in judgment).

Authority. However, by federal legislative mandate, the Authority was compelled to appoint a review board made up exclusively of members of Congress selected from a pool determined by Congress. *See id.* at 268–69. Congress's agents on the board thus were able to exercise ultimate control over important operational decisions of the Airports Authority, in violation of the Constitution's constraints on the exercise of congressional power. *Id.* at 275–77.

The Court of Appeals for the D.C. Circuit recently came to a similar conclusion in *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994), in striking down part of a section of the Federal Election Campaign Act, 2 U.S.C. § 437c(a)(1). That section provides that the Secretary of the Senate and Clerk of the House or their designees are to be members of the Federal Election Commission "ex officio and without the right to vote." The Secretary and the Clerk are self-evidently agents of Congress, but the Commission argued that their presence was constitutionally harmless because their only formal role was informational and advisory. The court rejected the argument, reasoning that the very point of placing the Secretary and Clerk on the Commission was to influence the Commission's actions and that

> Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role. . . . What the Constitution prohibits Congress from doing, and what Congress does in this case, is to place its agents "beyond the legislative sphere" by naming them to membership on an entity with executive powers.

6 F.3d at 827 (citation omitted). We believe that *NRA Political Victory Fund* was correctly decided: however modest the ability of Congress's agents to influence the Commission's actions may have been formally, the statute placed the agents intended to communicate that influence within the very heart of an agency charged with enforcing federal law. The anti-aggrandizement principle properly can be interpreted to forbid even modest attempts by Congress to intervene in the enforcement of the laws once "its participation [in the passage of legislation] ends." *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

E. The General Separation of Powers Principle

The proper application of the general separation of powers principle is highly specific to context, and thus few generalizations are possible. For example, in the past we have expressed concern that legislation delegating federal authority to state or local officials or private persons could undermine the executive branch's ability to carry out its functions and thereby violate the principle. *See, e.g., Constitutional Limits on "Contracting Out" Department of Justice Functions*

under OMB Circular A–76, 14 Op. O.L.C. 94, 99–101 (1990).[132] We continue to believe that such delegations can raise questions with respect to the constitutional separation of powers,[133] and that in certain circumstances, a congressional delegation of authority to non-federal officials or to private parties might have a significant impact on the executive branch's ability to fulfill its constitutional functions. If so, the delegation might be invalid under the general separation of powers principle.[134]

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[132] The delegation question actually at issue in our 1990 opinion concerned OMB requirements to contract out governmental work. Executive branch delegations to non-federal entities, we now think, are properly analyzed as raising issues about the Executive's statutory authority to delegate.

[133] In theory, Congress's authority to delegate law-making authority to *anyone*, including the President, is limited by the non-delegation doctrine, which prohibits standardless grants of legislative power. That doctrine is, however, essentially moribund in the courts. *See, e.g., Yakus v. United States*, 321 U.S. 414 (1944) (upholding broad delegation). In any event, the problem of delegation in the separation of powers context is not, or not primarily, one of congressional failure to specify the limits and standards relevant to the delegated authority, but rather the interference with executive (or judicial) branch functions created by the bestowal of federal-law authority on non-federal entities. *Cf. Currin v. Wallace*, 306 U.S. 1, 15–16 (1939) (upholding statute requiring supermajority vote by participants in regulated activity before executive branch could take certain action).

[134] A common form of "delegation" — the grant of authority to state, local, or tribal officials or to private parties to stop federal action by declining to consent to it — is unlikely to present a constitutional problem. Such legislation merely sets a condition on the executive branch's exercise of authority that the Executive would not possess at all in the absence of the legislation. In upholding a statute requiring a supermajority of regulated farmers to agree before the Secretary of Agriculture could exercise certain powers, the Supreme Court rejected the argument that the statute impermissibly delegated legislative power, reasoning that such legislation does not, strictly speaking, involve a *delegation* of authority to the farmers at all. *See Currin v. Wallace*, 306 U.S. 1, 15–16 (1939). By requiring the Secretary, as one of the prerequisites to the exercise of power granted him by statute, to ascertain the agreement of a certain percentage of those who would be affected, the statute at issue in *Currin* had done nothing but add another condition to the availability of the power. *Id.* at 15 ("Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market 'unless two-thirds of the growers voting favor it.'").

A recent district court opinion that reached the opposite conclusion illustrates, in our judgment, the fallacy involved in attempting to discern a separation of powers problem in this sort of legislation. *See Confederated Tribes of Siletz Indians v. United States*, 841 F. Supp. 1479 (D. Or. 1994), *aff'd on other grounds*, 110 F.3d 688 (9th Cir.), *cert. denied*, 522 U.S. 1027 (1997). The statute at issue prohibits the location of gaming establishments on land acquired by the Department of the Interior in trust for the benefit of a Native American tribe when the land in question is off-reservation. The statute permits the Secretary to grant a waiver of the prohibition, but requires him or her to obtain the concurrence of the relevant state governor before finally approving the waiver. The district court denied that the act was similar for constitutional purposes to the legislation upheld in *Currin* or the False Claims Act provisions sustained in the *qui tam* cases: "Instead we have a statute in which Congress delegates to a state official the power to veto a favorable determination by an official of the Executive Branch who was legislatively charged with making that determination." 841 F. Supp. at 1488. Therefore, the court concluded, the provision requiring the governor's concurrence violated the Appointments Clause and the general separation of powers principle. *Id.* at 1489. We think that the district court went wrong in its description of the legislation it was reviewing: the *only* final determination the Secretary is "legislatively charged with making" under 25 U.S.C. §2719(b)(1)(A) is a determination that the statutory conditions — inter alia, that the relevant governor concurs in the Secretary's findings that granting the waiver will be beneficial to the tribe and harmless to its neighbors — have been satisfied. The governor's concurrence, from the Secretary's perspective, is as much a fact about the world as the predicted effects of the casino (or the concurrence of the supermajority of farmers at issue in *Currin*); it is one more condition that must be met before the Secretary can exercise the waiver power Congress has provided, albeit a condition that the Secretary may be able to satisfy using different methods (persuasion, for example) than those employed in satisfying other conditions (economic forecasts of the impact of a casino, for example).

For somewhat similar reasons, there is no separation of powers problem with legislation that defines a federal rule of law by reference to state or foreign law. The Supreme Court held in *United States v. Sharpnack*, 355 U.S. 286 (1958), that the Constitution permits Congress to provide for the application, as bases for federal prosecution, of subsequently enacted state criminal laws in federal enclaves. The Court concluded that such a prospective congressional adoption of "future state legislative action in connection with the exercise of federal legislative power" does not involve "a delegation by Congress of its legislative authority to the States" at all. *Id.* at 294. On the basis

Continued

F. Statutory Construction

Issues involving the constitutional separation of powers between the President and Congress most often arise in the context of a statute that raises or proposed legislation that would raise questions under one of the three headings we have identified. For this reason, it is worth recalling the "cardinal principle" of statutory interpretation that statutes be construed to avoid raising serious constitutional questions, where such a construction is reasonably available. *See, e.g., Crowell v. Benson*, 285 U.S. 22 (1932).

An important subset of these questions relate to statutes that do not plainly state that they apply to the President. The Supreme Court and this Office have adhered to a plain statement rule: statutes that do not expressly apply to the President must be construed as not applying to the President, where applying the statute to the President would pose a significant question regarding the President's constitutional prerogatives. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992); *Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350 (1995). This principle has two sources in the constitutional context within which the Congress drafts statutes. The first is the interpretive canon of avoiding serious constitutional questions. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

The second source is the constitutional principle of separation of powers. The purpose of the constitutional separation of powers is to prevent an excessive accumulation of authority in any of the three branches of the federal government. The plain statement safeguards "'the 'usual constitutional balance'" of power. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)); *see Franklin*, 505 U.S. at 800–01. Given the central position that the separation of powers doctrine occupies in the Constitution's design, this rule also serves to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters" of the balance of power among the three branches of the federal government. *See United States v. Bass*, 404 U.S. 336, 349 (1971).

This plain statement rule has been applied frequently by the Supreme Court as well as this Office with respect to statutes that might otherwise be susceptible of an application that would affect the President's constitutional prerogatives, were one to ignore the constitutional context. For instance, in *Franklin* the Court was called upon to determine whether the Administrative Procedure Act ("APA"), 5 U.S.C § 701, authorized "abuse of discretion" review of final actions by the

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of *Sharpnack*'s reasoning, we think that no special separation of powers issues are raised by the role of the states under such legislation. The courts of appeals have applied the rationale of *Sharpnack* to a variety of federal statutes that require consideration of state or foreign laws in determining the application of federal law. *See, e.g., United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988) ("Congress has delegated no power, but has itself set out its policies and has implemented them.").

President. The APA authorizes review of final actions by an "agency," which it defines as "each authority of the Government of the United States." 5 U.S.C. § 701(b)(1). From this definition, the APA expressly exempts Congress, the courts, the territories, and the District of Columbia government.

Even though the statute defined "agency" in a way that could include the President and did not list the President among the express exceptions to the APA, Justice O'Connor wrote for the Court,

> [t]he President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would *require* an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

505 U.S. at 800–01 (emphasis added). To amplify, she continued, "[a]s the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements." *Id.* at 801. Numerous other Supreme Court decisions employ this approach. *See, e.g., Public Citizen v. United States Dep't of Justice*, 491 U.S. 440 (1989) (holding that the Federal Advisory Committee Act does not apply to committees that advise the President on the discharge of his exclusive constitutional functions because doing so would raise serious separation of powers questions); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) (refusing to give the Refugee Act extraterritorial application because doing so could conflict with the President's constitutionally committed authority); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (holding the President immune from suit because Congress had failed to create a cause of action expressly against the President of the United States).

In addition to the Supreme Court precedents, this Office has frequently applied the plain statement rule in the context of the separation of powers between the executive and legislative branches. For example, we were asked whether the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621–634, prohibits the President from considering the age of judicial candidates when determining whom to nominate for federal judgeships. *See Judges—Appointment—Age Factor*, 3 Op. O.L.C. 388 (1979). We concluded that the ADEA should not be read to apply to the presidential appointment of federal judges:

> The power to appoint Federal judges, who hold office on good behavior, is by tradition and design one of the most significant powers given by the Constitution to the President. It provides one of the

> few administrative mechanisms through which the President can exert a long-term influence over the development and administration of law in the courts. The President's present power to exert that influence to the fullest by preferring candidates for appointment who are likely to have long, rather than short, careers on the bench is therefore a matter of constitutional significance. Whether Congress could deny the President that power by requiring him to disregard utterly the age of candidates for appointment has never been considered by the courts, but because of the gravity of the constitutional questions it raises, we would be most reluctant to construe any statute as an attempt to regulate the President's choice in that way, absent a very clear indication in the [statute].

Id. at 389.[135]

III. Constitutional Requirements and Policy Concerns

The conclusion that a particular provision of proposed legislation probably would not be held unconstitutional by the courts is not equivalent to a determination that the legislation is constitutional per se. The judiciary is limited, properly, in its ability to enforce the Constitution, both by Article III's requirements of jurisdiction and justiciability and by the obligation to defer to the political branches in cases of doubt or where Congress or the President has special constitutional responsibility.[136] In such situations, the executive branch's regular obligation to ensure, to the full extent of its ability, that constitutional requirements are respected is heightened by the absence or reduced presence of the courts' ordinary guardianship of the Constitution's requirements. Furthermore, even where on any view the letter of the Constitution is satisfied, the Constitution's intention to separate the federal government's powers can appropriately be invoked as a sound reason for objecting to legislation that undermines or imperils that separa-

[135] *See also Application of 28 U.S.C. §458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350 (1995); *Constraints Imposed by 18 U.S.C. §1913 on Lobbying Efforts*, 13 Op. O.L.C. 300, 304–05 (1989); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101 (1984); Memorandum for Richard T. Burress, Office of the President, from Laurence H. Silberman, Deputy Attorney General, *Re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution* at 2, 5 (Aug. 28, 1974); Memorandum for Egil Krogh, Staff Assistant to the Counsel to the President, from William H. Rehnquist, Assistant Attorney General, *Re: Closing of Government Offices in Memory of Former President Eisenhower* (Apr. 1, 1969).

[136] This last point is true not only with respect to true "political questions," i.e., constitutional issues the resolution of which is committed by the Constitution to (one of) the political branches, but also as to areas which, although not absolutely insulated from judicial review, demand extraordinary judicial respect for the decisions of a coordinate branch. *See, e.g., United States v. Butenko*, 494 F.2d 593, 603, 605 (3d Cir.) (en banc) (broad presidential power to order covert surveillance for foreign affairs and national security purposes does not "justify completely removing" judicial enforcement of the Fourth Amendment; however, the "strong public interest" in "the efficient operation of the Executive's foreign policy-making apparatus" should make a court "wary of interfering"), *cert. denied*, 419 U.S. 881 (1974).

tion. The constitutional separation of powers, to make the point in a different way, is a political as well as a legal principle. [137]

The Constitution demands of the executive and legislative branches alike an "ethic of institutional responsibility" in defending their respective roles in the overall constitutional structure. [138] For example, legislation that attempts to structure the very details of executive decision making, or that imposes onerous and repetitive reporting requirements on executive agencies, is troubling from a separation of powers standpoint even if the individual statutes could not easily be described in themselves as unconstitutional. The overall effects of such micromanagement for the constitutional separation of powers obviously can be tremendous, and yet it is unlikely that judicial intervention can or would preserve the constitutional balance. The executive branch thus has the primary responsibility for presenting, in as forceful and principled a way as possible, the separation of powers problems with all legislation that has such effects. In carrying out this Office's various roles in the Executive's review of existing and proposed legislation, we intend to bear this obligation in mind, and we are pleased to be of assistance to other components of the executive branch in their efforts to analyze, from a policy standpoint as well as from a strictly legal perspective, the impact of legislation on the constitutional separation of congressional and presidential powers.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

[137] Justice Robert Jackson once wrote that "[i]t is hard to conceive a task more fundamentally political than to maintain amidst changing conditions the balance between the executive and legislative branches of our federal system." Robert H. Jackson, *The Supreme Court in the American System of Government* 62 (1955).

[138] *See* Richard A. Champagne, Jr., *The Separation of Powers, Institutional Responsibility, and the Problem of Representation*, 75 Marq. L. Rev. 839, 844 (1992).

Placing of United States Armed Forces Under United Nations Operational or Tactical Control

Proposed funding restriction generally prohibiting the President from placing United States Armed Forces under the operational or tactical control of the United Nations in U.N. peacekeeping operations would unconstitutionally constrain the President's exercise of his authority as Commander-in-Chief and unconstitutionally undermine the President's constitutional authority with respect to the conduct of diplomacy.

Granting the President the authority to waive the prohibition if he provides a certification and report to Congress would not remove the funding restriction's constitutional defect, because Congress cannot burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the exercise of that power.

May 8, 1996

MEMORANDUM OPINION FOR THE SPECIAL ASSISTANT TO THE PRESIDENT AND LEGAL ADVISER TO THE NATIONAL SECURITY COUNCIL

This memorandum responds to your request for our views as to the constitutionality of H.R. 3308, 104th Cong. (1996), a bill that would limit the President's ability to place United States armed forces under the United Nations' ("U.N.") operational or tactical control.

Section 3 of H.R. 3308 would add a new section 405 to chapter 20 of title 10, United States Code, to read as follows:

> Except as provided in subsections (b) and (c), funds appropriated or otherwise made available for the Department of Defense may not be obligated or expended for activities of any element of the armed forces that after the date of the enactment of this section is placed under United Nations operational or tactical control, as defined in subsection (f).

Proposed subsection 405(f) provides that elements of the armed forces shall be considered to be placed under U.N. operational or tactical control if they are under the operational or tactical control of an individual who is acting on behalf of the U.N. in a peacekeeping, peacemaking or similar activity, and if the senior military commander of the U.N. force or operation is either a foreign national or a U.S. citizen other than an active duty U.S. military officer.

Proposed section 405 thus bars the President from placing U.S. armed forces participating in U.N. peacekeeping operations under the U.N. operational or tactical control, as so defined.

Two subsections set out exceptions to the prohibition.[1] Subsection 405(c) provides that the limitation does not apply if Congress specifically authorizes a particular placement of U.S. forces under U.N. operational or tactical control, or if the U.S. forces involved in a placement are participating in operations conducted by the North Atlantic Treaty Organization.

Subsections 405(b) and (d) together provide that the President may waive the limitation if he certifies to Congress fifteen days in advance of the placement that it is "in the national security interests of the United States to place any element of the armed forces under United Nations operational or tactical control," and provides a detailed report setting forth specific items of information within eleven distinct categories.[2] If the President certifies that an "emergency" precluded compliance with the fifteen day limitation, he must make the required certification and report in a timely manner, but no later than forty-eight hours after a covered operational or tactical control is initiated.

The proposed amendment unconstitutionally constrains the President's exercise of his constitutional authority as Commander-in-Chief. Further, it undermines his constitutional role as the United States' representative in foreign relations. While "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping," *United States v. O'Brien*, 391 U.S. 367, 377 (1968), Congress may not deploy that power so as to exercise functions constitutionally committed to the Executive alone, for that would "pose a 'danger of congressional usurpation of Executive Branch functions.'" *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 (1986)). Nor may Congress legislate in a manner that "'impermissibly undermine[s]' the powers of the Executive Branch, [*Commodity Futures Trading Comm'n v.] Schor*, [478 U.S. 833 (1986)] at 856, or 'disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions,' *Nixon v. Administrator of General Services*, [433 U.S. 425 (1977)] at 433." *Morrison*, 487

[1] There is also an exception made for ongoing operations in Macedonia and Croatia.

[2] As detailed in subsection 405(d), the report must include eleven distinct elements. It must set forth: (1) a description of the national security interests that would be served by the troop placement; (2) the mission of the U.S. forces involved; (3) the expected size and composition of the U S. forces involved; (4) the precise command and control relationship between the U.S. forces involved and the U.N. command structure; (5) the precise command and control relationship between the U.S. forces involved and the commander of the U.S. unified command for the region in which those U.S. forces are to operate; (6) the extent to which the U.S. forces involved will rely on other nations' forces for security and defense and an assessment of the capability of those foreign forces to provide adequate security to the U.S. forces involved; (7) the exit strategy for complete withdrawal of the U.S. forces involved; (8) the extent to which the commander of any unit proposed for the placement would at all times retain the rights to report independently to superior U.S. military authorities and to decline to comply with orders judged by that commander to be illegal or beyond the mission's mandate until such time as that commander has received direction from superior U.S. military authorities; (9) the extent to which the United States retains the authority to withdraw any element of the armed forces from the proposed operation at any time and to take any action it considers necessary to protect those forces if they are engaged; (10) the extent to which the U.S. forces involved will be required to wear as part of their uniform a device indicating U.N. affiliation; and (11) the anticipated monthly incremental cost to the United States of participation in the U.N. operation by U.S. forces proposed to be placed under U.N. operational or tactical control.

U.S. at 695. Even though there are areas in which both Congress and the President have a constitutional voice, and in which Congress, therefore, may rely on its own constitutional authority to seek to guide and constrain presidential choices, it may not impose constraints in the areas that the Constitution commits exclusively to the President. *See, e.g.*, Letter for Richard Darman, Director, Office of Management and Budget, from Bruce Navarro, Deputy Assistant Attorney General, Office of Legislative Affairs (Feb. 2, 1990) (finding provision of Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101–246, 104 Stat. 15 (1990), limiting President's ability to receive spies as ambassadors, unconstitutional even though President could waive limitation if it was in the national security interests of the United States to do so).

Article II, Section 2, of the Constitution declares that the *President* "shall be Commander in Chief of the Army and Navy of the United States." Whatever the scope of this authority in other contexts, there can be no room to doubt that the Commander-in-Chief Clause commits to the President alone the power to select the particular personnel who are to exercise tactical and operational control over U.S. forces. *See Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual . . . ."). Indeed, the major object of the Clause is to "vest in the President the supreme command over all the military forces,—such supreme and undivided command as would be necessary to the prosecution of a successful war." *United States v. Sweeny*, 157 U.S. 281, 284, (1895); *see also Nordmann v. Woodring*, 28 F. Supp. 573, 578 (W.D. Okla. 1939) ("[A]s Commander in Chief, the President has the power to employ the Army and the Navy in a manner which he may deem most effectual."); *The Federalist No. 69*, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("[The Commander in Chief power] would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy . . . ."); William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 Yale L.J. 599, 610 (1916) (the Commander-in-Chief Clause precludes Congress from "order[ing] battles to be fought on a certain plan" or "direct[ing] parts of the army to be moved from one part of the country to another"); George Sutherland, *Constitutional Power and World Affairs* 76–77 (1919) ("In the actual conduct of military operations, in the field where the battles are being fought, in the movement, disposition and discipline of the land and naval forces, the Commander-in-Chief is supreme."). As Attorney General (later Justice) Robert Jackson explained,

> the President's responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their imme-

> diate movements and operations designed to protect the security and effectuate the defense of the United States. . . . [T]his authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country.

Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61–62 (1941).

It is for the President alone, as Commander-in-Chief, to make the choice of the particular personnel who are to exercise operational and tactical command functions over the U.S. Armed Forces. True, Congress has the power to lay down general rules creating and regulating "the framework of the Military Establishment," *Chappell v. Wallace*, 462 U.S. 296, 301 (1983), but such framework rules may not unduly constrain or inhibit the President's authority to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field, including the choice of particular persons to perform specific command functions in those missions. Thus, for example, the President's constitutional power to appoint a particular officer to the temporary grade of Marine Corps brigadier general could not be undercut by the failure of a selection board, operating under a general statute prescribing procedures for promotion in the armed services, to recommend the officer for that promotion. *See Promotion of Marine Officer*, 41 Op. Att'y Gen. 291 (1956). As Acting Attorney General Rankin advised President Eisenhower on that occasion, "[w]hile Congress may point out the general class of individuals from which an appointment may be made and may impose other reasonable restrictions it is my opinion that the instant statute goes beyond the type of restriction which may validly be imposed. . . . It is recognized that exceptional cases may arise in which it is essential to depart from the statutory procedures and to rely on constitutional authority to appoint key military personnel to positions of high responsibility." *Id.* at 293, 294 (citations omitted).[3] In the present context, the President may determine that the purposes of a particular U.N. operation in which U.S. Armed Forces participate would be best served if those forces were placed under the operational or tactical control of an agent of the U.N., as well as under a U.N. senior military commander who was a foreign national (or a U.S. national who is not an active duty military officer). Congress may not prevent the President from acting on such a military

[3] The Acting Attorney General's opinion relied chiefly on Congress's inability to undermine the President's authority under the Appointments Clause, U.S. Const. art. II, §2, rather than on the promotion procedure's effect on the Commander-in-Chief power. The President's appointment power is not at issue here, because the foreign or other nationals performing command functions at the President's request would be discharging specific military *functions*, but would not be serving in federal *offices*. *See* Memorandum for Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Defense Authorization Act* at 2 n.1 (Sept. 15, 1995). Nonetheless, we believe that the reasoning under the Commander-in-Chief Clause closely parallels that under the Appointments Clause.

judgment concerning the choice of the commanders under whom the U.S. forces engaged in the mission are to serve.

Moreover, in seeking to impair the President's ability to deploy U.S. Armed Forces under U.N. operational and tactical command in U.N. operations in which the United States may otherwise lawfully participate, Congress is impermissibly undermining the President's constitutional authority with respect to the conduct of diplomacy. *See, e.g., Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive' ") (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705–06 n.18 (1976) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch."); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"); *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 Op. Att'y Gen. 484, 486 (1940) (Jackson, Att'y Gen.) (the Constitution "vests in the President as a part of the Executive function" "control of foreign relations"). United Nations peacekeeping missions involve multilateral arrangements that require delicate and complex accommodations of a variety of interests and concerns, including those of the nations that provide troops or resources, and those of the nation or nations in which the operation takes place. The success of the mission may depend, to a considerable extent, on the nationality of the commanding officers, or on the degree to which the operation is perceived as a *U.N.* activity (rather than that of a single nation or bloc of nations). Given that the United States may lawfully participate in such U.N. operations, we believe that Congress would be acting unconstitutionally if it were to tie the President's hands in negotiating agreements with respect to command structures for those operations. [4]

It might be argued that section 405 does not impose a significant constraint on the President's constitutional authority because it grants the President the authority to waive the prohibition whenever he deems it in the "national security interest" of the United States to do so, provided he reports his decision to execute a waiver to Congress fifteen days in advance. If he certifies that an emergency is present, he may avoid the fifteen day limitation and make a report in a timely manner, but no later than forty-eight hours after troops are placed under U.N. command. Thus, functionally, section 405 effects only a conditional ban on the

[4] Past Presidents have committed U.S. forces to foreign command. For example, at a time of great military and diplomatic exigency during the First World War, President Woodrow Wilson agreed, after discussions with our allies, to place U.S. forces under General Foch, a French commander. General Pershing called on General Foch at his headquarters to say, "[i]nfantry, artillery, aviation, all that we have are yours; use them as you wish." 8 Ray Stannard Baker, *Woodrow Wilson: Life and Letters* 60 (1939); *see also id.* at 62 (President Wilson's telegram to General Foch, stating that "[s]uch unity of command is a most hopeful augury of ultimate success"); *id.* at 69–70 (resolution of Supreme War Council, stating that General Foch "is charged by the British, French and American Governments with the coordination of the action of the Allied Armies on the Western Front; to this end there is conferred on him all the powers necessary for its effective realization").

President's constitutional authority to control the tactical and operational deployment of U.S. forces.[5] Congress cannot, however, burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the exercise of that power. Attorney General Brownell put the matter well:

> It is recognized that the Congress may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted. It may also impose conditions with respect to the use of the appropriation, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution. If the practice of attaching invalid conditions to legislative enactments were permissible, it is evident that the constitutional system of the separability of the branches of Government would be placed in the gravest jeopardy.

Authority of Congressional Committees to Disapprove Action of Executive Branch, 41 Op. Att'y Gen. 230, 233 (1955).

Similarly, then-Assistant Attorney General Rehnquist opined:

> Even in the area of domestic affairs, where the relationship between Congress and the President is balanced differently than it is in the field of external affairs, virtually every President since Woodrow Wilson had had occasion to object to certain conditions in authorization legislation as being violative of the separation of powers between the Executive and the legislative branch. The problem would be met in exacerbated form should Congress attempt by detailed instructions as to the use of American forces already in the field to supersede the President as Commander-in-Chief of the armed forces.

William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* 21 (May 22, 1970).[6]

We are mindful that Congress has framed its restriction on placing troops under U.N. control as a prohibition on the obligation or expenditure of appropriated funds. That Congress has chosen to invade the President's authority indirectly,

[5] Arguably, section 405 effects a complete ban on the use of appropriated funds to support troops under U.N. control in circumstances when the President would find such a deployment advisable but not strictly in the national security interest of the United States. We doubt, however, that such a circumstance is more than hypothetically possible. If the President found it advisable to place U.S. forces under U.N. control, then, ipso facto, it would be in the national security interest to place those troops under U.N. control. To the extent that a contrary circumstance could truly arise, then section 405 is unconstitutional.

[6] In a footnote to the text quoted above, Mr. Rehnquist added: "All of these Presidents have stated in one way or another that just because Congress concededly may refrain from appropriating money at all, it does not necessarily follow that it may attach whatever condition it desires to an appropriation which it does make." *Id.* at 21 n.3.

through a condition on an appropriation, rather than through a direct mandate, is immaterial. Broad as Congress's spending power undoubtedly is, it is clear that Congress may not deploy it to accomplish unconstitutional ends.[7] In particular, as our Office has insisted over the course of several Administrations, "Congress may not use its power over appropriation of public funds ' "to attach conditions to Executive Branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs." ' " *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 28 (1992) (quoting *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 42 n.3 (1990) (quoting *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain C.I.A. Covert Actions*, 13 Op. O.L.C. 258, 261 (1989))).[8]

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

[7] *See United States v. Lovett*, 328 U.S. 303, 316 (1946) (appropriations power misused to impose bill of attainder); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (appropriations act unconstitutionally intruded on President's pardon power); *cf. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271 (1991) (Congress may not use its power over Federal property to achieve ends by indirect means that it is forbidden to achieve directly); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926) (State legislature cannot attach unconstitutional condition to privilege that it may deny); *see also Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller*, 41 Op. Att'y Gen. 507, 530 (1960) (Att'y Gen. Rogers) ("[T]he Constitution does not permit any indirect encroachment by Congress upon [the] authority of the President through resort to conditions attached to appropriations."); *Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. 56, 61 (1933) (Att'y Gen. Mitchell) ("This proviso can not be sustained on the theory that it is a proper condition attached to an appropriation. Congress holds the purse strings, and it may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted and impose conditions in respect to its use, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution."), *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 469–70 (1860) (concluding that appropriations bill that contained condition that money be spent only under supervision of congressionally-designated individual was invalid); William P. Barr, *The Appropriations Power and the Necessary and Proper Clause*, 68 Wash. U. L.Q. 623, 628 (1990) ("Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control."); Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 Yale L.J. 1255, 1303 n.218 (1988) (citing support for view that Congress acts unconstitutionally if it refuses to appropriate funds for President to carry out his enumerated constitutional responsibilities); Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1351 (1988); Louis Henkin, *Foreign Affairs and the Constitution* 115 (1972) ("Congress cannot impose conditions which invade Presidential prerogatives to which the spending is at most incidental.").

[8] *See also The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 169–70 (1986) ("[W]hile Congress unquestionably possesses the power to make decisions as to the appropriation of public funds, it may not attach conditions to Executive Branch appropriations that require the President to relinquish any of his constitutional discretion in foreign affairs.").

This limitation on legislative power has also been acknowledged by Members of Congress. *See* Orrin Hatch, *What the Constitution Means by Executive Power*, 43 U. Miami L. Rev. 197, 200–01 (1988) ("[C]onstitutional foreign policy functions may not be eliminated by a congressional refusal to appropriate funds. The Congress may not, for example, deny the President funding to receive ambassadors, negotiate treaties, or deliver foreign policy addresses . . . . Congress oversteps its role when it undertakes to dictate the specific terms of international relations."); Eli E. Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 289 Annals Am. Acad. Pol. & Soc. Sci. 145, 150 (1953) (citing remarks of Representative Daniel Webster, objecting on constitutional grounds in 1826 to appropriations rider that purported to attach instructions to United States diplomats).

Section 609 of the FY 1996 Omnibus Appropriations Act

A provision of an appropriations law purporting to condition the use of funds to pay for the United States' diplomatic representation to Vietnam on the President's making a particular detailed certification "within 60 days" does not require the cutoff of the covered funds until such time as the President has made the certification, but instead permits use of the funds to maintain diplomatic representation in Vietnam for 60 days after enactment.

Taken as a whole, the provision impermissibly impairs the exercise of the core Presidential power to recognize, and maintain diplomatic relations with, a foreign government. Hence, the provision is unconstitutional and without legal force or effect.

May 15, 1996

MEMORANDUM OPINION FOR THE LEGAL ADVISER
DEPARTMENT OF STATE

You have sought our advice on section 609 of the Fiscal Year 1996 Omnibus Appropriations Act (H.R. 3019), Pub. L. No. 104–134, 104 Stat. 1321, 1321–63 ("the Act"), which the President signed into law on April 26, 1996.[1] That section purports to condition the use of appropriated funds to pay for the United States' diplomatic representation to Vietnam on the President's making a detailed certification "within 60 days." You have asked whether section 609 prohibits the use of appropriated funds for this purpose from the moment the Act was signed into law, unless the President, within 60 days thereafter, provides the requisite certification, and so enables diplomatic relations between the two countries to resume.[2]

At the very least, section 609 does not require a cutoff of funds until the President makes the certification. Rather, the use of appropriated funds for maintaining diplomatic representation to Vietnam remains lawful and proper during the sixty days after enactment, so that the President, during that period, may gather and assess the facts needed to enable him to decide whether or not to provide the certification, without disrupting the United States' existing diplomatic relations with Vietnam in the interval. This construction follows the natural meaning of the language of the section, comports with the rational and efficient use of government resources, and reduces the likelihood of unnecessary diplomatic friction.

More importantly, we believe that section 609, taken as a whole, impermissibly impairs the exercise of a core Presidential power—the authority to recognize,

[1] The section originated as section 609 of the Commerce, Justice, State and the Judiciary Appropriations Bill for Fiscal Year 1996 (H.R. 2076).

[2] Several members of Congress have written to the Secretary of State to advocate this view of the provision's meaning. *See* Letter for the Honorable Warren Christopher, Secretary of State, from Senator Bob Smith, *et al.* (Apr. 26, 1996) ("Congressional Letter"). In support of their interpretation, the writers attach a two paragraph opinion from an Associate General Counsel of the General Accounting Office. *See* Letter for the Honorable Robert C. Smith, United States Senate, from Gary I. Kepplinger, Associate General Counsel, General Accounting Office (Apr. 26, 1996) ("GAO Opinion").

and to maintain diplomatic relations with, a foreign government.[3] Accordingly, section 609 is unconstitutional and without legal force or effect.

Section 609, in its entirety, reads as follows:

> None of the funds appropriated or otherwise made available by this Act may be obligated or expended to pay for any cost incurred for (1) opening or operating any United States diplomatic or consular post in the Socialist Republic of Vietnam that was not operating on July 11, 1995; (2) expanding any United States diplomatic or consular post in the Socialist Republic of Vietnam that was operating on July 11, 1995; or (3) increasing the total number of personnel assigned to United States diplomatic or consular posts in the Socialist Republic of Vietnam above the levels existing on July 11, 1995, unless the President certifies within 60 days, based upon all information available to the United States Government that the Government of the Socialist Republic of Vietnam is cooperating in full faith with the United States in the following four areas:
>
> > (1) Resolving discrepancy cases, live sightings and field activities,
> >
> > (2) Recovering and repatriating American remains,
> >
> > (3) Accelerating efforts to provide documents that will help lead to fullest possible accounting of POW/MIA's,
> >
> > (4) Providing further assistance in implementing trilateral investigations with Laos.

The statutory reference to "July 11, 1995" keys the provisions of the bill to the date of the President's offer to establish diplomatic relations with Vietnam. *See Remarks by the President Announcing the Normalization of Diplomatic Relations with Vietnam*, 2 Pub. Papers of William J. Clinton 1073 (July 11, 1995). In announcing that offer, the President stated that from the beginning of his Administration, "any improvement in relationships between America and Vietnam has depended upon making progress on the issue of Americans who were missing in action or held as prisoners of war." *Id.* Noting that he had lifted the trade embargo against Vietnam seventeen months earlier "in response to their cooperation and to enhance our efforts to secure the remains of lost Americans and to

[3] There is yet another apparent constitutional flaw in section 609: it purports to prescribe to the President the manner in which he must proceed to recover the remains of Americans, and to account for POWs and MIAs, in Vietnam. Such detailed prescriptions may well encroach on the President's constitutional authority as Commander in Chief. We do not press that objection here.

determine the fate of those whose remains have not been found," *id.*, the President stated that the Government of Vietnam had, in the interval, "taken important steps to help us resolve many cases," including releasing the remains of Americans, delivering documents that shed light on the fate of MIAs, assisting efforts to reduce discrepancy cases, and stepping up cooperation with Laos, where many Americans were lost. *Id.* The President stated that "[n]ever before in the history of warfare has such an extensive effort been made to resolve the fate of soldiers who did not return," but he added that "normalization of our relations with Vietnam is not the end of our effort." *Id.* On July 12, 1995, the Government of Vietnam agreed to diplomatic relations with the United States. Soon thereafter, the United States Liaison Office in Vietnam was upgraded to a Diplomatic Post.

The four certification requirements in section 609 relate, respectively, to resolving discrepancy cases, recovering American remains, accelerating the provision of documents relating to POWs and MIAs, and promoting trilateral investigations with Laos. All four conditions derive directly from a July 2, 1993 Presidential statement that set forth the areas in which the United States expected to see progress before expanding diplomatic relations with the Government of Vietnam. *See Statement by the President on United States Policy Toward Vietnam*, 1 Pub. Papers of William J. Clinton 990 (July 2, 1993).[4] The State Department advises us that later statements and testimony have referred, in varying language, to the same four areas, and that, since July, 1993, progress in United States-Vietnamese relations has been measured in terms of the satisfaction of the four criteria.

I.

Section 609 provides that "[n]one of the funds appropriated or otherwise made available by this Act may be obligated or expended to pay for any cost incurred" for the stated purposes, "unless the President certifies within 60 days, based upon all information available to the United States Government that the Government of the Socialist Republic of Vietnam is cooperating in full faith with the United States" in four areas relating to POWs and MIAs. The Congressional Letter, sent just after the bill was passed and signed, argues that the provision forbids any expenditure of funds before the President makes a certification. The letter relies on and attaches a six-sentence opinion of the Associate General Counsel of the General Accounting Office. According to that opinion, the "plain language" of the section leads to the conclusion that "no obligations or expenditures may be

[4] In that statement, the President announced that Vietnam would have access to the International Monetary Fund, and that he would be sending a high-level delegation to Vietnam. He explained that "any further steps in relations between our two nations depend on tangible progress on the outstanding POW/MIA cases," and said that the delegation would make clear that "[w]e insist upon efforts by the Vietnamese in four key areas," including (1) remains, (2) discrepancy cases, (3) investigations with Laos and (4) archival material. *Id.* at 991. These four conditions are substantially the same as those that section 609 treats as mandates that the President must certify Vietnam has met.

made prior to the President's certification." The Congressional Letter also refers to, but does not supply, an opinion of the Senate Legislative Counsel.

We conclude that, under the better reading, section 609 would not cut off funds until 60 days have elapsed. Section 609 purports to forbid obligations or expenditures "unless the President certifies within 60 days" that certain facts exist; the provision does not say that funds may not be obligated or expended "until" the President certifies or unless the President "has certified." The most natural reading of the language actually used is that funds are to be cut off if sixty days pass without the Presidential certification.

Our reading is supported by section 609's requirement that the President make his decision "based upon all information available to the United States Government." The statute thus contemplates a wide-ranging inquiry, covering every agency of the Government that might have relevant information. To require a termination of funds before the 60-day period elapsed would push the President toward making a hasty and ill-considered decision. Such a decision would conflict with the full inquiry that section 609 requires.

Furthermore, the Supreme Court has cautioned that Congress must express its intent clearly before a statute is read "so as to give rise to a serious question of separation of powers which in turn would . . . implicate[] sensitive issues of the authority of the Executive over relations with foreign nations." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) (describing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)). *See also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 465–67 (1989); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). Section 609, if read to order an immediate cut off of funds, would impede the President's conduct of foreign affairs. On that reading, section 609 could require largely ending operations at the Embassy pending the certification and then starting up operations again after a certification was made. Such a procedure not only would entail severe administrative difficulty, but also could cause diplomatic embarrassment. Such lurches from full to lesser diplomatic relations and back again would call into question the reliability and stability of the United States' conduct of foreign affairs. As we discuss below, we believe that section 609 encroaches on the President's constitutional powers and is therefore invalid. At the least, however, the "within 60 days" language of section 609 should be construed in a manner that avoids seriously impairing the President in the exercise of his constitutional responsibilities.

In offering a different interpretation, the GAO Opinion relies on the "plain language" of the section. However, the "plain language" does not support the GAO Opinion. Furthermore, even if (contrary to our view) section 609 in at least some circumstances might cut off funds immediately, the GAO Opinion's "plain language" is not the *literal* language of section 609. The *literal* language of section 609 would be that expenditures made even before the Presidential certification

would be lawful, as long as the President made the certification at any time during the 60-day period. The GAO Opinion simply asserts that the "plain language" makes a Presidential certification "a precondition to the availability of the funds," without explaining why this result follows.

When section 609 was being considered by Congress, it would have been a simple matter to draft the language to achieve the result that the authors of the Congressional Letter now desire. Such language could have stated — but did not state — that no funds appropriated or otherwise made available by the Act could be obligated or expended "unless the President has previously certified" that the requisite conditions had been met. Instead of seeking to amend the provision, the authors waited until the legislation was enacted and then sought to place a particular interpretation on the language. As post-enactment legislative history, the Congressional Letter sheds no light on the meaning of the language. *See, e.g., Sullivan v. Finkelstein*, 496 U.S. 617, 631–32 (1990) (Scalia, J., concurring in part); *Tataranowicz v. Sullivan*, 959 F.2d 268, 278 n.6 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 1048 (1993); *Michigan United Conservation Clubs v. Lujan*, 949 F.2d 202, 208–10 (6th Cir. 1991); *Multnomah Legal Servs. Workers Union v. Legal Services Corp.*, 936 F.2d 1547, 1555 (9th Cir. 1991).[5]

II.

More fundamentally, section 609's prohibition on the use of appropriated funds to maintain diplomatic relations with Vietnam unless the President provides Congress with a detailed certification is an unconstitutional condition on the exercise of the President's power to control the recognition and non-recognition of foreign governments — a power that flows directly from his textually-committed authority to receive ambassadors, U.S. Const. art. II, § 3.[6] It is by now firmly established that "[p]olitical recognition is exclusively a function of the Executive." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964).[7] As President Woodrow Wilson (himself a leading constitutional scholar) stated in a message to Congress in 1919, "the initiative in directing the relations of our Government with foreign governments is assigned by the Constitution to the Executive, and to the

[5] If the "plain language" of section 609 required an immediate termination of funds, it is hard to see why the authors of the Congressional Letter thought it necessary to seek an opinion on the point from the GAO. The insistence that the "plain language" supports their view rings hollow.

[6] Relatedly, of course, the President has the power to appoint Ambassadors, and to make treaties, by and with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2.

[7] *See also United States v. Belmont*, 301 U.S. 324, 330 (1937); *Goldwater v. Carter*, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting); *Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994); *Phelps v. Reagan*, 812 F.2d 1293, 1294 (10th Cir. 1987); *Americans United for Separation of Church and State v. Reagan*, 786 F.2d 194, 202 (3d Cir.), *cert. denied*, 479 U.S. 914 (1986); *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892, 894 (8th Cir. 1977); *Restatement (Third) of the Foreign Relations Law of the United States* § 204 (1987); 1 Green Hackworth, *Digest of International Law* 161–62 (1940).

Executive, only."[8] Accordingly, Congress may not determine the conditions that a foreign government must satisfy in order to be recognized by, or to enter into normal diplomatic relations with, the United States.

The Executive's recognition power[9] necessarily subsumes within itself the power to withhold or deny recognition, to determine the conditions on which recognition will be accorded, and to define the nature and extent of diplomatic contacts with an as-yet unrecognized government.[10] The United States' diplomatic history has illustrated, on many occasions, the importance of the Executive's powers to withhold or condition recognition.[11] Just as Congress may not usurp the Executive's power by attempting to compel the President affirmatively to recognize a particular government as the sole sovereign of a disputed area,[12] so also it may not ordain that the Executive is to withhold recognition, or that the Executive is not to accord recognition unless the foreign government concerned complies with requirements that Congress, rather than the Executive, imposes. Were Con-

[8] President Woodrow Wilson to Senator Albert B. Fall, Dec. 8, 1919, *reprinted in* S. Doc. No. 66–285, at 843D (1920). Similarly, when the Senate Foreign Relations Committee informed the executive branch during President Grover Cleveland's second Administration that it proposed to report out a resolution that purported to recognize the independence of a Republic of Cuba, the Secretary of State, Richard Olney, responded that that resolution, if adopted, could only be regarded as "an expression of opinion," because "[t]he power to recognize the so-called Republic of Cuba as an independent state rests exclusively with the Executive." *See* Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 Tex. L. Rev. 833, 866 (1972) (quoting Olney statement).

[9] "Recognition" has been defined as "the act of the Executive taking note of the facts [*e.g.*, that a particular government holds power in a certain territory] and indicating a willingness to allow all the legal consequences of that noting to operate. These are consequences in international law. Whether consequences also follow in municipal law is a matter for municipal law itself to determine." 1 Daniel Patrick O'Connell, *International Law* 128 (1970) (footnote omitted). The Executive may engage in diplomatic or other dealings with a government that it does not recognize, for example by entering into treaties or other agreements with that government.

[10] The President's recognition power "includes the power to determine the policy which is to govern the question of recognition." *United States v. Pink*, 315 U.S. 203, 229 (1942). The courts have given effect both to the Executive's refusal to recognize particular governments, and to the policies underlying such non-recognition. *See, e.g., Latvian State Cargo & Passenger S.S. Line v. McGrath*, 188 F.2d 1000, 1003 (D.C. Cir.), *cert. denied*, 342 U.S. 816 (1951); *The Maret*, 145 F.2d 431, 442 (3d Cir. 1944); *Russian Republic v. Cibrario*, 235 N.Y. 255, 263–65 (1923).

[11] Such occasions include President Wilson's refusal to recognize the Huerta government of Mexico in 1913 (which contributed to its downfall a year later); the refusal of Wilson's successors until President Franklin Roosevelt to recognize the Union of Soviet Socialist Republics; the Hoover Administration's non-recognition of the Japanese puppet state of Manchukuo in 1932; and the non-recognition of the People's Republic of China from the Truman Administration until President Nixon's de facto recognition of that government in 1972. *See* Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 99–16, at 567 (1987). Although originally it was the policy of the United States to "accept any foreign government existing *de facto*, respecting every fact as supreme over all theory," *Construction of the Mesilla Treaty*, 7 Op. Att'y Gen. 582, 587 (1855), recognition has come to depend on a variety of foreign policy concerns. Thus, the United States has at times withheld recognition unless the foreign government concerned has agreed to comply with particular conditions. *See, e.g., Establishment of Diplomatic Relations With Albania*, 13 Dep't St. Bull. 767 (1945); *American Mission to Albania Withdrawn*, 15 Dep't St. Bull. 913 (1946); *American Support of Free Elections in Eastern Europe*, 17 Dep't St. Bull. 407, 409 (1947) (non-recognition of Albania for failure to satisfy conditions required by Executive). In this Administration, the President has stated that he had used the possibility of United States recognition of the Government of Angola as "leverage towards promoting an end to the civil war and hostilities" in that country. *Remarks and an Exchange With Reporters Prior to Discussions With Archbishop Desmond Tutu*, 1 Pub. Papers of William J. Clinton 704, 704 (May 19, 1993). *See also* Louis L. Jaffe, *Judicial Aspects of Foreign Relations* 107–10 (1933) (through non-recognition, United States at various times pursued policy goal of discouraging violent revolutions against existing governments); *U.S. Policy on Nonrecognition of Communist China*, 39 Dep't St. Bull. 385 (1958) (bases of United States policy on nonrecognition of Communist China).

[12] *See Bill to Relocate United States Embassy from Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123 (1995).

gress to seek to direct and control the exercise of the recognition power in any of these ways, it would violate separation of powers principles.

The Supreme Court has identified two fashions in which Congress may impermissibly encroach on the Executive power. First, Congress may attempt to exercise itself one of the functions that the Constitution commits solely to the Executive, thus "pos[ing] a 'danger of congressional usurpation of Executive Branch functions.' " *Morrison v. Olson*, 487 U.S. 654, 694 (1988) (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 (1986)). Second, Congress may not attempt to " 'impermissibly undermine' the powers of the Executive Branch, [*Commodity Futures Trading Comm'n v.*] *Schor*, [478 U.S. 833 (1986)] at 856, or 'disrupt[] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions,' *Nixon v. Administrator of General Services*, [433 U.S. 425 (1977)] at 433." *Morrison*, 487 U.S. at 695.

Section 609 both poses a "danger of congressional usurpation" of the Executive function of recognition, and "impermissibly undermine[s]" that authority. In effect, section 609 requires the President either (1) to reduce our diplomatic presence in, and contacts with, Vietnam to the levels that existed immediately before his July 11, 1995 offer to normalize relations, or else (2) to go forward with normalizing relations, but only if Vietnam satisfies specific conditions that Congress, rather than the Executive, demands. This Congress may not do: if the United States is to impose conditions precedent on Vietnam for being recognized, it is for the President, not Congress, to decide what those conditions are. [13]

Specifically, section 609 purports to impose a certification requirement on the availability of funds (1) to "open[] or operat[e]" a diplomatic or consular post in Vietnam that was not operating on the date the President offered to establish diplomatic relations with that country, (2) to "expand[]" any such post that was operating in Vietnam before that date, or (3) to augment the number of personnel assigned to United States diplomatic or consular posts in Vietnam before that date. In our view, each of these three restrictions is unconstitutional. That the first two restrictions (on opening, operating or expanding any diplomatic or consular post in Vietnam) overtly infringe on the President's recognition power is, we think, clear. [14] While the unconstitutionality of the third restriction (on the number of

[13] The fact that the conditions Congress imposed in section 609 are similar to those that the President himself set forth in July, 1993 does not alter the analysis. The President retained the discretion to revise his criteria, apply them flexibly, or take account of other unrelated factors, in making an overall judgment as to the wisdom of normalizing our relations with Vietnam. As codified in section 609, however, the criteria have been transformed into hard-and-fast requirements that the President must certify Vietnam to have met before our diplomatic relations with its government can be normalized. Section 609 precludes the President from making the finely-shaded, situation-sensitive judgments that are necessary for conducting a successful recognition policy.

[14] An 1855 opinion by Attorney General Caleb Cushing, though rendered on grounds of the Appointments Clause rather than on the basis of the recognition power, supports our conclusion that Congress may not attempt to dictate to the President the level of our diplomatic representation to Vietnam. Attorney General Cushing addressed himself to legislation that stated that, from and after a date certain, the President "shall," by and with the Senate's advice and consent, "appoint representatives of the grade of envoys extraordinary and ministers plenipotentiary" to des-

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personnel assigned to such posts) may be less patent, we think that, in the particular context surrounding the enactment of section 609, it too impermissibly invades a core Presidential power. As we have explained, section 609 was enacted against the backdrop of the progress that the Government of Vietnam had made between July, 1993 and July, 1995 in resolving POW/MIA issues, the President's July 11, 1995 offer to the Government of Vietnam, that government's response to it, and the ensuing diplomatic dealings between the two nations. Indeed, one of the signatories of the Congressional Letter explicitly stated that the purpose of a prior version of section 609 was to "bar[] the use of Federal funds for implementing the President's ill-considered, pre-mature [sic] decision to expand diplomatic relations with Vietnam." 141 Cong. Rec. H7765 (daily ed. July 26, 1995) (remarks of Rep. Gilman).[15] Thus, the unmistakeable intent and effect of section 609's restrictions, taken as a whole, are to return the United States' diplomatic relations with Vietnam to the very limited level that existed before the President's offer, or else to require that Vietnam demonstrably satisfy requirements imposed by legislative mandate. Thus, even if Congress may, for reasons of economy or efficiency, reduce the size of embassy staff, it may not do so as part of an effort, as here, to direct and control the recognition power in a particular instance.

III.

The fact that in section 609 Congress is seeking to control the exercise of the Presidential recognition power indirectly, through the appropriations process, rather than as a direct mandate, does not change our conclusion. Broad as Congress's spending power undoubtedly is, it is clear that Congress may not deploy it to accomplish unconstitutional ends.[16] In particular, as our Office has insisted over

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ignated countries. *Ambassadors and other Public Ministers of the United States*, 7 Op. Att'y Gen. 186, 214 (1855). The Attorney General opined that in this context, "'shall' must be construed to signify 'may;' for Congress cannot by law constitutionally require the President to make removals or appointments of public ministers on a given day, or to make such appointments of a prescribed rank, or to make or not make them at this or that place. . . . [W]e are therefore not to read this act as requiring the President to appoint and maintain a minister of the rank of envoy extraordinary at the courts of London, Paris, St. Petersburg, Madrid, Mexico, Copenhagen, regardless of what may, in his judgment and that of the Senate, be the necessities or interests of the public service; nor to read it as forbidding him to leave either of those legations, or any other, in the hands of a mere chargé d'affaires." *Id.* at 217–18. In the Attorney General's view, the President had "the absolute discretion at all times . . . to appoint a public minister of such degree as he and [the Senate] might please for any particular mission, or not to appoint any." *Id.* at 219.

[15] *See also Some in Congress oppose recognition of Vietnam*, The Baltimore Sun, July 11, 1995, at 1A, *available in* 1995 WL 2452091 (reporting statements by members of Congress threatening to bar use of Federal funds for diplomatic relations with Vietnam).

[16] *See United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (appropriations act unconstitutionally intruded on President's pardon power); *United States v. Lovett*, 328 U.S. 303, 316 (1946) (appropriations power misused to impose bill of attainder); *cf. Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271 (1991) (Congress may not use its power over Federal property to achieve ends by indirect means that it is forbidden to achieve directly); *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926) (State legislature cannot attach unconstitutional condition to privilege that it may deny). *See also Authority of Congressional Committees to Disapprove Action of Executive Branch*, 41 Op. Att'y Gen. 230, 233 (1955) (Att'y Gen. Brownell) ("If the practice of attaching invalid conditions to legislative enactments were permissible, it is

the course of several Administrations, "Congress may not use its power over appropriation of public funds 'to attach conditions to Executive Branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs.' " *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 28 (1992) (quoting *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 42 n.3 (1990) (quoting *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 261 (1989))). [17]

Indeed, it has long been established that the spending power may not be deployed to invade core Presidential prerogatives in the conduct of diplomacy. [18] As early as 1818, an attempt by Representative Henry Clay to use appropriations bill rider to compel the recognition of a South American government was criticized by other members of Congress as a violation of separation of powers principles, and it soon proved to be abortive. [19] Then-Secretary of State (and later President) John Quincy Adams also urged constitutional objections to Clay's proposal before President Monroe's Cabinet:

> Instead of admitting the Senate or House of Representatives to any share in the act of recognition, I would expressly avoid that form of doing it which would require the concurrence of those bodies. It was, I had no doubt, by our Constitution an act of the Executive authority. General Washington had exercised it in recognizing

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evident that the constitutional system of the separability of the branches of Government would be placed in the gravest jeopardy."); *Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. 56, 61 (1933) (Att'y Gen. Mitchell) ("This proviso can not be sustained on the theory that it is a proper condition attached to an appropriation. Congress holds the purse strings, and it may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted and impose conditions in respect to its use, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution."); *Memorial of Captain Meigs*, 9 Op. Att'y Gen 462, 469–70 (1860) (Att'y Gen. Black) (concluding that appropriations bill that contained condition that money be spent only under supervision of congressionally-designated individual was invalid); William P. Barr, contribution to symposium on *The Appropriations Power and the Necessary and Proper Clause*, 68 Wash. U. L.Q. 623, 628 (1990) ("Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control"); Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 Yale L.J. 1255, 1303 n.218 (1988) (citing support for view that Congress acts unconstitutionally if it refuses to appropriate funds for President to carry out his enumerated constitutional responsibilities); Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1351 (1988).

[17] *See also The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 169–70 (1986) ("[W]hile Congress unquestionably possesses the power to make decisions as to the appropriation of public funds, it may not attach conditions to Executive Branch appropriations that require the President to relinquish any of his constitutional discretion in foreign affairs.").

[18] This limitation on legislative power has been acknowledged by members of Congress *See* Orrin Hatch, contribution to symposium, *What the Constitution Means by Executive Power*, 43 U. Miami L. Rev. 197, 200–01 (1988) ("constitutional foreign policy functions may not be eliminated by a congressional refusal to appropriate funds. The Congress may not, for example, deny the President funding to receive ambassadors, negotiate treaties, or deliver foreign policy addresses . . . . Congress oversteps its role when it undertakes to dictate the specific terms of international relations."); Eli E. Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 289 Annals Am. Acad. Pol. & Soc. Sci. 145, 150 (1953) (citing remarks of Representative Daniel Webster, objecting on constitutional grounds in 1826 to appropriations rider that purported to attach instructions to United States diplomats).

[19] *See* Edward S. Corwin, *The President: Office and Powers 1787–1984*, at 216 (5th rev. ed. 1984).

> the French Republic by the reception of Mr. Genest. Mr. Madison had exercised it by declining several years to receive, and by finally receiving, Mr. Onis; and in this instance I thought the Executive ought carefully to preserve entire the authority given him by the Constitution, and not weaken it by setting the precedent of making either House of Congress a party to an act which it was his exclusive right and duty to perform.[20]

Accordingly, Congress may not attempt indirectly, through the use of its spending power, to control the exercise of the President's exclusive right to grant or withhold political recognition. Section 609 is such an attempt; thus, it is an unconstitutional encroachment on the President's power.

IV.

Because section 609 is, in our view, invalid, we regard it as being without legal force or effect.[21]

The past practice of the executive branch demonstrates its refusal to comply with unconstitutional spending conditions that trench on core Executive powers. Particularly pertinent in this regard is an opinion written in 1960 by Attorney General William Rogers for President Eisenhower concerning such an unconstitutional condition.[22]

Attorney General Rogers' opinion dealt with a provision of a statute that directed that certain expenses of a State Department office be charged to certain appropriations, provided that all documents relating to activities of that office were furnished upon request to Congress. A related statute provided for termination of funds if all documents were not produced, unless the President certified that he had forbidden the disclosure of the documents to protect the public interest. The State Department refused to furnish a number of documents requested by a House subcommittee, and the President certified that he had forbidden their disclosure. The Comptroller General, interpreting the former statute as not incorporating a "public interest" exception permitting the President to withhold the documents from Congress, directed that funds not be made available to liquidate obligations incurred from the following day forward. The Attorney General concluded that the statute should be construed to include a "public interest" exception because, as applied under the circumstances, it would otherwise embody an unconstitutional condition. He based this conclusion in part on the reasoning that:

[20] *Quoted in id.* at 216–17.

[21] The invalidity of section 609 does not, of itself, undermine the validity of the Act as a whole, or cause any of its other provisions to fail.

[22] *Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller*, 41 Op. Att'y Gen. 507 (1960) (construing the Mutual Security Act of 1959, 73 Stat. 253).

> the Constitution does not permit any indirect encroachment by Congress upon this authority of the President through resort to conditions attached to appropriations such as are contended to be contained in . . . the act.[23]

Further, the Attorney General concluded that "the Comptroller General's view that the proviso . . . has cut off funds under the circumstances disclosed here is an erroneous interpretation of the meaning of this statute," and that "if this view of the Comptroller General as to the meaning of this statute is correct, the proviso is unconstitutional."[24] He stated that, despite the Comptroller General's view that appropriated funds had been cut off, the funds "continue to be available as heretofore."[25]

Accordingly, we conclude that funds elsewhere appropriated in the Act for State Department diplomatic activities abroad may lawfully be obligated or expended for diplomatic relations with the Government of Vietnam if those funds are otherwise available for that purpose, without the President's having to certify that Vietnam has met the conditions purportedly imposed by section 609.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

[23] *Id.* at 530.
[24] *Id.*
[25] *Id.* at 531.

Use of Federal Employees for Olympic Security

Where the teams and delegations visiting the United States for the Olympic Games in Atlanta have been designated "official guests" of the United States by the Secretary of State pursuant to §§ 112, 1116 and 1201 of the Criminal Code, those provisions authorize federal agencies to provide their employees to assist in security operations at the Atlanta Olympics upon request of the Attorney General.

May 17, 1996

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

This responds to your request for our opinion whether the provisions of §§ 112(f), 1116(d), and 1201(f) of the Criminal Code, 18 U.S.C. §§ 112(f), 1116(d), and 1201(f), authorize federal agencies, upon request of the Attorney General, to provide their employees to assist in security operations at the Atlanta Olympics. Under the circumstances presented, we conclude that they do.

I.

The City of Atlanta, Georgia, will host the 1996 Summer Olympics. The organizing entity for the Atlanta Games is the Atlanta Committee for the Olympic Games ("ACOG"), which will be working in close concert with the City of Atlanta in managing and facilitating the Summer Games. In light of the international attention focused on the games, the large number of athletes, spectators, and others who will be present at the games, and the tragic events of the Munich Olympics, federal and state authorities have focused on the importance and challenge of maintaining appropriate security.

Among other significant measures, we understand that, at ACOG's request, the Administration plans to provide approximately 1,000 federal employees to assist with security, principally the operation of metal and weapons detectors at various Olympic security checkpoints. To the extent permissible, eligible employees will be drawn from department and agency offices in the Atlanta area, including the Departments of Agriculture, Commerce, Education, Energy, Health and Human Services, Labor, Transportation, and Treasury; the General Services Administration; the Small Business Adminstration; the Social Security Administration; and the Office of Personnel Management.

For purposes of this memorandum, we assume that the Secretary of State will, in keeping with past practice, designate the Olympic delegations from the participating nations as "official guests" of the United States pursuant to §§ 112, 1116, and 1201 of the Criminal Code. *See* 18 U.S.C. §§ 112, 1116, and 1201; 22 C.F.R. §§ 2.2–2.5 (1996). Such designations would place these delegations under the coverage of special federal laws protecting foreign officials and "official guests" of the United States from murder, kidnapping, and assault. "In the course of en-

forcement" of these provisions, moreover, the Attorney General is authorized to "request assistance from any Federal, State, or local agency." *E.g.*, 18 U.S.C. § 1116(d).

We consider below whether, under these provisions, the Attorney General may seek, and whether federal agencies may provide, the 1,000 employees needed to assist with security at the Atlanta Olympics. For reasons discussed below, we conclude that they may do so. For purposes of this memorandum, we assume that federal agencies providing such requested assistance to the Attorney General would do so on a non-reimbursable basis. We suggest, however, that the Attorney General enter into a Memorandum of Understanding with each federal agency providing such assistance, recording the authority, scope, funding, and supervisory arrangements for the activities to be undertaken by such agency.

II.

In 1972, Congress enacted the Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. No. 92–539, 86 Stat. 1070 (1972) ("Official Guests Act" or "OGA"), which established three federal crimes of violence against official guests of the United States: 18 U.S.C. § 1116 covers murder, manslaughter, and attempted murder; 18 U.S.C. § 1201 covers kidnapping, abduction, and similar offenses; and 18 U.S.C. § 112 covers various forms of assault and the offering of violence. An "official guest" is defined as "a citizen or national of a foreign country present in the United States as an official guest of the Government of the United States pursuant to designation as such by the Secretary of State." *Id.* § 1116(b)(6).

Four years later, Congress enacted the Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons, Pub. L. No. 94–467, 90 Stat. 1997 (1976) ("IPPA" or "1976 Act"), which amended the above-described provisions. The IPPA was enacted, in turn, to implement two international conventions to which the United States was a signatory: the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 ("OAS Convention"); and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 28, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532 ("UN Convention"). In addition, the IPPA amended §§ 112, 1116, and 1201 to authorize the Attorney General to obtain the assistance of federal agencies and state and local governments in the enforcement of these criminal statutes.

Section 2 of the IPPA, now codified at 18 U.S.C. §§ 112(f), 1116(d), and 1201(f), provides (emphasis added):

> In the course of enforcement of [sections 112, 1116, and 1201 of the Criminal Code] and any other sections prohibiting a conspiracy or attempt to violate [those sections], *the Attorney General may request assistance from any Federal, State or local agency, including the Army, Navy, and Air Force, any statute, rule, or regulation to the contrary notwithstanding.*

In our view, this provision authorizes federal agencies to assist the Attorney General in responding to criminal offenses covered by the referenced statutes. Indeed, this Office has previously opined that the provision authorizes federal agencies (including the Armed Services) to respond to "terrorist activity, including hostage-taking, directed at . . . visiting Olympic athletes while they are in the United States." Memorandum for Paul R. Michel, Acting Deputy Attorney General, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Possible Use of Armed Forces in the Event of Terrorist Activity at the Lake Placid Olympics* at 1 (Feb. 5, 1980).[1]

The further question presented here is whether the IPPA authorizes the Attorney General to request assistance from federal agencies where no violation of the governing criminal statutes has yet occurred, but under circumstances in which there exists cause to believe that, without appropriate security, "official guests" of the United States might be at risk. That question primarily turns on the meaning of the phrase, "[i]n the course of enforcement" of §§ 112, 1116, and 1201 of the Criminal Code.

The starting point in interpreting this provision is, of course, the plain language of the statute. *See Ardestani v. INS*, 502 U.S. 129, 135 (1991). As this Office has previously noted, "[t]he concept of 'enforcement' is a broad one, and a given statute may be 'enforced' by means other than criminal prosecutions brought directly under it." *See Admissibility of Alien Amnesty Application Information in Prosecutions of Third Parties*, 17 Op. O.L.C. 172, 177 (1993). There, we further noted that, in the context of the statute at issue, the statutory authority to enforce a criminal provision included both "the prevention and punishment" of the underlying criminal conduct.[2] *Id.* We have also opined that a statute declaring it "unlawful . . . for any alien to depart from the United States except under" rules prescribed by the President provides the Attorney General with authority to "prevent" such departures by, for example, keeping individuals under surveillance and screening their contacts with others who might seek to coerce them to depart

[1] As noted in the 1980 opinion, the Secretary of State had designated the visiting Olympic athletes as "official guests of the United States" pursuant to the OGA. This opinion is based upon an assumption that the 1996 Olympic delegations will also be so designated.

[2] This broad understanding of the word "enforce" is reflected in dictionary definitions of the term as well. *See, e.g., The American Heritage Dictionary of the English Language* 433 (1st ed. 1976) (defining "enforce" to mean "1. To compel observance of or obedience to: enforce a regulation."); *Black's Law Dictionary* 528 (6th ed. 1991) (defining "enforcement" to mean "The act of putting something such as a law into effect; the execution of a law; the carrying out of a mandate or command.").

in violation of the law. *See Department of Justice Authority to Provide "Protective Custody" for Defectors*, 4B Op. O.L.C. 348, 353 (1980). In reaching this conclusion, moreover, we stressed that "law enforcement authorities customarily have great discretion to decide how to enforce the law." [3] *Id.*

A construction of the word "enforcement" that is broad enough to include preventive measures is also consistent with a variety of other federal statutes that define the phrase "law enforcement officer" to include those engaged in not only the apprehension and prosecution of those who have violated the law, but also "the prevention" of criminal violations.[4] Similarly, another federal statute defines "enforcement of the criminal laws" to include, among other things, "efforts to *prevent, control, or reduce crime.*" 5 U.S.C. § 552a(j)(2) (emphasis added).

When the phrase "in the course of enforcement" is placed in its statutory context, we are left with little doubt that it is properly read to include preventive, as well as responsive, crime control efforts. Significantly, the two acts at issue here are entitled the "Act for the *Protection* of Foreign Officials and Official Guests of the United States," 86 Stat. at 1070 (emphasis added), and the "Act for the *Prevention* and Punishment of Crimes Against Internationally Protected Persons," 90 Stat. at 1997, Preamble (emphasis added). In explicitly declaring their protective and preventive purposes, the titles of these statutes provide additional support for a broad interpretation of the term "enforcement" as used in IPPA's assistance provisions.[5] The 1976 Act, moreover, was expressly enacted "to implement the 'Convention to *Prevent* and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Significance' and the 'Convention on the *Prevention* and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.'" *Id.* (emphasis added). *See also CISPES v. FBI*, 770 F.2d 468, 472 (5th Cir. 1985).

[3] *See also* Memorandum for Wayne B. Colburn, Director, United States Marshals Service, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Law Enforcement Authority of Special Deputies Assigned to DOT to Guard Against Air Piracy* (Sept. 30, 1970). Relying on the Supreme Court's opinions in *In Re Neagle*, 135 U.S. 1 (1890) and *In Re Debs*, 158 U.S. 564 (1895), we there concluded: "It is our view that since the United States has jurisdiction to punish air piracy and related offenses, it likewise has inherent authority to take reasonable and necessary steps to prevent these offenses." *Id.* at 2.

[4] *See, e.g.* (emphasis added throughout), 18 U.S.C. § 115(c)(1) ("'Federal law enforcement officer' means any officer, agent, or employee of the United States authorized by law or by a Government agency to engage in or supervise the *prevention*, detection, investigation, or prosecution of any violation of Federal criminal law"); 18 U.S.C. § 3592(c)(14) ("For purposes of this subparagraph, a 'law enforcement officer' is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the *prevention*, investigation, or prosecution or adjudication of an offense"); 18 U.S.C. § 3673 ("the term 'law enforcement officer' means a public servant authorized by law or by a government agency to engage in or supervise the *prevention*, detection, investigation, or prosecution of an offense"); 42 U.S.C. § 3796dd–8 ("'career law enforcement officer' means a person hired on a permanent basis who is authorized by law or by a State or local public agency to engage in or supervise the *prevention*, detection, or investigation of violations of the criminal laws").

[5] It is well-recognized that the title of a statute can provide useful evidence of legislative intent in interpreting the statute. *See INS v. National Ctr. for Immigration Rights, Inc.*, 502 U.S. 183, 189 (1991); 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.03 (5th ed. 1992) ("Since the title of an act is essentially a part of the act and is itself a legislative expression of the general scope of the bill, it is proper to consider it in arriving at the intent of the legislature.").

Those international conventions, moreover, clearly impose an obligation on signatory states not simply to punish those who commit acts of violence against protected persons, but also to prevent such violence from occurring in the first place. Article 4 of the UN Convention, for example, provides in relevant part:

> States Parties shall co-operate in the *prevention* of the crimes set forth in article 2 [i.e., those crimes covered by the statutes in issue here], particularly by:
>
> (a) taking *all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories*;
>
> (b) exchanging information and co-ordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes.

28 U.S.T. at 1979 (emphasis added). The OAS Convention makes similar provision.[6]

The language and statutory context of the IPPA thus provide persuasive support for the view that its provisions should be understood to authorize the Attorney General to take "practicable measures" to prevent the commission of violent crimes against "official guests" of the United States.[7]

III.

A.

The legislative history of the OGA and IPPA further confirms our view that the Attorney General may request assistance from any federal agency in both preventing and punishing acts of violence against Olympic delegations visiting the United States. As originally drafted, the OGA covered only "foreign officials."

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[6] Article 1 of the OAS Convention provides:

> The contracting states undertake to cooperate among themselves by taking all measures that they may consider effective, under their own laws, and especially those established in this convention, to *prevent and punish* acts of terrorism, especially kidnapping, murder, and other assaults against the life or physical integrity of those persons to whom the state has the duty according to international law to give special protection, as well as extortion in connection with those crimes.

27 U.S.T. at 3958 (emphasis added).

[7] It might be argued that the broad preventive obligations of the two conventions do not necessarily apply to the "official guests" covered by the implementing criminal statutes because official guests are protected under those statutes but not under the conventions themselves. Such an argument fails because Congress explicitly intended for designated "official guests" to receive the same protections extended to persons protected under the conventions. *See* S. Rep. No. 92–1105, at 7, 9, 15 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4316, 4318, 4324–25 ("1972 Senate Report"); H.R. Rep. No. 94–1614, at 5–6 (1976), *reprinted in* 1976 U.S.C.C.A.N 4480, 4483–84 ("1976 House Report").

A series of amendments introduced in the Senate Judiciary Committee, however, expanded the Act to encompass crimes against "official guests" of the United States. The legislative history of these amendments makes clear that they were intended to help "protect" members of an "Olympic contingent" visiting the United States.[8] The Senate Report on the 1972 legislation, for example, contained the following description of the Judiciary Committee amendments that extended the Act's protection to "official guests":

> The first series of committee amendments extend this umbrella of Federal protection to other "official guests" of the United States as designated by the Secretary of State so as to authorize expanded *protective*, investigative and other law enforcement services for the benefit of private citizens visiting our country pursuant to official recognition by the United States.

1972 Senate Report at 7, *reprinted in* 1972 U.S.C.C.A.N. at 4316 (emphasis added).

The Report went on to detail the remarks of Senator McClellan in introducing the amendment that extended the Act's coverage of official guests. *Id.* at 9, *reprinted in* 1972 U.S.C.C.A.N. at 4318–19. As Senator McClellan explained:

> The bill under consideration recognizes that the *United States as a host country has particular responsibility to protect the person and property of "foreign officials", including ambassadors, agents, employees and their families while such persons are present within our territorial confines.* However, the measure would not offer any expanded protection for foreign citizens, who might visit our shores as official guests of our country as members of an Olympic contingent.
>
> . . . .
>
> The amendment I propose will *extend the umbrella of Federal protection to cover "official guests" of the United States as designated by the Secretary of State so as to include visiting athletes in international competition.*

Id. (emphasis added).

[8] The Act was amended to include "official guests" in response to the kidnapping and murder of Israeli athletes at the Munich Olympic games. 1972 Senate Report at 9, *reprinted in* 1972 U.S.C.C.A.N. at 4318–19. In light of the protective purpose repeatedly stressed in the legislative history, it is unlikely that Congress intended only to provide federal law enforcement with authority to respond to such an attack after the fact, but not to take steps, such as screening for weapons, to prevent an attack in the first place.

B.

Section 2 of the IPPA added the provision authorizing the Attorney General to request the assistance of federal agencies and state governments "in the course of enforcement" of the substantive provisions of the act. The House and Senate Reports provide only terse explanation of this provision, stating that "[t]he legislation amends section 1116 [the murder and manslaughter provision] of title 18, United States Code, to authorize the Attorney General to request assistance from any federal, state or local agency in the course of enforcing the provisions of section 1116." 1976 House Report at 5, *reprinted in* 1976 U.S.C.C.A.N. at 4483 (footnote omitted). A footnote appended to the foregoing sentence, however, explains: "There may be circumstances—such as the takeover of an embassy—when the Justice Department will need assistance from other federal, State or local agencies." *Id.* at n.7, *reprinted in* 1976 U.S.C.C.A.N. at 4483. This sentence provides further evidence that Congress intended the Attorney General to obtain assistance for preventive, as well as prosecutorial, enforcement of the covered statutes. Significantly, it cites the takeover of an embassy as a situation in which assistance may be provided in the enforcement of § 1116—which prohibits *murder* and *manslaughter* of the protected persons. The takeover of an embassy, however, does not necessarily involve the commission of murder or manslaugter of a protected person; rather, it presents a situation where enhanced resources are necessary to *prevent* the commission of such crimes.

In addition to the foregoing, President Ford's statement on signing the IPPA stressed that "[*p*]*reventing* or punishing" acts of international terrorism "is a prime concern of this Government." 3 Pub. Papers of Gerald Ford 2479 (1976). The President further stated:

> The Act for the Prevention and Punishment of Crimes Against Internationally Protected Persons (H.R. 15552) will serve as a significant law enforcement tool for us to deal more effectively with the menace of terrorism, and it will assist us in discharging our important responsibilities under the two international conventions which I am today authorizing for ratification.

Id. at 2480. As shown above, the *prevention* of crimes against protected persons is among the United States' "responsibilities" under the conventions, and therefore under the Act as well.

IV.

In a 1980 Opinion, this Office concluded that the IPPA does not authorize the Attorney General to obtain the assistance of the Armed Forces "to protect foreign

dignitaries . . . present in New York for [an] opening session of the United Nations." *See* Memorandum for Paul R. Michel, Associate Deputy Attorney General, from Larry L. Simms, Deputy Assistant Attorney General, *Re: Request for Assistance to Protect Foreign Dignitaries* (Sept. 11, 1980). The 1980 opinion expressed the view that the Act was adopted to discharge our obligation under the two international conventions discussed above, but read those conventions to require only that signatories either extradite or prosecute those found within their territory who have committed an offense against an internationally protected person. The opinion, accordingly, concluded that the IPPA does not authorize the Attorney General to request assistance from the Armed Forces or any other agency "to provide protective custody or other routine assistance to foreign officials in the absence of an imminent or actual criminal offense." *Id.* at 2. Finally, the opinion conceded that "enforcement and protection responsibilities" will at times overlap, but concluded that, absent an "actual threat or imminent harm," these responsibilities are distinguishable and that it is not appropriate to use the Act to provide purely "protective service." *Id.* at 3.

For the reasons discussed above, we do not read the IPPA or the international conventions that it implemented as narrowly as did the 1980 opinion. To the contrary, it appears that the conventions and the IPPA were intended not simply to provide the Attorney General with the power to prosecute crimes of violence committed against "official guests" of the United States, but also to take "practicable measures to prevent preparation[]" for such violent acts. *See, e.g.*, Article 4, Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 28 U.S.T. at 1979. In our view, the operation of metal and weapons detectors at the Olympic games constitutes a good example of the type of reasonable steps that might be taken to prevent the ultimate preparation for the commission of a violation of §§ 112, 1116, and 1201 of the Criminal Code. To the extent the 1980 opinion is inconsistent with this view, that opinion is hereby superseded.

Finally, we note that even the 1980 opinion seems to recognize that the Attorney General may request the assistance of federal agencies under the IPPA in responding to an actual threat. We understand that some generalized threats of violence have been directed at the Atlanta Olympics. The Attorney General has "great discretion to decide how to enforce the law," 4B Op. O.L.C. at 353, and is, in our view, best suited to determine the appropriate response to these threats. Indeed, even without an express and tangible threat, the Attorney General might reasonably conclude that history (e.g., the tragic precedent of Olympic terrorism created at the Munich Olympic Games of 1972), world events, and other pertinent background information give rise to a "threat" of violence at the Olympic Games. Thus, even under the more restrictive view of the IPPA articulated in the 1980

opinion, we believe that the Attorney General has authority to request the assistance of other federal agencies under the circumstances described above.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Relocation Deadline Provision Contained in the 1996 Omnibus Consolidated Rescissions and Appropriations Act

Requirement in the Appropriations Act that the United States Information Agency relocate the Office of Cuba Broadcasting to south Florida by a date almost a month before the Act was signed into law constitutes a technical or typographical error, and USIA is entitled to obligate the funds appropriated in the provision, even though it is unable to turn back the clock and comply with the provision's literal deadline.

May 21, 1996

MEMORANDUM OPINION FOR THE CHAIRMAN
BROADCASTING BOARD OF GOVERNORS

This is in response to your request for advice concerning the interpretation of a provision contained in title IV of the Omnibus Consolidated Rescissions and Appropriations Act, Pub. L. No. 104–134, 110 Stat. 1321, 1321–43 (1996) ("Act") (the provision at issue is herein referred to as "the provision"). *See* Letter for Walter E. Dellinger, Assistant Attorney General, Office of Legal Counsel, from David W. Burke, Chairman, Broadcasting Board of Governors (May 2, 1996). Specifically, you have asked whether the United States Information Agency ("USIA") is entitled at this time to spend monies appropriated under the provision, whether the provision requires the relocation of the Office of Cuba Broadcasting's ("OCB") headquarters to south Florida, and whether the accounts cited in the provision as being available to finance the relocation are currently available for that purpose.

The provision provides a fiscal year 1996 appropriation to USIA to carry out activities authorized under various public laws relating to international broadcasting by the United States. The provision states in pertinent part:

> For expenses necessary to enable the United States Information Agency to carry out the Radio Broadcasting to Cuba Act, as amended, the Television Broadcasting to Cuba Act, and the International Broadcasting Act of 1994 . . . $24,809,000 . . . *Provided, That not later than April 1, 1996, the headquarters of the Office of Cuba Broadcasting shall be relocated from Washington, D.C. to south Florida*, and that any funds available under the headings "International Broadcasting Operations," "Broadcasting to Cuba," and "Radio Construction" may be available to carry out this relocation.

Pub. L. No. 104–134, 110 Stat. at 1321–43 (emphasis added).

As your letter makes clear, because the Act was signed into law on April 26, 1996, almost one month after the date upon which OCB's headquarters must be

relocated to south Florida under the literal terms of the provision's relocation deadline, these literal terms cannot be satisfied. For the reasons stated below, however, we conclude that USIA is at this time nevertheless entitled to spend funds appropriated under the provision. In addition, we conclude that the relocation of OCB's headquarters to south Florida is mandatory under the appropriation. Finally, we conclude that, despite USIA's inability to comply with the literal terms of the provision's relocation deadline, it may at this time access funds contained in the International Broadcasting Operations, Broadcasting to Cuba, and Radio Construction accounts in order to cover expenses associated with relocating OCB's headquarters to south Florida. These conclusions are premised on observance of the statutory mandate to relocate OCB's headquarters to south Florida. We decline to address at this time, however, the time period within which the relocation must be accomplished.

II. *Discussion*

The pre-eminent principle of statutory interpretation, as most recently expressed by the Supreme Court, is that where Congress has "spoken to the precise question at issue," agencies and courts are bound by the terms of the statute as written. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). Here, the appropriations provision under review speaks plainly and precisely, imposing an April 1, 1996 deadline on the relocation of OCB's headquarters to south Florida. We conclude, however, that the exceptional aspects of this provision and its enactment history justify a narrow exception to the principle enunciated in *Chevron* to correct what manifestly appears to be a technical or clerical error.

According to a General Accounting Office ("GAO") treatise on Appropriations law:

> A statute may occasionally contain what is clearly a technical or typographical error which, if read literally, could alter the meaning of the statute or render execution effectively impossible. In such a case, if the legislative intent is clear, the intent will be given effect over the erroneous language.

1 Office of the General Counsel, United States General Accounting Office, *Principles of Federal Appropriations Law* 2–74 (2d ed. 1991). Courts have embraced the GAO's view regarding such statutes. In *Fleming v. Salem Box Co.*, 38 F. Supp. 997 (D. Or. 1940), the court gave effect to what it determined to be the true intent of Congress when confronted with a clerical error that, if adhered to, could not have been reconciled with the statute's legislative history. The court stated that "[a] palpable clerical error clearly shown should not override legisla-

tive intention." *Id.* at 998. In *Ronson Patents Corp. v. Sparklets Devices, Inc.*, 102 F. Supp. 123 (E.D. Mo. 1951), the court determined that a statute extending the term of a patent was not invalid despite the existence of an error in the patent's reissue date. According to the court, "if the error in a legislative act is apparent on the face of the act and can be corrected by other language of the act, it is not fatal." *Id.* at 124.[1] The fact that the provision's literal terms require USIA to satisfy a condition that is beyond the realm of possibility strongly suggests that the provision contains an error of the type contemplated by the "technical or clerical error" line of cases.

The "technical or clerical error" doctrine directs courts, when necessary, to look beyond a statute's literal language to the statute's legislative history to fashion an interpretation that is consistent with Congress's intention in passing the statute. We will, therefore, attempt such an exercise with respect to the provision's April 1, 1996 relocation deadline. Our research reveals that Senator Gramm initially introduced the requirement that OCB's headquarters be relocated to south Florida by April 1, 1996 as an amendment to the Senate's version of H.R. 2076, the Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1996. 141 Cong. Rec. S14,539–40 (daily ed. Sept. 28, 1995).[2] On September 28, 1995, the same day the amendment was introduced, it was incorporated by unanimous consent into the version of H.R. 2076 then pending before the Senate. *Id.* at S14,540. On the following day, September 29, 1995, the Senate passed its version of H.R. 2076, as amended. *Id.* at S14,697 (daily ed. Sept. 29, 1995).

A slightly modified version of Senator Gramm's amendment emerged from conference with the House of Representatives, *see* 141 Cong. Rec. H13,885 (daily ed. Dec. 4, 1995), and was included in the version of H.R. 2076 that was passed by both houses of Congress on December 6 and 7, 1995. *Id.* at H14,112 (daily ed. Dec. 6, 1995); *id.* at S18,182–83 (daily ed. Dec. 7, 1995). The relocation language that emerged from conference and was approved by both houses as part of H.R. 2076 was identical to the relocation language contained in the provision. In describing the relocation language that emerged from the conference on H.R. 2076, the joint explanatory statement on the conference agreement stated:

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[1] Although the Supreme Court has not had an occasion to review a decision regarding technical or clerical errors of this kind, it has acknowledged that *Chevron's* teaching with regard to the literal meaning of a statute is subject to some exceptions. Recognizing in *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 510 (1989), that a literal interpretation of Fed. R. Evid. 609(a)(1) would cause an "unfathomable" result (i.e., the "den[ial to] a civil plaintiff [of] the same right to impeach an adversary's testimony that [the rule] grants to a civil defendant"), it held that the rule should be read in a manner consistent with Congress's intention in enacting it, which requires that the word "defendant" be interpreted to refer solely to "criminal" defendants. 490 U.S. at 521.

[2] The amendment introduced by Senator Gramm modified H.R. 2076 to add the following language to the section appropriating funds for Broadcasting to Cuba:

> ". *Provided further*, That not later than April 1, 1996, the headquarters of the Office of Cuba Broadcasting shall be relocated from Washington, D.C. to south Florida, and that any funds available to the United States Information Agency may be available to carry out this relocation."

Id. at S14,558.

> The conference agreement includes $24,809,000 for Broadcasting to Cuba under a separate account, as proposed by the Senate, instead of within the total for International Broadcasting Operations, as proposed by the House.
>
> The agreement also includes language requiring the relocation of the headquarters of the Office of Cuba Broadcasting from Washington, D.C., to south Florida by April 1, 1996, and permits funds from three accounts, International Broadcasting Operations, Broadcasting to Cuba, and Radio Construction, to be used to carry out the relocation. The Senate bill proposed the relocation, but allowed any USIA funds to be used to carry out the relocation. The House bill contained no similar provision.

141 Cong. Rec. H13,923 (daily ed. Dec. 4, 1995); H.R. Conf. Rep. No. 104–378, at 148–49 (1995).

Because the President vetoed H.R. 2076, *see* 141 Cong. Rec. D1491 (daily ed. Dec. 19, 1995), and Congress was unable to override his veto, H.R. 2076 was never enacted. Subsequently Congress and the President reached agreement on the bulk of the fiscal year 1996 appropriations that were originally included in H.R. 2076, and these appropriations and other provisions from H.R. 2076 were included in H.R. 3019. H.R. 3019 contained H.R. 2076's relocation language, with no adjustment in the relocation date. On April 25, 1996, the House and Senate passed H.R. 3019 with this language in it, including the April 1, 1996 relocation deadline, *see* 142 Cong. Rec. 9141 (1996); *id.* at 9218, and President Clinton signed it on April 26, 1996. *See* 142 Cong. Rec. D386 (daily ed. Apr. 29, 1996).

On the basis of the original passage of H.R. 2076 on December 6 and 7, 1995, Congress intended OCB's headquarters to be relocated to south Florida, was willing to allow funds contained in USIA's International Broadcasting Operations, Broadcasting to Cuba, and Radio Construction accounts to finance the relocation, and was prepared to allow approximately four months for the relocation to be accomplished. The retention of the relocation and related language in H.R. 3019 indicates that Congress's intention as to the relocation and its financing had not changed in the intervening period between December, 1995 and the passage of H.R. 3019, and there is no other evidence of any kind to suggest that it had changed. The manifest intention of Congress, thus, is that OCB's headquarters be relocated by *some* date, that the relocation be financed through the USIA accounts specified above, and that the relocation be a condition on the expenditure of certain appropriated funds. Under these circumstances, we believe the retention of the April 1, 1996 relocation deadline—compliance with which had become a temporal impossibility by the provision's date of enactment—was the result

of a technical error in failing to revise the relocation deadline prior to the passage of H.R. 3019.

Finally, in many other cases of correcting a technical or clerical error, a substitute for the erroneous term is obvious or apparent from the context. *Cf. Appropriations to Pay Supervisiors of Election*, 1 Comp. Dec. 1 (1894) (holding that an appropriation providing funds in connection with an election held on November "5th," 1890 could be used to make payments associated with an election held on November 4, 1890, where it was clear that November "5th" was a typographical error and Congress intended to make the funds available to support the November 4 election). Here, several plausible alternatives seem available. In this circumstance, we leave to USIA, the agency administering the appropriation in the first instance, the responsibility for determining a compliance date that is consistent with Congress's intention.

II. *Conclusion*

Based on the foregoing, we conclude that USIA is entitled at this time to obligate the funds appropriated in the provision, even though it is unable to turn back the clock and comply with the provision's literal deadline for relocating OCB's headquarters to south Florida. We also conclude that the relocation of OCB's headquarters to south Florida is mandatory under the appropriation. Finally, we conclude that USIA may use funds available under the account headings specified in the provision to finance the relocation.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Involvement of the Government Printing Office in Executive Branch Printing and Duplicating

Section 207(a) of the Legislative Branch Appropriations Act, 1993, as amended, which requires all executive branch printing to be procured by or through the Government Printing Office, vests executive functions in an entity subject to congressional control and is therefore unconstitutional under the doctrine of separation of powers.

Agency contracting officers who act consistently with this opinion, and in derogation of the contrary view of the Comptroller General, would face little or no risk of civil, criminal, or administrative liability.

May 31, 1996

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

You have asked us to analyze the constitutional implications of the involvement of the Government Printing Office ("GPO") in executive branch printing and duplicating under the authority of section 207(a) of the Legislative Branch Appropriations Act, 1993, Pub. L. No. 102–392, 106 Stat. 1703, 1719 (1992) (codified at 44 U.S.C. § 501 note) ("1993 Act"), which was recently amended by section 207(2) of the Legislative Branch Appropriations Act, 1995, Pub. L. No. 103–283, 108 Stat. 1423, 1440 (1994) ("1995 Act").[1] You have also posed a more general question as to "whether GPO may undertake any decision-making role in printing for the Executive Branch." While we have previously expressed our tentative view that such legislative branch involvement in executive branch affairs would contravene separation of powers principles,[2] we now face the issue in the context of a specific congressional enactment investing in the GPO the authority to control a significant proportion of executive branch printing and duplicating. *See* 44 U.S.C. § 501 note. We find that the GPO is subject to congressional control, and conclude that the GPO's extensive control over executive branch printing is unconstitutional under the doctrine of separation of powers. Finally, we make various observations about potential liability of contracting officers who act consistently with this opinion but contrary to the Comptroller General's view, which we reject.

[1] Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Emily C. Hewitt, General Counsel, General Services Administration (Aug. 23, 1994).

[2] *See, e.g.*, Memorandum for Sheila F. Anthony, Assistant Attorney General, Office of Legislative Affairs, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Government Printing Provisions in H.R. 3400 and S. 1824* (Apr. 1, 1994) (separation of powers violation would occur if Public Printer received power to control printing and duplicating operations in executive and judicial branches).

I

In the early years of the Republic, Congress endeavored to devise a satisfactory contract-based system for printing its official documents. In 1846, for example, Congress established an orderly contract process "for supplying the Senate and House of Representatives . . . with the necessary printing for each[.]" J. Res. of Aug. 3, 1846, § 1, 29th Cong., 9 Stat. 113, 113. Printing projects "of the respective houses" were divided into classes for which the Secretary of the Senate and the Clerk of the House of Representatives accepted sealed bids. *Id.* The 29th Congress further established a committee on printing "consisting of three members of the Senate and three members of the House." *Id.* § 2, 9 Stat. at 114. The committee on printing was entrusted with "[the] power to adopt such measures as may be deemed necessary to remedy any neglect or delay on the part of the [chosen low-bid] contractor to execute the work ordered by Congress, and to make a *pro rata* reduction in the compensation allowed, or to refuse the work altogether, should it be inferior to the standard[.]" *Id.*

The contract system devised in 1846 apparently proved unsatisfactory. The 32d Congress revisited the subject of public printing only six years later and added structure and oversight to the basic framework established in 1846. *See* Act of Aug. 26, 1852, ch. 91, 32d Cong., 10 Stat. 30. The 32d Congress created the position of "superintendent of the public printing," set qualification requirements for the position,[3] and directed the superintendent of the public printing to serve as a clearinghouse for the printing projects of the Congress and the departments and bureaus of the executive branch. *Id.* § 3, 10 Stat. at 31. Congress chose to retain the contract-based approach to printing, however, and assigned to the superintendent of the public printing the tasks of soliciting bids for public printing work and delivering the materials submitted by Congress and the executive branch "to the public printer or printers in the order in which it shall be received, unless otherwise ordered by the joint committee on printing." *Id.* §§ 3–4, 10 Stat. at 31.

The 32d Congress also provided for the election of "a public printer for each House of Congress, to do the public printing for the Congress for which he or they may be chosen, and such printing for the executive departments and bureaus of the government of the United States as may be delivered to him or them to be printed, by the superintendent of the public printing." *Id.* § 8, 10 Stat. at 32. Congressional dissatisfaction with the slow pace of public printing was manifest. The 32d Congress set a 30-day deadline for each public printing project, *id.* § 5, and expressly stated that "the public printer or printers may be required by the superintendent [of the public printing] to work at night as well as through the

[3] Congress explained that the "superintendent shall be a practical printer, versed in the various branches of the arts of printing and book-binding, and he shall not be interested directly or indirectly in any contract for printing for Congress or for any department or bureau of the government of the United States." Act of Aug. 26, 1852, § 2, 10 Stat. at 31.

day upon the public printing, during the session of Congress, when the exigencies of the public service require it." *Id.* § 10, 10 Stat. at 34. Finally, the 32d Congress created the Joint Committee on the Public Printing to resolve disputes "between the superintendent of the public printing and the public printer," *id.* § 12, 10 Stat. at 34, and "to adopt such measures as may be deemed necessary to remedy any neglect or delay in the execution of the public printing" of the Congress. *Id.* § 12.

In 1860, Congress completely overhauled the public printing system. J. Res. of June 23, 1860, 36th Cong., 12 Stat. 117. The 36th Congress "authorized and directed" the superintendent of public printing "to have executed the printing and binding authorized by the Senate and House of Representatives, the executive and judicial departments, and the Court of Claims." *Id.* § 1, 12 Stat. at 117. More importantly, the 36th Congress completely abandoned the contract printing system by creating the GPO.[4] Specifically, the 36th Congress granted the superintendent of public printing sweeping authority to contract for "the necessary buildings, machinery, and materials" and to hire all "hands necessary to execute the orders of Congress and of the executive and judicial departments, at the city of Washington." *Id.* §§ 1–2; *see also United States v. Allison*, 91 U.S. 303, 304 (1875) ("This resolution dispensed with the public printers appointed by the two Houses of Congress, and placed the whole subject of public printing in charge of the superintendent."). At that point in time, the GPO was simply conceptualized as a more expeditious and less partisan alternative to the existing contract system of public printing. *See Applicability of Post-Employment Restrictions on Dealing with Government to Former Employees of the Government Printing Office*, 9 Op. O.L.C. 55, 56–57 (1985).

The 39th Congress tightened the legislative branch's control over the GPO by creating the office of "Congressional printer" and abolishing the position of superintendent of public printing. Act of Feb. 22, 1867, ch. 59, §§ 1–3, 14 Stat. 398–99. *See also Allison*, 91 U.S. at 306 (Congressional Printer "was given the same powers as the superintendent of public printing"). Under the terms of the 1867 enactment, the Senate was empowered to "elect some competent person, who shall be a practical printer, to take charge of and manage the government printing office." Act of Feb. 22, 1867, § 1, 14 Stat. at 398. The Congressional Printer was "deemed an officer of the Senate," *id.* § 2, and was directed to "superintend the execution of all the printing and binding for the respective departments of the government *now required by law to be executed at the government printing office.*" *Id.* (emphasis added). Thus, the 39th Congress not only declared that the head of the GPO was its own officer, but also set forth its assumption that the executive branch was obligated to submit printing and binding projects to the GPO.

[4] Congress chose to retain the contract system for obtaining "all paper which may be necessary for the execution of the public printing[.]" J. Res. of June 23, 1860, § 7, 12 Stat. at 118.

In 1895, Congress consolidated the GPO's control over public printing but changed the method for selecting the head of the GPO. Act of Jan. 12, 1895, ch. 23, 53d Cong., 28 Stat. 601 ("1895 Act"). In section 17 of the 1895 Act, Congress created the position of Public Printer and prescribed an appointment process modeled after the Appointments Clause, U.S. Const. art. II, §2, cl. 2: "The President of the United States shall nominate and, by and with the advice and consent of the Senate, appoint a suitable person, who must be a practical printer and versed in the art of bookbinding, to take charge of and manage the Government Printing Office." 1895 Act, § 17, 28 Stat. at 603.[5]

The 1895 Act extended the exclusive domain of the Public Printer to virtually all printing operations throughout the entire federal government. Specifically, section 87 of the 1895 Act decreed that "[a]ll printing, binding, and blank books for the Senate or House of Representatives and for the Executive and Judicial Departments shall be done at the Government Printing Office, except in cases otherwise provided by law." *Id.* §87, 28 Stat. at 622. Additionally, section 31 of the 1895 Act dictated that "all printing offices in the Departments now in operation, or hereafter put in operation, by law, shall be considered a part of the Government Printing Office, and shall be under the control of the Public Printer[.]" *Id.* §31, 28 Stat. at 605. Finally, section 31 stated that "all persons employed in said printing offices and binderies [in the Departments] shall be appointed by the Public Printer, and be carried on his pay roll the same as employees in the main office, and shall be responsible to him[.]" *Id.* Thus, in the 1895 Act, Congress took the position that the GPO controlled virtually all printing and binding work in all three branches of the federal government.

The 65th Congress used an appropriations bill passed in 1919 to make explicit what had been implicit in prior public printing legislation: the GPO was subordinated to the Joint Committee on Printing, which effectively controlled the allocation of the printing and binding work of the executive and judicial branches. *See* Act of Mar. 1, 1919, Pub. L. No. 65–314, §11, 40 Stat. 1213, 1270 ("1919 Act"). Section 11 of the 1919 Act granted to the Joint Committee on Printing the "power to adopt and employ such measures as, in its discretion, may be deemed necessary to remedy any neglect, delay, duplication, or waste in the public printing and binding and the distribution of Government publications[.]" *Id.* Moreover, the 1919 Act mandated that "on and after July 1, 1919, all printing, binding, and blank-book work for Congress, the Executive Office, the judiciary, and every executive department, independent office, and establishment of the Government, shall be done at the Government Printing Office[.]" *Id.* The 65th Congress provided for only one exception to the rigid rule that all printing must be performed by the GPO: "such classes of work as shall be deemed by the Joint Committee on Printing to be urgent or necessary to have done elsewhere than in the District

[5] *Cf.* U.S. Const. art. II, §2, cl. 2 (President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint" Officers of the United States).

of Columbia for the exclusive use of any field service outside of said District." *Id.*

One year after Congress passed the 1919 Act, President Wilson took action to curtail the expanding role of the Joint Committee on Printing. "On May 13, 1920, President Wilson vetoed an appropriation Act on the ground that it contained a proviso that certain documents should not be printed by any executive branch or officer except with the approval of the Joint Committee on Printing." *Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. 56, 62 (1933) ("*Legislation Affecting Tax Refunds*"). In explaining his decision to veto the bill, President Wilson offered the following comments:

> I regard the provision in question as an invasion of the province of the Executive and calculated to result in unwarranted interference in the processes of good government, producing confusion, irritation, and distrust. The proposal assumes significance as an outstanding illustration of a growing tendency which I am sure is not fully realized by the Congress itself and certainly not by the people of the country.

Id. at 62–63 (quoting veto message of President Wilson). Thus, despite initial executive branch acquiescence in the involvement of the GPO in the printing work of executive departments and bureaus, the executive branch promptly objected to the explicit insertion of the Joint Committee on Printing into executive functions.

In 1949, Congress reaffirmed that "all printing, binding, and blank-book work" for the executive and judicial branches had to be done at the GPO unless the Joint Committee on Printing authorized some other arrangement. Act of July 5, 1949, Pub. L. No. 81–156, 63 Stat. 405, 406. The 81st Congress, however, expressly exempted the Supreme Court of the United States from this requirement,[6] *id.*, thereby effectively minimizing the influence of the legislative branch with respect to judicial branch printing. The 81st Congress offered no justification for treating the printing projects of the executive and judicial branches differently, but did indicate generally that the legislation was intended "to modify the law in order to permit essential Government printing to be produced in the best interest of the Government." H.R. Rep. No. 81–841, at 1 (1949), *reprinted in* 1949 U.S. Code Cong. Serv. 1515, 1515. Although the 81st Congress conceded "that obvious savings of time and expense can be effected by producing much printing within the area where use is required," approval of such action by the Joint Committee on Printing remained a prerequisite for all executive branch printing "within the area where use is required." *Id.*

[6] The printing of the Supreme Court traditionally had been treated in a different manner than executive and legislative branch printing. *See Supreme Court Expenses*, 8 Op. Att'y Gen. 219, 222 (1856).

The modern legislative scheme governing public printing was enacted in 1968 by the 90th Congress, which produced an act collecting all of the public printing provisions in title 44 of the United States Code.[7] *See* Act of Oct. 22, 1968, Pub. L. No. 90–620, 82 Stat. 1238 ("1968 Act"). The 1968 Act purported "to restate in comprehensive form, without substantive change, the statutes in effect on January 14, 1968, relating to public printing and documents[.]" S. Rep. No. 90–1621, at 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. at 4438–39. Therefore, the initial version of title 44 contained the requirement that "[a]ll printing, binding, and blank-book work for Congress, the Executive Office, the Judiciary, other than the Supreme Court of the United States, and every executive department, independent office and establishment of the Government, shall be done at the Government Printing Office[.]" 1968 Act, § 501, 82 Stat. at 1243. Likewise, the two exceptions to this rule remained in place: (1) "classes of work the Joint Committee on Printing considers to be urgent or necessary to have done elsewhere"; and (2) "printing in field printing plants operated by an executive department, independent office or establishment, and the procurement of printing by an executive department, independent office or establishment from allotments for contract field printing, if approved by the Joint Committee on Printing." *Id.* In other words, all executive branch printing had to be performed at the GPO unless the Joint Committee on Printing authorized some other arrangement.

Once Congress collected and codified all of the public printing provisions in title 44, few changes in the statutory scheme took place for several decades. In 1990, however, the 101st Congress reinforced the GPO's monopoly on executive branch printing with a public printing provision inserted in the Legislative Branch Appropriations Act, 1991, Pub. L. No. 101–520, 104 Stat. 2254 (1990) ("1991 Act"). Section 206 of the 1991 Act foreclosed the use of federal funds in most instances to procure printing from any commercial source unless the GPO was involved in the transaction. *Id.* § 206, 104 Stat. at 2274. The "printing" subject to this restriction included "the process of composition, platemaking, presswork, binding, and microform, and the end items of such processes." *Id.* § 206(c).

Two years later, the 102d Congress used another legislative branch appropriations act to broaden the language of the provision prohibiting public printing by commercial sources without the involvement of the GPO. *See* Legislative Branch Appropriations Act, 1993, Pub. L. No. 102–392, § 207, 106 Stat. 1703, 1719–20 (1992) ("1993 Act"). The 1993 Act expanded the proscription to include the expenditure of any funds appropriated in any fiscal year for any printing from any source other than the GPO. *Id.* § 207(a)(1), 106 Stat. at 1719. The 1993 Act also added "silk screen processes" to the definition of "printing," *id.* § 207(a)(3), 106 Stat. at 1720, thereby enlarging the scope of the GPO's exclusive domain.

[7] The public printing initiative resulted from congressional concern that "many laws ha[d] been enacted" affecting the printing scheme set forth in the 1895 Act, but these laws had not uniformly amended the 1895 Act, "with the result that the body of printing laws ha[d] grown haphazardly." S. Rep. No. 90–1621, at 1 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4438, 4439.

Congress's effort to accord the GPO control over executive branch printing reached its zenith in 1994 with the passage of the Legislative Branch Appropriations Act, 1995, Pub. L. No. 103–283, 108 Stat. 1423 (1994) ("1995 Act"). Section 207(2) of the 1995 Act expanded the definition of "printing" subject to GPO control to include "duplicating." *Id.* § 207(2), 108 Stat. at 1440. Thus, the principal statutory provision restricting executive branch printing,[8] which is codified at 44 U.S.C. § 501 note currently reads as follows:

> (1) None of the funds appropriated for any fiscal year may be obligated or expended by any entity of the executive branch for the procurement of any printing related to the production of Government publications (including printed forms), unless such procurement is by or through the Government Printing Office.
>
> (2) Paragraph (1) does not apply to (A) individual printing orders costing not more than $1,000, if the work is not of a continuing or repetitive nature, and, as certified by the Public Printer, if the work is included in a class of work which cannot be provided more economically through the Government Printing Office, (B) printing for the Central Intelligence Agency, the Defense Intelligence Agency, or the National Security Agency, or (C) printing from other sources that is specifically authorized by law.
>
> (3) As used in this section, the term "printing" includes the processes of composition, platemaking, presswork, duplicating, silk screen processes, binding, microform, and the end items of such processes.

Although President Clinton approved the 1995 Act, he issued a signing statement that expressed serious concerns about the ever-increasing "involvement of the Public Printer and the Government Printing Office in executive branch printing related to the production of Government publications." Statement by President William J. Clinton Upon Signing the Legislative Branch Appropriations Act of 1995, H.R. 4454, 1 Pub. Papers of William J. Clinton 1301, 1301 (July 22, 1994). Specifically, the President's statement framed the constitutional issues this way:

> The Act raises serious constitutional concerns by requiring that executive branch agencies receive a certification from the Public Printer before procuring the production of certain Government doc-

[8] Chapter 11 of title 44, United States Code, contains a host of statutory provisions dealing with the general subject of executive and judicial branch printing. *See* 44 U.S.C. §§ 1101–1123. Those statutes, however, focus primarily upon the logistical concerns of the Public Printer in responding to printing orders from the executive and judicial branches.

> uments outside of the Government Printing Office. In addition, the Act expands the types of material that are to be produced by the Government Printing Office beyond that commonly recognized as "printing."

Id. To ameliorate the perceived constitutional defects in 44 U.S.C. § 501 note, the President chose to interpret the amendments to the public printing provision narrowly. *See, e.g., Communications Workers v. Beck*, 487 U.S. 735, 762 (1988) ("federal statutes are to be construed so as to avoid serious doubts as to their constitutionality"). First, the President expressed his intention to restrict "the exclusive authority of the Government Printing Office" over executive branch printing "to procurement of documents intended primarily for distribution to and use by the general public." Statement by President William J. Clinton, 1 Pub. Papers of William J. Clinton at 1301. Second, the President interpreted the concept of "duplicating" to "encompass only the reproduction inherent in traditional printing processes, such as composition and presswork, and not reproduced by other means, such as laser printers or photocopying machines." *Id.*

The legislative branch did not accept President Clinton's narrowing construction of 44 U.S.C. § 501 note. In response to an inquiry from Senator Wendell H. Ford, the Chairman of the Joint Committee on Printing, the Comptroller General issued an opinion concluding that, in virtually all instances, "executive agencies procuring duplicating services involving the use of high-speed duplicating equipment must do so through the GPO[.]" B–251481.4, 1994 WL 612291, at *3 (C.G. Sept. 30, 1994). Thus, the interpretations of 44 U.S.C. § 501 note espoused by the executive branch and the legislative branch are in direct conflict. Faced with these divergent views, you asked us for "an interpretation of the proper construction of title 44 of the U.S. Code." We conclude that, to the extent that 44 U.S.C. §§ 501 & 501 note require all executive branch printing and duplicating to be procured by or through the GPO, those statutes violate constitutional principles of separation of powers and that executive branch departments and agencies are not obligated to procure printing by or through the GPO.

II

The constitutional doctrine of separation of powers prohibits Congress from performing functions that are not legislative or in aid of the legislative process. Except through the passage of legislation, Congress may not seek to control the performance of functions that are "beyond the legislative sphere." *See Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986); *see also Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 274 (1991) ("*MWAA*") (separation of powers doctrine is directed at "forestall[ing] the danger of encroachment 'beyond the legislative sphere' "); *INS v. Chadha*, 462 U.S. 919

(1983); *Hechinger v. Metropolitan Washington Airports Auth.*, 36 F.3d 97 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995); *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994); *cf. Buckley v. Valeo*, 424 U.S. 1, 137–41 (1976) (per curiam).

In *Bowsher*, for example, the Supreme Court held that Congress violated the doctrine of separation of powers by vesting non-legislative functions in an official who was subject to Congress's control. *Bowsher* involved the Balanced Budget and Emergency Deficit Control Act of 1985. That statute established maximum federal budget deficits for each of the succeeding five years. If the projected deficit for any year exceeded the statutory maximum, the Comptroller General was to specify for the President spending reductions necessary to bring the deficit under the designated ceiling. The President was then required to issue a sequestration order effectuating the Comptroller General's cuts. 478 U.S. at 717–18. The Comptroller General is appointed by the President from a list of nominees submitted by the Congress and "is removable only at the initiative of Congress." *Id.* at 728 (Comptroller General may be removed by joint resolution of Congress finding one of five statutorily enumerated causes).

The Court characterized the Act as giving the Comptroller General executive functions, *id.* at 733, but did not hold that the Comptroller General is an agent of Congress. If it had, the Court's holding would have been the unremarkable observation that Congress may not vest itself or one of its agents with executive authority. The Act, however, did not give Congress any formal authority to vote on or dictate any particular of how the Comptroller General would exercise the executive functions that the Act conferred upon him. In other words, Congress had no formal power over the exercise of the Comptroller General's executive functions. Nevertheless, the Court viewed the removal power as giving Congress the ability to coerce the Comptroller General to conform to the "legislative will." *See id.* at 729.[9]

Thus, the constitutional doctrine of separation of powers forbids Congress from vesting non-legislative functions — specifically, in the case of your inquiry, executive functions — in the GPO if Congress retains control over the GPO. First, we will examine the extent to which Congress controls the GPO. Then, we will determine whether the functions that the GPO performs may be characterized as falling within the legislative sphere.

[9] The GPO argues that *Bowsher* only prohibits vesting executive functions in officials over whom Congress holds the power of removal. Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Anthony J. Zagami, General Counsel, United States Government Printing Office at 1 (Sept. 22, 1994). We agree that the President may remove the public printer at will. Further, we agree that non-legislative functions may not be vested in an official who is removable by Congress. Nevertheless, we cannot read *Bowsher* as applying exclusively to those officials who are removable by Congress. The Supreme Court could not have been clearer in holding that the Constitution prohibits Congress from retaining any sort of control that allows it to exert its "legislative will" outside the legislative sphere. *See, e.g.*, 478 U.S. at 729–32 (discussing significance of Congress's view that the Comptroller General is within the legislative branch).

A. *Congressional Control of the GPO*

One significant indication of control is whether Congress perceives an agency or official as its agent or as an entity of the legislative branch. *See Bowsher*, 478 U.S. at 731–32. The GPO, since its inception, has been conceptualized as a congressional entity.[10] *See Allison*, 91 U.S. at 307 (head of GPO "is more responsible to Congress than to any other authority"). "Discussion of the GPO's role in government, both in Congress and by GPO officials themselves, has consistently indicated that 'the Joint Committee on Printing . . . constitute[s], in fact, a board of directors' for the GPO, and that the GPO 'is, and was, designed to be primarily under the control of Congress.' " *International Graphics, Div. of Moore Business Forms, Inc. v. United States*, 4 Cl. Ct. 186, 197 (1983). Moreover, the Comptroller General has consistently concluded that the GPO "is under the legislative branch of the Government."[11] 36 Comp. Gen. 163, 165 (1956); 29 Comp. Gen. 388, 390 (1950). In addition, the Courts have taken the same view. *See, e.g., Thompson v. Sawyer*, 678 F.2d 257, 264 (D.C. Cir. 1982) (GPO "is a unit of the legislative branch"); *accord Lewis v. Sawyer*, 698 F.2d 1261, 1262 n.2 (D.C. Cir. 1983) (Wald, J., concurring) (GPO is "a legislative unit performing a support function for Congress"); *International Graphics*, 4 Cl. Ct. at 197 ("GPO appears to be a unit of the legislative branch").

The Supreme Court has also noted that an official is subservient to the branch of government that has the authority to control and supervise the conduct of that official's functions. *See Bowsher*, 478 U.S. at 730. On this score, both the Public Printer and the GPO are beholden to Congress in several significant respects. As we have previously explained:

> The Congressional Joint Committee on Printing ("JCP") retains supervisory control over a host of GPO's functions. *See, e.g.*, 44 U.S.C. § 103 (power to remedy neglect, delay, duplication, and waste); *id.* § 305 (approval of GPO employees' pay); *id.* § 309 (revolving fund available for expenses authorized in writing by the JCP); *id.* § 312 (requisitioning of materials and machinery with ap-

[10] Indeed, in 1867, Congress expressly declared that the GPO was to be run by the Congressional Printer, who was elected by the Senate and "deemed an officer of the Senate." Act of Feb. 22, 1867, ch. 59, §§ 1–2, 39th Cong., 14 Stat. 398–99. The major public printing reform of 1895 gave rise to the position of Public Printer and prescribed a new method for selecting this head of the GPO—nomination by the President and appointment "by and with the advice and consent of the Senate." 1895 Act, § 17, 28 Stat. at 603. This selection system, however, did not necessarily transform the Public Printer into an officer of the executive branch. *See Bowsher*, 478 U.S. at 758 n.25 (Stevens, J., concurring) (identifying Public Printer as "obvious congressional agent[]" despite appointment by President); *cf. also Mistretta v. United States*, 488 U.S. 361, 408–11 (1989) (members of Sentencing Commission in judicial branch appointed and subject to removal by President). In any event, while the 1895 modification of the appointment process may have reduced the direct control of Congress over the GPO, the 1919 Act firmly established the preeminence of the JCP—composed of members of Congress—in matters of public printing. *See* 1919 Act, § 11, 40 Stat. at 1270.

[11] In ascribing to Congress the views of the Comptroller General, we are fortified by the Supreme Court's decision in *Bowsher*, which held that Congress controls the Comptroller General. *See* 478 U.S. at 727–32.

> proval of the JCP); *id.* § 313 (examining board consisting of GPO personnel and a person designated by the JCP); *id.* § 502 (approval of contract work); *id.* § 505 (regulation of sale of duplicate plates); *id.* §§ 509–517 (approval of paper contracts); *id.* § 1914 (approval of measures taken by the Public Printer to implement the depository library program)[.]

Applicability of Post-Employment Restrictions on Dealing with Government to Former Employees of the Government Printing Office, 9 Op. O.L.C. at 57 (footnote omitted). What we deduced in 1985 is equally accurate today: "This relationship to Congress appears to preclude a conclusion, either in fact or as a constitutional matter, that the GPO is not an arm of Congress." *Id.* (citation omitted).

Given the level of control over the GPO that Congress exercises today through the JCP,[12] as well as the history of the relationship between the GPO and Congress, we believe that the GPO is subject to the sort of control that Congress may not exercise over an actor that performs non-legislative functions.[13] We now turn to consider whether the GPO's functions fall outside the legislative sphere.

B. *The Nature of GPO's Functions*

Section 501 of title 44, United States Code, establishes that "[a]ll printing, binding, and blank-book work for Congress, the Executive Office, the Judiciary, other than the Supreme Court of the United States, and every executive department, independent office and establishment of the Government, shall be done at the Government Printing Office[.]" [14] Subsection (1) of 44 U.S.C. § 501 note bolsters the provision granting the GPO exclusive control of virtually all the printing work of the executive branch: "None of the funds appropriated for any fiscal year may be obligated or expended by any entity of the executive branch for the procurement of any printing related to the production of Government publications (including printed forms), unless such procurement is by or through the Government Printing Office." [15] "Printing" is defined in subsection (3) of 44 U.S.C. § 501

[12] The JCP, which "consist[s] of the chairman and four members of the Committee on Rules and Administration of the Senate and the chairman and four members of the Committee on House Administration of the House of Representatives[,]" 44 U.S.C. § 101, is undeniably a congressional entity.

[13] We need not determine whether Congress has ever actually sought to exert the control that it, by statute, has retained. The mere existence of this ability to control the GPO raises the separation of powers bar against vesting the GPO with non-legislative functions. *See Bowsher*, 478 U.S. at 730 (dismissing as beside the point Justice White's vigorous argument that "[r]ealistic consideration of the nature of the Comptroller General's relation to Congress . . . reveals that the threat to separation of powers . . . is wholly chimerical." *Id.* at 774 (White, J., dissenting)).

[14] Section 501 contains two exceptions to this sweeping rule; both of the exceptions require the approval of the JCP. 44 U.S.C. §§ 501(1) & 501(2). In 1984, we declared the JCP approval provisions unconstitutional with respect to operations outside the legislative branch. Memorandum for William H. Taft, IV, Deputy Secretary of Defense, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Effect of INS v. Chadha on 44 U.S.C. § 501, "Public Printing and Documents"* at 3–6 & n.5 (Mar. 2, 1984); *Constitutionality of Proposed Regulations of Joint Committee on Printing*, 8 Op. O.L.C. 42, 51 & n.14 (1984).

[15] Subsection (2) of 44 U.S.C. § 501 note sets forth three exceptions to this sweeping prohibition. These exceptions include printing for the Central Intelligence Agency, the Defense Intelligence Agency, and the National Security

note to include "the processes of composition, platemaking, presswork, duplicating, silk screen processes, binding, microform, and the end items of such processes." By enacting these statutory provisions, Congress has forbidden the executive branch to expend funds on printing that is not procured by or through the GPO.

Congress may create and empower an entity such as the GPO to provide printing in aid of its legislative function. *Cf. Chadha*, 462 U.S. at 956 n.21 (recognizing authority of each House of Congress "to act alone in determining specified internal matters"). However, when Congress dictates that all executive branch printing and duplicating must be procured by or through the GPO, *see* 44 U.S.C. §§ 501 & 501 note the GPO necessarily acts outside the legislative sphere.

The GPO implicitly concedes — as it must — that its involvement in executive branch printing is beyond the legislative sphere, but asserts that such action does not violate separation of powers principles because its duties with regard to executive branch printing "are essentially ministerial and mechanical so that their performance does not constitute 'execution of the law' in a meaningful sense." *Bowsher*, 478 U.S. at 732. We doubt that the doctrine of separation of powers permits Congress to control functions outside the legislative sphere as long as such aggrandizement is in some sense *de minimis*. We need not resolve that issue here, however, because the experience of executive branch agencies under recent amendments to 44 U.S.C. § 501 note belies the GPO's characterization of its authority.

Under the current public printing regime, the GPO is obligated to "execute such printing and binding for the President as he may order and make requisition for." 44 U.S.C. § 1101. Nevertheless, the GPO controls the timing [16] and the production of all printing work for the executive branch. 44 U.S.C. §§ 501 & 501 note. The Public Printer also determines "the form and style in which the printing or binding ordered by a department is executed, and the material and the size of type used[.]" 44 U.S.C. § 1105. Moreover, any executive branch officer in possession of printing equipment "no longer required or authorized for his service" must "submit a detailed report of them to the Public Printer." 44 U.S.C. § 312. The Public Printer possesses the statutory authority to "requisition such articles," which must then "be promptly delivered" to the GPO.[17] *Id.* In sum,

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Agency, as well as all printing for other sources that is specifically authorized by law. In addition, subsection (2) creates an exception for small printing orders. The exception for small printing orders, which requires the certification of the Public Printer, is discussed in section III(B) of this opinion.

[16] The United States Court of Appeals for the District of Columbia Circuit has held that a congressionally controlled entity may not be given authority to delay an executive function. *See Hechinger v. Metropolitan Washington Airports Auth.*, 36 F.3d 97 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

[17] The GPO and JCP have used this authority to strip executive branch agencies of their ability to engage in printing and duplicating. The experience of the Department of Veterans Affairs regional office in Philadelphia, Pennsylvania is illustrative. On March 26, 1993, the JCP advised the Secretary of Veterans Affairs that the regional office "ha[d] acquired a two color printing press and [was] conducting printing activities without the concurrence of this Committee." Letter for Honorable Jesse Brown, Secretary of Veterans Affairs, from Honorable Wendell H. Ford, Chairman, Joint Committee on Printing (Mar. 26, 1993). The JCP instructed the Secretary of Veterans Affairs to "review this matter and take immediate action to transfer all printing requirements to the nearest Govern-

Continued

what began as a cooperative arrangement in 1860 that was mutually beneficial to the executive and legislative branches has become a system by which Congress — acting primarily through the GPO and the JCP — maintains an ever-increasing degree of control over executive branch printing. Because the GPO is subject to congressional control and because the GPO performs executive functions, we conclude that the language in 44 U.S.C. §§ 501 & 501 note requiring the executive branch to procure all of its printing by or through the GPO is unconstitutional and, therefore, inoperative.

C. *Certification*

You have also directed our attention to a provision of 44 U.S.C. § 501 note that you regard as inconsistent with *Chadha*. Specifically, subsection (2) of 44 U.S.C. § 501 note excludes from the class of printing work subject to GPO control "individual printing orders costing not more than $1,000, if the work is not of a continuing or repetitive nature, and, as certified by the Public Printer, if the work is included in a class of work which cannot be provided more economically through the Government Printing Office[.]" Whether this provision involving discretionary certification by the Public Printer is understood as the exercise of legislative power or executive power, it plainly runs afoul of separation of powers principles. "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7" of the Constitution. *MWAA*, 501 U.S. at 276. As we have previously explained in the context of a public printing dispute, any statute that permits a congressional agent "to effect an exception to a legislated rule" is unconstitutional. *See* Memorandum for William H. Taft, IV, Deputy Secretary of Defense, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Effect of INS v. Chadha on 44 U.S.C. § 501, "Public Printing and Documents"* at 5 n.5 (Mar. 2, 1984).

Although we have found a fatal constitutional defect in the statutory provision granting the Public Printer the authority to except certain small printing orders from the control of the GPO, we need not engage in a protracted discussion of

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ment Printing Office Regional Procurement Office and comply with section 312, 44 U.S.C. for disposition of this unauthorized equipment." *Id.* Ten months later, Senator Wendell Ford wrote to the Department of Veterans Affairs in his capacity as Chairman of the JCP to express dissatisfaction with the Department's response. Senator Ford demanded executive branch compliance with the desires of the JCP:

> I ask that your Inspector General readdress these issues and that the Headquarters printing management organization be involved to facilitate the orderly transfer of work to GPO. I have asked the Public Printer to have his staff contact appropriate departmental officials to expedite this process. At your earliest convenience, please provide the Joint Committee with a listing of all printing and duplicating equipment, including its age, condition and cost, now on site at [the regional office in Philadelphia]. Please immediately remove the two color press and any similar equipment from this site in accordance with the provisions of section 312, 44 USC.

Letter for Honorable Jesse Brown, Secretary of Veterans Affairs, from Honorable Wendell H. Ford, Chairman, Joint Committee on Printing at 1 (Jan. 13, 1994).

the effect of this conclusion upon the balance of subsection (2) of 44 U.S.C. § 501 note. Subsection (2) simply creates an exception to the broad rule of 44 U.S.C. §§ 501 and 501 note, that all executive branch printing must be procured by or through the GPO. Because we have already determined that this requirement runs afoul of separation of powers principles, there is no reason to address the scope of the remaining exceptions to the general requirement.

III

It appears that the Comptroller General does not share our view regarding the constitutionality of the GPO's control over executive branch printing. *See, e.g.*, Opinion for Senator Wendell H. Ford, Chairman of the Joint Committee on Printing, B–251481.4, 1994 WL 612291 (C.G. Sept. 30, 1994).[18] You have asked whether contracting officers who act in a manner consistent with our opinion and in derogation of the Comptroller General's view will be subject to liability or sanction.

This opinion presents the official view of the executive branch; the Comptroller General's opinion may not carry legally binding effect, although it may be considered for whatever persuasive value it may offer. *See Bowsher*, 478 U.S. at 733 (holding that statute unconstitutionally entrusted execution of laws to Comptroller General, a unit of the legislative branch, because "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law"); *see also Buckley*, 424 U.S. at 137–41 (holding that officials whom Congress controls cannot participate in the issuance of advisory opinions that have legally binding effect outside the legislative branch). We further note that neither the Comptroller General nor the Inspectors General may initiate prosecutions on their own. Inspector General Act of 1978, 5 U.S.C. app.; *United States v. Nixon*, 418 U.S. 683, 693 (1974). Both the Comptroller General and the Inspectors General have the statutory authority to audit and disallow costs, *see* 31 U.S.C. §§ 3522–3530; 5 U.S.C. app. § 4(a)(1), (b), but these powers cannot be stretched so as effectively to encompass prosecutorial decisions.

With respect to the Comptroller General, the Supreme Court has held that the Constitution does not permit the Comptroller General to exercise authority with respect to executive functions. *Bowsher*, 478 U.S. at 721–27. Although the Comptroller General may audit expenditures and in the course of doing so may express an opinion as to the propriety of costs incurred, the Comptroller General may not in any legally consequential sense "disallow" an expenditure or cost. Any statute purporting to give the Comptroller General such authority is invalid. *See, e.g., Hechinger v. Metropolitan Washington Airports Auth.*, 36 F.3d 97 (D.C. Cir.

[18] Separate statutory provisions vest in the Comptroller General the authority to relieve accountable officials and certifying officials of such liability. *See* 31 U.S.C. §§ 3527–3529. We have determined, however, that this grant of authority to a congressional agent violates separation of powers principles. *See Comptroller General's Authority To Relieve Disbursing and Certifying Officials From Liability*, 15 Op. O.L.C. 80 (1991).

1994), *cert. denied*, 513 U.S. 1126 (1995); *Comptroller General's Authority To Relieve Disbursing and Certifying Officials From Liability*, 15 Op. O.L.C. 80 (1991). Insofar as this position is not free of litigation risk, *see Lear Siegler, Inc., Energy Prods. Div. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), *modified as to attorney fees*, 893 F.2d 205 (9th Cir. 1989) (en banc); *Ameron Inc. v. United States Army Corps of Engineers*, 809 F.2d 979 (3d Cir. 1986), *cert. granted*, 485 U.S. 958 (1988), *cert. dismissed*, 488 U.S. 918 (1988),[19] you have asked us whether there are additional specific measures that agencies may take to safeguard contracting officers.

It appears that, except for *qui tam* suits (which are discussed below), the only entity that could bring a civil or criminal action against a certifying official in court would be the executive branch, and more specifically the Department of Justice. Any actions considered by the Department of Justice would necessarily be in accord with the constitutional views expressed by the President in his signing statement and the opinions of this Office. Consequently, we see little risk to an officer who acts consistently with our interpretation.

Administrative liability poses separate issues, but ones that we believe may be allayed by GSA itself. Congress has attempted to provide an enforcement mechanism for the Anti-Deficiency Act, 31 U.S.C. § 1341(a), and other restrictions on appropriations by holding certain executive branch employees personally liable for amounts illegally authorized or disbursed. For example, 31 U.S.C. § 3528(a) provides that a certifying official is responsible for the legality of the proposed payment on a voucher and for repaying any payments that are illegal, improper, or prohibited by law. The Comptroller General uses the GAO's audit powers to determine what amounts are wrongfully spent or unallowable, and 31 U.S.C. § 3526(a) grants the Comptroller General the power to "settle all accounts of the United States Government and supervise the recovery of all debts finally certified by the Comptroller General as due the Government."

For funds determined to be illegally expended, the government may attempt to collect that debt pursuant to the Federal Claims Collection Act of 1966. Section 3716 of title 31, United States Code, and various regulations provide for administrative offset to collect claims due the United States, following notice of the prospective offset. 4 C.F.R. pts. 101–105 (1996); 41 C.F.R. §§ 105–55.001 to 105–56.013 (1995).[20] When a current employee owes the debt, the agency may attempt to collect it through administrative offset. 41 C.F.R. § 105–56.001.

Thus, the danger for the certifying officials is that the Comptroller General will determine that a given payment is illegal and that the certifying official is adminis-

[19] The Department of Justice has consistently taken the position that these lower court cases were wrongly decided and are inconsistent with the Supreme Court's decision in *Bowsher*. We continue to adhere to this view and will assert this position if an appropriate case arises. *See* Brief of United States at 30–33, *Hechinger v. Metropolitan Washington Airports Auth.*, 36 F.3d 97 (D.C. Cir. 1994) (No. 94–7036).

[20] Federal regulations authorize the GSA to collect, compromise, or terminate collection efforts on debts owed the United States arising from activities under GSA's jurisdiction. All the contracts at issue — whether GSA is paying for services, or collecting for services rendered — arise under GSA's jurisdiction. *See, e.g.*, 41 C.F.R. pt. 105–55.

tratively liable for these expenditures. The statutory structure appears to be designed to enforce collection of claims or debts owed to the United States. Section 3711(a) of title 31, United States Code, provides that the head of an executive agency *shall* try to collect a claim of the United States Government for money or property arising out of the activities of the agency.

The statute also, however, allows the agencies to compromise claims of less than $100,000, and, pursuant to the GSA's regulations, GSA may decline to collect on a claim when it determines that the claim is legally meritless. 41 C.F.R. § 105–55.008(b); *see also* 4 C.F.R. § 104.3(d) (joint DOJ and GAO regulations providing for termination of legally meritless claims).[21] GSA could thus offer reassurances to its officers and the agencies contracting with it that any debts found by the Comptroller General to be owed by GSA or other agency officers as a result of payments made on the contracts at issue would be legally without merit. GSA could further assure its employees and the employees of agencies contracting with it for routine photocopying services that it would not seek to recoup such amounts through administrative offset. Although GSA has government-wide authority to collect claims owed the United States through administrative offset, other agencies could offer reassurances to their employees that they would not seek in any way to collect as claims owed the United States amounts determined to fall outside the scope of section 207(a)(1), notwithstanding any contrary determination on the part of the Comptroller General.

Assuming that GSA did not make such a determination in advance, it still could shield executive branch employees from administrative liability on a case-by-case basis. Following a determination by the Comptroller General that a certifying officer owed a debt to the United States, the burden would be on GSA to issue the notice to the employee of the determination that part of his or her salary was to be offset. If it failed to issue the notice of debt, notwithstanding a Comptroller General directive that it do so, the Comptroller General would seem to have no recourse, other than to notify Congress of the dispute. Congress's possible actions would be general ones, against the GSA itself, and not against the particular employee.

Even if GSA did perform the offset, it would remain possible, consistent with the regulation, to relieve the contracting official of liability. GSA has the authority promptly to refund an amount already offset when a debt is waived or otherwise found not owing the United States, or when GSA is directed by an administrative or judicial order to refund amounts deducted from the employee's current pay. 41 C.F.R. § 105–56.012. The regulations do not state who may make such a finding. A finding by the Department of Justice or GSA superiors that no debt was

[21] The regulations also provide that waivers of liability for government employees, if authorized by law, may be requested from the General Accounting Office. 41 C.F.R. §§ 105–56.004(g), 105–56.005(b). It is unlikely, however, that GAO would authorize a waiver if it determined that payments for the copier rentals would violate section 207.

owing and that a refund should be made would relieve the officer of individual liability.

The only remaining theoretical risk of exposure would arise from *qui tam* suits under the False Claims Act, 31 U.S.C. §§ 3729–3733. Such suits would almost assuredly fail, however, because such actions should either be defeated pursuant to a motion to dismiss or on the merits. In brief, in order to state a claim under 31 U.S.C. § 3729, a plaintiff must demonstrate that someone knowingly submitted or caused to be submitted a false or fraudulent claim to the government.[22] If an official simply authorizes payment on a contract lawfully entered into, it is difficult to envision how liability could lie under the False Claims Act. Although, in some situations, False Claims Act cases may be brought against government officials in their personal capacity, the circumstances at issue here do not appear to give rise to such claims. Even if the officer is required to certify that he or she understands that the claim is being paid in accordance with law, such a certification presumably would not be determined to be a false statement, with respect either to rental contracts or photocopying contracts, given this Office's determination that payment of the contracts would be in accord with the law. The contract would have been clearly authorized at the time it was signed (pursuant to a clear executive branch interpretation of the law), the agency would have authorized all the relevant actions (including payment), and the contractor would have fulfilled its obligations under the contract. Thus, there would be no false statement and the intent element—*knowingly* submitting a false statement—would also be absent.

Even if a matter were filed against an individual certifying officer, the Department of Justice would have the authority to represent the officer. 28 C.F.R. § 50.15 (1995). The Department is authorized to undertake such representation when "the actions for which representation is requested reasonably appear to have been performed within the scope of the employee's employment and the Attorney General

[22] Section 3729(a) establishes liability for:

> Any person who—
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
>
> (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
>
> (5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
>
> (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or
>
> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

or his designee determines that providing representation would otherwise be in the interest of the United States." *Id.* at § 50.15(a). Those circumstances would seem to be present here, although the Civil Division would make the determination regarding representation, whether by the Department or by outside counsel.[23]

For the foregoing reasons, we believe that any agency officials involved in the decision to certify or disburse money pursuant to the three types of contracts discussed herein face little or no litigation risk arising from the decision to certify or disburse.

IV

To the extent that 44 U.S.C. §§ 501 and 501 note require all executive branch printing and duplicating to be procured by or through the GPO, those statutes violate constitutional principles of separation of powers. We further find that the provision in subsection (2) of 44 U.S.C. § 501 note authorizing the Public Printer to certify exceptions to the general rule of printing by or through the GPO is unconstitutional, but we need not ascertain the implications of that determination given our conclusion that executive branch departments and agencies are not obligated to procure printing by or through the GPO. Finally, we perceive little or no risk of liability or sanction to contracting officers who act consistently with this opinion.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

[23] It should also be noted that, under the False Claims Act, the United States has significant control over suits filed under that Act alleging that the contracting officer somehow submitted a false statement in order to get a claim allowed or paid. As a procedural matter, the United States has the opportunity to intervene in a False Claims Act action filed by a relator and may, following intervention, move to dismiss. If the relator objects, however, it has the opportunity to have its objections heard. 31 U.S.C. § 3730(c)(2)(A).

Severability and Duration of Appropriations Rider Concerning Frozen Poultry Regulations

A provision in the Department of Agriculture appropriations legislation for Fiscal Year 1996, providing that a regulation otherwise rendered inoperative could be put into effect if a revised version of the regulation submitted by the Secretary of Agriculture was received and approved by two committees of Congress, violates the constitutional separation of powers by purporting to provide for the legislative enactment of a regulation without bicameral passage and presentment, as required by Article I of the Constitution.

This unconstitutional provision is severable from the remainder of the section and statute in which it is contained, so that the section's prohibition against the use of appropriated funds to implement the subject regulation, and its provision that the regulation may not take effect absent authorizing legislation, are both constitutionally enforceable.

All provisions of the section, including its prohibition against the regulation taking effect absent future authorizing legislation, are limited in duration to the 1996 Fiscal Year.

June 4, 1996

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF AGRICULTURE

This responds to your letter of March 13, 1996, requesting the views of this Office regarding section 726 of the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1996, Pub. L. No. 104–37, 109 Stat. 299, 332 (1995) ("the Act"). Specifically, you have asked (1) whether section 726 is unconstitutional in whole or in part; (2) if it is unconstitutional only in part, whether the constitutionally sustainable portions are severable from the unconstitutional portion, and therefore valid and effective; and (3) whether the sustainable provisions of section 726 constitute permanent or temporary legislation.

Section 726 prohibits the use of fiscal year 1996 ("FY 1996") appropriations to implement or enforce a regulation promulgated by the Department of Agriculture ("USDA") concerning the labeling of raw poultry products. *See* Use of the Term "Fresh" on the Labelling of Raw Poultry Products, 60 Fed. Reg. 44,396 (1995). It also sets forth conditions that must be met before that regulation may legally "take effect." Section 726 provides as follows:

> None of the funds appropriated or otherwise made available by this Act may be used to develop compliance guidelines, implement or enforce a regulation promulgated by the Food Safety and Inspection Service on August 25, 1995 (60 Fed. Reg. 44396): *Provided*, That this regulation shall take effect only if legislation is enacted into law which directs the Secretary of Agriculture to promulgate such regulation, or the House Committee on Agriculture and the

> Senate Committee on Agriculture, Nutrition and Forestry receive and approve a proposed revised regulation submitted by the Secretary of Agriculture.

109 Stat. at 332.[1]

In a statement made upon signing the Act, the President said, "Section 726 raises constitutional concerns and I have therefore asked the Department of Justice to advise me as to the validity and enforceability of that section." 2 Pub. Papers of William J. Clinton 1690, 1691 (Oct. 27, 1995). This opinion addresses the constitutional concerns raised by the President and subsequently reiterated in your specific request for an opinion.

We conclude that the final proviso of section 726 violates the constitutional separation of powers by purporting to provide for the legislative enactment of a regulation without bicameral passage and presentment, as required by Article I of the Constitution. U.S. Const. art. I, § 7; *INS v. Chadha*, 462 U.S. 919, 952 (1983). We further conclude that this unconstitutional proviso is severable from the remainder of the section and the statute, so that section 726's prohibition against the use of appropriated funds to implement the subject regulation, and its provision that the regulation may not take effect absent authorizing legislation, are both constitutionally enforceable. Finally, we conclude that all provisions of section 726, including its prohibition against the regulation taking effect absent future authorizing legislation, are limited in duration to the 1996 Fiscal Year.

DISCUSSION

1. *Enactment of Regulation by Committee Action*

When exercising its power to pass legislation, Congress must act in accordance with the procedures established in Article I, Section 7 of the Constitution: passage by both houses of Congress and presentment to the President for signature or veto. *Chadha*, 462 U.S. at 951. In *Chadha*, the Supreme Court struck down a statute that authorized either house of Congress, by passing a concurrent resolution and without presentment to the President, to veto particular decisions by the Attorney General. While acknowledging that Congress had the authority to achieve that same ultimate result through the proper exercise of its legislative power, the Court held the statute unconstitutional because Congress was exercising that authority without following the bicameral passage and presentment procedures specified in Article I.

[1] We note that this section is not a model of legislative clarity. For example, the proviso contains an internal contradiction in that it provides that the poultry regulation promulgated by USDA in August 1995 "shall take effect only if" the House and Senate agricultural committees receive and approve a "revised regulation"—i.e., a *different* regulation.

By its terms, the final clause of section 726 provides that an otherwise inoperative regulation proposed by USDA can be validated and enacted as a binding regulation if it is approved by two named committees of Congress. Section 726 would thus authorize these congressional committees, acting independently of the Congress as a whole and without presentment to the President, to enact a rule that governs the actions and conduct of persons outside the legislative branch. While the clause in question speaks in terms of allowing a regulation to "take effect," the actual legal effect of the committees' action would be essentially indistinguishable from the enactment of a law or statute.

Such legislative action cannot be validly accomplished by mere committees of the Congress. Therefore, the "committee approval" clause of section 726 is unconstitutional under the fundamental principles expressed in *Chadha*. Like the one-house legislative veto invalidated by that decision, section 726 violates Article I's specific requirements for the enactment of legislation. While Congress has broad authority to grant, limit, or withhold appropriations, that power may not be used — as it would be here — to circumvent the steps required by the Constitution for Congress to enact a law or regulation binding on persons outside the legislative branch.

2. *Severability*

Although we conclude that the committee-approval clause of section 726 is invalid, the section's primary clause barring the use of fiscal year 1996 appropriations to implement or enforce the poultry regulation would present no constitutional problem standing by itself. That raises the question whether the otherwise valid restriction on the use of appropriations is severable from the unconstitutional component of section 726.

In *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987), the Supreme Court outlined the basic principle governing such severability determinations:

> The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

(internal quotations omitted). As the Court further explained, "The final test [of severability] . . . is the traditional one: the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Id.* at 685. *See also* 2 Norman J. Singer, Sutherland Statutory Construction § 44.06 (5th ed. 1992) (a portion of a statute that has been held invalid may be severed, leaving the rest to operate, unless it is evident that the

legislature considered the valid and invalid portions to be "conditions, considerations, or compensations for each other"). Only if the severance of the invalid provision would result in the creation of a law that the legislature otherwise would not have enacted should the entire statute be invalidated. *Id.* § 44.04.

Accordingly, the courts will generally presume that Congress intends the unconstitutional portion of a statute to be severed from the remainder of that statute. *See Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality opinion) (" 'The cardinal principle of statutory construction is to save and not to destroy.' " (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 30 (1937)).[2] However, that presumption may sometimes be overcome by persuasive indications that the truncated statute remaining after severance would be incompatible with the intentions of the legislature that enacted it. *See* Memorandum for the Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Legality of Government Honoraria Ban Following U.S. v. National Treasury Employees Union* (Feb. 26, 1996).

Significantly, on several occasions the Supreme Court has found congressional control mechanisms that violate the bicameralism and presentment requirements of *Chadha* to be severable from the constitutional portion of the statutes in question. *Chadha*, 462 U.S. at 931–35; *Alaska Airlines*, 480 U.S. at 684–85. As the Court explained in *Alaska Airlines*:

> Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently. . . . *This is not a concern, however, when the invalid provision is a legislative veto, which by its very nature is separate from the operation of the substantive provisions of [the] statute.*

Id. (emphasis added) (citation omitted).

This Office has previously determined that an unconstitutional "committee approval" provision similar to that at issue here is severable from other portions of the statute. *Exercise of Transfer Authority under Section 110 of H.J. Res. 370*, 6 Op. O.L.C. 520 (1982). Citing a lengthy record of "historical practice," we stressed (1) the general rule that severability is presumed unless there is evidence that Congress would not have enacted the untainted provisions independent of the tainted provision; (2) the absence of legislative history providing such evidence; and (3) the long and continuous executive branch practice of proceeding as though legislative veto provisions are invalid and treating them as requiring only that the designated committees "be consulted." *Id.* at 521–23.

[2] We also note that the absence of a severability clause in the subject legislation, which is the case here, does not give rise to a presumption against severability. *Alaska Airlines*, 480 U.S. at 686.

In a 1991 opinion, we similarly concluded that an unconstitutional legislative veto clause was severable from the measure's primary provision for accelerated procurement of certain military supplies. *Severability of Legislative Veto Provision*, 15 Op. O.L.C. 49 (1991). There, we focused on the nature of the primary substantive provision to which a legislative veto or similar legislative control mechanism is attached. Quoting the Supreme Court's *Alaska Airlines* opinion, 480 U.S. at 685, we considered whether the primary provision is "so controversial or so broad" that Congress would have been unwilling to enact it "without a strong oversight mechanism." 15 Op. O.L.C. at 51. Where that is *not* the case, and where the function of the legislative control mechanism is subordinate and expendable in relation to the primary enactment, severability is warranted.

Measured against the foregoing standards, the unconstitutional committee approval clause appears properly severable from the remainder of section 726. Although the text of the section is awkwardly worded, its primary prohibition against the use of FY 1996 funds to implement the regulation is not made dependent or conditional upon the committee approval provision that follows it. The committee approval mechanism is one of two alternative preconditions to the regulation "tak[ing] effect" at a later time, but there is no indication that the primary spending restriction was intended to be subordinate to the availability of those mechanisms. Moreover, it is evident from the text that the spending restriction clause is capable of functioning independently and workably—i.e., it would be "fully operative as a law" within the meaning of *Alaska Airlines*, 480 U.S. at 684—when separated from the unconstitutional committee approval clause. Thus, the text of section 726 strongly supports a conclusion that the committee approval provision is severable.

The legislative history of the Act, moreover, does not support the view that Congress would have declined to enact the untainted portions of section 726 in the absence of the tainted committee approval mechanism. Section 726 originated as part of the Senate version of the agricultural appropriations legislation. The section was discussed at some length during a Senate floor debate on a motion to strike the provision from the bill. 141 Cong. Rec. 25,569–84; 25,619–21 (1995). That debate concentrated on the substantive merits of the fresh poultry regulation, rather than on the precise legal effect of section 726. Although the debate contained some statements touching on the measure's purpose and effect, it provides only limited evidence of the Senate's understanding and intent.

Opponents of section 726 insisted that it was intended to stop the USDA regulation from going into effect altogether.[3] Proponents of section 726 offered a variety of perspectives. Responding to charges that the section would inappropriately enact substantive legislation through an appropriations bill, the bill's floor manager, Senator Cochran, stated, "I am not advocating legislation on this bill. *I am*

[3] 141 Cong. Rec. at 25,570–72 (remarks of Sens. Boxer and Feinstein); *id.* at 25,620 ("The committee amendment[s] would stop that rule from going into effect.") (remarks of Sen. Boxer).

saying no funds shall be used to carry out this regulation." 141 Cong. Rec. at 25,571 (emphasis added) (statement of Cong. Cochran). Statements by other proponents of section 726 generally reflected an intent to reject the pending poultry regulation, while allowing for the proposal of a different one to be considered by the agricultural committees or by the Congress.[4]

Additional specific commentary on section 726's intended effect is found in the Senate debate on the conference report on H.R. 1976, the bill that was enacted. Just before final passage, a colloquy took place between Senator Cochran, the Chairman of the Appropriations Committee's Subcommittee on Agriculture, and Senator Bumpers, the Ranking Minority Member of that subcommittee. These senators were the respective floor managers for the legislation, and Senator Cochran was the sponsor of the amendment that added section 726 to the bill.[5] Referring to the conference committee's actions on the fresh poultry regulation provision, Senator Bumpers stated:

> I understand that, by including the Senate-passed bill provision in the conference report, the conferees intended to prevent the final rule which was promulgated on August 25, 1995, from taking effect, and also to prevent USDA from using any funds to implement or enforce this regulation as promulgated. Is that my colleague's understanding as well?

141 Cong. Rec. at 27,744. Senator Cochran responded in relevant part as follows:

> [T]his is my understanding of the effect of the conference committee's action as well. As you may recall, the regulation as promulgated did not reflect the Department's findings in scientific research. . . . Therefore, the language of this act makes it clear that the rule as published on August 25 shall never go into effect unless the conditions of this statutory language is [sic] met. The burden is now upon USDA to submit a regulation to the appropriate committees for approval which resolves these critical issues in a satisfactory manner.

[4] 141 Cong. Rec. at 25,573–82 (remarks of Sens. Lott, Warner, Cochran, Faircloth, Pryor, Bumpers, Helms, Heflin, and Biden). For example, Senator Lott stated, "The purpose of the provision is to require that the Secretary of Agriculture develop and implement a more reasonable regulation." *Id.* at 25,573. Senator Faircloth said the measure "requir[es] the Department of Agriculture to report back to Congress with a new rule regarding poultry labeling." *Id.* at 25,575. Senator Helms said the issue presented by the measure was "whether the Senate should allow the USDA to proceed with such unnecessary requirements." *Id.* at 25,580.

[5] As such, his remarks can be viewed as "an authoritative guide to the statute's construction." *North Haven Board of Educ. v. Bell*, 456 U.S. 512, 527 (1982).

Id.[6]

The limited House debate touching on section 726 also occurred during consideration of the final conference committee report (141 Cong. Rec. at 27,796–812). This arose in the context of a motion to recommit the overall bill for removal of section 726. The House debate was almost exclusively devoted to the merits of the frozen poultry regulation and did not address the relative significance of the different components of section 726.

Considering the text of section 726 against the overall legislative history, it is evident that Congress was strongly committed to barring the use of FY 1996 appropriations to implement the regulation and that this was the primary and predominant purpose underlying that section. The subsequent provision for the submission of a substitute regulation to the agricultural committees for their approval reflected a secondary and subordinate intent to allow USDA an opportunity to issue a revised regulation, but only if it could be done on terms satisfactory to Congress as a whole or the respective agricultural committees. Moreover, we find no persuasive evidence that Congress intended the measure's spending restriction to be conditional or dependent upon the enforceability of the subordinate provision for a committee-approved substitute regulation. Thus, the provision's legislative history tends to reinforce our conclusion that section 726's valid spending restriction is severable from the unconstitutional committee approval provision.

We also believe that the clause providing that the regulation may take effect "only if legislation is enacted into law" directing the Secretary to promulgate such a regulation—i.e., the first of the two alternative prerequisites for putting the regulation into effect—is severable from the committee approval provision. Our conclusion on that point is governed by the same considerations discussed above and mirrors the calibrated method of severance employed by the Supreme Court in *Chadha*. There, the Court struck only the unconstitutional one-House veto provision, while letting stand an accompanying report-and-wait clause. *Chadha*, 462 U.S. at 935 & n.9.

Here, striking only the unconstitutional committee approval clause leaves standing the bar against use of appropriations to implement the regulation, together with a separate proviso that the regulation may "take effect" through the enactment of authorizing legislation. Such a "remainder" of the section is intelligible, consistent with the main thrust of congressional intent, and would not result in a provision that fundamentally alters the measure that was actually enacted. Although it might be argued that the two remaining provisions would be somewhat redundant, the fact remains that each produces a result that the other does not. While the spending restriction would *bar* the use of FY 1996 appropriations to implement the regulation both before and after its scheduled effective date of August 26, 1996, the "take effect" proviso would *authorize* the use of appropriated

[6] To the extent that this statement asserts that section 726 was intended to establish a permanent bar against the regulation's taking effect, it would be inconsistent with Senator Cochran's earlier remarks in the pre-Conference Senate debate. There, he stressed that he was "not advocating legislation on this bill." 141 Cong. Rec. at 25,571.

funds if legislation is enacted that directs the Secretary to promulgate the regulation.

3. *Permanent or Temporary Legislation*

You have also inquired whether section 726 should be regarded as permanent or temporary legislation. As explained above, we regard both the bar against the use of FY 1996 appropriations and the provision that the poultry regulation can be put into effect only through enactment of legislation as severable and sustainable provisions of that section. It is self-evident that the restriction on the use of FY 1996 appropriations is temporary legislation and does not govern the use of future appropriations. In unequivocal terms, that provision affects only the use of "funds appropriated or otherwise made available by *this Act.*" 109 Stat. at 332 (emphasis added). The more difficult question is whether the provision that the regulation may not "take effect" without the enactment of authorizing legislation expires with the end of FY 1996, or continues beyond that date.

Although the enactment of permanent, substantive legislation through appropriations acts is generally disfavored, *see TVA v. Hill*, 437 U.S. 153, 190 (1978), it is recognized that Congress may constitutionally do so. *United States v. Will*, 449 U.S. 200, 221–22 (1980); *United States v. Dickerson*, 310 U.S. 554 (1940). As the Supreme Court has stated, the " 'whole question' " of whether a given appropriations rider validly enacts permanent legislation " 'depends on the intention of Congress as expressed in the statutes.' " *Will*, 449 U.S. at 222 (quoting *United States v. Mitchell*, 109 U.S. 146, 150 (1883)).

In *Building & Constr. Trades Dep't, AFL–CIO v. Martin*, 961 F.2d 269 (D.C. Cir.), *cert. denied*, 506 U.S. 915 (1992) ("*BCTD v. Martin*"), the Court of Appeals for the D.C. Circuit addressed that question with reference to another appropriations act rider restricting the implementation of identified agency regulations. The provision in question there provided:

> Notwithstanding any other provision of law, no funds shall be expended by the Secretary of Labor to implement or administer [various regulations based upon the Davis-Bacon Act] . . . or to implement or administer any other regulation that would have the same or similar effect.

Dire Emergency Supplemental Appropriations for Consequences of Operation Desert Shield/Desert Storm, Food Stamps, Unemployment Compensation Administration, Veterans Compensation and Pensions, and Other Urgent Needs Act of 1991, Pub. L. No. 102–27, §303, 105 Stat. 130, 151. In holding that this section could not be construed as permanent legislation, the court explained the basic governing principles:

> While appropriation acts are "Acts of Congress" which can substantively change existing law, there is a very strong presumption that they do not, and that when they do, the change is only intended for one fiscal year. In fact, a federal appropriations act applies only for the fiscal year in which it is passed, unless it expressly provides otherwise. Accordingly, a provision contained in an appropriations bill operates only in the applicable fiscal year, unless its language clearly indicates that it is intended to be permanent.

BCTD v. Martin, 961 F.2d at 273–74 (citations omitted).

The court further explained that such an intent is principally established through "words of futurity or permanency," such as the phrase, "'to apply in all years hereafter.'" *Id.* at 274. Finding that "nothing in the rider affects the ability of the Secretary to promulgate the present regulations at any time other than during the 1991 fiscal year," the court concluded that it was not permanent legislation. *Id.*

Given the principles reflected in opinions such as *BCTD v. Martin* and *Minis v. United States*, 40 U.S. (15 Pet.) 423, 445 (1841), clear and convincing evidence of congressional intent is needed to establish that a provision in an appropriations act constitutes permanent legislation. Based on the text and legislative record presented here, we conclude that this exacting standard has not been satisfied and that the congressional approval prerequisite is effective only during fiscal year 1996.

First, the text of section 726 does not unambiguously express an intent to enact permanent legislation unrelated to annual appropriations. Rather, the "take effect" restrictions are expressed in a "proviso" linked to a restriction on the use of FY 1996 appropriations. Matter expressed in the form of a proviso in an appropriations bill is generally restricted to the fiscal year covered by the bill. *See Minis*, 40 U.S. at 445–46; *Permanent Legislation in an Appropriation Act—Gwinn Amendment Involving Public Housing*, 41 Op. Att'y Gen. 274, 277–78 (1956). Although the proviso in section 726 does not impose a precondition on the spending restriction that precedes it, and although the intended scope of the proviso is not entirely clear, the use of this format nonetheless suggests that the "take effect" limitation is tied to the restriction on use of the appropriation.

Second, section 726 does not contain the terms of "futurity" (such as "hereafter") that are given crucial significance in determining whether an appropriations rider creates permanent legislation. *See BCTD v. Martin*, 961 F.2d at 273–74. Although we do not consider the absence of such terms dispositive, it is persuasive in combination with the other factors presented here.

Finally, the pertinent legislative history is inconsistent in key respects and ultimately inconclusive on the permanence issue. We acknowledge that the previously-quoted colloquy between Senators Cochran and Bumpers preceding the Senate vote on the conference report might be cited as strong evidence that the

section 726 proviso was intended as a permanent bar to the regulation's taking effect in the absence of approving legislation. *See* 141 Cong. Rec. at 27,744. Although that colloquy provides significant legislative history, its force is substantially undercut by Senator Cochran's earlier statement during the Senate debate, when he pointedly denied that he intended to enact substantive legislation on the agricultural appropriations bill. *Id.* at 25,571.[7] Moreover, inasmuch as the Cochran-Bumpers colloquy was undertaken after the House had taken its final vote on the conference report, and no similar expressions were made in the House, we cannot readily conclude that it reflected the will or understanding of the House. Especially in light of section 726's confusing textual formulation, we do not find the legislative history sufficiently clear and consistent to satisfy the strict standards for establishing the permanence of an appropriations proviso.[8]

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[7] This disclaimer was significant, because an acknowledgment that a permanent provision was intended would have invited a point of order based on charges that section 726 violated Senate Rule XVI, which prohibits the inclusion of permanent legislation in appropriations bills reported by the Appropriations Committee, as well as in floor amendments to appropriations bills.

[8] We have also considered the contention that an appropriations act provision may be construed as permanent "if construing it as temporary would render the provision meaningless or produce an absurd result." 1 GAO, *Principles of Federal Appropriations Law* 2–32 (2d ed. 1991). Here, the USDA regulation is not scheduled to take effect until August 26, 1996. Because fiscal year 1996 expires on October 1, 1996, the "take effect" proviso would come into play for only 36 days if it operates only during FY96. Thus, it might be argued that Congress would not have enacted the proviso to achieve such an inconsequential effect and it follows that a permanent effect was intended. We do not find that argument conclusive for a number of reasons. First, we believe the "take effect" proviso does add a meaningful component above and beyond the spending prohibition. Section 726 was enacted nearly a full year before the expiration of the fiscal year. At any time during that period, Congress could enact a law directing the Secretary to promulgate the regulation, thereby making funds available to implement the regulation without requiring a separate appropriation. Second, the Comptroller General opinions applying this principle have been generally limited to situations where the measure in question would be rendered effective for *extremely* brief periods (e.g., one day) if its effect were limited to the fiscal year covered by the appropriations bill in question. *See id.* at 2–32. That is not the case here. Finally, if the "take effect" proviso is read broadly to foreclose enforcement of the regulation until Congress says otherwise, then the *appropriations limitation* becomes, if not meaningless, of little real effect. In short, section 726 is subject to this sort of attack however it is read.

FBI Authority to Investigate Violations of Subtitle E of Title 26 or 18 U.S.C. §§ 921–930

The Federal Bureau of Investigation has authority to participate in investigations of violations of Subtitle E of Title 26 and 18 U.S.C. §§ 921–930 but may not supplant the primacy of the Department of the Treasury over investigations of such violations, unless the FBI has reason to believe that the investigation concerns a crime of terrorism over which a statute or Presidential Decision Directive 39 has given the FBI primary responsibility.

June 21, 1996

MEMORANDUM OPINION FOR THE
ACTING ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

The Criminal Division has asked us whether the Federal Bureau of Investigation ("FBI") has authority to participate in investigations of weapons and explosives offenses under 26 U.S.C. §§ 5001–5881 (subtitle E) and 18 U.S.C. §§ 921–930. *See* Memorandum for Merrick B. Garland, Principal Associate Deputy Attorney General, from John C. Keeney, Acting Assistant Attorney General, Criminal Division, *Re: FBI Involvement in Domestic Terrorism Matters and the Resulting Execution of High Risk Process* at 4–5 (May 13, 1996).[1] To date, such investigations have been conducted exclusively by the Department of the Treasury, specifically by the Bureau of Alcohol, Tobacco and Firearms. The FBI is concerned that its lack of participation in these investigations has prevented it from fully performing its role as the lead federal agency for the investigation of terrorism. *Cf.* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 702(a), 110 Stat. 1214, 1291 ("AEDPA") ("[T]he Attorney General shall have primary investigative responsibility for all Federal crimes of terrorism."); Presidential Decision Directive 39 (June 21, 1995) ("PDD 39"). We conclude that the FBI has authority to participate in investigations of the above listed offenses, but that the primary responsibility for investigating violations of the above sections of titles 18 and 26 rests with the Department of the Treasury. Where, however, the FBI has a reasonable expectation that an investigation involves a crime of terrorism over which a statute or PDD 39 has granted primary responsibility to

[1] The Criminal Division has recently asked that we also determine whether the FBI's authority extends to investigations of the following offenses: 18 U.S.C. §§ 876, 877; 18 U.S.C. § 1715; 18 U.S.C. § 1716; 18 U.S.C. §§ 1956, 1957; 18 U.S.C. § 2114; 22 U.S.C. § 2712(f); 22 U.S.C. § 2778(c); 31 U.S.C. §§ 5322, 5324; 42 U.S.C. § 2283; 47 U.S.C. § 606; and 50 U.S.C. § 1705. We have not yet found any indication that Congress has displaced the FBI's general investigative jurisdiction with respect to these offenses. Our research into the legislative history, however, is not yet complete. Consequently, we cannot offer a final determination with respect to these offenses. Moreover, we express no opinion as to investigative jurisdiction over violations of federal law other than those listed above or in the text of this memorandum.

the FBI, the FBI's lead role may be extended to cover crimes as to which lead responsibility would otherwise reside elsewhere.

Under 28 U.S.C. § 533, "[t]he Attorney General may appoint officials . . . to detect and prosecute crimes against the United States." This statute confers on the Attorney General broad general investigative authority with respect to federal criminal offenses. *See United States v. Marzani*, 71 F. Supp. 615, 617 (D.D.C. 1947), *aff'd*, 168 F.2d 133 (D.C. Cir.), *aff'd per curiam by an equally divided court*, 335 U.S. 895 (1948).[2] We have frequently repeated that "this provision authorizes the Department of Justice to investigate all federal criminal violations, unless a particular statute specifically assigns exclusive investigative responsibility to another agency." *Department of Labor Jurisdiction to Investigate Certain Criminal Matters*, 10 Op. O.L.C. 130, 132 (1986). The Attorney General has delegated her investigative authority to the FBI. *See* 28 C.F.R. § 0.85 (1995). Therefore, the FBI has authority to investigate violations of 18 U.S.C. §§ 921–930 and 26 U.S.C. §§ 5001–5881, unless Congress has specifically vested exclusive investigative authority in another agency.

Congress has provided that "[e]xcept as otherwise expressly provided by law, the administration and enforcement of . . . title [26] shall be performed by or under the supervision of the Secretary of the Treasury." 26 U.S.C. § 7801(a).[3] With respect to subtitle E, the Secretary of the Treasury has specific authority to conduct investigations, *see id.* § 5557(a), and to authorize investigators and agents to make arrests, execute warrants, and carry firearms. *See id.* § 7608(a). With respect to 18 U.S.C. §§ 921–930, administration and enforcement is vested in the Secretary of the Treasury. *See* Gun Control Act of 1968, Pub. L. No. 90–618, § 103, 82 Stat. 1213, 1226; Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90–351, § 903, 82 Stat. 197, 234. It is plain that these provisions specifically vest investigative authority in the Secretary of the Treasury. The Justice Department has long taken the position that, while title 26 vests the Secretary of the Treasury with primary authority over investigations of violations of subtitle E of title 26, it does not vest the Secretary with exclusive investigative jurisdiction. *See* Katzenbach Memorandum.[4] We have concluded that "[t]he exist-

[2] We have held that this authority extends to investigations of violations of state criminal law where there is a reasonable expectation that such an investigation will lead to the detection or prevention of a violation of federal law, including even such derivative federal laws as the Fugitive Felons Act, 18 U.S.C. § 1073. *Authority of FBI Agents, Serving as Special Deputy United States Marshals, to Pursue Non-Federal Fugitives*, 19 Op. O.L.C. 33 (1995).

[3] Nothing in the above-quoted language "shall be considered to affect the duties, powers, or functions imposed upon, or vested in, the Department of Justice, or any officer thereof, by law existing on May 10, 1934." *Id.* § 7801(c). Then-Assistant Attorney General Katzenbach opined that this was meant only to reserve the Justice Department's prosecutorial jurisdiction and not the Department's investigative jurisdiction. *See* Memorandum for Herbert J. Miller, Assistant Attorney General, Criminal Division, from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Authority of the Federal Bureau of Investigation to Investigate Offenses in Violation of the Wagering Tax Provisions of the Internal Revenue Code* at 7 (Oct. 25, 1961) ("Katzenbach Memorandum"). We do not find it necessary to revisit that conclusion here.

[4] Although the Katzenbach Memorandum does not address the Secretary of the Treasury's jurisdiction under title 18, the language of title 18 is not as expansive as the language of title 26. If the Secretary's jurisdiction under

Continued

ence of authority to investigate specified types of crimes in other agencies does not divest the FBI of its 'broad, general investigative powers.' " Memorandum for the Attorney General, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, *Re: Jurisdiction to Investigate Offenses by Military Personnel* at 2 (Oct. 19, 1954) (concluding that the FBI has authority concurrent with that of the military police of the various branches of the military to investigate federal criminal violations by military personnel) (quoting *Marzani*, 71 F. Supp. at 617) ("Rankin Memorandum"). The Katzenbach Memorandum examined the various authorities of title 26 set forth above and concluded that these provisions did not supplant the Attorney General's authority under 28 U.S.C. § 533, although these provisions accord primacy to the Secretary of the Treasury. We recognize that the Katzenbach Memorandum reviewed enforcement of the wagering tax laws, but the opinion notes that these laws do not "stand on a different footing" from the provisions of subtitle E. Katzenbach Memorandum at 4.

We have independently reviewed the relevant provisions of titles 26 and 18 and find nothing in the language or structure of those titles that expresses an intention to vest exclusive investigative jurisdiction in the Secretary of the Treasury or to supplant the Attorney General's general investigative authority. Moreover, we have reviewed the legislative history of these provisions and have found no indication of an intent that the Secretary of the Treasury exercise exclusive jurisdiction or that the Attorney General be divested of investigative authority. Instead, we believe that the statutes grant the Attorney General and the Secretary of the Treasury overlapping authority to investigate violations of subtitle E of title 26 and of 18 U.S.C. §§ 921–930, with investigative primacy vested in the Secretary.

We agree with the Katzenbach Memorandum that title 26 generally grants "primary responsibility to investigate violations of [subtitle E]" to the Secretary of the Treasury. *See* Katzenbach Memorandum at 2. Respect for this statutory scheme, as well as avoidance of duplicative effort and promotion of efficiency, dictate that the FBI should not exercise the general investigative authority of 28 U.S.C § 533 unless it has "a strong reason" for doing so. *See* Katzenbach Memorandum at 1; Rankin Memorandum at 2. We believe that effective investigation of anti-terrorism laws is "a strong reason" and supports the exercise of some level of investigative jurisdiction by the FBI, depending on the circumstances of the particular investigation. This position is further buttressed by PDD 39 and the recently enacted anti-terrorism statute, AEDPA, § 702(a), 110 Stat. at 1291. We do not believe, however, that the FBI may use its concurrent, general investigative power to supplant the statutory primacy of the Secretary of the Treasury over investigations of violations of subtitle E of title 26, where the FBI does

title 26 does not supplant the Attorney General's general investigative authority under 28 U.S.C. § 533, therefore, it follows a fortiori that the Secretary's title 18 jurisdiction does not supplant the Attorney General's general investigative authority.

not have a reasonable expectation that the investigation will lead to the detection or prevention of a crime of terrorism over which a statute or PDD 39 has granted primary responsibility to the FBI.

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Constitutionality of Legislative Provision Regarding ABM Treaty

There are serious doubts as to the constitutionality of a provision of a bill stating that the United States shall not be bound by any international agreement entered into by the President that would substantively modify the Antiballistic Missile Treaty with the Soviet Union, including any agreement that would add other countries as signatories or convert that bilateral treaty into a multilateral treaty, unless the agreement is entered pursuant to the President's treaty making power. The provision intrudes on the Executive's exclusive constitutional powers to interpret and execute treaties and to recognize foreign States.

June 26, 1996

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our views on section 233(a) of S. 1745, the Department of Defense Authorization Act for Fiscal Year 1997, relating to the Antiballistic ("ABM") Treaty with the former Soviet Union, Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.–U.S.S.R., 23 U.S.T. 3435. Section 233(a) reads:

> (a) Fiscal Year 1997.—During fiscal year 1997, the United States shall not be bound by any international agreement entered into by the President that would substantively modify the ABM Treaty, including any agreement that would add one or more countries as signatories to the treaty or would otherwise convert the treaty from a bilateral treaty to a multilateral treaty, unless the agreement is entered pursuant to the treaty making power of the President under the Constitution.

Section 233(a) raises serious constitutional questions. It is "a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving v. United States*, 517 U.S. 748, 757 (1996); *see also Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850 (1986). It follows that Congress may not hamper or curtail the prerogatives that the Constitution commits exclusively to the executive branch. *See Morrison v. Olson*, 487 U.S. 654, 694 (1988); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). We have serious doubts about the constitutionality of section 233(a), given that it intrudes on two exclusively Executive prerogatives: the power to interpret and execute treaties, and the power of recognition.

1. The dissolution of the former Soviet Union during the autumn and winter of 1991 required the United States to re-evaluate the bilateral treaties that had

existed between the Soviet Union and itself, including the ABM Treaty.[1] Both President Bush and President Clinton operated on the general principle that the treaty rights and obligations of the former Soviet Union had passed to the successor States,[2] unless the terms or the object and purpose of the treaty required a different result. As the Legal Adviser to the State Department during the Bush Administration explained,

> [a]s an operating principle, agreements between the United States and the USSR that were in force at the time of the dissolution of the Soviet Union have been presumed to continue in force with respect to the former republics. What is the legal basis for adopting this position? Except for the Baltic states, which the United States never recognized as part of the Soviet Union, we regarded the emergence of Russia and the other former republics to have stemmed from what was essentially the complete breakup of the Soviet Union. Thus, continuity of treaty relations is supported by our reading of state practice, and by the policy considerations underlying this rule. Perhaps most importantly, however, continuity has been supported by the republics themselves, who affirmed this approach in the Alma Ata Declaration when they guaranteed the "fulfillment of international obligations stemming from the treaties and agreements of the former U.S.S.R."

Edwin D. Williamson and John E. Osborn, *A U.S. Perspective on Treaty Succession and Related Issues in the Wake of the Breakup of the USSR and Yugoslavia*, 33 Va. J. Int'l L. 261, 264–65 (1993).

Congress was well aware that the executive branch was conducting discussions with Russia and several other successor States regarding their rights and obligations under the ABM Treaty, and it twice "urged" the President to pursue such discussions on particular topics. *See* Missile Defense Act of 1991, Pub. L. No. 102–190, § 233(c), 105 Stat. 1321, 1322, *reprinted as note* to 10 U.S.C. § 2431;

[1] The former Soviet Government recognized the independence of the Baltic States of Estonia, Latvia, and Lithuania on September 6, 1991. On December 8, 1991, the Republics of Ukraine, Belarus, and Russia formally declared that the Soviet Union had disintegrated, and announced the formation of the Commonwealth of Independent States. In an Address to the Nation on December 25, 1991, President Bush announced that "the United States recognizes and welcomes the emergence of a free, independent, and democratic Russia . . . . Our Embassy in Moscow will remain there as our Embassy to Russia. . . . [T]he United States also recognizes the independence of Ukraine, Armenia, Kazakhstan, Byelarus [sic], and Kyrgyzstan, all States that have made specific commitments to us. We will move quickly to establish diplomatic relations with these States and build new ties to them. . . . [T]he United States also recognizes today as independent States the remaining six former Soviet Republics: Moldova, Turkmenistan, Azerbaijan, Tadjikistan, Georgia, and Uzbekistan. We will establish diplomatic relations with them when we are satisfied that they have made commitments to responsible security policies and democratic principles, as have the other States we recognize today." 2 *Pub. Papers of George Bush* 1654 (1991). *See generally* Paul R. Williams, *The Treaty Obligations of the Successor States of the Former Soviet Union, Yugoslavia, and Czechoslovakia: Do They Continue in Force?*, 23 Denv. J. Int'l L. & Pol'y 1, 3, 24–25 (1994).

[2] References to the "successor States" and the like should not be understood to include the Baltic States, whose conquest by the Soviet Union the United States had refused to recognize.

National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103–160, § 232(c), 107 Stat. 1547, 1593 (1993).

The United States's presumption that the successor States are generally subject to our bilateral treaties with the former Soviet Union is rooted, not only in the United States's past diplomatic practice, but in its understanding of international law.[3] In a May 10, 1995, diplomatic note to the Government of Ukraine, the United States took as its point of departure the "continuity principle" of article 34 of the Vienna Convention on Succession of States in Respect of Treaties, Aug. 22, 1978, 17 I.L.M. 1488, 1509, which reads in relevant part:

> 1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:
>
> (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed . . . .

The State Department informs us that the resolution of succession questions after the dissolution of a State has been regarded as a function of the executive branch, and that many executive agreements have been concluded that recognized the succession of new States to the treaty rights and obligations of their predecessors. Furthermore, the State Department advises us, such agreements have not been regarded as treaty amendments or as new treaties requiring Senate advice and consent, but rather as the implementation of existing treaties.

2. It belongs exclusively to the President to interpret and execute treaties. This is a direct corollary of his constitutional responsibility to "take Care" that the laws are faithfully executed. *See* U.S. Const. art. II, § 3; *Goldwater v. Carter*, 444 U.S. 996, 1000 n.1 (1979) (Powell, J., concurring in judgment) (President has "duty to execute" treaty provisions).[4] As the Congressional Research Service has stated, "[t]he executive branch has the primary responsibility for carrying out treaties and ascertaining that other parties fulfill their obligations . . . . The executive branch interprets the requirements of an agreement as it carries out its provisions." *Treaties and Other International Agreements: The Role of the United States Senate*, 103d Cong. at xxiv–xxv (1993). (A Study prepared for the Senate Comm. on Foreign Relations) ("CRS Study").

[3] In an older but still pertinent formulation, "[a] state formed by separation from another, whether the personality of the original state still exists or is completely lost by disintegration, succeeds to such treaty burdens of the parent state as are permanent and attached to the territory embraced in the new state." Samuel B. Crandall, *Treaties: Their Making and Enforcement* 434 (1916).

[4] *See also Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on Conservation of North Pacific Fur Seals*, 10 Op. O.L.C. 12, 14–15, 17 (1986).

The responsibility to interpret and carry out a treaty necessarily includes the power to determine whether, and how far, the treaty remains in force. Again, we cite the Congressional Research Service:

> there is clear judicial recognition that the President may without consulting Congress validly determine the question whether specific treaty provisions have lapsed. The following passage from Justice Lurton's opinion in *Charlton v. Kelly* [229 U.S. 447, 473–76 (1913)] is pertinent: "If the attitude of Italy was, as contended, a violation of the obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligation as if there had been no such breach. . . . That the political branch of the Government recognizes the treaty obligation as still existing is evidenced by its action in this case. . . . The executive department having thus elected to waive any right to free itself from the obligation to deliver up its own citizens, it is the plain duty of this court to recognize the obligation to surrender the appellant as one imposed by the treaty as the supreme law of the land as affording authority for the warrant of extradition."

The Constitution of the United States of America: Analysis and Interpretation, S. Doc. No. 99–16, at 518 (1987). Cases both before and after *Charlton v. Kelly* regard the Executive's views as determining whether and to what extent treaties remain in effect. *See, e.g., Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984); *Kolovrat v. Oregon*, 366 U.S. 187, 190 n.4 (1961); *Terlinden v. Ames*, 184 U.S. 270, 286–90 (1902); *Restatement (Third) of the Foreign Relations Law of the United States* §208, Reporters' Note 5 at 102 (1987). Hence, "[u]nder the law of the United States, the President has the power . . . to elect in a particular case not to suspend or terminate" a treaty. *Id.* §339(c).

Accordingly, in circumstances in which a State that was a party to a bilateral treaty with the United States has been dissolved, the President must determine, in executing the treaty, whether and how far it remains in force, whether another State or States have succeeded to it, and whether their actions do or do not constitute compliance with its terms. In this instance, the President has determined that the ABM Treaty's obligations should be imputed to the Soviet Union's successor States, including Russia. Congress may not interfere with or direct the President's interpretation and execution of a treaty any more than it may do so

in the case of a statute. Under the proposed legislation, however, Congress appears to be impermissibly interfering in the President's discharge of those responsibilities with respect to the ABM Treaty, thus violating separation of powers principles. *See Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

We are aware that the Senate Committee on Foreign Relations, in its Report on the Intermediate Range Nuclear Forces Treaty, maintained that it is a constitutional requirement that "[t]he meaning of a treaty is to be determined in light of what the Senate understands the Treaty to mean when it gives its advice and consent." CRS Study at 95. While we have not been able to review the entire record of the Senate's ratification of the ABM Treaty, we would point out that the treaty was adopted against a background of diplomatic practice by the United States and other nations, and that "where a state divides into its constituent parts, the [diplomatic] practice supports the continuity of existing treaty rights and obligations."[5] Although the dissolution of the Soviet Union was not likely to have been contemplated when the ABM Treaty was ratified, insofar as the Senate may be taken to have had an understanding of what the treaty would mean in such circumstances, that understanding would have been informed by the pattern of diplomatic practice in similar contingencies. Thus, we do not believe that the executive branch's interpretation of the ABM Treaty contradicts the Senate's understanding at the time of ratification.[6]

The Senate Foreign Relations Committee also maintained that it is constitutionally required that "[t]he President may not amend a treaty without the agreement of the parties and the advice and consent of the Senate." CRS Study at 95. Section 233(a) appears to be designed to apply this principle to the ABM Treaty, by deeming "any agreement that would add one or more countries as signatories to the treaty or [that] would otherwise convert the treaty from a bilateral treaty to a multilateral treaty" to constitute a "substantive[ ] modif[ication]" of the treaty.

We would take issue with the proposition that the inclusion of other Soviet successor States along with the United States and Russia as parties to the ABM Treaty would necessarily comprise a substantive modification of that treaty, such as to require Senate advice and consent. We think this in part because of the international law and general diplomatic practice regarding successorship, and in part because, even without the addition of Ukraine, Belarus, Kazakhstan, and possibly other successor States, the ABM Treaty will remain in effect as between

[5] Williamson and Osborn, *supra* at 263. For example, treaty obligations were found to be continuous in the cases of the dissolution of the following States: the Greater Colombian Union, which broke up into Colombia, Ecuador, and Venezuela; the union of Norway and Sweden, dissolved in 1905; the separation of Austria and Hungary upon the dissolution of the Austro-Hungarian Empire following World War I; and the separation of Syria from Egypt after the dissolution of the United Arab Republic. *Id.*

[6] Post-ratification interpretations of a treaty by the Senate have no special authority. In *Fourteen Diamond Rings v. United States*, 183 U.S. 176, 180 (1901), the Court, in ignoring a Senate resolution that sought to clarify the customs status of an American territory under a treaty of peace, stated that "[t]he meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it."

the United States and Russia. Thus, although some changes in the administration of the ABM Treaty may be entailed by the inclusion of other successor States as parties, we do not see why their inclusion must be considered a matter of "substantively modifying," as distinct from "interpreting" and "implementing," the treaty. If the changes do not rise to the level of substantive modifications, then to insist that the proposed executive agreements be submitted to the Senate for its advice and consent would appear to intrude on the President's exclusive authority to interpret and implement treaties.

3. Section 233(a) also raises a serious constitutional question with respect to the President's recognition power.

It is by now firmly established that the power of recognition is exclusively Executive in character. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive.").[7] It is also established that the Executive's recognition authority "includes the power to determine the policy which is to govern the question of recognition." *United States v. Pink*, 315 U.S. 203, 229 (1942). Thus, incident to the recognition of a foreign State, the President may "without the consent of the Senate, . . . determine the public policy of the United States with respect to the [previously unrecognized government's] nationalization decrees," *id.*; or he may unilaterally abrogate a mutual defense treaty with a government that he is derecognizing while recognizing another in its stead, *see Goldwater v. Carter*, 444 U.S. at 1007 (Brennan, J., dissenting). A presidential decision to recognize, or not to recognize, a foreign State or government is binding upon the other organs of the Federal Government: for instance, "[i]t has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue." *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 319–20 (1978). In sum, the President's recognition authority is not only exclusive, but broad.

The question of determining which States are the "successors" to a State that, like the former Soviet Union, has been completely dissolved, is a matter for the President alone to determine in the exercise of his recognition authority. Moreover, we believe, in determining which States are the successors of a dissolved State, the President may also determine which of the successors are bound by the former

[7] *See also id.* at 461 & n.20 (White, J., dissenting), *United States v. Belmont*, 301 U.S. 324, 330 (1937), *Goldwater v. Carter*, 444 U.S. at 1007 (Brennan, J., dissenting); *Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994); *Phelps v. Reagan*, 812 F.2d 1293, 1294 (10th Cir 1987); *Americans United for Separation of Church and State v. Reagan*, 786 F.2d 194, 202 (3d Cir.), *cert. denied*, 479 U.S. 914 (1986); *Restatement (Third) of the Foreign Relations Law of the United States* §204 ("[T]he President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government."); *Section 609 of the FY 1996 Omnibus Appropriations Act*, 20 Op. O.L.C. 189, 193–96 (1996). *Bill to Relocate United States Embassy From Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123, 124–26 (1995); Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Diplomatic Relations with the Vatican* at 4–5 (Jan. 6, 1984); Statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Executive Agreements (S. 1251 and S. 632)*, Before the Subcomm. on Separation of Powers, Senate Comm. on the Judiciary at 13 (May 15, 1975).

State's treaty obligations towards the United States, and the extent to which they are so bound. The power to recognize newly emergent States formed from a State's dissolution thus encompasses the power to determine the treaty consequences of their successorship to the parent State.

One of the elements of the recognition of these newly emergent States was and is their succession to applicable Soviet treaties. By purporting to determine that the addition of these successor States to the ABM Treaty would constitute an amendment to that treaty requiring the advice and consent of two-thirds of the Senate, the proposed legislation would act in derogation of the President's recognition power. Because the recognition power is exclusively Presidential, it is doubtful that Congress may take that step.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995

The Mexican Debt Disclosure Act of 1995 requires that, before certain assistance is extended to Mexico, the President must certify that he has provided the House of Representatives with the documents described in House Resolution 80. The President submitted a certification that indicated that the executive branch had not provided to the House certain documents because it would be inconsistent with the public interest to do so. The Act is best interpreted as incorporating an exception for those documents as to which disclosure would not be in the public interest. Therefore, the President's certification was a legally sufficient formulation of the certification required by the Act.

June 28, 1996

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum sets forth the analysis underlying our conclusion that the President's April 14, 1995, certification regarding the use of the Exchange Stabilization Fund to assist Mexico was a legally sufficient formulation of the certification required by the Mexican Debt Disclosure Act of 1995, Pub. L. No. 104–6, tit. IV, 109 Stat. 73, 89.

I.

A.

Mexico suffered severe economic problems in 1994, leading to a thirty-two percent devaluation of the peso during the month of December. In January 1995, Congress debated legislative proposals to provide up to $40 billion in emergency assistance to Mexico to stabilize the peso. When it became clear that the legislative process would not work quickly enough to avert a liquidity crisis, the President announced on January 31, 1995, his intention to use the Treasury Department's Exchange Stabilization Fund ("ESF") to provide up to $20 billion of loans and credits as part of a financial support package designed to prevent the further destabilization of the Mexican peso and to halt the withdrawal of capital out of Mexico.[1]

[1] By statute, the ESF is to be used consistent with United States obligations with respect to the International Monetary Fund ("IMF"). *See* 31 U.S.C. §5302. Article IV of the IMF Articles of Agreement requires the United States to "collaborate with the [IMF] and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates." Second Amendment to the Articles of Agreement of the International Monetary Fund, *approved* Apr. 30, 1976, art. IV, §1, 29 U.S.T. 2203, 2208, 15 I.L.M. 499, 549. Members are to fulfill their obligation "by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions." *Id.* The ESF "is under the exclusive control of the Secretary" of

Continued

The President made his announcement in a joint statement issued with the congressional leadership, including Senate Majority Leader Robert Dole, Senate Minority Leader Thomas Daschle, House Speaker Newt Gingrich, and House Minority Leader Richard Gephardt, all of whom expressed the view that the use of the ESF in connection with the support package was both lawful and necessary:

> We agree that, in order to ensure orderly exchange arrangements and a stable system of exchange rates, the United States should immediately use the Exchange Stabilization Fund (ESF) to provide appropriate financial assistance for Mexico. We further agree that under Title 31 of the United States Code, Section 5302, the President has full authority to provide this assistance. . . .
>
> . . . .
>
> We must act now in order to protect American jobs, prevent an increase in the flow of illegal immigrants across our borders, ensure stability in this hemisphere, and encourage reform in emerging markets around the world.
>
> This is an important undertaking, and we believe that the risks of inaction vastly exceed any risks associated with this action. We fully support this effort, and we will work to ensure that its purposes are met.[2]

On February 21, 1995, the United States entered into a series of agreements with Mexico by which the United States pledged to provide up to $20 billion in the form of currency swaps and securities guarantees ("U.S.–Mexico Agreements"). Under the terms of the agreements as announced by Secretary Rubin, $10 billion would be made available through the ESF in stages between February 21 and the end of June, 1995, as Mexico met agreed-upon conditions. Under the same terms and conditions, another $10 billion would become available beginning in July 1995, to be provided in stages as needed.[3]

B.

On March 1, 1995, the House of Representatives adopted House Resolution 80 ("Resolution 80" or "the Resolution"), a resolution of inquiry "requesting

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the Treasury, who may use the ESF as he "considers necessary," "[s]ubject to approval by the President." 31 U.S.C. § 5302(a)(2).

[2] *Statement with Congressional Leaders on Financial Assistance to Mexico*, 1 Pub. Papers of William J. Clinton 130 (1995).

[3] Statement of Treasury Secretary Robert E. Rubin, Mexico Agreement Signing Ceremony (Feb. 21, 1995).

information from the President concerning actions taken to strengthen the Mexican peso and stabilize the economy of Mexico."[4] The Resolution began by stating:

> Resolved, that the President is hereby requested to provide to the House of Representatives (consistent with the rules of such House), not later than 14 days after the adoption of this resolution, the following documents in the possession of the executive branch, if not inconsistent with the public interest.[5]

This initial paragraph of Resolution 80 was followed by 28 numbered paragraphs, each identifying substantive categories of requested documents.

In presenting the Resolution for consideration by the House, Representative James Leach, Chairman of the House Committee on Banking and Financial Services ("Banking Committee"), stated that:

> It is . . . the obligation of Congress and the Committee of jurisdiction in particular to review how Mexico got into this dilemma and what obligations the U.S. Government has undertaken to resolve the crisis. It is also the obligation of this Congress to assess why and how Mexico lost its way and whether the U.S. government failed to recommend or insist that Mexican officials follow a less bumpy road.
>
> In this regard, let me stress this resolution of inquiry is of a fact-finding nature. It looks to the basis of the policy without having the effect of changing administration commitments. Nothing, in other words, in this approach jeopardizes the stabilization package itself. . . .
>
> There also should be no doubt that if the U.S. Government had failed to act, an international economic crisis could have been precipitated which would have had extraordinary job loss consequences in America and around the world.[6]

The Banking Committee also presented to the House a report on Resolution 80. The report contained a paragraph setting forth language almost identical to the portion of Representative Leach's floor statement concerning the obligation of Congress to review this matter, and it then stated:

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[4] 141 Cong. Rec. 6408 (1995) (quoting heading in Congressional Record).

[5] *Id.*

[6] *Id.* at 6410.

> It is in the context of the paragraph above that the request for documents contained in this resolution should be interpreted. But the scope of this request for documents should not be construed to include drafts of documents provided in final form, nor any notes of any individual.
>
> The Committee further notes that under the rules and precedents of the House, requests for ongoing reports concerning actions taken through the ESF and international financial institutions are outside the scope of this resolution of inquiry.[7]

The Administration promptly began to search for documents responsive to the Resolution. On March 21, Abner Mikva, Counsel to the President, met with Representative Leach and Representative Christopher Cox to discuss the status of the Administration's response, and then reported on that status in a letter of the same day to Speaker Gingrich. Judge Mikva's letter explained that the extreme breadth and scope of the document requests and the need to review documents to determine whether it was consistent with the public interest to produce them to the entire House had made it impossible to meet the fourteen day deadline set forth in the Resolution. The letter indicated that the Administration would attempt to complete its response to the Resolution by May 15, and that in the meantime the Treasury Department would immediately make available to the House documents that had been provided to the Senate,[8] the Administration would produce other documents on a "rolling production" basis, and the Administration would work with the Banking Committee "to reach any appropriate agreements and accommodations with respect to responsive documents that are classified or otherwise subject to applicable privileges."[9]

The Treasury Department made available to the House the next day, March 22, the documents that had previously been made available to the Senate, and it and the other agencies proceeded to implement the rest of the response plan outlined by Judge Mikva. However, the Administration subsequently was informed by representatives of the House that the May 15 target date for completion of the response to Resolution 80 was unacceptable and that completion by April 7 was desired so that House staff could review the documents during the three-week congressional recess scheduled to begin that day. Responding to this statement of the House's needs, representatives of the Treasury and Justice Depart-

[7] H.R. Rep. No. 104–53, at 5 (1995).

[8] The Treasury Department had been providing documents to the Senate in response to two requests received earlier in the year. *See* Letter for the Honorable Robert Rubin, Secretary of the Treasury, from Senators Connie Mack, Trent Lott, Spencer Abraham, and Bob Dole (Jan. 26, 1995); Letter for the Honorable Robert Rubin, Secretary of the Treasury, from Senator Alfonse D'Amato, Chairman, Committee on Banking, Housing, and Urban Affairs (Feb. 17, 1995).

[9] Letter for the Honorable Newt Gingrich, Speaker of the House of Representatives, from Abner J. Mikva, Counsel to the President at 2 (Mar. 21, 1995). A copy of this letter was sent to Representatives Leach and Cox.

ments met with Banking Committee staff on April 3 and informed them that the Administration expected that it would be able to make all responsive documents available by April 7, except for those confidential documents for which by that date it would have requested a dialogue concerning possible accommodations.

The Administration representatives also informed Banking Committee staff on April 3 of the procedures that were being followed in an effort to complete the response to Resolution 80 within a time frame that would satisfy the House's needs. These procedures were confirmed in an April 5 letter from the Treasury Department to the Banking Committee, and subsequently restated in letters during the week of April 10 from the various responding agencies informing the House that they had completed their responses. These procedures delimited the scope of the search for responsive documents. In accordance with the Banking Committee Report on Resolution 80, certain drafts and notes were not considered responsive. Since there was no beginning date specified in the Resolution, and searching for archived documents in warehouses and elsewhere would have taken far more time than the House's needs would allow, agencies generally searched only for recent files (for example, Treasury searched back to January 1, 1994). Only the agencies that were likely to have worked on the Mexico matter or to have responsive files were asked to conduct searches. Finally, given the extraordinary difficulty, time, and expense involved in searching computer backups and other computer records, only hard-copy files were searched. The Banking Committee staff raised no objection to these procedures when they were identified at the April 3 meeting, and no objection was conveyed by any representative of the House at any time before the Administration completed its response on April 14.

As the Administration was working to respond to Resolution 80, a bill concerning the use of the ESF was introduced as an amendment to the Emergency Supplemental Appropriations and Rescissions Act, H.R. 889, 104th Cong. (1995). As introduced in the Senate on March 16, H.R. 889 required the President to provide periodic reports to Congress regarding the current state of the Mexican economy, measures taken by the Mexican government to safeguard the stability of the economy, and any U.S. government assistance provided to Mexico. In addition, it required that, before extending additional assistance to Mexico, the President certify to the appropriate congressional committees that:

> (1) there is no projected cost to the United States from the proposed loan, credit, guarantee, or currency swap;
>
> (2) all loans, credits, guarantees, and currency swaps are adequately collateralized to ensure that United States funds will be repaid;

> (3) The Government of Mexico has undertaken effective efforts to establish an independent central bank or an independent currency control mechanism; and
>
> (4) Mexico has in effect a significant economic reform effort.[10]

H.R. 889, providing $3.04 billion in new funding for the Department of Defense, was considered by a House and Senate Conference Committee in closed session. When it emerged from conference on April 6, the bill contained an additional requirement that the President certify that:

> (5) the President has provided the documents described in paragraphs (1) through (28) of House Resolution 80, adopted March 1, 1995.[11]

The bill also contained the following new subsection:

> (b) TREATMENT OF CLASSIFIED OR PRIVILEGED MATERIAL—For purposes of the certification required by subsection (a)(5), the President shall specify, in the case of any document that is classified or subject to applicable privileges, that, while such document may not have been produced to the House of Representatives, in lieu thereof it has been produced to specified Members of Congress or their designees by mutual agreement among the President, the Speaker of the House, and the chairmen and ranking members of the Committee on Banking and Financial Services, the Committee on International Relations, and the Permanent Select Committee on Intelligence of the House.[12]

During the limited post-conference floor debate on the portion of the bill dealing with the ESF, Representative Marcy Kaptur, who had introduced Resolution 80, began by complaining that the documents requested by the Resolution had not yet been turned over to the House. She characterized the bill as follows:

> Essentially what it says is that no money, loan credit guarantee or arrangement through the [ESF] or the Federal Reserve can be extended unless the President of the United States has provided us with every single document that we have asked for in our resolution of inquiry.[13]

[10] 141 Cong. Rec. 8200 (1995).

[11] H.R. Conf. Rep. No. 104–101, at 19 (1995).

[12] *Id.* There were also minor revisions made to the wording of the original four certification requirements.

[13] 141 Cong. Rec. 10,672 (1995).

Representative Bob Livingston followed by noting that "[w]e have compelled the White House to provide documentation which has not been forthcoming to date despite a resolution passed by this House on March 1." [14] Representative Sonny Callahan concluded the debate:

> The agreement we have reached with the Senate requires the President to provide the information on the Mexican debt crisis called for in House Resolution 80. . . . The bill language does not cut off aid to Mexico. It does, however, require the President to provide the information requested in House Resolution 80, prior to the extension of additional aid to Mexico.[15]

The bill was passed by both the House and Senate on April 6 as part of the Emergency Supplemental Appropriations and Rescissions for the Department of Defense to Preserve and Enhance Military Readiness Act of 1995, Pub. L. No. 104–6, 109 Stat. 73. Section 406 of title IV, the Mexican Debt Disclosure Act of 1995, imposed the presidential certification requirement. On April 7, Congress left for recess, to return on May 1.

As Congress was completing its work on the Mexican Debt Disclosure Act, the White House and the Justice Department were informed by the Treasury Department that additional assistance for Mexico pursuant to the terms of the U.S.–Mexico Agreements was due to be provided the week of April 17, and that, due to market exigencies, the disbursement could not be delayed. Accordingly, the Administration proceeded to complete its response to Resolution 80 and the Mexican Debt Disclosure Act by April 14. All of the agencies that had conducted document searches in response to the Resolution sent letters to the Speaker of the House during the week of April 10, advising that they had completed their searches and had made available to the entire House all documents except those for which it would be inconsistent with the public interest to provide to the entire House. The only documents withheld under the public interest exception were: (1) documents withheld by the White House reflecting confidential communications between the President and foreign leaders; (2) documents withheld by the White House revealing White House deliberations; and (3) Central Intelligence Agency documents withheld by the CIA that constituted daily briefings for the President or records of meetings at the National Security Council or with senior White House staff.[16]

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[14] *Id.*

[15] *Id.* at 10,674.

[16] *See* Letter for the Honorable Newt Gingrich, Speaker of the House of Representatives, from Abner J. Mikva, Counsel to the President (Apr. 14, 1995), Letter for the Honorable Newt Gingrich, Speaker of the House of Representatives, from Leo Hazlewood, Executive Director, Central Intelligence Agency (Apr. 11, 1995).

On April 14 the President issued a certification in the form of a Memorandum to the Secretary of the Treasury published in the Federal Register.[17] In relevant part, the President certified that:

> The Executive Branch has provided the documents requested by House Resolution 80 adopted March 1, 1995, and described in paragraphs (1) through (28) of that Resolution. All documents identified as responsive to the Resolution have been provided to the entire House of Representatives. Pursuant to the terms of the Resolution, the Executive Branch has not provided those documents as to which the Executive Branch has informed the House that it would be inconsistent with the public interest to provide the documents to the House. Pending arrangements for safekeeping of classified material in a House facility, classified documents have been provided to the House by making them available at Executive Branch facilities. Each agency, including the Federal Reserve Board, has advised the House of the procedures employed by that agency to provide the documents requested by House Resolution 80.[18]

In issuing the certification regarding the production of documents, the President relied on advice from the Counsel to the President and this Office. By letter to the Counsel to the President on April 14, we advised that the draft presidential certification submitted to this Office for review was a legally sufficient formulation of the certification required by section 406(a)(5). We advised that the certification requirement was properly interpreted as incorporating the "public interest" exception provided by Resolution 80. We further advised the White House that making classified documents available to House members at executive branch facilities pending arrangements for safekeeping in a House facility satisfied the requirement that the documents be "provided" to the House.[19]

A currency swap was executed according to the terms of the U.S.–Mexico Agreements on April 19.[20]

After Congress returned from its recess, the Administration and House Members and staff undertook to negotiate an agreement regarding the small number of White House documents withheld under the public interest exception. An agreement was ultimately reached.

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[17] 3 C.F.R. 472 (1996).

[18] *Id.* at 472–73.

[19] Letter for the Honorable Abner J. Mikva, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (Apr. 14, 1995) ("April 14 Letter").

[20] Additional currency swaps were executed on May 19 and July 5, 1995.

II.

As we stated in our April 14 Letter, the President's certification regarding the production of certain documents in connection with the use of the ESF was legally sufficient. Subsequently, however, five Republican House Committee Chairs questioned our interpretation of the Act.[21] Those Members relied on a memorandum from the General Counsel of the House of Representatives.[22] In view of the Members' objections, we take this opportunity to set forth in greater detail the basis for our advice to the President on April 14.

The essence of the argument presented in the House Counsel Memorandum is that section 406(a)(5) of the Act incorporates only the terms of paragraphs 1–28 of House Resolution 80 and, thus, does not include an exception for those documents that it would not be in the public interest to disclose. This interpretation is not the better reading of the statutory text and is refuted by the relevant legislative history, by traditional principles of statutory construction, and by long-accepted constitutional principles.

A.

The fifth certification requirement states that, as a condition of extending further financial assistance to Mexico, the President must certify that he "has provided the documents described in paragraphs (1) through (28) of House Resolution 80, adopted March 1, 1995." House Counsel argues that section 406(a)(5) incorporates only paragraphs 1–28, and not the public interest exception and other language contained in the initial paragraph. However, as we stated in our April 14 Letter, "[a]lthough the statute cites only to the numbered paragraphs of House Resolution 80, it must be read as also incorporating the initial, unnumbered paragraph of the Resolution."[23] Our conclusion was compelled by the following considerations.

1. It is necessary to read section 406(a)(5) as incorporating the initial, unnumbered paragraph of the Resolution because that paragraph, and only that paragraph, makes clear that the President is to make available all responsive documents "in the possession of the executive branch" as a whole. House Counsel states that such an incorporation is unnecessary because any other reading of the statute

[21] Letter for the Honorable William J. Clinton, President of the United States, from Rep. Larry Combest, Chairman, Permanent Select Committee on Intelligence; Rep. Benjamin A. Gilman, Chairman, International Relations Committee, Rep. Henry J. Hyde, Chairman, Judiciary Committee, Rep. James Leach, Chairman, Banking and Financial Services Committee; Rep. Bob Livingston, Chairman, Appropriations Committee (June 28, 1995) ("Members' Letter").

[22] Memorandum for the Honorable Newt Gingrich, Speaker of the House of Representatives, from Cheryl A. Lau, General Counsel, Office of the Clerk, House of Representatives, and Barbara K. Bracher, Principal Assistant and Solicitor (May 30, 1995) ("House Counsel Memorandum").

[23] April 14 letter at 2.

would be "plainly ludicrous."[24] However, House Counsel mistakenly identifies the only alternative interpretation as a requirement that the President certify that he had produced any responsive document "in existence anywhere."[25] House Counsel overlooks the fact that only by reading section 406 in light of the initial paragraph of the Resolution can one determine that the documents named in the certification requirement were not limited to *White House* documents alone. House Counsel's interpretation would render meaningless the decision of the House Banking Committee to modify the Resolution to include the reference to the executive branch.[26] Thus, House Counsel is wrong in viewing section 406(a)(5) as in itself "clearly and unambiguously identify[ing] the 'universe of documents' subject to the President's certification."[27]

2. It is necessary to refer to the initial paragraph of Resolution 80 to know to whom the documents were to be provided. Although section 406(b) refers to documents that have not been produced to the House, this reference assumes a prior instruction that the documents were to be delivered to that body. Again, this information is not inconsequential; it makes clear that (subject to the exception in subsection (b)) the documents were to be provided to the full House, rather than to certain House committees or to both houses of Congress.

3. It is necessary to go beyond the four corners of paragraphs 1–28 of Resolution 80 in order reasonably to limit the scope of the obligation imposed by the certification requirement. Without such limitations it would have been impossible to satisfy the requirement quickly enough to meet the needs of the House, and, moreover, not in time to provide the needed assistance to Mexico. For example, section 406(a)(5) does not define the universe of documents in terms of the time period covered by the document request. Thus, without resorting to certain understandings extrinsic to the numbered paragraphs, section 406(a)(5) would require the Administration to locate and produce documents created from the beginning of the federal government's recordkeeping. For certain of the document requests, this would not have been difficult. For others—e.g., "any document concerning the condition of the Mexican economy"—this would have been impossible to do in a timely manner. The House had not objected when the Administration had indicated in responding to the Resolution that to meet the House's time schedule it was generally limiting its search to recent files.

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[24] House Counsel Memorandum at 6.

[25] *Id.* at 6 n.7.

[26] The initial paragraph originally read as follows:

> Resolved, That the President is hereby requested to provide to the House of Representatives, not later than 14 days after the adoption of this resolution, the following documents.

41 Cong. Rec. 6408 (1995). When it was reported to the full House by the Banking Committee, the paragraph had been amended to read:

> That the President is hereby requested to provide to the House of Representatives (consistent with the rules of such House), not later than 14 days after the adoption of this resolution, the following documents *in the possession of the executive branch*, if not inconsistent with the public interest:

Id. at 6409 (emphasis added).

[27] House Counsel Memorandum at 5.

4. If going outside the twenty-eight paragraphs were precluded and the certification requirement were to be construed in such a way as to make it impossible to satisfy within any realistic time frame, then section 406(a)(5) would operate as a deliberate termination of the Mexico assistance program. However, there is no hint in the limited legislative history that this was what Congress accomplished or intended.[28] This is not surprising given that if Congress did so, it would be compelling the President to fail to honor a commitment he had made, pursuant to statutory authority, to a foreign sovereign. It would be extraordinary for Congress to impose such a requirement on the President without any debate or consideration.

5. There is scant legislative history available to shed light on section 406(a)(5). What does exist supports the interpretation that section 406(a)(5) was intended to require the President to certify that he had provided the set of documents sought by Resolution 80 in its entirety, which did not seek those documents that in the President's judgment it would be contrary to the public interest to disclose. The supporters of section 406(a)(5) identified the section's scope and purpose in terms of obtaining the documents sought by Resolution 80.

Representative Kaptur described the bill as follows: "Essentially what it says is that no money, loan credit guarantee or arrangement through the [ESF] or the Federal Reserve can be extended unless the President of the United States has provided us with every single document *that we have asked for in our resolution of inquiry.*"[29] Representative Livingston stated: "We have compelled the White House to provide documentation which has not been forthcoming to date despite a resolution passed by this House on March 1."[30] Representative Callahan concluded the debate: "The agreement we have reached with the Senate requires the President to provide *the information* on the Mexican debt crisis *called for in House Resolution 80.*"[31]

These statements contradict House Counsel's assertion that this Office's construction of the Act and its legislative history is "untenable." Indeed, the House Counsel Memorandum itself notes that "[t]hese new provisions were designed to resolve the document dispute by making the continuation of the President's Mexican aid program contingent upon the production of *the documents sought by the precatory Resolution of Inquiry and the oversight committee.*"[32]

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[28] Indeed, Representative Kaptur, the sponsor of Resolution 80, stated during the floor debate on section 406 that the provision got the House to "second base" in terms of serious oversight of the expenditure of funds. She had said when introducing the Resolution that she had been seeking a "home run" of an actual House vote on the assistance program, but since the House leadership blocked that, she had settled for the "single" represented by the Resolution's request for documents. 141 Cong. Rec. at 10,672. The clear implication of her statement, of course, is that the vote on section 406 was not a vote on terminating the assistance program. *See also id.* at 10,674 (statement of Rep. Callahan) ("The bill language does not cut off aid to Mexico.").

[29] 141 Cong. Rec. at 10,672 (emphasis added).

[30] *Id.*

[31] *Id.* at 10,674 (emphasis added).

[32] House Counsel Memorandum at 9 (emphasis added).

6. According to House Counsel, instead of merely requiring the President to comply with Resolution 80 before providing additional assistance to Mexico, section 406 actually *expanded* the scope of the documents being sought by the House by requiring the inclusion of documents that, in the President's judgment, it would not be in the public interest to provide. Nothing in the text or legislative history of the statute supports such a conclusion. The text of section 406 defines the documents at issue by reference to Resolution 80 without any indication of an intent to go beyond the requirements of the Resolution. Indeed, the reference in section 406(b) to documents that "may not have been produced to the House of Representatives" reflects the existence of authority to withhold documents from the House. However, in the view of House Counsel, although the House had authorized the President to protect the public interest in complying with its request, the Congress withdrew that authorization *sub silentio*. We find such a conclusion implausible.

Additionally, the legislative history of section 406 fails to reveal any intent or even interest in expanding the scope of the documents sought by Resolution 80. Instead, as we noted above, in all of the relevant legislative history, section 406 is described as merely enforcing the existing request, and not as expanding the request by deleting authority to protect the public interest. It would be remarkable for such a critical change to go unremarked in the legislative history.

7. Finally, as discussed more fully below, it was necessary to construe the statute to incorporate the initial paragraph of Resolution 80 because any other reading would fail to preserve the President's constitutional authority and responsibility to preserve the absolute confidentiality of documents the disclosure of which would be contrary to the public interest.[33] Section 406(b) concerns the "treatment of classified or privileged material." Under House Counsel's reading of section 406(b), all such material, if not provided to the full House, would have to "be produced to specified Members of Congress or their designees."[34] In other words, House Counsel would interpret section 406 to require the President either to dishonor the United States' commitment to Mexico, thereby posing a threat that Mexico would default and jeopardize important U.S. interests, or to divulge all documents, even highly sensitive documents reflecting diplomatic negotiations, to at least some Members of Congress as a condition of aid to Mexico. Such an interpretation creates serious doubts about the statute's constitutionality.

A paramount rule of statutory construction thus stands as an obstacle to House Counsel's interpretation. As the Supreme Court has repeatedly cautioned, "[w]hen the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which

[33] *See United States v. Nixon*, 418 U.S. 683 (1974); Memorandum for C. Boyden Gray, Counsel to the President, from J. Michael Luttig, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Access to Presidential Communications* (Dec. 21, 1989).

[34] House Counsel Memorandum at 7.

the question may be avoided."[35] Absent clear evidence of Congress's contrary intent, a court will adopt a reasonable construction of a statute to avoid reaching a serious constitutional problem.[36] The practice of the executive branch is and should be the same. As just discussed, there was no such clear evidence of contrary congressional intent.

B.

In summary, we believe our construction of section 406 is correct, and we reject the alternative put forward by House Counsel. The fundamental premise of House Counsel's reading is that paragraphs 1–28 of House Resolution 80 should be interpreted without recourse to the initial paragraph of the Resolution. As we have shown, however, this premise is erroneous. In order to give a plausible reading to section 406, it is necessary to go outside the four corners of paragraphs 1–28. It is clear that the initial paragraph of House Resolution 80—in which the House itself set forth its understanding of its request but which the House Counsel treats as superfluous—is an appropriate source of clarification. The admittedly scanty legislative history of section 406 confirms what would have seemed obvious in any case, that certification requirement five was intended to obtain executive branch compliance with House Resolution 80, and not to broaden the scope of the House's request. At the same time, the legislative history is devoid of any suggestion that Congress intended for section 406 to present the President with a choice between violating the President's own obligations to the Constitution or failing to honor a commitment to a foreign sovereign and placing important U.S. interests at risk. Finally, our interpretation of section 406, unlike the alternative, provides a reasonable way to give effect to the statutory language while avoiding the creation of a serious question about the constitutionality of the section. We now turn to explain more fully the constitutional issues.

III.

Were House Counsel correct in defining the scope of the document production needed to satisfy that requirement, then section 406 would be an invalid intrusion into the President's constitutional authority. According to House Counsel, section 406

[35] *Crowell v. Benson*, 285 U.S. 22, 62 (1932); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court.").

[36] *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *Public Citizen v. Department of Justice*, 491 U.S 440, 466 (1989) (The Supreme Court is "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.").

> is not a document request, but a statement of the conditions under which the Administration's financial assistance to Mexico may proceed. It sets forth conditions for the exercise of executive authority. The President may choose not to supply the documents identified in the Act. But then the President may not exercise the authority for which the production of documents is the condition precedent.[37]

While it is true that section 406 is not in itself a request for documents, it specifically refers in terms to House Resolution 80, which *was* a document request, and it requires the President, as a condition of furnishing further financial assistance to Mexico, to certify that he has provided certain documents.

Broad as the spending power of the legislative branch undoubtedly is, it is clear that Congress may not deploy it to accomplish unconstitutional ends.[38] Thus, as this Office has repeatedly affirmed, and as we discuss more fully below, Congress may not use the spending power to infringe on the President's constitutional authority. In particular, "Congress may not use its power over appropriation of public funds ' "to attach conditions to Executive Branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs." ' " *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 28 (1992) (Asst. Att'y Gen. Flanigan) (quoting *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 42 n.3 (1990) (Asst. Att'y Gen. Barr), (quoting *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 261 (1989) (Asst. Att'y Gen. Barr))). Moreover, "the conduct of affairs committed exclusively to the President by the Constitution must be carefully insulated from improper congressional interference in the guise of 'oversight' activities. . . . [W]hile Congress unquestionably possesses the power to make decisions as to the appropriation of public funds, it may not attach conditions to Executive Branch appropriations that require the President to relinquish any of his constitutional discretion in foreign affairs." *The President's Compliance with the "Timely Noti-*

[37] House Counsel Memorandum at 4–5.

[38] *See, e.g., United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872) (appropriations act unconstitutionally intruded on President's pardon power); *United States v. Lovett*, 328 U.S. 303, 316 (1946) (Congress may not employ its appropriations power to impose bill of attainder); *cf. Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926) (state legislature cannot affix unconstitutional condition to a privilege that it may deny); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271 (1991) (Congress may not use its authority over federal property to achieve ends by indirect means that it cannot accomplish directly); *see also Authority of Congressional Committees to Disapprove Action of Executive Branch*, 41 Op. Att'y Gen. 230, 233 (1955) (Att'y Gen. Brownell) ("If the practice of attaching invalid conditions to legislative enactments were permissible, it is evident that the constitutional system of the separability of the branches of Government would be placed in gravest jeopardy."); *Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. 56, 61 (1933) (Att'y Gen. Mitchell) ("This proviso can not be sustained on the theory that it is a proper condition attached to an appropriation. Congress holds the purse strings, and it may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted and impose conditions in respect to its use, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution.").

fication" Requirements of Section 501(b) of the National Security Act, 10 Op. O.L.C. 159, 169–70 (1986) (Asst. Att'y Gen. Cooper).[39]

A.

As then-Assistant Attorney General William Barr noted, "Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control." [40] It is, of course, well settled that the Constitution vests the President with the exclusive authority to conduct the Nation's diplomatic relations with other States. This authority flows, in large part, from the President's position as Chief Executive, U.S. Const. art. II, § 1, cl. 1, and as Commander in Chief, *id.* art. II, § 2, cl. 1. It also derives from the President's more specific powers to "make Treaties," *id.* art. II, § 2, cl. 2; to "appoint Ambassadors . . . and Consuls," *id.*; and to "receive Ambassadors and other public Ministers," *id.* art. II, § 3. The Supreme Court has repeatedly recognized the President's constitutional authority with respect to the conduct of diplomatic relations.[41]

Interwoven with the President's constitutional authority to conduct diplomatic relations is his constitutional authority to determine whether to disclose the content of international negotiations: without such power, he could not ensure the con-

[39] *See also Bill to Relocate United States Embassy from Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123, 126 (1995) (concluding that a bill, which would condition executive branch's ability to obligate appropriated funds upon locating U.S. embassy to Israel in Jerusalem, would unconstitutionally invade the President's constitutional authority to determine the form and manner of the Nation's diplomatic relations).

[40] Panel symposium on *The Appropriations Power and the Necessary and Proper Clause*, 68 Wash. U L.Q. 623, 628 (1990). So, for instance, the Supreme Court has prohibited Congress's use of its spending power to encroach on the exclusive power of the President to grant pardons. *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872). A century later, this Office construed an amendment to an appropriations act that prohibited the use of certain funds for salaries or expenses in connection with readmitting into the United States persons who had evaded the draft. This Office concluded that the statute, if construed broadly, would be an unconstitutional interference with the President's pardon power. Accordingly, we advised the Counsel to the President that the statute should be narrowly construed to avoid the constitutional infirmity. If the circumstances (unavailability of alternative funds) made that unworkable, then the President was advised to disregard the amendment as an unconstitutional condition attached to an appropriations act. Memorandum for the Honorable Robert J. Lipshutz, Counsel to the President, from John Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Myers Amendment* (Aug. 30, 1977); *see also Mutual Security Program—Cutoff of Funds From Office of Inspector General and Comptroller*, 41 Op. Att'y Gen. 507, 527 (1960) (Att'y Gen. Rogers) ("[T]he power of appropriation . . . is far-reaching in scope, and the objects of appropriation are also subject to the broad discretion of Congress. But the power to appropriate . . cannot be exercised without regard to constitutional limitation."); *Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 469–70 (1860) (concluding that appropriations bill that contained condition that the money be spent only under the supervision of a particular person designated for appointment by Congress was invalid encroachment upon presidential authority and should be treated "as if the paper on which it is written were blank.").

[41] *See, e.g., Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive'" (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981))); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705–06 n.18 (1976) (opinion of White, J.) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch."); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"); *see also Ward v. Skinner*, 943 F.2d 157, 160 (1st Cir. 1991) (Breyer, C.J.) ("[T]he Constitution makes the Executive Branch . . . primarily responsible" for the exercise of "the foreign affairs power."), *cert. denied*, 503 U.S. 959 (1992); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (Scalia, J.) ("[B]road leeway" is "traditionally accorded the Executive in matters of foreign affairs."); Charles J. Cooper, panel symposium on *What the Constitution Means by Executive Power*, 43 U. Miami L. Rev. 165, 177 (1988) ("[T]he conduct of foreign affairs is an aspect of the executive power entrusted to the President, subject only to narrowly defined exceptions.").

fidentiality and secrecy that are essential elements of diplomacy. "[I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence." [42] As precedent and continuing practice firmly establish, "[t]he conduct of international negotiations is a function committed to the President by the Constitution," and "he must have the authority to determine what information about such international negotiations may, in the public interest, be made available to Congress and when such disclosure should occur." [43] The President therefore possesses, as a matter of constitutional law, the authority to exercise independent judgment about whether it is in the public interest to disclose such information to Congress.[44] The President's authority to control the release of diplomatic communication does not terminate when the negotiations conclude.[45]

On the interpretation of section 406 advocated by House Counsel, however, Congress would be attempting to compel the President to disclose the contents of international negotiations of a highly sensitive and confidential nature (including direct correspondence between one Head of State and another) as a condition of honoring a commitment made by the President, acting pursuant to statutory authority, to furnish financial aid in the midst of an international currency crisis. Such a constraint on the President's authority would "deprive the President of

[42] *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring). As the Senate Foreign Relations Committee stated in 1816, in recognizing limits on its authority to demand documents related to diplomatic matters from the President, "[t]he nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends upon secrecy and dispatch." *United States v. Curtiss-Wright Export Corp.* 299 U.S. 304, 319 (1936) (quoting *Compilation of Reports of the Committee on Foreign Relations, United States Senate, 1789–1901*, S. Doc. No. 56–231, pt. 8, at 24 (1901)); *see also* Charles J. Cooper and Leonard A. Leo, *Executive Power Over Foreign and Military Policy: Some Remarks on the Founders' Perspective*, 17 Okla. City U. L. Rev. 265, 274 (1991) ("*The Federalist No. 75* . . . recognize[ed] the importance of presidential autonomy in . . . negotiations—so that he may 'enjoy the confidence and respect of foreign powers' and 'act with an equal degree of weight of efficacy.'" (quoting *The Federalist No. 75* at 487 (Alexander Hamilton) (E. Earle ed. 1937))).

[43] 14 Op. O.L.C. at 43. In that opinion, this Office concluded that a condition contained in a statute authorizing funds for international conferences that required the President to include certain individuals as U.S. Representatives in the negotiating delegation was unconstitutional. *See also The Disclosure of Documents to the House Committee on Government Operations—Boycotts—Export Administration Act*, 1 Op. O.L.C. 269, 270 (1977) (Asst. Att'y Gen. Harmon) (concluding that the executive branch may, as a matter of constitutional law, refuse to provide to Congress documents reflecting confidential communication and notes of meetings with foreign government officials, where the disclosure of documents could "impair our relations with the foreign governments involved, both by breaching a pledge of confidentiality and by releasing information possibly detrimental to the interests of the other governments," the documents could properly be considered "state secrets"); Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Executive Privilege to Withhold Foreign Policy and National Security Information* at 7 (Dec. 8, 1969) ("[T]he President has the power to withhold from the Senate information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest.").

[44] 1 Op. O.L.C. at 269, 272.

[45] *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320–21 (1936); 14 Op. O.L.C. at 44 n.6, 13 Op. O.L.C. at 259; 10 Op. O.L.C. at 165 n.13. (Asst. Att'y Gen. Cooper).

his constitutionally-mandated control over the disclosure of the content of [foreign affairs] negotiations."[46] Congress, therefore, cannot directly or indirectly compel such a disclosure: it lacks the authority, whether in the exercise of its spending power or any other of its powers, to "inquire into matters which are within the exclusive province of one of the other branches of the Government."[47] Accordingly, section 406, if given the construction urged in the House Counsel Memorandum, would be invalid as an unconstitutional condition imposed on the President.[48]

B.

The President's constitutional authority to control the disclosure of documents and information relating to diplomatic communications has been recognized since the beginning of the Republic. The issue first arose during the administration of President George Washington, and it was President Washington and the distinguished members of his cabinet who originally articulated the Executive's authority to withhold documents in the public interest. By its deliberations and actions, the Washington administration outlined a consistent account of the executive branch's independent power over diplomatic communications: (1) the Constitution delegates to the President the authority to withhold documents relating to diplomatic negotiations from Congress when disclosure would be, in his judgment, contrary to the public interest; (2) the President has discretion to disclose documents that he could have withheld when in his judgment it is appropriate to do so; and (3) it is appropriate whenever possible to construe congressional requests for information to avoid a conflict between the President's constitutional prerogative and congressional requirements. Subsequent Presidents have regularly adhered to Washington's views.

The earliest discussion of the question of presidential authority over disclosure appears to have been in response to a March 1792 resolution of the House of Representatives appointing a committee with the power to investigate the disastrous St. Clair expedition of the previous year. When the committee requested

[46] 14 Op. O.L.C. at 42.

[47] *Barenblatt v. United States*, 360 U.S. 109, 112 (1959)

[48] We do not mean to suggest that the President's constitutional authority over the disclosure of confidential executive branch documents is limited to the area of foreign affairs. A few years ago then-Assistant Attorney General Barr described "the President's constitutional right and duty to withhold from disclosure certain information" as including "information whose disclosure might significantly impair the conduct of foreign relations, the national security, the deliberative processes of the executive branch or the performance of its constitutional duties." *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 254 (1989); *see also* Memorandum from President Harry S. Truman (Mar. 15, 1948), *reprinted in* H.R. Rep. No. 80–1595, at 8–10 (1948) (minority report) ("Truman Memorandum") ("Since the founding of the Government the Presidents of the United States have, from time to time, held information of various types to be confidential, and have refused to divulge or to permit the divulgence of such information outside of the executive branch of the Government."). For the purposes of this memorandum, however, it is unnecessary to examine the legal principles governing presidential control of this broader range of information: section 406 concerns documents with respect to which the President's authority is the most unequivocal and absolute. *See, e.g., Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. 481, 482–83 & n.3 (1982) (Asst. Att'y Gen. Olson).

that the Secretary of War provide it with relevant documents, President Washington asked the cabinet's advice as to his proper response "because [the request] was the first example, and he wished that so far as it should become a precedent, it should be rightly conducted."[49] Washington's own view was that "he could readily conceive of papers of so secret a nature, as that they ought not to be given up."[50] A few days later a unanimous cabinet — including Secretary of State Thomas Jefferson, Secretary of the Treasury Alexander Hamilton, and Attorney General Edmund Randolph — concurred. The cabinet advised the President that while the House "might call for papers generally," "the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public."[51] The Executive "consequently w[as] to exercise a discretion" in responding to the House request.[52]

Although the cabinet further advised President Washington that the documents in question could all be disclosed consistently with the public interest,[53] his and their conclusion that the House resolution could not compel disclosure against the President's judgment apparently was communicated to the House, which promptly substituted a new resolution asking only for papers "of a public nature," a request with which the President complied.[54] Just as Washington had anticipated, the St. Clair episode set an important precedent, in several respects. First, it produced agreement in a group including three of the most distinguished participants in the Philadelphia convention (Washington, Hamilton and Randolph) as well as between two of the most influential early interpreters of the Constitution (Hamilton and Jefferson) that the President possesses the authority to refuse to disclose documents respecting military and diplomatic matters to Congress when in his judgment to do so would be harmful. Second, the event was the first instance of the Executive construing a congressional document request in order to preserve executive branch prerogatives.[55] Finally, the House's substitute motion apparently

[49] 1 *Writings of Thomas Jefferson* 303 (Andrew Lipscomb ed. 1903) (The Anas).

[50] *Id.*

[51] *Id.* at 304.

[52] *Id.*

[53] *Id.* at 305.

[54] The substitute resolution acknowledged indirectly the President's asserted power to withhold documents, by defining the documents included in rather than those excepted from the scope of the House's request. *See* Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power* 82–83 (1976) ("Sofaer") (concluding that the "far more reasonable construction" of the House's "somewhat ambiguous" language is that it meant "those papers that could properly or safely be made public"). Subsequent congressional requests to the President have generally included direct acknowledgments of the President's authority not to disclose.

[55] Although the House committee had demanded the originals of the relevant documents, the cabinet opined that "copies only should be sent, with an assurance" that the Executive would permit verification of the copies' accuracy if desired. 1 *Writings of Thomas Jefferson* at 305. A majority of the cabinet, furthermore, advised Washington that such document requests should properly come from the full House to the President rather than from a committee to his subordinate, *id.* at 304, a view apparently accepted by the House in its substitute resolution. *See* Sofaer, *supra* at 82.

began the long history of congressional acquiescence in the Executive's assertion of discretionary authority over disclosure.[56]

President Washington adhered to the conclusions reached in 1792 in later confrontations with Congress. In January 1794, the Senate requested the President to provide it with "the correspondences which have been had" between the Republic of France and the United States minister to France, as well as between the minister and the Secretary of State; the resolution was entirely unqualified. Once again, Washington's cabinet advised the President unanimously that he need not and should not disclose documents against his judgment of the public interest.[57] In a separate written opinion, Attorney General William Bradford agreed: "[I]t is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed." [58] Bradford vigorously rejected the argument that the Senate's unqualified language precluded a construction of the resolution that would respect the President's authority over disclosure, authority that Bradford plainly rooted in the Constitution.[59] President Washington acted on this advice by providing the Senate with the correspondence except, as he explained in a cover letter, for "those particulars which, in my judgment, for public considerations, ought not to be communicated." [60]

The best known of President Washington's assertions of the Executive's authority over disclosures not in the public interest involved the controversial Jay Treaty and a resolution by the House requesting the correspondence and other documents relating to the Treaty. Although the resolution contained an explicit exception for

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[56] *See* Sofaer, *supra* at 81–83. Perhaps the most serious congressional questioning of the President's constitutional authority occurred in 1948, when the House of Representatives considered a joint resolution intended to vest in a congressional committee the power to make determinations about disclosure of documents obtained from the executive branch. Opponents of the bill pointed out that its passage would violate the principle that "[u]nder the Constitution, the Executive is no less supreme in his field than is the Congress in its field of operation." H.R. Rep. No. 80–1595, at 10 (1948) (minority report). In addition, they argued, "the acquiescence by the Congress for over 150 years in the Executive prerogative of withholding from disclosure such information as the Executive deems must be withheld in the public interest is in itself conclusive proof that the prerogative is one which exists under, and is protected by, the Constitution." *Id.* The Resolution was not finally adopted.

[57] Secretary Hamilton agreed with Secretary of War Henry Knox that it would be best flatly to decline compliance, but reasoned that "the principle" of executive authority would be "safe, by excepting such parts as the President may choose to withhold." Cabinet Meeting Opinion on Communicating to the Senate the Dispatches of Gouverneur Morris, 15 *The Papers of Alexander Hamilton* 666, 667 (Harold C. Syrett ed., 1969). Randolph, now Secretary of State, advised the communication of "all the correspondence, proper from its nature to be communicated to the Senate," but agreed that "what the President thinks improper, should not be sent." *Id.*

[58] Memorandum for the President, from William Bradford, Attorney General (n.d.), *reprinted in* Walter Dellinger and H. Jefferson Powell, *The Attorney General's First Separation of Powers Opinion*, 13 Const. Commentary 309, 316 (1996).

[59] Bradford wrote that he also conceived

> that the *general* terms of the resolve do not exclude, in the construction of it, those just exceptions which the rights of the executive and the nature of foreign correspondences require. Every call of this nature, where the correspondence is secret and no specific object pointed at, must be presumed to proceed upon the idea that the papers requested are proper to be communicated[;] & it could scarcely be supposed, even if the words were stronger[,] that the Senate intended to include any Letters[,] the disclosure of which might endanger national honour or individual safety.

Id.

[60] 4 Annals of Cong. 56 (1794); *see* Sofaer, *supra* at 83–85.

documents "improper to be disclosed," the President ultimately refused to comply:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolite; for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers.[61]

While Washington explained his rejection of any "right" on the House's part to demand "all the Papers respecting a negotiation with a foreign power," *id. in* 1 *Messages and Papers* at 195, with reference to the realities of foreign affairs, he grounded his position in his "obligation . . . to 'preserve, protect and defend the Constitution.'"[62]

C.

We have not discussed the Washington era events at length out of mere antiquarian interest. Later Presidents have regularly followed Washington — and cited him — in combining assertions of their constitutional authority to withhold documents relating to diplomatic matters and of the propriety of interpreting congressional requests as respecting their constitutional prerogative with earnest attempts to accommodate Congress's interests.[63] The constitutional position originally for-

[61] Message of President George Washington to the House of Representatives (Mar. 30, 1796), *in* 1 *A Compilation of the Messages and Papers of the Presidents 1789–1897*, at 194–95 (James D. Richardson ed., (1897)) ("*Messages and Papers*").

[62] *Id. in* 1 *Messages and Papers* at 194. In asserting the constitutional basis for his refusal to comply with the House request, Washington relied in part on the exclusion of the House from the treaty power. However, we believe that it is clear that Washington was in no way rejecting the position he had already taken — that the President might withhold documents when the public interest so required. *See* Sofaer *supra* at 93; Message of President James K. Polk to the House of Representatives (Jan. 12, 1848), *in* 4 *Messages and Papers* 565, 567 (relying on Washington's argument based on his authority to control the disclosure of diplomatic information while not "deeming it to be necessary on the present occasion to examine or decide upon the other reasons" given in Washington's message).

The Executive's responsibility for determining what part of the correspondence could be disclosed was also defended vigorously in the House. Even James Madison, who strongly insisted on the House of Representatives' general right to access to information, conceded the President's authority over disclosure. Madison told the House that the House "must have a right, in all cases, to ask for information which might assist in their deliberations on the subjects submitted to them by the Constitution; being responsible, nevertheless, for the propriety of the measure" but continued that he "was as ready to admit that the Executive had a right, under a due responsibility, also, to withhold information, when of a nature that did not permit a disclosure of it at the time." 5 Annals of Cong. 773 (1796).

[63] The traditional executive branch view of the 1796 message is that it is a powerful precedent for the Executive's long-standing constitutional view that Congress cannot legitimately deny the President the power to withhold documents when in his judgment the public interest requires such action. *See* Message of President James K. Polk to the House of Representatives (Jan. 12, 1848), *in* 4 *Messages and Papers* at 566–67; Message of President John Tyler to the House of Representatives (Jan. 31, 1843), *in* 4 *Messages and Papers* 220, 223; Truman Memorandum; *see also Position of the Executive Department Regarding Investigative Reports*, 40 Op. Att'y Gen. 45, 48 (1941); 13 Op. O.L.C. at 259; 10 Op. O.L.C. at 165 n.13.

mulated by the Washington Administration has thus become the practice of the executive branch as an ongoing institution,[64] and the Attorneys General and the heads of this Office have consistently maintained that it is the correct interpretation of the respective powers of President and Congress.[65] The executive branch position has had vigorous defenders in the legislative branch as well,[66] and Congress has usually accepted the Executive's position as a practical matter.[67]

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[64] William H. Taft, *The Presidency* 110 (1916) ("The executive has always insisted and maintained that, while either house may request information, it cannot compel it if the executive deems it to be inconsistent with the public weal to disclose what is asked."). President James K. Polk's response to an 1848 document request is particularly instructive. On January 4, 1848, the House passed a resolution calling on the President to provide the House with a broad range of documents concerning United States relations with Mexico, including communications to the United States minister to Mexico and to United States military officers. As President Polk noted in his response, "[t]he customary and usual reservation contained in calls of either House of Congress upon the Executive for information relating to our intercourse with foreign nations [was] omitted." Message of President James K. Polk to the House of Representatives (Jan. 12, 1848), *in* 4 *Messages and Papers* at 566. Despite the unqualified nature of the House resolution, Polk provided only those documents that he deemed it "compatible with the public interests to communicate," *id. in* 4 *Messages and Papers* at 565, citing constitutional principle and executive precedent:

> The call of the House is unconditional. It is that the information requested be communicated, and thereby made public, whether in the opinion of the Executive (who is charged by the Constitution with the duty of conducting negotiations with foreign powers) such information, when disclosed, would be prejudicial to the public interest or not. It has been a subject of serious deliberation with me whether I could, consistently with my constitutional duty and my sense of the public interests involved and to be affected by it, violate an important principle, always heretofore held sacred by my predecessors, as I should do by a compliance with the request of the House.

Id. in 4 *Messages and Papers* at 566. Polk discussed and relied on President Washington's 1796 refusal in concluding that it was his "constitutional right and solemn duty under the circumstances of this case to decline a compliance with the request of the House." *Id. in* 4 *Messages and Papers* at 567; *see also* 94 Cong. Rec. 5711 (1948) (statement of Rep. McCormick) (identifying seventeen different administrations in which by 1948 the executive branch had declined to comply with congressional requests for information or documents).

[65] *See e.g., Mutual Security Program — Cutoff of Funds From Office of Inspector General and Comptroller*, 41 Op. Att'y Gen. 507 (1960); *The Disclosure of Documents to the House Committee on Government Operations — Boycotts — Export Administration Act*, 1 Op. O.L.C. 269 (1977).

[66] Senator Howell Edmunds Jackson's 1886 speech in response to President Cleveland's refusal to provide certain documents is illustrative. Jackson noted that the question

> as to how far the executive department of the Government should respond to the calls of the House and Senate for papers . . . came up as early as 1792, and from that time to this it has been uniformly held both by the executive and judicial departments of the Government that it rested in the discretion of the Executive as to what papers he would produce in response to calls by the Legislature or the courts.

17 Cong. Rec. 2622 (1886). As the Senate Foreign Relations Committee stated in 1816, in recognizing the limits on its authority to interfere in diplomatic matters, "[t]he nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends upon secrecy and dispatch." *Compilation of Reports of the Committee on Foreign Relations, United States Senate, 1789–1901*, S. Doc. No. 56–231, pt. 8, at 24 (1901), *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (describing Washington's refusal to comply with the House request in 1796 — "a refusal the wisdom of which was recognized by the House itself and has never since been doubted").

In 1826, Representative Daniel Webster objected to an appropriations rider that purported to attach instructions to United States diplomats whom the President proposed to send to an international conference. Webster argued vigorously that the rider was "unconstitutional; as it was taking the proper responsibility from the Executive and exercising, ourselves, a power which, from its nature, belongs to the Executive and not to us." *See* Eli E. Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 289 Annals Am. Acad. Pol. & Soc. Sci. 145, 150 (1953).

[67] The most persuasive evidence of congressional recognition of the force of the executive branch position may be the long-standing practice of including the public interest exception in resolutions requesting information. As noted in the minority report accompanying the Truman Memorandum,

> The unwisdom of our attempting at this time to enforce this asserted congressional 'right' of doubtful constitutionality [to demand information that the executive branch deems is not in the public interest to disclose] when 79 Congresses which have gone before us have seen fit not to attempt such enforcement

Continued

The more recent doctrine and practice of the executive branch demonstrate the continuing vitality of the President's constitutional authority to control the disclosure of diplomatic communications, even in the face of an effort by Congress to condition funding on the making of those disclosures. In 1960, Attorney General William Rogers advised President Eisenhower regarding a provision of a statute that directed that certain expenses of a State Department office be charged to certain appropriations, provided that all documents relating to activities of that office were furnished upon request to Congress.[68] A related statute provided for termination of funds if all documents were not produced, unless the President certified that he had forbidden the disclosure of the documents to protect the public interest. The State Department refused to furnish a number of documents requested by a House subcommittee, and the President certified that he had forbidden their disclosure. The Comptroller General, interpreting the former statute as not incorporating the public interest exception, directed that funds not be made available to liquidate obligations incurred from the following day forward. Attorney General Rogers concluded that the statute should be construed to include the public interest exception because otherwise the statute, as applied under the circumstances, would embody an unconstitutional condition:

> First, it is the constitutional duty and right of the President and those officials acting pursuant to his instructions, to withhold information of the executive branch from Congress whenever the President determines that it is not in the public interest to disclose such information.
>
> Second, under the constitutional doctrine of separation of powers Congress may not directly encroach upon the authority confided to the President.
>
> Third, the Constitution does not permit any indirect encroachment by Congress upon this authority of the President through resort to

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is self-evident. Not only that, but also the acquiescence by the Congress for over 150 years in the Executive prerogative of withholding from disclosure such information as the Executive deems must be withheld in the public interest is in itself conclusive proof that that prerogative is one which exists under, and is protected by our Constitution and that the 'right' of the Congress which House Joint Resolution 342 would enforce has no constitutional basis.

H.R. Rep. No. 80–1595, at 10 (1948).

To be sure, the Houses of Congress have rarely conceded unequivocally that the exception is constitutionally required. This is hardly surprising: Congress is subject to strong "hydraulic pressures" to describe its powers in expansive terms and consequently minimize the independent authority of the Executive. *See INS v. Chadha*, 462 U.S. 919, 947, 951 (1983) (noting " 'propensity' " of the legislative branch " 'to invade the rights of the Executive' " (quoting *The Federalist No. 73*, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

[68] 41 Op. Att'y Gen. 507 (1960) (construing the Mutual Security Act of 1959, Pub. L. No. 86–108, sec. 401(b), § 533A, 73 Stat. 246, 253).

> conditions attached to appropriations such as are contended to be contained in . . . the act.[69]

Thus, he concluded, in spite of the Comptroller General's letter announcing the termination of funds, the funds "continue to be available as heretofore." [70]

Similarly, in 1973, this Office issued an opinion regarding the constitutionality of a section of an authorizations act providing that no funds made available to the Department of State and related agencies may be obligated thirty-five days after delivery to the head of the agency of a request from certain congressional committees for documents, unless the agency has complied with the request.[71] The statute excepted only communications to and from the President personally. Thus, the statute precluded the President from exercising his constitutional authority "to prevent the disclosure to the Congress of information where in his judgment disclosure would be contrary to the public interest." [72] This Office concluded that the statute, if interpreted literally, would be an unconstitutional interference with the President's duty to refuse compliance with a congressional demand to disclose documents that may reveal state secrets. The opinion noted that the statute did not literally deny to the President the exercise of his authority to invoke executive privilege, but rather it would "as a practical matter" leave the President with "no choice." [73] The following analysis from that opinion is fully applicable to the present situation:

> The Department of Justice is not prepared to take the position that in every instance legislation would be unconstitutional that might operate to interfere with the free exercise of the President's discretion as to whether or not he shall invoke the privilege. . . . Congress may refuse to pass needed legislation, or the Senate may withhold its advice and consent to a treaty, or to the appointment of an officer, if it is denied requested information. Legislation that would provide for similar limited restraints on the President's exercise of privilege therefore is not necessarily unconstitutional. That consideration, however, ceases to be operative where the penalty attached to the exercise of the privilege is such that as a practical matter the President has no choice but to comply with every Congressional demand no matter how injurious to the public interest

[69] *Id.* at 530 (footnote omitted).

[70] *Id.* at 531.

[71] Memorandum for the Honorable Leonard Garment, Counsel to the President, from Leon Ulman, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Section 13 of the State/USIA Authorization* (July 16, 1973).

[72] *Id.* at 1–2.

[73] *Id.* at 4.

> or unreasonable. The choice is transferred from the President to the Congress, without recourse.
>
> In our view, [the statute] falls into the latter category. By providing that the funds for an entire agency will be cut off should the President exercise his constitutional power it deprives the President of all choice. In other words, despite its wording, [the statute] is for all practical intent and purposes identical with legislation that would expressly deny to the President the exercise of a constitutional power. It is therefore in our judgment unconstitutional.[74]

Precipitously cutting off assistance to Mexico, thereby threatening a liquidity crisis in Mexico, which could in turn put at risk a secure U.S.–Mexico border and jeopardize the position of other emerging markets is as serious a consequence as terminating funds to a government agency — the threatened situation considered in the 1973 Opinion. To compel the President to choose between violating his constitutional duty to withhold documents when that is required by the public interest and failing to honor a commitment to a foreign sovereign, just as surely would deny the President a meaningful choice. The choice presented to the President under House Counsel's interpretation of section 406 would be particularly hollow because — in contrast to the statutes at issue in the 1960 and 1973 opinions, which apparently sought to deny funds *prior* to their being obligated by the executive branch — the certification requirement would have forbidden the disbursal of funds already committed.

IV.

As then-Assistant Attorney General Barr has cautioned, in analyzing the scope of Congress's use of its power over finances to control the activities of the coordinate branches of government, "the easy answer is probably not a correct answer."[75] In the absence of a large body of case law interpreting the separation of powers issues raised by congressional efforts to use its appropriations power to control the President's exercise of his foreign affairs powers,[76] long-standing executive branch practice is a primary authority for the proper interpretation of

[74] *Id.* at 4–5. The Act as finally enacted did not include the unconstitutional provision. Department of State Authorization Act of 1973, Pub. L. No. 93-126, 87 Stat. 451.

[75] Panel symposium on *The Appropriations Power and the Necessary and Proper Clause*, 68 Wash. U. L.Q. 626, 626 (1990).

[76] The Supreme Court itself has labelled "the decisions of the Court in this area . . . [as] rare, episodic and afford[ing] little precedential value for subsequent cases." *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981). The paucity of judicial decisions is partly a result of the fact that many of the issues are non-justiciable, and partly a product of the courts' proper reluctance to intrude into the decisions of the political branches in the area. *See Chicago & Southern Air Lines Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative.").

the Constitution. As one commentator has noted: "Most of the law here consists not of judicial precedents but of historical ones; legitimacy is found in repetition, innovation, and acceptance." [77] The history of the relationship between Congress and the President in this area is one of delicate accommodation, and wherever possible the executive branch has sought to construe statutes in a manner that avoids rather than creates confrontation. Our April 14 Letter continued that history.

The President's constitutional authority to control disclosure of diplomatic communications, and the invalidity of congressional attempts to compel the President to relinquish his constitutional powers by the imposition of conditions on expenditures, are directly relevant to the correct interpretation of section 406. Read as House Counsel does, the effect of the statute would be a dramatic intrusion into the President's conduct of foreign relations. At the time section 406 was enacted, the President had already taken action, pursuant to his statutory authority with respect to the Exchange Stabilization Fund, that constituted a United States commitment of emergency assistance to Mexico. Failure to honor that commitment would risk a sovereign default, severe hardship within Mexico, with direct consequences for the United States.

According to House Counsel, section 406 required the President either to accept these serious consequences or to surrender his constitutional authority to determine which documents relating to the Mexico assistance program could be disclosed consistent with the public interest. As we have discussed, the Constitution does not permit Congress to employ its fiscal powers to compel such a surrender, and the interpretation of section 406 advocated by House Counsel thus would raise a serious question about its validity. Moreover, the validity of section 406, read in this manner, is not saved by the accommodation process outlined in section 406(b). Compliance with that subsection would require the President to share with the Speaker and other members of the House his discretion to determine which documents could be disclosed and would entail disclosing every document, regardless of its contents, to at least some members of the legislative branch. The President's constitutional authority to control disclosure, however, vests in him unilateral exercise of judgment about disclosure, and to decline to disclose appropriate documents entirely. As this Office has observed in the past, the President's authority over diplomatic information, unlike certain other constitutionally grounded privileges, is not subject to balancing: it is absolute.[78] Congress may not use conditions on spending to control or compel a waiver of such a presidential power.

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[77] Peter J. Spiro, *War Powers and the Sirens of Formalism* 68 N.Y.U. L. Rev. 1338, 1340 (1993); *see also The Pocket Veto Case*, 279 U.S. 655, 688–90 (1929) ("Long settled and established practice is a consideration of great weight . . . .").

[78] *See, e.g.*, Memorandum for C. Boyden Gray, Counsel to the President, from J. Michael Luttig, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Congressional Access to Presidential Communications* (Dec. 21, 1989); Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutional Concerns Implicated by Demand for Presi-*

Continued

It is the duty and practice of the executive branch to avoid statutory constructions that unnecessarily raise grave doubts about the constitutionality of congressional measures. Respect for Congress, furthermore, counsels reluctance to interpret a statute so as to require the assertion of a presidential power to act contrary to the statute. It was the obligation of this Office, therefore, to seek a construction of section 406 that avoided interpreting it as an attempt to override the President's constitutional powers.

By referring to House Resolution 80, which contained the traditional public interest exception, to define in part the certification required by the Act, section 406 itself provided a construction that obviated the need for the President to assert his constitutional authority.[79] The April 14 Letter therefore construed section 406 to include the public interest exception contained in Resolution 80. In doing so, the advice of this office followed executive practice dating back to the beginning of the Republic.

WALTER DELLINGER
Assistant Attorney General
Office of Legal Counsel

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dential Evidence in a Criminal Prosecution (Oct. 17, 1988); *see also Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) (President's control over communications containing state secrets is absolute).

[79] Because the position adopted in the April 14 Letter was the appropriate construction to give the statute, we need not resolve the difficult question of what the Executive's legal view would have been if the statute had not been expressly linked to House Resolution 80. We do note, however, that in the past this Office has opined that the President was entitled to disregard a severable, unconstitutional condition on statutory spending authority, and proceed to employ that authority. *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18 (1992) (Acting Asst. Att'y Gen. Flanigan); *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37 (1990) (Asst. Att'y Gen. Barr); Memorandum for the Honorable Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Myers Amendment* (Aug. 30, 1977).

As this Office has concluded, the President does not, by signing a piece of legislation, "barter away" his responsibility to treat an Act as unconstitutional. Memorandum for the Honorable Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Myers Amendment* at 8 (Aug. 30, 1977); *see also* 14 Op. O.L.C. at 46 n.10 ("The analysis of [whether the President may refuse to enforce an unconstitutional condition on an appropriation] does not depend on whether the President signed the bill or not. As the Supreme Court has observed, 'it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds.' That the President has signed the bill in no way stops his ability to assert the bill's unconstitutionality, in court or otherwise.") (citation omitted).

Constitutionality of Statute Governing Appointment of United States Trade Representative

19 U.S.C. §2171(b)(3), which prohibits the appointment as United States Trade Representative of any person who has "represented, aided, or advised a foreign entity" in a trade negotiation or dispute with the United States, is an unconstitutional intrusion on the President's appointment power and thus has no legal effect.

July 1, 1996

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our opinion whether 19 U.S.C. §2171(b)(3) would bar the appointment of Ambassador (and Acting United States Trade Representative) Charlene Barshefsky to be United States Trade Representative. The provision, recently enacted as part of the Lobbying Disclosure Act of 1995, Pub. L. No. 104–65, §21, 109 Stat. 691, 705, states that anyone "who has directly represented, aided, or advised a foreign entity (as defined by section 207(f)(3) of Title 18) in any trade negotiation, or trade dispute, with the United States may not be appointed as United States Trade Representative." We believe that the provision is an unconstitutional intrusion on the President's power of appointment, U.S. Const. art. II, § 2, cls. 2 & 3, and thus has no legal effect. *

Section 2171(b)(3) purports to disqualify for appointment as United States Trade Representative a broad group of the most knowledgeable and experienced practitioners in the field of international trade. When Congress was considering this restriction, the Department of Justice stated that the provision "would raise serious constitutional concerns." Letter for Hon. Henry Hyde, Chairman, Committee on the Judiciary, U.S. House of Representatives, from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs at 2 (Nov. 7, 1995). In signing the bill, President Clinton stated that "Congress may not, of course, impose broad restrictions on the President's constitutional prerogative to nominate persons of his choosing to the highest executive branch positions, and this is especially so in the area of foreign relations." Statement by President William J. Clinton Upon Signing S. 1060, 2 Pub. Papers of William J. Clinton 1907 (Dec. 19, 1995). He endorsed, however, the policy behind the provision: "[B]ecause as a policy matter I agree with the goal of ensuring the undivided loyalty of our representatives in trade negotiations, I intend, as a matter of practice, to act in accordance with this provision." *Id.*

Under the Appointments Clause of the Constitution, the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, . . . and all other Officers of the United States," except for inferior officers whose appointment Congress vests in

* Editor's Note: A portion of this opinion addressing a separate issue is not being published.

the President alone, the heads of departments, or the courts of law. U.S. Const. art. II, § 2, cl. 2. Thus, under the Appointments Clause, "[t]he President has the sole responsibility for nominating [principal officers] and the Senate has the sole responsibility of consenting to the President's choice." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring in the result). Whatever the possible role of Congress in setting reasonable qualifications for office, *see Myers v. United States*, 272 U.S. 52, 128–29 (1926), a restriction ruling out a large portion of those persons best qualified by experience and knowledge to fill a particular office invades the constitutional power of the President and Senate to install the principal officers of the United States. Any power in the Congress to set qualifications "is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment." *Civil Service Commission*, 13 Op. Att'y Gen. 516, 520–21 (1871). Congress may not dictate qualifications "unattainable by a sufficient number to afford ample room for choice." *Id.* at 525.

Even if "[t]here is no settled constitutional rule that determines how . . . the power of the Congress to prescribe qualifications and the power of the President to appoint . . . are to be reconciled," we have opined that "there must be some constitutionally prescribed balance" and that this "balance may shift depending on the nature of the office in question." *Judges—Appointment—Age Factor*, 3 Op. O.L.C. 388, 389 (1979). Here, the restriction is particularly egregious because the office in question involves representation of the United States to foreign governments — an area constitutionally committed to the President. *See, e.g., Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive' ") (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705–06 n.18 (1976) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch."); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"). *See also Ward v. Skinner*, 943 F.2d 157, 160 (1st Cir. 1991) (Breyer, J.) ("[T]he Constitution makes the Executive Branch . . . primarily responsible" for the exercise of "the foreign affairs power."), *cert. denied*, 503 U.S. 959 (1992); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (Scalia, J.) ("[B]road leeway" is "traditionally accorded the Executive in matters of foreign affairs.").

Furthermore, the position in question is especially close to the President. The Office of United States Trade Representative is "established within the Executive Office of the President." 19 U.S.C. § 2171(a). Congress has also expressed its sense that the United States Trade Representative "be the senior representative on any body that the President may establish for the purpose of providing to the President advice on overall economic policies in which international trade matters

predominate." *Id.* § 2171(c)(2)(A). We believe that, where an office thus entails broad responsibility for advising the President and for making policy, the President must have expansive authority to choose his aides. *See also Promotion of Marine Officer*, 41 Op. Att'y Gen. 291, 292 (1956).

We therefore believe that § 2171(b)(3) is unconstitutional and cannot preclude the President's appointment of Ms. Barshefsky.

CHRISTOPHER SCHROEDER
Acting Assistant Attorney General
Office of Legal Counsel

Government Printing Office Involvement in Executive Branch Printing

The Office of Legal Counsel continues to adhere to the analysis and conclusions in its opinion dated May 31, 1996, regarding Government Printing Office involvement in executive branch printing.

July 23, 1996

LETTER OPINION FOR THE GENERAL COUNSEL
GOVERNMENT PRINTING OFFICE

This letter responds to your request for reconsideration of the opinion issued by this office on May 31, 1996 regarding Government Printing Office ("GPO") involvement in executive branch printing. *See Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, 20 Op. O.L.C. 214 (1996) (the "May 31, 1996 memorandum"). In that opinion, we concluded that, to the extent 44 U.S.C. § 501 & note require all executive branch printing and duplicating to be procured by or through the GPO, the statute violates constitutional principles of separation of powers. We further found that the provision in subsection (2) of 44 U.S.C. § 501 note authorizing the Public Printer to certify exceptions to the general rule of printing by or through the GPO is unconstitutional. In preparing the memorandum, we gave the issues our complete consideration. We continue to adhere to the analysis and conclusions set forth in that memorandum.

Specifically, you contend the May 31, 1996 memorandum represents an unwarranted departure from the principle previously embraced by this office, as set forth in a footnote of an opinion issued on September 13, 1993. *See General Services Administration Printing Operations*, 17 Op. O.L.C. 54 (1993) (the "September 13, 1993 memorandum"). We note, as an initial matter, that the September 13, 1993 memorandum focused on whether the Joint Committee on Printing ("JCP") has the authority to restrict printing functions of the General Services Administration ("GSA"), and whether then-recent legislation had any effect on GSA's authority to engage in printing. The issue central to the May 31, 1996 memorandum — the constitutionality of Congress's mandate that the executive branch use the GPO for all its printing and duplicating work — was addressed only in passing in a footnote of the September 13, 1993 memorandum.

Under separation of powers doctrine, Congress may not vest executive functions in a person or entity subject to congressional control. *See, e.g., Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Bowsher v. Synar*, 478 U.S. 714 (1986). This principle was further clarified subsequent to issuance of the September 13, 1993 memorandum in *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993) (striking down the ex officio, non-voting participation by congressional

agents in the Federal Election Commission on grounds that the "mere presence of agents of Congress on an entity with executive powers offends the Constitution"), *cert. dismissed*, 513 U.S. 88 (1994). As we concluded in the May 31, 1996 memorandum, the GPO is subject to congressional control through the JCP.

Your letter identifies as constitutionally significant (1) the fact that the Public Printer is appointed, and subject to removal at will, by the President; and (2) the absence of JCP veto authority over GPO actions. The President's appointment and removal authority demonstrates only that the executive branch also exercises a degree of control over the GPO and Public Printer. This fact does not ameliorate the constitutional problem that occurs as a result of the congressional control that is exerted over the same entity and official. Similarly, the absence of JCP veto authority in no way diminishes the control Congress exercises through other statutory mechanisms.

You further contend that, because the GPO cannot refuse executive branch printing orders nor modify the contents of any printed material, congressional control over its functions does not violate separation of powers principles. As set forth in detail in the May 31, 1996 memorandum, we disagree that the GPO's functions are so limited in nature that congressional control over such functions holds no constitutional significance. Indeed, as we noted in the May 31, 1996 memorandum, we doubt that the Constitution permits Congress to control functions outside the legislative sphere even where such aggrandizement is de minimis. But we need not resolve that issue at this time because the GPO functions cannot be characterized as merely ministerial. The GPO controls the timing and production of all printing work for the executive branch. *See* 44 U.S.C. § 501 & note. The Public Printer also determines "the form and style in which the printing or binding ordered by a department is executed, and the material and the size of type used." 44 U.S.C. § 1105. Thus, the GPO's functions are essential to the discharge of all executive functions that require printing work.

Accordingly, to the extent footnote 2 of the September 13, 1993 memorandum is at variance with current jurisprudence and the analysis and conclusions set forth in the May 31, 1996 memorandum, it no longer represents the views of this office.

CHRISTOPHER SCHROEDER
Acting Assistant Attorney General
Office of Legal Counsel

Nomination of Sitting Member of Congress to be Ambassador to Vietnam

The Ineligibility Clause does not bar the nomination of Representative Pete Peterson to be Ambassador to the Socialist Republic of Congress, provided that the President does not make the determination to create the office of ambassador to that government until after the expiration of the term for which Representative Peterson was elected.

July 26, 1996

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our opinion as to whether the Ineligibility Clause of the Constitution, U.S. Const. art. I, §6, cl. 2, operates to bar the nomination of Representative Douglas ("Pete") Peterson to be Ambassador to the Socialist Republic of Vietnam. We conclude that, in the circumstances of this case, Representative Peterson is not ineligible, provided that the President does not make the determination to create the office of ambassador to that government until after the expiration of the term for which Representative Peterson was elected.

I.

The Ineligibility Clause (the "Clause"), U.S. Const. art. I, §6, cl. 2, states, in part, that

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased, during such time . . . .

Representative Peterson was elected on November 8, 1994, for a term that began on January 4, 1995, and that will end at noon of January 3, 1997. The President nominated him as Ambassador to the Socialist Republic of Vietnam ("Vietnam") on May 23, 1996.

If the Ineligibility Clause applies to Representative Peterson's appointment to the office of Ambassador to Vietnam, it will apply only until the end of the term for which he was elected, i.e., until January 3, 1997, but not thereafter.[1] Prior opinions of the Attorney General and of our Office have resolved that an ineligible Member of Congress cannot escape the Clause by resigning from Congress before

[1] *See, e.g., Appointment of Senator as Federal Judge*, 33 Op. Att'y Gen. 88, 89 (1922) (Senator elected for term expiring March 4, 1919, and re-elected for term beginning on same date, was eligible to be appointed as federal judge, notwithstanding fact that salaries of federal judges were increased by Act of Congress of February 25, 1919.).

accepting his or her appointment to office.[2] The opinions and practice of the executive branch have also assumed that the Clause cannot be avoided if an ineligible Member of Congress is nominated and confirmed to an office created during the term for which the Member was elected, but not *commissioned* by the President until after that term expires.[3]

Before proceeding further, we note that there is a difficult and substantial question whether the ambassadorial position for which Mr. Peterson has been nominated would be a "civil Office" covered by the Clause. The only precedent we have identified that is directly on point assumes (without discussion) that it should be considered to be such an office.[4] In accordance with that precedent, we shall assume here, without deciding, that the Ambassadorship to Vietnam would be a "civil Office" within the meaning of the Ineligibility Clause.[5]

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[2] *See, e.g., Appointment to Civil Office*, 17 Op. Att'y Gen. 365 (1882) (prospective appointee held ineligible despite having resigned from Congress during term for which he was elected and before appointment would have been made); Memorandum for the Honorable John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Eligibility of Members of the 91st Congress to Be Appointed to the Position of Director of the Office of Management and Budget* at 4–5 (Mar. 31, 1970) (reaffirming prior view), *accord* Memorandum to the Honorable Jesse Helms, Chairman, and the Honorable Claiborne Pell, Ranking Member, from Thomas B. Griffith and Jill E. Hasday, Office of Senate Legal Counsel, *Re: The Ineligibility Clause* at 2 (July 24, 1996) ("Senate Memo").

[3] *See* Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Ineligibility of Sitting Congressman to Assume A Vacancy on the Supreme Court* at 3 n.2 (Aug. 24, 1987), *Federal Election Commission—Appointment of Members*, 2 Op. O.L.C. 359, 360 (1977); *Member of Congress—Appointment to Office*, 21 Op. Att'y Gen. 211, 214 (1895); *Appointment to Civil Office*, 17 Op Att'y Gen. 522, 523 (1883); *accord* Senate Memo at 2–3.

This construction of the meaning of the term "appointed" in the Ineligibility Clause originated with President George Washington, who withdrew the nomination of an ineligible former Senator to be an Associate Justice of the Supreme Court, and declared the act of nomination within that Senator's term "to have been null by the Constitution." *Nomination of George Washington in* 1, *The Documentary History of the Supreme Court of the United States, 1789–1800*, at 90 (Maeva Marcus et al. eds., 1985).

At least one later President has explicitly followed the Washington precedent. In 1973, President Richard Nixon informed the Senate that he would withhold the nomination of Senator William Saxbe to be Attorney General until after Congress had cured Senator Saxbe's ineligibility by enacting legislation that would reduce the compensation and other emoluments attached to the Office of Attorney General to those that had been in effect before Senator Saxbe began his term. President Nixon stated that "Constitutional precedents beginning with President Washington indicate that the nomination of an individual not then eligible may be improper and that any subsequent appointment based on such nomination might be null and void." Letter from the President to the Hon. Gale W. McGee, Chairman, Comm. on Post Office and Civil Service, U.S. Senate (Nov. 8, 1973), *reprinted in* S. Rep. No. 93–499, at 3 (1973); *see also To Reduce the Compensation of the Office of Attorney General: Hearing on S. 2673 Before the Senate Comm. on the Judiciary*, 93d Cong. 70 (1973) (the "Saxbe Hearing") (statement of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel) ("In light of this constitutional practice, Senator Saxbe cannot be nominated until legislation removing his disqualification has been passed.").

[4] *See Member of Congress—Appointment to Office*, 21 Op. Att'y Gen. at 212–13 (appointment of Senator as envoy extraordinary and minister plenipotentiary to Mexico was forbidden by Clause because emoluments of that office had been increased during term for which Senator was elected); *see also* Saxbe Hearing at 50 (remarks of Professor van Alstyne) (finding that opinion to be "unquestionably sound").

[5] Accordingly, we do not rely on the view that the Office of the Senate Legal Counsel ascribes to us, that "the Clause applies only to congressionally-created offices." Senate Memo at 3.

As we have stated, the question whether the Ineligibility Clause generally applies to ambassadorships is a difficult one. It has been said that "[t]he foremost danger" that the Clause was intended to guard against "was that legislators would create offices with the expectancy of occupying them themselves." *Freytag v. Comm'r*, 501 U.S. 868, 904 (1991) (Scalia, J., concurring in judgment); *see also Atkins v. United States*, 556 F.2d 1028, 1070 (Ct. Cl. 1977) (per curiam) ("This provision was generated out of a fear that corruption would result if the legislature multiplied the number or increased the salaries of public offices for the benefit of its own members."), *cert. denied*, 434 U.S. 1009 (1978); *see generally* Saxbe Hearing at 70–71 (statement of Assistant Attorney General Dixon) (reviewing

Continued

II.

The central question, therefore, is whether the office of Ambassador to Vietnam has been "created" within the proscribed time.[6] This appears to be a case of first impression; in any event, relevant precedents are rare.[7] While federal offices are nearly always created by Acts of Congress (or else pursuant to delegations of legislative authority),[8] the executive branch has historically taken the position that the President has the inherent, constitutional power to create diplomatic offices, and Congress has generally acquiesced in that view.[9]

As long ago as 1855, Attorney General Caleb Cushing opined that the Constitution conferred on the President the power to appoint ambassadors and other diplomatic officers, subject only to the advice and consent of the Senate, in the absence

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original materials). If the purpose of the Clause is only to prevent self-dealing *by Congress*, its prohibition would not extend to offices that were created by the *President* pursuant to his inherent, constitutional powers; and, as further discussed below, it has been the traditional position of the executive branch that diplomatic offices are created by unilateral presidential action. On this understanding of the Clause, it would not apply to the ambassadorial post for which Mr. Peterson has been nominated.

The Clause does not in terms refer, however, to civil Offices created "by Congress": it refers to "civil Offices" as such. Moreover, the Clause might well be understood to be addressed, not only to legislative self-dealing, but also to attempts by the Executive to exercise improper influence on Congress, including offers of appointments to offices that the Executive could create by virtue of its own independent powers. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (per curiam) (concern of Clause was with "maintenance of the separation of powers"); Joseph Cooper & Ann Cooper, *The Legislative Veto and the Constitution*, 30 Geo. Wash. L. Rev. 467, 500 (1962) ("The framers were trying to avoid a pattern of politics in which the executive manipulated the legislature through its patronage resources or the legislature multiplied the number or increased the salaries of public officers for the benefit of its own members."). Consistent with that view, it appears that many Americans in the Founding Period were fearful of the British Crown's power to create offices, as well as to fill them. *See, e.g., The Federalist No. 69*, at 421 (A. Hamilton) (Clinton Rossiter ed. 1961) ("The king of Great Britain . . . not only appoints to all offices, but can create offices."); *Weiss v. United States*, 510 U.S. 163, 187 n.2 (1994) (Souter, J., concurring); *Freytag v. Comm'r*, 501 U.S. at 904 n.4 (Scalia, J., concurring in judgment); Gordon S. Wood, *The Creation of the American Republic 1776–1787*, at 144 (1969); Louis Fisher, *Constitutional Conflicts between Congress and the President* 23 (3d ed. 1991). So understood, the Clause would reach offices that were created by the Executive acting alone.

On yet another view of the Clause, its primary purpose was to discourage the wasteful multiplication of federal offices. In that connection, at least two delegates to the Philadelphia Convention, and one delegate to the Virginia Ratifying Convention, specifically pointed to the danger that ambassadorships might be created unnecessarily. *See Notes of Debates in the Federal Convention of 1787, Reported by James Madison* 178 (Adrienne Koch ed., 1976) (remarks of Mr. Sherman on June 23); *id.* at 452 (remarks of Mr. Gerry on August 14); *see also* 10 *The Documentary History of the Ratification of the Constitution* 1263–64 (John P. Kaminski et al. eds. 1993) (remarks of Mr. Grayson in Virginia Ratifying Convention). In light of these comments, it might again be argued that the Clause reached ambassadorial offices.

[6] We note that if the office of Ambassador to Vietnam has not been "created" during the time for which Representative Peterson was elected, the prohibition on increased "emoluments" in art. I, §6, cl. 2 would necessarily be inapplicable. The ineligibility relates to civil offices, "the Emoluments *whereof* shall have been increased" (emphasis added). If the office does not exist within the proscribed time, no emoluments have attached to it, or could have been increased.

[7] *See* John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 Hofstra L. Rev. 89, 111 (1995) ("Not surprisingly, the question whether Congress has in fact created a new office rarely has surfaced; statutes creating new federal offices generally are clear enough to settle the matter.").

[8] *See Myers v. United States*, 272 U.S. 52, 128–29 (1926); *Weiss v. United States*, 510 U.S. at 183 (Souter, J., concurring), *Limitations on Presidential Power to Create a New Executive Branch Entity to Receive and Administer Funds Under Foreign Aid Legislation*, 9 Op. O.L.C. 76, 77–78 (1985).

[9] *See generally* Fisher, *supra* note 5, at 39–40.

of any legislation purporting to create offices for them to occupy. He stated that the Appointments Clause of the Constitution, U.S. Const. art. 2, § 2, cl. 2,[10]

> empowers the President to appoint [ambassadors] and other "public ministers," that is, any such officers as by the law of nations are recognised as "public ministers," without making the appointment of them subject, like, "other (non-enumerated) officers," to the exigency of an authorizing act of Congress. In a word, the power to appoint diplomatic agents, and to select for employment any one out of the varieties of the class, according to his judgment of the public service, is a constitutional function of the President, not derived from, nor limitable by, Congress, but requiring only the ultimate concurrence of the Senate; and so it was understood in the early practice of the Government.

Ambassadors and other Public Ministers, 7 Op. Att'y Gen. 186, 193 (1855).[11]

With reference to early practice, Attorney General Cushing cited the case of President George Washington's nomination of William Short to be *chargé d'affaires* in France, during the temporary leave of Ambassador Thomas Jefferson.[12] This nomination occurred very early in Washington's first term, even before the first Congress had been able to enact legislation creating the Department of Foreign Affairs (later, the State Department).[13] As Cushing pointed out, "no enactment occurs at that session, either in the act making appropriations for the service of the year, (1 Stat. at Large, p. 95), or in any other, to define the number or rank of the diplomatic agents of the United States."[14] Hence, "the designation of the officer was derived from the law of nations, and the authority to appoint from the Constitution."[15]

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[10] The Appointments Clause states, in part, that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."

[11] For the background to Attorney General Cushing's opinion, *see* Graham H. Stuart, *American Diplomatic and Consular Practice* 6 (2d ed. 1952).

[12] *See Ambassadors and other Public Ministers*, 7 Op. Att'y Gen. at 193–94; *see also* 1 *Messages and Papers of the Presidents* 58 (James D. Richardson ed. 1896) (letter from President George Washington to the Senate, dated June 15, 1789, nominating Short).

Moreover, President Washington reported a conversation with James Madison, in which Madison concurred in the opinion, given also by John Jay and Thomas Jefferson to Washington, that the Senate had "no Constitutional right" to "interfere" with the President's decision "on the places to which it would be necessary to send persons in the Diplomatic line," or on the "grade" of such persons. *The Diary of George Washington, From 1789 to 1791* (Benson J. Lessing ed., photo. reprint 1978) (1860).

[13] *See* Act of July 27, 1789, ch. 4, 1 Stat. 28.

[14] *Ambassadors and other Public Ministers*, 7 Op. Att'y Gen. at 193.

[15] *Id.* at 194. Similarly, James Madison advised President Monroe on May 6, 1822, that it was his belief that "the practice of the Government had from the beginning been regulated by the idea that the places or offices of public ministers and consuls existed under the law and usages of nations, and were always open to receive appointments as they might be made under competent authorities." 1 *A Digest of the International Law of the United*

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It appears that the practice of the political branches thereafter generally accorded with the Executive's conception of its constitutional power. In *Francis v. United States*, 22 Ct. Cl. 403, 405 (1887) (emphasis added), the court said:

> Most offices of the Government are established by general laws, *except in the diplomatic service*, and all salaries are fixed in like manner . . . . In the diplomatic service, Congress seems to have practically conceded, whether on constitutional grounds rightly or wrongly taken or otherwise, the duty, power, or right of the Executive to appoint diplomatic agents, of any rank or title, at any time and at any place, subject to such compensation, or none at all, as the legislative branch of the Government should in its wisdom see fit to provide . . . .

In another opinion from the same time, the court again pointed out that the Executive had consistently taken this view of its power, and that Congress had long acceded to it:

> It has been claimed by the Executive, in accordance with the opinion of Attorney General Cushing, that by the Constitution to the Executive alone is granted the power to appoint diplomatic agents of any rank or title, at any time, and at any place, and upon the exercise of this power Congress can place no extension or limitation, by undertaking either to create, abolish, or change the character, title, or rank of officers. On the other hand, to the legislative branch of the Government alone is granted the power to provide for the compensation of those, as well as of all other public officers, and this it may do in such manner as it deems best, or may withhold all compensation whenever it sees fit to do so. During the whole

States §78 at 583 (Francis Wharton ed. 1886). (Madison therefore rejected the idea that every time an ambassador was sent to a particular country, the office of ambassador to that country was created anew. *Id.*

According to an authoritative treatise from the period of the framing of the Constitution, the law of nations taught that "each Nation possesses both the right to negotiate and have intercourse with the others, and the reciprocal obligation to lend itself to such intercourse as far as circumstances will permit it to do so." 3 Emmerich de Vattel, *The Law of Nations or The Principles of Natural Law* 362 (Charles G. Fenwick trans., 1916) (1758). Accordingly, because "Nations or sovereign States do not treat with one another directly as corporate entities; nor can their rulers or sovereigns readily meet one another personally in order to negotiate their affairs," they communicate "through the mediation of *public ministers*. This expression . . . is particularly applied to those who are appointed to fulfill [public] duties at a foreign court . . . . Every sovereign State has, therefore, the right to send and to receive public ministers. For they are the necessary agents in the negotiation of the affairs which sovereigns have with one another, and in the maintenance of the intercourse which sovereigns have a right to keep up." *Id; see also* Henry Wheaton, *Elements of International Law* §207, at 243 (photo. reprint 1936) (1866) ("Every independent State has a right to send public ministers to, and receive ministers from, any other sovereign State with which it desires to maintain the relations of peace and amity. No State, strictly speaking, is obliged, by the positive law of nations, to send or receive public ministers, although the usage and comity of nations seem to have established a sort of reciprocal duty in this respect. It is evident, however, that this cannot be more than an imperfect obligation, and must be modified by the nature and importance of the relations to be maintained between different States by means of diplomatic intercourse.").

> of the administration of President Jefferson, and part of the terms of other early Presidents, Congress annually appropriated a sum in gross "for the expenses of intercourse with foreign nations," leaving it to the Executive to fix the salaries of its several appointees.

Byers v. United States, 22 Ct. Cl. 59, 63–64 (1887).[16]

Accordingly, we believe that the President has the inherent, constitutional power to create diplomatic offices such as ambassadorships, without any need for statutory authorization.[17] The question then becomes that of identifying the time at which the President acts to create such offices.

Particularly instructive is a controversy over the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, that arose during the War of 1812, under the Presidency of James Madison.[18] The Czar of Russia had unexpectedly offered to mediate between the United States and Great Britain, who were then at war. President Madison was eager to grasp the opportunity, and in 1813 gave recess appointments to Albert Gallatin, John Quincy Adams and James A. Bayard to negotiate a peace treaty. Madison also sought the Senate's advice and consent to their appointment as Envoys Extraordinary and Ministers Plenipotentiary. The Senate confirmed Adams' and Bayard's nominations, but rejected Gallatin's. Senator Gore introduced a motion to censure Madison, on the grounds that the recess appointments had been unconstitutional. The principal argument was that because these offices had not been established by statutory law, no vacancies existed to which the President could make recess appointments. Madison's defenders in the Senate argued that the recess appointments were constitutional, maintaining that the President had the inherent power to create diplomatic offices when and as, in his judgment, international circumstances so required — and thus, if need be, during a recess

[16] There have, however, been instances in which Congress has apparently asserted the authority to create diplomatic offices. For example, the Act of March 2, 1909, provided that "hereafter no new ambassadorship shall be created unless the same shall be provided for by an Act of Congress." 35 Stat. 672. Notwithstanding that Act, "President Wilson appointed an ambassador to Peru in 1919 without any authorization from the Congress other than that found in the appropriation bill for the Department of State." Graham H. Stuart, *American Diplomatic and Consular Practice* at 137.

[17] The Foreign Service Act, codified in relevant part as 22 U.S.C. § 3942(a)(1), states that "[t]he President may, by and with the advice and consent of the Senate, appoint an individual . . . as an ambassador at large, as an ambassador, [or] as a minister." The relevant question here is whether the statute should be understood to be a legislative act creating the office of ambassador (and, inter alia, the office of ambassador to Vietnam). Assuming that it could be so read, Mr. Peterson would not be ineligible for the office to which he has been nominated, because that office would have been created before the beginning of the 104th Congress. (Section 3942(a) was last amended by the Foreign Relations Authorization Act, Fiscal Year 1992 and 1993, Pub. L. No. 102–138, § 141, 105 Stat. 647, 667 (1991)). In our opinion, however, the section is better understood as merely declaratory of what the constitutional procedure for appointing ambassadors is, rather than as a legislative creation of such offices. Thus, the fact that it was enacted before the current Congress would have no bearing on Mr. Peterson's eligibility. Alternatively, the section might conceivably be construed, not as itself creating ambassadorships, but as authorizing *the President* to do so. That reading would also fail to resolve the question at issue, however, because the time at which the President exercised such a *statutory* grant of authority would be identical with the time at which he exercised his *constitutional* authority to create the office of ambassador to Vietnam.

[18] The Recess Appointments Clause states that the President "shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

of the Senate.[19] Senator Bibb, an ally of Madison's, reasoned that it was essential to recognize

> two descriptions of offices altogether different in their nature, authorized by the Constitution—one to be created by law, and the other depending for their existence and continuance upon contingencies. Of the first kind, are judicial, revenue, and similar offices. Of the second, are Ambassadors, other Public Ministers and Consuls. The first description organize the Government and give it efficacy. They form the internal system, and are susceptible of precise enumeration. When and how they are created, and when and how they become vacant, may always be ascertained with perfect precision. Not so with the second description. They depend for their original existence upon no law, *but are the offspring of the state of our relations with foreign nations*, and must necessarily be governed by distinct rules. As an independent Power, the United States have relations with all other independent Powers; and the management of those relations is vested in the Executive.

22 Annals of Cong. 699 (1814) (emphasis added).

With respect to the disputed recess appointments, Bibb argued

> that the office could not exist until the Russian mediation was proposed, and that it was proposed during the recess of the Senate. Until, therefore, the office was created, it could not be said to have been either full or vacant; but the moment it commenced its existence, it was necessarily full or vacant. It was vacant until filled by the President. *The office itself, like that of all foreign missions, was the offspring of circumstances, and the happening of the vacancy was contemporaneous with the commencement of the office. They were both created by the occasion; the occasion occurred; the office began its existence*; the vacancy happened during the recess of the Senate; and as the Executive is authorized "to fill up all vacancies which may happen during the recess," it was his Constitutional right to fill this.

26 Annals of Cong. 702–03 (1812) (emphasis added).[20]

[19] For the circumstances of Madison's recess appointments and the ensuing controversy, see 6 Irving Brant, *James Madison* 155–57, 242–43 (1961).

[20] Senator Bibb also articulated a distinct defense of President Madison's action. According to this alternative theory, "the office commenced with every independent Power from the moment the United States became independent, and authorized the appointment of foreign Ministers, and it will continue to exist so long as we and they

Senator Horsey (a Federalist, and so not of Madison's party), also defended the President's recess appointments, arguing that

> [t]he office then of a public Minister is the medium through which the Executive is enabled to manage our foreign relations, and particularly to conduct negotiations. It is an office wholly different from the ordinary offices created by the Constitution or by law. . . . [I]t is an office not created by the Constitution, nor by any municipal law, but emanates from the laws of nations and is common to all civilized Governments. . . . It is an office, if it may be so called, *sui generis.* The number may be multiplied to any extent, or diminished. *It is brought forth with the occasion, and disappears when the occasion ceases. When not filled, if it exists at all, it is only in contemplation.* . . . The office of a public Minister, therefore, depends upon events, upon the state of foreign affairs, and is authorized by the laws of nations. . . . *The office in truth attaches whenever the occasion arises to use it, and the act of appointment is the consummation of the law.*

Id. at 711–12 (emphasis added).[21]

Review of this controversy suggests that, at the very least, diplomatic offices may be created by the President at whatever time, in his judgment, the interests of the United States in its dealings with foreign nations require them to be made.[22]

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continue independent, unless destroyed by the termination of the relations which created it. The period at which it should be filled is left by the Constitution to the discretion of the President." *Id.* at 699. On this account, it appears that the office of ambassador exists as a necessary incident to sovereignty, and thus has existed since the United States became independent in 1776. *Cf. United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316–18 (1936) (power to maintain diplomatic relations was vested in United States as an incident of external sovereignty upon separation from Great Britain). Were that theory correct, it would appear to follow that the office for which Representative Peterson was nominated—the Ambassadorship to Vietnam—existed since (at least) the time that diplomatic relations between the United States and Vietnam became possible, and thus that the office had not been "created" during the term for which he was elected.

[21] As Senator Horsey explained his view, the "Occasion" for instituting the mission to Russia was the Russian Government's offer of March 8, 1813, to mediate between the United States and Great Britain, and the acceptance of that offer by the Secretary of State on March 11, 1813. This occasion "happened in the recess of the Senate. The office then attached, and with it the vacancy, which was filled and the office perfected by issuing the commissions . . . ." *Id.* at 713.

[22] *See* Memorandum of Law, *Re: Appointment of Deputy Special Representative for Trade Negotiations* at 5, accompanying Letter for Arthur B. Focke, General Counsel, Bureau of the Budget, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel (Dec. 19, 1962) ("[T]he office is created whenever the President determines that the interests of the United States require diplomatic representation or negotiation."). Madison himself may subsequently have taken a different view of the matter from that of his defenders in the Senate. In a memorandum of 1834—twenty years after the controversy over the recess appointments—he expressed the opinion that the "place of a foreign minister or consul is not an office in the constitutional sense of the term," basing that conclusion in part on the premise that "[i]t cannot, as an office, be created by the mere appointment for it, made by the President and Senate, who are to fill, not create offices." *Power of the President to appoint Public Ministers and Consuls in the recess of the Senate, in* 4 *Letters and Other Writings of James Madison* 350 (1865). On this theory, "[t]he place of a foreign minister or consul is to be viewed as created by the law of nations." *Id.* Were Madison correct in denying that an ambassadorship is an "office" in the constitutional sense, no Ineligibility Clause issue would arise.

To be sure, the President's decisionmaking may unfold over a period of time, and he will ordinarily take various preparatory steps relating to the creation of a diplomatic office before he unequivocally determines to do so. The remarks of Madison's defenders in the Senate debate suggest that, if it becomes necessary to pinpoint the precise time at which the President creates such an office (as, for instance, in determining the validity of a recess appointment), then that time should be identified as the moment at which he *fills* the office. While the 1814 debate was directed to the interpretation of the Recess Appointments Clause, we believe that it also illuminates the meaning of the Ineligibility Clause.

III.

We think it fair to say that the patterns of constitutional practice that we have described do not conclusively answer the question *when* the office of an ambassadorship is created. Nonetheless, we think that the legal and historical materials strongly point toward a particular answer, and we find that answer to be considerably more persuasive than any of the alternatives. Based on our survey of the materials, including the 1814 debate, we believe that the following tests are appropriate in determining when, for purposes of the Ineligibility Clause, the President has created the office of ambassador to a particular foreign State, in cases where such an ambassadorship has not existed before or (as in the case of Vietnam) has lapsed or been terminated:

1. In the usual course, the office is created at the time of appointment of the first ambassador to a foreign State once the President establishes diplomatic relations with that State. All that precedes the appointment—offering to establish normal diplomatic relations, receiving the foreign State's agreement to receive a particular person as the United States' ambassador, nominating and confirming that individual as ambassador—are all steps preparatory to the creation of the office.[23] If the President ultimately declines to appoint an ambassador, the "office" is never created.

2. The President, nonetheless, retains the power to alter the ordinary course of events, and to create the office at some other time—or not at all. The act of creating the office must be distinguished from the preparatory steps leading to its creation. The preparatory acts indicate that the President *intends* to create the office; they do not in themselves constitute its creation. Indeed, in the ordinary course, the President should be understood to *intend* to create the office of ambas-

[23] The preparations leading up to the creation of the office can be analogized to the legislative process. Congress holds hearings on legislative proposals, conducts debates on them, considers amendments, casts votes on a final bill and presents that bill to the President. All of these activities are designed to culminate in the enactment of a bill into law. Nonetheless, exceptional cases aside, a bill does not actually become law until the moment that the President *signs* it. *See INS v. Chadha*, 462 U.S. 919 (1983).

sador upon the *appointment* of the individual as the first ambassador to the receiving State.[24]

We turn now to the application of these tests to the ambassadorship to Vietnam.

IV.

The process by which the United States has been normalizing its relations with Vietnam has been underway for several years.[25] The Republic of Vietnam ("RVN") was constituted as an independent State within the French Union in 1950, and the United States sent a Minister to that State. The United States did not recognize the Democratic Republic of Vietnam ("DRVN"), which had earlier declared itself to be an independent State. Thereafter, on June, 25, 1952, the United States appointed an Ambassador to the RVN, and upgraded the United States Legation in Saigon to Embassy status. In 1954, Vietnam was partitioned into what came commonly to be called "North" and "South" Vietnam. Despite an international agreement calling for the reunification of Vietnam, that did not occur; instead, the RVN, functionally, became South Vietnam, and the DRVN, functionally, North Vietnam. The United States maintained an ambassadorial post in the RVN from 1952 onwards. The last United States Ambassador left his post in Saigon on April 29, 1975.[26]

After the Communist victory over South Vietnam in April, 1975, it became the position of the United States that " '[t]he Government of South Vietnam has ceased to exist and therefore the United States no longer recognizes it as the sovereign authority in the territory of South Vietnam. The United States has not recognized any other government as constituting such authority.' " *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892, 895 n.4 (8th Cir. 1977) (quoting Letter for the Department of Justice from the Department of State (June 9, 1975)).

During the present administration, several successive and carefully measured steps were taken with a view to improving, and perhaps normalizing, relations between the United States and Vietnam. On July 2, 1993, President Clinton announced that the United States would no longer oppose the resumption of aid to Vietnam by international financial institutions. On February 3, 1994, the President announced the lifting of the United States' embargo against Vietnam. He also announced an intent to open a liaison office in Hanoi in order to promote further progress on issues of concern to both countries, including the status of American prisoners of war and Americans missing in action. His statement emphasized, however, that "[t]hese actions do not constitute a normalization of our rela-

[24] In unusual circumstances, the President might depart from this procedure. For example, following the establishment of diplomatic relations, he might *by proclamation* declare the office of ambassadorship to a particular country to be created, even if he had not appointed a particular person to fill that office.

[25] *See generally* Congressional Research Service, Report for Congress, *Vietnam: Procedural and Jurisdictional Questions Regarding Possible Normalization of U.S. Diplomatic and Economic Relations* (Aug. 4, 1994).

[26] *See generally* Office of the Historian, *Principal Officers of the Department of State and United States Chiefs of Mission: 1778–1990*, Dep't of State Publication 9825, at 163 (Jan. 1991).

tionships. Before that happens, we must have more progress, more cooperation and more answers."[27] On May, 26, 1994, the United States and Vietnam formally entered into consular relations within the framework of the Vienna Convention on Consular Relations, *done* Apr. 18, 1961, 21 U.S.T. 77, 596 U.N.T.S. 261, to which both States were party. The United States, however, continued to condition diplomatic relations on progress in areas of concern to it. On January 28, 1995, the United States and Vietnam signed an agreement relating to the restoration of diplomatic properties and another agreement relating to the settlement of private claims. On July 11, 1995, the President announced an offer to establish diplomatic relations with Vietnam under the Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95—an offer that Vietnam accepted on the following day. In announcing that offer, the President stated that from the beginning of his Administration, "any improvement in relationships between America and Vietnam has depended upon making progress on the issue of Americans who were missing in action or held as prisoners of war."[28] Soon thereafter, the United States Liaison Office in Hanoi was upgraded to a Diplomatic Post.

On May 8, 1996, the Government of Vietnam gave its agreement ("*agrément*") to the United States' proposal that Representative Peterson be Ambassador Extraordinary and Plenipotentiary of the United States to Vietnam.[29] On May 23, 1996, the President submitted Mr. Peterson's name to the United States Senate for its advice and consent to that appointment.

In our judgment, while this pattern of activity demonstrates that the President fully intends and expects to create the office of ambassador to Vietnam, it does not establish that he has, in fact, yet done so. The establishment of diplomatic relations does not entail the establishment of a diplomatic mission or the creation of the office of an ambassador. *See* Vienna Convention on Diplomatic Relations, art. 2, 23 U.S.T. at 3231, 500 U.N.T.S. at 98. Moreover, the existence of diplomatic relations with Vietnam does not require (although it may normally assume) an exchange of ambassadors, since relations may be conducted at a lower diplomatic level. Further, we do not think that Vietnam's *agrément* to receive Mr. Peterson as ambassador establishes that that office exists for constitutional purposes.[30] Nor (although the question is closer) does the President's decision to submit Mr. Peterson's name to the Senate for confirmation. Even if Mr. Peterson

[27] *Remarks on Lifting the Trade Embargo on Vietnam and an Exchange With Reporters*, Pub. Papers of William J. Clinton 178, 179 (Feb. 3, 1994).

[28] *Remarks Announcing the Normalization of Diplomatic Relations with Vietnam*, 2 Pub. Papers of William J. Clinton 1073, 1073 (July 11, 1995).

[29] "In order to avoid the unfriendly feeling which might arise through the refusal of a state to receive a foreign representative it is customary for the sending state to submit in advance the name of its envoy to the government of the state to whom he is to be accredited. The procedure of determining in advance as to whether the envoy will be *persona grata* is called *agréation* and the approval *agrément*." Stuart, *supra* note 16, at 139–40.

[30] Indeed, as a matter of *international* law, it may be that the office of ambassador to Vietnam will not begin to exist until our representative is "duly accredited and received" as ambassador by the Government of Vietnam. *Hollander v. Baiz*, 41 F. 732, 735 (S.D.N.Y.), *prohibition denied by* 135 U.S. 403 (1890).

is confirmed, the President would retain the discretion not to send an ambassador to Vietnam, or otherwise not to create that office. In view of the facts that the United States has not had an ambassador to Vietnam since 1975 (and has never had an ambassador to the present government), that the process of normalizing relations between the United States and Vietnam has been a complex and protracted one, and that contingencies, however unlikely, may yet arise that would lead the President to conclude that it was not in the United States' best interests to appoint and send an ambassador, we do not think that the office of ambassador to Vietnam can be said to *exist* unless and until the President actually completes the process by appointing an officer to that position. Accordingly, if the President decides not to appoint Mr. Peterson to that office until after the expiration of the present term of Congress on January 3, 1997, we do not think that Mr. Peterson is constitutionally ineligible for that appointment.

In the interests of clarity, we repeat that we are *not* maintaining that an "appointment" within the meaning of the Ineligibility Clause does not occur until the appointee is actually *commissioned* by the President. Whatever the merits of that view as an original proposition (and they are substantial),[31] we are not writing on a clean slate. Accordingly, we follow the centuries-old teaching and practice of the executive branch in assuming that the nomination of an ineligible individual is itself a constitutional nullity, even if the commissioning of that individual were to occur after the term of his or her ineligibility. Our position is that, in the singular circumstances of this case, the relevant *office*—the Ambassadorship to Vietnam—has not yet been "created," so that no ineligibility exists. Thus, both the President's act of nominating Mr. Peterson, and the Senate's act of confirming him (if it does), are constitutionally valid.

V.

It could be argued that our analysis gives insufficient weight to the policy of the Ineligibility Clause, inasmuch as it makes it possible, by the President's decision to withhold creating a diplomatic post until after the expiration of a congressional term, to appoint an otherwise ineligible Member of Congress to that position. We would disagree. The tradition of interpreting the Clause has been "formalistic" rather than "functional," and our analysis comports fully with the literal meaning of the text. Furthermore, it is important to bear in mind that the Clause was a compromise that reflected policy disagreements at the Philadelphia Convention: to some extent, at least, the Clause was designed to *permit* Members of Congress, in appropriate circumstances, to hold office in the executive branch.[32]

[31] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155 (1803) (appointment not effective until commissioning by President); *Appointments to Office—Case of Lieutenant Coxe*, 4 Op. Att'y Gen. 217, 219 (1843).

[32] *See* Saxbe Hearing at 67 (emphasis added) (testimony of Assistant Attorney General Dixon) ("There was a disagreement in the convention concerning this issue and that was because there was a competition in values. The

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Moreover, even at the time of the Framing, it was understood that the Clause was a highly imperfect safeguard against the danger that the prospect of appointment to office would improperly influence Members of Congress. Luther Martin, a delegate from Maryland to the Philadelphia Convention, provided his State legislature with a critical report on the Convention's work. As to the Ineligibility Clause, he wrote:

> As to the exception that [Members of Congress] cannot be appointed to offices created by themselves, or the emoluments of which are by themselves increased, it is certainly of little consequence, since they may easily evade it by creating new offices, to which may be appointed the persons who fill the offices before created, and thereby vacancies will be made, which may be filled by the members who for that purpose have created the new offices.[33]

More recent commentators have also pointed out the inadequacy of the Clause as a device for controlling the abuses at which it is apparently aimed. Thus, former Assistant Attorney General Antonin Scalia rejected a policy-based interpretation of the Clause, writing:

> the constitutional provision does not avoid some degree of absurdity in any event, no matter what imaginatively constructed extensions are devised; and . . . therefore it is best to restrict the provision to its clear, literal meaning . . . . As for a means of easy evasion, nothing could be easier than having the Congress create a new post, to be filled by an existing appointee, and then appointing the favored Member to the vacated office. In light of the essential incohesivesness of the constitutional provision, I do not regard the policy argument . . . as persuasive.

Memorandum for Hugh M. Durham, Chief, Legislative & Legal Section, Office of Legislative Affairs, from Antonin Scalia, Assistant Attorney General, Office

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matter was not viewed as being simple or mechanistic. As Madison said at one point: 'Some gentlemen give too much weight and others too little to this subject.' There was a fear that unless the Constitution did include an ineligibility clause of this sort, that there would be undue inroads on the independence of the legislature by the Executive in enticements and appointments to the executive branch and that also there might be self-interest in the members' approach toward salary increases or toward creation of new offices. *At the same time there was also a recurrent concern shared by Madison who was a primary mover of the clause and also Pinkney, that a total bar would be a disservice to the public and indeed to the executive branch and judicial branch.*").

[33] *The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia, By Luther Martin, Esquire* (1788), *reprinted in* 2 Herbert J. Storing, The Complete Anti-Federalist 19, 52 (1981).

of Legal Counsel, *Re: Proposed bill to increase the salary of the Attorney General* at 6 (Nov. 22, 1974).[34]

VI.

Finally, there remains the question whether the President may nominate, and the Senate confirm, an individual for an office that does not exist at the time of the nomination and confirmation, but is expected to come into existence later. The Office of the Senate Legal Counsel raises this objection, stating that "we are aware of no prior instance in which the President appointed someone to an office that did not yet exist."[35] There are, however, several such precedents.

The practice of the political branches establishes that the President may make a nomination, and the Senate give its advice and consent, for an office not yet in being. For example, the statute creating the Occupational Safety and Health Review Commission became effective on April 28, 1971. *See* Occupational Safety and Health Act of 1970, Pub. L. No. 91–596, §34, 84 Stat. 1590, 1620. President Nixon nominated the first members of the Commission on March 19, 1971, *see* 117 Cong. Rec. 7270 (1971), and the Senate confirmed the nominees on April 14, 1971, "effective in accordance with the provisions of law," *id.* at 10,458. Similarly, Reorganization Plan No. 1 of 1953, 3 C.F.R. 1022 (1949–1953), *reprinted in* 5 U.S.C. app. at 1488 (1994), *and in* 67 Stat. 631 (1953), created the office of Secretary of Health, Education, and Welfare, as of April 11, 1953. On April 2, 1953, President Eisenhower nominated Oveta Culp Hobby to be the first Secretary, effective April 11, *see* 99 Cong. Rec. 2716 (1953), and the Senate confirmed her on April 10, *id.* at 2958.[36]

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[34] Similarly, Professor van Alstyne, testifying in a Senate hearing regarding the possibility of curative legislation to remove Senator Saxbe's ineligibility to be appointed Attorney General, noted that

> the mechanicalism of article I, section 6, clause 2, has the same virtues and the same vices as similar provisions elsewhere in the document. For along with the virtue of clear and impersonal operation, there is, of course, the shortcoming that legislative technique—that a line drawn in a manner giving conclusive effect to but one or two circumstances may often fail to reach a variety of possible corrupt practices that a more general standard would tend to reach. It is clear, for instance, . . . that a Senator or Representative nearing the end of his term might be induced to vote to create a new office or to raise the emoluments in an existing one, expecting in return for his vote at once to be appointed to that office the instant his term expires. Yet, the clause does not reach that point.

Saxbe Hearing at 51.

[35] Senate Memo at 4.

[36] Other instances in which Presidents have made nominations for offices not yet in being include: (1) the nomination on January 20, 1989, of Edward Derwinski to be the first Secretary of Veterans Affairs, 135 Cong. Rec. 321 (1989), under a statute that precluded appointment until after January 21, 1989, *see* Department of Veterans Affairs Act, Pub. L. No. 100–527, §18(b), 102 Stat. 2635, 2648 (1988) (codified as amended at 38 U.S.C. §301 note); (2) the nomination on June 8, 1979, of the first Federal Inspector for the Alaska Natural Gas Transportation System, 125 Cong. Rec. 14,209 (1979), under Reorganization Plan No. 1 of 1979, 3 C.F.R. 505 (1980), *reprinted in* 5 U.S.C. app. at 1584 (1994), *and in* 93 Stat. 1373 (1979), which became effective on July 1, 1979; and (3) the nomination on November 16, 1970, of William D. Ruckelshaus to be the first Administrator of the Environmental Protection Agency, 116 Cong. Rec. 37,347 (1970), under a Reorganization Plan creating the office as of December 2, 1970, Reorganization Plan No. 3 of 1970, 3 C.F.R. 199 (1971), *reprinted in* 5 U.S.C. app. at 1551 (1994), *and in* 84 Stat. 2086 (1970).

The reasoning that supports this procedure is similar to that underlying nominations and confirmations for prospective vacancies in existing offices:

> [A]s a constitutional matter, nothing precludes the nomination and confirmation of a successor while the incumbent still holds office. Confirmation does not confer any rights on the nominee; the President remains free to decide that he does not want to make the appointment, which is not legally completed until the execution of the commission.

Nominations for Prospective Vacancies on the Supreme Court, 10 Op. O.L.C. 108, 109 (1986). The President and Senate have repeatedly used this procedure for prospective vacancies. *See id.* at 110–11. Just as in the case of prospective vacancies, nomination and confirmation for a prospective office can confer no rights on the nominee, who must await further decisions and the President's appointment.

The Office of the Senate Legal Counsel also objects that the nomination and confirmation of an individual to a position that is to be created later "raises serious separation of powers concerns because it might fundamentally reshape and limit the Senate's constitutionally-based confirmation power. The Senate's advice and consent function requires a review not simply of the nominee, but of his fitness to fulfill a particular office."[37] We do not find that objection forceful in the circumstances present here. First, the Senate's constitutional power to reject a nominee for any reason, or for none, is completely unimpaired. Second, in the actual circumstances of this nomination, the Senate possesses all the facts that are needed to make an informed judgment of the nominee's fitness to serve as Ambassador to Vietnam. Even if that particular ambassadorship has yet to be created, the duties and responsibilities of an ambassador are of course perfectly familiar to the Senate.

Conclusion

Accordingly, we conclude that Representative Peterson is not constitutionally ineligible for appointment as Ambassador to Vietnam, provided that the President finally creates that office after Representative Peterson's term of office as a Member of Congress has expired on January 3, 1997.

CHRISTOPHER SCHROEDER
Acting Assistant Attorney General
Office of Legal Counsel

[37] Senate Memo at 4.

Contractor Access to Information from Interstate Identification Index

The Office of Personnel Management and other agencies have authority to disclose criminal history records information to private contractors performing background investigations of government employees or prospective employees.

OPM and other agencies also have authority to permit those contractors to have controlled on-line access to criminal history records of individuals subject to background investigations through the Interstate Identification Index system.

August 15, 1996

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

This responds to your request for our opinion concerning whether private contractors retained by the Office of Personnel Management ("OPM") to conduct or assist in conducting background investigations of government employees (or prospective employees) may be granted access to the criminal history records of those employees that are maintained in the Interstate Identification Index system ("III"). In particular, you have asked (1) whether OPM may provide designated contractors with particular information gleaned by OPM from III system records that OPM concludes will assist the contractor in performing background investigations; or, more expansively, (2) whether the contractors may themselves be granted direct on-line access to all III records necessary to perform the required background investigations.

Based upon the factual circumstances outlined below, we conclude that both of the proposed arrangements would be lawful. Our conclusion with respect to the second alternative is based on the understanding that direct contractor access to the III system will be subject to effective mechanisms to guard against exceeding authorized access, including contractual restrictions and systems for monitoring the identity of records accessed by contractor personnel through the III system.

I. BACKGROUND

A.

OPM is one of several agencies responsible for conducting background investigations on federal employees and prospective federal employees for two general purposes: (1) authorizing employee access to classified information and (2) determining a person's suitability for federal employment or for particular categories of federal employment. *See* 5 U.S.C. § 3301; Exec. Order No. 10450, 3 C.F.R. 936 (1949–1953), Exec. Order No. 10577, 3 C.F.R. 218 (1954–1958), and Exec.

Order No. 11222, 3 C.F.R. 306 (1964–1965). Under 5 C.F.R. pt. 731 (1996) ("Suitability"), OPM is also authorized to deny federal appointments when necessary to "promote the efficiency of the [civil] service." *Id.* §731.201. Among the factors to be considered as grounds for disqualification under that regulation are criminal or dishonest behavior and abuse of narcotics or alcohol. *Id.* §731.202.

OPM's background investigation workload has increased substantially over the past ten years. The extent of that workload, the quality and cost of the background investigations, and the measures OPM has taken to improve its performance have been the subject of congressional attention and legislation. In 1985, for example, Senate hearings explored federal government security clearance programs in general, and OPM's background investigation practices in particular, in considerable depth. *See Federal Government Security Clearance Programs: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 99th Cong. (1985) ("1985 Hearings"). In those hearings, OPM reported that it had begun to use outside contractors to expand and enhance its background investigation capabilities. *Id.* at 198, 256. Those hearings also showed that the State Department, at that time, was already using retired federal investigators as private contractors to perform background investigations previously performed for the State Department by OPM. *Id.* at 287. The hearing record reveals that Congress was not only aware that certain background investigations were being "contracted out," but that Congress was actively exploring the benefits of expanded contracting out for other civilian agencies. *Id.*

B.

As part of the background investigation process, it is necessary for an investigating agenc[y] to have access to the criminal history record ("CHR") of the subject. [1] For many years, CHRs have been collected, maintained, and exchanged on a nationwide basis under the auspices of the Federal Bureau of Investigation ("FBI") in cooperation with federal, state, and local law enforcement agencies. Statutory authority for the creation, maintenance, and use of that system is set forth in 28 U.S.C. §534. That statute directs the Attorney General, *inter alia*, to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records" and to "exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions." *Id. §534(a)(1), (4).*

The FBI has complied with this mandate by acquiring CHR information (as well as related identifying information, such as fingerprint cards) from the states. The states have provided this information to the FBI and derived reciprocal benefit by drawing upon the FBI's national repository of such record information for their

[1] As OPM stated in the 1985 Senate hearings, "[i]t is obvious that State and local law enforcement checks are an essential and irreplaceable component of any background investigation." 1985 Hearings at 271.

own law enforcement purposes. In more recent years, the FBI has sought to improve and streamline this system by approving the development and implementation of the Interstate Identification Index, a computerized and more decentralized system of CHR exchange maintained in cooperation with the National Crime Information Center ("NCIC") and participating states.

As explained to us by the FBI, the III system consists of three basic parts: (1) the National Identification Index; (2) the National Fingerprint File; and (3) the actual criminal record repositories of the participating federal, state, and local agencies. The National Identification Index is essentially an electronic locator system for the federal and state criminal history records of individuals. The system database is maintained by the FBI and accessed by participants through a web of computer linkups. The National Fingerprint File ("NFF") consists of a system of fingerprint records provided by participating governments and maintained by the FBI. The NFF serves to provide positive identification of the subjects of such records. Finally, the criminal record repositories maintain and make available the actual criminal history records of individuals.

The federal-state exchange of criminal history records pursuant to 28 U.S.C. § 534 was originally and primarily intended for criminal law enforcement purposes. *See United States Dept. of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 752 (1989). Although many states would also provide such records to federal agencies for background investigation purposes (i.e., non-criminal justice purposes) on a voluntary basis, the 1985 hearings showed that some states refused to do so, either as a matter of policy or due to state laws limiting access to such information. *See* H.R. Conf. Rep. No. 99–373, at 24–25 (1985), *reprinted in* 1985 U.S.C.C.A.N. 959, 967–68 ("Conf. Rep."). As a result, Congress enacted 5 U.S.C. § 9101, which now provides a *mandatory* mechanism for federal agencies performing background investigations to obtain CHR information from state and local (as well as federal) law enforcement agencies.

C.

OPM has entered into a contract with a company called US Investigations Services, Inc. ("USIS") to obtain assistance in performing personnel background investigations. The contract provides that USIS "will conduct background investigations nationwide on Federal Government applicants, employees, and contract employees performing sensitive work." USIS Contract at 50. The contract also contains a variety of provisions restricting the use and disclosure of background information made available under the contract, including a clause prohibiting the con-

tractor from disclosing such information for any purpose other than fulfilling its obligations under the contract.[2]

We have been asked to consider the legality of two possible arrangements that OPM might pursue with its contractor. Under one arrangement, OPM would provide contractor personnel with only particular items of information from a subject's CHR (including items obtained by OPM personnel from the III system) to enable the contractor to resolve particular questions raised by a subject's CHR. For example, the contractor might be provided information concerning a particular criminal charge against the subject and assigned the task of ascertaining its ultimate disposition.

Under the second alternative, OPM would provide its contractors with direct on-line access to the III records and would leave it to the contractors to perform all aspects of the background investigations, albeit under OPM's ultimate supervision. Under this arrangement, although contractor personnel would be authorized to access only the III records of designated investigation subjects and would be subject to a variety of sanctions for exceeding authorized access, their actual on-line access would extend to the system as a whole.[3] At the same time, we understand that any attempt by users to access unauthorized records on the III system would be recorded by the system's monitoring mechanisms and readily subject to detection.

II. ANALYSIS

A.

1. *Authorized Disclosure of CHR Information.*

In 1985, Congress enacted what is now 5 U.S.C. §9101 as part of the Intelligence Authorization Act for FY 1986, Pub. L. No. 99–169, tit. VIII, §801(a), 99 Stat. 1002, 1008 (1985). That legislation provided the Department of Defense, OPM, and the Central Intelligence Agency (the FBI and State Department were included under subsequent amendments) with the right to obtain federal, state, and local criminal history record information for purposes of determining the eligibility of personnel for (1) access to classified information; and (2) assignment to or retention in sensitive national security duties. As relevant here, the operative portion of this statute now provides:

[2] Paragraph H.18 of the contract, for example, provides: "Except as otherwise provided herein, any information made available to the Contractor by the Government shall be used only for the purpose of carrying out the provisions of this contract and shall not be divulged or made known in any manner to any persons except as may be necessary in the performance of the contract." *Id.* at 83.

[3] We have been advised by OPM that it is not technically feasible to arrange for contractor personnel to be granted computer access only to the full III criminal history records of designated investigation subjects without being granted access to the III system as a whole. That is, the system apparently does not permit retrieval of the complete CHR on a subject by means of a limited access password that would confine the user's III access solely to the records of that individual subject.

> Upon request by the [OPM or the FBI], criminal justice agencies shall make available criminal history record information regarding individuals under investigation by [OPM or the FBI] for the purpose of determining eligibility for (A) access to classified information or (B) assignment to or retention in sensitive national security duties.

5 U.S.C. §9101(b)(1). The "criminal justice agencies" required to provide the information include federal, state, and local agencies engaged in the administration of criminal justice. *Id.* §9101(a)(1). The "criminal history record information" covered by the statute consists of

> information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correction supervision, and release.

Id. §9101(a)(2). This definition encompasses CHR information contained in the III system.[4]

Section 9101 provides separate authorization for the controlled use and disclosure of the subject CHR information by the recipient agency, as follows:

> Criminal history record information received under this section shall be *disclosed or used* only for the purposes set forth in paragraph (b)(1) or for national security or criminal justice purposes authorized by law, and such information shall be made available to the individual who is the subject of such information upon request.

Id. §9101(d) (emphasis added). The text of §9101 thus indicates that some disclosure of CHR information to individuals outside the agency by the recipient agencies is contemplated and permitted. In particular, use of the term "disclosure" would amount to mere surplusage, and make little sense, if construed to refer only to disclosure to employees within the recipient agency. *See Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976) (statute should not be construed in a manner that renders some provisions superfluous). The recipient agency's "use" of the information necessarily encompasses its "disclosure" to the agency employees who handle and review it. Use of the broader phrase "disclosed *or*

[4] It is also our understanding, based on descriptions of the III system provided to us by the FBI, that information made available through the III system is limited to the categories of information covered by §9101(a)(2)'s definition of "criminal history record information."

used" thus indicates that Congress contemplated and authorized disclosure of the CHR information in contexts apart from the internal use of it by agency employees. *See also* 5 U.S.C. §9101(b)(3)(A) (providing for indemnification of state and local governments for damages resulting from "disclosure or use" by OPM or the FBI of CHR information initially received from the state or local government). The disclosures authorized by §9101(d) are limited to those that serve certain national security or criminal justice purposes or "the purposes set forth in paragraph (b)(1)"—that is, the performance of background investigations to determine eligibility for access to classified information or suitability for sensitive positions. Disclosure of CHR information to private contractors retained to perform background investigations constitutes such a disclosure.

The legislative history of §9101, moreover, further supports the conclusion that Congress intended to authorize the disclosure of CHR information to private contractors. Congress conducted extensive hearings in 1985 on problems arising out of the federal government's background investigation and security clearance process. It was those hearings that revealed that state and local governments were frequently refusing to make CHR information available to federal background investigators, thereby leading to the enactment of 5 U.S.C. §9101. *See* S. Rep. No. 99–136, at 2 (1985). The 1985 hearings also established that OPM and the State Department had already begun to utilize outside contractors to help reduce their growing backlogs of background investigation work. 1985 Hearings at 198, 256–57, 287–90. As then OPM Director Donald Devine testified in explaining one of the key measures taken by OPM to deal with its increased background investigation workload:

> [M]ost importantly in a major change [of] policy, we have been moving to a concept of a corps of permanent investigators consisting of OPM employees *supplemented by an expanding contractor relationship with outside investigators*, many of them previous OPM investigations [sic]. This measure is the only way we can meet the recurring surges and declines in work load without significant disruptions.

Id. at 198 (emphasis added). Senators at the hearing revealed not only their awareness that agencies were "contracting out" background investigation work, but their considerable interest in the potential cost savings that might be achieved through that practice. *Id.* at 202 (remarks of Senator Nunn, who observed, "[W]e heard testimony yesterday that the State Department had contracted out their investigative services at a cost of approximately $900 per personnel case."); *id.* at 287–88 (additional written Committee questions and OPM responses submitted for the record, including the following question from the Committee: "Should other civilian agencies contract out [their background investigations] like the State

Department to get the same quality [of] work cheaper and faster than with OPM?").

It is therefore evident that when Congress enacted §9101, it fully understood and accepted the fact that personnel background investigations conducted by OPM and the State Department were sometimes "contracted out" to private firms or individuals. That understanding provides relevant perspective as to what Congress had in mind when it provided that recipient agencies could "disclose" criminal history record information for authorized background investigation purposes.[5] In this context, it would appear that Congress intended to authorize OPM and other agencies to continue their practice of, at least at times, using contractors to perform background investigations and, correspondingly, to permit those contractors to have access to the necessary CHR information.[6]

2. *Controlled On-Line Access to III System.*

We also conclude that OPM's proposal to provide certain contractor personnel with controlled on-line access to the III system in order to review the criminal history records of individuals subject to background investigations is consistent with the requirements and restrictions of §9101. Such access, properly controlled to prevent unauthorized inquiries, simply constitutes another form of authorized disclosure under §9101(d). It should be recognized, however, that allowing contractor personnel to have direct access to the III system could pose an increased risk of abuse and litigation.

If contractors were permitted *unrestricted* access to the III system as a whole, it might reasonably be argued that such access is functionally equivalent to the disclosure to the contractors of all records accessible on the system. Such wholesale disclosure would plainly exceed the sort permitted under §9101, which is (for present purposes) limited to disclosure for the purpose of conducting required background investigations of government employees or prospective employees. As we understand it, however, the arrangement that OPM has negotiated with USIS

[5] The Conference Report on the legislation provides little additional insight on the meaning of the authorized disclosure provision of 5 U.S.C. §9101(d). Conf. Rep. at 29, *reprinted in* 1985 U.S.C.C.A.N. at 972–73. Insofar as pertinent here, it merely reiterates the point that disclosures of CHR information permitted under the statute must be limited to those furthering the statutory purposes. We should note, however, that a reference in the Conference Report to a "specific need" as a predicate for disclosure of CHR information refers only to certain special disclosures "for national security or criminal justice purposes," as specified in §9101(d). *Id.* That "specific need" qualification does not relate or apply to disclosures made for the basic purpose of conducting background investigations pursuant to §9101(b)(1).

[6] The Privacy Act, of course, precludes an agency from disclosing "any record which is contained in a system of records . . . to any person . . . except . . . with the prior written consent of[] the individual to whom the record pertains, unless" a particular exemption applies. 5 U.S.C. §552a(b). Here, we understand that all those who will be subject to background checks conducted by USIS employees will first sign releases, authorizing the disclosure of CHR information to a "representative" of OPM. To avoid any confusion regarding the scope of the release, and to minimize the risk of litigation, we strongly recommend that OPM modify the release to clarify that the CHR information will be disclosed to an independent contractor retained to assist in performing background investigations. In addition, the risk of litigation would also be reduced by the issuance of a relevant routine use notification. *See id.* at §552a(b)(3).

does not go this far. On the contrary, there are numerous contractual, legal, and practical mechanisms to deter and sanction unauthorized exploitation of III access in these circumstances. The USIS contract includes at least four clauses (paragraphs H.14, H.18, and H.20–21) prohibiting or sanctioning unauthorized use of confidential information accessed under the contract by the contractor or its employees. OPM is also authorized to revoke a contract employee's access authorization and to bar him from work on the contract in the event of "misconduct . . . affecting the integrity of an investigative product under the contract" (paragraph H.24)—which would likely include unauthorized examination of non-subject CHR's on the III system. USIS Contract at 85. Moreover, continuous system monitoring and recording of the particular records accessed on the III system provides an added deterrent against such abuse. By comparing the record subjects that contract personnel are authorized to examine by OPM against those that they actually examine (as recorded by the monitoring system), unauthorized examinations would be readily detectable. Finally, abuse of access to III records could also subject the perpetrator to criminal prosecution under some circumstances.[7]

Such restrictions provide the kind of limitations on access to sensitive records that have been upheld as adequate in comparable contexts. *See, e.g., Whalen v. Roe*, 429 U.S. 589, 598–602 (1977) (measures to preserve confidence of state drug prescription registry held sufficient to negate claims that potential for public disclosure would violate privacy rights); *Hodge v. Jones*, 31 F.3d 157, 165–66 (4th Cir.), *cert. denied*, 513 U.S. 1018 (1994) (Maryland statutory procedures held adequately to limit access to child abuse information records, and thus "tangential possibility" of public disclosure through such theoretical means as improperly motivated state employees or fortuitous computer hackers did not implicate a constitutional privacy right). Here, we believe the above-described restrictions provide adequate assurance that the contractor's access to III records will be limited to the background investigation purposes authorized by 5 U.S.C. § 9101(b)(1).

B.

Finally, our conclusion that § 9101 authorizes the sort of disclosures contemplated by the OPM/USIS contract is not inconsistent with prior opinions of this office that have concluded that certain disclosures of CHR information to private entities were not authorized by the governing law. *See* Memorandum for William Webster, Director, Federal Bureau of Investigation, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Missing Children Act* (Apr. 24, 1984) (concluding that certain CHR information on missing persons could not be provided to private organizations); Memorandum for Joseph H. Davis, Assistant Director, Legal Counsel Division, Federal Bureau of Investiga-

[7] For example, the Privacy Act provides misdemeanor sanctions for "[a]ny person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses." 5 U.S.C. § 552a(i)(3).

tion, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, *Re: Proposal by Federally Chartered or Insured Financial Institutions to Disseminate FBI Criminal History Record Information to CARCO Group, Inc.* (Sept. 1, 1989) (concluding that secondary dissemination of CHR information by authorized private users—banks and securities firms—to other private entities who were in a contractual relationship with the authorized private user was not permitted); Memorandum to Files, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Railroad Police Access to FBI Criminal Identification Records* (June 22, 1978) (concluding that a local criminal justice agency may not provide private railroad police with criminal history information obtained from the FBI).

None of these prior opinions involved the question whether disclosure was authorized under § 9101, but rather each turned on the distinct question whether disclosure was permitted under 28 U.S.C. § 534. In short, each of these prior opinions rests on the premise that § 534 only authorizes the "exchange" of information between governmental officials, and that governmental officials who receive information *pursuant to § 534* may not disseminate the information to private entities.[8] Here, in contrast, we conclude that the disclosures at issue are authorized under § 9101, and § 534 does not purport to limit the dissemination of information authorized under a separate statute.

Moreover, to the extent any inconsistency might arguably exist between the two statutes, § 534 must yield to § 9101. Insofar as conflicts between two statutes cannot be reconciled by construction, "the most recent and more specific congressional pronouncement will prevail over a prior, more generalized statute." *Natural Resources Defense Council, Inc. v. EPA*, 824 F.2d 1258, 1278 (1st Cir. 1987), *citing* 2A C. Sands, *Sutherland on Statutes and Statutory Construction* § 51.02 (4th ed. 1984). Section 9101 was enacted in 1985 to establish specific provisions for designated federal agencies to obtain CHR information from the states on a mandatory basis for purposes of conducting background investigations. Its enactment was necessitated in part by the fact that the more general provisions for exchange of CHR information previously provided by § 534 (enacted in 1966, Pub. L. No. 89–554, § 4(c), 80 Stat. 616) did not require the states to provide such information for background investigation purposes. As the more recently enacted and more specific provision, therefore, the disclosure provision of § 9101 would prevail over § 534 insofar as a conflict exists.

CHRISTOPHER H. SCHROEDER
Acting Assistant Attorney General
Office of Legal Counsel

[8] Because we conclude that § 9101 authorizes the disclosures at issue here, we need not (and do not) consider whether § 534 might also authorize these disclosures.

Immunity of the Counsel to the President from Compelled Congressional Testimony

Executive privilege is assertable in response to a congressional subpoena seeking the testimony of the Counsel to the President because the Counsel serves as one of the President's immediate advisers and is therefore immune from compelled congressional testimony.

September 3, 1996

LETTER OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether it would be consistent with precedent and governing legal principles to assert executive privilege should a subpoena be issued by a congressional committee to you, in your capacity as Counsel to the President, to compel your testimony at a committee hearing concerning the performance of your official duties. We believe that executive privilege would be assertable on the basis that you serve as an immediate adviser to the President and are therefore immune from compelled congressional testimony.

It is the longstanding position of the executive branch that "the President and his immediate advisors are absolutely immune from testimonial compulsion by a Congressional committee." [1] This position is constitutionally based:

> The President is a separate branch of government. He may not compel congressmen to appear before him. As a matter of separation of powers, Congress may not compel him to appear before it. The President's close advisors are an extension of the President. [2]

Accordingly, "[n]ot only can the President invoke executive privilege to protect [his personal staff] from the necessity of answering questions posed by a congres-

[1] Memorandum for all Heads of Offices, Divisions, Bureaus, and Boards of the Department of Justice, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 5 (May 23, 1977).

[2] Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 2 (Jul. 29, 1982) (discussing subpoena for testimony of the Counsel to the President). *See also* Memorandum for the Honorable John W. Dean, III, Counsel to the President, from Roger C. Cramton, Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Executive Privilege Where Congressional Committee Seeks Testimony of Former White House Official on Advice Given President on Official Matters* at 6 (Dec. 21, 1972) (since "[a]n immediate assistant to the President may be said to serve as his alter ego . . . the same considerations that were persuasive to former President Truman [when he declined to comply with a congressional subpoena for his testimony] would apply to justify a refusal to appear by . . . a former staff member"); Letter for Senator Orrin G. Hatch, Chairman, United States Senate, Committee on Labor and Human Resources and Senator Edward M. Kennedy, Ranking Minority Member, United States Senate, Committee on Labor and Human Resources, from Edward C. Schmults, Deputy Attorney General at 2 (Apr. 19, 1983) ("[O]ur concern regarding your desire for the sworn testimony of [the Counsel to the President] is based upon important principles relative to the powers, duties and prerogatives of the Presidency We share with previous Presidents and their advisers serious reservations regarding the implications for established constitutional doctrines arising from the separation of powers of a Congressional demand for the sworn testimony of close presidential advisers on the White House staff.").

sional committee, but he can also direct them not even to appear before the committee."[3]

An often-quoted statement of this position is contained in an opinion by Assistant Attorney General William Rehnquist:

> The President and his immediate advisers — that is, those who customarily meet with the President on a regular or frequent basis — should be deemed absolutely immune from testimonial compulsion by a congressional committee. They not only may not be examined with respect to their official duties, but they may not even be compelled to appear before a congressional committee.[4]

There is no question that the Counsel to the President falls within Assistant Attorney General Rehnquist's description of the type of Presidential advisers who are immune from testimonial compulsion.

CHRISTOPHER H. SCHROEDER
Acting Assistant Attorney General
Office of Legal Counsel

[3] Memorandum for Margaret McKenna, Deputy Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Dual-purpose Presidential Advisers*, Appendix at 7 (Aug. 11, 1977).

[4] Memorandum for the Honorable John D. Ehrlichman, Assistant to the President for Domestic Affairs, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Power of Congressional Committee to Compel Appearance or Testimony of "White House Staff"* at 7 (Feb. 5, 1971).

Fourth Amendment Issues Raised by Chemical Weapons Inspection Regime

The inspection regime to be created by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction and by the proposed Chemical Weapons Implementation Act, under which inspections of facilities that produce certain chemicals would occur, absent exigent circumstances, only after the United States Government obtained the consent of the owner or operator of the facility, an administrative warrant, or a criminal search warrant, is consistent with the Fourth Amendment to the Constitution.

September 10, 1996

STATEMENT BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, FEDERALISM, AND PROPERTY RIGHTS OF THE SENATE COMMITTEE ON THE JUDICIARY

I appreciate being given the opportunity to address this Subcommittee on the Fourth Amendment Issues raised by both the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (the "Convention" or "CWC") and the Chemical Weapons Implementation Act (the "Act") currently before Congress.

The Senate, with respect to the Convention, and the Congress, with respect to the Act, now have the opportunity to contribute to the world-wide effort to eliminate the scourge of chemical weapons. Ratification of the Convention and passage of the Act also will represent positive steps towards the goal of reducing the threat posed by terrorists, a goal shared by the President and the Congress. Before I discuss specific aspects of the inspection regime established under the Convention and the Act, and the application of the Fourth Amendment thereto, I think it is important to remind the Subcommittee that the commitment to achieving a global ban on chemical weapons, and to doing so within our constitutional framework, has been a bipartisan one. Negotiations on the Convention commenced during the Administration of President Reagan; the Convention was signed under President Bush. President Clinton is fully pledged to ratification of the Convention and enactment of the implementing legislation.

We have reviewed this Convention and this Act and have concluded that the inspection regime they would create will not compromise the guarantees of the Fourth Amendment. The right of the people to be free from unreasonable searches and seizures, as much as any specific provision of the Constitution, represents a check on the power of government. At the same time, the Fourth Amendment stands as a solemn declaration of the right to conduct one's affairs in private. Over eighty years ago, the Supreme Court observed that the duty of giving force and effect to the Fourth Amendment "is obligatory upon all entrusted under our Federal system with the enforcement of the laws." *Weeks v. United States*, 232

U.S. 383, 392 (1914). This Administration, the Department of Justice, and I have an abiding conviction in this principle.

Both the Convention and the Act have been painstakingly drafted to put in place an effective, verifiable ban on the development, acquisition, and use of chemical weapons. But none of their provisions in any way contemplates or permits conduct in contravention of the Fourth Amendment. Indeed, the inspection provisions were drafted to be fully consonant with the dictates of search and seizure law.

To ensure compliance with the CWC prohibitions and requirements, the Convention and its implementing legislation would permit two types of verification inspections: routine (which will apply to three Schedules of chemicals) and challenge. I will address each type of inspection in turn.

Routine Inspections. All facilities, both public and private, that are "declared" as producing scheduled chemicals as set forth under the CWC would be subject to routine inspections. The Technical Secretariat of the CWC's Organization for the Prohibition of Chemical Weapons ("OPCW") would select such facilities for inspection based on neutral and objective criteria. The purpose of the routine inspection is strictly limited: to determine the accuracy of declarations and to determine whether activities are in accordance with CWC obligations. Other than those facilities that produce the very restricted amounts of chemicals set forth under Schedule 1, no declared facility would be subject to routine inspection more than twice a year.

As an initial matter, the Administration anticipates that most inspections — routine and challenge — will be conducted with the consent of the owner or operator of the facility at issue. It is important to keep in mind that the chemical manufacturing industry itself strongly supports the ratification and implementation of the CWC and its verification inspection scheme. Where available, the specifics of these inspections will be dictated by facility agreements entered into between the U.S. Government and the OPCW. If consent were to be denied, however, absent exigent circumstances, the U.S. Government would seek an administrative warrant to inspect a specific facility.

This inspection scheme is fully consistent with Fourth Amendment principles. The Fourth Amendment requires that "subject only to a few specifically established and well-delineated exceptions," *Katz v. United States*, 389 U.S. 347, 357 (1967), searches and seizures conducted in the absence of "a judicial warrant issued upon probable cause and particularly describing the items to be seized" are per se unreasonable. *United States v. Place*, 462 U.S. 696, 701 (1983). The Fourth Amendment's warrant and probable cause requirements do not apply to a particular search, however, when the party to be searched provides consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). I thus would emphasize that the warrant provisions under the CWC and its implementing legislation would

apply only to the small minority of inspections as to which consent might be withheld.

The Fourth Amendment's prohibition on unreasonable searches and seizures applies to administrative searches of private commercial property. *See See v. City of Seattle*, 387 U.S. 541, 543–44 (1967). The expectation of privacy in commercial premises, however, is less than the similar expectation in one's home. *See id.* at 545–46. For purposes of an administrative search, "probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].'" *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978) (footnote omitted) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)). With respect to closely regulated industries, the Supreme Court has held that "[t]his expectation is particularly attenuated." *New York v. Burger*, 482 U.S. 691, 700 (1987).

In part due to the extensive environmental, health, and safety issues inherent in its activities, the chemical manufacturing industry is already subject to pervasive governmental regulation. The Resource Conservation and Recovery Act, the Toxic Substance Control Act, the Clean Air Act, and the Clean Water Act, to a greater or lesser degree, apply to most of the U.S. facilities that will be declared under the CWC. Through ratification of the CWC and enactment of its implementing legislation, the chemical manufacturing industry similarly would be subject to their regulatory scheme. To ensure compliance with its terms, the CWC and the Act provide for "'reasonable legislative or administrative standards for conducting an . . . inspection.'" *Barlow's*, 436 U.S. at 320 (quoting *Camara v. Municipal Court*, 387 U.S. at 538). All facilities that would be subject to routine searches under the CWC are part of this industry, and would be declared under the CWC and thus on notice that routine inspections would take place. For these facilities, there would be sufficient basis for obtaining administrative search warrants to conduct verification inspections where consent is denied. In those cases, a warrant would be sought prior to initiation of an inspection, in the absence of exigent circumstances.

Challenge Inspections. The second type of inspections are the challenge inspections. If a State Party makes a specific allegation of non-compliance, it may request that the suspect facility be made subject to a challenge inspection, whether or not that facility was declared.

Declared facilities selected for a challenge inspection would be subject to inspections in the same manner as provided under the CWC and the Act for routine inspections: pursuant to either consent or an administrative search warrant. Facilities that are undeclared, however, likely would not fall within the closely regulated industry of chemical manufacturing. Therefore, the government may not be able to obtain administrative search warrants to conduct such inspections. Instead, for

the small number of undeclared facilities where consent to inspect is denied, and where an administrative warrant is unobtainable, the Fourth Amendment, in the absence of exigent circumstances, may require that a criminal search warrant be secured. This warrant would be based on probable cause to believe that a violation of the Act or Convention has been or is being committed.

In certain instances, insufficient evidence may exist to establish criminal probable cause within the meaning of the Fourth Amendment. Thus, a search warrant would be unobtainable. The CWC anticipates this possibility and would not force a choice between compliance with its terms, and adherence to our constitutional principles. Rather, the Convention specifically allows the U.S. Government, in granting access to facilities identified for challenge inspections, to "tak[e] into account any constitutional obligations it may have with regard to proprietary rights or searches and seizures." *See* Verification Annex of the CWC, pt. X, para. C.41. Hence, in the rare event that the Fourth Amendment would pose a bar to a search of premises identified for a challenge inspection and the inspection could not go forward, the United States would remain in full compliance with its obligations under the CWC.

Issuance of Warrants. Next, I would like to discuss specifically how warrants would be issued under the Act. Once the Lead Agency representing the U.S. Government provides sufficient information to support a finding of administrative probable cause, the Act directs the authorized official to issue promptly a search warrant authorizing the requested routine or challenge inspection. To demonstrate probable cause for an administrative warrant, the government must submit an affidavit stating that the CWC is in force for the United States; the facility to be inspected is subject to the specific type of inspection requested by the OPCW; the procedures established under the CWC and the Act for initiating the inspection have been complied with; and the Government will undertake to ensure that the inspection is conducted in a reasonable manner, not to exceed the scope or duration set forth in, or authorized by, the CWC and the Act. In turn, the administrative warrant must specify the type of inspection authorized and its purpose; the type of facility to be inspected and its location; the items, documents, and areas that may be inspected; the commencement and concluding dates and times of the inspection; and the identities of the representative of the Technical Secretariat of the OPCW, and of the representatives of the Lead Agency.

Additional Protections. The inspection regime set forth in the Act contains a number of provisions designed to protect individual rights. Written notice must be provided to the owner and to the operator, occupant, or agent ("operator") in charge of the premises to be inspected. The notice must be submitted to the owner or operator as soon as possible after the U.S. Government receives it from the Technical Secretariat. The notice must include all appropriate information supplied by the Technical Secretariat regarding the basis for the selection of the facility. For challenge inspections, this notice will specify the nature and circumstances

of the alleged non-compliance, as well as all appropriate information serving as the basis for the challenge.

In addition, the Act provides that if an owner or operator of the premises is present, a member of the inspection team and the U.S. Government representative must present appropriate credentials. Consistent with the time frames set forth in the CWC, each inspection must commence and be completed promptly. The time, scope, and manner of the inspection must be reasonable. To the extent possible consistent with the CWC, no inspection may extend to financial, sales and marketing (other than shipment), pricing, personnel, research, or patent data, or data maintained for compliance with environmental or occupational health and safety regulations.

Under the CWC and the Act, facility agreements must be concluded for all Schedule 1 facilities, and for Schedule 2 facilities, unless the owner or operator of the premises and the Technical Secretariat concur that such an agreement is unnecessary. The owners or operators of Schedule 3 facilities and other chemical production facilities subject to inspection under the CWC have the option of requesting a facility agreement if they so desire. The Act provides that, if a request is made, the U.S. Government should negotiate and conclude a facility agreement. The owner or operator shall have the right, to the extent practicable consistent with the obligations of the United States under the CWC, to participate in the preparation for, and observe the negotiation of, this agreement.

If the U.S. Government has signed a facility agreement with the OPCW governing a particular facility, any routine inspection of that facility must be conducted in accordance with such agreement. Because these agreements will establish detailed procedures that will control the conduct of inspections of affected facilities, the agreements will encourage owners and operators to consent to an inspection and grant access to their facilities.

In my opinion the Chemical Weapons Convention and the Implementation Act reflect a supreme effort and an extraordinary accomplishment. A measurable step has been taken to make the world a safer place in which to live and, at the same time, the principles set forth in the Fourth Amendment of the U.S. Constitution have been scrupulously observed. I would thus urge the Senate to consent to ratification of the Convention and Congressional passage of the Act.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Transmission by a Wireless Carrier of Information Regarding a Cellular Phone User's Physical Location to Public Safety Organizations

Neither 47 U.S.C. § 1002(a) nor the Fourth Amendment of the Constitution prohibits a wireless carrier's transmission to local public safety organizations of information regarding the physical location of a caller who uses a cellular telephone to dial the 911 emergency line.

Although 18 U.S.C. § 2703 would apparently apply to the carrier's transmission of such location information to public safety organizations, the caller, by dialing 911, has impliedly consented to such disclosure, thus permitting the federal government to require the carrier to disclose such information without a warrant or court order.

September 10, 1996

MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

You have asked for our opinion as to whether 47 U.S.C. § 1002(a) prohibits a wireless carrier's transmission to local public safety organizations of information regarding the physical location of a caller who uses a cellular telephone to dial the 911 emergency line. In addition, you have inquired as to the constraints, if any, imposed by the Fourth Amendment on such a transmission.[1] As set forth in detail below, we conclude that § 1002(a), by its terms, does not prohibit such transmission of location information. Although you have not inquired as to the applicability of 18 U.S.C. § 2703(c), we conclude that, while the provision would apparently apply to the carrier's transmission of such location information to public safety organizations, the caller, by dialing 911, has impliedly consented to such disclosure, thus permitting the federal government to require the carrier to disclose such information without a warrant or court order. Finally, the Fourth Amendment does not prohibit such transmission both because of the caller's implied consent to the disclosure and because a caller who dials 911 has neither an actual nor a reasonable expectation of privacy with regard to his whereabouts at the time of the call.

[1] Memorandum for Walter E. Dellinger, Assistant Attorney General, Office of Legal Counsel, from John C. Keeney, Acting Assistant Attorney General, Criminal Division, *Re: Request for a Legal Opinion from the Federal Communications Commission as to the Applicability of 47 U.S.C. § 1002(a) to the Transmission to Local Public Safety Agencies of the Physical Location of a Cellular Telephone Caller Who Dials the 911 Emergency Line* (May 13, 1996).

BACKGROUND

A. *Facts*

In its recently issued rule regarding Compatibility of Wireless Services With Enhanced 911 ("E-911"), the Federal Communications Commission (the "FCC") established a timetable for the development and deployment of new technologies through which wireless carriers (cellular telephone companies) will automatically provide a designated public safety answering point ("PSAP")[2] with information regarding the physical location of a caller who dials 911 on a wireless cellular telephone. Commercial Mobile Radio Services, 47 C.F.R. §§20.3, 20.18 (1996).[3] This information will significantly enhance the effectiveness of wireless 911 services by helping emergency service personnel locate the caller and more rapidly and accurately determine where the emergency has occurred.

The implementation and deployment of enhanced 911 features and functions will be accomplished in two phases. In phase one, covered carriers must relay to the PSAP the 911 caller's telephone number and the location of the cell site or base station through which the call originates. *See id.* §20.18(d). This information will identify the caller's location only in quite general terms,[4] but will enable emergency service providers to call back if a 911 call is disconnected. *See id.* We understand that the information provided in phase one is currently available to wireless carriers, as it is regularly captured by them as part of their transmission of calls from cellular phones,[5] but some carriers must develop the ability to pass it on to a third party.

A more precise identification of the caller's location will occur in phase two, when the carrier must provide the designated PSAP with the physical location of the mobile unit making the call by longitude and latitude within a radius of 125 meters in 67% of all cases. *See id.* §20.18(e). According to FCC representatives, the more precise location determination required in phase two will occur

[2] A public safety answering point is a facility designated to receive 911 calls and route them to emergency service personnel. *See* 47 C.F.R. §20.3.

[3] An E-911 system automatically identifies on a screen at the PSAP the telephone number and geographical location from which the call was made. This system permits a more efficient response to calls received, including silent calls, and deters false alarms, because such calls are capable of being traced. In many jurisdictions, E-911 systems are already operational for landline phones, identifying the telephone number and the address associated with that telephone number. The address of the subscriber to the cellular telephone will often be insufficient to identify the caller's physical location at the time of a call, however, because cellular telephones are mobile and calls are frequently made from someplace other than the caller's address. The need for this critical information regarding the location of the caller was the impetus for the new FCC rule.

[4] The physical size of a cell depends upon the density of use: it could encompass only a few blocks in a populated city, or miles in a rural area.

[5] When a cellular caller makes a call, the carrier captures his signal (his electronic serial number) and the data carried on that signal, which is generally a mobile identification number ("MIN"). A MIN is a 34-bit binary number that a cellular handset transmits as part of the process of identifying itself to wireless networks. Each handset has one MIN, which is derived from the ten-digit North American Numbering Plan telephone number that is generally programmed into the handset by a provider when it initiates service for a new subscriber. *See id.* §20.18. The carrier's records include transactional information, such as the caller's address, associated with the MIN.

through the development of new technologies enabling the carrier to combine and analyze information regarding the strength, angle and timing of the caller's signal measured at two or more cell sites. A caller's signal, and its strength, are already often picked up by more than one cell site. In addition, many cell sites have sectorized antennas, and, depending upon the angle of the signal's arrival, a particular antenna will pick up the signal, thus informing the carrier what sector of the cell the caller is located in. Finally, each site records the arrival time of a signal. By developing new computer programs, switching technology, protocols and network architecture, the carrier will be able to combine and analyze all of this information — the strength of the signal at each of the cell sites picking up the signal, the sector of a cell from which a signal emanates, and the time that it takes for the signal to arrive at one cell site compared to other sites — to identify more precisely the caller's location.

B. *Relevant Statutory Provisions*

The Communications Assistance for Law Enforcement Act of 1994 ("CALEA"), among other things, requires telecommunications carriers to ensure that their equipment is capable of permitting the government (pursuant to a court order or other lawful authorization) to access certain "call-identifying information" [6] that is reasonably available to the carrier. 47 U.S.C. § 1002(a)(2). CALEA includes limitations, however, and specifically prohibits telecommunications carriers from providing the government with "information acquired solely pursuant to the authority for pen registers and trap and trace devices (as defined in section 3127 of title 18) . . . that may disclose the physical location of the subscriber (except to the extent that the location may be determined from the telephone number)." *Id.* § 1002(a)(2)(B). [7] Section 3127 of title 18 (part of the Electronic Communications Privacy Act of 1986 ("ECPA")) in turn prohibits the installation or use of pen registers and trap and trace devices absent a court order, with the exception of particular uses by providers of electronic or wire communication services. [8]

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[6] "The term 'call-identifying information' means dialing or signaling information that identifies the origin, direction, destination, or termination of each communication generated or received by a subscriber by means of any equipment, facility, or service of a telecommunications carrier." 47 U.S.C. § 1001(2).

[7] 18 U.S.C. § 3127 defines "pen register" and "trap and trace device" as follows:

> (3) the term 'pen register' means a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached, but such term does not include any device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services provided by such provider or any device used by a provider or customer of a wire communication service for cost accounting or other like purposes in the ordinary course of its business;
>
> (4) the term 'trap and trace device' means a device which captures the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.

[8] 18 U.S.C. § 3121 provides in pertinent part:

Continued

Another provision of ECPA, 18 U.S.C. § 2703, "Requirements for governmental access," sets forth the terms under which carriers may provide governmental entities with information relating to electronic communications. In particular, § 2703(c) provides that a carrier shall only disclose a record or other information pertaining to one of its customers (excluding the contents of communications covered elsewhere in the section) to a governmental entity when the governmental entity obtains a warrant, a court order or the consent of the customer.[9]

ANALYSIS

A. *Section 1002(a) Does Not Prohibit Wireless Carriers From Transmitting Information Regarding the Physical Location of Cellular Telephone Callers to Public Safety Agencies*

By its terms, 47 U.S.C. § 1002(a)(2) does not prohibit a wireless carrier's transmission of physical location information as required by the new FCC rule. As set forth above, § 1002(a)(2) only prohibits carriers from providing physical location information "acquired solely pursuant to the authority [under 18 U.S.C. § 3127] for pen registers and trap and trace devices." The physical location of a cellular caller would not be obtained pursuant to legal authority requested and obtained by law enforcement officers as part of a government-initiated investigation, but instead pursuant to the recently issued FCC rule in response to an individual's request for help. Indeed, the cellular caller's physical location would not be determined by use of a pen register or trap and trace device at all,[10] but rather

(a) *In general.*—Except as provided in this section, no person may install or use a pen register or a trap and trace device without first obtaining a court order under section 3123 of this title or under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.).

(b) *Exception.*—The prohibition of subsection (a) does not apply with respect to the use of a pen register or a trap and trace device by a provider of electronic or wire communication service—

(1) relating to the operation, maintenance, and testing of a wire or electronic communication service or to the protection of the rights or property of such provider, or to the protection of users of that service from abuse of service or unlawful use of service; or

(2) to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire communication, or a user of that service, from fraudulent, unlawful or abusive use of service; or

(3) where the consent of the user of that service has been obtained.

[9] A provider of electronic communication service . . . shall disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a) or (b) of this section) to a governmental entity only when the governmental entity—

(i) obtains a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant;

(ii) obtains a court order for such disclosure under subsection (d) of this section; or

(iii) has the consent of the subscriber or customer to such disclosure.

18 U.S.C. § 2703(c)(1)(B). Section 2703(c)(1)(C) provides that a carrier shall disclose certain transactional information, including the name, address and telephone number or other subscriber number, of a customer when the governmental entity utilizes an authorized administrative subpoena.

[10] Although pen registers and trap and trace devices would be used to obtain the caller's telephone number and to relay the call to the PSAP, they would not provide any information on the actual physical location of the cellular caller.

by advanced technologies that aggregate and analyze the strength and angle of the caller's signal measured at various cell sites. At the very least, it certainly cannot be said that the caller's physical location would be determined "solely" through use of a pen register or trap and trace device. 47 U.S.C. § 1002(a). Thus § 1002 does not prohibit a telecommunications carrier from transmitting to a public safety organization the physical location information pertaining to a cellular caller required by the FCC rule. [11]

B. *18 U.S.C. § 2703 Permits Wireless Carriers to Transmit to Public Safety Authorities the Physical Location of Cellular Callers Dialing 911 Because Such Callers Have Impliedly Consented to Such Disclosure*

As set forth above, 18 U.S.C. § 2703 requires wireless carriers to obtain a warrant, a court order or the consent of the customer before disclosing to governmental authorities information relating to such customer. Although the disclosure of information regarding the physical location of a customer would likely fall within this provision, it is our view that, by dialing 911, the caller impliedly consents to the disclosure of information regarding his location at the time of the call. [12]

The whole purpose of a 911 call is to seek the aid of appropriate government officials in responding to an emergency at a particular place. Typically, that emergency is in the immediate vicinity of the caller—indeed, it often involves the caller himself and thus his exact location—and the whole purpose of the call

[11] The legislative history of § 1002(a) supports our conclusion. As explained in the House Report (there was no Senate Report submitted with CALEA), Congress was acting to ensure that "the authority for pen registers and trap and trace devices cannot be used to obtain tracking or location information, other than that which can be determined from the phone number." H.R. Rep. No. 103–827, at 17 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3489, 3497; *see also id.* at 22, *reprinted in* 1994 U.S.C.C.A.N. at 3502 ("Call identifying information *obtained pursuant to pen register and trap and trace orders* may not include information disclosing the physical location of the subscriber sending or receiving the message, except to the extent that location is indicated by the phone number.") (emphasis added). "Currently, in some cellular systems, transactional data that could be *obtained by a pen register* may include location information." *Id.* at 17, *reprinted in* 1994 U.S.C.C.A.N. at 3497 (emphasis added).

[12] Although there appear to be no cases interpreting § 2703's consent provision, and the legislative history of the section is silent on the matter, some guidance can be found in analyses of the consent provision in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2511(2)(c). Section 2511(2)(c) provides in part that "[i]t shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where . . . one of the parties to the communication has given prior consent to such interception." According to the legislative history of § 2511(2)(c), "[c]onsent may be expressed or implied." S. Rep. No. 90–1097, at 94 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2182 ("Surveillance devices in banks or apartment houses for institutional or personal protection would be impliedly consented to."). "In the Title III milieu as in other settings, consent inheres where a person's behavior manifests acquiescence or a comparable voluntary diminution of his or her otherwise protected rights." *Griggs-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir. 1990) (citations omitted). "[I]mplied consent—or the absence of it—may be deduced from 'the circumstances prevailing' in a given situation. . . . The circumstances relevant to an implication of consent will vary from case to case, but the compendium will ordinarily include language or acts which tend to prove (or disprove) that a party knows of, or assents to, encroachments on the routine expectation that conversations are private." *Id.* at 117 (citation omitted). *See also United States v. Amen*, 831 F.2d 373, 378–79 (2d Cir. 1987) (no violation of Title III where taping of prison inmates' telephone calls was impliedly consented to by inmates who used phones when on notice of the monitoring procedures at prison; "[h]ere we imply consent in fact from surrounding circumstances indicating that the appellants knowingly agreed to the surveillance") (citations omitted), *cert. denied*, 485 U.S. 1021 (1988).

is to inform officials of that location in order for the caller to obtain, and the emergency service officials to provide, help. The caller is the source of the location information needed by the government to respond, and his call evidences not merely an expectation, but in fact a purpose, of conveying that information to the authorities. If the caller himself does not tell the authorities where he is located (which he generally does), it is presumably due to the exigent circumstances resulting from the emergency, and not to any desire to withhold such information. Even if the emergency is in a different location, his decision to reach out to government officials to seek their help indicates that he would similarly tell them his location if it would help them respond to the emergency.[13] The mere possibility that a caller subjectively does not wish his location to be revealed would not negate the consent presumed from his making the 911 call.[14]

C. *Wireless Carriers May Transmit to Public Safety Authorities Information Regarding the Physical Location of Cellular Callers Dialing 911 Without Violating the Fourth Amendment*

1. *There is no "Search" Within the Meaning of the Fourth Amendment Because 911 Callers Have No Actual or Reasonable Expectation of Privacy in Information Regarding Their Location*

The Fourth Amendment protects individuals from "unreasonable searches." U.S. Const. amend. IV. For the Fourth Amendment even to apply to a particular government action, the person invoking its protection must be able to claim "a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been

[13] Calling 911 and triggering the government's emergency response invalidates any claim by a caller that he does not in fact consent to the disclosure of information regarding his location. If he chooses to seek such emergency aid, he implicitly consents both to aiding the authorities in this limited way and to action taken by the government to verify his call. *See Nolan v. United States*, 423 F.2d 1031, 1043 (10th Cir. 1969) (telephone company's monitoring of calls does not violate 47 U.S.C. §605 because illegal user has impliedly consented to company's attempts to properly bill user), *cert. denied*, 400 U.S. 848 (1970); *Bubis v. United States*, 384 F.2d 643, 648 (9th Cir. 1967) ("[w]hen a subscriber of a telephone system uses the system's facilities in a manner which reasonably justifies the telephone company's belief that he is violating his subscription rights, then he must be deemed to have consented to the company's monitoring of his calls to an extent reasonably necessary for the company's investigation" and there is no violation of 47 U.S.C. §605); *Commonwealth v. Gullett*, 329 A.2d 513, 519 (Pa. 1974) (Party calling police to report homicide, its location and number of bodies has no claim for violation of Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S.A. §5703, where, "[f]rom the nature of the call, the non-confidential quality of the information conveyed, the emergency atmosphere the communication engendered, and the particular agency to which the disclosure was directed, it is apparent that the caller did not intend the privacy of the communication to be maintained. Rather, the conclusion is inescapable that a call made under these circumstances carried with it the permission of the caller to divulge the communication to authorized police personnel other than the officer who happened to take the message and to use the communication to investigate the reported crime by any reasonable means.").

[14] *See United States v. Tzakis*, 736 F.2d 867, 871–72 (2d Cir. 1984) (defendant cannot assert post-hoc limits on a listener's recording of conversation by alleging that his willingness to allow overhearing did not encompass permission to record); *United States v. Jachimko*, 19 F.3d 296, 299 (7th Cir. 1994) ("where a suspect does not withdraw his valid consent to a search for illegal substances *before* they are discovered, the consent remains valid"); *Jones v. Berry*, 722 F.2d 443, 449 (9th Cir. 1983) (consent search is valid where consent revoked after search complete), *cert. denied*, 466 U.S. 971 (1984).

invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citations omitted). This inquiry embraces two discrete questions. The first is "whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' "—whether the individual "has shown that 'he seeks to preserve [something] as private.' " *Id.* at 740 (quoting *Katz v. United States*, 389 U.S. 347, 361 (Harlan, J., concurring), 351 (1967)). The second question is "whether the individual's subjective expectation of privacy is 'one that society is prepared to recognize as "reasonable," ' "—whether "the individual's expectation, viewed objectively, is 'justifiable' under the circumstances." *Id.* (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring), 353).

In our opinion, a cellular caller dialing the 911 emergency line has not exhibited an "actual (subjective) expectation of privacy" in information regarding his physical location, much less a "reasonable" one. It is hard to imagine any clearer indication of the absence of an expectation of privacy than a cry for help; by reaching out to government officials to seek their help, the caller indicates that he has no expectation of privacy in information that could help the authorities respond to the emergency.[15]

Even assuming that, in some number of cases, the caller actually expects his physical location to remain private, we believe that expectation is not "one that society is prepared to recognize as 'reasonable.' " *Katz*, 389 U.S. at 361. A caller dialing 911 seeking assistance cannot reasonably expect that information regarding his location will remain private when public service organizations need such information first and foremost to expeditiously provide the emergency assistance requested by the caller, and secondly to ensure that the call is legitimate and thus worthy of response.[16]

In addition, the Supreme Court has repeatedly held that a person has no expectation of privacy in information he voluntarily turns over to third parties.[17] In order to complete his call, the cellular caller must convey his signal and its corresponding cell site location to the carrier. The caller therefore has no reasonable

[15] Although no court has directly addressed this issue, our conclusion is supported by cases holding that a person calling 911 has no expectation of privacy in the contents of his call. "There is no expectation of privacy when a person makes a 911 call. Instead, there is an expectation that the information provided will be recorded and disclosed to the public." *State ex rel. Cincinnati Enquirer v. Hamilton County, Ohio*, 662 N.E.2d 334, 337 (Ohio 1996) (tape recordings of 911 calls are public records that are not exempt from disclosure and must be immediately released upon request); *see also State v. Cain*, 613 A.2d 804, 809 (Conn. 1992) (tape recordings of 911 calls are public records); *State v. Gray*, 741 S.W.2d 35, 38 (Mo. App. 1987) (same).

[16] *See United States v. Van Poyck*, 77 F.3d 285, 290–91 (9th Cir.) (prisoner has no reasonable expectation of privacy in outbound calls), *cert. denied*, 519 U.S. 912 (1996); *People v. Suite*, 161 Cal. Rptr. 825, 829 (Cal. App. 1980) (person telephoning police and threatening to bomb public building "cannot reasonably expect that records of the call will be private; the only reasonable expectation under such circumstances is that police will make use of every available technology to trace the source of that call").

[17] "[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller*, 425 U.S. 435, 443 (1976) (bank depositor has no legitimate expectation of privacy in financial information voluntarily conveyed to banks and exposed to their employees in the ordinary course of business); *see also Smith*, 442 U.S. at 744 (telephone caller has no reasonable expectation of privacy in phone number voluntarily dialed).

expectation of privacy with regard to that information, which is exactly the location information that will be disclosed in phase one of the new FCC rule. And it is the strength of this same signal — information voluntarily turned over by the caller to a third party — that would be measured from different antennas and cell sites, and then analyzed in phase two in order more precisely to determine his location. An expectation of privacy simply is not "justified" in these circumstances.

In sum, because a cellular caller dialing 911 has no actual or reasonable expectation of privacy as to information regarding his physical location, there will be no "search" within the meaning of the Fourth Amendment, and thus no constraints imposed by the Fourth Amendment, when wireless carriers transmit such information to public safety authorities.

2. *Cellular Callers Dialing 911 Have Impliedly Consented to the Transmission of Information Regarding Their Physical Location*

Even assuming that the provision to public safety agencies of information regarding the physical location of a cellular caller dialing 911 would constitute a search within the meaning of the Fourth Amendment, that search would be lawful if the caller consented to it, as consent is "one of the specifically established exceptions to the requirements of both a warrant and probable cause." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). As set forth above, we believe that dialing 911 evidences such consent.

Consent to a warrantless search can be explicit or can be implied from conduct. The Seventh Circuit recently reviewed the caselaw on implied consent, summarizing the pertinent analysis as follows:

> Generally, in deciding whether to uphold a warrantless search on the basis of implied consent, courts consider whether (1) the person searched was on notice that undertaking certain conduct, like attempting to enter a building or board an airplane, would subject him to a search, (2) the person voluntarily engaged in the specified conduct, (3) the search was justified by a 'vital interest', (4) the search was reasonably effective in securing the interests at stake, (5) the search was only as intrusive as necessary to further the interests justifying the search and (6) the search curtailed, to some extent, unbridled discretion in the searching officers.

McGann v. Northeast Ill. Regional Commuter R.R., 8 F.3d 1174, 1181 (7th Cir. 1993) (citations omitted).[18]

[18] "We decline to regard these six factors as dispositive criteria. Rather, these factors should be examined carefully in each case in evaluating the totality of the circumstances and in respecting the consideration that the courts not unnecessarily extend exceptions to the warrant requirement." *Id.* at 1181. *See also Almeida-Sanchez v. United States*,

Applying this analysis to the "search" here at issue leads us to conclude that a person using his cellular telephone to call 911 impliedly consents to the carrier providing public safety officials with information as to his physical location. Almost all, if not all, of the above-enumerated factors will be satisfied. The caller will have voluntarily called 911; the search will be justified by a vital interest in responding to an emergency and should be quite effective in facilitating that response; and the search will be limited to determining the caller's physical location, and thus will be only as intrusive as necessary to respond quickly and efficiently to the emergency and should minimize any risk of unbridled discretion by officers. The only factor possibly raising a question would be the first. In most instances, a person calling 911 will be doing so to obtain help for himself or someone in his immediate vicinity, and thus he will undoubtedly be "on notice" that calling 911 will entail disclosure of his location. Even if the caller is seeking help for a third party in a different location, he should be deemed to be on notice that his call will entail disclosure of his physical location in order to expedite the government's response. [19] Moreover, this simply is not a situation with any of the indicia of unwarranted interference into the private aspects of a person's life. In particular, the government's "search" is in response to the caller's request for assistance; it is not a government-initiated intrusion into a person's private life.

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Deputy Assistant Attorney General
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413 U.S. 266, 271 (1973) (warrantless inspections are constitutional where businessmen engaged in federally regulated enterprises "accept the burdens as well as the benefits of their trade . . . [and] in effect consent[] to the restrictions placed upon [them]"); *United States v. Bonanno*, 487 F.2d 654, 658–59 (2d Cir. 1973) (consent shown where "informer went ahead with a call after knowing what the law enforcement officers were about").

[19] Although we think it unnecessary, the FCC could consider publishing a notice in the telephone book and/or in the standard service contract signed by each subscriber that anyone calling 911 will be deemed to consent to disclosure of their physical location.

Applicability of Executive Privilege to Deliberations Regarding Assertion of Privilege

Documents reflecting and constituting deliberative communications within the White House Counsel's Office and between that Office and the Department of Justice relating to advice and recommendations to the President on the assertion of executive privilege are themselves a proper subject of a claim of executive privilege.

September 11, 1996

LETTER OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether certain predecisional deliberative documents in the possession of the White House Counsel's Office may properly be the subject of an assertion of executive privilege.

These documents reflect and constitute deliberative communications within the White House Counsel's Office and between that Office and the Department of Justice relating to the advice and recommendations presented to the President earlier this year with respect to the assertion of executive privilege in response to a subpoena from the House Committee on Government Reform and Oversight. We believe that the deliberative process concerning the President's assertion of his constitutional privilege is at the heart of the interests protected by the privilege — not only because of the heightened confidentiality interests regarding such deliberations, but also because of the severe separation of powers concerns raised by a congressional intrusion on that process.

Based on our review of these documents, we conclude that they are clearly protected by executive privilege and may properly be the subject of an executive privilege claim. The Supreme Court has expressly (and unanimously) recognized that the Constitution gives the President the power to protect the confidentiality of White House deliberations. This power is rooted in the "need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties." *United States v. Nixon*, 418 U.S. 683, 705 (1974). "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." *Id.* at 708. The Court has also stressed the separation of powers nature of executive privilege, stating that "[t]he privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *Id.*

You have not inquired concerning whether executive privilege could properly be asserted in the context of any specific congressional demand for these documents.

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18 U.S.C. § 207 and the Government of Guam

18 U.S.C. § 207(a)(1) prohibits a former Department of the Navy employee from representing the Government of Guam before the Federal Maritime Commission in a litigation in which he participated personally and substantially while employed by the Navy.

September 12, 1996

MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF GOVERNMENT ETHICS

You have asked for our opinion whether 18 U.S.C. § 207(a)(1) bars a former employee from representing the Government of Guam in a litigation in which he participated personally and substantially while employed by the Department of the Navy. *See* Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Stephen D. Potts, Director, Office of Government Ethics (June 25, 1996) ("Potts Letter"). We conclude that the statute forbids the representation. [1]

While an attorney with the Navy's Military Sealift Command ("MSC"), the former employee represented the MSC in a case before the Federal Maritime Commission ("FMC"), *Government of Guam v. Sea-Land Service, Inc.*, Docket No. 89–26. He has now joined the law firm representing the Government of Guam in the case. He wishes to appear on behalf of Guam before the FMC and in any subsequent judicial review proceedings.

Section 207(a)(1) provides:

> Any person who is an officer or employee . . . of the executive branch of the United States . . ., or of the District of Columbia, and who, after the termination of his or her service or employment with the United States or the District of Columbia, knowingly makes, with the intent to influence, any communication to or appearance before any officer or employee of any department, agency, court, or court-martial of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia) in connection with a particular matter—
>
> (A) in which the United States . . . is a party or has a direct and substantial interest,

[1] Section 207(a)(1) covers a former employee's "communication to or appearance before" agencies and courts, made "with the intent to influence." Here, we use forms of the word "represent" as a shorthand, without meaning to specify the exact scope of the statute. There is no dispute in the present case that the former employee would be engaged in "communication[s]" and "appearance[s]" within the meaning of the law.

> (B) in which the person participated personally and substantially as such officer or employee, and
>
> (C) which involved a specific party or specific parties at the time of such participation,
>
> shall be punished as provided in section 216 of this title.

Here, the former employee, while with the MSC, "participated personally and substantially" in the "particular matter" in question, which involves "specific parties." *See* Potts Letter at 2. The former employee, however, makes two basic arguments that the statute does not apply. First, he argues that Guam is not a "person" under § 207 and that his representation is, therefore, not "on behalf of any other person." *See* Memorandum for the Director, U.S. Office of Government Ethics, from Former Employee, *Re: Request for Advisory Opinion Concerning the Application of 18 U.S.C. § 207(a)(1)*, at 3 (Feb. 26, 1996). Second, he argues that his representation is not on behalf of a person "except the United States," because Guam is an instrumentality of the United States. *Id.* at 3–4. He maintains, in addition, that his representation would square with the policy of the statute because Guam and the MSC have no adverse interests in the FMC proceedings, and he urges the relevance of the principle that criminal statutes must be strictly construed. *Id.* at 4–5. These arguments are unpersuasive.

First, although Guam is not a "person" under some other statutes, *see, e.g., Ngiraingas v. Sanchez*, 495 U.S. 182 (1990) (Guam not a "person" under 42 U.S.C. § 1983), it is a "person" under § 207. That provision treats even the United States and the District of Columbia as persons; it applies to representation of "any other person (except the United States or the District of Columbia)." It also treats state and local governments as "persons": a one-year "cooling off" period for representation by former high-level officials of "persons other than the United States," 18 U.S.C. § 207(c), (d) & (e), is expressly made inapplicable to representation undertaken by employees of state and local governments, on behalf of those governments. *See id.* § 207(j)(2)(A). Representation of state or local governments by former federal employees, therefore, *could* violate § 207(a)(1), the provision at issue here. By providing exemptions for work on behalf of the United States, the District of Columbia, and (in some circumstances) state and local governments, and by restricting certain other work on behalf of state and local governments, the statute bespeaks an intent to cover units of government as "persons." *Cf. United States v. Smith*, 499 U.S. 160, 167 (1991) (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)) (" 'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.' "). Guam is therefore a "person" under § 207.

Second, although Guam is an "instrumentality of the federal government" for some purposes, *see Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286, 1289 (9th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986) (Commerce Clause and antitrust laws), it is not the "United States" for purposes of § 207. It would be anomalous for Guam to be an instrumentality of the United States under a statute that even treats the United States and the District of Columbia as separate entities. Section 207(a)(1) applies to "any communication to or appearance before any officer or employee . . . of the United States or the District of Columbia, on behalf of any other person (except the United States or the District of Columbia)," and clarifies that former officials of the United States may communicate to or appear before officers and employees of the District of Columbia, and vice versa. 18 U.S.C. § 207(a)(3). Thus, the District of Columbia is not covered by the term "the United States" in § 207, and there is no apparent reason why an unincorporated territory with its own government, *see, e.g.*, 48 U.S.C. §§ 1421–1423, should receive different treatment.

Furthermore, § 207 is aimed, among other things, at preventing former employees of the United States from "switching sides" in particular matters involving specific parties, such as litigation. *See, e.g.*, 5 C.F.R. § 2637.101(c)(1) (1996).[2] Guam and the United States may now appear separately in litigation and take opposite sides. As Judge (now Justice) Kennedy explained, "the executive branch of the Government of Guam [before 1971] might have been deemed under the control of the United States" as to litigation, because the Governor was appointed by the President with the advice and consent of the Senate, but

> [o]nce the Governorship of Guam was made an elected office, the United States relinquished its control over the executive of the Government of Guam. The executive branch is responsible now to the people of Guam. That the Government of Guam is now capable of acting independently of the United States in deciding whether to sue the United States is evidenced by the institution of the present action.

Government of Guam v. United States, 744 F.2d 699, 701 (9th Cir. 1984). Given this possibility of conflict between the United States and Guam and given the statutory structure, we believe that Guam does not fall within the term "the United States" as used in § 207.

To be sure, there may be some instances where, even within the executive branch of the federal government, an employee who leaves one agency and joins

[2] The statute is also designed to restrict trading on past friendships and associations and prevent the unfair use of inside information. 5 C.F.R. § 2637.101(c)(2), Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1121 (1963). (The regulation cited, 5 C.F.R. § 2637.101(c), applies only to persons who left the government before statutory amendments became effective on January 1, 1991, but the earlier regulations "remain [ ]persuasive" to the extent the statute has not changed. Office of Government Ethics, Summary of Post-Employment Restrictions of 18 U.S.C. § 207, at 1 (Nov. 4, 1992).)

another might "switch sides" in some sense, and yet § 207 would not apply: "A prime example of this is the activities of the Federal Labor Relations Authority. It is basically an intra-governmental regulatory body whose employees sometimes come from other agencies having worked on pending matters before the FLRA or who may wish to leave [the] FLRA for an agency which has a matter pending at the FLRA in which they are officially involved." OGE Informal Opinion 86x1 (1986). We do not believe, however, that these instances are analogous to the present case. The employee who transfers from one executive agency to another remains under the control of the executive branch and subject to its ethics regulations. As the Office of Government Ethics has noted, "[t]he FLRA . . . has been very sensitive to these situations and has used its standards of conduct to provide guidance for its employees." *Id.* Congress has left these conflicts to be policed by regulations issued by agencies plainly within the United States government; it hardly follows that § 207 should be construed as inapplicable to an entity "capable of acting independently of the United States." *Government of Guam*, 744 F.2d at 701.

We may assume, as the former employee argues, that the United States and Guam do not have adverse interests in the action before the FMC and that there is no "reasonably probable scenario" for future adversity. *See* Memorandum from MSC Designated Agency Ethics Official, *Re: Government of the Territory of Guam et al. v. Sea-Land and APL, FMC Docket No. 89–26* (Feb. 23, 1996). But § 207 is a prophylactic statute that is "intended to prevent even the appearance of wrongdoing and that may apply to conduct that has caused no actual injury to the United States." *Crandon v. United States*, 494 U.S. 152, 164 (1990) (describing another conflict of interest law, 18 U.S.C. § 209). It creates a prohibition applicable to specified *types* of circumstances, as listed in the statute, where conflicts *may* arise. On its face, the language of § 207 draws no distinction between matters in which the interests of the person represented by the former employee coincide with the interests of the United States and those in which the interests diverge or are adverse. The statute reaches "*any* investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest, or judicial or other proceeding." 18 U.S.C. § 207(i)(3) (emphasis added). Thus, "[a] former employee does not act on behalf of the United States . . . merely because the United States may share the same objective as the person whom the former employee is representing." Office of Government Ethics, *Summary of Post-Employment Restrictions of 18 U.S.C. § 207*, at 4 (Nov. 4, 1992).

Although (under an earlier version of § 207) we found that a former employee would not be an agent of another person with regard to a contract unless there was "an ingredient of at least inchoate adversariness," *Former Officers and Employees—Conflict of Interest (18 U.S.C. § 207)—Contract—Disqualification Connected with Former Duties or Official Responsibilities*, 2 Op. O.L.C. 313,

316 (1978), the justification for this conclusion was that "[a]side from a contract, the other listed matters [in the definition of 'particular matter'] appear to be pregnant with at least some adversariness (in the sense of urging a point of view) in all their aspects," *id. See also* OGE Informal Opinion 80x4 (1980); 5 C.F.R. § 2637.201(b)(5) (1996). With regard to litigation in which the United States is a party or has a direct and substantial interest and in which a former employee represents a participant in the case, it is irrelevant whether the former employee will be advancing a position aligned with the government's:

> An attorney participated in preparing the Government's antitrust action against Z Company. After leaving the Government, she may not represent Z Company in a private antitrust action brought against it by X Company on the same facts involved in the Government action. *Nor may she represent X Company in that matter.*

5 C.F.R. § 2637.201(c)(5), Ex. 1 (emphasis added). That the interests of the United States and Guam are aligned in the present case does not alter our conclusion about the applicability of § 207.[3]

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Deputy Assistant Attorney General
Office of Legal Counsel

[3] The former employee also relies on the rule of lenity, under which "'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952)). There may be some doubt how that rule applies to prospective ethics advice, where the "need for fair warning" underlying the rule is met by the advice itself. *See United States v. R.L.C.*, 503 U.S. 291, 306 n.6 (1992) (plurality opinion); *Liparota v. United States*, 471 U.S. 419, 427 (1985); *but see R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring in part and concurring in the judgment) (rule of lenity also "assur[es] that the society, through its representatives, has genuinely called for the punishment to be meted out"). In any event, we believe that § 207(a) is unambiguous in its application here and so do not resort to the rule of lenity for guidance. *See Lewis v. United States*, 445 U.S. 55, 65 (1980) (the "touchstone" of the rule of lenity "is statutory ambiguity").

Permissible Accommodation of Sacred Sites

The Establishment Clause of the First Amendment does not bar either an Executive Order that requires the accommodation of ceremonial use of sites on federal land that are sacred to federally recognized Indian tribes or a National Park Service regulation, designed to implement that Order, that prohibits the issuance of commercial climbing licenses at one such site during a period of religious significance.

September 18, 1996

MEMORANDUM OPINION FOR THE SECRETARY OF THE INTERIOR

We have been asked to provide our views on the obligations imposed by the Establishment Clause on the treatment of sacred sites under Executive Order No. 13007. That Order states that each federal agency with responsibility for the management of federal lands "shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." Exec. Order No. 13007, 61 Fed. Reg. 26,771 (1996). The executive order defines "Indian tribe" to mean "an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to Public Law No. 103–454, 108 Stat. 4791, and 'Indian' refers to a member of such an Indian tribe." *Id.*

Questions concerning the permissible means for implementing this executive order have arisen in the wake of a recent federal district court decision enjoining a National Park Service regulation that prohibited the issuance of commercial climbing licenses at Devils Tower, a sacred site in Wyoming, during the religiously significant month of June. [1] We believe that this case was wrongly decided and that the federal government has broad latitude to accommodate the use of sacred sites by federally recognized Indian tribes. [2]

In the first section of this memorandum, we lay out the general principles that govern the accommodation of religion under the Establishment Clause. In the second section, we address the principles applicable to the accommodation of sacred sites. We then apply those principles to the Devils Tower case.

[1] *See Bear Lodge Multiple Use Ass'n v. Babbitt*, No. 96–CV–063–D (D. Wyo. Jun. 8, 1996).*

* Editor's Note: Following both the district court's grant of the preliminary injunction in the cited decision and the issuance of this opinion, the Secretary of the Interior revoked the commercial climbing ban at Devils Tower in December 1996. The district court thereafter dismissed as moot the plaintiffs' request, based on a theory that the ban violated the Establishment Clause, for permanent injunctive relief. *See Bear Lodge Multiple Use Ass'n v. Babbitt*, 2 F. Supp.2d 1448, 1451 (D. Wyo. 1998), aff'd, 175 F.3d 814 (10th Cir. 1999).

[2] It is our understanding that Executive Order No. 13007 only requires accommodations for federally recognized tribes.

I. BACKGROUND

The Supreme Court has held that the Establishment Clause generally prohibits the government from singling out religious organizations for special, preferred treatment, whether in the form of a direct benefit or an exemption from a government requirement. *See Board of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687, 696 (1994) (plurality opinion) (the government must "pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents" (citation omitted)); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (same).[3] At the same time, however, the Court "'has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.'" *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144–45 (1987)).[4] The accommodation doctrine permits the government to single out religion for special treatment under certain circumstances, usually when a generally applicable regulation interferes with the exercise of religion.

Although the accommodation doctrine permits the government, at times, to single out religion for special treatment, in general it does not excuse the government from complying with traditional Establishment Clause principles in other respects. Those traditional principles are embodied in the familiar *Lemon* test. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).[5] Under *Lemon*, the government must demonstrate that a law implicating the Establishment Clause (1) has a "secular legislative purpose," (2) has "a principal or primary effect" that neither advances nor inhibits religion, and (3) does not foster excessive governmental entanglement with religion. Recent Supreme Court cases make clear that purported accommodations must have a "secular legislative purpose"—namely, to lift a special, government-imposed burden on religious exercise. Such a permissible purpose generally will, in addition, prevent the accommodation from having the impermissible effect of advancing religion over non-religion. If an accommodation passes these two tests, it will satisfy *Lemon* so long as it does not foster excessive government entanglement with religion.

Importantly for present purposes, however, even where accommodations satisfy the *Lemon* test, the Establishment Clause still might be implicated where the accommodation is for the benefit of some denominations and not others; indeed,

[3] The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const amend. I.

[4] The Free Exercise Clause sometimes requires the government to accommodate religious exercise. This memorandum concerns principles that allow the government to provide religion with special treatment when not mandated by the Free Exercise Clause.

[5] In recent cases, the Supreme Court has moved away from rigid application of the *Lemon* framework. *See e.g., Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995); *Kiryas Joel*, 512 U.S. 687. At the same time, however, the Court has continued to apply the principles articulated in *Lemon*, where relevant. Because the Court has not announced a new test, we also use the *Lemon* principles to organize our analysis, and we supplement those principles where appropriate.

government actions that discriminate among religions typically are subject to strict scrutiny. *See Larson v. Valente*, 456 U.S. 228, 246 (1982).

A. *Permissible Secular Purpose*

Under *Lemon*, laws and government practices that benefit religion must serve a "secular legislative purpose." 403 U.S. at 612. There is no requirement, however, that a law's purpose be unrelated to religion. As the Supreme Court has said, "that would amount to a requirement that the government show a callous indifference to religious groups, and the Establishment Clause has never been so interpreted." *Amos*, 483 U.S. at 335 (internal quotations and citation omitted). But the government may not act "with the intent of promoting a particular point of view in religious matters." *Id.*

Although this is hardly a bright line, one application is certain: "Under the *Lemon* analysis, it is a permissible legislative purpose to *alleviate significant governmental interference* with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335 (emphasis added); *see also Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 454 (1988) ("The Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices.")[6] As a general rule, however, the government may only lift a burden that *it* has imposed. The Supreme Court has repeatedly emphasized that the accommodation doctrine allows the protection of religious organizations from *governmental* interference.[7] In addi-

[6] In *Amos*, for example, the Supreme Court upheld an exemption for the secular, nonprofit activities of religious organizations from Title VII's prohibition on religious discrimination in employment. 483 U.S. at 327. Although a previous version of the statute already exempted such employers from the ban on religious discrimination with respect to their religious activities, the *Amos* Court reasoned that "it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious" and that such "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Id.* at 336. Congress was entitled to lift this burden, the Court held.

In *Lyng*, the government adopted a plan permitting timber harvesting and road construction in an area of national forest that was traditionally used for religious purposes by members of three American Indian Tribes. After rejecting the tribes' argument that the Free Exercise Clause prohibited the government from establishing its plan, the Court, in dicta, encouraged the government to implement the plan in a manner that accommodated tribal religious practices. 485 U.S. at 454–55. This was true even though there was no assurance that other religions (or even other federally recognized tribes) would receive similar accommodations.

[7] In addition to *Amos* and *Lyng*, *see, e.g., Kiryas Joel*, 512 U.S at 706 ("Prior decisions have allowed religious communities and institutions to pursue their own interests free from governmental interference."), *id.* at 705 ("[T]he Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice."), *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989) (plurality opinion) (exemption must "remov[e] a significant state-imposed deterrent to the free exercise of religion")

In *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), the Court invalidated a statutory exemption that alleviated a privately imposed burden on religious exercise. The Court reasoned that the statute, which required employers to excuse employees from working on their designated Sabbath, took "no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath." *Id.* at 709. As a general matter, *Thornton* suggests the importance of weighing the interests of third parties when accommodating religious exercise. Although there is no explicit requirement that the government consider the effect of a religious accommodation on third parties, the Court has characterized exemptions that "burden[] non-beneficiaries markedly" as "unjusti-

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tion, the government may only lift a burden that specially affects the *exercise* of religion, or religious activity. In the absence of a special burden on religious exercise, the government simply has nothing to accommodate. [8]

It is also clear that the Court at times will examine the purpose behind regulations that do not on their face refer to religion. [9] Thus, drafting a regulation without reference to religion will not necessarily shield it from Establishment Clause scrutiny. However, the Supreme Court has suggested in dicta that in the context of government zoning and land-use regulations, facially neutral accommodations of religion — that is, regulations that are designed to accommodate religion but that do so without explicitly referring to religion — are likely to withstand Establishment Clause review, even when designed to accommodate only one religious group. [10] Furthermore, the Court will not strike down a law (facially neutral or otherwise) on purpose grounds unless the law has no apparent secular purpose or its (impermissible) religious purpose predominates. [11]

B. *Nonpreferential Effect*

Under *Lemon*, the primary effect of a government regulation cannot be to advance religion over non-religion. The Supreme Court has held, however, that when the government lifts a burden it has imposed on the exercise of religion, it does

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fiable awards of assistance to religious organizations" rather than permissible accommodations. *Texas Monthly*, 489 U.S. at 15 (internal quotations omitted).

[8] The Court applied this logic in *Texas Monthly* to invalidate a state tax exemption for religious periodicals. Rejecting the state's argument that the Free Exercise Clause compelled the tax exemption, the plurality observed: "[T]he State has adduced no evidence that the payment of a sales tax by subscribers to religious periodicals . . . would offend their religious beliefs or inhibit religious activity. . . . No concrete need to accommodate religious activity has been shown." 489 U.S. at 18. Because the tax exemption singled out religious periodicals for a benefit and could not "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion," the plurality found that it constituted an impermissible subsidy to religion. *Id.* at 15.

[9] *See Gillette v. United States*, 401 U.S. 437, 452 (1971) ("The question of government neutrality is not concluded by the observation that [a statute] on its face makes no discrimination among religions, for the Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses."). In *McGowan v. Maryland*, 366 U.S. 420 (1961), for example, the Court examined the purpose behind the state's Sunday Closing laws, even though those laws merely prohibited commercial activity on Sunday and made no reference to religion. The Court upheld the laws, despite their apparent religious purpose, because they advanced several important secular goals. *Id.* at 433–35.

[10] *See Lyng*, 485 U.S. at 453–54 ("Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents."); *id.* at 454 (noting with approval the "many" ameliorative, facially neutral measures that the Forest Service planned — including building a road so as to avoid Indian sacred sites — and implicitly suggesting that such "solicitous" choices would not violate the Establishment Clause despite their obvious purpose to accommodate religious exercise). At the very least, the Establishment Clause is not seriously implicated by facially neutral zoning regulations that benefit religious as well as other "like" institutions. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982) ("[T]here can be little doubt about the power of a state to regulate the environment in the vicinity of schools, churches, hospitals, and the like by exercise of reasonable zoning laws."); *id.* at 123 ("There can be little doubt that [protecting spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets] embraces valid secular legislative purposes" under *Lemon*.).

[11] *See Wallace v. Jaffree*, 472 U.S. 38, 56–60 (1985) (invalidating moment of silence statute where the record not only establishes a religious purpose but reveals no secular purpose); *Edwards v. Aguillard*, 482 U.S. 578, 590 (1987) (finding legislation invalid if backed by "preeminent religious purpose"); *id.* at 599 (Powell, J., concurring) (observing that "religious purpose must predominate" for legislation to be invalid).

not impermissibly advance religion. *See Amos*, 483 U.S. at 336–37. Although the government may thereby enable religion to better advance itself, such an effect does not automatically offend the Establishment Clause. *Id.* at 337. Furthermore, the Court has stated, where "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, [there is] no reason to require that the exemption comes packaged with benefits to secular entities." *Id.* at 338.

C. *No Excessive Entanglement*

Finally, *Lemon* prohibits the government from accommodating religion in a manner that creates a risk of excessive governmental entanglement with religion. Under *Lemon*, impermissible entanglement may occur when the government intervenes in religious affairs or when religious organizations assume governmental functions. [12]

D. *Nondiscrimination*

Even where religious accommodations satisfy all three *Lemon* prongs, they also must satisfy the "clearest command of the Establishment Clause": "that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. It follows that a discriminatory accommodation typically will be subject to strict scrutiny. *Id.* at 246. [13]

II. ACCOMMODATION AT SACRED SITES

Although the accommodation doctrine generally permits the government to single out religion for special treatment in order to alleviate government-imposed burdens on religious exercise, it nonetheless ordinarily prohibits the government from enacting regulations that prefer one religion over others, that foster excessive

[12] For example, in *Larkin*, the Court invalidated a statute that granted religious bodies veto power over applications for liquor licenses. Despite the State's otherwise valid interest in protecting churches, schools, and like institutions from "the 'hurly-burly' associated with liquor outlets," 459 U.S. at 123, the Court found that the statute created an impermissible "fusion" of governmental and religious functions. *Id.* at 126. Similarly, in *Kiryas Joel*, the Court invalidated a statute creating a school district for the Satmar Hasidim in part because it "delegat[ed] the State's discretionary authority over public schools to a group defined by its character as a religious community." 512 U.S. at 696.

[13] In *Larson*, the Supreme Court invalidated a portion of Minnesota's charitable solicitation registration and reporting requirements that exempted only those religious organizations that received more than half of their funding from members or affiliated organizations. Applying strict scrutiny, the Court found that the exemption was not closely fitted to further the government's interest in protecting its citizens from abusive solicitation practices because there was no evidence that predominantly member-funded organizations committed such practices less frequently than organizations receiving the majority of their funding elsewhere. *Id.* at 244–46. More recently, in *Kiryas Joel*, the Supreme Court invalidated a statute creating a special school district only for the religious enclave of Satmar Hasidim. It reasoned, in part, that the statute violated the principle that "government should not prefer one religion to another, or religion to irreligion" because the benefit flowed only to a single sect and there was "no assurance that the next similarly situated group seeking a school district of its own will receive one." 512 U.S. at 703. Citing Larson, the Court concluded that, "whatever the limits of permissible legislative accommodations may be it is clear that neutrality as among religions must be honored." *Id.* at 706–07 (citations omitted).

entanglement with religion, or that lift privately imposed burdens. However, these general prohibitions do not apply to regulations that accommodate the religious practices of federally recognized Indian tribes.

A.

In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court held that preferences for federally recognized Indian tribes are subject to less exacting scrutiny under the Equal Protection Clause than racial or ethnic preferences because of the historical guardian-ward relationship between those tribes and the federal government. In upholding an employment preference for Indians contained in the Indian Reorganization Act, 25 U.S.C. §§ 461–494, the Court held that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians, such legislative judgments will not be disturbed." 417 U.S. at 555. Applying this standard, the Court found that the preference before it was "reasonable and rationally designed to further Indian self-government" and did not constitute racial discrimination. *Id.* In fact, according to the Court, the preference was not even racial in nature because it favored a quasi-sovereign or political group consisting of federally recognized Indian tribes, rather than a discrete racial group consisting of Native Americans. Id. at 554, 553 n.24.

Two Courts of Appeals have extended the logic of Morton to the Establishment Clause context. In *Rupert v. Director, U.S. Fish and Wildlife Serv.*, 957 F.2d 32 (1st Cir. 1992) (per curiam), the First Circuit upheld an exemption for federally recognized Indian tribes from the federal criminal prohibition on the possession of eagle feathers. Faced with the question of whether to apply the strict scrutiny standard of *Larson* or the rational basis test of *Morton*, the court concluded that the principles articulated in *Morton* govern "where the government has treated Native Americans differently from others in a manner that arguably creates a *religious* classification." *Id.* at 35. The court reasoned that such preferential treatment—as with the preferential treatment at issue in *Morton*—"finds its source in Congress's historical obligation to respect Native American sovereignty and to protect Native American culture." *Id.* The court also found that such treatment

> is uniquely supported [in this context] by the legislative history and congressional findings underlying the American Indian Religious Freedom Act [42 U.S.C. § 1996], which declares a federal policy of "protect[ing] and preserv[ing] for American Indians their inherent right of freedom to believe, express and exercise the[ir] traditional religions . . ., including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites."

Id. at 35 (quoting *United States v. Rusk*, 738 F.2d 497, 513 (1st Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985)).

Similarly, in *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991), the Fifth Circuit upheld statutory exemptions for the Native American Church from federal and state laws prohibiting peyote possession. After construing the exemptions as political classifications rather than as religious classifications, the court stated:

> The unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation between church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that same relationship.

Id. at 1217.

Given the special trust relationship between the federal government and federally recognized Indian tribes that *Morton*, *Rupert*, and *Peyote Way* recognize, there is a strong argument that neither *Lemon* nor *Larson* should apply to accommodations of tribal religious practices or sacred sites, because such accommodations are not religious preferences in the usual sense of that term. Rather, they are political preferences conferred by the federal government on a quasi-sovereign in furtherance of the federal government's duty to promote tribal self-determination in all of its forms. The fact that the accommodated rituals might be viewed as religious in some sense (because of the way in which the distinction between church and state has been understood in traditional Establishment Clause jurisprudence) is not dispositive when the government benefits those rituals in order to promote tribal self-determination. Such accommodations are political ones under *Morton* because they are "reasonably designed to further the cause of Indian self-government." 417 U.S. at 554.

But, even if traditional Establishment Clause principles apply, they must be applied in a manner that takes account of the special considerations that underlie *Morton*. As *Morton* clearly states, the Constitution gives the federal government broad power in dealing with federally recognized tribes as quasi-sovereigns. The Establishment Clause cannot appropriately be read to diminish the government's ability to exercise this power, as would result from a direct application of standard Establishment Clause analysis in the context of tribal religious accommodations. Indeed, as the *Peyote Way* court suggested, such analysis is plainly incompatible with the federal government's duty toward the tribes.

The special relationship between the federal government and tribes — a relationship that envisions active assistance from the federal government — thus, at the very least, necessitates a modification of the usual Establishment Clause analysis

when evaluating accommodations of tribal religious practices and sacred sites. At a minimum, as *Morton* suggests and *Rupert* and *Peyote Way* hold, the federal government may, without triggering *Larson* strict scrutiny, single out federally recognized Indian tribes for special treatment that is not provided to other groups, if other Establishment Clause principles are satisfied.[14] Moreover, we think that the government may do more than simply lift a government-imposed burden on tribal religious practices, and may in addition alleviate burdens imposed by private parties. While the *Lemon* test ordinarily requires the government to lift a burden of its own making when accommodating religion to deter back-door attempts to benefit religion, the special relationship contemplates direct benefits for tribes. Furthermore, such accommodations arguably may include a degree of involvement with Indian tribes that exceeds the normal entanglement boundaries between government and religion. While the *Lemon* test typically forbids excessive government entanglement with religion, the special relationship between the government and the tribes entails a degree of government involvement in tribal religious practices. In short, the federal government has considerable discretion to enact accommodations on behalf of federally recognized tribes.[15]

We should not be understood to suggest that the government's discretion to accommodate tribal religious practices is unlimited, even under the broadest understanding of *Morton's* effect on Establishment Clause analysis. For example, the rationale of *Morton* would not permit the government to act with the impermissible purpose of diluting tribal religious practices or establishing a national Indian religion. We do not decide here the precise limits of our analysis. We believe, however, that *Morton* leaves the government with broad latitude to accommodate tribal religious practices.

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[14] To the extent the Establishment Clause or any other provision of law prohibits the federal government from discriminating *between* similarly situated federally recognized tribes, we note that Executive Order No. 13007, which provides that federal agencies "shall, to the extent practicable . . . accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners," ensures that all such tribes will receive accommodations where possible, and we read that Order to intend that similarly situated federally recognized tribes shall be treated similarly. *Cf. Kiryas Joel*, 512 U.S. at 703 (invalidating statute creating school district for the Satmar Hasidim where there was "no assurance that the next similarly situated group seeking a school district of its own will receive one").

[15] Prior to *Rupert* and *Peyote Way*, this Office took a narrower view of the effect on Establishment Clause analysis of the special relationship between the federal government and federally recognized tribes. *See Peyote Exemption for Native American Church*, 5 Op. O.L.C. 403, 419–20 (1981) (concluding that special relationship does not affect Establishment Clause analysis). In that Opinion, we stated that the unique status of federally recognized tribes does not justify special treatment of tribal religious practices. Because the tribes' unique status derives from their political position as quasi-sovereign nations, we reasoned that it only extends to preferences that further tribal authority and self-governance, not tribal religious observance. We note that that Opinion was drafted without the benefit of *Rupert* or *Peyote Way* and substantial commentary arguing that tribal religious practices are integral to tribal self-governance. *See, e.g.*, Richard Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, 79 Va. L. Rev. 691, 703–04 (1993); Michael J. Simpson, *Accommodating Indian Religions: The Proposed 1993 Amendment to the American Indian Religious Freedom Act*, 54 Mont. L. Rev. 19, 34 (1993); Jack F. Trope, *Protecting Native American Religious Freedom: The Legal, Historical, and Constitutional Basis for the Proposed Native American Free Exercise of Religion Act*, 20 N.Y.U. Rev. L. & Soc. Change 373, 393 (1993). In addition, we do not believe that *Morton's* holding is limited to legislation directly related to Indian self-government functions. The reasoning in *Morton* should apply as well to legislation that is rationally related to the furtherance of Congress's unique obligation toward federally recognized tribes. *See, e.g., Alaska Chapter v. Pierce*, 694 F.2d 1162, 1167 (9th Cir. 1982).

Although we believe that the *Lemon* test does not apply with full force to tribal religious accommodations, no court has had occasion to address this precise issue. *Rupert* and *Peyote Way* upheld laws that singled out tribes for special treatment, but those laws complied with *Lemon* in other respects. Because the law is unsettled in this area, we recommend that federal agencies comply with *Lemon* to the extent feasible in implementing Executive Order No. 13007. Thus, where possible, we would advise agencies to minimize the risk of governmental entanglement and to target government-imposed burdens on access to, or ceremonial use of, sacred sites. [16] If these hurdles are cleared, the only remaining obstacle will be a question of *Larson*-like differential treatment; and *Rupert* and *Peyote Way* have held (correctly, in our view) that, in light of *Morton*, such differential treatment is permissible when it is to the benefit of federally recognized tribes.

We also suggest that, where feasible, agencies adopt regulations that are facially neutral with respect to religion—i.e., that do not on their face give priority to any religious use of the sites. Although such neutral regulations would not be immune from traditional Establishment Clause scrutiny, they may engender fewer constitutional challenges. Furthermore, as noted above, the Supreme Court has suggested that in the context of government zoning and land-use regulations, such neutral accommodations of religion are likely to withstand Establishment Clause scrutiny.

B.

For the reasons outlined above, we believe that the district court in *Bear Lodge* erred in declaring the National Park Service ("NPS") management plan unconstitutional. That plan provides, in relevant part: "commercial use licenses for June climbing guide activities will not be issued [by the NPS] for June 1996 and beyond." National Park Service, Final Climbing Plan Management Plan at 22 (Feb. 1995). A group of commercial climbers sought to enjoin the operation of this part of the plan as a violation of the Establishment Clause. The district court granted a preliminary injunction, characterizing the no-commercial-climbing rule as "affirmative action by the NPS to exclude a legitimate public use of the tower for the sole purpose of aiding or advancing some American Indians' religious practices." *Bear Lodge*, slip op. at 11. [17] Furthermore, the court found that the

[16] In *many* cases, it might be argued that the federal government imposed a burden on tribal religious practices when it occupied the land on which a sacred site is located. More often, it might suffice that the government's prior Indian regulations, as well as its prior zoning and land-use decisions—including those that permit private parties to make use of the land on which the site sits—created a burden on tribal religious exercise.

[17] The court relied on *Badoni v. Higginson*, 638 F.2d 172, 179 (10th Cir. 1980), *cert. denied*, 452 U.S. 954 (1981), in which the Tenth Circuit rejected a Free Exercise claim asserted by Indians seeking to completely exclude tourists from a national monument. We note that nothing in *Badoni*—which merely held that the federal government need not exclude tourists from the monument under the Free Exercise Clause—precluded the government from voluntarily accommodating the tribal religious exercise under the Establishment Clause. As the Supreme Court has observed, "[i]t is well established . . . that [t]he limits of permissible state accommodation to religion are by no means co-

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restriction "coerce[d]" climbers to conform their conduct to the Indians' religious practices in a way that would entangle the government in regulating behavior. *Id.* [18]

The district court incorrectly analyzed the Devils Tower no-commercial-climbing rule. As discussed above, regulations that accommodate tribal religious practices generally are permissible under *Morton* and its progeny either because they are political (and not religious) preferences or because they are subject to a different, less restrictive test under the Establishment Clause.

Indeed, the rule in this case is perhaps the least problematic form of accommodation on our analysis because it satisfies traditional Establishment Clause principles in every respect, with the possible exception of one. For example, the no-commercial-climbing rule creates no risk of excessive entanglement because it does not involve the government in tribal affairs or vice versa. It merely regulates third parties (i.e., commercial climbers)—parties that have been long subject to NPS regulation and permitting authority. Furthermore, it does so in a manner that neither requires the government to conform climber conduct to tribal religious practices, nor requires the climbers to conform their own conduct to those practices, as the district court suggested. Far from entangling the government in monitoring climber conduct at the site, the rule simply forecloses commercial climbing activity for a limited period of time.

To the extent that the climbing ban lifts a burden imposed by NPS in permitting commercial climbing at the site in the first instance, it satisfies this aspect of the purpose prong of *Lemon*. It is true that the rule was designed, at least in part, to accommodate tribes and tribal religions and not other groups or religions. It achieves this purpose, however, without referring to tribal religious practices or singling out religious uses of Devils Tower for preferential treatment. Thus, in order for the rule to survive constitutional review, the government need rely upon *Morton* only insofar as that case makes clear that the government may act with the purpose of accommodating tribes without providing a comparable accommodation to other religions. We believe *Morton* easily supports this modest application and that the no-commercial-climbing rule therefore comports with the Establishment Clause. Although the district court reached the opposite conclusion, its decision has no binding precedential effect on other courts. [19]

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extensive with the noninterference mandated by the Free Exercise Clause." *Amos*, 483 U.S. at 334 (internal quotations omitted). Thus, "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* (internal quotations omitted).

[18] The court thus analogized the climbing ban to the tribes' request in *Badoni* that the government require tourists to act in a respectful and appreciative manner when visiting the site.

[19] The district court's decision is unpublished and was issued in the context of an expedited motion for preliminary injunction. Briefing on the merits has yet to commence.

Submission of Aviation Insurance Program Claims to Binding Arbitration

In insurance policies issued to air carriers pursuant to authority arising under chapter 443 of title 49, the Secretary of Transportation may include "50–50 clauses," which require that disputes between insurers over coverage liability be submitted to binding arbitration unless the insurers are able to negotiate a settlement in advance, if the use of such clauses is an accepted practice in the aviation insurance business.

49 U.S.C. § 44309 does not preclude the use of binding arbitration to resolve disputes regarding the liability of the United States for losses insured under chapter 443.

50–50 clauses included in insurance policies issued under chapter 443 may include a provision for arbitration under state or foreign law if it is a common practice of the commercial insurance business to resolve liability disputes by reference to the decisional rules of a non-federal sovereign.

September 27, 1996

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL AVIATION ADMINISTRATION

Chapter 443 of title 49 authorizes the Secretary of Transportation to offer insurance and reinsurance to air carriers conducting flights "necessary to carry out the foreign policy of the United States Government." 49 U.S.C. § 44302(b). Apparently, disputes arise from time to time as to whether liability to compensate an air carrier is properly assigned to the policy issued under the Secretary's authority, the so-called "war-risk" insurance, or to the air carrier's general, or "all-risk," policy. You have asked whether such insurance and reinsurance policies issued pursuant to the Secretary's authority may provide for resolution of such disputes under a "50–50 clause." Under a 50–50 clause, the all-risk and war-risk insurers each advance half of the amount payable under their policy at the time of the loss, assuring that the insured air carrier is fully compensated immediately. The 50–50 clause provides that insurers then submit their dispute as to liability to binding arbitration, unless the insurers are able to negotiate a settlement in advance.

There is no constitutional prohibition on the use of binding arbitration to resolve disputes involving a governmental program, *see Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), or on the use of binding arbitration to resolve the government's liability to make payments, *see Schweiker v. McClure*, 456 U.S. 188 (1982); *United States v. Erika, Inc.*, 456 U.S. 201 (1982). *See generally Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 Op. O.L.C. 208 (1995). This is not to say that there can be no limits

on the use of binding arbitration to resolve questions of governmental liability.[1] For example, federal officials may agree to this means of resolution only where there is a basis of authority for doing so. You have asked whether the Administrator of the Federal Aviation Administration ("FAA"), pursuant to a delegation from the Secretary of Transportation, is so authorized.

The statute provides that, in offering insurance and reinsurance, "[t]he Secretary of Transportation may carry out this chapter consistent with the commercial practices of the aviation insurance business." 49 U.S.C. § 44308(a). You have represented that use of 50–50 clauses is "widespread" in the aviation insurance industry. We have not sought to verify this factual assertion. If the use of 50–50 clauses is an accepted practice in the aviation insurance business, then we believe that § 44308(a) authorizes the Secretary to include such a clause in insurance and reinsurance policies offered under chapter 443 of title 49, United States Code.

We faced a similar question with respect to the Export-Import Bank. The federal statute establishing the Bank provided that it would be a "corporation . . . which shall be an agency of the United States" and that "[i]n connection with and in furtherance of its objects and purposes, the bank is authorized and empowered to do a general banking business." 12 U.S.C. § 635(a). We concluded that, under this charter, the Bank "was intended to have similar powers" to those of other banks. *See Arbitration—Export-Import Bank—Sovereign Immunity—Representation of Bank by Department of Justice*, 3 Op. O.L.C. 226, 228 (1979). We held, therefore, that the Export-Import Bank was authorized to include a binding arbitration clause in contracts the Bank entered into as part of "its normal banking operations." *Id.*[2]

The Secretary's authority to enter into 50–50 clauses follows a fortiori from our holding with respect to the Export-Import Bank. There, we inferred from the Bank's structure that it was to have the power to engage in the practices that private banks employ and that this included the use of binding arbitration. The Secretary's authority does not arise by inference from the structure of the war-risk insurance program. Rather, the authority to engage in common commercial practices is express. You have informed us, and we have no reason to doubt, that binding arbitration is such a practice. The Secretary, and by delegation the Administrator of FAA, is therefore statutorily authorized to include the 50–50

[1] The use of alternative dispute resolution mechanisms, including non-binding arbitration, generally is authorized by the Administrative Dispute Resolution Act ("ADRA"). *See* Pub. L. No. 101–552, 104 Stat. 2736 (1990). That Act, however, expressly forbids the use of binding arbitration with respect to any arbitration conducted under the ADRA's authority. *See* 5 U.S.C. § 580(c). As discussed below, authority to enter into 50–50 clauses is asserted to derive from chapter 443 of title 49. Because the ADRA's limitation applies only to the arbitration entered into under that authority, it does not limit the Secretary's authority to use binding arbitration if that authority exists under title 49 alone.

[2] We have subsequently distinguished the situation where a statute commits a matter, such as the issuance of regulations, to the exclusive and non-delegable discretion of a federal official. In that context, the official is not authorized to vest actual decision-making authority in anyone else, including an arbitrator or arbitration panel. *See Establishment of a Labor Relations System for Employees of the Federal Labor Relations Authority*, 4B Op. O.L.C. 709, 715–16 (1980).

clause binding arbitration provision in war-risk insurance policies issued under chapter 443 of title 49. Our holding regarding the Export-Import Bank did not rest on the fact that the Bank is established formally as a government corporation. Rather, we inferred from the use of the corporate form statutory authority to engage in whatever practices non-governmental corporations might engage in. A governmental entity that is not chartered formally as a corporation might be given the same authority by express statutory provision, such as a provision authorizing a government agency to act in a manner that is consistent with the commercial practices of a given industry. *See Tenaska Washington Partners II v. United States*, 34 Fed. Cl. 434, 442 (1995) (holding that statute authorizing Bonneville Power Administration to operate as a "business enterprise" creates authority to agree to binding arbitration).[3]

You have asked us to consider whether the provisions of chapter 443—specifically, those at 49 U.S.C. § 44309—relating to civil actions preclude the use of binding arbitration to resolve disputes regarding the liability of the United States for losses insured under this chapter. Section 44309 waives the United States' sovereign immunity and provides that, when a loss under chapter 443 is in dispute, a person may bring a civil action against the United States in a district court. The section goes on to define the districts in which such a case may be brought, toll the statute of limitations, and provide for interpleader. *See* 49 U.S.C. § 44309.

If § 44309 were the exclusive mechanism for resolving disputes regarding the government's liability under policies issued pursuant to chapter 443, then § 44309 would preclude the use of binding arbitration. We do not read § 44309 as exclusive or as precluding the use of binding arbitration. Nothing in § 44309 states or otherwise indicates that it is meant to be exclusive. More significantly, the structure of chapter 443 strongly suggests that it is not exclusive. The preceding section, 49 U.S.C. § 44308, expressly authorizes the Secretary to settle claims against the United States. *See* 49 U.S.C. § 44308(b)(2)(A). Disputes regarding the liability of the United States may therefore be resolved without ever reaching a district court or ever being subject to the processes of § 44309.

Finally, you have asked whether the 50–50 clause may include a "provision for arbitration in London under British law" or "in New York under the laws of that state." We believe that such a provision is permissible. Federal law often incorporates the law of other sovereigns. Such statutes have frequently been attacked as an impermissible delegation of Congress's legislative power. These challenges have consistently been rejected on the grounds that Congress has not dele-

[3] We have reviewed the opinions of the Comptroller General on this subject. These opinions may not carry legally binding effect, although they may be considered for whatever persuasive value they may offer. *See Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986); *Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, 20 Op. O.L.C. 214, 227 (1996); *Comptroller General's Authority to Relieve Disbursing and Certifying Officials from Liability*, 15 Op. O.L.C. 80 (1991). While those opinions are not entirely consistent with one another, *compare* 22 Comp. Gen. 140 (1942) *with* 8 Comp. Gen. 96, 97 (1928), they broadly adhere to the proposition that government agencies may enter into arbitration agreements where there is authority to do so. *See* 22 Comp. Gen. at 141, 144–45. We are in accord with this proposition.

gated any legislative power. Instead, Congress has made the legislative judgment that a given federal law shall operate in cognizance of and conformity with state or foreign law, whatever that might be. Thus, the federal Assimilative Crimes Act[4] is valid, even though it prospectively incorporates state law adopted after the federal statute was enacted. *See United States v. Sharpnack*, 355 U.S. 286 (1958) (upholding conviction for violation of a state criminal law enacted subsequent to the Assimilative Crimes Act). This rationale has been applied to incorporation of foreign law as well. For example, the Lacey Act makes it a crime for any person "to import, export, transport, sell, receive, acquire, or purchase . . . any fish or wildlife taken, possessed, transported, or sold in violation of . . . any foreign law." 16 U.S.C. §3372(a)(2). The courts have consistently held that Congress does not delegate any legislative authority by incorporating, even prospectively, foreign law. *See United States v. Lee*, 937 F.2d 1388, 1393–94 (9th Cir. 1991), *cert. denied*, 502 U.S. 1076 (1992); *United States v. Rioseco*, 845 F.2d 299 (11th Cir. 1988); *United States v. Molt*, 599 F.2d 1217, 1219 (3d Cir. 1979). We think it is therefore clear that Congress could have provided that disputes regarding liability be resolved pursuant to the decisional rules of an independent sovereign, be it state or foreign.

Chapter 443 does not include an authorization to utilize state or foreign law *in haec verba*. We believe that the authority to "carry out [chapter 443] consistent with the commercial practices of the aviation insurance business" authorizes the resolution of disputes by whatever decisional rules are common within the aviation insurance business. If, therefore, it is a common commercial practice of the aviation insurance business to resolve disputes pursuant to the decisional rules of a particular state or foreign jurisdiction, then a 50–50 clause may provide that arbitration be pursuant to the rules or laws of such jurisdiction.[5]

Similarly, we see no reason that Congress may not delegate the authority to incorporate the decisional rules of non-federal sovereigns into the insurance program authorized under chapter 443, as long as this delegation is not standardless. *Cf. Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989) (upholding congressional delegation of taxing power). If it is a common practice of the commercial insurance business to resolve liability disputes by reference to the decisional rules of a non-federal sovereign, then Congress has delegated the Secretary discretion to agree to do so. Moreover, we believe that the statutory injunction, "consistent with the commercial practices of the aviation insurance business," is a sufficient standard to support the delegation to the Secretary. *Compare National Broad-*

[4] The Assimilative Crimes Act adopts for each federal enclave the criminal law of the state within which the enclave is located. *See* 18 U.S.C. §13.

[5] We reiterate that we have not attempted to verify your assertion that many 50–50 clauses provide for arbitration in London under British law and that others provide for arbitration in New York under New York law.

casting Co. v. United States, 319 U.S. 190 (1943) (upholding delegation to regulate "as public interest, convenience, or necessity" may require).

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

The Constitutionality of Cooperative International Law Enforcement Activities Under the Emoluments Clause

The Emoluments Clause of the Constitution does not bar a proposed cooperative maritime counter-narcotics operation, because the foreign naval personnel assisting U.S. law enforcement personnel would not hold an "Office of Profit or Trust" under the United States.

October 7, 1996

MEMORANDUM OPINION FOR THE DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

This memorandum responds to your request for our advice on certain legal issues raised by proposed bilateral executive agreements providing for cooperative maritime counterdrug enforcement activities in the Caribbean. In particular, you have asked whether the agreements would be impermissible under the Emoluments Clause, Article I, Section 9, Clause 8 of the Constitution, and this opinion is confined to that question.

I.

You have explained that the United States has had discussions with several European countries with interests in the Caribbean about possible executive agreements addressing maritime counterdrug enforcement activities in that region. You have further explained the general structure of the proposed cooperative "shiprider" program that would be established under the terms of the agreements:

> Each of the proposed agreements would have reciprocal provisions, under which, pursuant to standing or ad hoc permission, duly authorized state vessels of each party would be able to enter the territorial sea of the other to take drug law enforcement action against vessels not flying the flag of the coastal state, and against the persons on board them. Such law enforcement action could include enforcement of the coastal state's laws, (*e.g.*, by seizing the vessel and apprehending the persons, for subsequent turnover to the coastal state's enforcement authorities) or enforcement of the seizing state's laws (in which case the vessel and persons would be taken out of the coastal state's territorial of sea for prosecution in a territory of the seizing state). [1]

[1] Memorandum for Richard Shuffrin, Deputy Assistant Attorney General, Office of Legal Counsel, from Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, *Re: Request for Office of Legal Counsel Views on Proposed Reciprocal Maritime Counterdrug Agreements* at 1 (May 31, 1996) ("Criminal Division Submission").

As an example, you have provided the text of a draft agreement between the United States and the United Kingdom (acting on behalf of Bermuda, the British Virgin Islands, and other islands) concerning maritime counterdrug operations in the Caribbean ("U.S.-U.K. Draft Agreement" or "Agreement").[2] The Agreement provides that the parties "shall continue to cooperate in combatting illicit maritime drug traffic to the fullest extent possible."[3] To that end, the parties agree to establish a joint law enforcement "shiprider" program. In relevant part, the Agreement provides that the U.S. government may designate qualified Coast Guard officials to act as shipriders who may:

> a. embark on British law enforcement vessels;
>
> b. authorize the pursuit, by the British law enforcement vessels on which they are embarked, of suspect vessels and aircraft fleeing into United States waters;
>
> c. authorize the British law enforcement vessels on which they are embarked to conduct counter-drug patrols in United States waters;
>
> d. enforce the laws of the United States in United States waters, or seaward therefrom, in the exercise of the right of hot pursuit or otherwise in accordance with international law; and
>
> e. authorize the British law enforcement vessels on which they are embarked to assist in the enforcement of the laws of the United States seaward of the territorial sea of Anguilla, Bermuda, the Cayman Islands, Montserrat, and Turks and Caicos.[4]

The Agreement further provides that crew members of the British law enforcement vessel may assist in the search and seizure of property, detention of a person, and use of force pursuant to the Agreement if expressly requested to do so by the U.S. shiprider.

The provisions of the U.S.-U.K. Agreement are fully reciprocal; identical or equivalent terms apply to create a shiprider program for the United Kingdom. Congress has expressly authorized the President to enter into reciprocal maritime agreements with other countries in order to promote international cooperation to curtail drug traffic. *See* International Narcotics Control Act of 1992, Pub. L. No. 102–583, 106 Stat. 4914.

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[2] *Agreement Between the Government of the United States of America and the Government of the Kingdom of the United Kingdom of Great Britain and Northern Ireland on behalf of the Governments of Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Montserrat, and the Turks and Caicos Islands, Concerning Maritime Counter-Drug Operations in the Western Atlantic and Caribbean Areas* (Attachment A to Criminal Division Submission).

[3] U.S.-U.K. Draft Agreement, article 1.

[4] U.S.-U.K. Draft Agreement, article 6.

II.

The Emoluments Clause, U.S. Const. art. 1, § 9, cl. 8, provides:

> No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, 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.

The Emoluments Clause was intended to protect foreign ministers, ambassadors, and other officers of the United States from undue influence and corruption by foreign governments. Governor Randolph explained the purposes underlying Article 1, Section 9, Clause 8 in the Virginia Ratification Convention. He stated that it had been prompted by the gift of a snuff box by the King of France to Benjamin Franklin, then Ambassador to France. It therefore "was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states." [5]

We understand that the question has arisen whether the U.S.-U.K. shiprider program violates the Emoluments Clause by authorizing U.K. naval personnel, under instruction of the U.S. shiprider, to enforce U.S. law "seaward of the territorial sea of Anguilla, Bermuda, the Cayman Islands, Montserrat, and Turks and Caicos." [6] According to the Criminal Division Submission, *see id.* at 1–2, the concern regarding the Emoluments Clause stems at least in part from a prior opinion of this Office that concluded that the Clause prevented foreign government personnel — who receive pay from their own government — from being designated U.S. federal law enforcement agents. [7]

We conclude that the U.K. naval personnel assisting U.S. law enforcement personnel under the shiprider program do not hold an "Office of Profit or Trust under [the United States]" within the meaning of the Emoluments Clause, and, thus, the Emoluments Clause presents no bar to the cooperative maritime counterdrug operations as outlined in the Criminal Division Submission and the U.S.-U.K. Draft Agreement. The U.K. naval personnel owe no duty of loyalty to the United States that would be compromised by payment from the British Royal Navy. Rather, they are, at all times, operating as members of the Royal Navy, owing their duty to the Royal Navy, and participating in a cooperative endeavor with the United States pursuant to the terms of an agreement executed by their own government. If British personnel enforce U.S. law, it is merely derivative of their duty to obey the dictates of the government of the United Kingdom.

[5] 3 *The Records of the Federal Convention of 1787*, at 327 (Max Farrand, ed., rev. ed. 1966) ("Farrand").

[6] U.S.-U.K. Draft Agreement, article 6.

[7] *See Authority of Foreign Law Enforcement Agents to Carry Weapons in the United States*, 12 Op. O.L.C. 67 (1988) ("1988 Opinion").

Simply put, British pay could not undermine the "undivided loyalty" [8] of the British naval personnel to the United States because their ultimate loyalty is to Britain, not the United States.

The Criminal Division Submission cites the 1988 Opinion of this Office, in which we concluded that "the Emoluments Clause precludes the designation of foreign agents to enforce federal law in the absence of congressional consent." [9] The 1988 Opinion concluded that "[a]s a matter of general principle, anyone exercising law enforcement powers on behalf of the United States must be viewed as holding an office of trust under the Emoluments Clause." [10] We reject this sweeping and unqualified view.

Until 1988, we had never interpreted the Emoluments Clause as applying to persons entirely outside the federal government. To be sure, we concluded in 1982 that the Emoluments Clause applies more broadly than just to the "offices" covered by the Appointments Clause, [11] and also reaches " 'lesser functionaries' subordinate to officers." [12] But such " 'lesser functionaries' subordinate to officers" plainly are in the United States Government.

While we understand the concern behind the 1988 opinion — certain governmental functions are of such importance that their assignment to persons under obligation to a foreign government may raise serious problems — we see no basis for extending the Emoluments Clause to persons having *no* position or employment in the United States Government. [13] First, the expressed purpose for the Emoluments Clause was to "preserv[e] foreign Ministers & other officers of the U.S. independent of external influence." [14] This formulation supports the view that the Emoluments Clause extends only to those, like foreign ministers, who have positions in the Government of the United States. Second, the ordinary meaning of the term "office" does not include assignments of duties to persons who

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[8] *Id.* at 69.

[9] *Id.* at 68.

[10] *Id.* at 69.

[11] *See Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 157–58 (1982).

[12] *See Application of Emoluments Clause to Part-Time Consultant for the Nuclear Regulatory Commission*, 10 Op. O.L.C. 96, 98 (1986). The Appointments Clause applies only to persons (1) in a position of employment (as opposed to an independent contractor), (2) within the federal government (3) that carries significant authority. *See Constitutional Limitations on Federal Government Participation in Binding Arbitration*, 19 Op. O.L.C. 208, 210–11 (1995). The Emoluments Clause is not so limited. Most significantly, the Emoluments Clause applies regardless of whether the person exercises "significant authority." *See Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 158 (1982) ("The problem of divided loyalties can arise at any level.").

[13] In the same year we concluded that Civilian Aides to the Secretary of the Army occupied an "Office of Trust" and thus were covered by the Emoluments Clause. In contrast to the U.K. shipriders, however, there was no question that, as a threshold matter, the Civilian Aides held an "Office." As the opinion explains, certain Army regulations governed Civilian Aides, the Aides were chosen by the Secretary according to specified criteria, and they were subject to security clearances and standards of conduct. They served a "term of office" of two years and enjoyed the "responsibilities and privileges" of the position until formal "separation action" was taken by the Secretary. Memorandum for James H. Thessin, Assistant Legal Adviser for Management, United States Department of State, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Emoluments Clause to a Civilian Aide to the Secretary of the Army* at 3 (Aug. 29, 1988).

[14] 2 Farrand at 389.

hold no positions in the government. In interpreting the term even outside the context of the Constitution, the Supreme Court has stated that "[a]n office is a public station conferred by the appointment of government" and that "[t]he term embraces the idea of tenure, duration, emolument and duties fixed by law." [15]

Assisting in the enforcement of federal law does not, in itself, make a person an officer for purposes of the Emoluments Clause. If so, all persons, including state actors, who enforce federal law would be barred from accepting any "emolument" from a foreign government. Thus, for example, state governors, local officers, and qui tam relators would be barred from accepting an appointment as an instructor in certain foreign public universities. [16] Such a limitation, however, is not compelled by the text of the clause — in fact it is not even facially consistent with the text — and would do nothing to further the purpose of the Clause.

Although the definition of an officer for the purpose of the Emoluments Clause is more expansive than for the Appointments Clause, this Office has drawn a distinction in the context of the Appointments Clause between individuals covered by that Clause and individuals who exercise authority that is delegated by federal law that is equally applicable to the Emoluments Clause. As we recently explained:

> It is a conceptual confusion to argue that federal laws delegating authority to state officials create federal "offices," which are then filled by (improperly appointed) state officials. Rather, the "public station, or employment" has been created by state law; the federal statute simply adds federal authority to a pre-existing state office. Accordingly, the substantiality of the delegated authority is immaterial to the Appointments Clause conclusion. An analogous point applies to delegations made to private individuals: the simple assignment of some duties under federal law, even significant ones, does not by itself pose an Appointments Clause problem. [17]

Similarly, we believe it is a conceptual confusion to argue that delegating authority to foreign officials creates federal "offices," which are then filled by (improperly paid) foreign officials. Rather, the office held is a foreign, not a U.S. office; the bilateral agreement merely adds additional authority to an existing foreign office.

[15] *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 520 (1926).

[16] *Cf. Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13 (1994) (concluding that foreign public universities are presumptively instrumentalities of foreign States under the Emoluments Clause).

[17] *The Constitutional Separation of Powers between the President and Congress*, 20 Op. O.L.C. 124, 142 n 52 (1996) (expressly superseding inconsistent prior opinions of this Office regarding the Appointments Clause).

The assignment of some duties under an international executive agreement, even significant ones, does not by itself pose an Emoluments Clause problem.

CHRISTOPHER H. SCHROEDER
Acting Assistant Attorney General
Office of Legal Counsel

Department of Justice Participation on the Internal Revenue Service Undercover Review Committee

Disclosure of tax return information to a Department of Justice attorney serving on the Undercover Review Committee of the Internal Revenue Service is permissible under § 6103 of title 26 of the United States Code as a limited referral for legal advice.

October 8, 1996

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
TAX DIVISION

This memorandum responds to your request for our legal opinion on what limitations, if any, are imposed by the provisions of § 6103 of the Internal Revenue Code on the participation by Department of Justice ("DOJ") attorneys on the Undercover Review Committee of the Internal Revenue Service ("IRS"). Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Loretta C. Argrett, Assistant Attorney General, Tax Division (July 6, 1995) ("DOJ July 6, 1995 Letter"). Specifically, we have been asked to determine whether tax return information can be disclosed to DOJ attorneys sitting on the IRS Undercover Review Committee ("Committee") in investigations that have not been formally referred to DOJ by the IRS. As set forth below, we conclude that disclosure of tax return information to a DOJ attorney serving on the Committee is permissible under section 6103 as a limited referral for legal advice.

I. *Background*

A. *Section 6103*

Section 6103 of title 26 of the United States Code imposes restrictions on the disclosure of tax returns or tax return information. Only if authorized by statute can such information be disclosed. 26 U.S.C. § 6103(a). In pertinent part, § 6103(h)(2) and (3) provides for disclosure of tax returns or return information to DOJ attorneys. Section 6103(h)(2) states:

> (2) **Department of Justice.** — In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States attorneys) personally and directly engaged in, and solely for their use in, any proceeding before a Federal grand jury or preparation for any proceeding (or investigation which may result in such a proceeding) before a Federal grand jury or any Federal or State court, but only if —

> (A) the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability in respect of any tax imposed under this title;
>
> (B) the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation; or
>
> (C) such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation.

Section 6103(h)(3) provides:

> (3) **Form of request.**—In any case in which the Secretary is authorized to disclose a return or return information to the Department of Justice pursuant to the provisions of this subsection—
>
> > (A) if the Secretary has referred the case to the Department of Justice, or if the proceeding is authorized by subchapter B of chapter 76, the Secretary may make such disclosure on his own motion, or
> >
> > (B) if the Secretary receives a written request from the Attorney General, the Deputy Attorney General, or an Assistant Attorney General for a return of, or return information relating to, a person named in such request and setting forth the need for the disclosure, the Secretary shall disclose return or return information so requested.

A disagreement has arisen between the IRS and the Tax Division of DOJ as to what limitations, if any, are imposed by § 6103(h)(2) and (3) on the participation by a DOJ attorney on the Committee.

B. *The Undercover Review Committee*

The IRS has promulgated, in the form of guidelines, specific procedures for the review, approval, conduct, and oversight of undercover operations. As set forth in these guidelines, the IRS recognizes that although the undercover technique

is lawful and valuable as an investigative tool, undercover operations can create legal problems. *Internal Revenue Manual* 910 at 9781–551 ("IRM").

Undercover operations conducted by the IRS are classified into two groups. Group I operations are deemed more sensitive in nature, and the approval of the Assistant Commissioner (Criminal Investigation) of the IRS must be obtained. These operations include those that exceed six months in duration and/or exceed the Director of Investigations' level of approval for confidential expenditures. IRM 922 at 9781–551. Group I operations also include any operation in which there is a reasonable chance that one or more of fourteen specified sensitive factors will arise. These factors include, inter alia, operations that will: result in significant civil claims against the United States; have an impact on investigations in numerous regions; involve public corruption crimes; involve an undercover person running the risk of being arrested or being required to give sworn testimony or attending a meeting where the subject understood a privilege would exist. *Id.* at 9781–551 to 552.

Group II operations are those undercover activities that do not meet the Group I requirements. The IRS Director of Investigations is authorized to approve requests for Group II operations. *Id.* at 9781–552.

Requests for undercover operations must be submitted in writing, setting forth information necessary to evaluate the particular request. Each request must include in narrative form the evidence obtained to date that would lead a reasonable person to believe a violation of law has occurred. Not all undercover operations involve tax or tax-related crimes. Some investigations involve crimes such as money laundering.

The request must also establish that the undercover operation is the only efficient investigative alternative available. IRM 931 at 9781–553. We have been advised by the IRS that every submission to the Committee for a tax or tax-related investigation includes all information generated or collected by the IRS regarding the investigation, the identity of the taxpayer and the nature and plan of investigation and the potential charges, and tax return information for purposes of § 6103. Letter for Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, from Eliot D. Fielding, Associate Chief Counsel, Enforcement Litigation, Internal Revenue Service (Jan. 22, 1996) ("IRS Jan. 22, 1996 Letter").

All requests for Group I operations are reviewed by the Committee. The Committee also reviews significant deviations in ongoing Group I operations and all requests for recoverable funds which exceed an aggregate of $50,000 in Group II operations. The Committee is advisory in nature and makes recommendations to the Assistant Commissioner (Criminal Division).

The Attorney General and the IRS Commissioner have agreed in a Memorandum of Understanding ("MOU"), signed in August 1995, on following specified procedures for the review and approval of certain undercover operations conducted by the IRS. According to the MOU, an attorney from either the Criminal Division or Tax Division of the Department of Justice will serve on the Committee

in assessing Group I operations that exceed one year in duration and/or require approval of more than $40,000 in confidential funds.

With the exception of the DOJ attorney, the Committee is comprised of IRS officials: the Director, National Operations Division; the Assistant Chief Counsel (Criminal Tax); and the Chief, Office of Special Investigative Techniques; or their designees. The Assistant Commissioner (Criminal Investigation) may invite other individuals to participate in the Committee. IRM 932 at 9781–554(2); MOU at 3.

According to the MOU, the Committee shall meet on a regular basis to consider initial requests for qualifying Group I undercover operations or significant deviations to previously approved plans of action. No more than four operations will be scheduled for each meeting. Prior to each meeting, Committee members are to receive a sealed packet containing the undercover requests. The materials must be securely maintained and may not be copied. The materials must be returned after the Committee meeting. MOU at 3–4.

The IRS National Operations Division, Office of Special Investigative Techniques, is responsible for the presentation of the undercover request packets to the Committee. Prior to the Office of the Special Investigative Techniques' receipt of the requests, however, each request has been reviewed and approved by the respective IRS Division Chief, District Director and Area Director of Investigations. MOU at 3.

After consideration of each request is completed, the Committee makes a recommendation to the Assistant Commissioner (Criminal Investigation) that the operation be approved, approved with conditions, or disapproved. The recommendation is based upon a majority vote of the Committee members. The Committee's recommendation, minutes from the Committee meeting and the undercover request is then sent to the Assistant Commissioner (Criminal Investigation) for final action. MOU at 4.

In the event the DOJ attorney disagrees with the Committee's recommendation for approval because of legal, ethical, prosecutive, or departmental policy considerations, the appropriate Assistant Attorney General shall consult with the Assistant Commissioner (Criminal Investigation). If the disagreement is not resolved, no further action shall be taken on the undercover request without the approval of the IRS Chief Compliance Officer.

The MOU states that the "undercover technique is a valuable law enforcement investigative tool" and is essential to the enforcement of tax and tax related statutes. MOU at 1. The MOU acknowledges that because the undercover tool is sensitive and potentially intrusive, care must be exercised to ensure that the technique is used properly. The parties agree that the participation of a DOJ attorney in the approval process for the sensitive operations is necessary "to ensure legal, ethical, and prosecutorial uniformity in the application of the undercover technique for Federal law enforcement." MOU at 2. The IRS has informed us that the "DOJ

attorney would necessarily require access to tax data in order to permit a meaningful review of the details'' of the operation. IRS Jan. 22, 1996 Letter at 10.

C. *The Positions of the IRS and the Tax Division*

The IRS and the Tax Division have informed us of their respective positions in several letter submissions, all of which we have reviewed and considered in reaching the conclusions set forth herein. Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Stuart L. Brown, Chief Counsel, Internal Revenue Service (Aug. 21, 1995) (''IRS Aug. 21, 1995 Letter''); Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Eliot D. Fielding, Associate Chief Counsel, Enforcement Litigation, Internal Revenue Service (Sept. 11, 1995); IRS Jan. 22, 1996 Letter; DOJ July 6, 1995 Letter; Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Loretta C. Argrett, Assistant Attorney General, Tax Division (Aug. 25, 1995) (''DOJ Aug. 25, 1995 Letter''); Letter for Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, from Mark E. Matthews, Deputy Assistant Attorney General, Tax Division (Jan. 24, 1996) (''DOJ Jan. 24, 1996 Letter'').

The IRS takes the position that the disclosure of tax information to a DOJ attorney serving on the Committee is not permissible under § 6103. The IRS believes that § 6103(h)(2) and (3) must be read in conjunction with one another because § 6103(h)(2) alone does not provide independent disclosure authorization. According to the IRS, even where the requirements of § 6103(h)(2) are satisfied, a disclosure is authorized only where the Secretary or his designee has referred a case to DOJ, the proceeding falls under subchapter B of chapter 76 or a written request is submitted by a DOJ official listed in § 6103(h)(3)(B).

In construing what constitutes a ''referral'' for purposes of § 6103(h)(3), the IRS asserts that an ''institutional decision'' must first be made by the IRS to request that DOJ provide advice or assistance. Once that decision has been made, a ''referral'' is appropriate in one of three forms. First, a ''formal'' referral (also known as a referral of ''the case on the merits'') is where the IRS requests that DOJ conduct a grand jury investigation, or prosecute, defend, or take some other affirmative action in court with respect to a case. IRS Aug. 21, 1995 Letter, attached memorandum at 15; IRS Jan. 22, 1996 Letter at 1–2.

Another type of referral is where a limited aspect of the case is referred by the IRS to DOJ for purposes of DOJ representing the IRS in court for a specific purpose, such as to obtain approval for an immunity order, to enforce a summons, or to obtain a search or arrest warrant or writ of entry. IRS Jan. 22, 1996 Letter at 2–4.

The third type of referral, and the one most relevant to the issue herein, is where the IRS makes tax return information disclosures to DOJ in seeking advice

on issues arising during the investigative stage and prior to a formal referral of the case. IRS Jan. 22, 1996 Letter at 4–6. In this type of referral, the IRS asserts that DOJ advice may be sought only on a case-by-case basis by those officers with authority to make the referral. According to the IRS, the solicitation must be made of the DOJ division to which a formal referral would be submitted, and only after the IRS has made a preliminary determination that a formal referral may be appropriate. [1] In addition, the disclosures must be limited to the information necessary to obtain the legal advice sought on the specific case. *Id.* at 4–5.

The IRS relies upon the "Blue Book" [2] on the Tax Reform Act of 1976 and various IRS publications as authority for its practice of referring a limited aspect of the case to DOJ or seeking advice prior to a formal referral. *Id.* at 3–4, n.4 & 7. The Blue Book states in relevant part:

> For purposes of [6103(h)(3)], the referral of a tax matter by the IRS to the Justice Department would include those disclosures made by the IRS to the Justice Department in connection with the necessary solicitation of advice and assistance with respect to a case prior to formal referral of the entire case to the Justice Department for defense, prosecution, or other affirmative action.

Staff of Joint Comm. on Taxation, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976*, at 322 (Comm. Print 1976) ("Blue Book").

The IRS rejects the notion that DOJ's participation on the Committee would constitute any of the referral types permitted by §6103. The IRS argues that the disclosures to the DOJ attorney would not qualify as the type of pre-formal referral "advice" contemplated by the Blue Book because certain prerequisites to soliciting advice from DOJ are not satisfied. Specifically, the IRS claims that an "institutional decision" to seek DOJ advice is lacking and that no decision has been made on a "case-by-case" basis after a preliminary determination that a formal referral may thereafter be appropriate. In addition, IRS officials submitting requests to the Committee are not necessarily authorized to "refer" matters to DOJ for purposes of §6103 and the DOJ attorney serving on the Committee would not necessarily be from the division to which a formal referral would be made.

The Tax Division agrees with the IRS that §6103(h)(2) and (3) must be read in conjunction with one another. The Tax Division characterizes the only issue in dispute as centering on what constitutes a "referral" under §6103(h)(3). The Tax Division agrees with the IRS that a §6103 referral includes a formal referral

[1] According to the IRS, the question of which officials have authority to refer matters to DOJ depends upon the type of investigation involved. IRS documents specify who these officials are. Disclosures to DOJ are generally made by IRS District and Regional Counsel, and the Assistant Commissioner of Criminal Investigation. IRM (22)55.1, at 1272–298.2; *see also* IRS Jan. 22, 1996 Letter at 4–5, Tabs C & L.

[2] For further discussion of the Blue Book *see infra* pp. 360–61.

of the case and a limited referral for the purpose of seeking DOJ assistance in court or advice during the investigative stages of cases. The Tax Division acknowledges that a limited referral terminates once the advice or assistance has been rendered. The Tax Division disagrees, however, with the IRS as to whether disclosures to the DOJ attorney serving on the Committee constitute the type of limited referrals permitted by § 6103. Relying upon the plain meaning of the statute, the Blue Book, and the practices of the IRS, the Tax Division claims that the disclosures to the DOJ attorney are permissible under the statute as a limited referral for purposes of seeking advice. *See* DOJ Aug. 25, 1995 Letter; DOJ Jan. 24, 1996 Letter.

II. *Analysis*

We believe that the IRS and the Tax Division are correct that § 6103(h)(2) and (3) must be read in conjunction with one another. Section 6103(h)(3) provides in relevant part that "[i]n any case in which the Secretary is authorized to disclose a return or return information to the Department of Justice pursuant to the provisions of this subsection," the Secretary may make such disclosure if the Secretary has referred a case to DOJ, the proceeding falls under subchapter B of chapter 76, or a written request is submitted by an authorized DOJ official. In its plain meaning, the quoted language refers to a disclosure authorized by § 6103(h)(2).

The primary guide to statutory interpretation is the plain meaning of the text. As stated by the Supreme Court in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989):

> The plain meaning of legislation should be conclusive, except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). In such cases, the intention of the drafters, rather than the strict language, controls.

This is not the "rare case[]" where the result that follows from the statute's text is "demonstrably at odds" with its underlying congressional purpose. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). The legislative history supports the conclusion we have reached from a plain reading of the statute.

In explaining the provisions relating to disclosures to DOJ representatives in tax cases, the Senate Committee on Finance stated:

> The Justice Department would continue to receive returns and return information with respect to the taxpayer whose civil or criminal tax liability was at issue.

. . . .

> Except in those instances where a tax matter was referred by the IRS to the Department of Justice, and tax refund cases under Subchapter B of Chapter 76, the Department of Justice would be required to make a written request (by the Attorney General, the Deputy Attorney General, or an Assistant Attorney General) for the inspection or disclosure of returns and return information, setting forth the reasons for such disclosure or inspection.

S. Rep. No. 94–938, at 325–26 (1976). The conference agreement adopted a shortened version of this explanation in its report. "The Justice Department will continue to receive returns and return information with respect to the taxpayer whose civil or criminal tax liability is at issue. Written request is required in cases other than refund cases and cases referred by the IRS." Staff of House Comm. on Ways and Means, 94th Cong., 2d Sess., *Summary of Conference Agreement on the Tax Reform Act of 1976*, at 44 (Comm. Print 1976). *See also* H.R. Conf. Rep. No. 94–1515, at 477 (1976); S. Conf. Rep. No. 94–1236, at 477 (1976).

Courts addressing the issue have adopted the same plain meaning of §6103(h)(2) and (3). In *United States v. Chemical Bank*, 593 F.2d 451, 457 (2d Cir. 1979), the Second Circuit found that DOJ attorneys may obtain tax returns and return information pursuant to §6103(h)(2) "only on compliance with" §6103(h)(3). Similarly, the Third Circuit found that in tax cases "there are two possible routes under which disclosure of tax returns and return information can be made" to DOJ attorneys—compliance with either §6103(h)(3)(A) or §6103(h)(3)(B). *United States v. Bacheler*, 611 F.2d 443, 447 (3d Cir. 1979). *See also United States v. Robertson*, 634 F. Supp. 1020, 1027 n.9 (E.D. Cal. 1986) ("Section 6103(h)(3) sets forth two alternative procedures by which the Department of Justice may inspect return information when [§6103(h)(2)] is satisfied . . . ."), *aff'd*, 815 F.2d 714 (9th Cir.), *cert. denied*, 484 U.S. 912 (1987).

We now turn to the issue in dispute, whether disclosure of tax return information to a DOJ attorney serving on the Committee is permissible under §6103 as a limited referral for advice. Section 6103 provides that the IRS may make disclosures of tax information to DOJ attorneys if the case has been "referred" to DOJ. We agree with the IRS and the Tax Division that referrals under §6103 include a formal referral of the entire case, as well as a limited referral for purposes of seeking DOJ assistance in court or advice during the investigative stages.

Nothing in the plain meaning of the statute or in its legislative history suggest that Congress intended that the term "referred" be narrowly construed. Section 6103 states, in relevant part, that tax information may be disclosed to DOJ employees for use in the grand jury or other proceeding, or in an "investigation which may result in such a proceeding." 26 U.S.C. §6103(h)(2). This language

clearly contemplates disclosures to DOJ not only when a tax matter is far enough along for presentment to the grand jury or in some court proceeding, but where disclosures are needed at the investigative stage. We know from the practices of the IRS and DOJ, as discussed below, that disclosures at the investigative stage are often made in seeking legal advice from DOJ attorneys prior to a formal referral of the entire case. These pre-formal referral practices play a critical role in the effective enforcement of tax statutes.

The legislative history confirms that pre-formal referral disclosure is permissible as a § 6103 referral. As the IRS has stated:

> the legislative history of [Section] 6103 indicates that Congress intended a broad interpretation of the term [referred] and acceptance of the definition traditionally used by the Service and the Department of Justice.

IRM, (22)53, at 1272–298.2. The legislative history reveals that Congress did not intend to limit DOJ's access to tax information that was necessary in enforcing criminal tax statutes. *See* S. Rep. No. 94–938, at 324–25; Staff of House Comm. on Ways and Means, 94th Cong., 2d Sess., *Summary of Conference Agreement on the Tax Reform Act of 1976*, at 44–45 (Comm. Print 1976); *see also United States v. Bacheler*, 611 F.2d at 449 ("Section 6103 recognized the need of the Justice Department for continued access to tax returns and return information in carrying out its statutory responsibility in the civil and criminal tax areas and did not seek to change the rules pertaining to the disclosure of returns and return information of the taxpayer whose civil and criminal tax liability is at issue."). And, we know from the agencies' practices that disclosures prior to formal referral are essential to prosecuting tax crimes. The legislative history reveals that in adopting the statute, Congress was concerned with protecting individuals against misuses of tax information by the government. *See Beresford v. United States*, 123 F.R.D. 232 (E.D. Mich. 1988); *McSurely v. McAdams*, 502 F. Supp. 52 (D.D.C. 1980). For example, Congress sought to address DOJ's use of tax information in nontax cases. *See* S. Rep. No. 94–938, at 316–17; Staff of House Comm. on Ways and Means, 94th Cong., 2d Sess., *Summary of Conference Agreement on the Tax Reform Act of 1976*, at 45 (Comm. Print 1976); *see also McLarty v. United States*, 741 F. Supp. 751, 755 (D. Minn. 1990), *reconsideration granted on other grounds*, 784 F.Supp. 1401 (D. Minn. 1991).

In addition, the Blue Book specifically states that a referral includes disclosures made in connection with "the necessary solicitation of advice and assistance with respect to a case prior to formal referral of the entire case to the Justice Department for defense, prosecution, or other affirmative action." Blue Book at 322. Although some courts have held that the Blue Book is not part of the statute's "legislative history" per se, *see, Flood v. United States*, 33 F.3d 1174, 1178 (9th

Cir. 1994); *Estate of Wallace v. Commissioner*, 965 F.2d 1038, 1050 n.15 (11th Cir. 1992); *Todd v. Commissioner*, 862 F.2d 540, 541–42 (5th Cir. 1988); *Hutchinson v. Commissioner*, 765 F.2d 665, 669–70 (7th Cir. 1985); *Redlark v. Commissioner*, 141 F.3d 936 (9th Cir. 1998); *Zinniel v. Commissioner*, 89 T.C. 357, 365–66 (1987), courts agree that the Blue Book is a valuable aid in understanding and interpreting the federal tax code, *see Condor Int'l, Inc. v. Commissioner*, 98 T.C. 203, 227 (1992), *aff'd in part and rev'd in part*, 78 F.3d 1355 (9th Cir. 1996); *Estate of Wallace*, 965 F.2d at 1050 n.15; *Todd*, 862 F.2d at 542–43; *McDonald v. Commissioner*, 764 F.2d 322, 336 n.25 (5th Cir. 1985); *Allison v. United States*, 701 F.2d 933, 940 n.9 (Fed. Cir. 1983); *Hutchinson*, 765 F.2d at 669–70; *Estate of Ceppi v. Commissioner*, 698 F.2d 17, 19 (1st Cir. 1983), *cert. denied*, 462 U.S. 1120 (1983); *Bank of Clearwater v. United States*, 7 Cl. Ct. 289, 294 (1985). Indeed, the Supreme Court observed that the Blue Book constituted a "compelling contemporary indication" of legislative intent. *Federal Power Comm'n v. Memphis Light, Gas & Water Div.*, 411 U.S. 458, 472 (1973).

The IRS does not dispute the relevance of the Blue Book as to the issue raised herein. Indeed, an IRS training manual entitled *Disclosure Litigation Training Reference*, states in relevant part:

> As for prereferral advice, although no court has addressed the issue, a referral for purposes of section 6103(h)(3) may, in appropriate circumstances, include disclosures made by the IRS to Justice in connection with the necessary solicitation of advice and assistance with respect to a case prior to the formal referral (citing the Blue Book).

Office of Chief Counsel, IRS, *Disclosure Litigation Training Reference* 45 (July 1994).

In sum, we believe a §6103 referral does include those occasions where the IRS solicits DOJ advice during the investigative stage, but prior to a formal referral of the case.[3] We now turn to the issue whether DOJ's participation on the Committee would fall within this type of referral category.

The IRS claims that the solicitation of advice from the DOJ attorney on the Committee does not qualify as a §6103 referral because the undercover proposals do not satisfy certain prerequisites. The Tax Division takes the contrary position, citing current practices of the IRS in seeking pre-formal referral advice from DOJ attorneys as analogous to the advice sought from the Committee attorney. These practices include the following:

[3] Although no court has decided the issue presented herein, at least one court has broadly construed what constitutes a "referral" for purposes of §6103. *See United States v. Bacheler*, 611 F.2d 443 (3d Cir. 1979). Courts have also acknowledged the importance of DOJ and IRS working together in investigating and prosecuting tax crimes. *See id.; United States v. Chemical Bank*, 593 F.2d 451 (2d Cir. 1979).

Advice concerning IRS summons for records and/or testimony. IRS agents or District Counsel attorneys often contact DOJ civil trial or appellate attorneys in the Tax Division for advice relating to the defensibility of the procedures or scope of an IRS summons. Disclosure of tax information and often the identity of the taxpayer are essential to rendering the opinion requested.

Case development and strategy. On a regular basis, Tax Division lawyers receive telephone calls from IRS District Counsel attorneys seeking advice about the course of legal action that should be pursued in certain factual situations to build a strong case against the defendant. Full disclosure is made in seeking this type of advice. In some instances, representatives from the IRS Criminal Investigation Division meet with Tax Division managers to discuss a whole class of cases focused on a particular market segment. Tax information has been disclosed so that the Tax Division could assess the likelihood that the cases would be prosecuted.

Coordination of multi-district litigation. In IRS investigations that cross judicial districts, IRS District Counsel attorneys may disclose details of the cases to DOJ in seeking advice as to whether all of the cases would be prosecuted and to facilitate the coordination of those prosecutions.

Appellate issues. IRS personnel frequently contact the Tax Division appellate attorneys about specific issues pending in DOJ cases that are similar to ones arising in IRS investigations. To fully discuss the legal implications, IRS personnel often disclose tax information to the DOJ attorney.

Cases requiring prompt DOJ action. In exigent circumstances where prompt DOJ action is necessary, IRS personnel will make disclosures to DOJ so that DOJ attorneys can begin working on the case. The IRS describes these circumstances as part of the referral procedure and not a request for prereferral advice. IRS Jan. 22, 1996 Letter at n.2. The Tax Division asserts that the disclosures are made before any formal referral of the case has been made.

DOJ prosecution policies. The Tax Division and the IRS describe another situation where pre-formal referral solicitation occurs. In determining whether DOJ's dual prosecution policy applies to preclude a particular federal prosecution, certain procedures must be followed by the IRS and DOJ. In compliance with these requirements, tax information must be disclosed. The IRS describes this procedure as rarely used during the past several years.

Consensual monitoring of conversations. The Tax Division and the IRS acknowledge that pre-formal referral disclosures are made in compliance with DOJ policy that IRS agents seek DOJ approval prior to engaging in any consensual monitoring during an investigation. The DOJ policy is set forth in a 1983 Attorney General Memorandum signed by William French Smith and in the United States Attorney's Manual. Memorandum to Heads and Inspectors General of Executive Departments and Agencies, from William French Smith, Attorney General, *Re: Procedures for Lawful, Warrantless Interceptions of Verbal Communications* (Nov. 7, 1983); USAM 9–7.302 (July 1, 1992). The IRS requires compliance with

the DOJ policy. IRM 9389. As explained in the Internal Revenue Manual, the purpose of the policy is "to avoid any abuse or any unwarranted invasion of privacy." *Id.* at 9389.1 at 9–228.4. The Tax Division explained that the policy has the additional purposes of ensuring that the interception be carried out in a way that will withstand challenge in court and that a uniform approach to monitoring be utilized throughout the country. DOJ Jan. 24, 1996 Letter at 6.

We agree with the Tax Division that the current practices are analogous to and legally indistinguishable from DOJ's participation on the Committee.[4] We also agree that disclosures to the DOJ attorney on the Committee would be permissible referrals under § 6103. DOJ's involvement on the Committee is necessary "to ensure legal, ethical, and prosecutorial uniformity in the application of the undercover technique for Federal law enforcement." MOU at 2. The role played by the DOJ attorney would include assisting in the development of a uniform approach to the use of the undercover technique and to ensure that prosecutive issues are addressed at the earliest stage. The attorney could help ensure that the investigation would withstand challenge in court, by advising on entrapment and double jeopardy defenses, as well as other issues. To fulfill the role of providing the desired advice and assistance, the DOJ attorney would need full access to the relevant tax information. We understand that the disclosures, however, would be limited to the information necessary to obtain the advice sought on the specific proposal and that such information would be returned upon completion of the assignment.

The nature of Group I operations creates the necessity for the solicitation of DOJ advice in approving the proposals. A Group I undercover operation is a sensitive and potentially intrusive technique, and care must be exercised to ensure that it be used properly. MOU at 2. A flawed operation could create significant legal impediments to a tax prosecution. If done correctly, however, the technique is a valuable law enforcement investigative tool and is essential to the enforcement of tax and tax related statutes. MOU at 1. IRS policies associated with these operations underscore the legitimate legal concerns associated with the practice.

Under these circumstances, we are compelled to conclude that DOJ's participation on the Committee falls within the rubric of the pre-formal referral advice contemplated by § 6103, as articulated in the Blue Book and applied in other practices by the IRS and DOJ. We do not find persuasive the contrary arguments made by the IRS. Specifically, the IRS claims that the disclosures are not permissible because no "institutional decision" to refer a specific question to DOJ exists. Nor has a preliminary determination been made that a formal referral may thereafter be appropriate. The IRS also states that the proposals to the Committee would not necessarily be submitted by an IRS official with authority to make a § 6103

[4] Although the IRS now raises a question as to the propriety of its 20 year compliance with DOJ policy relating to consensual monitoring (*see* IRS Jan. 22, 1996 Letter at 10), we think the practice is permissible under the scope of § 6103.

referral. Nor would the DOJ attorney on the Committee necessarily be from the DOJ division to which a formal referral would be made.

First, assuming § 6103 requires that solicitations for advice must be made on a case-by-case basis or after an "institutional decision" has been made, as well as a preliminary determination that a formal referral may be appropriate, we believe that referring requests to the Committee for approval of Group I operations would satisfy these standards. The qualifying requirements for Group I operations necessarily limit the types of requests made to the Committee. Determining that a matter satisfies the prerequisites for a proposed undercover operation constitutes a case-by-case determination. Indeed, before proposals are submitted to the Committee, several IRS officials must review and approve the proposals. We understand that the number of undercover requests submitted to the Committee are few in relation to the total number of IRS investigations and that no more than four operations are considered at any one Committee meeting.

In addition, the very nature of Group I operations and the associated approval process would suggest that the IRS views these type of investigations as ones that may be appropriate for referral to DOJ for prosecution. And, the assistance proffered by the DOJ attorney would be limited in nature based upon the issues posed by the particular operation and relevant tax information. These circumstances, that is the special role of the Committee, the policies associated with referring qualifying proposals to the Committee for approval, the particular nature of Group I undercover investigations, and the IRS decision to enter into an MOU for DOJ participation, would suggest that an "institutional decision" has been made to seek DOJ advice in a particular matter. Simply put, we cannot agree that these facts support IRS' claim that disclosures to the DOJ attorney would be tantamount to giving DOJ "free and unfettered" access to tax information in a whole class of cases.

Even if, however, the submissions to the Committee were correctly characterized as a referral of "a class of cases," we do not believe § 6103 precludes such referrals. Some of the IRS' current practices of consulting with DOJ attorneys prior to a formal referral could also be characterized as referrals of whole classes of cases. For example, as discussed above, IRS representatives occasionally meet with DOJ attorneys to discuss whole classes of cases, wherein tax information is disclosed in seeking legal advice. Similarly, the IRS practice of complying with the DOJ consensual monitoring policy could be characterized as a referral of a whole class of cases. In these practices, as well as the proposed Committee work, the solicitations for advice are essential to the successful prosecutions of tax violations. For example, as to the consensual monitoring cases, the solicitations help "to avoid any abuse or any unwarranted invasion of privacy," IRM 9389.1 at 9–228.4, and to build a legally stronger investigation. DOJ Jan. 24, 1996 Letter at 6. No one can dispute that uniformity in tax investigations and prosecutions

is critical to the success of the federal tax enforcement program. *See* USAM 6–4.000 (Mar. 1, 1994).

In sum, we do not believe § 6103 was intended to preclude DOJ from providing advice in cases that as a class present legitimate legal concerns. The objectives behind the current practices, as well as DOJ's participation on the Committee, are entirely consistent with the statute's legislative history and Blue Book provision. The legislative history shows that § 6103 was not intended to interfere with DOJ's access to tax information that is necessary in enforcing the tax laws. *See* S. Rep. No. 94–938, at 324–25; Staff of House Comm. on Ways and Means, 94th Cong., 2d Sess., *Summary of Conference Agreement of the Tax Reform Act of 1976*, at 44–45 (Comm. Print 1976); *see also Bacheler*, 611 F.2d at 449. And, the Blue Book explicitly states that the IRS may make disclosures to DOJ "in connection with the necessary solicitation of advice." [5] Blue Book at 322.

Finally, we are not persuaded by IRS' claim that DOJ's full participation on the Committee is impermissible because the "referrals" are not necessarily made by IRS officials with authority to do so, or that the DOJ attorney would not be from the division to which a formal referral would be made. We agree that the "referral" must be made by IRS personnel with the authority to do so. We also believe, however, that this prerequisite can be satisfied. To the extent persons involved in submitting requests to the Committee are not currently authorized to "refer" matters to DOJ for purposes of § 6103, the IRS orders or practices can be amended to guarantee that the persons referring the matters to the Committee have the appropriate authority. We are unaware of any authority for the remaining alleged prerequisite, that the DOJ attorney must be from the division to which a formal referral would be made, nor has any been called to our attention. Moreover, the current practices of the IRS in soliciting DOJ advice, as discussed above, do not appear to be consistent with the existence of such a requirement. In any event, if such a prerequisite is desired, it could easily be complied with by redesignating, as necessary, which DOJ attorney would sit on the Committee for specific proposals.

CHRISTOPHER H. SCHROEDER
Acting Assistant Attorney General
Office of Legal Counsel

[5] We construe "necessary" here to mean solicitation that will further federal efforts in the tax enforcement program.

Eligibility of a Noncitizen Dual National for a Paid Position Within the Department of Justice

The Department of Justice must determine the "dominant, effective" nationality of a noncitizen with dual nationality to determine that person's eligibility for a paid position in the Department under section 606 of the Treasury, Postal Service, and General Government Appropriations Act, 1997.

October 11, 1996

MEMORANDUM OPINION FOR THE ASSISTANT DIRECTOR
OFFICE OF ATTORNEY PERSONNEL MANAGEMENT

You have sought our views on the question whether, in light of section 606 of the Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009–314, –354 (1996) ("section 606"), the Department of Justice may offer a paid position to a noncitizen who is a national of two foreign States. [1] Section 606 prohibits, with various exceptions, the use of appropriated funds to employ noncitizens whose post of duty is in the continental United States; the prohibition is, however, inapplicable to "nationals of those countries allied with the United States in the current defense effort." In the case you have described, a noncitizen law student, who is a dual national of Canada and Bangladesh, is an applicant for the Department's Summer Law Intern Program. That program involves employment at the GS–7 level solely within the continental United States.

The State Department maintains a list of countries "allied with the United States in the current defense effort." [2] You have advised us that Canada is included on this list, but that Bangladesh is not.

Although Congress has repeatedly enacted appropriations laws that restrict the employment of noncitizens, it has also significantly modified those restrictions through a series of exceptions. *See Hampton v. Mow Sun Wong*, 426 U.S. 88, 108–09 (1976). Specifically, in 1943, it created an exception for " 'nationals of those countries allied with the United States in the prosecution of the war' " *Id.* at 109 (quoting Act of June 26, 1943, ch. 146, 57 Stat. 196, 196). That exception,

[1] *See* Memorandum for Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, from Marc R. Salans, Assistant Director, Office of Attorney Personnel Management, *Re: Eligibility of Dual Citizen for Paid Position* (Oct. 7, 1996).

[2] We have reviewed the basis of the State Department's determinations in Memorandum to Files, from Todd D. Peterson, Attorney Advisor, Office of Legal Counsel, *Re: Request for Advice from Administrative Office of United States Courts Concerning the Interpretation of 31 U.S.C. §699(b)* (Dec. 20, 1982) (the "Peterson Memo").

We note that the Comptroller General's Office has stated that the decision concerning what countries should be considered "allied" is a political one, which it will not challenge in an audit. In particular, it has stated that "a determination that Canada is allied with the United States in the current defense effort is a political judgment not subject to the decision of this Office. However, we believe it to be a commonly accepted fact that Canada is so allied, and we would not question an affirmative administrative determination to that effect." *Matter of: Clarence D. Swanson*, Unpublished Opinion B–188852, 1977 WL 12358 at *3 (C.G.).

the substance of which has often been re-enacted, is the basis of the present section 606. *See* Peterson Memo at 1.

Analysis

The plain language of section 606 does not decide the question presented. It is true that the applicant is a national of an "allied" country, and so would seem eligible for hire. But it is also true that the applicant is a national of a *nonallied* State, and thus would remain subject to the general ban on noncitizens. Moreover, Congress has crafted careful, narrowly drawn exceptions in section 606 for the nationals of particular nonallied countries (e.g., for aliens from Cuba, provided they are lawfully admitted permanent residents, or for nationals of the People's Republic of China, if they qualify for adjustment of status under the Chinese Student Protection Act). It would seem, therefore, that nationals of *other* nonallied countries should remain ineligible, notwithstanding that they may also happen to have the nationality of an "allied" State. Thus, the language of the statute does not resolve the issue.

Similarly, examination of the policies behind section 606 does not yield a straightforward answer. The general exclusion of noncitizens from federal employment in the United States seems to be aimed chiefly at protecting national security by ensuring the loyalty of federal employees, encouraging noncitizens who seek federal employment to become naturalized, and shielding United States nationals from competition in a substantial sector of the labor market. *See Hampton v. Mow Sun Wong*, 426 U.S. at 94, 104 (reviewing arguments of executive branch). The exception for nationals of "allied" foreign States, on the other hand, serves distinct, indeed often contrary, interests: it allows federal employers greater flexibility in meeting their personnel needs; it expresses this Nation's solidarity with its allies; and it signifies confidence that the nationals of such allies are unlikely to betray the trust that the United States Government has reposed in them. Any simple, "bright line" rule that treated dual nationals in the applicant's position as eligible—or as ineligible—would promote some of these policies only at the expense of others.

We think that the statute is best read, and the policies behind it most satisfyingly accommodated, by applying the concept of "effective, dominant nationality." That concept, which derives from international law,[3] has also been invoked by

[3] *See Nottebohm (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4, 22 (Apr. 6) ("International arbitrators . . . have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved . . . . Similarly, the courts of third States, when they have before them an individual whom two other States hold to be their national, seek to resolve the conflict by having recourse to international criteria and their prevailing tendency is to prefer the real and effective nationality."); *see also* 8 Marjorie M. Whiteman, *Digest of International Law* 1252–55 (1967) (quoting decision of Italian-United States Conciliation Commission in *Mergé Claim, see United States ex rel. Mergé v. Italy*, 22 I.L.R. 443 (Italian-U.S. Conciliation Comm'n, 1955) discussing international law origins and applications of concept of effective, dominant nationality).

Continued

the federal courts to resolve disputes under domestic law that involve dual nationals. For example, the court in *Sadat v. Mertes*, 615 F.2d 1176 (7th Cir. 1980), made use of the concept in analyzing whether the "alienage jurisdiction" statute, 28 U.S.C. § 1332(a)(2), which vests the district courts with jurisdiction over civil actions between citizens of States of the United States and citizens of foreign States, gave rise to jurisdiction in a case involving a naturalized citizen who was also an Egyptian national under that country's laws.[4] The court explained the concept as follows:

> Under international law, a country is responsible for official conduct harming aliens, for example, the expropriation of property without compensation. It is often said, however, that a state is not responsible for conduct which would otherwise be regarded as wrongful if the injured person, although a citizen of a foreign state, is also a national of the state taking the questioned action . . . .
>
> Despite the general rule of nonresponsibility under international law for conduct affecting dual nationals, there are recognized exceptions. One is the concept of effective or dominant nationality . . . . [T]his exception provides that a country (respondent state) will be responsible for wrongful conduct against one of its citizens whose dominant nationality is that of a foreign state, that is,
>
> > (i) his dominant nationality, by reason of residence or other association subject to his control . . . is that of the other state and (ii) he . . . has manifested an intention to be a national of the other state and has taken all reasonably practicable steps to avoid or terminate his status as a national of the respondent state.
>
> *Restatement (Second) of the Foreign Relations Law of the United States* § 171(c) (1965).

615 F.2d at 1187 (citation omitted).

Applying the *Restatement*'s tests, the *Sadat* court found that the plaintiff was not a "citizen[] or subject[] of a foreign state" under 28 U.S.C. § 1332(a)(2),

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The doctrine of dominant and effective nationality rests on two fundamental principles that reflect a contemporary view of the link of nationality. First, the concept of nationality embodies more than a tenuous legal bond asserted by municipal law . . . . Second, nationality is a product of personal choice and action. The conduct of the individual furnishes the only sound juridical foundation for recognition of a single nationality.

Note, *Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal*, 83 Mich. L. Rev. 597, 613 (1984) (footnote omitted).

[4] Later decisions have followed *Sadat*. *See, e.g., Soghanalian v. Soghanalian*, 693 F. Supp. 1091 (S.D. Fla. 1988).

i.e., that his dominant, effective nationality was American, not Egyptian. Although the plaintiff had resided in Egypt rather than in the United States, his actions "manifest[ed] his continued, voluntary association with the United States and his intent to remain an American." 615 F.2d at 1188.[5] For example, he had registered with the U.S. Embassy during his sojourns abroad, had cast an absentee ballot in a Presidential election, and had not sought employment that might jeopardize his status as a naturalized U.S. citizen. *Id.*

These tests should be used to determine the dominant, effective nationality of the applicant in question.[6] The primary question to be asked is what nationality is indicated by the applicant's residence or other voluntary associations. A second question is whether the applicant has manifested an intention to be a national of one of the two States, while also seeking to avoid or terminate nationality in the other. Of these two questions, the former will ordinarily be the more important. In *Sadat* itself, it was the plaintiff's voluntary associations with the United States that led the court to find that his dominant nationality was American: he had not sought to terminate or avoid his Egyptian nationality, and had in fact maintained significant contacts with that country. Consequently, we believe that a dual national can be found to have a dominant, effective nationality of one country, even if he or she takes no affirmative steps to terminate or avoid the nationality of the other — indeed, even if he or she makes a conscious decision to retain the latter nationality.[7]

We believe that the procedure we have outlined serves the various, and sometimes conflicting, goals of section 606. In particular, it will enable the United States to demonstrate its good will toward allied States and its confidence in their nationals, without compromising national security. Moreover, the results of following the procedure should be both fair to individual applicants and satisfactory to federal employers. Because "municipal law determines how citizenship may be acquired," *Perkins v. Elg*, 307 U.S. 325, 329 (1939),[8] an applicant may be deemed a national of a particular country under its domestic law, even if he or she has no significant voluntary ties whatever to that country.[9] It would be unfair

[5] As the International Court of Justice explained in *Nottebohm*, "the habitual residence of the individual concerned is an important factor [in determining dominant nationality], but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc." 1955 I.C.J. at 22.

[6] Although making these determinations may entail some administrative inconvenience, we think that the difficulties should not be substantial.

[7] We note also that it may be a legal *impossibility*, under applicable municipal law, for an individual to renounce a particular nationality. Knowing that the effort to renounce that nationality would be futile, the individual may make no attempt to do so. In such a case, the decision not to make such an attempt should obviously not prevent a court or agency from finding the individual's *other* nationality to be dominant.

[8] *See also Murarka v. Bachrack Bros., Inc.*, 215 F.2d 547, 553 (2d Cir. 1954) (Harlan, J.) ("It is the undoubted right of each country to determine who are its nationals, and it seems to be general international usage that such a determination will usually be accepted by other nations.").

[9] "Municipal laws broadly applying the doctrine of *jus sanguinis* can . . . create dual nationality without regard to the individual's connection to the state. Under this doctrine children are nationals if their parents are nationals,

Continued

to deny the possibility of federal employment to that applicant merely because of such an incidental, nonvoluntary status, if the country in question happened to be nonallied. Equally, it would be unreasonable to treat such an applicant as eligible for federal employment merely because the country happened to be allied, when the applicant's actions and choices demonstrated a conscious commitment to the nationality of another, nonallied State.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

irrespective of the links (birth or domicile) between the child and the state." Note, *supra* note 3, at 607 (footnote omitted).

UN Draft Declaration on the Rights of Indigenous Groups

The Constitution would not bar the federal government from establishing the kind of government-to-government relationship it presently maintains with federally recognized Indian tribes with other appropriately constituted indigenous communities within the jurisdiction of the United States.

November 1, 1996

LETTER OPINION FOR THE DEPUTY LEGAL ADVISER
DEPARTMENT OF STATE

This letter responds to your letter of October 10, 1996, to Associate Deputy Attorney General Seth Waxman, which requested the views of the Department of Justice as to whether the Constitution would permit the federal government to afford other indigenous groups in the United States treatment comparable to that presently afforded federally recognized Indian tribes.

We have reviewed the text and constitutional history of the Indian Commerce and Treaty Clauses of the Constitution, the history of the federal government's exercise of the authority granted by those clauses with respect to Indian tribes in the continental United States and to the indigenous peoples of Alaska, and the relevant case law. Based upon this analysis, we have concluded that the Constitution would not bar the federal government from establishing the kind of government-to-government relationship it presently maintains with federally recognized Indian tribes with other appropriately constituted indigenous communities within the jurisdiction of the United States.

We cannot, however, offer any view as to the permissibility of exercising this authority regarding a particular group of indigenous peoples without a thorough analysis of that group's history, its structure and status, the relationships between its members, and the group's relations with federal and state government authorities. Thus, while Congress has the authority to consider recognizing or extending benefits to indigenous groups other than Indian tribes, we cannot express a view at this time as to whether Congress could lawfully take such action towards any existing community of Native Hawaiians or other indigenous entities. We would be happy to undertake such an analysis if you so desire.

CHRISTOPHER H. SCHROEDER
Acting Assistant Attorney General
Office of Legal Counsel

Legal Effectiveness of Congressional Subpoenas Issued After an Adjournment *Sine Die* of Congress

A congressional subpoena issued after an adjournment *sine die* of Congress lacks any legal force and effect and does not impose any legal obligation to comply with the subpoena.

November 12, 1996

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked this Office to analyze the legal effectiveness of a congressional subpoena issued after a *sine die* adjournment of Congress. In a 1982 opinion, this Office concluded that a congressional subpoena issued during a session of Congress lacks present force and effect after the adjournment *sine die* of Congress. *See Continuing Effect of a Congressional Subpoena Following the Adjournment of Congress*, 6 Op. O.L.C. 744 (1982). According to that opinion, the lapse in legal effectiveness "results from the same factors that produce, at the same time, the death of all pending legislation not enacted . . . and the termination of congressional authority to hold a contumacious witness in custody." *Id.* at 745 (internal citations omitted). It would necessarily follow from the analysis contained in that opinion that a subpoena issued after an adjournment *sine die* lacks any force and effect ab initio. After revisiting the issue, we continue to adhere the analytical framework used in this Office's 1982 opinion. Therefore, for the reasons set forth below, we conclude that a congressional subpoena issued after a *sine die* adjournment has no legal effect. [1]

I. LEGAL DISCUSSION

The Constitution vests all legislative authority in Congress. U.S. Const. art. I, § 1. Although the Constitution does not expressly authorize Congress to issue subpoenas, the Supreme Court has stated that the authority to subpoena is an "indispensable ingredient" of Congress' legislative power. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 505 (1975). In *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927), the Court declared that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." According to the Court:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation

[1] Several rules of the House and Senate apply to the authorization and issuance of congressional subpoenas. *See, e.g.*, House Rule XI(2)(m)(1)(B); Senate Rule XXVI(1). *See also* House Rule XI(2)(m)(2)(A); Senate Rule XXVI(7)(a)(1). For purposes of analysis, this memorandum assumes that a post-*sine die* adjournment congressional subpoena can be issued in a manner consistent with the relevant House and Senate rules.

> is intended to affect or change; and where the legislative body does not itself possess the requisite information — which not infrequently is true — recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.

Id. at 175. Similarly, in *Eastland*, the Court said:

> The power to investigate and to do so through compulsory process plainly falls within [the definition of Congress's legislative function]. This Court has often noted that the power to investigate is inherent in the power to make laws.

Eastland, 421 U.S. at 504.[2]

This understanding — that Congress's subpoena power inheres in and is ancillary to its power to legislate — leads logically to the conclusion that the legal obligation to comply with a congressional subpoena lapses upon the cessation of Congress's authority to legislate. Just as an adjournment *sine die* results in the death of all pending legislation, *see* Floyd M. Riddick, *The United States Congress: Organization and Procedure* 56 (1949), making passage and presentment to the President impossible, *see* U.S. Const. art. I, §§ 1, 7; *The Pocket Veto Case*, 279 U.S. 655, 681 (1929) (final adjournment of Congress "terminates the legislative existence of the Congress"), so too must it result in the cessation of the auxiliary power to compel witnesses to present testimony or information via subpoena. It follows that congressional subpoenas issued after an adjournment *sine die* but prior to the beginning of a new Congress have no legal effect.

The limitations the Court has placed upon Congress's use of its inherent authority to deal with contempts provide additional support for the view that congressional subpoenas issued after an adjournment *sine die* have no legal effect. The Court has held that Congress has implicit authority under the Constitution to deal with a contempt of its authority. *See Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226–30 (1821). This power stems, according to the Court, from Congress's inherent authority to preserve its constitutionally-derived legislative power. *See id.*; *Marshall v. Gordon*, 243 U.S. 521, 541 (1917) ("[I]n virtue of the grant of legislative authority there [is] a power implied to deal with contempt in so far as that authority [is] necessary to preserve and carry out the legislative authority given.").

[2] The Court emphasized in *Eastland* that "whether particular activities . . . fall within the 'legitimate legislative sphere' [depends upon] whether the activities took place 'in a session of the [house of Congress at issue] by one of its members in relation to the business before it.'" *Id.* at 503–04 (quoting *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881)).

The Court has made clear, however, that there are limits to Congress's use of this power. First, such power "rests only upon the right of self-preservation; that is, the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed." *Id.* at 542.[3] Second, even where Congress properly exercises its authority to deal with a contempt, the punishment must cease upon the adjournment of Congress:

> [T]he existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, *the legislative body ceases to exist on the moment of its adjournment or periodic dissolution. It follows, that imprisonment must terminate with that adjournment.*

Anderson, 19 U.S. at 231 (emphasis added); *accord Marshall*, 243 U.S. at 542 (Congress's contempt power, "even when applied to subjects which justified its exercise, is limited to imprisonment, and such imprisonment may not be extended beyond the session of the body in which the contempt occurred."). These limitations, which the Court concluded were justified in view of the nature of the authority upon which Congress's contempt power is based (i.e., self-preservation of legislative authority), *see Anderson*, 19 U.S. at 230–31,[4] provide additional support for the conclusion that Congress lacks the power of compulsory process after a *sine die* adjournment.

Because this conclusion rests upon the cessation of Congress's legislative existence, it applies equally to House and Senate subpoenas. However, the case of the Senate merits some separate discussion, because the Court, noting certain internal and structural differences between the House and the Senate, has occasionally referred to the Senate as a "continuing body." *See Eastland*, 421 U.S. at 512; *McGrain*, 273 U.S. at 181; *cf. Gojack v. United States*, 384 U.S. 702, 706 n.4

[3] Applying this standard, the Court in *Marshall* invalidated an attempt by the House to respond to a contempt in the form of "irritating and ill-tempered statements made in [a] letter [addressed to the chairman of a House subcommittee]," *id.* at 546, where "the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties," *id.*, but was, instead, "related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject." *Id.*

[4] The Court in *Anderson* stated:

> The present question is, what is the extent of the punishing power which the deliberative assemblies of the Union may assume and exercise on the principle of self-preservation?
>
> Analogy, and the nature of the case, furnish the answer—"the least possible power adequate to the end proposed;" which is the power of imprisonment. . . . And even to the duration of imprisonment a period is imposed by the nature of things, since the existence of the power that imprisons is indispensable to its continuance; and although the legislative power continues perpetual, the legislative body ceases to exist on the moment of its adjournment or periodic dissolution. It follows, that imprisonment must terminate with that adjournment.

Id.

(1966). In *McGrain*, the Court suggested that the Senate's status as a continuing body might prevent a controversy over an attempt by the Senate to compel compliance with one of its subpoenas from becoming moot upon the adjournment of the Congress during which the Senate action was initially taken. *See McGrain*, 273 U.S. at 181; *see also Eastland*, 421 U.S. at 512. The continuing existence of a case and controversy with respect to enforcement of a subpoena might seem to imply that the subpoena had a continuing legal effect beyond a *sine die* adjournment.

The Court's discussion of mootness in *McGrain* does not alter our conclusion regarding the legal effect of a Senate subpoena issued after an adjournment *sine die*, for two reasons. First, in addressing the mootness issue, the Court in *McGrain* relied upon an interpretation of a passage in *Jefferson's Manual* that appears to have misunderstood that passage's actual import. The Court quoted the following passage from *Jefferson's Manual*:

> Neither House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose.

McGrain, 273 U.S. at 181 (quoting Senate Rules and Manual, 1925, p. 303). Referring to that language, the Court concluded that "the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the king." *Id.*

The larger passage of which this quotation is a part, and which we have set out in a footnote,[5] indicates that Jefferson is drawing upon the practices of Par-

[5] The larger passage from *Jefferson's Manual* is as follows:

Parliament have three modes of separation, to wit: by adjournment, by prorogation or dissolution by the King, or by the efflux of the term for which they were elected. Prorogation or dissolution constitutes there what is called a session; provided some act was passed. In this case all matters depending before them are discontinued, and at their next meeting are to be taken up de novo, if taken up at all. Adjournment, which is by themselves, is no more than a continuance of the session from one day to another, of for a fortnight, a month, &c., ad libitum. All matters depending remain in statu quo, and when they meet again, be the term ever so distant, are resumed, without any fresh commencement, at the point at which they were left. Their whole session is considered in law but as one day, and has relation to the first day thereof.

Committees may be appointed to sit during a recess by adjournment, but not by prorogation. Neither House can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose.

Congress separate in two ways only, to wit, by adjournment, or dissolution by the efflux of their time. What, then, constitutes a session with them? A dissolution certainly closes one session, and the meeting of the new Congress begins another. The Constitution authorizes the President, "on extraordinary occasions to convene both Houses, or either of them." If convened by the President's proclamation, this must begin a new session, and of course determine the preceding one to have been a session. So if it meets under the clause of the Constitution which says, "the Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall appoint a different day." This must begin a new session, for even if the last adjournment was to this day the act of adjournment is

Continued

liament to propound analogous principles to guide the newly established Congress. Where differences in the English and American systems of governance necessitate explication of the analogies, Jefferson does so. Where the analogy between the English and American systems applies without modification, however, there is no need for further discussion. Thus, in the quotation repeated in *McGrain*, Jefferson notes that upon the end of the session, all pending matters are discontinued and all parliamentary functions cease, unless special provisions, requiring the consent of the other two branches, have been made. The larger passage reveals that this assertion has been preceded by a discussion of the three modes by which Parliament "separates," only two of which amount to the end of a legislative session. So Jefferson has stated the ways in which Parliament can be separated so as to result in the termination of all parliamentary functions. He then continues on in the passage to note that Congress is unlike the Parliament, in the specific respect that it has only two modes of separation. This prompts Jefferson to ask, "[w]hat, then, constitutes a session [of Congress]?" *Jefferson's Manual* at 292. An answer to that question is necessary in order to apply the principle that all pending matters are discontinued and all parliamentary functions cease upon termination of the legislative session, but a repetition of the principle itself is unnecessary, because Jefferson is taking it as understood that this fundamental principle applies to the American legislature just as it applies to the British legislature.[6]

Reading this passage to suggest that Jefferson meant *not* to apply the principle to Congress would be most peculiar. Such a reading would need to explain why Jefferson had so carefully noted the differences with respect to what constitutes a session of Congress, as compared to Parliament, and yet kept so completely hidden his belief that entirely different consequences flowed from the end of a congressional session as compared to the end of a parliamentary session.

Nor can this passage be read to treat the Senate differently from the House. Throughout the passage, Jefferson refers consistently to "Congress," suggesting that both houses of Congress are subject to the same analysis. Elsewhere, he shows full awareness of the fact that because the Constitution makes numerous distinctions between the two bodies, it is conceivable that different rules would apply to each of them. Where that is true, however, he explicitly distinguishes between the House and the Senate, as he does in a subsequent passage that refers back to the passage quoted in footnote 5, and that states an important qualification to the principle that the end of a session terminates all business before the legislative body:

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merged in the higher authority of the Constitution, and the meeting will be under that, and not under their adjournment. So far we have fixed landmarks for determining sessions.

William Holmes Brown, *Constitution, Jefferson's Manual and Rules of the House of Representatives*, H.R. Doc. No. 101–256, at 291–92 (1991) ("*Jefferson's Manual*")(citations omitted).

[6] As suggested above, Jefferson's reference to the "end of the session" is satisfied by a *sine die* adjournment. *See The Pocket Veto Case*, 279 U.S. at 681; Riddick, *supra*, at 56.

> When it was said above that all matters depending before the Parliament were discontinued by the determination of the session, it was not meant for judiciary cases depending before the House of Lords, such as impeachments, appeals, and writs of error. These stand continued, of course, to the next session. . . .
>
> Impeachments stand, in like manner, continued before the Senate of the United States.

Jefferson's Manual at 294. This passage confirms the view that in the earlier passage Jefferson was relying upon Parliamentary rules to develop rules applicable to both houses of Congress because it shows that he did not hesitate to point out cases where a rule applied to only one house of the legislature in particular. In addition, and quite separately, by calling attention to the Senate's post-adjournment authority to exercise its constitutionally-derived *judicial* powers to try impeachments as a special exception, the passage confirms that Jefferson did not believe that the Senate could exercise its constitutionally-derived *legislative* powers after an adjournment *sine die*. Because Congress's authority to coerce by subpoena the production of information derives from its constitutionally-delegated authority to legislate, Jefferson must have intended to convey that such authority ceases upon an adjournment *sine die*.[7]

Second, even assuming with *McGrain* that the Senate's status as a continuing body dictates that a legal controversy relating to an action taken by the Senate of a previous Congress (i.e., before the adjournment *sine die* of that Congress) under a then-existing Senate subpoena cannot be mooted merely by the adjournment *sine die* of the previous Congress,[8] such fact does not compel the conclusion that the legal effectiveness of compulsory Senate process extends beyond a *sine die* adjournment. A case will become moot when the relief sought by the plaintiff would, if granted, confer no tangible benefit. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). The Court's discussion of mootness in *McGrain* thus centered on whether the Senate, having initially exercised its constitutionally-based contempt authority during the session in which it had issued the subpoena, was capable of repeating such action. *See McGrain*, 273 U.S. at 181–82. As demonstrated by the Court's discussion in *McGrain*, a mootness determination entails a different analysis than that required to resolve whether a party is empowered in the first instance to bring a suit or take a specified action.

For these reasons, the Court's mootness discussion in *McGrain* does not, in our view, resolve the legal status of a Senate subpoena issued after a *sine die*

[7] The House Parliamentarian appears to agree with this view. In the annotation to the Parliamentarian's presentation of *Jefferson's Manual*, he refers to the passage cited in *McGrain* as "Sitting of committees in recess, and creation of commissions to sit after *Congress* adjourns." *Jefferson's Manual* §589 (annotation) at 291 (emphasis added).

[8] In *McGrain*, the Senate took action to enforce its subpoena prior to its adjournment. *McGrain*, 273 U.S. at 153–54.

adjournment, and the passage from *Jefferson's Manual* relied upon in *McGrain* to distinguish the Senate from the House actually equates the two bodies for purposes relevant to this analysis.[9] In fact, we believe that the Court's previous analyses of Congress's subpoena and contempt power support the view that a congressional subpoena issued after an adjournment *sine die* has no legal effect.[10]

II. CONCLUSION

For the reasons discussed above, we conclude, consistent with our 1982 opinion, that a congressional subpoena issued after an adjournment *sine die* lacks any legal force and effect and does not impose any legal obligation to comply with the subpoena.

CHRISTOPHER SCHROEDER
Acting Assistant Attorney General
Office of Legal Counsel

[9] As stated above, our analysis concludes, consistent with *Anderson*, 19 U.S. at 231, *The Pocket Veto Case*, 279 U.S. at 681, and *Jefferson's Manual*, that the legislative power of a house of Congress ends upon the end of a session and that its adjournment *sine die* constitutes the end of a session. *See* text at note 4, and note 6, above. Therefore, we reject as untenable the apparent suggestion of the court in *Harris v. Board of Governors*, 938 F.2d 720, 723 (7th Cir. 1991) that Congress's ability to exert legislative power may continue beyond that point. In any event, because the court in *Harris* determined that the case became moot upon appeal, *see id.* at 720, such dicta has no binding effect. *See id.* at 725 (Ripple, J., concurring in the court's decision that the case became moot on appeal and noting that the court's dicta "does not constitute the law of the circuit.").

[10] Our conclusion that Congress's constitutional authority to coerce by subpoena the tendering of requested information lapses upon an adjournment *sine die* is not intended to call into question the executive branch's longstanding practice of responding voluntarily to information requests from congressional committees (whether by letter or subpoena) during adjournment *sine die* periods. The conclusion that as a matter of law Congress lacks authority after adjournment *sine die* to impose obligations or sanctions outside the legislative branch — whether by legislation, subpoena or contempt order — does not mean that Congress cannot make a request for information or that the executive branch cannot, as a matter of policy (based on the comity afforded another branch of government), respond voluntarily to such a request.

Service on the Board of Directors of Non-Federal Entities by Federal Bureau of Investigation Personnel in Their Official Capacities

Section 208 of title 18 prohibits a Federal Bureau of Investigation employee from serving on the board of directors of an outside organization in his or her official capacity, unless the service is authorized by statute or the employee obtains either a release of fiduciary obligations by the organization or a waiver of the requirements of section 208.

November 19, 1996

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL BUREAU OF INVESTIGATION

You have requested our advice as to whether Federal Bureau of Investigation ("FBI") personnel may serve on the boards of directors of non-federal nonprofit entities in their official capacities. Specifically, you have raised the question whether 18 U.S.C. § 208 would prohibit such service. Section 208 prohibits any officer or employee of the executive branch from participating as a government official in any "particular matter" in which an "organization in which he is serving as officer, director, trustee, general partner or employee . . . has a financial interest." 18 U.S.C. § 208(a). We conclude that this broad prohibition against conflicts of interest within the federal government would prevent a government employee from serving on the board of directors of an outside organization in his or her official capacity, in the absence of: (1) statutory authority or a release of fiduciary obligations by the organization that might eliminate the conflict of interest, or (2) a waiver of the requirements of § 208(a), pursuant to 18 U.S.C. § 208(b).

Our conclusion follows inevitably from earlier opinions of this Office on the scope of § 208. Specifically, we recently found that § 208 would prevent an executive officer or employee who was also serving as the director of an outside organization (in a state that imposed fiduciary obligations upon such directors) from participating in any particular matter in his or her government employment in which the outside organization had a financial interest. *See Applicability of 18 U.S.C. § 208 to Proposed Appointment of Government Official to the Board of Connie Lee*, 18 Op. O.L.C. 136 (1994) ("Connie Lee opinion"). In the Connie Lee opinion, we made clear that the inherent conflict of interest between the government employee's loyalty to the federal government and his or her fiduciary duty to the outside organization under state law could be overcome only if such service were expressly authorized by statute, or if the outside organization waived applicable fiduciary obligations. [1] Neither of those exceptions applied to the situa-

[1] This would require that applicable state law permit a waiver of fiduciary obligations.

tion in the Connie Lee opinion, nor are we aware that they apply to the question you have raised.

Although our focus in the Connie Lee opinion was with how this conflict of interest might influence the government employee's official duties in his or her *government* job, that conflict is no less troublesome in its effect upon the employee's official actions as director of the outside organization. The prohibition in § 208 extends to *any* official action by a government employee that affects the employee's financial interests or those of other specified persons or entities, such as an organization for which the employee is a director. In the instance you have asked us to address, the employee performs *official* duties for the FBI in serving on the board of the outside organization. Thus, § 208 would apply to any action the employee takes *as a director* that affects the financial interests of the outside organization.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

Procedural Rights of Undocumented Aliens Interdicted in U.S. Internal Waters

Undocumented aliens seeking to reach the United States aboard a vessel that has reached the internal waters of the United States at the time of interdiction, but who have not come ashore on United States "dry land," are not entitled to deportation proceedings or other proceedings under the Immigration and Nationality Act.

Apprehension of such aliens in the internal waters of the United States solely for the purpose of interdicting or repulsing their attempt to enter the United States unlawfully does not constitute an "arrest" under section 287(a)(2) of the Immigration and Nationality Act and would not require the institution of exclusion or other proceedings under the Act.

If such aliens are brought ashore on United States dry land, they would acquire the status of "applicants for admission" and would have to be inspected and screened pursuant to section 235 of the Immigration and Nationality Act.

November 21, 1996

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
IMMIGRATION AND NATURALIZATION SERVICE

This responds to your request for our opinion on several additional questions related to the interdiction of undocumented aliens in vessels before they have come ashore in the United States.[1] Your request was submitted before Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, Division C, 110 Stat. 3009, 3009–546 (1996) ("Reform Act"), which substantially amended the Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1503) ("INA"), and thereby altered the premises of your questions in significant respects. Taking into account the changes effected by the Reform Act, our response to your inquires may be summarized as follows:

1. Undocumented aliens seeking to reach the United States aboard a transit vessel that has reached the internal waters of the United States at the time of interdiction, but who have not landed or been taken ashore on United States dry land, are not entitled to deportation proceedings (now encompassed within the new "removal proceedings" established by section 304 of the Reform Act, INA § 240, 110 Stat. 3009–589) or other proceedings under the INA.

[1] Memorandum for Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, from David A. Martin, General Counsel, Immigration and Naturalization Service, *Re: Rights of Aliens Found In United States Internal Waters* (Aug. 12, 1996) ("INS Memo"). Your request refines broader questions previously addressed by this Office in opinions issued in 1993 and 1994. *See Immigration Consequences of Undocumented Aliens' Arrival in United States Territorial Waters*, 17 Op. O.L.C. 77 (1993); Memorandum for T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Whether the Interdiction of Undocumented Aliens Within United States Territorial Waters Constitutes an "Arrest" under Section 287(a)(2) of the Immigration and Nationality Act* (Apr. 22, 1994) ("Arrest Opinion").

2. Apprehension of such aliens in the internal waters of the United States solely for purposes of interdicting or repulsing their attempt to enter the United States unlawfully does not constitute an "arrest" under section 287(a)(2) of the INA and would not require the institution of exclusion proceedings (now also encompassed by the new "removal proceedings") or other proceedings under the INA. If such aliens are brought ashore on U.S. dry land, however, they would acquire the status of "applicants for admission" and would have to be inspected and screened pursuant to section 235 of the INA.

3. Until the State Department's views on the matter are expressed, we defer to the State Department on the question whether United States treaty obligations would require it to implement non-refoulement protections if an alien apprehended in internal waters demonstrates that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular political group, or political opinion if he is returned to his country. We would note, however, that to the extent such a treaty-based obligation is in conflict with the newly-enacted provisions of the Reform Act, *see, e.g.*, § 302(a), INA § 235(a)(1), 110 Stat. 3009–579 ("Aliens Treated as Applicants for Admission"), the latter would prevail as the more recent enactment if Congress intended that result. *See, e.g., Reid v. Covert*, 354 U.S. 1, 18 (1957); *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893).

4. Your inquiry regarding the effect of section 414 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214, 1270 ("AEDPA") insofar as it enacted a new subsection 241(d) of the INA has been rendered moot due to the repeal of that subsection by section 308(d)(2)(D) of the Reform Act.

Our analysis of the first two questions follows.

ANALYSIS

Your inquiry raises questions concerning undocumented aliens (i.e., those lacking a visa or other authorization for lawful entry into the United States) interdicted in the "internal waters" of the United States, which you define by reference to certain treaty and statutory definitions.[2] The internal waters thus defined could include, for example, such locations as the straits between the Florida Keys, portions of the Chesapeake Bay, or even the upper reaches of the Potomac River. For purposes of this analysis, we assume that the aliens in question are aboard

[2] The Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, Part I, § II, art. 5(1), 15 U.S.T. 1606, 1609, provides: "Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State." The related classification of "Inland Waters" is defined for purposes of domestic law under 33 U.S.C. § 2003(o) as "the navigable waters of the United States shoreward of the navigational demarcation lines dividing the high seas from harbors, rivers, and other inland waters of the United States and the waters of the Great Lakes on the United States side of the International Boundary."

a vessel in transit from another country to the United States but have not landed or disembarked on U.S. soil at the time of interdiction.

I.

Your initial question asks whether an undocumented alien interdicted in U.S. inland waters has effected an "entry" within the meaning of the INA and is thus entitled to deportation proceedings. In this regard, we note that the amendments to the INA enacted by the Reform Act have supplanted the significance of the technical term "entry" as a legal threshold for such procedural entitlements. *See* Reform Act §§ 301(a) and 308(f), INA § 101(a)(13), 110 Stat. 3009–575, 3009–621 (substituting the term "admission" for "entry" in various sections of the INA). Before enactment of the Reform Act, an alien's "entry" into the United States was generally regarded as a prerequisite to his entitlement to deportation, as opposed to exclusion, proceedings. *See Yang v. Maugans*, 68 F.3d 1540, 1547 (3d Cir. 1995).

Under the amended provisions of the INA, both deportation and exclusion proceedings have been supplanted by the single, streamlined "Removal Proceedings" now governed by section 240 of the INA. That section provides:

> Unless otherwise specified in this Act, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States.

Reform Act § 304(a)(3), INA § 240(a)(3), 110 Stat. 3009–589. These removal proceedings are now called into play both with respect to those aliens who are "applicants for admission" who are not summarily removed under section 235(b)(1)(A)(i) of the INA as well as to those aliens who are "in and admitted to the United States" and who fall within various sub-categories of deportability. INA § 237(a)(1), 8 U.S.C. § 1227(a)(1).

Relatedly, the Reform Act has created the new category of "Aliens Treated as Applicants for Admission" under section 235 of the INA. Reform Act § 302(a), 110 Stat. 3009–579. An alien's classification within *that* category will now determine whether he must receive inspection, screening, and other attendant procedures — including a removal proceeding under section 240 in the case of certain applicants for admission whom the inspection officer determines are "not clearly and beyond a doubt entitled to be admitted" — in contrast to aliens who may be summarily repulsed or returned without any INA screening and procedural requirements. Thus, the question whether an alien's presence on the internal waters constitutes an "entry" mandating "deportation" procedures no longer reflects the governing terminology and procedures. The relevant question now is whether such

an alien qualifies as an "applicant for admission" under section 235(a)(1) of the INA, which provides as follows (emphasis added):

> (1) *Aliens Treated as Applicants for Admission.* — An alien present in the United States who has not been admitted, or who arrives in the United States (whether or not at a designated port of arrival and *including an alien who is brought to the United States after having been interdicted in* international or *United States waters*) shall be deemed for purposes of this Act an applicant for admission.

Thus, aliens who are "present in" or have "arrive[d] in" the United States are to be deemed "applicants for admission" and must be accorded the inspection, screening, and attendant procedures that will result in either admission, asylum, or removal. That raises the question whether an alien interdicted on a vessel in the internal waters of the United States, *before he has disembarked on U.S. land,* shall be deemed "present in the United States" or to have "arrived in the United States." We conclude that the wording of section 235 yields a negative answer to that question.

The underscored portion of section 235 contemplates the situation where an alien is "*brought to* the United States *after* having been interdicted in . . . *United States waters.*" *Id.* (emphasis added). If an unlanded alien interdicted in United States waters — which would include the inland waters — still must be "brought to" the United States, it plainly follows that Congress did not regard such an alien as already present or arrived in the United States.[3] Rather, Congress provided that the unlanded alien interdicted in United States waters must first be "brought to" the United States — i.e., taken ashore to U.S. dry land — before he can be said to have "arrived" there and before he acquires the right to be treated as an applicant for admission.

Given our conclusion that unlanded aliens interdicted on internal waters do not constitute "applicants for admission," and therefore need not be inspected or screened pursuant to section 235(b), it necessarily follows that such aliens are not entitled to removal proceedings (i.e., the amended INA's substitute for deportation proceedings) under section 240. Only those interdicted aliens who qualify as applicants for admission must be referred to removal proceedings if the examining officer determines that they are not "clearly and beyond a doubt entitled

[3] This interpretation is consistent with the fact that the INA's current definition of "United States," 8 U.S.C. § 1101(a)(38), does not include waters or airspace subject to the jurisdiction of the United States. Moreover, as emphasized in one recent court of appeals opinion: "Nor can it be said that the current definition implicitly includes territorial waters." *Yang v. Maugans,* 68 F.3d at 1548. The court in *Yang,* noting that the definition of "United States" prior to the 1952 enactment of the INA *did* include "waters . . . subject to [U.S.] jurisdiction," ascribed considerable significance to the absence of "waters" from the current definition in concluding that the "physical presence" requirement of the former "entry" test is satisfied "only when an alien reaches dry land." *Id.* at 1548–49.

to be admitted." Reform Act § 302(a), INA § 235(b)(2)(A), 110 Stat. 3009–582.[4] Those aliens who do not land on U.S. soil, in contrast, do not constitute applicants for admission and therefore need not be inspected or screened by an immigration officer.

Our conclusion on this issue is fortified by court decisions interpreting the analogous concept of "physical presence in the United States" in deciding whether aliens had effected an "entry" under the pre-Reform Act provisions of the INA. As demonstrated in your memorandum, INS Memo at 3–4, those decisions hold that an arriving alien's mere presence on U.S. waters does not establish the requisite physical presence in the United States unless and until the alien has "landed" on U.S. soil. *Yang v. Maugans*, 68 F.3d at 1546–49; *Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir. 1995) ("an alien attempting to enter the United States by sea has not satisfied the physical presence element . . . until he has landed"), *cert. denied*, 516 U.S. 1176 (1996); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1343 (4th Cir. 1995) (Chen never entered the United States because he was apprehended "before he reached the shore").

In declining to equate presence in U.S. waters with "presence in the United States," the wording of amended section 235 of the INA is consistent with these holdings. Accordingly, both the text of the amended INA and pertinent judicial precedents confirm the view that an unlanded alien is not entitled to removal proceedings, or any other proceedings under the INA, merely because he is apprehended in the internal waters of the United States. Only when such an alien has reached or been "brought to the United States [dry land]" does he attain the status of an "applicant for admission" and trigger the procedural requirements linked to that status. Reform Act § 302(a), INA § 235(a)(1).

II.

The second question is whether an unlanded alien's apprehension within the internal waters constitutes an "arrest" for purposes of section 287(a)(2) of the INA, 8 U.S.C. § 1357(a)(2), and would therefore require the institution of exclusion proceedings — i.e., what are now removal proceedings under amended section 240. In particular, INS takes the view that such apprehension constitutes an arrest "at least when it involves the boarding of the vessel by United States officers, the forced diversion of the vessel at the command of United States officers, or

[4] We note that section 235(a)(3) of the amended INA provides: "All aliens (including alien crewmen) who are applicants for admission *or otherwise seeking admission* or readmission to or transit through the United States shall be inspected by immigration officers." (Emphasis added.) We do not believe unlanded aliens interdicted on U.S. internal waters constitute aliens "otherwise seeking admission" who must be inspected by immigration officers under this section. Unless that term is limited to those persons who *appear before* immigration officers in the United States (or at its border) seeking admission, it would extend overinclusively to persons who may be hundreds or thousands of miles from the United States, but nonetheless "seek admission" to it. Requiring immigration officers to inspect all such persons would make no sense. *Cf. Xiao v. Reno*, 837 F. Supp. 1506, 1562 (N.D. Cal. 1993), *aff'd sub nom. Wang v. Reno*, 81 F.3d 808 (9th Cir. 1996).

the physical custody of an individual (for example, after being pulled from the water)." INS Memo at 4.

Absent any purpose to hold the alien in question for processing under the INA, prosecution, or for other legal proceedings, we do not view the apprehension of an unlanded alien under the circumstances you describe as an "arrest" and do not conclude that it would require the institution of removal proceedings under the INA.

Our 1994 Arrest Opinion concluded that "INS interdictions of aliens within the territorial waters *do not involve taking aliens into custody and holding them for further legal proceedings*, and are thus not 'arrests' as that term is naturally understood." Arrest Opinion at 3 (emphasis added). The mere fact that such an interdiction of unlanded aliens takes place in the internal waters of the United States—e.g., on the straits of the Florida Keys—does not alter or undermine our conclusion on that point. Because such an alien has not landed in the United States, he is not "present," nor has he "arrived," in the United States within the meaning of section 235 of the INA. We therefore do not consider his pre-landing, non-prosecutorial apprehension an "arrest" any more than if the apprehension occurred on non-internal territorial waters of the United States. Only if the interdicted alien is taken into custody and held *for the purpose of further immigration proceedings or prosecution*—as opposed to being held until the vessel is escorted or diverted out of United States waters—would an "arrest" result. [5]

Your memorandum specifically contends that the apprehension of unlanded aliens in internal waters must be viewed as an arrest under the provisions of section 287(a)(2) of the INA (INS Memo at 4). In this regard, our prior opinion stressed that section 287(a)(2) of the INA "is not designed to guarantee procedural rights to illegal aliens whom the INS turns back from this country *before they have arrived.*" Arrest Opinion at 8 (emphasis added). As discussed above, an unlanded interdicted alien has not "arrived" in the United States unless and until he disembarks on U.S. dry land. When such an unlanded alien is apprehended and temporarily detained solely in order to "turn back" his attempted entry, rather than for the purpose of subjecting him to the procedures or sanctions of U.S. immigration laws, the particular concerns of section 287(a)(2)'s provisions are simply not implicated.

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Deputy Assistant Attorney General
Office of Legal Counsel

[5] Of course, if the alien were taken ashore for some reason—i.e., if he were "brought to the United States" within the meaning of section 235(a)(1)—he would be deemed an "applicant for admission" and would have to be inspected and screened pursuant to section 235(b), which in some cases may lead in turn to asylum or removal proceedings.

Authority to Exempt Programs under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

The Attorney General may not exempt California's prenatal care program under § 401 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 because eligibility for, and the recipient's share of the cost of benefits provided by, that program are conditioned on the recipient's income.

November 25, 1996

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
OFFICE OF POLICY DEVELOPMENT

You have asked whether California's prenatal care program might fall within the Attorney General's authority to exempt programs that "(A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (C) are necessary for the protection of life or safety." The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, § 411(b)(4), 110 Stat. 2105, 2268. It is our opinion that the Attorney General does not have the authority to exempt California's prenatal care program because eligibility for, and the cost of benefits provided by, that program are conditioned on the recipient's income.

The prenatal care benefits at issue are provided under the California Medi-Cal Act, Cal. Welf. & Inst. Code §§ 14000–14029 (West Supp. 1999). Under section 14007.5(d) of the Medi-Cal Act, an alien who is not lawfully admitted for permanent residence, otherwise permanently residing in the United States under color of law, or a lawful temporary resident pursuant to specified provisions of the Immigration and Nationality Act is nonetheless eligible for "medically necessary pregnancy-related services" if she "is otherwise eligible for Medi-Cal services." The implementing regulation, Cal. Code Regs. tit. 22, § 50302(c), similarly provides that alien applicants for "restricted Medi-Cal benefits" (which include pregnancy-related services) who lack documentation of satisfactory immigration status or are nonimmigrant aliens "shall meet all other requirements for program eligibility" (except for possessing or having applied for a social security number).

Under the Medi-Cal Act, "medically needy family persons" meeting the Act's eligibility requirements are entitled to certain health care services. Cal. Welf. & Inst. Code § 14005.7(a). "[A] pregnant woman of any age with a confirmed pregnancy . . . *whose income and resources are insufficient* to provide for the costs of health care or coverage" is a "medically needy family person." *Id.* § 14051(b) (emphasis added). In addition, a medically needy family person is only eligible for health care services during months in which his or her "share of cost" has

been met. *Id.* § 14005.7(b). A medically needy family person's "share of cost" is his or her monthly income in excess of the amount required for maintenance established under the Medi-Cal Act, exclusive of any amounts considered exempt as income under California law, less amounts for Medicare and other health insurance premiums. Once a recipient has incurred expenses for deductibles, coinsurance charges and necessary medical and remedial services that exceed his or her share of cost, the individual is entitled to receive Medi-Cal health care services. In other words, the share of cost that a recipient must pay under the Medi-Cal system is based, in part, on the monthly income of the recipient.

Accordingly, prenatal care under restricted Medi-Cal, as well the cost of those services, are conditioned on the recipient's income. As such, it is our opinion that the prenatal care benefits do not satisfy the second requirement for programs that the Attorney General may exempt under § 401, 110 Stat. 2261 of the new welfare law.

RANDOLPH D. MOSS
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Office of Legal Counsel

Validity of Congressional-Executive Agreements that Substantially Modify the United States' Obligations Under An Existing Treaty

It lies within Congress's power to authorize the President to modify substantially the United States' domestic and international legal obligations under a prior treaty, including an arms control treaty, by making an executive agreement with our treaty partners, without Senate advice and consent.

November 25, 1996

MEMORANDUM OPINION FOR THE
SPECIAL ASSISTANT TO THE PRESIDENT AND
LEGAL ADVISER TO THE NATIONAL SECURITY COUNCIL

You have sought our views on the question whether Congress can authorize the President to enter into an international agreement that substantially modifies the obligations which the United States would otherwise have under a pre-existing treaty, or whether only the Senate can do so, pursuant to the treaty-making power, U.S. Const. art. II, § 2, cl. 2.[1] We conclude that it lies within the power of Congress to authorize the President substantially to modify the United States' obligations under a prior treaty, including an arms control treaty.

A "treaty" in the constitutional sense[2] has two aspects: it may state a judicially enforceable rule of domestic law; and it creates binding obligations between or among the parties in international law. (*See* Part I below.) It is well established that Congress has the power, by legislation, to modify the domestic legal effects, if any, of a treaty. (*See* Part II below.) Insofar as the treaty embodies international legal obligations, these may remain in force, even after an Act of Congress has superseded the treaty as a matter of domestic law; but the States that are parties to the treaty may consent to the modification of the obligations that the treaty imposes. (*See* Part III below.) If Congress authorizes the President to enter into

[1] The context in which you had originally raised this question was Congress's consideration of a proposed provision of the Department of Defense Authorization Act for Fiscal Year 1997, purporting to prohibit the United States from being bound by any international agreement that would substantively modify the Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States–U.S.S.R., T.I.A.S. 7503, 23 U.S.T. 3435, unless that agreement was made pursuant to the President's treaty-making power specified in Article II, Section 2, Clause 2 of the Constitution. We had previously addressed another aspect of that legislation. *See Constitutionality of Legislative Provision Regarding ABM Treaty*, 20 Op. O.L.C. 246 (1996).

Our use of the term authorize necessarily contemplates the grant of authority prior to taking legally effective action. We thus perceive no distinction between "pre"-authorization and authorization in the present context.

[2] It is important to distinguish the constitutional sense of the term "treaty," which is relevant here, from other uses of the term in international or domestic law. "The word 'treaty' has more than one meaning. Under principles of international law, the word ordinarily refers to an international agreement concluded between two sovereigns, regardless of the manner in which the agreement is brought into force. Under the United States Constitution, of course, the word 'treaty' has a far more restrictive meaning. Article II, § 2, cl. 2, of that instrument provides that the President 'shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.'" *Weinberger v. Rossi*, 456 U.S. 25, 29–30 (1982) (citation and footnotes omitted).

an executive agreement with our treaty partners to modify those obligations, and those States consent to such modifications when the President proposes them, then the treaty obligations can be modified by executive agreement, without Senate advice and consent. (*See* Part IV below.)

I.

At the outset, it is essential to recognize the dual nature of treaties, as instruments of both domestic and international law. As the Supreme Court has said,

> [a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties of it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.

Head Money Cases, 112 U.S. 580, 598 (1884).[3]

[3] *See also Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.) ("A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision."); *Taylor v. Morton*, 23 F. Cas. 784, 785 (C.C.D. Mass. 1855) (No. 13,799) (Curtis, Circuit Justice), *aff'd*, 67 U.S. (2 Black) 481 (1862) (treaties are "contracts, by which [sovereigns] agree to regulate their own conduct" and, under the Constitution, "part of our municipal law"), *Goldwater v. Carter*, 617 F.2d 697, 705 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979) ("a treaty is *sui generis*. It is not just another law. It is an international compact, a solemn obligation of the United States and a 'supreme Law' that supersedes state policies and prior federal laws. For clarity of analysis, it is thus well to distinguish between treaty-making as an international act and the consequences which flow domestically from such act. In one realm the Constitution has conferred the primary role upon the President; in the other, Congress retains its primary role as lawmaker."); 1 Westel Woodbury Willoughby, *The Constitutional Law of the United States* §317a, at 577 (2d ed. 1929) ("Treaties entered into by the United States may be viewed in two lights: (1) as constituting parts of the supreme law of the land, and (2) as compacts between the United States and foreign Powers.").

A "treaty," therefore, has two aspects: insofar as it is self-executing, it prescribes a rule of domestic or municipal law[4] and, as a compact or contract between nations, it gives rise to binding obligations in international law.[5]

II.

Under the Supremacy Clause of the Constitution, treaties, like Acts of Congress, are made "supreme Law," U.S. Const. art. VI, cl. 2; *Maiorano v. Baltimore & Ohio R.R. Co.*, 213 U.S. 268, 272–73 (1909). Accordingly, "treaty provisions, which are self-executing in the sense that they require no additional legislation to make them effective, are equivalent to and of like obligation with an act of Congress."[6] Further, insofar as a treaty incorporates a rule of domestic law, the Supreme Court has long held that it may be modified or repealed by a later Act of Congress.[7] *See Head Money Cases*, 112 U.S. at 599 ("so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal"); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899) ("Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country which had been negotiated by the President and approved by the Senate."); *Alvarez y Sanchez v. United States*, 216 U.S. 167, 175–76 (1910) ("an act of Congress, passed after a Treaty takes effect, must be respected and enforced, despite any previous or existing Treaty provision on the same subject"); *United States v. Stuart*, 489 U.S.

[4] As Chief Justice Marshall pointed out in *Foster v. Neilson*, 27 U.S. at 314, not all treaty provisions are self-executing: they may require implementing legislation to be given their full effect. Many treaties are, however, self-executing. For example, in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.), the Court considered a treaty between the United States and France, ratified during the pendency of the appeal of the condemnation of a seized French vessel, that required that vessels seized by either nation should be restored if not yet definitively condemned. The Court held that the treaty controlled the disposition of the prize: the treaty was effective of its own force, without need of any further legislative action, and thus provided the rule of decision on appeal, rather than a prior statute that would have authorized the vessel's condemnation. The Supreme Court has given "self-executing" effect to numerous treaties. *See Disposition by Treaty of Territory or Property Belonging to the United States*, 43 Op. Att'y Gen. 96, 99, 103–04 & n.6 (1977) (Bell, A.G.) (citing cases), *see also* Samuel B. Crandall, *Treaties: Their Making and Enforcement* §73, at 162–63 & n.16 (2d ed. 1916) (discussing distinction between self-executing and non-self-executing treaties, and illustrating former category).

[5] *See* The Vienna Convention on the Law of Treaties, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."), *reprinted in Basic Documents in International Law* 388, 400 (Ian Brownlie ed., 4th ed. 1995). Although not ratified by the United States, this convention "is frequently cited . . . as a statement of customary international law." *Review of Domestic and International Legal Implications of Implementing the Agreement with Iran*, 4A Op. O.L.C. 314, 321 (1981).

[6] *Canadian Boundary Waters*, 30 Op. Att'y Gen. 351, 353 (1915) (citing *Foster v. Neilson*, 27 U.S. at 314; *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870); *Chew Heong v. United States*, 112 U.S. 536, 539 (1884); *Head Money Cases*, 112 U.S. at 599; and *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). *See also Cook v. United States*, 288 U.S. 102, 118–19 (1933); *Exemption of Resident Aliens from Military Service Pursuant to Treaties—Bar to Eligibility for Citizenship*, 42 Op. Att'y Gen. 373, 379 (1968).

[7] There was some earlier authority to the contrary. *See Thompson's Case*, 9 Op. Att'y Gen. 1, 6 (1857) (Black, A.G.) ("Congress has no authority to abrogate a treaty made by the Executive, any more than the Executive has to abrogate a law passed by Congress.").

353, 375 (1989) (Scalia, J., concurring in judgment) (Congress "may abrogate or amend [a treaty] as a matter of internal law by simply enacting inconsistent legislation."); *Congressional Authority to Modify an Executive Agreement Settling Claims Against Iran*, 4A Op. O.L.C. 289 (1980).[8]

The rationale for this rule was set forth in 1855 by Justice Curtis, sitting as Circuit Justice. Justice Curtis wrote:

> The first and most obvious distinction between a treaty and an act of congress is, that the former is made by the president and ratified by two thirds of the senators present; the latter by majorities of both houses of congress and the president, or by the houses only, by constitutional majorities, if the president refuses his assent. Ordinarily, it is certainly true, that the powers of enacting and repealing laws reside in the same persons. But there is no reason, in the nature of things, why it may not be otherwise. . . . I think it is impossible to maintain that, under our constitution, the president and senate exclusively, possess the power to modify or repeal a law found in a treaty. If this were so, inasmuch as they can change or abrogate one treaty, only by making another inconsistent with the first, the government of the United States could not act at all, to that effect, without the consent of some foreign government; for no new treaty, affecting, in any manner, one already in existence, can be made without the concurrence of two parties, one of whom must be a foreign sovereign. That the constitution was designed to place our country in this helpless condition, is a supposition wholly inadmissible.

Taylor v. Morton, 23 F. Cas. at 785–86.

Accordingly, it lies within the power of Congress to modify the substantive obligations that a treaty imposes upon the United States, or to authorize the President to modify those obligations, insofar as those treaty obligations are binding as a matter of domestic or municipal law. The advice and consent of the Senate are not necessary to achieve that outcome.

[8] Similarly, a treaty can supersede a prior Act of Congress to the extent that the two are incompatible. *See Charlton v. Kelly*, 229 U.S. 447, 463 (1913); *United States v. Lee Yen Tai*, 185 U.S. 213, 220 (1902); *Canadian Boundary Waters*, 30 Op. Att'y Gen. at 352–53; Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 99–16, at 505 (1982); Samuel B. Crandall, *Treaties: Their Making and Enforcement* § 72, at 161–62.

III.

A.

The unilateral modification or repeal of a provision of a treaty by Act of Congress, although effective as a matter of domestic law, will not generally relieve the United States of the international legal obligations that it may have under that provision. *See Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160 (1934) (while an Act of Congress that conflicted with a treaty provision "would control in our courts as the later expression of our municipal law . . . the international obligation [would] remain[ ] unaffected"). Secretary of State Charles Evans Hughes (later the author, as Chief Justice, of the *Pigeon River* opinion) explained the position well:

> a judicial determination that an act of Congress is to prevail over a treaty does not relieve the Government of the United States of the obligations established by a treaty. The distinction is often ignored between a rule of domestic law which is established by our legislative and judicial decisions and may be inconsistent with an existing Treaty, and the international obligation which a Treaty establishes. When this obligation is not performed a claim will inevitably be made to which the existence of merely domestic legislation does not constitute a defense and, if the claim seems to be well founded and other methods of settlement have not been availed of, the usual recourse is arbitration in which international rules of action and obligations would be the subject of consideration.[9]

"[W]e are bound to observe [a treaty] with the most scrupulous good faith . . . [O]ur Government could not violate [it], without disgrace." *The Amiable Isabella*, 19 U.S. 1, 68 (1821). "The foreign sovereign between whom and the United States a treaty has been made, has a right to expect and require its stipulations to be kept with scrupulous good faith . . . ." *Taylor v. Morton*, 23 F. Cas. at 785.[10] "A party may not invoke the provisions of its internal law as justification

[9] Letter for the Secretary of the Treasury, from the Secretary of State, Feb. 19, 1923, *quoted in* 5 Green Haywood Hackworth, *Digest of International Law* § 489, at 194–95 (1943).

[10] Chief Justice (and former President) Taft, sitting as sole arbitrator in an international dispute, stated that

> a treaty may repeal a statute, and a statute may repeal a treaty. The Supreme Court cannot under the Constitution recognize and enforce rights accruing to aliens under a treaty which Congress has repealed by statute. *In an international tribunal, however, the unilateral repeal of a treaty by a statute would not affect the rights arising under it and its judgment would necessarily give effect to the treaty and hold the statute repealing it of no effect.*

Continued

for its failure to perform a treaty." Vienna Convention on the Law of Treaties, art. 27, *reprinted in Basic Documents in International Law* at 400.

B.

As with contracts of other kinds, however, the parties to a treaty may agree to modify the obligations to which the treaty gives rise. It is "a general principle of [international] law recognized by civilized nations" that "[a]ny legal position, or system of legal relationships, can be brought to an end by the consent of all persons having legal rights and interests which might be affected by their termination." *International Status of South-West Africa*, 1950 I.C.J. 128, 167 (July 11) (Separate Opinion of Judge Read). As a general rule of international law, therefore, "[a] treaty may be amended by agreement between the parties." Vienna Convention on the Law of Treaties, art. 39, *reprinted in Basic Documents in International Law* at 404.[11] The principle was well stated in a study prepared for the Senate Foreign Relations Committee:

> The amendment of a binding international agreement may be accomplished in a variety of ways including, among others, . . . by the consent of the parties . . . . Amendment or modification of an international agreement by consent of the parties is recognition of the fact that consent is the basis of international agreements. Accordingly, the parties are at liberty to change an international agreement regardless of its terms. For similar reasons, a later agreement on the same subject involving the same parties that expressly or impliedly modifies an earlier agreement will be regarded as effecting the resulting change.

Treaties and Other International Agreements: The Role of the United States Senate, S. Rep. No. 53, 103d Cong., 1st Sess. 140 (Comm. Print 1993) ("S. Rep. 53").[12]

18 Am. J. Int'l L. 147, 159–60 (1924) (emphasis added). *See also The Ship James and William*, 37 Ct. Cl. 303, 306 (1902) (decree of French Government abrogating provisions of treaty of 1778 relating to contraband goods on neutral vessels justified French courts in condemning such vessels if seized by French cruisers, but did not abrogate any treaty right of the United States); *Ropes v. Clinch*, 20 F. Cas. 1171, 1174 (C.C.S.D.N.Y. 1871) (No. 12,041) (Congress may "legislate as if no such treaty existed, in modification or alteration of what, by force of the treaty, has been the law heretofore, thus modifying the law of the land, without denying the existence of the treaty, or the obligations thereof between the two governments, as a contract, and answer therefor to such foreign government, or meet its reclamation or retaliation as may be necessary."); 1 Westel Woodbury Willoughby, *The Constitutional Law of the United States* § 324, at 585 ("The termination of a treaty as an international compact carries with it the annulment of the agreement as a law of the land, but its annulment as a law by Congress does not carry with it its annulment as an international compact.").

[11] This Convention details in arts. 40 and 41 more specific rules for the amendment (as among all the parties) and modification (as among certain of the parties) of a multilateral treaty.

[12] *See also* David A. Koplow, *When Is An Amendment Not An Amendment? Modification Of Arms Control Agreements Without The Senate*, 59 U. Chi. L. Rev. 981, 1023 (1992) ("International law imposes few limitations upon parties' abilities to change their treaty obligations. In general, states are free to alter their commitments to any

The United States has often modified its treaty rights and obligations through agreements with its treaty partners: "following a precedent established in 1784 when the Treaty of Commerce and Amity with France was modified by an exchange of notes between the French Foreign Minister and Benjamin Franklin, executive agreements have not infrequently been utilized as a method of altering treaties." [13] Thus, assuming that the consent of our treaty partners was obtained, the United States could, as a matter of *international* law, substantially modify its pre-existing treaty obligations by agreement with its treaty partners.

The only remaining question, therefore, is whether, as a matter of *constitutional* law, the President has the power to modify, by means of an executive agreement authorized by Act of Congress, the international legal obligations that the United States has under a treaty, or whether the only constitutional method by which the President may achieve that end is through the advice and consent of the Senate. We discuss that question in the following section.

IV.

A.

"When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). The Supreme Court has repeatedly emphasized the sweeping authority of the President in the field of foreign affairs, particularly when his own considerable inherent powers in that area are augmented by those of Congress. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109–10 (1948); *Hirabayashi v. United States*, 320 U.S. 81, 92–93 (1943); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). We believe that the inherent powers of the President over foreign affairs, coupled with whatever powers Congress can and does delegate to him in this area, are constitutionally sufficient to enable the President to make an executive agreement that substantially modifies the international legal obligations of the United States under a prior treaty.[14]

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extent, at any time, and in any manner, provided that they are reasonably clear about what they are doing and that they reciprocally agree or at least acquiesce in the outcome.").

[13] Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L.J. 181, 334 (1945) (footnote omitted).

[14] We do not consider here how far the President has the authority, acting without *either* Senate advice and consent *or* an Act of Congress, substantially to modify the United States' obligations under treaty or international law. We note, however, that the executive branch has taken the position that the President possesses the authority to terminate a treaty in accordance with its terms by his unilateral action, and a plurality of the Supreme Court concluded that the issue was a non-justiciable political question. *See Goldwater v. Carter*, 444 U.S. at 1003 (plurality op.). *See generally* Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of

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The Constitution makes the President the Nation's "guiding organ in the conduct of our foreign affairs . . . . He . . . was entrusted with . . . vast powers in relation to the outside world . . . ." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948).[15] Pursuant to his inherent powers, the President has made executive agreements with other countries, not submitted to the Senate for its advice and consent or to Congress for its approval, including agreements that regulated the use of military forces.[16] Congress too — as distinct from the Senate under its treaty-making power — has some power to vary the international legal obligations of the United States.[17] So, for example, in *Weinberger v. Rossi*, 456 U.S. at 32, the

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Legal Counsel, *Re: Presidential Authority to Modify the Conditions under which the United States Will Recognize the Compulsory Jurisdiction of the International Court of Justice Without Prior Congressional Approval* at 1 (Apr. 9, 1984) ("although the question has never been definitively resolved by the courts, a substantial body of judicial, historical, and scholarly support exists for the proposition that, under certain circumstances, the President is constitutionally empowered unilaterally to terminate an existing treaty in accordance with its terms"). *But see International Load Line Convention*, 40 Op. Att'y Gen. 119, 123 (1941) (opining that President had power to suspend a treaty, but suggesting that "action by the Senate or by the Congress" would be "required" to "denounce" or "otherwise abrogate[ ]" it).

Assuming that the President *does* have the power unilaterally to terminate a treaty, it appears to follow that he also has the authority to relieve the United States of the affirmative obligations imposed on it by particular treaty provisions. It would not follow, however, that he had the authority unilaterally to *augment* the United States' treaty obligations. Moreover, it has been held that the President has no constitutional power to abrogate rights under *Indian* treaties. *See Mille Lacs Band of Chippewa Indians v. State of Minnesota*, 861 F. Supp. 784, 823–24 (D. Minn. 1994), *appeal dismissed*, 48 F.3d 373 (8th Cir. 1995).

[15] The President's authority in the field of foreign affairs flows, in large part, from the President's position as Chief Executive, U.S. Const. art. II, § 1, cl. 1, and as Commander in Chief, *id.* art. II, § 2, cl. 1. It also derives from his more specific powers to "make Treaties" with the advice and consent of two-thirds of the Senators present, *id.* art. II, § 2, cl. 2; to "appoint Ambassadors . . . and Consuls," *id.*; and to "receive Ambassadors and other public Ministers," *id.* art. II, § 3. The Supreme Court has repeatedly recognized the President's authority with respect to the conduct of foreign affairs. *See, e.g., Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive' ") (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705–06 n.18 (1976) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch . . . ."); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations").

[16] The President's "inherent powers" as Commander in Chief are "clearly extensive." *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and in the judgment). The executive agreements that past Presidents have concluded under the Commander in Chief authority have often been "important compacts," such as the armistice, or peace protocol, with Spain, of August 12, 1898, establishing the basis of the conditions for ending the Spanish-American War. 2 Charles Cheney Hyde, *International Law Chiefly As Interpreted and Applied by the United States* § 508, at 1411 (2d rev. ed. 1945). *See also* 5 John Bassett Moore, *A Digest of International Law* 213 (1906).

[17] That proposition might be questioned. *See, e.g.*, 1 Westel Woodbury Willoughby, *The Constitutional Law of the United States* § 324, at 585 ("it seems almost too clear for argument that Congress, not having been made by the Constitution a participant in the treaty-making power, has no constitutional authority to exercise that power either affirmatively or negatively, that is, by creating or destroying international agreements").

We believe that Congress *does* possess delegable authority in this area. First, among the powers vested in Congress by the Constitution is the power of declaring war. U.S. Const. art. I, § 8, cl. 11. A declaration of war is a legislative act that can have the effect of abrogating a treaty in whole or in part. *See Karnuth v. United States*, 279 U.S. 231, 239–41 (1929) (Declaration of War of 1812 abrogated provision of Treaty of 1794 granting British subjects right freely to enter United States); *see also Valk v. United States*, 29 Ct. Cl. 62, 67 (1894), ("war supersedes treaties of peace and friendship"), *aff'd*, 168 U.S. 703 (1897); *cf. Argento v. Horn*, 241 F.2d 258, 260–62 (6th Cir.) (Potter Stewart, J.) (extradition treaty with Italy was suspended but not abrogated by war), *cert. denied*, 355 U.S. 818 (1957). When Congress acts under its war power, "a wide latitude of discretion must be accorded" to it, for on that power "the very life of the nation depends." *Hamilton v. Kentucky Distillers & Warehouse Co.*, 251 U.S. 146, 163 (1919) (Brandeis, J.); *see also Dryfoos v. Edwards*, 284 F. 596, 599 (S.D.N.Y. 1919) (L. Hand, J.) (Congress' war power may "be inferred [not only from specific clauses of article I, but also] from the fact that the United States is the only sovereign recognized among the world of nations, within the territory of the

Supreme Court implied that Congress, if it expressed its intent with sufficient clarity, could effect the abrogation of the United States' international obligations, as set forth in international agreements for the hiring of local nationals at the United States' overseas military bases.[18] It can reasonably be maintained that, if Congress may effect the *abrogation* of international obligations, it has some power to authorize the President to *modify* them.

B.

The practice of the two branches discloses many examples of binding agreements that Presidents have made with foreign States, relying on the inherent authority of the Executive, as affirmed and amplified by Congress. As the Senate Foreign Relations Committee study cited above points out,

> Congressional authorization for the conclusion of international agreements dates from the earliest days of the Nation's constitutional history. Thus, in 1790 Congress empowered the President to pay off the Revolutionary War debt by borrowing money from foreign countries "upon terms advantageous to the United States" and to conclude "such other contracts respecting the said debt as shall be found for the interest of the said States." Two years later

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United States, at once responsible and vested with any of the powers which are customarily exercised by such a sovereign so charged"), *aff'd sub nom., Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919). Accordingly, it is at least arguable that Congress' war power enables it to enact legislation, other than a formal declaration of war, that authorizes the President to vary the United States' obligations under disarmament or other political-military treaties. *Accord* Armen R. Vartian, *Approval of SALT Agreements by Joint Resolution of Congress*, 21 Harv. J. Int'l L. 421, 441 (1980) ("it is clear that the power of Congress to legislate with regard to arms control matters is nearly unlimited, and, when combined with the President's authority as Commander in Chief, is plenary") (footnotes omitted).

Furthermore, Congress has been held to have the power to make *peace* by legislation, as an alternative to a treaty. *See Ludecke v. Watkins*, 335 U.S. at 168. Indeed, because of the Senate's refusal to ratify the Treaty of Versailles, Congress by joint resolution authorized the President to terminate the war with Germany, *see* 42 Stat. 105 (1921). The validity of Congress' action was recognized by both the Supreme Court, *see Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923), and by the Executive, *see* Proclamation of Peace by the President, Aug. 25, 1921, 42 Stat. 1939, 1944. Again, it may be inferred that if Congress may make peace, it may authorize Executive agreements, such as arms control measures, that conduce to peace.

Finally, the Constitution vests in Congress the power to "provide for the common Defence . . . of the United States." U.S. Const. art. I, §8, cl. 1. The Supreme Court has indicated that this clause enables Congress to authorize the President to make agreements with foreign States that were directly related to the Nation's defense. In *People of the State of New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937), the Court reviewed a large body of legislation dealing with the Panama Canal. These statutes included the Act of June 28, 1902, ch. 1302, 32 Stat. 481, which authorized the President to enter into an agreement to acquire control of a strip of land—the Panama Canal Zone—from the Republic of Colombia. To enact this mass of legislation, the Court said, lay "within the constitutional power of Congress to provide for the national defense." 299 U.S. at 406. Arguably, therefore, the "common Defence" clause also confers on Congress delegable power to authorize the President to enter into executive agreements that modify our obligations under prior arms control treaties.

[18] *See also Van Der Weyde v. Ocean Transp. Co.*, 297 U.S. 114, 118 (1936) (Act of Congress requesting and directing President to give notice to treaty partners of termination of treaties inconsistent with domestic legislation made it "incumbent upon the President . . . to reach a conclusion as to the inconsistency" between treaty provisions and domestic statute, and "[h]aving determined that [treaty provisions'] termination was necessary, the Preside through the Secretary of State took appropriate steps to effect it.").

> the Postmaster General was authorized to make arrangements with the postmasters in any foreign country for the reciprocal receipt and delivery of letters and packets, through the post-offices. . . . Over the years, Congress has authorized or sanctioned additional agreements concerning a wide variety of subjects including *inter alia*, the protection of intellectual property rights, acquisition of territory, national participation in various international organizations, foreign trade, foreign military assistance, foreign economic assistance, atomic energy cooperation, and international fishery rights.

S. Rep. 53, at 52–53 (footnotes omitted). *See also Seizure of Foreign Ships on the High Seas Pursuant to Special Arrangements*, 4B Op. O.L.C. 406, 407 (1980) ("The President has Congress' express authority to enter into special arrangements [with foreign countries], including those that will aid the United States' effort to curtail drug traffic."); *Validity of Commercial Aviation Agreement*, 40 Op. Att'y Gen. 451, 452 (1946) (Clark, A.G.) ("It is recognized that there are many classes of agreements with foreign countries which are not required to be formulated as treaties . . . [including] that class of executive agreements which are entered into in accordance with, and within the scope of, authority vested in the executive branch by legislation enacted by the Congress. Notable examples of agreements which fall within this class are postal conventions and reciprocal trade agreements."); *Postal Conventions with Foreign Countries*, 19 Op. Att'y Gen. 513, 520 (1890) (Taft, S.G.) (beginning with legislation of 1792, the Postmaster General, by virtue of Congressional authorization, "has exercised the treaty-making power of the Government in so far as it was necessary to the improvement of the foreign mail service," without obtaining the advice and consent of the Senate to such postal conventions). *Cf. Antoine v. Washington*, 420 U.S. 194, 204 (1975) (Court has repeatedly treated Executive agreements with Indian tribes ratified by later Acts of Congress as "law, and like treaties, the supreme law of the land").[19]

The constitutionality of such "Congressional-Executive agreements" is firmly established. *Accord* S. Rep. 53, at 58.[20] The Supreme Court long ago rejected arguments that such agreements constitute an invalid delegation of power to the President or the House of Representatives, or an improper invasion of the Senate's treaty-making power. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 410–11 (1928); *Field v. Clark*, 143 U.S. 649, 694 (1892); *see also Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C.

[19] Among earlier international agreements which were accomplished by Congressional-Executive agreements rather than by Article II treaties were the annexation of Texas, *see Texas v. White*, 74 U.S. (7 Wall.) 700 (1868) and of Hawaii, *see Hawaii v. Mankichi*, 190 U.S. 197 (1903). For discussion of the background of these two annexations, *see Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea*, 12 Op. O.L.C. 238, 251–52 (1988); Louis Fisher, *Constitutional Conflicts between Congress and the President* 227–28 (3d rev. ed. 1991).

[20] *But see* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1249–78 (1995) (defending exclusivity of Treaty Clause).

232, 234 (1994).[21] An international agreement negotiated by the President and concluded with prior, or subsequent, authorization from Congress has "the force and effect of an act of Congress." 2 Op. O.L.C. 227, 229 (1978).

C.

Of particular relevance here, the practice of the political branches underscores that the President has the authority to make Congressional-Executive agreements with our treaty partners that substantially modify the United States' rights or obligations under those treaties.

Congress has enacted legislation in the political-military field that permits the modification of the United States' international obligations through a Congressional-Executive agreement as an alternative to the treaty-making process. The Arms Control and Disarmament Act of 1961, Pub. L. No. 87–297, § 33, 75 Stat. 634, as recently amended by Pub. L. No. 103–236, § 709, 108 Stat. 382, 494 (1994) (codified in relevant part at 22 U.S.C. § 2573(b)), provides that no action obligating the United States to reduce or limit its Armed Forces or armaments "in a militarily significant manner" can be taken "except pursuant to the treaty-making power of the President set forth in Article II, Section 2, Clause 2 of the Constitution *or unless authorized by the enactment of further affirmative legislation by the Congress of the United States*" (emphasis added).[22]

Further, in a 1990 study, the Congressional Research Service identified three Congressional-Executive agreements since 1970 of a political-military nature; each of them could arguably have been adopted as a treaty instead. These were the Interim Agreement on the Limitation of Stategic Offensive Arms ("Salt I"), signed May 26, 1972, entered into force October 3, 1972, T.I.A.S. No. 7504, 23 U.S.T. 3462, which President Nixon submitted to Congress for its approval by joint resolution, and which Congress authorized in Pub. L. No. 92–448, 86 Stat.

[21] "Notwithstanding that the text of the Constitution confers no explicit authority for the making of congressional-executive agreements, such agreements have been authorized frequently by Congress over the years on a wide variety of subjects. Similarly, the courts have been little troubled by theoretical considerations and have sustained such agreements largely on the basis of the actual practice of the political branches of the government and the cumulative weight of prior judicial decisions. Presumably, if a doctrinal basis were at this date necessary to uphold agreements of this type, the combined foreign affairs powers of the Congress and the President would prove sufficient." S. Rep. 53, at 58–59.

[22] The legislative history of section 33 of the Arms Control and Disarmament Act indicates that neither the Senate nor the House of Representatives regarded the provision as infringing on the Senate's treaty-making power. *See* Armen R. Vartian, *Approval of SALT Agreements by Joint Resolution of Congress*, 21 Harv. J. Int'l L. at 446–47 & n.95.

The Senate had previously recognized that international political-military obligations could be undertaken by Act of Congress rather than by treaty when, in 1943, it adopted the Connally Resolution. That resolution provided that the United States, "acting through its constitutional processes," could join in an international authority with the power to prevent aggression. The resolution's reference to "constitutional processes" was understood to mean "that international commitments (in this case joining the United Nations) could be made either by treaty or by a majority of each House voting on a bill or joint resolution." Louis Fisher, *Presidential War Power* 74 (1995); *see also* 89 Cong. Rec. 8662 (1943) (explanation of terms used in resolution).

746, signed September 30, 1972[23]; a pair of identical agreements made by President Ford in 1975 with Egypt and Israel, under which the United States undertook to participate in an early-warning system in the Sinai, which Congress approved in Pub. L. No. 94–110, 89 Stat. 572, signed October 13, 1975, and which entered into force on the same date, T.I.A.S. No. 8155, 26 U.S.T. 2271 (Israel), T.I.A.S. No. 8156, 26 U.S.T. 2278 (Egypt); and a protocol signed by the United States, Egypt and Israel on August 3, 1981, T.I.A.S. No. 10556, 34 U.S.T. 3341, entered into force August 3, 1981, and T.I.A.S. No. 10557, 34 U.S.T. 3349, entered into force March 26, 1982, outlining United States participation in a Multinational Force and Observers unit, to function as a peacekeeping force in Sinai, for which President Reagan requested and obtained Congressional authorization in Pub. L. No. 97–132, 95 Stat. 1693, signed December 29, 1981. *See* Ellen C. Collier & James V. Saturno, Congressional Research Service, *Executive Agreements Submitted to Congress: Legislative Procedures Used Since 1970* (Nov. 26, 1990).[24]

Congress has also ratified, by legislation, Executive acts that substantially modified pre-existing treaty (or other international) obligations. Under article 3 of the Treaty of Peace with Japan, Sept. 8, 1951, T.I.A.S. No. 2490, 3 U.S.T. 3169, 3172–73, Japan was required to concur in any proposal that the United States made to the United Nations for placing certain islands under trusteeship. By a 1953 executive agreement, T.I.A.S. No. 2895, 4 U.S.T. 2912, President Eisenhower agreed to relinquish to Japan the United States' rights under the Treaty of Peace with respect to the Amami Islands. Although it appears that no prior legislative authorization for this modification of the treaty existed, Congress in 1960 impliedly ratified the President's action in Pub. L. No. 86–629, 74 Stat. 461, an Act, "To provide for the promotion of economic and social development in the Ryukyu Islands."[25]

Finally, in its Resolution of Advice and Consent of 27 May 1988 to the U.S.–U.S.S.R. Treaty on the Elimination of Their Intermediate-Range and Shorter-Range Missiles (INF Treaty), the Senate adopted the "Biden condition," which

[23] "[T]he Interim Agreement of 1972 was by no means the first non-treaty agreement pertaining to arms limitation or national security. In addition to numerous armistice agreements, the Rush-Bagot Agreement of 1817, 8 Stat. 231, T.S. No. 110 1/2 (1846), the 'Hot Line' Agreement of 1963, 1 U.S.T. 825, T.I.A.S. No. 5362, and unwritten agreements with the Soviet Union concerning moratoriums on nuclear testing (1958–1961) and placing nuclear weapons in orbit (1963–1967), among others, were effected without Senate approval." Armen R. Vartian, *Approval of SALT Agreements by Joint Resolution of Congress*, 21 Harv. J. Int'l L. at 442 n.77.

[24] In light of such judicial and historical precedents, the General Counsel to the Clerk of the House of Representatives concluded that "the United States may appropriately choose to negotiate an arms accord in the form of a Congressional-Executive agreement, and approve it by legislation, as an alternative to treaty ratification." Memorandum for the Honorable Dante B. Fascell, Chairman, House Committee on Foreign Affairs, from Steven R. Ross, General Counsel to the Clerk, and Charles Tiefer, Deputy General Counsel to the Clerk, *Re: Congressional Approval of an Arms Control Agreement by Legislation Rather than Treaty Ratification* (May 23, 1985), *reprinted in* 134 Cong. Rec. 7323 (1988). *See also* Memorandum for Ambassador Kampelman, Counselor, from Michael J. Matheson, Deputy Legal Adviser, *Re: Form of submission of arms control agreements* (Apr. 14, 1988), *reprinted in* 134 Cong. Rec. at 7324 ("Neither the [Arms Control and Disarmament Act] nor the Constitution dictates which of these two options the President should exercise with respect to a particular [arms control] agreement," but noting that "[w]ith one exception, the significant arms control agreements of the past few decades have all been submitted for the advice and consent of the Senate as treaties.").

[25] *See* 14 Marjorie M. Whiteman, *Digest of International Law* § 23, at 230 (1970).

provides that "the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification," and that "the United States shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, *or the enactment of a statute.*" 134 Cong. Rec. 12,849 (1988) (emphasis added). The Senate affirmed "the applicability to all treaties of the constitutionally-based principles" in this condition. Resolution of Advice and Consent of 25 November 1991 to the Treaty on Conventional Armed Forces in Europe (CFE Treaty), 137 Cong. Rec. 34,347, 34,348 (1991), adopted *id.* at 34,546. Because the Senate took the view that such "common understandings" of a treaty had the same binding effect as express provisions of the treaty for purposes of U.S. law, the Biden condition logically supports the proposition that the President may be authorized to accept changes in treaty obligations either by further Senate advice and consent *or by statutory enactment.*

In light of these judicial and historical precedents, we conclude that Congress may authorize the President, through an executive agreement, substantially to modify the United States' international obligations under an arms control (or other political-military) treaty.

Conclusion

It lies within the power of Congress to authorize the President substantially to modify the United States' domestic and international legal obligations under a prior treaty, including an arms control treaty.

CHRISTOPHER SCHROEDER
Acting Assistant Attorney General
Office of Legal Counsel

Access to Classified Information

This memorandum provides an opinion on various legal questions posed by a panel appointed by the Director of Central Intelligence to make a recommendation on whether an official at the Department of State, Richard Nuccio, should be granted access to Sensitive Compartmented Information.

November 26, 1996

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
CENTRAL INTELLIGENCE AGENCY

This memorandum responds to your request for our opinion on various legal questions posed by a panel appointed by the Director of Central Intelligence to make a recommendation on whether an official at the Department of State, Richard Nuccio, should be granted access to Sensitive Compartmented Information ("SCI").[1] The panel has stated that "[it is] not asking that OLC take any position on the facts presented by Mr. Nuccio in his statement." Panel Memorandum at 1. Accordingly, we limit our role to providing our opinion on only the specific legal questions presented, and make no attempt to apply our legal conclusions to the facts in this matter. Nor, of course, do we express any opinion on the ultimate question of whether Mr. Nuccio should retain his SCI security clearance.

We have organized the legal questions posed by the panel into three categories: (1) the application of executive branch rules and practices on disclosure of classified information to Members of Congress, in light of relevant congressional enactments; (2) the applicability of the Whistleblower Protection Act, 5 U.S.C. § 2302; and (3) the applicability of Executive Order 12674, 3 C.F.R. 215 (1990).

1. *Disclosure of Classified Information to Members of Congress*

Two questions posed by the panel address the relationship between, on the one hand, Executive Order 12356, *National Security Information*, 3 C.F.R. 166 (1983), which governs the handling of classified information in the executive branch, along with the applicable nondisclosure agreement signed by individuals having access to SCI information, and, on the other hand, two congressional enactments concerning the rights of federal employees to provide information to Congress.[2]

[1] *See* Letter for Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, from Michael J. O'Neil, General Counsel, Central Intelligence Agency (Nov. 13, 1996), enclosing Memorandum for Michael J. O'Neil from Kenneth W. Dam, John Podesta, and Terrence O'Donnell (Nov. 12, 1996) ("Panel Memorandum"). The Panel Memorandum attached a submission from Mr. Nuccio's attorney setting forth various legal positions. *See* Letter for Terrence O'Donnell, from Ronald W. Kleinman (Oct. 25, 1996), enclosing Statement of Richard A. Nuccio Submitted to the Review Panel in Response to Proposed Withdrawal of SCI Clearance ("Nuccio Statement"). The Panel Memorandum set forth questions (a) through (g) for us to address, but the panel subsequently withdrew questions (d) and (g).

[2] Question (c) asks that we address "5 U.S.C. § 7211 ('Lloyd La Follette Act') including the legitimacy of nondisclosure agreements for those having access to SCI information and the issues raised in *National Federation of Federal Employees v. U.S.*, 695 F. Supp. 1196 (D.D.C. 1988)." Panel Memorandum at 1. Question (f) asks

The congressional enactments identified by the panel are 5 U.S.C. § 7211 and the provision of the Treasury, Postal Service and General Government Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009–314 (1996), relating to classified information nondisclosure agreements, a version of which has been enacted annually since 1987. Section 7211, entitled *Employees' right to petition Congress*, provides (in its entirety) that "[t]he right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

The current version of the nondisclosure agreements appropriations provision provides (in pertinent part) that:

> No funds appropriated in this or any other Act for fiscal year 1997 may be used to implement or enforce the agreements in Standard Forms 312 and 4355 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: "These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by . . . section 7211 of title 5, United States Code (governing disclosures to Congress) . . . ."

Treasury, Postal Service and General Government Appropriations Act, 1997, § 625, 110 Stat. at 3009–359.[3]

a. *Effect of Congressional Enactments*

The longstanding position of the executive branch concerning the relationship between, on the one hand, these congressional enactments and, on the other hand, Executive Order 12356 and the classified information nondisclosure agreements is set forth in the brief that the Acting Solicitor General submitted to the Supreme Court in 1989 in the litigation cited in question (c).[4] *See* Brief for the Appellees,

"[w]hether the annual provision of the Treasury, Postal Service and General Government Appropriations Act (for FY97, *see* Section 625) authorizes disclosure [of] another agency's classified information to a member of Congress notwithstanding Sections 4.1(d) of Executive order 12356 and 4.2(b) of Executive Order 12958." *Id.* at 2.

[3] We have not included in the quotation the provision's listing of the Whistleblower Protection Act because of our conclusion in section 2 of this opinion that the Whistleblower Protection Act is inapplicable in this situation.

[4] The litigation concerned the then-applicable appropriations provision addressed to the classified information nondisclosure agreements. As with the current version, the appropriations provision at issue in the litigation contained language implicitly referring to the right of government employees to petition Congress that is the subject of 5 U.S.C. § 7211:

> No funds appropriated . . . may be used to implement or enforce the agreements in Standard Forms 189 or 4193 of the Government or any other nondisclosure policy, form or agreement if such policy, form or agreement . . . (3) directly or indirectly obstructs, by requirement of prior written authorization, limita-

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American Foreign Serv. Ass'n v. Garfinkel, 488 U.S. 923 (1988) (No. 87–2127) ("*AFSE* Brief").[5] We view that brief as the controlling statement of the views of the Department of Justice ("Department") on the issues presented by the panel's questions (c) and (f). Accordingly, we will cite to that brief in this opinion in the same manner as we would cite an opinion of this Office.

The Department's *AFSE* Brief stated our view that a congressional enactment would be unconstitutional if it were interpreted "to divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a 'right' to furnish such information to a Member of Congress without receiving official authorization to do so." *AFSE* Brief at 48; *see also id.* at 16–17. This position is based on the following separation of powers rationale:

> [T]he President's roles as Commander in Chief, head of the Executive Branch, and sole organ of the Nation in its external relations require that he have ultimate and unimpeded authority over the collection, retention and dissemination of intelligence and other national security information in the Executive Branch. There is no exception to this principle for those disseminations that would be made to Congress or its Members. In that context, as in all others, the decision whether to grant access to the information must be made by someone who is acting in an official capacity on behalf of the President and who is ultimately responsible, perhaps through intermediaries, to the President. The Constitution does not permit Congress to circumvent these orderly procedures and chain of command — and to erect an obstacle to the President's exercise of all executive powers relating to the Nation's security — by vesting lower-level employees in the Executive Branch with a supposed "right" to disclose national security information to Members of

tion of authorized disclosure, or otherwise, the right of any individual to petition or communicate with Members of Congress in a secure manner as provided by the rules and procedures of the Congress . . . .

Treasury, Postal Service and General Appropriations Act, 1988, Pub. L. No. 100–202, § 630, 101 Stat. 1329–391, 1329–432 (1987). The difference between the current and former provisions is that the reference to section 7211 in the current version is explicit while the reference in the former version is implicit. We do not believe that this difference is meaningful for current purposes.

[5] The district court had held section 630 to be unconstitutional, concluding that it "impermissibl[y] restrict[ed] the President's power to fulfill obligations imposed upon him by his express constitutional powers and the role of the Executive in foreign relations." *National Fed'n of Fed. Employees v. United States*, 688 F. Supp. 671, 685 (D.D.C. 1988). On appeal, the Supreme Court concluded that the case had become partially moot and therefore vacated the district court judgment and remanded the case to the district court for further proceedings on the non-moot aspects of the case, including the dispute over subsection (3) of section 630. *See American Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 160–61 (1989). In doing so, the Court "emphasize[d] that the District Court should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so." *Id.* at 161. On remand, the district court dismissed the amended complaint on statutory construction grounds, avoiding the constitutional issues. *See American Foreign Serv. Ass'n v. Garfinkel*, 732 F. Supp. 13 (D.D.C. 1990).

> Congress (or anyone else) without the authorization of Executive Branch personnel who derive their authority from the President.

Id. at 42.

In light of this constitutional position, the Department did not interpret the congressional enactments at issue in the *AFSE* litigation as vesting in executive branch employees a right to provide classified information to Members of Congress without official authorization. *See id.* (appropriations provision does not confer such a right); *id.* at 50 n.43 (5 U.S.C. §7211 "does not confer a right to furnish national security information to Congress."). Based on the same separation of powers analysis, we do not give such an interpretation to the currently applicable provisions. Accordingly, we conclude that the classified information nondisclosure agreements may validly be applied to a disclosure to a Member of Congress and that section 625 of the Treasury, Postal Service and General Government Appropriations Act does not authorize any disclosure to a Member of Congress that is not permitted under Executive Order 12356.[6]

b. *Interpretation of Executive Order 12356*

We turn now to question (e), which concerns the interpretation of Executive Order 12356. We stress that this question also implicates issues of policy, practice and precedent with respect to which the panel may wish to consult others in the executive branch.

Question (e) asks "[w]hether Executive Order 12356 can be read to permit a cleared employee of the Executive Branch to disclose classified information to a cleared member of Congress based on the employee's determination of the member's need to know." Panel Memorandum at 2. The Department's brief in the *AFSE* litigation summarizes the executive branch framework — consisting of Executive Order 12356 and related directives and nondisclosure agreements — for the protection of classified information. *See generally, AFSE* Brief at 2–7. The first pertinent part of that framework is Executive Order 12356's two-part requirement of trustworthiness and "need to know":

> Executive Order No. 12,356 provides that access must be limited as a general matter to those individuals who have been determined to be trustworthy, and that access to any particular item of information may be granted only where it "is essential to the accomplish-

[6] The panel's question (f) also refers to the currently applicable classified information executive order, Executive Order 12958, 3 C.F.R. 333 (1996), but our discussion will refer only to Executive Order 12356, because that was the order applicable at the time of Mr. Nuccio's disclosure to a Member of Congress. In any event, we do not find the differences in wording between the two executive orders to be relevant for purposes of the questions posed by the panel.

> ment of lawful and authorized Government purposes" (§ 4.1(a)) — *i.e.*, where the individual has a "need to know" that information.

AFSE Brief at 3. The brief notes that in addition to the provisions of Executive Order 12356, reference should be made to the requirement imposed by the Director of Central Intelligence, on the basis of his statutory authority to protect intelligence sources and methods, that all individuals with access to SCI and other Central Intelligence Agency information sign nondisclosure agreements (*see id.* at 4–6) and to the governmentwide requirement, based on National Security Decision Directive 84, *Safeguarding National Security Information* (issued by President Reagan on Mar. 11, 1983), that all individuals with access to classified information (at any level) sign nondisclosure agreements (*see id.* at 6–7). We would add to this listing the relevant directives issued by the Director of Central Intelligence. *See, e.g.*, Director of Central Intelligence Directives 1/7, *Security Controls on the Dissemination of Intelligence Information* (1987), and 1/19, *Security Policy for Sensitive Compartmented Information* (1995).

Members of Congress, as constitutionally elected officers, do not receive security clearances as such, but are instead presumed to be trustworthy. *See* Information Security Oversight Office, *Classified Information Nondisclosure Agreement (Standard Form 312) Briefing Booklet* ("ISOO Briefing Booklet") at 66. "Members of Congress are not exempt, however, from fulfilling the 'need-to-know' requirement." *Id.* Thus, the issue presented by question (e) is whether, under the existing executive branch rules and practices, individual employees are free to make a disclosure to Members of Congress based on their own determination on the need-to-know question.

The answer to that question is most assuredly "no." The Department's brief in the *AFSE* litigation stated that it would be unconstitutional for Congress to "remov[e] decisionmaking about congressional access [to classified information] from the usual channels in the Executive Branch and allow[ ] lower-ranking employees to decide for themselves whether to divulge such information to Congress or its Members." *AFSE* Brief at 41–42. In making this statement, the Department was obviously indicating that the existing regime under Executive Order 12356 did not afford individual employees such discretion. With respect to "disseminations that would be made to Congress or its Members . . ., the decision whether to grant access to the information must be made by someone who is acting in an official capacity on behalf of the President and who is ultimately responsible, perhaps through intermediaries, to the President." *Id.* at 42. "Both the Executive Branch and Congress have recognized that [disclosure of classified information] must be conducted through the secure channels established by the Branches working in cooperation." *Id.* at 45.

Thus, the longstanding practice under Executive Order 12356 (and its successor) has been that the "need to know" determination for disclosures of classified infor-

mation to Congress is made through established decisionmaking channels at each agency. We believe that it would be antithetical to the existing system for an agency to permit individual employees to decide unilaterally to disclose classified information to a Member of Congress — and we are unaware of any agency that does so.[7] In this regard, we suggest that the panel may wish to review what procedures were in place at the Department of State for such decisions at the time of Mr. Nuccio's disclosure of classified information to a Member of Congress.

2. *Whistleblower Protection Act*

The panel's question (b) asks whether denial or revocation of a SCI security clearance is a "personnel action" within the meaning of the Whistleblower Protection Act ("WPA"), 5 U.S.C. §2302. *See* Panel Memorandum at 1. A recent decision of the United States Court of Appeals for the Federal Circuit has settled this question. *See McCabe v. Department of the Air Force*, No. 94–3463, 1995 WL 469464 (Fed. Cir. 1995). Affirming a decision of the Merit Systems Protection Board, the Federal Circuit held in *McCabe* that the revocation of a security clearance is not a personnel action within the meaning of the WPA. The court's reasoning was as follows:

> Under *Egan v. Department of Navy*, 484 U.S. 518, 98 L. Ed. 2d 918, 108 S. Ct. 818 (1988), an agency's decision to grant or deny a security clearance is not judicially reviewable, except to the extent that an agency must follow any applicable procedures. "It should be obvious that no one has a 'right' to a security clearance. The grant of a clearance requires an affirmative act of discretion on the part of the granting official." *Egan*, 484 U.S. at 528. Given the high degree of discretion involved in matters of national security, we are convinced that Congress did not intend that agency decisions regarding security clearance status be encompassed within the definition of "personnel action" under the WPA.

Id. at **2. We believe that the Federal Circuit's decision was clearly a correct application of the Supreme Court's decision in *Egan*.[8]

[7] We do not doubt that some agencies may have in place procedures whereby very senior officials are vested with this authority. However, we understand question (e) to be inquiring about procedures with respect to the broad category of "cleared employees," not this much narrower category of very senior officials.

[8] In addition, even if revocation of a security clearance were to be viewed as a personnel action under the WPA, revoking a security clearance because of an unauthorized disclosure of classified information would not be a "prohibited personnel action" under the WPA. The WPA's prohibition against taking a personnel action because of a disclosure by an employee contains an express exception for disclosure of classified information. *See* 5 U.S.C. §2302(b)(8)(A); *see also* ISOO Briefing Booklet at 72 ("The [classified information nondisclosure form] does not

Continued

Mr. Nuccio's attorney argues that "Congress expressed its intent that the definition of 'prohibited personnel practices' would include 'any personnel action against an employee who discloses information to Congress.'" Nuccio Statement at 7, quoting 5 U.S.C. §2302(b). The Department rejected this argument in the *AFSE* litigation. After citing the express exception for disclosure of classified information contained in subsection 2302(b)(8)(A), *see supra* note 8, the Department noted that:

> by not including the exception for classified information in subsection 2302(b)(8)(B), which provides for disclosures to Inspectors General or the Office of Special Counsel of the Merit Systems Protection Board, Congress evidenced an intent to limit disclosures of classified information to particular Executive Branch officials with a designated need-to-know. Although Congress also stated in the whistleblower statute that "[t]his subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress" (5 U.S.C. §2302(b)), that provision does not confer an affirmative right to make such disclosures.

AFSE Brief at 50 n.43.

3. *Executive Order 12674*

The panel's question (a), *see* Panel Memorandum at 1, seeks our views on an argument that Mr. Nuccio's attorney makes in a footnote:

> Mr. Nuccio was acting consistently with the directives of the Office of the President as expressed and documented in Executive Order No. 123674 [sic], which require *every* federal employee to "disclose waste, fraud, abuse and corruption to appropriate officials [sic]." While the term "appropriate officials" is undefined in the Executive Order, there is no suggestion therein that it does not include members of Congress, and in particular members of oversight committees with direct interest in such abuse and corruption.

Nuccio Statement at 6 n.6.

The reference here is to section 101(k) of Executive Order 12674, *Principles of Ethical Conduct for Government Officers and Employees*, 3 C.F.R. 215, 215 (1990) as amended by Executive Order 12731, 3 C.F.R. 306, 307 (1991), which

conflict with the 'whistleblower' statute (5 U.S.C. §2302). The statute does not protect employees who disclose classified information without authority.").

provides that "[e]mployees shall disclose waste, fraud, abuse, and corruption to appropriate authorities."[9] Mr. Nuccio's attorney correctly states that the term "appropriate authorities" is not defined in Executive Order 12674. We do not question that in certain circumstances that term could include a member of a congressional oversight committee. However, we believe—for the reasons set forth in the prior sections of this opinion—that the question of who is an "appropriate authority" to receive classified information is governed by Executive Order 12356 and the related directives and practices. Put another way, there should be no conflict in these circumstances between the ethical conduct executive order and the classified information executive order. The latter executive order should control because it more directly and specifically addresses the subject at issue, the disclosure of classified information.

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Office of Legal Counsel

[9] Mr. Nuccio's attorney employs the term "appropriate officials," but we will refer to the term actually used in the executive order: "appropriate authorities."

Application of the Ineligibility Clause

The Ineligibility Clause of the Constitution would not bar the appointment of Representative Bill Richardson to serve as United States Ambassador to the United Nations or of Senator William Cohen to serve as Secretary of Defense.

December 31, 1996

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether the Ineligibility Clause, U.S. Const. art. I, § 6, cl. 2, would forbid the appointment of Representative Bill Richardson as United States Ambassador to the United Nations or of Senator William Cohen as Secretary of Defense. The Ineligibility Clause provides that

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time . . . .

We believe that the Clause would not bar either appointment.

Representative Richardson entered Congress on January 3, 1983; has served continuously since then; and recently won election to the 105th Congress. The President has announced his intention to nominate Representative Richardson to be United States Ambassador to the United Nations. *See* 22 U.S.C. § 287(a).

The President sets the salary of the Ambassador to the United Nations, at an amount not to exceed the rate of pay for chiefs of mission. *Id.* § 287(g). Chiefs of mission may receive pay up to the amount for Level II of the Executive Schedule (and may receive total compensation up to the amount for Level I). *Id.* § 3961(a). The salary of the current Ambassador equals the pay for Executive Level II — the statutory maximum. At least one prior Congress in which Representative Richardson was serving voted to increase the pay for the Executive Levels and thus to raise the ceiling on the salary for the position. *See* Pub. L. No. 101–194, § 703(a)(1), 103 Stat. 1716, 1768 (1989). Furthermore, during his first term, the President increased the salary for the current Ambassador. We assume that the 105th Congress will not enact any further increase before Representative Richardson would be appointed, and we understand that the President's annual order about pay in the executive branch, which will be issued shortly, will not increase the pay for the Executive Levels.

Only increases during the 105th Congress, and before Mr. Richardson's appointment, could be disqualifying. The Ineligibility Clause identifies, as the disqualifying event, an increase "during the Time for which [the Member of Congress] was elected." In 1922, President Harding sought Attorney General Daugherty's

opinion whether the Ineligibility Clause blocked the appointment of Senator William S. Kenyon as United States Circuit Judge because there had been a salary increase during Senator Kenyon's prior term. An Act of Congress had increased judicial salaries on February 25, 1919, while Senator Kenyon was serving a term that expired on March 4, 1919. On March 4, he began another term as Senator, to which he had been elected in 1918. Attorney General Daugherty concluded that the Ineligibility Clause covers only increases during the term that a Member of Congress is currently serving and that the salary increase during Senator Kenyon's prior term did not stand in the way of his appointment. 33 Op. Att'y Gen. 88 (1922).[1] Thus, any increases voted by past Congresses, or ordered by the President during past Congresses, would not bar Representative Richardson's appointment. (Under the circumstances here, we need not decide whether it is the action of Congress in raising the ceiling or of the President in dictating the pay that is the relevant "encrease[]" under the Ineligibility Clause.) Moreover, any increases that might take place after Mr. Richardson's appointment would not implicate the Ineligibility Clause, which is a bar to appointment when emoluments "shall have been encreased" and thus "on its face plainly shows an intention of preventing an appointment only when an increase in the emoluments of an office precedes an appointment to that office." *Constitutional Law—Article I, Section 6, Clause 2—Appointment of Member of Congress to a Civil Office*, 3 Op. O.L.C. 286, 288 (1979).

Senator Cohen did not seek reelection and thus will cease to be a member of the Senate when the new Congress convenes. He therefore would not be appointed "during the Time for which he was elected," and his appointment would not be within the prohibition of the Ineligibility Clause, no matter what increases in the salary for Secretary of Defense may have been enacted while he was in the Senate. *See, e.g.*, Memorandum for William P. Rogers, Deputy Attorney General, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, *Re: Qualification as Member of the Subversive Activities Control Board* (May 18, 1953).

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[1] We have noted that "appointment of a Member of Congress to an office created by some previous Congress, of which he was also a member, has not been considered to be within the prohibition of the Constitution. Numerous such appointments have been made in the past." Memorandum for Files, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, *Re: Effect Upon the Judicial Appointment of a Former Congressman of a Judicial Salary Increase, Enacted by the Congress from Which He Has Resigned* at 2 (Dec. 12, 1963). *See also* Memorandum for the Attorney General, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel, Untitled (Sept. 1, 1954).

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