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OF THE

UNITED STATES DEPARTMENT OF JUSTICE

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FOREWORD

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

The Attorney General is responsible, "from time to time," to "cause to be edited, and printed in the Government Printing Office [Government Publishing Office], such of his opinions as he considers valuable for preservation in volumes." 28 U.S.C. § 521. The Official Opinions of the Attorneys General of the United States comprise volumes 1–43 and include opinions of the Attorney General issued through 1982. The Attorney General has also directed OLC to publish those of its opinions considered appropriate for publication on an annual basis, for the convenience of the Executive, Legislative, and Judicial Branches and of the professional bar and general public. These OLC publications now also include the opinions signed by the Attorney General. The first 32 published volumes of the OLC series covered the years 1977 through 2008. The present volume 33 covers 2009.

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

Opinions of the Attorney General

Opinions of the Office of Legal Counsel

OPINIONS

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

Assistance of Counsel in Removal Proceedings (I)

The Constitution does not confer a constitutional right to effective assistance of counsel in removal proceedings, because the alien has no constitutional right to counsel, including government-appointed counsel, in the first place.

Although the Constitution does not entitle an alien to relief for his lawyer's mistakes, the Department may, in its discretion, allow an alien to reopen removal proceedings based on the deficient performance of his lawyer.

In extraordinary cases, where a lawyer's deficient performance likely changed the outcome of an alien's removal proceedings, the Board may reopen removal proceedings notwithstanding the absence of a constitutional right to such relief.

January 7, 2009

OPINION IN REMOVAL PROCEEDINGS*
MATTER OF ENRIQUE SALAS COMPEAN, RESPONDENT
MATTER OF SYLLA BANGALY, RESPONDENT
MATTER OF J-E-C- ET AL., RESPONDENTS

On August 7, 2008, pursuant to 8 C.F.R. § 1003.1(h)(1)(i) (2007), I directed the Board of Immigration Appeals ("Board") to refer to me for review its decisions in the above-captioned cases, and I invited the parties and any interested amici to submit briefs addressing the questions I planned to consider on certification.

For the reasons set forth in the accompanying opinion, I affirm the Board's orders denying reopening in the certified cases and overrule the Board's decisions in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), and *Matter of Assaad*, 23 I. & N. Dec. 553 (BIA 2003), to the extent those decisions are inconsistent with the legal conclusions and administrative framework set forth in the opinion.

* * * * *

The Supreme Court has recognized constitutional claims for ineffective assistance of counsel only where a person has a constitutional right to a

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* Editor's Note: This opinion was subsequently vacated by *Matter of Compean, Bangaly & J-E-C-*, 25 I. & N. Dec. 1 (Att'y Gen. 2009); *Assistance of Counsel in Removal Proceedings (II)*, 33 Op. O.L.C. 57 (2009) (Holder, Att'y Gen.).

government-appointed lawyer. In contrast to a defendant in a criminal case, an alien has no right—constitutional or statutory—to government-appointed counsel in an administrative removal proceeding. *Compare* Immigration and Nationality Act ("INA" or "Act") § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2006) (providing that an alien has a "privilege of being represented, at no expense to the Government, by counsel of the alien's choosing"), *and* INA § 292, 8 U.S.C. § 1362 (2006), *with* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."), *and Gideon v. Wainwright*, 372 U.S. 335 (1963). The question before me is whether, notwithstanding the absence of a constitutional right to a government-appointed lawyer, there is nevertheless a constitutional right to effective assistance of counsel in removal proceedings. More specifically, the question is whether the Constitution entitles an alien who has been harmed by his lawyer's deficient performance in removal proceedings to redo those proceedings.

In *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), the Board of Immigration Appeals ("Board") responded to an alien's constitutional claim of ineffective assistance of counsel by assuming, consistent with the earlier rulings of two federal courts of appeals, that an alien "may" have a constitutional right to effective assistance of counsel under the Due Process Clause of the Fifth Amendment. *Id*. at 638. Having thus accepted the potential existence of such a right, the Board's decision established three threshold requirements—commonly known as the "*Lozada* factors"—that an alien must satisfy to reopen his removal proceedings on the basis of lawyer error. The Board revisited these issues 15 years later in *Matter of Assaad*, 23 I. & N. Dec. 553 (BIA 2003), in response to a claim from the Immigration and Naturalization Service ("INS") that Supreme Court precedent in criminal and habeas cases undermined the notion of a constitutional right to effective assistance of counsel in removal proceedings. The Board acknowledged "some ambiguity in the basis set forth in [*Lozada*] for [aliens] to assert ineffective assistance claims," but declined to overrule its prior decision. *Id*. at 558. Among the reasons cited by the Board, one loomed large: "[S]ince *Matter of Lozada* was decided 15 years ago, the circuit courts have consistently continued to recognize that . . . [an alien] has a Fifth Amendment due process right to a fair immigration hearing and may be denied that right if counsel prevents the respondent from meaningfully presenting his or her case." *Id*. (citing cases).

Five years later, that condition no longer holds, as several courts of appeals, relying on the same Supreme Court precedent that the INS had cited in *Assaad*, have rejected the proposition that there is a constitutional right to the effective assistance of counsel in removal proceedings. *See, e.g.*, *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008); *Afanwi v. Mukasey*, 526 F.3d 788, 798–99 (4th Cir. 2008); *Magala v. Gonzales*, 434 F.3d 523, 525 (7th Cir. 2005); *see also Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006) (suggesting the same in dictum); *Stroe v. INS*, 256 F.3d 498, 500–01 (7th Cir. 2001) (same and noting that the "question whether there is ever a constitutional right to [effective assistance of] counsel in immigration cases is ripe for reconsideration"). In addition, the courts of appeals that continue to recognize the constitutional right have diverged with respect to the standards and requirements for a successful ineffective assistance claim. Some courts, for example, have applied a strict standard of prejudice while others have not; some have treated the *Lozada* factors as mandatory while others have not.

Because of the circuit splits on these important issues, and the resulting patchwork of rules governing motions to reopen removal proceedings in different parts of the country, I ordered the Board to refer these matters to me so that I could review the Board's position on both the constitutional question and the question of how best to resolve an alien's claim that his removal proceeding was prejudiced by his lawyer's errors. *See* Att'y Gen. Order Nos. 2990-2008, 2991-2008, & 2992-2008 (Aug. 7, 2008); *see also* 8 C.F.R. § 1003.1(h)(1)(i) (2008); *cf. Matter of R-A-*, 24 I. & N. Dec. 629, 631 (Att'y Gen. 2008) (stressing the importance of a "consistent, authoritative, nationwide interpretation of ambiguous provisions of the immigration laws"). To aid my review, I invited the parties and any interested amici curiae to submit briefs addressing the constitutional question. I invited them to address also whether, if there is no constitutional right to effective assistance of counsel, an alien nevertheless should be permitted, as a matter of administrative discretion, to reopen removal proceedings based on his lawyer's deficient performance.[1]

[1] My orders of August 7, 2008, called for submission of all briefs by September 15, 2008, and stated that "requests for extensions will be disfavored." Following requests from a few parties and amici, however, I extended the briefing deadline for all briefs by three weeks, until October 6, 2008. *See* Att'y Gen. Order No. 2998-2008 (Sept. 8, 2008). Thus, in

I conclude, as have a growing number of federal courts, that the Constitution does not confer a constitutional right to effective assistance of counsel in removal proceedings. The reason is simple: Under Supreme Court precedent, there is no constitutional right to effective assistance of counsel under the Due Process Clause or any other provision where—as here and as in most civil proceedings—there is no constitutional right to counsel, including government-appointed counsel, in the first place. Therefore, although the Fifth Amendment's Due Process Clause applies in removal proceedings, as it does in any civil lawsuit or in any administrative proceeding, that Clause does not entitle an alien to effective assistance of counsel, much less the specific remedy of a second bite at the apple based on the mistakes of his own lawyer.

However, the foregoing conclusion does not foreclose a remedy for aliens prejudiced by their lawyers' errors, because the Department of Justice is not limited to the very least that the Constitution demands. Although the Constitution does not entitle an alien to relief for his lawyer's mistakes, I conclude that the Department may, in its discretion, allow an alien to reopen removal proceedings based on the deficient performance of his lawyer. Balancing the strong public interest in the fairness and accuracy of removal proceedings with the strong public interest in the finality of completed proceedings, I establish in this opinion an administrative framework for the exercise of that discretion. In extraordinary cases, where a lawyer's deficient performance likely changed the outcome of an alien's removal proceedings, the Board may reopen those proceedings notwithstanding the absence of a constitutional right to such relief. Applying this administrative framework to the three cases before me, I affirm the Board's orders.

I.

I begin with a brief summary of the certified matters. In *Matter of Compean*, respondent, a native and citizen of Mexico, unlawfully entered the

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total, the parties and amici had one day shy of two full months to prepare their submissions, which is more time than that usually granted for briefing matters before the Board. *See* Board of Immigration Appeals Practice Manual ch. 4.7(a) & (c), at 65–67 (rev. ed. July 30, 2004). I received more than a dozen amicus briefs from interested organizations and individuals.

United States in 1989. In 2004, he was placed in removal proceedings and sought cancellation of removal. The Immigration Judge denied respondent's request on the ground that he had failed to establish the "exceptional and extremely unusual hardship" required by section 240A(b)(1)(D) of the Act, 8 U.S.C. § 1229b(b)(1)(D) (2006), and ordered him removed from the United States. After the Board affirmed on the merits, respondent filed a motion to reopen on the grounds of ineffective assistance of counsel. Respondent's self-described "most important" claim was that his former lawyer had failed to present evidence of a pending Form I-130 visa petition, although in point of fact that form had been part of the record before the Immigration Judge. In May 2008, the Board denied the motion on two grounds. First, the Board found that respondent had not filed a complaint with disciplinary authorities regarding his lawyer's deficient representation or explained his failure to do so, as required by *Lozada*. Second, noting that respondent had not produced any evidence that his lawyer's conduct precluded him from presenting before the Immigration Judge, the Board concluded that respondent had failed to establish that he had suffered prejudice from his lawyer's actions.

In *Matter of Bangaly*, respondent, a native and citizen of Mali, entered the United States in 1998 on a non-immigrant visa, which he unlawfully overstayed. He was placed in removal proceedings in 2003. Respondent subsequently obtained several continuances because he had filed for adjustment of status based upon his 2002 marriage to a United States citizen. In 2004, the Department of Homeland Security denied respondent's request for adjustment of status because his wife had failed three times to appear for an interview. The Immigration Judge denied respondent's request for a further continuance so that he could seek reopening of his adjustment of status petition and ordered him removed. Respondent's lawyer filed a notice of appeal, which stated that respondent would challenge the denial of the additional continuance. Respondent's lawyer never filed an appellate brief, however, and in 2005 the Board summarily affirmed the Immigration Judge's order. Approximately 2 years later, respondent moved to reopen his removal proceedings. Respondent alleged that his former counsel's failure to file an appellate brief and to notify him that his appeal had been summarily denied constituted ineffective assistance of counsel but did not explain how he had been prejudiced by these failures. In March 2008, the Board denied respondent's motion because he had failed to comply with

one of *Lozada*'s requirements: He had not given his former counsel a chance to respond to his allegations of ineffective representation.

Finally, in *Matter of J-E-C-*, the lead respondent, a native and citizen of Colombia, was admitted to the United States in 2000 on a six-month visa. His wife and children, also respondents, were admitted in 2001, on six-month visas as well. Lead respondent then sought asylum, withholding of removal, and protection under the Convention Against Torture on his own behalf and derivatively for his wife and children. In 2003, the Department of Homeland Security found respondents ineligible for relief and began removal proceedings. In those proceedings, lead respondent conceded removability, but renewed his application for asylum and withholding of removal. The Immigration Judge denied relief, concluding that, among other things, lead respondent had failed to demonstrate persecution "on account of" a protected ground, and ordered respondents removed. Respondents' lawyer filed a notice of appeal with the Board alleging four points of error, but the Board never received a brief in support of the appeal. Notwithstanding the absence of a brief, the Board addressed the four points of error on the merits, and affirmed what it called the "thorough and well-reasoned decision" of the Immigration Judge. Thereafter, respondents moved to reopen, contending that counsel's failure to file a brief constituted ineffective assistance and submitting a copy of the brief they would have submitted. In April 2008, the Board denied respondents' motion. Noting its previous decision addressing the merits of the claims, and reviewing those claims again, the Board concluded that respondents had suffered no prejudice from the failure to file a brief because a brief would not have changed the outcome of their proceedings.

II.

Several uncontroversial propositions inform whether there is a constitutional right to effective assistance of counsel in removal proceedings. A removal proceeding is a civil action, not a criminal proceeding. *See, e.g.*, *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry."); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal proce-

dure.").[2] Therefore, the Sixth Amendment's guarantee that, in all "criminal prosecutions," an "accused shall . . . have the Assistance of counsel for his defence" does not apply. *See, e.g.*, *Abel v. United States*, 362 U.S. 217, 237 (1960) ("[D]eportation proceedings are not subject to the constitutional safeguards for criminal prosecutions."). Accordingly, the federal courts uniformly have held that the Sixth Amendment right to counsel (which includes the right to government-appointed counsel) does not apply in removal proceedings. *See, e.g.*, *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003); *United States v. Loaisiga*, 104 F.3d 484, 485 (1st Cir. 1997); *Delgado-Corea v. INS*, 804 F.2d 261, 262 (4th Cir. 1986); *United States v. Cerda-Pena*, 799 F.2d 1374, 1376 n.2 (9th Cir. 1986). The corresponding Sixth Amendment right to effective assistance of counsel, *see Strickland v. Washington*, 466 U.S. 668, 685–86 (1984), does not apply either. *See, e.g.*, *Afanwi*, 526 F.3d at 796 & n.31 (citing cases).

Unlike the Sixth Amendment, the Due Process Clause of the Fifth Amendment, which provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law," applies to civil and criminal proceedings alike. Moreover, that Clause applies to "all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Therefore, it is well established that the Fifth Amendment entitles all aliens who have entered the United States to due process of law in removal proceedings. *See, e.g.*, *Reno v. Flores*, 507 U.S. 292, 306 (1993); *see also Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.").

The Fifth Amendment's due process guarantee, however, applies only against the government. *See, e.g.*, *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (stating that the Due Process Clause applies only to "*governmental decisions* which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment" (emphasis added)). Thus, the actions of a private party,

[2] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (enacted Sept. 30, 1996), established a new type of proceeding known as a "removal" proceeding to replace "deportation" proceedings.

including a privately retained lawyer, can give rise to a due process claim only if those actions can be attributed to the government for constitutional purposes. *See, e.g.*, *S.F. Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 542–43 (1987) (stating that where a plaintiff alleges a violation of the Fifth Amendment, "[t]he fundamental inquiry is whether the [defendant] is a governmental actor to whom the prohibitions of the Constitution apply"); *cf. Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (stating that the Due Process Clause of the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful"). The question presented in these cases, therefore, is whether the conduct of a privately retained lawyer can be attributed to the government for Due Process Clause purposes such that a litigant's general right to due process with respect to state action would include a specific right to effective representation by that private lawyer.

In the usual civil case, the answer to this question is a resounding no.[3] It is well established that, as a general matter, there is no constitutional right to counsel, and thus no constitutional right to effective assistance of coun-

[3] The Supreme Court has recognized a due process right to government-appointed counsel (and thus a constitutional right to effective assistance of counsel) in certain civil proceedings that pose the same ultimate threat to a defendant's physical liberty as a criminal trial that may result in incarceration. *See Vitek v. Jones*, 445 U.S. 480, 496–97 (1980) (plurality opinion) (holding that an individual has a constitutional right to appointed counsel in a civil proceeding the outcome of which may result in physical confinement at a psychiatric institution); *In re Gault*, 387 U.S. 1, 36–41 (1967) (holding that a juvenile has a constitutional due process right to appointed counsel in a delinquency proceeding where he faces commitment to a juvenile-detention facility). But these cases involved the right to government-appointed counsel, and the Supreme Court has largely limited these holdings to their particular contexts. *See, e.g.*, *Stroe*, 256 F.3d at 500 (noting that *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Pennsylvania v. Finley*, 481 U.S. 551 (1987), "seem . . . to have cut back on earlier cases according a Fifth Amendment right to counsel when physical liberty is at stake in a noncriminal proceeding") (citing *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 31–32 (1981), and *In re Gault*, 387 U.S. at 36). And, in any event, the "preeminent generalization that emerges" from these cases is that the right to government-appointed counsel "has been recognized to exist *only* where the litigant may lose his physical liberty if he loses the litigation." *Lassiter*, 452 U.S. at 25 (emphasis added). Although an alien may be detained during the course of a removal proceeding, he does not "lose his physical liberty" based on the outcome of the proceeding. That is, the point of the proceeding is not to determine or provide the basis for incarceration or an equivalent deprivation of physical liberty, but rather to determine whether the alien is entitled to live freely in the United States or must be released elsewhere.

sel, in civil cases. *See, e.g.*, *MacCuish v. United States*, 844 F.2d 733, 735 (10th Cir. 1988) (citing cases). Instead, the rule is that counsel's errors are imputed to the client who chose his counsel, and that the client's sole remedy is a suit for malpractice against counsel and not a litigation do-over. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 397 (1993); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92 (1990); *Link v. Wabash R.R.*, 370 U.S. 626, 634 n.10 (1962); *Magala*, 434 F.3d at 525. That is true even when the case is complex or the stakes are especially high. Indeed, "[t]he non-right to effective assistance of counsel in civil cases is the rule even when the proceeding though nominally civil involves liberty or even life, as in a capital habeas corpus case, where the Supreme Court has held that there is no right to effective assistance of counsel." *Stroe*, 256 F.3d at 500 (citing *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Pennsylvania v. Finley*, 481 U.S. 551 (1987)).

Despite the foregoing uncontroversial principles, several courts of appeals have suggested or held that the Due Process Clause creates a right to effective assistance of counsel in removal proceedings. *See, e.g.*, *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008); *Aris v. Mukasey*, 517 F.3d 595, 600–01 (2d Cir. 2008); *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007); *Fadiga v. Att'y Gen.*, 488 F.3d 142, 155 (3d Cir. 2007); *Sene v. Gonzales*, 453 F.3d 383, 386 (6th Cir. 2006); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1274 (11th Cir. 2005); *Tang*, 354 F.3d at 1196; *see also Nelson v. Boeing Co.*, 446 F.3d 1118, 1120 (10th Cir. 2006) ("[T]he only context in which courts have recognized a constitutional right to effective assistance of counsel in civil litigation is in immigration cases.").[4] As

[4] It is important to note that many of these courts have limited the right to effective assistance of counsel to proceedings in which an alien seeks non-discretionary relief, thus precluding constitutional ineffective assistance of counsel claims in proceedings seeking purely discretionary relief such as waiver or cancellation of removal, asylum, adjustment of status, or voluntary departure. *See, e.g.*, *Garcia v. Att'y Gen.*, 329 F.3d 1217, 1223–24 (11th Cir. 2003); *Huicochea-Gomez v. INS*, 237 F.3d 696, 700 (6th Cir. 2001); *Mejia-Rodriguez v. Reno*, 178 F.3d 1139, 1148 (11th Cir. 1999); *see also Gutierrez-Morales v. Homan*, 461 F.3d 605, 609–10 (5th Cir. 2006); *Guerra-Soto v. Ashcroft*, 397 F.3d 637, 640–41 (8th Cir. 2005); *United States v. Torres*, 383 F.3d 92, 104-05 (3d Cir. 2004). *But see, e.g.*, *Fernandez v. Gonzales*, 439 F.3d 592, 602 & n.8 (9th Cir. 2006); *Rabiu v. INS*, 41 F.3d 879, 882–83 (2d Cir. 1994). These limitations flow from Supreme Court precedent holding that the constitutional guarantee of procedural due process applies to government proceedings only where a constitutionally protected interest in life, liberty, or property is at

noted, the Board has accepted these decisions as well. *See Assaad*, 23 I. & N. Dec. at 560; *Lozada*, 19 I. & N. Dec. at 638.

In doing so, however, the Board did not consider several critical points. For one thing, the cases the Board has accepted as supporting a potential Fifth Amendment right to effective assistance of counsel in removal proceedings rest on a weak foundation. As several courts now recognize, the cases acknowledging a constitutional right to effective assistance of counsel in removal proceedings trace back to a pair of 1975 decisions by the United States Court of Appeals for the Fifth Circuit, *Barthold v. INS*, 517 F.2d 689 (5th Cir. 1975), and *Paul v. INS*, 521 F.2d 194 (5th Cir. 1975), neither of which actually held that such a right exists. *See Afanwi*, 526 F.3d at 797. In fact, the Fifth Circuit explicitly stated in those cases that the "existence, let alone the nature and scope, of such a right has not been established," and merely suggested in dictum that "any right an alien may have in this regard is grounded in the fifth amendment guarantee of due process rather than the sixth amendment right to counsel." *Barthold*, 517 F.2d at 690 (emphasis added); *see also Paul*, 521 F.2d at 197 (following *Barthold*).[5]

More important, the constitutional analysis in the cases that recognize a Fifth Amendment right to effective assistance of counsel in removal proceedings is, in the words of the Seventh Circuit "distinctly perfunctory," *Stroe*, 256 F.3d at 500; *see also Assaad*, 23 I. & N. Dec. at 558 ("We . . . acknowledge some ambiguity in the basis set forth in [*Lozada*] for [aliens] to assert ineffective assistance claims."), and fails to establish that lawyers privately retained to represent aliens in removal proceedings are state actors for purposes of the Due Process Clause. This is a fatal flaw because, as noted, it is indisputable that the Fifth Amendment applies only against

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stake in those proceedings, *see, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005), and that such interests are not implicated where proceedings involve only the pursuit of purely discretionary administrative relief, *see, e.g.*, *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464–67 (1981); *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 7–10 (1979).

[5] 5 In *Assaad*, the Board emphasized that the Fifth Circuit had "joined the other circuits that have found a basis in the Fifth Amendment for ineffective assistance of counsel claims." 23 I. & N. Dec. at 558 (citing *Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001)). But the Fifth Circuit itself has stated that it "has repeatedly assumed without deciding that an alien's claim of ineffective assistance may implicate due process concerns under the Fifth Amendment." *Mai*, 473 F.3d at 165 (emphasis added).

the government. *See, e.g.*, *S.F. Arts & Athletics*, 483 U.S. at 542–43; *Mathews*, 424 U.S. at 332. And as the Eighth Circuit recently observed, it is "difficult to see how an individual, such as an alien's attorney, who is not a state actor, can deprive anyone of due process rights." *Rafiyev*, 536 F.3d at 860–61.

For private action to trigger scrutiny under the Due Process Clause, there must be a "sufficiently close nexus" between the federal government and the conduct of the private party "so that the action of the latter may be fairly treated as that of" the government itself. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974); *accord Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982) (stating that "constitutional standards" may be invoked to challenge private action "only when it can be said that the [government] is responsible for the specific conduct of which the plaintiff complains"); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (emphasizing that the Due Process Clause applies to a private actor only if he may "fairly be said to be a state actor"). That may be the case where the private actor "has exercised powers that are traditionally the exclusive prerogative of the [government]," or where the government "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Blum*, 457 U.S. at 1004–05 (internal quotation marks omitted). But "[t]he mere fact that a [private party] is subject to state regulation does not by itself convert its action into that of the [government]" for purposes of the Due Process Clause. *Id*. at 1004 (internal quotation marks omitted). And "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient" either. *Id*. at 1004–05.

Applying these standards here, I agree with the courts that have concluded that the government is not responsible for the conduct of a privately retained lawyer in removal proceedings. *See Rafiyev*, 536 F.3d at 861; *Afanwi*, 526 F.3d at 798–99; *Magala*, 434 F.3d at 525. A private lawyer plainly does not exercise "powers that are traditionally the exclusive prerogative" of the government because the lawyer is an adversary of the government. *Cf. Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 304 (2001) ("The state-action doctrine does not convert opponents into virtual agents."); *Polk County v. Dodson*, 454 U.S. 312, 317–24 (1981) (holding that adversaries of the state are not state actors for purposes of 42 U.S.C. § 1983). Nor, in the ordinary case, can it be said

that a private lawyer's deficient performance in representing an alien in removal proceedings is the product either of government "coerci[on]" or "encouragement." *Blum*, 457 U.S. at 1004–05; *see, e.g.*, *Afanwi*, 526 F.3d at 799 ("Afanwi's counsel was privately retained pursuant to 8 U.S.C. § 1362, and his alleged ineffectiveness . . . was a purely private act. The federal government was under no obligation to provide Afanwi with legal representation, and there was no connection between the federal government and counsel's failure.") (footnote omitted).

It is true that, as respondents and their amici assert, the federal government has taken affirmative steps to notify aliens of the availability of counsel, *see, e.g.*, 8 C.F.R. § 1240.10(a)(1)–(3) (2008), and to regulate the private immigration bar, *see, e.g.*, *id*. §§ 1003.101(a)(1)–(4), 1003.102(k), 1292.1(a)(1)–(6), 1292.2(a), (c), (d), 1292.3(a). But as noted, the "mere fact that a [private party] is subject to state regulation does not by itself convert its action into that of the [government]" for purposes of the Due Process Clause. *Blum*, 457 U.S. at 1004 (internal quotation marks omitted). Moreover, for the constitutional standards to apply, the government must be responsible for "the specific conduct of which the plaintiff complains." *Id*. (emphasis added). It cannot accurately be said that the government's steps to encourage competent representation and to improve the quality of counsel as a general matter are "responsible" for a specific lawyer's incompetent performance. *Cf. Lawrence v. Florida*, 547 U.S. 327, 337 (2007) ("[A] State's effort to assist prisoners in postconviction proceedings does not make the State accountable for a prisoner's delay."). The relevant regulatory provisions do not condone poor representation, much less constitute "significant encouragement" of, *Blum*, 457 U.S. at 1004, or "willful participa[tion] in," *Lugar*, 457 U.S. at 941 (internal quotation marks omitted), incompetent performance. These basic and well-established principles, which the Board did not consider in either *Lozada* or *Assaad*, have moved several courts to hold that private lawyers in immigration proceedings are not state actors for due process purposes. *See Rafiyev*, 536 F.3d at 861; *Afanwi*, 526 F.3d at 798–99; *Magala*, 434 F.3d at 525.

In arguing that a private lawyer's representation of an alien in a removal proceeding may nonetheless constitute state action, respondents and their amici rely heavily on the Supreme Court's decision in *Cuyler v. Sullivan*, 446 U.S. 335 (1980). *See, e.g.*, Brief for American Immigration Law Foundation as Amicus Curiae at 11–12, 15, 17; Brief for Joseph Afanwi as

Amicus Curiae at 3, 6, 10, 12. But that reliance is misplaced. In *Cuyler*, the Court held that a criminal defendant may challenge the effectiveness of his trial lawyer even if that lawyer was privately retained. *See* 446 U.S. at 342–45. A reading of the Court's decision, however, makes plain that its holding was merely an application of the underlying Sixth Amendment right to counsel in criminal cases (and the equal justice principles that make that right applicable to the actions of both government-appointed and privately retained lawyers). As the Court explained:

> Our decisions make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel . . . . [T]he Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The [Sixth Amendment] right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.
>
> A proper respect for the Sixth Amendment disarms [the] contention that defendants who retain their own lawyers are entitled to less protection than defendants for whom the State appoints counsel. . . . The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection.

Id. at 344 (emphasis added). As the repeated references in this passage to the Sixth Amendment make clear, the Court's ruling was grounded in the Sixth Amendment and its explicit guarantee of a right to counsel, including government-appointed counsel, which are inapplicable here. That is, the Court recognized a constitutional right to effective assistance of counsel by privately retained lawyers in criminal proceedings because: (1) the Constitution itself, through the Sixth Amendment, guarantees a right to counsel in such proceedings (whether the defendant is "indigent" or able to hire lawyers); (2) to be meaningful, this right must refer to "adequate" (or effective) assistance of counsel; and (3) in light of principles of equal justice, the right must apply to all criminal defendants, whether they hire private lawyers with their own funds or have a government-appointed lawyer. Thus, where, as here, there is no constitutional right to counsel that includes the right to government-appointed counsel, the holding in *Cuyler* does not apply. *See, e.g.*, *Stroe*, 256 F.3d at 501 ("In criminal cases . . . the Sixth Amendment is interpreted to impute even a retained lawyer's goof-

ups to the state, *Cuyler v. Sullivan*, 446 U.S. 335, 342–45 (1980)—but then the Sixth Amendment creates a right to counsel, whereas all that the due process clause requires, so far as procedure is concerned, is notice and an opportunity for a hearing.").

Were there any doubt on this score, it is resolved by the Supreme Court's decisions in *Wainright v. Torna*, 455 U.S. 586 (1982) (per curiam), and *Coleman v. Thompson*, 501 U.S. 722 (1991). In *Wainwright*, the Court considered whether the respondent, a criminal defendant, could challenge his lawyer's failure to file timely a discretionary appeal to the state supreme court. Noting that "a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals," 455 U.S. at 587 (citing *Ross v. Moffitt*, 417 U.S. 600 (1974)), the Court quickly disposed of the respondent's claim. "Since respondent had no constitutional right to counsel," the Court explained, "he could not be deprived of the effective assistance of counsel by his retained counsel's failure to file the application timely." *Id*. at 587–88. In reaching this conclusion, the Court explicitly addressed the due process and state action issues relevant here, explaining that the respondent "was not denied due process of law by the fact that counsel deprived him of his right to petition" the state supreme court for review because "[s]uch deprivation . . . was caused by his counsel, and not by the State." *Id*. at 588 n.4.

The Court applied the same analysis in *Coleman*. In that case, the petitioner, a criminal defendant, had been convicted and sentenced to death. On state habeas review, he raised various federal constitutional claims, but the state supreme court refused to address them because his lawyer had filed an untimely notice of appeal. Normally, such "procedural default" would bar review of the claims on federal habeas review, but the petitioner argued that his lawyer's error should excuse the default. As in *Wainwright*, the Court rejected this argument swiftly: "There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. *See Wainwright v. Torna*, 455 U.S. 586 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance)." *Coleman*, 501 U.S. at 752 (some citations omitted). The Court further explained that because the petitioner's lawyer was "the petitioner's agent when acting, or failing to act, in furtherance of the litigation, . . . the petitioner must 'bear the risk of attorney error.'" *Id*. at 753 (quoting *Mur-*

ray v. Carrier, 477 U.S. 478, 488 (1986); and citing *Link*, 370 U.S. at 634, and *Irwin*, 498 U.S. at 92).

The Court acknowledged that a different rule applied where, as in *Cuyler*, a lawyer's conduct had deprived his client of the Sixth Amendment's right to counsel. The Court explained, however, that "[t]his is not because . . . the error is so bad that 'the lawyer ceases to be an agent of the petitioner.'" *Coleman*, 501 U.S. at 754 (quoting petitioner's brief). Rather, "if the procedural default is the result of [constitutional] ineffective assistance of counsel, *the Sixth Amendment itself* requires that responsibility for the default be imputed to the State." *Id*. (internal quotation marks omitted) (emphasis added). "In other words," wrote the Court, "it is not the gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, i.e., 'imputed to the State.'" *Id*. Where a criminal defendant has been deprived of his Sixth Amendment right to effective assistance of counsel, the Court continued, "the State, which is responsible for the denial as a constitutional matter, must bear the cost. . . . A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel." *Id*.; *cf. Lawrence*, 549 U.S. at 337 (holding that a lawyer's filing errors do not entitle a party to equitable tolling in a "context where [the party] ha[s] no constitutional right to counsel").

Respondents and their amici attempt to distinguish *Wainwright* and *Coleman* on the grounds that those cases implicated federalism concerns that are not present here and involved discretionary state appeals rather than first appeals as of right. *See, e.g.*, Brief for American Immigration Law Foundation as Amicus Curiae at 16–18; Brief for Joseph Afanwi as Amicus Curiae at 11–12. But to the extent relevant here, nothing in the Court's decisions turned on these considerations. (Indeed, *Wainwright* did not even discuss federalism.) *See Assaad*, 23 I. & N. Dec. at 565–66 (Scialabba, Chairman, and Filppu, Board Member, concurring). Respondents and their amici also contend that *Wainwright* and *Coleman* should not guide the constitutional inquiry here because they concerned criminal, rather than immigration, matters. *See, e.g.*, Brief for Respondent J-E-C- at 9–11; Brief for American Immigration Law Foundation as Amicus Curiae at 19–20; Brief for Joseph Afanwi as Amicus Curiae at 11–12; *see also Assaad*, 23 I. & N. Dec. at 560 (majority opinion) (stating, in adhering to

Lozada, that *Wainwright* and *Coleman* "arose in the context of criminal, rather than immigration, proceedings" and thus did not control over circuit precedent issued in the immigration context). But *Coleman* involved state habeas review, which—like a removal proceeding—is civil in nature. Moreover, if anything, that *Wainwright* and *Coleman* related to criminal cases actually cuts against the arguments presented by respondents and their amici because criminal defendants enjoy an express constitutional right to assistance of counsel, including government-appointed counsel, while aliens in removal proceedings do not.

In the final analysis, respondents' and their amici's arguments boil down to an assertion that, notwithstanding all of the foregoing Supreme Court precedent and settled constitutional law, an alien's general due process right to a full and fair hearing on the merits of his immigration claims must include a specific right to effective assistance of counsel because without such a specific right removal proceedings would be fundamentally unfair. In particular, respondents and their amici contend that because the stakes in removal proceedings are so high, the immigration laws are so complex, and aliens are so often ill equipped—due to cultural, educational, financial, or language barriers—successfully to handle them alone, due process requires the guiding hand of competent counsel. *See, e.g.*, Brief for the Immigration Law Clinic at the University of Detroit Mercy School of Law as Amicus Curiae at 2–4; Brief for Respondent Bangaly at 9–10 (arguing for a fundamentally fair proceeding); Brief for Respondent J-E-C- at 12 (same); *see also, e.g.*, *Hernandez v. Mukasey*, 524 F.3d 1014, 1017–18 (9th Cir. 2008); *Hernandez-Gil v. Gonzales*, 476 F.3d 803, 806–07 (9th Cir. 2007). This argument is insufficient to override the relevant constitutional holdings of *Wainwright* and *Coleman*, which had nothing to do with the complexity of the issues involved or the wealth and sophistication of the litigants. Nor can the arguments convert otherwise private actors into state actors, which, as discussed, is the prerequisite for a Due Process Clause claim.

Moreover, respondents' and their amici's argument regarding the special nature of removal proceedings ignores key implications of the constitutional right they assert. If respondents and their amici are correct that a Fifth Amendment right to effective assistance of counsel flows from a litigant's relative disadvantage in certain civil proceedings, the Constitution would arguably require not just effective assistance by privately retained lawyers in removal proceedings, but also assistance of counsel—including govern-

ment-appointed counsel—in removal proceedings. Yet no court has ever held that such a right exists in removal proceedings. Nor has any court ever suggested that where an alien represents himself in his removal proceedings (as often happens), he has a constitutional right to seek or obtain reopening of the proceedings on the ground that his own performance was incompetent. This fact is revealing, because as the Supreme Court has explained in the Sixth Amendment context, there are serious equal protection concerns with construing the Constitution to confer greater rights on an alien who chose to avail himself of the privilege to retain counsel than on an alien who did not do so or who could not do so because he was indigent. *See Cuyler*, 446 U.S. at 344.

In addition, if correct, respondents' and their amici's Fifth Amendment argument would apply with equal, if not greater, force to many other forms of civil proceedings. Yet courts have repeatedly and expressly held that there is no constitutional right to effective assistance of counsel in other civil contexts where the stakes are as high (or higher) than in removal proceedings and where litigants suffer from the same alleged disadvantages as aliens. As Judge Easterbrook explained in a recent Seventh Circuit opinion, "The Constitution entitles aliens to due process of law, but this does not imply a right to good lawyering. Every litigant in every suit and every administrative proceeding is entitled to due process, but it has long been understood that lawyers' mistakes are imputed to their clients." *Magala*, 434 F.3d at 525 (citing cases); *see also Stroe*, 256 F.3d at 500.

In sum, and as a number of courts have now recognized, there is no valid basis for finding a constitutional right to counsel in removal proceedings, and thus no valid basis for recognizing a constitutional right to effective assistance of privately retained lawyers in such proceedings. The Sixth Amendment right to effective assistance of counsel in criminal cases does not apply because removal proceedings are civil. And the Fifth Amendment does not confer an equivalent right because the Due Process Clause applies only against the government, aliens have no constitutional right to government-appointed lawyers in removal proceedings, and there is no other ground for treating private lawyers as state actors. Accordingly, the government is not "responsible" for the denial of effective representation in removal proceedings "as a constitutional matter." *Coleman*, 501 U.S. at 754; *see also, e.g.*, *Rafiyev*, 536 F.3d at 860–61 (concluding that because "[c]onstitutional rights are rights against the government" and it is "diffi-

cult to see how an individual, such as an alien's attorney, who is not a state actor, can deprive anyone of due process rights," there "is no constitutional right under the Fifth Amendment to effective assistance of counsel in a removal proceeding").

The fact that aliens in removal proceedings have a statutory privilege to retain counsel of their choosing at no expense to the government, *see* INA §§ 240(b)(4) & 292, 8 U.S.C. §§ 1229a(b)(4) & 1362, does not change the constitutional analysis, because a statutory privilege is not the same as a right to assistance of counsel, including government-appointed counsel, under the Constitution. *See Finley*, 481 U.S. at 556 ("[T]he fact that the defendant has been afforded assistance of counsel [under state law] does not end the inquiry for Federal constitutional purposes. Rather, it is the source of that right to a lawyer's assistance, combined with the nature of the proceedings, that controls the constitutional question. In this case, respondent's access to a lawyer is the result of the State's decision, not the command of the United States Constitution."). Under *Finley*, *Wainwright* and *Coleman*, it is the presence or absence of a constitutional (as opposed to statutory or other) right to counsel, including government-appointed counsel, that controls whether there is a constitutional right to effective assistance of counsel. *See Rafiyev*, 536 F.3d at 861 ("Removal proceedings are civil; there is no constitutional right to an attorney, so an alien cannot claim constitutionally ineffective assistance of counsel.") (citing *Wainwright*, *Coleman* and other cases). Because the Constitution does not confer a right to counsel (including government-appointed counsel) in removal proceedings, I conclude, as have a growing number of federal courts of appeals, that there is no constitutional right to effective assistance of counsel in such proceedings. To the extent they are inconsistent with this conclusion, *Lozada* and *Assaad* (and any other Board precedent decisions on point) are overruled.

III.

Having concluded that there is no constitutional right to effective assistance of counsel in removal proceedings, I consider whether a non-constitutional source of law—either the immigration statutes or departmental regulations—entitle an alien to reopen his removal proceedings based on his lawyer's deficient performance. They do not. The Act and

its implementing regulations merely permit an alien to hire "such counsel" as "he shall choose," INA § 292; *accord id*. § 240(b)(4)(A); 8 C.F.R. § 1003.16(b) (2008); they give an alien "no right to complain," much less reopen his proceedings, "if the lawyer he hires is ineffective." *Stroe*, 256 F.3d at 500; *see also Jezierski v. Mukasey*, 543 F.3d 886, 888 (7th Cir. 2008) ("No statute entitles the alien to effective assistance of counsel."); *cf. Father & Sons Lumber and Bldg. Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1097 (6th Cir. 1991) (holding that the Administrative Procedure Act, 5 U.S.C. § 555(b) (1988), which provides that a "person compelled to appear in person before an agency . . . is entitled to be accompanied, represented, and advised by counsel," does not "confer a statutory right to effective assistance of counsel"). Accordingly, neither the Constitution nor any statutory or regulatory provision entitles an alien to a do-over if his initial removal proceeding is prejudiced by the mistakes of a privately retained lawyer.

That said, the Department of Justice is "not limited to the very least that the Constitution"—or the Act—"demands." *Magala*, 434 F.3d at 526. Although the law does not require the Department to provide an alien with the right to reopen his removal proceedings based on lawyer error, the law allows the Department to do so "as a matter of sound discretion." *Id*. The source for this authority is the Department's broad authority to reopen removal proceedings. *See* INA § 240(c)(7) (permitting a motion to reopen within 90 days of the date on which a final administrative order of removal is entered); *id*. § 240(b)(5)(C) (granting an alien 180 days to seek reopening in order to rescind a removal order entered in absentia; and providing no time limit where the alien did not receive notice of the immigration hearing or was in custody); 8 C.F.R. § 1003.2 (2008). The Act and its implementing regulations place a few limits on the Board's discretion in determining whether reopening is warranted, *see, e.g.*, INA § 240(c)(7)(B) (providing that a motion to reopen must state "the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material"); 8 C.F.R. § 1003.2(c) (2008) ("A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing[.]"), but the Board generally enjoys "broad discretion" in ruling on motions to reopen, and may deny reopening even where an alien has made

a prima facie showing of eligibility for relief. *INS v. Doherty*, 502 U.S. 314, 323 (1992); *accord INS v. Abudu*, 485 U.S. 94, 105–06 (1988); *INS v. Rios-Pineda*, 471 U.S. 444, 449 (1985); *Matter of Coelho*, 20 I. & N. Dec. 464, 471–72 (1992); *cf. Matter of J-J-*, 21 I. & N. Dec. 976, 984 (BIA 1997) (stating that the authority to reopen proceedings sua sponte is limited to "exceptional" circumstances and "is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations, where enforcing them might result in hardship").[6]

Reopening removal proceedings on the basis of a lawyer's deficient performance is a permissible exercise of this broad discretion. It is also a proper exercise of that discretion in appropriate circumstances—namely, if certain prerequisites, explained below, are met—because the stakes in removal proceedings are sometimes high, the immigration laws can be complex, and many aliens would be better equipped to navigate them with counsel. *See, e.g.*, *Aris*, 517 F.3d at 600; *Hernandez-Gil*, 476 F.3d at 806–07. Moreover, and regrettably, "[t]he deficiencies of the immigration bar are well known." *Stroe*, 256 F.3d at 504; *see also, e.g.*, *Aris*, 517 F.3d at 596, 600–01 ("With disturbing frequency, this Court encounters evidence of ineffective representation by attorneys retained by immigrants seeking legal status in this country."). There is a strong public interest in ensuring that these deficiencies do not affirmatively undermine the fairness and accuracy of removal proceedings. *Cf. Final Rule: Professional Conduct for Practitioners—Rules and Procedures*, 65 Fed. Reg. 39,513, 39,514–15 (June 27, 2000) (recognizing that an effective disciplinary system protects the public, preserves the integrity of the immigration courts, and helps maintain high professional standards); *Final Rule: Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances*, 73 Fed. Reg. 76,914, 76,915 (Dec. 18, 2008) (defining "additional categories of behavior that constitute misconduct" by attorneys and accredited representatives in order to "preserve the fairness and integrity of immigration proceedings, and increase the level of protection afforded to aliens in those proceedings"). That interest justifies allowing the Board

[6] Although this opinion discusses the Board's power to reopen, immigration judges also have the power to reopen removal proceedings based on a lawyer's deficient performance, *see* 8 C.F.R. § 1003.23 (2008), and shall be guided by the same standards and procedures set forth herein when adjudicating such a motion. Likewise, the framework in this opinion applies to claims of deficient performance raised before the Board on direct review.

to mitigate the consequences of a lawyer's deficient performance by allowing an alien to relitigate his removal in the extraordinary case where his lawyer's deficient performance likely changed the outcome of his initial removal proceedings.[7]

At the same time, it is important to recognize that there is a strong public interest in the expeditiousness and finality of removal proceedings, an interest that Congress has repeatedly emphasized through legislation imposing time limits and curbing discretionary relief. *See, e.g.*, *Liadov v. Mukasey*, 518 F.3d 1003, 1009–10 (8th Cir. 2008) ("Congress in recent years has taken repeated action to expedite removal proceedings and curb perceived abuses."). As the Supreme Court has observed, granting motions to reopen "too freely" would undermine this interest by "permit[ting] endless delay of deportation by aliens creative and fertile enough to continuously produce new and material facts sufficient to establish a prima facie case." *Abudu*, 485 U.S. at 108 (internal quotation marks omitted); *see also Doherty*, 502 U.S. at 323 (stating that motions to reopen are "especially" disfavored "in a deportation proceeding, where, as a general matter, every delay works to the advantage of the deportable alien who wishes

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[7] The interest in ensuring that a lawyer's deficient performance does not undermine the fairness and accuracy of removal proceedings does not warrant, however, allowing a motion to reopen based on the conduct of non-lawyers (except where an alien is represented by an accredited representative pursuant to 8 C.F.R. § 1292.1(a)(4) or in the extraordinary case where an alien reasonably but erroneously believed that someone was a lawyer). The reason is that lawyers and accredited representatives are governed by rules of professional conduct and have skills, including but not limited to knowledge of immigration laws and procedures, that are directly related to furthering the interest that aliens and the government have in fair and accurate immigration proceedings. *See, e.g.*, *Hernandez*, 524 F.3d at 1018–19. The same cannot be said of non-lawyers, so-called "notarios" and other unaccredited immigration consultants. *See, e.g.*, *Mendoza-Mazariegos v. Mukasey*, 509 F.3d 1074, 1077 n.4 (9th Cir. 2007) ("[T]he immigration system in this country is plagued with 'notarios' who prey on uneducated immigrants."); *see also* Executive Office for Immigration Review, U.S. Dep't of Justice, Notice, *"Notarios," Visa Consultants, and Immigration Consultants Are Not Attorneys* (Nov. 20, 2008), http://www.usdoj.gov/eoir/press/08/NotariosNoticeProtectionsCAFINAL112008.pdf. Accordingly, the deficient performance claim established in this opinion extends only to the conduct of a lawyer, an accredited representative, or a non-lawyer the alien reasonably but erroneously believed to be a lawyer and who was retained to represent the alien in the proceedings; it does not extend any further or to the conduct of an alien representing himself. *Cf. Hernandez*, 524 F.3d at 1018–19 (holding that an alien may not pursue an ineffective-assistance-of-counsel claim with respect to the conduct of a non-lawyer).

merely to remain in the United States"); *Betouche v. Ashcroft*, 357 F.3d 147, 150 (1st Cir. 2004) ("Since a delay in deportation may itself constitute a substantial boon to an alien already subject to a final deportation order, there exists a significant prospect that entirely meritless and/or collusive ineffective assistance claims may be filed for purely dilatory purposes."). This concern is especially strong when an alien seeks reopening on the basis of a lawyer's alleged deficient performance, because even a meritless motion can succeed in tying up the system and postponing an alien's removal for months or even years based on the difficulties inherent in assessing and adjudicating a lawyer's performance after the fact. Federal courts have observed that they are increasingly burdened by claims of lawyer error and have condemned "the numerous groundless and dilatory claims" of this sort that are "routinely submitted" to immigration judges and the Board. *Betouche*, 357 F.3d at 150.

The balancing of these competing considerations in addressing motions to reopen under the Act is committed to the discretion of the Attorney General. *See Abudu*, 485 U.S. at 108, 110. I exercise that discretion in this opinion by identifying the general criteria to be used by the Board and immigration judges in addressing motions to reopen based on claims of deficient performance by counsel. At the same time, the Board and immigration judges retain considerable discretion in addressing such motions. Whether an alien has made a sufficient showing to warrant relief based on counsel's allegedly deficient performance is, in each case, committed to the discretion of the Board or the immigration judge. And the Board and immigration judges retain discretion to deny relief in appropriate circumstances even if the prerequisites described below are satisfied, especially where the ultimate relief sought is discretionary.

IV.

With these competing interests in mind, I turn to the general framework that the Board and immigration judges should apply henceforth when aliens seek to reopen removal proceedings based on a lawyer's deficient performance. To avoid confusion with what has heretofore been treated as a constitutional claim of ineffective assistance of counsel, I will refer to the

claim recognized in this opinion as a "deficient performance of counsel" claim.[8]

In establishing a framework for consideration of deficient performance claims, I do not write on a blank slate. As noted, 20 years ago, in *Lozada*, 19 I. & N. Dec. 637, the Board held (albeit based on erroneous constitutional underpinnings) that an alien may qualify for reopening of his removal proceedings based on lawyer error. To qualify for relief, the Board explained, an alien must establish that his lawyer's failings had been "egregious," and that he had been prejudiced by his lawyer's performance. *Id*. at 638–39. In addition, the Board established three requirements, the so-called *Lozada* factors, for reopening removal proceedings on grounds of lawyer error. First, the alien must submit an affidavit "attesting to the relevant facts," including "a statement that sets forth in detail the agreement that was entered into with former counsel with respect to the actions to be taken [in the litigation] and what counsel did or did not represent to the [alien] in this regard." *Id*. at 639. Second, "former counsel must be informed of the allegations and allowed the opportunity to respond," and that response, if any, must accompany the motion. *Id*. And third, "the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not." *Id*.

The *Lozada* standards and requirements have largely stood the test of time, but 20 years of experience has also revealed ways in which they can and should be improved. The administrative framework established today supersedes that set forth in *Lozada*, but draws on its approach. Significantly, it is designed, as the framework in *Lozada* was, to enable the Board to resolve most deficient performance claims on the basis of the written record presented by the parties in connection with the motion without

[8] In the interest of national uniformity, the Board and immigration judges should apply the framework set forth below in toto, even in circuits that have previously held that there is a constitutional right to effective assistance of counsel. That will allow those circuits to reconsider the question (en banc if necessary) more efficiently and easily, without the weight of the Board's 1988 *Lozada* precedent, which predated the majority of the relevant judicial decisions. If, notwithstanding my decision today, a court of appeals subsequently reaffirms (or decides in the first instance) that there is a constitutional right to effective assistance of counsel in removal proceedings, and that court's decision has become final and unreviewable, the Board and immigration judges will need to determine what elements of the framework may be implemented in that circuit consistent with the court's decision.

having to remand to an immigration judge for fact-finding. *See Patel v. Gonzales*, 496 F.3d 829, 831–32 (7th Cir. 2007) (noting that the *Lozada* factors were designed to "reduce the potential for abuse by providing information from which the [Board] can assess whether an ineffective assistance claim has enough substance to warrant the time and resources necessary to resolve the claim on its merits"). Evidentiary hearings before an immigration judge cannot always be avoided, but "such hearings are an added burden on both the parties and the Immigration Court, and they rarely assist in resolving the merits of the substantive immigration law issues presented by a particular case." *Matter of Rivera*, 21 I. & N. Dec. 599, 604 (BIA 1996). Consequently, the framework established today is intended, as *Lozada* was, to permit the Board to resolve the great majority of claims expeditiously on the basis of an alien's motion to reopen and accompanying documents alone. *See id*. (noting that the Board "prefer[s] to make final determinations of ineffective assistance of counsel claims on the documentary submissions alone, where possible"); *see also Betouche*, 357 F.3d at 150 ("The immigration courts, which reasonably cannot be expected to conduct a full-fledged evidentiary hearing for all such claims, must be able to impose fair and efficacious techniques for screening out, *ab initio*, the numerous groundless and dilatory claims routinely submitted in these cases.").

A.

To prevail on a deficient performance of counsel claim, an alien bears the burden of establishing three elements.

1.

First, the alien must show that his lawyer's failings were "egregious," a requirement the Board recognized in *Lozada*, 19 I. & N. Dec. at 639. In light of the strong public interest in finality and the rule that "litigants are generally bound by the conduct of their attorneys," *id*., it is not enough merely to demonstrate that one's lawyer made an ordinary mistake or could have presented a more compelling case. Moreover, given the danger of second-guessing a lawyer's performance with "the distorting effects of hindsight," it is appropriate in making this assessment to apply a "strong presumption that counsel's conduct falls within the wide range of reasona-

ble professional assistance." *Strickland*, 466 U.S. at 689. Requiring that the error be "egregious," and viewing the matter from counsel's perspective at the time, will help ensure that reopening is reserved for those extraordinary cases that truly warrant relief, and that relief is not granted simply because an alien shows after the fact that he received less than flawless representation.

2.

Second, in cases where the alien moves to reopen beyond the applicable time limit—typically 90 days from the date the removal order was entered—the Board may exercise its discretion to allow tolling of the 90-day period, but only if the alien affirmatively shows that he exercised due diligence in discovering and seeking to cure his lawyer's alleged deficient performance. *Cf., e.g.*, *Barry v. Mukasey*, 524 F.3d 721, 724–25 (6th Cir. 2008) (holding that the reopening deadline may be equitably tolled in cases involving a lawyer's deficient performance, provided that the alien shows due diligence); *Zhao v. INS*, 452 F.3d 154, 157–58 (2d Cir. 2006) (same). "Due diligence requires an alien to prove that the delay in filing the motion to reopen was due to an exceptional circumstance beyond his control." *Tapia-Martinez v. Gonzales*, 482 F.3d 417, 423 (6th Cir. 2007) (quotation marks omitted). In deficient performance cases, this will typically require that the alien prove he made timely inquiries about his immigration status and the progress of his case. It will also typically require that the alien promptly file a motion to reopen within a reasonable period after discovering his lawyer's deficient performance.

There is no bright line for determining when a particular delay is too long. Instead, the Board should evaluate due diligence on a case-by-case basis, taking into account the circumstances of the case and the reasons offered for any delay. The Board should perform this evaluation by determining objectively when a reasonable person should have discovered the possibility that he had been victimized by the lawyer's deficient performance, and when a reasonable person would have taken steps to cure it following discovery. *See Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (stating that the test is whether the lawyer's error was, "or should have been, discovered by a reasonable person in the situation"); *Patel v. Gonzales*, 442 F.3d 1011, 1016 (7th Cir. 2006) (asking "whether a reasonable

person in the plaintiff's position would have been aware of the possibility that he had suffered an injury") (internal quotation marks omitted). The determination of whether the facts and circumstances warrant tolling of the filing period is—like the decision on a motion to reopen based on counsel's allegedly deficient performance itself—committed in all instances to the discretion of the Board.

3.

Third, as the Board and courts of appeals uniformly have held, an alien must establish prejudice arising from the lawyer's errors. *See Lozada*, 19 I. & N. Dec. at 638; *cf. Strickland*, 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.").

The proper standard of prejudice to apply, however, is a crucial question on which even the courts of appeals that have recognized a constitutionally based claim of ineffective assistance have not spoken consistently. Some courts apply a strict standard. *See, e.g.*, *Sako v. Gonzales*, 434 F.3d 857, 864 (6th Cir. 2006) (holding that an alien "must establish that, but for the ineffective assistance of counsel, he would have been entitled to continue residing in the United States"). Other courts apply a standard similar to the one the Supreme Court established in Strickland for Sixth Amendment ineffective-assistance-of-counsel claims, namely "a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *See, e.g.*, *Fadiga*, 488 F.3d at 159. And one court—the Ninth Circuit—deems the prejudice requirement satisfied as long as the alien can show "plausible grounds for relief" on the underlying claim. *Mohammed v. Gonzales*, 400 F.3d 785, 794 (9th Cir. 2005).

I conclude that to establish prejudice arising from a lawyer's deficient performance sufficient to permit reopening, an alien must show that but for the deficient performance, it is more likely than not that the alien would have been entitled to the ultimate relief he was seeking. In doing so, I borrow from the standard commonly applied by the federal courts, in both civil and criminal proceedings, to motions for a new trial based on newly discovered evidence. *See, e.g.*, *Environmental Barrier Co., LLC v. Slurry Sys., Inc.*, 540 F.3d 598, 608 (7th Cir. 2008); *United States v. Johnson*, 519

F.3d 478, 487 (D.C. Cir. 2008). The Supreme Court itself has described such motions as "the appropriate analogy" to motions to reopen removal proceedings. *Abudu*, 485 U.S. at 110; *accord Doherty*, 502 U.S. at 323. And as the Court explained, "[t]he reasons why motions to reopen are disfavored in deportation proceedings are comparable to those that apply to . . . motions for new trials on the basis of newly discovered evidence. There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases." *Abudu*, 485 U.S. at 107 (footnote omitted).

In my judgment, the "more likely than not" standard is more appropriate than *Strickland*'s "reasonable probability" standard. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (recognizing that a "more likely than not" standard is more demanding than a "reasonable probability" standard). The *Strickland* standard, after all, was intended to vindicate a criminal defendant's constitutional right to effective assistance of counsel. Here, as discussed, there is no constitutional right to effective assistance of counsel, so the alien's interests relative to the public interest in finality are correspondingly weaker. It follows that the "more likely than not" standard is also more appropriate than the Ninth Circuit's "plausible grounds for relief" standard. Indeed, even *Strickland* rejected a comparable standard, explaining that "[v]irtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." 466 U.S. at 693. In short, the "more likely than not" standard best reflects and protects the strong public interest in ensuring the finality of removal proceedings while still providing a safety valve for those cases in which an alien was demonstrably harmed by his lawyer's egregious performance.

As noted, this standard of prejudice requires the alien to establish the probability that, but for his lawyer's error, he would have been entitled to the ultimate relief he was seeking. In most cases, this will require a showing that, but for the lawyer's error, the alien likely would have been entitled to continue residing in the United States. Hence, an alien cannot prevail on a claim that, for example, his lawyer was wrong in failing to request a continuance simply by showing that he likely would have been granted a continuance. Instead, he must show that, but for the lawyer's failing, he likely would have succeeded on the merits of his underlying claim to re-

main in the United States. And in cases where discretionary relief is at issue, an alien must present evidence that not only establishes he was eligible for relief, but also that he believes would have led to a favorable exercise of discretion.

This is a common-sense requirement: If the alien would have been denied discretionary relief had the merits been adjudicated, there can have been no prejudice arising from an error that led to the agency's failure to reach the merits. Moreover, because an alien who seeks only discretionary relief is removable, and because the request to reopen is itself discretionary, the Board may properly insist upon a clear showing that discretionary relief would have been granted if the merits had been adjudicated. This also will enable the Board to address some claims of lawyer error more efficiently, because it "may leap ahead, as it were, over the . . . threshold concerns . . . and simply determine that even if they were met, the movant would not be entitled to the discretionary grant of relief." *Abudu*, 485 U.S. at 105.[9]

B.

To enable the Board to determine if these standards have been met, an alien who seeks reopening of removal proceedings based on his lawyer's deficient performance also must submit certain documents in support of his motion. In particular, he must submit a detailed affidavit setting forth the facts that form the basis of the deficient performance of counsel claim. The affidavit must explain with specificity what his lawyer did or did not do, and why he, the alien, was harmed as a result. As the First Circuit has explained, "the requirement of a sworn affidavit, presaging and memorializing the testimony which the alien petitioner would present were he to be accorded a hearing, produces the primary evidentiary basis upon which the [agency] evaluates the bona fides of the petitioner's claim in determining whether a hearing is even warranted." *Betouche*, 357 F.3d at 150. Moreover, "by exposing an alien to the potential pains of perjury, the affidavit requirement foster[s] an atmosphere of solemnity commensurate with the gravity of the . . . claim, and serves as a screening device whereby deporta-

[9] It bears mentioning that many of the federal courts that have recognized constitutional claims to ineffective assistance of counsel in removal proceedings have not even permitted such claims where the relief sought is discretionary. *See supra* note 4.

ble aliens are discouraged from filing dilatory ineffective assistance claims." *Id*. (internal quotation marks omitted).

In addition to the alien's affidavit, the alien must attach five documents or sets of documents to his motion. If any of these documents is unavailable, the alien must explain why. If any of these documents is missing rather than nonexistent, the alien must summarize the document's contents in his affidavit.

1.

First, the alien must attach a copy of his agreement, if any, with the lawyer whose performance he alleges was deficient. Where there was no written agreement, the alien must specify in his affidavit what the lawyer had agreed to do, including whether it included the particular step in the proceedings in which the deficient performance is alleged to have occurred. This requirement will enable the Board to determine whether the alleged error was actually within the scope of the lawyer's representation. After all, the mere fact that a lawyer failed to do something—for example, file a petition for review—does not, by itself, establish that the lawyer's conduct was deficient, because the alien may not have retained the lawyer for that purpose. *See Lozada*, 19 I. & N. Dec. at 639 (noting that the alien "has not alleged, let alone established, that former counsel ever agreed to prepare a brief on appeal or was engaged to undertake the task"); *see also, e.g.*, *Beltre-Veloz v. Mukasey*, 533 F.3d 7, 10 (1st Cir. 2008) (holding that the petitioner's motion to reopen had a "fatal flaw" in that it "makes no mention of the nature, scope, or substance of the petitioner's arrangement with [his lawyer], nor does it indicate what communications the petitioner had with the attorney over the years").

2.

Second, the alien must attach both a copy of a letter to his former lawyer setting forth the lawyer's deficient performance and a copy of the lawyer's response, if any. (If the alien never received a response from his former lawyer, his affidavit must note the date on which he mailed his letter and state whether he made any other efforts to notify the lawyer.) The letter from the alien must suffice to put the lawyer on notice that the alien intends to file a deficient performance claim and to inform the lawyer of the facts

that the alien alleges in support of the claim. This requirement gives the former lawyer—whose professional competence is being questioned—an opportunity to present his side of the story, and helps to ensure that the Board has the facts necessary to render an informed judgment. As the Board recognized in *Lozada*, this requirement also has the effect of "discouraging baseless accusations" because "the potential for abuse is apparent where no mechanism exists for allowing former counsel, whose integrity or competence is being impugned, to present his version of events if he so chooses." 19 I. & N. Dec. at 639.

3.

Third, the alien must attach a completed and signed complaint addressed to the appropriate state bar or disciplinary authorities.[10] This requirement, like the preceding one, discourages baseless accusations and collusion, because it is one thing to file a motion that, even if denied, has the effect of delaying removal and another thing altogether to back that motion with the weight of a disciplinary complaint. *See Assaad*, 23 I. & N. Dec. at 556 (noting that the "bar complaint requirement acts as a protection against collusion between counsel and client to achieve delay in proceedings"). As the Board has explained, the requirement "increases our confidence in the validity of the particular claim, reduces the likelihood that an evidentiary hearing will be needed, and serves our long-term interests in monitoring the representation of aliens by the immigration bar." *Id.*; *cf.* 65 Fed. Reg. at 39,514–15; 73 Fed. Reg. at 76,915.

It should be noted that, under this requirement, the alien need not actually file the complaint with the appropriate state bar or disciplinary authorities, as *Lozada* had required. By making the actual filing of a bar complaint a prerequisite for obtaining (or even seeking) relief, it appears that *Lozada* may inadvertently have contributed to the filing of many unfounded or

[10] Where a deficient performance claim is based on the conduct of an accredited representative, *see* 8 C.F.R. § 1292.1(a)(4) (permitting aliens appearing before the Board to be represented by an accredited representative); *cf. Matter of Zmijewska*, 24 I. & N. Dec. 87, 94 (BIA 2007) (holding that the *Lozada* framework applies to accredited representatives), the alien must instead attach a complaint addressed to the Executive Office for Immigration Review disciplinary counsel, because such accredited representatives are subject to disciplinary action under the Executive Office for Immigration Review's professional conduct regulations.

even frivolous complaints. *See, e.g.*, Comment filed by the Committee on Immigration & Nationality Law, Association of the Bar of the City of New York (Sept. 29, 2008), in response to the *Proposed Rule for Professional Conduct for Practitioners—Rules and Procedures, and Representation and Appearances*, 73 Fed. Reg. 44,178 (July 30, 2008) ("Under the *Lozada* Rule, an ineffective assistance of counsel charge is often required in order to reopen a case or reverse or remand an unfavorable decision. The practice of filing such claims is rampant, and places well-intentioned and competent attorneys at risk of discipline."). Such unfounded complaints impose costs on well-intentioned and competent attorneys, and make it harder for state bars to identify meritorious complaints in order to impose sanctions on lawyers whose performance is truly deficient. The new approach is intended to avoid these problems by requiring only that the alien submit to the Board a completed and signed but unfiled complaint, and leaving it to the Board whether to refer the complaint to the state bar or to the Executive Office for Immigration Review disciplinary counsel for further action.[11]

4.

Fourth, if the alien's claim is that his former lawyer failed to submit something to the immigration judge or to the Board, he must attach the allegedly omitted item to his motion. For example, if the alien's claim is that his former lawyer failed to submit a brief to the Board, he must submit, in substance and detail if not in form, a copy of the brief that he alleges should have been filed. If the alien's claim is that his former lawyer failed to introduce certain evidence or testimony, he must submit that evidence (directly in the case of physical or documentary evidence and through a witness's affidavit in the case of testimony) to the Board. Moreover, the alien must explain in his affidavit whether he told his former lawyer about the evidence or testimony in question, and if not, why not.

Requiring aliens to submit such material to the Board will reduce delays and promote finality by ensuring that the Board can resolve most deficient performance claims without remanding for evidentiary hearings. In addition, requiring proof that an alien told his lawyer about evidence or testi-

[11] Of course, nothing prevents an alien, should he choose to do so, from filing his complaint with the state bar *and* with the Board. Prior filing of a complaint with the state bar simply is not a requirement for the motion to reopen.

mony—or had a good reason for failing to do so—is common sense. After all, if an alien never shared the existence of certain evidence or testimony with his lawyer, it is difficult to fault the lawyer for failing to submit that evidence or testimony to the immigration judge.

5.

Fifth and finally, where an alien is represented by counsel in seeking reopening, the motion for reopening shall contain the following signed statement of the new attorney: "Having reviewed the record, I express a belief, based on a reasoned and studied professional judgment, that the performance of my client's former counsel fell below minimal standards of professional competence."[12] This requirement—which is analogous to court of appeals rules requiring lawyers to attest to the existence of circuit splits or to questions of exceptional importance in petitions for rehearing en banc, *see, e.g.*, Third Circuit Rule 35.1 (2008); Federal Circuit Rule 35(b) (2008)—will further discourage meritless claims by serving as a reminder that challenges to the performance of another lawyer should not be made lightly.

C.

The legal standards set forth in Part IV.A and the evidentiary requirements set forth in Part IV.B are mandatory. That is, to be eligible for a favorable exercise of discretion based on a deficient performance claim, an alien must comply with all requirements that apply. Excusing an alien from compliance with a particular requirement, or deeming "substantial compliance" adequate (as several courts of appeals have done with respect to the

[12] A lawyer may not bypass this requirement by preparing a motion to reopen for the alien and then having the alien file the motion pro se. *Cf.* 8 C.F.R. § 1001.1(i) (2008) (defining the term "practice" to mean "the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client") (emphasis added); *id.* § 1001.1(k) (defining the term "preparation, constituting practice," to mean "the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers") (emphasis added). I also note that this requirement to acknowledge the deficient performance of counsel in the prior proceedings is applicable even where the same attorney continues to represent the alien in seeking to reopen the proceedings based on his own prior deficient performance.

Lozada factors, *see, e.g.*, *Reyes v. Ashcroft*, 358 F.3d 592, 597–99 (9th Cir. 2004)), would hinder the development of a complete record, making it more difficult for the government to respond and more difficult for the Board to adjudicate the case. It also would undermine the Board's (and the bar's) efforts to monitor the quality of representation before the immigration courts. Finally, excusing compliance in some cases would create uncertainty as to when a requirement will be enforced and when it will be waived. Of course, even if an alien complies with all applicable requirements, the Board is not compelled to reopen proceedings, as reopening ultimately is discretionary. *See, e.g.*, *Doherty*, 502 U.S. at 323.

D.

Finally, it bears noting that the Board's discretion to reopen on the basis of a lawyer's deficient performance is not limited to conduct that occurred during the agency proceedings. The Board may reopen on the basis of deficient performance that occurred subsequent to the entry of a final order of removal.[13]

In reaching this conclusion, I recognize that, in reviewing claims under the *Lozada* framework, the Board has not spoken consistently on the question of when deficient performance must occur to permit reopening. *See Afanwi*, 526 F.3d at 795–96 (noting that the Board "has issued contradictory opinions on the subject" and citing cases). I recognize also that the courts of appeals have taken conflicting views. *Compare Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1044 n.4 (9th Cir. 2000) ("A claim of ineffective assistance of counsel occurring after the [Board] has ruled may

[13] In cases involving claims of this sort, it is not uncommon for the alien to allege that his lawyer never notified him of the Board's decision in his case. To ensure that aliens receive notice of decisions in their cases and to forestall unfounded allegations that they did not, I have directed the Executive Office for Immigration Review to begin sending courtesy copies of final Board decisions to the aliens themselves in addition to sending them to the aliens' lawyers. The Executive Office for Immigration Review intends to do so beginning March 1, 2009. *See* Executive Office for Immigration Review, News Release, *Board to Begin Providing Copy of Decision to Aliens Who Are Represented by Counsel* (Dec. 19, 2008), http://www.usdoj.gov/eoir/press/08/BIAProvidesCourtesyCopy121908.pdf. After that date, aliens will be presumed to have received personal notice of the Board's decision (in addition to notice through counsel) if it was sent to the most recent address the alien provided to the Executive Office for Immigration Review, as required by 8 C.F.R. § 1003.15(d) (2008).

be raised with the [Board] by filing a motion to reopen."), *and Gjondrekaj v. Mukasey*, 269 F. Appx. 106, 108 (2d Cir. 2008) (remanding where the alien's lawyer missed the petition for review filing deadline, and holding that "to the extent the [Board] here concluded that it could not grant reopening or reissuance absent some error by the agency or ineffective assistance before the agency, it failed to apply the correct law"), *with Afanwi*, 526 F.3d at 795–96 (holding that the Board "does not have jurisdiction over an ineffective assistance claim arising out of an alien's counsel's failure to file a timely petition for review with the court of appeals").

In my judgment, the better view, and the one I adopt today, is that the Board has jurisdiction to consider deficient performance claims even where they are predicated on lawyer conduct that occurred after a final order of removal has been entered. The Board has broad discretion to reopen removal proceedings, and nothing in the statute or the regulations limits the grounds for reopening to events that occurred before the agency or prior to the entry of the final administrative order of removal. *See Firmansjah v. Ashcroft*, 347 F.3d 625, 627 (7th Cir. 2003) (explaining, in a case where the alien's lawyer had missed the petition-for-review filing deadline, that "[t]he Board of Immigration Appeals . . . has authority to reopen and revise its decisions on account of new developments" and "nothing prevents the Board from entering a new removal order, which is subject to a fresh petition for review"). In holding otherwise, the Fourth Circuit in *Afanwi* relied on 8 C.F.R. § 1003.1(d)(3)(ii) to conclude that the Board's jurisdiction is limited to "questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges." 526 F.3d at 795–96. But that regulation addresses only the scope and standard of review by the Board. It does not purport to restrict the Board's jurisdiction or to limit the Board's broad authority to reopen removal proceedings.

Deficient performance claims based on conduct that occurred after entry of a final order of removal shall be evaluated under the standards set forth in this opinion for all deficient performance claims. Thus, an alien must comply with the filing requirements set forth in Part IV.B, and must establish, among other things, that, but for the deficient performance, it is more likely than not that he would have been entitled to the ultimate relief he was seeking, as provided in Part IV.A. It is beyond the scope of this opinion to identify all the situations in which reopening after entry of a final order of removal may be warranted. There are, however, some situations in

which it clearly would be unwarranted, such as when the deficient performance claim involved the quality of a lawyer's briefs or arguments before a court of appeals—that is, when the claim involved conduct in proceedings conducted well after the administrative order of removal became final, in a separate tribunal in a separate branch of government.

V.

Before evaluating the Board's orders in the instant cases, it is necessary to address one final matter: how, if at all, the framework announced in this opinion should be applied to motions to reopen (including the three at issue here) that were filed prior to this opinion. The general rule is that an agency or court should apply the law in effect at the time that it renders its decision. *See Bradley v. Richmond Sch. Bd.*, 416 U.S. 696, 716 (1974); *see also Meghani v. INS*, 236 F.3d 843, 846 (7th Cir. 2001). In light of that rule, the Board and immigration judges should apply the substantive standards set forth in Part IV.A above to motions to reopen based on a lawyer's deficient performance, regardless of when such motions were filed. It would be unfair, however, to apply the new filing requirements set forth in Part IV.B to such motions, since aliens may have filed them in good faith reliance on *Lozada*. *See Bradley*, 416 U.S. at 720 (stating that changes in the law should not be applied to pending cases where those changes would result in the imposition of "new and unanticipated obligations" without adequate notice). Accordingly, I hold that the Board and immigration judges should apply the new filing requirements only with respect to motions filed after today; with respect to motions filed prior to this opinion, they should continue to apply the *Lozada* factors.[14]

With respect to the instant cases, then, the substantive standards set forth in Part IV.A above apply, but the new filing requirements set forth in Part IV.B do not. Applying those rules, I affirm the Board's decisions denying respondents' motions to reopen.

In *Matter of Compean*, respondent's motion was without merit for three reasons. First, applying the substantive standards set forth in this opinion,

[14] Given the potential delay between signing this opinion and its publication, it may be unreasonable to expect aliens to comply with the new filing requirements immediately. Accordingly, the Board and immigration judges may allow amendment of motions filed in the next few weeks to comply with the new filing requirements.

respondent has failed to establish either that his former lawyer committed an "egregious" error or that he was prejudiced by any deficiencies in the lawyer's conduct. As noted, respondent's self-described "most important" claim was that his former lawyer had failed to submit his Form I-130 visa petition to the Immigration Judge, but that form was in fact part of the record. Thus, he has shown neither that his lawyer's actions were egregious nor that, but for his lawyer's performance, it is more likely than not that he would have established the "exceptional and extremely unusual hardship" required for cancellation of removal. INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D). The Board therefore properly denied respondent's motion to reopen on the ground that he had failed to establish prejudice. Finally, as the Board noted, respondent failed to comply with *Lozada*'s requirement of filing a disciplinary complaint. Under *Lozada*, that alone warranted denial of his motion.

In *Matter of Bangaly*, respondent's motion was properly denied on either of two grounds. First, under *Lozada* (as under the new requirements set forth in this opinion), respondent was required to give his former lawyer notice of his alleged deficiencies and a chance to respond. As discussed above, such notice is important because it discourages baseless claims and because it makes it more likely that the Board can address the motion without the need to remand for a hearing. Yet, as the Board found, respondent failed to show that he complied with this requirement. Second, respondent has failed to show prejudice under the standard announced in this opinion. His motion to reopen was premised on his former lawyer's failure to file a brief with the Board appealing the Immigration Judge's denial of an additional continuance. But neither here nor before the Board has respondent made any effort to show that, had his lawyer filed a brief, he likely would have obtained the continuance, let alone that he likely would have been permitted to remain in the United States.

In *Matter of J-E-C-*, unlike the other two cases, respondents appear to have complied with the *Lozada* factors. Nevertheless, respondents' motion was properly denied for failure to establish prejudice. Among other things, the Board addressed the merits of each of the four points of error identified in respondents' notice of appeal before it affirmed the Immigration Judge's "thorough and well-reasoned decision" (Apr. 8, 2008). The Board also considered the brief submitted by respondents' new lawyer and found it unpersuasive, thus "affirming . . . that the respondent[] did not suffer prej-

udice" from the failure of his former lawyer to file an appellate brief. *Id*. Under the standard of prejudice adopted in this opinion, the Board's decision was correct.

VI.

In sum, for the reasons stated above, I overrule *Lozada* and *Assaad* to the extent they are inconsistent with the constitutional conclusions in this opinion, and I affirm the Board's decisions denying reopening in each of the matters before me.

MICHAEL B. MUKASEY
Attorney General

Constitutionality of the D.C. House Voting Rights Act of 2009

The constitutionality of the District of Columbia House Voting Rights Act of 2009 presents a close question, but the balance tips in favor of finding the Act constitutional.

Neither the text of the Constitution nor the analysis of applicable precedent clearly resolves the question of whether Congress may confer House voting rights on D.C. residents by legislation.

In the absence of a clear constitutional prohibition, the Constitution does not require denying the most basic rights in a democracy—the right to elect representation in the legislature and therefore to self-governance—to U.S. citizens who happen to be residents of the District of Columbia.

February 26, 2009

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT*

You have requested the view of the Department of Justice regarding the constitutionality of H.R. 157 and S. 160, which propose legislation granting congressional representation to the District of Columbia (collectively, the "D.C. House Voting Rights Act"). Although it presents a close constitutional question, in my view, for the reasons explained below, the balance tips in favor of finding this proposed legislation constitutional.

I. Executive Summary

H.R. 157 and S.160 would give the District of Columbia one voting member in the House of Representatives. Each bill includes a provision stating: "Notwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives." H.R. 157, § 2(a); S. 160, § 2(a). Each bill would grant the citizens of the District the ability to elect a voting member of the House of Representatives by identifying it as a congressional district in its own right, although neither bill purports to grant the District statehood.

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* Editor's Note: This opinion refers to views of the Office of Legal Counsel on the same legislation, which are available elsewhere in this volume. *See Views on Legislation Making the District of Columbia a Congressional District*, 33 Op. O.L.C. 156 (2009).

There are a number of strong arguments against the constitutionality of such a statute, including those advanced by the Office of Legal Counsel with respect to prior versions of the proposed legislation. *See Constitutionality of the D.C. Voting Rights Act of 2007*, 31 Op. O.L.C. 147 (2007) ("*D.C. Voting Rights Act*") (statement of John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel); E-mail for Velma Taylor, Office of Legislative Affairs, from Michelle Boardman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act of 2006* (May 22, 2006). The Office of Legal Counsel has recently presented to me its view that the current proposed legislation is similarly infirm. These arguments rest primarily on the text of Article I, Section 2 of the Constitution (the "Composition Clause"), which provides: "The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1 (emphasis added).

At the same time, there are a number of compelling arguments in favor of the constitutionality of the proposed legislation, including those advanced by a diverse array of well-respected constitutional scholars. *See, e.g.*, Viet D. Dinh & Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives* at 19 (Nov. 2004), https://www.dcvote.org/sites/default/files/upload/vietdinh112004.pdf ("Dinh & Charnes"); *Common Sense Justice for the Nation's Capital: An Examination of Proposals to Give D.C. Residents Direct Representation: Hearing Before the H. Comm. on Gov't Reform*, 108th Cong. 77–84 (June 23, 2004) (Serial No. 108-218) (statement of Kenneth W. Starr); *Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 18–22 (May 23, 2007) (S. Hrg. No. 110-440; Serial No. J-110-38) (statement of Patricia Wald) ("Wald Statement"); *see also* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 191 (1975). These scholars rely upon Congress's plenary power to legislate for the District of Columbia under Article I, Section 8, Clause 17 (the "District Clause"), together with case law holding that, under the authority conferred by the District Clause, Congress

may provide that the District should be treated as a state for constitutional purposes. In addition, proponents of the legislation contend that fundamental principles of democracy and the importance of the right to vote—principles that animate the Constitution and undergird our founding as a nation—further buttress their constitutional analysis.

These competing arguments highlight the fact that the constitutionality of the D.C. House Voting Rights Act presents a close constitutional question. Neither the text of the Constitution nor the analysis of applicable precedent clearly resolves the question of whether Congress may confer House voting rights on D.C. residents by legislation. In addition, should Congress enact the proposed legislation, that act would embody the will of the people of the United States to extend the franchise to District citizens. In that context, and in the absence of a clear constitutional prohibition, I cannot conclude that the Constitution requires us to ignore the will of the American people and to deny the most basic rights in a democracy—the right to elect representation in the legislature and therefore to self-governance—to U.S. citizens who happen to be residents of our nation's capital, the District of Columbia.[1]

II. The D.C. House Voting Rights Act of 2009 Is Constitutional

A. The District Clause Empowers Congress to Provide Congressional Representation to Residents of the District of Columbia

The District Clause confers on Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States." U.S. Const. art. I, § 8, cl. 17. In my view, the power conferred by the District Clause includes the authority to create a congressional district within the District of Columbia.

[1] The closeness of the constitutional question precludes confident prediction regarding the outcome of any litigation regarding the constitutionality of the proposed legislation. Consequently, decision-makers should be mindful of the substantial litigation risks associated with the possibility of judicial review of a congressional decision to extend voting rights of the District of Columbia by ordinary legislation, should the courts find an appropriate vehicle to conduct such a review.

The Supreme Court has held that Congress's power under the District Clause is plenary, providing Congress with "full and unlimited jurisdiction to provide for the general welfare of District citizens by any and every act of legislation which it may deem conducive to that end." *Nat'l Mut. Ins. Co. of D.C. v. Tidewater Transfer Co.*, 337 U.S. 582, 601 (1949) (quoting *Neild v. Dist. of Columbia*, 100 F.2d 246, 250 (D.C. Cir. 1940)). Moreover, when Congress exercises its power to legislate for the District, it "acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other." *Id*. at 602; *see also Palmore v. United States*, 411 U.S. 389, 397–398 (1973); *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984) (Scalia, J.) (noting that Congress has "extraordinary plenary power" in legislating for the District).

The Supreme Court has upheld Congress's authority to enact legislation that treats the District of Columbia as a "state" for constitutional purposes, even where the text of the Constitution, by referring to "states," would appear to preclude such legislation. In *Tidewater Transfer*, a three-Justice plurality upheld Congress's power to confer jurisdiction on federal courts over state-law suits between citizens of the District and citizens of other States. 337 U.S. at 603–04. The plurality did so even though the text of Article III purported to limit such jurisdiction only to suits "between citizens of different states." U.S. Const. art. III, § 2, cl. 1. The plurality acknowledged Chief Justice Marshall's conclusion in *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805), that "the District of Columbia is not a state within Article III of the Constitution," *Tidewater Transfer*, 337 U.S. at 588, as well as the concomitant conclusion that a state-law suit between a District resident and a citizen of a state would not be diverse within the meaning of Article Ill's explicit language, *id*. at 600. The plurality noted, however, that *Hepburn & Dundas* had not considered the exact question before it, whether Congress could exercise its authority under the District Clause to create diversity jurisdiction under Article III for suits involving residents of the District. The plurality also noted that the Court's opinion in *Hepburn & Dundas* suggested that Congress could create a "legislative" solution:

> It is therefore significant that . . . the Chief Justice added, as we have seen, that it was extraordinary that the federal courts should be closed to the citizens of "that particular district which is subject to the jurisdiction of congress." Such language clearly refers to Congress' Art. I power of "exclusive Legislation in all Cases whatsoever, over such District." And mention of that power seems particularly significant in the context of Marshall's further statement that the matter is a subject for "legislative not for judicial consideration." [*Hepburn & Dundas*, 6 U.S. at 453.] Even if it be considered speculation to say that this was an expression by the Chief Justice that Congress had the requisite power under Art. I, it would be in the teeth of his language to say that it is a denial of such power.

Tidewater Transfer, 337 U.S. at 589. The plurality concluded that "[t]o put federally administered justice within the reach of District citizens . . . is an object which Congress has a right to accomplish," and Congress's determination that it had the authority to use Article I to confer jurisdiction of the district courts was entitled to deference. *Id*. at 603, 607.[2]

Two other cases have upheld Congress's power to enact legislation that treated the District of Columbia as though it were a state for purposes of a constitutional provision.[3] In *Milton S. Kronheim Co. v. District of Columbia*, 91 F.3d 193 (D.C. Cir. 1996), the Court of Appeals for the District of Columbia upheld Congress's treatment of D.C. as a state for purposes of the Twenty-First Amendment, which provided that "[t]he transportation or importation into any state, territory, or possession of

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[2] Two Justices concurred in the judgment, but would have overruled *Hepburn & Dundas* and held that D.C. was a state under Article III. They disagreed with the plurality's holding that the District Clause provided Congress the necessary authority to supplement the jurisdiction conferred by Article III. *Tidewater Transfer*, 337 U.S. at 621–26. Although no rationale commanded a majority of the Court, a majority concluded that the District of Columbia could be treated as a state for purposes of a constitutional provision that was seemingly limited to "states."

[3] Although they do not analyze Congress's power under the District Clause, several opinions of the Supreme Court have held that the District of Columbia is a state for purposes of some constitutional provisions. *See, e.g.*, *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889) (holding that the District of Columbia was a state within the meaning of the Commerce Clause); *Callan v. Wilson*, 127 U.S. 540 (1888) (stating that the Sixth Amendment right to "impartial jury in the state and [judicial] district" of the crime applies to D.C.).

the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. The court was considering a D.C. statute that regulated the storage of liquor in the District, and that arguably would have violated the dormant Commerce Clause if the Twenty-First Amendment were held not to apply to D.C. The court upheld the statute and stated that "we will treat the District of Columbia as a state for purposes of the Twenty-First Amendment analysis. Congress determined at the time of the passage of the ABC Act . . . that the District would function in a state-like manner for alcohol regulation purposes. We have no warrant to interfere with Congress's plenary power under [the District Clause]." *Kronheim*, 91 F.3d at 201. Similarly, in *Clarke v. Washington Metropolitan Area Transit Authority*, 654 F. Supp. 712, 714 n.1 (D.D.C. 1985), *aff'd*, 808 F.2d 137 (D.C. Cir. 1987), the District Court for the District of Columbia upheld Congress's power to enact legislation that treated the District as a state for purposes of Eleventh Amendment immunity, despite that amendment's textual application only to each "one of the United States."

In response to these arguments, opponents of the constitutionality of the D.C. House Voting Rights Act have pointed out that Congress may exercise its District Clause power only in accordance with other provisions of the Constitution. But *Tidewater Transfer* and the other cases support the argument that Congress has some leeway, pursuant to the District Clause, to prescribe the manner in which the District will be treated for purposes of various constitutional provisions. Presumably, that discretion is limited by the rest of the Constitution, in the sense that Congress may not treat the District as a state if doing so would violate the fundamental principles expressed in the Constitution (as opposed to the literal text that limits a provision to "states"). *See Tidewater Transfer*, 337 U.S. at 585. As discussed below, there are persuasive arguments that granting House voting rights does not offend the structural principles animating Article I.

B. Important Constitutional Principles Reinforce Congress's Power Under the District Clause

Congress's power to treat the District as though it were a state for purposes of representation in the House of Representatives is consistent with two vitally important constitutional principles: that the Constitution

protects the right to be represented in the federal government, and that this right belongs to the people, rather than the states. A narrow reading of Congress's authority under the District Clause would contravene the very structural and political principles that Article I's voting provisions were designed to protect.

First, there is no question that the right to vote for representation in the House of Representatives is fundamentally important. Any consideration of Congress's Article I power must take place against the backdrop of the principles of self-government that illuminated the framing of the Constitution. *See Powell v. McCormack*, 395 U.S. 486, 547 (1969) (interpreting Article I in light of principle of self-representation). Congressional action to grant D.C. voting rights would vindicate these principles by expanding the franchise. The right to participate in government directly—to petition it, alter it, or abolish it—was thought of by many framers as an inalienable right that could not be vitiated by governmental action, even on the constitutional level. Under this theory, while the Constitution may not have explicitly commanded that District residents receive the vote, it may not be interpreted in a manner that invalidates an expansion of the franchise that a majority of the people, as represented by a majority of the House and Senate, wish to grant.

Second, extending the vote to District residents would vindicate—rather than undermine—the structural principles expressed in Article I. While the Senate was designed to provide representation to the states, the House was designed to represent the people directly. *See, e.g.*, Sen. Orrin G. Hatch. *"No Right is More Precious in a Free Country": Allowing Americans in the District of Columbia to Participate in National Self-Government*, 45 Harv. J. on Legis. 287, 304 (2008); U.S. Const. art. I, § 2, c1. 1 (House members to be chosen by "the people of the several states"). The Framers intentionally vested this right in the people, so that its enjoyment would not depend on state citizenship or state regulation. *See U.S. Term Limits v. Thornton*, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring) ("The federal right to vote . . . does not derive from the state power in the first instance but . . . belong[s] to the voter in his or her capacity as a citizen of the United States"); *id*. at 845 (the right arises out of the "relationship between the people of the Nation and their National Government, with which the States may not interfere"); *id*. at 805 (Stevens, J., for the Court) (noting that "'while, in a loose sense, the right to

vote for representatives in Congress is sometimes spoken of as a right derived from the states,'" in fact it "was a new right, arising from the Constitution itself" (quoting *United States v. Classic*, 313 U.S. 299, 315 (1941)). Given that the right to House representation actually resides in the people themselves, it would over-read the language of the Composition Clause to hold that it explicitly precludes a congressional exercise of Congress's power under the District Clause to grant House voting rights to the District's residents.

Relatedly, expanding access to the vote in this manner would not interfere with any other core principles underlying the structure established in Article I. Providing the District with a House vote would not dilute any other citizens' right to vote (at least, it certainly would not dilute anyone's representation to any greater extent than any other exercise of Congress's authority to increase the number of representatives "in such Manner as they shall by law direct," U.S. Const. art. I, § 2, cl. 3). *See* Wald Statement at 10. Nor would providing voting rights threaten to aggrandize the national government. As the Court has noted, one of the predominant concerns surrounding the establishment of Congress's power to govern itself was the fear that elected officials would use that power at the expense of the people or the states. *See Powell*, 395 U.S. at 533–34. As a result the framers were particularly concerned with Congress's ability to limit the number or type of people who could become representatives. *See* 2 *Records of the Federal Convention of 1787* 249–50 (M. Farrand ed., 1911) ("A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect." (Madison)); *Powell*, 395 U.S. at 548 (in light of "fundamental principle of our representative democracy . . . that the people should choose whom they please to govern them," holding that Congress could not supplement the Constitution's list of qualifications for office (internal citations omitted)), Here, granting the residents of the District the right to elect a single representative would not run this risk or contravene the rule against aggrandizement. Congress would be expanding, rather than limiting, the ability of the people to elect the officials of their choice.

C. No Other Controlling Authority Resolves the Question

1. Selected Cases Holding That the District Is Not a State for Unrelated Purposes Do Not Apply Here

Although the federal courts have ruled that the District of Columbia is not a "state" under specific provisions of the Constitution, it does not follow that the proposed legislation is necessarily unconstitutional. This is because the question with respect to the D.C. House Voting Rights Act is not whether the District is a "state," but whether Congress has authority under the District Clause to enact legislation that treats the District as a state for purposes of voting representation in the House. For example, in *Hephurn & Dundas*, Chief Justice Marshall held that a statute conferring diversity jurisdiction on the federal courts did not apply to suits between citizens of D.C. and citizens of a state. Reasoning that other constitutional provisions used the word "state" to refer only to states, the Court concluded that Congress did not intend the statute, which was modeled on the language of Article III, to create federal jurisdiction over suits involving District residents. Put simply, the question of Congress's power under the District Clause to pass legislation that treated the District of Columbia as a congressional district was not before the Court.

Likewise, and more recently, in *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000), a three-judge panel of the D.C. District Court applied *Hepburn & Dundas* to hold that the District was not a state under the Composition Clause, and therefore that the Constitution itself did not confer voting rights on D.C. residents. The court concluded that because "the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives," *id*. at 50, "the clauses of Article I that provide for congressional voting . . . are not applicable to residents of the District of Columbia," *id*. at 60. The Supreme Court summarily affirmed the decision. 531 U.S. 941. Like *Hepburn & Dundas*, Adams does not prohibit Congress from granting voting rights by legislation, because it addressed a question that is not raised here, namely, whether Article I itself directly provided District residents with a constitutionally compelled right to vote. 90 F. Supp. 2d at 38. Indeed, the court distinguished its case from *Tidewater Transfer* because, in *Tidewater Transfer*, Congress had affirmatively exercised its

legislative authority to supplement Article III and therefore the plurality had not held that the Constitution itself established the District as a state for purposes of Article III. *Adams*, 90 F. Supp. 2d at 54–55.[4]

2. Passage of the Twenty-Third Amendment Does Not Bear on Congress's Power to Grant Congressional Voting Rights to District Residents by Legislation

Another potential argument against the constitutionality of the D.C. House Voting Rights Act rests on the fact that D.C. residents were granted the right to vote in presidential elections by means of the Twenty-Third Amendment. Some have taken Congress's prior use of a constitutional amendment to expand voting rights within the District to reflect the need to use an amendment to work any type of expansion of D.C.'s voting rights.

Congress's choice to use an amendment to establish voting rights for presidential elections does not imply that a constitutional amendment is the only means by which voting rights may be granted, however. The Twenty-Third Amendment was designed to address a wholly different constitutional issue, voting for President under Article II, an issue over which Congress had limited authority. *See Oregon v. Mitchell*, 400 U.S. 112 (1970) (holding that Congress may regulate presidential elections through Section 5 of the Fourteenth Amendment, but not through its Article I powers). Because the Fourteenth Amendment did not apply to the District, Congress was forced to use a constitutional amendment, rather than legislation, to provide the District's residents with the right to vote in presidential elections. *See* Dinh & Charnes at 21. This problem would not be present with respect to the proposed legislation, given that Congress has power to regulate House elections under Article I and the District Clause.

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[4] Other cases that refer to the right of District residents to vote for congressional representation, *see, e.g.*, *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994) (holding that House rules cannot confer a voting representative to District residents); *Banner v. United States*, 428 F.3d 303, 309 (D.C. Cir. 2005) (holding that, pursuant to the District Clause, Congress can prohibit the imposition of a commuter tax), can similarly be distinguished.

D. The United States Has Expanded Voting Rights by Statute in Other Circumstances

A statutory precedent also supports the conclusion that the D.C. House Voting Rights Act is constitutional. The Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 42 U.S.C. § 1973ff *et seq*., "extends federal voting rights to U.S. citizens formerly citizens of a State who reside outside the United States." *Romeu v. Cohen*, 235 F.3d 118, 120 (2d Cir. 2001). UOCAVA applies even to voters who have no plans to return to their former states, do not pay taxes in their former states, and have no residence in their former states. Although the statute permits these voters to vote absentee in their former states, rather than allowing them to vote as part of a non-state entity, the fact remains that these voters would be disenfranchised under a narrow reading of Article I.

Under a literalist reading, because they are no longer citizens of a state, they would not have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1; *see* Dinh & Charnes at 18.

III. Arguments Against the Constitutionality of the D.C. House Voting Rights Act of 2009

The Office of Legal Counsel ("OLC") recently submitted to the Office of Management & Budget its conclusion that the D.C. House Voting Rights Act of 2009 is unconstitutional, and has provided me with a thorough explanation of the basis for its constitutional conclusion. In reaching this conclusion, the Office of Legal Counsel remained consistent with two recent, prior opinions offered by the Office. *See D.C. Voting Rights Act*, 31 Op. O.L.C. at 147 ("S. 1257 violates the Constitution's provisions governing the composition and election of the United States Congress."); E-mail for Velma Taylor, Office of Legislative Affairs, from Michelle Boardman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: HR. 5388, the District of Columbia Fair and Equal House Voting Rights Act of 2006* (May 22, 2006) ("We conclude that the creation of a District of Columbia seat by this legislation is unconstitutional. Membership in the House of Representatives is limited to representatives elected

by the people of the several States, and the District of Columbia is not a State.").[5] The Office of Legal Counsel rests its argument on the constitutional text of the Composition Clause, as well as related historical evidence and judicial authority, and disputes the argument that the District Clause affords Congress sufficient authority to extend congressional voting rights to the District of Columbia by ordinary legislation.

Although I have reached the conclusion that the balance of arguments tips slightly in favor of the constitutionality of the D.C. House Voting Rights Act, I remain mindful of the substantial constitutional arguments that have been advanced against the proposed legislation, including those offered by the Office of Legal Counsel. Consequently, while, for the reasons explained above, it is my view that the fundamental importance of the right to representation in our constitutional scheme tips the scales in favor of the proposed legislation in this exceptional case, I believe it is important that any decision-maker be aware of the weighty constitutional arguments on the other side. This is particularly so given the substantial litigation risks that this constitutional uncertainty creates. Accordingly, I will provide a brief summary of the views that have been advanced against the constitutionality of the statute, including the principal arguments advanced by the Office of Legal Counsel.[6]

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[5] Although Congress had not sought to give the District voting representation by ordinary legislation until recently, OLC also points to its analysis of related questions as further support for OLC's longstanding view. *See, e.g.*, Letter for Benjamin Zelenko, Committee on the Judiciary, House of Representatives, from Martin F. Richman, Acting Assistant Attorney General, Office of Legal Counsel (Aug. 11, 1967) (explaining that "provisions for elections of Senators and Representatives in the Constitution are stated in terms of the States, and the District of Columbia is not a State"); Memorandum for Warren Christopher, Deputy Attorney General, from Frank M. Wozencraft, Assistant Attorney General, Office of Legal Counsel, *Re: Budget, Economic, and State of the Union Messages* (Oct. 16. 1968) (same); *District of Columbia Representation in Congress: Hearing on S.J. Res. 65 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Cong. 16–29 (1978) (testimony of John M. Harmon, Assistant Attorney General, Office of Legal Counsel) (stating that, "[i]f the District is not to be a state, then an amendment [to the Constitution] is required" to give the District voting representation in Congress, as "we do not believe that the word 'state' as used in Article I can fairly be construed to include the District under any theory of 'nominal statehood'").

[6] OLC prepared a thorough written analysis delineating its views regarding the constitutionality of the proposed legislation. My summary of the arguments that have been advanced against the constitutionality of the legislation here does not purport to be a full

Those who argue against the constitutionality of the legislation primarily advance the following arguments:

A. The Text of the Composition Clause Is Clear

To proponents of the view that the legislation is unconstitutional, including OLC, the key constitutional provision is the Composition Clause, which governs the membership of the House of Representatives. The Clause provides: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1. From their perspective, the language itself clearly limits the right to choose "members" of the House to people from states, and that nothing in the text of the Composition Clause indicates that the people of an entity other than a state may do so. Supporters of this view urge that the reference to "the people" in the Clause is best read to underscore that members of the House would be selected by popular vote within "the several states" whereas members of the Senate would be selected (prior to the adoption of the 17th Amendment) by state legislatures. It is this critical distinction that underlies the familiar description of the House of Representatives as "the people's house."[7]

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catalogue of the issues raised in OLC's analysis, but rather reflects what I understand to be key points raised by those who argue against the constitutionality of the statute. I am happy to provide OLC's full written analysis in the event that you or other decisionmakers are interested.

[7] This line of reasoning is underscored by other provisions of the Composition Clause. Immediately after providing that members of the House shall be chosen by "the people of the several States," the Clause directs that the electors in House elections "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, § 2, cl. 1. (emphasis added). "[F]or most of its history," however, "the District of Columbia has had nothing that could even roughly be characterized as a legislature for the entire District." *Adams*, 90 F. Supp. 3d at 47; *see also id*. at 49 ("The impossibility of treating Congress as the legislature under that clause is manifest, as doing so would mean that Congress would itself choose the District's senators."). Likewise, the same section of Article I provides: "When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies." As the *Adams* court explained, this provision would be anomalous as applied to the District. Leaving aside the fact that the Mayor of the District is a relatively recent office,

B. Historical Evidence and More Recent Practice Support This View

This conclusion is reinforced by pointing to evidence that the Framers regarded states as uniquely important components of the federal constitutional structure. *See Adams*, 90 F. Supp. at 56 ("The Constitution's repeated references to states . . . are reflections of the Great Compromise forged to ensure the Constitution's ratification. There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the congressional franchise."). Likewise, those who find the legislation unconstitutional contend that the evidence from founding-era history supports the conclusion that Congress may not give the District voting representation in the House without making the District a state. *See generally Adams*, 90 F. Supp. 2d at 50–53. The District was created to serve the distinct purpose of protecting the national government and its institutions. That particular purpose—maintaining the nation's capital as a non-state entity—obviously does not require that the District be denied voting representation in Congress. *See, e.g.*, Raven-Hansen, *Congressional Representation for the District of Columbia*, 12 Harv. J. on Legis. at 184. But opponents of the proposed legislation, including OLC, contend that Founding-era statements addressing the voting rights of residents of such a district—including statements

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"it is Congress that is the ultimate executive authority for the District." *Id*. at 49. And "[t]he possibility that the Framers intended Congress to fill its own vacancies seems far too much of a stretch, even if the constitutional fabric were more flexible than it appears to be." *Id*.; *see also* U.S. Const. art. I, § 2, cl. 2 ("No person shall be a Representative . . . who shall not, when elected, be an inhabitant of that *State* in which he shall be chosen.") (emphasis added). The repeated textual references to "states" or "state" in this Clause, when combined with the numerous constitutional provisions relating to federal elections that similarly restrict voting to "states" and their people, are presented as a clear intention to exclude non-state entities, such as the District, unless the Constitution expressly provides otherwise. *See* U.S. Const. amend. XXIII, § 1 (The District "shall appoint . . . [a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be *in addition to those appointed by the States*, but they shall be considered, *for the purposes of the election of President and Vice President*, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment." (emphasis added)).

from prospective district residents themselves—clearly reveal an understanding that citizens of the District would have no right to vote in national elections, as they were not residents of a state.[8]

Likewise, proponents argue that subsequent historical practice and the resultant constitutional structure further confirm this view. For instance, some suggest that the ratification of the Twenty-Third Amendment, ratified in 1961—which provides that the District "shall appoint . . . [a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be *in addition to those appointed by the States*, but they shall be considered, *for the purposes of the election of President and Vice President*, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment" (emphasis added)—provides further support for this view, as this text would serve no purpose if the District were already

[8] *See, e.g.*, 10 Annals of Cong. 991, 998–99 (1801) (remarks of Rep. Dennis) (stating that because of District residents' "contiguity to, and residence among the members of [Congress]," "though they might not be represented in the national body, their voice would be heard. But if it should be necessary [that they be represented], the Constitution might be so altered as to give them a delegate to the General Legislature when their numbers should become sufficient"); *id*. at 992 (remarks of Rep. Bird) (assigning "blame" for disenfranchisement of District residents to "the men who framed the Constitutional provision, who peculiarly set apart this as a District under the national safeguard and Government"); 5 *The Papers of Alexander Hamilton* 189–90 (Harold C. Syrett ed., 1962) (reprinting text of subsequently rejected amendment proposed by Alexander Hamilton during the New York ratifying convention: "That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and Direct Taxes Amount to [left blank] such District shall cease to be parcel of the State granting the Same, *and Provision shall be made by Congress for their having a District Representation in that Body*." (emphasis added)); *see also* 12 Annals of Cong. 487 (1803) (remarks of Rep. Smilie) ("Under the exercise of exclusive jurisdiction the citizens are deprived of all political rights, nor can we confer them."); 5 *The Documentary History of the Ratification of the Constitution* 621 (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino eds., 1976) (statement by Samuel Osgood, a delegate to the Massachusetts ratifying convention, that he could accept the Seat of Government provision only if it were amended to provide that the District be "represented in the lower House," though no such amendment was ultimately included in the amendments recommended by the Massachusetts convention); *see generally Adams*, 90 F. Supp. 2d at 51–53 (recounting this history).

a state for purposes of constitutional provisions governing federal elections. Even if this amendment is not conclusive regarding the meaning of Article I, some, including OLC, contend that fidelity to constitutional structure now requires factoring this amendment into the interpretation of Article I.

C. Judicial Precedent Supports This View

Proponents of this view also argue that recent judicial authority affirms this same conclusion, and point to *Adams*, which relied on similar evidence from text, history, and precedent to conclude that the District of Columbia is not a "state" within the meaning of the Composition Clause. 90 F. Supp. 2d at 55–56 ("In sum, we conclude that constitutional text, history, and judicial precedent bar us from accepting plaintiffs' contention that the District of Columbia may be considered a state for purposes of congressional representation under Article I."). That decision was summarily affirmed by the Supreme Court. 531 U.S. 941 (2000); *see also Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (summary affirmance is a precedential ruling on the merits).

D. The District Clause Provides Only Limited Authority to Congress

This argument rejects the notion that the District Clause might provide support for the legislation, concluding that such direct reliance on Congress's authority under the District Clause to support District voting representation in the House is not persuasive. Its proponents acknowledge that the District Clause gives Congress broad power to provide for the governance of the District, but contend that what this means is simply that Congress has "all legislative powers that the legislature of a state might exercise within the state." *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899). As courts have stressed, Congress's broad power to provide for the governance of the District does not give it the authority to "contravene any provision of the Constitution." *Palmore v. United States*, 411 U.S. 389, 397 (1973) (quoting *Hof*, 174 U.S. at 5); *accord Keller v. Potomac Elec. Co.*, 261 U.S. 428, 443–44 (1923); *see also Neild v. Dist. of Columbia*, 110 F.2d 246, 249 (D.C. Cir. 1984) ("*Subject only to those prohibitions of the Constitution which act directly or by implication upon the*

federal government, Congress possesses full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end.") (emphasis added). Consequently, from this perspective, the District Clause does not afford Congress the opportunity to override the requirements of the Composition Clause, nor can the Composition Clause reasonably be read to permit Congress to treat the District as a "state" for purposes of representation in the House through legislation. Indeed, some argue that, if it could be so read, there would be no principled basis for concluding that Congress could not, by statute, give territories voting representation in the House as well.

E. *Tidewater Transfer* Does Not Support a Contrary Conclusion

Those who argue that the proposed legislation is unconstitutional, including OLC, contest the reliance of proponents of the pending legislation on *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). That case held that Congress may give Article III courts jurisdiction over suits brought by citizens of the District of Columbia against citizens of the several states, even though Article III expressly confers diversity jurisdiction only over cases involving residents of "states." However, opponents argue that the fractured decision in *Tidewater Transfer* is not persuasive authority for the proposition that Congress may enact legislation that treats the District of Columbia a "state" for purposes of the Composition Clause for at least two reasons. First, the holding that Congress could, through legislation, provide that the District should be treated as a state for purposes of Article III diversity jurisdiction was in a plurality opinion that had the support of only three justices and should not be given precedential effect. Second, even if the opinion were given some precedential effect, opponents argue that, unlike the decision to extend Article III diversity jurisdiction to cases involving the District, the decision to treat the District as a state for purposes of the Composition Clause would improperly disturb the balance between the Union and the several states struck in the Constitution, and would therefore exceed the limit Justice Jackson presented in *Tidewater Transfer*.

F. Strong Policy Reasons for Extending Congressional Voting Rights Do Not Provide a Basis for Overriding Clear Constitutional Text

Some proponents of the view that this legislation is unconstitutional, including OLC, acknowledge the strong policy considerations that have been advanced in support of the extension of congressional voting rights to citizens of the District, noting that there is no denying the force of the considerations in favor of enfranchising District residents. *See, e.g.*, *Loughborough v. Blake*, 18 U.S. 317, 324 (1820) (conceding that "in theory it might be more congenial to the spirit of our institutions to admit a representative from the district," but omitting any suggestion that Congress might provide such representation by simple legislation); *Adams*, 90 F. Supp. 2d at 66 ("We do not disagree that defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress."). As important as these constitutional purposes are, however, they nevertheless argue that the fact that the plain terms of the Composition Clause give the people of the states, and only those electors, the right to choose House members is not surprising or at odds with the central purposes of the founding charter. Likewise, some, including OLC, recognize the arguments that these policy considerations are implicit in the constitutional structure and that, in consequence, Congress should be assumed to have the authority to enact the pending legislation unless the Constitution *clearly* prohibits it. OLC's view, however, is that this proposed legislation would be unconstitutional even if such a clear statement rule were appropriate in this context.

* * * * *

In sum, those who find the proposed legislation unconstitutional, including OLC, conclude that Congress may not by statute give the District of Columbia voting representation in the House. From this perspective, the relevant constitutional text, original understanding, historical practice, and judicial precedent all clearly support the proposition that the District is not a "state" within the meaning of the Composition Clause. Even acknowledging that the District Clause gives Congress broad power to legislate for the District, proponents of this view contend that the District

Clause does not permit Congress to override the prescriptions of the Composition Clause.

III. Conclusion

I have concluded that, in this exceptional case, although the question is exceedingly close, my views are different than those offered by the Office of Legal Counsel. For the reasons outlined in Part II above, I believe that, for each of these constitutional points, there are sufficient rejoinders to, at a minimum, place the answer to the constitutional question in doubt. In my view, the arguments of those who find the proposed legislation unconstitutional, including OLC's analysis, identify no clearly controlling constitutional text or squarely on-point precedent. What is at stake in this legislation is whether the more than half-a-million residents of our Nation's capital, who pay taxes, serve in the Armed Forces, and sit on federal juries like other Americans, have what the Supreme Court has referred to as the most fundamental of political rights, the franchise. *See Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("[T]he political franchise of voting . . . is regarded as a fundamental political right, because preservative of all rights"). In those circumstances, and in the absence of clear constitutional authority to the contrary, it is my view that we must give weight to the animating purposes of the Constitution—and in particular its fundamental elevation of democracy and the right to vote—and therefore I conclude that the balance tips in favor of the constitutionality of the proposed legislation.

ERIC H. HOLDER, JR.
Attorney General

Assistance of Counsel in Removal Proceedings (II)

The Attorney General's decision in *Matter of Compean, Bangaly & J-E-C-*, 24 I. & N. Dec. 710 (Att'y Gen. 2009); *Assistance of Counsel in Removal Proceedings (I)*, 33 Op. O.L.C. 1 (2009) (Mukasey, Att'y Gen.), is vacated.

The Acting Director of the Executive Office for Immigration Review shall initiate rulemaking procedures as soon as practicable to evaluate the pre-*Compean* framework for reviewing claims of ineffective assistance of counsel in deportation proceedings and to determine what modifications should be proposed for public consideration.

Pending the issuance of a final rule, the Board of Immigration Appeals and Immigration Judges should apply the pre-*Compean* standards to all pending and future motions to reopen removal proceedings based upon ineffective assistance of counsel.

June 3, 2009

OPINION IN REMOVAL PROCEEDINGS
MATTER OF ENRIQUE SALAS COMPEAN, RESPONDENT
MATTER OF SYLLA BANGALY, RESPONDENT
MATTER OF J-E-C-, ET AL., RESPONDENTS

On January 7, 2009, Attorney General Mukasey overruled in part the decisions of the Board of Immigration Appeals ("Board") in *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), and *Matter of Assaad*, 23 I. & N. Dec. 553 (BIA 2003), and affirmed the Board's orders denying reopening in *Matter of Compean*, A078 566 977 (BIA May 20, 2008), *Matter of Bangaly*, A078 555 848 (BIA Mar. 7, 2008), and *Matter of J-E-C-* (BIA Apr. 8, 2008). *See Matter of Compean, Bangaly & J-E-C-*, 24 I. & N. Dec. 710 (Att'y Gen. 2009) ("*Compean*"); *Assistance of Counsel in Removal Proceedings (I)*, 33 Op. O.L.C. 1 (2009) (Mukasey, Att'y Gen.).

In *Lozada*, the Board established the procedural requirements for filing a motion to reopen deportation (now removal) proceedings based upon a claim of ineffective assistance of counsel and required the alien to show that he was prejudiced by the action or inaction of his counsel. *Lozada*, 19 I. & N. Dec. at 639–40. The *Compean* decision acknowledged that the *Lozada* framework had "largely stood the test of time," having been expressly reaffirmed by the Board fifteen years after its initial adoption. *Compean*, 24 I. & N. Dec. at 731; *see also Assaad*, 23 I. & N. Dec. at 556–57 (affirming the application of *Lozada* to removal proceedings). Nonetheless, *Compean* both rejected *Lozada*'s constitutional reasoning and

ordered the Board not to rely upon the *Lozada* framework, even as a discretionary matter. Instead, *Compean* set forth, as an exercise of the Attorney General's administrative discretion, a new substantive and procedural framework for reviewing all such claims and a formulation of the prejudice showing different from that followed by many courts, despite the limited discussion of the *Lozada* framework in the briefs submitted in *Compean* by the parties and amici curiae. *Compean* further provided that this new administrative framework should apply "henceforth," even though the decision acknowledged it might conflict with the *Lozada*-based approach taken by a number of federal courts of appeals. *See Compean*, 24 I. & N. Dec. at 730 & n.8.

For the reasons stated herein, I have determined that it is appropriate to reconsider the January 7, 2009 decision.

Establishing an appropriate framework for reviewing motions to reopen immigration proceedings based on claims of ineffective assistance of counsel is a matter of great importance. I do not believe that the process used in *Compean* resulted in a thorough consideration of the issues involved, particularly for a decision that implemented a new, complex framework in place of a well-established and longstanding practice that had been reaffirmed by the Board in 2003 after careful consideration. The preferable administrative process for reforming the *Lozada* framework is one that affords all interested parties a full and fair opportunity to participate and ensures that the relevant facts and analysis are collected and evaluated.

Accordingly, I direct the Acting Director of the Executive Office for Immigration Review to initiate rulemaking procedures as soon as practicable to evaluate the *Lozada* framework and to determine what modifications should be proposed for public consideration. After soliciting information and public comment, through publication of a proposed rule in the Federal Register, from all interested persons on a revised framework for reviewing claims of ineffective assistance of counsel in immigration proceedings, the Department of Justice may, if appropriate, proceed with the publication of a final rule.

In *Compean*, the introduction of a new procedural framework depended in part on Attorney General Mukasey's conclusion that there is no constitutional right to effective assistance of counsel in removal proceedings. Because that conclusion is not necessary either to decide these cases

under pre-*Compean* standards or to initiate a rulemaking process, this Order vacates *Compean* in its entirety. To ensure that there is an established framework in place pending the issuance of a final rule, the Board and Immigration Judges should apply the pre-*Compean* standards to all pending and future motions to reopen based upon ineffective assistance of counsel, regardless of when such motions were filed. The litigating positions of the Department of Justice will remain unaffected by this Order. Finally, prior to *Compean*, the Board itself had not resolved whether its discretion to reopen removal proceedings includes the power to consider claims of ineffective assistance of counsel based on conduct of counsel that occurred after a final order of removal had been entered. Given the absence of a pre-*Compean* standard of the Board to apply pending issuance of a final rule, I resolve the question in the interim by concluding that the Board does have this discretion, and I leave it to the Board to determine the scope of such discretion.

Turning to the merits of the particular cases at issue, I find that, for the reasons stated by the Board, its orders denying reopening of the three matters reviewed in *Compean* were appropriate under the *Lozada* framework and standards as established by the Board before *Compean*. On that basis, I concur with Attorney General Mukasey's decision to affirm the Board's decisions denying reopening of these matters. *Compean*, 24 I. & N. Dec. at 743.

ERIC H. HOLDER, JR.
Attorney General

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Use of the EINSTEIN 2.0 Intrusion-Detection System to Protect Unclassified Computer Networks in the Executive Branch

An intrusion-detection system known as EINSTEIN 2.0 used to protect civilian unclassified networks in the Executive Branch against malicious network activity complies with the Fourth Amendment to the Constitution, the Wiretap Act, the Foreign Intelligence Surveillance Act, the Stored Communications Act, and the pen-register and trap-and-trace provisions of 18 U.S.C. § 3121 *et seq*., provided that certain log-on banners or computer-user agreements are consistently adopted, implemented, and enforced by executive departments and agencies using the system.

January 9, 2009

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

As part of the Comprehensive National Cybersecurity Initiative, the Department of Homeland Security ("DHS"), in coordination with the Office of Management and Budget, is in the process of establishing an intrusion-detection system known as EINSTEIN 2.0 in order to detect unauthorized network intrusions and data exploitations against the Executive Branch's civilian unclassified computer systems ("Federal Systems").[1] In January 2007, you asked this Office to undertake a legal review of proposed EINSTEIN 2.0 operations; since that time we have provided ongoing informal advice regarding the legality of those operations, which are now underway. This memorandum formalizes the informal advice we have provided regarding whether EINSTEIN 2.0 operations comply with the Fourth Amendment to the Constitution of the United States, title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Pub. L. No. 90-351, 82 Stat. 197, 211, *codified as amended at* 18 U.S.C. § 2510 *et seq*. ("Wiretap Act")); the Foreign Intelligence Surveillance Act of 1978 (Pub. L. No. 95-511, 92 Stat. 1783, *codified as amended at* 50 U.S.C. § 1801 *et seq*. ("FISA")); the Stored Communications Act (18 U.S.C. § 2701 *et seq*. ("SCA")); and the pen-register and trap-and-trace provisions of 18 U.S.C. § 3121 *et seq*. ("Pen/Trap Act").

[1] As used this memorandum, the term "Federal Systems" includes all Executive Branch federal government information systems except for National Security Systems of executive departments and agencies and Department of Defense information systems.

We examine these legal issues in the context of an executive department's or agency's use of a model computer log-on banner or a model computer-user agreement developed by lawyers from the Department of Justice ("DOJ"), DHS, and other departments and agencies with expertise in cybersecurity issues. We conclude that as long as executive departments and agencies participating in EINSTEIN 2.0 operations consistently adopt, implement, and enforce the model log-on banner or computer-user agreement—or log-on banners or computer-user agreements with terms that are substantially equivalent to those models—the use of EINSTEIN 2.0 technology to detect computer network intrusions and exploitations against Federal Systems complies with the Fourth Amendment, the Wiretap Act, FISA, the SCA, and the Pen/Trap Act.

I.

Over the past several years, Federal Systems have been subject to sophisticated and well-coordinated computer network intrusions and exploitations on an unprecedented scale. The Intelligence Community has determined that those malicious network activities pose a grave threat to national security. *See also* Center for Strategic and International Studies, *Securing Cyberspace* 11–15 (2008) (discussing national security implications of federal network vulnerabilities). Those malicious network activities occur at the hands of hostile foreign nations (including foreign intelligence services), transnational criminal groups and enterprises, and individual computer hackers. Recent intrusions and exploitations have resulted in the theft of significant amounts of unclassified data from many executive departments and agencies, as well as information regarding the vulnerabilities of Federal Systems. The unclassified networks of the Departments of Defense, State, Homeland Security, and Commerce, among others, have suffered intrusions against their networks and exploitations of their data. Accordingly, the Homeland Security Council has determined that the deployment of a multi-layered network defense system is necessary to protect Federal Systems against these ongoing computer intrusions and exploitations carried out by a broad array of cyber adversaries.

The first layer of this network-defense system is known as EINSTEIN 1.0 and already is in place across segments of several Executive Branch agencies. EINSTEIN 1.0 is a semi-automated process for detecting—albeit after the fact—inappropriate or unauthorized inbound and outbound

network traffic between participating departments and agencies and the Internet. The United States Computer Emergency Readiness Team ("US-CERT"), an organizational component of DHS, administers EINSTEIN 1.0.

EINSTEIN 1.0 analyzes only "packet header" information—and not packet "payload" (content) information—for inbound and outbound Internet traffic of participating agencies.[2] The header information collected by EINSTEIN 1.0 technology includes: the source and destination IP addresses for the packet, the size of the data packet, the specific Internet protocol used (for e-mail, the Simple Mail Transfer Protocol and, for use of the World Wide Web, the Hypertext Transport Protocol), and the date and time of transmission of the packet (known as "the date/time stamp"). EINSTEIN 1.0 collects this information only after packets already have been sent or received by a user and, thus, does not provide real-time information regarding network intrusions and exploitations against Federal Systems. US-CERT analysts examine the header information to identify suspicious inbound and outbound Internet traffic, particularly network backdoors and intrusions, network scanning activities, and computer network exploitations using viruses, worms, spyware, bots, Trojan horses, and other "malware."

EINSTEIN 1.0 contains several limitations. First, it does not provide real-time reporting regarding intrusions and exploitations against Federal Systems. Second, it does not cover all Federal Systems, and, therefore, does not provide complete awareness regarding malicious network activity directed against those systems. Third, because EINSTEIN 1.0 does not scan packet content, it does not offer complete intrusion and exploitation detection functionality.

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[2] The Internet consists of millions of computers connected by a network of fiber-optic cables and other data-transmission facilities. Data transmitted across the Internet are broken down into "packets" that are sent out from one computer to another. Each packet is directed (routed) to its intended source from its respective destination by an Internet Protocol address ("IP address"). An IP address is a unique numerical address, akin to a phone number or physical address, identifying each computer on the Internet. Each packet may follow a different route to its ultimate IP address destination, traveling over the networks of several different Internet backbone providers and Internet Service Providers ("ISPs") before arriving at the destination. Upon arrival at the destination, the packets are reconstituted. *See generally* Jonathan E. Nuechterlein & Philip J. Weiser, *Digital Crossroads* 121–28 (2005).

We understand that many executive departments and agencies supplement EINSTEIN 1.0 with their own intrusion-detection systems, which are designed to identify network intrusions and exploitations conducted against their own computer systems. In addition, individual departments and agencies also operate their own network filters to block certain unauthorized content, such as Internet pornography and file-sharing activities, among others. We understand, however, that there is little or no coordination or communication among Executive Branch entities conducting these individualized network defense activities. Accordingly, multiple departments facing the same intrusion or exploitation might have no idea that they are all facing a coordinated malicious network operation. Nor would departments or agencies that have not yet been subject to the intrusion or exploitation have advanced warning of the activity, such that they could upgrade their defenses. Hence, the lack of cybersecurity collaboration within the Executive Branch leads to inefficient network defensive measures that contribute to the ongoing vulnerability of Federal Systems.

To rectify this situation, DHS, in conjunction with OMB, is deploying throughout the Executive Branch an intrusion-detection system known as EINSTEIN 2.0 to provide greater coordination and situational awareness regarding malicious network activities directed against Federal Systems. EINSTEIN 2.0 is a robust system that is expected to overcome the technical limitations of EINSTEIN 1.0. EINSTEIN 2.0 technology is comprised of computers ("sensors") configured with commercial "off-the-shelf" intrusion-detection software as well as government-developed software. That technology will be located at certain Internet access points known as Trusted Internet Connections ("TICs"), which connect Federal Systems to the Internet.

EINSTEIN 2.0 intrusion-detection sensors will observe in near-real time the packet header and packet content of all incoming and outgoing Internet traffic of Federal Systems ("Federal Systems Internet Traffic") for the "signatures" of malicious computer code used to gain access to or to exploit Federal Systems.[3] *See generally* NIST Special Publication No.

[3] By the term "malicious computer code," we mean not only "malware," such as viruses, spyware, and Trojan horses, but also malicious network intrusion and exploitation activities, such as identifying network backdoors and network scanning activities, and so-called "social engineering" activities, such as "phishing" exploits that seek usernames, passwords, social security numbers, or other personal information.

800-94 (2007) (discussing signature-based detection techniques). Because Internet traffic is IP address-based, we understand that only Federal Systems Internet Traffic destined to or sent from an IP address associated with an executive department or agency participating in EINSTEIN 2.0 ("EINSTEIN 2.0 Participant") would be scanned by EINSTEIN 2.0 technology. Thus, EINSTEIN 2.0 technology will scan only the Federal Systems Internet Traffic for EINSTEIN 2.0 Participants that connect to the Internet at TICs.

DHS has the responsibility for determining which signatures to program into the EINSTEIN 2.0 sensors, pursuant to procedures developed by DHS. Signatures may be derived from several sources, including commercial computer security services, publicly available computer security information, privately reported incidents to US-CERT, in-depth analysis by US-CERT analysts, and other federal partners involved in computer defense. We understand that from information obtained through these sources, DHS will create signatures based upon known malicious computer code to guide the operations of EINSTEIN 2.0 sensors.

EINSTEIN 2.0 sensors will not scan actual Federal Systems Internet Traffic for malicious computer code as that traffic is in transmission, but instead will scan a temporary copy of that traffic created solely for the purpose of scanning by the sensors. The "original" Federal Systems Internet Traffic will continue to its destination without being scanned by EINSTEIN 2.0 sensors; thus, EINSTEIN 2.0 operations will not disrupt the normal operations of Federal Systems. But EINSTEIN 2.0 technology will create a temporary mirror image of all Federal Systems Internet Traffic of EINSTEIN 2.0 Participants for parallel scanning by the sensors. The temporary copy of Federal Systems Internet Traffic is created only for identifying known signatures. When EINSTEIN 2.0 sensors identify Federal Systems Internet Traffic containing packets with malicious computer code matching a signature, EINSTEIN 2.0 technology is designed to generate—in near-real time—an automated alert about the detected signature. The alert generally will not contain the content of the packet, but will include header information, such as the source or remote IP address associated with the traffic that generated the alert, metadata regarding the type of signature that was detected, and the date/time stamp.

In addition to generating automated alerts, EINSTEIN 2.0 operations will both acquire and store data packets from the mirror copy of Federal

Systems Internet Traffic that are associated with a detected signature. Those packets, which may include the full content of Internet communications, such as e-mails, may be reviewed by analysts from US-CERT and other authorized persons involved in computer network defense. We understand that no packets other than those associated with a known signature will be acquired and stored. Accordingly, we understand that the vast majority of packets that are not associated with malicious computer code matching a signature will be deleted promptly. *See* DHS, *Privacy Impact Assessment for EINSTEIN 2*, at 12 (May 18, 2008) (stating that all "clean traffic" is promptly deleted).

We have been informed that EINSTEIN 2.0 operations are expected to improve substantially the government's ability to defend Federal Systems against intrusions and exploitations. EINSTEIN 2.0 operations will supplement—and not replace—the current individualized computer network security defenses of executive departments and agencies with a centralized and coordinated network defense system operated by DHS. That centralization and coordination of information regarding all Federal Systems Internet Traffic is expected to facilitate real-time situational awareness regarding malicious network activity across all Federal Systems. Improved situational awareness in turn will facilitate improved defensive measures, such as minimizing network vulnerabilities and alerting users of Federal Systems about particular malicious computer code detected against particular EINSTEIN 2.0 Participants. By sharing information throughout the Executive Branch regarding signatures detected in Federal Systems Internet Traffic, EINSTEIN 2.0 operations should facilitate improved defenses against known malicious computer code.

As part of enrolling in EINSTEIN 2.0 operations, each EINSTEIN 2.0 Participant is required to enter into a memorandum of agreement ("MOA") with DHS. We understand that the MOA will require an EINSTEIN 2.0 Participant to certify that it has implemented procedures to provide appropriate notice to its employees that by using government-owned information systems, the employee acknowledges and consents to the monitoring, interception, and search of his communications transiting through or stored on those systems, and that the employee has no reasonable expectation of privacy in his use of those systems.[4] Those procedures

[4] Throughout this memorandum we refer to "Executive Branch employees" and to the "employees" of EINSTEIN 2.0 Participants. By using the word "employees," we do not

are to include computer-user agreements, log-on banners, and computer-training programs. We understand that DHS must receive that certification from each EINSTEIN 2.0 Participant before any of the Participant's Federal Systems Internet Traffic can be scanned by EINSTEIN 2.0 technology.

EINSTEIN 2.0 Participants will not be required to use a specific banner or user agreement. We have been advised that given the diversity of missions and organizations among departments and agencies within the Executive Branch and the varying technical constraints faced by those entities, there simply is no one-size-fits-all solution for providing notice to and obtaining the consent of employees for EINSTEIN 2.0 operations. We have been informed, however, that the MOA will include model log-on banner and model computer-user agreement language for EINSTEIN 2.0 Participants to consider in crafting their own banners and user agreements. The model language, which was developed by lawyers from DOJ with the input and advice of lawyers from DHS and other interested departments and agencies, is as follows:

- You are accessing a U.S. Government information system, which includes (1) this computer, (2) this computer network, (3) all computers connected to this network, and (4) all devices and storage media attached to this network or to a computer on this network. This information system is provided for U.S. Government-authorized use only.
- Unauthorized or improper use of this system may result in disciplinary action, as well as civil and criminal penalties.
- By using this information system, you understand and consent to the following:
  - You have no reasonable expectation of privacy regarding communications or data transiting or stored on this information system.

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mean to limit the requirement to provide appropriate notice and consent to only those persons in a common law employment relationship with the federal government. Rather, the term "employees" in this memorandum should be understood to include "employees" as well as "officers," "contractors," and "agents" of EINSTEIN 2.0 Participants.

- At any time, and for any lawful government purpose, the Government may monitor, intercept, and search any communication or data transiting or stored on this information system.
- Any communications or data transiting or stored on this information system may be disclosed or used for any lawful government purpose.

[click button: I AGREE]

The model computer-user agreement language contains the same substantive terms as the model log-on banner, except that it requires a computer user to sign a document indicating that the user "understand[s] and consent[s]" to the foregoing terms. Although we understand that EINSTEIN 2.0 Participants will not be required to use the exact model log-on banner and model computer-user agreement language, each EINSTEIN 2.0 Participant must certify that its log-on banners, computer-user agreements, and other computer policies contain language that demonstrates consent is "clearly given" and "clearly obtained" before EINSTEIN 2.0 becomes operational for the Participant's Federal Systems Internet Traffic.[5]

DOJ has advised that with the consistent adoption, implementation, and enforcement of appropriate consent and notification procedures, EINSTEIN 2.0 operations would comply with the Fourth Amendment to the Constitution of the United States, the Wiretap Act, FISA, the SCA,

[5] For example, DOJ already has in place a log-on banner that we believe would satisfy the MOA's certification criteria. DOJ's banner at present provides:

- You are accessing a U.S. Government information system, which includes (1) this computer, (2) this computer network, (3) all computers connected to this network, and (4) all devices and storage media attached to this network or to a computer on this network. This information system is provided for U.S. Government-authorized use only.
- Unauthorized or improper use of this system may result in disciplinary action, as well as civil and criminal penalties.
- By using this information system, you understand and consent to the following:
  - You have no reasonable expectation of privacy regarding any communications transmitted through or data stored on this information system.
  - At any time, the Government may monitor, intercept, search and/or seize data transiting or stored on this information system.
  - Any communications transmitted through or data stored on this information system may be disclosed or used for any U.S. Government-authorized purpose.

[click button: I AGREE]

and the Pen/Trap Act. The Department arrived at these conclusions after a lengthy review by the Office of the Deputy Attorney General, this Office, and, with respect to the statutes for which they have expertise, the National Security Division and the Computer Crimes and Intellectual Property Section of the Criminal Division. This memorandum explains the reasoning for those conclusions.

II.

We first explain the reasoning behind DOJ's conclusion that the deployment, testing, and use of EINSTEIN 2.0 technology complies with the Fourth Amendment where each EINSTEIN 2.0 Participant consistently adopts and implements the model log-on banner or model computer-user agreement—or a log-on banner or computer-user agreement containing substantially equivalent terms establishing that the consent of its employees is "clearly given" and "clearly obtained."

A.

The Fourth Amendment provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV. Government activity implicates the protections of the Fourth Amendment where it constitutes a "search" or a "seizure" within the meaning of the Fourth Amendment. The Supreme Court has said that a "search" occurs where the government infringes upon a person's legitimate expectation of privacy, consisting of both an actual, subjective expectation of privacy as well as an objectively reasonable expectation of privacy—"*i.e.*, one that has a source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (internal quotation marks omitted).

We think it plain that computer users exchanging Internet communications through Federal Systems lack a legitimate expectation of privacy in certain specific categories of data that will be subject to scanning by EINSTEIN 2.0 technology. There is no objectively reasonable expectation of privacy in information regarding the to/from addresses for e-mails, the IP addresses of websites visited, the total traffic volume of the user, and

other addressing and routing information conveyed for the purpose of transmitting Internet communications to or from a user. *See Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892, 904–05 (9th Cir. 2008); *United States v. Forrester*, 512 F.3d 500, 510 (9th Cir. 2008); *see also Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (no legitimate expectation of privacy in dialing, routing, addressing, and signaling information transmitted to telephone companies). E-mail addresses and IP addresses provide addressing and routing information to an Internet Service Provider ("ISP") in the same manner as a telephone number provides switching information to a telephone company. *Forrester*, 512 F.3d at 510. Just as a telephone user has no objectively reasonable expectation of privacy in telephone numbers voluntarily turned over to the phone company to enable switching of a phone call, an Internet user has no such expectation of privacy in routing information submitted to an ISP in order to deliver an Internet communication. *Id.* That routing information also is akin to the addressing information written on the outside of a first-class letter, which also is not constitutionally protected. *Id.* at 511 ("E-mail, like physical mail, has an outside address 'visible' to the third-party carriers that transmit it to its intended location."). With respect to information regarding the total volume of data received and transmitted by an Internet user, that information is no different from the information produced by a pen register regarding the number of incoming and outgoing calls at a particular phone number; and the Supreme Court has long held that an individual has no legitimate expectation of privacy in such information, which already has been exposed to a telecommunications carrier for the purpose of routing a communication. *Id.* Therefore, because there is no legitimate expectation of privacy with respect to the foregoing information transmitted for the purpose of routing Internet communications, the scanning of that information by EINSTEIN 2.0 technology does not constitute a "search" subject to the restrictions of the Fourth Amendment.

With respect to a user's expectation of privacy in the content of an Internet communication (such as an e-mail), we assume for the purposes of this memorandum that a computer user generally has a legitimate expectation of privacy in that content while it is in transmission over the Internet. To date, the federal courts appear to agree that the sender of an e-mail, like the sender of a letter via first-class mail, has an objectively reasonable expectation of privacy in the content of a message while it is in transmission. *See, e.g.*, *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir.

2004) (analogizing expectation of e-mail user in privacy of e-mail to expectation of individuals communicating by regular mail); *United States v. Maxwell*, 45 M.J. 406, 418 (C.A.A.F. 1996) (sender of an e-mail generally "enjoys a reasonable expectation that police officials will not intercept the transmission without probable cause and a search warrant"); *see also Quon*, 529 F.3d at 905 ("[U]sers do have a reasonable expectation of privacy in the content of their text messages vis-à-vis the service provider.").[6]

Here, EINSTEIN 2.0 technology will scan a mirror copy of the packet content of Federal Systems Internet Traffic—including packets that are part of e-mails—for malicious computer code associated with a signature while the e-mail is in transmission, and, thus, while a sender of the e-mail, we assume, generally retains an expectation of privacy in the content of that communication. Hence, the precise question for us is whether the Executive Branch's automatic scanning of Federal Systems Internet Traffic for malicious computer code would implicate a computer user's legitimate expectation of privacy in the content of his Internet communications. We consider the privacy expectations of two groups of computer users: (1) Executive Branch employees and (2) private individuals communicating with specific Executive Branch employees or with Executive Branch departments or agencies more generally.

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[6] It also appears that the federal courts agree that, again like the sender of a first-class letter, an individual has a "diminished" expectation of privacy in the content of an e-mail that "ha[s] already arrived at the recipient." *Lifshitz*, 369 F.3d at 190 (internal citations omitted); *see Guest v. Leis*, 225 F.3d 325, 333 (6th Cir. 2001) (individual does not have a reasonable expectation of privacy "in an e-mail that had already reached its recipient; at this moment, the e-mailer would be analogous to a letter-writer, whose expectation of privacy ordinarily terminates upon delivery of the letter"); *Maxwell*, 45 M.J. at 417 (once an e-mail, like a letter, "is received and opened, the destiny of the [e-mail] then lies in the control of the recipient . . . , not the sender"); *United States v. Jones*, No. 03-15131, 149 F. Appx. 954, 959 (11th Cir. Sept. 20, 2005) (unpublished) ("We have not addressed previously the existence of a legitimate expectation of privacy in text messages or e-mails. Those circuits that have addressed the question have compared e-mails with letters sent by postal mail. Although letters are protected by the Fourth Amendment, 'if a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery.'" (quoting *United States v. King*, 55 F.3d 1193, 1195–96 (6th Cir. 1995)).

1.

We first address the expectations of Executive Branch employees. The Supreme Court has rejected the contention that public employees "can never have a reasonable expectation of privacy in their place of work." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality); *id.* at 729–31 (Scalia, J., concurring). "Individuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Id.* at 717 (plurality). Nevertheless, there are reasons to doubt that an Executive Branch employee has a legitimate expectation of privacy in the content of his Internet communications made using government-owned information systems. The text of the Fourth Amendment protects the right of the people to be secure only in "*their* persons, houses, papers, and effects." U.S. Const. amend. IV (emphasis added). Although an individual generally possesses a legitimate expectation of privacy in his own personal computer, *e.g.*, *United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007); *Lifshitz*, 369 F.3d at 190, it is less clear that an Executive Branch employee has a legitimate expectation of privacy in Internet communications he makes using a computer that is the property of the United States government, provided by the taxpayers for his use at work. *Cf. Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002) (Posner, J.) (employee "had no right of privacy in the computer that [his private employer] had lent him for use in the workplace"); *but cf. United States v. Slanina*, 283 F.3d 670, 677 (5th Cir. 2002) (employee had reasonable expectation of privacy in use of city-owned computer where there was no "city policy placing Slanina on notice that his computer usage would be monitored" and there was no "indication that other employees had routine access to his computer"), *vacated on other grounds*, 537 U.S. 802 (2002). A government employee lacks an ownership or other property interest in the computer he uses at work; and he especially lacks any such interests in the Federal Systems—the network infrastructure that the government provides to enable its employees to access the Internet—that, unlike his personal computer, ordinarily is not within his day to day control.

As a general matter, however, the Supreme Court has held that there may be circumstances in which a government employee has a legitimate expectation of privacy in the contents of governmental property that the employee uses or controls at work, such as an office or a locked desk

drawer. *See O'Connor*, 480 U.S. at 716–19 (1987) (plurality opinion) (public employee has a reasonable expectation of privacy in personal items, papers, and effects in office, desk, and file cabinets provided by public employer); *id*. at 730–31 (Scalia, J., concurring) (government employee has a legitimate expectation of privacy in the contents of his office). And the Court also has made it clear that property interests are not conclusive regarding the legitimacy of an individual's expectation of privacy. *See Oliver v. United States*, 466 U.S. 170, 183 (1984) ("The existence of a property right is but one element in determining whether expectations of privacy are legitimate."); *Warden v. Hayden*, 387 U.S. 294, 304 (1967) ("The premise that property interests control the right of the Government to search and seize has been discredited."); *see also Legality of Television Surveillance in Government Offices*, 3 Op. O.L.C. 64, 66–67 (1979) (government ownership of office insufficient to establish employee's lack of expectation of privacy where "in a practical sense" the employee exercises exclusive use of the office) ("*Television Surveillance*"); *but cf. United States v. Ziegler*, 474 F.3d 1184, 1191 (9th Cir. 2007) (private employee's "workplace computer . . . is quite different from the" property described in *O'Connor*, because the computer was owned by the company, was controlled jointly by the company and the employee, and was monitored to ensure that employees did not visit pornographic or other inappropriate websites).

Instead, whether, in a particular circumstance, a government employee has a legitimate expectation of privacy in his use of governmental property at work is determined by "[t]he operational realities of the workplace" and "by virtue of actual office practices and procedures, or by legitimate regulation." *O'Connor*, 480 U.S. at 717 (plurality); *see United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) ("[O]ffice practices, procedures, or regulations may reduce legitimate privacy expectations."). Here, we believe that an Executive Branch employee will not have a legitimate expectation of privacy in the content of his Internet communications transmitted over government-owned information systems, provided that EINSTEIN 2.0 Participants consistently adopt, implement, and enforce appropriate consent and notification procedures, such as the model log-on banner or model computer-user agreement.

Although the Supreme Court has not addressed the issue, the federal courts of appeals have held that the use of log-on banners or computer-user agreements, such as the models provided by DHS to EINSTEIN 2.0

Participants, can eliminate any legitimate expectation of privacy in the content of Internet communications made at work using government-owned information systems. For example, in *Simons*, the computer-use policy at the Foreign Bureau of Information Services ("FBIS"), a division of the Central Intelligence Agency, expressly noted that FBIS would "'audit, inspect, and/or monitor'" employees' use of the Internet, "including all file transfers, all websites visited, and all e-mail messages, 'as deemed appropriate.'" 206 F.3d at 398 (quoting policy). The Fourth Circuit held that this policy "placed employees on notice that they could not reasonably expect that their Internet activity would be private" and that, "in light of the Internet policy, Simons lacked a legitimate expectation of privacy" in his use of the Internet at work. *Id*.

Likewise, in *United States v. Angevine*, 281 F.3d 1130 (10th Cir. 2002), the Tenth Circuit held that a professor at a state university had no reasonable expectation of privacy in his Internet use in light of a broadly worded computer-use policy and log-on banner. The computer-use policy stated that the university "'reserves the right to view or scan any file or software stored on the computer or passing through the network, and will do so periodically'" and has "'a right of access to the contents of stored computing information at any time for any purpose which it has a legitimate need to know.'" *Id*. at 1133 (quoting policy). The log-on banner provided that "'all electronic mail messages . . . contain no right of privacy or confidentiality except where Oklahoma or Federal statutes expressly provide for such status,'" and that the university may "'inspect electronic mail usage by any person at any time without prior notice as deemed necessary to protect business-related concerns . . . to the full extent not expressly prohibited by applicable statutes.'" *Id*. (quoting banner). The court held that these notices prevent university employees "from reasonably expecting privacy in data downloaded from the Internet onto [u]niversity computers," because users are warned that data "is not confidential either in transit or in storage" and that "network administrators and others were free to view data downloaded from the Internet." *Id*. at 1134.

The Eighth Circuit came to the same conclusion in *United States v. Thorn*, 375 F.3d 679 (8th Cir. 2004), *vacated on other grounds*, 543 U.S. 1112 (2005). In *Thorn*, a state employee had acknowledged in writing a computer-use policy, which warned that employees "'*do not* have any personal privacy rights regarding their use of [the agency's] information

systems and technology. An employee's use of [the agency's] information systems and technology indicates that the employee understands and consents to [the agency's] right to inspect and audit all such use as described in this policy.'" *Id*. at 682 (quoting policy). As a result of this policy, the court held that the state employee "did not have any legitimate expectation of privacy with respect to the use and contents of his [work] computer," because under the agency's policy, employees have "no personal right of privacy with respect to their use of the agency's computers" and provides the state with a "right to access all of the agency's computers." *Id*. at 683.

The decisions of other federal courts that have addressed the issue support the proposition that actual and consistent use of log-on banners or computer-user agreements can eliminate any legitimate expectation of an employee in the privacy with respect to his Internet communications using government-owned information systems. *See Biby v. Bd. of Regents*, 419 F.3d 845, 850–51 (8th Cir. 2005) (university computer policy warning user "not to expect privacy if the university has a legitimate reason to conduct a search" and that "computer files, including e-mail, can be searched" under certain conditions eliminates any reasonable expectation of privacy the use of the computer network); *Muick*, 280 F.3d at 743 (employer's announced policy of inspecting work computers "destroyed any reasonable expectation of privacy"); *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 1999) (no reasonable expectation of privacy that network administrators would not review e-mail where banner stated that "users logging on to this system consent to monitoring"); *see also Heckenkamp*, 482 F.3d at 1147 ("[P]rivacy expectations may be reduced if the user is advised that information transmitted through the network is not confidential and that the systems administrators may monitor communications transmitted by the user.") (citing *Angevine*, 281 F.3d at 1134, and *Simons*, 206 F.3d at 398); *cf. Slanina*, 283 F.3d at 677 ("[G]iven the absence of a city policy placing Slanina on notice that his computer usage would be monitored and the lack of any indication that other employees had routine access to his computer, we hold that Slanina's expectation of privacy was reasonable."); *Leventhal v. Knapek*, 266 F.3d 64, 73–74 (2d Cir. 2001) (public employee had reasonable expectation of privacy in the contents of his office computer because his employer neither "had a general practice of routinely conducting searches of office computers" nor

"had placed [him] on notice that he should have no expectation of privacy in the contents of his office computer").

In light of these decisions, we believe that an Executive Branch employee who has clicked through the model log-on banner or signed the model computer-user agreement—or a log-on banner or computer-user agreement containing substantially equivalent terms—would not have a legitimate expectation of privacy in the contents of Internet communications made using government-owned information systems and transmitted over Federal Systems. The model log-on banner is explicit and comprehensive regarding an employee's lack of a legitimate expectation of privacy in his use of government-owned information systems. That banner states that the information system the employee uses is the property of the government and "is provided for U.S. Government-authorized use only." The user "understand[s] and consent[s]" that: he has "no reasonable expectation of privacy regarding communications or data transiting or stored" on that information system; "[a]t any time, and for any lawful government purpose, the Government may monitor, intercept, and search any communication or data transiting or stored" on the information system; and any communications transmitted through or data stored on the information system "may be disclosed or used for any lawful government purpose." *See supra* pp. 69–70. We believe that the current DOJ banner, which deviates from the model log-on banner and the model computer-user agreement language in some respects, is to the same effect. *See supra* note 5. Both the model log-on banner and computer-user agreement and the current DOJ log-on banner are at least as robust as—and we think they are even stronger than—the materials that eliminated an employee's legitimate expectation of privacy in the content of Internet communications in *Simons*, *Angevine*, *Thorn*, *Biby*, and *Monroe*. Therefore, we believe that adoption of the language in those model materials by EINSTEIN 2.0 Participants would eliminate their employees' legitimate expectations of privacy in their uses of government-owned information systems with respect to the lawful government purpose of protecting Federal Systems against network intrusions and exploitations.

It is important to note, however, that the use of log-on banners or computer-user agreements may not be sufficient to eliminate an employee's legitimate expectation of privacy if the statements and actions of Executive Branch officials contradict these materials. Recently, in *Quon v. Arch Wireless Operating Company*, the Ninth Circuit held that a police officer

had a legitimate expectation of privacy in the contents of text messages sent and received on his department-provided pager notwithstanding departmental policies, because informal guidance from the officer's superiors had established, in practice, that the department would not monitor the content of his text messages. 529 F.3d at 906–07. Thus, the "operational reality" at the department established a reasonable expectation of privacy in the text messages sent through a department-provided pager. *Id*. at 907 (quoting *O'Connor*, 480 U.S. at 717). In light of *Quon*, management officials at EINSTEIN 2.0 Participants should be careful not to make statements—either formal or informal—or to adopt practices that contradict the clear position in a log-on banner or a computer-user agreement that an employee has no legitimate expectation of privacy in his use of government-owned information systems.

2.

We next consider whether an individual in the private sector communicating with an Executive Branch employee (such as where an individual sends an e-mail to either the employee's governmental—i.e., work—or personal e-mail account) or with an EINSTEIN 2.0 Participant directly (such as where an individual browses the website of the participating department or agency) has a legitimate expectation of privacy in the content of those communications. We conclude that he does not, provided that EINSTEIN 2.0 Participants consistently adopt, implement, and enforce notice and consent procedures for Executive Branch employees, such as the model log-on banner or model computer-user agreement, or banners or user agreements with terms that are substantially equivalent to those models.

The Supreme Court has held repeatedly that "[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); *see SEC v. Jerry T. O'Brien, Inc*., 467 U.S. 735, 743 (1984) ("[W]hen a person communicates to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities."); *Smith*, 442 U.S. at

743–44 ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."). Accordingly, "[i]t is well[ ]settled" that where a person "reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information." *United States v. Jacobsen*, 466 U.S. 109, 117 (1984).

We believe this principle applies to a person e-mailing an Executive Branch employee at the employee's personal e-mail account, where the employee has agreed to permit the government to monitor, intercept, and search all of his Internet communications and data transiting government-owned information systems. By clicking through the model log-on banner or agreeing to the terms of the model computer-user agreement, an Executive Branch employee gives ex ante permission to the government to intercept, monitor, and search "any communications" and "any data" transiting or stored on a government-owned information system for any "lawful purpose." That permission necessarily includes the interception, monitoring, and searching of all personal communications and data sent or received by an employee using that system for the purpose of protecting Federal Systems against malicious network activity.[7] Therefore, an individual who communicates with an employee who has agreed to permit the government to intercept, monitor, and search any personal use of the employee's government-owned information systems has no Fourth

[7] The language of the model log-on banner and model computer-user agreement unambiguously applies to "any" communications and "any" data transiting through or stored on a government-owned information system and clearly eliminates any reasonable expectation of privacy that a user could have with respect to such communications and data. Nevertheless, if a participating department or agency wished to add even more express notice that those terms apply to personal communications and personal data that an employee sends, receives, or stores using a government-owned information system, such as the use of personal web-based e-mail accounts at work, the department or agency could do so in several ways. To be clear, we do not believe that any such efforts are legally required. But should a participating department or agency decide to go even further than the robust protection afforded by the model language, it would have several options at its disposal. For example, the department or agency could include in its log-on banner or computer-user agreement express language regarding personal communications or data. Or it could notify employees through computer training and certification programs that *any* personal use of government-owned information systems by an employee is subject to interception, monitoring, and searching.

Amendment right to prohibit the government from doing what the employee has authorized. *See Jerry T. O'Brien, Inc.*, 467 U.S. at 743; *Jacobsen*, 466 U.S. at 117; *Miller*, 425 U.S. at 443.

This well-settled Fourth Amendment principle applies even where, for example, the sender of an e-mail to an employee's personal, web-based e-mail account (such as G-mail or Hotmail) does not know of the recipient's status as a federal employee or does not anticipate that the employee might read an e-mail sent to a personal e-mail account at work. Indeed, it is well established that a person communicating with another (who turns out to be an agent for the government) assumes the risk that the person has agreed to permit the government to monitor the contents of that communication. *See, e.g.*, *United States v. White*, 401 U.S. 745, 749–51 (1971) (plurality opinion) (no Fourth Amendment protection against government monitoring of communications through transmitter worn by undercover operative); *Hoffa v. United States*, 385 U.S. 293, 300–03 (1966) (information disclosed to individual who turns out to be a government informant is not protected by the Fourth Amendment); *Lopez v. United States*, 373 U.S. 427, 439 (1963) (same); *Rathbun v. United States*, 355 U.S. 107, 111 (1957) ("Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain."); *United States v. Coven*, 662 F.2d 162, 173–74 (2d Cir. 1981) (individual has no expectation of privacy in documents given to or accessible by undercover informant). Therefore, where an employee agrees to let the government intercept, monitor, and search any communication or data sent, received, or stored by a government-owned information system, the government's interception of the employee's Internet communications with individuals outside the Executive Branch does not infringe upon those individuals' legitimate expectations of privacy. *See also infra* pp. 83–89 (consent of employee).

We also think it clear that an individual submitting information directly to an EINSTEIN 2.0 Participant through the Internet—such as where an individual submits an application online or browses the public website of the Participant—has no legitimate expectation of privacy in the contents of any information that he transmits to the department or agency. An individual has no expectation of privacy in communications he makes to a known representative of the government. *See United States v. Caceres*,

440 U.S. 741, 750–51 (1979) (individual has no reasonable expectation of privacy in communications with IRS agent made in the course of an audit); *cf. Transmission by a Wireless Carrier of Information Regarding a Cellular Phone User's Physical Location to Public Safety Organizations*, 20 Op. O.L.C. 315, 321 (1996) (individual calling 911 lacks a reasonable expectation that information regarding his location will not be transmitted to public safety organizations) ("*Caller ID*"). Furthermore, an individual who communicates information to another individual who turns out to be an undercover agent of the government has no legitimate expectation of privacy in the content of that information. *See supra* p. 81. *A fortiori*, where an individual is communicating with a *declared* agent of the government—here, an executive department or agency—the individual does not have a legitimate expectation that his communication would not be monitored or acquired by the government. It also is well established that an individual does not have any legitimate expectation of privacy in information that he reveals to a third party. *See supra* p. 79; *see also United States v. Ganoe*, 538 F.3d 1117, 1127 (9th Cir. 2008) (individual has no legitimate expectation of privacy in computer files he made accessible to others); *United States v. King*, 509 F.3d 1338, 1342 (11th Cir. 2007) (individual has no legitimate expectation of privacy in computer files shared with others over network on military base). Hence, an individual could not possibly have a legitimate expectation of privacy in communications he shares directly with a department or agency of the government. Indeed, the entire purpose of his online communication is for the government to receive the content of his message. *Cf. Caller ID*, 20 Op. O.L.C. at 321 (purpose of calling 911 is to request governmental aid in an emergency). Therefore, we also do not believe that EINSTEIN 2.0 operations implicate a legitimate expectation of privacy in the content of Internet communications made between private individuals and an EINSTEIN 2.0 Participant.

B.

Even if EINSTEIN 2.0 operations were to constitute a "search" under the Fourth Amendment, we believe that those operations nonetheless would be consistent with that Amendment's "central requirement" that all searches be reasonable. *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (internal quotation marks omitted). Where, as here, the statutes and com-

mon law of the founding era do not provide a specific analogue, we analyze the reasonableness of a search in light of traditional judicial standards, balancing the degree of intrusion upon an individual's privacy in light of the search's promotion of legitimate governmental interests. *Virginia v. Moore*, 553 U.S. 164, 168–71 (2008). In many circumstances, a search is unreasonable unless law enforcement officials first obtain a warrant "issued by a neutral magistrate after finding probable cause." *McArthur*, 531 U.S. at 330. Yet the Supreme Court also has "made it clear that there are exceptions to the warrant requirement," *id.*, and that "neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance," *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989).

One well-known exception to the need to obtain a warrant based upon probable cause is where a person consents to the search. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (consent is "one of the specifically established exceptions to the requirements of both a warrant and probable cause"). An Executive Branch employee who clicks "I agree" in response to the model log-on banner, enabling him to use government-owned information systems to access the Internet, or an employee who signs the model computer-user agreement, thereby acknowledging his "consent[]" to monitoring of his use of those systems, certainly appears to have consented expressly to the scanning of his incoming and outgoing Internet communications.

In the context of public employment, however, merely obtaining the consent of an employee to search is not necessarily coextensive with the requirements of the Fourth Amendment. Such consent must be voluntary and cannot be obtained through duress or coercion. *See generally Schneckloth*, 412 U.S. at 223–35. Where an employee is confronted with the choice of either consenting to a search or facing adverse employment consequences, it is debatable whether consent is in fact voluntary. An Executive Branch employee who refuses to accept a log-on banner or to sign a computer-user agreement likely will not be able to access his computer and, hence, may be unable to perform his duties. *See, e.g.*, *Anobile v. Pelligrino*, 303 F.3d 107, 124 (2d Cir. 2002) ("[C]oercion may be found where one is given a choice between one's employment and one's constitutional rights.").

Indeed, putting a public employee to the choice of either consenting to an *unreasonable* search or facing potential adverse employment consequences may impose an invalid condition on public employment. Into the first part of the 20th Century, the government "enjoyed plenary authority to condition public employment on the employee's acceptance of almost any term of employment including terms that restricted constitutional rights." Memorandum for the Attorney General, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: The Legality of Drug Testing Programs for Federal Employees* at 4 (Aug. 25, 1986) ("*Drug Testing*"). That view has since given way to the doctrine of unconstitutional conditions, which, as applied to public employment, prohibits the government from conditioning employment on the relinquishment of a constitutional right, such as the First Amendment right to freedom of speech. *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("'The theory that public employment, which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.'") (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605–06 (1967)). More than 20 years ago, we noted that the federal courts of appeals "have generally applied the doctrine of unconstitutional conditions" to conditions of employment that would require government employees to forgo their Fourth Amendment rights against unreasonable searches. *Drug Testing* at 7 ("[T]here appears to be a consensus that the doctrine of unconstitutional conditions applies in the Fourth Amendment context."). That statement is just as true today. *See, e.g.*, *Anobile*, 303 F.3d at 123–25 (search of dormitories of horse-racing industry employees' pursuant to their written consent unreasonable under the Fourth Amendment); *McGann v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 8 F.3d 1174, 1180 (7th Cir. 1993) ("[T]he conditioning of access on the surrender of one's Fourth Amendment rights raises the specter of an unconstitutional condition."); *McDonell v. Hunter*, 807 F.2d 1302, 1310 (8th Cir. 1987) ("If a search is unreasonable, a government employer cannot require that its employees consent to that search as a condition of employment."); *Doyon v. Home Depot U.S.A., Inc.*, 850 F. Supp. 125, 129 (D. Conn. 1994) (Cabranes, J.) ("[C]onsent to an unreasonable search is not voluntary when required as a condition of employment.").

We do not believe, however, that the unconstitutional conditions doctrine applies here, because obtaining the consent of employees for EINSTEIN 2.0 operations does not require Executive Branch employees

to consent to an *unreasonable* search. Notwithstanding that the terms of both the model log-on banner and the model computer-user agreement would permit monitoring of an employee's computer use for purposes other than network defense, we believe that the specific EINSTEIN 2.0 operations to which Executive Branch employees would be asked to consent would be reasonable.[8] Where, as here, an Executive Branch employee is being asked to consent only to a reasonable search, there is no invalid conditioning of public employment on the employee's relinquishment of his Fourth Amendment rights against unreasonable searches and no coercion that renders a search involuntary. *See, e.g.*, *United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977) (prison employee's consent to routine search of his lunch bag valid); *cf. Drug Testing* at 7 ("[C]onsent to an *unreasonable* search is invalid.") (emphasis added); *Anobile*, 303 F.3d at 124 (similar); *McDonnell*, 807 F.2d at 1310 (similar). Thus, the inquiry regarding the voluntariness of an Executive Branch employee's consent merges with the underlying inquiry regarding the overall reasonableness of EINSTEIN 2.0 operations.[9] *See Drug Testing* at 7 ("[I]t appears that the government could not insist upon a complete waiver of Fourth Amendment rights as a condition of public employment and that the courts will scrutinize the search under the Fourth Amendment to determine whether it is reasonable.").

Therefore, we turn to the reasonableness of EINSTEIN 2.0 operations. A work-related administrative search by a public employer conducted for a non-law enforcement purpose is not per se unreasonable under the

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[8] Because the question presented to us is whether an employee's consent to conduct the particular scanning activities performed by EINSTEIN 2.0 technology would be valid under the Fourth Amendment, we do not address whether there would be valid consent to conduct any other search that could be conducted pursuant to the terms of the model log-on banner or the model computer-user agreement. *See Warshak v. United States*, 532 F.3d 521, 529–31 (6th Cir. 2008) (en banc) (rejecting premature Fourth Amendment challenge to facial constitutionality of provisions of the Stored Communications Act).

[9] Indeed, the consent of an employee is one factor the courts consider in determining whether a search by a public employer is reasonable. *See, e.g.*, *Nat'l Treasury Emps. Union*, 489 U.S. at 672 & n.2 (considering consent to drug testing by customs officers as one factor in concluding that such testing was reasonable); *United States v. Scott*, 450 F.3d 863, 868 (9th Cir. 2006) ("[S]earches of government employees still must be reasonable. . . . The employee's assent is merely a relevant factor in determining how strong his expectation of privacy is, and thus may contribute to a finding of reasonableness.") (internal citations omitted).

Fourth Amendment simply because the government has not obtained a warrant based upon probable cause. The Supreme Court has said that "special needs, beyond the normal need for law enforcement," may render the warrant and probable cause provisions of the Fourth Amendment "impracticable for legitimate work-related, non-investigatory intrusions as well as investigations of work-related misconduct." *O'Connor*, 480 U.S. at 725 (plurality opinion) (internal quotation marks and citations omitted); *id*. at 732 (Scalia, J., concurring) (searches in the government-employment context present "special needs"); *see also Nat'l Treasury Emps*. *Union*, 489 U.S. at 665–66 (warrant and probable cause provisions of the Fourth Amendment are inapplicable to a search that "serves special governmental needs, beyond the normal need for law enforcement"); *Griffin v*. *Wisconsin*, 483 U.S. 868, 872 (1987) (special needs doctrine applies in circumstances that make the "warrant and probable cause requirement impracticable"). Rather, "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes . . . should be judged by the standard of reasonableness under all the circumstances." *O'Connor*, 480 U.S. at 726 (plurality); *see id*. at 732 (Scalia, J., concurring).

Here, the government plainly has a lawful, work-related, noninvestigatory purpose for the use of EINSTEIN 2.0's intrusion-detection system, namely the protection of Federal Systems against unauthorized network intrusions and exploitations. *See Heckenkamp*, 482 F.3d at 1148 (preventing misuse of and damage to university computer network is a lawful purpose); *see also Nat'l Treasury Emps*. *Union*, 489 U.S. at 668 (special needs include government's need to "discover . . . latent or hidden" hazards); Federal Information Security Management Act of 2002, Pub. L. No. 107-347, tit. III, 116 Stat. 2899, 2946 (2006) (codifying 44 U.S.C. §§ 3541–3549) ("FISMA") (establishing purposes and authorities for the protection of federal information systems). As we have already noted, *see supra* p. 64, there is a substantial history of intrusions and exploitations against Federal Systems. The deployment of EINSTEIN 2.0 technology is designed to provide greater awareness regarding intrusions and exploitations against those Systems in order to facilitate improved network defenses against malicious network activity. Those goals are unrelated to the needs of ordinary criminal law enforcement. *See Heckenkamp*, 482 F.3d at 1147–48 (state university has "separate security interests" in maintaining integrity and security of its network that are unrelated to

interest in law enforcement); *see also Illinois v. Lidster*, 540 U.S. 419, 424 (2004) (although ordinary law enforcement objectives do not qualify as "special needs," certain distinct "special law enforcement concerns" do); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (upholding highway checkpoint stops designed to detect and prevent drunk driving). It is true that DHS may share alerts of detected signatures associated with malicious computer code with other executive departments and agencies, including law enforcement agencies, as permitted by applicable law and DHS procedures. The disclosure of alert information to law enforcement agencies, however, is at most an ancillary, rather than a central, feature of EINSTEIN 2.0 operations. *Cf. Ferguson v. City of Charleston*, 532 U.S. 67, 79–80 (2001) ("central and indispensable feature" of hospital policy to screen obstetrics patients for cocaine was to facilitate "the use of law enforcement" tools—arrest and prosecution—"to coerce the patients into substance abuse treatment"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2001) ("primary purpose" of narcotics checkpoints is to advance the "general interest" in "ordinary crime control"). We understand that EINSTEIN 2.0 operations are for the purpose of protecting Federal Systems, *see supra* p. 66, and are not conducted in order to advance ordinary law enforcement goals. Therefore, we conclude that EINSTEIN 2.0 operations would advance special governmental needs distinct from the ordinary interest in criminal law enforcement.

Furthermore, it would be impracticable to require the government to obtain a warrant based upon probable cause before deploying EINSTEIN 2.0 technology to detect malicious cyber activity against Federal Systems. The need for coordinated situational awareness regarding all intrusions and exploitations against Federal Systems is inconsistent with the requirement to obtain a warrant based upon probable cause. *See Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002) (warrant and probable cause requirements are "peculiarly related to criminal investigations and may be unsuited to determining the reasonableness of administrative searches where the government seeks to prevent the development of hazardous conditions"). Indeed, the goal of near-real-time awareness of malicious network activity is incompatible with a requirement to obtain a warrant. Given the constant stream of intrusions and exploitations against Federal Systems and the time it would take to seek and obtain a warrant, it would be entirely impracticable—if not impossible—to identify data packets containing malicious code in near real-time if the government was re-

quired first to obtain a warrant before each such action. *See Skinner*, 489 U.S. at 623 (interest in dispensing with warrant requirement is at its strongest where "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search") (internal quotation marks omitted). Requiring a particularized warrant based upon probable cause before a scan for each signature would introduce an element of delay, thus frustrating the government's ability to collect information regarding intrusions and exploitations in a timely manner. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (obtaining a warrant based upon probable cause is not a necessary element of reasonableness where such a requirement "would unduly interfere with the swift and informal" procedures needed to facilitate the government's special needs) (internal quotation marks omitted). Moreover, in light of the speed and frequency with which intrusion and exploitation techniques change, requiring the government to obtain a warrant to use EINSTEIN 2.0 sensors to protect Federal Systems would require nearly continuous, ongoing, daily supervision by the courts of the details of the government's network-defense activities. Such supervision would frustrate efforts to protect Federal Systems and to obtain new information regarding advanced intrusion and exploitation techniques. *See Heckenkamp*, 482 F.3d at 1148 ("[R]equiring a warrant to investigate potential misuse of the university's computer network would disrupt the operation of the university and the network that it relies upon in order to function."). For these reasons, we do not believe that EINSTEIN 2.0 operations would be presumptively unreasonable absent a warrant justified by probable cause.

Therefore, the reasonableness of EINSTEIN 2.0 operations is measured in light of the "totality of the circumstances," *United States v. Knights*, 534 U.S. 112, 118 (2001), in "the context within which a search takes place," *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). In the context of a workplace search by a public employer, the reasonableness analysis requires balancing the "invasion of the employees' legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace." *O'Connor*, 480 U.S. at 719–20 (plurality); *see Knights*, 534 U.S. at 118–19 (reasonableness inquiry balances, "on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which a search is needed for the promotion of legitimate governmental interests") (internal quotation marks omitted). A reasonable workplace search must be "justified at

its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *O'Connor*, 480 U.S. at 726 (plurality) (internal quotation marks omitted).

Based upon the information available to us, we believe that EINSTEIN 2.0 operations are reasonable under the totality of the circumstances. In light of the substantial history of intrusions and exploitations against Federal Systems, *see supra* p. 64, the deployment and use of EINSTEIN 2.0 technology to scan Federal Systems Internet Traffic of EINSTEIN 2.0 Participants for malicious computer code certainly is "justified at its inception." *O'Connor*, 480 U.S. at 726 (plurality) (internal quotation marks omitted).

We also conclude that any search conducted under EINSTEIN 2.0 operations would have a minimal impact upon the legitimate privacy expectations of computer users. The Supreme Court has said that "[w]hen faced with . . . diminished expectations of privacy, minimal intrusions, or the like, certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *McArthur*, 531 U.S. at 330. We already have noted that individuals have no legitimate expectation of privacy whatsoever in certain categories of information collected by EINSTEIN 2.0—e.g., to/from addresses for e-mails, the IP addresses of websites visited, and the total traffic volume of a user—generated in connection with the routing of Internet communications. *See supra* pp. 71–72. And in light of the notice and consent procedures that EINSTEIN 2.0 Participants must adopt under the MOA, we believe that an individual's expectation of privacy in the content of Internet communications transiting Federal Systems would, at a minimum, be significantly diminished. *See supra* pp. 75–78. Furthermore, we think it is reasonably likely that most Executive Branch employees and United States persons interacting with EINSTEIN 2.0 Participants and their employees neither intend to include nor want to receive malicious computer code in their e-mails and other Internet communications. And those who do intentionally unleash malicious computer code upon the Internet in order to conduct an unauthorized exploitation against Federal Systems have "no reasonable expectation of privacy" in the contents of those unauthorized Internet communications. 18 U.S.C. § 2510(21)(A).

We also conclude that the use of EINSTEIN 2.0 technology to detect malicious computer code in Federal Systems Internet Traffic imposes, at

worst, a minimal burden upon legitimate privacy rights. Indeed, we understand that the actual scope of content monitoring by EINSTEIN 2.0 technology will be quite narrow. EINSTEIN 2.0 technology scans a mirror copy of the Federal Systems Internet Traffic of EINSTEIN 2.0 Participants. Of course, the EINSTEIN 2.0 technology will scan a copy of every single data packet of the Federal Systems Internet Traffic of those Participants. But we understand that the technology will scan that traffic—and only that traffic—only for particular malicious computer code associated with specific signatures. There is no authorization to acquire the content of any communication unrelated to detecting malicious computer code present in the packet. Therefore, we believe the intrusion upon any expectation of privacy in the privacy of the content of Internet communications that computer users may have vis-à-vis EINSTEIN 2.0 operations would be minimal, encompassing only the intrusion of searching for specified malicious computer code.

Our conclusion finds some support in the Supreme Court's cases holding that a search technique that reveals only unlawful activity is not subject to the Fourth Amendment at all. *See Jacobsen*, 466 U.S. at 123–24 (chemical field test that could disclose only whether white powder was cocaine does not infringe upon a legitimate expectation of privacy); *see also United States v. Place*, 462 U.S. 696, 706–07 (1983) (canine sniff by a well-trained narcotics detection dog that discloses only the presence or absence of narcotics is "*sui generis*" because it "is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure" and, therefore, does not intrude upon a legitimate expectation of privacy). The inclusion of malicious computer code in an e-mail or other Internet-based communication may or may not be analogous to the possession of contraband, such as narcotics, at issue in *Jacobsen* and *Place*. But the use of malicious computer code to gain access to Federal Systems is a federal offense, *see, e.g.*, 18 U.S.C. § 1030(a)(2)(B), (3), & (5)(A) (2006), and the inclusion of that code in, for example, an e-mail is far from "perfectly lawful activity," *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (emphasizing that a canine sniff detects only unlawful activity and does not implicate legitimate privacy interests).

We also find support in the decisions of federal appellate courts concluding that the use of a magnetometer (a metal detector) to scan for weapons at airports, courthouses, and other special locations is a reasona-

ble search. *See, e.g.*, *United States v. Albardo*, 495 F.2d 799, 803–06 (2d Cir. 1974) (airport); *United States v. Epperson*, 454 F.2d 769, 771–72 (4th Cir. 1972) (airport); *Klarfield v. United States*, 944 F.2d 583, 586 (9th Cir. 1991) (courthouse). In those contexts, the government's interests are compelling, and the magnetometer's ability to detect not only weapons, but also keys, belt buckles, jewelry, and other harmless items does not otherwise render its use an unreasonable search. *See United States v. Bell*, 464 F.2d 667, 675 (2d Cir. 1972) (Friendly, J.); *Epperson*, 454 F.2d at 771–72. Regardless whether the government's interests here are on par with preventing hijacking or airport and courthouse violence, EINSTEIN 2.0 technology promotes the government's network-defense interests through a more limited and precise intrusion. The information provided to us indicates that EINSTEIN 2.0 technology is more precisely calibrated than a magnetometer to detect the materials (here, malicious computer codes) that pose a threat. *See supra* pp. 66–68. Hence, we believe that, like the use of the magnetometer in certain contexts, the use of EINSTEIN 2.0 technology to detect malicious computer code in Federal Systems Internet Traffic is a reasonable activity.

Furthermore, we understand that any information acquired or shared by DHS in the course of EINSTEIN 2.0 operations shall be subject to minimization procedures that are designed to minimize the acquisition, retention, and dissemination of non-publicly available information concerning United States persons. So, for example, even to the extent EINSTEIN 2.0 operations would acquire the content of malicious computer code that overlaps with human-readable text—e.g., the "I love you" virus from several years ago, or social engineering techniques that rely upon regular e-mail text to encourage the recipient to submit sensitive information, including personally identifiable information—we understand that these minimization procedures are intended to reduce further the impact of EINSTEIN 2.0 operations upon the privacy interests of United States persons in the content of their Internet communications. *Cf. In re Sealed Case*, 310 F.3d 717, 740 (FISA Ct. Rev. 2002) (noting importance of minimization procedures in holding that electronic surveillance pursuant to FISA was reasonable under the Fourth Amendment). In addition, we understand that DHS is required to develop auditing, oversight, and training procedures to ensure that its employees follow the procedures developed with respect to minimizing and protecting United States person information. We further understand that DHS is required to develop

procedures for the development of signatures to be programmed into the EINSTEIN 2.0 sensors, to ensure that the sensors are limited only to the detection of malicious computer code. In light of these safeguards, we believe that EINSTEIN 2.0 operations will have a minimal impact upon the legitimate privacy rights of computer users.

We conclude that the important governmental interest in protecting Federal Systems from intrusion and exploitation at the hands of foreign intelligence services, transnational criminal enterprises, and rogue computer hackers, *see supra* p. 64, outweighs the limited impact on the privacy rights, if any, of computer users communicating through Federal Systems. *See Heckenkamp*, 482 F.3d at 1148 (there is a "compelling government interest" in maintaining "the security of its network" and in determining the source of "unauthorized intrusion into sensitive files"); *Vernonia Sch. Dist.*, 515 U.S. at 661 (government must identify "an interest that appears *important enough* to justify the particular search at hand"). Based upon the information provided to us, we believe that EINSTEIN 2.0 operations would constitute a "reasonably effective means" of promoting those interests. *Earls*, 536 U.S. at 837 (activity must be "a reasonably effective means of addressing" government's interest); *see Vernonia Sch. Dist.*, 515 U.S. at 663 (considering "the efficacy of [the] means for addressing the problem"). As explained, *see supra* pp. 66–68, EINSTEIN 2.0 operations are expected to improve the government's situational awareness regarding computer network intrusions and exploitations against Federal Systems and to strengthen the ability to defend Federal Systems across the entire Executive Branch. Because EINSTEIN 2.0 technology is designed to detect and to store only malicious computer code associated with previously signatures, they also "are reasonably related in scope" to the problem EINSTEIN 2.0 is intended to address—the use of known malicious computer code to conduct intrusions and exploitations against Federal Systems. *O'Connor*, 480 U.S. at 726 (plurality) (internal quotation marks omitted).

Therefore, even if EINSTEIN 2.0 operations did involve a "search" within the meaning of the Fourth Amendment, we conclude that those operations nonetheless would satisfy the reasonableness requirement of the Fourth Amendment. For that same reason, we also conclude that an Executive Branch employee's agreement to the terms of the model log-on banner or the model computer-user agreement, or those of a banner or user agreement that are substantially equivalent to those models, consti-

tutes valid, voluntary consent to the reasonable scope of EINSTEIN 2.0 operations, and, thus, does not impose any coercive unconstitutional condition upon federal employment.

III.

We now turn to the statutory issues. DOJ has advised that the deployment, testing, and use of EINSTEIN 2.0 technology would comply with the requirements of the Wiretap Act, FISA, the SCA, and the Pen/Trap Act where EINSTEIN 2.0 Participants obtain the consent of their employees through appropriate log-on banners or computer-user agreements. As we concluded with respect to the Fourth Amendment, we also conclude that EINSTEIN 2.0 operations would be consistent with the requirements of these statutes, provided that each EINSTEIN 2.0 Participant consistently adopts, implements, and enforces the model log-on banner or model computer-user agreement—or a log-on banner or computer-user agreement containing substantially equivalent terms establishing that the consent of its employees is "clearly given" and "clearly obtained."

A.

We begin with the Wiretap Act. The Wiretap Act, as amended by title I of the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) ("ECPA"), and other subsequent statutes, prohibits the intentional "intercept[]" of any "electronic communication" unless authorized by law. 18 U.S.C. § 2511(1)(a) (2006); *see also id.* § 2511(1)(c) & (d) (prohibiting the intentional disclosure or use of the contents of electronic communications acquired in violation of section 2511(1)(a)). As relevant here, the Act defines "intercept" as the "acquisition of the contents of any . . . electronic . . . communication through the use of any electronic, mechanical, or other device." *Id.* § 2510(4). EINSTEIN 2.0 technology would constitute a covered "device." *See id.* § 2510(5) (defining "electronic, mechanical, or other devices" as any device "which can be used to intercept a[n] . . . electronic communication other than" certain specified devices not applicable here).

Because use of the EINSTEIN 2.0 sensors requires the creation of a full mirror copy of the Federal Systems Internet Traffic of EINSTEIN 2.0 Participants, we conclude that the operation of those sensors "acqui[res] the contents" of an electronic communication within the meaning of the

Act. The Wiretap Act defines "contents" to mean "any information concerning the substance, purport, or meaning" of a communication. 18 U.S.C. § 2510(8). And "electronic communication" is defined to mean "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, . . . electromagnetic, photoelectronic, or photooptical system that affects interstate or foreign commerce," with certain exceptions not applicable here. *Id.* § 2510(12). The courts have held that communications that have not been recorded (to a medium such as a computer disk), viewed, or listened to have not been "acquired" within the meaning of the Wiretap Act. *See, e.g.*, *United States v. Lewis*, 406 F.3d 11, 17–18 (1st Cir. 2004). Although the full mirror copy of Federal Systems Internet Traffic is only temporary, we believe the creation of the copy is sufficient to constitute an acquisition of the contents of communication under the Wiretap Act. Furthermore, even if creation of the temporary mirror copy were not sufficient to implicate the provisions of that Act, EINSTEIN 2.0 technology also acquires and stores, for later review by analysts, data packets from Federal Systems Internet Traffic containing malicious computer code associated with a signature. The acquisition and storage of these data packets, which are part of the "contents" of electronic communications, certainly constitutes an "intercept" within the meaning of the Wiretap Act. *See* 18 U.S.C. § 2510(4), (5), (8), & (12). Therefore, absent an exception, section 2511(1)(a) applies to at least some aspects of EINSTEIN 2.0 operations.

The Wiretap Act also prohibits a person or entity providing "electronic communication service" to "the public" from intentionally "divulg[ing] the contents of any communication (other than one to such person or entity, or an agent thereof) while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient." 18 U.S.C. § 2511(3)(a). It is unclear whether the federal Government provides "electronic communication service" to "the public." It reasonably could be argued that an EINSTEIN 2.0 Participant does offer websites and other Internet-related services that enable the transmission of electronic communications to and from the public, qualifies as a provider of electronic communication service to the public. *See id.* § 2510(15) (defining "electronic communication service" as "any service which provides to users thereof the ability to send or receive wire or electronic communication service"); *Black's Law Dictionary* 1227 (6th ed. 1990) (defining

public as "aggregate of the citizens"; "everybody"; "the community at large"). We need not decide the issue today, for even if the government is a provider of electronic communication service to the public, we do not believe that EINSTEIN 2.0 operations run afoul of the prohibitions in the Wiretap Act on the divulging of the contents of wire and electronic communications.

We conclude that EINSTEIN 2.0 operations do not constitute an unlawful interception or divulging of the contents of Internet communications under the Wiretap Act for two reasons. First, where EINSTEIN 2.0 Participants obtain the consent of their employees through appropriate log-on banners or computer-user agreements, there would be no violation of the Wiretap Act. Second, there is a strong argument that the government's EINSTEIN 2.0 operations are subject to the "rights or property" exception to the Wiretap Act. We also discuss, but do not decide, whether EINSTEIN 2.0 operations fall within the new "computer trespasser" exception to the prohibitions of the Wiretap Act.

1.

Under the Act, "[i]t shall not be unlawful . . . for a person acting under color of law to intercept a[n] . . . electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c). Likewise, a person providing electronic communication service to the public "may divulge the contents of any such communication" either "to a person . . . authorized, or whose facilities are used, to forward such communications to its destination," *id*. § 2511(3)(b)(iii), or "with the lawful consent of the originator or any addressee or intended recipient of such communication," *id*. § 2511(3)(b)(ii). These exceptions take EINSTEIN 2.0 operations, if conducted consistent with the terms of the EINSTEIN 2.0 MOA, outside the scope of the prohibitions in the Wiretap Act.

The exception in section 2511(2)(c) applies to the interception of the contents of an Internet communication where an executive department or agency is a direct party to the communication, such as where an individual files a form with an agency through a website or responds online to a government survey. There is no violation of the Wiretap Act where "a person acting under color of law" intercepts an electronic communication

provided that "one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c). For purposes of section 2511(2)(c), DHS is "a person acting under color of law" in the course of conducting EINSTEIN 2.0 operations. *Id.* § 2510(6) (defining person to include any "agent" of the United States Government). *See Nardone v. United States*, 302 U.S. 379, 384 (1937) (government bound by wiretap laws because "the sovereign is embraced by general words of a statute intended to prevent injury"); *cf.* 18 U.S.C. § 2520(a) (2006) (plaintiff may recover civil damages from "a person or entity, other than the United States," which engaged in that violation). By entering into an MOA with DHS, an EINSTEIN 2.0 Participant has signaled its consent to the interception by EINSTEIN 2.0 sensors and DHS of the content of Internet communications to which it is a party. Therefore, DHS lawfully may intercept the contents of an EINSTEIN 2.0 Participant's Internet communications with individuals under the Wiretap Act. *Id.* § 2511(2)(c). For the same reason, it also is lawful for an EINSTEIN 2.0 Participant to divulge the contents of an Internet communication to DHS for the purposes of EINSTEIN 2.0 operations where an EINSTEIN 2.0 Participant is one of the addressees or recipients of the communication. *Id.* § 2511(3)(b)(ii) (person may divulge contents of communication "with the lawful consent of the originator or any addressee or intended recipient of such communication").

With respect to intercepting and divulging the contents of Internet communications involving Executive Branch employees and individuals outside the Executive Branch, we do not believe that such actions would violate the prohibitions in the Wiretap Act. To begin with, EINSTEIN 2.0 operations do not unlawfully "divulge" the contents of Internet communications with Executive Branch employees, because the federal government is "authorized," and its "facilities are used, to forward such communications to [their] destination." 18 U.S.C. § 2511(3)(b)(iii). Internet communications cannot get to or from Executive Branch employees at work without routing through the facilities of Federal Systems.

There also is no violation of either the interception or the divulging prohibitions of the Wiretap Act where one of the parties to a communication has given consent. *See* 18 U.S.C. § 2511(2)(c) ("prior consent" required for intercept); *id.* § 2511(3)(b)(ii) ("lawful consent" required for divulging). An EINSTEIN 2.0 Participant cannot consent to the interception of the contents of the communications of its employees on their

behalf; rather, the consent of the employee who is the sender or the recipient of the communication is required. *See Television Surveillance*, 3 Op. O.L.C. at 67 (consent to surveillance is "not predicated on the consent of the owner of the pertinent property, but rather on the consent of the person to whom the targeted individual reveals his communications or activities"); *see also Caceres*, 440 U.S. at 750 ("[F]ederal statutes impose no restrictions on recording a conversation with the consent of one of the conversants."); *United States v. Barone*, 913 F.2d 46, 49 (2d Cir. 1990) (one-party consent obviates the need to obtain a court order under the Wiretap Act). As with any other person, an employee's consent under the Wiretap Act also must be provided voluntarily. *See United States v. Hernandez*, 93 F.3d 1493, 1500 (10th Cir. 1996). Here, an employee's valid, voluntary consent is expressly apparent from his clicking through the log-on banner or signing the computer-user agreement in order to access a government-owned information system. *See supra* pp. 83–89; Memorandum for Ronald D. Lee, Associate Deputy Attorney General, from William Treanor, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Report of the Working Group on Access to Government Property (Second Draft)* at 5 (June 1, 2000) (consent exception in Wiretap Act satisfied where employee clicks through log-on banner acknowledging monitoring of electronic communications in order to access DOJ's computer network).

An Executive Branch employee's consent to interception or divulging of the contents of his Internet communications also may be implied where the "'circumstances indicat[e] that the [individual] knowingly agreed to the surveillance.'" *United States v. Van Poyck*, 77 F.3d 285, 292 (9th Cir. 1996) (quoting *United States v. Amen*, 831 F.2d 373, 378 (2d Cir. 1987) (federal inmate consented to interception of phone calls where notice that inmate calls were monitored was ubiquitous)). Under the Wiretap Act, "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) (tenant consented to landlord's recording of phone calls where tenant knew that all calls were being recorded); *accord United States v. Staves*, 383 F.3d 977, 981 (9th Cir. 2004) (party to communication impliedly consents to monitoring where circumstances "indicate that [he] knew that interception was likely and agreed to the monitoring"). Where "language or acts . . . tend to prove (or disprove) that a party knows of, or

assents to, encroachments" on a routine expectation of privacy, that party has manifested his consent for purposes of the Wiretap Act. *Griggs-Ryan*, 904 F.2d at 117; *see Van Poyck*, 77 F.3d at 292 (similar).

Here, no Executive Branch employee who has read the model log-on banner or computer-user agreement (or a log-on banner or computer-user agreement with substantially equivalent terms) and who nonetheless has logged on to a government-owned information system could reasonably claim not to have knowledge that monitoring, interception, and searches of his Internet communications would occur. The employee's use of government-owned information systems despite that knowledge would establish voluntary consent to any such monitoring, interception, or search. *See supra* pp. 81, 84–93.[10] Therefore, we believe that EINSTEIN 2.0 operations would comply with the Wiretap Act as long as EINSTEIN 2.0 Participants consistently adopt, implement, and enforce the terms of appropriate log-on banners or computer-user agreements, as discussed in this memorandum.

2.

Even absent the consent of Executive Branch employees, there is a reasonable basis to conclude that the use of EINSTEIN 2.0 technology to protect Federal Systems comes within the express terms of the "rights or property" exception to the prohibitions in the Wiretap Act, 18 U.S.C. § 2511(2)(a)(i). The "rights or property" exception provides in relevant part that the prohibitions in the Act shall not apply to the "intercept, disclosure, or use" of an "electronic communication" by a "provider of a wire or electronic communication service . . . engaged in any activity which is a necessary incident to . . . the protection of the rights or property of the provider of that service." *Id.*

We believe that this provision may be applied to the government here as a "provider" of "electronic communication service[s]" for its employ-

[10] Similarly, no reasonable person communicating directly with an agency of the federal government through the Internet, such as by filing a form on an agency website, could claim not to know that his communication would be acquired by the government. Indeed, that is the entire purpose of communicating with the government. *See supra* pp. 81–82. Hence, the individual impliedly would consent to the government's interception of the contents of his communication. *See Caller ID*, 20 Op. O.L.C. at 320 & n.13 (dialing 911 constitutes implicit consent to government's direct monitoring of an emergency call).

ees. Executive Branch departments and agencies provide the necessary computers, network infrastructure, facilities, and connectivity to the Internet that enable Executive Branch employees "to send or receive" electronic communications. 18 U.S.C. § 2510(15) (defining "electronic communication service"). The courts have held that to benefit from the rights or property exception, the electronic communication service provider's activities must protect the provider's own rights or property, and not those of any third party, such as a customer. *See, e.g.*, *Campiti v. Walonis*, 611 F.2d 387, 393 (1st Cir. 1979) (rights or property exception does not apply to a person who is not an agent of the telephone company for monitoring that "had nothing to do with telephone company equipment or rights"); *United States v. Auler*, 539 F.2d 642, 645–46 (7th Cir. 1976) (telephone companies intercepting communications under section 2511(2)(a)(i) may share those communications with the government only to the extent necessary to protect telephone company's rights or property). EINSTEIN 2.0 technology is owned, operated, and controlled by DHS, and we understand that it is to be used solely for the protection of the government's rights and property in Federal Systems. *See supra* p. 66.

The legislative history of the rights or property exception in the Wiretap Act arguably speaks only to the efforts of telephone companies to monitor calls in order to prevent callers from using "blue boxes" to avoid paying for long-distance telephone calls. *See* S. Rep. No. 90-1097, at 67 (1967), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2182. Nevertheless, we believe that "the plain meaning of Congress'[s] language" in the "rights or property" exception includes EINSTEIN 2.0 operations "within its ambit." *United States v. Savage*, 564 F.2d 728, 731 (5th Cir. 1977). The courts have construed the "necessary" language in the Wiretap Act provision "to impose a standard of reasonableness upon" the provider's activities to protect his rights or property. *United States v. Harvey*, 540 F.2d 1345, 1351 (8th Cir. 1976); *see, e.g.*, *United States v. McLaren*, 957 F. Supp. 215, 220 (M.D. Fla. 1997) (similar). As in the Fourth Amendment context, reasonableness is "assessed under the facts of each case." *Harvey*, 540 F.2d at 1352 n.9. The "rights or property" exception does not strictly *require* "minimization" of the acquisition of communication contents by a provider, *McLaren*, 957 F. Supp. at 220, but a provider's activities are reasonable under the exception where they involve only "minimal interception" of communications. *Harvey*, 540 F.2d at 1351.

We believe that the government's use of EINSTEIN 2.0 technology to detect intrusions and exploitations against Federal Systems is reasonably necessary to protect the federal government's rights with respect to its exclusive use of Federal Systems and its property interests in the integrity and security of its networks and data. For the reasons we have noted already, *see supra* pp. 89–92, we believe that EINSTEIN 2.0 operations would involve the minimal acquisition and storage of communications necessary to detect malicious network activity directed against Federal Systems. EINSTEIN 2.0 operations are limited to the detection and storing of data packets containing only malicious computer code associated with computer intrusions and exploitations, and are reasonably designed to protect Federal Systems without acquiring any additional content of Internet communications that is unrelated to that goal. Thus, EINSTEIN 2.0 operations are appropriately limited in scope to what is reasonably necessary to protect governmental rights and property against computer intrusions and exploitations. *See Harvey*, 540 F.2d at 1351 (recording of limited portion of phone calls to identify use of technology to evade paying for long-distance calls is "reasonable"); *United States v. Freemen*, 524 F.2d 337, 341 (7th Cir. 1975) (taping of conversations for no more than two minutes and only when blue box was in use was "necessary and in line with the minimal invasion of privacy contemplated by the statute"); *cf. Auler*, 539 F.2d at 646 (monitoring and recording of all calls, regardless whether made using a blue box, acquired "far more information" than the telephone company "needed to protect its interests"); *McLaren*, 957 F. Supp. at 220 (interception, recording, and disclosure of complete phone calls "having nothing whatever to do" with abuse of telephone company's service is unreasonable because those actions "could not possibly be 'necessary'" to protecting the company's rights).

Therefore, even absent employee consent, there is a strong basis in the text of the "rights or property" exception to the Wiretap Act to believe that the government's activities under EINSTEIN 2.0 would not violate the prohibitions in the Wiretap Act. That being said, however, there are very few cases applying the rights or property exception since the mid-1970s, and almost none involving computer networks, the Internet, or defenses against cyber intrusions and exploitations, and none involving the government in protecting its own rights or property, as opposed to a private communications provider protecting its private property. Accordingly, we believe there is some uncertainty regarding how the courts

would view a defense of EINSTEIN 2.0 operations based upon the "rights or property" exception to the Wiretap Act.

3.

Finally, we discuss briefly the "computer trespasser" exception in the Wiretap Act, 18 U.S.C. § 2511(2)(i), which was added to the Wiretap Act by section 217 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 291 (2001). Section 2511(2)(i) permits "a person acting under color of law" to "intercept" the contents of "wire or electronic communications of a computer trespasser transmitted to, through, or from [a] protected computer" on four conditions: First, "the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer." Second, "the person acting under color of law is lawfully engaged in an investigation." Third, "the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation." And fourth, "such interception does not acquire communications other than those transmitted to or from the computer trespasser." 18 U.S.C. § 2511(2)(i)(I)–(IV). The phrase "protected computer" has the same definition as in 18 U.S.C. § 1030(e)(2), *see id.* § 2510(20) (defining "protected computer"), which includes the government-issued computers of EINSTEIN 2.0 Participants at issue here. "Computer trespasser" is defined to mean "a person who accesses a protected computer without authorization" and "does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator of the protected computer for access to all or part of the protected computer." *Id.* § 2510(21)(A) & (B).

We need not discuss the first three requirements of the computer trespasser exception. Even assuming that EINSTEIN 2.0 operations satisfy these requirements, it is questionable that EINSTEIN 2.0 operations satisfy the final requirement. The computer trespasser exception is applicable only if interception of the contents of communications "does not acquire communications other than those transmitted to or from the computer trespasser." 18 U.S.C. § 2511(2)(i)(IV). We understand that EINSTEIN 2.0 technology is designed to detect and to store only packets containing malicious computer code associated with a signature. Accord-

ingly, it could be argued that it would not acquire communications other than the malicious code sent over the Internet by computer trespassers, as defined in section 2510(21). However, EINSTEIN 2.0 technology also can acquire the contents of communications to or from persons who do not satisfy the definition of "computer trespasser." To take just one example, an Executive Branch employee—even one who intentionally includes malicious computer code in his Internet communications at work—does not appear to be a "computer trespasser" within the scope of the definition. *See id.* § 2510(21)(B) (defining "computer trespasser" to exclude a "person known by the owner or operator of the protected computer to have an existing contractual relationship . . . for access to all or part of the protected computer").[11] EINSTEIN 2.0 operations, however, nonetheless would acquire the contents of their communications.

We do not decide, however, whether the computer trespasser exception would or would not apply to EINSTEIN 2.0 operations. In light of the other legal justifications for EINSTEIN 2.0 operations under the Wiretap Act, we need not rely upon this provision.

B.

We next consider whether the provisions in title I of FISA, which govern the conduct of "electronic surveillance" within the United States, and in revised title VII of FISA, which govern, among other things, the acquisition of foreign intelligence information from United States persons outside the United States, apply to the deployment, testing, and use of EINSTEIN 2.0 technology. We conclude that they do not, provided that EINSTEIN 2.0 Participants obtain the consent of their employees through the terms of log-on banners or computer-user agreements, as discussed throughout this memorandum.

1.

Under 50 U.S.C. § 1809(a)(1) (Supp. II 2008), it is a felony for a person acting "under color of law" to engage intentionally in "electronic

[11] That does not mean that the government would be prohibited from acquiring the communications of an employee or contractor who intentionally incorporates malicious code in their Internet communications. Rather, some other statutory exception—such as consent or the rights or property exception—may authorize that result.

surveillance" as defined in title I of FISA, *see* 50 U.S.C. § 1801(f) (2006), "except as authorized" by FISA, the Wiretap Act, the SCA, the Pen/Trap Act, or any other "express statutory authorization that is an additional exclusive means for conducting electronic surveillance" under 50 U.S.C. § 1812(b) (Supp. II 2008). *See also id*. § 1810 (2006) (establishing civil penalties for violations of section 1809(a)(1)). As we have established in Part III.A, EINSTEIN 2.0 operations would not be prohibited by the Wiretap Act. Thus, it could be argued that they are "authorized" under the Wiretap Act. On this view, FISA does not govern activity that is expressly permitted under provisions in the Wiretap Act, such as activity falling within the terms of the consent or the rights or property exception. *Cf. Freemen*, 524 F.2d at 340 & n.5 (phrase "[e]xcept as authorized by [the Wiretap Act]" in 47 U.S.C. § 605(a) (1970) "permits" telephone companies to protect their rights or property under section 2511(2)(a)(i) notwithstanding any otherwise applicable terms of section 605(a)). Accordingly, EINSTEIN 2.0 operations permitted under the rights or property exception of the Wiretap Act would be authorized notwithstanding the electronic surveillance provisions of FISA (and notwithstanding the absence of a rights or property exception in FISA).

There is much to recommend that view, although the better reading of "authorized" may be that the term refers to orders obtained under the procedures of the Wiretap Act, the SCA, the Pen/Trap Act, or another covered statute, rather than to activities that merely are not prohibited by those statutes. *Cf. United States v. Keen*, 508 F.2d 986, 988 (9th Cir. 1974) ("Section 2511(2)(c) is worded as an exception to [the] general prohibition of judicially non-authorized wire taps, not as a positive authorization of such taps."). We need not and do not resolve this issue today. Rather, we assume for the purposes of this memorandum that title I of FISA applies to the deployment, testing, and use of EINSTEIN 2.0 technology if those actions constitute "electronic surveillance" within the meaning of 50 U.S.C. § 1801(f).

Section 1801(f) sets forth four separate definitions of "electronic surveillance." They are as follows:

> (1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communications sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired

> by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;
>
> (2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of Title 18;
>
> (3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or
>
> (4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

50 U.S.C. § 1801(f)(1)–(4). EINSTEIN 2.0 operations that scan, acquire, and store copies of data packets containing malicious computer code from Federal Systems Internet Traffic constitute an "acquisition" of the "contents" of a communication. *Id.* § 1801(n) (defining "contents" to include "any information concerning the identity of the parties to . . . communications or the existence, substance, purport, or meaning of that communication").

Nevertheless, paragraphs (1) and (3) of section 1801(f) do not apply to EINSTEIN 2.0 operations. Those operations do not constitute electronic surveillance under section 1801(f)(1), because EINSTEIN 2.0 sensors generally would not target any "particular, known United States person" in the United States. Nor do EINSTEIN 2.0 operations constitute electronic surveillance within the meaning of section 1801(f)(3), because the EINSTEIN 2.0 sensors do not acquire the contents of any "radio communication." As explained in Part I, EINSTEIN 2.0 sensors are to scan only a mirror copy of Federal Systems Internet Traffic created as that traffic passes through the facilities located at the government's TICs. Further-

more, even if section 1801(f)(1) and section 1801(f)(3) did apply to EINSTEIN 2.0 operations, the use of EINSTEIN 2.0 technology still does not constitute "electronic surveillance" under those definitions, because the use of those sensors does not implicate "a person's reasonable expectation of privacy." *See supra* pp. 71–82 and *infra* p. 106.

That leaves section 1801(f)(2) and (4). Section 1801(f)(2) applies to EINSTEIN 2.0 operations only if EINSTEIN 2.0 technology acquires the contents of "wire communication[s]," which FISA defines as "any communication while it is being carried by a wire, cable, or other like connection furnished or operated by . . . a common carrier . . . providing or operating such facilities for the transmission of interstate or foreign communications." 50 U.S.C. § 1801(*l*); *see* H.R. Rep. No. 95-1283, at 66–67 (1978) (communications are wire communications "only when they are carried by a wire furnished or operated by a common carrier"). FISA does not define the term "common carrier." We need not decide whether EINSTEIN 2.0 operations acquire the contents of communications while being carried by the wire facilities of a common carrier. Even if they do, the use of EINSTEIN 2.0 technology does constitute electronic surveillance under section 1801(f)(2) as long as the government obtains "the consent of any party" to a communication to acquire the contents of that communication. 50 U.S.C. § 1801(f)(2).

Because the consent exception in section 1801(f)(2) concerns the same subject matter—consent of a party to a communication—as section 2511(2)(c), we construe the two provisions *in pari materia*. *See Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 316 (2006) (statutes addressing a similar subject matter should be read "as if they were one law") (internal quotation marks omitted); *Authority of USDA to Award Monetary Relief for Discrimination*, 18 Op. O.L.C. 52, 69 (1994) ("Statutes addressing the same subject matter—that is, statutes '*in pari materia*'—should be construed together."). That construction is consistent with the stated views of the Senate Select Committee on Intelligence and the Senate Committee on the Judiciary in their respective committee reports on the legislation that ultimately would become FISA. *See* S. Rep. No. 95-604, pt. I, at 35 (1978) (definition of electronic surveillance "has an explicit exception where any party has consented to the interception. This is intended to perpetuate the existing law regarding consensual interceptions found in 18 U.S.C. § 2511(2)(c)."), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3936–37; S. Rep. No. 95-701, at 37 (1978) (same), *reprinted in* 1978 U.S.C.C.A.N.

3973, 4006. Accordingly, for the same reasons already noted above with respect to the Wiretap Act, we believe that the government could obtain valid consent under section 1801(f)(2) through consistent and actual use of log-on banners or computer-user agreements. *See United States v. Missick*, 875 F.2d 1294, 1299 (7th Cir. 1989) (section 1801(f)(2) does not apply to acquisition of content of telephone calls where one of the parties consented).

For that same reason, we do not believe that EINSTEIN 2.0 operations constitute "electronic surveillance" under section 1801(f)(4). It is plain that the use of EINSTEIN 2.0 technology constitutes "the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information." 50 U.S.C. § 1801(f)(4). But regardless whether that technology would acquire the contents of communications "other than from" the wire facilities of a common carrier, EINSTEIN 2.0 operations would not fall within the scope of section 1801(f)(4). As long as EINSTEIN 2.0 Participants consistently adopt, implement, and enforce the use of appropriate log-on banners or computer-user agreements as discussed in this memorandum, EINSTEIN 2.0 technology would not acquire the contents of Internet communications under circumstances where there is a "reasonable expectation of privacy" and a warrant "would be required for law enforcement purposes." *See supra* Parts II.A.2, III.A.1; *see also Interception of Radio Communication*, 3 Op. O.L.C. 240, 241 (1979) (phrase "reasonable expectation of privacy" in FISA incorporates "the standard of constitutionally protected privacy interests"); H.R. Rep. No. 95-1283, pt. 1, at 53 (1978) (under section 1801(f)(4) "the acquisition of information [must] be under circumstances in which a person has a constitutionally protected right of privacy. There may be no such right in those situations where the acquisition is consented to by at least one party to the communication"); S. Rep. No. 95-701, at 37 (1978) (same).

Therefore, EINSTEIN 2.0 operations would not constitute "electronic surveillance" under title I of FISA as long as EINSTEIN 2.0 Participants consistently adopt, implement, and enforce the terms of appropriate log-on banners or computer-user agreements, as discussed in this memorandum.

2.

For the same reasons, we do not believe that the use of EINSTEIN 2.0 technology with respect to the Federal Systems Internet Traffic of Executive Branch employees outside the United States, such as (hypothetically) employees of the Department of State or the Central Intelligence Agency, implicates revised title VII of FISA. As applicable here, section 703(a)(1) of FISA provides that the Foreign Intelligence Surveillance Court ("FISC") shall have jurisdiction over the "the targeting of a United States person reasonably believed to be located outside the United States to acquire foreign intelligence information, if the acquisition constitutes electronic surveillance" under FISA. 50 U.S.C. § 1881b(a)(1) (Supp. II 2008). And section 704(a)(2) of FISA generally prohibits elements of the Intelligence Community from "intentionally target[ing], for the purpose of acquiring foreign intelligence information, a United States person reasonably believed to be located outside the United States under circumstances in which [the] person has a reasonable expectation of privacy and a warrant would be required if the acquisition were conducted inside the United States for law enforcement purposes." *Id*. § 1881c(a)(2) (Supp. II 2008).

We have no reason to believe that EINSTEIN 2.0 operations generally would involve the intentional targeting of any United States person employed by an EINSTEIN 2.0 Participant outside the United States in order to acquire "foreign intelligence information" as defined in 50 U.S.C. § 1801(e). Even assuming for the sake of argument that EINSTEIN 2.0 operations would satisfy those requirements, we do not believe those operations would satisfy the other jurisdictional requirements in sections 1881b(a)(1) or 1881c(a)(2), provided that EINSTEIN 2.0 Participants employing United States persons outside the United States consistently adopt, implement, and enforce appropriate notice and consent procedures, as discussed in this memorandum. In that circumstance, there would be no "electronic surveillance" as defined in section 1801(f)(1)–(4), and, thus, section 1881b(a)(1) would be inapplicable. *See supra* Part III.B.1. Likewise, there would be no reasonable expectation of privacy and a warrant would not be required for law enforcement purposes for either of two reasons: there would be no search under the Fourth Amendment, *see supra* Part II.A, or there would be proper consent, thus obviating the need for a warrant and probable cause, *see supra* pp. 81, 84–93. Under either rationale (or both), the prohibition in section 1881c(a)(2) would not apply.

Therefore, we do not believe that EINSTEIN 2.0 operations would be subject to revised title VII of FISA.

C.

We also conclude that the relevant provisions of the Stored Communications Act would not apply to EINSTEIN 2.0 operations, provided that EINSTEIN 2.0 Participants consistently adopt, implement, and enforce the terms of appropriate log-on banners or computer-user agreements, as discussed in this memorandum. As relevant here, the SCA prohibits a person or entity "providing an electronic communication service to the public" from knowingly "divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." 18 U.S.C. § 2702(a)(1) (2006). As already noted with respect to the Wiretap Act, it is unclear that the federal government—which does offer websites and other Internet-related services that enable the transmission of electronic communications to and from the public—qualifies as a provider of electronic communication service to the public under the SCA. *See supra* p. 94. The matter is far from settled. *Compare Andersen Consulting LLP v. UOP*, 991 F. Supp. 1041, 1042–43 (N.D. Ill. 1998) (computer system of partnership used to communicate with third parties does not provide electronic communication service to the public within the meaning of the SCA), *with Bohach v. City of Reno*, 932 F. Supp. 1232, 1236 (D. Nev. 1996) (City of Reno is an "electronic communication service provider" under the SCA because it provides the terminals, computers, pages, and software that enables its own personnel to send and to receive electronic communications). We need not decide the issue, for even if the government is a provider of electronic communication service to the public, we do not believe that EINSTEIN 2.0 operations would run afoul of the SCA.

EINSTEIN 2.0 operations would implicate the prohibition in section 2702(a)(1) if the temporary mirroring of all Federal Systems Internet Traffic of EINSTEIN 2.0 Participants divulges the content of an electronic communication "while in electronic storage." The SCA defines "electronic storage" to mean:

> (A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

> (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication.

Id. § 2510(17)(A) & (B). The courts have interpreted section 2510(17)(A) to apply only to an electronic communication stored temporarily on a provider's server pending delivery of the communication to the recipient. *See, e.g*., *In re DoubleClick, Inc*. *Privacy Litig*., 154 F. Supp. 2d 497, 511–12 (S.D.N.Y. 2001). As noted in Part I, *see supra* p. 67, EINSTEIN 2.0 technology does not have any effect upon the transmission of wire or electronic communications to their intended recipients. Rather, EINSTEIN 2.0 operations will make a mirror copy of every packet in Federal Systems Internet Traffic and will scan that copy to detect known signatures. This copy is "temporary" storage of communications "incidental" to their transmission, in the sense that the storage is related to the transmission of those communications. But arguably it is not "intermediate" in the process of that transmission, because the temporary copy is not created as part of a step in the chain of transmitting the communication to its intended recipient. Rather, the copy is made for the separate purpose of enabling EINSTEIN 2.0 sensors to detect malicious computer code embedded in Federal Systems Internet Traffic. Indeed, the EINSTEIN 2.0 scanning process occurs out-of-line from the transmission process, even if it is related to the in-line transmission of Federal Systems Internet Traffic.

Nor do we understand that EINSTEIN 2.0 operations would divulge the content of any communication while in storage "for purposes of backup protection" within the meaning of section 2510(17)(B), even under a broader reading of "backup protection" than DOJ has embraced in litigating the scope of that provision. *See Theofel v*. *Farey Jones*, 341 F.3d 978, 985 (9th Cir. 2003) (backup protection means "storing a message on a service provider's server after delivery to provide a second copy of the message in the event that the user needs to download it again"). Because the EINSTEIN 2.0 sensors scan a mirror copy of Federal Systems Internet Traffic for the purpose of detecting malicious computer code, there is no routing of the contents of any communication stored by an ISP for purposes of backup protection. It is true that EINSTEIN 2.0 technology would store data packets containing malicious computer code for later review by DHS analysts. But the "purpose" of any storage and subsequent review by analysts of blocked data packets would be to prevent

intrusions and exploitations against Federal Systems, and not "to provide a second copy of the message in the event that the user needs to download it again." *Id.* at 985. Therefore, we have no reason to believe that EINSTEIN 2.0 operations would divulge the contents of communications stored for backup protection.

Even if section 2702(a)(1) would apply to EINSTEIN 2.0 operations, scanning Federal Systems Internet Traffic for malicious computer code would fall within the SCA's consent exception in 18 U.S.C. § 2702(b)(3) as long as EINSTEIN 2.0 Participants consistently adopt, implement, and enforce the terms of appropriate log-on banners or computer-user agreements, as discussed in this memorandum. Section 2702(b)(3) states in relevant part that an electronic communication service provider "may divulge the contents of a communication . . . with the lawful consent of the originator or an addressee or intended recipient of such communication." *Id.*; *see also id.* § 2702(c)(2) (provider may divulge information pertaining to subscriber or customer of electronic communication service, but not the contents of that communication, "with the lawful consent of the customer or subscriber"). We have interpreted a similar consent exception in 18 U.S.C. § 2703(c)(1)(B)(iii) (2006), which states that a provider shall divulge a record pertaining to the identity of a subscriber or customer—but not the contents of a communication—to a governmental entity that "has the consent" of the customer or subscriber, *in pari materia* with the consent exception in the Wiretap Act. *See Caller ID*, 20 Op. O.L.C. at 319 & n.12 (interpreting consent exception in section 2703(c)(1)(B)(iii) in accord with the consent exception in the Wiretap Act). We also construe the consent exception in section 2702(b)(3)—which is even more closely analogous to the consent exception in section 2511(2)(c) than is section 2703(c)(1)(B)(iii)—*in pari materia* with section 2511(2)(c). *See supra* p. 105. For the reasons already noted with respect to the consent exception in the Wiretap Act, *see supra* Part III.A.1, to the extent the SCA applies to EINSTEIN 2.0 operations, we believe that the government could obtain proper consent under section 2702(b)(3) and (c)(2) through the consistent and actual use of log-on banners or computer-user agreements.[12]

[12] EINSTEIN 2.0 operations also may fall within the "rights or property" exceptions to the SCA, *see* 18 U.S.C. § 2702(b)(5), (c)(3). The SCA's "rights or property" exceptions are substantively similar to the parallel exception in the Wiretap Act. The SCA's first

D.

Finally, we conclude that the Pen/Trap Act would not apply to EINSTEIN 2.0 operations where EINSTEIN 2.0 Participants consistently adopt, implement, and enforce the terms of appropriate log-on banners or computer-user agreements, as discussed in this memorandum. Section 3121(a) of title 18, United States Code, provides that "[e]xcept 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" FISA. 18 U.S.C. § 3121(a) (2006). As relevant here, the statute defines a "pen register" as a "device . . . which records or decodes . . . routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted, provided, however, that such information shall not include the contents of any communication." *Id*. § 3127(3) (2006). And a "trap-and-trace device" means "a device . . . which captures the incoming electronic or other impulses which identify . . . routing, addressing, and signaling information reasonably likely to identify the source of a wire or

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rights or property provision states that a provider of electronic communication service to the public may divulge the contents of a stored communication "as may be necessarily incident . . . to the protection of the rights or property of the provider of that service." 18 U.S.C. § 2702(b)(5). Another provision in the SCA permits a provider of electronic communication service to the public to disclose non-content information regarding a subscriber or a customer "as may be necessarily incident to . . . the protection of the rights or property of the provider of that service." *Id*. § 2702(c)(3). In light of the similarities in wording and subject matter between the SCA's rights or property exceptions and the Wiretap Act's parallel provision, we construe them *in pari materia*. *See supra* pp. 105, 110.

A crucial difference, however, between the "rights or property" exceptions in the SCA and the one in the Wiretap Act is that the SCA provisions apply only to a provider of electronic communication service *to the public*, whereas the Wiretap Act provision applies to *any* provider of such service, whether to the public or otherwise. As we noted, it is debatable whether the government is a "provider" of electronic communication service to the public under the SCA. *See supra* pp. 94, 108. Assuming that the government is a public provider of electronic communication service, the SCA's rights or property exceptions apply to any action under EINSTEIN 2.0 divulging the contents of stored electronic communications or non-content information concerning a subscriber or a customer that is reasonably necessary to protect Federal Systems. *See supra* Part III.A.2. Of course, if the government is not a public provider, then the provisions of the SCA do not apply to it in any event.

electronic communication, provided, however, that such information shall not include the contents of any communication." *Id.* § 3127(4).[13]

We assume for the purposes of this memorandum that the use of EINSTEIN 2.0 technology would fall within the definitions of both a pen register and a trap-and-trace device, because they can both "record" and "capture," 18 U.S.C. § 3127(3) & (4), information that identifies routing, addressing, and signaling information for data packets that are part of Federal Systems Internet Traffic. *See supra* pp. 66–68, 71. Hence, absent an exception, we assume that the government would be required to obtain a court order before the deployment, testing, and use of EINSTEIN 2.0 technology. *See* 18 U.S.C. § 3123 (2006).

As with the Wiretap Act, FISA, and the SCA, obtaining the valid consent of Executive Branch employees also exempts EINSTEIN 2.0 operations from any applicable requirement of the Pen/Trap Act. Section 3121(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 . . . where the consent of the user of that service has been obtained." 18 U.S.C. § 3121(b)(3).[14] We believe that an EINSTEIN 2.0 Participant providing Internet service to its employees through government-owned information systems and its Federal Systems would qualify as a "provider of electronic . . . communication service" within the meaning of the Pen/Trap Act. *See supra* p. 98; 18 U.S.C. § 2510(15). Accordingly, the government would be exempt from the prohibitions of the Pen/Trap Act with respect to EINSTEIN 2.0 operations where the "consent" of the "user[s]" of their electronic communication service "has been obtained." With respect to both entities, we believe that the "user" whose consent needs to be obtained is the Executive Branch employee using a government-owned computer at an IP address that is subject to EINSTEIN 2.0 operations. For the same reasons discussed above we believe that EINSTEIN 2.0 Participants could obtain proper consent from their em-

[13] Title III of FISA also establishes a statutory basis for the government to obtain an authorization from the FISC to install a pen register or a trap-and-trace device in order to acquire certain foreign intelligence information. *See* 50 U.S.C. §§ 1841–1846 (2006 & Supp. II 2008). Under FISA, the terms "pen register" and "trap and trace device" have the same meanings as used in 18 U.S.C. § 3127(3) and (4). *See* 50 U.S.C. § 1841(2).

[14] The consent exception in section 3121(b)(3) also applies to the provisions in FISA authorizing the installation or use of such devices to acquire foreign intelligence information.

ployees under section 3121(b)(3) through the consistent adoption, implementation, and enforcement of appropriate log-on banners or computer-user agreements, as discussed in this memorandum. Therefore, we conclude that the deployment, testing, and use of EINSTEIN 2.0 technology would not constitute the unauthorized installation or use of a pen register or a trap-and-trace device under 18 U.S.C. § 3121(a).[15]

STEVEN G. BRADBURY
Principal Deputy Assistant Attorney General
Office of Legal Counsel

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[15] EINSTEIN 2.0 operations also may fall within the "rights or property" exception to the Pen/Trap Act. Section 3121(b)(1) provides that the prohibitions of that Act do not apply with respect to the use of such technology "by a provider of electronic or wire communication service . . . relating 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." 18 U.S.C. § 3121(b)(1).

We believe there is a strong argument that EINSTEIN 2.0 operations are subject to this "rights or property" exception. The rights or property exception in the Pen/Trap Act is more expansive than the parallel provisions in the Wiretap Act and the SCA. There is no requirement under the Pen/Trap Act provision that the action of a provider be "necessary" to protecting its rights or property. Furthermore, the Pen/Trap Act provision also permits a provider to protect not only its own rights or property, but also its users against "abuse of service or unlawful use of service." 18 U.S.C. § 3121(b)(1). Accordingly, under EINSTEIN 2.0 operations the government is protecting the Executive Branch "users" of the Internet service and the government's own rights and property. For these reasons and the reasons noted with respect to the narrower exception in the Wiretap Act, *see supra* Part III.A.2, we believe the rights or property exception to the Pen/Trap Act provides an additional basis to believe that EINSTEIN 2.0 operations are consistent with the Pen/Trap Act.

Status of Presidential Memorandum on Use of the Polygraph in the Executive Branch

An undated four-page memorandum from President Lyndon Johnson entitled "Use of the Polygraph in the Executive Branch" and addressed to the heads of Executive Branch departments and agencies, which was neither issued as a directive to the Executive Branch nor understood contemporaneously to have legal effect, does not now bind the Department of Justice or other entities within the Executive Branch.

January 14, 2009

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
JUSTICE MANAGEMENT DIVISION

You have asked for our views on the validity of an undated four-page memorandum from President Lyndon Johnson entitled "Use of the Polygraph in the Executive Branch" and addressed to the heads of Executive Branch departments and agencies. Memorandum to the Heads of Departments and Agencies, *Use of the Polygraph in the Executive Branch* ("Johnson Memorandum" or "Memorandum"), Ex PE1 10/1/64, Box 4, White House Central Files ("WHCF"), Lyndon Baines Johnson Library ("LBJL"). You state that you have previously relied on the Johnson Memorandum in providing advice regarding polygraph use in the Department of Justice, but that a September 2006 report by the Office of the Inspector General called into question whether the Johnson Memorandum was ever issued, and whether it has legal effect. *See* Office of the Inspector General, Dep't of Justice, *Use of Polygraph Examinations in the Department of Justice* at 2–5 (Sept. 2006) ("OIG Report"), www.usdoj.gov/oig/reports/plus/e0608/final.pdf. The Johnson Memorandum states that "to prevent unwarranted intrusions into the privacy of individuals . . . use of the polygraph is prohibited" in the Executive Branch, subject to three "limited exceptions." Johnson Memorandum at 1.

Based on our examination of the historical record, we conclude that while President Johnson apparently signed the Memorandum in January 1967, he did not issue it as a directive to the Executive Branch, nor was the document understood contemporaneously to have legal effect. Even assuming the Memorandum did take effect at the time of signature, uncontroverted evidence demonstrates that President Johnson gave subsequent directions to his subordinates sufficient to revoke the Memorandum

and deny it further legal effect. It is our view, therefore, that the Memorandum does not now bind the Department of Justice or other entities within the Executive Branch.[1]

I.

The Johnson Memorandum states that "to prevent unwarranted intrusions into the privacy of individuals . . . use of the polygraph is prohibited" in the Executive Branch, with three "limited exceptions." *Id*. at 1. First, it states that an Executive Branch entity with "an intelligence or counter-intelligence mission directly affecting the national security" may use polygraphs for "employment screening and personnel investigations, and in intelligence and counter-intelligence operations," after complying with certain procedural and substantive requirements. For polygraph use "in intelligence and counter-intelligence operations," it states that an agency must "prepare regulations and directives governing the use of the polygraph" to be approved by the agency head. For polygraph use "in employment screening and personnel investigations," it states that a broader set of requirements applies: an agency must prepare regulations subject to the review and approval of the Chairman of the Civil Service Commission containing enumerated procedural and substantive protections, including advance notice to the subject of a polygraph examination about his privilege against self-incrimination, the effect of the results of the polygraph examination (or refusal to consent) on eligibility for employment, and an assurance that refusal to consent to a polygraph will not be made part of a personnel file. *Id*. at 1–2.[2] Second, the Memorandum would permit executive departments and agencies to use polygraphs "in aid of criminal investigations" after they promulgate regulations or direc-

[1] The Office of Personnel Management interprets its authority to review and approve agency polygraph policies as deriving from general statutory authority to administer the civil service rules and regulations, 5 U.S.C. § 1103(a)(5)(A) (2006); authority under Executive Order 10577 of November 22, 1954, as amended, to establish standards for determining the suitability of applicants and appointees to the competitive service; and its authority under Executive Order 10450 of April 27, 1953, as amended, to investigate persons entering or employed in the competitive service, including investigations for sensitive national security positions.

[2] Pursuant to the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, the management functions of the Civil Service Commission have been transferred to the Office of Personnel Management.

tives subject to the approval of the Attorney General and containing similar procedural and substantive protections, including advance notice of the subject's privilege against self-incrimination, right to refuse to submit to the examination, and, in the case of a federal employee, an affirmation that refusal to consent to a polygraph will not result in an adverse action against the employee and will not be made part of an employee's personnel file. *Id*. at 3. Third, the Memorandum would allow polygraph use "to record physiologic variables in bona fide research and development projects." *Id*. at 3–4.

To understand the legal status of the Johnson Memorandum requires an in-depth examination of the historical record. In June 1963, following public criticism of efforts by the Department of Defense to use polygraph examinations during a leak investigation, the Chairman of the House Government Operations Committee directed that a comprehensive study be undertaken of polygraph use in the Executive Branch. The resulting report, published in March 1965, was critical of polygraph technology and the existing qualifications and supervision of federal polygraph operators, and it called on the Johnson Administration to prohibit the use of polygraphs "in all but the most serious national security and criminal cases." *See* H.R. Rep. No. 89-198, at 1–2 (1965). In November 1965, President Johnson established an interagency committee (the "Committee") to study Executive Branch polygraph use; the Committee consisted of representatives from the Department of Defense, Bureau of the Budget, Office of Science and Technology, Department of Justice, and Central Intelligence Agency, and it was chaired by John W. Macy, Jr., Chairman of the Civil Service Commission.[3]

On July 29, 1966, the polygraph Committee transmitted to the President a report and draft memorandum to heads of Executive Branch departments and agencies, which (but for the absence of the President's signature), is identical to the Johnson Memorandum. Given the "wide divergence of opinion" on polygraph reliability, general inadmissibility of polygraph results in judicial proceedings, and "invasion of privacy of the individual being interrogated," the interagency Committee recommended to the

[3] *See* Civil Service Commission Memorandum for the President at 1 (July 29, 1966) ("Commission Memorandum"); *see also* Office of Technology Assessment, *Scientific Validity of Polygraph Testing* 34 (1983) (discussing establishment and work of interagency Committee).

President that polygraph use be prohibited in the Executive Branch except for the three limited circumstances (and subject to the enumerated protections) described in the Johnson Memorandum.[4] Although the surviving copy of the Johnson Memorandum is undated, correspondence with senior White House staff suggests President Johnson initially reviewed and approved the report and draft Memorandum in substance on or about December 30, 1966 and signed the Memorandum between January 11 and January 14, 1967.[5]

A review of White House records from the Johnson Administration reveals several indications that the Johnson Memorandum was never issued. Neither the published Weekly Compilation of Presidential Documents, nor the Johnson White House's internal collection of presidential memoranda issued to heads of departments and agencies, contains a copy.[6] The surviving copy of the Memorandum in the official records of the Johnson Administration was deposited in the White House Central Files with a cover note from the chief clerk of the White House files, stating: "I don't think this was ever circulated or released. It was held up on instructions after signature."[7] We have consulted several agencies and Department

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[4] *See* Commission Memorandum at 1–2.

[5] On January 11, John Macy wrote to the President attaching "for your signature" the Memorandum "as approved by you on December 30." *See* Memorandum for the President from John W. Macy, Jr. (Jan. 11, 1967), Ex PE1 10/1/64, Box 4, WHCF, LBJL. On January 14, Macy wrote to White House Press Secretary George Christian attaching a signed copy of the Johnson Memorandum and stating: "In view of the President's approval of the attached memorandum to department and agency heads, the attached press release is available for press office use at whatever time you and the President decide." *See* Memorandum for George Christian, Press Secretary to the President, from John W. Macy, Jr. (Jan. 14, 1967), Ex PE1 10/1/64, Box 4, WHCF, LBJL.

[6] This collection is now contained in the presidential archives at LBJL.

[7] Undated note by William J. Hopkins, Ex PE1 10/1/64, Box 4, WHCF, LBJL. According to records at the Johnson Library, Hopkins was a member of the permanent White House staff who served as Executive Clerk of the White House from 1943 to 1964 and later as Executive Assistant to the President. His note bears annotations from employees in the White House Central Files that suggest it was written at the time the Johnson Memorandum was signed or when it was deposited in the White House files in January 1967 or 1969. *See* E-mail for Jeremy Marwell, Attorney-Adviser, Office of Legal Counsel, from Allen Fisher, Archivist, Lyndon Baines Johnson Library (July 31, 2008). As discussed below, *see infra* note 8, the Memorandum bears two date stamps from the White House Central Files—January 27, 1967 and January 13, 1969.

components, and none reports any historical record of having received the Memorandum from the Johnson White House.[8]

Other contemporaneous evidence from the Johnson White House further supports the view that the signed Memorandum was held up for revisions after the President's signature and not ultimately released. On January 17, 1967, a copy of the Memorandum was sent to Special Assistant to the President for Domestic Policy Joseph Califano to determine "whether and how this is to be distributed."[9] By January 25, Califano had voiced concerns to John Macy about permitting polygraph use in criminal investigations.[10] In response, the Committee revised its report and draft

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[8] The agencies and components consulted include the Office of Personnel Management, the Office of Special Counsel, the Merit Systems Protection Board, the Office of the Director of National Intelligence, the Department of the Interior, the Department of Energy, the Criminal Division of the Department of Justice, the Federal Bureau of Investigation, and the Department's Office of the Inspector General. The version of the signed Memorandum in the archives is itself a photocopy. The Johnson Library has no record of the original document. A clue to the fate of the original document may be drawn from the fact that the surviving photocopy bears two White House Central Files date stamps, from January 27, 1967 and January 13, 1969. Based on these stamps, it is possible that the original signed Memorandum and surviving photocopy were first deposited in the Central Files on January 27, approximately two weeks after the President's signature and shortly after circulation of a revised draft presidential memorandum that omitted the "criminal investigation" exception. *See infra* note 10 and accompanying text. The second date stamp on the surviving photocopy, and the absence of the original document, may suggest that the documents were at some subsequent point removed from the Central Files, with only the photocopy later re-deposited (acquiring the second date stamp) in the final weeks of the Administration. That the archives do not contain the original signed Memorandum may suggest that it was destroyed, perhaps deliberately, between January 27, 1967 and the end of the Administration; for instance, the original may have been destroyed upon a final decision by the President to implement the Committee's recommendations through channels other than a presidential memorandum. *See infra* text accompanying notes 22–25.

[9] *See* Memorandum for Joseph A. Califano, Jr., from William J. Hopkins (Jan. 17, 1967), Ex JL, Box 1, WHCF, LBJL. The memo states that "[Assistant to the White House Press Secretary] Tom Johnson now tells me that whether and how this is to be distributed is in your hands."

[10] *See* Memorandum for Joseph A. Califano, Jr., from John W. Macy, Jr. (Jan. 25, 1967), Box 356 (1058), Office Files of James C. Gaither, LBJL ("Jan. 25 Macy Memorandum") (circulating versions of report, presidential memorandum, and press release "rewritten in accordance with our discussion the other day"); Letter for Joe Califano from Harry C. McPherson (Feb. 2, 1967), Box 356 (1058), Office Files of James C. Gaither, LBJL ("Feb. 2 McPherson Letter") ("John Macy has gone back to his inter-departmental

memorandum, deleting the exception for criminal investigations that is contained in the version of the memorandum signed by the President, and circulated the revised documents for White House review.[11] Notably, the revised documents included a draft press release that made no mention of an earlier policy.[12] Had President Johnson released the signed version of the Memorandum to heads of all departments and agencies only weeks earlier, it seems unlikely that a subsequent press release would have been silent about a substantial change to a recent, government-wide directive.

This view is further supported by the Johnson Administration's internal discussions and public statements about congressional efforts in 1967 and 1968 to pass legislation restricting the federal government's use of polygraphs. In February 1967, for instance, Harry McPherson, Special Assistant and Counsel to the President, urged Califano with respect to the revised report and memorandum (which prohibited polygraph use in criminal investigations) to "go back to the boss with this and try to get it issued" because, in his view, the Administration "need[ed] to do something constructive in this field before Sam Ervin [Chairman of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee] starts to train his guns on [John Macy] again."[13] Indeed, Senator Ervin introduced legislation in 1967 (which was not ultimately enacted) that would have restricted polygraph testing of Executive Branch employees and job applicants, with limited exceptions.[14] But as late as May 1967, the

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committee on the use of the polygraph, and they have agreed to eliminate the 'criminal investigation' exception."); *see also* Draft Memorandum for the President from Joe Califano (undated), Box 356 (1058), Office Files of James C. Gaither, LBJL ("As you may recall, the Committee originally recommended allowing the use of the polygraph in criminal investigations, but, upon reconsideration after a meeting between John Macy, McPherson, and me, limited the recommendation to national security cases.").

[11] Jan. 25 Macy Memorandum, *supra* note 10.

[12] *See* Draft White House Press Release on Use of Polygraph (attachment to Jan. 25 Macy Memorandum, *supra* note 10).

[13] *See* Feb. 2 McPherson Letter, *supra* note 10; *see also* Memorandum for Joe Califano, Special Assistant to the President for Domestic Policy, from Jim Gaither, Staff Assistant to the President (Mar. 27, 1967), Box 356 (1058), Office Files of James C. Gaither, LBJL (proposing additional revisions to the report and draft memorandum to be made prior to documents' release).

[14] *See* S. 1035, 90th Cong. §§ 1(f), 6 (1967) (reprinted in *Privacy and the Rights of Federal Employees: Hearing Before the Subcomm. on Manpower and Civil Service of*

Civil Service Commission deferred adopting any "final" position on the bill's polygraph provisions because "[w]ith respect to the executive branch in general, results of the study by the President's Inter-Agency [Polygraph] Committee . . . *have not yet been issued*."[15]

We are aware of no historical evidence that President Johnson approved the revised memorandum to agency and department heads. To the contrary, nearly a year later, on April 15, 1968, Macy again wrote to the President asserting that "the time is right for Executive Branch action" on polygraphs and enclosing another copy of the revised report and memorandum he had circulated in late January 1967. Although summarizing other aspects of the Committee's work and history, Macy made no mention of the President's approval of the original report or Memorandum, or of any directive issued to heads of departments and agencies at that time. Further, Macy advised the President in April 1968 that "there are three options" available to implement the Committee's recommendations: "[a] Presidential directive to heads of departments and agencies setting forth the new policy," "[a] Civil Service Commission directive as a Government-wide statement of policy," or "[n]o formal directive or announcement but informal advice from the Civil Service Commission to responsible agency officials."[16] Macy's formulation of the policy options in the present tense ("there are three options"), inclusion of the apparently as-yet-unexecuted "option" of issuing a presidential memorandum to the heads of departments and agencies, and suggestion that the Administration might still choose to have "[n]o formal directive," all suggest the earlier Memorandum was not in effect.

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the H. Comm. on Post Office and Civil Service, 90th Cong. 2–20 (1968) ("*Privacy Hearings*")).

[15] Letter for Sam J. Ervin, Jr., Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, from John C. Macy, Jr., Chairman, Civil Service Commission (May 9, 1967) (emphasis added) (reprinted in *Privacy Hearings*, *supra* note 14, at 57, 61).

[16] Memorandum for the President from John W. Macy, Jr. (Apr. 15, 1968), Box 28, Folder Ex PE 6 Investigations, WHCF, LBJL ("Apr. 15 Macy Memorandum"). Temple concurred with Macy's recommendation in an April 25 memorandum to the President. Johnson instructed Temple to call him to discuss the matter, but available documents do not reveal the outcome. *See* Memorandum for the President from Larry Temple (Apr. 25, 1968), Box 28, Folder Ex PE 6 Investigations, WHCF, LBJL.

White House correspondence further suggests that as late as June 1968, the Johnson Administration still had not taken any definitive action on the interagency Committee's report. In that month, the House Subcommittee on Manpower and Civil Service called John Macy to testify on Executive Branch polygraph use in connection with hearings on Senator Ervin's bill.[17] Macy suggested that he tell Congress "the policy of the Executive Branch . . . prohibits the use of the polygraph with the limited exception of personnel investigations and operations in the intelligence area," explain the work of the interagency Committee, and state that "legislative action is not required in view of these administrative steps which have accomplished the same purpose."[18] The President rejected Macy's recommendation in favor of the position of Special Counsel Larry E. Temple, who argued that "there is much to be said for an expression of Congressional will in this area—even though the recommendations of the Inter-Agency Committee *might be implemented* without legislation."[19] The President approved instructions for Macy to testify that "[t]he Executive Branch *has not formulated any final position or Government-wide policy on the use of the polygraph*," that an interagency study had been undertaken at the President's direction, and that the legislation under consideration was "consistent with and parallel [to] the conclusion reached by this Inter-Agency Committee."[20]

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[17] *See Privacy Hearings*, *supra* note 14, at 27–55 (statement of John W. Macy, Jr., Chairman, Civil Service Commission).

[18] Memorandum for the President from John W. Macy, Jr. (June 10, 1968), Box 28, Folder Ex PE 6 Investigations, WHCF, LBJL ("June 10 Macy Memorandum").

[19] *See* Memorandum for the President from Larry Temple (June 10, 1968), Box 28, Folder Ex PE 6 Investigations, WHCF, LBJL (emphasis added).

[20] *Id*. (emphasis added). Temple's memorandum included lines for the President's direction entitled "Agree," "Disagree," and "Tell Macy." The President checked "Agree" and "Tell Macy." Consistent with Temple's recommendation (adopted by President Johnson) that Macy make a statement about polygraph policy "if—and only if—he receives an inquiry about his position on the Ervin bill," *id*., Macy appears to have avoided discussing the Administration's position or testifying that the Administration had not yet formulated a polygraph policy. He did, however, testify that "[a]t the present time the polygraph is only used by the national intelligence and security agencies in connection with employment. It is not used by any of the civilian agencies. It is not used in any instances where an employee in the competitive civil service is selected." *Privacy Hearings*, *supra* note 14, at 52. Significantly, the policy described in Macy's June 1968

President Johnson's apparent direction to Macy to testify that the Executive Branch "has not formulated any final position or Government-wide policy" on polygraph examinations is difficult to reconcile with the possibility that the President understood the Executive Branch to be bound at that time by the terms of the January 1967 Memorandum. Similarly, Temple's comment that the Committee's recommendations "*might be* implemented without legislation" appears to reflect the assumption that those recommendations had yet to be issued. Indeed, even Macy himself, who proposed telling Congress that the Executive Branch had adopted a policy, evidently had in mind the version of the policy from the revised documents, rather than the earlier signed Memorandum; Macy's proposed testimony acknowledged a "limited exception"—in the singular—to the general ban on polygraph use, for "personnel investigations and operations in the intelligence area," making no reference to the exception for criminal investigations included in the signed Memorandum.[21]

Shortly after Macy's June 1968 testimony, the Civil Service Commission issued a policy for inclusion in the Federal Personnel Manual governing polygraph use in pre-employment screening of applicants and appointees to the federal competitive service.[22] The content of, and circumstances surrounding, this policy suggest that it may have been the vehicle by which the Johnson Administration implemented the interagency Committee's recommendations, consistent with Macy's April 1968 suggestion

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testimony is inconsistent with the position set forth in the Johnson Memorandum, which would have permitted broader polygraph use, including in criminal investigations.

[21] June 10 Macy Memorandum, *supra* note 18.

[22] *See* Federal Personnel Manual Letter No. 736-4, *Full Field Investigations on Competitive Service Employees and Applicants for Critical-Sensitive Positions*, attachment, *Use of the Polygraph in Personnel Investigations of Competitive Service Applicants and Appointees to Competitive Service Positions* (Oct. 25, 1968). The polygraph policy attached to Letter 736-4 was later incorporated into appendix D of chapter 736 of the Federal Personnel Manual. *See* Federal Personnel Manual ch. 736, app. D, *Use of the Polygraph in Personnel Investigations of Competitive Service Applicants and Appointees to Competitive Service Positions* (Mar. 3, 1969) (reprinted in Norman Ansley, *Polygraph and the Law* at 3-12 to 3-13 (1990)). *See also The Use of Polygraphs and Similar Devices by Federal Agencies: Hearings Before a Subcomm. of the H. Comm. on Government Operations*, 93d Cong. 408–10 (1974) (statement of Anthony L. Mondello, General Counsel, Civil Service Commission) (reprinting polygraph policy as codified in chapter 736, appendix D of Federal Personnel Manual). The Federal Personnel Manual was abolished in 1993. *See* Office of Personnel Management, *FPM Sunset Document* (1993).

that the Civil Service Commission issue a polygraph directive.[23] The Commission's polygraph policy issued in October of that year closely tracked the structure and language of the personnel investigation section from the Johnson Memorandum (which in turn was largely identical to the relevant sections of the revised version from late January). The Commission's policy, for instance, permitted polygraph use in pre-employment screening only by an agency with "a highly sensitive intelligence or counterintelligence mission directly affecting the national security," and only when such an agency had received approval of its rules from the Chairman of the Civil Service Commission. The policy further established procedural and substantive protections that closely tracked the requirements set forth in the Johnson Memorandum (and Committee recommendations), including advance notice to the prospective employee of his privilege against self-incrimination, advance notice of the effect of the polygraph examination (or a refusal to submit) on eligibility for employment, and an assurance that refusal to submit would not be made a part of a personnel file. The Commission's policy did not, however, mention any presidential directive on the subject.

Subsequent Executive Branch practice also suggests that the Civil Service regulations were issued in lieu of a formal presidential directive. In 1974, the General Counsel of the Civil Service Commission testified in congressional hearings on Executive Branch polygraph use that "as a result of" the 1965 interagency study on polygraph use, "the Commission [had] promulgated instructions governing the use of the polygraph for employment screening . . . [involving] competitive service positions." *The Use of Polygraphs and Similar Devices by Federal Agencies: Hearings Before a Subcomm. of the H. Comm. on Government Operations*, 93d Cong. 408 (1974) (statement of Anthony L. Mondello). Neither the Civil Service Commission nor any other federal agency mentioned the Johnson Memorandum or any other presidential directive during the hearings.[24]

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[23] Apr. 15 Macy Memorandum, *supra* note 16, at 2.

[24] A similar understanding appears to have been in place during the Reagan Administration. For example, a March 1982 interagency report recommended expanded use of polygraph examinations in leak investigations of federal employees, but made no mention of any government-wide polygraph policy. *See* Report of the Interdepartmental Group on Unauthorized Disclosures of Classified Information (Mar. 31, 1982) (reprinted in *Presidential Directive on the Use of Polygraphs and Prepublication Review: Hearings before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*

In 1984, the Office of Personnel Management ("OPM"), successor to the Civil Service Commission, re-codified the October 1968 policy to take account of President Reagan's March 1983 National Security Decision

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98th Cong. 166–80 (1983) ("*Presidential Directive Hearings*")). President Reagan's National Security Decision Directive 84, which, in pertinent part, directed agencies with access to classified information to revise their regulations and policies "so that employees may be required to submit to polygraph examinations" in leak investigations, discussed several executive orders relevant to the control of classified information, but made no reference to the Johnson Memorandum or any government-wide policy. *See Safeguarding National Security Information*, Nat'l Sec. Decision Directive at 84, ¶ 5 (Mar. 11, 1983) ("NSDD-84"). Nor are we aware of any reference to the Johnson Memorandum in Congress's response to NSDD-84. *See, e.g.*, H.R. 4681, 98th Cong. (1984) (proposed legislation that would have prohibited polygraph testing of federal employees except in cases of alleged criminal conduct) (reprinted in H.R. Rep. No. 98-961, pt. 1, at 1–4 (1984)); *Presidential Directive Hearings* at 79 (statement of Arch S. Ramsey, Associate Director for Compliance and Investigations, Office of Personnel Management, summarizing OPM polygraph policy without mention of Johnson Memorandum); H.R. Rep. No. 98-578, at 5–7 (1983) (describing history of federal polygraph use, including interagency Committee and 1968 civil service regulations, with no mention of Johnson Memorandum); H.R. Rep. No. 98-961, pt. 1, at 43–45 (same).

Department of Justice policies and statements from this time period appear consistent with this understanding. In 1980, this Office concluded, without mention of the Johnson Memorandum, that the Attorney General had authority to compel employees to submit to polygraph examinations in the context of investigations of improper disclosures of information about pending criminal investigations. *See Use of Polygraph Examinations in Investigating Disclosure of Information About Pending Criminal Investigations*, 4B Op. O.L.C. 421, 429 (1980). In addition, a 1983 memorandum of this Office observed that both the FBI and the Department as a whole had policies permitting compulsory polygraph testing of employees and the drawing of adverse inferences against employees who refused testing. *See* Memorandum for A.R. Cinquegrana, Deputy Counsel for Intelligence Policy, Office of Intelligence Policy and Review, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Implementation of Polygraph Policy in National Security Decision Directive 84* at 7–8 (Aug. 22, 1983). The Department took a similar position in an October 1983 hearing. *See Review of the President's National Security Decision Directive 84 and the Proposed Department of Defense Directive on Polygraph Use: Hearing Before Subcomm. on Legislation and Nat'l Sec. of the H. Comm. on Government Operations*, 98th Cong. 163, 204–05 (1983) (announcing comprehensive administration policy allowing polygraph use "as a condition of initial or continuing employment with or assignment to CIA and NSA" and similarly sensitive positions "as a condition of access to highly sensitive categories of classified information," "to investigate serious criminal cases," and "to investigate serious administrative misconduct cases . . . including unauthorized disclosure of classified information"). These documents suggest the Department at the time was either unaware of the Johnson Memorandum or understood it to lack legal effect.

Directive 84. OPM stated at that time that "[w]ith the concurrence of President Lyndon B. Johnson, the following rules, incorporated in an interagency committee report dated July 29, 1966 . . . remain in effect."[25] Had the Johnson Memorandum been in effect as a binding directive in 1984, it is difficult to see why OPM would have cited an "interagency committee report" rather than the presidential Memorandum, or would have referred merely to the President's "concurrence." A 1996 proposed rulemaking by OPM superseding the polygraph provisions in the (by then withdrawn) Federal Personnel Manual ("FPM") reflected the same understanding. *See Suitability, National Security Positions, and Personnel Investigations*, 61 Fed. Reg. 394, 396 (Jan. 5, 1996) ("[T]he former FPM contained limitations upon using polygraphs in personnel investigations, based upon a July 29, 1966, interagency committee report approved by former President Lyndon B. Johnson."). At various times, congressional entities have expressed a similar understanding. *See, e.g.*, H.R. Rep. No. 98-578, at 5–6 (1983) (summarizing federal polygraph policy beginning with the work of the interagency Committee, noting issuance of the Civil Service Commission regulations, but making no mention of a presidential directive); *see also* Office of Technology Assessment, *Scientific Validity of Polygraph Testing* at 34 (1983) ("The recommendations [of President Johnson's interagency Committee] made at that time concerning personnel screening were promulgated as Civil Service regulations on regulating the use of polygraphs in personnel investigations of competitive service applicants and appointees to competitive service positions."). Some scholarly accounts have also reached this conclusion. *See, e.g.*, Priscilla M. Regan, *Legislating Privacy* 152 & nn.32–33 (1995) (citing Civil Service regulations and Department of Defense polygraph policy as reflecting "[t]he general [polygraph] policy of the federal government" in the 1970s).

We are aware of some more recent references to the Johnson Memorandum, such as a 1999 rulemaking by the Department of Energy expressing the belief that the agency's polygraph policy was "clearly permitted" under the Johnson Memorandum. *See Polygraph Examination Regulation*,

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[25] Federal Personnel Manual ch. 736, § 2-6(a) (1984); *see also* Federal Personnel Manual ch. 732, § 3-4, *Use of the Polygraph in National Security Investigations* (Aug. 15, 1991) (later edition of Manual addressing use of polygraph examinations in national security investigations and containing same statement).

64 Fed. Reg. 70962, 70964 (Dec. 17, 1999). Similarly, in 1998 the Department of the Interior submitted a polygraph policy to the Attorney General for her review and approval, in apparent reliance on the Johnson Memorandum. In recommending that the Attorney General approve the request, the Criminal Division apparently accepted (without discussion) that the Johnson Memorandum had been "issued" by the President and that it imposed binding "requirements" that were satisfied by the proposed policy. *See* Memorandum for the Attorney General from James K. Robinson, Assistant Attorney General, Criminal Division, *Re: Department of the Interior Policy on the Use of the Polygraph in Criminal Investigations* at 1 (Sept. 17, 1999); *id*. at 5 (approval of polygraph policy by Attorney General Janet Reno); *see also* OIG Report at 6 & n.15 (describing September 17 memorandum). We believe, however, that the uncontroverted contemporaneous evidence that the Johnson Memorandum did not have legal effect (and similar evidence during the succeeding two decades) outweighs these more recent references.

In sum, the overwhelming weight of historical evidence of which we are aware supports the conclusion that the Johnson Memorandum was never issued and did not take effect. Whatever the President's intent was in signing the document, contemporaneous White House records provide uncontroverted evidence that the Memorandum was deliberately held up from release or distribution within days of the President's signature; that in the months that followed, neither the President nor his senior White House advisers understood the Memorandum to have taken effect; that a year and a half after the signature, the President was still actively deciding whether or not to issue a memorandum addressing polygraph use to the Executive Branch; and that the President directed the Chairman of the Civil Service Commission to testify to Congress that the Administration "ha[d] not formulated any final position or Government-wide policy on the use of the polygraph." The evidence rather indicates that the Civil Service Commission ultimately issued polygraph guidance applicable to competitive service hiring and appointments that closely mirrored the Johnson Memorandum and apparently served as an alternative to the issuance of a presidential directive, and that for three decades following the President's signature, neither Congress nor senior Executive Branch officials understood the Memorandum to be in effect.

We believe this historical record compels the conclusion that the Johnson Memorandum lacks any legal effect. This conclusion is informed by

two related legal principles. First, in light of the substantial historical evidence that the Johnson Memorandum was deliberately withheld after signature, we draw support from the premise that a set of instructions from a superior to his subordinates typically will not take effect until it is communicated. Second, regardless of when or whether the Johnson Memorandum might have taken effect, we conclude that the document would not currently bind the Executive Branch, given the well-established rule that the President may revoke or amend instructions to his subordinates at will, and the uncontroverted evidence that President Johnson gave directives to his subordinates sufficient to deny the Memorandum further effect.

It is a familiar principle of agency law that instructions from a principal to a subordinate ordinarily are not operative until they have been communicated. Hornbook law teaches that "[a]n agent has a duty to comply with all lawful instructions received from [a] principal . . . concerning the agent's actions on behalf of the principal." Restatement (Third) of Agency § 8.09(2) (2006); *see also* Harold Gill Reuschlein & William A. Gregory, *The Law of Agency and Partnership* § 69 (2d ed. 1990) ("The agent is under a duty to follow instructions given by his principal."). As the Restatement formulation indicates, such a duty is typically predicated on the agent's "recei[pt]" of such instructions. Restatement (Third) of Agency § 8.09(2); *see also* Restatement (Second) of Agency § 33 cmt. a (1958) ("The implicit, basic understanding of the parties to the agency relation is that the agent is to act only in accordance with the principal's desires *as manifested to him*.") (emphasis added). According to the second Restatement, "[a]n agent is subject to liability to his principal if he acts contrary to orders contained in a *notification given by the principal*," and a letter containing such a notification would "normally [be] effective as notice when it is received at the agent's place of business." *Id*. § 385 cmt. e (emphasis added). A similar premise is reflected in the rule that an agent will not be liable "for a departure from the will of the principal where the principal's orders are ambiguous, doubtful, or not explicit" and where the agent has reasonably interpreted those orders. *See* 3 Am. Jur. 2d *Agency* § 214 (2002); *see also* 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 1266 (2d ed. 1914) ("If the principal desires his instructions to be pursued, it is obviously necessary that he should make them intelligible and clear.").

While the law of agency may not be directly applicable to the President's supervision and communication with subordinates, the requirement of a manifestation from the principal reflects the pragmatic reality that communication of an instruction is ordinarily a necessary antecedent to a subordinate's implementation of those instructions. The advice of this Office has occasionally reflected this concern. *See, e.g.*, Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Executive Privilege* at 2 (Apr. 6, 1982) (noting that "some communication to [agency heads] by the President [on the subject of executive privilege] is necessary to ensure that they will know what to do when faced with Congressional demands for information").[26] If nothing else, the Johnson Administration's failure to distribute the Memorandum underscores the likelihood that the President did not intend it to go into effect.[27]

Even assuming, however, that the Johnson Memorandum took effect in January 1967, the historical record compels the conclusion that President Johnson took actions and gave directives sufficient to constitute a revocation of the original document. It is well established that "[t]he President has the constitutional authority to supervise and control the activity of subordinate officials within the executive branch." *The Legal Significance*

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[26] This discussion should not be read as casting doubt on the President's discretion, absent circumstances not present here, to issue instructions or directives to his subordinates in the Executive Branch in the manner and form of his choosing. *Cf. 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, 76–77 (1985) (concluding that where statute appropriated funds in general terms to "such department or agency of the United States as the President shall designate," the "designation could be accomplished in several ways, from a formal executive order to an oral directive from the President").

[27] Although not controlling of the question before us, an analogous principle has been recognized in the context of the President's exercise of the appointment power. With respect to an office from which an appointee is removable at will, courts and the Executive Branch have recognized the President's authority to deny legal effect to a signed commission by withholding its delivery to the appointee. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803) (stating in dictum that where "an officer is removable at the will of the executive . . . the act [of appointment] is at any time revocable[,] and the commission may be arrested [by the President], if still in the office"); *accord Case of Franklin G. Adams*, 12 Op. Att'y Gen. 304, 306 (1867) ("The effect [of the President's withholding a commission after signature] is a revocation of the appointment; not a removal, but the exercise of the right of the President to stop it before the office vests in the appointee.").

of Presidential Signing Statements, 17 Op. O.L.C. 131, 132 (1993); *cf. Myers v. United States*, 272 U.S. 52, 135 (1926) (the President "may properly supervise and guide [Executive Branch officers'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone"). As a corollary to the President's general supervisory power, we have also concluded that the President is generally free to amend or revoke instructions to his subordinates in a form and manner of his choosing. In *Proposals Regarding an Independent Attorney General*, 1 Op. O.L.C. 75 (1977), for instance, Attorney General Griffin Bell observed that the President "legally could revoke or supersede [an] Executive order at will." *Id*. at 77; *accord* Memorandum for the Attorney General from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Legal Authority for Recent Covert Arms Transfers to Iran* at 14 (Dec. 17, 1986) ("Cooper Memorandum") ("all executive orders [are] a set of instructions from the President to his subordinates in the executive branch"). The same understanding would hold for other presidential instructions, such as memoranda and directives. *See generally Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order*, 24 Op. O.L.C. 29, 29 (2000) (noting that there is "no basis for drawing a distinction as to the legal effectiveness of a presidential action based on the form or caption of the written document through which that action is conveyed").

Applying the Cooper Memorandum's reasoning to the historical circumstances of the Johnson Memorandum provides support for the view that, whatever President Johnson's intent may have been in signing the Memorandum, he gave clear expression to his subsequent understanding that the Memorandum did not have legal effect. Most tellingly, eighteen months after having signed the original polygraph memorandum, President Johnson directed the head of the Civil Service Commission to testify before Congress that the Administration "has not formulated any final position or Government-wide policy on the use of the polygraph."[28] If the

[28] *See supra* note 20 and accompanying text. NSDD-84 also appears to condone polygraph testing for investigations of unauthorized disclosures of classified information by directing the revision of regulations so that employees might be required to submit to polygraphs in the course of investigations of unauthorized disclosures of classified

Memorandum had actually been released to agency heads, a correspondingly public presidential revocation would be expected; but given the Memorandum's limited circulation among a small group of advisers, the unqualified and sweeping nature of the President's directive that a senior Administration official disclaim publicly "*any* final position or Government-wide policy" on polygraph use would have constituted a "valid modification of, or exception to" the recently signed Memorandum, *see* Cooper Memorandum at 14, sufficient to deny that document continuing legal effect.[29]

II.

In sum, we conclude that the Johnson Memorandum does not now bind the Department of Justice or other entities in the Executive Branch, in light of compelling historical evidence that the document was never issued by the President and that President Johnson took actions subsequent to signature that under the circumstances here would have constituted a revocation of any such directive.

STEVEN G. BRADBURY
Principal Deputy Assistant Attorney General
Office of Legal Counsel

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information, and by specifying that adverse action could be taken for failure to cooperate with the examination. *Id*. at 2–3.

[29] We need not address any limitations that might apply to revocation or amendment of a presidential directive that arguably creates enforceable private rights. We doubt very much that the Johnson Memorandum would have created judicially enforceable rights even if it had been issued, *cf., e.g.*, *Facchiano Constr. Co. v. Dep't of Labor*, 987 F.2d 206, 210 (3d Cir. 1993) ("Generally, there is no private right of action to enforce obligations imposed on executive branch officials by executive orders."); here, however, the uncontroverted historical evidence demonstrates that the signed Memorandum was never issued and that the President timely confirmed that the Memorandum was not in effect. In such circumstances, there is no basis to suggest that the Memorandum created any cognizable private right.

Status of Certain Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001

Certain propositions stated in several opinions issued by the Office of Legal Counsel in 2001–2003 respecting the allocation of authorities between the President and Congress in matters of war and national security do not reflect the current views of this Office.

January 15, 2009

MEMORANDUM OPINION FOR THE FILES

The purpose of this memorandum is to confirm that certain propositions stated in several opinions issued by the Office of Legal Counsel ("OLC") in 2001–2003 respecting the allocation of authorities between the President and Congress in matters of war and national security do not reflect the current views of this Office. We have previously withdrawn or superseded a number of opinions that depended upon one or more of these propositions. For reasons discussed herein, today we explain why these propositions are not consistent with the current views of OLC, and we advise that caution should be exercised before relying in other respects on the remaining opinions identified below.[1]

The opinions addressed herein were issued in the wake of the atrocities of 9/11, when policy makers, fearing that additional catastrophic terrorist attacks were imminent, strived to employ all lawful means to protect the Nation. In the months following 9/11, attorneys in the Office of Legal Counsel and in the Intelligence Community confronted novel and complex legal questions in a time of great danger and under extraordinary time pressure. Perhaps reflecting this context, several of the opinions identified below do not address specific and concrete policy proposals, but rather address in general terms the broad contours of legal issues potentially raised in the uncertain aftermath of the 9/11 attacks. Thus, several of these opinions represent a departure from this Office's preferred practice of rendering formal opinions addressed to particular policy

[1] This memorandum supplements the Memorandum for the Files from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: October 23, 2001 OLC Opinion Addressing the Domestic Use of Military Force to Combat Terrorist Activities* (Oct. 6, 2008). Neither memorandum is intended to suggest in any way that the attorneys involved in the preparation of the opinions in question did not satisfy all applicable standards of professional responsibility.

proposals and not undertaking a general survey of a broad area of the law or addressing general or amorphous hypothetical scenarios involving difficult questions of law.

Mindful of this extraordinary historical context, we nevertheless believe it appropriate and necessary to confirm that the following propositions contained in the opinions identified below do not currently reflect, and have not for some years reflected, the views of OLC. This Office has not relied upon the propositions addressed herein in providing legal advice since 2003, and on several occasions we have already acknowledged the doubtful nature of these propositions.

I. Congressional Authority Over Captured Enemy Combatants

A number of OLC opinions issued in 2002–2003 advanced a broad assertion of the President's Commander in Chief power that would deny Congress any role in regulating the detention, interrogation, prosecution, and transfer of enemy combatants captured in the global War on Terror. The President certainly has significant constitutional powers in this area, but the assertion in these opinions that Congress has no authority under the Constitution to address these matters by statute does not reflect the current views of OLC and has been overtaken by subsequent decisions of the Supreme Court and by legislation passed by Congress and supported by the President. The following opinions contain variations of this proposition:

1. Memorandum for William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power as Commander in Chief to Transfer Captured Terrorists to the Control and Custody of Foreign Nations* at 4–5 (Mar. 13, 2002) ("Detainee Transfer Opinion") (asserting that "the power to dispose of the liberty of individuals captured and brought under the control of United States armed forces during military operations remains in the hands of the President alone" because the Constitution does not "specifically commit[] the power to Congress"; "The treatment of captured enemy soldiers is but one of the many facets of the conduct of war, entrusted by the Constitution in plenary fashion to the President by virtue of the Commander-

in-Chief Clause. Moreover, it is an area in which the President appears to enjoy exclusive authority, as the power to handle captured enemy soldiers is not reserved by the Constitution in whole or in part to any other branch of the government.").

2. Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from Patrick F. Philbin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Swift Justice Authorization Act* at 2, 12 (Apr. 8, 2002) ("Swift Justice Opinion") ("Indeed, Congress may no more regulate the President's ability to convene military commissions or to seize enemy belligerents than it may regulate his ability to direct troop movements on the battlefield."; "Precisely because [military] commissions are an instrument used as part and parcel of the conduct of a military campaign, congressional attempts to dictate their precise modes of operation interfere with the means of conducting warfare no less than if Congress were to attempt to dictate the tactics to be used in an engagement against hostile forces.").
3. Memorandum for Daniel J. Bryant, Assistant Attorney General, Office of Legislative Affairs, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 18 U.S.C § 4001(a) to Military Detention of United States Citizen* at 10 (June 27, 2002) ("Congress may no more regulate the President's ability to detain enemy combatants than it may regulate his ability to direct troop movements on the battlefield.").
4. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A* at 35, 39 (Aug. 1, 2002) ("Interrogation Standards Opinion") ("Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."; "Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President.") (previously withdrawn).

5. Memorandum for William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Military Interrogation of Unlawful Enemy Combatants Held Outside the United States* at 13, 19 (Mar. 14, 2003) (declassified by Department of Defense, Mar. 31, 2008) ("Military Interrogation Opinion") ("In our view, Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield."; "Congress can no more interfere with the President's conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield.") (previously withdrawn).

OLC has already withdrawn the last two opinions listed above, the Interrogation Standards Opinion and the Military Interrogation Opinion. *See Definition of Torture Under 18 U.S.C. §§ 2340–2340A*, 28 Op. O.L.C. 294 (2004); Letter for William J. Haynes II, General Counsel, Department of Defense, from Daniel B. Levin, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel*, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States *(March 14, 2003) ("March 2003 Memorandum")* (Feb. 4, 2005). We have also previously expressed our disagreement with the specific assertions excerpted from the Interrogation Standards Opinion:

> The August 1, 2002, memorandum reasoned that "[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President." I disagree with that view.

Responses of Steven G. Bradbury, Nominee to be Assistant Attorney General for the Office of Legal Counsel, to Questions for the Record from Senator Edward M. Kennedy, at 2 (Oct. 24, 2005).

> The federal prohibition on torture, 18 U.S.C. §§ 2340–2340A, is constitutional, and I believe it does apply as a general matter to the subject of detention and interrogation of detainees conducted pursuant to the President's Commander in Chief authority. The statement to the contrary from the August 1, 2002, memorandum, quoted

> above, has been withdrawn and superseded, along with the entirety of the memorandum, and in any event I do not find that statement persuasive. The President, like all officers of the Government, is not above the law. He has a sworn duty to preserve, protect, and defend the Constitution and faithfully to execute the laws of the United States, in accordance with the Constitution.

Responses of Steven G. Bradbury, Nominee to be Assistant Attorney General for the Office of Legal Counsel, to Questions for the Record from Senator Richard J. Durbin, at 1 (Oct. 24, 2005).

Here, we record our conclusion that the assertions excerpted above are not the position of OLC.

It is well established that the President has broad authority as Commander in Chief to take military actions in defense of the country. *See, e.g.*, *Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 187 (1980) ("The power to deploy troops abroad without the initiation of hostilities is the most clearly established exercise of the President's general power as a matter of historical practice."); *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941) (recognizing the President's authority to "dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country"). Furthermore, this Office has recognized that Congress may not unduly constrain or inhibit the President's exercise of his constitutional authority in these areas. *See, e.g.*, *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C 182, 185 (1996) (Congress "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"). We have no doubt that the President's constitutional authority to deploy military and intelligence capabilities to protect the interests of the United States in time of armed conflict necessarily includes authority to effectuate the capture, detention, interrogation, and, where appropriate, trial of enemy forces, as well as their transfer to other nations. *Cf., e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion) (describing important incidents of war).

At the same time, Article I, Section 8 of the Constitution also grants significant war powers to Congress. We recognize that a law that is constitutional in general may still raise serious constitutional issues if

applied in particular circumstances to frustrate the President's ability to fulfill his essential responsibilities under Article II. Nevertheless, the sweeping assertions in the opinions above that the President's Commander in Chief authority categorically precludes Congress from enacting any legislation concerning the detention, interrogation, prosecution, and transfer of enemy combatants are not sustainable.

Congress's power to "define and punish . . . Offences against the Law of Nations," U.S. Const. art. I, § 8, cl. 10, provides a basis for Congress to establish the federal crime of torture, in accordance with U.S. treaty obligations under the Convention Against Torture, and the War Crimes Act offenses, in accordance, for example, with the "grave breach" provisions of the Geneva Conventions. This grant of authority also provides a basis for Congress to establish a statutory framework, such as that set forth in the Military Commissions Act of 2006, for trying and punishing unlawful enemy combatants for violations of the law of war and other hostile acts in support of terrorism. Without suggesting that congressional enactment was necessary to authorize the establishment of military commissions, the President's support for enactment of the Military Commissions Act following the Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), confirms this view. The prior opinion of this Office suggesting that Congress has no role to play concerning the prosecution of enemy combatants is incorrect. *See* Swift Justice Opinion at 17–19. Furthermore, the power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, gives Congress a basis to establish standards governing the U.S. military's treatment of detained enemy combatants, including standards for, among other things, detention, interrogation, and transfer to foreign nations. This grant of authority would support, for example, the provisions of the Detainee Treatment Act of 2005 that address the treatment of alien detainees held in the custody of the Department of Defense. We disagree with the suggestion in the Detainee Transfer Opinion that this Clause does not permit Congress to establish standards of conduct for the military's handling of detainees, but rather "is limited to the discipline of U.S. troops." *Id.* at 5.

The Captures Clause, which grants Congress power to "make Rules concerning Captures on Land and Water," U.S. Const. art. I, § 8, cl. 11, also would appear to provide separate authority for Congress to legislate with respect to the treatment and disposition of enemy combatants cap-

tured by the United States in the War on Terror. Two of the opinions identified above reasoned that the Captures Clause grants authority to Congress only with respect to captured enemy property, such as enemy vessels seized on the high seas or materiel taken on the battlefield, and not captured persons, such as the fighters or supporters of al Qaeda and its affiliates who are detained by the United States in the global War on Terror. *See* Swift Justice Opinion at 16–17; Detainee Transfer Opinion at 5. This Office has substantial doubts about that view.

Sources from around the time of the Framing suggest that the Founders understood battlefield "captures" to include the capture of enemy prisoners. During the Revolutionary War, the Continental Congress passed legislation concerning not simply the capture of enemy vessels, but also the capture and treatment of persons on board those vessels. *See, e.g.*, 4 *Journals of the Continental Congress 1774–1789* 254 (1906) (Worthington Chauncey Ford ed., 2005) (prohibiting the treatment of persons "contrary to common usage, and the practice of civilized nations in war"); 10 *Journals of the Continental Congress 1774–1789* 295 (1908) (Worthington Chauncey Ford ed., 2005) ("[I]f the enemy will not consent to exempt citizens from capture, agreeably to the law of nations, the commissioners be instructed positively to insist on their exchange, without any relation to rank."). Likewise, in 1801, Alexander Hamilton observed that belligerents in war have the right "to capture the persons and property of each other." Alexander Hamilton, *The Examination* No. 1 (Dec. 17, 1801) (emphasis added), *quoted in* 3 *The Founders' Constitution* 100 (Philip B. Kurland & Ralph Lerner eds., 1997); *see also id*. ("War, of itself, gives to the parties a mutual right to kill in battle, and to capture the persons and property of each other. This is a rule of natural law; a necessary and inevitable consequence of the state of war."). Other early commentators similarly understood the "law of capture" to encompass the capture of prisoners of war, as well as the seizure of property. *See* Richard Lee, *Treatise of Captures in War* 45–63 (2d ed. 1803) (tracing the evolution of the law concerning definition and treatment of captured enemies); Emmerich de Vattel, *The Law of Nations* 394 (Joseph Chitty ed., 1834) (1758) (explaining that persons or things "captured" by the enemy are usually freed as soon as they fall into the hands of soldiers belonging to their own nation); G.F. Martens, *An Essay on Privateers, Captures, and Particularly on Recaptures* (1881) (Thomas Hartwell

trans., 2004) (addressing the treatment by various nations of prisoners of war as part of the law of captures).

The Supreme Court also presumed this understanding of the Captures Clause in the early decision *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), in which Chief Justice Marshall considered whether by virtue of a declaration of war the President possessed authority to detain enemy aliens (both enemy civilians and enemy combatants) and to confiscate their property. After quoting the Captures Clause, the Court noted that Congress had enacted laws regulating both enemy aliens and their property in the War of 1812, and concluded that those laws should govern the actions of the Executive Branch in the conflict. *See id*. at 126 ("The act concerning alien enemies, which confers on the president very great discretionary powers respecting their persons, affords a strong implication that he did not possess those powers by virtue of the declaration of war."); *see id*. (citing an "act for the safe keeping and accommodation of prisoners of war"). Insofar as the early Supreme Court, relying on the Captures Clause, commented favorably on Congress's authority to regulate the treatment of prisoners of war—and, indeed, actually suggested that the exercise of such congressional authority counseled against locating the authority to detain enemy prisoners solely in the general war powers of the President—we have substantial doubts about the assertion that the Captures Clause grants no power to Congress with regard to the detention and treatment of enemy combatants.[2]

For all these reasons, the identified assertions in the five opinions excerpted above do not reflect the current views of OLC and should not be treated as authoritative. This Office previously has withdrawn two of those opinions in their entirety. Appropriate caution should be exercised before relying in other respects on the remaining three opinions.

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[2] The survey of early historical examples in the Detainee Transfer Opinion similarly does not support that opinion's assertion that an "unbroken historical chain" recognizes "exclusive Presidential control over enemy soldiers." *Id*. at 19. To the contrary, that history very usefully demonstrates a number of examples (such as the statute cited in *Brown*) where Congress passed legislation addressing the circumstances of captured soldiers. Although many of those measures simply authorized presidential action, and were careful to preserve broad discretion for the President, they reflect an early understanding that Congress, as well as the President, has relevant authority in this area.

II. Interpreting FISA and Its Applicability to Presidential Authority

A number of classified OLC opinions issued in 2001–2002 relied upon a doubtful interpretation of the Foreign Intelligence Surveillance Act ("FISA"). As the Department has previously acknowledged, these opinions reasoned that, unless Congress had made clear in FISA that it sought to restrict presidential authority to conduct warrantless surveillance activities in the national security area, FISA must be construed to avoid such a reading, and these opinions asserted that Congress had not included such a clear statement in FISA. *See* Letter for Dianne Feinstein & Sheldon Whitehouse, U.S. Senate, from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, Office of Legislative Affairs (May 13, 2008). All but one of these opinions have been withdrawn or superseded by later opinions of this Office. The remaining opinion containing this questionable proposition is:

6. Memorandum for William J. Haynes II, General Counsel, Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: [Classified Matter]* at 13 (Feb. 8, 2002) ("Classified FISA Opinion").

The proposition paraphrased above interpreting FISA and its applicability to presidential authority does not reflect the current analysis of the Department of Justice and should not be relied upon or treated as authoritative for any purpose. The general rule of construction that statutes will not be interpreted to conflict with the President's constitutional authorities absent a clear statement that Congress intended to do so is unremarkable and fully consistent with longstanding precedents of this Office. *See, e.g.*, Memorandum for Alan Kreczko, Legal Adviser to the National Security Council, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of 47 U.S.C section 502 to Certain Broadcast Activities* at 3 (Oct. 15, 1993) ("The President's authority in these areas is very broad indeed, in accordance with his paramount constitutional responsibilities for foreign relations and national security. Nothing in the text or context of [the statute] suggests that it was Congress's intent to circumscribe this authority. In the absence of a clear statement of such an intent, we do not believe that a statutory provision of this generality should be interpreted to restrict the President's] constitu-

tional powers" to conduct the Nation's foreign affairs and to protect the national security). The courts apply the same canon of statutory interpretation. *See, e.g.*, *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988) ("[U]nless Congress has specifically provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."). However, the application of this canon of construction to conclude that FISA does not contain a clear statement that Congress intended the statute to apply to the President's exercise of his constitutional authority is problematic and questionable, given FISA's express references to the President's authority. The statements to this effect in earlier opinions of OLC were not supported by convincing reasoning.

As set forth in the Justice Department's white paper of January 19, 2006, addressing the legal basis for the surveillance activities of the National Security Agency publicly described by the President in December 2005, the Department's more recent analysis is different: Congress, through the Authorization for Use of Military Force of September 18, 2001, Pub. L. No. 107-40, 115 Stat. 224 ("AUMF"), confirmed and supplemented the President's Article II authority to conduct warrantless surveillance to prevent further catastrophic attacks on the United States, and such authority confirmed by the AUMF could reasonably be, and therefore had to be, read consistently with FISA, which explicitly contemplated that Congress could authorize electronic surveillance by a statute other than FISA. *See* U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) ("White Paper"). As the January 2006 White Paper pointed out, "[i]n the specific context of the current armed conflict with al Qaeda and related terrorist organizations, Congress by statute [in the AUMF] had confirmed and supplemented the President's recognized authority under Article II of the Constitution to conduct such surveillance to prevent further catastrophic attacks on the homeland." *Id*. at 2. The White Paper further explained the particular relevance of the canon of constitutional avoidance to the NSA activities: "Even if there were ambiguity about whether FISA, read together with the AUMF, permits the President to authorize the NSA activities, the canon of constitutional avoidance requires reading these statutes to overcome any restrictions in

FISA and Title III, at least as they might otherwise apply to the congressionally authorized armed conflict with al Qaeda." *Id*. at 3.[3]

Accordingly, because the proposition highlighted above does not reflect the current views of this Office, appropriate caution should be exercised before relying in any respect on the Classified FISA Opinion as a precedent of OLC.

III. Presidential Authority to Suspend Treaties

Two opinions of OLC from 2001 and 2002 asserted that the President, under our domestic law, has unconstrained discretion to suspend treaty obligations of the United States at any time and for any reason as an aspect of the "executive Power" vested in him by the Constitution:

7. Memorandum for John B. Bellinger III, Legal Adviser to the National Security Council, from John C. Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, *Re: Authority of the President to Suspend Certain Provisions of the ABM Treaty* at 12, 13 (Nov. 15, 2001) ("ABM Treaty Suspension Opinion") ("The President's power to suspend treaties is wholly discretionary, and may be exercised whenever he determines that it is in the national interest to do so. While the President will ordinarily take international law into account when deciding whether to suspend a treaty in whole or in part, his constitutional authority to suspend a treaty provision does not hinge on whether such suspension is or is not consistent with international law." (footnote omitted); "The power unilaterally to suspend a treaty subsumes complete and partial suspension: both kinds of suspension authority are comprehended within the 'executive Power,' U.S. Const, art. II, § 1, cl. 1[.]").

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[3] We recognize that the Supreme Court in Hamdan v. Rumsfeld refused to read the AUMF to authorize the President to convene military commissions in contravention of the Court's interpretation of the Uniform Code of Military Justice. 548 U.S. at 557–58. The Department's 2006 White Paper, however, was based on the view that FISA, which expressly contemplated that Congress may authorize warrantless surveillance in a separate statute, such as the AUMF, was more like the statute at issue in Hamdi, 18 U.S.C. § 4001(a), which prohibits detention of a U.S. citizen, "except pursuant to an act of Congress." See White Paper at 20–23.

8. Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees* at 11–13 (Jan. 22, 2002) ("Application of Treaties Opinion") (reasoning that the President has "unrestricted discretion, as a matter of domestic law, in suspending treaties").

The highlighted assertions were based on generalizations from historical examples in which Presidents have acted in certain limited circumstances to terminate or suspend treaties. *See, e.g.*, ABM Treaty Suspension Opinion at 14–18.

We have previously concluded in a file memorandum that the reasoning supporting these assertions is unconvincing. *See* Memorandum for the Files from C. Kevin Marshall, Deputy Assistant Attorney General, and Bradley T. Smith, Attorney-Adviser, Office of Legal Counsel, *Re: Legal Issues Regarding Proposed Broadcasts into Cuba* at 2, 11–13 (May 23, 2007) ("Cuba Broadcasting File Memorandum"). We observed that Presidents have traditionally suspended treaties where authorized by Congress or where suspension was authorized by the terms of the treaty or under recognized principles of international law, such as where another party has materially breached the treaty or where there has been a fundamental change in circumstances. *See id*. at 6–13. We found the two opinions' treatment of this history to be unpersuasive, their analysis equating treaty termination with treaty suspension to be doubtful, and their consideration of the Take Care Clause to be insufficient. *See id*. at 11–13. For those reasons, in 2006 we advised the Legal Adviser to the National Security Council and the Deputy Counsel to the President not to rely on the two opinions identified above to the extent they suggested that the President has unlimited authority to suspend a treaty beyond the circumstances traditionally recognized. *Id*. at 13. We noted that the President, in fact, had not relied upon the broad assertions of authority to suspend treaties contained in the ABM Treaty Suspension Opinion and the Application of Treaties Opinion; the President decided not to suspend the Third Geneva Convention as to Afghanistan, and he did not suspend the ABM treaty (instead, the United States gave formal notice of withdrawal from the treaty pursuant to its terms). *Id*. In summarizing the advice given in

2006 concerning the reliability of the 2001 and 2002 opinions, our file memorandum emphasized that although we questioned the reasoning in these opinions, we had no occasion to make a determination about the extent of the President's authority to suspend treaties:

> The above critique is not meant to be a determination that under the Constitution the President lacks authority to suspend treaties absent authorization from Congress, the text, or background law. The White House did not directly ask that question [in 2006], and we did not purport to resolve it. There are arguments to be made based on the Vesting Clause and other provisions of Article II, as well as history. Other prior opinions have suggested that the President could have plenary authority to terminate treaties, and one can find scholars supporting such a view. The issue, however, is not nearly as simple or clear as the [ABM Treaty Suspension Opinion] and [the Application of Treaties Opinion] indicated, and we therefore are no longer willing to advise the President to act in reliance upon those memoranda's more sweeping claims.

Id. (citation omitted).

We adhere to the 2007 Cuba Broadcasting File Memorandum, and, accordingly, we confirm that the highlighted propositions from the ABM Treaty Suspension Opinion and the Application of Treaties Opinion do not reflect the current views of this Office and should not be treated as authoritative, and that appropriate caution should be exercised before relying upon these opinions in other respects.

IV. "National Self-Defense" as a Justification for Warrantless Searches

A 2001 OLC opinion addressing the constitutionality of proposed FISA amendments asserted the view that judicial precedents approving the use of deadly force in self-defense or to protect others justified the conclusion that warrantless searches conducted to defend the Nation from attack would be consistent with the Fourth Amendment:

9. Memorandum for David S. Kris, Associate Deputy Attorney General, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Amending Foreign Intelligence Surveillance Act to Change the "Purpose"*

> *Standard for Searches* at 8 (Sept. 25, 2001) ("FISA Amendments Opinion") (reasoning that because the Government's post-9/11 interest in "preventing terrorist attacks against American citizens and property within the continental United States" implicated the "right to self-defense . . . of the nation and of its citizens," and because the courts had recognized that "deadly force is reasonable under the Fourth Amendment if used in self-defense or to protect others," it was appropriate to conclude that "[i]f the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches").

We believe that this reasoning inappropriately conflates the Fourth Amendment analysis for government searches with that for the use of deadly force.

We do not doubt that the existence of a government interest in preventing catastrophic terrorist attacks is highly relevant in determining whether a particular search would be "reasonable" under the Fourth Amendment. Although warrants are often required in the criminal law context, the Supreme Court has recognized warrantless searches to be "reasonable" in a variety of situations involving "special needs" that go beyond the routine interest in law enforcement. *See, e.g.*, *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002). Foreign intelligence collection may fit squarely within the area of "special needs, beyond the normal need for law enforcement," particularly where it occurs in the midst of an ongoing armed conflict and for the purpose of preventing a future terrorist attack. *See* White Paper at 37. Accordingly, as explained at length in the Department's January 2006 White Paper, warrantless searches for such purposes may well be "reasonable" and consistent with the Fourth Amendment. *Id*. To the extent that the FISA Amendments Opinion advances that straightforward proposition, we have no disagreement.

However, the FISA Amendments Opinion's reliance on court decisions involving the use of deadly force suggests a "self-defense" rationale whereby the purpose behind a search would, standing alone, justify the search for purposes of the Fourth Amendment. The Supreme Court has recognized that the use of deadly force may be "reasonable" under the Fourth Amendment where the "officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or

to others." *Tennessee v. Garner*, 471 U.S. 1, 12 (1985); *see also Graham v. Connor*, 490 U.S. 386, 392 (1989). Under this rule, the circumstances in which deadly force may be employed are highly fact-dependent and require a showing that the officer believed that the suspect posed an imminent threat of harm. The FISA Amendments Opinion's assertion that, "[i]f the government's heightened interest in self-defense justifies the use of deadly force, then it certainly would also justify warrantless searches," does not adequately account for the fact-dependent nature of the Fourth Amendment's "reasonableness" review, and does not expressly recognize that the circumstantial factors relevant to the *Tennessee v. Garner* self-defense analysis are not necessarily the same as those that may determine the constitutional reasonableness of a particular search, both in its inception and in its scope.

Accordingly, the highlighted reasoning in the FISA Amendments Opinion does not reflect the current views of OLC.

* * * * *

For all the foregoing reasons, the propositions highlighted in the nine opinions identified above do not reflect the current views of the Office of Legal Counsel and should not be treated as authoritative for any purpose. A number of the opinions that contained these propositions have been withdrawn or superseded and do not constitute precedents of this Office; caution should be exercised before relying in other respects on the remaining opinions.

We have advised the Attorney General, the Counsel to the President, the Legal Adviser to the National Security Council, the Principal Deputy General Counsel of the Department of Defense, and appropriate offices within the Department of Justice of these conclusions.

STEVEN G. BRADBURY
Principal Deputy Assistant Attorney General
Office of Legal Counsel

Authority of Acting FBI Officials to Sign National Security Letters

Under the statutes authorizing the FBI to issue national security letters, the Director of the FBI may designate Acting Deputy Assistant Directors and Acting Special Agents in Charge to sign national security letters.

January 16, 2009

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL BUREAU OF INVESTIGATION

You have asked whether an official acting temporarily in the position of Deputy Assistant Director at the headquarters of the Federal Bureau of Investigation ("FBI") or Special Agent in Charge of an FBI field office may sign national security letters ("NSLs"). By statute, NSLs may be issued by "[t]he Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director." *E.g.*, 18 U.S.C. § 2709(b) (2006).[1] We conclude that, under the NSL statutes, the Director of the FBI ("Director") may designate Acting Deputy Assistant Directors and Acting Special Agents in Charge to sign NSLs.[2]

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[1] Memorandum for the Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Valerie E. Caproni, General Counsel, Federal Bureau of Investigation (Mar. 27, 2008) ("FBI Memorandum").

[2] You also raise the question whether the conferral of authority to sign NSLs on Acting Deputy Assistant Directors and Acting Special Agents in Charge would square with the Appointments Clause; your memorandum assumes that the authority to sign NSLs implicates the Appointments Clause and that employees who sign NSLs must be appointed in accordance with that Clause. *See* FBI Memorandum at 6. We understand that the Director selects Acting Deputy Assistant Directors and Special Agents in Charge from among special agents and members of 'the FBI Senior Executive Service, and that the authority to appoint these officials has been delegated (and, in some cases, redelegated) from the Attorney General to subordinate officials of the FBI. *See id*. at 1, 6–7. As our Office previously has stated, the "question whether [the head of a department may] delegate appointment authority to an officer below the head of the department is a difficult one, and we cannot provide a definitive answer at this time." *Assignment of Certain Functions Related to Certain Military Appointments*, 29 Op. O.L.C. 133, 135 (2005). We noted in particular that "[t]he Clause was designed to 'limit[] the universe of eligible recipients of

I.

Under 18 U.S.C. § 2709 (2006), 12 U.S.C. § 3414 (2006), and 15 U.S.C. § 1681u (2006), the FBI may issue NSLs seeking information relevant to national security investigations.[3] In particular, 18 U.S.C. § 2709(b) allows the FBI to obtain from a wire or electronic communications service provider the name, address, length of service, and billing records of a subscriber, while 12 U.S.C. § 3414 deals with customer records from financial institutions, and 15 U.S.C. § 1681u with certain information from consumer reporting agencies. To issue an NSL under these statutes, the FBI must certify in writing that the information requested "is sought for the conduct of an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(b); 12 U.S.C. § 3414(a)(5); 15 U.S.C. § 1681u(a). If the FBI further certifies that "otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person," the recipient of the NSL will be prohibited from disclosing the NSL's existence or content, except as necessary to comply with the NSL or to seek legal advice about it. 18 U.S.C. § 2709(c); 12 U.S.C. § 3414(a)(5)(D); 15 U.S.C. § 1681u(d). Both of these statutory certifications must be made by "[t]he Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director." 18 U.S.C. § 2709(b), (c); 12 U.S.C. § 3414(a)(5); 15 U.S.C. § 1681u(a), (d). You have asked whether this language permits Acting Deputy Assistant Direc-

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the power to appoint' in order to ensure that such actors were readily identifiable and politically accountable." *Id*. at 4 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 885 (1991)). We are not in a position in the present opinion to resolve this difficult question about the delegability of a department head's authority to appoint inferior officers.

[3] The FBI Memorandum notes (at page 2) that 15 U.S.C. § 1681v (2006) similarly authorizes the issuance of NSLs to consumer reporting agencies (to obtain full credit reports), but that statute is different from the other NSL statutes insofar as it requires the certifications to be made by a "supervisory official" designated by the head of an agency or another official appointed by the President with the Senate's advice and consent. *Id*. § 1681v(b). We understand that, despite this textual difference, the FBI's policy is to follow the same procedures for issuing NSLs under section 1681v as for other NSLs.

tors and Acting Special Agents in Charge to make these certifications. We conclude that it does.

As a general rule, "[a]n acting officer is vested with the full authority of the officer for whom he acts." *Acting Officers*, 6 Op. O.L.C. 119, 120 (1982); *see Keyser v. Hitz*, 133 U.S. 138, 146 (1890); *Ryan v. United States*, 136 U.S. 68, 81 (1890); *Commissioners of Soldiers' Home—Vacancy*, 23 Op. Att'y Gen. 473, 475–76 (1901); *see, e.g.*, *United States v. McGee*, 173 F.3d 952, 955–56 (6th Cir. 1999); *United States v. Pellicci*, 504 F.2d 1106, 1107 (1st Cir. 1974) ("There is no basis for concluding that one 'acting' as Attorney General has fewer than all the powers of that office."). We assume that Congress legislates with an awareness of this presumption, *see Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993), and we therefore construe statutes that authorize officers to perform specified functions as encompassing acting officers, even if the statutes do not expressly name them. See Memorandum for Richard L. Thornburgh, Assistant Attorney General, Criminal Division, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Designation of a Deputy Assistant Attorney General to Act as Assistant Attorney General* at 3–4 (Sept. 9, 1975) ("*Designation of a Deputy Assistant Attorney General*"); Memorandum for Stephen S. Trott, Assistant Attorney General, Criminal Division, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Authority of Acting Assistant Attorney General to Authorize an Application for a Title III Wiretap* at 7 (July 10, 1984) ("*Authority of Acting Assistant Attorney General*").

Applying this principle, a 1975 opinion of our Office concluded that the federal wiretap statute, 18 U.S.C. § 2516 (1970), permitted an Acting Assistant Attorney General to authorize wiretap applications, even though the statute provided for authorization by the "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General." *See Designation of a Deputy Assistant Attorney General* at 3, 6. Our opinion was prompted by dicta in *United States v. Acon*, 513 F.2d 513, 516 (3d Cir. 1975), stating that Acting Assistant Attorneys General could not authorize wiretap applications because the statute did not list them. We disagreed with that view. We argued that *Acon* had erroneously relied on *United States v. Giordano*, 416 U.S. 505 (1974), which had held that the Attorney General's Executive Assistant could not approve a

wiretap application because the statute did not name the "Executive Assistant" as among the officials to whom the Attorney General could delegate his authority, and the statute's legislative history revealed an intent to restrict the delegation of authority to a small group of politically responsive, senior Department of Justice officials. *See Designation of a Deputy Assistant Attorney General* at 2. *Giordano* was not relevant to the issue at hand, we explained, because whether a power may be delegated to a particular official and whether an acting official may exercise that power are two distinct issues; *Acon* erred by failing to distinguish between an intent to limit delegation and the "extraordinary" intent "to reverse the normal rule concerning authority of acting officers." *Id*. at 4. We noted that reading a delegation limitation to exclude acting officials from a function would substantially expand the restriction with relatively small benefits. *Id*. Any such exceptions to the general rule about acting officials, we also noted, would impose a significant burden on acting officials by making it difficult to determine which powers of the permanent office they possess. *Id*. at 6 (citing *Pellicci*, 504 F.2d at 1107). Thus, although we recognized that "congressional concern for the sensitivity of a function could result in not merely the commitment of that function to particular officials but also in a prohibition against exercise of the function by any acting holders of the named offices," we concluded that evidence of intent to limit the delegability of a function alone would not show that Congress also intended to preclude acting officials from performing that function. *Id*. at 4.

A 1984 opinion of our Office reaffirmed the conclusions of our 1975 opinion. Nonetheless, we observed that intervening court cases had extended *Giordano*'s analysis to preclude Acting Assistant Attorneys General from authorizing wiretap applications. *See Authority of Acting Assistant Attorney General* at 1. We therefore advised caution in pursuing the position that the wiretap statute permitted Acting Assistant Attorneys General to approve wiretap applications. The wiretap statute, however, presented a specialized concern that is not presented by the NSL statutes. As described in *Giordano*, the legislative history of the wiretap statute revealed congressional intent to limit authority to approve wiretap applications to officials who could be held accountable through the political process, and it suggested that perhaps only Senate-confirmed presidential appointees are politically responsive in the relevant sense. *See id*. at 2–3

(citing *Giordano*, 416 U.S. at 520 & n.9). Thus, cases such as *Acon* stated that "an acting assistant attorney general [does not] meet the Supreme Court's test of political responsiveness." *Acon*, 513 F.2d at 516. The NSL statutes, in contrast, expressly authorize the issuance of NSLs by officials who are not Senate-confirmed and arguably are not politically responsive according to *Giordano*, and the legislative history of the NSL statutes, described in more detail below, does not reveal any special concern about the political accountability of officials who issue NSLs.

If the NSL statutes simply named "Deputy Assistant Directors" and "Special Agents in Charge" as among the officials whom the Director could designate to issue NSLs, the presumption about acting officials and our 1975 opinion would lead directly to the conclusion that Acting Deputy Assistant Directors and Acting Special Agents in Charge could sign NSLs. *See Designation of Deputy Assistant Attorney General* at 5 ("[T]he naming of the office[] goes merely to the level of which delegation is permitted and not to the issue of whether, for an interim period, a temporary holder of that office can perform the delegated function."). The text of these statutes, however, raises a substantial and difficult question whether "congressional concern for the sensitivity of" NSL functions has resulted "in a prohibition against exercise of [such] function[s] by any acting holders of the named offices." *Id*. at 4. These statutes do not simply name the officials whom the Director may designate to exercise NSL authorities. Instead, they reserve the exercise of NSL functions to the Director "or his designee *in a position not lower than* Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director." 18 U.S.C. § 2709(b); 12 U.S.C. § 3414(a)(5); 15 U.S.C. § 1681u(a) (emphasis added). This language is unusual and might suggest a congressional intent to limit the exercise of NSL authority to permanent appointees, who, unlike acting officials, perhaps are more fittingly characterized as "in a position."[4]

[4] We are aware of two other statutes that use the formulation "in a position not lower than." *See* 20 U.S.C. § 1232g(j) (2006) (authorizing "the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated.by the Attorney General)," to seek an ex parte court order allowing access to educational records in connection with terrorism investigations or prosecutions (emphasis added)); *id*. § 9573(e) (similar). Neither our Office nor any court has considered the meaning of these provisions.

II.

Statutes about the designation of acting officials typically do not refer to such officials as being "in a position." The Vacancies Reform Act ("VRA"), for example, says that an acting officer "shall perform the functions and duties" of the vacant office. 5 U.S.C. § 3345(a) (2006). Other statutes use similar language or provide that the acting official shall "serve as" or shall "be" "Acting [Title]" in the event of a vacancy, absence, or disability. *See, e.g.*, 10 U.S.C. § 154(d) (2006) (providing that "the Vice Chairman [of the Joint Chiefs of Staff] *acts as Chairman and performs the duties of the Chairman* until a successor is appointed or the absence or disability ceases"); 12 U.S.C. § 1462a(c)(3)(B) (2006) ("In the event of a vacancy in the position of Director [of the Office of Thrift Supervision] or during the absence or disability of the Director, the Deputy Director *shall serve as Acting Director*."); 18 U.S.C. § 508 (2006) ("In case of a vacancy in the office of Attorney General, or, of his absence or disability, the Deputy Attorney General may *exercise all the duties of that office*.") (emphases added).

The existence of these formulations, however, does not demonstrate that by using the language "in a position not lower than," Congress sought to preclude Acting Deputy Assistant Directors from exercising NSL functions. Nothing in the statutes speaks directly to the issue of acting officials, and the phrase "in a position not lower than" easily could refer to the level to which the function may be delegated. In light of the distinction we drew in our 1975 opinion between provisions that restrict delegability and those that exclude acting officials from performing a function, and in light of the well-established presumption that acting officials may exercise the same authorities as permanent officeholders, the NSL statutes are best read as placing a limit on delegation, not overturning the ordinary presumption about acting officials. We believe Congress would have spoken more clearly had it intended to preclude acting officials from issuing NSLs. *See Designation of a Deputy Assistant Attorney General* at 6; *Authority of Acting Assistant Attorney General* at 7.

The legislative history of the NSL statutes generally supports the view that Congress sought to limit the delegation of NSL functions to FBI officials at the level of Deputy Assistant Director or above, rather than to preclude Acting Deputy Assistant Directors from issuing NSLs. As

originally enacted, 18 U.S.C. § 2709, 12 U.S.C. § 3414, and 15 U.S.C. § 1681u did not expressly limit the class of officials whom the Director could designate to sign NSLs. Instead, 18 U.S.C. § 2709 authorized "[t]he Director . . . (or an individual within the Federal Bureau of Investigation designated for this purpose by the Director)" to make the certifications required for NSLs (Electronic Communications Privacy Act, Pub. L. No. 99-508, § 201, 100 Stat. 1848, 1867 (1986)), and 12 U.S.C. § 3414 and 15 U.S.C. § 1681u provided that "the Director . . . (or the Director's designee)" could make NSL certifications (Intelligence Authorization Act for Fiscal Year 1987, Pub. L. No. 99-569, § 404, 100 Stat. 3190, 3197 (1986); Intelligence Authorization Act for Fiscal Year 1996, Pub. L. No. 104-93, § 601(a), 109 Stat. 961, 975 (1996)). In the conference reports accompanying 12 U.S.C. § 3414 and 15 U.S.C. § 1681u, however, the conferees stated that the Director should not delegate NSL authority below the level of Deputy Assistant Director. *See* H.R. Rep. No. 99-952, at 23–24 (1986) (Conf. Rep.) (noting that the conferees had "concluded that, should the Director of the FBI decide to delegate his authority [under 12 U.S.C. § 3414], . . . *he should delegate it no further down the FBI chain-of-command than the level of Deputy Assistant Director*" (emphasis added)); H.R. Rep. No. 104-427, at 37–38 (1995) (Conf. Rep.) ("As is the case with the FBI's existing National Security Letter authority . . . , the conferees expect, that if the Director of the FBI delegates th[ese] function[s] under [15 U.S.C. § 1681u], the Director will delegate [them] no further than the level of FBI Deputy Assistant Director."); *see also* H.R. Rep. No. 99-690, pt. 1, at 17 (1986) ("The Committee urges that, if the Director of the FBI delegates his function under [12 U.S.C. § 3414], he will delegate it no further down the FBI chain of command than the level of Assistant Director."). The conference report that accompanied 18 U.S.C. § 2709 does not as clearly reveal a concern about delegability, but it seems likely that Congress viewed this statute and the other NSL statutes as similar. *See* S. Rep. No. 99-541, at 44–45 (1986) ("It is intended that the [certification] requirement will be determined by a senior FBI official at the level of Deputy Assistant Director or above.").[5] There is no indication in the legislative history of 18 U.S.C.

[5] Congress subsequently codified these restrictions by amending 18 U.S.C. § 2709(b) to provide that the "Director of the [FBI], or his designee in a position not lower than

§ 2709, 12 U.S.C. § 3414, or 15 U.S.C. § 1681u that Congress intended to preclude acting officials from issuing NSLs.

The legislative history of the NSL statutes does not reveal anything more than intent to restrict the delegability of NSL functions. That intent does not support a conclusion that Congress meant to preclude Acting Deputy Assistant Directors from exercising NSL functions. In the absence of any evidence in the statutory text or legislative history of "extraordinary" congressional intent to "reverse the normal rule concerning authority of acting officers," *Designation of a Deputy Assistant Attorney General* at 4, we conclude that 18 U.S.C. § 2709, 12 U.S.C. § 3414, and 15 U.S.C. § 1681u permit Acting Deputy Assistant Directors at FBI headquarters to exercise NSL functions.

III.

We also conclude that the NSL statutes permit Acting Special Agents in Charge to exercise NSL functions. As a preliminary matter, we note that the language in the NSL statutes, "in a position not lower than," may not apply to Special Agents in Charge of FBI field offices. It would be awkward and redundant for the NSL statutes to permit NSLs to be signed by the Director's "*designee* in a position not lower than . . . *a* Special Agent in Charge in a Bureau field office *designated by the Director*." (Emphasis added.) To avoid surplusage, we could read these statutes as authorizing the exercise of NSL authorities by the director's (1) "designee in a position not lower than Deputy Assistant Director at Bureau headquarters" or (2) "a Special Agent in Charge in a Bureau field office designated by the Director." *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). On this reading, because the "in a position not lower than" language would not apply to Special Agents in Charge, they would simply be named among the officials whom the Director could designate to exercise NSL authorities. Under the ordinary presumption about acting officials, therefore, the NSL statutes would authorize Acting Special Agents in

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Deputy Assistant Director," may sign an NSL. Pub. L. No.103-142, § 1, 107 Stat. 1491, 1491 (1993). Section 3414 of title 12 and 15 U.S.C. § 1681u were later amended to conform to 18 U.S.C. § 2709. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, § 505, 115 Stat. 272, 365–66 (2001).

Charge to sign NSLs. *See Designation of a Deputy Assistant Attorney General* at 3–4 ("[T]he description of the class of officials who are authorized to perform certain acts also includes acting officials, even if they are not specifically mentioned[.]"); *see also McGee*, 173 F.3d at 955–56; *Pellicci*, 504 F.2d at 1107; *Commissioners of Soldiers' Home—Vacancy*, 23 Op. Att'y Gen. 473, 475–76 (1901).

Even if the phrase "in a position not lower than" applies to Special Agents in Charge, however, we would still read the statute as limiting delegation only, rather than overturning the presumption that acting officers may exercise the full powers of the offices in which they temporarily serve. Like the legislative history discussed above, the legislative record behind the addition of Special Agents in Charge to the NSL statutes does not show any congressional concern about the issuance of NSLs by acting officials. When Congress added Special Agents in Charge to the NSL statutes, it sought to expand, not restrict, the class of officials who may be authorized to issue NSLs. In 2001, Congress amended the NSL statutes to permit the Director to designate a "Special Agent in Charge in a Bureau field office," in addition to headquarters officials at the level of Deputy Assistant Director or above. Pub. L. No. 107-56, § 505, 115 Stat. at 365–66. In hearings on the proposed legislation, a Department of Justice official explained that the proposed amendment would "allow special agents in charge—that is, the top-ranking FBI field agent in each of the FBI's 56 field offices—to issue one of these letters rather than requiring the letter to be sent out by an Assistant Director at headquarters." *S. 1448, The Intelligence to Prevent Terrorism Act of 2001 and Other Legislative Proposals in the Wake of the September 11, 2001 Attacks: Hearing Before the S. Select Comm. on Intelligence*, 107th Cong. 24 (2001) (statement of David Kris, Associate Deputy Attorney General). A section-by-section analysis similarly explained that, "because [NSLs] require the signature of a high-ranking official at FBI headquarters, they often take months to be issued. . . . In many cases, counterintelligence and counterterrorism investigations suffer substantial delays while waiting for NSLs to be prepared, returned from headquarters, and served. The section would streamline the process of obtaining NSL authority." *Administration's Draft Anti-Terrorism Act of 2001: Hearing Before the H. Comm. on the Judiciary*, 107th Cong. 57–58 (2001). In view of the statutory presumption about acting officials and this indication of congressional intent to expand the

class of officials who may issue NSLs, we think that 18 U.S.C. § 2709, 12 U.S.C. § 3414, and 15 U.S.C. § 1681u permit Acting Special Agents in Charge to sign NSLs.[6]

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

[6] It might be argued that Acting Deputy Assistant Directors and Acting Special Agents in Charge should not be permitted to issue NSLs under the NSL statutes because the Director could designate relatively low-level employees to serve in these roles. *See* 136 Cong. Rec. 35,806, 35,817 (Oct. 26, 1990) (statement of Sen. Boren) (introducing amendment to NSL statutes that "adds the requirement that the Director's designee be of at least the rank of Deputy Assistant Director . . . due, in part, to the finding that critical decisions [concerning NSLs] were made at low levels at FBI Headquarters"). We do not think this possibility undermines our interpretation of the NSL statutes. Congress vested the authority to issue NSLs in Deputy Assistant Directors and Special Agents in Charge designated by the Director, and there is no indication of congressional intent to preclude issuance of NSLs by officials acting in these positions. Moreover, as the FBI Memorandum notes (at pages 1 and 7), the Director selects permanent and acting Deputy Assistant Directors and Special Agents in Charge from the same pool of FBI employees (special agents and members of the FBI Senior Executive Service). This practice further supports the view that the issuance of NSLs by Acting Deputy Assistant Directors and Special Agents in Charge should not raise any special concern under the NSL statutes.

Views on Legislation Making the District of Columbia a Congressional District

The District of Columbia Voting Rights Act of 2009 is unconstitutional.

Congress may not by statute give the District of Columbia voting representation in the House.

The District of Columbia is not a "State" within the meaning of the Composition Clause, which governs the membership of the House of Representatives.

The District Clause gives Congress broad power to legislate for the District, but it does not permit Congress to override the prescriptions of the Composition Clause.

February 25, 2009

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

We have prepared the attached letter for transmittal to the Counsel to the President.* The letter elaborates on comments the Office of Legal Counsel, at the request of the Office of Management and Budget, recently provided on H.R. 157 and S. 160, the House and Senate versions of the District of Columbia Voting Rights Act of 2009. *See* E-mail for Adrien Silas, Office of Legislative Affairs, from David Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 157 and S. 160, D.C. House Voting Rights* (Feb. 9, 2009). We have also prepared for transmittal the attached executive summary of the constitutional analysis set forth in the letter.

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* Editor's Note: The Attorney General provided a different memorandum opinion to the Counsel to the President. *See Constitutionality of the D.C. House Voting Rights Act of 2009*, 33 Op. O.L.C. 38 (2009).

EXECUTIVE SUMMARY

The attached letter addresses the constitutionality of the District of Columbia Voting Rights Act of 2009, which would give the District of Columbia one voting member in the House of Representatives. The key provision of the two bills now pending in Congress states: "Notwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives."

In recent years, this Office has twice concluded that essentially identical legislation was unconstitutional. *See Constitutionality of the D.C. Voting Rights Act of 2007*, 31 Op. O.L.C. 147 (2007) (statement of John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel); E-mail for Velma Taylor, Office of Legislative Affairs, from Michelle Boardman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act of 2006* (May 22, 2006). Although Congress had never until recently sought to give the District voting representation without statehood, our analysis of related questions for at least 40 years makes clear that our recent conclusions reflect the consistent and longstanding view of the Office.

We have carefully reviewed the arguments that have been advanced in support of the pending legislation, and we now reaffirm the Office's earlier conclusion. In so doing, we are mindful of the exceptionally strong policy reasons for extending congressional voting rights to citizens of the District. We further recognize that, in light of those policy considerations, it has been argued that any doubts concerning the constitutionality of the pending legislation should, if reasonably possible, be resolved in favor of Congress's authority to give citizens of the District a voice in the national legislature. After conducting a careful and thorough review of all relevant authorities, however, we conclude that the legislation is clearly unconstitutional even under that demanding standard.

Constitutional text, structure, original understanding, historical practice, and judicial precedent support this Office's longstanding view. The key constitutional provision is the Composition Clause, which governs the

membership of the House of Representatives. The Clause provides: "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." U.S. Const. art. I, § 2, cl. 1. The repeated textual references to "states" or "state" in this Clause, when combined with the numerous constitutional provisions relating to federal elections that similarly restrict voting to "states" and their people, reflect a clear intention to exclude non-state entities, such as the District, unless the Constitution expressly provides otherwise. See U.S. Const. amend. XXIII, § 1 (The District "shall appoint . . . [a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State*, but in no event more than the least populous State; they shall be *in addition to those appointed by the States*, but they shall be considered, *for the purposes of the election of President and Vice President*, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.") (emphasis added). Our conclusion is reinforced by powerful evidence that the Framers regarded states as uniquely important components of the federal constitutional structure. *See Adams v. Clinton*, 90 F. Supp. 2d 35, 56 (D.D.C. 2000) ("The Constitution's repeated references to states . . . are reflections of the Great Compromise forged to ensure the Constitution's ratification. There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the congressional franchise."). It is further confirmed by Founding-era statements and subsequent historical practice.

Recent judicial authority affirms this same conclusion. In a thorough and thoughtful opinion, a special three-judge panel of the United States District Court for the District of Columbia relied on similar evidence from text, history, and precedent to conclude that the District of Columbia is not a "state" within the meaning of the Composition Clause. *Adams*, 90 F. Supp. 2d at 55–56 ("In sum, we conclude that constitutional text, history, and judicial precedent bar us from accepting plaintiffs' contention that the District of Columbia may be considered a state for purposes of congressional representation under Article I."). That decision was summarily affirmed by the Supreme Court. *Adams v. Clinton*, 531 U.S. 941

(2000); *see also Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (summary affirmance is a precedential ruling on the merits).

Conceding that the District is not a "State" within the meaning of the Composition Clause, some have argued that Congress may evade the strictures of that Clause by invoking its power to "exercise exclusive legislation in all cases whatsoever" over the District." *See* U.S. Const. art. I, § 8, cl. 17. *Adams* did not directly address this argument, but the reliance on Congress's authority under the District Clause to support District voting representation in the House is not persuasive. The District Clause gives Congress broad power to provide for the governance of the District, but it does not allow Congress to "contravene any provision of the Constitution." *Palmore v. United States*, 411 U.S. 389, 397 (1973) (quoting *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899)); *accord Keller v. Potomac Elec. Co.*, 261 U.S. 428, 443–44 (1923). Nor can the Composition Clause reasonably be read to permit Congress to treat the District as a "State" for purposes of representation in the House. Indeed, if it could be so read, we see no principled basis for concluding that Congress could not, by statute, give territories voting representation in the House as well.

In arguing to the contrary, proponents of the pending legislation rely heavily on *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). That case held Congress may give Article III courts jurisdiction over suits brought by citizens of the District of Columbia against citizens of the several states, even though Article III expressly confers diversity jurisdiction only over cases involving residents of "States." Thus, the proponents of this legislation contend, the Composition Clause similarly should not prevent Congress from giving the District voting representation in the House, even though that Clause refers only to "States" and not the District. As we explain in our letter, however, *Tidewater Transfer* is not persuasive authority for that proposition. Indeed, a close examination reveals that the two opinions supporting the judgment in that case (neither of which drew support from more than three Justices) do not support it. The other relevant judicial precedents provide further support for our conclusion.

In sum, we conclude that Congress may not by statute give the District of Columbia voting representation in the House. The relevant constitu-

tional text, original understanding, historical practice, and judicial precedent all clearly support the proposition that the District is not a "State" within the meaning of the Composition Clause. The District Clause gives Congress broad power to legislate for the District, but it does not permit Congress to override the prescriptions of the Composition Clause.

LETTER

At the request of the Office of Management and Budget, the Office of Legal Counsel recently provided comments on H.R. 157 and S. 160, the House and Senate versions of the District of Columbia Voting Rights Act of 2009. *See* E-mail for Adrien Silas, Office of Legislative Affairs, from David Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 157 and S. 160, D.C. House Voting Rights* (Feb. 9, 2009). In those comments, the Office set forth its conclusion that this legislation is unconstitutional and offered to provide a further elaboration of its reasoning upon request. I am now writing in response to your office's request for a more detailed explanation of the basis for our constitutional conclusion and further consideration of the constitutional arguments of the proponents of the legislation. We have also enclosed a separate, executive summary of our analysis for your convenience.

H.R. 157 and S. 160 would give the District of Columbia one voting member in the House of Representatives. In particular, each bill includes a provision stating: "Notwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives." H.R. 157, § 2(a); S. 160, § 2(a). Significantly, neither bill purports to grant the District statehood. Instead, each bill would grant the citizens of the District the authority to elect a voting member of the House of Representatives by identifying it as a congressional district in its own right.

In recent years, this Office has twice concluded that essentially identical legislation was unconstitutional. *See Constitutionality of the D.C. Voting Rights Act of 2007*, 31 Op. O.L.C. 147, 147 (May 23, 2007) ("*D.C. Voting Rights Act*") (statement of John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel) ("S. 1257 violates the Constitution's provisions governing the composition and election of the United States Congress."); E-mail for Velma Taylor, Office of Legislative Af-

fairs, from Michelle Boardman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act of 2006* (May 22, 2006) ("We conclude that the creation of a District of Columbia seat by this legislation is unconstitutional. Membership in the House of Representatives is limited to representatives elected by the people of the several States, and the District of Columbia is not a State."). And although until recently Congress had never sought to give the District voting representation without statehood, our analysis of related questions for at least 40 years makes clear that our recent conclusions reflect the consistent and longstanding view of the Office. *See, e.g.*, Letter for Benjamin Zelenko, Committee on the Judiciary, House of Representatives, from Martin F. Richman, Acting Assistant Attorney General, Office of Legal Counsel (Aug. 11, 1967) (explaining that "provisions for elections of Senators and Representatives in the Constitution are stated in terms of the States, and the District of Columbia is not a State"); Memorandum for Warren Christopher, Deputy Attorney General, from Frank M. Wozencraft, Assistant Attorney General, Office of Legal Counsel, *Re: Budget, Economic, and State of the Union Messages* (Oct. 16, 1968) (same); *District of Columbia Representation in Congress: Hearing on S.J. Res. 65 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 95th Cong. 16–29 (1978) (testimony of John M. Harmon, Assistant Attorney General, Office of Legal Counsel) (stating that, "[i]f the District is not to be a state, then an amendment [to the Constitution] is required" to give the District voting representation in Congress, as "we do not believe that the word 'state' as used in Article I can fairly be construed to include the District under any theory of 'nominal statehood'").

We have carefully reviewed the arguments that have been advanced in support of the pending legislation, and we now reaffirm the Office's earlier conclusion. In so doing, we are mindful of the strong policy considerations that have been advanced in support of the extension of congressional voting rights to citizens of the District. There is no denying the force of the considerations in favor of enfranchising District residents. *See, e.g.*, *Loughborough v. Blake*, 18 U.S. 317, 324 (1820) (conceding that "in theory it might be more congenial to the spirit of our institutions to admit a representative from the district," but omitting any suggestion that Congress might provide such representation by simple legislation);

Adams v. Clinton, 90 F. Supp. 2d 35, 66 (D.D.C. 2000) ("We do not disagree that defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress."). We are also aware that some have argued that these policy considerations are implicit in the constitutional structure and that, in consequence, Congress should be assumed to have the authority to enact the pending legislation unless the Constitution clearly prohibits it. *See* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 191 (1975) ("If no constitutional purpose is served by exclusion of the District, the broader principles of representative government which the Constitution is meant to effect favor making the District a nominal state for purposes of congressional representation."); *accord Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 18–22 (May 23, 2007) (S. Hrg. No. 110-440; Serial No. J-110-38) (statement of Patricia Wald) ("Wald Statement"). Our view, however, is that this proposed legislation would be unconstitutional even if such a clear statement rule were appropriate in this context.

We begin by explaining that Section 2 of Article I of the Constitution, known as the Composition Clause, bars Congress from giving the District of Columbia the authority to elect a voting member of the House of Representatives unless and until the District becomes a state.[1] This conclusion follows from the plain text of the Constitution and draws additional support from founding-era understandings, subsequent historical practice, and judicial precedent. In the course of our discussion, we consider the main arguments that have been offered as to why the text and the historical evidence are not as clear as we believe them to be. We next consider the arguments, offered by some prominent defenders of the proposed legislation, and similar versions of it, that the District of Columbia Clause in Article I authorizes Congress to grant the District voting representation in the House, notwithstanding the Composition Clause. Two of these arguments merit particular consideration: (1) that Congress's so-called "plenary" power under the District Clause, U.S. Const. art. I, § 8, cl. 17, is such

[1] We wish to be clear that although this Office has in the past opined that District citizens' voting rights can only be effected by constitutional amendment, we do not address here whether and how Congress may, by statute, confer statehood on the District.

that it may give the District the authority to elect a voting member of the House even though the District is not a state, and cannot be treated as one, for purposes of the Composition Clause; and (2) that Congress possesses a more specific authority under the District Clause to treat the District as a "state" for purposes of the Composition Clause, even if Congress does not formally confer statehood on the District. We have carefully reviewed each of these arguments and find neither to be sound. Accordingly, we conclude that the proposed legislation is unconstitutional and therefore reaffirm the Office's consistent position that Congress may not give District residents the authority to elect a voting member of the House of Representatives, such as by denominating the District a "congressional district," because the District is not a state.

I.

We begin our analysis with a consideration of the text of the constitutional provision governing the composition of the House of Representatives. This provision, known as the Composition Clause, provides in full: "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." U.S. Const. art. I, § 2, cl. 1.

It has been suggested that by providing that voting members of the House be chosen by "the people of the several states," the Clause supplies a plausible textual basis for concluding that Congress may give the District voting representation in the House, even though the District is not a state. *See, e.g.*, Wald Statement at 19 ("[I]t is the House that has been identified as deriving its power from the people and not necessarily from the States."); *see also* Sen. Orrin G. Hatch. *"No Right is More Precious in a Free Country": Allowing Americans in the District of Columbia to Participate in National Self-Government*, 45 Harv. J. on Legis. 287, 304 (2008) (arguing that the Constitution allows Congress by statute to give the District voting representation in the House but not in the Senate because "the House was designed to represent people, whereas the Senate was designed to represent states"). The argument is that the Clause confers authority on "the people" rather than on the states, and so residents of the District—part of "the people" of the United States as a whole—are not

excluded from the scope of the Clause. This argument is reinforced by those who contend that the use of the word "states" in the Clause should not be deemed preclusive of constituencies that might encompass the District. *See Adams*, 90 F. Supp. 2d at 97 (Oberdorfer, J., dissenting) (concluding that "the literal references to the 'States' in Article I do not necessitate denying to the people of the District the right to vote for voting representation in the House of Representatives"); *id*. at 87 ("In essence, the defendants would apply the maxim *expressio unius est exclusio alterius*—the expression of one thing is the exclusion of another—as the basis for interpreting the term 'State.' . . . As the Supreme Court has explained, 'The "exclusio" is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.'" (citation omitted)).

The text, however, does not bear this construction, particularly when considered in context and in light of the constitutional structure. The language itself seems clear in limiting the right to choose "members" of the House to people from states.[2] Certainly nothing in the text of the Composition Clause indicates that the people of an entity other than a state may do so. The Composition Clause commands that representatives be chosen by "the people of the several states," not by "the people of the United States." U.S. Const. art. I, § 2, cl. 1. As such, the reference to "the people" must be read in connection with the language that follows ("of the several states"). For that reason, the language does not naturally suggest the possibility that "people" who are citizens of non-state entities—such as, for instance, the citizens of federal territories or of the District—would have a constitutional right to choose House representatives. Instead, the reference to "the people" is best read to underscore that members of the House would be selected by popular vote within "the several states" whereas members of the Senate would be selected (prior to the adoption of the Seventeenth Amendment) by state legislatures. It is this critical distinction that underlies the familiar description of the House of Representatives as "the people's house."

[2] For purposes of this letter we use the term "members" to refer to voting members, where not otherwise modified, as the District of Columbia has a delegate to the House.

Further language in the Composition Clause underscores the conclusion that only the people of a state are empowered to choose members of the House. Immediately after providing that members of the House shall be chosen by "the people of the several States," the Clause directs that the electors in House elections "shall have the qualifications requisite for electors of the most numerous branch of the *state legislature*." U.S. Const. art. I, § 2, cl. 1 (emphasis added). "[F]or most of its history," however, "the District of Columbia has had nothing that could even roughly be characterized as a legislature for the entire District." *Adams*, 90 F. Supp. 2d at 47; *see also id*. at 49 ("The impossibility of treating Congress as the legislature under that clause is manifest, as doing so would mean that Congress would itself choose the District's senators."). Likewise, the same section of Article I provides: "When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies." As the *Adams* court explained, this provision would be anomalous as applied to the District. Leaving aside the fact that the Mayor of the District is a relatively recent office, "it is Congress that is the ultimate executive authority for the District." *Id*. at 49. And "[t]he possibility that the Framers intended Congress to fill its own vacancies seems far too much of a stretch, even if the constitutional fabric were more flexible than it appears to be." *Id*.; *see also* U.S. Const. art. I, § 2, cl. 2 ("No person shall be a Representative . . . who shall not, when elected, be an inhabitant of that *State* in which he shall be chosen.") (emphasis added).

Nor is this textual conclusion rooted merely in the provisions of the original compact and thus perhaps the consequence of an outdated construction that has been overtaken by understandings that have developed over time. It is confirmed by a much more recent constitutional development. Section 1 of the Twenty-Third Amendment, ratified in 1961, provides that the District "shall appoint . . . [a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a state*, but in no event more than the least populous state; they shall be *in addition to those appointed by the states*, but they shall be considered, *for the purposes of the election of President and Vice President*, to be electors appointed by a State; and they shall meet in the District and perfonn such duties as provided by the twelfth article of amendment."

This text would serve no purpose if the District were already a state for purposes of constitutional provisions governing federal elections.

We are aware of the argument that the Twenty-Third Amendment is not as significant as it would appear to be. Judge Oberdorfer, for example, has argued in dissent in *Adams* that "the suggestion that the understanding of the people adopting a constitutional amendment in 1961 could confirm the 1787 understanding of the Framers of the Constitution appears to have no precedent in constitutional interpretation." 90 F. Supp. 2d at 98. That argument might have some force if the historical evidence demonstrated that "the 1787 understanding of the Framers" was that citizens of the District would enjoy voting representation in Congress. In such an event, one could argue that the understanding of the Framers should trump the mistaken and contrary understanding of a later generation. As we explain at greater length below, however, the evidence from the Founding era is wholly consistent with the evident understanding of those who drafted and ratified the Twenty-Third Amendment. But whether or not the Twenty-Third Amendment is confirmatory of the original understanding, the question at issue here is not whether the nation should be bound by what happened to be the prevailing "understanding of the people adopting a constitutional amendment in 1961"; it is whether a particular understanding carries interpretive weight when it is embodied in the text of the Constitution itself. Fidelity to constitutional structure is a well-established canon of interpretation. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414–15 (1819); *see generally* Charles L. Black, Jr., S*tructure and Relationship in Constitutional Law* (1969); Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999). Accordingly, we cannot agree with Judge Oberdorfer's contention that an understanding expressly and unambiguously codified in the text of one constitutional provision may be entirely ignored when interpreting a related constitutional provision. Regardless whether one looks to Article I or the Twenty-Third Amendment—and one should look to both—one arrives at the same result: participation in federal elections and representation in the national government, except where the Constitution expressly provides otherwise, is limited to the people of the "states."

It is clear, moreover, that the District is not a state. The District Clause itself makes that much plain, *see* U.S. Const. art. I, § 8, cl. 17, and the proposed bills do not purport to alter that fact. They do not, for example,

entitle District residents to choose two senators, an essential aspect of statehood. (The Framers did not merely give each state a right to be represented by two Senators; they deemed this aspect of the Great Compromise so sacrosanct that they included in Article V of the Constitution a provision that purports to foreclose the possibility of a constitutional amendment that would deprive any state of this right without its consent.) Nor would these bills limit Congress's authority to control the District's operations under the District Clause, even though states enjoy independent authorities pursuant to their own constitutions and do not, as the District does, derive their powers from congressional enactments. Instead, the bills seek only to make the District an independent congressional district, untied to any state, and on that basis to give its "people" the power to elect a voting member of the House.[3] But that is precisely what the text of the Composition Clause precludes.

Those who argue in favor of the proposed legislation's constitutionality contend that the broader purposes of the Constitution are best served by concluding that the Composition Clause would permit District residents to have voting representation in the House. They argue that "the right to vote

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[3] The pending legislation's conspicuous refusal to treat the District as a state, even for purposes of representation in the House alone, is underscored by the provision limiting the District's representation in the House to a maximum of one member regardless of population. Section 2(b)(1) of both bills would amend 2 U.S.C. § 2a, which governs the apportionment of representatives, by inserting a new subsection (d), which would provide: "This section shall apply with respect to the District of Columbia in the same manner as this section applies to a State, except that the District of Columbia may not receive more than one Member under any reapportionment of Members." This provision raises serious constitutional concerns in its own right. Section 2 of the Fourteenth Amendment in relevant part provides: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Even assuming that Congress could by statute treat the District as a "state" for purposes of representation in the House, any such representation would be subject to the constitutional requirement that the number of representatives assigned to each state be allocated on the basis of population. The pending legislation would seem to violate that requirement, as it would provide that "the District of Columbia may not receive more than one Member under any reapportionment of Members." We note that, under each bill's non-severability provision, this constitutional infirmity would threaten to render the entire legislation invalid. *See* S. 160, § 6(a) ("If any provision of this Act or any amendment made by this Act is declared or held invalid or unenforceable, the remaining provisions of this Act and any amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law."); H.R. 157, § 4 (same).

is one of the most important principles of democracy." Viet D. Dinh & Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives* at 19 (Nov. 2004), https://www.dcvote.org/sites/default/files/upload/vietdinh112004.pdf ("Dinh & Charnes"); *see also id*. (noting that the right to vote is regarded as "a fundamental political right, because preservative of all rights" (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *Adams*, 90 F. Supp. 2d at 73 (Oberdorfer, J., dissenting) ("'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'" (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964)). "Given these considerations," it is argued, "depriving Congress of the right to grant the District Congressional representation pursuant to the District Clause thwarts the very purposes on which the Constitution is based." Dinh & Charnes at 19.

As important as these constitutional purposes are, however, the fact that the plain terms of the Composition Clause give the people of the states, and only those electors, the right to choose House members is not surprising or at odds with the central purposes of the founding charter. The Framers clearly looked upon states as unusually important components of the constitutional structure. As much as they created the Constitution to forge a union, they regarded states as distinct and independent units of government that were to play key roles in choosing the elected officers of the federal government. As the Supreme Court has explained, the constitutional framework governing representation was carefully designed to protect the integrity of the states in our federal system. *See, e.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550–51 (1985) ("Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress."). Indeed, the Constitution ensures that all states are on an equal footing out of respect for their independent status. *See Coyle v. Smith*, 221 U.S. 559, 573 (1911) ("[W]hen a new state is admitted into the Union, it is so admitted with all of the powers of

sovereignty and jurisdiction which pertain to the original states, and [] such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission."); *cf*. U.S. Const. art. IV, § 3, cl. 1 (protecting against the possibility that the federal government might merge two states into one by providing that a new state may not "be formed by the junction of two or more states . . . without the consent of the legislatures of the states concerned as well as of the Congress"). In sum, we read the word "state" in the Composition Clause as denominating a unique and significant status that is exclusive of other constitutionally recognized political jurisdictions, such as the District, and that reading is entirely consistent with the constitutional structure. *See Adams*, 90 F. Supp. 2d at 49 (incongruity of giving Congress itself the authority to fill its own vacancies militates against theory that the District may be deemed a "state" for purposes of constitutional provisions governing representation).

Indeed, every Clause in the original Constitution addressing the qualifications of the electors for national office—whether members of the House, Senators, or the President—uses language that is similar to that in the Composition Clause. *See* U.S. Const. art. I, § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof"); *id*. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress" for purposes of electing the President). Here, too, the Twenty-Third Amendment is confirmatory. In providing that the District may play a role in the selection of the President, and thereby amending the rule established in Article II, Section 1 that presidential electors are appointed by "Each State" and meet in "their respective States," the Amendment specifically acknowledges that its provision for electors from the District is an exception to the constitutional rule that the states alone (and the people of those states) may be involved in determining the composition of the federal government. That states and states alone (and their people) are mentioned in the original composition provisions of the Constitution suggests a degree of intentionality on the part of the drafters that is hard to square with the conclusion

that the people of a non-state, such as the District or federal territories, may nonetheless exercise the power to choose members of the House. Simply put, the Constitution, in providing for the selection of the political branches of the national government, assigned a critical role to the independent states, which stand at arm's length from federal power in a way that no other constitutionally recognized political jurisdictions do.

In this regard, it is worth noting that the Constitution itself identifies a range of political entities—from tribes to enclaves to territories. Yet it is states and states alone that are referred to in the original provisions prescribing the selection of Senators, the President, and the members of the House. If the Composition Clause were not read in the exclusive manner we contend it must be, it would seem hard to argue that Congress could not pursuant to its similarly broad authority under the Territories Clause, U.S. Const. art. IV, § 3, cl. 2, provide all territories with representation in Congress. *See* Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 Geo. Wash. L. Rev. 305, 362–64 (2008) (explaining why logic of providing congressional representation to the District also applies to the territories). It has been argued that the District is unique, so that even if Congress may by statute give the District voting representation in the House, that legislative authority would not necessarily extend to providing the territories and other non-state entities with such representation. *See, e.g.*, Dinh & Charnes at 21 n.103. But once one opens the word "state" up for interpretation to include the District, it is not at all clear what limiting principle could be identified, as a matter of text or history, that would preclude other non-state entities from fitting within the Composition Clause. At the limit, then, Congress would be able to overwhelm the representatives of the "people of the several states" with those representing political jurisdictions lacking the attributes of statehood.

To this point, our focus has been on arguments concerning the text of the Composition Clause and its relationship to the broader constitutional structure. The evidence we have reviewed from founding-era history, however, also supports our conclusion that Congress may not give the District voting representation in the House without making the District a state. *See generally Adams*, 90 F. Supp. 2d at 50–53. The District was created to serve the distinct purpose of protecting the national government and its institutions. It was a direct reaction to the fact that the Continental

Congress was effectively run out of Philadelphia by an angry mob and received little assistance from Pennsylvania. To ensure that the federal government would not be at the mercy of a state government's willingness to protect it in the future, it was determined that a special non-state federal district be established. *See id*. at 50 n.25. That particular purpose—maintaining the nation's capital as a non-state entity—obviously does not require that the District be denied voting representation in Congress. *See, e.g.*, Raven-Hansen, *Congressional Representation for the District of Columbia*, 12 Harv. J. on Legis. at 184. But Founding-era statements addressing the voting rights of residents of such a district—including statements from prospective district residents themselves—clearly reveal an understanding that citizens of the District would have no right to vote in national elections, as they were not residents of a state. *See, e.g.*, 10 Annals of Cong. 991, 998–99 (1801) (remarks of Rep. Dennis) (stating that because of District residents' "contiguity to, and residence among the members of [Congress]," "though they might not be represented in the national body, their voice would be heard"; "[b]ut if it should be necessary [that they be represented], the Constitution might be so altered as to give them a delegate to the General Legislature when their numbers should become sufficient"); *id*. at 992 (remarks of Rep. Bird) (assigning "blame" for disenfranchisement of District residents to "the men who framed the Constitutional provision, who peculiarly set apart this as a District under the national safeguard and Government"); 5 *The Papers of Alexander Hamilton* 189–90 (Harold C. Syrett ed., 1962) (reprinting text of subsequently rejected amendment proposed by Alexander Hamilton during the New York ratifying convention: "That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and Direct Taxes Amount to [left blank] such District shall cease to be parcel of the State granting the Same, *and Provision shall be made by Congress for their having a District Representation in that Body*.") (emphasis added); *see also* 12 Annals of Cong. 487 (1803) (remarks of Rep. Smilie) ("Under the exercise of exclusive jurisdiction the citizens are deprived of all political rights, nor can we confer them."); 5 *The Documentary History of the Ratification of the Constitution* 621 (Merrill Jensen, John P. Kaminski & Gaspare J. Saladino eds., 1976) (statement of Samuel Osgood, delegate to the Massachusetts ratifying

convention, that he could accept the Seat of Government provision only if it were amended to provide that the District be "represented in the lower House," though no such amendment was ultimately included in the amendments recommended by the Massachusetts convention); *see generally Adams*, 90 F. Supp. 2d at 51–53 (recounting this history).

Some scholars and commentators have argued that certain pieces of evidence suggest a contrary understanding. In particular, some have pointed to the fact that, in the interim period between Congress's acceptance of the District and Congress's assumption of jurisdiction over the District, those living in the physical territory that would become the District were permitted to vote in Virginia or Maryland. *See, e.g.*, Arjun Garg, Note, *A Capital Idea: Legislation to Give the District of Columbia a Vote in the House of Representatives*, 41 Colum. J.L. & Soc. Probs. 1, 21 (2007). But at the time, such persons were still citizens of Virginia or Maryland, and thus this history does not show that the people of the District possessed voting rights that they have since lost. Instead, this history shows only that these persons' prospective status as District residents did not deprive them of the constitutionally conferred right as the "people" of one of the several states to choose members of the House under the Composition Clause. *See* Raven-Hansen, *Congressional Representation for the District of Columbia*, 12 Harv. J. on Legis. at 174 ("District residents did not lose state citizenship until December, 1800, and the prior decade of voting and representation provided no precedent for the representation of District citizens.").[4]

Nor is there any evidence that this original understanding was called into question over time. Although the movement to provide District citi-

[4] Professor Raven-Hansen argues that it was an act of Congress, and not the constitutional provisions limiting voting representation to "states," that disenfranchised citizens of the District. *See* Raven-Hansen, *Congressional Representation for the District of Columbia*, 12 Harv. J. on Legis. at 174–79. The evidence adduced for this proposition does not overcome the contrary indications in the constitutional text and history that a non-state entity may not enjoy voting representation in Congress. Indeed, the court in *Adams* considered this very evidence and concluded that "it *is* the Constitution itself that is the source of [the District's] voting disability." 90 F. Supp. 2d at 62 (emphasis in original); see also id. ("Thus, it was not the Organic Act or any other cession-related legislation that excluded District residents from the franchise, something we agree could not have been done by legislation alone.").

zens with some representation in the national legislature has a long historical pedigree, for most of the nation's history proponents of such a view "have assumed that District representation requires a constitutional amendment." *Id*. at 167. Thus, until very recently, no legislation comparable to that at issue here was even proposed, much less acted upon. Instead, members of Congress have consistently sought to give the District the right to vote in federal elections by way of at least three other devices: retrocession; statehood; and constitutional amendment. The history associated with such efforts, including the history underlying the adoption of the 23rd Amendment, demonstrates that Congress itself understood that the District is not a state and therefore may not enjoy voting representation in Congress. *See, e.g.*, *Providing Representation of the District of Columbia in Congress*, H.R. Rep. No. 90-819, at 4 (1967) ("If the citizens of the District are to have voting representation in the Congress, a constitutional amendment is essential; statutory action alone would not suffice. This is the case because provisions for elections of Senators and Representatives in the Constitution are stated in terms of the States, and the District of Columbia is not a State."); H.R. Rep. No. 86-1698 (noting that, absent a constitutional amendment, "voting rights are denied District citizens because the Constitution provides machinery only through the States for the selection of the President and Vice President," and observing that "apart from the Thirteen Original States, the only areas which have achieved national voting rights have done so by becoming States").[5]

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[5] The Uniformed and Overseas Citizens Absentee Voting Act ("OCAVA") does not provide a legislative precedent for the proposition that Congress may give voting representation to a non-state entity such as the District. As supporters of the pending legislation have observed, *see, e.g.*, Dinh & Charnes at 17–18, one provision of the Act purports to give a U.S. citizen residing abroad the right to vote by absentee ballot in federal elections if that citizen once was domiciled in a state and, but for the fact of overseas residence, is otherwise qualified to vote in that state's elections. *See* 42 U.S.C. § 1973ff-1(a)(1) ("Each state shall . . . permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office."); *id*. § 1973ff-6(5)(C) (defining "overseas voter" to include, among others, "a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States"). Assuming this particular aspect of the Act is constitutional—*compare Romeu v. Cohen*, 265 F.3d 118, 130–31 n.9 (2d Cir. 2001)

Notwithstanding clear and substantial evidence of the original understanding that the District was not a state and therefore would not enjoy voting representation in Congress, some have argued that the Framers inadvertently neglected to provide for voting representation for the District. Because the absence of such representation did not and does not serve any valid purpose, they argue, Congress should for practical reasons be deemed to have the authority to correct this omission by statute. *See, e.g.*, Raven-Hansen, *Congressional Representation for the District of Columbia*, 12 Harv. J. on Legis. at 191 ("[D]enial of congressional representation to District residents was neither necessary to effect the constitutional purpose nor desired by those involved. Rather the problem was not clearly perceived until the damage was done."); *see also* Dinh & Charnes at 7 & n.22; *Adams*, 90 F. Supp. at 87 (Oberdorfer, J., dissenting) ("As the Supreme Court has explained, 'The "exclusion" is often the result of inadvertence or accident, and the [*expressio unius est exclusio alterius*] maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.'") (citation and quotation marks omitted).

This argument is unpersuasive. First, the constitutional text limiting representation in Congress to states "is not a case where '[t]he "exclu-

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(Leval, J.), with *id*. at 134 n.7 (Walker, C.J., concurring); *see also* Memorandum for John R. Bolton, Assistant Attorney General, Office of Legislative Affairs, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: H.R.4393, 99th Cong., The Uniformed and Overseas Citizens Absentee Voting Act* (Aug. 22, 1986) ("The bill raises on its face serious questions about the proper relations between the Federal government and the States in the delicate area of voting rights."); Dinh & Charnes at 18 n.89 ("Since the [Act] was enacted in 1986, the constitutional authority of Congress to extend the vote to United States citizens living abroad has never been challenged.")—such a precedent would at most suggest that Congress might have the authority to give some citizens of the District (those who used to live in one of the states and would be qualified to vote in that state's elections but for the fact of their residence in the District) the right to vote in that state's elections for federal officers. *Cf. Romeu*, 265 F.3d at 129. Because the OCAVA does not treat U.S. citizens living abroad as part of a non-state entity entitled to its own representation in Congress, the Act cannot be cited as evidence that Congress may create freestanding congressional districts that do not belong to any state but nevertheless enjoy representation in the national legislature. *Cf. Att'y Gen. of Guam v. United States*, 738 F.2d 1017, 1020 (9th Cir. 1984) ("The OCAVA does not evidence Congress's *ability* or intent to permit all voters in Guam elections to vote in presidential elections.") (emphasis added).

sion" is . . . the result of inadvertence or accident.'" *Adams*, 90 F. Supp. 2d at 56 (citation and quotation marks omitted). To the contrary, "[t]he Constitution's repeated references to states . . . are reflections of the Great Compromise forged to ensure the Constitution's ratification. There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the congressional franchise." *Id.*; *see also D.C. Voting Rights Act*, 31 Op. O.L.C. at 150 (provisions governing the composition of Congress "were the very linchpin of the Constitution, because it was only by reconciling the conflicting wishes of the large and small States as to representation in Congress that the Great Compromise that enabled the Constitution's ratification was made possible").

Second, even if were true that the Framers inadvertently neglected to give the District voting representation, it does not follow that they would have intended to give Congress the power by simple majority vote to manipulate the membership of the national legislature. We have not found any evidence suggesting that the Framers thought Congress would or should have such authority, and the centrality of the Great Compromise in the drafting of the Constitution cuts the other way. *See D.C. Voting Rights Act*, 31 Op. O.L.C. at 152 ("Given the great care with which the Framers provided for State-based congressional representation in the Composition Clause and related provisions, it is implausible to suggest that they would have simultaneously provided for the subversion of those very provisions by giving Congress carte blanche to create an indefinite number of additional seats [representing the territories and the federal enclaves] under the [District] Clause.").

Finally, proponents of the pending legislation argue in support of its constitutionality by appealing to judicial precedent. Their primary contention is that affirmative precedent for their position exists in cases considering the District Clause, and we discuss this line of argument at considerable length in the next section. The proponents are less forceful, however, in contending that there is affirmative support for their position in precedents interpreting the Composition Clause itself. Here, as we explain, the available precedent is entirely consistent with the conclusion that the Clause excludes non-state entities such as the District and provides no meaningful support for the contrary position.

Most recently, in a thorough and thoughtful opinion, a three-judge panel of the United States District Court for the District of Columbia (with Judges Garland and Kollar-Kotelly in the majority and Judge Oberdorfer dissenting) concluded that "the clauses of Article I that provide for congressional voting [] are not applicable to residents of the District of Columbia." *Adams*, 90 F. Supp. 2d at 65. The Supreme Court summarily affirmed the ruling in *Adams*, turning aside the District's argument that Article I, Section 2 should be construed, in accord with broader democratic principles and purposes of the Constitution, to allow District citizens to vote for a congressional representative. *See Alexander v. Mineta*, 531 U.S. 940 (2000); *see also Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (summary affirmance is a precedential ruling on the merits).[6] Because *Adams* addressed the question whether the Constitution requires giving the District representation, the court's decision in that case does not directly answer whether Congress might have the authority to confer such electoral authority by legislation. *See D.C. Voting Rights Act*, 31 Op. O.L.C. at 149 (emphasizing that "the courts have not directly reviewed the constitutionality of a statute purporting to grant the District representation because . . . Congress has not previously considered such legislation constitutionally permissible"). Proponents emphasize that point by way of suggesting that *Adams* is not of great significance as to whether Congress

[6] In its appeal to the Supreme Court, the District of Columbia and 54 residents of the District specifically contended (as the *Adams* plaintiffs in the companion case did not) that citizens of the District have a constitutional right "to be counted as 'People of the several States' for purposes of congressional representation" under Article I, Section 2. Jurisdictional Statement at 10, *Alexander v. Daley*, 531 U.S. 940 (No. 99-2062). The Solicitor General, on behalf of the federal Appellees, devoted virtually all of his Motion to Affirm to the argument that citizens of the District are not among the "People of the several States" under Article I, Section 2; and, in responding to the District's primary argument "that the Court should 'reject[] the most literal reading of a constitutional provision in favor of one that is more harmonious with the principles enunciated by the document as a whole and in keeping with its underlying purposes,'" the Solicitor General argued that "[d]eparting from the 'most literal reading' of the constitutional text in this case would . . . lead to insurmountable textual difficulties and conflict with both historical evidence and judicial precedent." Motion to Affirm at 10–11, *Alexander v. Mineta*, 531 U.S. 940 (No. 99-2062). The Supreme Court summarily affirmed the decision of the three-judge court in *Adams*, a decision that included the holding that the citizens of the District are not among the "People of the several States" for purposes of Article I, Section 2.

may provide voting representation to the District. In fact, however, the *Adams* court conducted an exhaustive analysis of the Composition Clause itself and concluded that its references to "states" exclude the District from its scope. *Adams*, 90 F. Supp. 2d at 62 (rejecting argument that congressional legislation disenfranchised citizens of the District, concluding that "it *is* the Constitution itself that is the source of plaintiffs' voting disability," and noting that "it was not the Organic Act or any other cession-related legislation that excluded District residents from the franchise, something we agree could not have been done by legislation alone") (emphasis in original). Nor did the court suggest that the issue was close. *See id*. at 56 ("[T]he overlapping and interconnected use of the term 'state' in the relevant provisions of Article I, the historical evidence of contemporary understandings, and the opinions of our judicial forebears all reinforce how deeply Congressional representation is tied to the structure of statehood. The Constitution's repeated references to states cannot be understood . . . as merely the most practical method then available for holding elections. . . . There is simply no evidence that the Framers intended that not only citizens of states, but unspecified others as well, would share in the Congressional franchise.").

Moreover, there are additional dicta in other cases indicating that Congress cannot either expand the constitutional definition of "state" for purposes of the Composition Clause or invoke one of its enumerated authorities to avoid the strictures of that Clause by giving the District some of the voting representation that the Constitution affords only to the states. *See, e.g.*, *Michel v. Anderson*, 623 F.3d 623, 630 (D.C. Cir. 1994) (holding that House rule giving delegates from non-state entities authority to cast certain non-decisive votes did not make those delegates "members" of the House for purposes of the Composition Clause, but stating in dictum that the Clause "precludes the House from bestowing the characteristics of membership on someone other than those 'chosen every second Year by the People of the several States'"); *Adams*, 90 F. Supp. 2d at 50 ("[T]he Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives."); *Michel v. Anderson*, 817 F. Supp. 126, 140 (D.D.C. 1993) ("One principle is basic and beyond dispute. Since the Delegates do not represent States but only various territorial entities, they may not, consistently with the Constitution, exercise legislative power (in tandem with the

United States Senate), for *such power is constitutionally limited* to 'Members chosen . . . by the People of the several States.'") (emphasis added); *see also Banner v. United States*, 428 F.3d 303, 309 (D.C. Cir. 2005) (stating that the "Constitution denies District residents voting representation in Congress") (emphasis added).

As noted above, the Supreme Court in *Adams* affirmed the District Court's holding that the District of Columbia is not a "state" within the meaning of the Composition Clause. The Court has not had occasion to address whether Congress may by statute give the District voting representation in the House even though the District is not a "state" for purposes of the Composition Clause. But insofar as it has discussed the issue in dicta, it has without exception expressed the view that the District may not choose elected federal officials, other than where expressly provided, because it is not a state. *See Loughborough*, 18 U.S. at 324 (stating that the District "voluntarily relinquished the right of representation"); *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452–53 (1805) (suggesting in dictum that the District is not a state for purposes of the Composition Clause).

We have not found any judicial authority suggesting, even in dictum, that Congress might by statute treat the District as a state for purposes of federal enfranchisement and representation in the House. The absence of any such suggestion is revealing, particularly in those cases where courts have acknowledged that the lack of voting representation for the District is at odds with the nation's democratic principles. *See, e.g.*, *Loughborough*, 18 U.S. at 324 (conceding that "in theory it might be more congenial to the spirit of our institutions to admit a representative from the district," but omitting any suggestion that Congress might provide such representation by simple legislation); *Adams*, 90 F. Supp. 2d at 66 ("We do not disagree that defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress.").

II.

Proponents of the legislation advance two main arguments against this formidable body of authority for the proposition that the Composition Clause precludes giving the District voting representation in the House. Each rests on a contention about Congress's authority under the District

Clause, U.S. Const. art. I, § 8, cl. 17, which gives Congress the power to "exercise exclusive legislation in all cases whatsoever" over the District. We address each of these arguments in turn.

The first argument would read the District Clause to, in effect, trump the seemingly plain command of the Composition Clause. Proponents of this argument begin with the premise that the District Clause "grants Congress plenary and exclusive authority to legislate in all matters concerning the District." Dinh & Chames at 4. "This broad legislative authority," they contend, "extends to the granting of Congressional voting rights for District residents," regardless whether the District is a state within the meaning of the Composition Clause. *Id*.

Pursuant to the District Clause, Congress has broad authority to "exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore v. United States*, 411 U.S. 389, 397 (1973). Congress's power under the Clause has been described as "plenary." *Id*. But what this means is simply that Congress has "all legislative powers that the legislature of a state might exercise within the state." *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899).[7] As courts have repeatedly stressed, Congress's broad power to provide for the governance of the District does not give it the authority to "contravene any provision of the Constitution." *Palmore*, 411 U.S. at 397 (quoting *Hof*, 174 U.S. at 5); *see also Neild v. Dist. of Columbia*, 110 F.2d 246, 249 (D.C. Cir. 1984) ("Subject only to those prohibitions of the Constitution which act directly or by implication upon the federal government, Congress possesses full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end.") (emphasis added).

Therefore, for example, the power of Congress in the District of Columbia is limited by the individual rights guarantees of the Federal Constitution: Congress's District Clause power does not give it the authority to pass a bill of attainder or an ex post facto law, to dispense with trial by jury, to establish a religion, or to abridge the freedom of speech. *See*

[7] The word "exclusive" in the clause is to specify that the legislative power of Congress over the District is not concurrent with that of the ceding states. *See Dist. of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953).

Keller v. Potomac Elec. Co., 261 U.S. 428, 443 (1923) ("Subject to the guaranties of personal liberty in the amendments and in the original Constitution, Congress has as much power [under the District Clause] to vest courts of the District with a variety of jurisdiction and powers as a state legislature has in conferring jurisdiction on its courts."). Nor can Congress invoke its power under the District Clause to alter the structural provisions of the Constitution, as *Keller* itself demonstrates. *See* 261 U.S. at 444 (holding that the District Clause does not give Congress the authority to vest "legislative or administrative jurisdiction" pertaining to the governance of the District in Article III courts). Likewise, Congress may not use its power to govern the District, no matter how "plenary" that authority may be, to alter the constitutional prerequisites for representation in the national legislature itself—prerequisites that include the command that members of the House are to be chosen "by the people of the several states."

Proponents of the pending legislation argue, in the alternative, and more persuasively, that even if the District Clause does not give Congress the power to act in direct contradiction of an express constitutional limitation or requirement, such as the one we believe is established by the Composition Clause, the District Clause does give Congress the more limited power to enact "legislation treating the District as a state, even for constitutional purposes." Dinh & Charnes at 4. In support of this argument, proponents of the legislation note that the term "state" may in some contexts be interpreted to include the District. *See Dist. of Columbia v. Carter*, 409 U.S. 418, 420 (1973) ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved."). Therefore, they argue, Congress should at the very least be permitted to treat the District as a state for purposes of the Composition Clause, particularly given that doing so would enfranchise citizens of the United States who would otherwise be denied the right to vote for a voting member of the House.

The most relevant case concerning Congress's authority under the District Clause, and the case on which proponents of the pending legislation most heavily rely, is *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949). There, a fractured court held that Congress may give Article III courts jurisdiction over suits brought by citizens of

the District of Columbia against citizens of the several states, even if those suits do not involve a federal question or any of the other non-diversity-related heads of federal jurisdiction spelled out in section 2 of Article III. One of the four opinions in the case, authored by Justice Jackson and joined by two other Justices, concluded that Congress could use its authority under the District Clause to authorize Article III courts to hear such cases, even though, in Justice Jackson's view, such jurisdiction was not part of the federal judicial power as defined in Article III. *See id*. at 588, 600. Two other Justices concurred in the judgment but specifically rejected Jackson's broad view of Congress's power under the District Clause; those two justices would have upheld the statute on the ground that by operation of the Constitution itself the District is a state for purposes of the provision of Article III that extends the federal judicial power to controversies between citizens of different "states." *See id*. at 604–06, 625–26 (Rutledge, J., concurring). Unlike Justice Jackson's plurality opinion, Justice Rutledge's opinion argued that the statute at issue was constitutional by rejecting the Court's longstanding view regarding the meaning of the term "state" for purposes of the diversity jurisdiction provision of Article III. *See Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805) (holding that statute giving federal courts jurisdiction over disputes between citizens from different states did not give those courts jurisdiction over a case between a citizen of the District and a citizen of one of the several states, based on conclusion in dictum that the meaning of the term "state" as used in Article III and other constitutional provisions did not include the District).

At first glance, the Jackson opinion might seem to provide a precedent for holding that Congress may use its power under the District Clause to give citizens of the District representation in Congress. His opinion was the only one in the majority to attract as many as three votes (including his own). Moreover, that opinion reasoned that the statute at issue in *Tidewater Transfer* effectively added an additional head of federal jurisdiction to those specifically enumerated in Article III. If Congress's power to legislate for the District may be used to expand the scope of federal jurisdiction under Article III, proponents of voting representation for District residents in the House have suggested, it should be reasonable to suppose that the same power may likewise be used to expand the basis of voting representation in Congress under Article I. Indeed, legislation

giving citizens of the District voting representation would seem to right a much more serious wrong, and to vindicate a much more fundamental principle, than the law at issue in *Tidewater Transfer*. *Compare id*. at 651 (Frankfurter, 1., dissenting) ("Concededly, no great public interest or libertarian principle is at stake in the desire of a corporation which happens to have been chartered in the District of Columbia, to pursue its claim against a citizen of Maryland in the federal court in Maryland on the theory that the right of this artificial citizen of the District of Columbia cannot be vindicated in the State courts of Maryland."), *with Wesberry v. Sanders*, 376 U.S., 17–18 (1964) ("No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) ("the political franchise of voting . . . is regarded as a fundamental political right, because preservative of all rights").

Framed at a high level of generality, then, the analogy to the Jackson opinion in *Tidewater Transfer* seems both appealing and superficially plausible. On deeper analysis, however, it becomes clear that the Jackson opinion in *Tidewater Transfer* does not provide persuasive authority for the constitutionality of the pending legislation.

Most importantly, the rationale underlying Justice Jackson's opinion is not a controlling holding of the Court. Six Justices in *Tidewater Transfer* expressly rejected Justice Jackson's theory that Congress's power to legislate under the District Clause enables it either to give content to, or else to circumvent the constraints of, the term "state" as used in a constitutional provision.[8] Given that two-thirds of the Justices in *Tidewater*

[8] *See id*. at 605 (Rutledge, J., concurring, joined by Justice Murphy) ("The Constitution is not so self-contradictory. Nor are its limitations to be so easily evaded."); *id*. at 607 ("I think that the Article III courts in the several states cannot be vested, by virtue of other provisions of the Constitution, with powers specifically denied them by the terms of Article III."); *id*. at 626 ("I am not in accord with the proposed extension of 'legislative' jurisdiction under Article I for the first time to the federal district courts outside the District of Columbia organized pursuant to Article III, and the consequent impairment of the latter Article's limitations upon judicial power . . . . That extension, in my opinion, would be the most important part of today's decision, were it accepted by a majority of the Court. It is a dangerous doctrine which would return to plague both the district courts

Transfer disapproved the Jackson rationale, the case cannot be said to hold that Jackson's theory is valid. *See The Congressional Pay Amendment*, 16 Op. O.L.C. 87, 93 n.11 (1992) (explaining that when the Supreme Court issues a splintered decision, an opinion does not constitute the holding of the case unless it "'embod[ies] a position implicitly approved by at least five Justices who support the judgment'") (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)); *cf. Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) (previous decision was of "questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality"). It therefore is not surprising that, as far as we are aware, no court has ever relied on Justice Jackson's opinion as the holding of the case, or as precedential authority for the proposition that Congress may, in other contexts, invoke its power under the District Clause to circumvent otherwise applicable constitutional constraints.[9]

Moreover, even if Justice Jackson's opinion were of some precedential effect, two aspects of the reasoning of that opinion suggest that it would not extend to support Congress's use of its power under the District Clause to alter the structure of congressional representation.

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and ourselves in the future, to what extent it is impossible to say."); *id*. (Vinson, J., dissenting, joined by Justice Douglas) ("I agree with the views expressed by Mr. Justice Frankfurter and Mr. Justice Rutledge which relate to the power of Congress under Art. I of the Constitution to vest federal district courts with jurisdiction over suits between citizens of States and the District of Columbia."); *id*. at 652 (Frankfurter, J., dissenting, joined by Justice Reed) ("To find a source for 'the judicial Power,' therefore, which may be exercised by courts established under Article III of the Constitution outside that Article would be to disregard the distribution of powers made by the Constitution."); *id*. at 655 ("[T]he cases to which jurisdiction may be extended under Article III to the courts established under it preclude any claim of discretionary authority to add to the cases listed by Article III or to change the distribution as between original and appellate jurisdiction made by that Article.").

[9] Shortly after *Tidewater Transfer*, courts characterized that case as holding only that the statute at issue in that case was constitutional—not that the statute was permissible as an exercise of Congress's authority under the District Clause. *See, e.g.*, *Siegmund v. Gen. Commodities Corp.*, 175 F.2d 952, 953 (9th Cir. 1949) ("The *National Mutual* case upheld the constitutionality of the Act involved here as applied to an action between a citizen of the District of Columbia and a citizen of a state."); *accord Detres v. Lions Bldg. Corp.*, 234 F.2d 596, 603 (7th Cir. 1956) (adopting *Siegmund*'s understanding of "what was actually held by the Supreme Court" in *Tidewater Transfer*).

First, Justice Jackson repeatedly stressed that Congress's decision to extend diversity jurisdiction to cases involving citizens of the District would not "substantially disturb the balance between the Union and its component states." *Tidewater Transfer*, 337 U.S. at 585. Nor, perhaps, would a mere addition to the number of representatives in Congress compromise that balance. But a law expanding the categories of representation in Congress to include non-state entities would implicate the "balance between the Union and its component states" to a much greater extent than the extension of diversity jurisdiction to cases involving District residents. *See id*. ("This constitutional issue affects only the mechanics of administering justice in our federation. It does not involve an extension or a denial of any fundamental right or immunity which goes to make up our freedoms."); *see also Adams*, 90 F. Supp. 2d at 56 ("[T]he overlapping and interconnected use of the term 'state' in the relevant provisions of Article I, the historical evidence of contemporary understandings, and the opinions of our judicial forebears all reinforce how deeply Congressional representation is tied to the structure of statehood."); *D.C. Voting Rights Act*, 31 Op. O.L.C. at 150 (provisions governing the composition of Congress "were the very linchpin of the Constitution, because it was only by reconciling the conflicting wishes of the large and small States as to representation in Congress that the Great Compromise that enabled the Constitution's ratification was made possible"). Thus, the rationale of the Jackson opinion, by its own terms, would not seem to encompass the pending legislation.

Second, Justice Jackson relied upon on a pragmatic argument for extending diversity jurisdiction that would not apply here. In particular, Justice Jackson assigned great weight to the fact that Congress concededly enjoyed analogous authority that as a practical matter was indistinguishable from the power at issue in the case. As Justice Jackson explained, the parties agreed that Congress could use its Article I power to create courts, located inside and outside the District, with jurisdiction over cases between citizens of the District and citizens of the several states. The only question, then, was whether Congress had to create two distinct categories of courts across the country—one consisting of Article I courts empowered to hear diversity cases involving residents of the District, and one consisting of Article III courts authorized to hear all other cases. Justice Jackson saw no good reason for forcing Congress to maintain two sepa-

rate systems; in his view, practical reasons supported the conclusion that Congress had discretion to combine both functions in the same courts. *See id*. at 585, 602. The statute Congress enacted in that case, in other words, had very little practical effect, in light of other statutes that Congress concededly could have enacted.[10] Giving residents of the District voting representation in Congress, however, is not analogous in this respect; here, unlike in *Tidewater Transfer*, it is very much disputed whether Congress has any authority to alter by simple legislation the structure of congressional representation.

Justice Rutledge's two-Justice opinion also cannot be relied upon as authority to support this legislation. It, too, was adopted by a minority of the Court, and the theory itself was rejected by the remaining seven Justices. Moreover, Justice Rutledge's theory—that the constitutional provision conferring diversity jurisdiction included the District in its reference to cases between citizens of different "states"—was clause-specific and, as he himself explained, would not extend to the meaning of the term "state" as used in the Composition Clause. *Id*. at 619, 623 (Rutledge, J., concurring) (concluding that the term "state," as used in the Article III provision providing for diversity jurisdiction, should be understood to include the District, but suggesting that the term should not be so defined for purposes of constitutional provisions "relating to the organization and structure of the political departments of the government," expressly including the provisions of Article I pertaining to the composition of Congress).

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[10] *See id*. at 602 ("We could not of course countenance any exercise of this plenary power [under the District Clause] either within or without the District if it were such as to draw into congressional control subjects over which there has been no delegation of power to the Federal Government. But as we have pointed out, the power to make this defendant suable by a District citizen is not claimed to be outside of federal competence. If Congress has power to bring the defendant from his home all the way to a forum within the District, there seems little basis for denying it power to require him to meet the plaintiff part way in another forum. The practical issue here is whether, if defendant is to be suable at all by District citizens, he must be compelled to come to the courts of the District of Columbia or perhaps to a special statutory court sitting outside of it, or whether Congress may authorize the regular federal courts to entertain the suit. We see no justification for holding that Congress in accomplishing an end admittedly within its power is restricted to those means which are most cumbersome and burdensome to a defendant.").

While acknowledging that neither Justice Jackson's view of Congress's power under the District Clause nor Justice Rutledge's view of the meaning of state in Article III commanded the support of a majority of the Court, some commentators argue that "[t]he significance of *Tidewater*" to pending legislative efforts to give the District voting representation in the House "is that the five justices concurring in the result believed either that the District was a state under the terms of the Constitution or that the District Clause authorized Congress to enact legislation treating the District as a state." Dinh & Charnes at 13; *see also* Hatch, *No Right is More Precious*, 45 Harv. J. on Legis. at 301 (quoting *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives: Hearing Before the H. Comm. On Government Reform*, 108th Cong. 13 (2004) (statement of Viet D. Dinh, Professor, Georgetown University Law Center, and Adam Charnes, Partner, Kilpatrick Stockton L.L.P.)). On this view, the Court might rely on *Tidewater Transfer* in justifying a decision to reach the similar conclusion that the Composition Clause either implicitly includes the District as one of several "states" or at least does not necessarily bar Congress from exercising its authority under the District Clause to treat it as a state for purposes of that clause.

This argument fails, we believe, for a number of reasons. As we have explained, both theories supporting the particular statute in *Tidewater Transfer* were rejected by a majority of the Court in that case, and thus neither is part of the holding of the case. The fact that at one particular point in time five of the nine Justices then sitting on the Court would have embraced one of the two theories—although no more than three Justices accepted either one—does not mean that either theory can be viewed as governing authority in a different context. Indeed, each of the opinions from *Tidewater Transfer* that arguably provides support rested on a theory that, by its own terns, would not cover the Composition Clause, given its important function in establishing the nation's political structure. In sum, *Tidewater Transfer* does not provide authority in support of the constitutionality of the pending legislation. Six of the nine Justices in the case unambiguously rejected the theory that the District Clause might be used to circumvent constitutional constraints on the scope of federal judicial power; and the remaining three Justices, so far as one can tell from the reasoning set forth in their opinion, most likely would not have approved

the substantial extension of their theory that would be needed to sustain the constitutionality of the legislation at issue here. Rather, the most that can be said in support of the *Tidewater Transfer* analogy is that Justice Jackson's opinion articulates a theory that would offer a plausible basis for the pending legislation if that theory, in either *Tidewater Transfer* or later cases, had been (1) accepted as valid constitutional doctrine and (2) extended in a way Justice Jackson very likely would not have approved.

Although commentators arguing that Congress may statutorily grant the District voting representation in the House rely largely on *Tidewater Transfer*, they do also cite a number of other cases. They contend these cases support the proposition that Congress's power under the District Clause allows it, by statute, to treat the District as a state for purposes of various constitutional provisions. *See, e.g.*, Dinh and Charnes at 9–17 (discussing cases and concluding that "Congress can legislate to treat the District as a state for purposes of Article I representation" even though "[t]he District is not a state for purposes of . . . Article I, section 2, clause 1"); Hatch, *No Right is More Precious*, 45 Harv. J. on Legis. at 300 (citing cases for proposition that "Congress may extend to the District through legislation what the Constitution applies to the states"); Garg, *A Capital Idea*, 41 Colum. J.L. & Soc. Probs. at 20 ("In various instances in which the District or its residents have asserted rights under the Constitution, courts have held that this specific constitutional grant of congressional authority over the District is so strong that it trumps the ordinary application of other constitutional provisions."); Lawrence M. Frankel, Comment, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. Pa. L. Rev. 1659, 1679–83 (1991) (same).

None of the Supreme Court cases cited by those commentators, however, holds or implies that Congress's power to legislate for the District gives it the authority to define the term "state" to include the District for purposes of any particular constitutional provision (let alone Article I, Section 2). Nor can any of those cases be cited for the proposition that Congress's power under the District Clause enables it to circumvent otherwise applicable constitutional constraints. Some of the cases cited by supporters of the pending legislation stand for the unremarkable proposition that the term "state," as used in certain statutes and treaties, should be understood to include the District. *See, e.g.*, *Geofroy v. Riggs*, 133 U.S. 258, 272 (1890) (holding that the District is one of "the States of the

Union" for purposes of a particular consular convention with France).[11] Other of the cases on which the proponents of the legislation rely arguably imply that the term "state," as used in constitutional provisions other than those governing the composition of the House, includes the District independent of any congressional action. *See, e.g.*, *Stoutenburgh v. Hennick*, 129 U.S. 141, 148–49 (1889) (holding that Congress did not purport to delegate to the local government of the District the power to regulate interstate commerce but arguably proceeding on the assumption that the District is a state within the meaning of the Commerce Clause); *Callan v. Wilson*, 127 U.S. 540, 548–51 (1888) (holding that citizens of the District are covered by the constitutional provisions concerning the right to a jury trial in criminal cases). Because, as noted above, the District is not a "state" for purposes of Section 2 of Article I, these latter authorities, concerning distinct constitutional provisions not "relating to the organization and structure of the political departments of the government," *Tidewater Transfer*, 337 U.S. at 619, do not support the constitutionality of the pending legislation.

Our understanding of the scope of Congress's authority under the District Clause is also wholly consistent with *Loughborough v. Blake*, 18 U.S. 317 (1820). In that case, the Court held that Congress has the authority to impose a direct tax on the District of Columbia. Section 2 of Article I provides that "direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers." Because the District is not a "state," it was argued in Loughborough that Congress lacked the power to tax citizens of the District. The Court rejected this contention because other provisions of the Constitution give Congress broad power to lay taxes and do not say or

[11] Some other cases on which commentators rely hold that the District is not a state within the meaning of certain statutes. *Dist. of Columbia v. Carter*, 409 U.S. at 419 ("[W]e hold that the District of Columbia is not a 'State or Territory' within the meaning of § 1983."); *Hepburn & Dundas*, 6 U.S. at 452–53 (holding that the District was not a state within the meaning of the statute conferring diversity jurisdiction and reasoning that the clause governing the composition of the House provides evidence that "the members of the American confederacy only," as distinguished from the District, "are the states contemplated in the constitution"). Those cases plainly do not support the proposition that Congress can treat the District as a state for purposes of a constitutional provision that does not, by operation of the Constitution itself, embrace the District.

imply that such taxes may be imposed only on the states. *See* U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes[.]"); *id*. cl. 17 (Congress has power to "exercise exclusive legislation in all cases whatsoever" over the District). The purpose of the apportionment provision of section 2 of Article I, the Court concluded, was "to furnish a standard by which taxes are to be apportioned, not to exempt from their operation any part of our country." *Loughborough*, 18 U.S. at 320. Accordingly, the Court held that "Congress possesses, under the constitution, the power to lay and collect direct taxes within the District of Columbia, in proportion to the census directed to be taken by the constitution." *Id*. at 325. As the foregoing summary makes clear, Loughborough cannot reasonably be read to stand for the proposition that Congress can, by simple legislation, bring the District within the ambit of the term "state" for purposes of a constitutional provision that does not of its own force include the District. Indeed, the Court in *Loughborough* concluded that the District "has voluntarily relinquished the right of representation," *id*. at 324–25, and nothing in its discussion of that issue suggests that Congress could give by statute what, in the Court's view, the Constitution had taken away.

Defenders of the legislation also point to lower-court cases that they argue demonstrate Congress's authority to treat the District as a state for the purposes of the Constitution. *See Milton S. Kronheim & Co. v. Dist. of Columbia*, 91 F.3d 193 (D.C. Cir. 1996); *Clarke v. Wash. Metro. Area Transit Auth.*, 654 F. Supp. 712, 714 n.1 (D.D.C. 1985), *aff'd*, 808 F.2d 137 (D.C. Cir. 1987). Those cases do not, however, address the question whether the District can be treated as a state for purposes of Article I, Section 2, a provision that implicates the special concerns relating to the political structure of the federal government that both Justices Jackson and Rutledge singled out in their *Tidewater Transfer* opinions. Moreover, the provisions at issue in these lower-court cases, the Eleventh and Twenty-first Amendments, also differ from the Composition Clause. Not only do they have different constitutional texts (e.g., "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited"), but their legal effect is very different, as well. The Composition Clause is the exclusive source of the benefit it confers: Unless an entity can be deemed a state, there is no plausible basis

for it having voting representation in the House. By contrast, neither the Eleventh Amendment nor the Twenty-First is the exclusive source of the benefits they confer. Even without "treating" the District as a state, Congress could grant the District immunity from suit, or confer on the District the power to regulate the use of alcohol. For this reason, there could be no argument that Congress's action in either *Kronheim* or *Clarke* "contravene[d] any provision of the Constitution." *Palmore*, 411 U.S. at 397.

In sum, we conclude that Congress may not by statute give the District of Columbia voting representation in the House. The relevant constitutional text, original understanding, subsequent history, and judicial precedent—including a recent summary affirmance by the Supreme Court—all clearly support the proposition that the District is not a "state" within the meaning of the Composition Clause. The District Clause gives Congress broad power to legislate for the District, but it does not permit Congress to override the prescriptions of the Composition Clause.[12]

[12] Our analysis addresses the most fundamental problem with the pending legislation, which is that Congress may not by statute give the District voting representation in the House without making the District a state. We note that, in addition to this fundamental problem, another provision of the Senate bill raises additional concerns. Section 3(c)(l) of S. 160 would require the President to "transmit a revised version of the most recent statement of apportionment . . . to take into account this Act and identifying the State of Utah as the State entitled to one additional Representative pursuant to this provision." This provision raises potential constitutional concerns of its own. As noted above, section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers." Although Congress may by law expand the total number of Representatives in the House, the constitutional requirement that those representatives be allocated on the basis of population could be construed to preclude Congress from directing that additional representatives be assigned to a particular state. This constitutional concern could be addressed by replacing the language quoted above with the language used in the House bill, which requires the President to submit a report "identifying the State (other than the District of Columbia) which is entitled to one additional Representative pursuant to this section." H.R. 157, § 3(c)(2). The fix we have suggested for this particular provision would not, however, address the broader constitutional problem with the bill.

Withdrawal of Four Opinions on CIA Interrogations

Four previous opinions of the Office of Legal Counsel concerning interrogations by the Central Intelligence Agency are withdrawn and no longer represent the views of the Office.

April 15, 2009

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Sections 3(a) and 3(b) of Executive Order 13491, 3 C.F.R. 199 (2009 comp.), set forth restrictions on the use of interrogation methods. In section 3(c) of that order, the President further directed that "unless the Attorney General with appropriate consultation provides further guidance, officers, employees, and other agents of the United States Government may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation . . . issued by the Department of Justice between September 11, 2001, and January 20, 2009." That direction encompasses, among other things, four opinions of the Office of Legal Counsel: Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative* (Aug. 1, 2002); Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340–2340A to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee* (May 10, 2005); Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of 18 U.S.C. §§ 2340–2340A to the Combined Use of Certain Techniques in the Interrogation of High Value al Qaeda Detainees* (May 10, 2005); and Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of High Value al Qaeda Detainees* (May 30, 2005).

In connection with the consideration of these opinions for possible public release, the Office has reviewed them and has decided to withdraw them. They no longer represent the views of the Office of Legal Counsel.

DAVID J. BARRON
Acting Assistant Attorney General
Office of Legal Counsel

Participation of Members of Congress in the Ronald Reagan Centennial Commission

Provisions in the Ronald Reagan Centennial Commission Act of 2009 establishing that six of eleven commissioners of the Ronald Reagan Centennial Commission would be members of Congress, appointed by congressional leadership, would raise concerns under the Appointment Clause, the Ineligibility Clause, and the separation of powers.

April 21, 2009

MEMORANDUM OPINION FOR THE
ACTING ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

The Ronald Reagan Centennial Commission Act of 2009 (the "Act") would create a Ronald Reagan Centennial Commission with responsibility to "plan, develop, and carry out such activities as the Commission considers fitting and proper to honor Ronald Reagan on the occasion of the 100th anniversary of his birth." H.R. 131, 111th Cong. § 3(1). Six of the eleven commissioners would be members of Congress, appointed by congressional leadership, *id.* § 4(a), raising concerns under the Appointments Clause, the Ineligibility Clause, and the separation of powers. To ameliorate these concerns, we recommend amending section 3(1) of the bill to make clear that the Commission would be responsible for making advice and recommendations as to the planning, developing, and carrying out of the contemplated commemorative activities. We further recommend designating an Executive Branch official as the officer responsible for considering the advice and recommendations of the Commission and then "planning, developing and carrying out" the ceremonial events. The Act could require that these events include participatory roles for members of both branches, but operational control should remain with the designated Executive Branch official.

I.

The Ronald Reagan Centennial Commission (the "Commission") created by the Act would be composed of the following eleven members:

(1) The Secretary of the Interior.

> (2) Four members appointed by the President after considering the recommendations of the Board of Trustees of the Ronald Reagan Foundation.
>
> (3) Two Members of the House of Representatives appointed by the Speaker of the House of Representatives.
>
> (4) One Member of the House of Representatives appointed by the minority leader of the House of Representatives.
>
> (5) Two Members of the Senate appointed by the majority leader of the Senate.
>
> (6) One Member of the Senate appointed by the minority leader of the Senate.

H.R. 131, § 4(a). Six of the eleven members, therefore, would be members of Congress, appointed by other members of Congress. The Commission would have responsibility to

> (1) plan, develop, and carry out such activities as the Commission considers fitting and proper to honor Ronald Reagan on the occasion of the 100th anniversary of his birth;
>
> (2) provide advice and assistance to Federal, State, and local governmental agencies, as well as civic groups to carry out activities to honor Ronald Reagan on the occasion of the 100th anniversary of his birth;
>
> (3) develop activities that may be carried out by the Federal Government to determine whether the activities are fitting and proper to honor Ronald Reagan on the occasion of the 100th anniversary of his birth; and
>
> (4) submit to the President and Congress reports pursuant to section 7.

Id. § 3. To fulfill these responsibilities, the Commission would be empowered to appoint an executive director and hire staff (*id.* § 5(a)–(b)), to "procure temporary and intermittent services" of experts and consultants (*id.* § 5(e)), and to "enter into contracts with and compensate government and private agencies or persons" (*id.* § 6(f)). Positions on the Commission would be uncompensated (*id.* § 4(f)) and would last until the duties of the Commission are complete, "but not later than May 30, 2011" (*id.* § 8(a)).

II.

Legislation of this nature, creating a commemorative commission composed of representatives of multiple branches, has ample historical precedent.[1] It is not unconstitutional for such commissions to perform advisory functions. Nor is there any constitutional problem with representatives of multiple branches participating in ceremonial events. Congress also possesses the authority to plan, develop and carry out ceremonial activities of its own that are clearly in aid of the functions of the Legislative Branch.[2] However, when the responsibilities of members of hybrid commissions extend beyond providing advice or recommendations to the Executive Branch, or participating in ceremonial activities, to exercising

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[1] *See, e.g.*, Pub. L. No. 91-332, § 2(a), 84 Stat. 427 (1970) (creating a National Parks Centennial Commission, consisting of four members of the Senate appointed by the President of the Senate; four members of the House appointed by the Speaker of the House; the Secretary of the Interior; and six presidential appointees); Pub. L. No. 98-101, § 4(a), 97 Stat. 719 (1983) (creating a Commission on the Bicentennial of the Constitution, consisting of 20 presidential appointees; the Chief Justice of the United States; the President pro tempore of the Senate; and the Speaker of the House); Pub. L. No. 99-624, § 4(a), 100 Stat. 3497 (1986) (creating a Dwight David Eisenhower Centennial Commission, consisting of the President pro tempore of the Senate; the Speaker of the House; six Senators appointed by the President pro tempore of the Senate; six members of the House appointed by the Speaker; six Presidential appointees; and the Archivist of the United States); Pub. L. No. 105-389, § 4(a), 112 Stat. 3486 (1998) (creating a Centennial of Flight Commission, consisting of the Director of the National Air and Space Museum of the Smithsonian Institution; the Administrator of the National Aeronautics and Space Administration; the chairman of the First Flight Centennial Foundation of North Carolina; the chairman of the 2003 Committee of Ohio; the head of a United States aeronautical society; and the Administrator of the Federal Aviation Administration); Pub. L. No. 106-408, § 303(b)(1), 114 Stat. 1782 (2000) (creating a National Wildlife Refuge System Centennial Commission, consisting of the Director of the United States Fish and Wildlife Service; up to ten persons appointed by the Secretary of the Interior; the chairman and ranking minority member of the Committee on Resources of the House of Representatives and of the Committee on Environment and Public Works of the Senate; and the congressional representatives of the Migratory Bird Conservation Commission).

[2] *See, e.g.*, Capitol Visitor Center Act, Pub. L. No. 110-437, § 402(b)(1), 122 Stat. 4983, 4991–92 (Oct. 20, 2008), *to be codified at* 2 U.S.C. § 2242(b)(1) ("In providing for the direction, supervision, and control of the Capitol Guide Service, the Architect of the Capitol, upon recommendation of the Chief Executive Officer, is authorized to . . . subject to the availability of appropriations, establish and revise such number of positions of Guide in the Capitol Guide Service as the Architect of the Capitol considers necessary to carry out effectively the activities of the Capitol Guide Service.").

operational control over a statutorily prescribed national commemoration, then the Executive Branch has consistently raised constitutional objections.[3] Specifically, legislative involvement in the proposed Commission would be constitutionally problematic for several reasons.

First, the Appointments Clause requires that "Officers of the United States" be appointed by the President with the Senate's advice and consent or, in cases of inferior officers, either by that same process or by the President alone, by Courts of Law, or by Heads of Departments. U.S. Const. art. II, § 2, ¶ 2. An Officer of the United States is an appointee to an "office" whose duties constitute the exercise of "significant authority pursuant to the laws of the United States."[4]

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[3] *Constitutionality of Resolution Establishing United States New York World's Fair Commission*, 39 Op. Att'y Gen. 61, 62 (1937) (Attorney General Cummings) ("In my opinion those provisions of the joint resolution establishing a Commission composed largely of members of the Congress and authorizing them to appoint a United States Commissioner General and two Assistant Commissioners for the New York World's Fair, and also providing for the expenditure of the appropriation made by the resolution and for the administration of the resolution generally amount to an unconstitutional invasion of the province of the Executive"); H.R. Doc. No. 75-252, at 2 (1937) (message of President Roosevelt vetoing joint resolution that would have authorized federal participation in 1939 World's Fair and quoting opinion of Attorney General Cummings above as basis); *Statement on Signing the Bill Establishing a Commission on the Bicentennial of the United States Constitution*, 2 Pub. Papers of Pres. Ronald Reagan 1390 (Sept. 29, 1983) ("I welcome the participation of the Chief Justice, the President pro tempore of the Senate, and the Speaker of the House of Representatives in the activities of the Commission [on the Bicentennial of the Constitution]. However, because of the constitutional impediments contained in the doctrine of the separation of powers, I understand that they will be able to participate only in ceremonial or advisory functions of the Commission, and not in matters involving the administration of the Act. Also, in view of the incompatibility clause of the Constitution, any Member of Congress appointed by me pursuant to Section 4(a)(1) of this Act may serve only in a ceremonial or advisory capacity."); *Appointments to the Commission on the Bicentennial of the Constitution*, 8 Op. O.L.C. 200 (1984) ("*Bicentennial Commission*") (proposing practical solution to constitutional concerns raised by presence of members of Congress on Commission on the Bicentennial of the Constitution).

[4] *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam); *see also United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867) ("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 Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 148 (1996) ("Dellinger Memo") ("An appointee (1) to a position of employment (2) within the federal government (3) that

For purposes of the Appointments Clause, an "office" "embraces the ideas of tenure, duration, emolument, and duties." *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867). The commissioners here would not receive compensation for their services (H.R. 131, § 4(f) ("Members shall serve without pay")), and the positions they are to fill would exist for no longer than two years (*id.* § 8(a) ("The Commission may terminate on such date as the Commission may determine after it submits its final report pursuant to section 7(c), but not later than May 30, 2011")). Nevertheless, the duties of the commissioners would not be "occasional and intermittent."[5] They would be continuing during the period of time necessary for the exercise of the important government duties assigned to the Commission. In *Morrison v. Olson*, 487 U.S. 654 (1987), the Supreme Court held that it was "clear" that an "independent counsel" under the Ethics in Government Act of 1978, 28 U.S.C. §§ 591–599 (1982 & Supp. V)—a position that was temporary and case-specific, but expected to last for an extended period, with ongoing, continuous duties, and termination only upon a determination that all matters within the counsel's jurisdiction were substantially complete—"is an 'officer' of the United States, not an 'employee.'" *Id.* at 671 n.12. Consistent with this holding, our Office has concluded that members of an unpaid commission similar to the Reagan Commission would hold offices in the constitutional sense.[6]

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carries significant authority pursuant to the laws of the United States is required to be an 'Officer of the United States.'").

[5] *See United States v. Germaine*, 99 U.S. 508, 511–12 (1879) ("If we look to the nature of [the civil surgeon's] employment, we think it equally clear that he is *not* an officer. . . . [T]he duties are not continuing and permanent, and they *are* occasional and intermittent.") (emphasis in original); *see also Auffmordt v. Hedden*, 137 U.S. 310, 326–27 (1890) ("[The merchant appraiser] 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. . . . His position is without tenure, duration, continuing emolument, or continuous duties . . . . Therefore, he is not an "officer," within the meaning of the clause.").

[6] *See, e.g.*, Memorandum for L. Anthony Sutin, Acting Assistant Attorney General, Office of Legislative Affairs, from William Michael Treanor, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Centennial of Flight Commission—Airport Improvement Program Reauthorization, H.R. 4057*, at 1 (Oct. 1, 1998) ("*Centennial of Flight Commission*") (objecting on Appointments Clause grounds to H.R. 4057); *see also* H.R. 4057, 105th Cong. § 804(c)(1) (engrossed amendment as agreed to by Senate, Sept. 25, 1998) (providing that "members of the Commission shall serve without pay or com-

Moreover, the Commissioners would exercise significant governmental authority. Although some of the functions of the Commission here would be merely advisory (H.R. 131, § 3(2)–(4)), the Commission would also have the authority to "plan, develop, and carry out such activities as the Commission considers fitting and proper to honor Ronald Reagan" (*id.* § 3(1)). This Office has previously indicated that "carrying out a limited number of commemorative events and projects" is a "clearly executive" function and that the planning and development of commemorative events constitutes "significant authority" for Appointments Clause purposes if the plans are final (i.e., not just advisory).[7] In light of these precedents, we conclude the Commissioners would be Officers of the United States. Therefore the bill's prescription that members of Congress shall appoint certain of the Commissioners would violate the Appointments Clause.

An additional constitutional problem arises from the fact that six of the Commissioners would not only be appointed by members of Congress but would themselves be members of Congress. 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 States, which shall have been created, or the Emoluments whereof shall have been increased during such time." U.S. Const. art. I, § 6, cl. 2. As we have previously advised, "[t]he 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

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pensation"); *cf. Offices of Trust*, 15 Op. Att'y Gen. 187, 188 (1877) (concluding, for purposes of the Emoluments Clause and with respect to commissioners of the United States Centennial Commission, that "though their duties are of a special and temporary character, they may properly be called officers of the United States during the continuance of their official functions"); *In re Corliss*, 11 R.I. 639 (1877) (holding that member of same Centennial Commission held "Office of Trust or Profit" under U.S. Const., art. II, § 1, and was therefore disqualified from serving as a presidential elector).

[7] *Bicentennial Commission*, 8 Op. O.L.C. at 200; *Centennial of Flight Commission*, *supra* note 6, at 1 ("The Commission is also authorized . . . to plan and develop commemorative activities itself . . . . In accordance with prior precedent of this Office, these functions have been understood to encompass significant authority for purposes of the Appointments Clause.").

is advisory or ceremonial, the appointment of members of Congress to the commission would violate the Ineligibility Clause." Dellinger Memo, 20 Op. O.L.C. at 160. Here, the legislation contemplates that Commissioners would not simply be participating in or advising on ceremonial events but that they would also be responsible for planning, developing, and carrying out such events as part of a national commemoration. In such circumstances, the Commission's composition would run afoul of the Ineligibility Clause.

Finally, independent of the concerns under the Appointments and Ineligibility Clauses, the Commission's composition would raise constitutional concerns under the anti-aggrandizement principle. "[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation." *Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986); *see also INS v. Chadha*, 462 U.S. 919 (1983). A statute may not give members of Congress, or congressional agents, the authority to perform Executive Branch functions. Accordingly, "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." Dellinger Memo, 20 Op. O.L.C. at 160 n.95 (citing *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993) (invalidating statute that authorized agents of Congress to be members of the Federal Election Commission)). This problem would persist, moreover, even if only a minority of Commissioners were members or agents of Congress, and even if the congressional members were not permitted to exercise voting authority. *See NRA Political Victory Fund*, 6 F.3d at 826–27 (members of Congress could not serve on the FEC even in non-voting capacity).[8]

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[8] *See also* Memorandum for Robert Raben, Assistant Attorney General, Office of Legislative Affairs, from Evan Caminker, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: National Wildlife Refuge System Centennial Commemoration Act of 2000* (Aug. 11, 2000) (objecting on anti-aggrandizement grounds to statute appointing members of Congress to serve as non-voting members of commission with responsibility to develop and carry out plan to commemorate 100th anniversary of National Wildlife Refuge System).

To address these constitutional concerns, the functions of the Commission in section 3(1) should be limited to giving advice and making recommendations with respect to planning, developing and carrying out commemorative activities. In such an advisory capacity, the Commission could remain composed as it is under section 4(a) of the Act. The Act should then assign an Executive Branch official the responsibility to consider the advice of the Commission and then to "plan, develop and carry out such activities as [the official] considers fitting and proper to honor Ronald Reagan on the occasion of the 100th anniversary of his birth." The Act could still require that any ceremonial events include a role for members of Congress. As long as operational control remains with the Executive Branch official, the Appointments Clause and Ineligibility Clause concerns would be assuaged, and there would be no impermissible congressional aggrandizement.

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Statutory Rollback of Salary to Permit Appointment of Member of Congress to Executive Office

Where a salary increase for an office would otherwise create a bar to appointment of a member of Congress under the Ineligibility Clause, compliance with the Clause can be achieved by legislation rolling back the salary of the executive office before the appointment.

May 20, 2009

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

We recently have reconsidered the question whether legislation to roll back a salary increase for an executive office can ensure compliance with the Ineligibility Clause of the Constitution if such a rollback occurs before a Senator or Representative is appointed to the office. The Ineligibility Clause provides 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 States, which shall have been created, or the Emoluments whereof shall have been encreased during such time." U.S. Const. art. I, § 6, cl. 2. Rollback legislation lowers the salary of an office to the level at which it stood before Congress enacted the increase that would otherwise prohibit the appointment of a Senator or Representative. A 1987 opinion of this Office took the position that such a law, if passed before the nomination[1] of a Senator or Representative to an office, would not achieve compliance with the Ineligibility Clause. *See* Memorandum for the Counselor to 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* (Aug. 24, 1987) ("Cooper Memorandum"). That opinion was not in accord with the prior interpretations of this Clause by the Department of Justice and has not consistently guided subsequent practice of the Executive Branch. For

[1] President Washington withdrew the nomination of William Patterson to the Supreme Court in 1793 when it appeared Patterson's appointment would violate the Ineligibility Clause. 32 *The Writings of George Washington* 362 (John C. Fitzpatrick ed., 1939). The Patterson episode established a practice of Presidents not making nominations unless and until any Ineligibility Clause restrictions are eliminated. *See Office of the Attorney General: Hearing on S. 2673 Before the S. Comm. on Post Office and Civil Service*, 93d Cong. 9 (1973) (statement of Robert H. Bork, Acting Attorney General of the United States) ("Bork Statement"); *Appointment to Civil Office*, 17 Op. Att'y Gen. 522 (1883).

the reasons set forth below, we do not believe it reflects the best reading of the Ineligibility Clause.

I.

The Ineligibility Clause prohibits the appointment of a Senator or Representative to an "Office . . . which shall have been created, or the Emoluments whereof shall have been encreased" during "the Time for which [the appointee] was elected [to the Congress]." U.S. Const. art. I, § 6, cl. 2. As a linguistic matter, the words of the Clause suggest two possible interpretations of the phrase "shall have been encreased." Under the first interpretation, "shall have been encreased" means "shall have *ever* been encreased." The Clause thus would call for a series of "snapshots": if at any time during the term of a member of Congress the emoluments of an office are higher than at another time, the emoluments have "encreased" during the member's congressional term, and therefore the member may not be appointed to that office. Under this interpretation, even if a salary is rolled back before the appointment, it still has been "encreased" within the meaning of the Clause. The alternative interpretation is to read "shall have been encreased during such time" as "shall have been encreased *on net* during such time," thereby prohibiting the appointment of a congressional member to an office only when the emoluments of the office are greater at the time of appointment than they were at the start of the member's term.

There is a long history of Executive Branch consideration of which of these interpretations is better, and the Executive Branch has not yet come to rest on a conclusion. For the most part, however, the Executive Branch's interpretations have supported the effectiveness of statutory rollbacks to comply with the Ineligibility Clause, and thus they have adopted, at least implicitly, the "on net" interpretation.

When Congress was considering a bill to roll back the Secretary of State's salary in 1909 in order to permit the appointment of Senator Philander C. Knox, Assistant Attorney General Charles W. Russell gave an "unofficial opinion," published in the Congressional Record, that "the purpose, and the sole purpose of [the Ineligibility Clause] was to destroy the expectation a Representative or Senator might have that he would enjoy the newly created office or the newly created emoluments," and that if a salary increase "is made and then unmade, he can not get, or hope for,

anything more than if there had been no such increase." 43 Cong. Rec. 2402, 2403 (1909) (citations omitted). Russell thus concluded that passage of the bill would permit the appointment to be made.

In 1973, Robert H. Bork, the Acting Attorney General, and Robert G. Dixon, the Assistant Attorney General for the Office of Legal Counsel, testified in favor of a rollback of the Attorney General's salary that was intended to permit the appointment of Senator William B. Saxbe as Attorney General, the salary for which office had been increased during the Senator's term in Congress. Acting Attorney General Bork stated that the rollback legislation "should remove any constitutional question which may be raised concerning the appointment of Senator Saxbe to be Attorney General of the United States." *Office of the Attorney General: Hearing on S. 2673 Before the S. Comm. on Post Office and Civil Service*, 93d Cong. 11 (1973) (statement of Robert H. Bork, Acting Attorney General of the United States) ("Bork Statement"). He reasoned that, with regard to the Ineligibility Clause, "the rationale of the constitutional provision [would be] met because the expectation of a higher salary cannot influence Senators' or Representatives' votes on legislation to raise salaries . . . if a Senator or Representative knows . . . that should he ever be nominated for [an office with a raised salary] during his term of office, he will have to accept the lower salary." *Id.* Assistant Attorney General Dixon made a similar argument. *To Reduce the Compensation of the Office of Attorney General: Hearing on S. 2673 Before the S. Comm. on the Judiciary*, 93rd Cong. 71, 75 (1973) (statement of Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel) ("Dixon Statement") ("[The proposed rollback legislation] would overcome the . . . evil regarding emoluments by preventing Senator Saxbe from obtaining the benefit of the 1969 salary increase . . . without wastefully barring him from offering his services to the country in an appointive office.").

In 1979, our Office again took this position. Although we concluded that the Ineligibility Clause did not apply where a salary increase might take place *after* Representative Abner Mikva's appointment to the Court of Appeals, we noted that "even if a salary increase for Federal judges generally were to occur, Congress could, by legislation, exempt from coverage the office to which Representative Mikva may be appointed." *Appointment of a Member of Congress as a Judge of the U.S. Court of Appeals for the District of Columbia Circuit*, 3 Op. O.L.C. 286, 289 (1979) ("*Mikva I*"); *accord Appointment of Member of Congress as a*

Judge of the U.S. Court of Appeals for the District of Columbia Circuit (II), 3 Op. O.L.C. 298 (1979). We cited the examples of Philander Knox and William Saxbe. *Mikva I*, 3 Op. O.L.C. at 289–90.

In addition to those public statements endorsing the constitutional efficacy of rollback legislation, various unpublished memoranda of our Office before 1987 expressed the same view. In these memoranda, we noted the possible constitutional questions about the effectiveness of salary rollbacks but advised that such rollbacks would achieve compliance with the Ineligibility Clause. In 1969, then-Assistant Attorney General William H. Rehnquist stated that the argument for the constitutionality of an appointment after a rollback was "perfectly tenable," even though, in his view, the Ineligibility Clause would be "literally violated." Memorandum for Bryce N. Harlow, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: Statutory Language to Avoid Prohibition of Article I, Section 6, United States Constitution* at 2 (Nov. 24, 1969).[2] And in 1980 we advised that legislation to lower the salary of the Secretary of State would permit the appointment of Senator Edmund Muskie to that position. Memorandum for Alan A. Parker, Assistant Attorney General, Office of Legislative Affairs, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Enrolled bill, "To ensure that the compensation and other emoluments attached to the office of Secretary of State are those which were in effect January 1, 1977" (S. 2637)* (May 8, 1980).

However, in an unpublished opinion written in 1987, this Office reversed course and concluded that salary rollbacks do not satisfy the Ineligibility Clause, thus adopting the "snapshot" interpretation of the Clause. *See* Cooper Memorandum at 2.[3] The 1987 opinion argued that the contra-

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[2] A memorandum from then-Assistant Attorney General Antonin Scalia in 1974 assumed the effectiveness under the Ineligibility Clause of the salary rollback for Attorney General Saxbe and concluded that, although the matter was not free from doubt, the Ineligibility Clause did not bar the same Congress in which Mr. Saxbe had served from restoring the Attorney General's salary to its previous level after Mr. Saxbe's appointment. Memorandum for Hugh M. Durham, Chief, Office of Legislative Affairs, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Bill to Increase the Salary of the Attorney General* (Nov. 22, 1974).

[3] An opinion of Attorney General Holmes Conrad concluded in 1895 that Senator Ransom was ineligible under the Clause to be appointed as envoy extraordinary and minister plenipotentiary to Mexico where the salary for that position had been increased during his

ry view "simply ignores the plain language of the Ineligibility Clause." *Id.* at 6. It also argued that in light of "serious reservations about the wisdom of giving to the executive the power to appoint legislators to lucrative and prestigious executive and judicial offices," the Framers had "tried to limit the instances in which the executive could offer such enticements [as appointment to office] to legislators." *Id.* Furthermore, because a rolled-back salary could be restored to the higher level immediately after the appointment, rollbacks "would largely render [the Ineligibility Clause] a nullity." *Id.* at 7. Thus, the opinion reasoned, rollback legislation would "serve[] to frustrate the intentions of the Framers" by making more such appointments possible. *Id.* at 6.[4] The 1987 opinion had set forth the official view of the Office.

II.

Contrary to the conclusion of the 1987 opinion, however, we do not believe the phrase "shall have been encreased" sets forth "plain language" that renders rollback legislation incapable of bringing an appointment into compliance with the Ineligibility Clause. The "snapshot" interpretation favored by the 1987 opinion is but one possible interpretation of the text and, as a matter of plain language, there is no basis for concluding that it is superior to the "on net" reading that opinion failed to credit.

The "on net" construction represents an entirely natural interpretation of the language. If a potential investor asked for a prediction at the beginning of a year whether a stock index "shall have been encreased" during the year, the question would call for a prediction whether the index would be higher at the year's end as compared to the year's beginning, rather than whether the index would go up at any point during that year, as it

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term. *See Member of Congress—Appointment to Office*, 21 Op. Att'y Gen. 211 (1895). However, the efficacy of rollback legislation was not at issue.

[4] A number of scholars who testified in 1973 on the proposed rollback legislation reached the same conclusion as the 1987 opinion. *See*, *e.g.*, *To Reduce the Compensation of the Office of Attorney General: Hearing on S. 2673 Before the S. Comm. on the Judiciary*, 93rd Cong. (1973) (statements of Philip Kurland, William F. Swindler, Paul J. Mishkin, and William D. Lorenson). Other commentators have taken the same view. *See*, *e.g.*, 1 Westel Woodbury Willoughby, *The Constitutional Law of the United States* 607 (1929); Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 Stan. L. Rev. 907 (1994).

inevitably would on numerous occasions every day. Congressman Marlin Olmsted made this point in the debates relating to Senator Knox, noting that:

> even the letter [of the Ineligibility Clause], fairly interpreted, would not apply to this case. After this act is passed it can not be said that the salary of the Secretary of State has been increased, for the salary will then be precisely the same as it had existed for many years prior to the senatorial term which any member of that body was serving in 1907 [when the act to be rolled back was passed].

43 Cong. Rec. 2411 (1909).

This reading also accords with the usage of the word "increased" around the period in which the Clause was enacted. For example, in a report to Congress shortly after the founding, an organization of manufacturers noted that "[t]he value of goods manufactured in the United States . . . amounted, as early as 1810, to upwards of one hundred and seventy-two millions of dollars, which value was very greatly increased during the late war." 36 Annals of Cong. 2288 (1819). Such an observation cannot be understood to mean that at one time during the period concerned the value of the goods had increased, but that the value had returned to its original, lower level by the time of the statement. *See also, e.g.*, Alexander Hay, *The History of Chichester* 574 (West Sussex Co. & Dioscesan Record Office 1804) (noting that "[t]here is no reason to doubt the accuracy of the survey of 1801, unless it should be suspected that it . . . was taken at the desire of the ministery . . . that the population of the kingdom should appear increased, and not diminished, after a long destructive war").

We need not conclude, however, that the "on net" interpretation is, as a matter of the plain language, superior to the "snapshot" interpretation. The possibility of these two reasonable constructions shows that, at a minimum, there is no definitive "plain meaning" of the Ineligibility Clause and thus that the text standing alone is ambiguous. Therefore, we must look to evidence of the understandings of the drafters and ratifiers of the Constitution, the purposes of the Clause, and the practice of the political branches in construing and applying that Clause.[5]

[5] In concluding that Senator Kirkwood was ineligible to be appointed to the office of tariff commissioner, an opinion of Attorney General Benjamin Harris Brewster stated that "[i]t is unnecessary to consider the question of policy which occasioned this constitutional

III.

In his treatise on the Constitution, Joseph Story wrote that:

> [t]he reasons for excluding persons from offices, who have been concerned in creating them, or increasing their emoluments, are, to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness. The actual provision, however, does not go to the extent of the principle; for his appointment is restricted only 'during the time, for which he was elected;' thus leaving in full force every influence upon his mind, if the period of his election is short, or the duration of it is approaching its natural termination.

Joseph Story, *Commentaries on the Constitution of the United States* § 440, at 311 (Ronald D. Rotunda & John E. Nowak eds., 1987). In other words, Justice Story did not read the Clause as if it were intended to prevent members of Congress from receiving Executive Branch appointments. Rather, he understood it to have been designed to guard against the particular problems that the prospect of such executive appointments might raise. This more qualified understanding of the Clause's purpose finds support in the debates at the Constitutional Convention, and we believe it supplies the correct basis for construing the Ineligibility Clause and applying its restriction on conferring "emoluments" to the issue here.

The Convention considered a number of variations with respect to the Ineligibility Clause. Under the earliest version, as set out in the Virginia Plan's fourth and fifth resolutions, members of Congress would have been "ineligible to any office" under the authority of the United States during their term of election and for some time thereafter, whether or not the office in question had been created, or its emoluments increased, during the legislator's term. 1 *The Records of the Federal Convention of 1787*, at 20 (Max Farrand ed., rev. ed. 1966). In contrast, a proposal offered by Nathaniel Ghorum of Massachusetts would have eliminated the Ineligibility Clause altogether. *Id.* at 375. This proposal reflected the concern

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prohibition." *Appointment to Civil Office*, 17 Op. Att'y Gen. 365, 366 (1882). Senator Kirkwood, however, was barred from appointment under the Ineligibility Clause because the office unquestionably was "created" during his term as Senator. Therefore, there was no ambiguity in the plain text giving rise to a need to examine the purposes behind the restriction.

that a bar on the appointment of members of Congress to other offices would limit the number of capable persons who could serve in government. *See id.* at 376. For example, James Wilson stated that "[s]trong reasons must induce me to disqualify a good man from office," *id.* at 379, and that "we ought to hold forth every honorable inducement for men of abilities to enter the service of the public," *id.* at 380. Alexander Hamilton made the additional argument that the Executive would need the power to appoint Senators and Representatives to high office: "Our prevailing passions are ambition and interest," Hamilton observed, and the executive might have to "avail himself of those passions" to induce the legislature to act for "the public good." *Id.* at 381.

Between these two extremes—one which would have established a categorical bar against any sitting member of Congress's appointment to Executive office and another which would have placed no restrictions on such appointments at all—James Madison argued for a "middle ground between an eligibility in all cases, and an absolute disqualification." *Id.* at 388. Although Madison opposed the severity of the Virginia Plan's provisions, he conceded that there were instances in which the appointment of a member of Congress to another office would be undesirable. Without some form of the Ineligibility Clause, "there may be danger of creating offices or augmenting the stipends of those already created, in order to gratify some members if they were not excluded." *Id.* at 380. Appointing members of Congress to newly created offices or to offices with recently augmented salaries "were the evils most experienced," and Madison supposed that "if the door was shut agst. them, it might properly be left open for the appointt. of members to other offices as an encouragmt. to the Legislative service." *Id.* at 386. The goal was for "the national legislature to be as uncorrupt as possible." *Id.* at 392.

Although the version of the Clause that the Committee on Detail eventually presented to the Convention was a modification of the broad restriction in the Virginia Plan,[6] Madison's middle position eventually prevailed. 2 *id.* at 492. The aim behind the Ineligibility Clause was thus to

[6] Article VI, Section 9 of the draft Constitution made members of the House "ineligible to, and incapable of holding any office under the authority of the United States" during the term for which they have been elected. 2 *The Records of the Federal Convention of 1787* at 180. This version also made Senators "ineligible to, and incapable of holding any such office for one year afterwards." *Id.*

take away the possibility that Congress would create offices or increase emoluments in order to "gratify" members who might then gain appointment, while preserving sufficient eligibility for the appointment to executive office of qualified officials serving in Congress.[7] In that way, the Clause would ensure that the national legislature would be "as uncorrupt as possible." 1 *id.* at 392.

This basic purpose, as reflected in the Clause's drafting history, helps to resolve the ambiguity in the text. It indicates that the phrase "shall have been encreased" should be construed to mean "shall have been encreased on net" during the course of a Congress member's term. The alternative, snapshot reading, while plausible linguistically, would result in the Clause operating as a nearly categorical bar to the appointment of members of Congress, given the likelihood of a salary increase during a member's (and particularly a Senator's) term. Such a broad bar to appointment, however, is what Madison and other delegates sought to avoid by adopting Madison's compromise position and rejecting the complete bar to eligibility for members of Congress that had been proposed. Madison's compromise position, and the version of the Clause ultimately adopted, to use Justice Story's words, reflects the "reasons for excluding persons from offices" rather than an intention to establish a restriction that would be untethered to those specific reasons. As first Madison, and then Justice Story, explained, those reasons related to the concern that members of Congress would vote to establish new or higher paying offices to "gratify" themselves as future officeholders rather than out of a disinterested judgment about the need for such legislation.

This understanding of the Clause's purpose reveals the superiority of the "on net" construction of the ambiguous textual phrase "shall have been encreased." A member of Congress could hardly be said to be seeking to "gratify" himself in approving legislation to increase the salary of an office if he knew that the Clause would bar him from taking that office unless the salary had first been rolled back prior to his appointment. As

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[7] During the ratification debates in Virginia, Madison explained that the Ineligibility Clause "guards against abuse by taking away the inducement to create new offices, or increase the emoluments of old offices." 10 *The Documentary History of the Ratification of the Constitution* 1262 (John P. Kaminski & Gaspare J. Saladino eds., 1976–1993). But he also noted that it would be "impolitic to exclude from the service of his country, in any office, the man who may be most capable of discharging its duties, when they are most wanting." 3 *The Records of the Federal Convention of 1787* at 315.

Acting Attorney General Bork stated, "the expectation of a higher salary cannot influence Senators' or Representatives' votes on legislation to raise salaries . . . if a Senator or Representative knows . . . that should he ever be nominated for [an office with a raised salary] during his term of office, he will have to accept the lower salary." Bork Statement at 11.

The allowance for rollback legislation, therefore, does not violate the "plain language" of the Clause, or otherwise frustrate its purposes, as our 1987 opinion erroneously concluded. To the contrary, construing the Clause to permit appointments following rollback legislation advances the purposes behind the Ineligibility Clause by "assur[ing] the appointment eligibility of Members of Congress where there is no possibility of profit from offices created, or salaries increased, during the time for which they were elected." *See To Reduce the Compensation of the Office of Attorney General: Hearing on S. 2673 Before the S. Comm. on the Judiciary* 51 (1973) (Statement of William Van Alstyne) ("Van Alstyne Statement"). As Senator Philip Hart said in the debates on the rollback legislation for William Saxbe, such a law "would not 'evade' the bar intended by the Framers; rather, it would implement it and maintain its effectiveness, both in the present instance and as a deterrent to log rolling or improper executive-legislative collaboration in the future." 119 Cong. Rec. 38,346 (1973). Thus, he continued,

> rather than saying [the law] permits evasion of the constitutional provision, it is more correct to say the ban has here served its purpose. It has forced a statute denying any benefit, and without the statute the ban would prevent the appointment. If the purpose can thus be accomplished, to do more would do violence to the other competing consideration in the original compromise: namely, Madison's concern that good men not be precluded from executive service for existing posts.

Id. at 38,347.[8] *See also* Dixon Statement at 71, 81 ("A major purpose of the Ineligibility Clause . . . was the prevention of the evils which would

[8] As Professor Van Alstyne pointed out, grants of immunity under the Fifth Amendment are analogous. Van Alstyne Statement at 56, 66. The Fifth Amendment provides that "[n]o person . . . shall be compelled to be a witness against himself in any criminal case." Testimony may be compelled, however, if the witness is granted immunity, so that the testimony cannot be used against him. 18 U.S.C. § 6002 (2006); *Kastigar v. United*

arise if legislators could benefit from the creation of new offices or increase in the emoluments of existing ones . . . . S. 2673 would overcome the former evil regarding emoluments by preventing Senator Saxbe from obtaining the benefit of the 1969 salary increase."). Senator Olmstead, in defending the constitutional efficacy of the rollback legislation proposed to permit the appointment of Senator Knox, expressed the similar view that such proposed legislation "if enacted will be not an evasion of, but in compliance with [the Ineligibility Clause]." 43 Cong. Rec. 2410 (1909).[9]

Some commentators favoring the "snapshot" interpretation have argued that, contrary to Justice Story's view, the predominant purpose of the Ineligibility Clause was "to protect against legislative corruption by the executive's appointment power" and "to prevent the offering of high position as an inducement to legislators." *See* Daniel H. Pollitt, *Senator/Attorney-General Saxbe and the "Ineligibility Clause" of the Constitution: An Encroachment Upon Separation of Powers*, 53 N.C. L. Rev. 111, 122–23 (1974); Comment, *The Ineligibility Clause: An Historical Approach to Its Interpretation and Application*, 14 John Marshall L. Rev. 819, 824 n.31, 828 (1981). *But see* John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution*, 24 Hofstra L. Rev. 89, 164, 172–73 (1995) (arguing that the Framers did not view this as the central purpose of the Clause). Assistant Attorney General Dixon recognized this as a purpose of the Clause in testifying before Congress on the rollback bill introduced to permit the appointment of Senator Saxbe as Attorney General, *see* Dixon Statement at 70, and our 1987 opinion recognizes it as well, *see* Cooper Memorandum at 6.

States, 406 U.S. 441 (1972). The federal immunity statute is not an "evasion" of the Fifth Amendment. Rather, it respects the constitutional command.

[9] It might be argued that the text of the Ineligibility Clause precludes the effectiveness of rollback legislation, because it does not expressly permit Congress to make exceptions, in contrast with other constitutional provisions. For example, the Emoluments Clause states that "no Person holding any Office or 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." U.S. Const. art. I, § 9, cl. 8. Rollback legislation, however, is not an exception to the Clause, but rather a means for ensuring that the facts that would trigger the bar are not in place. Rollback legislation is thus more analogous to situations in which the Emoluments Clause would not apply at all, such as when the gift comes from a foreign jurisdiction after Congress has incorporated it into the United States.

This alternative account of the purpose of the Clause does not, however, favor the "snapshot" interpretation, and thus it does not cast doubt on the constitutional effectiveness of rollback legislation. Even if one understands a concern about undue executive pressure on the legislature to have influenced the delegates to the Constitutional Convention in negotiating the Clause, the "on net" construction of "shall have been encreased" is still the superior reading. Although there is some support in the history of the Constitutional Convention for the view that the drafters of the Ineligibility Clause had a concern about improper executive influence through the appointment power, the text of the Clause shows that this concern was not its overriding and unqualified purpose. By its terms, the Clause does not prohibit the President from appointing a sitting member of Congress to an Executive Branch office. The delegates rejected the Virginia Plan, which would have done so. In that regard, the Clause could not have been designed to root out any possible Executive Branch use of the appointment power to influence members of Congress. Indeed, in forging his compromise, Madison was clear in not seeking to impose such a draconian rule. *See* Van Alstyne Statement at 53 ("[N]ot to recognize the efficacy of [rollback legislation] . . . would itself offend one of the reasons that accounted for the final form of [the Ineligibility Clause]: to assure the eligibility of Members of Congress for appointment to vacancies in existing offices, insofar as neither the office itself nor any prerequisite associated with that office would result to them as a consequence of any act of Congress during [their] term.").

The issue, then, is whether the "snapshot" interpretation of "shall have been encreased" would appreciably guard against the corrupting influence of executive appointments, even though the Clause poses no general bar to the Executive offering them as inducements. We do not see how it would. A construction of the Clause that would permit rollback legislation would seem well-designed to check the Executive from unduly influencing congressional members with the prospect of attractive appointments, given that appointments in general are not prohibited. Any tangential effect that the increase in the pay of an office might otherwise have on the President's ability to influence Congress by promising appointment to such office would be negated by the expectation of the enactment of rollback legislation. Thus, as with the desire to avoid self-dealing by the legislature, conceding the efficacy of rollback legislation would comport with this purpose of the Ineligibility Clause. *See* Dixon Statement at 71

("S. 2673 would overcome the . . . evil regarding emoluments by preventing Senator Saxbe from obtaining the benefit of the 1969 salary increase and any other emoluments, without wastefully barring him from offering his services to the country in an appointive office."). Or at least, the possibility of corrupting influence would exist only insofar as it would exist in the absence of the Ineligibility Clause altogether: by its terms, the Ineligibility Clause does not prevent Congress and the President from colluding to make a deal in which the President would appoint a congressional member to an office (the salary of which had never been raised during the relevant period) and Congress would later raise the salary of that office. *See Mikva I*, 3 Op. O.L.C. at 288; *Member of Congress—Appointment to Civil Office Prior to Pay Increase*, 42 Op. Att'y Gen. 381 (1969) (concluding that subsequent increase in the emoluments of an office would not disqualify a member from appointment to that office). We thus disagree with the 1987 opinion's assertion that conceding the efficacy of rollback legislation would "serve[] to frustrate the intentions of the Framers." Cooper Memorandum at 6.

Finally, it has been argued that the Framers intended the Ineligibility Clause to limit the growth of the national government, and that this purpose would be best served by denying the effectiveness of rollback legislation. *See* O'Connor, *Emoluments Clause*, 24 Hofstra L. Rev. at 164, 170–71. According to this argument, if rollback legislation is ineffective, Congress will be less likely to increase the pay of offices in the first instance, because its members will want to maintain their eligibility for appointment; as a result, the purpose of economy will be advanced more completely than if a rollback were effective. *Id.* at 170–71. This argument, we believe, is mistaken and cannot be reconciled with the text of the Ineligibility Clause. It would find in the Ineligibility Clause a purpose to restrict the pay of all offices, including those filled by persons who are not appointed from the Congress after a salary increase and thus are not mentioned in the Ineligibility Clause. If that were the intended function of the Clause, however, it would not have been drafted in so limited a manner. To the extent the debates in the Constitutional Convention considered the relationship of the Ineligibility Clause to the size of the federal government, the delegates tied that concern to the increases that would result from allowing members of Congress to create, or raise the pay of, offices they would themselves then occupy. *See*, *e.g.*, 1 *The Records of the Federal Convention of 1787* at 380 (Mason) (cautioning that, without the

Ineligibility Clause, members of Congress "may make or multiply offices, in order to fill them"); *see also id.* at 387 (Mason) (referring to the Virginia legislature's "partiality . . . to its own members"); *id.* at 388 (Elbridge Gerry) (members will care more about themselves than their relatives and friends); *id.* at 392 (Madison) (all "public bodies" are inclined to support their own members).

Our construction depends on the judgment that rollback legislation suffices to further the Clause's underlying purposes, but those who take the other side of this question have contested that judgment. They contend that, even with rollback legislation, the purposes of the Ineligibility Clause are not fulfilled. They raise three arguments along these lines.

The first argument is that "an office for which Congress has once voted a pay increase has been made more attractive . . . even if Congress passes remedial legislation," because "in such a case Congress is infinitely more likely to revote the pay increase as soon as the [member's] disqualification expires than if Congress had never voted a pay increase for the office." 119 Cong. Rec. 38,331 (1973) (letter from then-Professor Stephen G. Breyer). This argument is arguably supported by some practice. Setting aside the two most recent instances of rollback legislation, of the remaining five instances where Congress rolled back salaries for specific appointees, the appointees in two cases later benefitted, however briefly, from a restored salary. Philander Knox's term as Senator would have ended in 1911; subsequently, in 1912, his previously rolled-back salary as Secretary of State was increased, *see* Pub. L. No. 62-299, 37 Stat. 360, 372 (1912), and he enjoyed that benefit until he resigned in 1913. The bill rolling back the salary in the case of Representative Casey provided for a salary increase to the pre-rollback position at the end of what would have been his congressional term or upon the appointment of a successor to his executive office, whichever was earlier. Pub. L. No. 94-195, § 1(b), 89 Stat. 1108 (1975). His term would have ended in January 1977, yet he remained at the Federal Maritime Commission until October 1977, meaning that he enjoyed a few months of the higher salary after his congressional term would have expired.[10]

[10] The legislation affecting Senator Muskie also included such a provision. Pub. L. No. 96-241, § 1(b), 94 Stat. 343 (1980). But Secretary of State Muskie resigned before the term for which he had been elected Senator would have ended.

Despite the force of this argument, at the time Congress first acts to increase the salary of the federal office, that higher level of pay remains a "conjectural reward[] a nominee may enjoy after his [congressional] term expires." 119 Cong. Rec. 38,347 (1973) (statement of Senator Hart, arguing that weighing such rewards goes beyond the bounds drawn by the Framers); *cf. Applicability of Ineligibility Clause to Appointment of Congressman Tony P. Hall*, 26 Op. O.L.C. 40, 42–43 (2002) (noting, with respect to an office the pay for which is set at the time of each appointment, that although prior action raising the salary of the previous appointee to the office "arguably might lead to some expectations about the salary to be paid [to the subsequent appointee] . . . this expectation is, in the end, a matter of speculation" and "[u]ntil the President [] or his delegate acts, there are no emoluments attached to the office in question"). At the time of a salary increase, it cannot be known whether Congress in the future, if it rolls back the increase, will also provide for its restoration or whether the prospective appointee will still occupy the executive office at the time that any such restoration takes effect. In three of the five historical cases of individual rollbacks, the appointees never drew a restored salary. Attorney General Saxbe's term would have ended in January 1975; he resigned in February 1975; and later that month Congress restored the Attorney General's salary, retroactively to the day after Mr. Saxbe's resignation. Pub. L. No. 94-2, 89 Stat. 4 (1975). Upon a change in administration, Secretary of State Muskie resigned before the term for which he had been elected Senator would have ended. Treasury Secretary Bentsen resigned in 1994, shortly after the end of the term for which he had been elected Senator. Congress did not restore the salary for the office of Secretary of the Treasury until 1997. Pub. L. No. 105-61, § 116, 111 Stat. 1272, 1284 (1997). The possibility that an officer appointed after a salary rollback will ever receive the higher salary is speculative. At the very least, there is no practice, as far as we have been able to determine, of Congress's immediately increasing salaries after a rollback, as then-Professor Breyer conjectured.

The second argument contends that, whether or not the fact of an increase during a member's term makes a post-appointment increase more likely, the current Congress, through a post-appointment enactment, might immediately restore the rolled-back salary of the position after the member of Congress is appointed. The 1987 opinion states: "Congress could in all cases reduce the salary of the congressman on the day before he is

nominated and restore it to its increased level on the day after he is commissioned." Cooper Memorandum at 6. As explained above, it does not appear that Congress has ever taken such a step. Nevertheless, according to this argument, the mere possibility that Congress might restore the salary as of the day after commissioning demonstrates the invalidity of the rationale on which rollback legislation is based.

This argument has prompted a range of responses. Acting Attorney General Bork said that he "would like to address that question at that time, if things fall out that way." Bork Statement at 12. Professor Van Alstyne took the position that the former member could not accept a salary increase enacted by the same Congress that voted a rollback. Van Alstyne Statement at 53. Assistant Attorney General Scalia thought that, although the matter was not free from doubt, a post-appointment enactment restoring the salary would be constitutional and could be accepted by the former member. Memorandum for Hugh M. Durham, Chief, Office of Legislative Affairs, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Bill to Increase the Salary of the Attorney General* at 3 (Nov. 22, 1974) ("Scalia Memorandum").

We agree with Acting Attorney General Bork's approach: there is no need to deal with this issue until Congress actually seeks to restore a rolled-back salary immediately upon an appointee's taking office. We only note that, even if Congress did take such action, it would not necessarily be inconsistent with the purposes behind the Ineligibility Clause. The former member, no longer being in Congress, might have lost much of his power to influence congressional action. Thus, a salary restoration enactment after his appointment to office might not be a subterfuge by which the constitutional restraint against self-dealing would be avoided. Likewise, post-appointment legislation restoring the salary of an office to its pre-rollback level would not promote the ability of the Executive corruptly to wield influence over the Legislative Branch insofar as the appointment would already have been completed. The speculative possibility, pre-appointment, that the salary of the office would later be restored, would hardly seem sufficient enticement to achieve improper executive influence over prospective appointees in Congress. Accordingly, the possibility of the repeal of the salary rollback, in itself, is not a good reason for abandoning the view that a salary rollback achieves compliance with the Ineligibility Clause.

The third and final argument is that "the purpose of the provision is to prevent Congress from [passing] special legislation for the benefit of one of its own Members" and that a rollback statute "would have no function or purpose except to qualify a particular member of . . . Congress for an office for which he could not otherwise qualify." *To Reduce the Compensation of the Office of Attorney General: Hearing on S. 2673 Before the S. Comm. on the Judiciary*, 93d Cong. 6 (1973) (statement of Professor Philip Kurland). Unlike the first two arguments, this one attacks the constitutionality of the rollback legislation itself, rather than the subsequent appointment.[11] In precisely this respect, however, the argument does not square with the language of the Ineligibility Clause. By its terms, the Clause does not address any legislation, whether for the benefit of a particular congressional member or for the benefit of a more general class. Instead, it forbids *appointment* to civil office. *See* Scalia Memorandum at 4. This argument, therefore, does not convincingly answer the case in favor of the effectiveness of rollback legislation.

IV.

Our conclusion that the history and purposes of the Clause favor a construction of the text that permits rollback legislation to bring an appointment into constitutional compliance draws further support from the practice of the political branches for more than a century. Several Congresses, as well as administrations of both parties, have affirmed that salary rollbacks achieve compliance with the Ineligibility Clause.

On at least seven occasions since the Civil War, Congress has rolled back the salary paid for service in an office, and subsequent to such rollbacks, the Senate has confirmed and the President has appointed a member of Congress who would otherwise have been barred from that office. First, in 1876, while Senator Lot M. Morrill was serving a term that had begun in 1871, he was nominated, confirmed, and appointed as Secretary of the Treasury. Congress had raised cabinet members' salaries from $8,000 to $10,000 in 1873 and then, in an effort at fiscal retrenchment,

[11] Professor Van Alstyne's answer to the second objection—that a statute to restore an appointee's salary before the end of the term for which he had been elected would be unconstitutional—is similar to the third objection in the sense that it asserts the unconstitutionality of legislation, rather than of an appointment.

had returned the salaries in 1874 to their previous level. Act of Mar. 3, 1873, ch. 226, 17 Stat. 485, 486 (1873); Act of Jan. 20, 1874, ch. 11, 18 Stat. 4 (1874). In this instance, unlike the others that followed, the lowering of the salary was not expressly for the purpose of achieving compliance with the Ineligibility Clause. Nevertheless, absent the salary reduction, Senator Morrill would not have been eligible for the office. Second, in 1909, Congress reduced the salary of the Secretary of State so that Senator Philander Knox could be appointed to the office. During Knox's term in the Senate, Congress had raised the salary of cabinet positions from $8,000 to $12,000. Pub. L. No. 59-129, 34 Stat. 935, 948 (1907). When President Taft announced his intention to nominate Knox, Congress reduced the Secretary of State's salary to $8,000, Pub. L. No. 60-235, 35 Stat. 626 (1909), and Knox was then confirmed and appointed. Third, in 1973, Congress reduced the Attorney General's salary from $60,000 to $35,000, thus rolling back a raise that had become effective during William Saxbe's term in the Senate. Pub. L. No. 93-178, 87 Stat. 697 (1973). Fourth, at the request of Attorney General Edward H. Levi, Congress in 1975 reduced the salary of a position as Federal Maritime Commissioner, in order to permit Congressman Robert Casey to be appointed, and Casey was confirmed and appointed to that position. Pub. L. No. 94-195, 89 Stat. 1108 (1975); 121 Cong. Rec. 40,811 (1975). Fifth, in 1980, Congress rolled back the salary of the Secretary of State to permit Senator Edmund Muskie to be appointed. Pub. L. No. 96-241, 94 Stat. 343 (1980). Sixth, in 1993, a salary rollback for the Secretary of the Treasury enabled Senator Lloyd Bentsen to be appointed. Pub. L. No. 103-2, 107 Stat. 4 (1993). The bill was signed by President George H.W. Bush, without any mention of a constitutional concern. 2 Pub. Papers of Pres. George Bush app. D, at 2323 (1992–93). Finally, Congress passed legislation, signed by President George W. Bush, rolling back the salary for the Secretaries of State and the Interior in order to permit the appointment of Senators Hillary Clinton and Ken Salazar to those respective offices by President Obama once he assumed office. *See* Pub. L. No. 110-455, 122 Stat. 5036 (2008) (concerning emoluments of Secretary of State); Pub. L. No. 111-1, 123 Stat. 3 (2009) (concerning emoluments of Secretary of the Interior).[12]

[12] The Ineligibility Clause was also at issue when President Roosevelt nominated Senator Hugo Black to the Supreme Court. Note, *Courts—Legality of Justice Black's Appointment to Supreme Court*, 37 Colum. L. Rev. 1212 (1937). The Senate, in passing

On two of these occasions, Congress thoroughly debated the constitutional issues before approving the rollback legislation. In 1909, the bill to reduce the salary of the Secretary of State prompted a full debate in the House of Representatives, during which opponents of the measure argued for its defeat on the ground that it would not bring Senator Knox's prospective appointment into conformity with the Ineligibility Clause. *See* H.R. Rep. No. 2155, at 2–3 (1909) (Views of the Minority); 43 Cong. Rec. 2390–2402, 2410–2415 (1909). Eventually, Congress voted to pass the rollback legislation, and it was signed by President Taft. Again in 1973, when the bill to roll back the Attorney General's salary was under consideration, the Post Office and Civil Service Committee and the Judiciary Committee of the Senate held hearings on the constitutional issues, and the Senate debated those issues at length. *Office of the Attorney General: Hearing on S. 2673 Before the S. Comm. on Post Office and Civil Service*, 93d Cong. (1973); *To Reduce the Compensation of the Office of Attorney General: Hearing on S. 2673 Before the S. Comm. on the Judiciary*, 93d Cong. (1973); 119 Cong. Rec. 36,484–36,485, 38,315–38,349 (1973). After this deliberation, Congress passed the bill, Pub. L.

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the Retirement Act of 1937, had increased the retirement pay of Justices. Pub. L. No. 10, 75 Stat. 24 (1937). It was argued at the time that there had been no increased emolument as to Justice Black because he would not have become eligible for retirement unless he served for almost 20 years on the Court. Edward S. Corwin, *The President: Office and Power, 1787–1957*, at 72–73 (4th rev. ed. 1957); *see also State ex rel. Todd v. Reeves*, 82 P.2d 173 (Wash. 1938) (contemporaneous case reaching conclusion that retirement benefits are not "emoluments" under state constitution); *cf. President Reagan's Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187 (1981) (California retirement benefits are not "emoluments" within the constitutional provision barring the President from receiving "emoluments" from any state); *The Honorable George J. Mitchell, United States Senate*, B-207,467, 1983 WL 27823 (Comp. Gen.) (Jan. 18) (same). After Senator Black was confirmed and took office, the Supreme Court dismissed, for lack of standing, a challenge to his authority as Justice. *Ex parte Levitt*, 302 U.S. 633 (1937). The Black nomination did not involve any issue of rollback legislation. Similarly, when Representative Abner Mikva was nominated to the United States Court of Appeals for the District of Columbia Circuit, opponents argued that his appointment was barred by a pay increase that might have gone into effect after his confirmation. Our Office concluded that it was uncertain whether the salary increase would take place and thus that the Ineligibility Clause would not forbid the appointment, *Mikva I*, 3 Op. O.L.C. at 289, and a challenge to Judge Mikva's appointment was dismissed on standing grounds. *See McClure v. Carter*, 513 F. Supp. 265 (D. Idaho), *aff'd sub nom. McClure v. Reagan*, 454 U.S. 1025 (1981). Again, no issue of a rollback was involved.

No. 93-178, 87 Stat. 697 (1973), President Nixon signed it without constitutional objection, and Congress subsequently confirmed Senator Saxbe as Attorney General.

Accordingly, the practice of the political branches, over more than a century and after serious deliberation, supports the effectiveness of rollback legislation to achieve compliance with the Ineligibility Clause. As Chief Justice John Marshall wrote in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315 (1819), where "the great principles of liberty are not concerned," any doubtful question, "if not put at rest by the practice of the government, ought to receive a considerable impression from that practice." *Id.* at 401.[13]

V.

For these reasons, we believe that, where a salary increase for an office would otherwise create a bar to appointment of a member of Congress under the Ineligibility Clause, compliance with the Clause can be achieved by legislation rolling back the salary of the executive office before the appointment.

DAVID J. BARRON
Acting Assistant Attorney General
Office of Legal Counsel

[13] Although the Presidents and Congresses passing rollback legislation could be seen as the parties that the Ineligibility Clause was meant to restrain, and thus it could be argued that their practice is not entitled to much weight, such an argument would overlook that Presidents, Senators, and Representatives all swear an oath pledging support for the Constitution, U.S. Const. art. VI, cl. 3, and should be presumed to take this oath seriously. Their long-standing practice may not be conclusive, but surely it merits respect.

Legislation Prohibiting Spending for Delegations to U.N. Agencies Chaired by Countries That Support International Terrorism

Section 7054 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009—which purports to prohibit all funds made available under title I of that Act from being used to pay the expenses for any United States delegation to a specialized U.N. agency, body, or commission that is chaired or presided over by a country with a government that the Secretary of State has determined supports international terrorism—unconstitutionally infringes on the President's authority to conduct the Nation's diplomacy, and the State Department may disregard it.

June 1, 2009

MEMORANDUM OPINION FOR THE ACTING LEGAL ADVISER
DEPARTMENT OF STATE

You have asked for an opinion regarding section 7054 of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2009 ("Foreign Appropriations Act"), which is division H of the Omnibus Appropriations Act, 2009 ("Omnibus Appropriations Act"), Pub. L. No. 111-8, 123 Stat. 524 (H.R. 1105).[1] The President signed the Omnibus Appropriations Act into law on March 11, 2009. Section 7054 purports to prohibit all funds made available under title I of the Foreign Appropriations Act from being used to pay the expenses for any United States delegation to a specialized United Nations ("U.N.") agency, body, or commission that is chaired or presided over by a country with a government that the Secretary of State ("Secretary") has determined supports international terrorism. You have asked whether section 7054 prevents the State Department from using title I funds for the prohibited function. We conclude that by purporting to bar the State Department from using title I funds for that function, section 7054 unconstitutionally infringes on the President's authority to conduct the Nation's diplomacy, and the State Department may disregard it.

[1] *See* Letter for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Joan E. Donoghue, Acting Legal Adviser, Department of State (May 4, 2009) ("Donoghue Letter").

I.

Section 7054 provides as follows:

> None of the funds made available under title I of this Act may be used to pay expenses for any United States delegation to any specialized agency, body, or commission of the United Nations if such commission is chaired or presided over by a country, the government of which the Secretary of State has determined, for purposes of section 6(j)(1) of the Export Administration Act of 1979 (50 U.S.C. app. 2405(j)(1)), supports international terrorism.

Section 6(j)(1) of the Export Administration Act ("EAA") mandates a license for the export of goods to a country the government of which the Secretary has determined "has repeatedly provided support for acts of international terrorism" ("terrorist list state").[2] The limitation imposed by section 7054 applies only to funds made available by title I of the Foreign Appropriations Act. You have informed us, however, that title I is the only source of appropriated funds currently available to the State Department for a number of purposes related to the administration of foreign affairs, including the carrying out of diplomatic and consular programs. You have further explained that title I appropriations are the only operat-

[2] You have informed us that all terrorist list states were so designated by the Secretary pursuant to the EAA. The authority granted by the EAA, however, terminated on August 20, 2001. *See* 50 U.S.C. app. § 2419 (2000). That fact does not alter our analysis. Since the EAA terminated, the President, acting under the authority of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701–1706 (2006), has annually issued executive orders that adopt the provisions of the EAA and that continue Executive Branch actions taken initially under the authority of the EAA. *See, e.g.*, Notice of the President, Continuing of Emergency Regarding Export Control Regulations, 73 Fed. Reg. 43603 (2008); Exec. Order No. 13222, 3 C.F.R. 783 (2001). (The President also issued similar orders covering brief, pre-August 20, 2001 periods during which the EAA had lapsed and Congress had not yet acted to renew it. *See, e.g.*, Exec. Order No. 12470, 3 C.F.R. 168 (1984); Exec. Order No. 12444, 3 C.F.R. 214 (1984).). Congress has recognized and ratified this practice. *See* Pub. L. No. 108-458, § 7102(c)(3), 118 Stat. 3638, 3776 (2004) (providing that "[t]he President shall implement" certain amendments to section 6(j) of the EAA "by exercising the authorities of the President under [IEEPA]"). In light of this history, we believe that Congress intended the reference in section 7054 to determinations "for purposes of 6(j)(1) of the [EAA]" to encompass, at a minimum, determinations that the Secretary made prior to EAA's termination, but which retain their force as a result of the President's exercise of his authority under IEEPA.

ing funds available to pay for State Department delegations to specialized U.N. entities. *See* State Department Request for Confirmation of the Views of the Office of Legal Counsel on Section 7054, Donoghue Letter att. at 3 ("State Request"). Section 7054 would thus effectively preclude the State Department from including any representatives in U.S. delegations to any specialized U.N. agency, body, and commission chaired by a terrorist list state. You have also informed us that most such government delegations are headed by a State Department official and include one or more additional State Department officials. *See* State Request at 3.

In signing the Omnibus Appropriations Act, President Obama issued the following statement:

> Certain provisions of the bill, in titles I and IV of Division B, title IV of Division E, and title VII of Division H, would unduly interfere with my constitutional authority in the area of foreign affairs by effectively directing the Executive on how to proceed or not proceed in negotiations or discussions with international organizations and foreign governments. I will not treat these provisions as limiting my ability to negotiate and enter into agreements with foreign nations.

Statement on Signing the Omnibus Appropriations Act, 2009, 2009 Daily Comp. Pres. Doc. No. 145, at 1 (Mar. 11, 2009). Section 7054 is within title VII of division H, and purports to "effectively direct[] the Executive on how to proceed or not proceed in negotiations or discussions with international organizations and foreign governments." Thus, although the President's signing statement did not identify section 7054 specifically, it encompasses that provision.

The same restriction on the use of appropriated funds has appeared in successive appropriations acts since fiscal year 2005.[3] President Bush

[3] *See* Department of State, Foreign Operations, and Related Programs Appropriations Act, 2008, Pub. L. No. 110-161, div. J, § 112, 121 Stat. 1844, 2277, 2288 (2007); Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, § 637, 119 Stat. 2290, 2347 (2005); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005, Pub. L. No. 108-447, div. B, § 627, 118 Stat. 2809, 2853, 2920 (2004); *cf.* Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations, 2004, Pub. L. No. 108-199, div. B, § 635, 118 Stat. 3, 46, 101 (2004) (prohibition limited to payment of expenses for delega-

indicated in signing statements accompanying these appropriations acts that the Executive Branch would construe such restrictions as "advisory."[4] Consistent with President Bush's direction, the Department sent representatives to participate from January 19, 2009, through January 23, 2009, in a session of a U.N. specialized body—the executive board of the United Nations Development Program ("UNDP") and the United Nations Population Fund ("UNFPA")—that was chaired at the time by Iran, a terrorist list state. *See* State Request at 4. Another meeting of the executive board of UNDP/UNFPA, which Iran still chairs, is scheduled for May 26, 2009 to June 5, 2009, and the State Department—the lead U.S. participant in the proceedings of this body—believes it would be advantageous to United States foreign policy objectives to send State Department officials to accompany the U.S. delegation. *See id.* Moreover, because the State Department is contemplating participation in other upcoming meetings of specialized U.N. entities that may fall within the restriction imposed by section 7054, and because the Department may receive little prior notice that a terrorist list state will chair a particular U.N. entity in the future, you have asked for more general guidance on whether and under what conditions the Department must comply with section 7054. *See id.* at 5.

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tion to United Nations Human Rights Commission, if chaired by state supporter of terrorism).

[4] *See Statement on Signing the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1764, 1764 (Nov. 22, 2005) (Pres. Bush) ("The executive branch shall construe as advisory the provisions of the Act that purport to direct or burden the Executive's conduct of foreign relations, including the authority to recognize foreign states and negotiate international agreements on behalf of the United States . . . . These provisions include section[] . . . 637."); *Statement on Signing the Consolidated Appropriations Act, 2005*, 40 Weekly Comp. Pres. Doc. 2924, 2924 (Dec. 8, 2004) (Pres. Bush) ("The executive branch shall construe as advisory provisions of the [Consolidated Appropriations Act] that purport to direct or burden the Executive's conduct of foreign relations . . . . Such provisions include: in the Commerce-Justice-State Appropriations Act, section[] . . . 627"); *cf. Statement on Signing the Consolidated Appropriations Act, 2004*, 40 Weekly Comp. Pres. Doc. 137, 137 (Jan. 23, 2004) (Pres. Bush) ("The executive branch shall construe as advisory the provisions of the Act that purport to . . . direct or burden the Executive's conduct of foreign relations, including section[] . . . 635 of the Commerce, Justice, State Appropriations Act.").

II.

As noted, President Bush announced in previous signing statements that the Executive Branch would construe as advisory restrictions that are functionally identical to section 7054. *See supra* note 4. Were such a construction available here, there would be no need to resolve the question of section 7054's constitutionality, and we are mindful that "[t]he executive branch has an obligation to attempt, insofar as is possible, to construe a statute so as to preserve its constitutionality." Memorandum for Robert J. Lipshutz, Counsel to the President, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Myers Amendment* at 11 (Aug. 30, 1977). In our view, however, section 7054 is not susceptible to a saving construction. Congress's injunction—"None of the funds made available under title I of [the Foreign Appropriations Act] may be used"—is unambiguously phrased in mandatory terms, and we see no evidence that Congress intended the word "may" to mean "should." Section 7054 is "plain and unambiguous," *United States v. Monsanto*, 491 U.S. 600, 606 (1989), and the canon of constitutional avoidance "has no application in the absence of statutory ambiguity," *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001); *see also United States v. Locke*, 471 U.S. 84, 96 (1985) (a court cannot "press statutory construction to the point of disingenuous evasion even to avoid a constitutional question") (internal quotation marks omitted). Therefore, we do not think that section 7054 can be construed as merely advisory, even to avoid the serious constitutional question we now address.

III.

In our view, section 7054 impermissibly interferes with the President's authority to manage the Nation's foreign diplomacy. To be sure, a determination that a duly enacted statute unconstitutionally infringes on executive authority must be "well-founded," Memorandum for the Heads of Executive Departments and Agencies, *Re: Presidential Signing Statements*, 74 Fed. Reg. 10669, 10669 (2009); *see also Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200–01 (1994), and Congress quite clearly possesses significant Article I powers in the area of foreign affairs, including with respect to questions of war and neutrality, commerce and trade with other nations, foreign aid,

and immigration.[5] As ample precedent demonstrates, however, Congress's power to legislate in the foreign affairs area does not include the authority to attempt to dictate the modes and means by which the President engages in international diplomacy with foreign countries and through international fora. Section 7054 constitutes an attempt to exercise just such authority: It effectively denies the President the use of his preferred agents—representatives of the State Department—to participate in delegations to specified U.N. entities chaired or presided over by certain countries. As this Office has explained, such statutory restrictions are impermissible because the President's constitutional authority to conduct diplomacy bars Congress from attempting to determine the "form and manner in which the United States . . . maintain[s] relations with foreign nations." *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. O.L.C. 18, 21 (1992) ("*Official or Diplomatic Passports*") (citing *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 38 (1990) ("*Foreign Relations Authorization Bill*")).

The President's basic authority to conduct the Nation's diplomatic relations derives from his specific constitutional authorities to "make Treaties," to "appoint Ambassadors . . . and Consuls" (subject to Senate advice and consent), U.S. Const. art. II, § 2, cl. 2, and to "receive Ambassadors and other public Ministers," *id.* art. II, § 3. It also flows more generally from the President's status as Chief Executive, *id.* art. II, § 1, cl. 1, and from the requirement in Article II, Section 3 of the Constitution that the President "shall take Care that the Laws be faithfully executed."[6]

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[5] *See, e.g.*, *Perez v. Brownell*, 356 U.S. 44, 57 (1958) ("Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the lawmaking organ of the Nation."), *overruled on other grounds*, *Afrovim v. Rusk*, 387 U.S. 253 (1967); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Hamdi v. Rumsfeld*, 542 U.S. 507, 582 (2004) (Thomas, J., dissenting) ("Congress, to be sure, has a substantial and essential role in both foreign affairs and national security."); *see generally* Louis Henkin, *Foreign Affairs and the United States Constitution* 72–80 (2d ed. 1996).

[6] *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) ("Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)); *see also* 4 *The Papers of John Marshall* 1044

As a result of these authorities, it is well established that the President is "the constitutional representative of the United States in its dealings with foreign nations." *United States v. Louisiana*, 363 U.S. 1, 35 (1960). As John Marshall noted in his famous speech of March 7, 1800 before the House of Representatives (while still a member of that body), the Executive Branch is "entrusted with the whole foreign intercourse of the nation, with the negotiation of all its treaties, with the power of demanding a reciprocal performance of the article, which is accountable to the nation for the violation of its engagements, with foreign nations, and for the consequences resulting from such violation." John Marshall, Speech of March 7, 1800, *in* 4 *The Papers of John Marshall* 104–05 (Charles T. Cullen ed., 1984). The President is, in other words, the "organ" of the Nation's diplomatic relations. Pacificus No. 1 (June 29, 1793), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 38 (Harold C. Syrett ed., 1969) (italics removed).

In addition, the Executive Branch has long adhered to the view that Congress is limited in its authority to regulate the President's conduct of diplomatic relations. Specifically, it may not (as section 7054 would) place limits on the President's use of his preferred agents to engage in a category of important diplomatic relations, and thereby determine the form and manner in which the Executive engages in diplomacy. Secretary of State Thomas Jefferson, for example, set forth this view in a legal opinion that he delivered to President Washington in the midst of an ongoing debate in the first Congress over a proposed amendment to a bill to fund the exercise of foreign relations—a bill that eventually became the Act Providing the Means of Intercourse Between the United States and Foreign Nations, ch. 22, 1 Stat. 128 (1790) ("Foreign Intercourse Appropriations Act"). *See* Opinion on the Powers of the Senate Respecting Diplomatic Appointments (Apr. 24, 1790), *reprinted in* 16 *The Papers of Thomas Jefferson* 378–80 (Julian P. Boyd ed., 1961). The proposed amendment would have given the Senate a role in approving the President's assignments of particular grades of diplomats to particular foreign posts. *See* 12 *Documentary History of the First Federal Congress of the*

(Charles T. Cullen ed., 1984) (observing that President's duty "to execute the laws" supports his foreign affairs powers).

United States of America 68–83 (Helen E. Veit et al. eds., 1994).[7] Jefferson—objecting to what he believed to be the Senate's impermissible attempt to extend its advice and consent authority over treaties and presidential appointments to executive determinations about the conduct of diplomacy—also shed light on the special role that the Constitution assigns to the President when it comes to the conduct of diplomatic relations. "The transaction of business with foreign nations is Executive altogether . . . *except* as to such portions of it as are specially submitted to the Senate," Jefferson stated, with "*[e]xceptions* . . . to be construed strictly." 16 *The Papers of Thomas Jefferson* at 379. In the course of objecting to the proposal at hand, Jefferson not only opined that "[t]he Senate is not supposed by the Constitution to be acquainted with the concerns of the Executive department . . . [they cannot] therefore be qualified to judge of the necessity which calls for a mission to any particular place . . . ," but also that "[a]ll this is left to the President." *Id.*; *see also Appointment of Consuls*, 7 Op. Att'y Gen. 242, 250 (1855) (affirming Jefferson's view in concluding that the "power of determining when and at what places to appoint [consuls], and of what rank to appoint them[]" is constitutionally "intrusted to the sole discretion of the Executive").

The available evidence suggests that Washington understood John Jay and James Madison to share Jefferson's views as expressed in this opinion, both as to the constraints on the Senate's powers and the nature of the special diplomatic authorities the Constitution confers on the President. *See* Michael D. Ramsey, *The Constitution's Text in Foreign Affairs* 83 (2007) (noting Washington's observation in his diary that "Madison's 'opinion coincides with Mr. Jay's and Mr. Jefferson's—to wit—that they [i.e., the Senate] have no Constitutional right to interfere with either [the destination or grade of diplomats], . . . their powers extending no farther than to an approbation or disapprobation of the person nominated by the President, *all the rest being Executive and vested in the President by the Constitution*.'") (quoting 4 *Diaries of George Washington* 122 (Apr. 27, 1790) (John Fitzpatrick ed., 1925)) (emphasis added). Indeed, prior to the

[7] Congress ultimately rejected the proposed amendment, and the Foreign Intercourse Appropriations Act as enacted appropriated an unconditional annual diplomatic budget and made the President alone responsible for deciding how to spend the lump sum. *See* 1 Stat. at 128–29.

Constitution's ratification, John Jay, in explaining why the President should have the discretion to decide when to seek the Senate's advice on treaty negotiation, had sounded a similar theme:

> Those matters which in negotiations usually require the most secrecy and the most dispatch, are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation. For these, the president will find no difficulty to provide; and should any circumstance occur which requires the advice and consent of the senate, he may at any time convene them. Thus we see that the constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other.

The Federalist No. 64, at 205 (McLean's ed. 1787); *accord The Federalist* No. 84, at 355 (McLean's ed. 1787) (Alexander Hamilton) ("[T]he management of foreign negotiations will naturally devolve upon [the President] according to general principles concerted with the Senate, and subject to their final concurrence.").

These executive officials were not alone in taking the position that the President enjoys significant discretion in determining how to negotiate with foreign nations. Newspaper accounts of the House debate over the Foreign Intercourse Funding Act indicate that there was strong opposition to the proposed amendment (opposition which prompted Washington's request for the Jefferson opinion). *See* 12 *Documentary History of the First Federal Congress of the United States of America* at 68–83. According to one report, among the positions of the "considerable majority" in the House that rejected the amendment was that "intercourse with foreign nations is a trust specially committed to the President of the United States; and after the Legislature has made the necessary provision to enable him to discharge that trust, the manner how it shall be executed must rest with him." *Id.* at 72, 83.

Members of Congress expressed similar views in other contexts during the Nation's early history. In 1796, for example, Senator Robert Ellsworth, a future Supreme Court Justice, explained that "[n]either [the legislative nor the judicial] branch had a right to dictate to the President

what he should answer [to foreign nations]. The Constitution left the whole business in his breast." 5 Annals of Cong. 28, 32 (1796). And in 1816, the Senate Committee on Foreign Relations made similar arguments in a report to the full Senate opposing adoption of a proposed resolution recommending that the President pursue certain negotiations with Great Britain. *See* Compilation of Reports of the Senate Committee on Foreign Relations, S. Doc. No. 231, pt. 8, at 22–25 (1901). The report stated that:

> The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution.

Id. at 24. "[T]he interference of the Senate in the direction of foreign negotiations" was, the Committee thought, "calculated to diminish that responsibility and thereby to impair the best security for the national safety." *Id*.

Consistent with these principles, Congress may by statute affirm the President's authority to determine whether, how, when, and through whom to engage in foreign diplomacy.[8] But when Congress takes the unusual step of purporting to impose statutory restrictions on this well-recognized authority, the Executive Branch has resisted. For example, Congress enacted an appropriations rider in 1913, providing that "[h]ereafter the Executive shall not extend or accept any invitation to participate in any international congress, conference, or like event, without first having specific authority of law to do so." Act of Mar. 4, 1913, ch. 149, 37 Stat. 913 (1913) (codified at 22 U.S.C. § 262 (2006)). The Executive has not acted in accord with that requirement, *see* Henry M. Wriston, *American Participation in International Conferences*, 20 Am. J. Int'l L. 33, 40 (1926) (observing that "there is not a single case [since 1913] where the President secured from Congress authorization to accept an invitation to a conference of a political or diplomatic character," and

[8] *See, e.g.*, 22 U.S.C. § 287a (2006) ("[W]hen representing the United States in the respective organs and agencies of the United Nations, [U.S. representatives] shall, at all times, act in accordance with the instructions of the President transmitted by the Secretary of State unless other means of transmission is directed by the President.").

that "since 1917 the whole practice of requesting Congress for authority to accept invitations to any sort of international conference has virtually fallen into disuse"), and the measure is now a "known dead letter," Louis Henkin, *Foreign Affairs and the United States Constitution* 118 (2d ed. 1996). Indeed, when first informed of the provision's existence (more than three years after its enactment), President Wilson reportedly termed it "utterly futile." Wriston, 20 Am. J. Int'l L. at 39. Wilson's dismissive characterization accorded with the view, expressed in a leading treatise of the day, that the President "cannot be compelled by a resolution of either house or of both houses of Congress to exercise" his constitutional powers with respect to "instituting negotiations." Samuel B. Crandall, *Treaties: Their Making and Enforcement* 74 (2d ed. 1916).

In more recent decades, the Executive has continued to object when Congress has attempted to impose limits on the form and manner by which the President exercises his diplomatic powers. In particular, the Executive has asserted on numerous occasions that the President possesses the "'exclusive authority to determine the time, scope, and objectives'" of international negotiations or discussions, including the authority "to determine the individuals who will" represent the United States in those diplomatic exchanges.[9] And this Office has "repeatedly objected on con-

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[9] *Foreign Relations Authorization Bill*, 14 Op. O.L.C. at 38, 41 (quoting *Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989*, 2 Pub. Papers of Pres. Ronald Reagan 1541, 1542 (Dec. 22, 1987); *see also Section 235A of the Immigration and Nationality Act*, 24 Op. O.L.C. 276, 281 (2000) (same); *Statement on Signing the Sustainable Fisheries Act*, 32 Weekly Comp. Pres. Doc. 2040, 2041 (Oct. 11, 1996) (Pres. Clinton) ("Under our Constitution, it is the President who articulates the Nation's foreign policy and who determines the timing and subject matter of our negotiations with foreign nations."); *Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1992 and 1993*, 27 Weekly Comp. Pres. Doc. 1527, 1528 (Oct. 28, 1991) (Pres. Bush) ("The Constitution . . . vests exclusive authority in the President to control the timing and substance of negotiations with foreign governments and to choose the officials who will negotiate on behalf of the United States."); *Participation of the State Department in Producer-Consumer Fora and Other International Negotiations Aimed at Stabilizing International Commodity Markets*, 2 Op. O.L.C. 227, 228 n.1 (1978) ("[W]e think it doubtful that the President's power to negotiate with foreign governments over subjects of national concern can ever be subject to unqualified restriction by statute."); *accord* Henkin, *Foreign Affairs* at 42 ("As 'sole organ,' the President determines also how, when, where, and by whom the United States should make or receive communi-

stitutional grounds to Congressional attempts to mandate the time, manner and content of diplomatic negotiations," including in the context of potential engagement with international fora. *See* Memorandum for Alan Kreczko, Legal Adviser, National Security Council, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: WTO Dispute Settlement Review Commission Act* at 3 (Feb. 9, 1995) ("Dellinger WTO Memo").

For example, we concluded that it would be unconstitutional for Congress to adopt joint resolutions mandating that the President enter negotiations to modify the rules of the World Trade Organization. *See id.* Relatedly, we determined that a legislative provision purporting to prevent the State Department from expending appropriated funds on delegates to an international conference unless legislative representatives were included in the delegation was an "impermissibl[e] interfere[nce]" with the President's "constitutional responsibility to represent the United States abroad and thus to choose the individuals through whom the Nation's foreign affairs are conducted." *Foreign Relations Authorization Bill*, 14 Op. O.L.C. at 38, 41. And the Executive Branch has objected numerous times on constitutional grounds to legislative provisions purporting to preclude any U.S. government employee from negotiating with (or recognizing) the Palestine Liberation Organization ("PLO") or its representatives until the PLO had met certain conditions.[10]

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cations, and there is nothing to suggest that he is limited as to time, place, form, or forum.").

[10] *See, e.g.*, Memorandum for Carol T. Crawford, Assistant Attorney General, Office of Legislative Affairs, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 2939* at 3 (Oct. 19, 1989); *see also International Security and Development Cooperation Act of 1985: Statement on Signing S. 960 Into Law*, 21 Weekly Comp. Pres. Doc. 972, 973 (Aug. 8, 1985) (Pres. Reagan) (objecting to such a provision as a "congressional effort to impose legislative restrictions or directions with respect to the conduct of international negotiations which, under article II of the Constitution, is a function reserved exclusively to the President"); *accord Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991*, 26 Weekly Comp. Pres. Doc. 266, 267 (Feb. 16, 1990) (Pres. Bush) (stating that provision "restrict[ing] the expenditure of appropriated funds for carrying on 'the current dialogue in the Middle East peace process with any [PLO representative]'" would, if "interpreted to prohibit negotiations with particular individuals under certain circumstances," "impermissibly limit my constitutional authority to negotiate with foreign organizations").

In objecting to one such provision, this Office explained that Congress "possesses no constitutional authority to forbid the President from engaging in diplomatic contacts." Memorandum for Carol T. Crawford, Assistant Attorney General, Office of Legislative Affairs, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 2939*, at 3 (Oct. 19, 1989). Other Executive Branch precedents are to similar effect. *See Bill To Relocate United States Embassy from Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123, 126 (1995) (concluding that a proposed bill conditioning the State Department's ability to obligate certain appropriated funds upon the relocation of the United States's Israeli embassy to Jerusalem would constitute an unconstitutional invasion of the President's authority to determine the form and manner of the Nation's diplomatic relations); *Official or Diplomatic Passports*, 16 Op. O.L.C. at 24–28 (deeming it an unconstitutional "interfere[nce] with the President's communications to foreign governments" and his "ability to conduct diplomacy" for Congress to preclude the State Department's use of appropriated funds to issue additional diplomatic passports of a type necessary for government employees to travel to certain Arab League countries); *Department of State, International Communication Agency, and Board for International Broadcasting Appropriations Bill: Statement on Signing H.R. 3363 into Law*, 15 Weekly Comp. Pres. Doc. 1434, 1434 (Aug. 15, 1979) (Pres. Carter) ("I believe that Congress cannot mandate the establishment of consular relations at a time and place unacceptable to the President.").[11]

Judicial support for the Executive Branch's position can be found in *Earth Island Institute v. Christopher*, 6 F.3d 648 (9th Cir. 1993). In that case, the United States Court of Appeals for the Ninth Circuit struck down a statute purporting to require the Secretary of State to initiate negotia-

[11] *See also Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 186 (1996) (proposed bill prohibiting the obligation or expenditure of appropriated funds by the Department of Defense for the activities of elements of the armed forces placed under the United Nations's operational or tactical control would "impermissibly undermin[e] the President's constitutional authority with respect to the conduct of diplomacy"); *Section 609 of the FY 1996 Omnibus Appropriations Act*, 20 Op. O.L.C. 189, 193 (1996) (legislative provision requiring the President to make a detailed certification before using appropriated funds to expand the United States's diplomatic presence in Vietnam constituted "an unconstitutional condition on the exercise of the President's" recognition power).

tions with, and otherwise engage, foreign governments for the purposes of developing and entering into international agreements for the protection of sea turtles. The court deemed the statute an unconstitutional "intru[sion] upon the conduct of foreign relations by the Executive." *Id.* at 653. Additional judicial support can be found in the Supreme Court's clear dicta in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936): "[T]he President alone has the power to speak or listen as a representative of the nation. . . . Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it." *Id.* at 319.

That the President possesses the exclusive power to determine how to conduct diplomacy with other nations does not mean that Congress is without relevant authority. For example, the Senate must approve the treaties the President negotiates, *see* U.S. Const. art. II, § 2, cl. 2, and Congress can, by a subsequently enacted statute, limit the effect of treaties, *see Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (stating that if a treaty and a statute are inconsistent, "the one last in date will control the other"). The Senate may even refuse its consent to a treaty if an international organization makes entry into such treaty a necessary precondition of United States participation in the proceedings of that organization.[12] The statutory limitation at issue here, however, does not constitute such an exercise of Congress's legitimate authority in the area of foreign affairs; rather, it purports to restrict the President from engaging in diplomacy through international fora that are organized pursuant to a treaty to which the United States is a party. *See* United Nations Charter, Jun. 26, 1945, 59 Stat. 1031, 1031, 1213 (noting that Senate consented to ratification of U.N. Charter on July 28, 1948). Section 7054, in other words, seeks to regulate who may participate in the delegations the President may send to the international fora of an organization to which the United States belongs, and at which the United States would be received were its delegations to be sent.

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[12] In addition, although the question is not settled, Congress may possess some authority to withdraw the United States from membership in an international organization—at least where the organization relates to a subject matter, such as foreign commerce, that falls within Congress's enumerated powers, U.S. Const. art. I, § 8, cl. 3. *See* Dellinger WTO Memo at 4–6; *cf.* Edward S. Corwin, *The President: Office and Powers, 1787–1984*, at 222 (5th ed. 1984) (arguing that Congress possesses "vast powers to determine the bounds within which a President may be left to work out a foreign policy").

Nor is the impact of section 7054 on the President's discretion to determine the "form and manner" of the Nation's diplomacy merely hypothetical. You have explained to us that "United Nations bodies and affiliated agencies are generally responsible for marshalling United Nations member state responses to issues that fall within their purview." State Request at 3. Accordingly, full U.S. participation in such bodies facilitates the type of direct diplomacy that is critically important to advancing U.S. objectives with respect to the issues under discussion. *Id.* at 4. Moreover, the decision to send a full complement of government representatives to a class of entities that are so centrally important to the business of the U.N. may affect the standing and influence of the U.S. within the community of nations and thereby have a deleterious effect on the President's diplomatic efforts more broadly. That Congress has purported to restrict the President's reliance on the State Department—the lead and most experienced and capable government agency with respect to U.N. relations, *see* 22 U.S.C. §§ 287, 287a (2006); *see also* State Request at 3–4—further heightens the extent to which section 7054 impermissibly restrains the President's authority. Indeed, with reference to the particular context of the upcoming meeting of the executive board of UNDP/UNFPA, you have explained that "prohibiting State Department participation . . . would significantly hinder direct U.S. engagement in important diplomatic efforts, undermining U.S. strategic foreign policy interests." State Request at 4.

For these reasons, section 7054's prevention of the inclusion of State Department representatives in delegations to the specified U.N. entities is unconstitutional.

IV.

Our conclusion is not affected by the fact that Congress has drafted its restriction as a prohibition on the use of appropriated funds rather than as a direct prohibition. Congress's spending power is undoubtedly broad, and, as a general matter, Congress may decline to appropriate money altogether for a particular function, or place binding conditions on the

appropriations it does make.[13] But as the Executive Branch has repeatedly observed, "it does not necessarily follow that [Congress] may attach whatever condition it desires to an appropriation,"[14] for "Congress may not deploy [the spending power] to accomplish unconstitutional ends."[15] The Supreme Court has affirmed this fundamental proposition on a number of occasions. The most notable case is *United States v. Lovett*, 328 U.S. 303 (1946). There, the Court expressly rejected the proposition that the appropriations power is "plenary and not subject to judicial review," and struck down as an unconstitutional bill of attainder a provision in an appropriations act that barred the payment of salaries to named federal employees. *Id.* at 305, 307; *see also United States v. Klein*, 80 U.S. (13 Wall.) 128, 147–48 (1871) (deeming an appropriations proviso that "impair[ed] the effect of a [presidential] pardon" void as an unconstitutional "infring[ement]" on "the constitutional power of the Executive"); *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 435 (1990) (White, J., concurring) (noting that "the [majority] does not state that statutory re-

[13] *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]"); *United States v. MacCollom*, 426 U.S. 317, 321 (1976) ("The established rule is that the expenditure of public funds is proper only when authorized by Congress[.]") (citing *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850)); *Authority of Congressional Committees to Disapprove Action of Executive Branch*, 41 Op. Att'y Gen. 230, 233 (1955) (Brownell) ("It is recognized that 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."); Memorandum for the Acting Solicitor General, from John F. Davis, Office of Legal Counsel, *Re: Validity of Section 207 of Current Appropriation Act Providing That None of the Funds May Be Used in the Santa Margarita Litigation* at 2 n.2 (June 26, 1953) ("The use of a rider to an appropriation act to control executive action is by no means novel.").

[14] *The President and the War Power: South Vietnam and the Cambodian Sanctuaries*, 1 Op. O.L.C. Supp. 321, 334 n.3 (1970).

[15] *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 266 (1996); *Authority of Congressional Committees*, 41 Op. Att'y Gen. at 233 ("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."); *Constitutionality of Proposed Legislation Affecting Tax Refunds*, 37 Op. Att'y Gen. 56, 61 (1933) (Mitchell) ("Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution. If such a practice were permissible, Congress could subvert the Constitution.").

strictions on appropriations may never fall even . . . if they encroach on the powers reserved to another branch of the Federal Government").

Consistent with these precedents, the Executive Branch has long adhered to the view that "Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control." *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. O.L.C. 253, 267 (1996) ("*Mexican Debt Disclosure Act*") (internal quotation marks omitted); *Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller*, 41 Op. Att'y Gen. 507, 530 (1960) (Rogers).[16] This proposition applies with equal force in the foreign affairs context.[17] Indeed, on numerous occasions, this Office has invoked the specific principle that "the spending power may not be deployed to invade core Presidential prerogatives in the conduct of diplomacy." *Section 609 of the FY 1996 Omnibus Appropriations Act*, 20 Op. O.L.C. 189, 197 (1996) ("*Section 609*") (citing precedents for this principle from early 19th century involving objections to appropriations riders by Representative Daniel Webster, then-Secretary of State John Quincy Adams, and members of Congress); *see supra* p. 233 (discussing memoranda and opinions). Section 7054, by purporting to use the appropriations power to enact a targeted restriction designed to dictate the form and manner

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[16] The Supreme Court suggested in *South Dakota v. Dole*, 483 U.S. 203 (1987), that "the constitutional limitations on Congress when exercising its spending power" vis-à-vis the States "are less exacting than those on its authority to regulate directly." *Id.* at 209. But the Court has since made clear that Congress does not enjoy such heightened latitude when it purports to impose spending conditions on the Executive Branch, for "*Dole* did not involve separation-of-powers principles." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 271 (1991); *see also Official or Diplomatic Passports*, 16 Op. O.L.C. at 29 (*Dole* does not apply to spending conditions in the separation of powers context).

[17] *See Mexican Debt Disclosure Act*, 20 Op. O.L.C. at 266 ("'Congress may not use its power over appropriations of public funds "'to attach conditions to Executive Branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs.'"'") (quoting *Official or Diplomatic Passports*, 16 Op. O.L.C. at 28 (quoting *Foreign Relations Authorization Bill*, 14 Op. O.L.C. at 42 n.3 (quoting *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification for Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 261 (1989)))).

through which the President may conduct the nation's diplomacy, is akin to these prior provisions.[18]

V.

Accordingly, the Secretary would be justified in disregarding section 7054—and using funds appropriated in title I for the purpose of paying the expenses of delegations to U.N. entities chaired by terrorist list states.

DAVID J. BARRON
Acting Assistant Attorney General
Office of Legal Counsel

[18] Because there is no evidence that the Foreign Appropriations Act "without [section 7054] will not function 'in a *manner* consistent with the intent of Congress,'" section 7054 is "severable." *Official or Diplomatic Passports*, 16 Op. O.L.C. at 29 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987)). Accordingly, section 7054's invalidity does not call into question the validity of any of the other provisions of the Act. *See Section 609*, 20 Op. O.L.C. at 198 n.21; *Foreign Relations Authorization Bill*, 14 Op. O.L.C. at 44 ("Because the [unconstitutional] condition is severable, the President may enforce the remainder of the provision, disregarding the condition."); *cf. Memorial of Captain Meigs*, 9 Op. Att'y Gen. 462, 469–70 (1860) (Black) ("[I]f a condition . . . is void, it can have no effect whatever either upon the subject-matter or upon other parts of the law to which it is appended[.]").

Withdrawal of Opinion on CIA Interrogations

A previous opinion of the Office of Legal Counsel concerning interrogations by the Central Intelligence Agency is withdrawn and no longer represents the views of the Office.

June 11, 2009

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Sections 3(a) and 3(b) of Executive Order 13491, 3 C.F.R. 199 (2009 comp.), set forth restrictions on the use of interrogation methods. In section 3(c) of that order, the President further directed that "unless the Attorney General with appropriate consultation provides further guidance, officers, employees, and other agents of the United States Government may not, in conducting interrogations, rely upon any interpretation of the law governing interrogation . . . issued by the Department of Justice between September 11, 2001, and January 20, 2009." We have previously noted that this direction encompasses, among other things, four opinions of the Office of Legal Counsel, which we withdrew on April 15, 2009. *See Withdrawal of Four Opinions on CIA Interrogations*, 33 Op. O.L.C. 191 (2009). We have now determined that it also encompasses another opinion of our Office. *See* Memorandum for John A. Rizzo, Acting General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques That May Be Used by the CIA in the Interrogation of High-Value al Qaeda Detainees* (July 20, 2007).

In connection with the consideration of this opinion for possible public release, the Office has now reviewed this additional opinion and has decided to withdraw it. It no longer represents the views of the Office of Legal Counsel.

DAVID J. BARRON
Acting Assistant Attorney General
Office of Legal Counsel

Constitutionality of the Matthew Shepard Hate Crimes Prevention Act

The prohibition in proposed section 249(a)(1) of S. 909, the Matthew Shepard Hate Crimes Prevention Act—against willfully causing bodily injury to any person, or attempting to cause bodily injury to any person through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, "because of the actual or perceived race, color, religion, or national origin of any person"—would be a permissible exercise of Congress's authority to enforce the Thirteenth Amendment, at least insofar as the violence is directed at members of those religions or national origins that would have been considered races at the time of the adoption of the Thirteenth Amendment.

The prohibition in proposed section 249(a)(2) of S. 909 —against willfully causing bodily injury to any person, or attempting to cause bodily injury to any person through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, "because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person"—would be a permissible exercise of Congress's authority under the Commerce Clause, because it would require the government to allege and prove beyond a reasonable doubt in each case that there is an explicit and discrete connection between the proscribed conduct and interstate or foreign commerce.

June 16, 2009

MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

You have asked for our views on the constitutionality of a pending bill, the Matthew Shepard Hate Crimes Prevention Act, S. 909, 111th Cong. (as introduced in the Senate, Apr. 28, 2009). In particular, you have asked us to review section 7(a) of S. 909, which would amend title 18 of the United States Code to create a new section 249, which would establish two criminal prohibitions called "hate crime acts."

First, proposed section 249(a)(1) would prohibit willfully causing bodily injury to any person, or attempting to cause bodily injury to any person through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, "because of the actual or perceived race, color, religion, or national origin of any person." This provision is similar to an existing federal law, 18 U.S.C. § 245 (2006), the principal difference being that the new section 249(a)(1), unlike section 245, would not re-

quire the prosecutor to prove that the victim was or had been "participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof."

Second, proposed section 249(a)(2) would prohibit willfully causing bodily injury to any person, or attempting to cause bodily injury to any person through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, "because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person," S. 909, sec. 7(a), § 249(a)(2)(A), but only if the conduct occurs in at least one of a series of defined "circumstances" that have a specified connection with or effect upon interstate or foreign commerce, *id.* § 249(a)(2)(B). This new provision would prohibit certain forms of discriminatory violence—namely, violence committed because of a person's actual or perceived gender, sexual orientation, gender identity or disability—that are not addressed by the existing section 245 of title 18.[1]

S. 909 is, in these respects, nearly identical to a bill this Office reviewed in 2000.[2] In our analysis of that proposed legislation, which your Office transmitted to Congress, we concluded that the bill would be constitutional. *See* Letter for Edward Kennedy, United States Senate, from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, Department of Justice (June 13, 2000); *see also* S. Rep. No. 107-147, at 15–23 (2002) ("Senate Report") (reprinting the OLA letter containing the 2000 OLC analysis as an explanation of the constitutional basis for such legislation). In 2007, however, the Office of Management and Budget indicated to the 110th Congress that one provision of such legislation would raise constitutional concerns, *see* Statement of Administration Policy on H.R. 1592 (May 3, 2007), as did the Attorney General, *see* Letter for Carl Levin, Chairman, Senate Committee on Armed Services,

[1] A new proposed section 249(a)(3) would make the same conduct unlawful if done within the special maritime or territorial jurisdiction of the United States—a provision that does not raise any serious questions with respect to Congress's authority. *See United States v. Sharpnack*, 355 U.S. 286, 288 (1958).

[2] The principal material difference is that section 249(a)(2) of S. 909 encompasses violence on the basis of a person's real or perceived gender identity, something that the 2000 legislation did not address.

from Michael B. Mukasey, Attorney General, at 6 (Nov. 13, 2007) (regarding section 1023 of H.R. 1585).

We have carefully reviewed the relevant legal materials and now conclude, as we did in 2000, that the legislation is constitutional. The Attorney General concurs in this view.

I.

As we explained in 2000, *see* Senate Report at 16–18, we believe Congress has authority under section 2 of the Thirteenth Amendment to punish racially motivated violence as part of a reasonable legislative effort to extinguish the relics, badges and incidents of slavery. Congress may rationally determine, as it would do in S. 909, that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude," and that "[s]lavery and involuntary servitude were enforced . . . through widespread public and private violence directed at persons because of their race." S. 909, § 2(7); *see also* H.R. 1585, 110th Cong. § 1023(b)(7) (2007) (same).[3]

Like the current 18 U.S.C. § 245, proposed section 249(a)(1) of title 18 would not be limited by its terms to violence involving racial discrimination: It would criminalize violence committed "because of the actual or perceived race, color, *religion, or national origin* of any person." S. 909 explains that "in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments." *Id.* § 2(8).

As we have previously concluded, under existing case law the proscription of violence motivated by "religion" and "national origin" would constitute a valid exercise of Congress's Thirteenth Amendment authority insofar as "the violence is directed at members of those religions or national origins that would have been considered races at the time of the

[3] Given our conclusion that Congress possesses authority to enact this provision under the Thirteenth Amendment, we do not address whether Congress might also possess sufficient authority under the Commerce Clause or the Fourteenth Amendment. *See United States v. Nelson*, 277 F.3d 164, 174–75 & n.10 (2d Cir. 2002).

adoption of the Thirteenth Amendment." Senate Report at 17–18; *see also Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610–13 (1987) (holding that the prohibition of race discrimination in 42 U.S.C. § 1981, a Reconstruction-era statute that was enacted pursuant to, and contemporaneously with, the Thirteenth Amendment, extends to discrimination against Arabs, as Congress intended to protect "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics"); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617–18 (1987) (holding that Jews can state a claim under 42 U.S.C. § 1982, another antidiscrimination statute enacted pursuant to, and contemporaneously with, the Thirteenth Amendment, because Jews "were among the peoples [at the time the statutes were adopted] considered to be distinct races"); *Hodges v. United States*, 203 U.S. 1, 17 (1906) ("Slavery or involuntary servitude of the Chinese, of the Italian, of the Anglo-Saxon, are as much within its compass as slavery or involuntary servitude of the African."); *United States v. Nelson*, 277 F.3d 164, 176–78 (2d Cir. 2002) (concluding that 18 U.S.C. § 245 could be applied constitutionally to protect Jews against crimes based on their religion, because Jews were considered a "race" when the Thirteenth Amendment was adopted). While it is true that the institution of slavery in the United States, the abolition of which was the primary impetus for the Thirteenth Amendment, primarily involved the subjugation of African Americans, it is well established by Supreme Court precedent that Congress's authority to abolish the badges and incidents of slavery extends "to legislat[ion] in regard to 'every race and individual.'" *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 288 n.18 (1976) (quoting *Hodges*, 203 U.S. at 16–17).[4]

Although "there is strong precedent to support the conclusion that the Thirteenth Amendment extends its protections to religions directly, and thus to members of the Jewish religion, without the detour through historically changing conceptions of 'race,'" *Nelson*, 277 F.3d at 179, it remains an open question whether and to what extent the Thirteenth Amendment empowers Congress to address forms of discrimination short of slavery

[4] In *McDonald*, for example, the Supreme Court held that 42 U.S.C. § 1981, a Reconstruction-era statute that was enacted pursuant to, and contemporaneously with, the Thirteenth Amendment, prohibits racial discrimination in the making and enforcement of contracts against all persons, including whites. 427 U.S. at 286–96.

and involuntary servitude with respect to religions and national origins that were *not* considered "races" in 1865. Accordingly, to the extent violence is directed at victims on the basis of a religion or national origin that was not regarded as a "race" at the time the Thirteenth Amendment was ratified, prosecutors may choose to bring actions under the Commerce Clause provision of S. 909, i.e., proposed 18 U.S.C. § 249(a)(2), if they can prove the elements of such an offense. *See* Senate Report at 15.

Proposed section 249(a)(1) differs from the current 18 U.S.C. § 245 in that it would not require the government to prove that the defendant committed the violence because the victim was or had been "participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof."[5] The outer limits of the expansive list of specified activities in section 245 have not

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[5] Section 245(b)(2) makes it a crime, "whether or not acting under color of law, by force or threat of force willfully [to] injure[], intimidate[] or interfere[] with, or attempt[] to injure, intimidate or interfere with . . . any person because of his race, color, religion or national origin and because he is or has been—

"(A) enrolling in or attending any public school or public college;

"(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

"(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

"(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

"(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

"(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and

"(i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and

"(ii) which holds itself out as serving patrons of such establishments."

been conclusively defined, but courts have concluded that the section protects, *inter alia*, drinking beer in a public park (*see United States v. Allen*, 341 F.3d 870 (9th Cir. 2003)), and walking on a city street (*see Nelson*, 277 F.3d 164). Although it is not clear that Congress included the activities element of section 245 in order to justify an exercise of its Thirteenth Amendment enforcement powers,[6] the courts have held that section 245 is proper Thirteenth Amendment legislation. *See, e.g.*, *Nelson*, 277 F.3d 164; *Allen*, 341 F.3d 870.

The Supreme Court's decisions in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), and *Griffin v. Breckenridge*, 403 U.S. 88 (1971), support the further judgment that the Thirteenth Amendment does not require such a federal-activities element. In *Jones*, the Court upheld section 1 of the Civil Rights Act of 1866 (now 42 U.S.C. § 1982) as a valid exercise of Congress's Thirteenth Amendment enforcement authority. The statute in *Jones* was limited to discriminatory interferences with the rights to make contracts and buy or sell property, but the Court did not rest its approval on that limitation. Instead, the Court wrote, "[s]urely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." 392 U.S. at 440. Similarly, in *Griffin*, the Court held that the Thirteenth Amendment supported application of the Ku Klux Klan Act (now 42 U.S.C. § 1985) to a case of racially motivated violence intended to deprive the victims of what the Court called "the basic rights that the law secures to all free men," 403 U.S. at 105—which in that case, according to the complaint, included the "right to be secure in their person" and "their rights to travel the public highways without restraint," *id.* at 91–92. The Court again endorsed the broad *Jones* formulation, which contains no interference-with-protected-activities limitation: "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." *Id.* at 105. To be sure, "there exist indubitable connections

[6] *See Nelson*, 277 F.3d at 191 n.26 (explaining that Congress included the "participating in or enjoying civil rights" requirement in section 245 for purposes of providing a basis for the provision under the Fourteenth Amendment and possibly also the Fifteenth Amendment).

. . . between post Civil War efforts to return freed slaves to a subjugated status and private violence directed at interfering with and discouraging the freed slaves' exercise of civil rights in public places." *Nelson*, 277 F.3d at 190. But there are also such "indubitable connections" "between slavery and private violence directed against despised and enslaved groups" more generally. *Id.*[7] In light of these precedents, and consistent with our conclusion in 2000, *see* Senate Report at 16–17, we think it would be rational at the very least for Congress to find that "[s]lavery and involuntary servitude were enforced . . . through widespread public and private violence directed at persons because of their race" and that "eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude," S. 909, § 2(7), regardless of whether the perpetrator in a particular case is attempting to deprive the victim of the use of the activities covered by the current section 245.

We therefore conclude, as we did in 2000, that the prohibition of discriminatory violence in proposed section 249(a)(1) would be a permissible exercise of Congress's broad authority to enforce the Thirteenth Amendment.

II.

Proposed section 249(a)(2) would be a proper exercise of Congress's authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, because it would require the government to allege and prove beyond a reasonable doubt in each case that there is an explicit and discrete connection between the proscribed conduct and interstate or foreign commerce.

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[7] As the Second Circuit noted in *Nelson*, the Supreme Court has limited the scope of Congress's enforcement authority under section 5 of the Fourteenth Amendment in a series of recent cases. 277 F.3d at 185 n.20. But as that court also noted, these precedents do not address the Thirteenth Amendment, which contemplates an inquiry that the Supreme Court has referred to as the "inherently legislative task of defining involuntary servitude." *Id.* (quoting *United States v. Kozminski*, 487 U.S. 931, 951 (1988)). The court of appeals in *Nelson* further explained that "the task of defining 'badges and incidents' of servitude is by necessity even more inherently legislative." *Id.* Finally, we note that the Thirteenth Amendment, unlike the Fourteenth Amendment, contains no state-action requirement, a distinction of relevance in determining Congress's authority to regulate private, racially motivated violence. *See* Senate Report at 18.

In particular, it would require that the offense have occurred "in any circumstance described in [proposed 18 U.S.C. § 249(a)(2)(B)]." Those enumerated circumstances are that:

> (i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—
>
> (I) across a State line or national border; or
>
> (II) using a channel, facility, or instrumentality of foreign commerce;
>
> (ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);
>
> (iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or
>
> (iv) the conduct described in subparagraph (A)—
>
> (I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or
>
> (II) otherwise affects interstate commerce.

S. 909, sec. 7(a), § 249(a)(2)(B). As we explained in 2000, *see* Senate Report at 18–23, requiring proof of at least one of these "jurisdictional" elements would "ensure, through case-by-case inquiry, that the [offense] in question affects interstate commerce." *United States v. Lopez*, 514 U.S. 549, 561 (1995). Nothing in the law since 2000 calls this analysis into question.[8]

[8] *See, e.g.*, *United States v. Dorsey*, 418 F.3d 1038, 1045–46 (9th Cir. 2005) (upholding 18 U.S.C. § 922(q)(2)(A), which makes it a crime "knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place the individual knows, or has reasonable cause to believe, is a school zone"); *United States v. Capozzi*, 347 F.3d 327, 335–36 (1st Cir. 2003) (upholding the Hobbs Act, 18 U.S.C. § 1951(a), which makes it a federal crime to commit or attempt to commit extortion that "in any way or degree, obstructs, delays or affects [interstate] commerce").

III.

For these reasons we adhere to our 2000 conclusion that the new criminal offenses created in S. 909 would be wholly constitutional.

MARTIN S. LEDERMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Eligibility of Retired Military Officer for Appointment as NASA Administrator

A retired military officer—and certainly one who has engaged in civilian pursuits after his retirement—qualifies for appointment as Administrator of the National Aeronautics and Space Administration under 42 U.S.C. § 2472(a), requiring that the Administrator be "appointed from civilian life."

July 8, 2009

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our opinion whether a retired military officer is eligible for appointment as Administrator of the National Aeronautics and Space Administration ("NASA"). Section 202 of the National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, 72 Stat. 426, 429 ("Space Act") (codified as amended at 42 U.S.C. § 2472(a) (2006)), creates NASA and provides that it "shall be headed by an Administrator, who shall be *appointed from civilian life* by the President by and with the advice and consent of the Senate" (emphasis added). The Space Act does not define the phrase "appointed from civilian life," nor does it expressly address whether a retired military officer is eligible to be appointed as NASA Administrator.

On June 22, 2009, the President nominated Charles F. Bolden, Jr., a retired General in the United States Marine Corps, to be Administrator of NASA. 155 Cong. Rec. 15834 (June 22, 2009). General Bolden retired from the Marine Corps in 2003. He is at present the Chief Executive Officer of a private consulting firm.

We believe that a retired military officer—and certainly one who has engaged in civilian pursuits after his retirement—is eligible for appointment as Administrator of NASA. This conclusion is supported by the ordinary meaning of the phrase "from civilian life," use of the phrase in other statutes, practice under such statutes, and longstanding Executive Branch precedent interpreting the phrase and similar words. We recognize that there are possible arguments to the contrary, but in our view these arguments, in the end, are unconvincing.

I.

The Space Act establishes NASA as a "civilian agency," whose activities "should be devoted to peaceful purposes for the benefit of all mankind." Pub. L. No. 85-568, § 102(a)–(b), 72 Stat. at 426. The statute requires the Administrator to come from "civilian life." *Id.* § 202, 72 Stat. at 429. It does not specifically address whether a retired military officer, who continues to hold a commission, would meet this qualification. Several arguments, however, support the conclusion that a retired military officer is eligible for appointment as Administrator of NASA.

First, the usual definition of "civilian" includes retired military personnel who are not on active duty. *See American Heritage Dictionary* (2009) (defining "civilian" as "[a] person following the pursuits of civil life, especially one who is not an active member of the military") (available at http://education.yahoo.com/reference/dictionary/entry/civilian, last visited ca. July 2009); *Merriam-Webster Online Dictionary* (2009) (defining "civilian" as "one not on active duty in the armed services") (available at http://www.merriam-webster.com/dictionary/civilian) (last visited ca. July 2009); *Webster's Seventh New Collegiate Dictionary* 152 (7th ed. 1963) (defining "civilian" as "one not on active duty in a military, police, or fire-fighting force"). In its ordinary meaning, therefore, the phrase "appointed from civilian life" refers to a person who is not on active military duty at the time of appointment. A retired military officer who has ceased active military service falls within this class of persons. Thus, by the literal terms of the statute, Congress did not bar all retired military personnel from appointment.

Second, although Congress did not define in the Space Act which persons are considered to be in "civilian life," the use of the phrase "appointed from civilian life" in other statutes supports the conclusion that the phrase generally does not disqualify retired military officers. In some statutes, as in the Space Act, Congress has limited eligibility for appointment to persons "from civilian life," without specifying whether retired military officers are deemed in "civilian life." *See, e.g.*, 10 U.S.C. § 133(a) (Supp. II 2008) (requiring Under Secretary of Defense for Acquisition, Technology, and Logistics to be "appointed from civilian life"); 15 U.S.C. § 633(b)(1) (2006) (requiring Administrator of Small Business Administration to be "appointed from civilian life"); 42 U.S.C. § 2286(b)(1) (2006) (requiring members of Defense Nuclear Facilities Safety Board to be "appointed from civilian life"). In other statutes,

however, Congress not only has directed that the appointee be "from civilian life," but also has explicitly disqualified all retired military officers from appointment during a specified cooling-off period. These statutes support the conclusion that the phrase "from civilian life," standing on its own, encompasses retired military officers.

For example, 10 U.S.C. § 113(a) (2006) requires that the Secretary of Defense be "appointed from civilian life" but excludes from eligibility any person "within seven years after relief from active duty as a commissioned officer of a regular component of an armed force." *See also* 10 U.S.C. § 134(a) (Supp. II 2008) (requiring that the Under Secretary of Defense for Policy be "appointed from civilian life" but not "within seven years after relief from active duty as a commissioned officer of a regular component of an armed force"); 10 U.S.C. § 3013(a) (2006) (requiring that the Secretary of the Army be "appointed from civilian life" but not "within five years after relief from active duty as a commissioned officer of a regular component of an armed force"); 10 U.S.C. § 5013(a) (2006) (same for Secretary of the Navy); 10 U.S.C. § 8013(a) (2006) (same for Secretary of the Air Force); 42 U.S.C. § 5812(a) (2006) (requiring that the Administrator of Energy Research and Development be "appointed from civilian life" but not "within two years after release from active duty as a commissioned officer of a regular component of an armed force").* The statutory exclusion of retired military officers from appointment to certain offices for a specified time period necessarily implies that such persons are eligible for appointment to those same offices once the cooling-off period has ended. Because persons appointed to those offices must be "from civilian life," it follows that retired military persons are considered to be "from civilian life." When Congress intends to make some retired military officers ineligible for appointment, it has done so expressly.

Similarly, when Congress has barred certain retired military personnel, for all time, from appointment to an office having a "civilian life" requirement, it has explicitly stated the prohibition. Congress, for example, has directed that judges of the United States Court of Appeals for the Armed Forces ("CAAF") "be appointed from civilian life," but, "[f]or purposes of appointment of judges to the court," has provided that "a person retired from the armed forces after 20 or more years of active service (whether or not such person is on the retired list) shall not be

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* Editor's Note: Subsequent to issuing this memorandum, we modified the parentheticals in this sentence to describe the statutes more clearly.

considered to be in civilian life." 10 U.S.C. § 942(b)(1) & (4) (2006). *See also* 49 U.S.C. § 106(b)–(d) (2006) (requiring Administrator of Federal Aviation Administration to "be a civilian," but imposing the condition that where "the Administrator is a former regular officer of an armed force, the Deputy Administrator may not be an officer on active duty in an armed force, a retired regular officer of an armed force, or a former regular officer of an armed force"). Congress's exclusion of certain retired military personnel from appointment to the CAAF would have no purpose unless they would otherwise be "from civilian life." Furthermore, under the statute, retired military personnel with less than twenty years of active service necessarily *are* considered to be "from civilian life."

All of these statutes support the view that when Congress limits appointments to persons "from civilian life," it treats retired military officers as coming "from civilian life." Under these statutes, when Congress intends to exclude retired military officers from appointment, it explicitly states that exclusion. The Space Act uses the phrase "from civilian life" without any further condition. The text of the statute, therefore, gives no indication that Congress, which has used the same "civilian life" requirement in many other acts, excluded retired military officers from appointment.

Third, there is practice—established by Presidents and the Senate acting together—in which retired military officers have been nominated, confirmed, and appointed to serve in positions covered by a "from civilian life" qualification. The Under Secretary of the Navy, for example, must be appointed "from civilian life." 10 U.S.C. § 5015(a) (2006). The current Under Secretary, Robert O. Work, who was confirmed May 18, 2009, is a retired military officer. The Under Secretary of Defense for Intelligence also must be "appointed from civilian life," 10 U.S.C. § 137(a) (2006), and the current occupant of that position, James R. Clapper, who was confirmed April 11, 2007, is a retired officer. These current examples are only part of a longer and more extensive practice. *See Eligibility of a Retired Army Officer To Be Appointed Inspector General of the Department of Defense*, 31 Op. O.L.C. 140, 144–45 (2007).

Fourth, longstanding Executive Branch precedent supports an interpretation of the phrase "from civilian life" that would extend to retired military officers. Our Office previously concluded that retired military officers were not automatically disqualified from appointment to several positions that were, by statute, confined to persons "appointed from civilian life." *See* Memorandum for Cyrus R. Vance, General Counsel,

Department of Defense, from Harold F. Reis, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Eligibility of a Retired Regular Officer of the Armed Forces To Be Appointed to the Position of Under Secretary or Assistant Secretary of One of the Military Departments* (attached to letter dated Feb. 3, 1961) ("*Eligibility of a Retired Regular Officer*"). We relied, in part, on "considerations [] relevant to the interpretation of the requirement that these officials shall be appointed from civilian life" that apply equally here—"the traditional meaning of the term" and "the fact that when Congress seeks to disqualify retired regular officers it does so in unmistakable language." *Id.* at 3. We noted the possibility that, under some sets of facts, particular retired officers might not be "from civilian life," and said in particular that it would accord with "the spirit" of the requirement if a retired officer had been engaged in civilian pursuits. *Id.* at 7. Whatever the possible facts that might call into question a particular retired officer's status in "civilian life" under some statutes having a "civilian life" qualification, a retired officer's eligibility is clear when he has been engaged in civilian pursuits at the time of appointment.

A 1930 Attorney General opinion similarly held that a retired Army officer could be appointed to an office that called for an appointee "from civil life." *Eligibility of Retired Army Officer to Hold the Position of Commissioner of the District of Columbia*, 36 Op. Att'y Gen. 389 (1930) ("1930 Opinion"). After canvassing the legal backdrop against which the relevant legislation had been passed, the opinion concluded:

> In using the term "civil life" Congress referred to the activity in life of the appointee. It is the taking of a person from one of two classes of society, military or civil. Military life is led when a person is in the active military service of the Army and is doing duty in his daily life in carrying out military functions. If he is carrying on military work and that is his life's activity at the time, he is not from civil life, but if he has retired from that activity and his pursuits are civil, then he is from civil life.

Id. at 398–99; *see id*. at 398 ("It seems reasonably clear, therefore, that in using the phrase 'civil life' . . . Congress was referring to those engaged in civil life, whether or not retired Army officers, as distinguished from the military life of an officer in active service."); *id.* at 402 ("Retired officers who have ceased to engage in military service and have entered civil life and civil pursuits . . . are in civil life within the meaning of the

[statute] and eligible to appointment[.]"). Congress, we believe, can be understood to have legislated against the background of this published Executive Branch interpretation of a term ("from civil life") that is virtually the same as the one in the Space Act ("from civilian life"), and that understanding accords with the ordinary meaning of the phrase "from civilian life," use of express language in other statutes to exclude some retired military officers who would otherwise fall within that category, and practice of the government. We therefore conclude that a retired military officer can qualify for appointment as Administrator of NASA.

II.

Although we believe that this conclusion is well supported, there are possible arguments for the view that the Space Act bars retired military personnel from appointment. We believe, however, that these arguments are ultimately unconvincing.

First, the legislative history of the Space Act arguably could be read to indicate that Congress intended the phrase "from civilian life," as used in that statute, to exclude retired military personnel. An earlier version of the bill may have assumed that the "civilian life" requirement barred appointment of a retired officer. That version would have prohibited the Administrator from employing retired commissioned officers under certain pay provisions unless sufficient numbers of qualified individuals "from civilian life" were unavailable. A House committee report explained the provision as follows:

> Paragraph (10) authorizes the Administrator to employ retired commissioned officers [under certain compensation provisions]; but this authority could be exercised only when sufficient numbers of qualified individuals from civilian life are not available . . . .

H.R. Rep. No. 85-1770, at 20 (1958). Although the provision allowing the Administrator to employ retired commissioned officers was enacted, the condition that "sufficient numbers of qualified individuals from civilian life are not available" was omitted from the final bill. *See* Pub. L. No. 85-568, § 203(b)(11), 72 Stat. at 431; *see* H.R. Rep. No. 85-2166, at 20 (1958) (Conf. Rep.) (noting omission during the conference). The legislative history does not explain why the provision was omitted, but the omission is consistent with the view that retired military officers could be considered to be in "civilian life," since that view is reflected in the

phrase's ordinary meaning, prior usage by Congress, and Executive Branch precedent.

We have not found any other significant materials in the legislative history of the Space Act that bear on the interpretation of the phrase. In the end, therefore, this murky legislative history about an unenacted version of the statute does not justify the conclusion that the phrase "from civilian life" in the version ultimately enacted bars the appointment of retired military officers—particularly in light of the ordinary meaning of the phrase and the ways in which Congress has used it in other statutes.

Second, it might be argued that our interpretation is mistaken because, on at least five occasions in recent times (and once under the Space Act itself), Congress has enacted separate legislation authorizing the appointment of a particular retired military officer to a position for which eligibility was limited to those "from civilian life." In 1989, Congress passed a bill authorizing the President to appoint Rear Admiral Richard Truly as NASA Administrator. *See* Act of June 30, 1989, Pub. L. No. 101-48, 103 Stat. 136. Admiral Truly was in active service at the time that the legislation was introduced, but he had expressed his intention to retire from active military duty before being sworn in as Administrator. *See* 135 Cong. Rec. 11,719 (1989). On the same day that Congress authorized the President to appoint Admiral Truly, it passed identical legislation authorizing the appointment of retired Admiral James Busey as Administrator of the Federal Aviation Administration ("FAA"). *See* Pub. L. No. 101-47, 103 Stat. 134 (1989). Similarly, in 1984, 1991, and 1992, Congress passed legislation authorizing the President to appoint a retired military officer as FAA Administrator. *See* Pub. L. No. 102-308, 106 Stat. 273 (1992); Pub. L. No. 102-223, 105 Stat. 1678 (1991); Pub. L. No. 98-256, 98 Stat. 125 (1984).[1]

The authorization for Admiral Truly's appointment apparently rested on the view that the "civilian life" qualification otherwise would have forbidden the appointment, unless Admiral Truly surrendered his commission and thus gave up his retired pay and benefits. The authorization declared that, with the Senate's advice and consent, the President could make the appointment, "[n]otwithstanding the provisions of section

[1] Essentially the same statutory structure and language have also been used to authorize the appointment of an active duty military officer. *See* Pub. L. No. 81-788, 64 Stat. 853 (1950) (authorizing appointment of General George C. Marshall to serve as Secretary of Defense, an office with a "civilian life" condition).

202(a) of the [Space Act] [which sets out the "civilian life" qualification], or any other provision of law." Pub. L. No. 101-48, § 1, 103 Stat. at 136; *see also id.* § 3, 103 Stat. at 137 (providing that "[n]othing in this Act shall be construed as approval by the Congress of any future appointments of military persons to the Offices of Administrator and Deputy Administrator of [NASA]."). The Senate committee report stated that "a review of the legislative history of the term 'from civilian' life indicates that this term excludes active duty military personnel and retired military personnel" and that "[t]o meet the strict interpretation of the term, a person would have to resign his commission and give up military benefits and pension to be considered 'civilian.'" S. Rep. No. 101-57, at 2 (1989).[2] The floor debates also revealed the view that, without a "waiver," Admiral Truly could not be appointed. *See* 135 Cong. Rec. 12,927 (June 22, 1989). To be sure, Admiral Truly disputed this conclusion. He took the view that retired military officers "do come from 'civilian life,'" although he acknowledged that the question would be "interpretable by lawyers I guess on all sides of the issue." *Nominations-May-June: Hearings Before the S. Comm. on Commerce, Science, and Transp.*, 101st Cong. 264, 279 (1989) (statement of Adm. Truly). In any event, Congress evidently acted on the view that a "waiver" was necessary.[3]

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[2] According to the committee report, "the President made reference to the requirement for a legislative waiver when he announced the nomination of Admiral Truly." S. Rep. No. 101-57, at 2. At the time of the President's statement, however, Admiral Truly was still on active duty, and the President said that "because Dick Truly is an active duty naval officer . . . I will need the assent and cooperation of the Congress to make this appointment." *Remarks Announcing the Nomination of Richard Harrison Truly To Be Administrator of the National Aeronautics and Space Administration* (Apr. 12, 1989), 1 Pub. Papers of Pres. George Bush 399, 399 (1989). *See also* Pub. L. No. 107-117, § 307, 115 Stat. 2230, 2301 (2002) (allowing appointment of an active duty officer as Deputy Administrator of NASA). The President, therefore, did not suggest that he could not appoint a retired military officer unless Congress enacted legislation.

[3] Admiral Busey requested legislation so that he could maintain his retirement benefits. *See* S. Rep. No. 101-56, at 1 (1989) ("Admiral Busey has requested a legislative waiver of this prohibition in order that he may retain his status as a retired military officer while serving as Administrator, thus allowing him to retain eligibility under his retirement plan and an opportunity to participate in the Survivors' Benefit Plan."). As in the case of Admiral Truly, the Senate committee report stated that the purpose of the legislation authorizing the appointment was "to allow Admiral Busey to retain his status as a retired officer in the U.S. Navy." *Id.*

To the extent the proponents of the authorization, in the committee report and on the floor, offered a construction of the Space Act, their construction is *subsequent* legislative history of that statute and thus is entitled to little weight. *See Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (later history is "a hazardous basis for inferring the intent of an earlier Congress" (quotation marks omitted)). A more substantial issue is that "the implications of a statute may be altered by the implications of a later statute," *United States v. Fausto*, 484 U.S. 439, 453 (1988), so that the later legislation here, while not an authoritative construction of the Space Act, might be argued to have "shape[d] or focus[ed]" that statute's "range of possible meanings," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000).

We do not believe, however, that the legislation enacted for Admiral Truly's appointment is sufficient to alter the interpretation of the Space Act that would otherwise prevail. In *Fausto*, the leading case on the interpretive principle, the Court held that after enactment of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 ("CSRA"), the Back Pay Act (5 U.S.C. § 5596) should no longer be interpreted to enable a federal employee to obtain review in the Court of Claims of certain personnel decisions. The Court found that such review would "turn . . . upside down" and "seriously undermine" elements of the CSRA's structure. *Fausto*, 484 U.S. at 449. Here, there is no need to reinterpret the Space Act in order to give full effect to the legislation authorizing Admiral Truly's appointment or to achieve the goal of "getting [those statutes] to 'make sense' in combination." *Id.* at 453. Even if the Space Act's "civilian life" requirement posed no obstacle, a targeted authorization for the President to make the appointment of a particular retired military officer "[n]otwithstanding the provisions of section 202(a) of the [Space Act], or any other provision of law," 103 Stat. at 136, would make sense—whatever the motivation of the Congress that enacted it—as a prudential measure, covering any possible statute that might endanger the officer's retired pay and benefits. Furthermore, other appointments could be made under the Space Act without creating any conflict with a statute authorizing the appointment of a single, named individual.

The Court's most recent extended application of the principle set forth in *Fausto* is also consistent with the conclusion that the targeted statute authorizing Admiral Truly's appointment does not alter the meaning of the Space Act itself. In *Brown & Williamson*, the Court read the Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938)

("FDCA"), to preclude the Food and Drug Administration ("FDA") from regulating tobacco. It interpreted the FDCA in the light of a string of later statutes that had presumed a lack of authority and had been enacted "against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco." 529 U.S. at 144. The authorization for Admiral Truly's appointment, however, was not part of a succession of statutes under the Space Act following an Executive Branch legal interpretation that our current interpretation would disturb. Indeed, the Executive Branch legal interpretation of the relevant phrase, as explained above, has been that retired officers are "from civilian life." We therefore would not read the authorization for Admiral Truly's appointment as altering the ordinary meaning of "civilian life."

Third, it might be argued that the interpretation that retired officers may be "from civilian life" means that the enactment of the "civilian life" qualification served no function, in light of another, preexisting statute. When Congress passed the Space Act, another statute, *see* Pub. L. No. 84-1028, 70A Stat. 1, 203 (1956) (codifying 10 U.S.C. § 3544(b)), already prohibited active duty officers from appointment to a civil office. According to the argument, the "civilian life" requirement could not have been intended to exclude only persons already barred by another law. In *Eligibility of a Retired Regular Officer*, however, we noted that the general statute was on the books, while concluding that the phrase "civilian life" does encompass retired military officers. Our analysis there points to one possible reason that the "civilian life" qualification had an effect beyond the general bar against appointment of active duty officers. We concluded that a retired officer was not "automatically disqualified" from appointment, *id*. at 1, but that a particular retired officer might still be disqualified under specific facts. We suggested, for example, that "the spirit" of the qualification might call for an officer to "'have ceased to engage in military service and entered civil life and civil pursuits.'" *Id.* at 7 (quoting 1930 Opinion, 36 Op. Att'y Gen. at 402).[4] We need not resolve here the precise relationship of the "civilian life" qualification and the current version of the preexisting statute, 10 U.S.C. § 973 (2006), except to note that there can be little doubt about the eligibility of a retired officer who

[4] Moreover, the "civilian life" requirement goes beyond the current version of the general prohibition against service by a retired officer, 10 U.S.C. § 973, because some retired officers—in particular, reservists who are on active duty for 270 days or less—could serve in Senate-confirmed positions under section 973 but would not meet the "civilian life" restriction.

has engaged in civilian pursuits (whether or not such an engagement is essential), even if there might be a prudential reason for enacting a statute (which might be unnecessary) to remove any possible question in the case of an officer who retired immediately before appointment.[5]

Finally, although no court has considered whether a retired military officer is eligible to be appointed to an office with a "from civilian life" qualification, there might be an argument that attempts to draw some significance from the conclusions of courts, in contexts other than appointments, that officers on the retired list remain members of the military and are deemed to be in military service. As the courts note, these retired officers are subject to the Uniform Code of Military Justice, to court-martial, and to recall to active duty by the Secretary of Defense. The Supreme Court explained in *United States v. Tyler*, 105 U.S. 244 (1882), for example, that persons whose names are on the retired list remain in "military service":

> It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service.

Id. at 246.

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[5] Under a line of cases in the Court of Claims, a provision giving additional service credit to officers "appointed from civil life" might have been unavailable to an officer who resigned with the purpose of rejoining the military and who then claimed he had come from "civil life." *Compare Guilmette v. United States*, 49 Ct. Cl. 188, 192 (1914) (holding that an officer "was in fact and in law completely separated from the public service" during a 17-day period and was entitled to the credit), *with Barber v. United States*, 50 Ct. Cl. 250, 256 (1915) (holding that where an officer "never intended to enter civil life if he could remain in the service," a break of several weeks did not amount to entry into "civil life"). An opinion of our Office, *Appointment of Member of the Federal Election Commission Who Resigned From Federal Service Immediately Prior to Appointment*, 2 Op. O.L.C. 359 (1977), read *Guilmette* and the 1930 Opinion as calling for an appointee "from civilian life" to have gone through more than an "immediate break" from military duty. We need not address here whether there is such a limit or whether it is sufficient that the officer, upon retiring, does not seek a quick return to active duty.

This precedent, however, does not bear significantly on the current issue. Although the Court's opinion in *Tyler* concluded that "retired officers are in the military service of the government," *id.*, the Court was not asked to decide whether such officers are in "civilian life" or military life. A retired military officer could be in military service as a result of continuing to hold a commission, but insofar as his daily pursuits are civil, he would live a civilian life. As the Attorney General recognized in the 1930 Opinion, the "fact that a man has a definite connection with the Military Establishment . . . does not prevent him from being properly treated as in civil life." 36 Op. Att'y Gen. at 400.

III.

We therefore conclude that a retired military officer—and certainly one who has engaged in civilian pursuits—qualifies for appointment as Administrator of NASA. Although there are possible arguments on the other side, we believe that these arguments are ultimately unpersuasive.

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Reaffirming Use of the EINSTEIN 2.0 Intrusion-Detection System to Protect Unclassified Computer Networks in the Executive Branch

Operation of the EINSTEIN 2.0 intrusion-detection system complies with the Fourth Amendment to the Constitution, title III of the Omnibus Crime Control and Safe Streets Act of 1968, the Foreign Intelligence Surveillance Act, the Stored Communications Act, and the pen-register and trap-and-trace provisions of 18 U.S.C. § 3121 *et seq*., provided that certain log-on banners or computer-user agreements are consistently adopted, implemented, and enforced by executive departments and agencies using the system.

Operation of the EINSTEIN 2.0 system also does not run afoul of state wiretapping or communications privacy laws, which would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and be unenforceable under the Supremacy Clause to the extent that such laws purport to apply to the conduct of federal agencies and agents conducting EINSTEIN 2.0 operations and impose requirements that exceed those imposed by the federal statutes above.

August 14, 2009

MEMORANDUM OPINION FOR THE
ASSOCIATE DEPUTY ATTORNEY GENERAL

This memorandum briefly summarizes the current views of the Office of Legal Counsel on the legality of the EINSTEIN 2.0 intrusion-detection system. This Office previously considered the legality of the system in an opinion of January 9, 2009. *See Use of the EINSTEIN 2.0 Intrusion-Detection System to Protect Unclassified Computer Networks in the Executive Branch*, 33 Op. O.L.C. 63 (2009) ("EINSTEIN 2.0 Opinion"). We have reviewed that opinion and agree that the operation of the EINSTEIN 2.0 program complies with the Fourth Amendment to the Constitution of the United States, title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Pub. L. No. 90-351, 82 Stat. 197, 211, *codified as amended at* 18 U.S.C. § 2510 *et seq*. ("Wiretap Act")); the Foreign Intelligence Surveillance Act of 1978 (Pub. L. No. 95-511, 92 Stat. 1783, *codified as amended at* 50 U.S.C. § 1801 *et seq*.); the Stored Communications Act (18 U.S.C. § 2701 *et seq*.); and the pen-register and trap-and-trace provisions of 18 U.S.C. § 3121 *et seq*. Accordingly, we have drawn upon the analysis in that opinion in preparing this summary, supplementing that material with analysis of an additional legal issue.

I.

We have assumed for purposes of our analysis that computer users generally have a legitimate expectation of privacy in the content of Internet communications (such as an e-mail) while it is in transmission over the Internet.[1] *See, e.g.*, *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (analogizing expectation of e-mail user in privacy of e-mail to expectation of individuals communicating by regular mail); *United States v. Maxwell*, 45 M.J. 406, 418 (C.A.A.F. 1996) (sender of an e-mail generally "enjoys a reasonable expectation that police officials will not intercept the transmission without probable cause and a search warrant"); *see also Quon*, 529 F.3d at 905 ("[U]sers do have a reasonable expectation of privacy in the content of their text messages vis-à-vis the service provider."). Even given this assumption, however, we believe the deployment, testing, and use of EINSTEIN 2.0 technology complies with the Fourth Amendment where each agency participating in the program consistently adopts, implements, and enforces the model log-on banner or model computer-user agreements described in this Office's prior opinion, or their substantial equivalents. *See* EINSTEIN 2.0 Opinion, 33 Op. O.L.C. at 68–71.

First, we conclude that the adoption, implementation, and enforcement of model log-on banners or model computer-user agreements eliminates federal employees' reasonable expectation of privacy in their uses of government-owned information systems with respect to the lawful government purpose of protecting federal systems against network intrusions and exploitations. We therefore do not believe that the operation of intrusion-detection sensors as part of the EINSTEIN 2.0 program constitutes a "search" for Fourth Amendment purposes. *See Minnesota v. Carter*, 525 U.S. 83, 88 (1998). Whether a government employee has a legitimate expectation of privacy in his use of governmental property at work in

[1] Computer users do not have an objectively reasonable expectation of privacy in addressing and routing information conveyed for the purpose of transmitting Internet communications to or from a user. *See Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 904–05 (9th Cir. 2008); *United States v. Forrester*, 512 F.3d 500, 510–11 (9th Cir. 2008); *cf. Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (no legitimate expectation of privacy in dialing, routing, addressing, and signaling information transmitted to telephone companies).

particular circumstances is determined by "[t]he operational realities of the workplace," and "by virtue of actual office practices and procedures, or by legitimate regulation." *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (plurality); *see United States v. Simons*, 206 F.3d 392, 398 (4th Cir. 2000) ("[O]ffice practices, procedures, or regulations may reduce legitimate privacy expectations."). The existence of an expectation of privacy, moreover, may depend on the nature of the intrusion at issue. *See O'Connor*, 480 U.S. at 717–18 (plurality) (suggesting that a government employee's expectation of privacy might be unreasonable "when an intrusion is by a supervisor" but reasonable when the intrusion is by a law enforcement official). The model banner and model computer-user agreement discussed in our prior opinion are at least as robust as—and we think stronger than—similar materials that courts have held eliminated a legitimate government employee expectation of privacy in the content of Internet communications sent over government systems. *See, e.g.*, *Simons*, 206 F.3d at 398 (finding no legitimate expectation of privacy in light of computer-use policy expressly noting that government agency would "'audit, inspect, and/or monitor'" employees' use of the Internet, "including all file transfers, all websites visited, and all e-mail messages, 'as deemed appropriate'") (quoting policy); *United States v. Angevine*, 281 F.3d 1130, 1132–33 (10th Cir. 2002) (finding no legitimate expectation of privacy in light of computer-use policy stating that university "'reserves the right to view or scan any file or software stored on the computer or passing through the network, and will do so periodically'" and has "'a right of access to the contents of stored computing information at any time for any purpose which it has a legitimate need to know'" (quoting policy)); *United States v. Thorn*, 375 F.3d 679, 682 (8th Cir. 2004) (finding no legitimate expectation of privacy in light of computer-use policy warning that employees "'*do not* have any personal privacy rights regarding their use of [the employing agency's] information systems and technology,'" and that "'[a]n employee's *use* of [the agency's] information systems and technology indicates that the employee understands and *consents* to [the agency's] right to inspect and audit all such use as described in this policy'" (quoting policy, emphasis in original)), *vacated on other grounds*, 543 U.S. 1112 (2005). We therefore believe that the adoption, implementation, and enforcement of the language in those model materials, or their substantial equivalents, by agencies participating in the

EINSTEIN 2.0 program will eliminate federal employees' legitimate expectations of privacy in their uses of government-owned information systems with respect to the lawful government purpose of protecting federal systems against network intrusions and exploitations.[2]

We also believe that individuals in the private sector who communicate directly with federal employees of agencies participating in the EINSTEIN 2.0 program through government-owned information systems do not have a legitimate expectation of privacy in the content of those communications provided that model log-on banners or agreements are adopted and implemented by the agency. The Supreme Court has repeatedly held that where a person "reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information." *United States v. Jacobsen*, 466 U.S. 109, 117 (1984); *see also United States v. Miller*, 425 U.S. 435, 443 (1976) ("[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."); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) ("[W]hen a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities."); *Smith*, 442 U.S. at 743–44 ("[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."). We believe this principle also applies to a person who e-mails a federal employee at the employee's personal e-mail account when that employee accesses his or her personal e-mail account through a government-owned information system, when the consent procedures described above are followed. By clicking through the model log-on banner or agreeing to the terms of the model computer-user agreement, a federal employee gives ex ante permission to the govern-

[2] The use of log-on banners or computer-user agreements may not be sufficient to eliminate an employee's legitimate expectation of privacy if the statements and actions of agency officials contradict these materials. *See Quon*, 529 F.3d at 906–07. Management officials of agencies participating in the EINSTEIN 2.0 program therefore should ensure that agency practices are consistent with the statements in the model materials.

ment to intercept, monitor, and search "any communications" and "any data" transiting or stored on a government-owned information system for any "lawful purpose," including the purpose of protecting federal computer systems against malicious network activity. Therefore, an individual who communicates with a federal employee who has agreed to permit the government to intercept, monitor, and search any personal use of the employee's government-owned information systems has no Fourth Amendment right against the government activity of protecting federal computer systems against malicious network activity, as the employee has consented to that activity. *See Jerry T. O'Brien*, 467 U.S. at 743; *Jacobsen*, 466 U.S. at 117; *Miller*, 425 U.S. at 443.

Under Supreme Court precedent, this principle applies even where, for example, the sender of an e-mail to an employee's personal, web-based e-mail account (such as G-mail or Hotmail) does not know of the recipient's status as a federal employee or does not anticipate that the employee might read, on a federal government system, an e-mail sent to a personal e-mail account at work or that the employee has agreed to government monitoring of his communications on that system. A person communicating with another assumes the risk that the person has agreed to permit the government to monitor the contents of that communication. *See, e.g.*, *United States v. White*, 401 U.S. 745, 749–51 (1971) (plurality) (no Fourth Amendment protection against government monitoring of communications through transmitter worn by undercover operative); *Hoffa v. United States*, 385 U.S. 293, 300–03 (1966) (information disclosed to individual who turns out to be a government informant is not protected by the Fourth Amendment); *Lopez v. United States*, 373 U.S. 427, 439 (1963) (same); *cf. Rathbun v. United States*, 355 U.S. 107, 111 (1957) ("Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain."). Accordingly, when an employee agrees to let the government intercept, monitor, and search any communication or data sent, received, or stored by a government-owned information system, the government's interception of the employee's Internet communications with individuals outside of the relevant agency through a government-owned information system does not infringe upon

any legitimate expectation of privacy of the parties to that communication.

We also think that, under the Court's precedents, an individual who submits information through the Internet to a federal agency participating in the EINSTEIN 2.0 program does not have a legitimate expectation of privacy for Fourth Amendment purposes in the contents of the information that he transmits directly to the participating agency. An individual has no expectation of privacy in communications he makes to a known representative of the government. *See United States v. Caceres*, 440 U.S. 741, 750–51 (1979) (individual has no reasonable expectation of privacy in communications with IRS agent made in the course of an audit). Further, as just discussed, an individual who communicates information to another individual who turns out to be an undercover agent of the government has no legitimate expectation of privacy in the content of that information. It follows *a fortiori* that where an individual is communicating directly with a declared agent of the government, the individual does not have a legitimate expectation that his communication would not be monitored or acquired by the government.

Second, even if EINSTEIN 2.0 operations were to constitute a "search" under the Fourth Amendment, we believe that those operations would be consistent with the Amendment's "central requirement" that all searches be reasonable. *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (internal quotation marks omitted). As discussed in the prior opinion of this Office, the government has a lawful, work-related purpose for the use of EINSTEIN 2.0's intrusion-detection system that brings the EINSTEIN 2.0 program within the "special needs" exception to the Fourth Amendment's warrant and probable cause requirements. *See O'Connor*, 480 U.S. at 720 (plurality); *see also Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989) (warrant and probable cause provisions of the Fourth Amendment are inapplicable to a search that "serves special governmental needs, beyond the normal need for law enforcement"); *Griffin v. Wisconsin*, 483 U.S. 868, 872–73 (1987) (special needs doctrine applies in circumstances that make the "warrant and probable cause requirement impracticable"); *United States v. Heckenkamp*, 482 F.3d 1142, 1148 (9th Cir. 2007) (preventing misuse of and damage to university computer network is a lawful purpose). And, based upon the information available to us, and as discussed in the prior opinion of this Office, we believe that

the operation of the EINSTEIN 2.0 program falls under that exception and is reasonable under the totality of the circumstances. *See United States v. Knights*, 534 U.S. 112, 118–19 (2001) (reasonableness of a search under the Fourth Amendment is measured in light of the "totality of the circumstances," balancing "on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests" (internal quotation marks omitted)); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) ("what is reasonable depends on the context within which a search takes place"); *O'Connor*, 480 U.S. at 726 (plurality) (reasonable workplace search must be "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place") (internal quotation marks omitted). In light of that conclusion, we also think that a federal employee's agreement to the terms of the model log-on banner or the model computer-user agreement, or those of a banner of user agreement that are substantially equivalent to those models, constitutes valid, voluntary consent to the reasonable scope of EINSTEIN 2.0 operations. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (consent is "one of the specifically established exceptions to the requirements of both a warrant and probable cause"); *United States v. Sihler*, 562 F.2d 349 (5th Cir. 1977) (prison employee's consent to routine search of his lunch bag valid); *cf. McDonell v. Hunter*, 807 F.2d 1302, 1310 (8th Cir. 1987) ("If a search is unreasonable, a government employer cannot require that its employees consent to that search as a condition of employment.").

With respect to statutory issues, we have also concluded that, for the reasons set forth in our prior opinion—and so long as participating federal agencies consistently adopt, implement, and enforce model computer log-on banners or model computer-user agreements—the deployment of the EINSTEIN 2.0 program on federal information systems complies with the Wiretap Act, the Foreign Intelligence Surveillance Act, the Stored Communications Act, and the pen-register and trap-and-trace provisions of title 18 of the United States Code. We agree with the analysis of these issues set forth in our prior opinion, and will not repeat it here.

II.

Finally, we do not believe the EINSTEIN 2.0 program runs afoul of state wiretapping or communication privacy laws. *See*, *e.g.*, Fla. Stat. Ann. § 934.03 (West Supp. 2009); 18 Pa. Cons. Stat. Ann. § 5704(4) (West Supp. 2009); Md. Code Ann., Cts. & Jud. Proc. § 10-402(c)(3) (LexisNexis 2006); Cal. Penal Code 631(a) (West 1999). To the extent that such laws purport to apply to the conduct of federal agencies and agents conducting EINSTEIN 2.0 operations and impose requirements that exceed those imposed by the federal statutes discussed above, they would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and be unenforceable under the Supremacy Clause. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Geier v. American Honda Motor Co*., 529 U.S. 861, 873 (2000) (same); *Old Dominion Branch v. Austin*, 418 U.S. 264, 273 n.5 (1974) (Executive Order "may create rights protected against inconsistent state laws through the Supremacy Clause"); *Bansal v. Russ*, 513 F. Supp. 2d 264, 283 (E.D. Pa. 2007) (concluding that "federal officers participating in a federal investigation are not required to follow" state wiretapping law containing additional requirements not present in the federal Wiretap Act, because in such circumstances, "the state law would stand as an obstacle to federal law enforcement"); *Johnson v. Maryland*, 254 U.S. 51 (1920); *cf. United States v. Adams*, 694 F.2d 200, 201 (9th Cir. 1980) ("evidence obtained from a consensual wiretap conforming to 18 U.S.C. § 2511(2)(c) is admissible in federal court proceedings without regard to state law").

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Additional Questions Concerning Use of the EINSTEIN 2.0 Intrusion-Detection System

The deployment of an intrusion-detection system known as the EINSTEIN 2.0 program on the unclassified computer networks of the Executive Branch is consistent with the federal and state laws discussed in this opinion.

Under the best reading of the statute, the EINSTEIN 2.0 program would not violate section 705 of the Communications Act, because it would fall within section 705's exception permitting a person to "divulge" a communication through "authorized channels of transmission or reception," which allows either the sender or the recipient of an Internet communication to convey the required authorization by consenting to a communication's disclosure, including by clicking through an approved log-on banner or signing the computer-user agreement in order to gain access to a government-owned information system.

If section 2702(a)(3) of the Stored Communications Act applied to the EINSTEIN 2.0 program, the exception in section 2702(c)(1)(C) permitting disclosure based on "the lawful consent of the customer or subscriber" would also apply, because in this context the government, and no other party, should be understood as the "customer or subscriber" of the Internet service provider.

If a state law imposed requirements on the EINSTEIN 2.0 program exceeding those imposed by these federal statutes, it would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress and therefore be unenforceable under the Supremacy Clause of the Constitution.

August 14, 2009

MEMORANDUM OPINION FOR THE
ASSOCIATE DEPUTY ATTORNEY GENERAL

You have asked us to address whether the deployment of an intrusion-detection system known as the "EINSTEIN 2.0" program on the unclassified computer networks of the Executive Branch is consistent with (1) section 705(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 605(a) (2006); (2) the provision of the Stored Communications Act codified at 18 U.S.C. § 2702(a)(3) (2006); and (3) state laws concerning interception or electronic surveillance. For the reasons given below, we conclude that it is.[1]

[1] We solicited the views of the Criminal Division and National Security Division on each of these questions. Both components concur in our conclusions.

I.

You have asked whether by engaging in any of the activities that are part of the EINSTEIN 2.0 program,[2] the Department of Agriculture ("USDA"), the Department of Homeland Security ("DHS"), or the relevant Internet service provider ("ISP") would violate section 705(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 605(a) (2006). Although this is a novel question, and the statute is hardly a model of clarity, we conclude that under the best reading of the statute, the EINSTEIN 2.0 activities would not violate section 705.

In pertinent part, section 705 provides:

> Except as authorized by chapter 119, title 18 [i.e., the Wiretap Act], no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception,
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> (1) to any person other than the addressee, his agent, or attorney,
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> (2) to a person employed or authorized to forward such communication to its destination,
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> (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed,
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> (4) to the master of a ship under whom he is serving,
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> (5) in response to a subpena issued by a court of competent jurisdiction, or
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> (6) on demand of other lawful authority.

47 U.S.C. § 605(a).[3] The Communications Act defines "person" in 47 U.S.C. § 153(32) (2006) to "include[] an individual, partnership, associa-

[2] These activities are described in detail in a memorandum of this Office. *See Use of the EINSTEIN 2.0 Intrusion-Detection System to Protect Unclassified Computer Networks in the Executive Branch*, 33 Op. O.L.C. 63 (2009) ("EINSTEIN 2.0 Opinion").

[3] Section 705 contains additional prohibitions, such as on the "intercept[ion] [of] any radio communication and divulg[ing] or publish[ing]" of its contents, and on the use for personal benefit of radio communications intercepted or received without authorization.

tion, joint-stock company, trust, or corporation." "[C]ommunication by wire" is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." *Id.* § 153(52).[4]

Although the scope of section 705's prohibition is not entirely clear on its face, case law supports reading the provision as a general bar on a "person receiving, assisting in receiving, transmitting, or assisting in transmitting" wire or radio communications from "divulg[ing]" or "publish[ing]" such communications to persons other than the addressee, his agent or attorney, except "through authorized channels of transmission or reception," as "authorized by" the Wiretap Act, or in the circumstances enumerated in clauses (2) through (6). In *United States v. Finn*, 502 F.2d 938, 942 (7th Cir. 1974), for instance, the court identified the "absurdities" that would result from a literal reading of the text, including that "[c]lauses (2) through (6) would be rendered meaningless, for all of those categories are completely covered by the more general clause (1)." Similarly, reading clause (6) as a prohibition "would forbid divulgence of a communication 'on demand of other lawful authority,'" thereby "render[ing] all such demands unlawful and by its own terms [] eliminat[ing] the very category to which it refers." Instead, the court concluded, clauses (2) through (6) should be read "as exceptions to the general prohibition of clause (1)," a construction the court viewed as "the only way to give effect to the Congressional intent." *Id. Finn* is consistent with a line of precedents interpreting the pre-Wiretap Act version of this provision,

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Except for the first sentence of section 705 quoted above, these additional provisions extend only to "radio" communications, which are not at issue here. *See* 47 U.S.C. § 605(a); *id.* § 153(33) (defining "radio communication" to "mean[] the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds").

[4] This definition of "wire communication" is substantially similar to the definition of "electronic communication" under the Wiretap Act, 18 U.S.C. § 2510(12) (2006), which includes "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce." *Cf. id.* § 2510(1) (defining "wire communication" under the Wiretap Act to mean an "aural transfer").

which contained substantially similar language. For instance, in *Nardone v. United States*, 302 U.S. 379, 380–81 (1937), the Supreme Court characterized the version of section 705 then in effect as providing that "no person who, as an employee, has to do with the sending or receiving of any interstate communication by wire shall divulge or publish it or its substance to anyone other than the addressee or his authorized representative or to authorized fellow employees, save in response to a subpoena issued by a court of competent jurisdiction or on demand of other lawful authority."[5] *See also Hanna v. United States*, 404 F.2d 405, 408–09 (5th Cir. 1968) ("[I]nformation thus lawfully obtained may be divulged 'in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority.'" (quoting section 705)); *Bubis v. United States*, 384 F.2d 643, 646–47 (9th Cir. 1967) ("[N]o . . . person shall divulge or publish the existence, contents, substance, purport, or effect of any such communication to anyone other than the addressee or his authorized representative, or to authorized fellow employees, or in response to a subpoena issued by a court of competent jurisdiction, or on

[5] The version of the statute at issue in *Nardone* provided that:

> No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part therof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto . . . .

Communications Act of 1934, Pub. L. No. 73-416, § 605, 48 Stat. 1064, 1103–04.

demand of other lawful authority."); *Brandon v. United States*, 382 F.2d 607, 611 (10th Cir. 1967) (similar).

Although our research has not uncovered any case law applying section 705 in the context of cybersecurity activities, we conclude that the EINSTEIN 2.0 program falls within section 705's authorization to "divulge" a communication through an "authorized channel[] of transmission or reception." We assume for purposes of this analysis—but do not decide—that federal-systems Internet traffic would constitute "communication[s] by wire" under section 705, that the EINSTEIN 2.0 program would involve "divulg[ence] or publi[cation]" of the contents of such communications, that DHS or USDA would be a "person receiving, assisting in receiving, transmitting, or assisting in transmitting" such communications, and that the program would not be "authorized by" the Wiretap Act.[6]

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[6] A number of those assumptions may not be necessary, and thus there may be additional bases for concluding that the EINSTEIN 2.0 program would not violate section 705. An argument might be made, for instance, that program activities are "authorized by" the Wiretap Act for purposes of section 705 because they are not affirmatively prohibited by that Act. *Compare United States v. Freeman*, 524 F.2d 337, 340 & n.5 (7th Cir. 1976) (phrase "[e]xcept as authorized by [the Wiretap Act]" in section 705 "permits" telephone companies to protect their rights or property pursuant to the relevant exception in 18 U.S.C. § 2511(2)(a)(i)), *with* EINSTEIN 2.0 Opinion, 33 Op. O.L.C. at 103 (concluding that "the better reading" of a related exception in FISA for conduct "authorized by" the Wiretap Act was to refer to affirmative "orders" obtained under that Act, rather than activities that "merely are not prohibited by those statutes"). Although we need not, and do not, resolve this question here, we note that such a reading of section 705 would not only incorporate the Wiretap Act's consent exception, *see* 18 U.S.C. § 2511(2)(a)(ii) (2006), but would also appear to import wholesale all of the statutory exceptions found in that Act, *cf., e.g.*, *id.* § 2511(2)(a)(i) ("rights or property"), essentially collapsing section 705 and the Wiretap Act into a single standard, notwithstanding that section 705(a) retained, by its plain terms, an independent limitation regarding wire communications.

It might separately be contended that any disclosure of communications by the service provider to DHS would occur on "demand of other lawful authority," although here DHS has entered into an agreement with USDA and thus arguably is not "demand[ing]" disclosure of communications. *Cf. Brown v. Continental Tel. Co.*, 670 F.2d 1364, 1365–66 (4th Cir. 1982) (request for records and telephone bills served on telephone company by Attorney for the Commonwealth was a "demand of . . . lawful authority" under section 705 because the statute's plain text contemplated the release of protected information "to appropriate authorities in response to a demand less compelling than a subpoena"). And with respect to any conduct of USDA or DHS that is potentially within the scope of section 705, there is some question whether the first sentence of section 705 applies to

We begin with the text of section 705, which expressly permits a "divulge[nce] or publi[cation]" of a wire communication made "through authorized channels of transmission or reception." We believe the plain language of section 705 is fairly interpreted to include the EINSTEIN scanning sensors as a "channel[] of transmission or reception" of Internet communications, particularly where a party to the communication has, as here, expressly authorized such scanning. In reaching this conclusion, we have considered the potential ambiguities concerning both what constitutes a "channel of transmission or reception" and what constitutes a channel that has been "authorized" for purposes of section 705.

As to the first issue, we are aware of a narrower construction of the phrase "channel[] of transmission or reception" that would be limited to the channel through which the communication actually passes from recipient to sender. Under such a reading, section 705 would prohibit, *inter alia*, forwarding of a mirror copy of federal systems Internet traffic to EINSTEIN 2.0 sensors for processing, *see* EINSTEIN 2.0 Opinion, 33 Op. O.L.C. at 67–68, or DHS's disclosure to another federal agency if that disclosure did not involve transmitting the communication to its recipient, unless one of the other express exceptions in the statute applied. But the text of the section does not by terms compel that narrower reading, given the placement of the relevant phrase. That phrase is located where it could be read to qualify the prohibition against divulgence to third parties, and thus to indicate that the channels being referenced are those that might be used to reach third parties. Indeed, the phrase itself, in its second appearance in the section, is not limited to channels of transmission by "wire,"

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government employees. *Compare United States v. Hall*, 488 F.2d 193, 195 (9th Cir. 1973) (superseded on other grounds) ("The legislative history [] explicitly shows that Congress intended to exclude law enforcement officers from the purview of the new [section 705]"); S. Rep. No. 90-1097, at 108 (1968) ("[The first sentence of section 705] is designed to regulate the conduct of communications personnel."); *and Int'l Cablevision, Inc. v. Sykes*, 75 F.3d 123, 131 n.4 (2d Cir. 1996) (similar), *with Nardone*, 302 U.S. at 381 ("Taken at face value the phrase 'no person' [in the pre-Wiretap Act version of section 705] comprehends federal agents[.]"); *and United States v. Sugden*, 226 F.2d 281 (9th Cir. 1955) (interpreting pre-Wiretap Act version of section 705 to permit FCC agents to "listen [to radio communications] for the purpose of enforcing the [Communications] [A]ct" but to require exclusion of evidence, in a criminal prosecution unrelated to violations of that Act, obtained by FCC agents who intercepted defendant's short range radio transmissions). We need not, and do not, resolve these issues in light of our conclusion that the exercise falls within section 705's "authorized channels of transmission" provision.

suggesting a potentially broad conception of the means by which communications may be passed along. Furthermore, the text is not clear that the channel in question must be the one through which the original communication travels, as the text specifically refers to the divulgence, not of the communication itself, but of its substance or meaning. Insofar as the phrase "channels of transmission or reception" qualifies the divulgence, as its placement indicates, it is clearly intended to refer to channels other than those through which the communication flows.

As to whether the channel would be "authorized" for purposes of section 705, the dictionary defines "authorized" as "having authority[;] . . . recognized as having authority[;] . . . approved," and defines "authority" as, inter alia, "justifying grounds: basis, warrant." *Webster's Third New International Dictionary* 146 (3d ed. 1993). The statute does not specify the source or nature of the "authoriz[ation]" required. As a matter of ordinary meaning, the term "authorized" is certainly broad enough to encompass either the sender or receiver of a communication expressly authorizing—by means of indicating consent to—divulgence or publication. This reading is also supported by the terms of section 705's second sentence, which states that "[n]o person not being *authorized by the sender* shall intercept any radio communication and divulge or publish" that communication. 47 U.S.C. § 605(a) (emphasis added). That Congress chose the unqualified term "authorized" in the first sentence, while expressly limiting which party could authorize disclosure in the second, suggests an intent that the term be given a broader reading in the former instance.[7] We therefore would interpret the phrase "authorized channels of transmission or reception" to permit either the sender or the recipient of an Internet communication to convey the required authorization by consenting to a communication's disclosure in the context of the EINSTEIN 2.0 system.

Although we are not aware of any judicial precedent directly on point, we draw support for this reading of the statute from case law analyzing

[7] Our reading of "authorized" arguably also draws support from, and is entirely consistent with, the use of the word "authorizing" in the text of section 705(b), which contemplates a "marketing system" for satellite communications in which "agents have been lawfully designated for the purpose of authorizing private viewing by individuals" and "individuals receiving [satellite] programming ha[ve] obtained authorization for private viewing under that [marketing] system." 47 U.S.C. § 605(b).

consent by either the sender or receiver of a communication in determining whether interception or divulgence of a telephone call violated certain related provisions in section 705. In *Rathbun v. United States*, 355 U.S. 107 (1957), for instance, the Supreme Court held that the second clause of the version of section 705 then in effect (which provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person," *see supra* note 5) was not violated where the *recipient* of a phone call asked the police to listen to the call on an extension telephone in his home. The Court concluded, notwithstanding the statute's specific reference to the "authoriz[ation] [of] the sender," that "there ha[d] been no 'interception' as Congress intended that the word be used." 355 U.S. at 109. The Court looked to another related provision of section 705, which then prohibited any person from "receiv[ing] or assist[ing] in receiving any interstate or foreign communication by wire or radio and us[ing] the same or any information therein contained for his own benefit." That provision, the Court explained, gave "[t]he clear inference . . . that one entitled to receive the communication may use it for his own benefit or have another use it for him." *Id.* at 110. In dictum the Court further observed that even the defendant in that case conceded that under section 705 "either party may record the [telephone] conversation and publish it." *Id.*

Similarly, in *Weiss v. United States*, 308 U.S. 321 (1939), the Court held evidence to be inadmissible in a criminal trial where federal agents had violated the same provision of section 705 as in *Rathbun* (the prohibition against any person "not being authorized by the sender" intercepting and divulging communications) by tapping the defendant's intrastate phone calls. In rejecting the government's argument that the defendant's trial testimony about the intercepted conversations constituted consent, the Court relied on the fact that "divulgence was not consented to *by either of the parties* to any of the telephone conversations." *Id*. at 330 (emphasis added). More recently, in *United States v. Hodge*, 539 F.2d 898 (6th Cir. 1976), the court rejected a defendant's claim that agents of the Drug Enforcement Agency had violated section 705 by recording telephone conversations between the defendant and a government informant. (The informant in the case had consented to the DEA monitoring.) The court quoted section 705 in full before tersely dismissing the defendant's claim, explaining that "[i]t is well settled that there is no violation of the

[Communications] Act if the interception was, as here, authorized by a party to the conversation." *Id*. at 905.[8]

Although these cases do not interpret the phrase in section 705 upon which we rely here, they provide at least indirect support for reading the word "authorized," which appears without qualification as to the scope of the persons encompassed by it, to permit the recipient of a communication (either a federal agency, in the case of communications directly to that agency, or individual federal employees, in the case of communications to those employees) to consent to and thereby authorize the communication's disclosure in the context of the EINSTEIN 2.0 program.[9] At a minimum, our reading of the unqualified word "authorized" is consistent with what appears to have been the prior understanding that the statute was not, absent an express limitation regarding the scope of any consent exception, intended to require two-party consent for any such exception to apply.

As we explain below, we believe that under our reading of section 705, the manifestations of consent by USDA in conjunction with those of

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[8] A modern line of cases brought by plaintiff corporations to prevent the unauthorized reception or transmission of satellite television signals has focused on the consent of the sending party in determining whether a "divulg[ence]" was "authorized." *See, e.g.*, *National Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 916–17 (6th Cir. 2001) (holding that private cable company had violated section 705 by selling the broadcast transmission of a boxing match to a commercial customer, when the company was only authorized by the program's originator to distribute it to residential customers). We do not read these cases as negating the relevance of the precedents discussed above, which contemplate consent by either party to communications such as telephone calls. For one thing, the modern case law does not purport to overrule or limit the precedents discussed above. More significantly, in this line of cases there is no contention that the recipient of a licensed commercial broadcast—who often acts pursuant to a contractual agreement with the originator—is "authorized" to distribute the material beyond the terms of that agreement.

[9] In light of this case law, we do not believe the existence of an express consent exception in the Wiretap Act requires a contrary interpretation of "authorized channel[] of transmission or reception" in section 705. When Congress reenacted the language of section 705 in the 1968 Wiretap Act, it did so against the settled background of case law interpreting the pre-Wiretap Act statute to allow consensual interception. By reenacting statutory text that was in large part identical to the preexisting language, and by indicating no disapproval of settled case law, Congress can be understood to have left in place the established meaning of the text it employed rather than to have impliedly precluded recognition of a consent exception.

individual federal employees using government information systems are sufficient to avoid a violation of that provision by the ISP, DHS, or USDA, in conjunction with the authorized operation of the EINSTEIN 2.0 system. First, with respect to potential violations by the service provider, we believe any "divulge[nce]" of communications would occur through an "authorized channel[] of transmission or reception." As to any disclosure by the provider of communications between third parties and USDA, the agency has "authorized" the service provider to disclose such communications to DHS by virtue of the Memorandum of Agreement between USDA and DHS, which memorializes USDA's consent to the scanning of its Internet traffic for cybersecurity purposes. As to disclosure by the service provider of communications addressed to or sent by individual employees, we have previously concluded that a federal employee's valid, voluntary consent to the scanning of Internet traffic is apparent from his clicking through an approved log-on banner or signing the computer-user agreement in order to gain access to a government-owned information system, *see* EINSTEIN 2.0 Opinion, 33 Op. O.L.C. at 98, and we believe this consent would foreclose any claim that the service provider would violate section 705 by transmitting communications through the intrusion-detection sensors operated by DHS because it would authorize any resulting divulgence.

We similarly conclude that the same consents—by USDA and USDA employees—"authorize" DHS to "divulge" the communications to any other authorized agency without running afoul of the prohibition in section 705. As to communications involving the agency itself, USDA has expressly consented to any such disclosures by DHS through the Memorandum of Agreement and other documents detailing the operation of the EINSTEIN 2.0 program. As to communications involving individual employees, the model log-on banner and computer-user agreement discussed in our EINSTEIN 2.0 Opinion state expressly that "[a]ny communications or data transiting or stored on this information system may be disclosed or used for any lawful government purpose." 33 Op. O.L.C. at 70. The scope of the employee's consent to disclosure for any "lawful government purpose" is informed by our separate conclusion in the context of 18 U.S.C. § 2511 that DHS is "authorized by law" to conduct an exercise involving EINSTEIN technology, as described in the implementation plan governing that exercise, by virtue of several affirmative statutory authorities, particularly a recent appropriations statute providing

funding for the precise exercise in question, as well as DHS's organic statute and the Federal Information Security Management Act.

Finally, we believe the log-on banner and computer-user agreements discussed above would also be sufficient to foreclose any claim that USDA would violate section 705 by divulging to DHS, through its participation in EINSTEIN 2.0, the contents of communications addressed to its employees.

This reading of section 705 is consistent with the conclusion in our EINSTEIN 2.0 Opinion that the EINSTEIN 2.0 program would not violate parallel non-disclosure provisions contained in the Wiretap Act. Section 2511(3) of title 18, U.S. Code, provides that "a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication . . . while in transmission on that service to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient," except "with the lawful consent of the originator or any addressee or intended recipient of such communication," or "to a person employed or authorized, or whose facilities are used, to forward such communication to its destination." Our EINSTEIN 2.0 Opinion concluded that EINSTEIN 2.0 would not unlawfully "divulge" the contents of Internet communications within the meaning of section 2511(3), both because the participating agency and its employees would have manifested consent to the scanning, and "because the federal government is 'authorized,' and its 'facilities are used, to forward such communications to [their] destination.'" 33 Op. O.L.C. at 96. With respect to individual federal employees, we further noted that Internet communications cannot reach employees at work without routing through the government's computer systems. *Id*. Thus, even if section 705 is not read by terms to incorporate this exception, we find it significant that the exception we conclude section 705 adopts is hardly a novel one in this area. We are also not aware of any legislative history that indicates a congressional intention to preclude recognition of such an exception here.

II.

We believe the EINSTEIN 2.0 system would also comply with the provision of the Stored Communications Act ("SCA"), codified at 18 U.S.C. § 2702(a)(3), that provides that "a provider of remote computing service

or electronic communication service to the public shall not knowingly divulge a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by [section 2702(a)(1) or (a)(2)]) to any governmental entity." Insofar as the EINSTEIN 2.0 system examines, in real time, Internet traffic-flow data that is not retained by the ISP, there may be grounds to assert that this provision is simply inapplicable, because the data in question is not a "record or other information" within the possession of the ISP. Even assuming, however, that section 2702(a)(3) by its terms may apply to EINSTEIN 2.0, we believe that the statutory exception permitting disclosure based on "the lawful consent of the customer or subscriber" would apply. 18 U.S.C. § 2702(c)(1)(C) (2006). That is because we believe that in this context the government, and no other party, should be understood as the "customer or subscriber" of the ISP for purposes of this exception. On this view, even assuming that non-content information obtained from or with the assistance of the ISP regarding Internet traffic that passed onto or off of the government's system would qualify as "record[s] or other information" under the SCA, these "record[s] or other information" would "pertain[] to" the government as a "subscriber to or customer of [the ISP's] service," and the government could therefore provide "lawful consent" to divulge this information. 18 U.S.C. § 2702(c)(2).

This construction of the statute fits naturally with the plain text: insofar as a government agency has contracted with an ISP for Internet service, the government is indisputably a "customer" (if not also a subscriber) of the ISP. In accordance with this view, the Ninth Circuit has characterized a municipality as a "subscriber" of a text-messaging service where the municipality contracted with the service to provide two-way text pagers to police officers and other municipal employees. *See Quon v. Arch Wireless Operating Co.*, 529 F.3d 892, 895, 903 (9th Cir. 2008).

Insofar as end users such as individual employees hold a protected privacy interest in non-content information, the employer's consent to disclosure might violate some legal obligation of the employer, but it would not create liability for the ISP under the SCA, since the ISP had obtained the necessary consent of its "customer or subscriber." In any event, in our case, the individual employees have also consented to the disclosure, so disclosure should not violate any SCA-protected interest of theirs (even if they are also somehow "customers or subscribers" of the ISP). Nor

does there appear to be any Fourth Amendment issue with the disclosure. Not only have the employees here consented to the disclosure, but courts have generally concluded that there is no reasonable expectation of privacy in non-content information provided to an ISP. *See, e.g.*, *United States v. Perrine*, 518 F.3d 1196, 1204–05 (10th Cir. 2008) (collecting cases); *Freedman v. America Online, Inc.*, 412 F. Supp. 2d 174, 181–82 (D. Conn. 2005).

We recognize the concern that non-content information pertaining to one customer or subscriber (such as the government in our case) could include information pertaining to other customers or subscribers of the ISP insofar as those other parties have sent or received traffic from the first customers/subscriber's computers. But we do not believe the SCA should be read to require separate consent from both customers/subscribers in that circumstance. Such records or information "pertain" to the customer/subscriber providing consent, even if they reveal information about other customers/subscribers too, so under the plain text of the statute one-party consent seems sufficient for disclosure. Indeed, any other interpretation would yield the odd result that a customer's ability to consent to disclosure of its information would depend on whether other parties it telephoned or emailed happened to be customers of the same provider. Also, unlike content information, which relates to discrete messages each with a particular sender and particular recipients, the "record or other information" covered by section 2702(a)(3) often involves an aggregation of data—the total record of a customer/subscriber's Internet traffic or phone calls, for example—that is unique to the individual customer/subscriber and for which (as a result) no other party could provide meaningful consent. Information regarding other customers/subscribers who have not provided consent could of course be disclosed under this analysis only to the extent that such information is contained in a "record or other information" pertaining to the customer or subscriber who has provided lawful consent (here, the government).

Furthermore, the SCA's consent exception for content information expressly allows one-party consent—either the "originator" or the "addressee" or "intended recipient" of the communication may authorize disclosure of its contents, 18 U.S.C. § 2702(b)(3)—and it would be anomalous if the provisions on non-content information, which are generally less restrictive, imposed a more stringent consent requirement than those for content information. *Cf. In re American Airlines, Inc. Privacy Litig.*, 370

F. Supp. 2d 552, 561 (N.D. Tex. 2005) (construing statute to allow any intended recipient of a communication to authorize disclosure of content information). Congress appears to have adopted the current SCA provisions on non-content information in part to bring those provisions more in line with provisions on content information. Before 2001, the SCA provided only that a provider could disclose "a record or other information pertaining to a subscriber to or customer of [the provider's] service (not including [content information]) to any person other than a governmental entity" and that the provider generally could disclose such records or information to a governmental entity "only when the governmental entity . . . ha[d] the consent of the subscriber or customer to such disclosure" or satisfied one of several other enumerated exceptions. *See* 18 U.S.C. § 2703(c) (2000); Pub. L. No. 99-508, § 201, 100 Stat. 1848, 1860 (1986). Congress amended the statute to provide that, even without an affirmative government request, the provider may disclose records and information covered by section 2702(a)(3) "with the lawful consent of the customer or subscriber" or in certain other specified circumstances. *See* 18 U.S.C. § 2702(c)(2) (Supp. I 2001); Pub. L. No. 107-56, § 212(a)(1)(E), 115 Stat. 272, 284 (2001). As explained in the legislative history, Congress intended this change "to allow communications providers to disclose non-content information (such as the subscriber's login records)." H.R. Rep. No. 107-236, pt. 1, at 58 (2001). Under pre-2001 law, the House Judiciary Committee explained, "the communications provider [was] expressly permitted to disclose content information but not expressly permitted to provide non-content information. This change would cure this problem and would permit the disclosure of the less-protected information, parallel to the disclosure of the more protected information." *Id.*; *see also* 147 Cong. Rec. 19,001, 19,009 (statement of Sen. Leahy) (discussing 2001 amendments and observing that "the right to disclose the content of communications necessarily implies the less intrusive ability to disclose non-content records"). In addition, although we are aware of little relevant legislative history bearing directly on the meaning of "consent" in section 2702(a)(3), the legislative history of the SCA as originally enacted suggests that Congress understood background legal principles to allow one-party consent, which arguably supports construing consent provisions of the statute in accordance with that understanding. *See* S. Rep. No. 99-541, at 3 (1986) (observing that "because [information on remote computer systems] is subject to control by a third party computer operator, the

information may be subject to no constitutional privacy protection" (citing *United States v. Miller*, 425 U.S. 435 (1976))).

III.

Finally, we do not believe the EINSTEIN 2.0 program impermissibly infringes state wiretapping and communication privacy laws. *See, e.g.*, Fla. Stat. Ann. § 934.03(3)(d) (West 2009); 18 Pa. Cons. Stat. Ann. § 5704(4) (West Supp. 2009); Md. Code Ann., Cts. & Jud. Proc. § 10-402(c)(3) (Lexis Nexis 2009); Cal. Penal Code § 631(a) (West 1999). To the extent that such laws purported to apply to the conduct of federal agencies and agents conducting authorized EINSTEIN 2.0 operations and imposed requirements that exceeded those imposed by the federal statutes discussed above and in our EINSTEIN 2.0 Opinion, they would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and be unenforceable under the Supremacy Clause. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000); *Old Dominion Branch v. Austin*, 418 U.S. 264 (1974); *Bansal v. Russ*, 513 F. Supp. 2d 264, 283 (E.D. Pa. 2007) (concluding that "federal officers participating in a federal investigation are not required to follow" state wiretapping law containing additional requirements not present in the federal Wiretap Act, because in such circumstances, "the state law would stand as an obstacle to federal law enforcement"); *Johnson v. Maryland*, 254 U.S. 51 (1920); *cf. United States v. Adams*, 694 F.2d 200, 201 (9th Cir. 1982) ("evidence obtained from a consensual wiretap conforming to 18 U.S.C. § 2511(2)(c) is admissible in federal court proceedings without regard to state law").

DAVID J. BARRON
Acting Assistant Attorney General
Office of Legal Counsel

Prioritizing Programs to Exempt Small Businesses from Competition in Federal Contracts

The Small Business Administration's regulations governing the interplay among the Historically Underutilized Business Zone Program, the 8(a) Business Development Program, and the Service-Disabled Veteran-Owned Small Business Concern Program constitute a permissible construction of the Small Business Act.

The Small Business Act does not compel the prioritization of awards under the Historically Underutilized Business Zone Program over those under the 8(a) Business Development Program and the Service-Disabled Veteran-Owned Small Business Concern Program. The Small Business Administration's regulations permissibly authorize contracting officers to exercise their discretion to choose among these three programs in setting aside contracts to be awarded to qualified small business concerns.

The Office of Legal Counsel's conclusion that the Small Business Administration's regulations are reasonable is binding on all Executive Branch agencies.

August 21, 2009

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
SMALL BUSINESS ADMINISTRATION

The Small Business Act ("Act"), as amended, exempts certain classes of small businesses from the general requirement that federal contracts to procure goods and services be awarded on the basis of full and open competition. *See* Act of July 30, 1953, Pub. L. No. 83-163, 67 Stat. 230 (codified as amended at 15 U.S.C.A. §§ 631–657p (West 2009)).[1] In particular, the Act establishes various programs, administered by the Small Business Administration ("SBA"), to assist qualifying small businesses in obtaining federal contracts by exempting them, in certain circumstances, from the degree of competition that would otherwise be required. At issue here is the permissibility of SBA's regulations governing the interplay among three such programs: the Historically Underutilized Business Zone ("HUBZone") Program, the 8(a) Business Develop-

[1] "Full and open competition" in the context of federal procurement means "that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement." 41 U.S.C. § 403(6) (2006); *see also* 41 U.S.C.A. § 253 (West Supp. 2009) (requiring full and open competition in the conduct of procurements for property or services, except under certain circumstances as provided).

ment Program, and the Service-Disabled Veteran-Owned ("SDVO") Small Business Concern Program.

Under SBA's regulations, federal contracting officers are given substantial discretion to consider and designate contracts for either the HUBZone, 8(a), or SDVO Program without having to prioritize one program above the others. This aspect of the regulations—which, according to SBA, effectively establishes "parity" among the three programs—has been called into question by a pair of recent Government Accountability Office ("GAO") bid protest decisions.[2] In these decisions, GAO rejected SBA's approach and ruled instead that the Act mandates that priority be given to the HUBZone Program when certain statutory conditions are met. As a result, according to GAO, contracting officers must set aside federal contracts to qualified HUBZone small businesses, when two or more such businesses can submit fair market bids, before they can set aside such contracts for award to small businesses under the 8(a) or SDVO Programs.

You have asked for our views on whether GAO was correct to conclude that the Act compels such prioritization of the HUBZone Program. *See* Letter for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Sara D. Lipscomb, General Counsel, Small Business Administration, at 2 (July 1, 2009) ("Lipscomb Letter"). You have further asked whether, if the Act can be read not to require such prioritization, GAO has authority to invalidate SBA's regulations. *See id.* Having carefully reviewed the relevant legal materials, including SBA's own views, we conclude that the Act does not compel SBA to prioritize the HUBZone Program in the manner GAO determined to be required. In our view, SBA's regulations permissibly authorize contracting officers to exercise their discretion to choose among the three programs in setting aside contracts to be awarded to qualified small business concerns.[3] Further, in

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[2] *See Mission Critical Solutions*, B-401057, 2009 WL 1231855 (Comp. Gen. May 4) ("*MCS*"), *recons. denied*, B-4010572 (Comp. Gen. July 6, 2009); *International Program Group, Inc.*, B-400278, B-400308, 2008 WL 4351134 (Comp. Gen. Sept. 19) ("*IPG*"). *recons. denied*, B-400278.2 *et al.* (Comp. Gen. Oct. 24, 2008). The Comptroller General's authority to review bid protests concerning alleged violations of a procurement statute or regulation is set forth in 31 U.S.C §§ 3551–3557 (2006).

[3] Our conclusion regarding these SBA regulations addresses only whether they constitute a permissible interpretation of the Act.

accord with this Office's longstanding precedent, GAO's decisions are not binding on the Executive Branch.

I.

The underlying legal issue ultimately turns on a relatively straightforward question of statutory interpretation, but it arises out of a complicated statutory and regulatory framework. Accordingly, we first review the key statutory provisions that establish these three programs.

A.

The term "HUBZone" refers to economically disadvantaged or distressed areas located within one or more qualified census tracts, nonmetropolitan counties, Indian reservations, or base closure areas. *See* 15 U.S.C. § 632(p)(1)–(2) (2006). Established by the Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, § 602(b)(1)(B), 111 Stat. 2592, 2627 (codified as amended at 15 U.S.C. § 657a(a) (2006)), the HUBZone Program provides federal contract assistance to qualified small business concerns operating within a HUBZone through contracts awarded on a sole source basis, contracts awarded on the basis of competition restricted to HUBZone concerns, or a ten-percent bid adjustment for contracts awarded on the basis of full and open competition. *Id.* § 657a(a)–(b).

The "restricted competition" provision at issue in the GAO decisions states that:

> Notwithstanding any other provision of law . . . a contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if the contracting officer has a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that the award can be made at a fair market price.

Id. § 657a(b)(2)(B). The conditions set forth in this provision—"a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers" and "that the award can be made at a fair market price"—are commonly referred to as "the rule of two." When the rule of two is met, the statute provides that the award must be made on the

basis of competition restricted to qualified HUBZone small businesses. This provision closely resembles in language and structure the restricted competition provision found in the earlier-enacted 8(a) Program. *See id.* § 637(a)(1)(D) (2006). The HUBZone Program also provides, in the alternative, that "a contracting officer may award sole source contracts under this section to any qualified HUBZone small business concern" upon a determination, *inter alia*, that there is no "reasonable expectation that two or more qualified HUBZone small business concerns will submit offers for the contracting opportunity." *Id.* § 657a(b)(2)(A).

B.

The 8(a) Program, established by amendment to the Act on October 24, 1978, Pub. L. No. 95-507, § 202, 92 Stat. 1757, 1761 (codified as amended at 15 U.S.C. § 637), "promote[s] the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals," *id*. § 631(f)(2)(A) (2006), defined as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," *id.* § 637(a)(5), and "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637(a)(6)(A).

The 8(a) Program promotes socially and economically disadvantaged small business development by, among other things, reserving certain contracts with federal agencies for administration and award by SBA to eligible 8(a) Program participants. The 8(a) authorizing statute provides, *inter alia*, that "[i]t shall be the duty of [SBA] and it is hereby empowered, whenever it determines such action is necessary or appropriate," to enter into procurement contracts with the federal government or any department, agency, or officer thereof, *id*. § 637(a)(1)(A), and then "to arrange for the performance of such procurement contracts" by awarding them to eligible 8(a) participants when certain conditions are met, *id.* § 637(a)(1)(B)–(C).[4] The statute explicitly states that contracting officers

[4] SBA has promulgated regulations that permit it to delegate its 8(a) contract execution and review authority to procuring departments and agencies. *See* 13 C.F.R. §§ 124.501(a), 124.503, 124.512 (2009).

shall retain "discretion to let such procurement contract[s]" to SBA for the 8(a) Program. *Id.* § 637(a)(1)(A).

The statute further provides that SBA's authority to award an 8(a) contract is conditioned on the requirement that the award be made as a result of an offer submitted in response to a published solicitation about "a competition conducted pursuant to subparagraph (D)." *Id.* § 637(a)(1)(C)(i). Subparagraph (D)(i), in turn, provides:

> A contract opportunity offered for award pursuant to this subsection shall be awarded on the basis of competition restricted to eligible Program Participants if . . . there is a reasonable expectation that at least two eligible Program Participants will submit offers and that award can be made at a fair market price.

Id. § 637(a)(1)(D)(i)(I).

C.

The SDVO Program was established by the Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 308, 117 Stat. 2651, 2662 (codified at 15 U.S.C. § 657f (2006)), and provides for federal contract assistance to qualified service-disabled veteran-owned small businesses through sole source and restricted competition awards. *Id.* § 657f.

The conditions set forth in the SDVO statute for the award of sole source contracts are the same as in the HUBZone statute. *Compare id.* § 657f(a) *with id.* § 657a(b)(2)(A). However, unlike the HUBZone and 8(a) provisions, the SDVO statute does not mandate the award of contracts through restricted competition even "if the contracting officer has a reasonable expectation that not less than 2 small business concerns owned and controlled by service-disabled veterans will submit offers and that the award can be made at a fair market price." *Id.* § 657f(b). Instead of requiring that a contract opportunity "shall be awarded" through restricted competition in such circumstances, the SDVO statute provides that the award "may" be made through such competition if the rule of two is met. *Compare id.* ("a contracting officer may award") *with id.* § 637(a)(1)(D)(i) ("a contract opportunity . . . shall be awarded") *and id.* § 657a(b)(2)(B) ("a contract opportunity shall be awarded").

D.

It is against this legislative background that SBA issued its regulations to guide contracting officers in making the determination whether and when to set aside a contract for the HUBZone, 8(a), or SDVO Program. Congress delegated broad authority to SBA to carry out the policies and purposes of the Act. *See generally id*. §§ 633(a), 634(b), 644(g) (2006). The relevant parts of the HUBZone regulations that you have asked us to review in light of the GAO decisions direct contracting officers first to determine whether the contract is a follow on to one already being performed by an 8(a) participant, has already been accepted for the 8(a) Program by SBA, or would be performed by a federal prison workshop or participating non-profit agency for the blind or severely disabled.[5] *See* 13 C.F.R. §§ 126.605 and 126.607 (2009). If the contract is still available, the regulations state that a contracting officer shall then choose among the HUBZone, 8(a), or SDVO Programs and "set aside the requirement for HUBZone, 8(a) or SDVO [] contracting before setting aside the requirement as a small business set-aside." *Id.* § 126.607.

The SDVO regulations implicated by the GAO decisions are operatively the same as the HUBZone regulations. *Compare id*. §§ 126.605 & 126.607 *with id*. §§ 125.18 & 125.19. A parallel provision also exists in the 8(a) regulations.[6] *See id*. § 124.503(j).

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[5] *See* 18 U.S.C. § 4124 (2006) (requiring purchase of prison-made products by all federal departments and agencies); 41 U.S.C. § 48 (2006) (requiring governmental purchases from qualified nonprofit agencies for the blind or severely disabled); *see also* 15 U.S.C. § 657a(b)(4) (prioritizing procurement awards to prison, blind, and severely-disabled entities over HUBZone awards); *id.* § 657f(c) (prioritizing procurement awards to prison, blind, and severely-disabled entities over SDVO awards).

[6] The SDVO and 8(a) regulations provide that the contracting officer "*should consider* setting aside the requirement" for 8(a), HUBZone, or SDVO participation "*before considering*" setting it aside for other small business programs. 13 C.F.R. §§ 125.19(b), 124.503(j) (2009) (emphasis added). Thus, although the SDVO and 8(a) regulations contain discretionary language not found in the corresponding HUBZone regulation, they nevertheless place the three programs on equal footing and prioritize their consideration before small businesses generally. In this way, they are consistent with the HUBZone regulations and provide uniform guidance to contracting officers regarding the interplay among the programs at issue. *See* 70 Fed. Reg. 51243, 51245 (Aug. 30, 2005) ("To make the HUBZone regulations consistent with SBA's recently published SDV regulations, SBA is . . . revising § 126.607 to incorporate contracting preferences for HUBZone, 8(a)

The SBA's regulations do not expressly provide for parity of treatment among the 8(a), HUBZone, or SDVO Programs. *See id.* §§ 124.503(j), 125.19(b), and 126.607(b). Rather, by their plain terms, the regulations require that contracting officers prioritize these programs *collectively* by giving consideration to the group of them before a contracting officer may set aside an opportunity for small businesses generally and before the contracting officer may make the contract otherwise available. *See* Lipscomb Letter at 6–7 ("The regulations themselves do not establish an order of precedence between an award under the HUBZone, SDVO SBC, or 8(a) BD programs."). The regulations do not, therefore, single out one program for the kind of prioritization over the other two that the GAO decisions conclude is mandated under the HUBZone statute. It is in this sense that, as the SBA puts it, the regulations "provide[] for parity between the HUBZone, SDVO SBC and 8(a) BD programs." *Id*. at 7.

II.

Having reviewed the language, context, and history of the relevant portions of the Act, we conclude that SBA's regulations implementing the HUBZone Program are based on a permissible interpretation of the Act. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *see also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–41 (1996) ("We accord deference to agencies under *Chevron* . . . because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency."). The GAO decisions reached the opposite conclusion based on what GAO considered the unambiguous language of the HUBZone Program's restricted competition provision. *See MCS*, 2009 WL 1231855, at *2–4; *IPG*, 2008 WL 4351134, at *4. GAO concluded that "the clear language" of this provision in the HUBZone statute, which uses the term "shall" with respect to the award of contracts, stood in marked contrast to the Act's use of the discretionary term "may" in the SDVO Program provision, *IPG*, 2008 WL 4351134, at *3–4 (citing 15 U.S.C. § 657f(b)), and its use of other discretionary language in the 8(a) Program, which authorizes a contracting

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and SDV over small business set-asides. This change will ensure consistent guidance throughout 13 CFR Chapter 1.").

officer "'in his discretion to let such procurement contract to [SBA].'" *MCS*, 2009 WL 1231855, at *2 (quoting 15 U.S.C. § 637(a)(1)(A)). Because Congress used mandatory language with respect to the award of contracts pursuant to the HUBZone Program and discretionary language with respect to the other two programs, GAO reasoned that Congress intended to give the HUBZone Program priority over these other contract assistance programs. The Ninth Circuit, we note, has expressed a similar view of the "mandatory" versus "discretionary" language in the HUBZone and 8(a) Programs. *See Contract Mgmt., Inc. v. Rumsfeld*, 434 F.3d 1145, 1149 (9th Cir. 2006) ("*CMI*").[7]

We conclude that the HUBZone provision does not unambiguously direct contracting officers to reserve every available contract opportunity for HUBZone small businesses whenever the rule of two is met. Rather, the text of the HUBZone provision may be fairly read as mandating only that a contract opportunity—already set aside for HUBZone small businesses in the discretion of a contracting officer—be awarded on the basis of restricted competition, and not as a sole source award, if the rule of two is met. So read, the provision, instead of simply permitting restricted competition for qualified HUBZone bidders, actually mandates such

[7] *CMI* involved a challenge to an earlier HUBZone regulation, no longer in effect, that directed contracting officers, *inter alia*, to give priority to eligible 8(a) participants over HUBZone concerns. The regulation provided, however, that contracting officers otherwise "must set aside the requirement for competition restricted to qualified HUBZone" small businesses if the rule of two is met. 13 C.F.R. § 126.607(c) (current through Dec. 28, 2005). The appellant, a small business concern that did not qualify for either the 8(a) or HUBZone Program, challenged this last aspect of the old regulation. In defending this regulation, the government advanced a reading of the HUBZone provision as mandatory, but inapplicable to the 8(a) Program. Citing legislative history, the government argued the HUBZone statute is "reasonably read as showing that Congress intended that there be parity between the Section 8(a) Program and the HUBZone Program." Brief for Appellees at 7, *Contract Mgmt., Inc. v. Rumsfeld*, 434 F.3d 1145 (9th Cir. 2006) (No. 04-15049).

The court ruled in the government's favor. The court compared what it viewed as the "unequivocal" terms of the HUBZone statute with the discretionary terms of the 8(a) set-aside provision and concluded that SBA's old regulation implementing the HUBZone Program "properly accord[ed] with congressional intent under the Small Business Act." 434 F.3d at 1147. The court noted that such a reading of the HUBZone statute was not compelled. *See id.* at 1149 n.8. In 2005, after establishment of the SDVO Program, SBA promulgated the current regulations replacing those reviewed by the *CMI* court. *See* 13 C.F.R. § 126.607.

competition. In other words, a contracting officer who uses discretion to set aside a contract for the HUBZone Program has no choice but to award a HUBZone contract on the basis of restricted competition once the rule of two is met. But, so read, the HUBZone provision does no more than compel restricted competition rather than a sole source award. It does not go further and require the prioritization of the HUBZone Program itself, leaving contracting officers with no discretion to set aside contracts for the other SBA programs whenever the HUBZone provision's rule of two is met.

The most basic reason we reach this conclusion is that the text of the HUBZone statute, on its own terms, does not clearly direct a contracting officer to reserve any and all procurement contracts for HUBZone small businesses whenever the rule of two is met. *See* 15 U.S.C. § 657a(b)(2)(B). The statute uses the mandatory phrase "shall be awarded" after the noun "contract opportunity," but the sentence does not stop there. It goes on to say "pursuant to this section"—i.e., under the HUBZone Program. *Id*. This qualification permits the HUBZone provision to be read as stating that contracts awarded "pursuant to this section" are subject to the enumerated conditions, but it does not compel a reading that all contract opportunities in the government must be awarded to the HUBZone Program whenever the enumerated conditions are met. Indeed, a contrary reading would implicate the canon of construction that discourages statutory interpretation that would render language mere surplusage. *See, e.g.*, *Clark v. Arizona*, 548 U.S. 735, 755 n.24 (2006) (recognizing "usual rule of statutory construction" to "giv[e] effect, if possible, to every clause and word of a statute") (internal quotations and citations omitted). In GAO's interpretation, it is not clear what independent meaning the "pursuant to this section" language would have.

Our conclusion is also consistent with another important section of the HUBZone statute, which provides that contracting officers "may award sole source contracts under this section" to any qualified HUBZone small business if the rule of two *cannot* be met. 15 U.S.C. § 657a(b)(2)(A). Again, the conditions set forth by this provision need only apply to contracts intended for award "under this section," i.e., under the HUBZone Program. The mandatory "shall" in the restricted competition provision can fairly be read, in connection with the discretionary "may" in the sole source provision, simply as a direction to contracting officers that within

the HUBZone Program there is a clear priority given to competition, albeit restricted, over sole source contract awards.

Such a construction of the HUBZone restricted competition provision is further supported by consideration of still another provision in the HUBZone statute, which expressly prioritizes the award of contracts to prison workshops and nonprofit agencies for the blind and severely-disabled over HUBZone small businesses. *See* 15 U.S.C. § 657a(b)(4) ("A procurement may not be made from a source on the basis of a preference [provided in the HUBZone statute], if the procurement would otherwise be made from a different source under section 4124 or 4125 of title 18 or the Javits-Wagner-O'Day Act (41 U.S.C. 46 et seq.)."). Whereas this provision clearly establishes the priority of these other contracting preferences, the HUBZone statute contains no express reference to the HUBZone Program's priority over SBA's other contract assistance programs.

Of course, the language of the HUBZone provision should be construed in the context of the provisions governing the other two SBA programs at issue. For that reason, we have considered whether the discretionary language in the 8(a) and SDVO statutes compels the conclusion that the HUBZone statute (with its mandatory language) requires that the HUBZone Program be given priority among the three programs. In our view, there are several reasons why it does not.

First, the 8(a) provision actually does contain mandatory language. Indeed, its restricted competition provision employs virtually the same mandatory language as the HUBZone provision. *Compare* 15 U.S.C. § 637(a)(1)(D)(i) ("A contract opportunity offered for award pursuant to this subsection shall be awarded on the basis of competition restricted to eligible Program Participants if"), *with id*. § 657a(b)(2)(B) ("[A] contract opportunity shall be awarded pursuant to this section on the basis of competition restricted to qualified HUBZone small business concerns if").[8] In both instances, a contract opportunity "shall be awarded" on the

[8] The 8(a) restricted competition provision predates the HUBZone provision by nine years. *Compare* Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 303, 102 Stat. 3853, 3868, *with* Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, § 602(b)(1)(B), 111 Stat. 2592, 2627. When the 8(a) Program was originally established in 1978, all 8(a) contracts could be awarded on a sole-source basis. *See* Amendments to the Small Business Investment Act of 1958, Pub. L. No. 95-507, § 202, 92 Stat. 1757, 1761 (1978). As part of a comprehensive reassessment of the 8(a)

basis of restricted competition if the applicable conditions are met. Where Congress uses the same language in similarly structured provisions within the same Act, it may be presumed that the language has the same meaning in each instance. *See, e.g.*, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992) (recognizing "the basic canon of statutory construction that identical terms within an Act bear the same meaning"). At the very least, the use of this mandatory language in both the 8(a) and HUBZone provisions makes it difficult to argue that the HUBZone provision unambiguously mandates that HUBZone awards be given priority over 8(a) awards.

Second, the 8(a) provision clearly applies only to "[a] contract opportunity offered for award pursuant to this subsection"—in other words, under the 8(a) Program. 15 U.S.C. § 637(a)(1)(D)(i). The mandate that such contracts "shall be awarded" on the basis of restricted competition does not extend to contract opportunities that exist outside of the 8(a) Program. Given the similarity just discussed between the 8(a) and HUBZone provisions, it is reasonable to read the phrase "pursuant to this section" in the HUBZone statute to function the same way as the comparable language contained in 8(a)—to limit the provision's application only to a "contract opportunity" already set aside for award pursuant to the HUBZone Program.

Admittedly, the 8(a) and HUBZone restricted competition provisions are not phrased in exactly the same way. As noted, the former provides that "[a] contract opportunity *offered for award pursuant to this subsection* shall be awarded on the basis of competition," *id*. § 637(a)(1)(D)(i) (emphasis added), whereas the latter provides that "a contract opportunity shall be awarded *pursuant to this section* on the basis of competition," *id.* § 657a(b)(2)(B) (emphasis added). But this slight difference in word order between the two provisions may fairly be read to reflect the fact that the 8(a) statute, unlike the HUBZone statute, explicitly provides for a means

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Program in 1988, Congress amended the Act to require that 8(a) contracts be awarded on the basis of restricted competition if certain conditions are met. *See* Pub. L. No. 100-656, § 303, 102 Stat. at 3868. Concerned about the success of the 8(a) Program, Congress provided three principal reasons for introducing competition, albeit restricted, to the program: "such competition will advance the business development objectives of the [8(a)] program; improve the distribution of contracts; and help avoid programmatic abuses." H.R. Rep. No. 100-460, at 28 (1987).

by which contracts will be "offered for award pursuant to this subsection." *Id.* § 637(a)(1)(D)(i).

Under the 8(a) statute, SBA is "empowered" to approach contracting officers in other agencies and certify that an available contract should be awarded under the 8(a) Program. *Id*. § 637(a)(1)(A). The discretionary language included in the 8(a) statute that GAO emphasized appears in this portion of the statute. Once SBA certifies that it is "competent and responsible" to perform a contract with a particular agency, the agency contracting officer "shall be authorized in his discretion to let such procurement contract" to SBA. *Id*. But this language can reasonably be read in a way that is consistent with SBA not having to give the HUBZone Program priority over the 8(a) Program. Because the 8(a) Program is a business development program to promote the ability of its participants to succeed as small business concerns, one aspect of this program is that the statute empowers SBA affirmatively to procure contracts for award to 8(a) participants. The discretionary language found in this same provision of the 8(a) statute may be read as an offset to this expansive SBA authority by reserving another agency's ability not to accede to SBA's certification. Because the HUBZone Program provides contract assistance but is not a more comprehensive business development program, there is no such authority provided in the HUBZone statute for SBA to solicit contracts on behalf of HUBZone concerns. Accordingly, the lack of an express reservation of a contracting officer's discretion to decline a HUBZone designation need not be construed to compel prioritization of the HUBZone Program.

There is also no basis for concluding that the discretionary language in the SDVO provision, *see id*. § 657f(b), requires the conclusion that the HUBZone Program must have priority. As noted above, the HUBZone provision includes discretionary language as well, in the award of sole source contracts. The inclusion of the discretionary term "may" in both the sole source and restricted competition provisions of the SDVO statute can reasonably be read, in contrast to the HUBZone statute, not to require the statutory prioritization of restricted competition over sole source awards as the means of contracting assistance to SDVO small business concerns.

Finally, it is true that the HUBZone provision is prefaced with the phrase "Notwithstanding any other provision of law," but the appearance

of that phrase does not establish a prioritization of its own force. *Id.* § 657a(b)(2). As we have noted previously, such "notwithstanding" phrases are best read simply to qualify the substantive requirement that follows. *See* Memorandum for Andrew J. Pincus, General Counsel, Department of Commerce, from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, *Re: The Effect of 8 U.S.C.A. § 1373(a) on the Requirement Set Forth in 13 U.S.C. § 9(a) That Census Officials Keep Covered Census Information Confidential* at 7 (May 18, 1999). Here, as we have noted, the HUBZone provision is at least ambiguous as to whether its substantive effect is to mandate that all contracts be set aside for its program and then subject, pursuant to the rule of two, to restricted competition; or whether it is instead intended to subject, pursuant to the rule of two, restricted competition only to those contracts that have been set aside for the HUBZone Program in the exercise of the contracting officer's discretion. If the latter interpretation is a permissible one, as we believe it is, then the "notwithstanding" clause simply ensures that no other provision of law countermands a contracting officer's discretion to make a sole source, restricted competition, or other contract award by means of assistance to qualified HUBZone small businesses pursuant to the requirements contained in the HUBZone statute.

III.

We find further support for our position in the larger statutory framework of the Act incorporating all three of the SBA programs at issue. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) (in considering the meaning of the statutory text, the particular statutory provision should not be viewed in isolation; "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context . . . . It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)); *see also Proposed Agency Interpretation of "Federal Means-Tested Public Benefit[s]" Under Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, 21 Op. O.L.C. 21, 23 (1997) ("[I]t is well-established that a provision in one Act of Congress should be read in conjunction with other relevant statutory provisions and not in isolation."). As discussed below, a reading

of the HUBZone provision that does not compel prioritization comports with the policies and purposes set forth in the Act and other specific provisions that were amended with and after the 1997 reauthorization establishing the HUBZone Program.

First, a construction of the statute that does not mandate HUBZone Program priority furthers Congress's stated policy that "small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." 15 U.S.C. § 637(d)(1); *see also id.* §§ 631(f)(1)(E), 637(d)(10). Congress required that a clause stating this policy "shall be included" in virtually every government procurement contract. *See id*. § 637(d)(2). In listing in the policy all of the covered classes of small business concerns, Congress did not in any way distinguish among them. Instead, the text does not disturb the discretion SBA and the agencies have to ensure that all of the covered small business concerns "have the maximum practicable opportunity" to secure federal contracts. Had Congress clearly intended to prescribe some order of priority among these SBA programs, Congress could have more directly adopted such a policy.

Second, this construction of the HUBZone statute furthers achievement of government-wide goals required by the Act. *See id*. § 644(g)(1). The Act prescribes that the "goal for participation by small business concerns shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year." *Id.* Furthermore, government-wide participation goals "shall be established" at not less than 3 percent each for HUBZone and SDVO small business concerns and not less than 5 percent for socially and economically disadvantaged small businesses. *Id*. Each agency, in turn, must establish its own goal "that presents . . . the maximum practicable opportunity" for the small business concerns qualified under the various SBA programs "to participate in the performance of contracts let by such agency." *Id.* In total, the "cumulative annual prime contract goals for all agencies" must "meet or exceed" the established minimum annual government-wide goal. *Id.* Congress did not prescribe for HUBZone concerns the highest minimum participation goal among the various SBA programs and it left to agency discretion how to achieve its

set goals. An interpretation of the HUBZone statute that does not compel a contract's award to a qualified HUBZone concern whenever the rule of two is met advances the achievement of the goals set forth for the other SBA programs and preserves the balance among the various programs established by the goaling provision of the Act.

IV.

Such a reading of the HUBZone statute also comports with congressional intent as reflected in legislative history. The legislative history can fairly be interpreted to show that Congress did not intend, through enactment of the HUBZone statute, to require the award of available contracts to qualified HUBZone concerns over 8(a) participants.

The HUBZone Program was introduced in 1997 as part of the Senate version of the Small Business Reauthorization Act. *See* Small Business Reauthorization Act of 1997, S. 1139, 105th Cong. tit. VI (as reported by S. Comm. on Small Business, S. Rep. No. 105-62, Aug. 19, 1997). The bill that the Senate Committee on Small Business unanimously voted to report contained an amendment with "parity" language making clear that the HUBZone Program did not interfere with the discretion of a contracting officer to designate a procurement contract for the 8(a) Program.[9] *See* S. 1139, 105th Cong. § 31(b)(5) (as reported by S. Comm. on Small Business, S. Rep. No. 105-62, Aug. 19, 1997). Right after a "Subordinate Relationship" provision setting forth the priority to be afforded to the prison industries, blind, and severely-disabled preference programs, the amendment provided, in a subsection entitled "Parity Relationship," that the HUBZone assistance provisions of the bill "shall not limit the

[9] At the time the bill was reported, the restricted competition provision of the HUBZone Program tracked even more closely the restricted competition provision in the 8(a) Program: "Subject to paragraph 3 [the sole source award provision], a contract opportunity offered for award pursuant to this section shall be awarded on the basis of competition restricted to qualified HUBZone small business concerns, if there is a reasonable expectation that not less than 2 qualified HUBZone small business concerns will submit offers and that award can be made at a fair market price." S. 1139, § 602(b)(1)(B), sec. 31(b)(B)(2) (1997); 143 Cong. Rec. 18,117. There is no explanation in the legislative history for the subsequent edit to this provision. But as discussed above, accounting for the substantive differences between the 8(a) and HUBZone Programs as enacted, the two slightly different formulations can be read functionally to operate the same way.

discretion of a contracting officer to let any procurement contract to [SBA] under section 8(a)." 143 Cong. Rec. 18,118 (1997). It further provided that "[n]otwithstanding section 8(a), [SBA] may not appeal an adverse decision of any contracting officer declining to let a procurement contract to the Administration, if the procurement is made to a qualified HUBZone small business concern on the basis of a preference [set forth in the bill]." *Id.* The Committee's report explained that the proposed HUBZone Program was "not designed to compete with SBA's 8(a) Program," and that the "parity" provision was simply intended to "give[] the procuring agency's contracting officer the flexibility to decide whether to target a specific procurement requirement for the HUBZone Program or the 8(a) Program." S. Rep. No. 105-62, at 26 (1997). The bill, with its parity provision intact, passed the Senate. *See* S. 1139, 105th Cong. § 31(b)(5) (as passed by Senate, Sept. 9, 1997).

When the bill reached the House of Representatives, the House struck everything after the enacting clause and substituted the provisions of a competing House version that omitted the entirety of the HUBZone Program. *See* Small Business Reauthorization and Amendments Act of 1997, H.R. 2261, 105th Cong. (as passed by House Sept. 29, 1997); 143 Cong. Rec. 20,662 (1997). Following return of the bill to the Senate, as amended by the House, the Senate reinstated the HUBZone Program by unanimous consent, but without the parity provision. 143 Cong. Rec. at 24,094–108. No explanation for the parity provision's omission was provided in the Senate record. *See id.* at 24,106.

The bill then returned to the House, where the issue of the HUBZone Program's relationship to the 8(a) Program was extensively discussed. *See* 143 Cong. Rec. at 25,747–66 (1997). Representative John J. LaFalce, the Ranking Member on the Committee on Small Business, explained that the Senate had struck the parity provision at the insistence of House members who were worried that the parity provision would have permitted contracts to be taken from the 8(a) Program; in other words, that the provision would have precluded the prioritization of 8(a) awards. Rep. LaFalce stated that "[a]ny proposals which might place [the 8(a)] program in jeopardy naturally cause concern to those Members who place a high priority on the development of minority small business." *Id*. at 25,760 (1997). Rep. LaFalce indicated that although the Senate prevailed in establishing the HUBZone Program, the final bill "confers considerable

discretion on the Administration of the SBA who will implement it." *Id.* (statement of Rep. LaFalce). Indeed, as Rep. LaFalce stated, he resisted the inclusion of the HUBZone Program until he was "specifically prevailed upon by the Small Business Administration," which pledged to him in writing that SBA "will not permit the implementation of the HUBZone's program to negatively affect the 8(a) program." *Id.*[10]

Numerous Representatives who spoke on S. 1139 during the floor debate expressed the same concern—that the new HUBZone Program not harm the existing 8(a) Program. *See* 143 Cong. Rec. at 25,761 (statement of Rep. Velázquez); *id.* (statement of Rep. Talent) ("I yield . . . to say that that is also my understanding, and I have said from the beginning, that I did not want this bill to affect the 8(a) program, and as far as I am concerned, it is out of this bill, it is not mentioned in this bill[.]"); *id.* at 25,762 (statement of Rep. Wynn) (accepting assurances that HUBZone Program would not harm 8(a) Program); *id.* at 25,763 (statement of Rep. Davis) (commending the protection of the 8(a) program); *id.* at 25,764 (statement of Rep. Weygand) ("Continued oversight and vigilance about this HUBZone program is extremely necessary. I know all of my colleagues are looking to Administrator Alvarez to be sure that she does not diminish the 8(a) program and sacrifice monies because of the HUB program. . . . I am concerned that there may be the unintended consequence of negatively impacting minority small businesses and 8(a) firms."); *id.* at 25,765 (statement of Rep. Jackson-Lee) ("we are not disturbing the 8(a) programs"); *id.* at 25,766 (statement of Rep. Mink) (expressing concern about the HUBZone Program's effect on the 8(a) Program and reliance upon SBA's assurances that "that in administering the HUBZone program, they would take steps necessary to assure that 8(a) was not adversely impacted").

[10] Indeed, after enactment of the HUBZone Program without inclusion of the explicit parity provision, SBA originally promulgated regulations directing contracting officers to preserve existing 8(a) contracts; then to prioritize small business concerns qualified under both the 8(a) and HUBZone Programs; and then to consider other 8(a) concerns before being directed to set aside a contract for competition restricted to HUBZone businesses. *See HUBZone Empowerment Contracting Program*, 63 Fed. Reg. 31896, 31908 (1998); 13 C.F.R. § 126.607(b) (effective from June 11, 1998 to Aug. 29, 2005). As noted earlier, the regulations were amended in 2005.

Accordingly, the legislative history comports with the conclusion reflected in SBA's regulations that the HUBZone statute need not be read to compel the prioritization of awards under the HUBZone Program over those under the 8(a) and SDVO Programs.[11] Our review of the text, structure and legislative record all support the conclusion that the HUBZone statute may fairly be read to mandate only that contract opportunities set aside for HUBZone concerns be awarded on the basis of restricted competition if the rule of two is met.

V.

Our conclusion that the SBA's regulations we have reviewed are reasonable is binding on all Executive Branch agencies, notwithstanding any GAO decisions to the contrary.

First, the statute that authorizes the Comptroller General to decide bid protests provides the Comptroller General with the power only to make "recommendations" as to how an Executive Branch agency should resolve bid protests submitted to the Comptroller General. *See* 31 U.S.C. § 3554 (2006); *see also id*. § 3556 (2006) ("This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States Court of Federal Claims."). Neither that statute nor GAO's regulations implementing it provide GAO with the authority to overrule or invalidate the properly-promulgated regulations of an Executive Branch

[11] Since enactment of the HUBZone Program in 1997, Congress has on other occasions considered whether to prescribe the relationship among the small business programs and has not done so. In 2002, Senator John F. Kerry introduced legislation that would have created a priority for small business concerns that were both 8(a) participants and HUBZone concerns. *See* Combined 8(a) and HUBZone Priority Preference Act, S. 1994, 107th Cong. (as introduced, Mar. 6, 2002). In 2003, when the House considered the Veterans Entrepreneurship and Benefits Improvement Act, an early version of the bill would have prioritized the various SBA assistance programs in the order of 8(a), SDVO, and then HUBZone. *See* H.R. 1460, 108th Cong. sec. 3(a), § 37(a)–(b) (as passed by the House, June 24, 2003). After a short debate that did not include any significant discussion of the priority provision, the bill was passed by the House. *See* 108 Cong. Rec. 15,741 (2003). On the Senate side, however, the provision was struck without debate or explanation. *See* Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2662; 108 Cong. Rec. 29,614–15 (2003).

agency. *See id*. § 3554; 4 C.F.R. § 21.8 (2009) (implementing 31 U.S.C. §§ 3551–3556 (2006)).

Second, the Comptroller General is an officer of the Legislative Branch. *See Bowsher v. Synar*, 478 U.S. 714, 727–32 (1986) (holding Comptroller General is subject to the control of Congress and therefore may not exercise non-legislative power). "Because GAO is part of the Legislative Branch, Executive Branch agencies are not bound by GAO's legal advice." *Whether Appropriations May Be Used for Informational Video News Releases*, 29 Op. O.L.C. 74, 74 (2005) ("Bradbury Memo") (citing *Bowsher*, 478 U.S. at 727–32).

Our Office has on many occasions issued opinions and memoranda concluding that GAO decisions are not binding on Executive Branch agencies and that the opinions of the Attorney General and of this Office are controlling. *See* Bradbury Memo, 29 Op. O.L.C. at 74 ("This memorandum is being distributed to ensure that general counsels of the Executive Branch are aware that the Office of Legal Counsel ('OLC') has interpreted this same appropriations law in a manner contrary to the views of GAO, and to provide a reminder that it is OLC that provides authoritative interpretations of law for the Executive Branch."); Memorandum for Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division and for John D. Leshy, Solicitor, Department of the Interior, from Todd David Peterson, Deputy Assistant Attorney General, *Re: Administrative Settlement of Royalty Determinations* at 6 n.7 (July 28, 1998) ("Although the opinions and legal interpretations of the GAO and the Comptroller General often provide helpful guidance on appropriations matters and related issues, they are not binding upon departments, agencies, or officers of the executive branch."); *Statutory Authority to Contract with the Private Sector for Secure Facilities*, 16 Op. O.L.C. 65, 68 n.8 (1992) ("We note that while GAO reports are often persuasive in resolving legal issues, they, like opinions of the Comptroller General, are not binding on the Executive branch."); Memorandum for Donald B. Ayer, Deputy Attorney General, from J. Michael Luttig, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation* at 8 (Dec. 18, 1989) ("This Office has never regarded the legal opinions of the Comptroller General as binding upon the Executive."); Memorandum for Joe D. Whitley, Acting Associate Attorney General,

from William P. Barr, Assistant Attorney General, Office of Legal Counsel, *Re: Detail of Judge Advocate General Corps Personnel to the United States Attorney's Office for the District of Columbia and the Requirements of the Economy Act (31 U.S.C. §§ 1301, 1535)* at 2 n.2 (June 27, 1989) ("The Comptroller General is an officer of the legislative branch, and historically, the executive branch has not considered itself bound by the Comptroller General's legal opinions if they conflict with the opinions of the Attorney General and the Office of Legal Counsel." (internal citation omitted)).

VI.

We accordingly conclude that SBA's regulations regarding the relationship among the 8(a), HUBZone, and SDVO Programs constitute a permissible construction of the Act.

JEANNIE S. RHEE
Deputy Assistant Attorney General
Office of Legal Counsel

Stay of Military Commission Proceedings While Review of Detentions Is Pending

Although the meaning of the word "Review" in section 7 of Executive Order 13492 is not unambiguous, that section is best construed in light of the Order's text and purposes in a manner that treats a review as pending as to a detainee at the Guantánamo Bay Naval Base when the detainee's case has been referred to but not finally resolved by the process under the formal protocol that the Departments of Defense and Justice have agreed upon and promulgated for further disposition of the case.

August 28, 2009

MEMORANDUM OPINION FOR THE EXECUTIVE SECRETARY
TASK FORCE ON DETENTION POLICY

Section 7 of Executive Order 13492 ("Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities") ("Executive Order" or "Order") directs the Secretary of Defense to

> immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

77 Fed. Reg. 4897, 4899 (Jan. 22, 2009).

Consistent with this directive, on January 20, 2009, the Secretary of Defense ordered the Chief Prosecutor of the Office of Military Commissions to seek 120-day continuances in all pending Commissions cases in which charges had already been referred. Memorandum for the Convening Authority for Military Commissions and the Chief Prosecutor, Office of Military Commissions, from Robert M. Gates, Secretary of Defense, *Re: Military Commissions* (Jan. 20, 2009) ("Jan. 20 Order"). The prosecution moved to continue all such cases as directed, and before the first set of continuances expired, the prosecution sought further continuances, which the courts granted in May 2009. In that same Order on January 20, 2009,

the Secretary of Defense also ordered the Chief Prosecutor to cease swearing any further charges to the Convening Authority for Military Commissions, and ordered the Convening Authority not to refer any additional cases to military commissions. *Id*. In compliance with the Secretary's orders, no Commissions charges have been sworn or referred since that date. As of the current date, cases with referred charges pending against ten detainees are currently continued.[1] And with respect to the six other detainees against whom the Chief Prosecutor had sworn charges prior to January 20, 2009, the Convening Authority has not yet referred them for trial.[2]

Section 4 of the Executive Order establishes the Review referenced in section 7. Pursuant to section 4(c)(3), "Determination of Prosecution," the Review Participants have collectively "evaluated" the cases of a number of Guantánamo detainees not approved for release or transfer, and have collectively "determine[d]" that "the Federal Government should seek to prosecute" approximately 35 such detainees, including nine of the ten detainees against whom charges have been referred to military commissions,[3] and four of the six detainees against whom charges have been sworn but not yet referred.[4] Section 4(c)(3) also prescribes an evaluation of whether it is "feasible" to prosecute such persons in an Article III court; accordingly, the Review Participants have determined that such Article III prosecution is "feasible" or "potentially feasible" for each of the roughly 35 detainees described above. The Participants then referred each of the cases to take what section 4(c)(3) calls any "necessary and appropriate steps based on [their] determination[]."

In order to take such "necessary and appropriate steps," the Departments of Defense ("DOD") and Justice ("DOJ") have agreed upon and

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[1] Those detainees are Khalid Sheikh Mohammed, Walid Muhammad Salih Mubarek Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi (the "9/11 defendants," whose cases have been consolidated for trial), Omar Ahmed Khadr, Almed Mohammed Ahmed Haza al Darbi, Ibrahim Ahmed Mahmoud al Qosi, Mohammed Kamin, and Noor Uthman Muhammed.

[2] Those detainees are Obaiduullah, Fouad Mahmoud Hasan al-Rabia, Faiz Mohammed Ahmed al-Kandari, Tarek Mahmoud El Sawah, Sufyian Barhoumi, and Ghassan Abdullah al Sharbi.

[3] The exception is Kamin.

[4] The exceptions are al-Rabia and al-Kandari.

promulgated a formal protocol for further disposition of the cases. *See* Determination of Guantánamo Cases Referred for Prosecution (undated; promulgated by the Departments of Defense and Justice) ("Protocol"). Pursuant to that Protocol, the cases in question have been assigned to a "team" composed of Assistant U.S. Attorneys, attorneys from the National Security Division ("NSD") of DOJ, and personnel from DOD, including prosecutors from the Office of Military Commissions. The Protocol directs the team to recommend, based on factors articulated in the Protocol, whether, the case should be prosecuted in an Article III court (including in what venue), or in a "reformed military commission." If the team concludes that prosecution "is not feasible in any forum, it may recommend that the case be returned to the Executive Order 13492 Review for other appropriate disposition." After the team has made its recommendation, NSD and the participating DOD entities are to "jointly determine whether the case is feasible for prosecution, and the appropriate forum (and, if necessary, venue) for that prosecution." They are then to transmit that determination to the Attorney General, along with any dissenting views, and the Attorney General, in consultation with the Secretary of Defense, will then "make the final decision as to the appropriate forum and (if necessary) venue for any prosecution."

All but one (Ghailani) of the approximately 35 detainees referred by the Review Participants to the Justice Department are still undergoing the process established by the protocols.[5] We understand that this process likely will not be completed, and final prosecutorial decisions will not be made by the Attorney General, until at least some time in October.

With respect to those 35 or so detainees who are still being considered under the Protocol, you have asked us whether the Secretary of Defense remains bound by the directive of section 7 that he "take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a military commission . . . , and that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered . . . are

[5] Ghailani has been indicted in the Southern District of New York, and on May 29, 2009, the Convening Authority withdrew all charges against him that had been referred to a military commission. *See* Memorandum of Susan J. Crawford, Convening Authority for Military Commissions (May 29, 2009).

halted." Your inquiry concerns whether the "determinations" thus far made by the Review Participants suffice to complete the Review described in section 4 for purposes of section 7, such that the Review is no longer pending—in which case the Secretary would be relieved of his legal obligation to take steps to halt the proceedings and prevent new charges from being sworn or referred to commissions.

In considering this issue, we sought the views of the drafters of the Protocol and received the views of the General Counsel of the Department of Defense. We also consulted with the Executive Director of the Task Force that the Attorney General established to make the initial "determinations" under section 4 regarding the way in which the Review has been operating. We now conclude that, although the meaning of the word "Review" referred to in section 7 is not unambiguous, it is best construed in light of the Order's text and purposes in a manner that treats it as pending as to a detainee whose case has been referred to, but not finally resolved by, the Protocol process. Accordingly, we believe the section 7 obligation is best construed as remaining in effect during the pendency of the Protocol process.

I.

We must first consider a threshold matter—namely, whether the phrase "the pendency of the Review" in section 7 refers to the Review of the entire population of Guantánamo detainees, or merely to the Review of the particular detainee in question. Section 4(a), entitled "Scope and Timing of Review," provides that "[a] Review of the status of *each* individual currently detained at Guantánamo shall commence" (emphasis added). Thus, the reference in section 7 to "the Review described in section 4" can be read to refer only to review of each individual detainee rather than review of all the Guantánamo detainees. Such a reading, moreover, would not be inconsistent with the purpose of the Order. Once the Review of an individual detainee has been completed under section 4, there is no obvious reason why it would be necessary to halt a military commission proceeding against him so that reviews of other detainees may be completed (including those who the Review Participants may not even refer for possible prosecution). Thus, if an individual de-

tainee's Review under section 4 is no longer pending, the section 7 obligation on the Secretary is best read not to apply to that detainee.

II.

Having addressed this threshold question, we must next tum to the question of whether, for purposes of section 7, "the Review described in section 4" is complete and therefore no longer pending with respect to any or all of the detainees the Review Participants have determined "the Federal Government should seek to prosecute" and who are currently being processed under the Protocol. If such a determination necessarily completed the "Review" as to a detainee, then the Secretary of Defense would no longer be bound by section 7 to take steps sufficient to "halt" the military commission proceedings or charges with respect to that detainee. Conversely, if such a determination does not complete the "Review," then the Secretary would remain bound.

In answering this question, we begin with the text of the Executive Order. We then consider how it has been implemented by the Review Participants, and the underlying purposes that animate it.

In our view, the text of the Order supports the conclusion that the Review is still pending with respect to the roughly 35 detainees currently being treated under the Protocol, notwithstanding the fact that the Review Participants appear to have fulfilled their obligation under section 4(c)(3) to evaluate their cases and determine whether "the Federal Government should seek to prosecute" them. When considered as a whole, section 4 describes a review that comes to completion not upon the Participants' "determination" of whether it is possible to transfer or release an individual consistent with the national security and foreign policy interests of the United States (section 4(c)(2)), or whether the federal government should seek to prosecute the individual (section 4(c)(3)), but instead upon the "achieve[ment]" of a detainee's "disposition" (section 4(c)(4)). We base this conclusion primarily on the text of section 4(c)(4), when read in light of the overall structure and purpose of the Order.

We begin with section 4(a). As noted above, that subsection provides that a "review" shall commence immediately "of the status" of each individual detainee. Section 4(b) comes next; it identifies the officials who shall participate in the Review ("Review Participants") and that the

Attorney General shall coordinate it. Section 4(c) is titled "Operation of Review"; it sets forth in four numbered paragraphs the duties of the Review Participants and the actions that must be taken by certain officials, including Review Participants acting either collectively or individually, relating to the status of individual detainees. Most importantly, section 4(c)(2)–(4) identifies certain determinations that must be made and certain actions that must be taken in consequence of those determinations as to individual detainees; and those paragraphs set forth a sequence by which such determinations and actions are to occur.

Paragraphs (2) and (3) of section 4(c) require that a certain "determination" be made with respect to detainees. Then, in each paragraph, there is a final directive instructing particular officials to take certain actions in light of those determinations. Paragraph (2) of the subsection provides that the "Review" shall make a determination "whether it is possible to transfer or release" a detainee. That paragraph then concludes with a sentence stating that the Secretaries of Defense and State, "and, as appropriate, other Review participants shall work to effect promptly the release or transfer of all individuals for whom release or transfer is possible." Similarly, paragraph (3) of the subsection provides that

> the cases of individuals not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed; including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution.

The paragraph then concludes with a clause instructing the "Review participants" to "in turn take the necessary and appropriate steps based on such determinations."

At issue here is whether the "Review described in section 4" remains "pending" during the actions of the Review Participants prescribed by those final clauses—i.e., working to effect release or transfer, and taking "necessary and appropriate steps based on" the determination that the government should seek to prosecute. The Department of Defense is of the view that, although the "determinations" mandated in paragraphs (2) and (3) are part of "the Review described in section 4," the steps and actions required to be taken in response to, or based upon, those deter-

minations fell *outside* the scope of that Review, and thus that the Review is not "pending" during those attempts to implement the determinations. If this were correct, then the "Review described in section 4" would no longer be pending as to an individual detainee for purposes of section 7 once the determination has been made that transfer or release is possible or, alternatively, that prosecution should be sought—regardless of whether additional implementing steps or actions based on the "determination" were taken that might result in a more final settlement of the status of the detainee.

This interpretation, however, would result in a potentially troubling anomaly, at least with respect to cases referred for possible prosecution. As paragraph (3) itself reflects, the Executive Order is plainly concerned not only with whether a detainee should be prosecuted but also with the forum in which he should be prosecuted—i.e., whether in an Article III tribunal or in a military commission. Indeed, the paragraph expressly instructs that the determination regarding prosecution shall include a determination regarding not only whether prosecution should be sought but also whether prosecution in an Article III forum is "feasible." Furthermore, one of the findings in the Order (section 2(f)) provides that "[i]t is in the interests of the United States to review whether *and how* any such individuals can and should be prosecuted" (emphasis added). Yet under the reading set forth above, military commission proceedings could resume, or new charges be sworn and referred, merely by virtue of a determination that "the Federal Government should seek to prosecute" the individual detainee, but before any decision on the forum in which such prosecution will transpire. It is not clear how that consequence, would accord with the Order's apparent purpose to halt military commission proceedings and charges until a review has been made with respect to "whether and how" a detainee currently held at Guantánamo will be prosecuted.

Whether or not that anomaly, standing alone, would be enough to disfavor such an interpretation, the text of section 4(c)(4) of the Order points strongly towards a contrary interpretation of whether the "Review described in section 4" is pending during the actions that are taken to implement the "determinations" in paragraphs (2) and (3). The principal sentence in paragraph (4) provides that "[w]ith respect to any individuals currently detained Guantánamo *whose disposition is not achieved under*

paragraphs (2) or (3) of this subsection, the Review shall select lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals" (emphasis added). The reference here to the key actions in paragraphs (2) and (3) is not to any "determination" being made, but, rather to a "disposition" being "achieved." The use of this distinct phrasing bespeaks a final resolution of how a detainee shall be treated based on a determination, rather than the predicate determination itself, which does no more than refer a case to authorities with the legal power to effect the disposition. *See, e.g.*, *Black's Law Dictionary* 505 (8th ed. 2004) (defining "disposition" to include "a final settlement or determination"). The use of the verb "achieved" is also telling. One "achieves" an outcome, whereas one makes (but does not "achieve") a determination. Moreover, the plain language of the remainder of the relevant sentence in paragraph (4) also directly supports the conclusion that the Review remains pending—because it specifically provides that the Review must select "lawful means, consistent with the national security and foreign policy interests of the United States and the interests of justice, for the disposition of such individuals" of the relevant officials are not able to achieve any of the relevant dispositions (i.e., transfer, release, or prosecution in one forum or the other).

We think these textual markers are significant. They support the conclusion that the "Review described in section 4" is pending as to a detainee unless a "disposition" has been "achieved" for that detainee under one of paragraphs (2), (3), or (4). Manifestly, no such disposition has been achieved under any of those paragraphs with respect to the 35 detainees in question here. Those detainees have at most been determined to be individuals the federal government should seek to prosecute. But a determination that their case should be referred for consideration by prosecutors is not the achievement of a "disposition . . . under paragraph[] (3)." At least until there is a final judgment to prosecute—something that occurs at the earliest upon the completion of the Protocol process when, by its terms, the Attorney General makes a "final" decision regarding prosecution and forum—no "disposition" has been "achieved . . . under paragraph (3)." And if the decision is ultimately made *not* to prosecute a detainee (or, in paragraph (2), if transfer of a detainee proves impossible), the Review must then select other lawful means "for the disposition of such individu-

als"—thus confirming that the Review remains pending until such a disposition is achieved.

To be clear, although the word "disposition," consistent with the dictionary definition, connotes a "final" settlement of a matter, we would not read paragraph (4) to suggest that the Review is pending so long as it is not yet known whether the detainee will be convicted in a particular tribunal or released from law-of-war detention at the end of an armed conflict. Such a reading would, among other things, effectively preclude the option of using military commissions altogether, because section 7's obligation to ensure a "halt" to commission proceedings would remain binding on the Secretary while an ultimate "disposition" under section 4(c)(4) remained open. This outcome is something the Order plainly does not intend. Instead, we read "achieve[ment]" of a "disposition" to mean, at the very least, a treatment of the detainee by the Executive Branch that is distinct from the mere referral of the case to prosecutors upon determination that the federal government "should seek" to prosecute—for example, the Attorney General's decision, at the end of the Protocol, to try the case in a particular forum, or the actual charging of the individual. This conclusion comports with the title of paragraph (3), which refers to "Prosecution" and not "Conviction." It is also consistent, if not compelled by, the reference in section 4(a) to the need for a review of the "status" of each individual detainee. The individual's status with respect to prosecution, may be understood to be "finally settled" for purposes of the Order upon a final decision regarding whether and how he will be prosecuted. On this understanding, "the prosecution" disposition is not achieved at least until the Protocol process runs its course. Because that has not yet occurred as to all but one of the detainees the Review Participants have referred for possible prosecution, however, we need not decide here precisely whether it is at that point or upon the filing of charges that, in fact, a "disposition" under paragraph (3) will have been "achieved" for purposes of paragraph (4). We also do not consider here the precise time at which there is a "disposition" in a case that the Review Participants refer directly to the Office of Military Commission, after having deemed that it was not feasible for Article III prosecution but nevertheless a case the federal government "should seek to prosecute."

In sum, the mere determination that the government should *seek* to prosecute a detainee, and the referral of the case for consideration by the

Department of Justice pursuant to the Protocol, does not "achieve" a "disposition." It simply triggers a new process under the Protocol by which a disposition—such as the filing of charges or at least the rendering of a final determination by the Attorney General that charges should be filed—might be "achieved." And until such a disposition, the Review remains pending. The Review described in section 4 accordingly is best understood as a process that encompasses the entirety of the functions set forth in section 4(c) for achieving a disposition of a detainee, and the Review comes to an end only once the full sequence of determinations and actions set forth in section 4(c) has run its course. For that to occur, under the plain terms of paragraph (4), either a disposition must have been achieved pursuant to either paragraphs (2) or (3)—in which case there is nothing left for the Review to do—or, failing that, the Review must then select some other lawful disposition. Only if a disposition has been achieved pursuant to one of those paragraphs will the Review described in section 4 have been completed. Thus, as the heading of section 4(c) indicates, *all* of the functions described in that subsection, including the steps taken to transform determinations into a disposition, constitute the "Operation of the Review."[6]

This interpretation of the Order's text is consistent with the practice of the Review Participants under the Order. We have been informed that the Protocol process described above has not been uniformly understood as part of the "determination" process described in section 4(c)(3). Rather, we have been informed that at least some Participants apparently have understood the Protocol process as constituting all or part of the "necessary and appropriate steps based on such determinations" that paragraph

[6] We do not believe the use of the word "status" in section 4(a)'s reference to a "review of the status of each individual currently detained at Guantánamo" is to the contrary. While that word could refer to the manner in which the Review Participants determine the individual can or should be treated, it is just as naturally read to mean the manner in which the Executive Branch in fact treats the detainee. For the reasons given above, we would read the final settlement of the "status" to be the "disposition" referenced in paragraph (4) and referred to at other points in the Order, rather than the mere determination" referenced in paragraph (3). Moreover, even if "status" were construed to have the "determination" meaning implicit in DOD's interpretation, it still would not necessarily follow that the Review is no longer pending once such a determination is made because, as paragraph (4) expressly contemplates, the Review will still be operative in the event no disposition is achieved.

(3) describes. But, even if that were correct, it would not mean "the Review described in section 4" ends for purposes of section 7 once the prosecution determination has been made by the Review Participants. Rather, as explained above, the Review in section 4 remains pending until a "a disposition" is "achieved" under paragraphs (2), (3) or (4). Quite clearly, no disposition—no final settlement or decision of how the government will in fact treat the detainee—is achieved under paragraph (3) until, at the very least, a decision to prosecute in a particular forum is made on the basis of the Review Participants' prosecution referral. Indeed, the Review Participants, collectively—i.e., the Task Force and Review Panel that the Attorney General established—have no authority to effectuate such a final disposition with respect to prosecution, an authority vested in the Attorney General (with respect to Article III prosecution) and in particular DOD officials (with respect to military commissions). And the Protocol itself reflects just this understanding. Its first sentence reads: "This protocol governs *disposition* of cases referred for possible prosecution pursuant to Section 4(c)(3) of Executive Order 13492, which applies to detainees held at Guantánamo Bay, Cuba." Protocol at 1 (emphasis added).

Furthermore, this interpretation is consistent with the purposes of the Order, as reflected in its other provisions. The Order makes clear in section 2(b) that the "prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interest of the United States and the interests of justice." Plainly, "disposition" in this usage connotes a final decision as to how the government will treat the detainees, and not a mere determination that "it is *possible* to transfer or release a detainee," or "the Federal Government *should seek* to prosecute the detained individuals," or that "it is *feasible* to prosecute such individuals before a court established pursuant to Article III." Consistent with this conclusion, the final sentence of section 2(b) reads: "To the extent practicable, the prompt and appropriate disposition of the individuals detained at Guantánamo should precede the closure of the detention facilities at Guantánamo." The constraint of practicability makes more sense with respect to the achievement of a final outcome—such as the actual transfer or filing of charges—than the mere making of a determination that remains to be implemented.

More generally, there is a basic logic to the idea, discussed above, that the military commission proceedings should be halted, and no charges sworn or referred, during the pendency of a process by which the final judgment as whether and how a detainee should be prosecuted is being made. This is consistent with the understanding of the Secretary of Defense when, in accord with the obligation that section 7 imposes, he first ordered a halt to commission proceedings and charges on January 20: He wrote that "[t]his is to provide the Administration sufficient time to conduct a review of detainees currently held at Guantánamo, to evaluate the cases of detainees not approved for release or transfer to determine whether prosecution may be warranted for any offenses these detainees may have committed, *and to determine which forum best suits any future prosecutions*." Jan. 20 Order (emphasis added).

The reading of the text set forth above aligns the Order with precisely this logical outcome: It treats the section 4 Review to which section 7 refers as a process that is completed upon the achievement of a final disposition of a detainee—whether (i) through transfer or release pursuant to the efforts of the Secretaries of Defense and State in working to effect the Review Participants' determination that release or transfer is possible; (ii) through a final decision to prosecute pursuant to the necessary and appropriate steps taken by the relevant authorities based on determinations by the Participants that the federal government should seek to prosecute the detainee; or (iii) if neither a transfer or prosecution disposition is achieved, through some other lawful disposition selected by the Review Participants under paragraph (4) and then promptly implemented by the appropriate authorities.

The alternative interpretation of the Order that DOD offers focuses on section 4(c)(3) and does not account for the fact that section 7 refers more generally to "the Review described in section 4," making no special reference to any of its subsections. The DOD interpretation does not account as well as the one offered above for the language of section 4(c)(4). Accordingly, we think the interpretation we offer above is the stronger and more logical reading of the Order, and is also more consistent with the Order's (and section 7's) manifest design.

III.

Although this is the better reading of the Order, however, we are not prepared to say that it is the only possible reading, such that it would be impermissible for the President to interpret his own executive order in accord with the alternative interpretation. *See Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1196 (D. Utah 2004) ("courts will generally give substantial deference to the President's . . . interpretation and use of an executive order"), *appeal dismissed*, 455 F.3d 1094 (10th Cir. 2006) (for lack of standing); *cf. Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (where agency's interpretation of its own regulation is reasonable, it is entitled to substantial judicial deference); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) (agency interpretation of its own regulations should be accepted, unless it is "'plainly erroneous or inconsistent with the regulation'") (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). The phrase "the Review described in section 4" is not unambiguous. One might read the word "Review" in section 7 to refer to something less than all of the steps and actions—the "operation of the Review"—prescribed in section 4(c) and, in particular, to refer only to those actions that pertain to *determinations* of how the government can or should treat the detainees, and the actions taken based on such a determination would not be part of the "Review" itself. To be sure, even on this reading, section 4(c)(4) expressly contemplates that there could be further action by the "Review" in the event no disposition were achieved. But, it might be argued, in that case the Review is not "pending" during the attempted implementation of the determinations (e.g., while the Protocol process is underway); it is instead dormant, and would become pending once more only if and when no disposition is achieved in a particular case.

But although we cannot say that the Order clearly precludes this alternative reading, we do believe the Order is better read to deem the "Review" pending for purposes of section 7 until a disposition of transfer or release under paragraph (2) of section 4(c), regarding prosecution in a particular forum under paragraph (3), or regarding some other lawful disposition under paragraph (4), is achieved. Such a reading avoids the seemingly anomalous result described above—a result in tension with the Order's apparent design to halt military commission proceedings and

charges until a decision is made to actually go forward with a military commission prosecution. It also fits comfortably with the text of the Order, including the heading of section 4(c), "Operation of Review," which presumably describes all of the actions set forth in that subsection, including the implementation of the determinations until a "disposition" is "achieved."

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Authority of the Former Inspector General for the Federal Housing Finance Board to Act as Inspector General for the Federal Housing Finance Agency

The Federal Housing Finance Board Inspector General did not by statute automatically acquire authority to act as Inspector General for the Federal Housing Finance Agency at the time of the enactment of the Federal Housing Finance Regulatory Reform Act of 2008.

The former Federal Housing Finance Board Inspector General cannot appoint employees to the Office of Inspector General for the Federal Housing Finance Agency.

September 8, 2009

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL HOUSING FINANCE AGENCY

The Federal Housing Finance Regulatory Reform Act of 2008 ("Reform Act"), which Congress passed as division A of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654, 2659, abolished the Federal Housing Finance Board ("FHFB"), an independent agency that oversaw the Federal Home Loan Banks, *see* 12 U.S.C. § 1422a (2006). The Reform Act established in place of the FHFB a new entity called the Federal Housing Finance Agency ("FHFA"). The FHFA now regulates and supervises "government sponsored enterprises" ("GSEs") supporting mortgage markets, and this responsibility extends not only to the Federal Home Loan Banks, but also to the Federal National Mortgage Association (commonly known as "Fannie Mae") and the Federal Home Loan Mortgage Corporation (commonly known as "Freddie Mac"). *See* Reform Act §§ 1002, 1101, 1102, 1311.

You have asked for our opinion on three questions about the Office of Inspector General of the FHFA: (1) whether by statute the former Inspector General for the FHFB at the time of the Reform Act's enactment automatically can act as Inspector General for the FHFA pending the appointment of an Inspector General for the FHFA; (2) whether the former Inspector General for the FHFB has authority to appoint employees to the Office of Inspector General for the FHFA; and (3) whether employees of the Office of Inspector General for the FHFA are paid at FHFA pay rates or general federal employee pay rates.

For the reasons given below, we conclude that: (1) the FHFB Inspector General at the time of the Reform Act's enactment did not by statute automatically acquire authority to act as Inspector General for the FHFA; and, accordingly, (2) the former FHFB Inspector General cannot appoint employees to the Office of Inspector General for the FHFA. In light of these conclusions, we express no view as to what pay rates apply to employees of the FHFA Office of Inspector General.

I.

A.

Congress passed the Reform Act to ensure that the GSEs supporting mortgage markets—specifically, Fannie Mae, Freddie Mac, and the Federal Home Loan Banks—"operate in a safe and sound manner and fulfill the missions assigned under their charters." H.R. Rep. No. 110-142, at 87 (2007). Fannie Mae and Freddie Mac are congressionally chartered entities that promote liquidity in residential mortgage markets by purchasing residential mortgages from lenders. *See* 12 U.S.C.A. §§ 1451, 1452, 1454, 1455, 1717, 1718, 1719 (West 2001 & Supp. 2009); H.R. Rep. No. 110-142, at 95. These GSEs, though established by statute and given special privileges not available to private firms, may issue securities to investors. *See* 12 U.S.C.A. §§ 1453, 1454, 1455, 1716, 1717, 1718, 1719 (West 2001 & Supp. 2009); H.R. Rep. No. 110-142, at 95. They generally finance mortgage purchases either by issuing debt securities or by packaging mortgages into so-called "mortgage-backed securities." *See* H.R. Rep. No. 110-142, at 95. The Federal Home Loan Banks are regional entities cooperatively owned by member financial institutions. *See* 12 U.S.C.A. §§ 1423, 1424, 1426 (West 2001 & Supp. 2009); H.R. Rep. No. 110-142, at 95. Like Fannie Mae and Freddie Mac, they were established by statute to provide liquidity to residential mortgage lenders; they typically pursue this objective by providing collateralized financing to member institutions. *See* 12 U.S.C.A. §§ 1429, 1430, 1431 (West 2001 & Supp. 2009); H.R. Rep. No. 110-142, at 95.

Before the Reform Act, the Office of Federal Housing Enterprise Oversight ("OFHEO"), an office within the Department of Housing and Urban Development ("HUD") headed by a presidentially-appointed and Senate-confirmed Director, oversaw the "safety and soundness" of Fannie Mae

and Freddie Mac, while the HUD Secretary supervised these GSEs in other respects, including compliance with certain affordable-housing mandates. *See* 12 U.S.C. §§ 4502(6), 4511, 4512, 4513, 4541, 4563 (2006); H.R. Rep. No. 110-142, at 95. The FHFB, an independent agency within the executive branch, oversaw the Federal Home Loan Banks. *See* 12 U.S.C. §§ 1422, 1422a, 1422b (2006).

In the Reform Act, Congress abolished OFHEO and the FHFB and assigned regulatory and supervisory responsibility for Fannie Mae (and any Fannie Mae affiliates), Freddie Mac (and any Freddie Mac affiliates), and the Federal Home Loan Banks to a new independent agency, the FHFA. *See* Reform Act §§ 1101, 1301, 1311; 12 U.S.C.A. § 4511 (West Supp. 2009). The FHFA is headed by a "Director," who receives advice "with respect to overall strategies and policies" from a "Federal Housing Finance Oversight Board" composed of the Director, the Secretary of the Treasury, the Secretary of HUD, and the Chairman of the Securities and Exchange Commission. Reform Act § 1101; 12 U.S.C.A. §§ 4512, 4513, 4513a (West Supp. 2009). The FHFA Director has substantial regulatory powers over the covered GSEs, including the authority to place regulated GSEs in receivership or conservatorship in certain circumstances. *See*, *e.g.*, Reform Act §§ 1108, 1113, 1128, 1144, 1145, 1205; 12 U.S.C.A. §§ 1430c, 4513b, 4518, 4561, 4616, 4617 (West Supp. 2009). The Director also holds authority, subject to certain transition provisions discussed below regarding FHFB, OFHEO, and HUD employees, to "appoint and fix the compensation of such officers and employees of the Agency as the Director considers necessary to carry out the functions of the Director and the Agency." 12 U.S.C.A. § 4515(a) (West Supp. 2009). These officers and employees "may be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of Title 5 relating to classification and General Schedule pay rates." *Id.* Although the FHFA Director "shall be appointed by the President, by and with the advice and consent of the Senate," the Reform Act provides that in the event of a vacancy in this position on the Act's effective date, "the person serving as the Director of the Office of Federal Housing Enterprise Oversight of the Department of Housing and Urban Development on that effective date shall act for all purposes as, and with the full powers of, the Director" until an initial Director is appointed. Reform Act § 1101; 12 U.S.C.A. § 4512(b)(1), (5).

B.

The Reform Act also provides for the appointment of an Inspector General for the FHFA. Specifically, the statute amends the Inspector General Act of 1978 ("IG Act"), 5 U.S.C.A. app. (West 2007 & Supp. 2009), to include the FHFA among the federal "establishments" in which "an office of Inspector General" "is established." Reform Act § 1105(c); IG Act §§ 2, 12(2). The Reform Act also specifies that "[t]here shall be within the [FHFA] an Inspector General, who shall be appointed in accordance with section 3(a) of the Inspector General Act of 1978," Reform Act § 1105(a)(5), which provides that the Inspector General "shall be appointed by the President, by and with the advice and consent of the Senate," IG Act § 3(a). Under the Inspector General Act, the Inspectors General for "establishments" like the FHFA have broad authority to conduct investigations with respect to programs and operations of the establishment. *Id.* §§ 4, 5. To carry out their functions, Inspectors General may

> select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office subject to the provisions of Title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

Id. § 6(a)(7). Although each such Inspector General "shall report to and be under the general supervision of the head of the establishment" (here the FHFA Director) or, if this power is delegated, "the officer next in rank below such head," *id.* § 3(a), only the President may remove the Inspector General, *id.* § 3(b), and "[n]either the head of the establishment nor the officer next in rank below such head shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpena during the course of any audit or investigation," *id.* § 3(a).*

* The Inspector General Act also includes special provisions, not relevant here, governing the powers and duties of Inspectors General at particular agencies. *See, e.g.*, IG Act §§ 8–8K.

C.

Despite "abolish[ing]" OFHEO and the FHFB effective one year after the statute's enactment, the Reform Act guarantees that each employee of these agencies "shall be transferred to the [FHFA] for employment" in "a position with the same status, tenure, grade, and pay as that held on the day immediately preceding the transfer." Reform Act §§ 1301, 1303, 1311, 1313. Permanent employees transferred under this provision "may not be involuntarily separated or reduced in grade or compensation during the 12-month period beginning on the date of transfer, except for cause." *Id.* §§ 1303(b)(2), 1313(b)(2). Similarly, a temporary employee may be separated only "in accordance with the terms of the appointment of the employee." *Id.*

The Reform Act likewise provides that certain HUD employees—those "whose position responsibilities primarily involve the establishment and enforcement of the housing goals under subpart B of part 2 of subtitle A of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (12 U.S.C. 4561 et seq.)"—"shall be transferred to the [FHFA] for employment." *Id.* § 1133(a). The Act gives these employees equivalent protections against involuntary separation or reduction in grade or compensation as are applied to transferred OFHEO and FHFB personnel. *Id.* § 1133.

II.

You have taken the view that because the position of FHFA Inspector General is a new office requiring presidential nomination and Senate confirmation under the Reform Act, this office must remain vacant until an Inspector General for the FHFA is properly appointed. Under your view, because the President has not designated the former FHFB Inspector General to act as Inspector General for the FHFA, the former Inspector General may not exercise the powers and duties of the FHFA Inspector General. The former FHFB Inspector General argues, in contrast, that he automatically assumed these powers and duties by operation of the Reform Act. We do not understand the former FHFB Inspector General to assert that the Reform Act made him the Inspector General for the FHFA. But he does assert that, by virtue of the Reform Act's transition provisions, he may exercise the powers of the FHFA Inspector General

"in trust until the President of the United States appoints a new Inspector General." Memorandum for Edward DeMarco, Deputy Director, FHFA, from Edward Kelley, *Re: Inspector General Authority* at 2 (July 7, 2009). In defense of this view, he contends that "the Congress clearly intended the continuation of the Office of Inspector General within the [FHFA]" and that "[t]he senior official of the FHFA Office of Inspector General has the duty and responsibility to conduct the affairs of the Office of Inspector General as envisioned by Congress." *Id*. at 3. The former FHFB Inspector General thus asserts that, in the capacity of acting head of the FHFA Office of Inspector General, he may hire personnel for that office and that he may employ such personnel at FHFA-specific pay rates, without regard to the General Schedule applicable to most federal employees.

In our judgment, the applicable statutes do not enable the former FHFB Inspector General to exercise the authority he claims. By its terms, the Reform Act nowhere expressly empowers the former FHFB Inspector General—or, for that matter, any other specific official—to perform the functions and duties of the FHFA Inspector General before an appointment of an FHFA Inspector General by the President. The Reform Act, rather, incorporates the relevant provisions of the Inspector General Act of 1978 and so provides for the appointment of the FHFA Inspector General by the President with the advice and consent of the Senate. *See* Reform Act § 1105(a)(5); IG Act § 3(a). By contrast, the Inspector General of the FHFB was appointed by the agency head. *See* IG Act § 8G.

A general provision in the Reform Act does guarantee that each former FHFB employee "shall be transferred to the [FHFA] for employment" in "a position with the same status, tenure, grade, and pay as that held on the day immediately preceding the transfer." Reform Act §§ 1313(a), (b)(1). We do not believe, however, that this section supports the former FHFB Inspector General's argument. As this Office has indicated in a prior opinion, transitional protections like these provisions of the Reform Act may be suitable where, as here, an agency is empowered to hire employees without regard to usual civil service protections. *See Applicability of the Civil Service Provisions of Title 5 of the United States Code to the United States Enrichment Corporation*, 17 Op. O.L.C. 27, 29 (1993). We thus concluded in our prior opinion that a provision guaranteeing the same "compensation, benefits, and other terms and conditions of employment in effect immediately prior to" an employee's transfer to

the new agency "reflect[ed] Congress's assumption that [the agency in question] would be free to set the terms and conditions of employment for its employees [without regard to civil service laws], because if [the agency] were bound by civil service statutes Congress would not have needed to guarantee transferred employees their existing employment terms and conditions." *Id.* By the same token, we understand the Reform Act's guarantee of identical "status, tenure, grade, and pay" to ensure that, despite the FHFA Director's authority to "appoint and fix the compensation of" FHFA officers and employees without regard to generally applicable federal pay rates, *see* 12 U.S.C.A. § 4515(a), employees transferred from the FHFB to the FHFA arrive with the same overall terms and conditions of employment that they enjoyed previously. The companion provision barring involuntary separation or reduction in "grade or compensation" without cause then ensures that—again despite the FHFA Director's appointment authority and general exemption from usual federal pay scales—the Director may not reassign such employees or reclassify their positions in a manner that results in a reduction in grade or pay during their first year at the FHFA. *See* Reform Act § 1313(b)(2). Consistent with this interpretation, the House Financial Services Committee's report on an earlier version of this legislation referred to comparable language as ensuring that former FHFB employees "will be guaranteed a position with the [FHFA] and will retain their benefits for one year following the transfer." H.R. Rep. No. 110-142, at 147.

Accordingly, even assuming the terms "status" and "tenure" might otherwise be given a broader construction, we do not understand these terms in this context to guarantee any specific title, duties, or responsibilities to transferred employees. *See*, *e.g.*, *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). To the contrary, as you have suggested (and as the FHFB Inspector General does not dispute), we understand the terms "status, tenure, grade, and pay" to refer to the transferred employee's prior competitive or excepted-service status, *cf.* 5 C.F.R. § 212.301 (2009) (defining "competitive status"), permanent or temporary tenure, pay grade, and compensation. This interpretation gives the four conjoined terms—"status, tenure, grade, and pay"—a consistent overall meaning: all refer to general terms and conditions of employment relating to compensation, seniority, and

job security. *See*, *e.g.*, *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990) ("words grouped in a list should be given related meaning" (internal quotation marks omitted)). In addition, while construing "status" and "tenure" to encompass job duties and responsibilities might severely constrain the FHFA Director's authority over the organization of the Agency, our interpretation preserves the Director's broad authority, expressly provided by Congress, to determine functions within the FHFA by "delegat[ing] to officers and employees of the Agency any of the functions, powers, or duties of the Director." Reform Act § 1102(a); 12 U.S.C.A. § 4513(b); *see also* Reform Act § 1101; 12 U.S.C.A. § 4512(c), (d), (e) (establishing Deputy FHFA Directors for "enterprise regulation," "federal home loan bank regulation," and "housing mission and goals," but providing that, within these broad subject-matter domains, the Deputy Directors "shall have such functions, powers, and duties . . . as the Director shall prescribe"). Finally, our interpretation harmonizes the meaning of the FHFB transition provision with a related statute, 5 U.S.C. § 3503, referenced in the transition provision itself. Reform Act section 1313(a) states that a transfer of employees under this provision "shall be deemed a transfer of function for purposes of" this statute, which provides that "[w]hen a function is transferred from one agency to another, each competing employee in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position," 5 U.S.C. § 3503(a) (2006). In accordance with our construction of section 1313 here, the language of section 3503 has been construed to require only that "an employee is entitled to '*a* job' for which he is qualified," not "*the* position most similar to [the employee's] former job." *Ross v. United States*, 566 F. Supp. 1024, 1027–28 & n.5 (D.D.C. 1982).

In contrast with the general transition provisions of section 1313, which do not expressly purport to assign duties, the Reform Act contains one provision about transition that does expressly assign duties. Section 1101 of the Reform Act provides that the former OFHEO Director may act as FHFA Director in the event of an initial vacancy in that post. *See* Reform Act § 1101; 12 U.S.C.A. § 4512(b)(5). That discrete transition provision would have been superfluous if section 1133(b)(1) by itself constituted a general assignment of identical duties to all former FHFB employees and thus to the FHFB Inspector General. That provision also shows that Con-

gress recognized the possibility of initial vacancies in positions at the FHFA, yet made no provision for an interim acting Inspector General. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *see also*, *e.g.*, *General Motors Corp. v. United States*, 496 U.S. 530, 538 (1990) (reading statute not to impose a specific deadline on a certain regulatory action because "the statutory language does not expressly impose a . . . deadline and Congress expressly included other deadlines in the statute"); *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (holding that "[t]he most natural reading" of a statute is "that Congress implicitly excluded a general . . . rule by explicitly including a more limited one").

The absence of an express provision providing for such an assignment of duties is also significant in light of the Federal Vacancies Reform Act of 1998 ("Vacancies Reform Act"), Pub. L. No. 105-277, div. C, § 151, 112 Stat. 2681, 2681-611 (as amended). The Vacancies Reform Act provides that, absent a recess appointment or an "express[]" statutory provision to the contrary, it is "the exclusive means for temporarily authorizing an acting official to perform the functions and duties of any office of an Executive agency . . . for which appointment is required to be made by the President, by and with the advice and consent of the Senate." 5 U.S.C. § 3347(a) (2006). Yet the Vacancies Reform Act provides only that "[i]f an officer of an Executive agency . . . whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office," either the "first assistant to the office" or another officer designated by "the President (and only the President)" may, within certain time limits, "perform the functions and duties of the office temporarily in an acting capacity." *Id*. §§ 3345, 3346. We have doubts that the Vacancies Reform Act authorizes interim assignments to fill initial vacancies. If, as in this case, no one has previously been appointed to an office, there is no officer who has "die[d]" or "resign[ed]" or "is otherwise unable to perform the functions and duties of office," and there thus is no vacancy that the Vacancies Reform Act allows to be filled. *Cf. Olympic Fed. Sav. & Loan Ass'n v. Office of Thrift Supervision*,

732 F. Supp. 1183, 1195 (D.D.C.) (construing term "required by law to be appointed" in prior vacancies statute to permit temporary filling of vacancies only where the officer vacating the position was properly appointed and had thus "take[n] office"), *appeal dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990). But even assuming that the Vacancies Reform Act would permit *someone* to be named acting FHFA Inspector General in this case, the former FHFB Inspector General's own submission shows that he is neither a properly appointed first assistant nor an officer designated by the President to act as FHFA Inspector General.

To be sure, the Inspector General Act, as amended by the Reform Act, provides that "there is established" within the FHFA "an office of Inspector General." IG Act § 2. But even assuming that this entity has inherent functions that its personnel may perform even without a properly appointed or designated Inspector General or acting Inspector General at the head of the office, neither the Reform Act nor the Inspector General Act supports the former FHFB Inspector General's view that the FHFA Office of Inspector General was automatically populated with former personnel of the FHFB Office of Inspector General by operation of the Reform Act's transition provisions. To the contrary, in the Reform Act, Congress "abolished" the FHFB, including its Office of Inspector General, and established a new agency, the FHFA, with its own Inspector General. *See* Reform Act §§ 1101, 1301, 1311. And while Congress provided for the transfer of FHFB personnel to the FHFA, the statute, as noted, does not guarantee these employees any particular substantive responsibilities. *See id.* § 1313; *cf. Ross*, 566 F. Supp. at 1028. Accordingly, although the FHFA Office of Inspector General might well be the natural place for transferred former employees of the FHFB Inspector General, the statute does not provide for the automatic transformation of the abolished FHFB Office of Inspector General into a new FHFA Office of Inspector General.

Finally, our conclusion that the Reform Act should not be construed to have authorized the former FHFB Inspector General to act as FHFA Inspector General draws support from the fact that the offices of FHFB Inspector General and FHFA Inspector General do not have essentially equivalent jurisdiction. The Supreme Court has held that Congress may assign new duties to an officer without creating a new office, provided the new duties are "germane to the office[] already held by" the incumbent, *Shoemaker v. United States*, 147 U.S. 282, 301 (1893); *see also The Constitutional Separation of Powers Between the President and Congress*,

20 Op. O.L.C. 124, 157–59 (1996), but this Office has indicated that the Constitution may require a new appointment when the addition of new duties—even duties "germane" to an existing office—is "considerable." *Status of the Director of Central Intelligence Under the National Security Intelligence Reform Act of 2004*, 29 Op. O.L.C. 28, 36 n.2 (2005); *see also Constitutional Separation of Powers*, 20 Op. O.L.C. at 158 (indicating that whether Congress has created a new office depends on "the reasonableness of assigning the new duties 'in terms of efficiency and institutional continuity'" and on "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'" (quoting *Legislation Authorizing the Transfer of Federal Judges from One District to Another*, 4B Op. O.L.C. 538, 541 (1980))); *Olympic Fed. Sav. & Loan Ass'n*, 732 F. Supp. at 1193. Without deciding the constitutional issue here, we note that the FHFA Inspector General holds materially broader statutory responsibility than did the FHFB Inspector General. While the FHFB oversaw only the Federal Home Loan Banks, the FHFA also regulates Fannie Mae and Freddie Mac—two major financial institutions, *see* H.R. Rep. No. 110-142, at 96. As the Reform Act itself indicates, oversight of Fannie Mae and Freddie Mac may raise different regulatory concerns from oversight of the Federal Home Loan Banks; the Reform Act thus requires the FHFA Director to "consider the differences between the Federal Home Loan Banks and [these] enterprises" before issuing any regulations or general guidance affecting the Federal Home Loan Banks. *See* Reform Act § 1201; 12 U.S.C.A. § 4513(f). Furthermore, the FHFA appears to hold broader powers than OFHEO or the FHFB expressly had, including the power to place GSEs in receivership in certain circumstances. *See* Reform Act § 1145; 12 U.S.C.A. § 4617; H.R. Rep. No. 110-142, at 90.

Consequently, the FHFA Inspector General conducts investigations with respect to an agency with substantially broader functions, powers, and responsibilities than did the FHFB Inspector General. Perhaps not surprisingly, while the statute establishing the FHFB provided that its Inspector General was to be appointed by the agency head, *see* IG Act § 8G, the Reform Act provides for appointment of FHFA's Inspector General by the President with the advice and consent of the Senate. That distinction between the offices is thus also in keeping with our conclusion that the Reform Act cannot be read to have automatically, by implication,

given the former FHFB Inspector General authority to act as Inspector General for the FHFA.

III.

In sum, neither the Reform Act nor the Vacancies Reform Act authorizes the former FHFB Inspector General to assume the functions and duties of the FHFA Inspector General pending appointment of a new nominee. The answer to your second question—whether the former FHFB Inspector General has authority to appoint staff to the FHFA Office of Inspector General—follows logically from this answer. The Inspector General Act authorizes only the Inspector General to "select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office." IG Act § 6(a)(7). Thus, because the former FHFB Inspector General lacks authority to act as FHFA Inspector General, he cannot hire staff for the FHFA Inspector General's office. And because we conclude that the former FHFB Inspector General cannot hire staff in the FHFA Office of Inspector General, we need not determine at this time what pay rates would apply to any employees who are hired in the future. We therefore do not address your third question.

Insofar as the absence of an Inspector General creates practical difficulties for the FHFA, we note that the Reform Act authorizes the FHFA Director to "delegate to officers and employees of the [FHFA] any of the functions, powers, or duties of the Director, as the Director considers appropriate." Reform Act § 1102(a); 12 U.S.C.A. § 4513(b). As you have suggested, this authority might permit the Director to give designated employees certain responsibilities for auditing and monitoring the FHFA's activities.

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

Mandatory Registration of Credit Rating Agencies

The Administration's proposal for mandatory registration of credit rating agencies—which would exempt an agency if (1) it does not provide ratings of securities in exchange for fees or other forms of compensation from the securities' issuers; and (2) it issues credit ratings only in any bona fide newspaper, news magazine or business or financial publication of general and regular circulation—would comply with the First Amendment.

October 22, 2009

LETTER OPINION FOR THE
ASSISTANT SECRETARY FOR FINANCIAL INSTITUTIONS
DEPARTMENT OF THE TREASURY

You have asked us to assess whether the Administration's proposal for mandatory registration of credit rating agencies, which would include an exemption designed to address First Amendment concerns, would be constitutional. For the reasons given below, we conclude that the Administration's registration proposal would satisfy the First Amendment's requirements.[1]

Under existing law, a credit rating agency may "*elect[]* to be treated as a nationally recognized statistical rating organization" by furnishing an application demonstrating that it meets certain criteria. 15 U.S.C. § 78*o*-7(a)(1)(A) (emphasis added). A registered credit rating agency receives certain benefits by being a "nationally recognized rating organization" and must abide by certain statutory requirements. *See id.* § 78*o*-7. As we understand it, the Administration wishes to amend the law to make

[1] Our conclusion assumes that application of the particular requirements and limitations that would be required of registered agencies would be tailored in accord with First Amendment requirements so that there would be no unconstitutional constraints imposed on the speech of registered agencies. We have not had sufficient time to consider the various particular regulatory requirements, either under the existing statute or in the Administration's proposal, and we express no view on whether any particular requirement would be constitutionally permissible as applied to the publication or conveyance of particular credit ratings. It is our understanding that, under the Administration's proposal, those requirements and limitations would only take effect once the Securities and Exchange Commission issues regulations implementing the new statute—regulations that that would have to reflect any exemptions or limitations the First Amendment may require.

it mandatory for credit rating agencies to register as nationally recognized statistical rating organizations—to the extent consistent with the Constitution. The current definition of "credit rating agency" is any person

> (A) engaged in the business of issuing credit ratings on the Internet or through another readily accessible means, for free or for a reasonable fee, but does not include a commercial credit reporting company;
>
> (B) employing either a quantitative or qualitative model, or both, to determine credit ratings; and
>
> (C) receiving fees from either issuers, investors, or other market participants, or a combination thereof.

Id. § 78c(a)(61).

A requirement that all "credit rating agen[cies]" so defined register with the federal government would implicate the First Amendment because such a requirement may impose at least some burden on their speech activities—namely, "issuing credit ratings on the Internet or through another readily accessible means, for free or for a reasonable fee." "As a matter of principle," the Supreme Court has explained, "a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly." *Thomas v. Collins*, 323 U.S. 516, 539 (1945); *see also id.* at 540 ("If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order.").

In light of these First Amendment concerns, analogous registration requirements in other financial regulatory statutes include exemptions designed to avoid constitutional problems. The Investment Advisers Act, for example, contains an exemption from its registration requirement for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." 15 U.S.C. § 80b-2(a)(11). And the Commodity Futures Trading Commission has adopted by regulation an exemption from the registration requirement of the

Commodity Exchange Act for any person that "does not engage in . . . [d]irecting client accounts; or . . . [p]roviding commodity trading advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients; or . . . [i]f, as provided for in section 4m(1) of the Act, during the course of the preceding 12 months, it has not furnished commodity trading advice to more than 15 persons and it does not hold itself out generally to the public as a commodity trading advisor." 17 C.F.R. § 4.14(a)(9), (10).

The Administration's proposal mirrors these other financial regulatory statutes. The proposal would exempt from the registration requirement any credit rating agency that satisfies two criteria: (i) it does not provide ratings of securities in exchange for fees or other forms of compensation from the securities' issuers; and (ii) it issues credit ratings only in any bona fide newspaper, news magazine or business or financial publication of general and regular circulation.[2]

Although the precise line for First Amendment purposes is not absolutely clear in this area, we believe that a mandatory registration requirement for credit rating agencies that contained such an exemption would comply with the First Amendment. We begin with the prong of the exemption that would require credit rating agencies to issue credit ratings only in any bona fide newspaper, news magazine or business or financial publication of general and regular circulation. This prong of the exemption derives from the Supreme Court's treatment of the similar Investment Advisers Act exemption in *Lowe v. Securities and Exchange Commission*, 472 U.S. 181 (1985).

In that case, the Securities and Exchange Commission had sought to enjoin Lowe from publishing an investment advice newsletter because it had previously revoked his registration as an investment adviser under the Act, due to his conviction for a series of financial crimes. Particularly in light of the "important constitutional question" raised by such a bar on publication, the Court read the Act's exemption for the "publisher of any bona fide newspaper, news magazine or business or financial publication

[2] The second criterion is adapted from the current Investment Advisers Act, which, as we explain below, the Supreme Court has construed so as to avoid First Amendment concerns. We assume the criterion in the proposed exemption would be given a similar construction.

of general and regular circulation" broadly to shield Lowe's newsletter, which reached an audience of between 3,000 and 19,000 subscribers. *Id.* at 188, 185. The Court further held that although Lowe's publication of his securities newsletters had not been "regular" in the sense of consistent circulation—in that the newsletters had not been published on a regular semimonthly basis as advertised—they were nevertheless "regular" for purposes of the Investment Advisers Act because there was "no indication that they have been timed to specific market activity, or to events affecting or having the ability to affect the securities industry." *Id.* at 209. The Court explained that its reading of the Act was informed by "the apparent intent of Congress to keep the Act free of constitutional infirmities." *Id*. at 207. The majority contrasted the character of Lowe's newsletter publishing, which it implied was entitled to strong First Amendment protection, with professional services involving speech that may be subjected to regulation without offending the First Amendment, such as the provision of legal advice by lawyers to their clients. The former, the Court emphasized, involved "communications [with] subscribers [that] remain entirely impersonal and," unlike the latter, "do not develop into the kind of fiduciary, person-to-person relationships that were discussed at length in the legislative history of the Act and that are characteristic of investment adviser-client relationships." *Id*. at 210; *see also id*. at 210 n.57 (noting that it was "significant" that Lowe did not engage in "individualized, investment-related interactions" with his subscribers).

In a separate opinion in *Lowe* by Justice White, three Justices found that the Act's statutory "publisher" exemption could not be construed to apply to Lowe's irregular publication, and therefore addressed the First Amendment question directly. They observed that the "power of government to regulate the professions is not lost whenever the practice of a profession entails speech," *id.* at 228, "[b]ut the principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech *per se* or of the press. . . . At some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment." *Id.* at 229–30. In attempting to "locate the point where regulation of a profession leaves off and prohibitions on speech begin," Justice White wrote,

> [o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client *in the light of the client's individual needs and circumstances* is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny. *Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted*, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Id. at 232 (emphasis added); *see also Thomas*, 323 U.S. at 544–45 (Jackson, J., concurring) ("Though the one may shade into the other, a rough distinction always exists, I think, which is more shortly illustrated than explained. A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views. Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.").

In accord with the majority and concurring opinions in *Lowe* regarding the line between impermissible regulations on speech and "merely permissible regulation of a profession," we think the First Amendment concerns that a mandatory registration requirement may raise are addressed by an exemption for agencies that supply ratings tailored to meet the needs of individual clients. The Court has adopted a somewhat similar line in determining whether credit reports constitute matters of public concern warranting heightened protection in defamation actions. *See*

Dun & Bradstreet v. Greenmoss, 472 U.S. 749, 761–63 (1985) (plurality opinion) (concluding that a credit report issued confidentially to five subscribers did not constitute speech about a matter of public concern requiring a plaintiff to show "actual malice" in a defamation suit).[3] The distinction between the provision of advice tailored to meet the needs of individual clients, on the one hand, and publication of opinions to a wide audience, on the other, supports the second prong of the Administration's proposed exemption, i.e., that credit rating agencies would be exempt from registration only if they "issue credit ratings only in any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." If a credit rating agency provides ratings to select investor clients, tailoring the speech it undertakes to those clients' needs, it is engaged in the sort of speech akin to that of other professionals when

[3] In accord with *Dun & Bradstreet*, lower courts considering credit rating agencies' First Amendment defenses to claims for defamation, fraud, and various other business torts (as well as breach of contract in at least one instance) have looked in part to whether the reports were distributed to a public audience or tailored to a discrete group of clients. *See*, *e.g., Compuware Corp. v. Moody's Investors Servs., Inc*., 499 F.3d 520, 525–34 (6th Cir. 2007) (affirming grant of summary judgment in favor of credit rating agency defendant on defamation and breach of contract claims based on "actual malice" requirement where ratings were made available to the public); *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, No. 08-Civ-7508 (SAS), 2009 WL 2828018, *9 (S.D.N.Y. Sept. 2, 2009) (rejecting First Amendment defense to various common law tort claims, including fraud, in part because "plaintiffs have plainly alleged that the . . . ratings were never widely disseminated, but were provided instead in connection with a private placement to a select group of investors"); *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.*, 580 F. Supp. 2d 630, 640 (S.D. Ohio 2008) (rejecting First Amendment defense to securities fraud and various common law claims in part because ratings disseminated to a "select class of investors"); *In re Enron Corp.*, 511 F. Supp. 2d 742, 820 (S.D. Tex. 2005) (finding that the First Amendment shielded credit rating agency from negligent misrepresentation claim where the "credit rating reports regarding Enron by national credit rating agencies were not private or confidential, but distributed 'to the world' and were related to the creditworthiness of a powerful public corporation that operated internationally"). At least one court of appeals has invoked the same consideration as one of its reasons for ruling that a credit rating agency could not avail itself of a *statutory* state-law journalist's privilege to refuse to comply with a subpoena. *In re Fitch, Inc.*, 330 F.3d 104, 109 (2d Cir. 2003) ("Unlike a business newspaper or magazine, which would cover any transactions deemed newsworthy, Fitch only 'covers' its own clients."); *see also id.* at 110 ("Fitch's information-disseminating activity does not seem to be based on a judgment about newsworthiness, but rather on client needs. We believe this weighs against Fitch being able to assert the privilege for the information at issue.").

they advise their clients—speech that is constitutionally distinct from the publication of facts or opinions to the public at large. *See Taucher v. Born*, 53 F. Supp. 2d 464 (D.D.C. 1999) (Commodity Exchange Act requirement that commodity trading advisors register with Commodity Futures Trading Commission was unconstitutional as applied to publishers of general commodity trading information strategy and advice, and trading systems, who made general buy and sell recommendations not tailored to any specific individuals, and never had contact with individual investors).

Indeed, federal courts have repeatedly rejected First Amendment challenges to professional licensing statutes as applied to persons who provide services to particular clients, and do not simply offer published advice or information to the general public. *See, e.g.*, *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1053–55 (9th Cir. 2000) (psychologists/psychoanalysts); *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1386 (7th Cir. 1992) (lawyers); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 603–05 (4th Cir. 1988) (accountants); *Fidelity Nat'l Info. Solutions, Inc. v. Sinclair*, No. Civ. A. 02-6928, 2004 WL 764834 (E.D. Pa. Mar. 31) (real estate appraisers); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (rejecting doctors' argument that they had a First Amendment right not to provide information to their patients about the risks of abortion, and childbirth, in a manner mandated by state statute; "[t]o be sure, the physician's First Amendment rights not to speak are implicated, . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State"). These precedents provide support for the application of the registration requirement to credit rating agencies that do not limit their issuance of credit ratings only to any bona fide newspaper, news magazine or business or financial publication of general and regular circulation.

The same reasons that support the constitutionality of mandatory registration for credit ratings agencies that do not satisfy the general publication criterion described above also support application of that registration requirement to any credit rating agency that receives fees or other forms of compensation from *issuers* of securities in return for its provision of ratings. Just as a credit ratings agency may be required to register, in accord with the distinction set forth in *Lowe*, if it provides individualized

advice to client *investors*, so too can registration be required if the agency provides its ratings (even to a public audience) as a professional service on behalf of individual *issuers* of securities. When a credit rating agency is hired by a particular issuer to rate a particular security, it is providing a particular client with a valuable professional service tailored to that client's needs, one for which the issuer-client is willing to pay, presumably because it believes the agency will "exercise judgment on behalf of the client," *Lowe*, 472 U.S. at 232 (White, J., concurring), in order to advance the issuer's own commercial goals. *Cf. Commercial Fin. Servs., Inc. v. Arthur Andersen LLP*, 94 P.3d 106, 110 (Okla. Civ. App. 2004) (rating agencies sued by issuer that hired it not protected by First Amendment against liability for negligent misrepresentation because "[w]hile the Rating Agencies gave 'opinions,' they did so as professionals being paid to provide their opinions to a client").[4]

This conclusion is bolstered by our understanding, based on information provided by officials at the Treasury Department, that a payment by an issuer to a credit rating agency in exchange for issuance of a rating ordinarily entails receipt of the rating by the issuer in advance of public disclosure, and the opportunity for discussion and exchange between the issuer and agency during the development of the rating. In this respect, this criterion of the proposed exemption would appear to be similar to an element of the exemption under the Commodity Exchange Act for "commodity trading advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients." 17 C.F.R. § 4.14(a)(9). To be sure, in developing the rating for the client, the credit rating agency may provide a neutral and candid assessment, using professional methods. But the same is true of accountants and other professionals when they give their clients advice, and yet

[4] We recognize that at least two lower courts, in determining whether a credit rating agency was entitled to the benefit of a statutory journalist's privilege, have rejected the significance of the fact that the agency had been hired by the issuer. *See In re Pan Am Corp.*, 161 B.R. 577 (S.D.N.Y. 1993); *In re Scott Paper Co.*, 145 F.R.D. 366 (E.D. Pa. 1993). But the lower courts are divided on that issue, even in the context of that analogous statutory question. *See Fitch*, 330 F.3d 104 (discussed *supra* note **Error! Bookmark not defined.**). Moreover, the considerations relevant to the application of the statutory journalist's privilege may differ from those that determine the constitutional permissibility of a registration requirement.

those professionals may be required to register consistent with the First Amendment. Admittedly, even issuer-paid agencies typically convey their ratings to the public. But other professionals who may be required to register also may subsequently convey to a wider audience some of the information the client has retained them to provide. It is the fact of the individualized provision of a service to a client that supports the registration requirement in either case. Although widespread publication of their ratings may be more central to the service provided by credit rating agencies than is the less frequent public speech by members of regulated professions acting on behalf of their clients (such as when a lawyer publicly discloses an advice of counsel letter), this appears to us to be a difference of degree rather than of kind. *Cf. Lowe*, 472 U.S. at 231 (White, J., concurring) ("the distinguishing factor was whether the speech in any particular case was 'associat[ed] . . . with some other factor which the state may regulate so as to bring the whole within official control'" (quoting *Thomas*, 323 U.S. at 547)). In light of the context-specific analysis courts have followed in assessing First Amendment protections in such cases, we believe findings reflecting the realities of how credit rating agencies operate in providing ratings, such as those that would support the representations made to us by the Treasury Department, would bolster the legal basis for a mandatory registration requirement.

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Effect of Spending Prohibition on HUD's Satisfaction of Contractual Obligations to ACORN

Section 163 of division B ("Continuing Appropriations Resolution, 2010") of Public Law 111-68 does not direct or authorize the Department of Housing and Urban Development to breach a pre-existing binding contractual obligation to make payments to the Association of Community Organizations for Reform Now or its affiliates, subsidiaries, or allied organizations where doing so would give rise to contractual liability.

October 23, 2009

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

You have asked whether section 163 of division B ("Continuing Appropriations Resolution, 2010") of Public Law 111-68, 123 Stat. 2023, 2053, approved by the President on October 1, 2009, prohibits the Department of Housing and Urban Development ("HUD") from making a payment to the Association of Community Organizations for Reform Now ("ACORN") or its affiliates, subsidiaries, or allied organizations to satisfy an existing contractual obligation that arose prior to the enactment of that measure. We conclude, in agreement with the views we solicited and received, that the language of section 163 is not clear with respect to whether its prohibition applies in cases where pre-existing law apart from section 163, including the contract itself, compels such a payment and where, accordingly, failure to make such a payment would subject the federal government to contractual liability. In accord with established interpretive principles for resolving such lack of clarity, we conclude that section 163 does not direct or authorize HUD to refuse payment on binding contractual obligations that predate the Continuing Appropriations Resolution.[1]

I.

Section 163 states: "None of the funds made available by this joint resolution or any prior Act may be provided to the Association of Commu-

[1] This opinion addresses only pre-existing contracts that create binding obligations requiring payment and not those that excuse payment in the relevant circumstances.

nity Organizations for Reform Now (ACORN), or any of its affiliates, subsidiaries, or allied organizations." The term "provided to" has no established meaning in appropriations law. As explained by the GAO Redbook, "[t]he two basic authorities conferred by an appropriation law are the authority to incur obligations and the authority to make expenditures. An obligation results from some action that creates a liability or definite commitment on the part of the government to make an expenditure. . . . The expenditure is the disbursement of funds to pay the obligation." 1 General Accounting Office, *Principles of Federal Appropriations Law* 5-3 (3d ed. 2004) ("GAO Redbook"). Thus, "obligate" and "expend" are terms of art that generally describe the commitment and payment of funds. *See, e.g.*, 31 U.S.C. § 1341(a)(1) (2006) (Anti-Deficiency Act) (providing that no federal officer or employee may "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation"). The term "expenditure," in particular, is broadly defined as "[t]he actual spending of money; an outlay." Government Accountability Office, *A Glossary of Terms Used in the Federal Budget Process* 48 (2005) ("GAO Glossary"); *see also* 1 GAO Redbook at 5-3 ("The expenditure is the disbursement of funds to pay the obligation."). And an opinion by the Comptroller General suggests that the word "expenditure" in the Anti-Deficiency Act prohibits an agency from making a payment to satisfy a contractual obligation if a statutory or regulatory funding limitation would thereby be exceeded. *See In re Currency Exchange Rate Fluctuations*, 58 Comp. Gen. 46 (1978).

By contrast, as we have noted, the term Congress elected to employ in section 163, "provided to," has no clearly defined meaning in appropriations law. *See, e.g.*, GAO Glossary (containing no definition of "provision" or "provide"). Moreover, appropriations case law and reference materials we have consulted, including the GAO Redbook, do not shed light on whether "provided to" in section 163 should be understood to prohibit a federal agency from making payments to satisfy pre-existing contractual obligations.

To be sure, some common definitions of "provide," such as "supply" or "furnish," *American Heritage Dictionary* 1411 (4th ed. 2006), would appear to describe any transfer of funds, presumably including a transfer in satisfaction of an existing obligation. Other definitions, however, connote a discretionary action. For instance, "provide" may mean "con-

tribute," *Webster's New International Dictionary* 1994 (2d ed. 1958), or "make available," *American Heritage Dictionary* 1411 (4th ed. 2006), and "offer" is among its synonyms, *Roget's II: The New Thesaurus* 780 (3d ed. 1995). And in common parlance, the verb "provide" frequently describes discretionary action taken to benefit another. Moreover, several of the word's definitions incorporate a forward-looking aspect, *see, e.g.*, *Webster's New International Dictionary* 1994 (2d ed. 1958) ("to look out for in advance"; "to prepare"); *Black's Law Dictionary* 1224 (6th ed. 1990) ("[t]o make, procure, or furnish for future use, prepare"), consistent with the etymology of "provide," which derives from the Latin *providere*, meaning to see before, foresee, or be cautious, 12 *Oxford English Dictionary* 713 (2d ed. 1989). Definitions of the word "expend," we note, do not carry a similarly discretionary or forward-looking connotation, in keeping with the etymology of that word, which comes from the Latin *expendere*, meaning simply to pay or weigh. 5 *id.* at 561.

Against this background, we find that the relevant text of section 163 is not clear with respect to the precise question before us. Congress had available to it—and yet did not use—appropriations language that had previously been construed to prohibit payments even on pre-existing contractual obligations.[2] It instead used a term that could be read to suggest a bar only on payments that result from new discretionary decisions—including, in particular, payments made pursuant to discretionary choices to incur new obligations. Accordingly, although one could read the phrase "None of the funds made available by this joint resolution or any prior Act may be provided to [ACORN], or any of its affiliates, subsidiaries, or allied organizations" categorically to prohibit *any* outlay of money to the identified entities, including pursuant to pre-existing contractual obligations, one could also read the phrase not to prohibit payments made pursuant to a prior binding contractual duty.

II.

In light of the term Congress chose, we turn to other interpretative tools to resolve the question before us. The recent Supreme Court case *Chero-*

[2] We do not address whether, if Congress had used the phrase "may be expended" in section 163, that phrase would necessarily prohibit payment pursuant to pre-existing legal obligations—a question that might depend at least in part on extratextual considerations.

kee Nation of Okla. v. Leavitt, 543 U.S. 631 (2005), is instructive. There, contracts between the government and Indian tribes provided that the tribes would supply health services normally furnished by the government and that the government would in turn pay the "contract support costs" the tribes incurred. The government subsequently refused to pay the full contract support costs because, it argued, Congress had not appropriated sufficient funds. Part of the government's argument rested on a later-enacted statute that stated: "Notwithstanding any other provision of law [the] amounts appropriated to or earmarked in committee reports for the . . . Indian Health Service . . . for payments to tribes . . . for contract support costs . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes." *Id.* at 645 (quoting section 314 of the Department of the Interior and Related Agencies Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2682-232, 2681-288 (1998)). The Court noted that, because committee reports in 1994 through 1997 had earmarked funds for contract support costs, and because those funds had "long since been spent," this language was "open to the interpretation that it retroactively bars payment of claims arising under 1994 through 1997 contracts." *Id*. In the Court's view, however, the statutory language was also open to a different interpretation that would simply forbid the "use of unspent funds appropriated in prior years to pay unpaid 'contract support costs.'" *Id.* at 646. Thus, the Court concluded:

> On the basis of language alone we would find either interpretation reasonable. But there are other considerations. The first interpretation would undo a binding governmental contractual promise. A statute that retroactively repudiates the Government's contractual obligation may violate the Constitution. And such an interpretation is disfavored. This consideration tips the balance against the retroactive interpretation.

Id. (citations omitted); *see also Lynch v. United States*, 292 U.S. 571, 580 (1934) ("Congress was without power to reduce expenditures by abrogating contractual obligations of the United States."); *United States v. Winstar Corp.*, 518 U.S. 839, 875–76 (1996) (plurality opinion) ("[I]t is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights, [although the] extent of that capacity, to be sure, remains somewhat obscure.") (citations omit-

ted); *cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 271 (1994) ("The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.").

Reading section 163 to prohibit payments to ACORN or its affiliates, subsidiaries, or allied organizations to satisfy a binding contractual obligation undertaken before enactment of section 163 would "undo a binding governmental contractual promise." *Cherokee Nation*, 543 U.S. at 646. In accord with *Cherokee Nation*, the better reading of the section is therefore that it does not prohibit such payments. This reading of "provided to" is especially appropriate here because, consistent with the canon of constitutional avoidance, *see, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 483 U.S. 568, 575 (1988), it not only avoids abrogating binding governmental contractual promises but also avoids the particular constitutional concerns that may be presented by reading the statute, which applies to specific named entities, to abrogate such contracts, including even in cases where performance has already been completed but payment has not been rendered.[3]

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[3] *See, e.g.*, *United States v. Lovett*, 328 U.S. 303, 315 (1946) ("[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution."); *Selective Serv. Sys. v. Minn. Pub. Interest Research Group*, 468 U.S. 841, 853 (1984) (stating that a particular provision imposed "none of the burdens historically associated with punishment" because "'the sanction is the mere denial of a *noncontractual* governmental benefit'") (emphasis added) (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 475–76 (1977) ("[O]ur inquiry is not ended by the determination that the Act imposes no punishment traditionally judged to be prohibited by the Bill of Attainder Clause. Our treatment of the scope of the Clause has never precluded the possibility that new burdens and deprivations might be legislatively fashioned that are inconsistent with the bill of attainder guarantee. The Court, therefore, often has looked beyond mere historical experience and has applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes."); *see also Consol. Edison Co. v. Pataki*, 292 F.3d 338, 346–49 (2d Cir. 2002) (applying the Bill of Attainder Clause to a bill that arguably singled out a corporation); *cf.* Kenneth R. Thomas, Cong. Research Serv., *The Proposed "Defund ACORN Act": Is it a "Bill of Attainder?"* (2009) (considering an earlier bill that would have, *inter alia*, prohibited the award of federal contracts or the provision of federal funds to a "covered organization,"

III.

In sum, section 163 should not be read as directing or authorizing HUD to breach a pre-existing binding contractual obligation to make payments to ACORN or its affiliates, subsidiaries, or allied organizations where doing so would give rise to contractual liability.

DAVID J. BARRON
Acting Assistant Attorney General
Office of Legal Counsel

with "organization" expressly defined as including ACORN and its affiliates, and concluding that "a court may have a sufficient basis to overcome the presumption of constitutionality, and find that the proposed [bill] violates the prohibition against bills of attainder").

Removability of the Federal Coordinator for Alaska Natural Gas Transportation Projects

The Federal Coordinator for the Alaska Natural Gas Transportation Projects serves at the pleasure of the President and thus may be removed at the President's will.

October 23, 2009

MEMORANDUM OPINION FOR THE
PRINCIPAL DEPUTY COUNSEL TO THE PRESIDENT

This memorandum confirms oral advice about the removability of the Federal Coordinator for the Alaska Natural Gas Transportation Projects ("Federal Coordinator" or the "Coordinator"). Specifically, you asked us whether the statute establishing the Office of the Federal Coordinator, 15 U.S.C. § 720d (2006), restricts the President's power to remove the Coordinator. As we previously explained in our oral advice and now explain in greater detail, we believe that the Federal Coordinator serves at the pleasure of the President and thus may be removed at the President's will.

Congress enacted the Alaska Natural Gas Pipeline Act ("ANGPA," or "the Act") to encourage the speedy construction of a pipeline carrying natural gas from the Alaskan North Slope to the contiguous United States. *See* Pub. L. No. 108-324, div. C, 118 Stat. 1220, 1255 (2004); *see generally Exxon Mobil Corp. v. FERC*, 501 F.3d 204, 207 (D.C. Cir. 2007). The Act established the Office of the Federal Coordinator for Alaska Natural Gas Transportation Projects "as an independent office in the executive branch." ANGPA § 106(a) (codified at 15 U.S.C. § 720d(a) (2006)). The Office is "headed by a Federal Coordinator" "who shall be appointed by the President, by and with advice and consent of the Senate, to serve a term to last until 1 year following the completion of the [natural gas pipeline] project referred to in section 720a of this title." 15 U.S.C. § 720d(b)(1). The Act further provides that the Coordinator "shall be responsible for—(1) coordinating the expeditious discharge of all activities by Federal agencies with respect to an Alaska natural gas transportation project; and (2) ensuring the compliance of Federal agencies with the provisions of this chapter." *Id.* § 720d(c).

Critically, the Act does not set out any preconditions for the removal of the Federal Coordinator. As a general matter, "[i]n the absence of a specific provision to the contrary, the power of removal from office is

incident to the power of appointment." *Keim v. United States*, 177 U.S. 290, 293–94 (1900); *cf. Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) ("When Congress decides purposefully to enact legislation restricting or regulating presidential action, it must make its intent clear."). This "rule of constitutional and statutory construction" recognizes that "those in charge of and responsible for administering functions of government who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint." *Myers v. United States*, 272 U.S. 52, 119 (1926). These principles support the inference that an officer serves at the pleasure of the President where Congress has not plainly provided for it. *See, e.g.*, *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 170 (1996) ("*Separation of Powers*"); *see also id*. at 172–73 ("[B]ecause the [officer]'s tenure is not protected by an explicit for-cause removal limitation, . . . we therefore infer that the President has at least the formal power to remove the [officer] at will."); *Removal of Holdover Officials Serving on the Federal Housing Finance Board and the Railroad Retirement Board*, 21 Op. O.L.C. 135, 135 (1997) ("*FHFB/RRB Removal*").

Because Congress did not explicitly provide tenure protection to the Federal Coordinator, the President, consistent with the above settled principles, may remove her without cause.

The only two textual indications that are conceivably to the contrary—i.e., the Coordinator's fixed term, 15 U.S.C. § 720d(b)(1), and the "independen[ce]" of the Office, *id.* § 720d(a)—do not undermine the above conclusion. First, the Supreme Court has long held fixed terms to impose a limit on service but not to imply tenure protection. *Parsons v. United States*, 167 U.S. 324, 338–39 (1897) (President can remove United States Attorneys even during their appointed four-year terms); *see also* Memorandum for J. Paul Oetken, Associate Counsel to the President, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: Displacement of Recess Appointees in Tenure-Protected Positions* (Sept. 1, 2000) (noting that "statutory term is a limit, rather than a protection of tenure."). The Act's legislative history supports the application of those precedents here. A predecessor bill of the same Congress, S. 1005, defined the Federal Coordinator position using language nearly identical to that in 15 U.S.C. § 720d. Although the accompanying Senate Report observed that the "Coordinator will serve a term that lasts one year

beyond the completion of construction on the pipeline," S. Rep. No. 108-43, at 138 (2003), it explained that the Coordinator "will serve at the pleasure of the President." *Id.**

Second, that Congress established the Office of the Federal Coordinator as an "independent office in the executive branch," 15 U.S.C. § 720d(a), does not imply tenure protection. As we observed with respect to similar language, "[a]ll that should be inferred from the status of an 'independent agency' is that the entity is not located within another department or agency." *FHFB/RRB Removal*, 21 Op. O.L.C. at 138 n.5; *see also* Memorandum for the Attorney General from Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, *Re: Removability of Members of the Renegotiation Board* (Feb. 24, 1961) ("The significance of th[e] . . . phrase [i.e., 'an independent establishment in the executive branch of the Government'] is uncertain, but there is reason to believe that Congress intended to make the Board independent of the Department of Defense and of other agencies in the executive branch, without necessarily intending that it be independent of the President as head of the executive branch."). Thus, Congress granted the Federal Coordinator a measure of free-standing authority from other executive agencies—not from the President. Indeed, although the statute grants limited authority to the Coordinator to overrule certain terms and conditions set by other federal agencies in their agreements related to the pipeline project, 15 U.S.C. § 720d(d)(2), it expressly subjects a critical aspect of the Federal Coordinator's duties to presidential oversight. *Id.* § 720d(e)(1) (requiring Coordinator to enter into a "joint surveillance and monitoring agreement" with the State of Alaska that shall be subject to the President's approval).

The Supreme Court has recognized an exception to the above settled rule against inferring tenure protection in the face of congressional silence. That case is inapplicable here. In *Wiener v. United States*, the

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* As reported out of the House Committee on Energy and Commerce, a competing bill explicitly provided that the Coordinator would "hold office at the pleasure of the President." H.R. 1644, § 2007(b)(2); H.R. Rep. No. 108-65 (2003). We do not see this provision as significant, however, since, as we have explained, there is no requirement that a law contain an express at-will removal provision. Indeed, the Senate Report, noting that the Coordinator serves at the President's pleasure, is consistent with the general rule that an express at-will removal provision need not be included in the enacted law in order to make the officer subject to the President's plenary removal authority.

Supreme Court upheld restrictions on the removal of members of the War Claims Commission because of "the intrinsic judicial character of [their] task." 357 U.S. 349, 355–56 (1958); *see also Separation of Powers*, 20 Op. O.L.C. at 170 (Executive Branch should not "infer the existence of a for-cause limit on presidential removal," "except with respect to officers whose only functions are adjudicatory."). Tasked by Congress with coordinating among various agencies and ensuring compliance with the Act, the Federal Coordinator performs quintessentially executive—not adjudicatory—functions. *Cf. Morrison v. Olson*, 487 U.S. 654, 691 (1988) (stating that an officer's function is only one consideration in deciding whether an express statutory protection of tenure is constitutional). Although *Wiener* concerned officers with adjudicatory functions, we are aware that there is language in cases, often in dictum, suggesting that a for-cause removal restriction may be inferred even for officers whose duties are not wholly adjudicatory, such as the board members of "independent" regulatory commissions. *See Swan v. Clinton*, 100 F.3d 973, 982–83 (D.C. Cir. 1996) (Board of National Credit Union Administration); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993) (Federal Election Commission); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (Securities and Exchange Commission); *cf. Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 680 (D.C. Cir. 2008) (recognizing for-cause removal restriction as to SEC Commissioners), *cert. granted*, 129 S. Ct. 2378 (2009) (No. 08-861). However, these multi-member boards, the appointments to which are typically subject to political balance requirements and staggered terms, do not remotely resemble the Office of the Federal Coordinator. Accordingly, we do not believe these cases addressing them provide support for departing from the general rule we have identified.

In sum, because Congress did not explicitly confer tenure protection upon the Federal Coordinator, the President may remove the incumbent officer at will.

DAVID J. BARRON
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Office of Legal Counsel

Applicability of Ten-Year Minimum Sentence to Semiautomatic Assault Weapons

Semiautomatic assault weapons are no longer among the firearms to which the ten-year minimum sentence in 18 U.S.C. § 924(c)(1)(B)(i) applies.

November 24, 2009

MEMORANDUM OPINION FOR THE
ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

You have asked whether possession of a semiautomatic assault weapon in furtherance of a crime of violence or drug trafficking crime is conduct that remains subject to a mandatory ten-year minimum sentence. Having carefully considered the views of the Criminal Division and the Bureau of Alcohol, Tobacco, and Firearms ("ATF"), we conclude that semiautomatic assault weapons are no longer among the firearms to which the ten-year minimum sentence in section 924(c)(1)(B)(i) of title 18 applies. The 1994 amendment that increased the penalties for use of such firearms in section 924(c)(1) is subject to a sunset provision, and thus was repealed as of 2004. Accordingly, the possession of a semiautomatic assault weapon in furtherance of, or the use during and in relation to, a crime of violence or drug trafficking crime is subject to the general five-year mandatory minimum sentence provided for in section 924(c)(1)(A), with increased penalties for the brandishment or discharge of such weapon.[1]

I.

Section 924(c)(1) of title 18 makes it a federal offense to use or carry a firearm during and in relation to certain other offenses or to possess a firearm in furtherance of those other offenses. The question you have asked us to consider depends upon the relationship between two amendments that Congress made to section 924(c)(1), the first in 1994 and the second in 1998.

[1] As explained herein, section 924(c)(1)(B)(i) of the current United States Code continues to refer to semiautomatic assault weapons. We conclude, however, because of the repeal, that reference should no longer appear in the Code.

Prior to 1994, section 924(c)(1) provided as follows:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, shall, in addition to the punishment provided for such crime . . . , be sentenced to imprisonment for five years, *and if the firearm is a short-barreled rifle [or a] short-barreled shotgun to imprisonment for ten years*, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

18 U.S.C. § 924(c)(1) (Supp. II 1990) (emphasis added).

In 1994, Congress enacted the Public Safety and Recreational Firearms Use Protection Act ("PSRFUPA" or "Act") as subtitle A of title XI of an omnibus crime bill. *See* Pub. L. No. 103-322, §§ 110101–110106, 108 Stat. 1796, 1996 (1994). The centerpiece of the Act was the so-called "Assault Weapons Ban," which did not affect the existing section 924(c)(1), but instead established a new offense, making it "unlawful for a person to manufacture, transfer, or possess a semiautomatic assault weapon," except in compliance with certain specified exceptions. *Id.* § 110102(a). The PSRFUPA further provided a detailed description of the weapons to which the Act applied, *see id.* § 110102(b) (identifying both nineteen specific models of firearms and listing certain defining characteristics of "semiautomatic assault weapons"), and imposed certain labeling requirements for such weapons, *see id.* § 110102(d) ("[t]he serial number of any semiautomatic assault weapon manufactured after the date of the enactment of this statute shall clearly show the date on which the weapon was manufactured"), to facilitate enforcement of the Act's prohibitions.

For present purposes, however, it is a distinct provision of the PSRFUPA that is our focus. Section 110102(c)(2) of the PSRFUPA amended the existing 18 U.S.C. § 924(c)(1) to add semiautomatic assault weapons to the list of firearms subject to a ten-year penalty for use during and in relation to any crime of violence or drug trafficking crime. It provided that "[s]ection 924(c)(1) . . . is amended in the first sentence by inserting ', or semiautomatic assault weapon,' after 'short-barreled shotgun.'" As amended, section 924(c)(1) read, in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and *if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years*, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

18 U.S.C. § 924(c)(1) (1994) (emphasis added).

Significantly, however, Congress included in the PSRFUPA a sunset provision that limited the temporal effect of the Act. The sunset provision, section 110105(2), stated that "[t]his subtitle and the amendments made by this subtitle . . . are repealed effective as of the date that is 10 years after [PSRFUPA's effective] date." Thus, because section 110102(c)(2) clearly was an "amendment made by this subtitle"—namely, an amendment to 18 U.S.C. § 924(c)(1)—it would have been "repealed" and ceased to have legal force and effect as of 2004 unless Congress enacted intervening legislation that insulated section 110102(c)(2) from the operation of the sunset provision.

In 1998, Congress did enact intervening legislation that amended section 924(c)(1). Congress enacted the legislation in response to *Bailey v. United States*, 516 U.S. 137 (1995), a Supreme Court decision that interpreted section 924(c)(1) and was issued one year after PSRFUPA's enactment. In *Bailey*, the Supreme Court considered what it meant to "use" a firearm for purposes of section 924(c)(1). It held that the government had to prove that a defendant "actively employed the firearm during and in relation to the predicate crime" in order to "sustain a conviction under the 'use' prong" of the statute. *Id.* at 150.

In response to *Bailey*, multiple bills were introduced in both houses of Congress to make clear that the "use" of a firearm for purposes of section 924(c)(1) would not require the active employment of the firearm in the commission of a predicate crime. Significantly, many of these bills proposed further amendments to section 924(c)(1) that went beyond merely responding to the Court's interpretation of the term "use." This legislative activity ultimately resulted in the passage of a 1998 amendment to section

924(c)(1) titled "An Act to Throttle Criminal Use of Guns." The 1998 amendment provided that "[s]ection 924(c) of title 18, United States Code, is amended . . . by striking '(c)' and all that follows through the end of paragraph (1) and inserting the following:

> "'(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> "'(i) be sentenced to a term of imprisonment of not less than 5 years;
>
> "'(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> "'(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.
>
> "'(B) If the firearm possessed by a person convicted of a violation of this subsection—
>
> "'(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
>
> "'(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.'"

Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469, 3469 (1998).

The 1998 amendment therefore split section 924(c)(1) into two new subsections—18 U.S.C. § 924(c)(1)(A) and 924(c)(1)(B)—and made three major changes to the section's operation. First, new section 924(c)(1)(A) made clear that the offense created by section 924(c)(1) applies not only to any individual who "uses or carries a firearm," but also to one who, "in furtherance of any such crime, possesses a firearm." Second, the remaining portion of subsection (c)(1)(A) imposed new minimum terms of imprisonment for specified types of firearms use. In lieu of the pre-1998

fixed five-year sentence, the amendment made the new baseline sentence for any use a minimum of five years, and it created new sentences of a minimum of seven and ten years, respectively, for the "brandishment" and "discharge" of a firearm during and in relation to a predicate crime.

The third change was set forth in the new subsection (c)(1)(B) and addressed the sentences imposed for possession of certain types of firearms. The list enumerating these firearms did not change from the pre-1998 version of section 924(c)(1), as already amended by the PSRFUPA. As was the case before 1998, that list included short-barreled rifles, short-barreled shotguns, semiautomatic assault weapons, machineguns, destructive devices, and firearms equipped with a silencer or muffler. And, as was the case before 1998, semiautomatic assault weapons were treated identically to short-barreled rifles and short-barreled shotguns, just as the 1994 PSRFUPA had prescribed. The only change was that, whereas offenses involving semiautomatic weapons, short-barreled rifles, and short-barreled shotguns were subject to a fixed ten-year term before 1998, and offenses involving machine guns, destructive devices, and firearms with silencers or mufflers were subject to a fixed thirty-year term before 1998, the 1998 amendment made such offenses subject to mandatory *minimum* terms of ten and thirty years, respectively. In making this change, however, the 1998 amendment retained the term "semiautomatic assault weapon" in precisely the same relation to the other terms in this section as had been prescribed in 1994 by the PSRFUPA amendment to section 924(c)(1).

II.

Whether the sunset provision of the 1994 PSRFUPA repealed the PSRFUPA amendment that added "or semiautomatic assault weapon" to section 924(c)(1) turns on the following question: Did the subsequent 1998 amendment to that section preserve the 1994 PSRFUPA amendment adding semiautomatic assault weapons, or did it instead abrogate that earlier PSRFUPA amendment and enact a new provision to replace it? If the 1998 amendment did not abrogate the 1994 amendment, then in 2004 the sunset provision of PSRFUPA repealed the 1994 amendment that added "or semiautomatic assault weapon" to section 924(c)(1). If, on the other hand, the 1998 amendment did abrogate and replace the relevant

part of the then-existing version of section 924(c)(1), then the sunset provision of PSRFUPA would not apply to the language enumerating "semiautomatic assault weapon"; the language in question would no longer appear in the section by virtue of an "amendment" "made by" the 1994 PSRFUPA and thus would be insulated from the operation of the PSRFUPA sunset provision.

In resolving the question, we are mindful that the effect of the 1998 amendment on the operation of the 1994 sunset provision has been the source of some uncertainty.[2] Even the Code publishers have taken varying views. The official U.S. Code retained the term "semiautomatic assault weapon" in section 924(c)(1)(B)(i) after 2004. 18 U.S.C. § 924(c)(1)(B)(i) (2006). West Publishing, however, removed the term from the U.S. Code Annotated from 2004 through 2008, before reinstating the term in its 2009 edition. *Compare* 18 U.S.C.A. § 924(c)(1)(B)(i) (2008), *with* 18 U.S.C.A. § 924(c)(1)(B)(i) (2009).

We are also aware that the issue has generated disagreement within the Department of Justice. In 2004, before the sunset provision repealed PSRFUPA, the Criminal Division took the position that the provision in section 924(c)(1)(B) concerning semiautomatic assault weapons would expire that year. It stated in the USABook, a Justice Department resource manual, that "there is nothing in the legislative history [of the 1998 law] to indicate that in rewriting § 924(c)(1), Congress intended to effectively repeal the sunset provision for semiautomatic assault weapons in § 924(c)." *Q & As on the Effect of the Expiration of the Assault Weapons Ban (AWB)*, USABook Online, http://10.173.2.12/usao/eousa/ole/usabook/fire/appxd.htm (last visited Nov. 7, 2009). However, the Criminal Division now takes a different view, maintaining that the sunset provision did not affect section 924(c)(1)(B)(i) because Congress struck

[2] No court has squarely addressed this question of statutory construction. Although two courts of appeals have suggested that semiautomatic assault weapons should no longer be subject to the mandatory ten-year sentence, it does not appear that the issue was squarely presented in those cases because the defendants committed their offenses before 2004, making the ten-year mandatory minimum sentence applicable regardless of whether the sunset provision caused the semiautomatic assault weapon language in section 924(c)(1)(B)(i) to be "repealed" in 2004. *See United States v. Klump*, 536 F.3d 113, 120–21 (2d Cir.), *cert. denied*, 129 S. Ct. 664 (2008); *United States v. Cassell*, 530 F.3d 1009, 1012 n.1 (D.C. Cir. 2008), *cert. denied* 129 S. Ct. 1038 (2009).

section 924(c)(1) in 1998 and replaced it with a new sentencing scheme that differed, in several respects, from the 1994 version of the law—thereby leaving in place no 1994 amendment to section 924(c)(1) that could be repealed. *See* Memorandum for David Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Lanny A. Breuer, Assistant Attorney General, Criminal Division, *Re: 18 U.S.C. § 924(c)(1)(B)(i) and Semiautomatic Assault Weapons* at 1 (July 30, 2009) (stating that "the sunset provision does not apply to the 1998 revision of Section 924(c)(1)" and referring to an attached July 14, 2009 memorandum from Patty Stemler, Chief of the Criminal Appellate Section, in support). By contrast, ATF is of the view that the sunset provision did repeal the semiautomatic assault weapon language in section 924(c)(1)(B)(i) as of 2004. It argues that to accept the Criminal Division's position would be to conclude that Congress implicitly repealed the sunset provision (at least as it would have applied to section 924(c)(1)) in 1998, but that there is no basis for concluding that such an implicit repeal occurred. *See* Memorandum for Office of Legal Counsel, from Stephen R. Rubenstein, Chief Counsel, ATF, *Re: Section 924(c) and the* "*Semiautomatic Assault Weapon*" *Sentence Enhancement* (Sept. 11, 2009).

A.

As both the Criminal Division and ATF acknowledge, neither the plain text of the PSRFUPA, nor the plain text of the 1998 amendment to section 924(c)(1), resolves the issue. The PSRFUPA obviously does not speak to whether Congress, in *subsequently* passing the 1998 amendment, intended to affect the application of the PSRFUPA sunset provision to the 1994 PSRFUPA amendment that added "semiautomatic assault weapon" to section 924(c)(1). And for its part, the 1998 amendment makes no reference, one way or the other, to the PSRFUPA sunset provision.

Because of this textual silence, we must look elsewhere for interpretive guidance. In particular, we rely on an established canon of statutory construction, endorsed in treatises and both federal and state case law, for resolving ambiguities of the sort we confront here. That canon provides that "[p]rovisions of [an] original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law." 1A Norman Singer, *Suther-*

land on Statutory Construction § 22.33, at 392 (6th ed. 2000); *see also Posadas v. Nat'l City Bank*, 296 U.S. 497, 505 (1936) ("a later act repeating provisions of an earlier one is a continuation, rather than an abrogation and reenactment, of the earlier act"; "provisions of a prior statute, so far as they are reproduced in a later one, are to be construed as a continuation of such provisions and not as a new enactment"); *id.* (noting common-law origins of this interpretive principle).[3]

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[3] *See also, e.g.*, *Kirchner v. Kan. Turnpike Auth.*, 336 F.2d 222, 230 (10th Cir. 1964) ("Provisions of the original Act which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law"); *Tyson v. United States*, 285 F.2d 19, 22 (10th Cir. 1960) ("A general rule of construction is that provisions of an original act or section re-enacted or substantially repeated in an amendment are construed as a continuation of the original law."); *Sutton v. State*, 101 N.E.2d 636, 638 (Ind. 1951) ("The unchanged portions of the statute are not to be considered as repealed and reenacted. They are continued in force, with the same meaning and effect after the amendment that they had before."); *In re Prime's Estate*, 32 N.E. 1091, 1093 (N.Y. 1893) ("Where the amended act re-enacts provisions in the former law, either *ipsissimis verbis* or by the use of equivalent, though different words, the law will be regarded as having been continuous[.]"); *cf. Am. Casualty Co. v. Nordic Leasing, Inc.*, 42 F.3d 725, 732 n.7 (2d Cir. 1994) ("Where sections of a statute have been amended but certain provisions have been left unchanged, we must generally assume that the legislature intended to leave the untouched provisions' original meaning intact."); *Sierra Club v. Sec'y of the Army*, 820 F.2d 513, 522 (1st Cir. 1987) ("Absent some evidence of an attempt to change that construction, a substantial reenactment of the law incorporating its preexisting phraseology is usually the functional equivalent of codifying the earlier construction into the statute.").

As a corollary to this interpretive principle, state courts have held that provisions of an original act that are reenacted in an amendatory act are repealed when the original act is repealed. *See, e.g.*, *Sutton*, 101 N.E. 2d at 638 ("Since the provisions of the original act which were 're-enacted' in the amendatory act are but a continuation of the original act, the repeal of the original act by the Act of 1939 repeals those provisions of the original act which were 're-enacted' in the amendatory act[.]"); *In re Yakima Amusement Co.*, 73 P.2d 519, 521 (Wash. 1937) ("In the event of the subsequent repeal of the prior or original statute, the provisions of the first statute continued in force in the second statute are repealed and fall with the abrogation of the original statute."); *Duke v. Am. Casualty Co.*, 226 P. 501, 504 (Wash. 1924) ("[T]he rule respecting construction of amendments is that, where a section of an original act has been amended, the amendment superseding the original action, a subsequent statute amending the original section by number, but not amending the section as amended, supersedes and repeals the amendatory law" (internal quotation marks omitted)); *see also* 1A Norman Singer, *Sutherland on Statutory Construction* § 22.39, at 430 (6th ed. 2000).

This canon is grounded in a longstanding legislative practice of reenacting in full an entire amended provision, even where only limited, discrete changes are made, as a convenient means of making clear how the new law should read. As the Supreme Court has explained, amending a statute by "repeating the language of the original section with the [new] additions" is generally done to "serve the causes of convenience and certainty. That is to say, by carrying the full text forward, the task of searching out and bringing together the various fragments which go to make up the completed whole, after specific eliminations or additions by amendment, is rendered unnecessary; and possible doubt as to the precise terms of the law as amended is avoided." *Posadas*, 296 U.S. at 505–06.[4]

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[4] Consistent with this rationale, many state constitutions still require that an amended provision be set out in full so as to "avoid the confusion caused by the distribution of different parts of the same section in different enactments." *Ex parte Allen*, 110 N.E. 535, 536–37 (Ohio 1915) (internal quotation marks omitted). *See also, e.g.*, Ala. Const. art. IV, § 45 ("[N]o law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only; but so much thereof as is revived, amended, extended, or conferred, shall be re-enacted and published at length."); Ariz. Const. art. IV, pt. 2, § 14 ("No Act or section thereof shall be revised or amended by mere reference to the title of such Act, but the Act or section as amended shall be set forth and published at full length."); Fla. Const. art. III, § 6 ("Laws to revise or amend shall set out in full the revised or amended act, section, subsection or paragraph of a subsection."); Idaho Const. art. III, § 18 ("No act shall be revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length."); Ky Const. § 51 ("[N]o law shall be revised, amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revised, amended, extended or conferred, shall be reenacted and published at length."); Md. Const. art. III, § 29 ("[I]t shall be the duty of the General Assembly, in amending any article, or section of the Code of Laws of this State, to enact the same, as the said article, or section would read when amended."); Mich. Const. art. IV, § 25 ("[I]t shall be the duty of the General Assembly, in amending any article, or section of the Code of Laws of this State, to enact the same, as the said article, or section would read when amended."); Miss. Const. art IV, § 61 ("No law shall be revived or amended by reference to its title only, but the section or sections, as amended or revived, shall be inserted at length."); Mo. Const. art. III, § 28 ("No act shall be amended by providing that words be stricken out or inserted, but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended."); Neb. Const. art. III, § 14 ("No law shall be amended unless the new act contains the section or sections as amended and the section or sections so amended shall be repealed."); N.M. Const. art. IV, § 18 ("No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full."); Or. Const. art. IV, § 22 ("No act

Given this long-standing practice, the "continuation" canon described above ensures that the legislature's amendment of a statute by "repeating the language of the original section with the [new] additions" will not mistakenly be construed as an implied repeal, or "abrogation and reenactment," *Posadas*, 296 U.S. at 505, of the entire statutory provision. This canon thus works in tandem with, and reinforces, the well-established canon disfavoring implied repeals,[5] and it further functions to avoid anomalies that could arise if re-enacted statutory provisions were construed as repeals of prior identical (or functionally identical) language. For these reasons, we see no basis for concluding that the canon should not apply in the circumstances presented here,[6] given that Congress has

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shall ever be revised, or amended by mere reference to its title, but the act revised, or section amended shall be set forth, and published at full length."); Wash. Const. art. II, § 37 ("No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length."). These constitutional requirements are not intended to "change the operation of the original section as to provisions which are not changed." *Allen*, 110 N.E. at 537.

[5] *See, e.g.*, *Am. Standard Life Ins. Co. v. State*, 147 So. 168, 168 (Ala. 1933) ("The repeal and simultaneous re-enactment of substantially the same statutory provisions is to be construed not as an implied repeal of the original statute, but as [an affirmance and] a continuation thereof." (internal quotation marks omitted)); *Robinson v. Ferguson*, 93 N.W. 350, 352 (Iowa 1903) ("The repeal and simultaneous reenactment of substantially the same provisions is not to be considered as an implied repeal of the original statute, but as a continuation thereof, so that all interests under the original statute shall remain unimpaired. The same rule applies to general revisions of existing laws which are substantially reenacted." (internal quotation marks omitted)); *see also, e.g.*, *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009) ("'We have repeatedly stated . . . that absent "a clearly expressed congressional intention," . . . [a]n implied repeal will only be found where provisions in two statutes are in "irreconcilable conflict," or where the latter Act covers the whole subject of the earlier one and "is clearly intended as a substitute."'") (quoting *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality opinion) (internal citations omitted))).

[6] There is precedent, albeit limited, to support the canon's application in circumstances directly analogous to the unusual one presented here, where the amendment to the preexisting statute carried forward the prohibition of certain conduct, but both expanded its application and changed the terms of punishment. In *Ex parte Allen*, 110 N.E. 535 (Ohio 1915), for example, a habeas petitioner challenged his sentence for the sale of cocaine under an amended Ohio provision that prescribed imprisonment instead of a fine for the subsequent violation of the same statutory prohibition. The petitioner had previously been convicted under a law that punished the sale of cocaine with a monetary fine. Petitioner was then convicted again under the amended version of the law that, in addition to

carried forward identical language from a prior enactment without expressly stating its intention regarding the continuing effect of an earlier-enacted repealer. Indeed, there is a sound basis for applying the "continuation" canon, in the absence of contrary congressional intent, to amendments carrying forward language from laws subject to a sunset provision. When, at the time of amendment, the original enactment is subject to a sunset provision, the legislature is well-positioned to make clear its intention to insulate the amendment from the automatic repeal that would otherwise occur. Its failure to do so fairly gives rise to the presumption against abrogation and reenactment that the "continuation" canon reflects.

In accord with the canon, and absent evidence of contrary congressional intent, the 1998 inclusion of the phrase "or semiautomatic assault weapon" in section 924(c)(1)(B)(i) should be construed as a continuation "to serve the causes of convenience and certainty," *Posadas*, 296 U.S. at 505–06, of the original 1994 amendment that added the phrase to section 924(c)(1), rather than as an "abrogation and reenactment" of that language. And if the 1998 amendment is so read, then the 1994 amendment

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cocaine, prohibited the sale of other drugs and punished a second violation of the statute with incarceration. Petitioner challenged his sentence on the grounds that he should have been punished with only a fine as a first-time offender under the amended statute, "notwithstanding his prior conviction under the statute before its amendment." 110 N.E. at 537. The court noted that if the amendment had abrogated and repealed the original law "as to those parts which have not been altered in the amending act," then the petitioner's contention was "well founded," "but not so if the amendment [wa]s simply a continuance thereof in so far as the language of both [were] identical or substantially so." The court applied the "continuation canon" and concluded that the provision of the statute making it an offense to sell cocaine continued in force and was undisturbed by the amendment. The addition of other covered drugs and the changed terms of punishment for subsequent violations of the statutory offense were not sufficient to disrupt the original law. *Id.*; *cf. Oldham v. Rooks*, 361 So. 2d 140 (Fla. 1978) (after determining that the Florida legislature had implicitly repealed an 1891 law as of 1970, the Florida Supreme Court held that that 1970 repeal thereby rendered inoperative a 1971 amendment to the original law where the only change in 1971 was to the penalty; that later amendment to the penalty, the court held, was insufficient to revive the underlying offense that the legislature had impliedly repealed the year before); *State v. Cline*, 339 P.2d 657, 661 (Mont. 1959) ("[t]here is substantial authority . . . holding that where the effect of the amendment of a statute is only to increase the prescribed punishment, the unchanged portion of the amended statute remains in effect"). We are not aware of any precedent, moreover, that would indicate the canon should not apply in cases of this kind.

originally adding "or semiautomatic assault weapon" remained in place and subject to the PSRFUPA sunset provision as of 2004.

The canon establishes only a presumption, however, and we must therefore examine whether there is a basis for concluding that Congress intended a different result when it enacted the 1998 amendment to section 924(c)(1). We begin by considering the fact that the 1998 enactment purported to "strike" section 924(c)(1) in its entirety and "insert" in its place a newly crafted revision. *See* Pub. L. No. 105-386, § 1(a)(1), 112 Stat. at 3469 ("Section 924(c) of title 18, United States Code, is amended . . . by striking . . . all that follows through the end of paragraph (1) and inserting the following").

In our view, such a "strike-and-insert" method of amendment does not in this context indicate a congressional intent to repeal, or abrogate-and-reenact, the preexisting provision in question. As discussed above, there is historic legislative practice, when amending statutes, to reenact the entire text of the statute as amended, rather than simply to note, in the amendatory public law, the particular changes that have been made to the text. Consistent with this practice, a 2003 Congressional Research Service report discussing "some common forms in which bills may express their intended relation to existing statutes" notes that when the express purpose of a bill is to modify or alter provisions of existing law, it may do so through various means of legislative drafting. The bill "may identify each separate point in existing statutes at which text is to be stricken out and, for each, set forth text to be inserted. Alternately, it may propose to strike out an entire provision, then set forth, to be inserted in lieu, a new text, incorporating all the changes in language desired at every point in the provision. Finally, a bill may simply provide that a specified provision 'be amended so as to read' in the way specified by text that follows." Richard S. Beth, *How Bills Amend Statutes* (Aug. 4, 2003), http://fas.org/sgp/crs/misc/RS20617.pdf. The report does not distinguish between these forms of legislative drafting in terms of the substantive effect of an amendment. In line with the practices the report describes, courts have construed language striking and replacing existing provisions—even language that expressly uses the word "repeal"—as not constituting a repeal or abrogation of provisions carried forward into the amended statute. *See, e.g.*, *Kirchner*, 336 F.2d at 230 ("Provisions of the original Act which are repeated in the body of the amendment, either in the same or equivalent

words, are considered a continuation of the original law. This rule of interpretation is applicable even though the original Act or section is expressly declared to be repealed." (citations omitted)).

We think such an interpretation of the significance of the strike-and-insert language is especially appropriate with respect to the 1998 enactment amending section 924(c)(1). The changes—in particular, the new graduated sentencing scheme distinguishing between the use and the brandishing or discharge of a firearm in the commission of a crime—made it significantly more complicated to parse the various penalties prescribed in the statute. Congress may be understood to have decided, as the canon anticipates, to "serve the causes of convenience and certainty" by setting forth the entire amended statute within the public law itself, rather than by specifying the various amendatory provisions that the code publishers would have to fashion into a coherent whole. For these reasons, we do not believe that Congress's choice to "strike" section 924(c)(1), and insert a newly organized replacement, evinces an intent to abrogate-and-reenact the entirety of the earlier version of the statute sufficient to overcome the presumption established by the "continuation" canon.

We turn next to the three substantive changes that the 1998 amendment did make to the statute, which we described above, in order to determine whether they demonstrate that Congress intended to insulate the "semiautomatic assault weapon" language from operation of PSRFUPA's sunset provision. In our view, they do not. In so concluding, we find it significant that, although those changes were clearly important, they did not affect the types of firearms to which a ten-year sentence attached. Nor did they alter the basic judgment, embodied in the text that PSRFUPA originally added to section 924(c)(1), that the use of semiautomatic assault weapons should receive the same sentencing treatment as the use of short-barreled rifles and short-barreled shotguns.

First, the 1998 enactment specified, in the new subsection (c)(1)(A), that—contrary to the Supreme Court's decision in *Bailey*—the federal offense would henceforth cover cases involving not just the more active "use" of firearms, but also possession in furtherance of any crime of violence or drug trafficking crime. But that change did not alter or affect the 1994 amendment's specific reference to semiautomatic assault weapons. To be sure, after 1998, *possession* of such weapons in furtherance of

a predicate crime—in addition to more active uses—became a separate federal offense. But in this respect, the 1998 amendment merely treated semiautomatic assault weapons the same as it treated all other firearms, a general state of equivalence that the statute established even before the 1994 amendment. Nothing in the 1994 PSRFUPA affected this basic statutory equivalence, or altered the fact that semiautomatic assault weapons were already "firearms" covered by the description of the conduct prohibited by section 924(c)(1) prior to PSRFUPA's amendment of the section in 1994. And the same is true for the 1998 amendment. The new subsection (c)(1)(A) sets forth the basic prohibition on the use, carry, or possession of a "firearm," but, as in the predecessor section (c)(1), it does not refer separately to semiautomatic assault weapons.

Second, the 1998 amendment, also in subsection (c)(1)(A), imposed a new graduated sentencing scheme based upon the manner in which the "firearm" is used during and in relation to any crime of violence or drug trafficking crime. Whereas all such uses were subject to a fixed five-year sentence before 1998, the 1998 amendment established a new baseline sentence of a *minimum* of five years. The amendment also provided that the "brandishment" and "discharge" of a firearm in relation to such crimes are to be punished by minimum sentences of seven and ten years, respectively. But this change, too, did not in any way affect the PSRFUPA's 1994 amendment of section 924(c)(1). That earlier amendment did not address the appropriate terms of imprisonment for different uses of a "firearm" in the commission of an underlying offense. And the new use-specific sentencing structure that the 1998 amendment added to subsection (c)(1)(A) applies to all "firearms" and does not treat semiautomatic assault weapons separately, or even mention them.

In sum, these first two changes Congress made to section 924(c)(1) in 1998 did not affect, let alone abrogate, the only substantive change made by the 1994 amendment. The sole effect of that 1994 amendment was—subject to the ten-year sunset provision—to treat semiautomatic assault weapons as equivalent to short-barreled rifles and short-barreled shotguns for purposes of setting the sentence for their use during and in relation to any crime of violence or drug trafficking crime. Nothing in the establishment of the new section 924(c)(1)(A), however, reflects a congressional intention to revisit that earlier change, let alone to repeal the temporal limitation that the sunset provision imposed upon it.

The third substantive change made by the 1998 amendment, unlike the other two, did have an impact on the portion of section 924(c)(1) that the 1994 PSRFUPA had amended—namely, the portion of that section that established a ten-year sentence in cases where the firearm in question is a semiautomatic assault weapon. Prior to the 1998 law, if the firearm at issue was "a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon," the punishment was a fixed ten-year sentence. After enactment of the 1998 law, however, if the firearm was "a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon," the new section 924(c)(1)(B)(i) provided that the punishment was to be *not less than* a ten-year sentence. It might be argued, therefore, that this change constituted a tailored and considered means by which Congress abrogated and replaced the earlier 1994 PSRFUPA amendment, which had established a ten-year fixed sentence for certain offenses involving semiautomatic assault weapons. On this view, Congress chose to replace a prior provision that had established a certain sentence, subject to a sunset, with a new provision establishing a more stringent sentence. In doing so, the argument would go, Congress chose not to expressly set forth a sunset for the provision, thereby supporting the inference that Congress intended to abrogate-and-reenact, rather than continue, the language that it had repeated from the prior version of section 924(c)(1), as it had been amended by the 1994 PSRFUPA.

We do not think, however, that the 1998 change from a ten-year fixed sentence to a ten-year minimum, without more, affects our conclusion that the 1998 amendment did not abrogate the 1994 amendment to section 924(c) or repeal the sunset provision as applied to that 1994 amendment. The 1998 amendment changed the sentences in section 924(c)(1) for the use of covered firearms generally—not only for the use of semiautomatic assault weapons—from fixed sentences to mandatory minimums. In other words, the terms of imprisonment with respect to all of the provisions in section 924(c)(1) remained the same, but Congress inserted the phrase "not less than" before the number of specified years in each instance. The categorical approach Congress took, substituting mandatory minimums for fixed sentences, without otherwise altering the terms of imprisonment, does not suffice to show that Congress intended that the possession of a semiautomatic weapon in furtherance of a predicate crime should carry a mandatory minimum ten-year sentence even *after* the sunset provision

repealed all of the other PSRFUPA amendments relating specifically to such weapons. That approach may easily be understood to have preserved the 1994 judgment that those weapons should be treated equivalent to the others in the grouping, unless and until the sunset provision took effect.

Indeed, this latter interpretation draws support from the fact that a construction of section 924(c)(1)(B)(i) that would insulate its "semiautomatic assault weapon" language from the 2004 repeal of the rest of the 1994 PSRFUPA provisions would introduce an anomaly into the law. As noted above, in addition to inserting "semiautomatic assault weapon" in section 924(c)(1), PSRFUPA provided a definition of "semiautomatic assault weapon," which was added to 18 U.S.C. § 921. The 1994-enacted definition of "semiautomatic assault weapon" carefully defined the term to include both nine specifically identified firearms (by make and model), as well as "any . . . copies or duplicates of the [nine specified] firearms in any caliber"; "a semiautomatic rifle that has an ability to accept a detachable magazine and has at least 2 of" five defined characteristics (e.g., a folding or telescoping stock, a bayonet mount, a grenade launcher); a "semiautomatic pistol that has an ability to accept a detachable magazine and has at least 2 of" five defined characteristics; and "a semiautomatic shotgun that has at least 2 of" four defined characteristics. Pub. L. No. 103-322, § 110102(b), 108 Stat. at 1997; *see also* H.R. Rep. No. 103-489, at 22–23 (1994). There is no doubt, however, that when the PSRFUPA sunset provision took effect in 2004, that definition was repealed.[7] Thus, if the 1998 Congress had intended to preserve a ten-year minimum sentence for "semiautomatic assault weapons" in section 924(c)(1)(B)(i) even beyond the preexisting sunset date, it would have done so with respect to an ambiguously labeled set of firearms, the statutory definition of which would sunset as of 2004.[8] We are reluctant to attribute such an intention

[7] ATF regulations, promulgated in 1995, tracked the PSRFUPA's definition of semiautomatic assault weapons and its prohibition on their manufacture, transfer, or possession. *See* 27 C.F.R. §§ 478.11, 478.40 (2009). ATF acknowledges that with the sunset of the PSRFUPA in 2004, these regulations are no longer in effect and should no longer appear in the Code of Federal Regulations.

[8] It is significant in this regard that some definitions of similar terms in state and local law differ from the definition of "semiautomatic assault weapon" that was set forth in PSFUPA. *See, e.g.*, *Arnold v. Cleveland*, No. 59260, 1991 Ohio App. LEXIS 5246, at *4 (Ohio Ct. App. Oct. 31, 1991) (quoting Cleveland Codified Ordinances section 628.02,

to Congress, particularly given that each of the other enumerated weapons subject to increased penalties in section 924(c)(1)(B)—including "short-barreled shotgun," "short-barreled rifle," "machine gun," "destructive device," "firearm silencer," and "firearm muffler"—is expressly defined in section 921(a), the very section of the Code that once contained, but in consequence of the sunset provision of PSRFUPA no longer contains, a definition of "semiautomatic assault weapon." *See* 18 U.S.C. § 921(a)(4), (6), (8), (23), (24).

Another aspect of the relevant statutory context reinforces this same conclusion. When Congress passed the PSRFUPA in 1994, it included an amendment to 18 U.S.C. § 922 that made it unlawful to "manufacture, transfer, or possess a semiautomatic assault weapon." Pub. L. No. 103-322, § 110102(a). In doing so, it subjected semiautomatic assault weapons, for the ten-year period of the legislation, to stringent regulation, akin to that to which the other weapons triggering heightened sentences in section 924(c)(1) were already subject.[9] If the 1998 Congress were understood to have preserved the enhanced sentence for semiautomatic assault weapons in section 924(c)(1)(B)(i) even *after* the repeal of the rest of the PSRFUPA, however, semiautomatic assault weapons would, in that

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defining "assault weapon" primarily based on the firearm's acceptance of a detachable magazine capable of taking a certain number of rounds); Cal. Penal Code § 12276 (West 2009) (designating roughly 30 semiautomatic firearms as "assault weapons").

[9] For example, 18 U.S.C. § 922(a)(4) makes it unlawful "for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, to transport in interstate or foreign commerce any destructive device, machine gun . . . short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity," and 18 U.S.C. § 922(b)(4) makes it unlawful "for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver . . . to any person any destructive device, machine gun . . . short-barreled shotgun, or short-barreled rifle, except as specifically authorized by the Attorney General consistent with public safety and necessity." *See* 18 U.S.C. § 922(a)(4), (b)(4) (2006). Further, 18 U.S.C. § 922(o) makes it unlawful for any person to transfer or possess a machinegun. *See id.* § 922(o). The Tax Code also severely regulates, through registration and limits on importation, possession, and transfer, the same types of firearms that are subject to special restriction under the criminal code. *See* 26 U.S.C. §§ 5841, 5844 (2006); *see also id.* § 5861 (defining "firearm" subject to Tax Code regulations to include, among other things, "a shotgun having a barrel or barrels of less than 18 inches in length"; "a rifle having a barrel or barrels of less than 16 inches in length"; "a machinegun"; "any silencer"; and "a destructive device").

case, be the only type of weapon subject to a heightened sentence in section 924(c)(1)(B) that was not otherwise more heavily regulated than firearms generally.

B.

The legislative history of the 1998 enactment is consistent with the conclusion that the 1998 amendment did not insulate the insertion of "or semiautomatic assault weapon" in section 924(c)(1) from the operation of the PSRFUPA sunset provision in 2004. The history shows that the Supreme Court's *Bailey* decision was the clear impetus for the first two of the three major changes to section 924(c)(1). And while the legislative record shows that the third change to section 924(c)(1)—the shift from fixed to mandatory minimum sentences—was the subject of considerable debate in the House, it does not indicate that the debate was of relevance to the question before us. Instead, the focus of that debate was on whether mandatory minimum sentences served their intended purpose as an effective deterrent against crime.[10] Indeed, we have not uncovered any evidence that members of Congress considered the appropriate mandatory minimum sentence for offenses involving semiautomatic assault weapons in particular, let alone whether such sentences should be established permanently for those firearms.[11]

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[10] *See, e.g.*, 144 Cong. Rec. 1715, 1717 (statement of Rep. Waters) ("I abhor crime, but this is not about sensible ways to deal with crime. This is about mandatory minimum sentencing, taking away the discretion of judges to make decisions about the varied situations that they may be confronted with. . . . I think this increase in mandatory minimums for crimes that could end up not being violent crimes at all with the simple possession is harmful to our system and should not be done."); *id.* (statement of Rep. Solomon) ("[T]he sooner we enact this legislation, the sooner we can toughen mandatory minimum penalties on those who commit crimes involving guns. In the long run this is a bill to save lives by getting criminals with guns off the street."); *id.* at 1719 (statement of Rep. Scott) ("The bottom line . . . is that mandatory minimums have been studied and are the least, one of the least effective ways to reduce crime. If we are serious about reducing crime, if we are serious about it, we should not pass the mandatory minimums.").

[11] A Department of Justice representative testified on two occasions with respect to the pending legislation. *See Violent and Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under 924(c): Hearing Before the S. Comm. on the Judiciary*, 104th Cong. (1996) (statement of Kevin Di Gregory, Deputy Assistant Attorney General, Criminal Division) ("Di Gregory 1996 Testimony"); *Criminal Use of Guns: Hearing*

Congress is presumed to have known that the "or semiautomatic assault weapon" language in section 924(c)(1) had been inserted by amendment and was subject to the accompanying sunset provision in the PSRFUPA. *See, e.g.*, *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (noting canon that "whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject"). We find it significant, therefore, that although there was general debate in 1998 about whether the sentences tied to identified types of firearms should be maintained, there was no discussion of whether the semiautomatic assault weapons amendment should be made permanent in the contemplated revisions to section

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Before the S. Comm. on the Judiciary, 105th Cong. (1997) (statement of Kevin Di Gregory, Deputy Assistant Attorney General, Criminal Division). With respect to mandatory minimum sentences, the testimony simply stated (erroneously, in the sense that section 924(c) did not then provide for mandatory minimum sentences) that "[t]itle 18 U.S.C. 924(c) makes subject to a mandatory minimum punishment beyond that imposed for the predicate crime whoever 'uses or carries a firearm' during and in relation to a crime of violence or a drug trafficking crime." There was no mention of semiautomatic assault weapons other than to point out that "to maintain consistency with the present sentencing scheme," a Senate version of the bill, S. 1612, "would need to include an intermediate category for purpose of sentence incrementation when the firearm employed is a short barreled rifle, short barreled shotgun or a semiautomatic assault weapon." Di Gregory 1996 Testimony at 8 (discussing S. 1612, 104th Cong. (passed Oct. 3, 1996)). The Department of Justice did not address the PSRFUPA sunset provision, let alone the potential effect of the proposed legislation upon its operation.

Likewise, the sunset provision was not addressed in a report that Congress required the Attorney General to provide under section 110104 of the PSRFUPA. That provision directed the Attorney General to "investigate and study the effect of this subtitle and the amendments made by this subtitle, and in particular [to] determine their impact, if any, on violent and drug trafficking crime," and to "prepare and submit to the Congress a report" on the study's findings no later than thirty months after enactment of the law. To satisfy this requirement, the Justice Department awarded a grant to The Urban Institute, which issued the required report in March 1997. *See* Jeffrey A. Roth et al., *The Urban Institute, Impact Evaluation of the Public Safety and Recreational Firearms Use Protection Act of 1994: Final Report* (Mar. 13, 1997). The report focused exclusively on the effect of the ban on possession, manufacture, or transfer of semiautomatic assault weapons; it did not address the penalty provisions of the PSRFUPA or what, if any, impact the inclusion of semiautomatic assault weapons among the group of firearms subject to the ten-year sentence in section 924(c)(1) had on any reduction in violent or drug-trafficking crimes. It thus provided nothing to inform Congress whether that provision should be extended past the sunset date, and presumably had no effect on legislative consideration of section 924(c)'s amendment.

924(c)(1).[12] In the absence of any such evidence, there is no basis to conclude that Congress intended to depart from the practice reflected in the "continuation" canon and render that particular provision permanent when it amended other aspects of section 924(c)(1). *See, e.g.*, *Sierra Club*, 820 F.2d at 522 ("congressional silence is strong evidence of a legislative policy that, after reenactment, the [statute] continued to operate exactly as before").[13]

III.

Accordingly, we conclude that when the sunset provision of PSRFUPA went into effect in 2004, repealing not only the Assault Weapons Ban but also all "amendments made by [PSRFUPA]" to existing law, it repealed the PSRFUPA amendment adding the term "semiautomatic assault weapon" to the enhanced sentencing provision of section 924(c)(1). We therefore conclude that the phrase "or semiautomatic assault weapon" was repealed in 2004; that the ten-year mandatory minimum sentence in

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[12] So far as we are aware, the only time the PSRFUPA was even acknowledged in the 1998 deliberations was in the following context: The House bill proposed to eliminate the differential punishments applied to specifically identified types of firearms, including semiautomatic assault weapons, in the pre-1998 version of section 924(c)(1). *See* H.R. 424, 105th Cong. (as introduced in the House); H.R. Rep. No. 105-344, at 3 (1997) ("[I]ncreased penalties [set forth in the bill] replace the bifurcated penalties in current law described above for short-barreled rifles, short-barreled shotguns or semiautomatic assault weapons and most other firearms."); *see also id.* at 6 ("[T]he Committee does not intend[] to discriminate between various types of firearms, as current law does, to determine the appropriate number of additional years of imprisonment."). This proposal generated considerable opposition, with some members asserting that the proposal sought to negate the effect of the PSRFUPA generally: "Ever since the ban on semiautomatic assault weapons was passed into law as part of the 1994 Omnibus Crime Bill, the majority has actively sought ways to diminish the significance and the impact of the [assault weapons] ban. The new penalty structure imposed by this legislation [i.e., the proposed, but not-enacted House bill] is simply another way that the majority is attempting to subvert the assault weapons ban without actually voting to repeal the ban." *Id.* at 20 (internal footnote omitted).

[13] If Congress had amended section 924(c)(1) not in 1998, but closer in time to the effective date of PSRFUPA's sunset provision, the conclusions to be drawn from silence in the legislative history with respect to the operation of the sunset provision might be different from the conclusions we draw here from congressional silence in 1998, six years from when the sunset would take effect.

section 924(c)(1)(B)(i) accordingly no longer applies to offenses involving semiautomatic assault weapons; and that such offenses are, instead, subject to the general penalty provisions prescribed by section 924(c)(1)(A).

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President's Receipt of the Nobel Peace Prize

The Emoluments Clause of the Constitution does not bar the President from accepting the Nobel Peace Prize without congressional consent, because the Norwegian Nobel Committee is not a "King, Prince, or foreign State."

The Foreign Gifts and Decorations Act does not bar the President from accepting the Nobel Peace Prize without congressional consent, because the Norwegian Nobel Committee is not a "unit of a foreign governmental authority," an "international or multinational organization whose membership is composed of any unit of foreign government," or an "agent or representative of any such unit or such organization."

December 7, 2009

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum concerns whether the President's receipt of the Nobel Peace Prize would conflict with the Emoluments Clause of the Constitution, which provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. As we previously explained in our oral advice and now explain in greater detail, because the Nobel Committee that awards the Peace Prize is not a "King, Prince, or foreign State," the Emoluments Clause does not apply. You have also asked whether the Foreign Gifts and Decorations Act, 5 U.S.C. § 7342 (2006), bars the President from receiving the Peace Prize. Here, too, we confirm our previous oral advice that it does not.

I.

On October 9, 2009, the Norwegian Nobel Committee (the "Peace Prize Committee," or the "Committee"), headquartered in Oslo, Norway, announced that the President will be this year's recipient of the Nobel Peace Prize. The 2009 Peace Prize, which will consist of ten million Swedish Kroner (or approximately $1.4 million), a certificate, and a gold medal bearing the image of Alfred Nobel, is expected to be awarded by the Nobel Committee to the President on December 10, 2009—the anniversary of Nobel's death. *See* Statutes of the Nobel Foundation § 9, http://nobelprize.org/nobelfoundation/statutes.html (last visited Nov.

24, 2009) ("Nobel Foundation Statutes"); *see also* The Nobel Prize Amounts, http://nobelprize.org/nobel_prizes/amounts.html (last visited Nov. 24, 2009).

The Peace Prize is a legacy of Swedish chemist Alfred Bernhard Nobel. In his will, Nobel directed that a portion of his wealth be used to establish a set of awards, one of which, the Peace Prize, was intended to honor the person or entity that "shall have done the most or the best work for fraternity between nations, for the abolition or reduction of standing armies and for the holding and promotion of peace congresses." Nobel Foundation Statutes § 1 (setting forth the pertinent provision of Nobel's will). The relevant assets of the Nobel estate have been managed since 1900 by the Nobel Foundation, a private institution based in Stockholm, Sweden. *See* Birgitta Lemmel, *The Nobel Foundation: A Century of Growth and Change* (2007) ("Lemmel"), http://nobelprize.org/nobelfoundation/history/lemmel (last visited Nov. 24, 2009). The Foundation is responsible for managing the assets of the bequest in such a manner as to provide for the annual award of the Nobel prizes and the operation of the prize-awarding bodies, including the Nobel Committee that selects the Peace Prize. Nobel Foundation Statutes § 14; *see also* Lemmel ("One vital task of the Foundation is to manage its assets in such a way as to safeguard the financial base of the prizes themselves and of the prize selection process."). Unlike the other Nobel prizes, for accomplishments in fields such as literature and physics, which are awarded by committees appointed by Swedish institutions, Nobel specified in his will that the recipient of the prize "for champions of peace" was to be selected "by a committee of five persons to be elected by the Norwegian Storting [i.e., the Norwegian Parliament]." Nobel Foundation Statutes § 1.

On April 26, 1897, the Storting formally agreed to carry out Nobel's will and, in August of that year, elected the first members of the Nobel Committee that would award the prize funded by Nobel's estate. That Committee—not the Storting itself, or any other official institution of the Norwegian government, or the Nobel Foundation—has selected the Peace Prize recipients since 1901. To be sure, in its nascent years, the Nobel Committee was more "closely linked not only to the Norwegian political establishment in general, but also to the Government," than it is today. *See* Øyvind Tønnesson, *The Norwegian Nobel Committee* (1999) ("Tønnes-

son"), http://nobelprize.org/nobel_prizes/peace/articles/committee (last visited Nov. 24, 2009). Indeed, until 1977, the Committee's official title was the Nobel Committee of the Norwegian Storting. Nevertheless, it has long been recognized that the "[C]ommittee is formally independent even of the Storting, and since 1901 it has repeatedly emphasized its independence." *Id*. In 1936, for instance, the Norwegian Foreign Minister and a former Prime Minister recused themselves from the Committee's deliberations out of concern that bestowing the award on the German pacifist Carl von Ossietzky would be perceived as an act of Norwegian foreign policy. *Id.*; *see also Berlin Protests Ossietzky Award*, N.Y. Times, Nov. 26, 1936, at 22 (noting that "Norway [d]enies [r]esponsibility for Nobel [d]ecision"). To make clear the independent nature of the Committee's decisions, moreover, the Storting in the very next year, 1937, barred government ministers from sitting on the Nobel Committee. *See* Special Regulations for the Award of the Nobel Peace Prize and the Norwegian Nobel Institute, etc., adopted by the Nobel Committee of the Norwegian Storting on the 10th day of April in the year 1905 (including amendments of 1977, 1991, 1994, 1998 and 2000), § 9, http://nobelprize.org/nobelfoundation/statutes-no.html (last visited Nov. 24, 2009) ("Nobel Peace Prize Regulations") ("If a member of the [Nobel] Committee is appointed a member of the Government during his period of office, or if a member of the Government is elected a member of the Committee, he shall resign from the Committee for as long as he continues in office as a Minister"). Furthermore, for nearly 36 years, no member of the Committee has been permitted as a general matter to continue serving in the Storting. *See* Tønnesson ("[I]n 1977 . . . the Storting decided that its members should not participate in nonparliamentary committees appointed by the Storting itself.").[1] That said, an appointment to the Committee does not appear to require a sitting member of the Storting to resign immediately from his or her government position, and thus two of the current members, who joined the Nobel Committee in 2009, appear to have served on the Storting during much, if not all, of the period during which this year's Prize recipient was selected. *See* List of Nobel Committee Members, http://nobelpeaceprize.org/en_GB/

[1] To further emphasize the Committee's independence from the Norwegian government, including the monarchy, "[u]nlike the prize award ceremony in Stockholm [for the other Nobel Prizes], it is the Chairperson of the Nobel Committee, and not the King [of Norway]" who formally presents the Peace Prize. Tønnesson.

nomination_committee/members/ (last visited Dec. 4, 2009). The other three members of the Committee were private individuals. *Id.*

Apart from the Storting's role in selecting the members of the Nobel Committee, the Norwegian government has no meaningful role in selecting the Prize recipients or financing the Prize itself. In addition to fully funding the Prize, the Sweden-based private Nobel Foundation, established pursuant to Alfred Nobel's will, is responsible for the Committee's viability and the administration of the award. Specifically, your Office has informed us that the Committee's operations, including the salaries of the various Committee members and of the staff, are funded by the Foundation and not by the Norwegian or Swedish governments. *See* E-mail for David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Virginia R. Canter, Associate Counsel to the President, (Nov. 2, 2009, 19:11 EST) ("Canter E-mail") (summarizing telephonic interview with Geir Lundestad, Secretary to the Nobel Committee and Director of the Nobel Institute); *see also* Nobel Foundation Statutes § 11 ("The Board of the Foundation shall establish financial limits on the work that the prize-awarding bodies perform in accordance with these statutes"); *id.* § 6 ("A member of a Nobel Committee shall receive remuneration for his work, in an amount to be determined by the prize-awarding body [i.e., the Nobel Committee]."). The Committee also deliberates and maintains staff in the Nobel Institute building, which is owned by the private Nobel Foundation rather than by the government of Sweden or Norway. *See* The Nobel Institute, http://nobelpeaceprize.org/en_GB/institute/ (last visited Dec. 4, 2009) (noting that Nobel Institute building is also where the recipient of the Peace Prize is announced); *see also* Description of Nobel Institute Building, http://nobelpeaceprize.org/en_GB/institute/nobel-building/ (last visited Dec. 4, 2009). Although the Nobel Foundation plays a critical role in sustaining the Nobel Committee and the Peace Prize, it is the Nobel Committee that independently selects the Prize recipients. *See* Organizational Structure of the Nobel Entities, http://nobelprize.org/nobelfoundation/org_structure.html (last visited Nov. 24, 2009) ("The Nobel Foundation does not have the right or mandate to influence the nomination and selection procedures of the Nobel Laureates."); *see also* Lemmel ("[T]he Prize-Awarding Institutions are not only entirely independent of all government agencies and organizations, but also of the Nobel Foundation.").

II.

The Emoluments Clause provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. Adopted unanimously at the Constitutional Convention, the Emoluments Clause was intended to recognize the "necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence," specifically, undue influence and corruption by foreign governments. *See* 2 *The Records of the Federal Convention of 1787*, at 389 (Max Farrand ed., rev. ed. 1966) (notes of James Madison); *see also* 3 *id.* at 327 ("It 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.") (remarks of Governor Randolph); *Applicability of the Emoluments Clause to Non-Government Members of ACUS*, 17 Op. O.L.C. 114, 116 (1993) ("*ACUS*"); *President Reagan's Ability to Receive Retirement Benefits from the State of California*, 5 Op. O.L.C. 187, 188 (1981) (discussing the background of the ratification of the Clause).

The President surely "hold[s] an[] Office of Profit or Trust," and the Peace Prize, including its monetary award, is a "present" or "Emolument . . . of any kind whatever." U.S. Const. art. I, § 9, cl. 8. The critical question, therefore, concerns the status of the institution that makes the award. Based on the consistent historical practice of the political branches for more than a century with respect to receipt of the Peace Prize by high federal officials, as well as our Office's precedents interpreting the Emoluments Clause in other contexts, we conclude that the President in accepting the Prize would not be accepting anything from a "foreign State" within the Clause's meaning. Accordingly, we do not believe that the President's acceptance of the Peace Prize without congressional consent would violate the Emoluments Clause.

A.

None of our Office's precedents concerning the Emoluments Clause specifically considers the status of the Nobel Committee (or the Nobel Foundation), but there is substantial and consistent historical practice of

the political branches that is directly relevant. The President would be far from the first government official holding an "Office of Profit or Trust" to receive the Nobel Peace Prize. Rather, since 1906, there have been at least six federal officers who have accepted the Prize while serving in their elected or appointed offices. The Peace Prize has been received by two other sitting Presidents—Theodore Roosevelt and Woodrow Wilson—by a sitting Vice President, Secretary of State, and Senator, and by a retired General of the Army,[2] with the most recent of these acceptances having occurred in 1973. Throughout this history, we have found no indication that either the Executive or the Legislative Branch thought congressional approval was necessary.

The first instance of the Nobel Committee awarding the Peace Prize to a sitting officer occurred only five years after the Committee began awarding the Prize. In 1906, President Theodore Roosevelt received the Peace Prize.[3] On December 10 of that year, United States Minister to Norway Herbert H.D. Pierce accepted the "diploma, medal, and order upon the Nobel trustees [of the Nobel Foundation] for the amount of the prize" on Roosevelt's behalf. *See "Emperor Dead" and Other Historic American Diplomatic Dispatches* 336–37 (dispatch from Pierce to Secretary of State Elihu Root) (Peter D. Eicher ed., 1997) ("Pierce Dispatch"). Not only did Roosevelt accept the Peace Prize while President, he also chose as President to use the award money (roughly $37,000) to establish a foundation for the promotion of "industrial peace." *See* Oscar S. Straus, *Under Four Administrations: From Cleveland to Taft* 239–40 (1922) ("Straus") (noting that Roosevelt transferred the draft of the monetary award to Chief Justice Fuller in January of 1907 to initiate efforts to establish the Foundation).

We have found no indication that the President or Congress believed that receipt of the Prize, including its award money, required legislative approval. Although Congress passed legislation to establish Roosevelt's

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[2] *See* Memorandum for the File from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Award of Honorary British Knighthood to Retiring Military Officer* (Aug. 27, 1996) (retired military officers continue to "hold[] [an] Office of Profit or Trust" under the United States and hence remain subject to the Emoluments Clause); *see also* 53 Comp. Gen. 753 (1974) (same).

[3] *See* List of Nobel Peace Prize Laureates, http://nobelprize.org/nobel_prizes/peace/laureates (last visited Nov. 19, 2009).

foundation, *see* Act of Mar. 2, 1907, ch. 2558, Pub. L. No. 59-217, 34 Stat. 1241, it did so some months *after* he accepted the Peace Prize, and we think it clear that neither the President nor Congress thought this law necessary to satisfy the Emoluments Clause.[4] The bill that established the trust said nothing about consent even though Congress assuredly knew how to express such legislative approval for Emoluments Clause purposes. For instance, the same Congress that established the foundation at Roosevelt's request also "authorized [Professor Simon Newcomb, a retired Naval Officer] to accept the decoration of the order 'Pour le Mérite, für Wissenschaftern und Kunste,' conferred upon him by the German Emperor," Act of Mar. 30, 1906, ch. 1353, Priv. Res. No. 59-1280, 34 Stat. 1713, 1713, and granted "[p]ermission . . . to [a Navy Rear-Admiral] . . . to accept the China war medal, with Pekin clasp, tendered to him by the King of Great Britain, and the Order of the Red Eagle, with swords, tendered to him by the Emperor of Germany," Act of Mar. 4, 1907, Priv. Res., 34 Stat. 2825, 2825 (S.J. Res. 98, 59th Cong.).[5]

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[4] Consistent with this understanding of the congressional action, the bill establishing the foundation was modeled after documents creating trusts, *see* Straus at 239, and not statutes conferring legislative consent to officers' receipt of gifts from foreign states. Further, the statute's legislative history contains no indication that the bill was intended to ratify Roosevelt's acceptance of a gift from a foreign power; nor does it indicate that his acceptance of the Prize without congressional consent was inappropriate. *See* S. Rep. No. 59-7283 (1907); *see also* 41 Cong. Rec. 4113 (1907) ("There can be no possible objection [to the bill]. It establishes trustees, who are to receive from the President the Nobel prize for the foundation of a society for the promotion of industrial peace.") (statement of Sen. Lodge). Ultimately, the Foundation never expended any funds, and in July of 1918, Congress dissolved the trust. *See* Act of July 12, 1918, ch. 150, Pub. Res. No. 65-37, 40 Stat. 899 (H.J. Res. 313) ("Joint Resolution Providing for the disposition of moneys represented in the Alfred Bernard Nobel peace prize, awarded in nineteen hundred and six"). Roosevelt then distributed the Nobel Prize money, along with the interest it had accrued, to various charities in the United States and Europe. *See* Straus at 241.

[5] *See also, e.g.*, Act of Apr. 2, 1896, Priv. Res. No. 54-39, 29 Stat. 759, 759 ("authoriz[ing]" President Harrison "to accept certain medals presented to him by the Governments of Brazil and Spain during the term of his service as President of the United States"); Act of Apr. 20, 1871, Priv. Res. No. 42-4, 17 Stat. 643, 643 ("[C]onsent of Congress is hereby given to . . . [the] secretary of the Smithsonian Institution, to accept the title and regalia of a commander of the Royal Norwegian Order of St. Olaf, conferred upon him for his distinguished scientific service and character by the King of Sweden and Norway"); Act of Mar. 3, 1865, Priv. Res. No. 38-39, 13 Stat. 604, 604 (Navy Captain "authorized to accept the sword of honor recently presented to him by the government of

Perhaps most importantly, the statute that established the foundation to administer the prize money that Roosevelt had accepted does not address at all Roosevelt's receipt of the gold medal and diploma. Yet the medal and the diploma have always constituted elements of the Peace Prize, *see* Pierce Dispatch at 337 (noting receipt of Nobel medal); *see also* Nobel Lecture of President Roosevelt (May 5, 1910), http://nobelprize.org/nobel_prizes/peace/laureates/1906/roosevelt-lecture.html (last visited Nov. 23, 2009) ("The gold medal which formed part of the prize I shall always keep, and I shall hand it on to my children as a precious heirloom."), and they constitute a "present" or "Emolument . . . of any kind whatever" within the meaning of the Emoluments Clause. Thus, if the law establishing the trust to be funded by the award money had been intended to provide congressional consent for President Roosevelt's receipt of the Prize, it would presumably have encompassed these elements of the Prize as well.

The example more than a decade later of President Wilson also clearly reflects an understanding by the political branches that receipt of the Peace Prize does not implicate the Emoluments Clause. When, in December of 1920, President Wilson received the Peace Prize, he, unlike President Roosevelt, did not seek to donate the Prize proceeds to a charitable cause or enlist Congress's aid in accomplishing such a charitable purpose. Instead, he simply accepted the Prize and deposited the award money in a personal account in a Swedish bank, apparently hoping for a favorable movement in the Kroner/dollar exchange rate. *See* 67 *The Papers of Woodrow Wilson* 51–52 (Arthur S. Link ed., 1992) (diary of Charles Lee Swem). President Wilson does not appear to have sought congressional approval for his acceptance, nor does it appear that Congress thought its consent was required.

These Presidents are not, as indicated above, the only federal officers who have received the Peace Prize. Senator Elihu Root in 1913, Vice President Charles Dawes in 1926, retired General of the Army George Marshall in 1953, and Secretary of State Henry Kissinger in 1973 each received the Nobel Peace Prize. *See* List of Nobel Peace Prize Laureates,

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Great Britain"); Act of June 29, 1854, Priv. Res. No. 33-14, 10 Stat. 830, 830 ("authoriz[ing] . . . accept[ance of] a gold medal recently presented . . . by His Majesty the King of Sweden").

supra note 3. As was the case with Presidents Roosevelt and Wilson, none of these recipients, as far as we are aware, received congressional consent prior to accepting the Prize or congressional ratification of such receipt at any time thereafter.

This longstanding treatment of the Nobel Peace Prize is particularly significant to our analysis because several of the Prizes were awarded when the Nobel Committee—then known as the Nobel Committee of the Norwegian Storting—lacked some of the structural barriers to governmental control that are present today, such as rules generally barring government ministers and legislators from serving on the Committee. If anything, then, these prior cases arguably would cause more reason for concern than would be present today, and yet the historical record reveals no indication that either the Congress or the Executive believed receipt of the Prize implicated the Emoluments Clause at all. The absence of such evidence is particularly noteworthy since the Clause was recognized as a bar to gifts by foreign states without congressional consent throughout this same period of time, such that the Attorney General and this Office advised that various gifts from foreign states could not be accepted, *see, e.g.*, *Gifts from Foreign Prince*, 24 Op. Att'y Gen. 116, 118 (1902), and Congress passed legislation specifically manifesting its consent to some gifts bestowed by foreign states on individuals covered by the Clause. *See supra* note 5. To be sure, this long, unbroken practice of high federal officials accepting the Nobel Peace Prize without congressional consent cannot dictate the outcome of our constitutional analysis. But we do think such practice strongly supports the conclusion that the President's receipt of the Nobel Peace Prize would not conflict with the Emoluments Clause, as it may fairly be said to reflect an established understanding of what constitutes a gift from a "foreign State" that would trigger application of the Clause's prohibition. *Cf. Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (analyzing President's foreign affairs power under the Constitution in light of "longstanding practice" in Executive Branch and congressional silence); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (noting that a "'systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on'" the Constitution); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot

supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315, 401 (1819) (where "the great principles of liberty are not concerned . . . [a doubtful question,] if not put at rest by the practice of the government, ought to receive a considerable impression from that practice").

B.

The precedents of our Office reinforce the constitutional conclusion that the historical practice recounted above strongly suggests. Indeed, our Office's numerous opinions on the Emoluments Clause have never adverted to the receipt of the Peace Prize by government officials and certainly have never suggested that the numerous acceptances of the Prize were contrary to the Clause. That is not surprising. Under these same opinions, it is clear that, due to the unique organization of the Nobel Committee (including its reliance on the privately endowed Nobel Foundation), Nobel Peace Prize recipients do not receive presents or emoluments from a "foreign State" for purposes of the Emoluments Clause.

The precedents of the Office do establish that the Emoluments Clause reaches not only "foreign State[s]" as such but also their instrumentalities. *ACUS*, 17 Op. O.L.C. at 122; *Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities*, 18 Op. O.L.C. 13, 18 (1994) ("*Public Universities*"). Quite clearly, the Nobel Committee is not itself a foreign state in any traditional sense. The issue, therefore, is whether the Committee has the kind of ties to a foreign government that would make it, and by extension the Nobel Foundation in financing the Prize, an instrumentality of a foreign state under our precedents. Our past opinions make clear that an entity need not engage specifically in "political, military, or diplomatic functions" to be deemed an instrumentality of a foreign state.[6] *See Public Universities*, 18 Op. O.L.C.

[6] Accordingly, we have explained that corporations owned or controlled by a foreign government are presumptively foreign states under the Emoluments Clause, even though the Act of State doctrine suggests that "when foreign governments act in their commercial capacities, they do not exercise powers peculiar to sovereigns," and thus are not entitled to the immunity from suit that might be available. *ACUS*, 17 Op. O.L.C. at 120

at 19; *see also ACUS*, 17 Op. O.L.C. at 122 ("[T]he language of the Emoluments Clause does not warrant any distinction between the various capacities in which a foreign State may act."). Thus, for example, we have determined that entities such as corporations owned or controlled by a foreign government and foreign public universities may fall within the prohibition of the Clause. *ACUS*, 17 Op. O.L.C. at 121–22.

To determine whether a particular case involves receipt of a present or emolument from a foreign state, however, our Office has closely examined the particular facts at hand. Specifically, we have sought to determine from those facts whether the entity in question is sufficiently independent of the foreign government to which it is arguably tied—specifically with respect to the conferral of the emolument or present at issue, e.g., hiring an employee or bestowing an award, *Public Universities*, 18 Op. O.L.C. at 20—that its actions cannot be deemed to be those of that foreign state. In short, our opinions reflect a consistent focus on whether an entity's decision to confer a particular present or emolument is subject to governmental control or influence.[7]

The factors we have considered include whether a government is the substantial source of funding for the entity, *see, e.g.*, *Applicability of Emoluments Clause to Proposed Service of Government Employee on Commission of International Historians*, 11 Op. O.L.C. 89, 90 (1987) ("*International Historians*"); whether a government, as opposed to a private intermediary, makes the ultimate decision regarding the gift or emolument, *see, e.g.*, Memorandum for John G. Gaine, General Counsel, Commodity Futures Trading Commission, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Expense Reimbursement in Connection with Trip to Indonesia* (Aug. 11, 1980) ("*Trip to Indonesia*"); and whether a government has an active role in the management of the entity, such as through having government officials serve on an entity's board of directors, *see, e.g.*, *Public Universities*, 18 Op. O.L.C.

("[N]othing in the text of the Emoluments Clause limits its application solely to foreign governments acting *as sovereigns*.").

[7] Where a foreign state indisputably and directly confers a present or emolument, such considerations of autonomy and control may be relevant, but not decisive. *See ACUS*, 17 Op. O.L.C. at 119. Here, however, the critical issue is whether the Nobel Committee, and by extension the Nobel Foundation, is an instrumentality of a foreign government for purposes of awarding the privately endowed Peace Prize.

at 15. No one of these factors has proven dispositive in our prior consideration of Emoluments Clause issues. Rather, we have looked to them in combination to assess the status of the entity for purposes of the Clause, keeping in mind at all times the underlying purpose that the Clause is intended to serve. *See, e.g.*, Memorandum for H. Gerald Staub, Office of Chief Counsel, National Aeronautics and Space Administration, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Emoluments Clause Questions Raised by NASA Scientist's Proposed Consulting Arrangement with the University of New South Wales* (May 23, 1986) ("given [foreign public university's] functional and operational separation and independence from the government of Australia and state political instrumentalities . . . [t]he answer to the Emoluments Clause question . . . must depend [on] whether the consultancy would raise the kind of concern (viz., the potential for 'corruption and foreign influence') that motivated the Framers in enacting the constitutional prohibition").

Consistent with this analysis, we have concluded in the past that Emoluments Clause concerns are raised where the "ultimate control" over the decision at issue—e.g., an employment decision or a decision to bestow an award—resides with the foreign government. For instance, an employee of the Nuclear Regulatory Commission ("NRC") sought authorization to work for a consulting firm that was retained by the Mexican government. *Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 158 (1982). Because we concluded that the "ultimate control, including selection of personnel, remains with the Mexican government," *id.* ("the retention of the NRC employee by the consulting firm appears to be the principal reason for selection of the consulting firm by the Mexican government"), we determined that the Emoluments Clause barred the arrangement. Similarly, we concluded that an invitation to join a commission of international historians that was established and funded entirely by the Austrian government constituted an invitation from the Austrian government itself. *International Historians*, 11 Op. O.L.C. at 90.

By contrast, although we have previously opined that foreign public universities are presumptively instrumentalities of a foreign state for the purposes of the Emoluments Clause, we determined that two NASA scientists on leave without pay could be employed by the University of

Victoria in British Columbia, Canada, without triggering that constitutional restraint. *Public Universities*, 18 Op. O.L.C. at 13. We came to this conclusion because the evidence demonstrated that the University acted independently of the Canadian (or the British Columbian) government when making faculty employment decisions. *Id.* at 15 ("[T]he University of Victoria should not be considered a foreign state."). To be sure, as we acknowledged, the University was under the formal control of the British Columbia government. *Id.* at 20 (noting that the government had "ultimate" control of the University); *see also id.* at 15 (noting that the faculty was "constituted" by the University's Board of Governors, the majority of whom were appointed by the provincial government). Nevertheless, it was critical to our analysis that the specific conduct at issue—the University's selection of faculty—was not made by the University "under statutory compulsion" or pursuant to the "dictates of the government." *Id.* at 20–21 (quoting *McKinney v. Univ. of Guelph*, [1990] 3 S.C.R. 229, 269 (Can.) (plurality op.)).

Similar considerations of autonomy informed our view that a federal officer could serve as a consultant to Harvard University on a project funded by the government of Indonesia. *See Trip to Indonesia* at 5. Although the consulting services were to be rendered for the benefit of Indonesia and the individual consultant's expenses were to be reimbursed by Harvard from funds paid by Indonesia, we identified no violation of the Emoluments Clause. We reached this conclusion in significant part because, under the consulting arrangement, Harvard had the sole discretion over the consultants it chose, and Indonesia had no veto power over those choices. *Id.* ("Since . . . the foreign government neither controls nor even influences the selection and payment of consultants, the Emoluments Clause is not implicated.").

In light of these precedents, we believe that it is significant that the Nobel Committee's selection of the Peace Prize recipient is independent of the dictate or influence of the Norwegian government. As far as we are aware, the Norwegian government has no authority to compel the Committee to choose the Prize recipient; nor does it have any veto authority with respect to the selection by the Committee members, who, in any event, are not appointed by a single official to whom they are accountable, but are instead elected by the multimember Storting. *See* Nobel Foundation Statutes § 1. To be sure, Norwegian government officials may

submit nominations to the Committee, but that opportunity is shared by any "[m]embers of national assemblies and governments of states," along with "University rectors" and "professors of social sciences, history, philosophy, law and theology." Nobel Peace Prize Regulations § 3. Indeed, the formal process of nomination and selection of a Prize recipient is not guided by the government, but by the private, Sweden-based Nobel Foundation and the Nobel Committee.[8] For example, pursuant to the Foundation's rules, no prize-awarding body, including the Peace Prize Committee, may reveal the details of its deliberations "until at least 50 years have elapsed after the date on which the decision in question was made." Nobel Foundation Statutes § 10. We have found no indication that the Norwegian government or its officials, if requesting such information, would be exempt from this restraint on disclosure. Other aspects of the selection process, including guidelines on nominations and supporting materials, are either provided in the private Foundation's statutes or delegated by the Foundation—not by the Norwegian government—to the prize-awarding bodies, including the Peace Prize Committee. *E.g.*, *id.* § 7 ("To be considered eligible for an award, it is necessary to be nominated in writing by a person competent to make such a nomination."). These formal limits on the capacity of the Norwegian government to influence, let alone control, the Committee's decision, are consistent with the Committee's own repeated assertions of its independence. *See* Tønnesson.

The Government of Norway's financial connection to the Nobel Committee is even more attenuated. It appears that the members of the Nobel Committee are compensated for their services by the privately funded Nobel Foundation, *see* Canter E-mail, and the precise amount of the remuneration is set by the Nobel Committee, not the Norwegian government. *See* Nobel Foundation Statutes § 6. The Peace Prize itself, including

[8] The Storting appears to have the limited authority only to approve "[i]nstructions concerning the election of members of the Nobel Committee" itself. *See* Nobel Foundation Regulations § 9. Any other amendments to the Committee's rules of operation, including its award selection guidelines, are decided upon by the Committee itself, after views are solicited from the Nobel Foundation. *Id.* ("Proposals for amendments to other provisions of these regulations may be put forward by members of the Norwegian Nobel Committee or by members of the Board of Directors of the Nobel Foundation. Before the Norwegian Nobel Committee makes a decision concerning the proposal, it shall be submitted to the Board of Directors of the Nobel Foundation for an opinion.").

its cash award and other elements, is funded by the Nobel Foundation, which alone is responsible for ensuring that all of the Nobel prize-awarding bodies can accomplish their purposes and which is itself financed by private investments and not government funding. *Id.* § 14 ("The Board [of the Foundation] shall administer the property of the Foundation for the purposes of maintaining good long-term prize-awarding capacity and safeguarding the value of the Foundation's assets in real terms."); *see also* The Nobel Foundation's Income Statement (2008), http://nobelprize.org/nobelfoundation/incomes.html (last visited Dec. 7, 2009); Lemmel (describing Nobel Foundation's investment strategies to ensure financial base of Nobel Prizes).

Thus, in our view, the only potentially relevant tie to the Norwegian government is that, in accordance with Alfred Nobel's will, the Storting elects the Nobel Committee's five members. Further, we are aware that, notwithstanding the rules generally barring sitting members of the Storting from the Nobel Committee, two members of the Storting served on the Committee for several months before leaving their parliamentary seats. However, in light of the strong basis for the Committee's autonomy, both as to the decision it makes and the finances upon which it draws, we do not view the Storting's appointment authority, or a minority of the Committee members' short-term overlap with parliamentary service, as having dispositive significance.

Nor has our Office done so in the past in analogous cases. In determining that an award to a Navy scientist from the Alexander von Humboldt Foundation was from the German government for the purposes of the Emoluments Clause, for example, we noted that the "awards are made by a 'Special Committee,' on which the Federal Ministries for Foreign Affairs and Research and Technology are represented." *See* Letter for Walter T. Skallerup, Jr., General Counsel, Department of the Navy, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel at 2 (Mar. 17, 1983). But we did not indicate that the presence of the government ministers on the award committee was the decisive factor in our analysis. Instead, we also noted that the Foundation was reestablished (because it had once been dissolved) by the Federal Republic of Germany, specifically by its Ministry of Foreign Affairs. In addition, we noted that the Foundation that administered the award was financed mainly through annual payments from the West German government. *See id.* By contrast,

the Nobel Committee is financed by the private Nobel Foundation, and although the Norwegian government may have formally established the Committee (as the "Nobel Committee of the Norwegian Storting"), it did so pursuant to a private individual's will, which assigned the Storting the limited role of electing the Committee's members, who would be charged with exercising their independent judgments.

Likewise, we concluded that the University of British Columbia in hiring faculty was not acting as a foreign state for the purposes of the Emoluments Clause—notwithstanding the provincial government's power to appoint a majority of the members of the University's board of governors. *Public Universities*, 18 Op. O.L.C. at 14, 22 (citing *Harrison v. Univ. of British Columbia*, [1990] 3 S.C.R. 451, 459 (Can.) (plurality op.)). We also determined that the Prince Mahidol Foundation was not an instrumentality of the Government of Thailand for the purposes of the Emoluments Clause, although several officials of the Thai government and the Royal Princess of Thailand sat on the Foundation's board. Memorandum for the File from Daniel L. Koffsky, Office of Legal Counsel, *Re: Application of the Emoluments Clause to a U.S. Government Employee Who Performs Services for the Prince Mahidol Foundation* (Nov. 19, 2002) ("*Prince Mahidol Foundation*").[9] In each case, we found countervailing indications of autonomy to be more significant. As noted above, we concluded that the University of British Columbia's faculty decisions, including contract negotiations and collective bargaining, were not subject to governmental compulsion. *Public Universities*, 18 Op. O.L.C. at 20–21 (noting University's "'legal autonomy'"). And despite the presence of the Thai government and royalty, we determined that the decision-making process of the Prince Mahidol Foundation's Board evidenced "independ-

[9] Similarly, the Supreme Court has indicated that a government's appointment authority is not given dispositive weight in determining whether a nominally private entity is, in fact, "what the Constitution regards as the Government." *See Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (holding that Amtrak was a state actor subject to the First Amendment). That the federal government appointed a majority of Amtrak's directors was not considered to be of controlling importance. As the *Lebron* Court observed, the Consolidated Rail Corporation ("Conrail") was held "not to be a federal instrumentality, despite the President's power to appoint, directly or indirectly, 8 of its 15 directors." *Id.* at 399; *see also Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974) ("Conrail is not a federal instrumentality by reason of the federal representation on its board of directors.").

ent judgment." *Prince Mahidol Foundation* at 4 (also noting that "most of the funds for the Foundation do not come from the [Thai] government"). These same considerations concerning the exercise of independent judgment and financial autonomy are at least as present here.

In sum, determining whether an entity is an instrumentality of a foreign government is necessarily a fact-bound inquiry, *see Application of the Emoluments Clause of the Constitution and the Foreign Gifts and Decorations Act*, 6 Op. O.L.C. 156, 158 (1982) ("Each situation must . . . be judged on its facts."), and the weight of the evidence in light of this Office's consistent precedents—and as reinforced by the substantial historical practice—demonstrates that the awarding of the privately financed Peace Prize through the Nobel Committee does not constitute the conferral of a present or emolument by a "foreign State" for the purposes of the Emoluments Clause.

III.

Our reasoning regarding the Emoluments Clause is equally applicable to the Foreign Gifts and Decorations Act. The Act provides express consent for officials to accept "gifts and decorations" from "foreign government[s]" under certain limited circumstances not present here. *See* 5 U.S.C. § 7342(b) (2006) ("An employee may not . . . accept a gift or decoration, other than in accordance with the provisions of" the Act); *see also id.* § 7342(a)(1)(E) (providing that the President is subject to the Act). Section 7342(a)(2) defines the term "foreign government" as follows:

> "foreign government" means—
>
> (A) any unit of foreign governmental authority, including any foreign national, State, local, and municipal government;
>
> (B) any international or multinational organization whose membership is composed of any unit of foreign government described in subparagraph (A); and
>
> (C) any agent or representative of any such unit or such organization, while acting as such.

While we do not necessarily assume that Congress intended the meaning of "foreign government" to be coextensive with the constitutional

term "foreign State," we have recognized that the Act's reference to "any unit of foreign governmental authority" is likely narrower in scope than the Emoluments Clause. *See ACUS*, 17 Op. O.L.C. at 121 (recognizing that corporations owned or controlled by foreign States are arguably not "units of foreign governmental authority," although they are presumptively subject to the Emoluments Clause); *cf.* S. Rep. No. 95-194, at 29 (1977) (definition of "foreign government" intended to reach "foreign governmental subdivision(s)" and "quasi-government organizations"). For the reasons discussed in detail above, the Nobel Committee in choosing the recipients of the Peace Prize, like the Nobel Foundation in financing the Prize, operates as a private non-governmental organization and not as a "unit" of a foreign government. Moreover, given the Foundation's private nature and the facts that the Committee acts independently of any government and is not required to include any government officials on it, *see* The Norwegian Nobel Committee, http://nobelprize.org/prize_awarders/peace/committee.html (last visited Nov. 23, 2009) ("Although this is not a requirement, all committee members have been Norwegian nationals."), we conclude that neither is an "international or multinational organization" because neither is "composed of any unit of foreign government," let alone composed of units of more than one foreign government. 5 U.S.C. § 7342(a)(2)(B); *see also Emoluments Clause and World Bank*, 25 Op. O.L.C. 113, 117 (2001) (concluding that international organizations of which the United States is a member are not generally subject to the Emoluments Clause and observing that the Act's coverage of international organizations was likely "motivated by policy concerns as opposed to constitutional ones"). Nor is the Committee as a whole, or, by extension, the Nobel Foundation in financing the Prize, an "agent or representative" of any unit of a foreign government or any international organization for purposes of the Act. Although two members of the Committee continued to serve in the Storting before leaving their parliamentary seats, we do not believe this limited tie between the Government of Norway and the Committee, affecting a minority of the Committee's members, transformed the Nobel Committee into an agent or representative of the Norwegian Government. *Id.* § 7342(a)(2)(C). The countervailing indications of autonomy described above support that conclusion. Consequently, the Foreign Gifts and Decorations Act poses no bar to the President's receipt of the Peace Prize.

IV.

For the reasons given above, we conclude that neither the Emoluments Clause nor the Foreign Gifts and Decorations Act prohibits the President from receiving the Nobel Peace Prize without congressional consent.

DAVID J. BARRON
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Office of Legal Counsel

EPA Acceptance and Use of Donations Under the Clean Air Act

Section 104(b)(4) of the Clean Air Act does not permit the EPA to accept and use donations of money.

Section 104(b)(4) of the Clean Air Act permits the EPA to accept items of personal property (other than money), such as an automobile, so long as the property in question would be received for use directly in the anti-pollution research authorized by section 104.

December 8, 2009

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
ENVIRONMENTAL PROTECTION AGENCY

Section 104(b)(4) of the Clean Air Act authorizes the Administrator of the Environmental Protection Agency ("EPA") to "acquire" various kinds of property by various means, including "donation," to further research relating to the "prevention and control of air pollution resulting from the combustion of fuels." 42 U.S.C. § 7404(a), (b)(4) (2006). You have asked whether section 104(b)(4) permits the EPA to accept and use donations of money. For the reasons discussed below in Part I, we conclude that it does not. You have also asked whether section 104(b)(4) permits the EPA to accept items of personal property (other than money), such as an automobile. For the reasons given below in Part II, we conclude that it does, so long as the property in question would be received for use directly in the anti-pollution research authorized by section 104.

I.

Section 104 of the Clean Air Act is titled "Research relating to fuels and vehicles." It provides, in relevant part, as follows:

> (a) Research programs; grants; contracts; pilot and demonstration plants; byproducts research
>
> The Administrator shall give special emphasis to research and development into new and improved methods, having industry-wide application, for the prevention and control of air pollution resulting

from the combustion of fuels. In furtherance of such research and development he shall—

(1) conduct and accelerate research programs directed toward development of improved, cost-effective techniques for—

(A) control of combustion byproducts of fuels,

(B) removal of potential air pollutants from fuels prior to combustion,

(C) control of emissions from the evaporation of fuels,

(D) improving the efficiency of fuels combustion so as to decrease atmospheric emissions, and

(E) producing synthetic or new fuels which, when used, result in decreased atmospheric emissions.

(2) provide for Federal grants to public or nonprofit agencies, institutions, and organizations and to individuals, and contracts with public or private agencies, institutions, or persons . . . .

(b) Powers of Administrator in establishing research and development programs

In carrying out the provisions of this section, the Administrator may—

(1) conduct and accelerate research and development of cost-effective instrumentation techniques to facilitate determination of quantity and quality of air pollutant emissions, including, but not limited to, automotive emissions;

(2) utilize, on a reimbursable basis, the facilities of existing Federal scientific laboratories;

(3) establish and operate necessary facilities and test sites at which to carry on the research, testing, development, and programming necessary to effectuate the purposes of this section;

(4) *acquire* secret processes, technical data, inventions, patent applications, patents, licenses, and an interest in lands, plants, and facilities, *and other property* or rights by purchase, license, lease, or *donation*; and

(5) cause on-site inspections to be made of promising domestic and foreign projects, and cooperate and participate in their devel-

> opment in instances in which the purposes of the chapter will be served thereby.
>
> (c) Clean alternative fuels
>
> The Administrator shall conduct a research program to identify, characterize, and predict air emissions related to the production, distribution, storage, and use of clean alternative fuels to determine the risks and benefits to human health and the environment relative to those from using conventional gasoline and diesel fuels. The Administrator shall consult with other Federal agencies to ensure coordination and to avoid duplication of activities authorized under this subsection.

42 U.S.C. § 7404 (emphasis added).

In your view, "the word 'property' when included in a statute that authorizes agencies to accept donations, includes funds, money, or cash unless the statute excludes this form of property from the reach of its gift acceptance authority." Letter for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Patricia K. Hirsch, Acting General Counsel, Environmental Protection Agency at 2 (Dec. 15, 2008) ("EPA Letter"). You note that this Office has read the phrase "other property" to include money in at least one instance. *Id*. at 4 (citing *Acceptance of Gifts to Be Used in the White House, the Official Residence of the Vice President, or the Offices of the President and Vice President*, 2 Op. O.L.C. 349, 352 (1977) ("*Acceptance of Gifts to Be Used in the White House*")). Thus, you believe the phrase "other property" in section 104(b)(4) should be understood to include money.

In June 2008, the Office of Management and Budget ("OMB") conveyed to your office a contrary position, based in part on what it contended would be the incongruous consequences that including money within the scope of section 104(b)(4) would have in light of the requirements of the Miscellaneous Receipts Act ("MRA"), 31 U.S.C. § 3302(b) (2006). In response to OMB's contentions about the MRA, you argue that section 104(b)(4) should be read as establishing an exception to the MRA. EPA Letter at 4–8.

We believe money is not included in the "other property" section 104(b)(4) authorizes the EPA to acquire, but in reaching this judgment we do not believe it is necessary to address the MRA. Instead, we reach

this conclusion simply by examining the language of section 104(b)(4). When the phrase "other property" in section 104(b)(4) is considered in context, we believe it is clear that Congress did not intend to include money among the forms of property that the EPA can acquire for use in the research program authorized by section 104. While an administrative agency is generally entitled to deference in its interpretation of an ambiguous term in a statute it is charged with administering, "the question whether a statute is ambiguous arises after, not before a court applies traditional canons of interpretation—the most important here being the context in which the word appears." *OfficeMax, Inc. v. United States*, 428 F.3d 583, 592 (6th Cir. 2005). As the Supreme Court has explained, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984) (in determining whether congressional intent is clear courts must "employ[] traditional tools of statutory construction"); *Cal. Indep. Operator Corp. v. FERC*, 372 F.3d 395, 400–01 (D.C. Cir. 2004) (rejecting agency's interpretation, and concluding that "practice" in section 206 of the Federal Power Act is not ambiguous when considered in context). Here, we think applying traditional tools of statutory construction demonstrates that "other property" in section 104(b)(4) is not ambiguous.

First, Congress has passed many statutes that authorize an agency to receive gifts of "money" in addition to authorizing the agency to receive gifts of "property." *See, e.g.*, 10 U.S.C. § 2601(a) (2006) (authorizing the Secretary of Defense or Homeland Security to "accept, hold, administer, and spend any gift, devise, or bequest of real property, personal property, or money"); 22 U.S.C. § 2395(d) (2006) (authorizing the President to accept "gifts, devises, bequests, grants, etc." of "money, funds, property, and services of any kind"); 22 U.S.C. § 2455(f) (2006) (authorizing the President to accept and use contributions of "funds, property, and services"); 22 U.S.C. § 5422(c)(1) (2006) (authorizing the Secretary of Labor to accept "any money or property, real, personal, or mixed, tangible or intangible, received by gift, devise, bequest, or otherwise"); 22 U.S.C. § 2056(b) (2006) (authorizing the Secretary of State to "accept from public and private sources money and property" as "gifts, bequests, and devises"); 29 U.S.C. § 568 (2006) (authorizing the Secretary of Labor to accept and employ "any money or property, real, personal, or mixed,

tangible or intangible, received by gift, devise, bequest, or otherwise"); 29 U.S.C. § 2939(b) (2006) (same); 42 U.S.C. § 2476b(a) (2006) (authorizing the Administrator of the National Aeronautics and Space Administration to "accept gifts and donations of services, money, and real, personal, tangible, and intangible property"); 42 U.S.C. § 7705c(a) (2006) (authorizing the Director of the Federal Emergency Management Agency to "accept and use bequests, gifts, or donations of services, money, or property"). These statutes, by specifically referencing "money" in addition to "property," demonstrate that Congress does not assume that the term "property" necessarily includes money or funds.

Moreover, even when Congress uses a general term, such as "any property," to characterize the types of property that an agency may receive, it sometimes spells out in a related statutory provision that money is among the types of property the agency may receive. *See, e.g.*, 7 U.S.C. §§ 2264, 2265 (2006) (authorizing the Secretary of Agriculture to "accept, receive, hold, and administer on behalf of the United States gifts, bequests, or devises of real and personal property . . . for the benefit of the National Agricultural Library," and subsequently specifying how "[a]ny gift of money accepted pursuant to the authority" shall be deposited in the Treasury and appropriated); 28 U.S.C. § 524(d)(1), (2) (2006) (authorizing the Attorney General to "accept, hold, administer, and use gifts, devises, and bequests of any property or services," and subsequently specifying how "[g]fits, devises, and bequests of money" shall be deposited in the Treasury and appropriated). These statutes show both that Congress has more than one way to indicate expressly that money is among the types of "property" that an agency may receive, and that the meanings of general terms such as "any property," "other property," or "property" need to be discerned by considering the surrounding statutory context.

This is not to say that Congress must expressly state in a gift acceptance provision or a related provision that money is among the types of property an agency may accept by donation in order for money to be included. Our 1977 opinion addressing the gift acceptance provision formerly codified at 40 U.S.C. § 298a (1976) (and now codified at 40 U.S.C. § 3175 (2006)) concluded that if Congress employs the term "property" in a context that indicates that its meaning is expansive enough to encompass money, an explicit invocation of the terms "money" or "funds" may not be necessary. *Acceptance of Gifts to Be Used in the*

White House, 2 Op. O.L.C. at 352. But Congress's inclusion of an explicit reference to money in numerous statutes that also use the term "property" undermines, in our view, the position that "the word 'property' when included in a statute that authorizes agencies to accept donations, includes funds, money, or cash unless the statute excludes this form of property." EPA Letter at 2.

Second, the immediate statutory context of the phrase "other property" in section 104(b)(4) indicates that it does not include money. *See, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("the meaning of statutory language, plain or not, depends on context"); *id*. ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.") (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)). Section 104 is not a general gift acceptance provision that permits an agency to accept donations for any authorized purpose. *See, e.g.*, 29 U.S.C. § 568 (2006) (titled "Acceptance of donations by Secretary" and providing that "[t]he Secretary of Labor is authorized to accept, in the name of the Department of Labor, and employ or dispose of in furtherance of authorized activities of the Department of Labor, during the fiscal year ending September 30, 1995, and each fiscal year thereafter, any money or property, real, personal, or mixed, tangible or intangible, received by gift, devise, bequest, or otherwise"). Rather, it permits acquisition of property only in order to facilitate a particular activity, namely, research to control air pollution resulting from the combustion of fuels. And consistent with that focused purpose, the words preceding "other property" in section 104(b)(4) indicate a limitation on the forms of property that may be "acquire[d]" pursuant to that section.[1]

The section states that the Administrator may acquire "secret processes, technical data, inventions, patent applications, patents, licenses, and an interest in lands, plants, and facilities." These detailed specifications

[1] We are aware of two other statutes in the U.S. Code with the same phrasing as section 104(b)(4), both of which, like section 104, authorize scientific research on a particular subject. *See* 7 U.S.C. §§ 178g, 178h (2006). These statutes are administered by the Departments of Agriculture and Commerce. The General Counsel's Offices in both of those departments have informed us that they are unaware of either department acquiring any property under these statutes.

would be unnecessary if the subsequent phrase "other property" was intended to include all types of property, including money. The list instead is best read to illustrate the types of property that may be received, types that are all distinguishable from money. Consistent with this purpose, the list that precedes the phrase "other property or rights" is narrowly focused on tools useful in research—various forms of intellectual property as well as space and facilities. Money, although always generally useful, is not in and of itself a research tool in the way that intellectual property—the specified "secret processes, technical data, inventions, patent applications, patents licenses"—and physical space and equipment—"an interest in lands, plants, and facilities"—are in and of themselves research tools.

This interpretation of section 104(b)(4) is reinforced by the canon of statutory construction *ejusdem generis*, which instructs that where "general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001) (internal quotation marks omitted) (quoting 2A Norman Singer, *Sutherland on Statutes and Statutory Construction* § 47.17 (1991)). For example, in *Washington State Department of Social & Health Services v. Keffeler*, the Supreme Court determined that the statutory phrase at issue, "other legal process," had to be read narrowly due to the words that preceded it. 537 U.S. 371, 383–84 (2003). *Keffeler* concerned the legality of a Washington State scheme whereby, for children under the State's foster care, the State credited Social Security benefits received on behalf of each of those children to a special account, and debited that account to pay foster care providers. Federal law protected those Social Security benefits from "execution, levy, attachment, garnishment, or other legal process." 42 U.S.C. § 407(a) (2006); *id*. § 1383(d)(1). The question before the court was whether "other legal process" covered Washington State's scheme. The Court concluded that it did not, even though the phrase at issue, "in the abstract," encompassed the contested activity. *Keffeler*, 537 U.S. at 383–84 ("[T]he case boils down to whether the department's manner of gaining control of the federal funds involves 'other legal process,' as the statute uses that term. That restriction to the statutory usage of 'other legal process' is important here, for in the abstract the department does use legal

process as the avenue to reimbursement."). The Court found that "other legal process" needed to be read "far more restrictively" because it was limited by the terms that preceded it, "execution, levy, attachment, garnishment." *Id.* at 384–85. The Court looked at those preceding terms, identified a unifying theme, and read "other legal process" to mean "process much like the processes of execution, levy, attachment, and garnishment, and at a minimum . . . requir[ing] utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of an allegedly existing or anticipated liability." *Id.* at 385.

Applying the *ejusdem generis* canon to section 104(b)(4) supports the conclusion that "other property" does not include money. Like "other legal process," the term at issue in *Keffeler*, "other property" in section 104(b)(4) could, "in the abstract," shorn of context, encompass the contested thing. But nothing in the list that precedes "other property" looks anything like money. Instead, each item in the list that precedes it could be classified as a tool that the Administrator might need to acquire for direct use in research. There is no item on the list, for example, of general value, which might indicate that "other property" should encompass property not directly useful in research but indirectly useful as a funding source.

To be sure, section 104(b)(4) includes "donation" as one of the allowable ways of obtaining something useful in the authorized research. And, in the abstract, money may be received by donation. But we do not read the word "donation," in context, to indicate an expansive meaning of the term "other property." The word "donation," like the term "other property," does not stand alone. It appears in a list of specified means of acquisition that is exhaustive. That list reinforces our conclusion that the illustrative examples that precede "other property" indicate that money was not intended to be among the things that could be accepted as a gift. "[P]urchase, license, lease, or donation" are the four ways one can obtain tangible or intangible personal property, real property, or the rights to use intellectual property. Money uniquely cannot be purchased, licensed or leased. It would be anomalous to authorize the Administrator to "acquire" money by "purchase, license," or "lease." Thus, the inclusion of the word "donation" does not indicate that the word "property" should be read to

include money. It is better read to denominate another means by which non-monetary types of property may be acquired.

In arguing that the term "other property" in section 104(b)(4) should be read to encompass money, your office notes that an earlier opinion by this Office addressing a different statute's use of the phrase "other property" could be read to encompass money. EPA Letter at 6. A brief examination of the statute at issue in that earlier opinion, however, only supports our conclusion here.

In 1977, we concluded that 40 U.S.C. § 298a (1976) (now codified at 40 U.S.C. § 3175) allowed the Administrator of General Services ("GSA") to accept gifts of money. Our analysis, in its entirety, was as follows: "The statute applicable to GSA does not expressly mention gifts of money, but such gifts would appear to be included in the general phrase in 40 U.S.C. § 298a (1976), 'gifts of real, personal, or other property.'" *Acceptance of Gifts to Be Used in the White House*, 2 Op. O.L.C. at 352. At the time we wrote that opinion, 40 U.S.C. § 298a was titled "Acceptance of gifts of real, personal, or other property." Its entire text was as follows:

> The Administrator of General Services, together with the Postmaster General where his office is concerned, is authorized to accept on behalf of the United States unconditional gifts of real, personal, or other property in aid of any project or function within their respective jurisdictions.

Unlike the statutory text surrounding the term "other property" in section 104(b)(4), there is no context to limit the meaning of the term "other property" in former section 298a. On the contrary, the different preceding phrase in former section 298a, "unconditional gifts of real, personal," stands in contrast to the beginning of section 104(b)(4). First, it authorizes receipt of property by only one means, "gifts," i.e., donation. That is consistent with the inclusion of money in the forms of property authorized to be accepted and contains none of the limiting implications of "acquire . . . by purchase, license, lease" in section 104(b)(4). Second, the terms "real" and "personal" are general and encompassing, again unlike the much more specific types of property interests identified in section 104(b)(4), "secret processes, technical data, inventions, patent applications, patents, licenses, and an interest in lands, plants, and facilities." All

property, of any kind, is either "real" or "personal," including money. *See, e.g.*, *Black's Law Dictionary* 1254 (8th ed. 2004) (defining "personal property" as "[a]ny movable or intangible thing that is subject to ownership and not classified as real property").[2] Our conclusion that the phrase "other property" should be interpreted differently in section 104(b)(4) and in former section 298a, then, flows naturally from the starkly different statutory contexts in which the phrase appears.

We have also examined the legislative history of section 104, but we think it sheds no light on the question before us. The legislative history contains no discussion of the meaning of the term "other property," nor does it address what the drafters meant by their use of the terms "acquire" or "donation." As the EPA acknowledges in its December 15, 2008 letter, the legislative history contains "no specific discussion of what Congress intended by the phrase 'and other property.'" EPA Letter at 3. The two places in the legislative history to which the EPA draws attention in its letter are inconclusive at best, and primarily can be read to indicate that Congress was focused on empowering the EPA Administrator to obtain the tools necessary for the relevant research programs, not on validating a general gift or donation statute.

First, the EPA notes that the original Senate report on the bill that included section 104 stated that "the Secretary is directed to . . . acquire property and rights by various means." EPA Letter at 3 (citing S. Rep. No. 90-403, at 41 (1967)). The use of the term "property" without explanation or elaboration sheds no light on whether it includes money. In a preceding paragraph, the Report characterizes section 104's purpose as "requir[ing] the Secretary to give special emphasis to research into new methods for the control of air pollution resulting from fuel combustion." S. Rep. No. 90-403, at 41. The reference to the Secretary's direction to "acquire property and rights by various means" appears in a list of the Secretary's obligations "[i]n order to carry out the provisions of this section." *Id.* The Secretary "is directed to conduct research and development of low-cost instrumentation techniques to determine the quantity and quality of air pollution emissions; make use of existing Federal laboratories; establish

[2] In fact, in 2002 Congress amended 40 U.S.C. § 298a to replace "real, personal, or other property" with the simple term "property" because the phrase "real, personal, or other" was "unnecessary." H.R. Rep. No. 107-479, at 57 (2002).

and operate facilities to carry out the research; acquire property and rights by various means, and cooperate and participate in the development of foreign and domestic projects." *Id.* Every element of this passage indicates that Congress's focus was on the research itself, and on the acquisition of the tools necessary to accomplish the research, rather than on the types of property the EPA could acquire. No reference is made to donations or gifts. The statement that the Secretary is directed "to acquire property by various means" demonstrates, at most, that Congress intended to broadly empower the acquisition of the necessary property, not that Congress intended such property to include money.

Second, the EPA points to a comment in another Senate report issued when Congress amended section 104 to increase appropriations. In that report, the Committee on Public Works expresses an expectation that "projects involving cost sharing by industry will account for an increasing share of the [research and development] program in the months and years ahead, particularly in the area of prototype testing." S. Rep. No. 91-286, at 6 (1969). This statement, like the one in the earlier Senate report, in no way suggests an intent to enable the EPA Administrator to receive and use donated funds. Nowhere does the report state that such "cost sharing" shall occur by the donation of private funds to the EPA. In fact, other parts of the report indicate that such cost sharing would be achieved through the sharing of real and intellectual property, the kinds of "property" specified in section 104(b)(4). For example, the report notes that "section 104 allows for the construction and testing of demonstration control equipment on private property. The consequence is to ease the legal problems associated with supporting large-scale development and demonstration projects involving construction on private property. The construction and operation of demonstration plants at industrial sites is often the best means of making a realistic evaluation of the economic and technical feasibility of new processes." *Id.* at 5. This passage fits with section 104(b)(4)'s statement that the Administrator may "acquire . . . an interest in lands, plants, and facilities." Similarly, in the paragraph following the statement about cost-sharing quoted by the EPA, the report notes that "[a]greements regarding the handling of proprietary information have been negotiated to pave the way for evaluation of flue-gas treatment processes developed by Wellman-Lord and the Monsanto Co." *Id.* at 7.

This passage fits with section 104(b)(4)'s authorization of the Administrator to "acquire . . . patents, licenses."

Considering both the immediate context in which "other property" appears in section 104(b)(4) and the broader context of other statutes authorizing agencies to accept donations, we believe Congress did not intend to authorize the EPA to accept monetary donations when it authorized the acquisition of certain types of property in section 104(b)(4).

II.

In a follow-up letter, dated May 29, 2009, your office has asked us to address a related question, whether "other property" in section 104(b)(4) includes items of personal property other than money, such as an automobile. *See* Letter for David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, from Patricia K. Hirsch, Acting General Counsel, Environmental Protection Agency, at 1 (May 29, 2009). We conclude that it does.

As our discussion in Part I indicates, we believe that, under the *ejusdem generis* canon, the term "other property" in section 104(b)(4) is constrained by the items in the list that precedes it. While many of those items are forms of intangible property, such as various kinds of intellectual property, not all of them are. Among the types of property that may be acquired are "lands, plants, and facilities." Admittedly, the reference to those forms of property is prefaced by "an interest in." 42 U.S.C. § 7404(b)(4). But fee simple ownership is one type of property interest. And, in any event, as explained above, this list identifies types of property that are all tools directly useful in executing the anti-pollution research authorized by section 104. In particular, the term "facilities" is quite broad, and would appear to cover a research lab and relevant research equipment. Personal property, moreover, may not only be acquired by donation, but also by purchase, license, or lease. Therefore, we believe that property that would be used directly in the anti-pollution research authorized by section 104 falls within the scope of property that can be acquired pursuant to section 104(b)(4). With this understanding of the term "property" in mind, certainly an automobile could fall under the term if, for example, it were acquired to test its emissions or even if it were acquired to shuttle equipment between research facilities.

III.

For the foregoing reasons, we conclude that section 104(b)(4) of the Clean Air Act does not authorize the receipt and use of donated money but does authorize the EPA to receive personal property that does not fall into one of the specifically enumerated categories so long as it is for use directly to carry out the anti-pollution research authorized by section 104.

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State Procedures for Appointment of Competent Counsel in Post-Conviction Review of Capital Sentences

Statutory provisions originally enacted as section 107(a) of the Antiterrorism and Effective Death Penalty Act of 1996, and now codified as chapter 154 of title 28, U.S. Code, may be construed to permit the Attorney General to exercise his delegated authority to define the term "competent" within reasonable bounds and independent of the counsel competency standards a state itself establishes, and to apply that definition in determining whether to certify that a state is eligible for special procedures in federal habeas corpus proceedings involving review of state capital convictions.

If the Attorney General chooses to establish a federal minimum standard of counsel competency that state mechanisms must meet in order to qualify for certification, he should do so in a manner that still leaves the states some significant discretion in establishing and applying their own counsel competency standards.

These statutory provisions may reasonably be construed to permit the Attorney General to evaluate a state's appointment mechanism—including the level of attorney compensation—to assess whether it is adequate for purposes of ensuring that the state mechanism will result in the appointment of competent counsel.

December 16, 2009

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

Statutory provisions originally enacted as section 107(a) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, § 107(a), 110 Stat. 1214, 1221 (1996), and now codified as chapter 154 of title 28, U.S. Code, make expedited and other special procedures available to state respondents in federal habeas corpus proceedings involving review of state capital convictions. Amendments to chapter 154 enacted in 2006 condition the availability of these procedures on the Attorney General's certification that the state in question has met certain requirements. *See* USA PATRIOT Improvement and Reauthorization Act of 2005 ("PATRIOT Improvement Act"), Pub. L. No. 109-177, § 507(c)(1), 120 Stat. 192, 250 (2006). Specifically, a state is entitled to the special procedures only if the Attorney General determines, *inter alia*, that the state has established "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in state postconviction proceedings brought by indigent [capital] prisoners," and that the state "provides standards of competency for the appointment of counsel in [such] proceedings." 28

U.S.C. § 2265(a)(1)(A), (C) (2006); *see also id.* § 2261(b). Chapter 154 also authorizes the Attorney General to "promulgate regulations to implement the certification procedure." *Id.* § 2265(b).

Attorney General Mukasey published a final rule implementing this certification procedure on December 11, 2008. *Certification Process for State Capital Counsel Systems*, 73 Fed. Reg. 75,327 (Dec. 11, 2008) (codified at 28 C.F.R. § 26.22 (2009)) ("2008 final rule"). That final rule afforded the Attorney General very limited discretion in exercising his certification responsibilities. In particular, the final rule required the Attorney General to apply the counsel competency standards established by the state itself in determining whether a state has established "a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of *competent* counsel," 28 U.S.C. § 2265(a)(1)(A) (emphasis added). *See* 73 Fed. Reg. at 75,330–32. In accord with this approach, the examples that the final rule offered to illustrate its application gave no indication that the Attorney General would have the authority to evaluate whether a state appointment mechanism could be expected to ensure the appointment of counsel who qualify as competent under a federal standard. *Id.* at 75,339 (codified at 28 C.F.R. § 26.22(d)) (setting forth examples). Indeed, the promulgated final rule expressly omitted the adjective "competent" found in the statutory requirement that the state mechanism provide for the appointment of "*competent* counsel." 28 C.F.R. § 26.22(a), 73 Fed. Reg. at 75,338. Similarly, the examples offered in the rule regarding the compensation provided by the proposed state mechanism indicated that so long as a state did not require appointed counsel to act on a volunteer basis, the Attorney General would have no authority to determine whether a state's chosen compensation level would ensure the appointment of competent counsel. 28 C.F.R. § 26.22(b) (setting forth examples).

A federal district court enjoined the rule from taking effect until the Department of Justice provided an additional comment period of at least thirty days and published a response to any comments received during that period. *Habeas Corpus Res. Ctr. v. Dep't of Justice*, No. C 08-2649 CW, 2009 WL 185423, at *10 (N.D. Cal. Jan. 20) (order granting motion for preliminary injunction). Acting Attorney General Filip thereafter instituted a new comment period that ended on April 6, 2009. 74 Fed. Reg. 6,131 (Feb. 5, 2009). Many of the comments received during this period took issue with the final rule, with a number of the comments

contending that the rule unduly cabined the Attorney General's discretion in exercising his certification authority.

You have asked our Office whether the relevant statutory provisions require you to follow the approach taken in the 2008 final rule. After carefully considering this question, we conclude that they do not. In our view, these provisions may be construed to permit you to exercise your delegated authority to define the term "competent" within reasonable bounds and independent of the competency standards a state itself establishes, and to apply that definition in making your certification determinations. If you choose to establish a federal minimum standard of counsel competency that state mechanisms must meet in order to qualify for certification, however, you should do so in a manner that still leaves the states some significant discretion in establishing and applying their own counsel competency standards. We further conclude that the statutory provisions in question may reasonably be construed to permit you to evaluate a state's appointment mechanism—including the level of attorney compensation—to assess whether it is adequate for purposes of ensuring that the state mechanism will result in the appointment of competent counsel.

I.

As originally enacted in 1996 (*see* AEDPA, Pub. L. No. 104-132, § 107(a)), chapter 154 of title 28 entitled a state to the advantages of expedited federal habeas procedures in capital cases[1] if it "establishe[d] by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law

[1] Such advantages included, for example, a shorter statute of limitations for death-sentenced inmates filing their federal habeas petitions (six months instead of one year), strict deadlines for federal courts ruling on such petitions, limitations on stays of execution, and tightened procedural default rules. *See* 28 U.S.C. §§ 2262–2264, 2266 (2000); *Spears v. Stewart*, 283 F.3d 992, 1009 (9th Cir. 2002). When Congress amended chapter 154 in 2006, *see infra* pp. 405–406, it changed these advantages slightly in ways that are not relevant here.

purposes." 28 U.S.C. § 2261(b) (2000). Chapter 154 further provided that the state "rule of court or statute must provide standards of competency for the appointment of such counsel." *Id.*

For almost a decade thereafter, federal courts, in the context of adjudicating federal habeas petitions brought by indigent state prisoners who had been sentenced to death, regularly engaged in an independent review of whether the state respondent had satisfied the competent counsel appointment preconditions set forth in chapter 154. *See, e.g.*, *infra* notes 5 & 8.

In 2006, however, Congress enacted section 507(c)(1) of the PATRIOT Improvement Act. Pursuant to these amendments, a federal court entertaining a habeas petition by a state capital prisoner is required to implement the expedited procedures "if the Attorney General of the United States certifies that [the] State has established a mechanism for providing counsel in postconviction proceedings as provided in section 2265," and if "counsel was appointed pursuant to that mechanism, petitioner validly waived counsel, petitioner retained counsel, or petitioner was found not to be indigent." 28 U.S.C. § 2261(b) (2006).

The Attorney General certification procedure is set forth in 28 U.S.C. § 2265(a)(1). That paragraph provides that, upon request "by an appropriate State official," the Attorney General "shall determine" the following:

> (A) whether the State has established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death;
>
> (B) the date on which the mechanism described in subparagraph (A) was established; and
>
> (C) whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A).

These substantive requirements for Attorney General certification are, for all purposes relevant here, identical to the requirements for entitlement to expedited habeas procedures codified in the pre-2006 version of the statute. *See* 28 U.S.C. § 2261(b) (2000). The amended version of 28 U.S.C. § 2265(a)(3) (2006), unlike the pre-2006 law, further specifies that "[t]here are no requirements for certification or for application of [chapter

154] other than those expressly stated in [chapter 154]." And 28 U.S.C. § 2265(b) authorizes the Attorney General to prescribe regulations to implement the certification process.

Underscoring the changed role of the federal habeas courts in the new chapter 154 process, 28 U.S.C. § 2265(c) provides that the Attorney General's certification shall be reviewed by the United States Court of Appeals for the District of Columbia Circuit. *See* 152 Cong. Rec. 2441 (Mar. 2, 2006) (statement of Sen. Kyl) (observing that review of certification is vested in the U.S. Court of Appeals for the District of Columbia Circuit, "which does not hear habeas petitions").

II.

A.

The preamble to the 2008 final rule makes clear that the rule was intended to constrain the Attorney General's certification authority quite significantly and that such a constraint was thought to be statutorily required. The preamble expressly rejected the suggestion in some of the comments received during the comment period that the Attorney General had the authority to give independent substantive content to the statutory requirements for certification to the extent those requirements were ambiguous. The preamble explained that such comments "reflected misunderstandings of the nature of the functions that chapter 154 requires the Attorney General to perform, and particularly, of the limited legal discretion that the Attorney General possesses under the statutory provisions." 73 Fed. Reg. at 75,327. Especially significant for present purposes, the preamble stated with respect to the term "competent counsel":

> The commenters are correct that the text of chapter 154 needs to be supplemented in defining competency standards for postconviction capital counsel, but mistaken as to who must effect that supplementation. *Responsibility to set competency standards for postconviction capital counsel is assigned to the states that seek certification*.

Id. at 75,331 (emphasis added).[2]

[2] One of the examples that the rule offered would seem to be in some tension with this basic approach. The rule indicated that, in setting competency standards, a state could not

The preamble defended this conclusion primarily by referring to the relationship between section 2265(a)(1)(A) and section 2265(a)(1)(C). The former provision requires the Attorney General to determine whether a state has "established a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death." The latter provision requires the Attorney General to determine "whether the State provides standards of competency for the appointment of counsel in proceedings described in subparagraph (A)." The preamble to the 2008 final rule reasoned that "[i]n context, the phrase 'competent counsel' in section 2265(a)(1)(A) *must* be understood as a reference to the standards of counsel competency that the states are required to adopt by section 2265(a)(1)(C)." 73 Fed. Reg. at 75,331 (emphasis added). The preamble further explained that "[i]f the reference to 'competent counsel' in section 2265(a)(1)(A) were a directive to the Attorney General to set independently the counsel competency standards that states must meet for chapter 154 certification, then the section 2265(a)(1)(C) requirement that the states provide such standards would be superfluous, and section 2265 would be internally inconsistent as to the assignment of responsibility for setting counsel competency standards." *Id.*

In our view, however, these provisions do not compel the preamble's conclusion. There is no express direction in the text of section 2265 that the Attorney General perform his certification function under subsection (a)(1)(A) solely with reference to the standards of competency that a state provides pursuant to subsection (a)(1)(C). The text of subsection (a)(1) instead may be read to require the Attorney General to make three distinct and independent determinations—those enumerated in subparagraphs (A)–(C)—each without reference to the other.

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simply allow "any attorney licensed by the state bar to practice law" to represent indigent capital defendants in post-conviction proceedings. 73 Fed. Reg. at 75,339 (codified at 28 C.F.R. § 26.22(d) (example 4)). The Rule did not explain why this "bar-licensed" standard would not suffice, nor why it might be different in kind from other minimal standards that a state could establish and still qualify for certification.

1.

In reaching this conclusion, we begin with the fact that nothing in the text of subsection (a)(1)(A), standing alone, compels the conclusion that the Attorney General must make his determination with reference to a state's standards of counsel competency. Indeed, subsection (a)(1)(A) neither mentions such state-promulgated standards nor references subsection (a)(1)(C). The absence of such an explicit direction or reference is significant. In general, it is fair to presume that Congress does not intend for state officials to be solely responsible for construing and giving content to a federal statutory term—such as "competent" in subsection (a)(1)(A)—that is ambiguous and not otherwise defined. As the Supreme Court has made clear, there is a "general assumption" that "in the absence of a plain indication to the contrary . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (internal quotation marks omitted).

That general assumption is especially warranted here because the statutory framework at issue appears to have specifically charged a *federal* official with interpretive authority. Congress assigned the Attorney General—not the states themselves—the function of certifying state mechanisms, a task requiring that the Attorney General determine whether the state's proffered mechanism qualifies as one that is "for the appointment, compensation, and payment of reasonable litigation expenses of *competent* counsel in State postconviction proceedings brought by indigent prisoners who have been sentenced to death." 28 U.S.C. § 2265(a)(1)(A) (emphasis added). We presume that the Attorney General has discretion to resolve statutory ambiguities contained in the statutory scheme he is charged with administering. The term "competent" is plainly a generality open to varying constructions. It is thus fair to conclude from the text of subsection (a)(1)(A) standing alone that, by assigning to the Attorney General the obligation to determine whether a state has established a qualifying mechanism for appointing competent counsel, Congress intended the Attorney General to resolve the ambiguity and to provide a reasonable interpretation of the word "competent." *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("ambiguities in statutes within an agency's jurisdiction to administer are

delegations of authority to the agency to fill the statutory gap in reasonable fashion").[3]

Although subsection (a)(1)(A) does not refer to the state standards for competency described in subsection (a)(1)(C), it is true that subsection (a)(1)(C) does expressly refer to subsection (a)(1)(A). In our view, however, that cross-reference does not suffice to compel the approach taken in the 2008 final rule. In fact, if anything, the cross-reference points in the opposite direction. The reference to subsection (a)(1)(A) in subsection (a)(1)(C) is not an express directive to the Attorney General to conform his judgments under subsection (a)(1)(A) to the competency standards that subsection (a)(1)(C) requires him to determine that a state has established. Rather, the reference to subsection (a)(1)(A) is more naturally read as a shorthand means of identifying the kind of "proceedings" for which states must provide standards of competency for the appointment of counsel. Indeed, the fact that Congress chose to refer back to subsection (a)(1)(A) in subsection (a)(1)(C) but, in doing so, did not expressly direct the Attorney General to conform his determination under subsection (a)(1)(A) to the standards that a state must provide under subsection (a)(1)(C), is itself significant. It shows that although Congress included statutory language cross-referencing provisions of section 2265(a)(1) in another context, it chose not to expressly constrain the Attorney General's subsection (a)(1)(A) determination by reference to subsection (a)(1)(C).

Similarly, the amended law unambiguously requires the federal habeas courts to give effect to the Attorney General's certification determinations. The courts' limited role in this regard is demonstrated by section 2261(b)(1), which expressly requires courts to accept the Attorney General's certification under section 2265(a)(1)(A) in determining whether the expedited procedures apply. By contrast, the 2006 amendments do not contain express language similarly requiring the Attorney General to accept the state's appointment mechanism or competency standards in making his certification determination. Rather, section 2265(a)(1)(A) provides only that "[t]he Attorney General shall determine . . . whether the state has established" the required mechanism. It makes no refer-

[3] The fact that the Attorney General's certification decisions are subject to de novo review by the United States Court of Appeals for the District of Columbia Circuit is not inconsistent with Congress's decision to confer interpretive authority on the Attorney General. *See United States v. Haggar Apparel Co.*, 526 U.S. 380, 391 (1999).

ence—either in the provision itself or by cross-reference—to state standards that would cabin this authority.

Although the preamble to the 2008 final rule did not contend that Congress expressly conferred upon the states the preclusive authority to define competency in a manner binding on the Attorney General's subsection (a)(1)(A) certification determination, the preamble did assert that the structure of section 2265 impliedly compels the conclusion that the states possess such preclusive authority. The preamble observes in this regard that an "internal[] inconsisten[cy]" would result from a contrary view because states would then be authorized to issue standards for competency that the Attorney General could reject. 73 Fed. Reg. at 75,331.

We do not see, however, how such a structure would necessarily introduce any such inconsistency. States seeking certification would have discretion to craft their own competency standards pursuant to subsection (a)(1)(C), and the Attorney General would then review those standards as part of his evaluation of whether the state mechanism ensures the appointment of counsel who meet minimum federal competency standards pursuant to subsection (a)(1)(A). In this respect, the relationship between the counsel competency standards applied as a matter of federal law by the Attorney General and the standards provided by the states would resemble the "cooperative federalism" model that is familiar from a number of federal statutory regimes. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 183 (1982) (describing the Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970), as amended, as "leav[ing] to the States the primary responsibility for developing and executing educational programs for handicapped children," but "impos[ing] significant requirements to be followed in the discharge of that responsibility"); *see also Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002) (observing that "[t]he Medicaid statute . . . is designed to advance cooperative federalism," and that "[w]hen interpreting other statutes so structured, we have not been reluctant to leave a range of permissible choices to the States, at least where the superintending federal agency has concluded that such latitude is consistent with the statute's aims").

Indeed, although the preamble to the 2008 final rule suggests that an approach contrary to that final rule would be anomalous, the approach adopted in that final rule would introduce anomalies of its own. First, the

2008 final rule provides no explanation for why Congress would lodge the certification function in the Attorney General—thus drawing on his time and expertise—if it intended his responsibilities in this capacity to be ministerial in nature. Second, the preamble to the 2008 final rule does not explain why, absent express indications to the contrary, one should assume Congress intended to establish a statutory framework that confers an "array of procedural benefits" on states, contingent upon their meeting a required set of qualifications, 152 Cong. Rec. 2446 (Mar. 2, 2006) (statement of sponsor Sen. Kyl), but to leave wholly within the discretion of the beneficiary states themselves the determination of a critical substantive criterion upon which eligibility under this framework depends. Thus, concerns about statutory anomalies do not provide a necessary reason to construe section 2265 as compelling the approach adopted in the 2008 final rule.

Finally, the preamble to the 2008 final rule relied on the fact that the 2006 amendments to AEDPA added a provision (section 2265(a)(3)) providing that "[t]here are no requirements for certification or for application of [chapter 154] other than those expressly stated in [chapter 154]." 73 Fed. Reg. at 75,331. The text of section 2265(a)(3) does not, however, compel the limited view of the Attorney General's interpretive authority that the 2008 final rule adopted. In reasonably construing an ambiguous term in a statute that he is charged with administering, the Attorney General would not be adding to the requirements for certification, or otherwise applying chapter 154 in ways not expressly stated. He would merely be implementing an express statutory provision—the certification requirement that a state establish a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of *competent* counsel, 28 U.S.C. § 2265(a)(1)(A)—just as agency officials regularly do in other contexts under the now familiar *Chevron* framework. *See Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 844 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.").

2.

The legislative history of chapter 154 accords with our conclusion that section 2265(a)(1)(A) may be read to afford the Attorney General

the authority, in the course of exercising his certification function, to construe the term "competent" independent of the standards the states themselves establish. To be sure, the legislative history makes clear that the sponsors of the 2006 amendments were concerned with the manner in which federal habeas courts had been approaching their role in the chapter 154 qualification process. *See, e.g.*, 152 Cong. Rec. 2445–46 (Mar. 2, 2006) (statement of Sen. Kyl) ("Chapter 154 has received an extremely cramped interpretation, denying the benefits of qualification to States that do provide qualified counsel and eliminating the incentive for other States to provide counsel."). But the sponsors' concerns do not suggest that, in establishing a new role for the Attorney General in certifying state mechanisms, Congress meant to dispense with independent federal review of the adequacy of those mechanisms. To see why, it is helpful to examine the origins of the 2006 amendments.

Although the 2006 amendments made federal habeas court judgments about the availability of expedited habeas procedures dependent upon the Attorney General's prior certification, it is significant that these provisions did not alter the terms of the substantive requirements that states had to meet in order to qualify for those procedures. Prior to the 2006 amendments, states already had to "establish a mechanism for the appointment" of counsel who were competent, and to establish competency standards for such counsel, in order to qualify for the expedited procedures. Yet, when Congress initially imposed these substantive requirements in 1996, and for the decade thereafter, the relevant language was not understood to reflect a congressional intent to insulate states from independent federal review of whether their mechanisms for appointing counsel, as well as the counsel competency standards they provided, were adequate to qualify for expedited habeas procedures.

Congress's original 1996 enactment came in response to a proposal of the 1989 Report of the Ad Hoc Committee of the Judicial Conference on Federal Habeas Corpus in Capital Cases, known as the "Powell Committee Report" (because the Committee was chaired by former Supreme Court Justice Lewis Powell). H.R. Rep. No. 104-23, at 16 (1995). Following the Committee's recommendations, AEDPA created a system to induce states to provide indigent capital defendants with post-conviction representation, offering what was described in the legislative history as a "quid pro quo," or an "opt-in" system, now codified as chapter 154. *Id.* at 10, 16. As one of the chief sponsors of the 2006 amendments to chapter

154 acknowledged, with a few changes not relevant here, "the Powell Committee Report's recommendations are what is now chapter 154," and that Report "is thus a very useful guide to understanding chapter 154." 152 Cong. Rec. 2447 (Mar. 2, 2006) (statement of Sen. Kyl); *see also Ashmus v. Woodford*, 202 F.3d 1160, 1163 (9th Cir. 2000) (chapter 154 "essentially codifie[d]" the Powell Committee proposal); H.R. Rep. No. 104-23, at 16 (H.R. 729, which became section 107(a) of AEDPA, "incorporates" the Powell Committee Report's recommendations).

Like the current section 2265(a)(1)(A), the Powell Committee Report's proposed 28 U.S.C. § 2256(b) would have provided a state with advantageous procedures in federal habeas proceedings brought by capital defendants if the state established "a mechanism for the appointment, compensation and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have been upheld on direct appeal to the court of last resort in the State or have otherwise become final for State law purposes." 135 Cong. Rec. 24,696 (Oct. 16, 1989). And, like current section 2265(a)(1)(C), the Powell Committee Report's proposed section 2256(b) also would have required the state to "provide standards of competency for the appointment of such counsel." 135 Cong. Rec. 24,696. The express purpose of the structure envisioned by the Powell Committee Report was to ensure that collateral review of capital convictions would "be fair, thorough, and the product of capable and committed advocacy." *Id.*; *see also id.* at 24,695 ("[F]or States that are concerned with delay in capital litigation, it is hoped that the procedural mechanisms we recommend will furnish an incentive to provide the counsel that are needed for fairness."). "Central to the efficacy of this scheme," the Committee wrote, was "the development of standards governing the competency of counsel chosen to serve in this specialized and demanding area of litigation." *Id.* at 24,696; *see also id.* ("Only one who has the clear ability and willingness to handle capital cases should be appointed."). The Committee explained that it was "more consistent with the federal-state balance to give the States wide latitude to establish a mechanism that complies with [the scheme]." *Id.* But, critically for present purposes, the Committee stressed that "[t]he final judgment as to the adequacy of any system for the appointment of counsel under subsection (b) . . . *rests ultimately with the federal judiciary*." *Id.* (emphasis added).

By enacting section 107(a) of AEDPA in 1996, Congress codified (in what was then 28 U.S.C. § 2261(b)) language that is essentially the same as appeared in the Powell Committee Report and that now appears in section 2265(a)(1), *see supra* p. 405. Congress did not adopt the Judicial Conference's suggested amendment that would have established federal statutory standards for counsel competence,[4] but the framework it enacted was consistent with the suggestion of the Powell Committee that there be independent federal review to determine "[t]he final judgment as to the *adequacy* of any system for the appointment of counsel." 135 Cong. Rec. 24,696 (emphasis added). And, indeed, during the decade the original AEDPA language was in effect, federal habeas courts construed then-section 2261(b) to permit their independent review of the "adequacy" of the states' competency standards.[5]

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[4] *See* Report of the Proceedings of the Judicial Conference of the United States 8 (Mar. 13, 1990); *cf.* 18 U.S.C. § 3599 (2006 & Supp. II 2008) (providing for the appointment of counsel for indigent capital defendants in post-conviction proceedings in federal court and setting qualifications that such counsel must meet).

[5] For example, numerous district courts concluded that states defending capital convictions were not entitled to expedited habeas procedures because the state competency standards did not provide for the appointment of counsel with adequate experience and skills in various facets of that specialized area of practice. *See Colvin-El v. Nuth*, No. Civ. A. AW 97-2520, 1998 WL 386403, at *6 (D. Md. July 6, 1998) (Maryland's competency standards not "adequate" because they did not require counsel to have experience or competence in raising collateral issues: "Given the extraordinarily complex body of law and procedure unique to post-conviction review, an attorney must, at a minimum, have some experience in that area before he or she may be deemed 'competent.'"); *Wright v. Angelone*, 944 F. Supp. 460, 467 (E.D. Va. 1996) (Virginia's competency standards are "deficient" and "grossly inadequate," and "fail to satisfy the requirements of [chapter 154]," because a state must require counsel "to have experience and demonstrated competence in bringing habeas petitions"); *Hill v. Butterworth*, 941 F. Supp. 1129, 1142 (N.D. Fla. 1996) ("[t]he plain language of 28 U.S.C. § 2261 contemplates counsel who are competent *through capital, post-conviction experience*"; and Florida's competency standards were not "adequate" because they did not require "any degree of specialization or skill in the arena of habeas proceedings" and made "no provision for any degree of competence or experience for substitute counsel"), *vacated on other grounds*, 147 F.3d 1333 (11th Cir. 1998); *see also Austin v. Bell*, 927 F. Supp. 1058, 1061–62 (M.D. Tenn. 1996) ("Although Tennessee provides for the appointment of counsel for indigent defendants, and has standards for determining whether appointed counsel has sufficiently performed, Tennessee imposes insufficient standards to ensure that only qualified, competent counsel will be appointed to represent habeas petitioners in capital cases.") (internal citations omitted).

To be sure, the sponsors of the 2006 amendments to AEDPA intended to bring about an important change in the framework that the Powell Committee Report proposed and that Congress enacted into law in 1996. But the legislative history of the 2006 amendments suggests that the sponsors were concerned with the consequences of leaving the adequacy review in the hands of federal habeas courts rather than with the prospect of federal officials in general—let alone the Attorney General in particular—exercising independent authority to evaluate counsel competence.

The legislative history shows that the sponsors focused on at least three specific problems they perceived in the AEDPA process, each of which they addressed with new language in the 2006 amendments. None of these responses indicates that the sponsors intended to require the Attorney General to make his certification decision solely on the basis of the competency standards established by the states. The legislative history of the new amendments suggests, if anything, that the Attorney General would instead be able to bring his expertise to bear in exercising the new certification authority that Congress conferred upon him.

First, the sponsors expressed the view that the courts hearing prisoner habeas cases could not fairly assess whether states satisfied the statutory standards because such courts had a "conflict of interest" on the question. 151 Cong. Rec. E2640 (daily ed. Dec. 22, 2005) (extended remarks of Rep. Flake). "Currently, . . . the court that decides whether a State is eligible for chapter 154 is the same court that would be subject to its time limits. Unsurprisingly, these courts have proven resistant to chapter 154." 152 Cong. Rec. 2441 (Mar. 2, 2006) (statement of Sen. Kyl).[6] To address

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Courts of appeals consistently engaged in a similar analysis in determining whether states were entitled to the benefits set forth in the pre-2006 chapter 154. *See, e.g.*, *Baker v. Corcoran*, 220 F.3d 276, 286 n.9 (4th Cir. 2000) (noting that its ruling on a different ground obviated the need to "consider whether Maryland's competency standards, if complied with, are adequate to ensure that prisoners subject to capital sentences receive competent representation in post-conviction proceedings"); *Ashmus v. Calderon*, 123 F.3d 1199, 1208 (9th Cir. 1997) (concluding that "a state's competency standards need not require previous experience in habeas corpus litigation" because "[m]any lawyers who could competently represent a condemned prisoner would not qualify under such a standard"), *rev'd on other grounds*, 523 U.S. 740 (1998), *vacated*, 148 F.3d 1179 (9th Cir. 1998).

[6] *See also* 152 Cong. Rec. 2445 (Mar. 2, 2006) (statement of Sen. Kyl) ("AEDPA left the decision of whether a State qualified for the incentive to the same courts that were

this issue, section 507 of the PATRIOT Improvement Act "places the eligibility decision in the hands of a neutral party—the U.S. Attorney General, with review of his decision in the D.C. Circuit, which does not hear habeas petitions." *Id.* If anything, then, this legislative history suggests that the legislation was designed to substitute one independent federal reviewer (the habeas judge) with another (the Attorney General) thought more likely to be "neutral." *See also* 151 Cong. Rec. E2640 (daily ed. Dec. 22, 2005) (extended remarks of sponsor Rep. Flake) (explaining that Congress was conferring upon the Attorney General the authority to certify state mechanisms under section 2265(a)(1) in part because he "has expertise in evaluating State criminal justice systems"). That the sponsors of the legislation thought the Attorney General would be the more appropriate reviewing entity hardly indicates that Congress intended to make the Attorney General's judgment dependent upon the states' own.

Second, section 107 of AEDPA had provided that the state appointment mechanism could be established "by statute, rule of its court of last resort, or by another agency authorized by State law." 28 U.S.C. § 2261(b) (2000). Congress's excision of this language in the 2006 amendments addressed the concern that arose from court decisions that construed such language to significantly constrain the manner in which a state could establish such a mechanism. For example, Senator Kyl, a sponsor of the 2006 amendments, pointed to *Ashmus*, 202 F.3d 1160, in which the U.S. Court of Appeals for the Ninth Circuit held that California did not qualify under chapter 154 because the state's competency standards were contained in its Standards of Judicial Administration rather than in its Rules of Court; Senator Kyl called this conclusion "a hypertechnical reading of the statute." 152 Cong. Rec. 2446 (Mar. 2, 2006). The 2006 amendments "abrogate[d]" this ruling by removing the "statute or rule of court" language that had been "construed so severely by *Ashmus*," so that "[t]here is no longer any requirement, express or implied, that any particular organ of government establish the mechanism for appointing and paying counsel or providing standards of competency—States may act through their

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impacted by the time limits. This has proved to be a mistake."); 151 Cong. Rec. E2640 (daily ed. Dec. 22, 2005) (extended remarks of Rep. Flake) ("The trouble with chapter 154 is that the courts assigned to decide when it applies are the same courts that would be bound by the chapter's strict deadlines if a State is found to qualify. Simply put, the regional courts of appeals have a conflict of interest.").

legislatures, their courts, through agencies such as judicial councils, or even through local governments." *Id.*

Finally, the sponsors of the 2006 amendments expressed particular concern with courts concluding that even when the federal statutory requirements had been satisfied, additional procedures could be imposed as a matter of judicial discretion. In particular, the sponsors expressed concern about the Ninth Circuit's decision in *Spears v. Stewart*, 283 F.3d 992 (9th Cir. 2001). In that case, the court of appeals held that even though Arizona's counsel appointment mechanism (including Arizona's competency standards) on its face *satisfied* the requirements of chapter 154, the state was nonetheless not entitled to benefit from the expedited procedures in the particular case because its appointment of the petitioner's counsel did not comply with the state's own requirement that counsel be appointed in an expeditious manner. *Id.* at 1018–19. *See* 151 Cong. Rec. E2640 (daily ed. Dec. 22, 2005) (extended remarks of Rep. Flake) (noting that the Ninth Circuit "found that Arizona's counsel system met chapter 154 standards, but . . . nevertheless came up with an excuse for refusing to apply chapter 154 to that case"); 152 Cong. Rec. 2446 (Mar. 2, 2006) (statement of Sen. Kyl) (similar). According to the sponsors of the legislation, 28 U.S.C. § 2265(a)(3), which "forbids creation of additional requirements not expressly stated in the chapter, as was done in the *Spears* case," 152 Cong. Rec. 2446, addressed this concern. Congress's intent to limit the requirements for certification to those "expressly stated," therefore, does not indicate a corollary intent to strip the Attorney General of the authority to apply those requirements that are "expressly stated," including the requirement in section 2265(a)(1)(A) that states establish a mechanism for the appointment of "competent counsel."

3.

For all of these reasons, we believe it would be reasonable to construe section 2265(a)(1) to permit the Attorney General to certify only those state mechanisms that provide for the appointment of counsel who meet a minimum federal threshold of competency. If you so construe the statute, then you may conduct the competency evaluation entirely on a case-by-case basis as particular state mechanisms are presented for your certification. Alternatively, pursuant to section 2265(b), you may promulgate regulations that set forth the federal minimum competency standards that

you will apply in making certification determinations, although you are not required to take this action. Under either approach, however, we believe that, consistent with the "traditional tools of statutory construction," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987), you may look to a variety of sources in giving content to the federal standards that you promulgate and apply.[7] We believe, however, that the text of subsection (a)(1)(C), when read in light of the legislative history of chapter 154, counsels against imposing too stringent a federal standard. A federal standard that is set too high would not afford the states discretion, as contemplated by Congress, to develop their own standards, within reasonable bounds, of counsel competency and mechanisms for ensuring that competent counsel are appointed. In particular, an unduly onerous standard might render trivial the section 2265(a)(1)(C) requirement that the states develop and provide their own standards of competency. Although we reject the view that subsection (a)(1)(C) must be read to bind the Attorney General to a state's chosen competency standards, that subsection may fairly be construed to reflect Congress's intent that the Attorney General not unduly constrain state discretion by imposing an

[7] A nonexhaustive list of sources you might consult in interpreting the term "competent counsel" would include judicial precedent, *see, e.g.*, *McFarland v. Scott*, 512 U.S. 849, 855–56 (1994) ("capital defendants [are unlikely to be] able to file successful petitions for collateral relief without the assistance of persons learned in the law") (internal quotation marks omitted); federal statutes, *see, e.g.*, 18 U.S.C. §§ 3599(c)–(d) (setting qualifications that counsel must have in order to represent indigent capital defendants in post-conviction proceedings in federal court); the Model Rules of Professional Conduct, *see, e.g.*, American Bar Association, Model Rule of Professional Conduct 1.1 (2007) ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); and American Bar Association guidelines, *see, e.g.*, American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913 (2003); *see also Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (observing that the Supreme Court "long ha[s] referred" to American Bar Association "standards for capital defense work" "as 'guides to determining what is reasonable'") (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); *cf. Bobby v. Van Hook*, 558 U.S. 4, 8 n.1 (2009) (per curiam) (reserving the question of whether it would be legitimate to use the 2003 ABA guidelines to evaluate whether an attorney's performance meets the reasonableness standard required by the Sixth Amendment; explaining that for such use to be proper, "the Guidelines must reflect '[p]revailing norms of practice' . . . and must not be so detailed that they would 'interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions'") (quoting *Strickland*, 466 U.S. at 688, 689).

overly stringent, one-size-fits-all federal standard of counsel competency. And that same conclusion accords with the legislative history that is relevant here.

B.

You have also asked us whether chapter 154 can reasonably be construed to require the Attorney General to evaluate whether a proposed state appointment mechanism—including, in particular, a state's provision of a certain level of attorney compensation—is adequate to ensure that competent counsel will, in fact, be appointed for capital prisoners in state post-conviction proceedings. The 2008 final rule appeared to construe the statute to *prohibit* the Attorney General from making such an evaluation. With particular respect to compensation, the preamble to the 2008 final rule concluded that chapter 154 "requires only that the state have a mechanism for the 'compensation' of postconviction capital counsel, leaving determination of the level of compensation to the states." 73 Fed. Reg. at 75,331. In explaining this approach, the preamble relied in part on section 2265(a)(3), reasoning that "[p]rescribing minimum amounts of compensation to ensure 'adequate' or 'reasonable' compensation . . . would add to the statutory requirements for certification, which 28 U.S.C. § 2265(a)(3) does not allow." 73 Fed. Reg. at 75,332; *see also id.* at 75,331 (subsection (a)(3) prohibits "the Attorney General . . . from supplanting the states' discretion in th[e] area [of attorney compensation]").

In our view, this conclusion set forth in the preamble to the 2008 final rule is not warranted. Section 2265(a)(1)(A), by its plain terms, requires the Attorney General to determine whether the state has established a mechanism for the compensation of counsel who are "competent." We believe this language may reasonably be construed to require the Attorney General to determine whether a particular state mechanism would, in fact, ensure appointment of competent counsel. Moreover, we believe that in making such a determination it would be reasonable to conclude that a state appointment mechanism must provide for compensation at a level sufficient to encourage competent attorneys to accept appointments and to enable those attorneys to provide their capital clients with competent legal representation (unless the state mechanism by some other means ensures representation by competent counsel notwithstanding low compensation rates).

To be sure, there is no language specifically authorizing the Attorney General to evaluate the adequacy of attorney compensation provided by a state's appointment mechanism. Moreover, while section 2265(a)(1)(A) mandates that the state provide reimbursement for "reasonable" litigation expenses, it does not similarly qualify the requirement of attorney "compensation." But we do not think the absence of explicit statutory text establishing that a state appointment mechanism must pay attorneys a certain level of compensation demonstrates that Congress intended for the Attorney General to be indifferent as to the level of compensation the state provides. *Cf. Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 222 (2009) (deeming it "eminently reasonable to conclude that [statutory provision's] silence" on whether an agency can employ cost-benefit analysis "is meant to convey nothing more than a refusal to tie the agency's hands").

This conclusion draws support from the close nexus between the adequacy of compensation, on the one hand, and the ability and willingness of competent attorneys to take on indigent capital clients and provide them with effective representation, on the other—a nexus recognized in longstanding guidelines and standards for capital counsel. *See* American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 9.1 (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913, 981 (2003) ("Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation."); *see also id.* § 9.1 cmt., *reprinted in* 31 Hofstra L. Rev. at 986 ("Low fees make it economically unattractive for competent attorneys to seek assignments and to expend the time and effort a case may require."); *cf.* 18 U.S.C. § 3599(g)(1) (setting minimum compensation level in providing for appointment of counsel for a defendant otherwise "unable to obtain adequate representation" in a federal criminal action involving a capital charge). Judicial precedent from the decade before the 2006 amendments also supports this reading. Several courts that had to determine whether states qualified for the benefits of chapter 154 assumed that the pre-2006 version of section 2261(b) required independent evaluation of the adequacy of the compensation that a state seeking certification provided the attor-

neys appointed pursuant to its mechanism.[8] As the U.S. District Court for the District of Maryland observed, "although § 2261(b) does not expressly require that a State establish a mechanism for the payment of reasonable compensation, . . . [c]learly, the payment of at least minimally reasonable compensation is necessary to obtain competent counsel, an express requirement of § 2261(b)." *Booth v. Maryland*, 940 F. Supp. 849, 854 n.6 (D. Md. 1996), *vacated on other grounds*, 112 F.3d 139 (4th Cir. 1997).

III.

Because we have found no evidence in the language or legislative history of chapter 154 to suggest that Congress clearly intended a different understanding, we conclude that you may interpret the statute to permit evaluation of whether a proposed state mechanism—including the state's compensation system—is sufficient to ensure appointment of competent counsel in state post-conviction proceedings brought by indigent prisoners who have been sentenced to death.[9] We also conclude that you may promulgate regulations pursuant to section 2265(b) that set forth the standards you will apply in making such a determination.

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[8] *See, e.g.*, *Ashmus*, 123 F.3d at 1208; *Baker*, 220 F.3d at 285–86; *Colvin-El*, 1998 WL 386403, at *4; *Booth v. Maryland*, 940 F. Supp. 849, 854 n.6 (D. Md. 1996), *vacated on other grounds*, 112 F.3d 139 (4th Cir. 1997); *cf. Spears*, 283 F.3d at 1015 (chapter 154 "requires that the appointment mechanism reasonably compensate counsel"); *Mata v. Johnson*, 99 F.3d 1261, 1266 (5th Cir. 1996) (holding that "we do not find [Texas's] limits" on attorney compensation and litigation expense reimbursement "facially inadequate"), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997).

[9] You have not asked us to address, and we do not address here, whether the Attorney General could impose a time limit, or sunset, on his certification of a state mechanism, or whether he would be authorized to revisit and reconsider a chapter 154 certification if a certified state mechanism proved inadequate in practice to ensure appointment of competent counsel.

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