

OPINIONS
OF THE
OFFICE OF LEGAL COUNSEL
OF THE
UNITED STATES DEPARTMENT OF JUSTICE
CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE
PRESIDENT OF THE UNITED STATES,
THE ATTORNEY GENERAL,
AND OTHER EXECUTIVE OFFICERS OF
THE FEDERAL GOVERNMENT
IN RELATION TO
THEIR OFFICIAL DUTIES

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FOREWORD

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the Executive, Legislative, and Judicial Branches of the government, and of the professional bar and the general public. The first thirty-one volumes of opinions published covered the years 1977 through 2007. The present volume covers 2008. Volume 32 includes Office of Legal Counsel opinions that the Department of Justice has determined are appropriate for publication.

The authority of the Office of Legal Counsel 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 the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General, rendering opinions to the various federal agencies, assisting the Attorney General in the performance of his or her function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25.

As always, the Office expresses its gratitude for the efforts of its paralegal and administrative staff—Elizabeth Farris, Melissa Kassier, Richard Hughes, 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 in Volume 32

<i>Contents</i>	<i>Page</i>
Assertion of Executive Privilege Over Communications Regarding EPA’s Ozone Air Quality Standards and California’s Greenhouse Gas Waiver Request (June 19, 2008).....	1
Assertion of Executive Privilege Concerning the Special Counsel’s Interviews of the Vice President and Senior White House Staff (July 15, 2008)	7
Constitutionality of the OLC Reporting Act of 2008 (November 14, 2008) ..	14

Opinions of the Office of Legal Counsel in Volume 32

<i>Contents</i>	<i>Page</i>
Constitutionality of Federal Government Efforts in Contracting With Women-Owned Businesses (January 16, 2008)	23
Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007 (January 29, 2008)	27
Payment of Back Wages to Alien Physicians Hired Under the H-1B Visa Program (February 11, 2008)	47
Office of Government Ethics Jurisdiction Over the Smithsonian Institution (February 29, 2008)	56
Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress (February 29, 2008)	65
Promotions of Judge Advocates General Under Section 543 of the National Defense Authorization Act for Fiscal Year 2008 (April 14, 2008)	70
Validity of the Food, Conservation, and Energy Act of 2008 (May 23, 2008)	77
Authority of the Environmental Protection Agency to Hold Employees Liable for Negligent Loss, Damage, or Destruction of Government Personal Property (May 28, 2008)	79
Admissibility in Federal Court of Electronic Copies of Personnel Records (May 30, 2008)	87
Scope of the Definition of “Variola Virus” Under the Intelligence Reform and Terrorism Prevention Act of 2004 (July 24, 2008)	103

Applicability of 18 U.S.C. § 207(f) to Public Relations Activities Undertaken for a Foreign Corporation Controlled by a Foreign Government (August 13, 2008)	115
Enforceability of Certain Agreements Between the Department of the Treasury and Government-Sponsored Enterprises (September 26, 2008)	127
Scope of Exemption Under Federal Lottery Statutes for Lotteries Conducted by a State Acting Under the Authority of State Law (October 16, 2008)	129
Requests for Information Under the Electronic Communications Privacy Act (November 5, 2008)	145
Meaning of “Temporary” Work Under 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (December 18, 2008)	159

OPINIONS

OF THE

**ATTORNEY GENERAL OF THE
UNITED STATES**

Assertion of Executive Privilege Over Communications Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request

The President may lawfully assert executive privilege in response to congressional subpoenas seeking communications within the Executive Office of the President or between the Environmental Protection Agency and the EOP concerning EPA's promulgation of a regulation revising national ambient air quality standards for ozone or EPA's decision to deny a petition by California for a waiver from federal preemption to enable it to regulate greenhouse gas emissions from motor vehicles.

June 19, 2008

THE PRESIDENT
THE WHITE HOUSE

Dear Mr. President:

You have asked for my legal advice as to whether you may assert executive privilege with respect to documents subpoenaed by the Committee on Oversight and Government Reform (the "Committee") of the House of Representatives. The Committee has issued three subpoenas, two directed to the Administrator of the Environmental Protection Agency ("EPA") and one to the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget ("OIRA"), a component of the Executive Office of the President ("EOP"). The subpoena to OIRA and one of the subpoenas to EPA seek documents related to EPA's promulgation of a regulation revising national ambient air quality standards ("NAAQS") for ozone on March 12, 2008. The other subpoena directed to EPA seeks documents reflecting communications between EPA and the EOP concerning the agency's decision to deny a petition by California for a waiver from federal preemption to enable it to regulate greenhouse gas emissions from motor vehicles.

The Office of Legal Counsel of the Department of Justice has reviewed the documents that EPA and OIRA have identified as responsive to the subpoenas but have not provided to the Committee. The great majority of these documents are internal to EOP and were generated in the course of advising and assisting you with respect to your consideration of EPA's proposed ozone regulation. The great majority of the EOP documents are internal OIRA deliberative work product in support of your participation in the ozone decision. The remaining OIRA documents consist of deliberative communications between OIRA and others within the EOP, including White House staff. The EPA documents include unredacted copies of notices for meetings between EPA officials and senior White House staff to discuss the ozone regulation and California waiver decisions; redacted copies of the notices that are being produced to the Committee indicate the time and place of the meetings, but the identities of the meeting participants are redacted. The only other EPA document concerning the ozone regulation is a set of talking points for

the EPA Administrator to use in a meeting with you. The remaining EPA documents consist of talking points for EPA officials to use in presentations to senior White House staff at meetings at which California's waiver petition was discussed, communications within EPA and with EOP staff concerning the preparation of talking points for you to use in a conversation with the Governor of California, communications with EOP staff regarding how to respond to a letter to you from the Governor, and a response to a request from senior White House staff for a report on EPA's goals and priorities.

The Office of Legal Counsel is satisfied that the subpoenaed documents fall within the scope of executive privilege. For the reasons discussed below, I agree with that determination and conclude that you may properly assert executive privilege in response to the subpoenas.

I.

Documents generated for the purpose of assisting the President in making a decision are protected by the doctrine of executive privilege. *See, e.g., In re Sealed Case*, 121 F.3d 729, 752–53 (D.C. Cir. 1997) (addressing presidential communications component of executive privilege); *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 1–2 (1999) (opinion of Attorney General Janet Reno) (same). As the Supreme Court recognized in *United States v. Nixon*, 418 U.S. 683 (1974), there is a

necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These . . . considerations justify[] a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

Id. at 708.

The doctrine of executive privilege also encompasses Executive Branch deliberative communications that do not implicate presidential decisionmaking. As the Supreme Court has explained, the privilege recognizes “the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties.” *Nixon*, 418 U.S. at 705. Based on this principle, the Justice Department—under administrations of both political parties—has concluded repeatedly that the privilege may be invoked to protect Executive Branch deliberations against congressional subpoenas. *See, e.g., Assertion of Executive Privilege With Respect to Prosecutorial*

Documents, 25 Op. O.L.C. 1, 2 (2001) (opinion of Attorney General John D. Ashcroft) (“The Constitution clearly gives the President the power to protect the confidentiality of executive branch deliberations.”); *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. at 2 (explaining that executive privilege extends to deliberative communications within the Executive Branch); *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 30 (1981) (opinion of Attorney General William French Smith) (assertion of executive privilege to protect deliberative materials held by the Department of Interior).¹

The subpoenaed documents implicate both the presidential communications and deliberative process components of executive privilege. The EPA Administrator’s talking points regarding the ozone regulation were provided for your use and are thus subject to the presidential communications component of the privilege. The OIRA documents fall within the scope of the presidential communications component because they are deliberative documents generated by your staff in reviewing a proposed agency regulation on your behalf and developing a position for presentation to you. Among other things, the OIRA documents contain candid assessments of alternative actions that EPA or you could pursue. Addressing the subpoenaed documents in their entirety, I believe that publicly releasing these deliberative materials to the Committee could inhibit the candor of future deliberations among the President’s staff in the EOP and deliberative communications between the EOP and Executive Branch agencies, particularly deliberations concerning politically charged issues. As the Supreme Court explained, “[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.” *Nixon*, 418 U.S. at 705. Accordingly, I conclude that the subpoenaed materials at issue here fall squarely within the scope of executive privilege.

II.

Under controlling case law, a congressional committee may overcome an assertion of executive privilege only if it establishes that the subpoenaed documents are

¹ The Justice Department’s long-standing position finds strong support in various court decisions recognizing that the deliberative process privilege protects internal government deliberations from disclosure in civil litigation. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) (“Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.”); *Landry v. FDIC*, 204 F.3d 1125, 1135–36 (D.C. Cir. 2000) (describing how agencies may assert the “deliberative process” component of executive privilege in litigation); *Dow Jones & Co., Inc. v. Dep’t of Justice*, 917 F.2d 571, 573–74 (D.C. Cir. 1990) (describing the “‘deliberative process’ or ‘executive’ privilege” as an “ancient privilege . . . predicated on the recognition that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl”) (internal quotation marks omitted).

“demonstrably critical to the responsible fulfillment of the Committee’s functions.” *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). Those functions must be in furtherance of Congress’s legitimate legislative responsibilities. *See McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (Congress has oversight authority “to enable it efficiently to exercise a legislative function belonging to it under the Constitution”). In particular, a congressional committee must “point[] to . . . specific legislative decisions that cannot responsibly be made without access to [the privileged] materials.” *Senate Select Comm.*, 498 F.3d at 733. I do not believe that the Committee has satisfied this high standard with respect to the subpoenaed documents.

In assessing the Committee’s need for the subpoenaed documents, the degree to which the Committee’s stated legislative interest has been, or may be, accommodated through non-privileged sources is highly relevant. *See id.* at 732–33 (explaining that a congressional committee may not obtain information protected by executive privilege if that information is available through non-privileged sources); *United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) (explaining that each branch has a “constitutional mandate to seek optimal accommodation” of each other’s legitimate interests); *Assertion of Executive Privilege*, 23 Op. O.L.C. at 3–4 (finding that documents were not demonstrably critical where Congress could obtain relevant information “through non-privileged documents and testimony”).

With respect to the ozone standards, the Committee asserts that it needs the subpoenaed materials to understand why the White House rejected EPA’s “recommendations regarding the ozone standard” and to determine whether White House staff complied with the Clean Air Act when evaluating EPA’s proposed regulation. Letter for Stephen L. Johnson, Administrator, EPA, from Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform at 2 (May 16, 2008). The Committee offers similar justifications in support of its demand for materials related to the California waiver issue. *See, e.g.*, Letter for Stephen L. Johnson, Administrator, EPA, from Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform at 1 (Dec. 20, 2007) (“Your decision appears to have ignored the evidence before the agency and the requirements of the Clean Air Act.”).

The Committee’s claim that it must have the subpoenaed materials to understand the reasons for EPA’s decision on the ozone regulation is unconvincing given the substantial information already available to the Committee. To date, EPA and OIRA have produced or made available to the Committee approximately 30,000 pages of documents related to the revised ozone NAAQS standard. *See, e.g.*, Memorandum for the Members of the Committee on Oversight and Government Reform, from the Majority Staff of the Committee on Oversight and Government Reform, *Re: Supplemental Information on the Ozone NAAQS* at 1

(May 20, 2008) (30,000 pages of documents received from EPA and the Office of Management and Budget); *see also* Letter for Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, from Jeffrey A. Rosen, General Counsel, Office of Management and Budget at 1 (May 20, 2008) (OIRA provided the Committee with access to more than 7,558 pages of documents). In particular, EPA and OIRA produced to the Committee copies of all communications between the Administrator of OIRA and the Administrator of EPA concerning the ozone NAAQS regulation. These communications explain in considerable detail the views of OIRA, EPA, the White House, and the President concerning the ozone NAAQS standard. *See, e.g.*, Letter for Stephen L. Johnson, Administrator, EPA, from Susan E. Dudley, Administrator, OIRA at 1 (Mar. 12, 2008) (describing disagreements between OIRA and EPA and advising EPA of the President's decision). Moreover, EPA publicly disclosed the substance of these concerns in the preamble to its Federal Register notice for the final ozone regulation. Finally, the Administrators of both EPA and OIRA testified before the Committee on May 20, 2008, concerning the ozone regulation. At that hearing, the Committee had ample opportunity to explore with the witnesses the decisions and rationale for the regulation.

It is of particular importance in considering the Committee's need for the internal OIRA documents—which constitute the great bulk of the documents at issue—that when the Administrator of OIRA testified before the Committee on May 20, the Committee had the opportunity to ask her about OIRA's role, as well as that of you and the White House staff, in the process leading up to the issuance of final NAAQS ozone regulation. Yet, the Committee asked no such questions. Indeed, Administrator Dudley was asked only four questions during the entire hearing. None of the questions put to the Administrator related to OIRA's internal deliberations or communications with the White House, and none demonstrated a need for additional documents or information from OIRA. *See* Letter for Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, from Jeffrey A. Rosen, General Counsel, Office of Management and Budget at 2 (June 18, 2008).

EPA made similar accommodations with respect to the California waiver decision. The agency has made available to the Committee approximately 27,000 pages of documents concerning the decision. *See* Memorandum for the Members of the Committee on Oversight and Government Reform, from the Majority Staff of the Committee on Oversight and Government Reform, *Re: EPA's Denial of the California Waiver* at 1 (May 19, 2008). Again, these materials describe in considerable detail—as a memorandum prepared by Committee Staff demonstrates—the reasons behind EPA's decision to deny California's petition. Beyond receiving access to tens of thousands of pages of documents, the Committee also “deposed or interviewed eight key officials from the EPA” concerning the California waiver decision, *id.* at 1, and, as discussed above, the Committee had an

opportunity to explore the California waiver decision with the EPA Administrator at the public hearing on May 20.

OIRA's and EPA's efforts represent an extraordinary attempt to accommodate the Committee's interest in understanding why EPA denied California's waiver petition, why EPA issued the revised NAAQS for ozone, and the involvement of you and your staff in both decisions. Given the overwhelming amount of material and information already provided to the Committee, it is difficult to understand how the subpoenaed information serves any legitimate legislative need. In any event, when I balance the Committee's attenuated legislative interest in the subpoenaed documents against the Executive Branch's strong interest in protecting their confidentiality, I conclude that the Committee has not established that the subpoenaed documents are "demonstrably critical to the responsible fulfillment" of the Committee's legitimate legislative functions. *Senate Select Comm.*, 498 F.2d at 731.

III.

For these reasons, I conclude that you may properly assert executive privilege in response to the Committee's subpoenas.

MICHAEL B. MUKASEY
Attorney General

Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff

It is legally permissible for the President to assert executive privilege in response to a congressional subpoena for reports of Department of Justice interviews with the Vice President and senior White House staff taken during the Department's investigation by Special Counsel Patrick Fitzgerald into the disclosure of Valerie Plame Wilson's identity as an employee of the Central Intelligence Agency.

July 15, 2008

THE PRESIDENT
THE WHITE HOUSE

Dear Mr. President:

I am writing to request that you assert executive privilege with respect to Department of Justice documents subpoenaed by the Committee on Government Reform of the House of Representatives (the "Committee").

The subpoenaed documents concern the Department's investigation by Special Counsel Patrick Fitzgerald into the disclosure of Valerie Plame Wilson's identity as an employee of the Central Intelligence Agency. The documents include Federal Bureau of Investigation ("FBI") reports of the Special Counsel's interviews with the Vice President and senior White House staff, as well as handwritten notes taken by FBI agents during some of these interviews.¹ The subpoena also seeks notes taken by the Deputy National Security Advisor during conversations with the Vice President and senior White House officials and other documents provided by the White House to the Special Counsel during the course of the investigation. Many of the subpoenaed materials reflect frank and candid deliberations among senior presidential advisers, including the Vice President, the White House Chief of Staff, the National Security Advisor, and the White House Press Secretary. The deliberations concern a number of sensitive issues, including the preparation of your January 2003 State of the Union Address, possible responses to public assertions challenging the accuracy of a statement in the address, and the decision to send Ms. Plame's husband, Ambassador Joseph Wilson, to Niger in 2002 to investigate Iraqi efforts to acquire yellowcake uranium. Some of the

¹ Although the subpoena also sought the FBI report of the Special Counsel's interview with you, the Committee has effectively suspended that portion of the subpoena. *See* Letter for Michael B. Mukasey, Attorney General, from Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform at 1 (July 8, 2008) ("July 8 Committee Letter") ("[T]he Committee will not seek access to the report of the FBI interview of President Bush at this time."). Accordingly, the report of your interview is not among the materials over which I am requesting that you assert executive privilege.

subpoenaed documents also contain information about communications between you and senior White House officials.

The Department has made substantial efforts to accommodate the Committee's oversight interests concerning the Plame matter by producing or making available for the Committee's review a large number of FBI reports of interviews with senior White House, State Department and Central Intelligence Agency officials. In view of the heightened confidentiality interests attendant to White House deliberations, we consider our willingness to make the reports of interviews with senior White House staff available for the Committee's review, subject to limited redactions, to be an extraordinary accommodation. On June 24, 2008, we informed the Committee that we anticipate offering to make the remaining reports of interviews with senior White House staff available for Committee review on the same basis as the reports previously reviewed by Committee staff. *See* Letter for Henry A. Waxman, Chairman, House Committee on Oversight and Government Reform, from Keith B. Nelson, Principal Deputy Assistant Attorney General, Office of Legislative Affairs at 1 (June 24, 2008) ("June 24 Department Letter"). The only reports the Department has not expressed a willingness to make available for review are those for the interviews of you and the Vice President, because of heightened separation of powers concerns.

Despite these substantial efforts at accommodation, the Committee insists that the Department provide it with unredacted copies of all of the subpoenaed documents except your interview report. In my view, such a production would chill deliberations among future White House officials and impede future Department of Justice criminal investigations involving official White House conduct. Accordingly, for the reasons discussed below, it is my considered legal judgment that it would be legally permissible for you to assert executive privilege with respect to the subpoenaed documents, and I respectfully request that you do so.

I.

It is well established that the doctrine of executive privilege protects a number of Executive Branch confidentiality interests. Preserving the confidentiality of internal White House deliberations related to official actions by the President lies at the core of the privilege. *See, e.g., In re Sealed Case*, 121 F.3d 729, 752–53 (D.C. Cir. 1997) (addressing presidential communications component of executive privilege); *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 1–2 (1999) (opinion of Attorney General Janet Reno) (same). As the Supreme Court recognized in *United States v. Nixon*, 418 U.S. 683 (1974), there is a

necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alterna-

tives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These . . . considerations justify[] a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

Id. at 708.

Executive privilege also extends to all Executive Branch deliberations, even when the deliberations do not directly implicate presidential decisionmaking. As the Supreme Court has explained, there is a “valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion.” *Nixon*, 418 U.S. at 705; *see also Assertion of Executive Privilege With Respect to Prosecutorial Documents*, 25 Op. O.L.C. 1, 2 (2001) (opinion of Attorney General John D. Ashcroft) (“The Constitution clearly gives the President the power to protect the confidentiality of Executive Branch deliberations.”); *Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. at 2 (explaining that executive privilege extends to deliberative communications within the Executive Branch); *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 30 (1981) (opinion of Attorney General William French Smith) (assertion of executive privilege to protect deliberative materials held by the Department of Interior).²

Much of the content of the subpoenaed documents falls squarely within the presidential communications and deliberative process components of executive privilege. Several of the subpoenaed interview reports summarize conversations between you and your advisors, which are direct presidential communications. Other portions of the documents fall within the scope of the presidential communications component of the privilege because they summarize deliberations among your most senior advisers in the course of preparing information or advice for presentation to you, including information related to the preparation of your 2003 State of the Union Address and possible responses to public assertions that the

² The Justice Department’s long-standing position finds strong support in various court decisions recognizing that the deliberative process privilege protects internal government deliberations from disclosure in civil litigation. *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) (“Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.”); *Landry v. FDIC*, 204 F.3d 1125, 1135–36 (D.C. Cir. 2000) (describing how agencies may assert the “deliberative process” component of executive privilege in litigation); *Dow Jones & Co. v. Dep’t of Justice*, 917 F.2d 571, 573–74 (D.C. Cir. 1990) (describing the “‘deliberative process’ or ‘executive’ privilege” as an “ancient privilege . . . predicated on the recognition that the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl”) (internal quotation marks omitted).

address contained an inaccurate statement. In addition, many of the documents summarize deliberations among senior White House officials about how to respond to media inquiries concerning the 2003 State of the Union Address and Ambassador Wilson's trip to Niger. Such internal deliberations among White House staff clearly fall within the scope of the deliberative process component of the privilege. As the Supreme Court explained, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Nixon*, 418 U.S. at 705.

Moreover, because the subpoenaed documents are from law enforcement files, the law enforcement component of executive privilege is also implicated. The President may invoke executive privilege to preserve the integrity and independence of criminal investigations and prosecutions. See *Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 75–78 (1986) ("*Independent Counsel Act*") (explaining the Executive Branch's authority to withhold open and closed law enforcement files from Congress); *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 117 (1984) ("Since the early part of the 19th century, Presidents have steadfastly protected the confidentiality and integrity of investigative files from untimely, inappropriate, or uncontrollable access by the other branches, particularly the legislature."); *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 32–33 (1982) (same concerning law enforcement files of the Environmental Protection Agency); *Position of the Executive Department Regarding Investigative Reports*, 40 Op. Att'y Gen. 45, 49 (1941) (same concerning investigative files of the Federal Bureau of Investigation). Although the law enforcement component of executive privilege is more commonly implicated when Congress seeks materials about an open criminal investigation, the separation of powers necessity of protecting the integrity and effectiveness of the prosecutorial process continues after an investigation closes. *Independent Counsel Act*, 10 Op. O.L.C. at 77. The Department has long recognized that executive privilege protects documents related to a closed criminal investigation where disclosure might "hamper prosecutorial decision-making in future cases" or undermine the Executive Branch's "long-term institutional interest in maintaining the integrity of the prosecutorial decision-making process." *Id.*

Even though the Special Counsel's investigation and the Libby prosecution are closed matters, the law enforcement component of executive privilege is applicable here because the Committee's subpoena raises serious separation of powers concerns related to the integrity and effectiveness of future law enforcement investigations by the Department of Justice. I have a general concern about the prospect of committees of Congress obtaining confidential records from Justice Department criminal investigative files for the purpose of addressing highly

politicized issues in public committee hearings. More specifically, I am concerned about the subpoena's impact on White House cooperation with future Justice Department criminal investigations. As the Department has explained to the Committee, there "is an admirable tradition, extending back through Administrations of both political parties, of full cooperation by the White House with criminal investigations." June 24 Department Letter at 2. In keeping with this tradition, you, the Vice President and White House staff cooperated voluntarily with the Special Counsel's investigation, agreeing to informal interviews outside the presence of the grand jury. Were future presidents, vice presidents or White House staff to perceive that such voluntary cooperation would create records that would likely be made available to Congress (and then possibly disclosed publicly outside of judicial proceedings such as a trial), there would be an unacceptable risk that such knowledge could adversely impact their willingness to cooperate fully and candidly in a voluntary interview. They might insist, alternatively, on disclosing information only pursuant to a grand jury subpoena in order to ensure the secrecy protections of Rule 6(e) of the Federal Rules of Criminal Procedure. Thus, if the Department were to release copies of interview reports with the Vice President or senior White House staff, this precedent could discourage voluntary cooperation with future Department criminal investigations involving official White House actions. Such a result would significantly impair the Department's ability to conduct future law enforcement investigations that would benefit from full White House cooperation.

Accordingly, for the reasons discussed above, I believe that the subpoenaed materials fall within the scope of executive privilege.

II.

Under controlling case law, a congressional committee may overcome an assertion of executive privilege only if it establishes that the subpoenaed documents are "demonstrably critical to the responsible fulfillment of the Committee's functions." *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc). Those functions must be in furtherance of Congress's legitimate legislative responsibilities. *See McGrain v. Daugherty*, 273 U.S. 135, 160 (1927) (Congress has oversight authority "to enable it efficiently to exercise a legislative function belonging to it under the Constitution."). The Committee has not satisfied this high standard.

The Committee asserts that it needs the subpoenaed documents "to answer important questions about how the White House safeguards national security secrets and responds to breaches, and to make legislative recommendations to ensure appropriate handling of classified information by White House officials." July 8 Committee Letter, *supra* note 1, at 6. The Department has acknowledged that the Committee may have legitimate oversight interests in this area. *See, e.g.,*

June 24 Department Letter at 1, 3 (summarizing the Department's efforts to accommodate the Committee's interests).

It is not sufficient, however, for the Committee to assert that the subpoenaed documents may, at some level, relate to a legitimate oversight interest. To overcome an assertion of executive privilege, a congressional committee must "point[] to . . . specific legislative decisions that cannot responsibly be made without access to [the privileged] materials." *Senate Select Comm.*, 498 F.2d at 733. In this sense, the D.C. Circuit has emphasized, "[t]here is a clear difference between Congress's legislative tasks and the responsibility of a grand jury." *Id.* at 732. "While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events." *Id.*; see also *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 159 (1989) ("Congress will seldom have any legitimate legislative interest in knowing the precise predecisional positions and statements of particular executive branch officials.").

The Committee has yet to identify any specific legislative need for the subpoenaed documents, relying instead on a generalized interest in evaluating the White House's involvement in the Plame matter as part of its review of White House procedures governing the handling of classified documents. The Department has already made extensive efforts to accommodate this interest. Among other steps, the Department has produced or made available for the Committee's review dozens of FBI reports of interviews with senior White House staff and State Department and Central Intelligence Agency officials. Indeed, with the exception of the Vice President's interview report (and yours), the Department has made available for the Committee's review, or indicated it anticipates making available for review, all of the interview reports subpoenaed by the Committee, subject to limited redactions to protect presidential communications and irrelevant personal information. In the Department's view, these accommodations, combined with the voluminous record from the Libby trial, should satisfy the Committee's legitimate interests.

The only subpoenaed document that the Committee addresses with any particularity is the Vice President's interview report, which the Department has not made available for review because of heightened separation of powers concerns. Despite repeatedly referencing the report, however, the Committee never articulates any legitimate legislative interest in the document that might outweigh an executive privilege claim. Instead, the Committee simply reiterates its general interest in White House procedures for handling classified information, July 8 Committee Letter at 6, and broadly asserts that "this Committee and the American people are entitled to know" about the Vice President's conduct in the Plame matter, *id.* at 2.

These general assertions fall well short of the "demonstrably critical" particularized need required to overcome an executive privilege claim. The Department

has already accommodated any legitimate interest the Committee may have in specifically understanding the Vice President's actions. Interview reports and other documents produced or made available to the Committee describe the Vice President's role in the Plame matter, including his involvement in responding to Ambassador Wilson's article about his trip to Niger and allegations that your State of the Union Address contained an inaccurate statement. Numerous public materials, including testimony and exhibits introduced at the Libby trial, also discuss the Vice President's participation in the matter. Much of the information in the Vice President's interview report is cumulative, and therefore not "demonstrably critical" to the Committee's legislative functions. *See Senate Select Comm.*, 498 F.2d at 731–32. And, even assuming that some of the information is not duplicative, the Committee still has not explained the compelling legislative need that requires it to understand all of the details of the Vice President's involvement in the matter. *See id.* at 732 (explaining that legitimate legislative functions rarely require a "precise reconstruction of past events").

Moreover, Congress's legislative function does not imply a freestanding authority to gather information for the sole purpose of informing "the American people." July 8 Committee Letter at 2. Article I of the Constitution does not explicitly vest Congress with an "informing function," and the only informing function of Congress implied under Article I, its oversight function, "is that of informing itself about subjects susceptible to legislation, not that of informing the public." *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 531 (9th Cir. 1983) (citing *Hutchinson v. Proximire*, 443 U.S. 111, 132–33 (1979)).

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

III.

I am greatly concerned about the chilling effect that compliance with the Committee's subpoena would have on future White House deliberations and White House cooperation with future Justice Department investigations. For the reasons set forth above, I believe that it is legally permissible for you to assert executive privilege with respect to the subpoenaed documents. I respectfully request that you do so.

MICHAEL B. MUKASEY
Attorney General

Constitutionality of the OLC Reporting Act of 2008

S. 3501, the OLC Reporting Act of 2008, which would require the Department of Justice to report to Congress on a wide range of confidential legal advice that is protected by constitutional privilege, is unconstitutional.

The bill raises very serious policy concerns because it would undermine the public interest in confidential advice and information sharing that is critical to informed and effective government decisionmaking.

November 14, 2008

LETTER FOR THE MAJORITY LEADER UNITED STATES SENATE

The Department of Justice has reviewed S. 3501, the OLC Reporting Act of 2008, which would amend 28 U.S.C. § 530D to require the Department to report to Congress on a wide range of confidential legal advice, thus extending the reporting requirement far beyond the decisions on statutory unenforceability currently covered by the statute. The bill would require reporting about advice that is protected by constitutional privilege and, in so doing, could deter Executive Branch officials from seeking, and the Department from providing, candid legal advice regarding the administration of important government programs. We believe that the bill is unconstitutional. Moreover, the bill raises very serious policy concerns because it would undermine, rather than advance, the public interest in confidential advice and information sharing that Congress, the Supreme Court, and administrations of both parties have long recognized as critical to informed and effective government decisionmaking. For these reasons, explained in greater detail below, the Department strongly opposes this legislation, and if it were presented to the President, his senior advisers would recommend that he veto it.

I. Unconstitutionality

Section 2 of the bill would amend 28 U.S.C. § 530D(a)(1) to require the Attorney General to submit to Congress, within 30 days of issuing legal advice covered by the provision, a report of any instance in which the Department issues an “authoritative legal interpretation” of “any Federal statute,” even if the legal construction has not risen, and may never rise, to the level of an Executive Branch policy not to enforce the statute in question and simply construes the statute using settled interpretive rules that courts routinely employ. Section 2 would then amend 28 U.S.C. § 530D(a)(2) to mandate that any report containing “classified information” related to “intelligence activities” shall be deemed “submitted to Congress” in accordance with section 530D as amended only if the information is submitted to the House and Senate judiciary committees as well as the intelligence

committees, and that any report containing “classified information about covert actions” shall be deemed properly submitted only if it is submitted to the foregoing committees, the Speaker and Minority Leader of the House of Representatives, and the Majority and Minority Leaders of the Senate.

The bill is unconstitutional in two respects. First, it infringes upon the President’s settled constitutional authority over classified information by purporting to prescribe the content, timing, and recipients of any classified disclosures the Executive Branch chooses to make in connection with section 530D reports. *See, e.g., Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988) (discussing the President’s constitutional authority to control national security information); *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92, 94–99 (1998) (same, discussing cases and practice since the Founding). Administrations of both parties have recognized that legislative mandates directing the timing and extent of classified disclosures are constitutionally objectionable even when the disclosures in question would go to Congress. In 1998, for example, the Department objected to, and President Clinton ultimately threatened to veto, *see* Statement of Administration Policy, S. 1668—Disclosure to Congress Act of 1998 (Mar. 9, 1998), a bill that would have required the President to allow federal agency employees to disclose certain classified information directly to members of Congress. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. at 100. The Department testified that the bill:

would deprive the President of his authority to decide, based on the national interest, how, when and under what circumstances particular classified information should be disclosed to Congress. This is an impermissible encroachment on the President’s ability to carry out core executive functions. In the congressional oversight context, as in all others, the decision whether and under what circumstances to disclose classified information must be made by someone who is acting on the official authority of the President and who is ultimately responsible to the President.

Id. S. 3501 violates the foregoing principles by purporting to prescribe the timing and extent of any classified disclosures the President, acting through the Attorney General, would choose to make in connection with the Executive Branch’s reporting obligations under section 530D as amended.

Second, and more broadly, the bill’s disclosure requirements are unconstitutional because they would require reporting to Congress about confidential legal advice that is subject to the constitutional doctrine of executive privilege while narrowing section 530D’s current exemption for privileged information from required reports. Currently, 28 U.S.C. § 530D requires the Attorney General to report Department legal positions outside the litigation context only where the Department “establishes or implements a formal or informal policy” either (1) to

refrain from enforcing a statutory or other legal position “on the grounds that such provision is unconstitutional” or (2) to refrain from complying with a binding judicial decision interpreting the Constitution or any other law that is enforced by the Department. 28 U.S.C. § 530D(a)(1)(A)(i), (ii). The bill would substantially expand the foregoing reporting obligations by requiring the Attorney General to report on legal advice on statutory construction that does not, and may never, result in a “formal or informal policy to refrain from enforcing” a federal statute on constitutional or other grounds. Much of the legal advice the Department provides the President and Executive Branch agencies about how to interpret and comply with federal statutes might fall within one of the sub-provisions the bill would add to section 530D(a)(1). For example, many legal opinions apply the judicially created doctrine of constitutional avoidance to support an interpretation of a statute that does not raise the constitutional concerns that would be raised by an alternative interpretation. And many opinions similarly respect and apply the judicially created “clear statement” principles that counsel against applying a statute in a way that affects the balance of power among the three branches of the federal government, or the balance of power between the federal government and the states, absent a clear statement that the legislation is designed to do so.

Thus, we believe that the bill would contemplate reporting on many Office of Legal Counsel (“OLC”) opinions. OLC opinions belong to a category of Executive Branch documents protected by executive privilege. They fall within the scope of the deliberative process, attorney-client, and, to the extent they are generated or used to assist in presidential decisionmaking, presidential communications components of executive privilege. *See, e.g., Assertion of Executive Privilege With Respect to Clemency Decision*, 23 Op. O.L.C. 1, 1–2 (1999) (opinion of Attorney General Janet Reno) (addressing presidential communications component); *Assertion of Executive Privilege Regarding White House Counsel’s Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (opinion of Attorney General Reno) (discussing the deliberative process and attorney-client components) (“*White House Counsel’s Office Documents*”); *Confidentiality of the Attorney General’s Communications in Counseling the President*, 6 Op. O.L.C. 481, 494 n.24 (1982) (explaining that the attorney-client privilege is “subsumed under a claim of executive privilege when a dispute arises over documents between the Executive and Legislative Branches”).

Administrations of both political parties have long recognized the importance of protecting the Executive Branch’s confidential legal advice. *See Response to Congressional Requests for Information Regarding Decisions Made Under the Independent Counsel Act*, 10 Op. O.L.C. 68, 78 (1986) (discussing “importance of protecting the President’s ability to receive candid legal advice”). As Assistant Attorney General John Harmon explained in a memorandum issued at the end of the Carter Administration:

[T]he reasons for the constitutional privilege against the compelled disclosure of executive branch deliberations have special force when legal advice is involved. None of the President's obligations is more solemn than his duty to obey the law. The Constitution itself places this responsibility on him, in his oath of office and in the requirement of article II, section 3 that "he shall take Care that the Laws be faithfully executed." Because this obligation is imposed by the Constitution itself, Congress cannot lawfully undermine the President's ability to carry it out. Moreover, legal matters are likely to be among those on which high government officials most need, and should be encouraged to seek, objective, expert advice. As crucial as frank debate on policy matters is, it is even more important that legal advice be "candid, objective, and even blunt or harsh," *see United States v. Nixon*, 418 U.S. 683, 708 (1974), where necessary. Any other approach would jeopardize not just particular policies and programs but the principle that the government must obey the law. For these reasons, it is critical that the President and his advisers be able to seek, and give, candid legal advice and opinions free of the fear of compelled disclosure.

Memorandum for the Attorney General, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: The Constitutional Privilege for Executive Branch Deliberations: The Dispute With a House Subcommittee Over Documents Concerning the Gasoline Conservation Fee* at 26 (Jan. 13, 1981).

Put simply, as is the case with all other public and private sector clients who seek legal advice, if Executive Branch officials are to execute their constitutional and statutory responsibilities, they must have access to candid and confidential legal advice and assistance. *See Confidentiality of the Attorney General's Communications in Counseling the President*, 6 Op. O.L.C. at 495 (emphasizing that the attorney-client "privilege . . . functions to protect communications between government attorneys and client agencies or departments . . . much as it operates to protect attorney-client communications in the private sector"); *Rules of Evidence for the United States Courts and Magistrates*, 56 F.R.D. 183, 235, 237 (1972) (expressly stating that the "definition of client" for purposes of attorney-client privilege "includes governmental bodies").

Finally, we note that the Executive Branch's need to protect the confidentiality of Office of Legal Counsel legal advice is comparable to the need recognized by Attorney General Reno in 1996, in advising President Clinton on the legality and appropriateness of an executive privilege assertion with respect to "analytical material or other attorney work-product prepared by the White House Counsel's Office":

I agree [with the Counsel to the President] that the ability of the White House Counsel's Office to serve the President would be significantly impaired if the confidentiality of its communications and work-product is not protected Impairing the ability of the Counsel's Office to perform its important functions for the President would in turn impair the ability of you and future Presidents to carry out your constitutional responsibilities.

White House Counsel's Office Documents, 20 Op. O.L.C. at 3.

For all of these reasons, the bill's expansion of section 530D's reporting obligations would be unconstitutional even with respect to non-classified information.

II. Policy Concerns

The bill's disclosure requirements are not just unconstitutional; they are also unjustified and bad policy. Requiring the Department to report on the broad range of confidential legal opinions referenced in the bill would deter precisely the kind of candid deliberations regarding government action that has long been recognized as vital to the integrity of government decisionmaking. In 1974, a unanimous Supreme Court emphasized

the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

United States v. Nixon, 418 U.S. 683, 705 (1974). See also *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150–51 (1975) (noting that the deliberative process component of executive privilege is premised on the belief that disclosing the “communications and the ingredients of the decisionmaking process” would inevitably “injur[e] the quality of agency decisions” by inhibiting “frank discussion of legal or policy matters”).

The bill's requirements could deter the President and Executive Branch officials responsible for executing government programs, including especially highly sensitive programs, from soliciting the Department's legal advice for fear that the advice would trigger reporting obligations that could compromise a program and/or subject its legal assessment to unnecessary and damaging uncertainty or publicity. In addition, the bill's reporting requirements could chill the Department's ability or willingness to provide full and candid legal assessments of statutes or government actions. For example, legal advisers might avoid relying on

the well-established clear statement and constitutional avoidance rules of construction in order not to trigger the bill's reporting requirements. Doing so would inevitably degrade the quality of the resulting legal advice and, thus, the integrity of the government decisionmaking to which it pertains. The bill would thus undermine, rather than advance, the public's interest in having Executive Branch officials, just like private parties, receive full, candid and confidential legal advice to ensure that they conduct the government's business effectively and in accordance with law.

The foregoing problems with the bill's reporting requirements are not a necessary (or permissible) cost of legitimate congressional oversight. Congress has ample authority to oversee Executive Branch programs and activities, and can inquire through the committee and Government Accountability Office oversight processes about the legal basis for Executive Branch decisions in the course of overseeing those programs and activities. The Executive Branch has a well-established process for accommodating such inquiries, *see, e.g., Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 158–61 (1989); *Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. at 101–02, which process the courts have recognized as the constitutionally contemplated method by which the branches should share information that Congress has a legitimate need to know but that the Executive Branch also has a legitimate, constitutionally based need to protect. *See, e.g., United States v. AT&T Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977). The bill's reporting requirements are an unnecessary and unwise effort to replace this well-established process with a reporting structure that violates constitutional limits and undermines the public interest protecting the confidentiality of legal advice vital to the integrity and legality of government decisionmaking. Accordingly, the Department strongly opposes the legislation on both legal and policy grounds.

Thank you for the opportunity to present our views. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

MICHAEL B. MUKASEY
Attorney General

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Constitutionality of Federal Government Efforts in Contracting With Women-Owned Businesses

This statement presents the Justice Department's views on the federal government's efforts to contract with women-owned businesses in a manner consistent with the Constitution and federal statutes. Because the Justice Department's position on federal contracting programs that employ gender preferences is based on constitutional and legal standards that are not specific to the program addressed by the recently published Small Business Administration rule, the statement focuses on the legal standards that govern the Department's approach to such programs generally.

January 16, 2008

TESTIMONY BEFORE THE HOUSE COMMITTEE ON SMALL BUSINESS

Thank you Chairwoman Velazquez, Ranking Member Chabot, and Members of the Committee for the opportunity to appear here today to discuss the Justice Department's views on the federal government's efforts to contract with women-owned businesses in a manner consistent with the Constitution and federal statutes.

One of the most recent developments in this area is the Small Business Administration's ("SBA's") publication of a proposed rule implementing the Women-Owned Small Business ("WOSB") Federal Contracting Program authorized by Public Law 106-554. That particular rule is addressed in SBA Administrator Preston's testimony before the Committee. For that reason, and because the Justice Department's position on federal contracting programs that employ gender preferences is based on constitutional and legal standards that are not specific to the program addressed by the recently published SBA rule, I will focus on the legal standards that govern the Department's approach to such programs generally.

As Administrator Preston testified and the Committee is aware, the federal government has taken a number of measures to increase the participation of women-owned small businesses in federal government contracting. Most of these efforts assist women-owned small businesses by improving their ability to compete with other small businesses for federal contracts, not by shielding them from such competition through gender-based restrictions on bidding opportunities. That said, one form of agency assistance that is authorized, though not required, by federal statute is the reservation, or set-aside, of certain contracts for competition only by "small business concerns owned and controlled by women." 15 U.S.C. § 637(m)(2). Federal agencies that employ such set-asides in their contracting programs must engage in gender discrimination among potential contract recipients because the set-asides require the contracting agencies to exclude otherwise qualified businesses from competing for certain contracts based solely on the degree to which those businesses are owned or controlled by men.

To be constitutional, federal programs that discriminate on the basis of gender in awarding government contracts must pass muster under the equal protection

component of the Due Process Clause of the Fifth Amendment. See *United States v. Virginia*, 518 U.S. 515 (1996) (“*VMI*”); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723–24 (1982). The Justice Department’s position on gender-based contracting programs necessarily reflects this constitutional requirement because the Department, like the rest of the Executive Branch, must construe and implement federal laws in a constitutional manner. The Department’s position on gender-based contracting programs also reflects Supreme Court opinions and other federal cases applying the Constitution’s equal protection requirements to such programs, because these are the cases that courts will consider in deciding whether specific agency WOSB programs are constitutional. The Department’s general position on these matters serves as the basis for the Department’s administration of its own programs, as well as for any guidance the Department may provide to other agencies.

The level of scrutiny that a government contracting program must satisfy in order to comply with equal protection depends on the type of preference at issue. Preferences, such as veterans’ preferences, that do not depend on a recipient’s race or gender are subject to rational basis scrutiny, which means courts will generally uphold them as constitutional if the government can demonstrate a rational basis for adopting them. Preferences that are based on a recipient’s race or gender are subject to higher levels of constitutional scrutiny. Race-based preferences must satisfy “strict scrutiny,” which means that the government must prove that the specific preference at issue is “narrowly tailored” to serve a “compelling government interest.” Gender-based preferences must satisfy “intermediate” or “heightened” scrutiny, which the Supreme Court has identified as considerably more demanding than rational basis scrutiny, but distinct from the strict scrutiny the Court applies to government preferences based on race.

In *VMI*, the 1996 case in which the Supreme Court considered the constitutionality of a government program that discriminated on the basis of gender, the Court emphasized that its decision to apply intermediate scrutiny did not excuse the government from establishing an “exceedingly persuasive” justification for the program. Noting the “strong presumption that gender classifications are invalid,” Justice Ginsburg’s opinion for the Court explained that “skeptical scrutiny of official action denying rights or opportunities based on” a person’s gender is necessary to ensure that government programs, no matter how well-intentioned, do not violate the hard-fought line of equal protection precedents rejecting the notion that an individual’s opportunity to “participate in and contribute to” a particular field should depend on that individual’s gender. Accordingly, the Court held that to justify a gender-based preference program under intermediate scrutiny, the government bears the burden of showing, through evidence that is “genuine” and “not hypothesized or invented *post hoc*,” “at least that the [program] serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” 518 U.S. at 532–33.

It bears mention that at least one court—the Seventh Circuit in an opinion by Judge Posner—has questioned whether there is any meaningful practical difference between the exacting intermediate scrutiny standard the Supreme Court articulated in *VMI* and the strict scrutiny the Court applies to racial preferences. See *Builders Ass’n of Greater Chi. v. Cnty. of Cook*, 256 F.3d 642, 644 (7th Cir. 2001). Whether or not this opinion raises a valid practical question, the Justice Department, like the majority of federal courts, adheres to the Supreme Court’s determination in *VMI* that there is a distinction between intermediate and strict scrutiny.

Federal courts applying this distinction to government programs for women-owned businesses have construed the “important governmental interest” aspect of intermediate scrutiny to mean that some degree of discrimination must have occurred in the economic sphere in which the program is administered in order for the government to justify the program’s constitutionality. The cases upholding gender-based preference programs under this standard emphasize the importance of the government’s proof of such discrimination. Similarly, the cases invalidating programs as unconstitutional under this standard emphasize the government’s failure to present evidence of discrimination in the economic sphere to which the preference program is directed.

Although strict scrutiny also requires the government to prove discrimination in justifying racial preference programs, the federal courts’ focus on the government’s ability to prove discrimination in gender cases does not erase the distinction between strict and intermediate scrutiny. The Eleventh Circuit has explained this distinction as follows: “While there is a difference between the evidentiary foundation necessary to support a race-conscious affirmative action program and the evidentiary foundation necessary to support a gender preference, that difference is one of degree, not of kind. In both circumstances, the test of the program is the adequacy of evidence of discrimination, but in the gender context less evidence is required.” *Eng’g Contractors Ass’n v. Metro. Dade Cnty.*, 122 F.3d 895, 901 (11th Cir. 1997).

Determining exactly how much evidence of discrimination is needed to support a gender-based, as opposed to race-based, preference program is, in the Eleventh Circuit’s words, a “difficulty” that all government entities face in considering whether gender-based preference programs are constitutional. Federal cases upholding such programs do not generally distinguish between the evidence required to satisfy strict versus intermediate scrutiny in a way that readily allows the government to determine that a particular study or other evidence of discrimination clearly goes far enough to justify a program under intermediate scrutiny, but does not go so far as to satisfy unnecessarily the requirements of strict scrutiny. What is clear from the cases is that mere findings of disparity or underrepresentation are generally not sufficient to establish the constitutionality of a gender-based preference program, and that courts are likely to strike down such

programs if the government cannot show genuine and non-hypothetical evidence of discrimination in the economic sphere in which the program will operate.

The Justice Department's position on gender-based set-aside programs reflects these cases and the simple lesson they offer federal entities considering such programs: if those entities, which must establish and administer gender-based set-asides in a constitutional manner, wish to maximize the chances that a particular program will survive constitutional scrutiny, it is both legally appropriate and legally prudent to require evidence of discrimination before implementing the program. This position accords with the requirement that the federal government administer all federal programs, including those benefiting women, in a constitutional manner, consistent with Supreme Court and other federal judicial precedents evaluating gender-based preference programs under intermediate scrutiny.

ELIZABETH P. PAPEZ
Deputy Assistant Attorney General
Office of Legal Counsel

Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007

Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007 does not prohibit DHS or OMB officials from reviewing, in accordance with established Executive Branch review and clearance procedures, the DHS Chief Privacy Officer's draft section 802 reports before the reports are transmitted to Congress.

Section 802(e)(1) is best interpreted not to prohibit DHS and OMB officials from commenting on a draft CPO report where the CPO is permitted to, and in fact does, transmit to Congress a final report that does not reflect the comments or amendments from such officials.

Section 802(e)(1)'s direct reporting requirement need not be enforced in circumstances where its application would require the CPO to ignore the results of the President's review, through DHS and OMB, of a particular report. In such circumstances, the statute must yield to the President's exercise of his constitutional authority to supervise subordinate Executive Branch officers and their communications with Congress.

January 29, 2008

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET
AND THE ACTING GENERAL COUNSEL
DEPARTMENT OF HOMELAND SECURITY

You have asked for our opinion regarding the constitutionality of section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266, 360 (2007) (codified at 6 U.S.C. § 142 (Supp. I 2007)) (the "Act" or "9/11 Act"). Section 802(e)(1) provides, in relevant part, that the Chief Privacy Officer ("CPO") of the Department of Homeland Security ("DHS" or "the Department") must submit reports "directly to the Congress . . . without any prior comment or amendment by the Secretary, Deputy Secretary, or any other officer or employee of the Department or of the Office of Management and Budget" ("OMB"). 6 U.S.C. § 142(e)(1). Specifically, you have asked whether we read section 802(e)(1) to prohibit DHS and OMB personnel from reviewing, commenting upon, or amending the CPO's reports and, if so, whether such prohibitions are constitutional.¹

We conclude, first, that section 802(e)(1) does not prohibit DHS or OMB personnel from reviewing, in accordance with established Executive Branch review

¹ See Letter for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Gus P. Coldebella, Acting General Counsel, Department of Homeland Security (Nov. 6, 2007); Letter for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Jeffrey A. Rosen, General Counsel, Office of Management and Budget (Sept. 25, 2007).

and clearance procedures, the CPO's section 802 reports before the reports are finalized and transmitted to Congress. The plain text of section 802(e)(1) concerns only the transmittal of reports that have been commented upon or amended by DHS or OMB officials; it does not purport to bar "review" of draft reports by such officials. Furthermore, any reading of the statute that would foreclose such review must be avoided if at all possible because of the serious constitutional issue that would arise if the statute were interpreted to interfere with the President's ability to supervise the work of the CPO through review of the CPO's draft reports by the Secretary of Homeland Security and the Director of OMB. Based upon the same principle of constitutional avoidance, we conclude, second, that the statute must be read not to prohibit DHS and OMB officials from commenting upon a draft report where, consistent with the supervisory review process, the CPO is permitted to, and in fact does, transmit to Congress a final report that does not reflect the comments or amendments suggested by those officials. Third, we conclude, however, that where supervisory review by the President, through the Secretary or the Director of OMB, results in comments or amendments on a draft report by DHS or OMB personnel, the CPO must be allowed to consider and incorporate those comments and amendments in the final report in the manner contemplated by the review. If section 802(e)(1) were applied to prevent the CPO from doing so, the statute would substantially frustrate the President's exercise of his constitutional authority to supervise the actions of a subordinate executive officer (the CPO) and to supervise the content, and particularly any classified or privileged content, of official Executive Branch communications with Congress. To the extent section 802(e)(1)'s application would purport to require that result, section 802(e)(1) would be unconstitutional.

As discussed more fully below, the constitutional grounds for these conclusions are well settled and have been long recognized by all three branches. For decades, the Executive Branch has consistently objected to direct reporting requirements similar to the one at issue here on the ground that such requirements infringe upon the President's constitutional supervisory authority over Executive Branch subordinates and information. The Supreme Court and Congress have also acknowledged and respected this supervisory authority as a fundamental part of our system of government. These precedents from all three branches, and the constitutional principles they recognize, inform our conclusion that the terms of section 802(e)(1) must yield to the extent their application would interfere with the President's constitutional authority to comment upon or amend, through his subordinates at DHS or OMB, a CPO report before the report is transmitted to Congress.²

² If DHS establishes a policy of declining to enforce section 802(e)(1) on the constitutional grounds set forth in this opinion, DHS should report that decision to Congress as required by statute. *See* 28 U.S.C. § 530D(a)(1)(A)(i), (b), (e) (Supp. V 2005) (establishing a 30-day deadline for Executive

I.

Congress created the position of the DHS Chief Privacy Officer in the Homeland Security Act of 2002, Pub. L. No. 107-296, § 222, 116 Stat. 2135, 2155 (2002) (codified as amended at 6 U.S.C. § 142 (Supp. V 2005)) (“HSA”). The HSA established the CPO as a “senior official” with significant operational and policy responsibilities who is appointed by, and reports directly to, the Secretary. 6 U.S.C. § 142(a)(1)–(5) (Supp. I 2007).

The 9/11 Act expands the CPO’s policymaking authority and permits the CPO to investigate possible violations of privacy laws and programs in a manner consistent with the CPO’s status as a senior Executive Branch official who is accountable to the President. 6 U.S.C. § 142(a)–(d) (Supp. I 2007). The provisions of the Act granting the CPO investigative authority contemplate that the CPO will have access to internal Department and Executive Branch information. *Id.* § 142(b)(1)(A). The Act also provides that in reviewing such information and in discharging his investigative and policymaking responsibilities, the CPO “shall report to, and be under the general supervision of, the Secretary.” *Id.* § 142(c)(1)(A). Further, the Act states that the CPO’s exercise of the statute’s new grant of subpoena authority is “subject to the approval of the Secretary,” *id.* § 142(b)(1)(C), and that the CPO’s investigative authority is subordinate to that of the Department’s Inspector General, *id.* § 142(c)(2)(B)(i).

The reporting requirements in section 802(e) were enacted as part of the 9/11 Act provisions that expanded the CPO’s statutory authority as outlined above. The House version of the bill (H.R. 1, 110th Cong.) included the direct reporting provision in section 802(e)(1) as part of a broader amendment that would have permitted the CPO to issue and enforce subpoenas without the Secretary’s approval, and that would have given the CPO a five-year term of office. The Administration specifically objected to these and other provisions of H.R. 1 in its comments on the bill. *See* Statement of Administration Policy on H.R. 1 (Jan. 9, 2007). The Senate subsequently amended H.R. 1 to remove the provisions granting the CPO independent subpoena authority and a five-year term, but did not alter the direct reporting language. *See* S. 4, 110th Cong. § 503 (as reported in Senate, Mar. 13, 2007). Emphasizing the Senate bill’s recognition of the CPO as a senior Executive Branch policy officer, the Administration reiterated its constitu-

Branch departments to submit to “Congress a report of any instance in which” they “establish[] or implement[] a formal or informal policy to refrain from enforcing, applying, or administering any provision of any Federal statute . . . on the grounds that such provision is unconstitutional”).

Editor’s Note: On March 4, 2008, the Secretary of Homeland Security sent a letter report to Congress pursuant to 28 U.S.C. § 530D in which the Department of Homeland Security disclosed and explained its decision to implement a non-enforcement policy regarding section 802(e)(1) of the 9/11 Act based on the legal advice in this memorandum.

tional objection to the bill's direct reporting provision, which was then designated as section 503 of S. 4. *See* Statement of Administration Policy on S. 4 (Feb. 28, 2007). The Senate did not amend the provision, however, and the Senate-passed version was included in the enrolled bill as section 802(e)(1). The President signed the Act on August 3, 2007.³

As provided in section 802, the CPO is responsible for investigating and ensuring departmental compliance with federal privacy laws and programs, and has policymaking authority over departmental policies as well as regulatory and legislative proposals for the collection, use, and disclosure of personal information by the federal government generally. *See* 6 U.S.C. § 142(a)–(d). Section 802(e) requires the CPO to prepare an annual report to Congress that addresses the CPO's areas of statutory and policymaking responsibility, including “activities of the Department that affect privacy, complaints of privacy violations, implementation of the Privacy Act of 1974, internal controls, and other matters.” *Id.* § 142(a)(6), (e). The direct reporting provision at issue here, section 802(e)(1), provides that the CPO “shall”:

submit reports directly to the Congress regarding performance of the responsibilities of the senior official under this section [the CPO], without any prior comment or amendment by the Secretary, Deputy Secretary, or any other officer or employee of the Department or the Office of Management and Budget[.]

Id. § 142(e)(1).

You have asked whether section 802(e)(1) must be interpreted, and, if so, whether it may constitutionally be applied, (1) to prohibit DHS and OMB officials from reviewing a draft report before it is finalized and transmitted to Congress, (2) to prohibit those officials from offering comments upon a draft report even if the comments will not be incorporated or reflected in the final report to Congress, and (3) to prohibit the CPO from considering and actually incorporating into the final report DHS or OMB comments and amendments in the manner contemplated by the President's supervisory review process.

³ It is well settled that Presidents may “approve legislation containing parts which are objectionable on constitutional grounds.” *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 202 (1994) (quoting *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983), and citing authorities dating back to the 1940s for the proposition that “the President's signing of a bill does not affect his authority to decline to enforce constitutionally objectionable provisions thereof”).

II.

A.

Section 802(e)(1) is not fairly read to prohibit the CPO from submitting his draft reports for review by DHS and OMB officials before the reports are finalized and transmitted to Congress. The statute refers only to “prior comment or amendment by” DHS and OMB officials; it does not by its terms address any “review” of the draft reports by these officials. Thus, the plain language of the statute permits the CPO to share his draft report with others at DHS, including the Secretary, and to submit it for prior review to OMB, including in accordance with the established OMB clearance process that applies to Executive Branch communications to Congress relating to legislation or legislative proposals. *See* OMB Circular No. A-19, *Legislative Coordination and Clearance* (Sept. 20, 1979).⁴

Interpreting section 802(e)(1) consistent with its text to permit review of draft CPO reports by DHS and OMB officials is also compelled by the principle that statutes must be construed whenever reasonably possible to avoid raising a serious constitutional question. *See Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159, 160 (2001). Article II of the Constitution vests the executive power in the President, and makes clear that he may rely upon, and bears responsibility for the conduct of, executive officers who stand subordinate to him. The President cannot fully and effectively discharge his constitutional responsibilities if Congress may, by statute, interfere with his ability to supervise the actions of such officers, especially their communications with Congress. Accordingly, we have long recognized that statutes that interfere with the President’s ability to supervise, directly or through subordinate officials, the Executive Branch’s communications with Congress raise serious constitutional concerns. *See, e.g., Authority of the Special Counsel of the Merit Systems Protection Board to Litigate*

⁴ We understand that reports to Congress like those contemplated by section 802(e) ordinarily would be submitted to OMB for review and clearance, and that both OMB and DHS agree that the CPO’s reports are subject to the requirements of Circular A-19. Circular A-19 applies, among other things, to “any comment or recommendation on pending legislation included in an agency’s annual or special report,” *id.* ¶ 5(e), and the CPO’s reports must address the CPO’s responsibilities under the Act, which include “evaluating legislative and regulatory proposals involving collection, use, and disclosure of personal information by the Federal Government,” 6 U.S.C. § 142(a)(3) (Supp. I 2007). Although Circular A-19 exempts from the OMB clearance process “agencies that are specifically required by law to transmit their legislative proposals, reports, or testimony to the Congress without prior clearance,” *id.* ¶ 4, this exception applies only to particular independent regulatory agencies that are subject to an agency-wide statutory exemption from Executive Branch clearance procedures, not to subordinate officers within a department or agency like the CPO. *See, e.g.,* 2 U.S.C. § 437d(d) (2000) (requiring Federal Election Commission to transmit budget estimates, legislative proposals, and testimony to Congress concurrently with their submission to the President or OMB); 7 U.S.C. § 2(a)(10) (Supp. V 2005) (same for Commodity Futures Trading Commission); 15 U.S.C. § 2076(k) (2000) (same for Consumer Product Safety Commission).

and Submit Legislation to Congress, 8 Op. O.L.C. 30, 31 (1984) (“*MSPB*”) (legislation requiring an Executive Branch officer to submit budget proposals and bill comments directly to Congress represents an “unconstitutional intrusion by the Legislative Branch into the President’s exclusive domain of supervisory authority over subordinate officials in the performance of their executive functions”). We therefore read statutes to avoid such interference “unless such construction is plainly contrary to the intent of Congress.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988); see generally *MSPB*, 8 Op. O.L.C. at 34–38 (invoking this principle and the President’s constitutional authority to supervise both Executive Branch subordinates and their communications with Congress in refusing to construe a statutory provision to “preclude Presidential review of [a subordinate executive officer’s] proposed legislative recommendations prior to their submission to Congress”). We see nothing in section 802(e)(1)’s text, or in the legislative history of the CPO provisions of the 9/11 Act, that reveals a clear and unambiguous intent by Congress to preclude simple review of the CPO’s draft reports by officials in DHS or OMB (as distinct from the transmittal to Congress of reports that reflect comments or amendments by such officials).

B.

Having concluded that section 802(e)(1) does not prevent DHS or OMB from reviewing the CPO’s reports before they are transmitted to Congress, we next consider whether the statute is best interpreted to prohibit DHS or OMB officials from commenting upon a draft report even where, at the end of the supervisory review process, the CPO is permitted to, and in fact does, transmit a final report to Congress that does not reflect any comments or amendments by such officials. Based upon the same principle of constitutional avoidance discussed above, we conclude that section 802(e)(1) is best read not to prohibit DHS and OMB from offering comments on a draft report where those comments are not reflected in the final report as transmitted.

It appears reasonably clear from the face of the statute that Congress was most concerned in section 802(e)(1) with preventing the CPO from transmitting to Congress reports that have been revised pursuant to comments and suggestions made by officials in DHS and OMB. That intent is suggested by the statute’s focus on the requirement to “submit” the report “directly” to Congress without any “prior comment or amendment” by such officials. Although the statute could be read more broadly to prohibit the transmittal of any report that has been the subject of any comment by DHS or OMB officials, even where the final report itself does not in any way reflect those comments, such a broad reading is not compelled by the plain text of the statute. We take it that Congress is most interested in the substance of the report submitted by the CPO, and the central purpose of the

statute is attempting to ensure that the substance of the report reflects the views of the CPO, rather than the views of other officials in DHS or at OMB.

In light of the ambiguity in the statute, we believe the canon of constitutional avoidance requires an interpretation that will avoid raising a serious conflict with the President's constitutional authority to supervise, through review and comment by the President's subordinates at DHS and OMB, the work of the CPO and the content of his communications to Congress. *See MSPB*, 8 Op. O.L.C. at 34–38; *Solid Waste Agency*, 531 U.S. at 160. Accordingly, where the President's supervisory review permits the CPO to transmit a final report to Congress that does not reflect suggested comments or amendments by DHS or OMB personnel, we believe that the statute is best interpreted to permit both the review and the suggested comments.

C.

The remaining question is whether section 802(e)(1) would be constitutional if applied to prohibit the CPO from incorporating into his report comments and amendments made by DHS and OMB officials, acting in the exercise of the President's supervisory authority, where their supervisory review contemplates that the CPO will accommodate their comments and amendments in the final version of the report to Congress. We conclude that applying section 802(e)(1) to require the CPO to reject the results of the President's review of a report in such circumstances would substantially conflict with two aspects of the President's constitutional authority: the President's authority to supervise subordinate Executive Branch officers and the President's authority to protect against the unauthorized disclosure of constitutionally privileged information. This Office has for decades consistently advised that where applying a statutory provision would give rise to one or both of these serious constitutional conflicts, the Executive Branch need not enforce the provision.

1.

If applied in the manner described above, section 802(e)(1)'s directive that the CPO submit reports to Congress "without any prior comment or amendment" by DHS or OMB would interfere directly with the President's constitutional authority to supervise subordinate Executive Branch officers. The Supreme Court recognized the Constitution's vesting of this power in the President more than two centuries ago. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803) (recognizing that the President has constitutional authority to exercise certain executive powers without interference from other branches whether he exercises those powers directly or through subordinate "officers, who act by his authority and in conformity with his orders"). Since *Marbury*, all three branches have recognized the President's constitutional authority to supervise certain Executive

Branch officers without interference from the other branches. These precedents, which we discuss below, include the Supreme Court’s 1988 decision in *Morrison v. Olson* as well as decades of congressional and Executive Branch decisions. These precedents support the conclusion that statutory reporting requirements cannot constitutionally be applied to interfere with presidential supervision and control of the communications that Executive Branch officers such as the CPO send to Congress.

The constitutional authority in question was first recognized by the Supreme Court in cases involving statutory attempts to limit the President’s supervision of executive officers by restricting his ability to remove them. In 1926, the Supreme Court, citing *Marbury*, elaborated on the President’s constitutional authority to exercise the ultimate form of supervision—at will removal—over certain Executive Branch officers without legislative interference. See *Myers v. United States*, 272 U.S. 52 (1926). *Myers* held that a statutory “provision of the law of 1876, by which the unrestricted power of removal of first class postmasters is denied to the President, is in violation of the Constitution and invalid.” *Id.* at 176. The Court based this conclusion on Article II, which “grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws.” *Id.* at 163–64. The Court explained:

If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices.

.....

The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.

.....

[T]o hold otherwise would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed.

Id. at 116, 135, 164.

Since the Court decided *Myers* in 1926, it has, on a case-by-case basis, upheld some legislative limits (specifically, statutory removal restrictions) on the President's ability to supervise certain types of officers. *See, e.g., Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958); *Morrison v. Olson*, 487 U.S. 654 (1988). Importantly, however, none of these cases involved an effort by Congress to constrain the President's ability to supervise—through removal or otherwise—Executive Branch officers who, like the CPO, possess broad operational and policymaking responsibility for core Executive Branch functions.

Humphrey's Executor and *Wiener* upheld legislative limits on the President's ability to supervise, through removal, officers who served on "independent" commissions and performed, in the Court's words, "quasi-judicial" and "quasi-legislative" functions. *Humphrey's Ex'r*, 295 U.S. at 624, 628 (upholding removal restrictions on members of an independent agency (the Federal Trade Commission) that could not "be characterized as an arm or eye of the executive"); *Wiener*, 357 U.S. at 352 (1958) (upholding removal restrictions on War Claims Commission members charged with "adjudicatory" functions). The Court has since declared that these decisions do not undermine the constitutional analysis in *Myers* of the President's supervisory authority over Executive Branch officers such as the CPO. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 725 (1986) (in upholding "the power of Congress to limit the President's powers of removal of a Federal Trade Commissioner" in *Humphrey's Executor*, the Court "distinguished *Myers*, reaffirming its holding that congressional participation in the removal of executive officers is unconstitutional").

The same is true of the Court's decision in *Morrison v. Olson*. Although *Morrison*, unlike *Humphrey's Executor* and *Wiener*, upheld removal restrictions on an officer (the independent counsel then authorized by the independent counsel provisions of the Ethics in Government Act, which are no longer in effect) who did perform a clearly executive function (the investigation and prosecution of unlawful conduct), the decision makes clear that its analysis does not extend to the President's supervisory authority over Executive Branch officers who, like the CPO, have policymaking and other broad operational responsibility for Executive Branch functions. In upholding the relevant statute's "for cause" limits on the President's ability to remove an independent counsel, the Court emphasized that the independent counsel in question occupied a unique office characterized by "limited jurisdiction and tenure and lacking [the] policymaking or significant administrative authority" typically associated with Executive Branch officials. *Morrison*, 487 U.S. at 691. Having thus distinguished an independent counsel under the Ethics in Government Act from officers such as the CPO, the Court expressly reaffirmed the "undoubtedly correct" determination in *Myers* that "there are some 'purely executive' officials who must be removable by the President at will if he is to 'be able to accomplish his constitutional role.'" *Id.* at 690 (quoting *Myers*, 272 U.S. at 132–34).

Although the Court has not had occasion (presumably for justiciability reasons) to opine on the constitutionality of statutory direct reporting requirements per se, the political branches have long recognized that statutes imposing such requirements merit the same constitutional analysis as statutes that impose removal restrictions on Executive Branch officers. The reason is that both types of statutes interfere with the President’s constitutional authority to supervise the Executive Branch subordinates he relies upon to discharge his Article II functions. We have consistently cited this constitutional authority before and after *Morrison* in objecting to statutory reporting requirements functionally identical to section 802(e)(1).

In 1977, for example, the Department objected to a draft bill that would have required inspectors general to submit reports “directly to Congress without clearance or approval by the agency head or anyone else in the executive branch” as an impermissible legislative interference with the President’s Article II right of “general administrative control” over executive officials, a presidential power that necessarily “includes the right to coordinate and supervise all replies and comments from the executive branch to Congress.” *Inspector General Legislation*, 1 Op. O.L.C. 16, 17–18 (1977). Congress responded by deleting the offending provision, and acknowledged the Administration’s separation of powers concerns in the bill’s legislative history. See *Establishment of Offices of Inspector and Auditor General in Certain Executive Departments and Agencies*, S. Rep. No. 95-1071, at 9, reprinted in 1978 U.S.C.C.A.N. 2676, 2684 (“[T]he Committee has deleted certain features of the earlier inspector general legislation which carried the greatest potential for tension between the inspector general and the agency head, and the executive and legislative branches.”).

In 1982, we raised the same constitutional objection to a statutory provision that purported to require the Administrator of the Federal Aviation Administration to submit budget estimates and comments on legislative proposals concurrently to Congress and the President. See *Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress*, 6 Op. O.L.C. 632, 641 (1982) (“*Constitutionality of Direct Reporting*”). Although we acknowledged that the text of the relevant provision “could be read to require the Administrator to submit any budget information or legislative comments directly to Congress prior to any approval or even review by the Administrator’s superiors,” *id.* at 639, we explained that such reporting would be “entirely inconsistent with the separation of powers” and with “the corollary right of the President to control his subordinates within the Executive Branch.” *Id.* at 639–40. Accordingly, in keeping with the canon of constitutional avoidance, we interpreted the statute to apply only to final documents, thereby permitting the Administrator’s superiors in the Executive Branch to review and edit preliminary drafts of the relevant reports and proposals. See *id.* at 640–41.

In 1984, we similarly advised that a statute authorizing the Special Counsel of the Merit Systems Protection Board—“an Executive Branch officer subject to the supervision and control of the President”—to submit budget proposals and bill comments directly to Congress represented an “unconstitutional intrusion by the Legislative Branch into the President’s exclusive domain of supervisory authority over subordinate officials in the performance of their executive functions.” *MSPB*, 8 Op. O.L.C. at 31, 35–36 (concluding that legislation that would “require an Executive Branch officer to submit budget information and legislative recommendations directly to Congress, prior to their being reviewed and cleared by the President or another appropriate reviewing official, would constitute precisely the kind of interference in the affairs of one Branch by a coordinate Branch which the separation of powers was intended to prevent”).

In 1988, we reiterated this constitutional analysis in objecting (as we did in 1977) to a proposal to add a direct reporting requirement in the Inspector General Act. See Memorandum for Thomas M. Boyd, Acting Assistant Attorney General, Office of Legislative Affairs, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 3049; H.R. 3285; H.R. 2126* (Apr. 22, 1988) (enclosing draft letters for Representative Morris K. Udall, Chairman, Subcommittee on Energy and the Environment, Committee on Interior and Insular Affairs). As in 1977, Congress deleted the offending provision from the bill, which was enacted four months after the Supreme Court decided *Morrison v. Olson*. See Inspector General Act Amendments of 1988, Pub. L. No. 100-504, § 102(f), 102 Stat. 2515 (Oct. 18). At approximately the same time we objected to the Inspector General Act proposal, we concluded that a “[s]tatutory provision requiring the Director of the Centers for Disease Control to distribute an AIDS information pamphlet to the public ‘without necessary clearance of the content by any official, organization or office’ violate[d] the separation of powers by unconstitutionally infringing upon the President’s authority to supervise the executive branch.” *Statute Limiting the President’s Authority to Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet*, 12 Op. O.L.C. 47, 47 (1988).

We continued to apply the constitutional analysis underlying the foregoing precedents after the Supreme Court decided *Morrison* in June 1988 because we concluded that *Morrison* does not affect the analysis of constitutional limits on statutory restrictions of the President’s ability to supervise—through removal or otherwise—Executive Branch officers like the CPO. See, e.g., *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 169 (1996) (“*Constitutional Separation of Powers*”) (concluding that “restrictions on the President’s power to remove officers with broad policy responsibilities” should continue to “be deemed unconstitutional” after *Morrison* because the “*Morrison* Court had no occasion to consider the validity of removal restrictions affecting principal officers, officers with broad statutory responsibilities, or officers involved in executive branch policy formulation,” and *Morrison* expressly

affirmed that *Myers* “was undoubtedly correct . . . in its broader suggestion that there are some ‘purely executive’ officials who must be removable by the President at will if he is to be able to accomplish his constitutional role”).

In 1989, we advised the general counsels of the Executive Branch that concurrent reporting requirements offend the separation of powers and “infringe upon the President’s authority as head of a unitary executive to control the presentation of the executive branch’s views to Congress.” *Common Legislative Encroachments on Executive Branch Authority*, 13 Op. O.L.C. 248, 255 (1989) (“*Common Legislative Encroachments*”).

In 1996, we similarly advised that “concurrent reporting requirements” clearly implicate “the President’s performance of his constitutionally assigned functions” and “impair the Constitution’s great principle of unity and responsibility in the Executive department.” *Constitutional Separation of Powers*, 20 Op. O.L.C. at 174–75 (internal quotation marks and citations omitted).⁵

In 1998, the Department notified Congress that a proposed reporting requirement virtually identical to section 802(e)(1) should be removed from a bill because the provision “would interfere with the President’s control over the executive branch and with his legitimate interest in overseeing the presentation of the executive branch’s views to Congress.” Letter for William V. Roth, Chairman, Committee on Finance, United States Senate, and Bill Archer, Chairman, Committee on Ways and Means, United States House of Representatives, from L. Anthony Sutin, Acting Assistant Attorney General, Office of Legislative Affairs at 4 (June 8, 1998).

In 2000, we raised similar separation of powers objections to a direct reporting requirement in the Medicare Rx Act, *see* Memorandum for Robert Raben, Assistant Attorney General, Office of Legislative Affairs, from Evan H. Caminker, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 4680—Medicare Rx 2000 Act* (June 26, 2000), and Congress ultimately removed the provision from the legislation, *see* Pub. L. No. 108-173, 117 Stat. 2066 (2003).⁶

⁵ Some might argue that our conclusions with respect to section 802(e)(1) are inconsistent with the suggestion in our 1996 opinion that “courts . . . might uphold the validity of a concurrent reporting requirement imposed for a legitimate congressional purpose on a specific agency with limited, domestic, and purely statutory duties.” 20 Op. O.L.C. at 175. We disagree. In making this statement, the 1996 opinion was making an observation about how courts “might” view such a requirement with respect to agencies whose duties differ substantially from those of DHS. The opinion did not endorse the constitutionality of concurrent reporting requirements with respect to these or any other agencies. To the contrary, the opinion concluded, quoting *Myers*, that direct reporting requirements “impair the Constitution’s ‘great principle of unity and responsibility in the Executive department.’” *Id.*

⁶ The original bill to which the Administration objected died in the Senate, but the legislation was reconsidered in the 107th Congress, *see Medicare Modernization and Prescription Drug Act of 2002*, H.R. Rep. No. 107-539 (2002), and was enacted without the objectionable provision, *see* Pub. L. No. 108-173, 117 Stat. 2066 (2003).

And, in 2004, we issued two opinions in which we concluded that two different statutory provisions, if construed or enforced to permit Executive Branch officers to communicate directly with Congress without appropriate supervision by the President or his subordinates, would violate the constitutional separation of powers and, specifically, the President's Article II authority to supervise Executive Branch personnel. See *Authority of HUD's Chief Financial Officer to Submit Final Reports on Violations of Appropriations Laws*, 28 Op. O.L.C. 248, 252–53 (2004) (“*Authority of HUD's CFO*”); *Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, 28 Op. O.L.C. 79, 80–82 (2004) (“*Authority of Agency Officials*”). These opinions, like their predecessors, applied the same settled reasoning we follow here:

The [judicial] decisions and the long practical history concerning the right of the President to protect his control over the Executive Branch are based on the fundamental principle that the President's relationship with his subordinates must be free from certain types of interference from the coordinate branches of government in order to permit the President effectively to carry out his constitutionally assigned responsibilities. The executive power resides in the President, and he is obligated to take care that the laws are faithfully executed. In order to fulfill those responsibilities, the President must be able to rely upon the faithful service of subordinate officials. To the extent that Congress or the courts interfere with the President's right to control or receive effective service from his subordinates within the Executive Branch, those other branches limit the ability of the President to perform his constitutional function.

Authority of HUD's CFO, 28 Op. O.L.C. at 252 (internal quotation marks and citations omitted).

2.

The constitutional authorities outlined above lead to the conclusion that section 802(e)(1) would be unconstitutional if applied to prevent the CPO from incorporating into his final report comments and amendments suggested by the President's review of the report through the President's subordinates at DHS and OMB. The very statute that contains section 802(e)(1) establishes the CPO as a subordinate officer accountable to the Secretary and ultimately to the President, and vests the CPO with a broad range of policymaking and operational authority within the Executive Branch. 6 U.S.C. § 142(a)–(c) (Supp. I 2007). Section 802 expressly designates the CPO as the “senior official in the Department” who has “primary responsibility for privacy policy,” which includes responsibility for “assuring” departmental compliance with “privacy protections,” particularly those contained in the information handling requirements of the Privacy Act of 1974, as well as

responsibility for “evaluating legislative and regulatory proposals involving collection, use, and disclosure of personal information by the Federal Government.” 6 U.S.C. § 142(a)(1)–(3). Additional provisions in section 802 further vest the CPO with broad authority to coordinate the implementation of “programs, policies, and procedures involving civil rights, civil liberties, and privacy considerations,” *id.* § 142(a)(5), and with authority to investigate and report on, with “access to all records, reports, audits, reviews, documents, papers, recommendations, and other materials available to the Department,” *id.* § 142(b)(1)(A), the “activities of the Department that affect privacy, including complaints of privacy violations, implementation of the Privacy Act of 1974, internal controls, and other matters,” *id.* § 142(a)(5); *see also id.* § 142(a)(6), (b)–(c).

The CPO’s responsibilities establish the CPO as the kind of Executive Branch officer with “broad statutory responsibilities” and “executive branch policy” authority that the Supreme Court “had no occasion to consider” in *Morrison, Constitutional Separation of Powers*, 20 Op. O.L.C. at 169, but who clearly falls within the class of “‘purely executive’ officials” over whom *Myers* concluded the President must be able to exercise full supervision in order to “accomplish his constitutional role.” *Morrison*, 487 U.S. at 689 (quoting *Myers*, 272 U.S. at 132–34). The CPO is an executive officer who assists the President in performing functions—most notably the execution of statutes and the formulation of Executive Branch policy and legislative recommendations, *see* 6 U.S.C. § 142(a), (c)(1)(A), (d)—that lie at the core of the President’s constitutional duties under Article II. *See Morrison*, 487 U.S. at 689–90; *Constitutional Separation of Powers*, 20 Op. O.L.C. at 169. For this reason, the Constitution requires that the President be able to supervise the CPO’s activities, including and especially the CPO’s communications with Congress, without legislative interference. *See, e.g., Constitutionality of Direct Reporting*, 6 Op. O.L.C. at 633 (“The separation of powers requires that the President have ultimate control over subordinate officials who perform purely executive functions and assist him in the performance of his constitutional responsibilities. This power includes the right to supervise and review the work of such subordinate officials, *including the reports issued either to the public or to Congress.*”) (emphasis added).

Section 802(e)(1) substantially interferes with the President’s ability to exercise this constitutional authority to the extent it purports to bar the CPO from revising his report to reflect comments from the DHS or OMB officials through whom the President supervises the CPO and his reports. The fact that section 802(e)(1) expressly prohibits only comments or amendments by DHS and OMB officials, not comments by the President or other Executive Branch officials, does not change the constitutional analysis. It is well settled that the President must rely upon Executive Branch subordinates in order to “accomplish his constitutional role.” *Morrison*, 487 U.S. at 690; *Myers*, 272 U.S. at 133; *Williams v. United States*, 42 U.S. (1 How.) 290, 297 (1842); *Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts*, 13 Op. O.L.C. 300, 306 n.12 (1989); *Opinion on*

Relation of the President to the Executive Departments, 7 Op. Att’y Gen. 453, 479 (1855). And it is similarly well settled that frustrating the President’s ability to rely on his subordinates unconstitutionally interferes with the President’s authority under Article II. See *Myers*, 272 U.S. at 132–34; *Morrison*, 487 U.S. at 689–90.

The President relies upon DHS and OMB not only to assist him in supervising the CPO and the CPO’s reports to Congress, but also in exercising his constitutional authority over the matters the CPO’s report addresses, most notably the execution of privacy laws and policies. In purporting to prohibit the CPO from incorporating DHS or OMB comments in his report, section 802(e)(1) directly interferes with the President’s ability to supervise the manner in which the CPO—a subordinate who qualifies as the type of “purely executive officer” over whom the Supreme Court has said the President must retain full supervisory authority—reports to Congress on the Executive Branch’s handling of matters (most notably the execution of privacy laws and the development of privacy policy and legislative proposals) for which the President is constitutionally responsible. Such interference is impermissible regardless of its purported oversight or other justifications. Broad though Congress’s powers are, Congress may not exercise those powers “in ways that violate constitutional restrictions on its own authority or that invade the constitutional prerogatives of other branches.” *Constitutionality of Proposed Statutory Provision Requiring Prior Congressional Notification For Certain CIA Covert Actions*, 13 Op. O.L.C. 258, 261 (1989). Because section 802(e)(1) would effect precisely such an invasion if applied to require the CPO to exclude from his report comments that the President’s review, through DHS or OMB, contemplates be incorporated, we conclude that the Executive Branch need not enforce the provision in such circumstances.

3.

For the reasons set forth above, the conclusion that certain applications of section 802(e)(1) would interfere with the President’s ability to supervise the CPO is constitutionally problematic regardless of Congress’s justifications for the provision. We note, however, that even if it were appropriate for us to balance Congress’s purported need for an unedited report against the degree to which section 802(e)(1)’s prohibition on editing would impair the President’s Article II functions, we would conclude that Congress’s asserted interest fails to justify the restrictions that section 802(e)(1) places on the President’s authority. *Cf. Morrison*, 487 U.S. at 695 (balancing Congress’s interest in restricting the President’s ability to remove an independent counsel against the degree to which the re-

restrictions would “prevent the Executive Branch from accomplishing its constitutionally assigned functions”).⁷

The 9/11 Act’s text and legislative history do not establish any congressional need for direct reporting, much less that direct reporting “is demonstrably critical to the responsible fulfillment of [the requesting committee’s] functions.” *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974); compare *Morrison*, 487 U.S. at 693 (emphasizing that the challenged statutory limits on the President’s removal authority were determined to be “essential, in the view of Congress, to establish the necessary independence of the office”). But even were we to assume that section 802(e)(1) serves a compelling congressional oversight need, applying the provision to preclude the CPO from incorporating DHS or OMB comments on a report would “unduly trammel[] executive authority” under the kind of balancing framework the Court employed in *Morrison*. The reason is that applying the provision in this manner would, unlike the removal restrictions in *Morrison*, interfere with the “President’s need to control the exercise of” a subordinate Executive Branch officer’s authority

⁷ We do not read *Morrison* to require such balancing here because, as we explained in Part II.C.1, *supra*, the Court’s opinion in *Morrison* does not affect the analysis of the constitutional problem with legislative provisions that, like section 802(e)(1), interfere with the President’s authority to supervise traditional Executive Branch officers like the CPO. See *Morrison*, 487 U.S. at 691.

Nor do we read the *Nixon* cases cited in our 1982 opinion as requiring us to evaluate section 802(e)(1)’s constitutionality in light of Congress’s “need” for the unedited report the provision purports to require. It is true that our 1982 opinion analyzed the constitutionality of imposing a concurrent reporting obligation on the FAA in terms of whether the requirement was supported by a “very compelling and specific [legislative] need.” 6 Op. O.L.C. at 633, 641–42. This approach was, however, a departure from the Office’s prior opinions objecting to direct reporting requirements regardless of their oversight value. See, e.g., *Inspector General Legislation*, 1 Op. O.L.C. at 17–18. Since 1982, our opinions and advice regarding the constitutionality of direct and concurrent reporting requirements have returned to the approach we employed in 1977. See, e.g., *Common Legislative Encroachments*, 13 Op. O.L.C. at 255 (concluding, without considering oversight or other justifications, that concurrent reporting requirements should be opposed on constitutional grounds if proposed in legislation, and that “if enacted,” these provisions should be “construed as applying only to ‘final’ recommendations that have been reviewed and approved by the appropriate superiors within the Executive Branch, including OMB”); Letter for William V. Roth, Chairman, Committee on Finance, United States Senate, and Bill Archer, Chairman, Committee on Ways and Means, United States House of Representatives, from L. Anthony Sutin, Acting Assistant Attorney General, Office of Legislative Affairs at 4 (June 8, 1998) (raising constitutional objections to direct reporting provisions without considering their oversight or other legislative value); *Authority of Agency Officials*, 28 Op. O.L.C. 79 (explaining that a direct reporting provision posed constitutional problems without regard to whether the provision served legitimate oversight or other needs); *Authority of HUD’s CFO*, 28 Op. O.L.C. 248 (same). That is also the approach we apply here, because the relevant portion of the 1982 opinion rests on authorities that balance Congress’s need for information with the “practical need for confidentiality in Executive Branch deliberations,” not with the constitutional principles that have long been held to preclude legislative interference with the President’s authority to supervise traditional Executive Branch officers. See 6 Op. O.L.C. at 638–41; see also *id.* at 640 n.3 (emphasizing that this Office knew of no instance in which Congress had imposed the type of concurrent reporting requirement at issue in the opinion “upon a purely executive agency that is under the President’s direct supervision and control”).

on issues (the execution of federal statutes, Executive Branch policy formulation, and the protection of privileged information) that are “central to the functioning of the Executive Branch.” *Id.* at 691.

As noted, the President cannot effectively perform his constitutional functions without the aid of Executive Branch agencies and officers. *See, e.g., Myers*, 272 U.S. at 133. The CPO is such an officer, and DHS and OMB are such agencies. Indeed, they are the agencies best able (and, in DHS’s case, uniquely able, because the report pertains largely to DHS activities) to assist the President in discharging his constitutional authority to supervise not just the CPO and his reports, but also the Executive Branch’s handling of the matters addressed in those reports. The statute requires that the CPO’s reports address DHS’s implementation of federal privacy laws, as well as Executive Branch privacy policy and legislative recommendations on privacy issues. *See* 6 U.S.C. § 142(a), (e). Section 802(e)(1)’s prohibition on the incorporation of DHS or OMB comments into the report would deprive the President of his ability to ensure that a report to Congress on privacy matters on behalf of the Executive Branch reflects the input of the Executive Branch officers on whom the President relies to discharge his constitutional authority over the report, the officer who transmits it, and the substantive matters that the report addresses. Section 802(e)(1)’s prohibition on incorporating OMB comments in the CPO’s report to Congress would also deprive the President of the benefits of the OMB review process that Presidents have relied upon for decades to ensure that a single officer’s or department’s communications to Congress do not conflict with the President’s policy program or legal obligations, and also do not compromise constitutionally privileged information or otherwise undermine the President’s ability to exercise his constitutional authority. *See* OMB Circular No. A-19, ¶¶ 3–4, 8 (1979). Because certain applications of section 802(e)(1) would impose these substantial burdens on the President’s ability to exercise his constitutional supervisory authority, we would consider those applications of the provision constitutionally objectionable even if we were to balance the degree to which they burden the President’s Article II authority against the provision’s oversight or legislative value.

4.

Certain applications of section 802(e)(1) would also conflict with the President’s constitutional authority to protect against the unauthorized disclosure of classified and other types of constitutionally privileged information.

We have long concluded that statutory provisions that purport to authorize Executive Branch officers to communicate directly with Congress without appropriate supervision by the President or his subordinates violate the separation of powers because such provisions infringe upon the President’s constitutional authority to protect against the unauthorized disclosure of constitutionally privileged information, most notably classified national security information. As

the Clinton Administration explained in a 1998 Statement of Administration Policy (“SAP”) on S. 1668, a bill that purported to give employees in the intelligence community a right to disclose certain types of privileged information to Congress without Presidential authorization:

This provision is clearly contrary to the Supreme Court’s explicit recognition of the President’s constitutional authority to protect national security and other privileged information. Congress may not vest lower-ranking personnel in the Executive branch with a “right” to furnish national security or other privileged information to a member of Congress without receiving official authorization to do so. By seeking to divest the President of his authority over the disclosure of such information, S. 1668 would unconstitutionally infringe upon the President’s constitutional authority.

This Office further developed the position stated in the SAP in testimony before Congress. *See Whistleblower Protections for Classified Disclosures*, 22 Op. O.L.C. 92 (1998) (reproducing the relevant testimony).

The President’s constitutional authority to protect against the unauthorized disclosure of privileged information is not “limited to classified information, but extends to all deliberative process or other information protected by executive privilege.” *Authority of Agency Officials*, 28 Op. O.L.C. at 81. “Because [a] statute[] may not override the constitutional doctrine of executive privilege, [it] may not act to prohibit the supervision of the disclosure of any privileged information, be it classified, deliberative process or other privileged material.” *Id.* Applying this principle, we have consistently advised that the President’s ability to protect against the unauthorized disclosure of information potentially protected by executive privilege may not be restricted by statute. *See, e.g.*, Memorandum for Peter J. Wallison, Counsel to the President, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel at 3 n.6 (Sept. 8, 1986) (“Consistent with our view that Congress cannot override executive privilege by statutory enactment, we do not believe the ‘whistleblower’ provisions allow an employee to escape sanctions for disclosure of material covered by executive privilege.”). More importantly here, we have concluded in the specific context of statutory reporting requirements that “the Constitution compels that the head of [a] department must have the authority to direct” subordinates preparing reports to Congress to “make whatever modifications are deemed necessary” to prevent the unauthorized disclosure in those reports of sensitive law enforcement or executive privileged information. *Legislation to Establish Offices of Inspector General—H.R. 8588*, Hearings before the Subcomm. on Governmental Efficiency and the District of Columbia of the S. Comm. on Governmental Affairs, 95th Cong. 141 (1978) (testimony of Lawrence A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel) (“Hammond Testimony”); *see also* Memorandum for Robert M.

McNamara, Jr., General Counsel, Central Intelligence Agency, from Todd D. Peterson, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legal Authority to Withhold Information from Congress* at 3 (Sept. 9, 1998) (the “application of [statutory] reporting requirements . . . is limited by a constitutional restraint—the executive branch’s authority to control the disclosure of information when necessary to preserve the Executive’s ability to perform its constitutional responsibilities”). As we explained 30 years ago:

This conclusion springs, first, from the President’s duty to see that the laws are faithfully executed. His immediate subordinates are charged with carrying out that constitutional duty. If a department head discovers in a report that, for instance, grand jury or tax return information has been . . . included, it is his duty to see that it is deleted. This is the simplest and clearest case. In each case an enactment having the force of law prohibits disclosure—even to Congress—and for the department head to allow a report to go out without alteration would be to disregard those enactments and fail in the faithful execution of the laws.

. . . .

In addition . . . , there are some limited circumstances in which it has been recognized that the President may restrict the disclosure of confidential information and information relating to national security, diplomatic and military secrets [I]f an [Executive Branch subordinate] decides to disclose confidential information, the head of the department should have the opportunity to review that intended disclosure and initiate the process of internal Executive Branch scrutiny to determine whether the President should be asked to make the decision to withhold that document or portions of it from Congress. Any law which interferes with the President’s power to make these sorts of deliberative judgments would, in the Department’s opinion, offend the core concept of separation of powers upon which the Supreme Court based its recognition of a Presidential privilege.

Hammond Testimony at 141–43. Congress acknowledged the foregoing constitutional principles in the Senate report on the legislation (the Inspector General Act) addressed in the Department’s testimony. S. Rep. No. 95-1071, at 32, 1978 U.S.C.A.N. at 2707 (“Insofar as [executive privilege] is constitutionally based, the committee recognizes that section 5(b) cannot override it.”).

There is no question that section 802(e)(1) would interfere with the President’s ability to protect against the unauthorized disclosure of privileged information if applied to preclude the CPO from accepting DHS or OMB amendments made to protect such information. If section 802(e)(1) were so applied, it would substan-

tially constrain the President's ability to protect against the unauthorized disclosure of privileged information by limiting the Executive Branch subordinates and processes on which the President may rely, and typically does rely, to exercise his constitutional authority over such information. To that extent, as well, the statute as so applied would be unconstitutional.

III.

In summary, we conclude that section 802(e)(1) does not prohibit DHS or OMB officials from reviewing, in accordance with established Executive Branch review and clearance procedures, the CPO's draft section 802 reports before the reports are submitted to Congress. We further conclude that section 802(e)(1) is best interpreted not to prohibit DHS or OMB officials from commenting upon a draft CPO report where the CPO is permitted to, and in fact does, transmit to Congress a final report that does not reflect comments or amendments from such officials. Finally, we conclude that section 802(e)(1)'s direct reporting requirement need not be enforced in circumstances where its application would require the CPO to ignore the results of the President's review, through DHS and OMB, of a particular report. In such circumstances, the statute must yield to the President's exercise of his constitutional authority to supervise subordinate Executive Branch officers and their communications with Congress. In the event DHS were to implement this conclusion by adopting a policy not to enforce section 802(e)(1) in the circumstances described above, DHS should report the policy to Congress as required by 28 U.S.C. § 530D.

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Payment of Back Wages to Alien Physicians Hired Under the H-1B Visa Program

The statute authorizing the H-1B visa program does not waive the federal government's sovereign immunity. Therefore, an administrative award of back wages to alien physicians hired by the Department of Veterans Affairs under the program is barred by sovereign immunity.

February 11, 2008

MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF VETERANS AFFAIRS AND THE SOLICITOR DEPARTMENT OF LABOR

The Department of Labor ("DOL") has determined that the Department of Veterans Affairs ("VA") failed to pay the required prevailing wage to eleven alien physicians employed by VA hospitals pursuant to the H-1B visa program. VA requested our opinion regarding its statutory authority to pay back wages pursuant to the DOL order. DOL also provided its views on this issue. Before resolving the merits of this dispute, we requested additional views from both agencies regarding whether sovereign immunity bars the award of such monetary relief in an administrative proceeding. We now conclude that the statute authorizing the H-1B program does not waive the federal government's sovereign immunity, and the award of back wages is therefore barred.

I.

The H-1B visa program (which takes its name from the paragraph of the Immigration and Nationality Act ("INA") in which it is codified) allows aliens to enter the United States on a temporary basis to perform certain specialty occupations, including the practice of medicine. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b) (2000). In order to obtain an H-1B visa, the alien's prospective "employer" (a term not defined in the Act) must submit a "labor condition application" to the Secretary of Labor. As part of that application, the employer must agree to pay wages that are at least "the actual wage level paid by the employer" to similarly situated employees or "the prevailing wage level" in the area, whichever is greater. *Id.* § 1182(n)(1)(A) (2000). The INA charges the Secretary of Labor with investigating and resolving any complaints over the employer's compliance with those conditions. *See id.* § 1182(n)(2)(A). Should the Secretary find, after a hearing, that "an employer has not paid wages at the wage level specified under the application," then the Secretary "shall order the employer to provide for payment of such amounts of back pay as may be required to comply." *Id.* § 1182(n)(2)(D).

Two VA hospitals submitted labor condition applications and hired eleven physicians under the H-1B program. The hospitals set the physicians' pay based

on VA's government pay scale. *See* 38 U.S.C. § 7404(b) (Supp. V 2005). Most of the physicians also received additional pay pursuant to VA's special pay authorities. *See id.* §§ 7431–7433 (Supp. V 2005). Several years later, the physicians filed administrative complaints asserting that the hospitals had failed to pay them the prevailing wages for the areas in which they were employed. The DOL Administrative Review Board ruled in the complainants' favor and ordered the VA to pay approximately \$230,000 in back wages.

II.

The principles governing sovereign immunity are well-established. As the Supreme Court has recognized, “[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.” *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also United States v. Mitchell*, 463 U.S. 206, 212 (1983) (“It is axiomatic that the United States may not be sued without its consent.”). Sovereign immunity bars any action against the United States if “the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.” *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (internal quotation marks and citation omitted). The Executive Branch has no authority to waive the federal government's sovereign immunity; rather, that authority rests solely with Congress. *See, e.g., United States v. Shaw*, 309 U.S. 495, 500–01 (1940) (explaining “that without specific statutory consent, no suit may be brought against the United States. No officer by his action can confer jurisdiction.”); *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660 (1947) (“It has long been settled that officers of the United States possess no power through their actions to waive an immunity of the United States.”). And the terms of any statutory waiver must be unambiguous, both as to the nature of relief that may be ordered and the forum in which the relief may be sought. *See, e.g., Lane v. Pena*, 518 U.S. 187, 192 (1996).

Because Congress has the sole authority to set the terms of any waiver, an administrative agency has no more authority to prosecute or adjudicate a claim against the federal government than does a federal court. The federal courts accordingly have applied the same sovereign immunity principles in reviewing administrative adjudications as they have in federal court suits. *See, e.g., United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992) (applying sovereign immunity principles to bankruptcy proceedings); *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (holding that sovereign immunity bars fee award to prevailing party in INS proceeding); *Foreman v. Dep't of Army*, 241 F.3d 1349, 1352 (Fed. Cir. 2001) (applying sovereign immunity principles to conclude that the Merit Systems Protection Board lacks authority to impose monetary damages); *cf. Fed. Mar.*

Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 76061 (2002) (state sovereign immunity applies in federal administrative proceeding).¹

This Office likewise has recognized that sovereign immunity principles “apply with equal force to agency adjudications.” *Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply With Orders Issued by EEOC Administrative Judges*, 27 Op. O.L.C. 24, 27 (2003) (“EEOC Opinion”). For instance, we recently concluded that sovereign immunity prevents the EEOC from imposing an attorney’s fee award against the federal government during an administrative adjudication. *Id.* at 33. We also found that the USDA generally lacks the authority to award monetary relief to individuals whom it finds to have been discriminated against in USDA programs. *See Authority of USDA to Award Monetary Relief for Discrimination*, 18 Op. O.L.C. 52 (1994) (“USDA Opinion”). And we found that the Special Counsel for Immigration Related Unfair Employment Practices may not bring administrative employment claims against a federal agency because the anti-discrimination statute in question did not expressly include the federal government within its ambit. *See Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices*, 16 Op. O.L.C. 121 (1992) (“Special Counsel Opinion”); *see also Waiver of Sovereign Immunity With Respect to Whistleblower Provisions of Environmental Statutes*, 29 Op. O.L.C. 171, 174 (2005) (concluding that Clean Water Act whistleblower provision does not waive federal government’s sovereign immunity).

Notwithstanding these decisions, DOL contends that sovereign immunity should not apply to enforcement actions between two federal agencies. In support, DOL relies principally upon our opinion in *EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act*, 24 Op. O.L.C. 84 (2000) (“EPA Opinion”), where, in concluding that the statute at issue clearly granted the EPA the authority to assess administrative penalties against federal agencies, we observed that “the doctrine of sovereign immunity does not apply to enforcement actions by one federal government agency against another.” *Id.* at 88. In another opinion, we observed that with respect to a dispute between two agencies, a sovereign immunity issue “would only arise if the judicial enforcement aspect of the enforcement scheme were found applicable.” *Authority of Department of Housing and Urban Development to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies*, 18 Op. O.L.C. 101, 104 n.4 (1994) (“HUD Opinion”).

¹ Cases addressing state sovereign immunity may provide some guidance, as the Supreme Court has applied similar principles in the state and federal sovereign immunity contexts. *See, e.g., Nordic Village*, 503 U.S. at 37.

These opinions suggest that an administrative action, consisting of a dispute between two federal agencies, and resolved entirely within the Executive Branch, would not constitute a “suit” against the United States. See Special Counsel Opinion, 16 Op. O.L.C. at 124 n.3 (“We assume *for purposes of this opinion* that sovereign immunity would not bar administrative proceedings in which one executive agency would press charges against another executive agency and final decisional authority would be vested in the Executive.”) (emphasis added). In such a context, the resulting administrative penalty would neither “expend itself on the public treasury or domain,” *Dugan*, 372 U.S. at 620, nor result in a judicial order requiring or prohibiting agency action. Instead, the administrative penalty would amount simply to the transfer of money from one part of the federal government to another. See Special Counsel Opinion, 16 Op. O.L.C. at 124 n.4 (“The assessment of a civil penalty against a federal agency in a sense would not expend itself upon the fisc, because it would not have any net effect on the Treasury balance.”).

Although some language in the EPA and HUD Opinions may be in tension with our subsequent recognition that sovereign immunity principles “apply with equal force to agency adjudications,” EEOC Opinion, 27 Op. O.L.C. at 27, we need not resolve that tension here, because the dispute between DOL and VA does not fall wholly within the Executive Branch. Rather, DOL’s order follows an administrative adjudication brought at the behest, and on behalf, of private parties—namely, the H-1B physicians. In the VA cases, DOL has ordered the payment of back pay awards that would go directly to the physicians in question—relief that clearly would “expend itself on the public treasury,” *Dugan*, 372 U.S. at 620. As the D.C. Circuit has recognized, sovereign immunity applies to actions like these, which are “brought by a government official acting for the benefit of private parties.” *Dep’t of Army v. FLRA*, 56 F.3d 273, 276 (D.C. Cir. 1995); see also *Hubbard v. MSPB*, 205 F.3d 1315, 1317 (Fed. Cir. 2000) (affirming MSPB’s holding that sovereign immunity barred its award of back pay against EPA).

DOL disagrees with this characterization and maintains that it should not be regarded as “acting for the benefit of private parties,” but rather should be seen as representing the public interest in enforcing the conditions on the H-1B program. DOL points out that the prevailing wage provisions of the H-1B program are not primarily intended to reward alien physicians, but rather to protect the wages of American workers from cheaper foreign competition. This may be so, but the argument does not bear on the sovereign immunity question. Federal agencies may represent the public interest through a wide variety of actions, but they do not have the authority to permit private parties to bring judicial or administrative suits against the government, or to order another federal agency to pay money judgments to private parties, unless Congress has unambiguously waived sovereign immunity.

III.

We consider then whether Congress waived sovereign immunity for DOL administrative proceedings brought against federal employers under section 212(n)(2) of the INA. *See* 8 U.S.C. § 1182(n)(2). The Supreme Court has made clear that any waiver of the federal government’s sovereign immunity “must be unequivocally expressed in statutory text . . . and will not be implied.” *Lane*, 518 U.S. at 192 (citations omitted); *see also Nordic Village*, 503 U.S. at 37 (a reading of a statute that imposes monetary liability on the government will not be adopted unless it is “unambiguous”). Waivers of immunity are “construed strictly in favor of the sovereign and not enlarged beyond what the language requires.” *Dep’t of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (internal quotation marks, citations, and alterations omitted). If an alternative reading of a statutory provision is available, then Congress has not waived sovereign immunity. *See Nordic Village*, 503 U.S. at 37.

In this regard, we take it as a given that the fact that a VA hospital may qualify as an employer under the H-1B visa program does not conclusively establish that Congress waived sovereign immunity. Federal agencies may well be subject to substantive obligations when participating in a particular statutory program without falling subject to the statute’s remedial provisions. *See, e.g., Dep’t of Energy*, 503 U.S. at 623 (distinguishing among “substantive and procedural requirements” of statute, “administrative authority,” and “process and sanctions”); *see also* USDA Opinion, 18 Op. O.L.C. at 72 (concluding that although antidiscrimination provisions of both Fair Housing Act and Rehabilitation Act expressly apply to the federal government, these statutes do not waive sovereign immunity for monetary relief); *Shaw*, 309 U.S. at 500–01 (sovereign immunity may be waived only by Congress through statute, not by actions of Executive Branch officers). In the Eleventh Amendment context, the Supreme Court has held that states do not waive their constitutional immunity merely by participating in a federal program, even though the relevant statutes expressly contemplate that states fall within the class of beneficiaries. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245–47 (1985) (although Rehabilitation Act applies to states, state does not waive Eleventh Amendment immunity by participating in program); *Edelman v. Jordan*, 415 U.S. 651, 673–74 (1974) (mere fact that state participated in federal aid program does not waive Eleventh Amendment immunity, which bars retroactive award of benefits). Accordingly, the question is not whether federal agencies, such as VA, may hire workers through the H-1B visa program, but whether Congress has unambiguously determined that those agencies shall be subject to DOL’s remedial authority to adjudicate administrative complaints under the H-1B program and to award back pay.

We are unable to find such an unambiguous waiver in this case. Congress did not expressly address the federal government’s sovereign immunity anywhere in the H-1B program. Nor did Congress clearly provide that a federal employer

would be subject to DOL’s remedial authority under section 212(n)(2) of the INA. See 8 U.S.C. § 1182(n)(2). Section 212(n)(2) does not contain a definition of “employer,” nor is the term otherwise defined for purposes of the H-1B program. We have recognized that general terms such as “employer” or “person” “should not be read to include federal agencies in the absence of affirmative evidence that Congress intended that they be included.” Special Counsel Opinion, 16 Op. O.L.C. at 124; see also *United States v. United Mine Workers*, 330 U.S. 258, 270 (1947) (declining to construe “employer” under the Norris-LaGuardia Act to include the United States “where there is no express reference to the United States and no evident affirmative grounds for believing that Congress intended to withhold an otherwise available remedy [obtaining a restraining order] from the Government”).² That rule of construction would preclude the finding of an “unambiguous” waiver of sovereign immunity, unless some other provision of the INA made clear that federal agencies must be included under the back pay provisions of section 212(n)(2).³

Seeking to identify such provisions, DOL points to several that it asserts show Congress’s expectation that federal agencies would fall within the scope of the term “employer” for purposes of section 212(n)(2). The first provision, 8 U.S.C. § 1184(l)(1) (2000), allows an “interested Federal agency” to request the waiver of a foreign residence requirement for alien graduate students who, following their education, seek to remain in the United States for employment at a health care facility. The statute specifically addresses “the case of a request by the Department of Veterans Affairs” for a waiver on behalf of an alien who “agrees to practice primary care or specialty medicine.” *Id.* § 1184(l)(1)(D)(i) (Supp. V 2005). This provision, however, does not apply only to applicants for H-1B visas, but also to aliens seeking other types of immigration benefits. The provision likewise does not directly refer to DOL’s remedial authority under section 212(n)(2). According-

² The Secretary of Labor has defined “employer” by regulation to mean “a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H-1B . . . nonimmigrants and/or U.S. worker(s).” 20 C.F.R. § 655.715 (2007); see also 8 C.F.R. § 214.2(h)(4)(ii) (2007) (similar definition in Department of Homeland Security regulations). This regulatory definition could not waive the federal government’s sovereign immunity, because the waiver “must be unequivocally expressed in statutory text.” *Lane*, 518 U.S. at 192. We note, however, that like the statute, this regulatory definition is ambiguous as to whether federal agencies fall within its ambit, because neither “person” nor “other association or organization in the United States” clearly includes federal agencies. See, e.g., *Vt. Agency of Natural Res. v. United States*, 529 U.S. 765, 780 (2000) (noting “longstanding interpretive presumption that ‘person’ does not include the sovereign”).

³ The lack of an explicit waiver in the H-1B statute contrasts sharply with other statutes expressly authorizing one federal agency to enforce the statute’s requirements against another federal agency. See, e.g., 42 U.S.C. § 2000e-16(b) (2000) (authorizing EEOC to enforce antidiscrimination provisions of Title VII against federal agencies in administrative proceedings, including through award of back pay); *id.* § 6903(15) (2000) (defining “person” to “include each department, agency, and instrumentality of the United States” for purposes of DOL’s administrative enforcement of whistleblower provisions of Solid Waste Disposal Act).

ly, we cannot regard this provision as an unequivocal waiver of sovereign immunity for the award of back pay.

DOL also points to a 1998 amendment to the INA prescribing special rules for an H-1B employer that is “an institution of higher education . . . or a related or affiliated nonprofit entity; or . . . a nonprofit research organization, or a Governmental research organization,” 8 U.S.C. § 1182(p)(1) (2000). With respect to institutions and organizations covered by this provision, “the prevailing wage level shall only take into account employees at such institutions and organizations in the area of employment.” *Id.* In addition, such employers are exempt from paying the H-1B filing fee, *id.* § 1184(c)(9)(A) (Supp. V 2005), and from the annual numerical limitations on H-1B visas, *id.* § 1184(g)(5). DOL reasons that Congress’s efforts to prescribe special rules for “Governmental research organizations” demonstrates an understanding that federal agencies as a class would be H-1B employers. The statute does not define the term “Governmental research organization,” however.⁴ Even assuming that this term includes certain federal government entities such as the National Institutes of Health, it could not be read unambiguously to waive sovereign immunity for all federal agencies under section 212(n)(2). The 1998 amendment demonstrates that Congress did address one way in which the prevailing wage requirement might impact universities, nonprofit organizations, and some government research entities.⁵ Congress spoke with no such clarity, however, as to whether federal agencies generally could be subject to administrative complaints and the award of monetary relief.

Finally, section 212(j)(2) of the INA permits an H-1B nonimmigrant who is a medical school graduate, but who has not fulfilled certain licensing requirements, to teach or conduct research for “a public or nonprofit private educational or research institution or agency in the United States.” 8 U.S.C. § 1182(j)(2) (2000). Once again, this phrase is ambiguous. An “educational or research institution or agency *in* the United States” does not clearly include federal agencies. Even if this phrase does signal that a federal agency may be an employer under the H-1B program, the phrase neither appears in the definition portion of the statute, nor in the remedial provisions. Insofar as a waiver of sovereign immunity “must be unequivocally expressed in statutory text . . . and will not be implied,” *Lane*, 518

⁴ DOL regulations define this term to mean “a United States Government entity whose primary mission is the performance or promotion of basic research and/or applied research.” 20 C.F.R. § 656.40(e)(1) (2007).

⁵ The legislative history of this provision indicates that Congress recognized a distinction between private entities and the nonprofit or government entities in question. The Senate Report on a bill containing an earlier version of this provision noted that it “separates the prevailing wage calculations between academic and research institutions and other nonprofit entities and those for for-profit businesses. . . . The bill establishes in statute that wages for employees at colleges, universities, nonprofit research institutes, and other nonprofit entities must be calculated separately from industry.” S. Rep. No. 105-186, at 29–30 (1998).

U.S. at 192, we cannot read this provision as an express waiver of sovereign immunity.

We agree with DOL that these provisions, taken together, suggest that Congress contemplated that certain federal entities may file applications as employers under the H-1B program, but we do not regard these suggestions as the unambiguous text required to subject the United States to liability for back pay judgments. The Supreme Court has demanded a “clear statement” of waiver so as to ensure that Congress directly considers the consequences of exposing the federal government to suit and potential financial liability. As the initial dispute between DOL and VA demonstrates, it is hardly clear that Congress gave such consideration in enacting the INA provisions governing the H-1B program. Indeed, the INA makes no provision for the potential conflict between the INA’s “prevailing wage” requirement and the pay scales established by the federal civil service laws. Nor did Congress address this conflict in 1998, when it created certain exceptions to the H-1B rules for educational and research entities, but made no express provision for federal agencies other than “Governmental research organizations.”

The present dispute between VA and DOL itself constitutes evidence that Congress did not directly consider the consequences of applying the H-1B program to federal employers, much less that it considered the consequences of waiving sovereign immunity and exposing the VA hospitals to financial liability. VA originally requested our advice as to whether it had the statutory authority to depart from civil service pay scales and pay a prevailing wage. The uncertainty over that question reflects the fact that in contrast to other federal laws, here, Congress did not clearly address the impact of the H-1B program on federal pay statutes. *See, e.g.*, 10 U.S.C. § 2164(e) (2000) (authorizing Secretary of Defense to appoint school staff “without regard to the provisions of any other law relating to the number, classification, or compensation of employees” based on consideration of compensation paid to comparable employees by local educational agencies in the State in which the military installation is located); 42 U.S.C. § 288-4(c)(3) (2000) (authorizing Director of National Institutes of Health to appoint certain individuals “without regard to the provisions of title 5 relating to appointment and compensation”). Congress’s silence on this issue demonstrates why a clear statement of a waiver is required and further supports the conclusion that the INA does not constitute an “unambiguous” waiver of sovereign immunity.

IV.

DOL requests that if we find that the administrative awards of back pay are barred by sovereign immunity, we nonetheless clarify that VA must comply with the prevailing wage requirements in future cases. We agree that VA should not file a labor condition application seeking DOL approval under the H-1B program unless VA is able, under its statutory pay authorities, to honor the prevailing wage requirements of that application. Although VA has no authority to pay an H-1B

employee compensation beyond what is authorized by its pay statutes, *see, e.g., Kizas v. Webster*, 707 F.2d 524, 535–37 (D.C. Cir. 1983), VA’s special pay authorities do appear to provide it with sufficient flexibility to enable the Department to pay the prevailing wage in many instances. Should VA determine that it underpaid employees wages to which they were entitled under the law, we agree with DOL that VA may correct that error to the extent that it could have paid the higher wage in the first instance. *See, e.g., 3 General Accounting Office, Principles of Federal Appropriations Law 12-5* (2d ed. 1994) (recognizing that an agency has authority to pay an employee money erroneously not paid). In the absence of a clear waiver of sovereign immunity, however, VA may neither be required to defend itself in an administrative proceeding nor compelled to pay back wages as a result of that administrative proceeding.⁶

Congress, of course, provided an additional mechanism for ensuring compliance with these requirements by granting DOL the authority to review labor condition applications in advance and to deny any that do not meet the statutory requirements. *Cf. In re Hunter Holmes McGuire Veterans Affairs Med. Ctr.*, No. 94-INA-00210, 1996 WL 616606, at *1 (Bd. Alien Labor Cert. App. Oct. 7, 1996) (affirming denial of labor certification where VA hospital was unable under federal law to offer prevailing wage to anesthesiologist; finding “that the labor certification regulations do not provide an exception, either express or implied, for a Federal wage schedule”). It is true that the statute permits DOL to review applications “only for completeness and obvious inaccuracies.” 8 U.S.C. § 1182(n). Still, an employer’s failure to list an acceptable source of prevailing wage data, as we understand occurred with respect to the applications submitted by some of the VA hospitals in question, would seem to fall within the scope of that review. Congress’s failure to waive sovereign immunity may limit DOL’s ability to enforce the H-1B requirements retrospectively, but DOL retains authority to ensure compliance at the front-end through its review of these applications before an alien may receive an H-1B visa.

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⁶ We note in this regard that sovereign immunity does not apply simply to awards of retrospective relief, such as back pay. Rather, sovereign immunity also would prevent a private party from bringing an administrative action against VA under the INA’s retaliation provision, 8 U.S.C. § 1182(n)(2)(C)(iv), or requiring VA to reinstate an employee after such a proceeding. *See, e.g., Dugan*, 372 U.S. at 620 (sovereign immunity bars an action against the United States “if the effect of the judgment would be to restrain the Government from acting, or to compel it to act”).

Office of Government Ethics Jurisdiction Over the Smithsonian Institution

The authority of the Office of Government Ethics to administer the Executive Branch ethics program under the Ethics in Government Act of 1978 and other statutes does not extend to the Smithsonian Institution or its personnel.

February 29, 2008

MEMORANDUM OPINION FOR THE DIRECTOR OFFICE OF GOVERNMENT ETHICS

The Ethics in Government Act of 1978 (“EIGA”), Pub. L. No. 95-521, 92 Stat. 1824 (codified as amended at 5 U.S.C. app., EIGA §§ 101–111, 401–408, 501–505 (2000 & Supp. V 2005)), established the Office of Government Ethics (“OGE”) and charged it with developing and implementing ethics policies for the Executive Branch. You have asked whether the Smithsonian Institution and its personnel (the “Smithsonian” or “Institution”) are subject to OGE’s authority to administer the Executive Branch ethics program.¹ We conclude that they are not.

I.

With limited exceptions not applicable here, OGE’s jurisdiction does not extend to an entity outside the Executive Branch. The text and structure of EIGA unmistakably support this conclusion.

EIGA clearly indicates that the Executive Branch is the focus of OGE’s jurisdiction. EIGA establishes a tripartite structure for the federal government’s ethics program that tracks the Constitution’s three-branch structure. Title I of EIGA, which governs financial disclosure requirements for federal officials and employees, creates a separate “supervising ethics office” for each of the three branches. It specifies that OGE is the “supervising ethics office . . . for all executive branch officers and employees,” 5 U.S.C. app., EIGA § 109(18), and authorizes its Director (along with certain agency officials) to administer financial disclosure requirements for Executive Branch officials and employees, *id.* § 111(1). EIGA provides that the ethics committees in the Senate and House of Representatives perform those functions for members of Congress, “officers and employees” of the two houses, and “employees of the legislative branch,” *id.* § 109(18)(A), (B); *id.* § 111(2); and the Judicial Conference does so “for judicial officers and judicial

¹ See Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Robert I. Cusick, Director, Office of Government Ethics (Apr. 26, 2007) (“OGE Letter”). We also have received the views of the Smithsonian Institution. See Letter for John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, from John E. Huerta, General Counsel, Smithsonian Institution (May 11, 2007) (“Smithsonian Letter”).

employees,” *id.* § 109(18)(C); *id.* § 111(3). Title V of EIGA, which imposes restrictions on outside sources of income or employment by high-level federal employees, distributes administrative and regulatory authority in the same manner; OGE is directed to issue rules and regulations to implement its provisions “with respect to officers and employees of the executive branch.” *Id.* § 503(2).

EIGA directs OGE to develop and implement ethics policies for the Executive Branch. Title IV of EIGA, which constitutes OGE’s “organic law,” OGE Letter at 2, authorizes OGE’s Director to “provide . . . overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency.” *Id.* § 402(a). The Director’s duties include, among other things, developing rules and regulations to address conflicts of interest and ethics in the Executive Branch, *id.* § 402(b)(1)–(2), monitoring Executive Branch compliance with financial disclosure and reporting requirements, *id.* § 402(b)(3)–(5), and ensuring that executive agencies develop and implement appropriate ethics rules, *id.* § 402(c)–(f).

Other authorities also direct OGE to oversee Executive Branch ethics programs. Sections 7351 and 7353 of title 5 of the United States Code authorize OGE to implement statutory restrictions on gifts to federal employees and gifts from federal employees to their superiors by issuing regulations “for all executive branch officers and employees.” 5 U.S.C. §§ 7351(c), 7353(b), (d) (2000 & Supp. V 2005). And the President has delegated OGE authority under 5 U.S.C. § 7301 (2000) to “prescribe regulations for the conduct of employees in the executive branch.” Exec. Order No. 12731, § 403, 3 C.F.R. 306, 310 (1990 Comp.). Thus, the authorities that created OGE and articulate its jurisdiction and responsibilities make clear that, with limited exceptions not implicated here, OGE supervises only entities and employees in the “executive branch.”²

The term “executive branch” is defined for purposes of title I of EIGA as follows:

For the purposes of this title, the term . . . “executive branch” includes each Executive agency (as defined in section 105 of title 5, United States Code), other than the Government Accountability Office, and any other entity or administrative unit in the executive branch

² Under 18 U.S.C. § 208(b)(2) and (d)(2) (2000), OGE is authorized to issue regulations exempting employees from a criminal conflict of interest statute that applies to “an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee.” *Id.* § 208(a). You have not asked us to consider any issues regarding the application of section 208 to the Smithsonian or the extent of OGE’s authority under that provision. See OGE Letter at 2 n.1.

5 U.S.C. app., EIGA § 109. OGE has adopted a similar definition in its regulations implementing title IV:

Executive branch includes each executive agency as defined in 5 U.S.C. 105 and any other entity or administrative unit in the executive branch. However, it does not include any agency, entity, office or commission that is defined by or referred to in 5 U.S.C. app. 109(8)–(11) of the Act as within the judicial or legislative branch.

5 C.F.R. § 2638.104 (2006); *see also* 5 U.S.C. app., EIGA § 109(8)–(11) (defining the terms “judicial employee,” “Judicial Conference,” “judicial officer,” and “legislative branch”). We see no reason to believe that Congress intended that the term would have another meaning under the other authorities providing OGE with jurisdiction over “executive branch” officers and employees. *See Enfield ex rel. Enfield v. A.B. Chance Co.*, 228 F.3d 1245, 1251 (10th Cir. 2000) (“It is a well recognized rule of statutory construction used to determine legislative intent that ordinarily identical words or terms used in different statutes on a specific subject are interpreted to have the same meaning in the absence of anything in the context to indicate that a different meaning was intended.”) (quotation marks omitted).

The definition of “executive branch” set forth in title I provides that the term “includes each Executive agency as defined in 5 U.S.C. 105.” Section 105’s definition is also referenced in title IV of the Act. *See* 5 U.S.C. app., EIGA § 402(a) (stating that the Director shall provide “overall direction of executive branch policies” related to preventing conflicts of interest on the part of “officers and employees of any executive agency, as defined in section 105 of title 5, United States Code”); *cf.* Exec. Order No. 12731, § 503(c), 3 C.F.R. at 310 (“Agency” means any executive agency as defined in 5 U.S.C. 105 . . .”).³ The clear focus of section 105 is on Executive Branch entities: “an Executive department, a Government corporation, and an independent establishment.” 5 U.S.C. § 105 (2000). All “Executive department[s]” are within the Executive Branch. *See* 5 U.S.C. § 101 (2006); *see also Haddon v. Walters*, 43 F.3d 1488, 1490 (D.C. Cir. 1995) (referencing the “exclusive list of Executive departments” in 5 U.S.C. § 101). Similarly, the term “independent establishment” is defined as “(1) an establishment in the executive branch,” and “(2) the Government Accountability Office.” 5 U.S.C. § 104 (2006). The definitions in both title I of EIGA and the regulations implementing title IV, however, explicitly exclude from their reach the Government Accountability Office, which is a Legislative Branch agency, *see Bowsher v. Synar*, 478 U.S. 714, 730–32 (1986). While the definition of “Government

³ The term “Executive agency” itself plainly suggests agencies within the Executive Branch. Although the term does encompass at least one agency in the Legislative Branch—the Government Accountability Office—it does so only by virtue of an explicit statutory provision, 5 U.S.C. § 104(2) (Supp. V 2005), that tends to underscore that GAO would not otherwise come within the scope of the term.

corporation” in 5 U.S.C. § 103 (2000) is not necessarily limited to Executive Branch entities, this Office has opined that the Smithsonian is not a “Government corporation” for purposes of a similar definition of “agency” under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(f)(1) (2000). Memorandum for Peter Powers, General Counsel, Smithsonian Institution, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Coverage of the Smithsonian Institution by Certain Federal Statutes* at 10 (Feb. 19, 1976) (“Ulman Memorandum”); *see also Status of National Veterans Business Development Corporation*, 28 Op. O.L.C. 70, 73 n.4 (2004) (explaining that “the understanding of [“Government corporation” and “Government controlled corporation”] reflected in the FOIA cases is . . . relevant” to the definition of those terms in 5 U.S.C. § 103); *Rivera v. Heyman*, 982 F. Supp. 932, 938 (S.D.N.Y. 1997) (holding that the Smithsonian is not a government corporation for purposes of 5 U.S.C. § 103), *rev’d in part on other grounds*, 157 F.3d 101 (2d Cir. 1998); *cf. Dong v. Smithsonian Inst.*, 125 F.3d 877, 879 (D.C. Cir. 1997) (stating that there is “much force” to the Smithsonian’s claim that it is not a “Government controlled corporation” but finding it unnecessary to resolve the issue).

Moreover, the phrase “executive agency as defined in 5 U.S.C. 105” in section 109 is followed by the catch-all phrase “*any other* entity or administrative unit in the executive branch,” confirming that Congress understood the term “Executive agency” to be within that category. The D.C. Circuit applied this principle, which it termed “reverse ejusdem generis,” in a similar context. Construing the definition of “agency” within the Privacy Act, 5 U.S.C. § 552a (2000 & Supp. V 2005)—“any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government,” *id.* § 552(f)(1) (2000)—the court held that the phrase applied only to establishments in the Executive Branch. *Dong*, 125 F.3d at 879–80. The court reasoned, “Congress evidently viewed the four specified classes as examples of ‘establishments in the executive branch,’ so that an entity clearly outside the executive branch would not qualify even if it could otherwise be shoehorned into the concept of a ‘Government controlled corporation.’” *Id.* at 879. This Office found that argument compelling in construing the same definition in the Ulman Memorandum, where we stated that the argument “lend[s] considerable credence to the contention that an authority must be within the Executive branch in order to be covered by” the Privacy Act. *Id.* at 4–5.

We therefore conclude that, with limited exceptions not applicable here, OGE’s jurisdiction does not extend to an entity outside the Executive Branch, regardless of whether that entity otherwise meets the definition of “executive agency” found in 5 U.S.C. § 105.

II.

The question thus becomes whether the Smithsonian is within the Executive Branch of the government for purposes of EIGA. We conclude that it is not.

This Office previously has described the Smithsonian Institution as a “very unusual entity,” a “historical and legal anomaly,” Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: S. 653, a [sic] Act to Establish a Foundation for the Advancement of Military Medicine* at 1 (May 23, 1983); that occupies an “anomalous position in the Government,” Memorandum for Drew S. Days, III, Assistant Attorney General, Civil Rights Division, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel at 2 (Mar. 20, 1978) (“*Status of GPO and Smithsonian*”); “*sui generis*,” *Garnishment of Remuneration Paid to Federal Employees*, 3 Op. O.L.C. 274, 277 (1979); and “unique unto its own terms,” Ulman Memorandum at 9; *accord* Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: President’s Removal Power over Certain Appointees* at 8 (Aug. 8, 1983) (“*President’s Removal Power*”). On occasion, we have suggested that the Smithsonian is a “congressional agenc[y]” that operates “in aid of the legislative process.” See *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 172 (1996) (stating that the Smithsonian “fit[s] under a broad construction of that concept”); *cf.* Ulman Memorandum at 5 (“[I]t could be argued that the Smithsonian is . . . an arm of the Congress itself . . .”). Others have classified it as a creature of the government of the District of Columbia. See, e.g., David P. Currie, *The Smithsonian*, 70 U. Chi. L. Rev. 65, 67–68 & n.14 (2003). Others have described the Smithsonian as “a private institution under the guardianship of the [federal] Government.” *The Status of the Smithsonian Institution under the Federal Property and Administrative Services Act*, 12 Op. O.L.C. 122, 123 (1988) (quoting Chief Justice Taft as Chancellor of the Smithsonian’s Board of Regents); see also Ulman Memorandum at 5 (“it could be argued that the Smithsonian is . . . a body entirely separate from the government of the United States utilized to fulfill trust obligations”); *Dong*, 125 F.3d at 879 (suggesting that the Smithsonian might accurately be classified as “a testamentary trust *res*”). We have advised that “[t]he unique nature of the Smithsonian counsels reluctance toward a sweeping declaration of the Smithsonian’s status within the federal government. The wiser course, which we and others have followed, is to focus upon the position of the Smithsonian within a precise statutory scheme.” *Status of the Smithsonian Institution*, 12 Op. O.L.C. at 123–24. We follow that course today.

The history of the Smithsonian suggests that Congress created the entity outside the Executive Branch. In 1836, Congress enacted legislation to accept the bequest of James Smithson, a wealthy English scholar and scientist, who bequeathed all his property to the United States to found “an Establishment for the increase and

diffusion of knowledge among men.” Smithsonian Letter at 3 (quoting Smithson will). See generally Act of July 1, 1836, ch. 252, 5 Stat. 64; *The Smithsonian Legacy to the United States*, 3 Op. Att’y Gen. 383 (1838). In 1846, Congress created the Institution as an “establishment” to “have perpetual succession,” see Act of Aug. 10, 1846, ch. 178, § 1, 9 Stat. 102, 102, created a Board of Regents to conduct the business of the Institution consistent with the terms of the Smithson will, *id.* § 3, 9 Stat. at 103, and provided that the funds would be held in the Treasury to support the Institution, *id.* § 2, 9 Stat. at 102.

It appears that Congress accepted the bequest and established the Institution under its constitutional power to legislate for the District of Columbia, see U.S. Const. art. I, § 8, cl. 17. 1 *The Smithsonian Institution: Documents Relative to Its Origin and History, 1835–1899*, at 396 (William J. Rhees ed., 1901) (“There was but one power in the Constitution under which this charity could be administered, and that was as a local legislature for the District of Columbia.”) (statement of Rep. Alexander D. Sims, Apr. 28, 1846); *id.* at 560 (“[T]he action of Congress in accepting the bequest, and agreeing to carry it into execution, was justified at the time on the ground of its peculiar and complete jurisdiction over the District of Columbia.”) (quoting House Committee Report, Mar. 3, 1855). It seems unlikely that Congress would have relied on this particular power—to act as a local legislature for the federal seat of government—if it had intended to establish the Smithsonian within the Executive Branch of the national government. At the time of the Smithsonian’s founding, many doubted that the Executive Branch had the constitutional authority to administer such a charitable trust. *Id.* at 130 (suggesting that the Executive lacked authority to “assum[e] and fulfill[] . . . the high and honorable duties involved in the performance of the trust committed with it”) (quoting report of House select committee, Jan. 19, 1836); see also *id.* at 471 (“The Smithsonian Institution is not a department of the Government”) (statement of Sen. Jefferson Davis) (Jan. 30, 1851); *Status of the Smithsonian Institution*, 12 Op. O.L.C. at 123 (quoting Chief Justice Taft’s statement, made as Chancellor of the Smithsonian’s Board of Regents, that “the Smithsonian Institution is not, and never had been considered a government bureau”).

Congress’s intent to establish the Smithsonian outside the Executive Branch is clear from its governing structure. The President appoints none of the Institution’s seventeen board members. Fifteen of its members are either members of Congress or congressional appointees; its remaining members are the Chief Justice and the Vice President. 20 U.S.C. §§ 42–43 (2000). As the D.C. Circuit has observed, “if the Smithsonian were to wield executive power, the method by which its Regents are appointed would appear to violate the Constitution’s separation of powers principles.” *Dong*, 125 F.3d at 879; Ulman Memorandum at 5 (“[I]f the Smithsonian were an ‘executive agency’ this mode of appointment might raise serious constitutional questions, in the sense that the Congress cannot appoint executive officers”). In addition, if the Board of Regents exercises a portion of the sovereign power of the United States, this manner of selection would violate the

Appointments Clause, which vests in the President alone the power to appoint “all . . . Officers of the United States” and does not permit Congress to appoint even “inferior Officers.” U.S. Const. art. II, § 2, cl. 2. It would also run afoul of the Incompatibility Clause, which forbids members of Congress from holding “any Office under the United States.” *Id.* art. I, § 6, cl. 2.

Moreover, the President exercises no control over the Smithsonian and has no power to remove its board members. *See Dong*, 125 F.3d at 879 (“[T]here is no evidence that the Secretary of the Smithsonian answers to the President . . .”); Ulman Memorandum at 5 (Smithsonian is “under no executive power of control or appointment whatever”). Instead, Congress presumably retains the ability to remove those members it appoints. *See generally President’s Removal Power* at 3 (“[T]he fundamental principle applicable in removal cases is that, absent contrary indications, the power to appoint implies the power to remove.”). Indeed, Congress did remove and replace a board member at least once in the Smithsonian’s history. *See* Act of Feb. 21, 1863, Pub. Res. No. 37-21, 12 Stat. 825 (removing and replacing a Board member for “giving aid and comfort to” the Confederacy). If the Smithsonian were in the Executive Branch, the President’s inability to supervise its operation through removal of its Board members, and Congress’s authority over the Institution, would implicate fundamental separation of powers principles. *Dong*, 125 F.3d at 879; *see generally Bowsher*, 478 U.S. at 726, 730.

Finally, structural and functional aspects of EIGA indicate that the Smithsonian is not part of the Executive Branch for purposes of the Act. As noted above, OGE is the supervising ethics office for the Executive Branch, while the Legislative and Judicial Branches have their own supervising ethics offices. Members of Congress and the Chief Justice fill seven of the positions on the Institution’s Board of Regents. If the Smithsonian fell within OGE’s jurisdiction, OGE would exercise authority over members of Congress and the Chief Justice in their capacity as Regents. Moreover, OGE’s ability to conduct its ethics programs under title IV of EIGA ultimately relies on the President’s authority to supervise the Executive Branch. OGE’s Director is required to monitor compliance with EIGA’s requirements and may order an agency or its employees under OGE’s jurisdiction to take corrective action when necessary. 5 U.S.C. app., EIGA § 402(b)(9). If the OGE Director concludes that an agency has not adequately investigated or dealt with an ethics violation, or if an agency head is himself the subject of an investigation, the Director is to report directly to the President. *Id.* § 402(f)(1)(B), (f)(2)(A)(ii)–(iv), (f)(3)(B). Those notification provisions would make little sense if applied to entities and persons, such as the Smithsonian and its board members, over which the President has no removal or disciplinary authority. *See* S. Rep. No. 100-392, at 16 (1988) (report on reauthorization of OGE) (“[I]n the final analysis, the OGE Director’s enforcement authority lies with his or her powers of persuasion *and ability to appeal to the President and the public.*”) (emphasis added).

While the Smithsonian's place in the taxonomy of government may not be entirely clear, it is certainly not within the Executive Branch for purposes of EIGA.⁴ See *Status of GPO and Smithsonian* at 2 ("The Smithsonian Institution is not within the Executive branch of the Government."); Ulman Memorandum at 5 ("It is readily apparent that the Smithsonian, . . . under no executive power of control or appointment whatever, is not within the Executive branch."). Therefore, we conclude that OGE's authority to administer the Executive Branch ethics program does not extend to the Smithsonian.

III.

Our conclusion that OGE does not supervise the Smithsonian under EIGA is consistent with longstanding practice. Before EIGA's passage, standards of ethical conduct for Executive Branch employees were governed by Executive Order 11222, 3 C.F.R. 130 (1965 Supp.). That order outlined rules relating to conflicts of interest, outside employment, receipt of gifts, and financial disclosure, to be administered by agency heads and the Civil Service Commission. The Institution first adopted standards of conduct in October 1961. Smithsonian Letter at 2. Shortly after issuance of the Executive Order, the Smithsonian issued revised standards "[p]ursuant to and in conformity with sections 201 through 209 of the United States Code, Executive Order 11222," and the regulations implementing the order, "set[ting] forth minimum standards of conduct" for Smithsonian employees. Smithsonian Institution Standards of Conduct, 31 Fed. Reg. 4512 (Mar. 17, 1966). Those regulations were published annually in the Code of Federal Regulations. See 36 C.F.R. pt. 500 (1966–1983).

Shortly after Congress enacted EIGA, the Smithsonian sought OGE's opinion about whether its board members and employees were subject to the financial disclosure requirements of EIGA. OGE concluded that, because the Smithsonian was not in the Executive Branch, EIGA's disclosure requirements for Executive Branch employees did not apply. Memorandum for Peter G. Powers, General Counsel, Smithsonian Institution, from Bernhardt K. Wruble, Director, Office of

⁴ We do not address whether the Smithsonian might be deemed part of the federal government or an executive agency for other statutory purposes. In a 1988 opinion, for example, this Office concluded that the Smithsonian was an "executive agency" for purposes of the Federal Property and Administrative Services Act ("Property Act"). *The Status of the Smithsonian Institution under the Federal Property and Administrative Services Act*, 12 Op. O.L.C. 122 (1988). That determination rested on the Property Act's particular legislative history. Section 201(c) of the Property Act, which granted authority to "any executive agency," replaced an earlier statute that had explicitly covered the Smithsonian. Because the legislative history of section 201(c) indicated that it was meant to "preserve all . . . existing authority," we concluded that the Smithsonian was included within its reach. *Id.* at 126 (quotation marks omitted). By contrast, there is no indication that the Executive Branch ethics program that existed before EIGA was meant to encompass the Smithsonian. See Exec. Order No. 11222, 3 C.F.R. 130 (1965 Supp.); see generally S. Rep. No. 95-170, at 28–31 (1977) (describing the ethics program that existed before EIGA).

Government Ethics, *Re: Ethics in Government Act of 1978* (Apr. 13, 1979). OGE informally reaffirmed that conclusion in 1990, *see* OGE Letter at 6, and continues to abide by it today. Thus, during the thirty years since enactment of EIGA, OGE has not asserted jurisdiction over the Smithsonian or its personnel. OGE has not sought—nor has the Smithsonian submitted—an annual ethics program report, as required of executive agencies under 5 U.S.C. app., EIGA § 402(e). Nor has the Smithsonian sought OGE’s guidance in resolving ethics questions. *See* OGE Letter at 6–7; Smithsonian Letter at 1.

Following the passage of EIGA, the Smithsonian continued to publish its own ethics regulations, which did not refer to OGE or EIGA. The Institution ceased to publish the regulations in 1984. The Smithsonian’s General Counsel explained:

The Smithsonian Institution is not a government agency as that term is traditionally used, but for a number of years the Standards of Conduct for Smithsonian employees . . . have been published in the format of government agency regulations as Part 500 . . . of Title 36 of the Code of Federal Regulations. Part 500 . . . [is] obsolete and [is] being removed from Title 36 of the Code of Federal Regulations. Henceforth, in keeping with the Institution’s status, current Standards of Conduct for Smithsonian employees . . . will be promulgated internally

49 Fed. Reg. 9171 (Mar. 12, 1984); *see also* Smithsonian Institution, *Smithsonian Directive 103, Smithsonian Institution Standards of Conduct* (Feb. 13, 2006) (current ethics standards).

Since then, Congress has amended EIGA and reauthorized OGE without modifying the definitions of “executive branch” or “executive agency,” and without taking other action to bring the Smithsonian within OGE’s jurisdiction. *See, e.g.*, An Act to Reauthorize the Office of Government Ethics, Pub. L. No. 100-598, 102 Stat. 3031 (1988); Office of Government Ethics Authorization Act of 1996, Pub. L. No. 104-179, 110 Stat. 1566; *see also* An Act to Amend the Ethics in Government Act of 1978, Pub. L. No. 98-150, 97 Stat. 959 (1983). Congress’s repeated decisions not to amend the scope of OGE’s jurisdiction provide further evidence that Congress did not intend for the Institution to be under the supervision of OGE. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . .”).

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Office of Legal Counsel

Whether the Department of Justice May Prosecute White House Officials for Contempt of Congress

The Department of Justice may not bring before a grand jury criminal contempt of Congress citations, or take any other prosecutorial action, with respect to current or former White House officials who declined to provide documents or testimony, or who declined to appear to testify, in response to subpoenas from a congressional committee, based on the President's assertion of executive privilege or the immunity of senior presidential advisers from compelled congressional testimony.

February 29, 2008

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked whether the Department of Justice ("Department" or "DOJ") may bring before a grand jury criminal contempt of Congress citations, or take any other prosecutorial action, with respect to current or former White House officials who declined to provide documents or testimony, or who declined to appear to testify, in response to subpoenas from a congressional committee, based on the President's assertion of executive privilege or the immunity of senior presidential advisers from compelled congressional testimony. We conclude it may not.

I.

The President has asserted executive privilege and directed that certain documents and related testimony not be provided in response to subpoenas issued to Joshua Bolten, the Chief of Staff to the President, and Harriet Miers, the former Counsel to the President, by the Committee on the Judiciary of the House of Representatives in connection with its inquiry into the decision of the Department of Justice to request the resignations of several United States Attorneys in 2006. The President also directed Ms. Miers to invoke her immunity as a senior presidential adviser from compelled congressional testimony and decline to appear in response to the subpoena from the Judiciary Committee. These directives were based on legal opinions from the Department advising that the assertions of privilege and immunity were legally proper. *See Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1 (2007) (addressing assertion of executive privilege); *Immunity of Former Counsel to the President From Compelled Congressional Testimony*, 31 Op. O.L.C. 191 (2007) ("*Immunity of Former Counsel to the President*").

Notwithstanding the President's directives asserting executive privilege and instructing Ms. Miers not to testify, the House of Representatives cited Mr. Bolten and Ms. Miers for contempt of Congress, and the Speaker of the House yesterday referred the contempt citations to the United States Attorney for the District of

Columbia for prosecution pursuant to the criminal contempt of Congress statute, 2 U.S.C. §§ 192, 194 (2000).¹ See Letter for Michael B. Mukasey, Attorney General, from Nancy Pelosi, Speaker of the House of Representatives (Feb. 28, 2008).

II.

The Department of Justice has long taken the position, during administrations of both political parties, that “the criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege.” *Application of 28 U.S.C. § 458 to Presidential Appointment of Federal Judges*, 19 Op. O.L.C. 350, 356 (1995) (“*Application of 28 U.S.C. § 458*”). In 1956, Deputy Attorney General (and later Attorney General) William Rogers presented to Congress a Department of Justice study that concluded that the criminal contempt of Congress statute was “inapplicable to the executive departments” where the President had asserted executive privilege. See *Availability of Information From Federal Departments and Agencies: Hearings Before a Subcommittee of the House Committee on Government Operations*, 84th Cong. 2891, 2933 (1956). Twenty years later, Assistant Attorney General for the Civil Division Rex Lee stated in testimony before the Subcommittee on the Separation of Powers of the Senate Judiciary Committee that if Congress cited an Executive Branch official for contempt of Congress because of an assertion of executive privilege and “the Department determined to its satisfaction that the claim was rightfully made, it would not, in the exercise of its prosecutorial discretion, present the matter to a grand jury.” *Representation of Congress and Congressional Interests in Court:*

¹ Sections 192 and 194 of title 2 of the U.S. Code provide, in relevant part:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers . . . willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

. . . .

Whenever a witness summoned as mentioned [above] fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House . . . a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House . . . to certify . . . the statement of facts aforesaid under the seal of the Senate or House . . . to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

Hearings Before the Subcomm. on Separation of Powers of the Senate Committee on the Judiciary, 94th Cong. 8 (1976).

The Department reaffirmed these principles in a detailed 1984 opinion prepared by Assistant Attorney General for the Office of Legal Counsel Theodore Olson. In that opinion, this Office explained that when an Executive Branch official complies in good faith with the President's assertion of executive privilege, "a United States Attorney is not required to refer a contempt citation . . . to a grand jury or otherwise to prosecute [the] Executive Branch official who is carrying out the President's instruction." *Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 102 (1984) ("*Prosecution for Contempt of Congress*"). Drawing upon the principles explained by Mr. Rogers and Mr. Lee, canons of statutory construction, and basic constitutional principles, we explained that at least two legal conclusions supported the Department's longstanding interpretation of the criminal contempt statute:

First, as a matter of statutory interpretation reinforced by compelling separation of powers considerations, we believe that Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred. Second, as a matter of statutory interpretation and the constitutional separation of powers, we believe that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege in this context.

Id.

During the Clinton Administration, the Department explicitly reiterated in a published opinion issued by Assistant Attorney General for the Office of Legal Counsel Walter Dellinger that the "criminal contempt of Congress statute does not apply to the President or presidential subordinates who assert executive privilege." *Application of 28 U.S.C. § 458*, 19 Op. O.L.C. at 356. To apply "the contempt statute against an assertion of executive privilege," Mr. Dellinger explained, "would seriously disrupt the balance between the President and Congress." *Id.*

Accordingly, based on this longstanding position, the refusal by Mr. Bolton and Ms. Miers to produce documents or testimony over which the President has asserted executive privilege did not constitute a crime, and therefore the Department may not pursue criminal contempt of Congress charges against them.

III.

We believe that the same reasoning necessarily applies to Ms. Miers' invocation of immunity from compelled congressional testimony. The principles that protect an Executive Branch official from prosecution for declining to comply with a congressional subpoena based on a directive from the President asserting executive privilege similarly shield a current or former senior adviser to the President from prosecution for lawfully invoking his or her immunity from compelled congressional testimony. Here, the President directed Ms. Miers to invoke her constitutional immunity, and the President's directive was based upon a legal opinion from the Department of Justice advising that such an invocation of immunity would be legally proper. *See Immunity of Former Counsel to the President*, 31 Op. O.L.C. at 192–93 (explaining Ms. Miers' immunity from compelled congressional testimony). In reaching the conclusion that a United States Attorney is not required to prosecute an Executive Branch official complying with the President's assertion of executive privilege, the Department reasoned that the separation of powers principles protected by executive privilege would be eviscerated if reliance on the privilege carried with it criminal liability:

Application of the criminal contempt statute to Presidential assertions of executive privilege would immeasurably burden the President's ability to assert the privilege and to carry out his constitutional functions. If the [criminal contempt] statute were construed to apply to Presidential assertions of privilege, the President would be in the untenable position of having to place a subordinate at the risk of a criminal conviction and possible jail sentence in order for the President to exercise a responsibility he found necessary to the performance of his constitutional duty. Even if the privilege were upheld, the executive official would be put to the risk and burden of a criminal trial in order to vindicate the President's assertion of his constitutional privilege.

Prosecution for Contempt of Congress, 8 Op. O.L.C. at 136.

In this respect, a senior presidential adviser's invocation of his or her immunity from compelled testimony is no different. Subjecting that adviser to prosecution for raising in good faith the President's separation of powers objection to a congressional subpoena would impermissibly undermine the President's constitutional authority. As Assistant Attorney General Olson's opinion analyzing this principle in the context of an assertion of executive privilege observed:

If the President is to preserve, protect, and defend the Constitution, if he is faithfully to execute the laws, there may come a time when it is necessary for him both to resist a congressional demand for documents and to refuse to prosecute those who assist him in the exercise

of his duty. To yield information that he in good conscience believes he must protect in order to perform his obligation, would abdicate the responsibilities of his office and deny his oath. To seek criminal punishment for those who have acted to aid the President's performance of his duty would be equally inconsistent with the Constitution.

Id. at 142. The prosecution of a senior presidential adviser who has lawfully invoked her constitutional immunity from compelled congressional testimony would likewise be inconsistent with the Constitution.

In sum, based on the longstanding Justice Department position discussed above, the non-compliance with the Judiciary Committee subpoenas by Mr. Bolten and Ms. Miers did not constitute a crime. Accordingly, the Department may not bring the criminal contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers for criminal contempt of Congress.

STEVEN G. BRADBURY

*Principal Deputy Assistant Attorney General
Office of Legal Counsel*

Promotions of Judge Advocates General Under Section 543 of the National Defense Authorization Act for Fiscal Year 2008

Section 543 of the National Defense Authorization Act for Fiscal Year 2008 does not automatically advance incumbent Judge Advocates General to a three star general officer grade, but rather such promotion requires a separate appointment by the President, by and with the advice and consent of the Senate.

The incumbent Judge Advocates General may continue to serve out their full terms in their present two star grades, though the President may nominate them for promotion to the higher grade at any time, if he so chooses.

April 14, 2008

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL DEPARTMENT OF DEFENSE

Section 543 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 114 (2008) (“NDAA”), amended sections 3037(a), 5148(b), and 8037(a) of title 10 of the United States Code to provide that each of the Judge Advocates General (“TJAGs”) of the Army, Navy, and Air Force has the grade of lieutenant general or vice admiral, depending on the service (in each case, a three star general officer grade), while serving as TJAG.¹ Before enactment of the NDAA, the TJAGs were required to hold officer grades of “not lower than” two stars while so serving, 10 U.S.C. §§ 3037(a), 5148(b), 8037(a) (2006), and each of the incumbent TJAGs is currently a two star officer. Your office has asked for our opinion whether section 543 automatically advances the incumbent TJAGs to the three star grade or whether such promotion requires separate appointment by the President, by and with the advice and consent of the Senate.²

¹ For example, with respect to the Navy TJAG, section 5148(b) of title 10, as amended by section 543 of the NDAA, now provides:

There is in the executive part of the Department of the Navy the Office of the Judge Advocate General of the Navy. The Judge Advocate General shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. He shall be appointed from judge advocates of the Navy or the Marine Corps who are members of the bar of a Federal court or the highest court of a State and who have had at least eight years of experience in legal duties as commissioned officers. *The Judge Advocate General, while so serving, has the grade of vice admiral or lieutenant general, as appropriate.*

10 U.S.C. § 5148(b) (as amended by the NDAA) (emphasized language added by section 543).

² Letter for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from William J. Haynes II, General Counsel, Department of Defense (Jan. 20, 2008).

The new language added by section 543 speaks in the present tense: “The Judge Advocate General, while so serving, *has* the grade of” a three star general officer (emphasis added). It might be suggested that this language—by specifying that each TJAG “has” the three star grade “while so serving” as TJAG—has the effect of automatically promoting the incumbent TJAGs to the higher, three star officer grade without any separate appointment. We believe, however, that this is not the better interpretation of the statute (and would raise significant constitutional issues). Rather, we believe that section 543 is best read to preserve the traditional understanding, consistent with similar provisions throughout title 10 and the settled treatment of grade promotions as appointments to constitutional offices, that TJAG promotions to the higher specified officer grade will occur through separate appointments by the President, by and with the advice and consent of the Senate. Under this reading, the effect of section 543 is to provide that, whereas under the prior statute the President had discretion to appoint TJAGs to an officer grade of two stars or higher, now when the President nominates and appoints officers to TJAG positions, he must also nominate and appoint them to the specified three star grade. We do not believe that section 543 can reasonably be read to terminate the current terms of the incumbent two star TJAGs or (what would be similarly problematic) to require that the President nominate the incumbent TJAGs for promotion to three star grade before the end of their current terms—though the President, of course, may choose to do so.

Commissioned military officers are “Officers of the United States” for purposes of the Appointments Clause of the Constitution, *see Weiss v. United States*, 510 U.S. 163, 170 (1994); *Shoemaker v. United States*, 147 U.S. 282, 301 (1893), and each promotion of a military officer from one grade level to the next is considered a separate appointment to a new office, *see Dysart v. United States*, 369 F.3d 1303, 1306 (Fed. Cir. 2004) (permanent grade promotion); *D’Arco v. United States*, 441 F.2d 1173 (Ct. Cl. 1971) (en banc) (temporary grade promotion). “Promotion . . . is as much or as little within the President’s constitutional power of appointment as an original appointment, and is subject . . . to the same considerations.” *Issuance of Commission in Name of Deceased Army Officer*, 29 Op. Att’y Gen. 254, 256 (1911); *accord Promotion of Marine Officer*, 41 Op. Att’y Gen. 291, 292 (1956) (considering the constitutionality of restrictions on the President’s authority temporarily to promote a commissioned officer by recess appointment).

Accordingly, the promotion of a military officer to a higher grade (like any appointment to a new office in the Executive Branch) requires appointment by the President, by and with the advice and consent of the Senate, unless Congress, with respect to “inferior Officers,” has vested the appointment power in “the President alone, in the Courts of Law, or in the Heads of Departments,” U.S. Const. art. II, § 2, cl. 2, or unless the President appoints an officer pursuant to the requirements of the Recess Appointments Clause, *id.* art. II, § 2, cl. 3. Traditionally, each promotion of a senior military officer has been done by such a procedure—

presidential appointment with Senate confirmation (or, on occasion, recess appointment pursuant to the Constitution)—whether or not the promotion is carried out pursuant to specific statutory authority. See *Promotion of Marine Officer*, 41 Op. Att’y Gen. at 291–92; see also *Promotion of Army Officers*, 30 Op. Att’y Gen. 177, 179 (1913) (“The provisions of the Constitution, therefore, operate directly upon this [grade promotion], and, without the intervention of Congress, obliges the President to nominate, and by and with the advice and consent of the Senate, to appoint thereto.”); *Issuance of Commission in Name of Deceased Army Officer*, 29 Op. Att’y Gen. at 256 (“Promotion in the Army is . . . an *appointment* to a higher office therein; and this fact is illustrated and confirmed by the long established practice of submitting nominations for promotion in the Army to the Senate for confirmation and of thereafter issuing a commission for the higher office.”).

This traditional approach to the appointment of military officers and their promotion to higher officer grades is reflected throughout title 10. Section 601, for example, authorizes the President to designate particular positions of importance and responsibility within the services to carry senior officer grades of three or four stars (lieutenant general/vice admiral or general/admiral, respectively), and provides that “[a]n officer assigned to any such position has the grade specified for that position if he is appointed to that grade by the President, by and with the advice and consent of the Senate.” 10 U.S.C. § 601(a) (2000). The express distinction in section 601 between the “assign[ment]” to the “position” in question and the “appoint[ment]” to the specified officer “grade” associated with that position reflects the traditional understanding that the officer’s assignment or appointment to a specific military position is distinct from his appointment to the higher grade associated with that position. See, e.g., 152 Cong. Rec. 4640 (2006) (reporting nominations received March 30, 2006) (nomination of Lt. Gen. Michael D. Rochelle “for appointment in the United States Army to the grade indicated while assigned to a position of importance and responsibility under title 10, U.S.C., section 601”). Similarly, section 624, which provides for the promotion of officers recommended for promotion by selection boards convened under section 611, makes it clear that such promotions are “[a]ppointments” and specifies that “[a]ppointments under this section shall be made by the President, by and with the advice and consent of the Senate, except that appointments under this section in the grade of first lieutenant or captain, in the case of officers of the Army, Air Force, or Marine Corps, or lieutenant (junior grade) or lieutenant, in the case of officers of the Navy, shall be made by the President alone.” *Id.* § 624(c).

Several provisions of title 10 that establish particular positions for military officers have for decades specified the officer grade associated with the position using language essentially identical to section 543’s, and the promotions to these officer grades have long been made through separate appointments by the President, by and with the advice and consent of the Senate. For example, section 152, establishing the position of Chairman of the Joint Chiefs of Staff, provides

that “[t]he Chairman, *while so serving, holds* the grade of general or, in the case of an officer of the Navy, admiral.” *Id.* § 152(c) (emphasis added). Although section 152 specifically provides for appointment to the position of Chairman of the Joint Chiefs (by the President with Senate confirmation), *id.* § 152(a), nominations for appointment to this position have also traditionally included separate nominations for the officer grade associated with the position. *See, e.g.*, 153 Cong. Rec. 17,916 (2007) (reporting nominations received June 28, 2007) (nomination of Adm. Michael G. Mullen “for appointment as the Chairman of the Joint Chiefs of Staff *and appointment to the grade indicated* [admiral] while assigned to a position of importance and responsibility under title 10, U.S.C., sections 152 and 601 [Chairman of the Joint Chiefs]”) (emphasis added). The same is true for the position of Vice Chairman of the Joint Chiefs. *See* 10 U.S.C. §§ 154(a) (appointment to position of Vice Chairman by the President with Senate confirmation), 154(f) (Vice Chairman, “while so serving, holds the grade of general,” etc.); *see, e.g.*, 153 Cong. Rec. 17,916, 17,916–17 (2007) (reporting nominations received June 28, 2007) (nomination of Gen. James E. Cartwright “for appointment as the Vice Chairman of the Joint Chiefs of Staff *and appointment to the grade indicated* while assigned to a position of importance and responsibility under title 10, U.S.C., sections 601 and 154”) (emphasis added). It is also true for a number of other positions in the military service. *See, e.g.*, 10 U.S.C. §§ 3036(b) (2000) (providing for appointment of several officers, including Surgeon General of the Army, by the President with Senate confirmation), 3036(b)(2) (specifying that the Surgeon General, “*while so serving, has the grade of lieutenant general*”) (emphasis added); 153 Cong. Rec. 27,258, 27,260 (2007) (reporting nominations received on Oct. 16, 2007) (nomination of Maj. Gen. Eric Schoomaker “for appointment as the Surgeon General, United States Army, *and appointment to the grade indicated* while assigned to a position of importance and responsibility under title 10, U.S.C., sections 601 and 3036”) (emphasis added).

Indeed, with respect to the appointment of the incumbent Air Force TJAG, essentially the same practice was followed under the previous TJAG appointment provision, which, before enactment of section 543, provided that “[t]he Judge Advocate General, while so serving, *shall hold* a grade not lower than [a two star grade].” *E.g.*, 10 U.S.C. § 8037(a) (2006) (Air Force TJAG) (emphasis added). *See, e.g.*, 152 Cong. Rec. 2064, 2065 (2006) (reporting nominations confirmed on Feb. 16, 2006) (nomination of Maj. Gen. Jack L. Rives “for appointment in the regular Air Force of the United States to the position *and grade indicated* under title 10, U.S.C., section 8037”) (emphasis added).³ Although the phrase “shall hold” might in some sense be even more imperative than the current “has” with respect to the grade specification for TJAG positions, still a distinction was made,

³ Major General Rives held the permanent grade of major general at the time of his appointment to the office of TJAG and to the grade of major general while serving in that office.

for appointment purposes, between the TJAG position itself and the associated grade.

We recognize that TJAG positions might not be designated as positions “of importance and responsibility” under section 601 and that TJAGs might not always be selected for promotion by selection boards convened under section 611, *see, e.g.*, 10 U.S.C. § 3037(d) (2000) (providing that in selecting an officer for recommendation as Army TJAG, the Secretary of the Army is to propose an officer recommended for promotion by a board of officers that, “insofar as practicable,” is subject to the procedures applicable to selection boards under section 611). Therefore, the appointment of TJAGs to a higher officer grade will not necessarily rest on the separate statutory authority of section 601 (as do grade promotions of officers serving in positions designated as positions of importance and responsibility) or section 624 (as do grade promotions of officers recommended for promotion by selection boards). To the extent TJAGs are selected for promotion by selection boards convened under section 611, section 624 would govern their promotions to the three star grade, and it, like section 601, provides for grade promotion by appointment of the President, by and with the advice and consent of the Senate. *Id.* § 624(c). If, however, there is no applicable statute specifically providing for the appointment to the separate office of the higher officer grade, the Appointments Clause of the Constitution supplies all needed authority, and its default rule specifies appointment by the President, by and with the advice and consent of the Senate. *Promotion of Army Officers*, 30 Op. Att’y Gen. at 179; *see* U.S. Const. art. II, § 2, cl. 2.

We assume that Congress was aware when it enacted section 543 of the NDAA of the established understanding that grade promotions require distinct appointments and the traditional appointment practice under similar provisions of title 10. *See Comm’r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993); *Lorillard v. Pons*, 434 U.S. 575, 580–81 (1978). Because the amended TJAG grade specification provisions track closely the corresponding language used for a number of the other military positions discussed above, we believe that section 543 is best read, consistent with the related provisions of title 10, to preserve the traditional understanding and settled practice with respect to such promotions for TJAGs. Nothing in the legislative history of the NDAA suggests Congress’s intent to do otherwise. Moreover, interpreting section 543 to dispense with the appointment process and provide for grade promotions by operation of law would raise significant constitutional concerns because Congress may not appoint an officer to a constitutional office. *See Shoemaker*, 147 U.S. at 300–01 (“[W]hile Congress may create an office, it cannot appoint the officer.”); *Dysart*, 369 F.3d at 1314 (construing section 624 of title 10 not to provide for promotions by operation of law because such a reading would conflict with the Constitution). Accordingly, we

conclude that the TJAG grade promotion provisions, as amended by section 543, contemplate separate appointment of TJAGs to the higher specified officer grade.⁴

We believe the incumbent TJAGs may continue to serve out their full terms in the two star grade, though the President may, of course, nominate them for promotion to the higher grade at any time, if he so chooses. Applying the new grade specification to the incumbents could be deemed to remove them from office before the end of their current terms because they do not hold the three star grade now specified for their positions. That result is certainly not demanded by the language of section 543, finds no support in its legislative history, and should be avoided because it is well established that Congress may not remove an executive officer from office other than by impeachment (unless the office itself is legitimately abolished). See *Myers v. United States*, 272 U.S. 52, 122 (1926); *Bowsher v. Synar*, 478 U.S. 714, 723 (1986). Similarly, we believe the amended statutes are not reasonably read to require the President to submit nominations for grade increases for the current TJAGs in mid-term. Again, neither the statute's text nor its legislative history requires that result. Usually, we construe appointment statutes to apply prospectively (here to any new appointment of an officer to a term as TJAG made after enactment of the statute). See, e.g., *Applicability of Appointment Provisions of the Anti-Drug Abuse Act of 1988 to Incumbent Officeholders*, 12 Op. O.L.C. 286, 288 (1988). In any event, as noted, if the statute were read to require the President to nominate particular individuals for appointment to particular military offices, like the specified higher officer grade, such an interpretation would raise significant constitutional concerns, as the President must retain sufficient discretion in selecting nominees for Executive Branch offices. See *Issuance of Commission in Name of Deceased Officer*, 29 Op. Att'y Gen. at 256 ("Congress may point out the general class of individuals from which an appointment must be made, if made at all, but it cannot control the President's discretion to the extent of compelling him to commission a designated individual."); *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring) (the Appointments Clause gives "[n]o role whatsoever . . . either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment").

In sum, we conclude that sections 3037(a), 5148(b), and 8037(a) of title 10, as amended by section 543 of the NDAA, continue to contemplate separate appointment by the President, by and with the advice and consent of the Senate, for TJAG promotions to the higher officer grade. This interpretation is consistent with the

⁴ That Congress has sometimes used more explicit language to require separate appointment to a specified grade, such as for the appointment of the Assistant TJAG of the Army to a permanent two star grade, see 10 U.S.C. § 3037(a) (2000) ("An officer appointed as Assistant Judge Advocate General [of the Army] who holds a lower regular grade shall be appointed in the regular grade of major general."), does not negate the settled understanding of the "while so serving" grade provisions that apply to the TJAGs and various other officer positions in title 10.

traditional understanding that each military officer grade is a separate office and each promotion of a senior military officer to a higher officer grade is made by presidential appointment, by and with the advice and consent of the Senate. It is also consistent with prior TJAG appointment procedures and with related provisions of title 10 providing for the appointment and promotion of military officers in various grades and positions. The nomination and appointment of a TJAG to the higher three star officer grade may be done simultaneously with the nomination and appointment of the officer to the TJAG position itself. The President is not required by section 543 to nominate the incumbent TJAGs to the three star grade before their current terms end but is free to do so at any time.

STEVEN G. BRADBURY

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Validity of the Food, Conservation, and Energy Act of 2008

Where a title in the version of the Food, Conservation, and Energy Act of 2008 passed by both houses of Congress was inadvertently omitted from the enrolled bill that was presented to and vetoed by the President, the version of the bill presented to the President became law upon Congress's successful override of the President's veto.

May 23, 2008

MEMORANDUM OPINION FOR THE GENERAL COUNSEL OFFICE OF MANAGEMENT AND BUDGET

You have asked whether the Food, Conservation, and Energy Act of 2008, H.R. 2419, has legal effect notwithstanding a significant discrepancy between the version of the bill passed by both houses of Congress and the enrolled bill presented to the President. We understand that a title III was included in the version of the bill passed by both houses of Congress but was inadvertently omitted from the enrolled bill that was attested to by the Speaker of the House and the President pro tempore of the Senate and presented to the President. The President vetoed the bill that was presented to him, and both houses of Congress then voted successfully to override the President's veto. We conclude that the bill as presented to the President (i.e., not including title III) has now become law.

That conclusion finds substantial support in the case law as well as Executive Branch practice. The Supreme Court has long held that a statute is not invalid merely because there is a difference between the text, as contained in the enrolled bill signed by the presiding officers of the respective houses of Congress and approved by the President, and the text passed by Congress as shown by its official records. In *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), importers protesting duties imposed by the Tariff Act of 1890 argued that the Tariff Act was not good law because documentary evidence showed that a part of the bill passed by both houses of Congress was missing from the enrolled bill presented to and signed by the President. *Id.* at 668–69. The Court rejected that argument and held that attestations of “the two houses, through their presiding officers” should be deemed “conclusive evidence that [a bill] was passed by Congress.” *Id.* at 672–73. Recent cases confirm that *Marshall Field* remains good law. *See, e.g., Pub. Citizen v. U.S. Dist. Ct. for D.C.*, 486 F.3d 1342 (D.C. Cir. 2007) (enrolled bill rule of *Marshall Field* precluded inquiry into whether Deficit Reduction Act of 2005 satisfied bicameralism and presentment requirements of Constitution); *OneSimpleLoan v. Sec’y of Educ.*, 496 F.3d 197, 198 (2d Cir. 2007) (“court may not look beyond the version of the bill authenticated by the signatures of the presiding officers of the House of Representatives and Senate”).

This Office adheres to the rule in *Marshall Field*. In 1986, OMB asked for our view on the validity of an appropriations bill when it was discovered that the enrolled bill signed by the President omitted several sections that were passed by both houses but dropped as a result of clerical error during the enrolling process.

We advised that the omitted portions were not law but that the signed bill, excluding the omitted provisions, had become law under the rule set out in *Marshall Field*. See Memorandum for the Files, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Omission of Section from Enrolled Continuing Resolution* at 3 (Nov. 13, 1986) (“Kmiec Memorandum”). We believe that *Marshall Field* and our prior analysis are fully applicable here, where the President has vetoed the enrolled bill that was presented to him and both houses of Congress have voted by the requisite two-thirds majorities to override the President’s veto of the enrolled bill. The Constitution provides that if the President has vetoed an enrolled bill by returning “it” with his objections to the house in which “it” originated, that house may “reconsider it”; if after reconsideration, that house votes by a two-thirds majority to “pass the Bill,” “it” shall be sent to the other house, and if the second house also approves it by a two-thirds majority vote, “it” shall become law. U.S. Const. art. I, § 7, cl. 2. In each case, we take the “it” or the “Bill” to refer to the enrolled bill as it was presented to the President. That interpretation gives full effect to the official enrolling process of the Congress and maintains consistency between the President’s consideration of the enrolled bill, as presented to him, and the House and Senate’s consideration of the President’s veto decision and each house’s determination whether to override that decision. It also maintains consistency with the principle laid down in the *Marshall Field* case.

Thus, it is the enrolled version of the bill presented to the President that becomes law either by the President’s signature or by successful congressional override of the President’s veto. See Kmiec Memorandum at 3 (“it is clear from *Field v. Clark* that the Continuing Resolution signed by the President . . . remains valid,” and that “the omitted portions are not deemed to be part of the signed bill”) (emphasis added); *Pub. Citizen*, 486 F.3d at 1349–50. That view is consistent with Executive Branch and congressional practice. See Statement by President Ronald W. Reagan upon Signing H.J. Res. 738, 22 *Weekly Comp. Pres. Doc.* 1496, 1496 (Oct. 30, 1986) (“The provisions I signed into law . . . remain the law of the land. The Supreme Court has held that transmission errors of this sort do not in any way vitiate the legal effect of a President’s signature. Accordingly, that which was signed became law.”); Valerie Heitshusen, Cong. Research Serv., *Enrollment of Legislation: Relevant Congressional Procedures*, RL 34480, at CRS-6 (May 7, 2008) (in rare instances where there is a discrepancy between the enrolled bill and the versions passed by both houses, the “enacted” version is the “enrolled” text).

For these reasons, we conclude that the text of the enrolled bill presented to the President became law upon Congress’s successful override of the President’s veto, and the Executive Branch may lawfully make the expenditures authorized therein.

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

Authority of the Environmental Protection Agency to Hold Employees Liable for Negligent Loss, Damage, or Destruction of Government Personal Property

The Environmental Protection Agency may hold its employees liable for the negligent loss, damage, or destruction of government personal property or for the unauthorized personal use of agency-issued cell phones.

May 28, 2008

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL ENVIRONMENTAL PROTECTION AGENCY

You have asked whether the Environmental Protection Agency (“EPA”) may hold its employees liable for the negligent loss, damage, or destruction of government personal property or for the unauthorized personal use of agency-issued cell phones. We conclude that it may.

I.

EPA’s policy on the treatment of government personal property is contained in the agency’s Personal Property Policy & Procedures Manual (“Property Manual”), available to employees on the agency Intranet. The Property Manual constitutes the “authoritative reference for EPA’s management of personal property.” *Id.* at ES-1. Describing itself as a “supplement” to existing federal law and regulations, the Property Manual “provid[es] basic policy and procedures governing the personal property management of EPA.” *Id.* at ES-1 to ES-2. Pursuant to the Property Manual, EPA employees are responsible for “properly caring for, handling, utilizing, and being accountable for EPA personal property assigned for their use within or away from an EPA facility,” as well as for “ensuring that personal property in their possession, custody or control is used only for official authorized duties (except as allowed per EPA Order 2100.3, ‘Policy on Limited Personal Use of Government Office Equipment.’)” *Id.* § 1.3.4.

EPA’s Property Manual expressly provides that employees may be held liable for any government property in their care that is lost, damaged, or destroyed through their negligence. The Property Manual both notifies employees of their duty of care and requires them to acknowledge that responsibility by completing certain forms before taking custody of EPA property. One form requires employees receiving personal property, like laptops and cell phones, to “accept responsibility for the equipment,” to agree to “exercise reasonable care in protecting it,” and to accept that they “may be required to reimburse EPA for part or all of the acquisition cost” in case the property is lost, damaged, or destroyed due to negligence. EPA Form 1740-22 (“Personal Property Custody Card”); *see also*

Property Manual § 2.1.3 (describing the purpose of EPA Form 1740-22). Another form requires employees transporting property outside EPA facilities to sign a notice that they will be “personally responsible” for the property and “if the property has been lost, damaged, or destroyed because of [their] negligence, a Board of Survey may find [them] at fault.” EPA Form 1700-9 (“Property Pass”); *see also* Property Manual § 2.2.1 (discussing the use of short- and long-term property passes for taking EPA personal property offsite). A third form requires employees transferring EPA personal property to other areas to accept that they are “personally responsible for [its] return in the condition in which received, normal wear and tear excepted . . . [and if] because of [their] negligence, the property has been lost, damaged or destroyed, EPA is hereby authorized to withhold any salary due [the employees] until full restitution is made.” EPA Form 1740-10 (“Property Action Request and Memorandum Receipt”); *see also* Property Manual § 2.4.1 (describing the purpose of EPA Form 1740-10).

EPA provides its policy governing the appropriate use of cell phones in an administrative order entitled “Policy on Limited Personal Use of Government Office Equipment,” which is available to employees on the agency Intranet. EPA Order 2100.3 A1 (2004). The order sets the parameters of authorized use (allowing limited personal use during non-work time where such use causes “minimal additional expense to the Government” and does not “reduce . . . productivity”) and states that “[u]nauthorized or inappropriate use of Government office equipment may result in [adverse consequences, including] . . . financial liability, depending on the severity and nature of the misuse.” *Id.*

EPA’s Property Manual sets forth specific administrative procedures for reviewing claims that employees should be held liable for the loss, damage, or destruction of agency property (referred to in the Manual as “LDD”). Under these procedures, a Board of Survey, composed of three to five EPA employees appointed for three-year terms, “serves as a fact-finding body charged with determining the circumstances and conditions of each case in which EPA property is declared LDD.” Property Manual § 1.3.2. The Board “must ensure that facts are fully disclosed, government interests are fully served, and the rights of the employee(s) involved are fully protected.” *Id.* § 3.8.4. The Board must consider the available evidence, including a custodial report “describing the circumstances of the LDD,” *id.* § 3.8.2, and must interview the “employee(s) assigned responsibility for the property and/or their supervisor,” *id.* § 3.8.4. Following such consideration, the Board must issue “comprehensive” written findings and recommendations, including a determination of whether the employees were “at fault” for the loss, damage, or destruction. *Id.* § 3.8.6. The Board’s findings and recommendations then must be reviewed by a senior-level EPA official (“Program/Regional leadership”), *id.* § 3.8.7, and if the senior official disagrees, a specified agency property officer must act as an advisor to “facilitate resolution of the case between all parties,” *id.*

II.

Federal departments and agencies may appeal to several sources of authority to promulgate rules concerning their employees' care for government property. Most directly, 5 U.S.C. § 301 provides the heads of "Executive departments" with a general "housekeeping" authority to prescribe rules for the conduct of their department's employees and "the custody, use, and preservation of its records, papers, and property." Although EPA is not an "Executive department" within the meaning of section 301, *see* 5 U.S.C. § 101 (2006) (defining "Executive departments"), we conclude that the Administrator of the EPA has the same "housekeeping" authority under EPA's organic statute.

Under 5 U.S.C. § 301, "[t]he head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301 (2006). Commonly referred to as a "housekeeping statute," section 301 gives "authority to [an] agency to regulate its own affairs." *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979). "[T]he antecedents of 5 U.S.C. § 301 go back to the beginning of the Republic, when statutes were enacted to give heads of early Government departments authority to govern internal departmental affairs." *Id.* at 301. This Office has interpreted section 301 to allow agencies not only to set rules for employee conduct while on the job, but also to regulate employee conduct outside the workplace that "may undermine the efficient operation of the Department or the effectiveness of employees in the performance of their duties." *Authority to Prescribe Regulations Limiting the Partisan Political Activities of the Commissioned Officer Corps in the National Oceanic and Atmospheric Administration*, 28 Op. O.L.C. 102, 104 (2004) ("*Authority to Prescribe Regulations*").

If section 301 applied to the EPA, we would have no difficulty concluding that it would confer authority to "prescribe regulations" setting standards of care for employee use of government property and to impose liability for breaches of those standards. The Property Manual and EPA Order 2100.3 regulate both the "custody, use, and preservation of . . . [EPA] property" and "the conduct of its employees." 5 U.S.C. § 301. These rules thus concern "internal departmental affairs," *Chrysler*, 441 U.S. at 301, and would constitute a proper exercise of "administrative power" pursuant to the statute, *United States v. George*, 228 U.S. 14, 20 (1913), which includes the authority to establish penalties for violations of agency regulations, *see Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 372, 376 (1973) (holding that an agency's authority to regulate certain conduct included the authority to impose penalties, such as a civil fine, for violating agency regulations). For this reason, several departments and agencies have cited section 301

expressly as a source of authority for rules subjecting employees to liability for losses due to violations of internal personnel and property rules.¹

The difficulty here, however, is that section 301 confers regulatory authority only on the “heads of Executive departments and military departments,” and not the heads of other executive agencies, such as EPA. 5 U.S.C. § 301; *see also* 5 U.S.C. § 101; *Authority of the Office of Government Ethics to Issue Touhy Regulations*, 25 Op. O.L.C. 13, 15 (2001) (recognizing that section 301 authority is limited to the listed departments). In considering whether the EPA Administrator may exercise housekeeping authority equivalent to that under section 301, we must consider whether such authority has been conferred under EPA’s organic statute.

The Reorganization Plan establishing the EPA vests the Administrator with authority equivalent in many respects to that enjoyed by the head of an executive department. Reorganization Plan No. 3 of 1970, § 1(b), 84 Stat. 2086, 2086 (July 9, 1970) (codified at 5 U.S.C. app. 189 (2006)).² The Reorganization Plan, which names the Administrator the “head of the agency,” *id.*, transfers to the Administrator functions previously vested by law in the heads of other executive departments, including functions of the Secretary of the Interior and the Secretary of Health, Education, and Welfare. *Id.* § 2(a)(1)–(4). The Administrator’s authority is not limited to those designated functions but also includes “[s]o much of the functions of the transferor officers and agencies” that are “incidental to or

¹ *See, e.g.*, Dep’t of Justice, Order 2400.3 (Aug. 6, 1998) (citing section 301 as legal authority for its policy providing that “[a]ll employees . . . [s]hall be liable for violation of their [property management] responsibilities when they result in losses to the Government through gross negligence”); Bureau of Land Management Manual § 1520 (providing that “[e]mployees may be held financially liable for loss, damage, destruction, or theft of property items” and citing 5 U.S.C. § 301 for authority) (available at www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.53408.File.dat/1520.pdf, last visited ca. 2008); National Aeronautics and Space Administration, Policy Directive 2540.1F, § 1.g (May 25, 2005) (“Unauthorized or improper use of Government office equipment could result in . . . criminal penalties, and/or employees/contractors being held financially liable for the cost of improper use.”) (invoking 5 U.S.C. § 301) (available at <http://code210.gsfc.nasa.gov/NPD2540001F.pdf>, last visited Aug. 12, 2014). Other agencies have adopted similar rules without expressly citing 5 U.S.C. § 301. *See* U.S. Agency for International Development (“USAID”), *ADS Chapter 518—Personal Property Management (Domestic)* (revised May 5, 2007) (available at www.usaid.gov/policy/ads/500/518.pdf, last visited ca. 2008); Dep’t of the Interior, Interior Property Management Directive 114-60.808-1 (available at www.doi.gov/pam/114-60-8.html, last visited ca. 2008) (stating that “employees *will* be held financially liable when a thorough investigation determines . . . [t]hat the property loss was a result of [misuse] . . . or ordinary neglect or negligence”) (emphasis in original); U.S. Forest Service Manual § 6500.2 (clarifying that “[i]ndividuals are liable to the Government . . . [i]f [t]he Government suffers a pecuniary loss due to their willful or unauthorized acts”); U.S. Fish & Wildlife Service Manual, 310 FW 1 (June 13, 1996) (available at www.fws.gov/policy/310fw1.html, last visited ca. 2008) (“Employees who have been determined by a Board of Survey to be negligent in the use of such property may be held personally liable to make financial restitution to the Government for any incurred loss”).

² Reorganization Plan No. 3 was transmitted to Congress on July 9, 1970, and became effective on December 2, 1970, pursuant to chapter 9 of title 5, 5 U.S.C. §§ 901 *et seq.*

Authority of EPA to Hold Employees Liable for Loss or Damage of Property

necessary for . . . the performance of,” or “primarily related to,” such functions. *Id.* § 2(a)(9). This ancillary authority includes “authority, provided by law, to prescribe regulations relating primarily to the transferred functions.” *Id.* At the time of the Reorganization Plan, such ancillary authority included the housekeeping authority conferred by 5 U.S.C. § 301 on the heads of those departments to enable their subordinates to carry out efficiently the statutory functions transferred to the Administrator of EPA. *See* 5 U.S.C. § 301 (Supp. II 1966). To perform those transferred functions, the Reorganization Plan further provides that the Director of OMB shall transfer to EPA “personnel, property, records, and unexpended balances of appropriations . . . used, held, available, or to be made available in connection with the functions transferred to the Administrator or the Agency.” Reorganization Plan No. 3 of 1970, § 4(a).

Taken together, these provisions convey to the Administrator all of the housekeeping authority available to other department heads under section 301, including authority to adopt property management regulations. Congress has vested the Administrator with the authority to run EPA, to exercise its functions, and to issue regulations incidental to the performance of those functions. This grant includes the authority to assign responsibility to others within the agency and to issue regulations prescribing the standards by which those functions are to be performed. The effective and efficient management of the agency’s personnel and property is plainly “incidental to” and “necessary for” the performance of the functions that the Administrator is charged with performing. Indeed, the Reorganization Plan specifically recognizes this authority by providing the Administrator not only with transferred functions but with the personnel and equipment necessary for the effective performance of those functions. The Administrator’s authority to prescribe standards for the care and use of agency property also includes the authority to enforce those standards by holding employees liable for losses that occur due to the breach of those standards. *See Mourning*, 411 U.S. at 372. Accordingly, we conclude that the Administrator has the regulatory authority to issue property management regulations.³

³ In view of this conclusion, we need not discuss at length EPA’s authority under the two other sources identified in your letter: (1) 5 U.S.C. § 7301 (2006), which recognizes the President’s authority to “prescribe regulations for the conduct of employees in the executive branch,” and (2) the common law principle of bailment. *See* EPA Letter at 3. Both sources remain potential avenues under which EPA could seek to impose liability on its employees, albeit subject to certain procedural hurdles. Pursuant to 5 U.S.C. § 7301, the President has delegated to the Office of Government Ethics (“OGE”) the authority to ensure that federal employees “protect and conserve Federal property” and do “not use it for other than authorized activities.” Exec. Order No. 12731, §§ 101(i), 201 (Oct. 17, 1990), 3 C.F.R. 306 (1990 Comp.). OGE in turn has issued a series of regulations authorizing agencies to issue supplementary property regulations, 5 C.F.R. § 2635.105(a), with which employees must comply or face “corrective action,” which can include restitution, *id.* § 2635.103. To rely on these OGE regulations to support its existing property regulations, EPA would have to submit those regulations for OGE’s approval and have them published alongside OGE regulations in the Federal Register. *See*

We also conclude that the rules contained within the Property Manual and EPA Order 2100.3 constitute binding and enforceable regulations. If EPA had submitted these rules for notice and comment and published them in the *Federal Register*, there would likely be little ambiguity about whether they constituted regulations binding within the agency. EPA has not done so in this case, however, because the Administrative Procedure Act (“APA”) expressly exempts rules related to internal agency governance from those procedural requirements.⁴ *See* 5 U.S.C. § 552(b) (2006) (exempting from disclosure requirements “matters that are . . . related solely to the internal personnel rules and practices of an agency”); *id.* § 553(a) (2006) (providing that formal rulemaking requirements, such as notice and comment procedures, are not required “to the extent that there is involved . . . a matter relating to agency management or personnel or to public property”); *see also Authority to Prescribe Regulations*, 28 Op. O.L.C. at 105–07 (concluding that a regulation concerning government employees’ political activities was not a “substantive rule” subject to APA procedural requirements because it “would govern only the conduct of government employees and would not directly affect the rights and obligations of private parties pursuant to the regulatory jurisdiction of the Department”). Accordingly, the fact that EPA’s rules were not promulgated in a notice and comment rulemaking process does not deprive them of legal effect; rather, as courts have held in analogous circumstances, an agency personnel manual may constitute a “regulation” that is binding within an agency even if “it was not promulgated and published in accordance with the requirements of the APA.” *Hamlet v. United States*, 63 F.3d 1097, 1103 (Fed. Cir. 1995).

5 C.F.R. § 2635.105(b). The common law doctrine of bailment also may allow an agency to hold employees liable for damage to property caused by their misuse or neglect. *See United States v. Thomas*, 82 U.S. (15 Wall.) 337, 344 (1872); *see also* 3 General Accounting Office, *Principles of Federal Appropriations Law* 13-160 (2d ed. 1994) (“Redbook”) (recognizing that “the concept of bailment” provides “the legal basis” for employee liability for damage to government personal property). There is some question, however, whether recovery on a theory of bailment would be available in the context of an employment relationship. *See, e.g., Elwood v. Bolte*, 403 A.2d 869 (N.H. 1979) (explaining that “because [the employer] retained elements of control [over his property], a master-servant relationship was created rather than a bailment”); *see also* Am. Jur. 2d, *Bailments* § 17 (2d ed. 2007) (citing cases). Even if recoupment were appropriate, agencies likely would have to seek recovery through administrative procedures, either through informal agency adjudications or through the assistance of the Office of Personnel Management.

⁴ As a general matter, regulations that “directly affect the rights and obligations of private parties” or regulate the “citizenry at large” constitute “substantive rules” under the APA and usually must be promulgated in accordance with notice and comment procedures. *Authority to Prescribe Regulations*, 28 Op. O.L.C. at 107. In contrast, agency rules “govern[ing] only the conduct of government employees” are not substantive rules within the meaning of the APA and are specifically excluded from publication and notice and comment requirements. *Id.* The EPA policies at issue here pertain solely to the conduct of EPA employees and have no application to the “citizenry at large.” Those policies are therefore not “substantive rules” that must be published under the APA.

Whether statements contained within agency policy manuals constitute binding agency regulations is a question that has arisen in a variety of contexts. Although not every agency statement constitutes a binding regulation, “the general consensus is that an agency statement, not issued as a formal regulation, binds the agency . . . if the agency intended the statement to be binding.” *Farrell v. Dep’t of Interior*, 314 F.3d 584, 590 (Fed. Cir. 2002); *see also Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 276 (1969) (holding that a circular issued by the Department of Housing and Urban Development constituted an administrative regulation where it “was intended to be mandatory”); *Service v. Dulles*, 354 U.S. 363, 376 (1957) (holding that removal of employee was invalid because it violated procedures for removal set forth in a State Department manual that was binding on the Department); *Doe v. Hampton*, 566 F.2d 265, 280–81 (D.C. Cir. 1977) (holding that unpublished provisions within an agency personnel manual may be “binding if so intended by the Commission” in question). Applying this standard here, we believe that the EPA rules in question bind both the agency and its employees. The Property Manual describes itself as constituting the “*authoritative* reference for EPA’s management of personal property” and states that it “*provid[es]* basic policy and procedures *governing* the personal property management of EPA.” *Id.* at ES-1 (emphasis added). The Manual also expressly notes that it is a “supplement to the portions of the *Code of Federal Regulations (CFR)* and the *Federal Management Regulations (FMR)*” that provide the legal framework for the treatment of federal property. *Id.* at ES-1 to ES-2. Similarly, EPA Order 2100.3 A1 states that it “*provides the EPA policy* permitting limited personal use of Government office equipment during non-work time” and replaces “any previous memoranda and policies regarding personal use of Government office equipment.” (Emphasis added.) Like the Property Manual, EPA Order 2100.3 A1 describes its status as on par with other binding legal authorities. *Id.* (stating that the order “supplements but does not supersede any statutes, regulations, or collective bargaining agreements on the authorized use of Government office equipment”). Accordingly, the EPA policies at issue make clear “that they were designed to be binding on the agency” and on employees alike. *Farrell*, 314 F.3d at 591. Those policies therefore qualify as regulations enforceable by EPA when agency property is damaged due to employee negligence or additional costs are incurred due to unauthorized use.⁵

⁵ You also have asked whether EPA’s authority to impose liability on its employees for the misuse or neglect of government property would be consistent with the Comptroller General’s decision in *Matter of Department of Defense—Authority to Impose Pecuniary Liability by Regulation*, B-280764, 2000 WL 812093 (May 4) (“*Matter of DoD*”). We believe that it is, because *Matter of DoD* addressed the specific rules governing “accountable officers,” rather than the general standards for other federal employees. (The decisions of the Comptroller General are not binding on the Executive Branch, although we do consider them useful sources on appropriations matters. *See Use of General Agency Appropriations to Purchase Employee Business Cards*, 21 Op. O.L.C. 150, 151 (1997).) The Comptroller General traditionally has

III.

For the foregoing reasons, we conclude that EPA's rules regarding employee liability for loss, damage, or destruction of government personal property and for the unauthorized use of government personal property are supported by EPA's housekeeping authority.⁶

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recognized that agencies may adopt regulations holding their employees liable for damage to property caused by employee negligence or misuse. *See* 3 Redbook at 13-159. At the same time, the Comptroller General has recognized the existence of specialized liability standards governing so-called "accountable officers," those federal officers responsible for certifying and disbursing government funds. *Id.* at 13-157. Insofar as accountable officers may be responsible for certifying and disbursing government funds and traditionally have been held to the highest standards of care, GAO has recognized that the specific terms governing that liability are set by statute.

In *Matter of DoD*, the Comptroller General addressed whether an agency could hold employees who are not accountable officers liable for contributing to the wrongful disbursement of government funds. The Comptroller General explained that, while Congress had singled out certifying officers, 31 U.S.C. § 3528, and disbursing officers, 31 U.S.C. § 3325, as officials who would be strictly liable for improper payments, "significantly, [Congress had not] extended liability beyond these officers to governmental employees whose work support[ed] these functions." 2000 WL 812093, at *5. The Comptroller General thus reasoned that because Congress had specifically considered which officers could be liable for erroneous disbursements in this context, the omission of certain officers signaled Congress's intent that those officers *not* be held liable as accountable officers. In this regard, *Matter of DoD* expressly repudiated two prior decisions of the Comptroller General, both of which involved liability for accountable officers, *id.* at *5, but gave no indication that it intended to overrule the long line of Comptroller General decisions holding, as a general matter, that employees may be held liable for property damage based upon agency regulations. Likewise, GAO's subsequent discussion of *Matter of DoD* provides no indication that *Matter of DoD* worked a sea change in GAO's understanding of agencies' ability to assess liability against employees absent specific statutory direction. *See* 2 Redbook at 9-11 (3d ed. 2006) (recognizing that *Matter of DoD* simply departed from the view that the government could "impose *accountable officer* status and liability" by administrative action). Accordingly, we believe that *Matter of DoD* is consistent with our conclusion that EPA may enforce its regulations imposing liability on employees for misuse or neglect of government property.

⁶ Because EPA's policy may result in a deprivation of an employee's property, EPA's procedures for determining employee negligence or misuse of property and assessing liability also must satisfy the constitutional requirement of due process. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that due process requires balancing an individual's property interests and the risk of an erroneous deprivation against the government's interests, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"). We note that as detailed in the Property Manual, EPA's procedures for assessing liability provide notice and an administrative hearing before a Board of Survey prior to the imposition of any liability, *see* Property Manual §§ 1.3.2, 3.8.3-3.8.4, two factors that the Supreme Court has identified as significant to the due process analysis.

Admissibility in Federal Court of Electronic Copies of Personnel Records

Federal official personnel and civil service retirement records that have been converted from paper to electronic format should be admissible in evidence in federal court under the Business Records Act, 28 U.S.C. § 1732, and should also qualify as “public records” admissible under Rule 1005 of the Federal Rules of Evidence.

Electronic versions of particular personnel records that, pursuant to statute or regulation, must be notarized, certified, signed, or witnessed may be authenticated under Rules 901 and 902 of the Federal Rules of Evidence. Converting such documents to electronic format should not affect their admissibility under hearsay rules.

May 30, 2008

MEMORANDUM OPINION FOR THE GENERAL COUNSEL OFFICE OF PERSONNEL MANAGEMENT

The Office of Personnel Management (“OPM”) intends to convert its personnel records, consisting of employees’ “Official Personnel Folders” (“OPFs”) and civil service retirement records (collectively, “Personnel Records”), from paper to electronic format. After verifying the accuracy of the electronic versions of the documents (“Electronic Personnel Records”), OPM intends to destroy the paper records. You have sought our opinion on whether the resulting Electronic Personnel Records will be admissible in federal court under the “best evidence” requirements of Article X (Rules 1001–1008) of the Federal Rules of Evidence (“Rules”). You also have asked us to analyze the admissibility of electronic versions of particular personnel records, which, pursuant to statute or regulation, must be notarized, certified, signed, or witnessed.¹

The Business Records Act, 28 U.S.C. § 1732 (2000), resolves this issue. It provides, in relevant part, that a reproduction made “in the regular course of business” of a record made “in the regular course of business” by “any department

¹ Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Kerry B. McTigue, General Counsel, Office of Personnel Management at 1 (Apr. 19, 2007) (“McTigue Letter”). We sought, and received, the written views of the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Office of Special Counsel, and the Criminal Division. See Letter for John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, from B. Chad Bungard, General Counsel, Merit Systems Protection Board (July 2, 2007); Letter for John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, from Peggy R. Mastroianni, Associate Legal Counsel, Equal Employment Opportunity Commission (May 25, 2007); Letter for John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, from Scott J. Bloch, Special Counsel, Office of Special Counsel (May 25, 2007); Memorandum for Alice S. Fisher, Assistant Attorney General, Criminal Division, from Patty Merkamp Stemler and Claire J. Evans, Appellate Section, Criminal Division, *Re: Admissibility of Electronic Official Personnel Folders and Electronic Retirement Records* (undated draft). In addition, we received the informal views of the Civil Division. This opinion memorializes informal advice we provided you in August 2007.

or agency of government” is “as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not.” *Id.* The Business Records Act expressly permits the destruction of the paper originals in the regular course of business unless their preservation is required by law. *Id.* The Electronic Personnel Records that OPM intends to create also should qualify as “public records” admissible under Rule 1005. We also discuss the application of authenticity and hearsay standards to printouts of electronic records under the Federal Rules of Evidence. While we cannot conclude in advance of litigation that Electronic Personnel Records will be admissible in every case, OPM’s plan to convert its paper files to electronic format should not appreciably increase the risk that a personnel record will be deemed inadmissible in a particular case.

I.

The head of each “Federal agency” is required to “make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency.” 44 U.S.C. § 3101 (2000); *see also id.* § 2901(14) (defining “Federal agency”). In cooperation with the National Archives and Records Administration (“NARA”) and the General Services Administration (“GSA”), the head of each agency is required to develop standards that will improve records management, ensure preservation of essential records, and “facilitate the segregation and disposal of records of temporary value.” *Id.* § 3102; *see also id.* § 2904 (charging NARA and GSA with “provid[ing] guidance and assistance to Federal agencies” regarding records management and disposition). In addition, NARA has promulgated regulations setting forth “(1) procedures for the compiling and submitting . . . of lists and schedules of records proposed for disposal, (2) procedures for the disposal of records authorized for disposal, and (3) standards for the reproduction of records by photographic or microphotographic processes with a view to the disposal of the original records,” 44 U.S.C. § 3302 (2000). *See generally* 36 C.F.R. pt. 1228 (2007–2008) (regarding the disposition of federal records).

In recent years, there has been increasing interest within the federal government in converting existing paper records to electronic format (and in permitting submission of required documents in electronic form), which promises to reduce storage costs while offering easier search and retrieval, thereby improving functionality and efficiency. *See* U.S. Dep’t of Justice, *Legal Considerations in Designing and Implementing Electronic Processes: A Guide for Federal Agencies* at 2, 5 (Nov. 2000) (“*Legal Considerations*”), available at www.cybercrime.gov/process.pdf; *cf.* Mary Moreland & Steward Nazzaro, *Admitting Scanned Reproductions into Evidence*, 18 Rev. Litig. 261, 262, 270 (1999) (“*Admitting Scanned Reproductions*”) (discussing trend in private sector). In 1998, Congress enacted the Government Paperwork Elimination Act, Pub. L. No. 105-277, tit. XVII, 112 Stat. 2681–2749,

reprinted in 44 U.S.C. § 3504 note (2000) (“GPEA”), which requires, among other things, that federal agencies provide “for the option of the electronic maintenance, submission, or disclosure of information, when practicable as a substitute for paper.” GPEA § 1704(1). “Electronic records submitted or maintained in accordance with procedures developed under [the GPEA] shall not be denied legal effect, validity, or enforceability because such records are in electronic form.” *Id.* § 1707. Although the GPEA does not appear directly relevant to the questions you posed,² it has spurred efforts to convert to electronic recordkeeping and reflects Congress’s judgment that maintenance of records in electronic format is in the interests of the federal government and its employees. Similarly, the expansion of “electronic government” was one of the components of the President’s Management Agenda announced during summer 2001. See Office of Management and Budget, *The President’s Management Agenda*, Fiscal Year 2002, at 23–25 (available at <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>, last visited ca. 2008). NARA has issued regulations and guidance on the conversion of paper records to electronic format and for the submission of electronic records to NARA for retention as permanent records. See 36 C.F.R. § 1228.31 (2008); *Expanding Acceptable Transfer Requirements: Transfer Instructions for Existing Permanent Electronic Records Scanned Images of Textual Records* (Dec. 23, 2002) (available at <http://www.archives.gov/records-mgmt/initiatives/scanned-textual.html>, last visited Aug. 13, 2014); General Records Schedule 20, Electronic Records, item 2 (Feb. 2008) (available at <http://www.archives.gov/records-mgmt/ardor/grs20.html>, last visited ca. 2008).

As one initiative designed to support the President’s Management Agenda, see Office of Personnel Management, *E-Gov, Enterprise Human Resources Integration: Overview* (available at <http://fehbo.opm.gov/egov/e-gov/EHRI/overview/>, last visited Aug. 13, 2014). OPM has announced plans to convert Official Personnel Records and civil service retirement records to electronic format. Under this

² Section 1707 of the GPEA addresses only the “legal effect, validity, or enforceability” of electronic records, that is, whether they have the legal effect of paper documents in effectuating a transaction and enforcing legal obligations. While the prohibition on “den[ying] legal effect” to appropriately maintained electronic records suggests that they may serve as evidence in court, section 1707 does not suggest that electronic records are admissible notwithstanding the “best evidence” requirements of Article X or the authenticity requirements of Article IX. Cf. 144 Cong. Rec. 27,170, 27,171 (Oct. 20, 1998) (joint statement of intent by Senators Abraham, Wyden, and McCain) (stating that predecessor of section 1707 “is intended to preclude agencies or courts from systematically treating electronic documents and signatures less favorably than their paper counterparts”). What guidance exists on the GPEA does not suggest that section 1707 affects admissibility under the Federal Rules of Evidence. See *Legal Considerations*; Office of Management and Budget, *Notices: Procedures and Guidance: Implementation of the Government Paperwork Elimination Act*, 65 Fed. Reg. 25,508 (May 2, 2000). No published court decisions have addressed the effect of the GPEA, and scholarly commentary does not discuss whether the GPEA affects admissibility. Given the clear authority supporting admissibility of electronic agency records discussed in the text, and the absence of relevant case law construing section 1707, it is not necessary or advisable for us definitively to resolve whether the GPEA prevents additional authority supporting admissibility. In any event, it is not clear that OPM maintains Electronic Personnel Records “in accordance with procedures developed under” the GPEA.

initiative, OPM proposes to scan paper records into digital electronic format. It will retain the paper originals for one year, during which time OPM will verify that the electronic versions are accurate reproductions. After one year, OPM will destroy the paper originals. McTigue Letter at 1. This program is expected to increase employee access to their records, improve security from destruction or loss, and increase efficiency and responsiveness.

The OPF is a file containing records reflecting a federal employee's appointment, employment history, and benefits information. Office of Personnel Management, *Operating Manual: The Guide to Personnel Recordkeeping* at 1-7 (2006) (available at <http://archive.opm.gov/feddata/recguide2006.pdf>, last visited Aug. 13, 2014). See generally 5 C.F.R. § 293.304 (2007) (specifying contents of folder). Federal regulations require each agency to establish an OPF for most employees. See *id.* § 293.302. An OPF typically includes such records as the Appointment Affidavit, Declaration for Federal Employment, forms verifying military service, performance assessments, federal benefits forms, and Thrift Savings Plan forms. See Personnel Documentation: Frequently Asked Questions, (available at <http://www.opm.gov/feddata/html/pd-faqs.asp>, last visited ca. 2008); *Guide to Personnel Recordkeeping* at 3-2 to 3-40. The civil service retirement records that OPM plans to convert to electronic format consist of various forms related to retirement from federal service and retirement-related benefits,³ as well as various court orders, correspondence, and miscellaneous notes.

Executive Order 12107, as amended, grants OPM authority to regulate the management of OPFs. It provides, in relevant part, that “the authority of the President, pursuant to the Civil Service Act of January 16, 1883, to designate official personnel folders in government agencies as records of the Office of Personnel Management and to prescribe regulations relating to the establishment, maintenance and transfer of official personnel folders, is delegated to the Director of the Office of Personnel Management.” *Id.*, reprinted in 5 U.S.C. § 1101 note (2007).⁴ OPM regulations specify that “[t]he OPF of each employee in a position

³ These forms may include, for example, the Individual Retirement Record (SF2806), Request for Recovery of Debt Due the United States (SF2805), Request for Offset for Health Benefits Premiums from Monies Payable Under the Civil Service Retirement System or the Federal Employees Retirement System (OPM1522), Application for Refund of Retirement Deductions (SF2802/SF3106), Application to Make Deposit or Redeposit (SF2803), Report of Separation from Active Duty (DD214), Military Deposit Worksheet (OPM1514), Application to Make Voluntary Contributions (SF2804), Application for Return of Excess Retirement (OPM1562), Health Benefits Registration Form (SF2809), Election of Coverage (SF3109), Assignment of Federal Employee's Group Life Insurance (RI76-10), Designation of Beneficiary, CSRS (SF2808/SF3102), and Designation of Beneficiary, Federal Employee's Group Life Insurance Program (SF2823) (available at <http://www.opm.gov/forms>, <http://www.archives.gov/veterans/military-service-records>, last visited ca. 2008).

⁴ See generally Civil Service Act of Jan. 16, 1883, ch. 27, 22 Stat. 403, 404 (providing that the Civil Service Commission “shall, subject to the rules that may be made by the President, make regulations for, and have control of, such examinations and, through its members or the examiners, it shall supervise and preserve the records of the same”); 5 U.S.C. § 1301 (2000) (“The Office of Personnel

subject to civil service rules and regulations is under the jurisdiction and control of, and is part of the records of, the Office of Personnel Management.” 5 C.F.R. § 293.303 (2007); *see also id.* § 293.304 (“The folder shall contain long-term records affecting the employee’s status and service as required by OPM’s instructions . . .”).

II.

You have asked us, first, to address whether electronic Official Personnel Folders and electronic retirement records will be admissible under the “best evidence” provisions of Article X of the Federal Rules of Evidence in litigation where those records are at issue. McTigue Letter at 1. Before turning to the Rules of Evidence, however, we will address the Business Records Act, 28 U.S.C. § 1732, which provides that Electronic Personnel Records are admissible to the same extent as paper Personnel Records (*see* Part II.A, *infra*). We conclude that this statute provides for the admissibility of the electronic records in question. Even if the Business Records Act were inapplicable, such Electronic Personnel Records (or certified paper printouts of them) should generally be admissible as “public records” under Rule 1005 (*see* Part II.B, *infra*). Although an electronic record might also meet the conditions for admissibility as a “duplicate” under Rule 1003 or as “other evidence” under Rule 1004, it is unlikely it would be admitted under those Rules because of the preclusive effect of Rule 1005 (*see* Part II.C, *infra*).

A.

The Business Records Act provides:

If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. *Such reproduction, when satisfactorily identified,*

Management shall aid the President, as he may request, in preparing the rules he prescribes under this title for the administration of the competitive service.”); *id.* § 1302; *id.* § 3301(1) (“The President may . . . prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service”); *id.* § 7301 (“The President may prescribe regulations for the conduct of employees in the executive branch.”).

is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not

28 U.S.C. § 1732 (emphasis added).

Section 1732 “gives [electronic] scanned copies the same status as originals” if three conditions are met. 2 Kenneth S. Broun et al., *McCormick on Evidence* § 236, at 98 n.10 (6th ed. 2006) (“McCormick”).⁵ There is little question that the Electronic Personnel Records will satisfy each of those conditions. First, the documents will consist of “writing[s]” that a “department or agency of government[] in the regular course of business or activity has kept or recorded.” Second, the agency will cause those writings to be scanned and converted to electronic format “in the regular course of business.”⁶ OPM may wish to issue regulations prescribing the procedure for creating these records to avoid any question about whether the electronic conversion is performed “in the regular course of business.” Third, we believe it evident that the Electronic Personnel Records will be “satisfactorily identified.” Although there is little case law addressing what it means for a record to be “satisfactorily identified” for purposes of section 1732, this condition should be met by a showing that the reproduction was made and kept in the ordinary course of business.⁷

⁵ Accord R. David Whitaker, *Admission into Evidence of Paper Records Converted to Electronic Form*, 60 Consumer Fin. L.Q. Rep. 325, 327 (2006) (“*Paper Records Converted*”) (“The Business Records Act permits business records scanned into electronic form to serve as originals, so long as the electronic record can be satisfactorily identified, the image is accurate, and its storage is durable.”); *Admitting Scanned Reproductions*, 18 Rev. Litig. at 266 (“As long as the company designs its program to meet the prerequisites of Section 1732, a scanning procedure should qualify as an ‘other process which accurately reproduces or forms a durable medium.’”); see also 5 Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* § 1002.02[2], at 1002-5 (9th ed. 2006) (“Saltzburg”) (suggesting that “photographic reproductions” can be treated as originals under section 1732); 6 Joseph M. McLaughlin, *Weinstein’s Federal Evidence* § 1001.11[3], at 1001-51 & n.5 (2d ed. 2007) (“Weinstein”) (“computer evidence is admissible if produced in the ordinary course of business, even if the underlying documents are routinely destroyed for business reasons”) (citing section 1732).

⁶ See, e.g., *United States v. Fendley*, 522 F.2d 181, 187 (5th Cir. 1975) (computer printout of financial records admissible under section 1732); *United States v. Teague*, 445 F.2d 114, 119 (7th Cir. 1971) (photocopies of documents, shown to have been kept in regular course of business, admissible under section 1732(b)); *Williams v. United States*, 404 F.2d 1372, 1373 (5th Cir. 1968) (per curiam) (microfilm copy of check and reproduction therefrom admissible under section 1732(b)); *Myrick v. United States*, 332 F.2d 279, 282 (5th Cir. 1963) (photostatic copy of check admissible under section 1732(b)).

⁷ See *United States v. Kitzman*, 520 F.2d 1400, 1403 (8th Cir. 1975) (suggesting that “reproduction was not identified” where “[t]here was no showing that the title certificate was kept, recorded or copied in the regular course of business”); *Williams*, 404 F.2d at 1373 (“The reproductions [of records] were satisfactorily identified by bank officials and employees, as required by the Business Records Act” where “[i]t was shown that each microfilm was made in the regular course of the business of the bank . . . and that it was the regular course of that bank’s business to make and keep such a record.”); *United States v. Miller*, 500 F.2d 751, 754–55 (5th Cir. 1974) (records properly admitted under section 1732 where “company employees testified that the government exhibits in question were copies of

For nearly twenty-five years before the adoption of the Federal Rules of Evidence, section 1732 (and analogous state provisions implementing the Uniform Photographic Copies of Business and Public Records as Evidence Act, *see McCormick's Handbook on the Law of Evidence* § 236, at 568 & nn. 68–69 (2d ed. 1972)) figured prominently in the admissibility of reproductions of records. But section 1732 has been cited only rarely since adoption of the Federal Rules; courts typically analyze the question of admissibility only under Rules 1001–1005.⁸ Section 1732 may be overlooked because of the preeminence of the Federal Rules of Evidence, or perhaps because courts believe it has been superseded by the Rules. Congress plainly intended, however, that section 1732 would have continuing applicability after adoption of the Federal Rules. At the time Congress enacted the Rules, it amended section 1732 to delete a statutory hearsay exception then set forth in subsection (a) of that provision because it was largely redundant with new Rule 803(6). *See* Pub. L. No. 93-595, § 2(b), 88 Stat. 1949 (1975); *see also* S. Rep. No. 93-1277, at 24 (1974). Congress retained the former subsection (b), which now constitutes the entirety of section 1732. Congress's decision to preserve the current provision at the time it transferred the substance of section 1732(a) to the new Rule 803(6) is a compelling indication that it intended the provision to have continuing effect after adoption of the Rules. Scholarly commentary confirms that section 1732 remains in force.⁹

customer bills and company records, were kept in the ordinary course of business, and were made at or near the time of the transactions reflected on them,” and emphasizing that “[t]he person who actually keeps the books and records and makes the entries need not testify if a person does testify who is in a position to attest to the authenticity of the records”); *see also United States v. Carroll*, 860 F.2d 500, 507 (1st Cir. 1988) (concluding that standards established under *Williams* and section 1732 are proper under Federal Rule of Evidence 1003, such that “when a print of a microfilm copy of bank checks, kept by the bank in the regular course of business, is properly identified by a custodian of records as a complete and accurate reproduction thereof,” it is admissible as a “duplicate”); *Turk v. Florida*, 403 So. 2d 1077, 1078–79 (Fla. App. 1981) (in applying analogous state provision, holding that “testimony by the custodian of the document as to how it came to be, who it came from, who reproduced it,” among other information, might “satisfactorily identify[y]” document); *Admitting Scanned Reproductions*, 18 Rev. Litig. at 265 (condition met where record is “satisfactorily identified as a duplicate”) (emphasis added).

⁸ We have found only four references to section 1732 in federal court decisions since the adoption of the Federal Rules of Evidence; in two of those decisions, the courts also discussed Rules 1001–1005 and appeared to consider the statute and the Rules to be coextensive. *See United States v. Carroll*, 860 F.2d 500, 506–08 (1st Cir. 1988) (holding microfilm copies of checks admissible under section 1732 and Rules 1003 and 1004 to prove contents of missing originals); *United States v. Kitzman*, 520 F.2d 1400, 1402 (8th Cir. 1975); *All Seasons Constr., Inc. v. United States*, 55 Fed. Cl. 175, 181 (2003) (noting section 1732 in passing); *Amoco Prod. Co. v. United States*, 455 F. Supp. 46 (D. Utah 1977) (holding photocopy of conformed copy of quitclaim deed inadmissible under section 1732 and Rule 1003 to prove contents of missing original deed), *rev'd*, 619 F.2d 1383, 1391 (10th Cir. 1980) (remanding for consideration whether photocopy might be admissible for other purposes under Rule 1003; not mentioning section 1732).

⁹ *See* 31 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 7185, at 396 & n.7 (2000) (“Wright & Gold”); *id.* § 7166, at 332–34; 6 Weinstein § 1001.11[3], at 1001-51 & n.5; *id.* § 1002.04[5][a], at 1002-12 to -13 & n.51; 2 McCormick § 236, at 98 n.10; *Paper Records*

Section 1732 provides that the reproduction kept by the government is as admissible in evidence as the original itself “in any judicial or administrative proceeding.” It thus applies to administrative hearings where the Federal Rules do not apply. *See* Fed. R. Evid. 1101(d), (e). Moreover, it authorizes “any department or agency of government” to destroy an original after duplicating it, so long as reproductions are made “in the regular course of business” and preservation of the original document is not “required by law.” It thus furnishes additional statutory authority for OPM to undertake this document conversion program.¹⁰

B.

Even if the Business Records Act were deemed inapplicable, Electronic Personnel Records should be admissible under Rule 1005 of the Federal Rules of Evidence. That rule, entitled “Public Records,” provides:

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original.

Fed. R. Evid. 1005. Rule 1005 treats the record lawfully on file with the government as the official or public “record” for purposes of admissibility, rather than an earlier version that may have been copied or destroyed. It also permits the contents of that record to be proven by “copy,” such that the government need not produce the official record in court.

Converted, 60 Consumer Fin. L.Q. Rep. at 327; *Admitting Scanned Reproductions*, 18 Rev. Litig. at 266; 5 Saltzburg § 1002.02[2], at 1002-5.

¹⁰ Similarly, 44 U.S.C. § 3312 (2000), provides that “[p]hotographs or microphotographs of records made in compliance with regulations under section 3302 of this title shall have the same effect as the originals and shall be treated as originals for the purpose of their admissibility in evidence.” As noted above, NARA has issued regulations and guidance under section 3302 concerning the conversion of paper records to electronic format through digital imaging technology. If OPM complies with NARA’s regulations in its creation of Electronic Personnel Records, those records should qualify for treatment as “originals for the purpose of their admissibility in evidence” under section 3312.

Section 1733(b) of title 28 likewise provides that “[p]roperly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.” That provision, however, “does not apply to cases, actions, and proceedings to which the Federal Rules of Evidence apply.” 28 U.S.C. § 1733(c) (2000). Although section 1733(b) may still apply to administrative, arbitral, and state court proceedings where the Federal Rules of Evidence do not, we have found no reported case indicating that the statute has been applied since the enactment of the Federal Rules of Evidence. As with section 1732, the provision’s disuse most likely reflects the availability of alternative mechanisms for admissibility under other applicable rules, including analogues to Federal Rule of Evidence 1005, discussed below.

Personnel Records should qualify as “official record[s]” or as “document[s] authorized to be recorded or filed and actually recorded or filed” under Rule 1005. The Rule has been construed to apply to any “writing . . . held in a public office that was either created by a public official or, regardless of public or private authorship, was authorized by law to be recorded or filed in that office and was in fact recorded or filed there.” 31 Wright & Gold § 8033, at 506. A host of official documents have been held to be “public records” under similar rules, including judicial records, weather records, geology records, census records, marriage records, and selective service records. *See* 6 Weinstein § 1005.03[2], at 1005-7 to 1005-8 & nn. 7–13. The Personnel Records consist of documents lawfully filed with agencies and created by government employees, former government employees, and private citizens with an interest in federal employees’ benefits, all of which fall squarely within the scope of Rule 1005.

It follows that Electronic Personnel Records, which OPM plans to keep and use for official purposes, should likewise qualify as “official records” or as “document[s] authorized to be recorded or filed and actually recorded or filed” under Rule 1005. This interpretation is bolstered by the Rule’s inclusion of “data compilations *in any form*,” Fed. R. Evid. 1005 (emphasis added), and by treatises and case law concluding that the copy of a document filed in a records office, not the original retained by a private citizen, is the “public record” for purposes of Rule 1005.¹¹ Because the content of these official electronic records may be proven by a “copy,” it follows that a certified paper printout of the electronic personnel record will be admissible under Rule 1005.¹²

¹¹ *See* 6 Weinstein § 1005.06[1], at 1005-12; 29A Am. Jur. 2d Evidence § 1091 (“While the language of Rule 1005 encompasses deeds, mortgages, and other documents filed in a county recorder’s office, it is the actual record maintained by the public office which is the object of the Rule, not the original deed from which the record is made; if the original deed is returned to the parties after it is recorded, it is not a public record as contemplated by Rule 1005.”) (footnotes omitted); *Amoco Prod. Co. v United States*, 619 F.2d 1383, 1390 (10th Cir. 1980) (same); *cf. State v. Blackmon*, No. 85 C.A. 70, 1987 WL 7423, at *4 (Ohio App. Mar. 5) (holding that while “a microfilm copy of the formal journal entry . . . was not the original of appellant’s plea of guilty to armed robbery,” “the journal entry is properly certified by the Clerk of Courts and described by the witness . . . as part of the record regularly kept by that office in the manner prescribed by law”; “[t]he record can be properly admitted under Ohio Evid. Rule 803(8), public records and reports”).

¹² Although Article X does not define the term “copy,” it defines “duplicate” as a “counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, . . . or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.” Fed. R. Evid. 1001(4). That definition appears broad enough to include a paper printout of an electronic document. *Cf.* Fed. R. Evid. 1001(3) (“If data are stored in a computer . . . , any printout or other output readable by sight, shown to reflect the data accurately, is an ‘original.’”). In the absence of a similarly limited definition, the term “copy” should be construed in accordance with its plain meaning, *cf. Pavelic & LeFlore v. Marvel Entm’t Group*, 493 U.S. 120, 123 (1989) (“We give the Federal Rules of Civil Procedure their plain meaning”), as a “reproduction of an original work.” *Webster’s Third New International Dictionary* 504 (1993). Thus, “it makes sense to conclude that ‘copy’ is a broader term” than “duplicate,” 31 Wright &

Even if the destroyed paper personnel record were deemed to be the “official record” for purposes of Rule 1005, a printout of “a digital copy” maintained by an agency should be admissible as a second-generation copy (i.e., a copy of a copy), because “if each generation of a copy is prepared by a public office using a reliable reproduction method, certified copies should be sufficiently reliable to be admitted under Rule 1005.” 31 Wright & Gold § 8033, at 506–07; *see also id.* at 506 (“The courts assume that a ‘duplicate’ under Rule 1003 can be a copy of a copy.”); 2 McCormick § 236, at 100 & n.13 (“a duplicate of a duplicate may be found admissible”) (collecting authorities). The process of converting paper originals to digital format, if conducted conscientiously according to regular procedures, should be sufficiently reliable that resulting electronic versions of documents would be admissible under Rule 1005 as a copy. “[I]f data is scanned into a computer or copied to the computer by some other device, the resulting stored data or printout probably is a duplicate of the source material,” even for purposes of the more exacting standard of Rule 1003. 31 Wright & Gold § 7167, at 20 (Supp. 2007).¹³ Similarly, courts routinely accept as “duplicates” under Rule 1003 records that have been converted from paper originals into other formats (such as microfilm or photographs) through comparable processes.¹⁴ *See generally* 2 McCormick § 236, at 98 (“any form of copying which generally produces an accurate duplicate of an original should be viewed as sufficient to fulfill this policy [of requiring original documents]”). A properly certified printout of an electronic record that is itself a copy should therefore also be admissible under Rule 1005 as a “copy.” 31 Wright & Gold § 8033, at 506 (a printout of a “digital ‘copy’ . . . in

Gold § 8033, at 506, and that a paper printout of an Electronic Personnel Record will be admissible to prove the content of that record.

¹³ *Accord Paper Records Converted*, 60 Consumer Fin. L.Q. Rep. at 326 (suggesting that printouts of electronically scanned originals should be admissible under best evidence rule as duplicates); *Admitting Scanned Reproductions*, 18 Rev. Litig. at 281 (“[I]f the proper steps are taken, there is no reason why [an] imaged reproduction should not be just as admissible as an original.”); James E. Carbine & Lynn McLain, *Proposed Model Rules Governing the Admissibility of Computer-Generated Evidence*, 15 Santa Clara Computer & High Tech. L.J. 1, 24 (Jan. 1999) (“*Computer-Generated Evidence*”) (concluding that, under present law, “[e]lectronically imaged documents would be ‘duplicates,’ and . . . [s]uch electronically imaged ‘duplicates,’ if they are of public records, are as equally admissible as the originals”); *cf. United States v. Stewart*, 420 F.3d 1007, 1021 n.13 (9th Cir. 2005) (holding that trial court did not err in admitting audio recording although government did not preserve the original digital recording but instead downloaded the data to disk and offered a duplicate recording at trial).

¹⁴ *See United States v. Mulinelli-Navas*, 111 F.3d 983, 989–90 (1st Cir. 1997) (microform copy of check admissible because defendant failed to offer testimony that original had been tampered with or altered in any way so that copy was not what it purported to be); *FDIC v. Wheat*, 970 F.2d 124, 131–32 (5th Cir. 1992) (upholding admission of copies of loan records made from microfilms of originals); *United States v. Carroll*, 860 F.2d 500, 506–08 (1st Cir. 1988) (construing Rules 1003 and 1004 to support admissibility of microfilms of checks); *see also United States v. Stockton*, 968 F.2d 715, 719 (8th Cir. 1992) (photographs of seized documents were admissible as “duplicates” under Rule 1003).

the official records can be a ‘copy’ for purposes of Rule 1005 even though it is not made from the original”).¹⁵

C.

The Electronic Personnel Records that OPM intends to create likely would also be admissible as “duplicates” under Rule 1003,¹⁶ or as “other evidence” under Rule 1004,¹⁷ but for the fact that Rule 1005 appears to preempt Rules 1003 and 1004 with respect to the admissibility of public records. Although Article X generally rejects the notion that some forms of secondary evidence are to be preferred over others, *see generally* Fed. R. Evid. 1004, Rule 1005 “creates a clear preference for certified or compared copies over other forms of secondary evidence” of a public record. 6 Weinstein § 1005.04, at 1005-9. Because of concerns that Rule 1005’s “blanket dispensation from producing or accounting for the original would open the door to the introduction of every kind of secondary evidence of contents of public records,” Fed. R. Evid. 1005, 1972 advisory committee’s note, the Rule provides that other types of secondary evidence of

¹⁵ Under Rule 1005, an otherwise admissible copy may be proved in two ways: by certification in accordance with Rule 902, and by comparison with the original by a witness who attests to its faithful reproduction. Rule 902(4) permits authentication of “[a] copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification.”

¹⁶ “A duplicate is admissible to the same extent as an original,” except when “a genuine question is raised as to the authenticity of the original” or when “in the circumstances it would be unfair to admit the duplicate in lieu of the original.” Fed. R. Evid. 1003. A “duplicate” is “a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by *mechanical or electronic re-recording*, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.” Fed. R. Evid. 1001(4) (emphasis added). Ordinarily, “[e]lectronically imaged documents,” such as the Electronic Personnel Records, “would be ‘duplicates’” of the paper original under Rule 1003. *Computer-Generated Evidence*, 15 Santa Clara Computer & High Tech. L.J. at 24.

¹⁷ “[O]ther evidence of the contents of a writing . . . is admissible,” if the originals have been lost or destroyed (other than in bad faith), are unobtainable, are in possession of an opponent (who does not produce them), or the documents are “not closely related to a controlling issue.” Fed. R. Evid. 1004. Because Rule 1004 “recognizes no ‘degrees’ of secondary evidence,” Fed. R. Evid. 1004, 1972 advisory committee’s note, once one of those prerequisites is satisfied, “the party seeking to prove the contents of the [document] . . . may do so by any kind of secondary evidence,” *United States v. Ross*, 33 F.3d 1507, 1513 (11th Cir. 1994), ranging from reproductions that may also qualify as “duplicates” under Rule 1003, *e.g.*, *United States v. Gerhart*, 538 F.2d 807, 810 n.4 (8th Cir. 1976), to the testimony of a witness about his recollection of the contents of a document, *e.g.*, *Neville Constr. Co. v. Cook Paint & Varnish Co.*, 671 F.2d 1107, 1109 (8th Cir. 1982). *See generally* 2 McCormick § 238, at 109. “Other evidence” thus should include electronic reproductions like those OPM intends to create. It therefore seems likely that scanned electronic versions of paper records that were destroyed in good faith in the ordinary course of business ordinarily would be admissible as “other evidence” under Rule 1004(1). *Cf. Wright v. Farmers Co-op of Ark. & Okla.*, 681 F.2d 549, 553 (8th Cir. 1982) (photocopy of interview transcript admissible where employee who took statement testified that recording had been destroyed in regular course of business).

records' contents are admissible only if a properly certified copy of the official record is not available. *See generally id.* ("Recognition of degrees of secondary evidence in this situation is an appropriate *quid pro quo* for not applying the requirement of producing the original."). This clear preference for certified or compared copies has caused some courts and commentators to conclude that a party may seek to introduce an uncertified or uncomparing "duplicate" of an official record under Rule 1003, or "other evidence" of the contents of such a document under Rule 1004, only if a certified copy of the record is not available. *See, e.g., Amoco Prod. Co. v. United States*, 619 F.2d 1383, 1391 (10th Cir. 1980); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1227 (E.D. Pa. 1980) (Becker, J.), *rev'd on other grounds*, 475 U.S. 574 (1986); 6 Weinstein § 1005.06[1], at 1005-12; 31 Wright & Gold § 8033, at 498-99.

Rule 1005's preclusive effect likely would prevent reliance on Rule 1003 to introduce Electronic Personnel Records into evidence unless no certified or compared copy of the public record is available. Because providing the requisite certification for the electronic records at issue (or comparing the printout with the electronic record) should be straightforward, any difficulty in satisfying the requirements of Rule 1005 would likely be because a "copy" is unavailable, perhaps because the electronic record is lost or corrupted. Under such circumstances, it seems unlikely that an agency would be able to produce a reliable counterpart of the original paper record that would qualify as a "duplicate" under Rule 1003. Thus, Rules 1003 and 1004 are unlikely to bear on proving the contents of Electronic Personnel Records.

III.

You also have asked us to "address specifically whether the electronic versions of the following categories of documents" would be admissible in federal courts, McTigue Letter at 1, once the paper versions are destroyed in accordance with OPM's plans:

- (1) documents required by OPM regulations to be notarized and/or certified, such as affidavits and court orders, as required in 5 C.F.R. § 831.2007-2008, 838.221(b), and 843.208-209;
- (2) designations of beneficiaries for life insurance (SF 2823), which require "signed and witnessed writing[s]" under 5 U.S.C. § 8705(a);
- (3) assignments of Federal employees' group life insurance (RI 76-10), which require signed and witnessed writing under 5 C.F.R. 870.902;

(4) designations of beneficiaries to receive lump sum CSRS benefits (SF 2808), which require “signed and witnessed writing[s]” under 5 U.S.C. § 8342(c); and

(5) designations of beneficiaries to receive lump sum [Federal Employees Retirement System] benefits (SF 3102), which also require “signed and witnessed writing[s]” under 5 U.S.C. § 8424(d).

Id. As discussed above, a printout of an Electronic Personnel Record should be admissible to prove the content of that document. The best evidence rules of Article X are not the only hurdles that a document must clear, however, to be admissible into evidence. *See United States v. Bellucci*, 995 F.2d 157, 160 (9th Cir. 1993) (“[t]he proponent of a writing at trial must overcome authentication, best evidence, and hearsay objections”). Accordingly, we will also address authentication of electronic versions of these five categories of documents under Article IX (Rules 901–903), and admissibility under the hearsay rules of Article VIII (Rules 801–808).

A.

“The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Fed. R. Evid. 901. So long as this “minimal” standard is met, “authenticity [is] established under Rule 901 and the court or trier of fact may consider conflicting evidence only for purposes of measuring probative value and weight.” 31 Wright & Gold § 7103, at 24; *id.* § 7104, at 36 (“The judge should permit the evidence to go to the jury unless the showing as to authenticity is so weak that no reasonable juror could consider the evidence to be what its proponent claims it to be.”); *see also United States v. Meienberg*, 263 F.3d 1177, 1181 (10th Cir. 2001) (“Any question as to the accuracy of the printouts, whether resulting from incorrect data entry or the operation of the computer program, as with inaccuracies in any other type of business records, would have affected only the weight of the printouts, not their admissibility.”) (quoting *United States v. Catabran*, 836 F.2d 453, 458 (9th Cir. 1988)). The best evidence requirements of Article X and the authentication requirements of Article IX overlap somewhat, but a paper printout of an electronic record will have to clear additional hurdles in order to be authenticated. We conclude that printouts of the electronic versions of these forms will likely be considered authentic and admissible.

The first step in authenticating a paper printout of an electronic record involves authenticating the electronic record itself. Because the electronic record is the official or public record maintained by OPM, it should qualify for authentication as a “[p]ublic record or report” under Rule 901(b)(7). “Public records or reports”

may be authenticated through “[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.” Fed. R. Evid. 901(b)(7). Each of the forms listed above is likely to be a “writing” within the scope of the authenticity rules. A variety of forms have been held to constitute “writings” for purposes of Rule 901(b)(7), including “not just items prepared by public officials but also items prepared by private parties where those items are authorized by law to be recorded or filed” in a public office. 31 Wright & Gold § 7112, at 122–23 & nn. 7–18; *id.* at 126; *see also* Fed. R. Evid. 1001 (defining “writings”).

Authentication of such documents is typically straightforward. Proof that a document was recorded or filed in a public office can be inferred from testimony that the document was found in the official public records, 31 Wright & Gold § 7112, at 125–26, so that the proponent of public documents ordinarily “may prove their authenticity by proving that the appropriate public office has custody of them, without further proof,” at least when the document is among the official records. 5 Weinstein § 901.10[1], at 901–88; *id.* § 901.10[1], at 901–89 (proof that copy of document was kept in a government agency’s working files, rather than its official files, was insufficient to authenticate it); *see also* Fed. R. Evid. 901(b)(7), 1972 advisory committee’s note (“Public records are regularly authenticated by proof of custody, without more.”). “This result is founded on the assumption that the public employees having custody of such records will carry out their public duty to receive and maintain only genuine official [documents].” 2 McCormick § 226, at 70–71 (“If a writing is claimed to be an official report or record of a public governmental agency, and is also proved to have come from the proper public office where such official papers are kept, it is generally agreed that this authenticates the offered document as genuine.”); *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir. 1999) (noting presumption that public records are authentic and trustworthy with the burden on the opponent to present “enough negative factors to persuade a court that a report should not be admitted”) (quoting *Johnson v. City of Pleasanton*, 982 F.2d 350, 352 (9th Cir.1992)). The testimony of a document custodian can establish this fact. *See, e.g., United States v. Miller*, 771 F.2d 1219, 1237 (9th Cir. 1985) (testimony of telephone company billing supervisor sufficient foundation for admission of computer-generated toll and billing records).

The second step is to authenticate the paper printout. Because of overlap between the Rules, that requirement likely would be satisfied by compliance with the requirements of Article X. For the printout to be introduced under Rule 1005 on the theory that it is a copy of a “public record,” it will have to be “certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original.” Fed. R. Evid. 1005. Rule 902 permits a copy of an official record or report to be authenticated when certified correct “by the custodian [of records] or other person authorized to make the certification,” Fed. R. Evid.

902(4), which would again include an official who is familiar with an agency's electronic record-keeping system. Because of the inherent reliability of public documents, certified copies are self-authenticating documents whose "authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence." Fed. R. Evid. 902, 1972 advisory committee's note. Their authenticity can also be proven by extrinsic evidence. *See* Fed. R. Evid. 901(b)(7); 31 Wright & Gold § 7112, at 129.

We do not anticipate that the statutory requirements of signing, witnesses, and notarization outlined above will present particular issues under the authentication rules for threshold admissibility purposes. There is no requirement that the proponent of a public record further authenticate it by, for example, proving that a specific electronic document is an authentic copy of the paper original or that its signatures and notary seals are authentic. *See United States v. Farah*, 475 F. App'x 1, 10–11 (4th Cir. 2007) (testimony of agency custodian was sufficient to establish documents in files as authentic; rejecting requirement that documents had to be identified by handwriting authentication), *cert. denied*, 552 U.S. 1185 (2008); *cf. Traction Wholesale Ctr. v. NLRB*, 216 F.3d 92, 105 (D.C. Cir. 2000) (evidence that documents came from business files is evidence that signatures they contain are authentic). *See generally* 31 Wright & Gold § 7112, at 128 (authentication under Fed. R. Evid. 901(b)(7) "only concerns whether an item has been kept as a genuine public record; the provision says nothing about an item's creation or the accuracy of its contents"). Requiring further authentication would be inconsistent with the understanding that documents maintained in official files can ordinarily be presumed to be authentic because "the official custodian has a public duty to verify the genuineness of the papers offered for recording or filing and to accept only the genuine." 2 McCormick § 226, at 71. Of course, a litigant in a particular case may contend that a signature or notarization is inauthentic or fraudulent, and it may be necessary to introduce known handwriting exemplars or expert testimony to persuade the factfinder that the document is genuine. But ordinarily a public record will be admissible in evidence once the "minimal" threshold showing of Article IX is satisfied, 31 Wright & Gold § 7103, at 21–22 & n.24, 24, & 27–28, and "contradictory evidence [about authenticity] goes to the weight to be assigned by the trier of fact and not to admissibility," *United States v. Reilly*, 33 F.3d 1396, 1409 (3d Cir. 1994). To help minimize such problems, it would seem advisable to exercise quality control to ensure that signatures and notarization markings on documents are clear and legible.

B.

Depending on how a Personnel Record is used in litigation, statements it contains may be considered hearsay. "'Hearsay' is a statement . . . offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). "Hearsay is not admissible except as provided by [the Federal Rules of Evidence] or by other rules

prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.” Fed. R. Evid. 802. If a Personnel Record is offered to prove that a statement contained within it is true—e.g., that the employee resided at the address given on the form—it will be considered hearsay. If it is offered to prove that the statement was made, regardless of its truth—e.g., that the employee designated a particular individual as the beneficiary of his life insurance—it will not be considered hearsay. In addition, the hearsay rules contain an exception for “[p]ublic records and reports,” defined in relevant part as “[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth . . . the activities of the office or agency.” Fed. R. Evid. 803(8)(A). If a Personnel Record satisfies that definition, it may be admitted to prove the truth of a matter it records, notwithstanding the availability of the person who completed it. *Id.*

Converting paper Personnel Records to electronic format would not appear to affect their admissibility under the hearsay rules. Converting a document from one format to another does not introduce another “declarant” or add a layer of hearsay. The hearsay exception for public records appears to contemplate that documents may be converted into another format for long-term storage, by providing that “[r]ecords, reports, statements, or data compilations, in any form” are admissible if they fit the remainder of the definition. *Id.* Your document conversion plan thus should not increase the risk that a given Personnel Record will be considered inadmissible hearsay.

IV.

In sum, Electronic Personnel Records should be admissible under the Business Records Act and as “public records” under Rule 1005. Such records may be authenticated under Rules 901 and 902, and converting documents to electronic format should not affect their admissibility under hearsay rules.

The use of electronic versions of documents may marginally increase the risk that a litigant will be able to refute the accuracy of the paper printout—if, for example, a signature becomes smudged during scanning of the original paper form or the file is lost. These risks principally concern the reliability of the conversion and reproduction process itself, however, not inherent limitations on the admissibility of electronic versions of paper documents. Assuming that technological and conversion issues are addressed consistently and conscientiously, OPM’s plan to adopt an electronic record-keeping system should not appreciably increase the risk that a personnel record will be deemed inadmissible in a particular case.

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Scope of the Definition of “Variola Virus” Under the Intelligence Reform and Terrorism Prevention Act of 2004

The definition of “variola virus” in 18 U.S.C. § 175c does not include other naturally occurring orthopoxviruses, such as cowpox and vaccinia, but is rather limited to viruses that cause smallpox or are engineered, synthesized, or otherwise produced by human manipulation from the variola major virus or its components.

July 24, 2008

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

Section 6906 of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, 3773 (“the Act” or “IRTPA”), makes it a criminal offense for “any person to knowingly produce, engineer, synthesize, acquire, transfer directly or indirectly, receive, possess, import, export, or use, or possess and threaten to use, variola virus,” 18 U.S.C. § 175c(a)(1) (Supp. V 2005), but exempts “conduct by, or under the authority of, the Secretary of Health and Human Services,” *id.* § 175c(a)(2). The statute defines “variola virus” as “a virus that can cause human smallpox or any derivative of the variola major virus that contains more than 85 percent of the gene sequence of the variola major virus or the variola minor virus.” *Id.* § 175c(d). Violations are punishable by fines of up to \$2,000,000 and imprisonment for 25 years to life. *See id.* § 175c(c)(1).

You have requested our opinion regarding the scope of the statutory definition of “variola virus.” Specifically, you ask whether that definition encompasses other viruses in the orthopoxvirus genus, such as cowpox and vaccinia, that occur naturally, generally affect animals rather than humans, and are commonly used in medical and veterinary research, including the development of smallpox vaccines. For the reasons set forth below, we conclude that section 175c does not apply to such orthopoxviruses, but rather only to viruses that cause smallpox or are engineered, synthesized, or otherwise produced by human manipulation from the variola major virus or its components.¹

I.

The variola major and minor viruses cause smallpox, a highly contagious and often fatal disease. Smallpox is classified by the Centers for Disease Control and

¹ In addition to the views of HHS on this question, we have received the views of the National Security Division, the Criminal Division, the Department of Homeland Security, the Bureau of Industry and Security in the Department of Commerce, and the Department of Agriculture, all of which agree with the conclusion we reach in this opinion.

Prevention (“CDC”) as a “Category A” bioterrorism agent or disease.² Although the World Health Organization declared in 1980 that smallpox had been eradicated worldwide, the United States and Russia maintain official government repositories of the variola virus for research purposes. The Department of Health and Human Services (“HHS”) conducts and supports research on countermeasures to smallpox. This research involves not only the variola virus itself, but also other closely related orthopoxviruses including cowpox (which Dr. Edward Jenner discovered in the 1790s could be used as a vaccine against smallpox), vaccinia (a similar virus later used to make smallpox vaccine), camelpox, and monkeypox. Although humans may be infected by animal orthopoxviruses, most of these viruses have milder effects on humans than smallpox and are significantly less contagious.³

Your concern is that the statutory definition of “variola virus,” specifically the phrase “any derivative of the variola major virus that contains more than 85 percent of the gene sequence of the variola major virus or the variola minor virus,” might be interpreted to prohibit research involving these other orthopoxviruses. The statute does not define the term “derivative.” You believe that this term should be interpreted as referring only to viruses engineered or otherwise created by human manipulation of the variola virus, but you are concerned that it might be read more broadly to include viruses that have been “deriv[ed]” naturally through evolution (although you suggest that scientists in this field do not usually use the term “derivative” in this sense). You have informed us that there is at present no scientific consensus regarding whether the variola virus and other orthopoxviruses evolved from a common genetic ancestor or whether variola or one of the other orthopoxviruses might be the ancestor of others. *See, e.g.,* I.V. Babkin et al., *Analysis of Nucleotide Sequences of Individual Orthopoxvirus Genes* (World Health Organization 2003) (abstract available at <http://www.who.int/csr/disease/smallpox/abstracts2003/en>) (last visited Aug. 15, 2014) (noting that “[t]he evolutionary relationships of various orthopoxvirus species are far from being clarified,” and arguing that “cowpox or cowpox-like virus was the ancestor of all the modern

² The CDC defines “Category A” “Bioterrorism Agents/Diseases” as those that “pose a risk to national security” because they

- can be easily disseminated or transmitted from person to person;
- result in high mortality rates and have the potential for major public health impact;
- might cause public panic and social disruption; and
- require special action for public health preparedness.

See <http://www.bt.cdc.gov/agent/agentlist-category.asp> (last visited Aug. 15, 2014).

³ We note that monkeypox may pose a greater threat than other animal orthopoxviruses and in fact has caused human deaths in Africa, but we understand that it is significantly less infectious and less likely to be fatal than smallpox. The CDC does not list monkeypox as a Category A, B, or C bioterrorism agent, *see* <http://www.bt.cdc.gov/agent/agentlist.asp> (last visited Aug. 15, 2014), but it does include monkeypox in its list of “select agents,” which “have the potential to pose a severe threat to public health and safety,” 42 C.F.R. § 73.3 (2007). Unauthorized possession or transfer of monkeypox virus is thus subject to criminal penalties under 18 U.S.C. § 175b (Supp. V 2005).

orthopoxviruses”). If one or more of the other orthopoxviruses were subsequently found to have evolved from variola major virus, however, they would be subject to the statute’s criminal prohibitions under the broader reading. You also indicate that there is no scientific consensus concerning the correct interpretation of quantitative data regarding the gene sequence homology of related viruses, but note that, under at least one approach, other orthopoxviruses might be found to contain more than 85 percent of the variola major or minor gene sequence. Because of these unresolved questions, you are concerned that important and beneficial scientific research involving non-variola orthopoxviruses may be chilled by fear of criminal liability.⁴

II.

A.

In addressing this question, we must begin with the language of the statute. The first part of the variola virus definition—“a virus that can cause human smallpox”—raises no question of interpretation and does not concern us here. We need address only the second, alternative definition—“any derivative of the variola major virus that contains more than 85 percent of the gene sequence of the variola major virus or the variola minor virus.” This second definition itself has two parts: the virus must be “a derivative of the variola major virus” and it must also “contain[] more than 85 percent of the gene sequence of the variola major virus or the variola minor virus.” Whatever may be meant by “85 percent of the gene sequence,” therefore, the second definition can include only those viruses that are “derivatives” of the variola major virus. Thus, if other orthopoxviruses are not “derivatives” of variola virus within the meaning of the statute, the fact that they may contain more than 85 percent of the variola gene sequence is irrelevant for purposes of section 175c.

Because the statute does not define the term “derivative,” we look first to the ordinary meaning of that term. *See, e.g., Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.”)

⁴ The National Science Advisory Board for Biosecurity (“NSABB”) has recommended that section 175c be repealed “because current scientific insight precludes meaningful definition of an agent based solely on sequence homology The current definition of variola virus, as provided in the statute, could be interpreted to include other less harmful naturally occurring poxviruses such as vaccinia virus that are vital to beneficial research, thereby inadvertently restricting and potentially making criminal many types of beneficial research such as the development and production of smallpox vaccine.” NSABB, *Addressing Biosecurity Concerns Related to the Synthesis of Select Agents* 12 (Dec. 2006) (available at http://osp.od.nih.gov/sites/default/files/resources/Final_NSABB_Report_on_Synthetic_Genomics.pdf, last visited Aug. 15, 2014).

(quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (“When interpreting a statute, we must give words their ‘ordinary or natural’ meaning.”) (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)). The noun “derivative” has a number of different meanings in different fields, but most of the standard dictionaries we have examined offer both a general definition and a definition pertaining to chemistry. See, e.g., 1 *The New Shorter Oxford English Dictionary* 641 (1993) (“2. *gen.* Something derived; a thing flowing, proceeding, or originating from another. . . . 4. *Chem.* A compound obtained from another by substitution or other simple process.”); *American Heritage Dictionary of the English Language* 489 (4th ed. 2000) (“1. Something derived. . . . 4. *Chemistry* A compound derived or obtained from another and containing essential elements of the parent substance.”); *id.* (defining “derive”: “1. To obtain or receive from a source. . . . 5. *Chemistry* To produce or obtain (a compound) from another substance by chemical reaction.”); *Webster’s New International Dictionary* 704 (2d ed. 1957) (“one that is derived; anything obtained or deduced from another *chem.* A substance so related to another substance by modification or partial substitution as to be regarded as theoretically derived from it, even when not obtainable from it in practice.”); *Webster’s Third New International Dictionary* 608 (1993) (“4. . . . b: a substance that can be made from another substance in one or more steps”).

We also have considered how scientific and medical dictionaries define the term “derivative.” See *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974) (noting that “where Congress has used technical words or terms of art, ‘it (is) proper to explain them by reference to the art or science to which they (are) appropriate’”) (quoting *Greenleaf v. Goodrich*, 101 U.S. 278, 284 (1880)). *Stedman’s Medical Dictionary* defines “derivative” to mean generally “[s]omething produced by modification of something preexisting,” or “[s]pecifically, a chemical compound that may be produced from another compound of similar structure in one or more steps, as in replacement of [a hydrogen atom] by an alkyl, acyl, or amino group.” *Id.* at 461–62 (26th ed. 2004). See also 1 *International Dictionary of Medicine and Biology* 760 (1986) (“[a] substance derived from another by some specific modification of its molecule, usually by substitution or addition reactions”); *Dorland’s Illustrated Medical Dictionary* 478 (29th ed. 2000) (“a chemical substance produced from another substance either directly or by modification or partial substitution”).

These dictionary definitions provide some guidance in interpreting the statute, although they do not conclusively resolve whether the term “derivative” under section 175c includes viruses that may have evolved from or otherwise arisen from variola without human involvement. One of the generic definitions—“a thing flowing, proceeding, or originating from another”—suggests that derivatives may

result from entirely natural processes without human intervention.⁵ Most of the other definitions, particularly the scientific definitions, imply a more active process—describing a “derivative” as a substance arising from “substitution,” “modification,” “replacement,” “addition,” or “obtained,” “produced,” or “made” in “steps.” And although “substitution,” “modification,” “replacement,” and “addition” may result from natural processes, these terms at least suggest deliberate human intervention. Similarly, while natural processes could “produce” a substance in steps, *see, e.g., American Heritage Dictionary of the English Language* 1111 (4th ed. 2004) (defining “produce” as “[t]o bring forth; yield: a plant that produces pink flowers”), many uses of that term require human activity, *see, e.g., id.* (defining “produce” as “[t]o manufacture”). Finally, in the context of creating one entity from another, at least one definition (“a substance that can be made from another substance in one or more steps”) unambiguously includes, and seems focused on, human intervention. *Webster’s Third New International Dictionary* at 608 (emphasis added).

Although the dictionary definitions leave some ambiguity regarding whether the phrase “derivative of the variola virus” in section 175c(d) implies something produced by human activity or more broadly includes any virus that has evolved from variola without human interference, we note that the language Congress used in section 175c(a)(1) provides some support for the former interpretation. The statute prohibits not only the possession or use of variola virus but also “knowingly produc[ing], engineer[ing], [or] synthesiz[ing] . . . variola virus.” In other words, it prohibits knowingly producing, engineering, or synthesizing “any derivative of the variola virus.” In that context, the term “derivative” makes perfect sense as something produced, engineered, or synthesized by human manipulation in a laboratory. Moreover, any violation of the statute must be “knowing[.]” Since there is currently no known evolutionary descendant of variola, there was no reason for Congress to consider whether such a descendant should be included in the statutory prohibition or whether any of the animal

⁵ We do not believe that Congress intended to use the term in the sense of something “so related . . . as to be regarded as theoretically derived” from another substance, since the statutory definition requires both that a virus be a derivative of variola and that it have a close genetic relationship to variola. If the statutory definition were satisfied by close relationship alone, the phrase “any derivative of the variola major virus” would seem almost redundant. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’”) (quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)). *Cf. Reckitt & Colman, Ltd. v. Adm’r, DEA*, 788 F.2d 22, 25–26 (D.C. Cir. 1986) (upholding DEA’s interpretation of the “undefined and potentially ambiguous statutory term” “derivative” in the Controlled Substances Act). In *Reckitt*, the court found that DEA had properly determined that a “derivative” of a drug is “any substance (1) prepared from that drug, (2) which chemically resembles that drug, and (3) which has some of the adverse effects of that drug.” *Id.* at 24–25. The court noted that “[a]lthough the Administrator was not necessarily required to follow a strictly scientific definition, . . . the definition he adopted is nevertheless consistent with that employed by chemists.” *Id.* at 25 (noting that Administrator relied on definition of “derivative” in *Van Nostrand’s Scientific Encyclopedia* (5th ed. 1976) (defining term as expressing “the relation between certain known or hypothetical substances and the compound formed from them”)).

orthopoxviruses might constitute natural “derivatives” of variola.⁶ Given the lack of any consensus among experts in the field regarding the evolutionary relationships between smallpox and the animal orthopoxviruses, we are reluctant to conclude that Congress intended to impose criminal penalties on the mere possession of a class of viruses whose antecedents are currently unknown and purely speculative.

B.

The proper interpretation of the term “derivative” in section 175c must take account also of other provisions of IRTPA. See *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”) (quotation marks and citation omitted); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) (“In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”) (citation and internal quotation marks omitted). Here, Congress clearly articulated the findings and purpose underlying section 6906 within the text of the Act itself. Section 6902(a) sets forth the following findings with respect to variola virus:

(3) Variola virus is the causative agent of smallpox, an extremely serious, contagious, and sometimes fatal disease. Variola virus is classified as a Category A agent by the Centers for Disease Control and Prevention, meaning that it is believed to pose the greatest potential threat for adverse public health impact and has a moderate to high potential for large-scale dissemination. . . . Because it is so dangerous, the variola virus may appeal to terrorists.

(4) The use, or even the threatened use, of . . . the variola virus, against the United States, its allies, or its people, poses a grave risk to the security, foreign policy, economy, and environment of the United States. . . .

(5) There is no legitimate reason for a private individual or company, absent explicit government authorization, to produce, construct, oth-

⁶ Indeed, we do not believe any person currently working with animal orthopoxviruses could be subject to prosecution even under the broadest possible reading of the statute. Since no virus has been identified as having evolved from variola, there can be no “knowing[]” possession of such an evolutionary “derivative” at present.

erwise acquire, transfer, receive, possess, import, export, or use . . . the variola virus.

Pub. L. No. 108-458, § 6902, 118 Stat. at 3769, *reprinted in* 18 U.S.C. § 175c note. These statutory findings provide useful guidance in determining Congress’s intent in enacting section 175c. *Cf. Sutton v. United Air Lines*, 527 U.S. 471, 484, 487 (1999) (relying on findings enacted as part of the Americans with Disabilities Act to interpret statutory term “disability”); *Price v. Forrest*, 173 U.S. 410, 427 (1899) (noting that “preamble may be referred to in order to assist in ascertaining the intent and meaning of a statute fairly susceptible of different constructions”). In addition, section 6902(b) of the Act states that “[t]he purpose of this subtitle [sections 6901–6911 of the Act] is to combat the potential use of weapons that have the ability to cause widespread harm to United States persons and the United States economy (and that have no legitimate private use) and to threaten or harm the national security or foreign relations of the United States.”⁷

The findings and statement of purpose, which are part of the statutory text, show that Congress intended to address what it regarded as extremely serious threats to national security. While the findings quoted above appear to relate only to the variola virus itself, and thus do not specifically address the “any derivative” prong of the statutory definition, they support the view that Congress’s purpose (as stated in section 6902(b)) was to “combat the potential use of weapons that have the ability to cause widespread harm . . . and that have no legitimate private use.” Vaccinia and other animal orthopoxviruses used in research do not fall into either category. They are not classified as Category A agents and do not currently “pose[] a grave risk to the security, foreign policy, economy, and environment of the United States.” Moreover, we understand that there are “legitimate private use[s]” of these non-variola orthopoxviruses in medical and scientific research and in the production of smallpox vaccine.⁸ Indeed, Congress has expressly recognized vaccinia as a “covered countermeasure against smallpox.” 42 U.S.C. § 233(p)(7)(A)(i)(I) (Supp. IV 2004) (authorizing the Secretary to exempt manufacturers and health care providers from liability for administering the smallpox vaccine). Imposing criminal penalties on the possession for legitimate reasons of viruses that do not threaten national security would appear to be inconsistent with Congress’s stated purpose. *Cf. Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 56 (1983) (explaining that a statute

⁷ Congress designated title VI, subtitle J, of the Act, which consists of sections 6901 to 6911, as the “Prevention of Terrorist Access to Destructive Weapons Act of 2004.” This subtitle also prohibits the possession or use of man-portable air defense systems (“MANPADS”), atomic weapons, and radiological dispersal devices. Pub. L. No. 108-458, §§ 6903–6905.

⁸ In addition, a broad interpretation of the statute could potentially render unlawful research on animal orthopoxviruses conducted by the Department of Agriculture (“USDA”) and its contractors. USDA also has statutory authority to regulate and license veterinary vaccines, many of which are based on orthopoxviruses. *See* 21 U.S.C. § 154 (2000).

should not be interpreted “to produce a result at odds with the purposes underlying the statute” but rather “in a way that will further Congress’[s] overriding objective”).

There is little legislative history on the variola prohibition, but what there is supports the view that Congress intended to criminalize the possession of only those “weapons” that pose the most serious threats to national security. In a hearing on a predecessor bill containing provisions identical to those later enacted as title VI, subtitle J of IRTPA (including the definition of variola), a representative of the Justice Department testified that the bill would address “four weapons that could be catastrophic in the hands of terrorists”: MANPADS, atomic weapons, radiological dispersal devices (“dirty bombs”), and the variola virus. *A Review of the Tools to Fight Terrorism Act: Hearing before the Subcomm. on Terrorism, Technology and Homeland Security of the S. Comm. on the Judiciary, 108th Cong. 7 (2004)* (statement of Daniel J. Bryant, Assistant Attorney General). The Department noted:

Current penalties for the unlawful possession of these weapons . . . do not adequately reflect the serious threat to public safety and national security posed by their enormous destructive power. . . . The knowing, unregistered possession of the variola virus has a maximum penalty of only 5 years in prison. . . . To provide a much greater deterrent for the possession or use of these weapons, the [bill] would establish a zero-tolerance policy toward the unlawful importation, possession or transfer of these weapons by imposing very tough criminal penalties.

Id. This statement suggests that the purpose of the bill was to impose more severe penalties on conduct that was already illegal, not to criminalize the possession of viruses that fall far short of posing the type of threat posed by MANPADS, atomic weapons, radiological dispersal devices, and smallpox. This view was also expressed on the Senate floor by Senator Cornyn, who introduced the original bill containing these provisions. *See* 150 Cong. Rec. 25,837 (Dec. 8, 2004) (“Tough penalties like these are appropriate for the most dangerous threats our nation faces, and that is exactly the kind of threat that these items pose.”). Representative Sessions, who introduced the same legislation in the House of Representatives, similarly asserted that “weak punishments for the possession or use of these weapons [are] simply unacceptable.” 150 Cong. Rec. 22,097 (Oct. 8, 2004).

Nowhere in the Act or its legislative history did Congress provide any explanation for its inclusion of the term “derivative” in the definition of “variola virus.” We can conceive of at least two possible rationales. First, Congress may have been concerned that bioterrorists might modify or engineer the variola virus to produce a new deadly virus, immune to smallpox vaccine, that could be used as a terrorist

weapon.⁹ This theory would support the narrower interpretation of “derivative” as something resulting from human manipulation. Alternatively, Congress may have been concerned that a virus that had evolved from variola could be engineered back into smallpox virus. In that case, however, it would be difficult to explain why Congress was not equally or more concerned about the reverse—a predecessor virus from which variola had evolved—or closely related viruses descended from a common ancestor. Moreover, smallpox virus obtained through reverse engineering would already be subject to the prohibition on “produc[ing], engineer[ing], [or] synthesiz[ing] . . . a virus that can cause human smallpox.” We have found no support for this alternative theory in the legislative history or text, and we think it unlikely that Congress intended to criminalize possession of a currently unknown class of viruses without any consideration of the actual danger that might be posed by such viruses or the potential impact of such a prohibition on beneficial research, including the production of smallpox vaccine. We therefore find that the statutory scheme as a whole tends to support the narrower interpretation.

Finally, a broad interpretation of section 175c may also be in tension with other smallpox-related legislation enacted the same year. See *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (The rule that statutes dealing with the same subject should be construed together “necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject Given this underlying assumption, the rule’s application certainly makes the most sense when the statutes were enacted by the same legislative body at the same time.”). The Project Bioshield Act of 2004 directs the Secretary of HHS to “award contracts, enter into cooperative agreements, or carry out such other activities as may reasonably be required in order to ensure that the stockpile [of smallpox vaccine] includes an amount of vaccine against smallpox as determined by such Secretary to be sufficient to meet the health security needs of the United States.” Pub. L. No. 108-276, sec. 3(a)(2), § 319F-2(b)(1), 118 Stat. 835, 843 (2004) (codified at 42 U.S.C. § 247d-6b(b)(1) (Supp. V 2005)). It further provides that “[n]othing in this section shall be construed to limit the private distribution, purchase, or sale of vaccines from sources other than the stockpile.” *Id.* § 247d-6b(b)(2). Although the criminal prohibition in section 175c exempts “conduct by, or under the authority of, the Secretary of Health and Human Services,” 18 U.S.C.

⁹ This hypothesis finds support in the legislative history of related enactments. See 150 Cong. Rec. 15,576 (July 14, 2004) (“Terrorists may soon be able to genetically manipulate biological agents so they are resistant to our current stockpile of countermeasures This legislation recognizes the fact that the growing power of biotechnology can render a pathogen like anthrax or smallpox immune to the vaccines and drugs we may develop”) (statement of Rep. Turner on Project Bioshield Act of 2004); 148 Cong. Rec. 8783 (2003) (“my colleagues and I learned that biological weapons engineers in the former Soviet Union had conducted chilling experiments to make these already deadly pathogens [anthrax, Ebola, and smallpox] yet more lethal through genetic engineering”) (statement of Sen. Kennedy on Conference Report on Public Health Security and Bioterrorism Preparedness and Response Act of 2004, which imposed sentences of up to five years for unlawful possession of smallpox and other biological agents and toxins).

§ 175c(a)(2), interpreting the definition of variola virus in section 175c to include vaccinia might subject the private distribution, purchase, or sale of vaccines otherwise permitted by the Act to criminal penalties, since vaccinia continues to be used in the manufacture of smallpox vaccine.¹⁰ Such criminal liability could extend even to doctors who administer smallpox vaccine to their patients. It would make no sense for Congress to impose criminal penalties on the possession of the most effective smallpox countermeasure, even if vaccinia were determined at some future date to have evolved from variola. Like the “covered countermeasure” provision cited above, the Project Bioshield Act makes clear that Congress considered vaccinia, at least, to have “legitimate private use[s]” despite its close genetic relationship to variola. Under the narrower reading of “derivative,” however, there is no tension between the two statutes, both of which are aimed at combating bioterrorism. Rather, this interpretation produces “a symmetrical and coherent regulatory scheme,” and allows us to “fit . . . all parts [of the relevant statutes] into an harmonious whole.” *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quotation marks and citations omitted); *cf. id.* at 138–39 (finding that the “collective premise” of numerous tobacco-related statutes enacted by Congress forecloses an interpretation of the FDCA that would allow the FDA to ban tobacco).¹¹

C.

After applying the traditional tools of statutory interpretation, we conclude that the better reading of section 175c limits “derivative” to viruses made through human intervention and therefore does not cover other orthopoxviruses that may have evolved naturally from variola at some point in the past. We cannot, however, exclude as unreasonable an interpretation of the statute that would also cover naturally occurring “derivatives.” Accordingly, there remains some ambiguity with respect to the term “derivative.” The rule of lenity, however, counsels in favor of resolving this residual ambiguity in favor of the narrower interpretation. *See, e.g., Castillo v. United States*, 530 U.S. 120, 131 (2000) (using rule of lenity as additional support for preferred interpretation); *Jones v. United States*, 529 U.S. 848, 858 (2000) (same); *Hughey v. United States*, 495 U.S. 411, 422 (1990)

¹⁰ The House Report on the Project Bioshield Act indicated an intent to encourage and provide incentives for private research and development of vaccines, noting that “[c]urrently, companies have little incentive to research, develop, or produce vaccines . . . simply for a possible one-time purchase by the Federal government for the Strategic National Stockpile. . . . The Project Bioshield Act is designed to help resolve these problems.” H.R. Rep. No. 108-147, pt. 3, at 17 (2003).

¹¹ In light of our conclusion that section 175c does not apply to other naturally occurring orthopoxviruses, since those orthopoxviruses do not fall within the statutory definition of “variola virus,” we need not address the scope of section 175c’s exemption for “conduct by, or under the authority of the Secretary of Health and Human Services.”

(“Even were the statutory language . . . ambiguous, longstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner.”).

In general, “‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity,’ . . . and . . . ‘when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.’” *Jones*, 529 U.S. at 858 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1962)). This canon of construction “ensures that criminal statutes will provide fair warning concerning conduct rendered illegal.” *Liparota v. United States*, 471 U.S. 419, 427 (1985); see also *United States v. Lanier*, 520 U.S. 259, 266 (1997) (noting that “the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered”).

To be sure, resort to the rule of lenity is justified only where, after “seiz[ing] everything from which aid can be derived,” we are “still left with an ambiguous statute.” *Chapman v. United States*, 500 U.S. 453, 463 (1991) (quotation marks and citations omitted). Nor is it appropriate to invoke the rule “merely because it [is] possible to articulate a construction more narrow” than another. *Moskal v. United States*, 498 U.S. 103, 108 (1990) (emphasis in original). Instead, the rule of lenity is “reserved . . . for those situations in which reasonable doubt persists about a statute’s intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute.” *Id.* (quotation marks and citation omitted, emphasis in original).

We have thoroughly examined the language and structure of section 175c and the enacted statutory purpose of the provision, as well as the interactions between section 175c and related statutes. Invocation of the rule of lenity is therefore appropriate with respect to the residual ambiguity in the term “derivative” and supports choosing the narrower interpretation—something produced by human intervention. More specifically, we believe that the better interpretation of the statute would not include within the definition of “variola virus” naturally occurring animal orthopoxviruses, such as cowpox, vaccinia, and monkeypox, even if one or more of these viruses were eventually determined to have evolved from variola. In any event, Congress certainly has not made clear its intent to cover these viruses. See *Dunn v. United States*, 442 U.S. 100, 112–13 (1979) (rule of lenity “is rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited” and “to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not ‘plainly and unmistakably’ proscribed”) (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)).

III.

For the reasons set forth above, we conclude that the phrase “derivative of the variola major virus” as used in section 175c of title 18 refers only to viruses produced, synthesized, or engineered from variola major virus or its components through human manipulation.

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Applicability of 18 U.S.C. § 207(f) to Public Relations Activities Undertaken for a Foreign Corporation Controlled by a Foreign Government

A foreign corporation is a “foreign entity” under 18 U.S.C. § 207(f) if it exercises sovereign authority or functions de jure or de facto.

A former official’s proposed activities are not prohibited by section 207(f)(1) if the former official does not provide those services on behalf of a “foreign entity,” regardless of whether the former official’s services incidentally benefit the foreign entity’s interests.

Where the former official does provide services on behalf of a “foreign entity,” the proposed public relations and media activities would fall within the scope of section 207(f)(1) if the former official acts with the requisite intent to influence a decision of an officer or employee of the United States government.

August 13, 2008

MEMORANDUM OPINION FOR THE GENERAL COUNSEL DEPARTMENT OF COMMERCE

Section 207(f) of title 18, United States Code, prohibits former government officials from “represent[ing]” or “aid[ing] or advis[ing]” a “foreign entity” under certain circumstances within one year of leaving government service. 18 U.S.C. § 207(f)(1) (2000). Your office has sought our opinion about the application of this prohibition to proposed public relations and media activities of a former senior official of the Department of Commerce on behalf of a foreign corporation that is owned and controlled by an instrumentality of a foreign government. That request raises three questions: (1) whether the foreign corporation is a “foreign entity” for purposes of section 207(f); (2) if not, whether the proposed activities are nevertheless prohibited because the foreign government supported the foreign corporation’s efforts to influence the United States government; and (3) if the foreign corporation is a “foreign entity,” whether the proposed activities fall within the class of activities that section 207(f)(1) prohibits.¹

For the reasons described below, we conclude that a foreign corporation is a “foreign entity” under section 207(f) if it exercises sovereign authority or functions de jure (i.e., by formal delegation) or de facto. Based on the information provided, however, we are unable to reach a conclusion about whether the particular foreign corporation described in your letter is such a “foreign entity.”

¹ Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from John J. Sullivan, General Counsel, Department of Commerce (Nov. 23, 2005) (“Commerce Letter”). We also sought and received the views of the Office of Government Ethics (“OGE”). See Letter for Steven G. Bradbury, Acting Assistant Attorney General, Office of Legal Counsel, from Marilyn L. Glynn, General Counsel, Office of Government Ethics (Dec. 12, 2005) (“OGE Letter”).

We further conclude that the former official's proposed activities are not prohibited by section 207(f)(1) if the former official does not provide those services on behalf of a "foreign entity," regardless of whether the former official's services incidentally benefit the foreign entity's interests. Where the former official does provide services on behalf of a "foreign entity," however, we believe that the proposed public relations and media activities would fall within the scope of section 207(f)(1), if the former official acts with the requisite intent to influence a decision of an officer or employee of the United States government.

I.

Your letter states that the foreign corporation at issue is a subsidiary of company owned and controlled by an instrumentality of a foreign government. The foreign government originally established the parent corporation as a state-owned company with overall responsibility for the administration and development of the foreign government's offshore petroleum operations. The parent company later transferred these operational and commercial interests to the subsidiary company at issue here.

The subsidiary made a public offer to purchase a United States oil and gas company. The bid was to be financed partly through loans from the subsidiary's state-owned parent corporation and partly from a foreign bank, also owned by the foreign government. In response to criticism of the bid from members of Congress and others in the United States, the foreign government made public statements demanding that the United States government refrain from interfering in the proposed transaction. While the bid was pending, a communications and media firm asked a former senior official of the Department of Commerce to perform work as a consultant on behalf of the foreign corporation. The proposed work would have included writing op-ed pieces and articles supporting the purchase in newspapers, magazines, and trade journals, and responding to reporters who contacted him about the matter. The former official did not plan to meet with any U.S. government officials on behalf of the foreign corporation, nor did he plan to act as a lawyer, agent, or other official representative for the company. Although the one-year period in which section 207(f) would have applied has expired, your office has advised that the questions raised in your letter are recurring ones and that it continues to seek our opinion on the subject.

II.

We begin with the question whether the foreign corporation at issue is a "foreign entity" for purposes of 18 U.S.C. § 207(f). Under that provision, former senior officials of the federal government are subject to a temporary post-employment restriction on activities conducted on behalf of a "foreign entity."

Public Relations Activities Undertaken for a Foreign Corporation

Section 207(f)(1) provides that for one year after leaving government employment, a former senior official may not knowingly:

(A) represent[] a foreign entity before any officer or employee of any department or agency of the United States with the intent to influence a decision of such officer or employee in carrying out his or her official duties, or

(B) aid[] or advise[] a foreign entity with the intent to influence a decision of any officer or employee of any department or agency of the United States, in carrying out his or her official duties.

18 U.S.C. § 207(f)(1). A “foreign entity” for purposes of the restriction is “the government of a foreign country as defined in section 1(e) of the Foreign Agents Registration Act of 1938, as amended, or a foreign political party as defined in section 1(f) of that Act.” *Id.* § 207(f)(3). A “government of a foreign country” under the Foreign Agents Registration Act (“FARA”), in turn,

includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated.

22 U.S.C. § 611(e) (2000).²

Under this definition, we agree with the Office of Government Ethics (“OGE”) that ownership or control by a foreign government, standing alone, does not necessarily make a foreign corporation a “foreign entity” for purposes of 18 U.S.C. § 207(f). *See* OGE, *Summary of Post-Employment Restrictions of 18 U.S.C. § 207*, at 11 (July 29, 2004) (“*Summary of Post-Employment Restrictions*”) (attachment to Memorandum to Designated Agency Ethics Officials, General Counsels and Inspectors General, from Marilyn L. Glynn, Acting Director, Office of Government Ethics, *Re: Reissuance of Post-Employment Summary*, DO-04-023 (July 29, 2004))

² We note that this statutory definition of “government of a foreign country” differs significantly from definitions of “foreign government” or “foreign state” found elsewhere in the United States Code. For instance, a “foreign government” for purposes of foreign gift rules is defined to mean “any unit of foreign governmental authority,” “any international or multinational organization whose membership is composed of any unit of foreign government,” and “any agent or representative of any such unit or such organization, while acting as such.” 5 U.S.C. § 7342(a)(2) (2000). Similarly, the Foreign Sovereign Immunities Act defines “foreign state” to mean any “separate legal person . . . which is an organ of a foreign state . . . or a majority of whose shares or other ownership interest is owned by a foreign state . . . and which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.” 28 U.S.C. § 1603 (2000).

(available at <http://www.oge.gov/OGE-Advisories/Legal-Advisories/Attachment-to-DO-04-023--Summary-of-Post-Employment-Restrictions-of-18-U-S-C--§-207/>, last visited Aug. 15, 2014). The touchstone of the statute’s definition is instead whether an entity “exercis[es] sovereign de facto or de jure political jurisdiction over [all or part of a foreign] country,” or exercises “such sovereign de facto or de jure authority or functions” by delegation. 22 U.S.C. § 611(e). Because foreign corporations generally do not themselves have “sovereign . . . political jurisdiction over [a] country” but rather exercise any sovereign powers they may possess by delegation, we focus on the latter portion of 22 U.S.C. § 611(e), which states that the term “foreign entity” includes an entity that exercises “sovereign de facto or de jure authority or functions” by “direct[] or indirect[]” delegation from a foreign government. *Id.* Under this portion of the statutory definition, as OGE has advised, “[a] foreign commercial corporation will not generally be considered a ‘foreign entity’ for purposes of section 207(f) unless it exercises the functions of a sovereign” as specified in section 611(e), i.e., the exercise of “political jurisdiction over . . . any part of [a foreign] country.” *Summary of Post-Employment Restrictions* at 11; accord OGE, *Letter to a Private Attorney*, Informal Advisory Ltr. 03x1, 2003 WL 23675077 (Jan. 2) (“OGE Advisory Letter”).

Whatever the precise limits of “sovereign political jurisdiction,” however, it is plain that not every governmental action involves the exercise of a “sovereign authority or function”: some governmental actions are merely “proprietary” or “commercial” in nature, see *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 74, 90 (2007) (citing *Opinion of the Justices*, 3 Greenl. (Me.) 481, 483 (1822)), a distinction that OGE has recognized in assessing whether a foreign corporation is a “foreign entity” under section 207, see OGE Advisory Letter, 2003 WL 23675077, at *2 (advising that a foreign government-owned corporation that performed “strictly commercial” tasks was not a “foreign entity” under section 207(f)). A government does not exercise sovereign authority, for example, when it elects to act as a “market participant” or perform “strictly commercial” functions. See *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988) (distinguishing a state’s activities in its “distinctive governmental capacity” from activities in its “more general capacity of a market participant,” such as when it “manufacture[s] and sell[s] cement”); OGE Advisory Letter, 2003 WL 23675077, at *2. Even in circumstances where a government has reserved a monopoly for itself or a government-owned corporation in the relevant market, it may perform proprietary or commercial functions that are not uniquely “sovereign” but rather are common to public and private entities alike. When performing them, a government does not exercise regulatory authority, execute or enforce the law, or, more generally, take actions that are associated with the exercise of “sovereign political jurisdiction” over a country within the meaning of 22 U.S.C. § 611(e). Thus, we agree with OGE that a foreign government owned corporation that performs “strictly commercial” functions is not a “foreign entity”

for purposes of section 207(f). See OGE Advisory Letter, 2003 WL 23675077, at *2.

In sum, the determination whether a foreign commercial corporation is a “foreign entity” for purposes of section 207(f) depends on whether the corporation possesses delegated authority or performs functions that involve the exercise of “sovereign . . . political jurisdiction,” which, at a minimum, excludes foreign corporations that perform only proprietary or commercial functions that may be performed by a private entity without any governmental delegation. Applying this inquiry to a corporation owned or controlled by a foreign government requires close attention to the authority the company exercises and the functions it performs, both by formal delegation from a foreign government and in practice. See 22 U.S.C. § 611(e) (“government of a foreign country . . . includes . . . any group or agency to which such sovereign *de facto* or *de jure* authority or functions are . . . delegated”) (emphasis added); see also OGE Advisory Letter, 2003 WL 23675077, at *2 (examining the authority and functions exercised by a foreign corporation in practice).

We lack sufficient information to reach a conclusion about whether the foreign corporation at issue is a “foreign entity” for purposes of 18 U.S.C. § 207(f). Many of the functions it performs (“petroleum exploration, development, production, and sales activities,” Commerce Letter at 6) could be proprietary or commercial, rather than sovereign, in nature. Your letter, however, describes other authority or functions (“administration and development of offshore petroleum operations with foreign oil and gas companies,” Commerce Letter at 5) that may be sovereign, depending on the manner in which they are conducted. As part of the “administration and development of offshore petroleum operations with foreign oil and gas companies,” for example, the foreign corporation might have political authority to exclude others from access to the foreign country’s offshore oil and gas reserves by setting policy governing oil and gas offshore operations, or by granting licenses for oil and gas extraction. On the other hand, the “administration and development of offshore petroleum operations” might only involve purely commercial activities in the offshore oil and gas industries that can be performed without any delegation of “sovereign” authority. Without more information about the details of the particular authorities and functions of the foreign corporation, however, we cannot determine whether it performs any sovereign functions or whether its functions are instead “strictly commercial.” Therefore, we are unable to determine whether the foreign corporation in question is a “foreign entity” under 18 U.S.C. § 207(f).

III.

Your office also has asked whether, even if the foreign corporation is not a “foreign entity,” and even though the former Commerce official did not propose to work on behalf of the foreign government, the prohibition in section 207(f)(1) would nonetheless bar the proposed consulting engagement “if the [foreign

government] is actively supporting the company's efforts to influence the United States Government" and has a financial interest in the matter to which the former official's activities would be addressed. Commerce Letter at 6. As we understand the facts, the foreign government made public statements supporting the foreign corporation's offer to buy the U.S. company and urging Congress not to interfere with the transaction. *See id.* at 7. The foreign government also had a financial interest in the proposed transaction, because it would have partially financed the deal. *Id.* Thus, the foreign government apparently had a common interest with the foreign corporation in persuading U.S. government officials not to block the deal.

We understand your question to be whether, in light of the foreign government's financial interest and activities supporting the proposed deal, the former official's activities on behalf of the foreign corporation in connection with its bid for the U.S. company would have been considered to "represent[]" or "aid[] or advise[]" the foreign government itself, which is clearly a "foreign entity" under section 207(f)(3). We answer this question in the negative. For the reasons given below, we conclude that section 207(f) does not prohibit former government officials from taking actions that are not undertaken on a foreign entity's behalf, regardless of whether the official's actions benefit the foreign entity in some way.

Section 207(f)(1)'s one-year post-employment restriction applies where a former government official "represents a foreign entity" or "aids or advises a foreign entity." 18 U.S.C. § 207(f)(1). Two of the three actions prohibited by section 207(f)—representing and advising—necessarily require a relationship between the former government official and a foreign entity. As OGE has said, a former official "'represents' a foreign entity when he acts as an agent or attorney for or otherwise communicates or makes an appearance on behalf of that entity to or before any employee of a department or agency." *Summary of Post-Employment Restrictions* at 11. Similarly, a former official "advise[s] a foreign entity" when he provides his counsel and expertise to the entity directly; he does not "advise" an entity, as that word is normally used, by making unsolicited observations to the public at large that prove helpful to the entity. *See Webster's Third New International Dictionary* 32 (1993) (defining "advise" to mean "to give advice to," and providing as an example, "among those *advising* the president"); *The Compact Oxford English Dictionary* 22 (1992) ("To offer counsel, as one of a consulting body; to give advice To give counsel to, to counsel, caution, warn.") (giving several examples involving the direct provision of advice). Thus, with respect to "represent[ing]" and "advise[ing]," section 207(f)(1) does not bar former government officials from taking actions that incidentally benefit the foreign entity unless they act on behalf of a foreign entity.

Conceivably, a person might "aid[] . . . a foreign entity" by taking actions that benefit the entity without providing services on its behalf. But such an expansive interpretation of "aids . . . a foreign entity" does not comport with the most natural reading of the statute. In its statutory context, "aids" is a part of the phrase "aids or

advises” in section 207(f)(1)(B) and is parallel to “represents” in section 207(f)(1)(A). Under the interpretive canon *noscitur a sociis*, “aids” should thus be read in the context of its statutory neighbors “to avoid ascribing to [it] a meaning so broad that it is inconsistent with its accompanying words, thus giving ‘unintended breadth to the Acts of Congress.’” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). Rather, as the Court has explained, where “several items in a list share an attribute,” the canon of *noscitur a sociis* “counsels in favor of interpreting the other items as possessing that attribute as well.” *Beecham v. United States*, 511 U.S. 368, 371 (1994); see also *James v. United States*, 550 U.S. 192, 222 (2007) (Scalia, J., dissenting) (under the canon of *noscitur a sociis*, “which of various possible meanings a word should be given must be determined in a manner that makes it ‘fit’ with the words with which it is closely associated”). Applying this interpretive canon here, the term “aids,” like the terms “represents” and “advises,” is best construed to encompass a category of services a person provides on behalf of a foreign entity, not any activity that incidentally benefits the foreign entity.

The statutory history of 18 U.S.C. § 207(f) confirms our view that a former senior official does not violate the restriction unless he or she provides services on behalf of a foreign entity. As originally enacted in the Ethics Reform Act of 1989, section 207(f)(1)(A) applied to any former senior official who “represents *the interests of* a foreign entity before any officer or employee of any department or agency.” Pub. L. No. 101-194, § 101(a), 103 Stat. 1716, 1722 (1989) (emphasis added). In technical amendments to the act several months later, Congress struck “interests of,” clarifying that the restriction applies only to a former official who “represents a foreign entity.” Pub. L. No. 101-280, § 2(a)(8)(A)(i), 104 Stat. 149, 150 (1990). Although the 1990 Act amended only section 207(f)(1)(A) (the “represents” prong) and not section 207(f)(1)(B) (the “aids or advises” prong)—which did not contain the “interests of” language in the first instance—its deletion of this language confirms that Congress did not intend section 207(f)(1) generally to apply when a former official takes actions that benefit the interests of a foreign entity but does not work on behalf of the foreign entity itself.³ See Summary of H.J. Res. 553, Technical Corrections to the Ethics Reform Act of 1989, 136 Cong. Rec. 7933, 7937 (1990) (“The amendment clarifies that the restrictions in section 207(f) apply to the representation of a foreign entity and not to representation of other parties on an issue in which the foreign entity may be interested.”); OGE Letter at 4–5.

³ Our interpretation is consistent with OGE’s guidance on the similar restriction in 18 U.S.C. § 207(b) (2000), which prohibits certain former officials from “aid[ing] or advis[ing] any other person” on certain matters for one year following government service. OGE has advised that this restriction prohibits “[o]nly activities that are undertaken on behalf of ‘any other person,’” not any activity that provides a benefit to any other person. *Summary of Post-Employment Restrictions* at 7.

Under the interpretation of “aids or advises” we adopt, it is ultimately immaterial that the foreign government shared a common interest with the foreign corporation in the proposed transaction or that it took action to promote that interest. The relevant question under section 207(f)(1) is whether the proposed activities would have been undertaken on behalf of a “foreign entity.”⁴ Assuming that the foreign corporation was not itself a “foreign entity,” and that the former Commerce official’s proposed activities would not have been performed on behalf of a foreign government, those activities would not have been prohibited by section 207(f)(1).

IV.

Finally, your office has asked whether the proposed public relations and media activities of the former Commerce official would constitute “represent[ing]” or “aid[ing] or advis[ing]” the foreign corporation within the meaning of 18 U.S.C. § 207(f)(1). The proposed activities include “writing op-ed pieces and articles about the proposed purchase of [the U.S. company] in major newspapers, magazines, and trade journals; responding to reporters’ questions; and otherwise disseminating information through the media in support of the purchase,” but would not involve “communicating directly to Members of Congress or officials in the Executive Branch or targeting . . . communications to those persons.” Commerce Letter at 7. Although these activities would not constitute representing or advising a foreign entity under section 207(f)(1), we conclude that, if undertaken by a former official with “the intent to influence a decision of any officer or employee of any department or agency of the United States, in carrying out his or her official duties,”⁵ 18 U.S.C. § 207(f)(1)(B), they would fall within the prohibition on “aid[ing]” a foreign entity.

⁴ We note that this rule may encompass a situation in which a former government official knows (or is willfully blind to the fact) that the foreign corporation procuring his services is acting, not in its own interests, but as an agent of the foreign government that owns or controls it. In that situation, although the former official nominally works for the foreign corporation, it would seem that his work would nevertheless be undertaken on behalf of the foreign government. See OGE Letter at 4. In such a case, assuming that other elements of the statutory prohibition are present, the engagement may fall within the scope of section 207(f)(1). Because we do not understand the situation your office has described to raise this concern, we do not discuss it further.

⁵ Intent may be inferred from circumstantial evidence. See generally 1 Wayne R. LaFare, *Substantive Criminal Law* § 5.2, at 357 (2d ed. 2003) (explaining that a defendant’s state of mind “at [a] particular earlier moment . . . must be gathered from his words (if any) and actions in the light of all the surrounding circumstances. Naturally, what he does and what foreseeably results from his deeds have a bearing on what he may have had in his mind”). Hence, publications and articles that are addressed to members of Congress or Executive Branch officials or, more generally, that urge or discourage government action in some way may be evidence of an intent “to influence a decision” of a government official. See 18 U.S.C. § 207(f)(1)(B). Conversely, where a former official’s assistance is unrelated to

Public Relations Activities Undertaken for a Foreign Corporation

An official does not “represent[]” an entity “before” any officer or entity of the United States government, under the ordinary meaning of that phrase, by writing and securing publication of op-ed pieces and articles. 18 U.S.C. § 207(f)(1)(A). As OGE has explained, under section 207(f)(1)(A), a former employee “‘represents’ a foreign entity when he acts as an agent or attorney for or otherwise communicates or makes an appearance on behalf of that entity *to or before* any employee of a department or agency.” *Summary of Post-Employment Restrictions* at 11 (emphasis added). As we have explained with respect to another statutory subsection of section 207, a former official does not communicate or make an appearance before an employee of a department or agency when that person publishes an editorial in a newspaper that a government employee reads. *See Applicability of 18 U.S.C. § 207(c) to the Briefing and Arguing of Cases in Which the Department of Justice Represents a Party*, 17 Op. O.L.C. 37, 43 n.6 (1993) (distinguishing the publication of an editorial in a newspaper from filing a brief in court on the ground that the former is not “*to a specific Department attorney*”) (emphasis added). Thus, the first prong of section 207(f)(1) does not prohibit the indirect communication that occurs when a government official reads an editorial or article written by a former official.

If undertaken with “the intent to influence a decision of any officer or employee of any department or agency of the United States, in carrying out his or her official duties,” however, the proposed activities would fall within the second prong of section 207(f)(1), in our view, because they involve “aid[ing] . . . a foreign entity.” 18 U.S.C. § 207(f)(1)(B). Although, as explained above, we construe this prohibition to apply only to services performed on behalf of a foreign entity, the plain meaning of “aid[]” (even with this limitation) is expansive: it means “to give help or support to” someone. *Webster’s Third New International Dictionary* 44 (1993). Consistent with this definition, OGE’s guidance states that a former employee “aids or advises” a foreign entity “when he assists the entity other than by making . . . a communication or appearance” on behalf of that entity to or before a government body. *Summary of Post-Employment Restrictions* at 11. In other words, a covered former official “aids or advises” a foreign entity under section 207(f)(1)(B) when he engages in any activity that would “give help or support to” a foreign entity with the “intent to influence a decision of” a U.S. government official, other than by providing the kind of assistance covered by section 207(f)(1)(A). Assuming that the requisite statutory intent is present, *see supra* note 5, the public relations and media activities described in the Commerce Letter would have fallen within the scope of this prohibition, because those activities would have plainly “given help or support to” the foreign corporation in its efforts

potential government action, as it may be in editorials addressed to shareholders of a public company, his conduct may be evidence that he lacked the requisite statutory intent.

to influence the opinion of the shareholders of the U.S. target company, the public at large, and government officials with regard to its bid for the company.

OGE's written guidance does not take a position on whether section 207(f)(1) covers public relations activities, although it indicates that section 207(f)(1)(B) targets "behind the scenes' assistance," such as "drafting a proposed communication to an agency, advising on an appearance before a department, or consulting on other strategies designed to persuade departmental or agency decisionmakers to take certain action." *Summary of Post-Employment Restrictions* at 11–12. Were section 207(f)(1)(B)'s prohibition limited to such assistance, at least some portion of the public relations and media activities proposed by the former Commerce official would have fallen outside of section 207(f)(1)(B). Such a limitation cannot, in our judgment, be reconciled with the breadth of the statutory language. A former official acting with the intent to influence a decision of a U.S. government official "aids" a foreign entity by undertaking the public relations and media activities at issue here just as much as he "aids" that foreign entity by providing "behind the scenes" assistance. The statutory language provides no basis for distinguishing between these two activities.

The other post-employment restrictions in section 207, which predate section 207(f)(1) and expressly cover a narrower range of conduct, do not cast doubt on our interpretation of section 207(f)(1). When Congress added section 207(f) to the statute in 1989, it did not use the language of these pre-existing restrictions but, instead, used the broader phrase "aids or advises" to describe the restricted activities. As we have observed before, this difference in language "suggests Congress had particular concern about representation of foreign entities," and correspondingly drafted section 207(f)(1)(B) to impose more expansive restrictions on such representation. *Application of 18 U.S.C. § 207(f) to a Former Senior Employee*, 28 Op. O.L.C. 97, 99 (2004); see also *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[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.") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Accordingly, the narrower scope of other post-employment bars in section 207 provides no justification for reading limitations into section 207(f)(1); rather, section 207(f)(1) must be construed according to its plain terms, which encompass the sort of media-related activities described in your letter, if they are undertaken with the requisite statutory intent.

Lastly, we do not believe that this conclusion raises serious constitutional questions. As an initial matter, we note that section 207(f)(1) prohibits media-related activities on behalf of a foreign entity only incidentally, as part of its broader prohibition on "aiding or advising" foreign entities with the intent to influence a decision of an official or employee of the United States government. That is, the purpose of section 207(f)(1) is not to restrict speech, but to prohibit former senior

government officials from engaging in a range of *conduct* at the behest of foreign entities in their first year after leaving the government. The statute bars speech only insofar as it forms part of the conduct at which the statute is aimed. Although this distinction does not remove a former government official's speech from the protection of the First Amendment, it may serve to distinguish section 207(f)(1) from prohibitions that aim to suppress speech because of its content. *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62, 67–68 (2006) (stating that “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed”).⁶ As the Supreme Court has explained, “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *United States v. O’Brien*, 391 U.S. 367, 376 (1968). As explained below, section 207(f)(1)'s prohibition is clearly justified by such an interest.

Even applying heightened constitutional scrutiny, section 207(f)(1)'s application to the media-related activities at issue here would pass muster because the prohibition furthers important government interests unrelated to the suppression of speech, and any incidental restriction on speech is no greater than is necessary to further those interests. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994). Congress's stated purpose in adding subsection (f)(1) to section 207 was “to restore public confidence in the integrity of government officials.” Report of the Bipartisan Task Force on Ethics on H.R. 3660, Government Ethics Reform Act of 1989, 135 Cong. Rec. 30,740, 30,740 (1989). The post-employment restriction on working for foreign entities serves this interest in two ways. First, it diminishes the possibility or perception that senior government officials may be influenced in the performance of their duties by the prospect of future employment by foreign entities. Second, it reduces the chance or the perception that senior government officials may benefit improperly from public service by sharing information learned during their time in government with foreign entities in return for remuneration. Taken together, these interests provide a sufficient justification for section 207(f)(1). As courts have recognized, the government has an “undeniably powerful” interest in ensuring that its employees do not “misuse or appear to misuse” the power and influence they gain through government employment, *United States v. Nat'l Treas. Emps. Union*, 513 U.S. 454, 472 (1995), and in

⁶ *See also Wirzburger v. Galvin*, 412 F.3d 271, 278 (1st Cir. 2005) (“Government actions that are aimed at some goal other than restricting the conveyance of ideas are generally permissible, even if they incidentally inhibit free speech.”); *Jews for Jesus, Inc. v. Jewish Cmty. Relations Council of N.Y., Inc.*, 968 F.2d 286, 295 (2d Cir. 1992) (“States can constitutionally regulate conduct even if such regulation entails an incidental limitation on speech.”).

certain circumstances, have held that interest to justify prophylactic limitations that burden even core First Amendment rights. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding prohibition on political activity by state government employees); *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548 (1973) (upholding prohibition on political activity by federal government employees); *United Pub. Workers (C.I.O.) v. Mitchell*, 330 U.S. 75, 102–03 (1947) (same).

Furthermore, the scope and duration of section 207(f)(1)'s prohibition is narrowly targeted to serve the government's interests: It applies only to senior former government officials, and it lasts only for one year following government service. Even during that period, moreover, to fall within section 207(f)(1)'s restriction, the former official must act on behalf of a "foreign entity" and speak with the intent to influence a decision of an official or employee of the United States government. So long as a former official is not acting on behalf a foreign entity, section 207(f)(1) does not preclude him from speaking publicly about actions the federal government should take in matters of interest to foreign entities. Accordingly, even subjecting section 207(f)(1) to strict constitutional scrutiny, we think its relatively narrow prohibition is adequately justified by the strong government interest supporting it. We thus conclude that it may be applied to the media activities described above consistent with the Constitution.⁷

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⁷ We note that section 207(f)(2) creates a "[s]pecial rule" that applies the substantive prohibitions of section 207(f)(1) to a lifetime prohibition applicable to former U.S. Trade Representatives and Deputy U.S. Trade Representatives. 18 U.S.C. § 207(f)(2). Whether the longer duration of section 207(f)(2)'s prohibition on "aiding or advising" a foreign entity would raise constitutional questions, or warrant a narrowing construction, when applied to the media-related activities at issue here is beyond the scope of this opinion. Cf. *Constitutionality of Statute Governing Appointment of United States Trade Representative*, 20 Op. O.L.C. 279, 280 (1996) (concluding that 19 U.S.C. § 2171(b)(3), which provides that anyone "who has directly represented, aided or advised a foreign entity . . . in any trade negotiation, or trade dispute, with the United States may not be appointed as United States Trade Representative" is unconstitutional because, among other things, it establishes a qualification that is "unattainable by a sufficient number to afford [the President] ample room for choice" in nominations) (quoting *Civil-Service Commission*, 13 Op. Att'y Gen. 516, 525 (1871)).

Enforceability of Certain Agreements Between the Department of the Treasury and Government-Sponsored Enterprises

The Amended and Restated Senior Preferred Stock Purchase Agreements between the United States Department of the Treasury and the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, according to their terms, would create rights enforceable through actions brought in the United States Court of Federal Claims in accordance with the ordinary rules and procedures governing litigation in that Court.

September 26, 2008

LETTER OPINION FOR THE SECRETARY OF THE TREASURY

I am writing with regard to the Amended and Restated Senior Preferred Stock Purchase Agreements (“the Agreements”) between the United States Department of the Treasury (“Treasury”), and the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, respectively (collectively the “Government-Sponsored Enterprises” or “GSEs”). You have asked for our view whether the Agreements create enforceable rights against Treasury for certain holders of debt securities and beneficiaries of Mortgage Guarantee Obligations issued by the GSEs (collectively “the Holders”).*

Under the Agreements, following a payment default by a GSE with respect to any Holders, and in the event Treasury fails to perform its obligations to either of the GSEs in respect of any draw on the Commitments, those Holders may file claims in the United States Court of Federal Claims for relief requiring Treasury to pay the relevant GSE a specified amount (called “the Demand Amount”) in the form of liquidated damages. After consultation with the Civil Division of the Department of Justice, we conclude that the United States Court of Federal Claims generally would have jurisdiction under the Tucker Act to entertain claims brought by the Holders for liquidated damages, payable to a GSE, according to the terms of the Agreements, if Treasury failed to perform its obligation under the Agreements to fund the Commitment in the event of a payment default by the GSE to the Holders. The general jurisdictional provision of the Tucker Act, section 1491(a)(1) of title 28 of the United States Code, authorizes the Court of Federal Claims “to render judgment upon any claim against the United States founded” on, among other bases, “any express . . . contract with the United States, or for liquidated . . . damages in cases not sounding in tort.” A Holder’s claim against Treasury for liquidated damages, payable to a GSE, under the Agreements falls within the general scope of section 1491(a)(1). It is established that the Court of Federal Claims has jurisdiction under section 1491(a)(1) to hear a breach of

* Any capitalized terms used but not defined in this letter opinion have the meanings set forth in the Agreements.

contract claim brought by a properly authorized party for payment of damages owed to a corporation. See *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1293–94 (Fed. Cir. 1999). Accordingly, the Court of Federal Claims generally would have jurisdiction under this provision of the Tucker Act to hear such claims by Holders. Because the Tucker Act constitutes express statutory consent to the award of monetary relief against the United States, the sovereign immunity of the United States would not be a bar to any such claim. See *United States v. Mitchell*, 463 U.S. 206, 212 (1983) (“[T]he Tucker Act constitutes a waiver of sovereign immunity.”); *Adair v. United States*, 497 F.3d 1244, 1250 (Fed. Cir. 2007) (Tucker Act “waives the government’s sovereign immunity for these claims”).

We therefore conclude that the Agreements, according to their terms, would create rights enforceable through actions brought in the Court of Federal Claims in accordance with the ordinary rules and procedures governing litigation in that Court.

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Scope of Exemption Under Federal Lottery Statutes for Lotteries Conducted by a State Acting Under the Authority of State Law

The federal lottery statute exemption for lotteries “conducted by a State” requires that the state exercise actual control over all significant business decisions made by the lottery enterprise and retain all but a de minimis share of the equity interest in the profits and losses of the business, as well as the rights to the trademarks and other unique intellectual property or essential assets of the state’s lottery.

It is permissible under the exemption for a state to contract with private firms to provide goods and services necessary to enable the state to conduct its lottery, including management services, as discussed in the opinion.

October 16, 2008

MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL CRIMINAL DIVISION

Federal law generally prohibits the promotion and advertisement of lotteries in interstate commerce, 18 U.S.C. §§ 1301–1304, 1953(a), but exempts from these prohibitions, among other things, lotteries “conducted by [a] State acting under the authority of State law.” *Id.* §§ 1307(a)(1), 1307(b)(1), 1953(b)(4). We understand that a number of states have proposed to enter into contracts with private management companies for the long-term operation of their lotteries, pursuant to state legislation. Under the terms of these proposed arrangements, the private management company would operate the lottery business under standards established by the state, would make a fixed upfront or annual payment to the state representing a projection of profits from the lottery business, and would have some significant economic interest in the additional profits of the enterprise and would bear some significant portion of the risk of losses. The Criminal Division has asked us for guidance in determining whether a lottery operating under such a long-term private management arrangement would qualify as a lottery “conducted by a State acting under the authority of State law” within the meaning of the federal lottery statutes.

We conclude that the statutory exemption for lotteries “conducted by a State” requires that the state exercise actual control over all significant business decisions made by the lottery enterprise and retain all but a de minimis share of the equity interest in the profits and losses of the business, as well as the rights to the trademarks and other unique intellectual property or essential assets of the state’s lottery. It is permissible under the exemption for a state to contract with private firms to provide goods and services necessary to enable the state to conduct its lottery, including management services, as discussed herein.

I.

State-chartered lotteries were prevalent during the colonial period and the early years of the Republic. In the nineteenth century, public sentiment shifted against gambling, and by the end of the century most states had banned lotteries of any sort, public or private. The State of Louisiana, however, continued to permit the Louisiana Lottery Company, a powerful private concern, to operate under a monopoly from the State. Largely unregulated by Louisiana, the Louisiana Lottery Company made significant profits by promoting and selling tickets to the citizens of other states where lotteries were illegal. *See generally* National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, Department of Justice, *The Development of the Law of Gambling 1776–1976* (1977) (“*DOJ Gambling Report*”); G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 *Cornell L. Rev.* 923, 927–38 (1978).

To stop this circumvention of other states’ laws and to address the perceived evils of the Louisiana Lottery Company, including the corruption of government officials and other problems associated with the commercialization of gambling, Congress in the 1890s made it a crime to sell or advertise lotteries through the mail or through interstate commerce. *See* Act of Sept. 19, 1890, ch. 908, § 1, 26 Stat. 465 (codified as amended at 18 U.S.C. § 1302) (prohibiting the use of the mails for lottery-related purposes); Act of Mar. 2, 1895, ch. 191, § 1, 28 Stat. 963 (codified as amended at 18 U.S.C. §§ 1301) (prohibiting interstate traffic in lottery materials), 1303 (prohibiting mail carriers from participating in lottery activities). Congress subsequently extended these prohibitions to broadcast media and to a broader array of gambling activity. *See* Communications Act of 1934, Pub. L. No. 73-416, § 316, 48 Stat. 1064, 1088–89 (codified as amended at 18 U.S.C. § 1304) (prohibiting the broadcast of information concerning a lottery); Pub. L. No. 87-218, 75 Stat. 492 (1961) (amending Travel Act) (codified at 18 U.S.C. § 1953(a)) (prohibiting interstate transport of wagering paraphernalia). These prohibitions applied regardless of whether the lottery was run by a private entity or by a state. *United States v. Fabrizio*, 385 U.S. 263, 269 (1966).

Beginning with New Hampshire in 1963, a number of states decided to institute or reinstitute their own state-run lotteries to raise public funds. *DOJ Gambling Report* at 116–21; Blakey, *Federal Law of Gambling*, 63 *Cornell L. Rev.* at 950 & nn. 114–15. By the end of 1974, thirteen states were conducting their own lotteries. H.R. Rep. No. 93-1517, at 4 (1974) (Committee on the Judiciary). To accommodate the promotion of these state-run lotteries, Congress in 1975 enacted exemptions to the criminal prohibitions in 18 U.S.C. §§ 1301–1304 and 1953(a) for “lotter[ies] conducted by [a] State acting under the authority of State law.” Pub. L. No. 93-583, §§ 1, 3, 88 Stat. 1916 (the “1975 Act”) (codified as amended at 18 U.S.C. §§ 1307(a)(1), 1307(b)(1), 1953(b)(4)). An earlier version of the bill would have “permit[ted] the advertisement of any legal lottery, whether it is

conducted by the State or not,” but at the urging of the Department of Justice, it was rejected in committee in favor of the more restrictive limitation quoted above.¹

In 1988, Congress added an exemption to section 1307 for lotteries that are “authorized or not otherwise prohibited by the State in which [they are] conducted,” if those lotteries are “conducted by a not-for-profit organization or a governmental organization” or “conducted as a promotional activity by a commercial organization and [are] clearly occasional and ancillary to the primary business of that organization.” Pub. L. No. 100-625, § 2(a), 102 Stat. 3205 (codified at 18 U.S.C. § 1307(a)(2)). Again, Congress gave serious consideration to legislation that would have “remove[d] federal restrictions on the advertising of legitimate lotteries and gambling activities in interstate commerce, whether conducted by public, private, or charitable interests,” but declined to adopt such a broad exemption.²

Today, forty states, as well as the District of Columbia, operate government-run lotteries.³ Although lotteries conducted by for-profit companies remain subject to

¹ *State Conducted Lotteries: Hearing on H.R. 6668 and Companion Bills Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 3 (1974); see also H.R. Rep. No. 93-1517, at 8 (1974) (Committee on the Judiciary) (“When the subcommittee took favorable action on bill 6668 and reported it to the full committee it recommended a series of amendments which would have extended the exceptions in the bill to lotteries ‘. . . authorized and licensed in accordance with State law.’ These amendments were rejected by the full committee, and are the amendments referred to in the statement of additional views appended to this report. The Justice Department opposed this series of amendments and, as has been noted, they were not accepted by the full committee and were not reported to the House.”).

² H.R. Rep. No. 100-557, at 3 (1988); see also *id.* at 9 (noting that the bill “would [have] permit[ted] the advertising of ‘state-authorized’ lotteries, and not merely ‘state-conducted’ lotteries”) (quoting testimony of Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice); 131 Cong. Rec. 25,508 (1985) (statement of Rep. Frank) (introducing earlier version of bill that would have exempted any lottery “authorized and regulated by the State in which it is conducted”).

³ See Ariz. Rev. Stat. Ann. §§ 5-501 to 5-525 (2002 & Supp. 2007); Cal. Gov’t Code § 8880 (2005 & West Supp. 2008); Colo. Rev. Stat. §§ 24-35-201 to 24-35-222 (2006); Conn. Gen. Stat. §§ 12-800 to 12-834 (2000 & West Supp. 2008); Del. Code Ann. tit. XXIX, §§ 4801-4824 (2003 & Supp. 2006); D.C. Code §§ 3-1301 to 3-1337 (2007 & Supp. 2008); Fla. Stat. Ann. §§ 24.101-24.124 (2003 & West Supp. 2008); Ga. Code Ann. §§ 50-27-1 to 50-27-55 (2006); Idaho Code §§ 67-7401 to 67-7452 (2006 & Supp. 2008); 20 Ill Comp. Stat. Ann. §§ 1605/1-1605/27 (West 2008); Ind. Code Ann. §§ 4-30-1-1 to 4-30-19-4.2 (1996 & Lexis/Nexis Supp. 2008); Iowa Code § 99G (2004 & West 2008); Kan. Stat. Ann. §§ 74-8701 to 74-8721 (1992); Ky. Rev. Stat. Ann. §§ 154A.010-154A.990 (2006 & West 2007); La. Rev. Stat. Ann. §§ 47-9000-47-9081 (Supp. 2008); Me. Rev. Stat. Ann. tit. VIII, §§ 371-389 (1997 & Supp. 2007); Md. Code Ann., State Gov’t §§ 9-101 to 9-125 (2004 & Lexis/Nexis Supp. 2007); Mass. Ann. Laws. ch. 10, §§ 22-35, 36-40, 56-58 (2000 & Lexis/Nexis Supp. 2008); Mich. Comp. Laws Ann. §§ 432.1-432.47 (2001 & West Supp. 2008); Minn. Stat. Ann. §§ 349A.01-349A.16 (2004 & West Supp. 2008); Mo. Rev. Stat. §§ 313.200-313.353 (2001 & West Supp. 2008); Mont. Code Ann. §§ 23-7-103 to 23-7-412 (2007); Neb. Rev. Stat. Ann. §§ 9-801 to 9-841 (2003 & Lexis/Nexis Supp. 2007); N.H. Rev. Stat. Ann. §§ 284-21-a to 284-21-v (Lexis/Nexis Supp. 2007); N.J. Stat. Ann. §§ 5-9-1 to 5-9-25 (1996 & West Supp. 2008); N.M. Stat. Ann. §§ 6-24-1 to 6-24-34 (2008); N.Y. Tax Law §§ 1600-1620 (2004 & McKinney Supp. 2008); N.C. Gen. Stat. §§ 18C-101 to 18C-172 (2007); N.D. Cent. Code §§ 53-12.1-03 to 53-12.1-10 (2007 & Supp. 2007); Ohio. Rev. Code Ann.

the criminal prohibitions in 18 U.S.C. §§ 1301–1304 and 1953(a), some states are considering legislation that would authorize long-term agreements with private management companies to operate lotteries for the states, subject to prescribed standards, in return for a significant share of the profits of the lottery enterprise. The Criminal Division has sought our views on whether lotteries operated under such arrangements would fall within the scope of the federal exemption for lotteries “conducted by a State acting under the authority of State law.” The arrangements proposed by the states, as we understand them, would be authorized by state legislation, and the question comes down to whether lotteries so operated would be “conducted by” the states.⁴

II.

For the reasons set forth herein, we believe that the statutory exemption for lotteries “conducted by a State” requires that the state manage and direct the course of the lottery venture—by exercising actual control over all significant business decisions made by the enterprise—and that the state retain all but a de minimis share of the equity interest in the profits and losses of the business, as well as the rights to the trademarks and other unique intellectual property and assets essential to the state’s lottery. As we discuss more fully below, preserving the state’s ownership interests in the lottery business will help to ensure that the lottery will be operated *by* the state and solely *for* the public benefit of the state, which we believe the federal lottery statutes require. In our view, these requirements flow from the text and structure of the statutes, from their legislative history, and from relevant court decisions. In interpreting the scope of the exemption for lotteries “conducted by a State,” we find that principles of agency and partnership law are instructive by analogy.

§§ 3770.01–3770.99 (2005 & Lexis/Nexis Supp. 2008); Okla. Stat. Ann. tit. 3A, §§ 701–735 (West Supp. 2008); Or. Rev. Stat. §§ 461.010 to 461.740 (2007); 72 Pa. Cons. Stat. §§ 3761-101 to 3761-314 (1995 & West 2008); R.I. Gen. Laws §§ 42-61-1 to 42-61-17 (2006); S.C. Code Ann. §§ 59-150-10 to 59-150-410 (2004 & Supp. 2007); S.D. Codified Laws §§ 42-7A-1 to 42-7A-65 (2004 & Supp. 2008); Tenn. Code Ann. §§ 4-51-101 to 4-51-206 (2005 & Supp. 2007); Tex. Gov’t Code Ann. §§ 466.001 to 466.453 (2004 & Vernon Supp. 2008); Vt. Stat. Ann. tit. XXXI, §§ 651–678 (2000 & Supp. 2007); Va. Stat. Ann. §§ 58.1-4000 to 58.1-4027 (2004 & Supp. 2007); Wash. Rev. Code Ann. §§ 67.70.010 to 67.70.905 (2001 & Lexis/Nexis 2008); W. Va. Code §§ 29-22-1 to 29-22-28 (2004 & Lexis/Nexis Supp. 2008); Wis. Stat. Ann. §§ 565.01 to 565.50 (West 2006).

⁴ Such a lottery would not appear to qualify under any other exemption to the federal lottery statutes. The private management company contemplated in the various state proposals would not be a “not-for-profit organization” for purposes of the exemption enumerated in 18 U.S.C. § 1307(a)(2)(A); nor would the lottery be managed “as a promotional activity” that “is clearly occasional and ancillary to the primary business of that organization,” *id.* § 1307(a)(2)(B). Similarly, even if the private management company were to maintain a close working relationship with the state government, it would be highly unlikely to qualify as a “governmental organization” under section 1307(a)(2)(A). None of the remaining exemptions in sections 1307 and 1953(b) would have any conceivable application to a state-sponsored lottery. *See* 18 U.S.C. §§ 1307(b)(2), 1953(b)(1), (b)(3), (b)(5).

A.

The verb “conduct” means “[t]o manage; direct; lead; have direction; carry on; regulate; do business.” *Black’s Law Dictionary* 295 (6th ed. 1990). See *Webster’s Third New International Dictionary* 474 (1993) (defining verb “conduct” to mean “lead,” “direct,” “control,” or “manage”); 2 *Oxford English Dictionary* 791 (1978) (similar). In the context of the federal lottery statutes, we believe the phrase “conducted by the State” contemplates that the state will “manage” the business, “direct” the affairs of the business, “carry on” its operations, and “do business” as a state-run enterprise, for the benefit of the state.

Although “regulate” is suggested in the dictionaries as one synonym for “conduct,” merely regulating the lottery, or licensing a private lottery concession pursuant to detailed standards prescribed by the state, plainly cannot be sufficient to satisfy the requirements of the statutory exemption. That the exemption requires more than state regulation or licensing is confirmed by 18 U.S.C. § 1307 as a whole. The exemption for lotteries “conducted by a State” in section 1307(a)(1) is followed immediately in section 1307(a)(2) by the exemption for a lottery “authorized or not otherwise prohibited by the State in which it is conducted” and “conducted by” a “not-for-profit organization,” a “governmental organization,” or “as a promotional activity by a commercial organization” that is clearly occasional and ancillary to the business of the organization. Were the phrase “conducted by a State” construed to include lotteries authorized, licensed, or regulated by the state (for example, pursuant to state law and subject to state-imposed standards), the exemption in section 1307(a)(1) would swallow those separately enumerated in section 1307(a)(2), a result that is strongly disfavored as a matter of statutory interpretation. See *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 & n.11 (1988) (“[W]e are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.”). Furthermore, the parallel use of the phrase “conducted by” in section 1307(a)(2)’s exemptions for certain lotteries run by not-for-profit organizations and as occasional promotional activities by commercial organizations strongly suggest that “conducted by” cannot mean “regulated by,” because not-for-profit organizations and commercial entities do not, in any conventional sense of the word, “regulate.”

The only federal decision to address the meaning of the statutory exemption for lotteries “conducted by a State” is consistent with this reading. In *United States v. Norberto*, 373 F. Supp. 2d 150 (E.D.N.Y. 2005), the court considered whether the exemption in section 1307(b)(2) for lotteries “authorized by the law[s] of [a] foreign country” requires that the foreign country affirmatively approve the conduct in question. See *id.* at 156. The defendants objected to such a reading on the ground that it would essentially read into that exemption a requirement (paralleling section 1307(a)(1)) that the lottery be “conducted by” the foreign government. The court rejected this contention, on the ground that a state’s

affirmative authorization of an activity was not equivalent to its conducting that activity. To make this point, the court contrasted “the State of New York which has a state run lottery” with “the United Kingdom[, which] authorizes a private company known as ‘Camelot’ to be the government sanctioned operator of its National Lottery.” *Id.* at 156–57. Consistent with our conclusion here, the court indicated that the British arrangement—which the court understood to involve the use of a government-licensed and regulated management company to operate the lottery—would not qualify as a lottery conducted by a state. *Id.*⁵

The Rhode Island Supreme Court reached a similar conclusion in two advisory opinions addressing whether state lottery proposals were consistent with the Rhode Island Constitution’s prohibition on gaming except where “operated by the state.” R.I. Const. art. 6, § 15. The statutory proposals would have permitted a private gaming company and an Indian tribe to run a casino subject to close regulatory supervision by the state, and the court was asked to determine whether the proposed arrangements left the state with sufficient control to satisfy the requirements of the constitutional provision. Interpreting the word “operate” as we interpret “conduct” here (as entailing active control over the enterprise), the court held that the state must possess “the power to make decisions about *all aspects* of the functioning of [the] business enterprise.” *In re Advisory Opinion to House of Representatives*, 885 A.2d 698, 706 (R.I. 2005) (“*Casino II*”) (emphasis in original) (quoting *In re Advisory Opinion to Governor*, 856 A.2d 320, 331 (R.I. 2004) (“*Casino P*”). Thus, even though the state gaming commission would have had regulatory control over the casino under the proposal, and under one proposal would have had veto authority over certain decisions, the court found it disqualifying that “Harrah’s would make day-to-day decisions having to do with the functioning of the proposed casino while the Lottery Commission merely would enforce the applicable regulations.” *Casino I*, 856 A.2d at 331–32; *see also Casino II*, 885 A.2d at 707 (“Mere regulatory power over the most fundamental aspects of the gaming business—selection of the casino service provider—certainly falls short of ‘operating’ ‘all aspects’ of the facility.”).

This interpretation of “operate”—as necessarily including “the power to make decisions about all aspects of the functioning of [the] business enterprise”—is consistent with our interpretation of the verb “conduct” in sections 1307 and 1953(b). The court concluded that the state had to have “actual control,” which meant that it could not cede the power to “make day-to-day decisions having to do with the functioning of” the lottery. In addition, while ultimately concluding that the statutory proposal did not leave the state with sufficient authority to “operate” the lottery, the Rhode Island Supreme Court drew favorable attention to features of

⁵ It is significant to note that while the British government regulates the activities of Camelot, the private company retains a substantial portion of the profits of the enterprise and is authorized to make business decisions for the lottery without the approval of the British government. *See* <http://www.natlotcomm.gov.uk/UploadDocs/Contents/Documents/Final%20ITA-Full.pdf> (last visited Aug. 5, 2008).

the proposal that “appear[ed] to vest operational control in the state.” *Casino II*, 885 A.2d at 708. These features included the right of the state “to direct daily revenue,” *id.* at 709; the responsibility of the gaming company to comply with detailed accounting procedures, *id.* at 709 & n.11; the right of the state to monitor all “gaming devices,” *id.* at 710; the right of the state to set the number of video lottery terminals and non-slot table games to be played at the casino, *id.*; the right of the state to set the odds of winning, *id.*; and “all other powers necessary and proper to fully and effectively execute and administer the provisions of this chapter for its purpose of allowing the state to operate a casino gaming facility,” *id.* at 711. Similarly here, a state’s authority over these aspects of lottery operations would be important in establishing that it is “conducting” the lottery and therefore that the lottery is eligible for section 1307(a)(1)’s statutory exemption.

There is a question whether the statutory exemption would allow for an arrangement in which the state’s lottery is conducted jointly by the state and by a private for-profit management company—in effect, through a partnership or joint venture between the state and the private company. It might be suggested that even if the private company participates in the conduct of the business, by exercising significant control over some business decisions and participating significantly in the profits and risks of the venture, the lottery could still be “conducted by the State” as long as the state participates in the joint conduct of the lottery. We do not believe, however, that that is the better reading of the statutes.

The overall structure of the statutory scheme strongly suggests that to qualify for the exemption the lottery must be conducted by the state and only by the state, not jointly by the state and a private for-profit entity. Section 1307(a) sets forth several parallel exemptions for lotteries that are “conducted by a State,” “conducted by a not-for-profit organization or a governmental organization,” or “conducted as a promotional activity by a commercial organization” where the lottery is clearly only occasional and ancillary to the business of the commercial organization. 18 U.S.C. §§ 1307(a)(1), 1307(a)(2). These various options are stated disjunctively in the statute; the statute does not appear to allow for an option whereby a lottery might be conducted jointly by more than one of these entities at the same time (though admittedly the statute does not expressly foreclose that possibility). The very narrow scope of the exemption for “clearly occasional and ancillary” “promotional” lotteries conducted by “commercial organization[s]” underscores the evident objective of the federal lottery prohibitions to prevent the broader commercial promotion of lotteries that serve the profit-making interests of private companies, as opposed to the public interests of state and local governments and charitable organizations.

This conclusion is strongly reinforced by the legislative history of the lottery statutes. Although enacted in phases over time, marking the evolving nature of interstate commerce, the federal lottery statutes as a whole reflect a consistent and focused policy by Congress to prohibit private for-profit concerns from engaging

in the promotion of lotteries and thereby to prevent recurrence of the perceived evils that were associated with the Louisiana Lottery Company. As explained by lawmakers at the time, the 1975 Act that created the exemption for state-conducted lotteries sought to accommodate the states' renewed interest in using lotteries to generate state revenue for the benefit of the public interest⁶ while avoiding the risk of corruption and commercialization driven by private interests that Congress believed to be presented by privately operated lotteries, such as the Louisiana Lottery Company.⁷ Indeed, the House Committee on the Judiciary considered a version of the 1975 Act, passed out of a subcommittee, that would have exempted any lottery "authorized and licensed in accordance with state law." H.R. Rep. No. 93-1517, at 8. A Department of Justice witness testified, however, that "the Department would not favor any change in the law which would have the effect of opening up the channels of commerce to individuals who would seize upon the existence of a State authorized lottery to 'commercialize the process,'" and the Committee subsequently amended the bill to exempt only lotteries that were

⁶ See S. Rep. No. 93-1404, at 8 ("It is the recommendation of the Committee that the Federal Government should not allow its laws to impede or prevent the lawfully authorized efforts of States to raise revenues and benefit its own citizens"); 120 Cong. Rec. 22,145 (1974) (statement of Sen. Kennedy) ("State lotteries . . . are not operating for private gain, but to supplement revenue in order to support essential public services."); 120 Cong. Rec. 12,599 (1974) (statement of Rep. Rodino) ("I would like to point out that the revenue being derived from State authorized lotteries is being used for the purposes of education in many States. In some States it is being used to fund programs designed to serve the interests of the elderly."); *id.* at 12,600 (statement of Rep. Cohen) ("Since there is no overriding Federal interest in prohibiting State controlled lotteries, the Federal Government should not interfere with the sovereignty of the individual States or in their selection of revenue-raising measures."); *id.* at 12,604 (statement of Rep. Daniels) ("The lottery . . . is a painless means of raising much needed revenue").

⁷ See 120 Cong. Rec. 12,601 (1974) (statement of Rep. Sarasin) (the 1890 anti-lottery acts were "intended to correct the abuses of a privately run illegal lottery," not to prevent "the situation which exists today, where the States use lotteries to fund such worthwhile programs as education, environmental research, programs to aid the elderly, and for maintenance of open spaces and recreation areas"). See also *State Conducted Lotteries: Hearing on H.R. 6668 and Companion Bills Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 29-30 (1974) (statement of William S. Lynch, Chief of the Organized Crime and Racketeering Section of the Criminal Division of the Department of Justice) ("[T]oday most State-operated lotteries are conducted by means of a central computer with information key-punched into its memory banks concerning every aspect of the lottery operation. This method prevents ticket alterations and duplications, improper claims, and thefts. It further operates to hinder organized criminal groups from infiltrating or stealing from these State lotteries."), *quoted in* H.R. Rep. No. 93-1517, at 5-6; 120 Cong. Rec. 22,145 (1974) (statement of Sen. Kennedy) ("None of the abuses which existed in lotteries run for private profit a century ago are present in the lotteries of these States."); 120 Cong. Rec. 12,600 (1974) (statement of Rep. McClory) ("Policing and disclosure policies have been built into the [Illinois lottery] system with the expectation of making impossible the kind of graft or corruption which existed in 19th century lottery systems."); *id.* at 12,604 (statement of Rep. Daniels) ("Thirteen States now conduct State lotteries under the full protection of State law and regulation. During the several years of experience there have been none of the scandals that had been forecast and the lotteries have brought in millions of dollars in revenue for education and other needs.").

“conducted by a State.” *Id.* at 5–7 (quoting testimony of Deputy Attorney General Henry E. Petersen).

In 1988, Congress again considered statutory language—this time, supported by the Justice Department—that would have “remove[d] federal restrictions on the advertising of legitimate lotteries and gambling activities in interstate commerce, whether conducted by public, private, or charitable interests.” H.R. Rep. No. 100-557, at 3 (1988); *see also id.* at 9 (noting that the bill “would [have] permit[ted] the advertising of ‘state-authorized’ lotteries, and not merely ‘state-conducted’ lotteries”) (quoting testimony of Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice); 131 Cong. Rec. 25,508 (1985) (statement of Rep. Frank) (introducing earlier version of bill that would have exempted any lottery “authorized and regulated by the State in which it is conducted”). Again, however, Congress rejected the proposal, and members expressed concerns that private for-profit companies could not be trusted to operate lotteries in a publicly beneficial manner. *See, e.g.*, 134 Cong. Rec. 10,317–318, 11,261, 11,376 (1988) (statements of Rep. Wolf). Congress instead passed a version of the bill that gave exemptions to lotteries that were “authorized or not otherwise prohibited by the State in which [they are] conducted,” but only if those lotteries were “conducted by a not-for-profit organization or a governmental organization” or “as a promotional activity by a commercial organization.” Pub. L. No. 100-625, § 2(a), 102 Stat 3205 (codified at 18 U.S.C. § 1307(a)(2)).

We believe this history reflects a consistent legislative judgment against permitting private for-profit companies to conduct lotteries. It would appear to be inconsistent with this judgment to permit the injection of a private company’s profit-making interests into the conduct of the state lottery, because doing so would raise the risk that the lottery business would serve a private commercial motive, rather than serving solely the public interest of the state.

The law of partnership offers useful guidance, by analogy, on the sorts of arrangements with a private management company that would convert a lottery business “conducted by a State” into a joint enterprise between the state and the private entity. Perhaps most significantly, partnership law would suggest that a business becomes a partnership (as distinguished from a principal-agent relationship) when a single entity does not exercise actual control over all significant business decisions. Under the Uniform Partnership Act (“UPA”), which has been widely adopted and followed, “the power of ultimate control” is an essential element that “distinguishes a partnership from a mere agency relationship.” Uniform Partnership Act § 202 cmt. 1 (1997); *see also, e.g., Kidz Cloz, Inc. v. Officially For Kids, Inc.*, 320 F. Supp. 2d 164, 171 (S.D.N.Y. 2004) (under New York law, demonstrating “the parties’ joint control and management of the business” is necessary to prove the existence of a partnership); *Harbaugh v. Greslin*, 436 F. Supp. 2d 1315, 1321 (S.D. Fla. 2006) (same under Florida law). Similarly, mutual control is a hallmark of a joint venture. *See, e.g., Taylor v.*

Texaco, Inc., 510 F. Supp. 2d 1255, 1262 (N.D. Ga. 2007) (under Georgia law, “The element of mutual control is a crucial element of a joint venture”); *Black’s Law Dictionary* 843 (7th ed. 1999) (defining “each member’s equal voice in controlling the project” as a “necessary element” of a joint venture). These concepts closely mirror, in our view, the proper meaning of “conducted by a State,” consistent with the text and legislative history and purpose of the federal lottery statutes.

In our view, it is also relevant to note that the sharing of a significant interest in the profits and losses of the business is recognized as “characteristic of a partnership.” *Steelman v. Hirsch*, 473 F.3d 124, 130 (4th Cir. 2007); *see also, e.g., Mallis v. Bankers Trust Co.*, 717 F.2d 683, 690 (2d Cir.1983) (under New York law, “the crucial element of a joint venture is the existence of a mutual promise or undertaking of the parties to share in the profits . . . and submit to the burden of making good the losses”) (quotation marks omitted); *Thomas v. Price*, 718 F. Supp. 598, 605 (S.D. Tex. 1989) (under Texas law, “Major incidents of the partnership relationship are an agreement among the participants to share profits and losses and a mutual right of control to manage the partnership”); *Black’s Law Dictionary* at 843 (defining “shared profits and losses” as a “necessary element” of a joint venture). The UPA creates a rebuttable presumption that a person “who receives a share of the profits of a business” is a partner in the business. Uniform Partnership Act § 202(c)(3). Importantly, however, the presumption does not attach if the profits were received “in payment . . . for services as an independent contractor or of wages or other compensation to an employee.” *Id.* This result supports the notion that some de minimis portion of profits or revenues may be shared among the parties without creating a partnership, because de minimis profit-sharing is consistent with a principal-agent relationship, rather than a true partnership.⁸ We believe this concept is relevant in interpreting the exemption for lotteries “conducted by a State,” because the sharing of a significant interest in the profits and losses of the lottery enterprise would be expected to diminish significantly the state’s incentive to exercise actual control over the management of the business and would mean also that the lottery would not be conducted solely in the public interest of the state, as Congress has mandated, but rather at least partially in the profit-maximizing interest of the private firm.⁹

⁸ Cf. *TIFD III-E, Inc. v. United States*, 459 F.3d 220, 233–35 (2d Cir. 2006) (holding that foreign banks’ investment in a partnership was properly classified as debt, not equity, for tax purposes where the banks had the contractual right to recoup their investment at an agreed upon rate of return *plus* an opportunity to participate in the profits of the partnership that was, as a practical matter, limited to 2.5% of the banks’ total investment—“a relatively insignificant incremental return over the projected eight-year life of the partnership”).

⁹ Although there may be no bright-line rule for identifying what would constitute a significant, or more than de minimis, ownership interest in the state’s lottery business, examples of rules from other statutory and regulatory contexts may be useful by analogy. *See, e.g.*, 15 U.S.C. § 78n(d)(1) (Williams Act provision requiring any person making tender offer for class of stock of publicly traded corporation

For these reasons, we believe that an arrangement by which a state engages in the business of operating a lottery jointly with a private firm that shares substantially in the profits and risks of the enterprise would not be consistent with the statutory exemption. The concerns that apparently led Congress to prohibit private companies from conducting lotteries would still apply if a private company and a state were jointly to own and operate the lottery venture. *See* H.R. Rep. No. 93-1517, at 5–6; 120 Cong. Rec. 22,145 (1974) (statement of Sen. Kennedy) (warning against the abuses of “lotteries run for private profit” and stating the view that such abuses would not be present in state-conducted lotteries). We therefore believe that the exemption for lotteries “conducted by a State” requires that the lottery be “conducted by” the state alone, and not be conducted jointly by the state and by a private for-profit corporation, whether through a formal partnership or through some other form of joint business venture.

B.

Our conclusion that the state must exercise actual control over all significant business decisions of the lottery and retain all but a *de minimis* share of the equity interest does not mean that the state in conducting the lottery enterprise may not contract with private firms to provide goods and services necessary to the lottery. States that operate their own lotteries routinely contract with private businesses to print and sell lottery tickets, promote the lottery, insure against loss, consult about games, and perform a wide range of other functions as part of operating the lottery.¹⁰ We do not read the lottery statutes to foreclose these types of arrangements; that a state contracts with a private company to assist in certain functions

to file disclosure report with SEC if, after consummation of offer, the person would own more than 5% of the class); H.R. Rep. No. 91-1655, at 3 (1970) (justifying Williams Act disclosure requirement on ground that “shareholders should be fully informed” of acquisitions of equity interests exceeding 5% because “[t]hese acquisitions may lead to important changes in the management or business of the company”); 26 C.F.R. § 1.368-2T(l)(2)(iii) & ex. 4 (2008) (IRS rule providing that “*de minimis*” variations in shareholder identity or proportionality of ownership are disregarded in determining whether transaction qualifies for tax treatment as “reorganization” under 26 U.S.C. § 368(a)(1)(D), and giving as example of such *de minimis* variation a 1% difference in stock ownership).

¹⁰ *See, e.g., Dalton v. Pataki*, 5 N.Y.3d 243, 271 (2005) (“The Division of the Lottery regularly contracts with outside vendors and other entities for various equipment and services to assist in the operation of the state lottery,” under state constitutional provision prohibiting lotteries unless “operated by the state”); *State ex rel. Ohio Roundtable v. Taft*, No. 02AP-911, ¶ 32, 2003 WL 21470307, *6 (Ohio App. June 26, 2003) (“Ohio undisputedly contracts with various vendors for the operation and promotion of the lottery, whether for existing in-state games or the new multi-state Mega Millions,” under state constitutional provision prohibiting lotteries unless “conduct[ed]” by “an agency of the state”); Mo. Rev. Stat. § 313.270 (2001) (“The director, pursuant to rules and regulations issued by the commission, may directly purchase or lease such goods or services as are necessary for effectuating the purposes of sections 313.200 to 313.350, including procurements which integrate functions such as lottery game design, supply of goods and services, and advertising.”); Minn. Stat. § 349A.07(1) (2004) (“The director may enter into lottery procurement contracts for the purchase, lease, or lease-purchase of the goods or services.”).

associated with the lottery, even where the contractor is compensated for its services by a relatively small fixed percentage of the revenues of the lottery, does not mean that the state itself is no longer conducting the lottery. The private contractor in such circumstances—though providing valuable assistance to the state—is not “conducting” the lottery within the meaning of the statutes.

The delegation of management responsibilities to a private contractor presents a more difficult question. As discussed above, the verb “conduct” itself connotes management. Thus, unlike the delegation of other activities necessary to a lottery, such as promoting the lottery or printing tickets, an overbroad delegation of management responsibility would definitely call into question whether the state, and only the state, is exercising actual control over all significant business decisions of the lottery. For instance, simply imposing operating standards, even if freely amendable, would not be enough to give the state the necessary control over all significant business decisions of the lottery. Nor would a regulatory system of legal authorization and license alone be sufficient. Accordingly, we believe that there must be significant limits on the authority the state may delegate and still qualify for the exemption under section 1307(a)(1).

Principles of agency law are instructive in defining the appropriate line in judging a management services contract. To be said to “conduct” a lottery, the state must maintain and exercise control over all significant aspects of the lottery operation. To the extent that such authority is delegated to a private management company, the management company should operate more in the role of an agent of the state, *see* Restatement (Third) of Agency § 1.01 (2006), than a partner that shares in the authority to make significant business decisions. This conclusion is fully consistent with the opinions of the Rhode Island Supreme Court in the *Casino I* and *Casino II* cases discussed above. In particular, a state official or agency must have the authority to direct or countermand operating decisions by the management company at any time. *Cf.* Restatement (Third) of Agency § 8.09, cmt. c (citing *id.* § 1.01, cmt. f(1)) (“The power to give interim instructions is an integral part of a principal’s control over an agent and a defining element in a relationship of common-law agency.”).¹¹ The state need not always choose to exercise this authority if it is satisfied from its oversight that the management company is operating the lottery properly, but the existence of this authority is vital for the state to exercise actual control over the business—and to ensure that it has not shared such control with a private company.

For the same reason, we believe that to “conduct” the lottery through the agency of a management company, a state must maintain ready access to information regarding all lottery operations. To this end, as a necessary corollary of its

¹¹ Unlike a principal at common law, which can contract away the right to direct its agents’ actions, *id.*, a state may not waive this responsibility, nor may it limit its authority to a veto power. *Cf. Casino II*, 885 A.2d at 706 (“[T]he power to choose is qualitatively different from the lesser power of vetoing another’s choice.”).

authority over lottery operations, a state should have the right to demand and receive information from the management company concerning any aspect of the lottery operations at any time. *Cf.* Restatement (Third) of Agency § 8.12(3) (agent has duty “to keep and render accounts to the principal of money or other property received or paid out on the principal’s account”); La. Civ. Code art. 3003 (2005) (“At the request of the principal . . . the mandatary [agent] is bound to provide information and render an account of his performance of the mandate.”).

In addition, the management company must have the affirmative duty to provide the state with any information the company reasonably believes state officials would want to know to enable the state to conduct the lottery. *Cf.* Restatement (Third) of Agency § 8.11 (“An agent has a duty to use reasonable effort to provide the principal with facts that the agent knows, has reason to know, or should know when (1) subject to any manifestation by the principal, the agent knows or has reason to know that the principal would wish to have the facts or the facts are material to the agent’s duties to the principal; and (2) the facts can be provided to the principal without violating a superior duty owed by the agent to another person.”). These notifications will “enable[] the [State] to update and sharpen instructions provided to the [management company]” as the lottery operation evolves. *Id.* cmt. d. We conclude also that a management company must give the state advance notice of any operating decision that bears significantly on the public interest, such as decisions on the kinds of games to be offered to the public and decisions affecting the relative risk and reward of the games being offered, so that the state will have a reasonable opportunity to evaluate and countermand that decision. The affirmative duties to report material information, and to inform the state in advance of significant decisions, are critical to ensuring that the state’s legal authority to direct the actions of the lottery translates into actual, practical control over the lottery’s operations.

As for the ownership of assets, we do not foreclose the possibility that the state may, consistent with the limits of the exemption, permit the private management contractor to own and provide most of the assets needed for the lottery. Many such assets—computers, printing equipment, possibly the gaming equipment—are likely to be widely available for lease or purchase from other sources if the private company were to withdraw from the contract with the state. Thus, we do not think that a state’s contracting with a private management company to provide these assets for its lottery would necessarily put the lottery business under the effective control of the private contractor, so as to make the private company the state’s partner in conducting the lottery. Even some non-fungible assets—software, games, accounting systems—can be redeveloped or replaced, and therefore could also be leased by a state for use in its lottery without elevating the role of the company providing the assets to that of a partner or joint venturer in the lottery.

Other assets, such as the trade name and trademarks of the state lottery, may perhaps be truly essential to the state’s ownership and control of the lottery, in the

sense that the state could not continue “conducting” its lottery (at least not without serious disruption) unless it retained ownership of these assets after discharging the management company. Ownership of these assets could be viewed as inextricably intertwined with the conduct of the lottery. Were a state to transfer such essential assets to a private company assisting the state in the management of the lottery, the state could become so dependent upon the management company for the continued operation of the business as to call into significant question whether the state is actually conducting the lottery.

As we have discussed above, we believe that the ownership by the private management company of a significant equity interest in the profits of the lottery would go beyond the scope of the exemption. We understand that some states have proposed to enter into agreements with private management firms under which the private company would assist in the management of the lottery and receive a significant share of the lottery’s profits or bear a significant share of the risk of losses. In return, it has been proposed that the management company would make a significant upfront payment to the state or make annual disbursements to the state. We believe that such an arrangement would not be consistent with the limited exemption for lotteries “conducted by a State.” If a private management company were to oversee the lottery’s operations and receive a significant share of the lottery’s profits (particularly in return for an investment of capital), we think it clear that the company would not be a mere contractor or agent, assisting the state in operating a lottery that the state conducts, but rather a co-participant in the conduct of the lottery with substantial managerial responsibilities and a significant equity stake in the lottery’s success or failure. In such circumstances, the private management company’s incentives and ability to influence the lottery would be significant. Where a state has a reduced stake in the profits or losses of a lottery, its incentive to exercise the actual control over all significant business decisions required by the exemption is necessarily diminished. Indeed, in practical respects, an arrangement in which the state cedes to a private firm a significant economic interest in the profits and losses of the business may be functionally quite similar to an arrangement whereby the state licenses a lottery concession to a private company. As described above, these incentives and characteristics are precisely what Congress sought to avoid in enacting the exemption for lotteries “conducted by a State.” *See supra* notes 6–7 (contemplating that state-conducted lotteries would be operated for the public benefit).¹²

¹² *See also* Colo. Const. art. XVIII, § 2(7) (“Unless otherwise provided by statute, all proceeds from the lottery, after deduction of prizes and expenses, shall be allocated to the conservation trust fund of the state for distribution to municipalities and counties for park, recreation, and open space purposes.”); Del. Const. art. II, § 17(a) (“All forms of gambling are prohibited in this State except . . . [l]otteries under State control for the purpose of raising funds”); Ga. Const. art. I, § 2, ¶ 8(c) (“Proceeds derived from the lottery or lotteries operated by or on behalf of the state shall be used to pay the operating expenses of the lottery or lotteries, including all prizes, without any appropriation required by law, and for educational programs and purposes as hereinafter provided.”); La. Const. art. XII, § 6(A)(1) (“The

That said, we think it is permissible for a state to compensate private contractors with some portion of the lottery's revenues or with some financial incentives that are contingent on the lottery's achievement of certain revenue objectives. For example, a state may agree to increase a private management company's fee by a certain amount if the lottery's revenues grow by a specified percentage in a given year. So long as the management company is not to receive more than a de minimis share of the lottery's profits, such an agreement would not significantly diminish the state's incentive to exercise actual control over the lottery.

Finally, it has been suggested that a private management company should be required to deposit lottery revenues into accounts owned by and maintained in the name of the state or state agency overseeing the lottery, and that the company be permitted to disburse funds from these accounts only on terms set forth in the management agreement. We believe that such accounting practices could be helpful in ensuring that the state, and not the private management company, is actually conducting the lottery business. Although we are not able to say that any particular accounting practice is mandated by the statutes, the more transparent the accounting procedure,¹³ the more likely it will be that the state is in fact exercising active ownership and control over the enterprise.

net proceeds from the operation of the lottery shall be deposited in a special fund created in the state treasury entitled the Lottery Proceeds Fund.”); N.D. Const. art. XI, § 25 (“[T]he legislative assembly shall authorize the state of North Dakota to join a multi-state lottery for the benefit of the state of North Dakota”); Mo. Const. art. III, § 39(b)(2), (3) (“The money received by the Missouri state lottery commission from the sale of Missouri lottery tickets, and from all other sources . . . shall be appropriated solely for public institutions of elementary, secondary and higher education.”); N.H. Const. pt. 2, art. 6-b (“All moneys received from a state-run lottery and all the interest received on such moneys shall, after deducting the necessary costs of administration, be appropriated and used exclusively for the school districts of the state.”); N.J. Const. art. IV, § 7, ¶ 2.C (“It shall be lawful for the Legislature to authorize the conduct of State lotteries restricted to the selling of rights to participate therein and the awarding of prizes by drawings when the entire net proceeds of any such lottery shall be for State institutions and State aid for education”); Tenn. Const. art. XI, § 5 (“[T]he legislature may authorize a state lottery if the net proceeds of the lottery’s revenues are allocated to provide financial assistance to citizens of this state to enable such citizens to attend post-secondary educational institutions located within this state.”); Va. Const. art. X, § 7-A (“Lottery proceeds shall be appropriated from the Fund to the Commonwealth’s counties, cities and towns, and the school divisions thereof, to be expended for the purposes of public education.”); Wis. Const. art. IV, § 24(6)(a) (“[N]et proceeds of the state lottery shall be deposited in the treasury of the state, to be used for property tax relief for residents of this state as provided by law.”).

¹³ See, e.g., Cal. Gov’t Code § 8880.41 (“The director shall make and keep books and records that accurately and fairly reflect each day’s transactions, including, but not limited to, the distribution of tickets or shares to lottery game retailers, receipt of funds, prize claims, prize disbursements or prizes liable to be paid, expenses and other financial transactions of the lottery”); *id.* § 8880.42 (“The director shall provide a monthly cumulative sales report to the commission and the Controller within 15 days after the end of each month.”).

III.

In sum, in order to satisfy the federal lottery statute exemption for lotteries “conducted by a State,” the state must exercise actual control over all significant business decisions made by the lottery enterprise and retain all but a de minimis share of the equity interest in the profits and losses of the business, as well as the rights to the trademarks and other unique intellectual property or essential assets of the state’s lottery. It is permissible under the exemption for a state to contract with private firms to provide goods and services necessary to enable the state to conduct its lottery, including management services, as discussed herein.

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Requests for Information Under the Electronic Communications Privacy Act

The Federal Bureau of Investigation may issue a national security letter to request, and a provider may disclose, only the four types of information—name, address, length of service, and local and long distance toll billing records—listed in 18 U.S.C. § 2709(b)(1).

The term “local and long distance toll billing records” in section 2709(b)(1) extends to records that could be used to assess a charge for outgoing or incoming calls, whether or not the records are used for that purpose, and whether they are linked to a particular account or kept in aggregate form.

Before issuance of a national security letter, a provider may not tell the FBI whether that provider serves a particular customer or telephone number, unless the FBI is asking only whether the number is assigned, or belongs, to that provider.

November 5, 2008

MEMORANDUM OPINION FOR THE GENERAL COUNSEL FEDERAL BUREAU OF INVESTIGATION

You have asked whether, under the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 201, 100 Stat. 1848, 1860 (“ECPA”) (codified as amended at 18 U.S.C. § 2709 (2006)), the Federal Bureau of Investigation (“FBI”) may obtain certain types of information from communications providers. See Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Valerie Caproni, General Counsel, Federal Bureau of Investigation, *Re: Electronic Communications Privacy Act* (Aug. 28, 2007) (“FBI Memorandum”). Section 2709(b)(1) of ECPA enables the FBI to “request the name, address, length of service, and local and long distance toll billing records” of a subscriber, if that information may be “relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States.” The provider “shall comply” with such a request. 18 U.S.C. § 2709(a). In most other circumstances, ECPA prohibits the disclosure of a “record or other information pertaining to a subscriber to or customer of” a communications service. 18 U.S.C. § 2702(a)(3) (2006).

In response to your specific questions, we conclude: (i) the FBI may issue a national security letter (“NSL”) to request, and a provider may disclose, only the four types of information—name, address, length of service, and local and long distance toll billing records—listed in section 2709(b)(1); (ii) the term “local and long distance toll billing records” in section 2709(b)(1) extends to records that could be used to assess a charge for outgoing or incoming calls, whether or not the records are used for that purpose, and whether they are linked to a particular account or kept in aggregate form; and (iii) before issuance of an NSL, a provider may not tell the FBI whether that provider serves a particular customer or

telephone number, unless the FBI is asking only whether the number is assigned, or belongs, to that provider.¹

I.

Under 18 U.S.C. § 2709(a), a wire or electronic communications service provider

shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.

Section 2709(b)(1), in turn, enables the Director or his designee to

request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the name, address, length of service, and toll billing records sought are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States.

You have asked whether the four types of information listed in subsection (b)(1)—the subscriber’s name, address, length of service, and local and long distance toll billing records—are exhaustive or merely illustrative of the information that the FBI may request and a provider may turn over. We conclude that the list in section 2709(b)(1) is exhaustive.²

A.

We begin with the text of the statute. *Limtiaco v. Camacho*, 549 U.S. 483, 488 (2007). Section 2709(b) authorizes the FBI to request from a provider “the name, address, length of service, and local and long distance toll billing records of a person or entity.” By its express terms, subsection (a), which specifies the

¹ We solicited and received the views of the National Security Division and the Criminal Division on these questions.

² Although the same issue could arise under section 2709(b)(2), we refer to section 2709(b)(1) for convenience, because your question about “toll billing records,” to which we turn below, relates only to section 2709(b)(1).

information that the provider is to disclose, reaches no further than the information that the FBI may request under subsection (b): subsection (a) requires a provider to comply with a request for “subscriber information and toll billing records information” made by the FBI “*under subsection (b).*” 18 U.S.C. § 2709(a) (emphasis added). Subsection (b) specifies the items for which the FBI may ask, and there is no indication that the list of items is illustrative. *Cf. Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) (examples where the word “includes” may enlarge the meaning of a definition beyond the terms in the list). The list—the name, address, length of service, and local and long distance toll billing records of a person or entity, *see id.* § 2709(b)(1)—thus sets the limits of what the FBI may request under section 2709, as well as what the provider may disclose under that provision. The text of subsection (b) forecloses an interpretation that would add other types of information to the excepted categories. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (applying the canon of *expressio unius est exclusio alterius*).³

ECPA’s structure reinforces this conclusion. Section 2709 is an exception to the background rule of privacy established by 18 U.S.C. § 2702(a), which generally bars a provider from giving the Government a record or other information pertaining to a subscriber or customer. Here, the exceptions listed in section 2709(b)(1) specify some types of information—a subscriber’s name, address, length of service, and billing records—and not others. Other exceptions to the rule of privacy appear in section 2702(b), dealing with voluntary disclosures, and in section 2703, dealing with disclosures in response to subpoenas or warrants. We would not infer additional exceptions. *See* 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.11, at 250–51 (6th ed. 2000) (“Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. . . . [W]here a general provision in a

³ Subsection (a) also refers to “electronic communication transactional records” requested under subsection (b). In its current form, however, subsection (b) does not include this term. As originally enacted, subsection (b) did not specify the items of information that the FBI could request, but simply provided the means by which the FBI could ask for “any such information and records” as were described in subsection (a). Pub. L. No. 99-508, § 201, 100 Stat. 1848, 1867 (1986). When Congress in 1993 added to subsection (b) the specification of “name, address, length of service, and toll billing records,” it did not include “electronic communication transactional records” in that list. Pub. L. No. 103-142, 107 Stat. 1491 (1993). Nevertheless, the reference to “electronic communication transactional records” in subsection (a), along with the absence of the phrase in subsection (b), does not undermine the conclusion that the categories of information listed in subsection (b) are exclusive. As the committee report on the original enactment explained, the language about “electronic communication transactional records” gives the FBI “the necessary authority [to issue NSLs] *with regard to subscriber information and toll billing information* with respect to electronic communication services other than ordinary telephone service.” S. Rep. No. 99-541, at 44 (1986) (emphasis added). While clarifying that NSLs can extend to other types of services, therefore, the language reaches only those categories of information parallel to subscriber information and toll billing records for ordinary telephone service.

statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions.”⁴

The FBI Memorandum suggests that, under basic principles of interpretation, the general term “subscriber information” should be construed in light of specific examples in the statute. FBI Memorandum at 3–4. According to the FBI Memorandum, the term “subscriber information” in subsection (a) should encompass all information similar to the types specified in subsection (b), so that a provider could turn over, for example, a subscriber’s date of birth or social security number. Under the widely employed canon of statutory construction known as “*ejusdem generis*,” “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 v. Adams*, 532 U.S. 105, 114–15 (2001) (internal quotation marks and citation omitted); see also *Vanderbrook v. Unitrin Preferred Ins. Co.*, 495 F.3d 191, 219 (5th Cir. 2007) (noting that the *ejusdem generis* canon “is used to interpret general terms (e.g., ‘and the like’) following a list of specific terms”). The canon thus allows a list of specific terms to define and limit an otherwise ambiguous term within the same list. See, e.g., 2A Norman J. Singer, *Statutes and Statutory Construction* § 47.17, at 188 (5th ed. 1992). The FBI Memorandum, however, would rely on this canon to draw the reverse inference, by expanding the meaning of a general term (“subscriber information”) that appears outside the list of terms in section 2709(b) and in a separate subsection of the statute. Even if the text of section 2709(a) were unclear, the canon of *ejusdem generis* would offer little support for the argument that subsection (a) should be interpreted more broadly than subsection (b). In any event, because the text of subsection (a) shows that a provider is to supply only information requested under subsection (b), the canon of *ejusdem generis* does not apply. See, e.g., *Tourdot v. Rockford Health Plans, Inc.*, 439 F.3d 351, 354 (7th Cir. 2006) (noting that the canon of *ejusdem generis* applies only where a statutory term is ambiguous, that it may not be used “both to create and to resolve [a statutory] ambiguity,” and that it “may not be used to defeat the obvious purpose or plain meaning of the text”).

B.

The FBI Memorandum also relies upon the legislative history of ECPA’s 1993 amendments to argue that, using NSLs, the FBI may seek and providers may

⁴ The conclusions in this memorandum apply only to disclosures under section 2709. We do not address other statutory provisions under which law enforcement officers may get information pertaining to electronic communications. See, e.g., 18 U.S.C. § 2702(b)(8), (c)(4) (authorizing disclosure of communications and customer records to governmental entities if the provider reasonably “believes that an emergency” involving “danger of death or serious physical injury to any person” justifies disclosure of the information); *id.* § 2703(a) (authorizing disclosure to a governmental entity of “the contents of a wire or electronic communication” pursuant to a warrant).

disclose—as “subscriber information”—“any information kept by the communications service provider for its own business purposes that identifies the subscriber,” not just the types of information listed in section 2709(b). FBI Memorandum at 5. In our view, the language of the provision is straightforward, and “[g]iven [a] straightforward statutory command, there is no reason to resort to legislative history.” *United States v. Gonzales*, 520 U.S. 1, 6 (1997). In any event, we believe that the legislative history accords with our conclusion.

In a passage that the FBI Memorandum cites, the House Judiciary Committee Report for the 1993 amendments stated that “[t]he Committee intends . . . that the authority to obtain subscriber information . . . under section 2709 does not require communications service providers to create records which they do not maintain in the ordinary course of business.” H.R. Rep. No. 103-46, at 3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1913, 1915. While the legislative history of ECPA therefore suggests that the statute does not require a provider to “create” new records, it does not follow that the statute would authorize the FBI to seek, or the provider to disclose, any records simply because the provider has already created them in the ordinary course of business. The universe of records subject to an NSL is still restricted to the types listed in the statute.⁵

Indeed, the 1993 amendments clarified and underscored the limitations on the scope of “subscriber information.” As the House Judiciary Committee Report explained, “[i]nstead of ‘subscriber information,’ the amendment here uses *more specific* terms: ‘name, address, length of service.’” H.R. Rep. No. 103-46, at 3, *reprinted in* 1993 U.S.C.C.A.N. at 1915 (emphasis added). More generally, the Report set the context of the amendments by declaring that “the national security letter is an extraordinary device” and that “[n]ew applications [for its use] are disfavored.” *Id.* at 3, *reprinted in* 1993 U.S.C.C.A.N. at 1914–15. Where Congress enlarged the FBI’s authority in the 1993 amendments, it placed careful limits on the new authority. It rejected one FBI proposal as “too broad” and substituted a narrower provision. *See id.* at 2, *reprinted in* 1993 U.S.C.C.A.N. at 1914. The Report, therefore, reinforces our construction of the text.

II.

Next, you have asked whether, under section 2709, the term “local and long distance toll billing records” includes records of incoming and outgoing calls upon which a charge could be assessed, whether or not a provider actually assesses a charge, and whether or not a provider maintains such records as aggregate data (as opposed to subscriber-specific data). We believe that the term includes records of individual calls identifying the telephone numbers called from a particular

⁵ We do not address whether the FBI must purge its files of any additional information given to it by communications providers.

telephone number or attributed to a particular account, if maintained in the normal course of a provider's business, whether or not the provider charges for each such call. In our view, moreover, section 2709 encompasses call records stored in aggregate form, even if they are not organized by customer accounts, provided that, as explained below, an NSL for such information is not unreasonably burdensome.

A.

Section 2709(a) requires a provider, in response to an NSL, to supply “subscriber information and toll billing records information.” As we explained in part I, section 2709(b) specifies the “subscriber information and toll billing records information” that an NSL may demand and a provider may supply. This information consists of “the name, address, length of service, and local and long distance toll billing records of a person or entity.” In addition to “subscriber information,” therefore, an NSL may demand, and a provider must turn over, “toll billing records information,” consisting of “local and long distance toll billing records.”

The “billing records” to which section 2709 refers could denote either records that are actually used for billing or records that could be used for that purpose. In the abstract, either meaning could be a natural use of language. For example, the phrase “running shoes” could mean either shoes actually used for running or those of a type making them suitable for that purpose, even if the owner only walks. We believe that the phrase “local and long distance toll billing records” covers records—including the caller's number, the number dialed, and the duration of the call—that are suitable for billing, whether or not the provider imposes a per call “toll.”

As originally enacted, section 2709(b) provided that the FBI could use NSLs to seek “toll billing records.” See 100 Stat. at 1867. In 1996, Congress amended the provision to read “local and long distance toll billing records.” See Intelligence Authorization Act for Fiscal Year 1997, Pub. L. No. 104-293, § 601, 110 Stat. 3461, 3469 (1996). The amendments clarified that billing records for local service, as specified in section 2709(b)(1), could be a type of “toll billing records information” that section 2709(a) directs a provider to turn over in response to an NSL. The reference in section 2709(b)(1) to billing records for “local” service, as a type of “toll billing records information” within section 2709(a), makes sense only if it encompasses records that are not actually used for billing customers, but are of a type that could be put to that use, because “local” service has traditionally been understood to be service for which the provider does not impose a per call “toll.”

The terms “local” and “long distance toll” are well established terms in the communications industry. See, e.g., *N.C. Utils. Comm'n v. FCC*, 552 F.2d 1036, 1045 (4th Cir. 1977) (distinguishing local service from “‘toll,’ or long distance, service” and suggesting both are “term[s] of art”). Traditionally, local service has

been identified and defined by the absence of per call charges, or “tolls.” See *Newton’s Telecom Dictionary* 488 (20th ed. 2004) (defining “local call” as one that “may or may not cost money. In many parts of the United States, the phone company bills its local service as a ‘flat’ monthly fee.”). By contrast, long distance service has been defined by the use of per call “toll” charges. See *id.* at 839 (defining “toll call” as “[a] long distance call”); see also *Webster’s Third New International Dictionary* 2405 (1993) (defining “toll” as “a charge for a long-distance telephone call”).

Congress has distinguished between “local” and “long distance toll” calls on this basis for as long as the federal government has regulated the telecommunications industry. In section 3 of the Communications Act of 1934, for example, Congress defined the term “telephone toll service” as “telephone service between stations in different exchange areas *for which there is made a separate charge* not included in contracts with subscribers for exchange service.” Act of June 19, 1934, ch. 652, § 3, 48 Stat. 1064, 1066 (codified at 47 U.S.C. § 153(s) (1934)) (emphasis added). Congress separately defined “telephone exchange service,” otherwise known as “local” service, as “service within a telephone exchange, or . . . within the same exchange area . . . and *which is covered by the exchange service charge.*” *Id.* § 3, 48 Stat. at 1066 (codified at 47 U.S.C. § 153(r) (1934)) (emphasis added). As the Federal Communications Commission explained in its rule implementing the AT&T consent decree, the definitions in the Communications Act “rel[y] primarily upon the non-toll or toll nature of a call to determine whether the call is a [local] or [long-distance] call.” See Memorandum Opinion, Order and Authorization, FCC 83-566, 96 F.C.C.2d 18, ¶ 17 n.24 (Dec. 23, 1983); see also *Office-Max, Inc. v. United States*, 428 F.3d 583, 596 (6th Cir. 2005) (explaining that before the divestiture of AT&T, all long distance calls were subject to tolls, which varied according to the duration of the call and the distance between the callers); Howard A. Shelanski, *Adjusting Regulation to Competition: Toward a New Model for U.S. Telecommunications Policy*, 24 *Yale J. on Reg.* 55, 59–60 (2007) (noting that before divestiture of its local assets, “AT&T charged flat monthly fees for local service, [but] it charged by the minute for long-distance service, and the [Federal Communications Commission] allowed AT&T to set long-distance rates well above cost for the purpose—at first implicit and later expressly stated—of providing profits AT&T could use to cross-subsidize local rates in support of universal service policies”).

Even the tax code draws the distinction between “local” and “toll” calls. For example, the Excise Tax Reduction Act of 1965, Pub. L. No. 89-44, 79 Stat. 136, 145 (1965) (“ETRA”), amended the Internal Revenue Code to impose a three percent excise tax on, among other things, “local telephone service.” See 26 U.S.C. §§ 4251(b)(1)(A), 4252(a) (2006). Excluded from the definition of the term “local telephone service” was any “toll telephone service,” as defined in section 4252(b). See, e.g., *Reese Bros., Inc. v. United States*, 447 F.3d 229, 233 (3d Cir. 2006); *W. Elec. Co. v. United States*, 564 F.2d 53, 55 (Ct. Cl. 1977). “Toll tele-

phone service” means, in relevant part, a “telephonic quality communication for which . . . there is a toll charge which varies in amount with the distance and elapsed transmission time of each individual communication.” 26 U.S.C. § 4252(b)(1)(A).⁶

In view of this background, when Congress inserted the words “local and long distance” before “toll billing records” in section 2709(b)(1), it was not limiting ECPA to those local calls for which a provider imposes a per call “toll.” We presume that Congress understood the well-established distinction between “local” and “long distance toll” calls and knew that “local” service was frequently *defined* by the absence of a per call charge. See *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) (“[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense.”) (emphasis added); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947) (“[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”). Therefore, the reference to “billing records” for “local” service in section 2709(b)(1), as a type of “toll billing records information” that section 2709(a) requires a provider to turn over, is best read to cover records that *could* be used for per call billing, not only those that actually are used for that purpose.

When Congress enacted the 1996 amendments, it was well known that providers of telephone service might keep records of local calls from or attributable to particular numbers, even if they did not assess per call charges. Providers had long used pen registers, for example, to record all telephone numbers dialed from particular telephones, whether the calls were local or long distance. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting) (emphasizing that the Court’s conclusion hinges on the fact “that pen registers are regularly used for recording local calls”); *Hodge v. Mountain States Tel. & Tel. Co.*, 555 F.2d 254, 266 (9th Cir. 1977) (Hufstedler, J., concurring) (emphasizing that pen registers collect records of local calls); *In the Matter of Grand Jury Subpoenas to Southwestern Bell Mobile Systems, Inc.*, 894 F. Supp. 355, 358 (W.D. Mo. 1995) (“*Southwestern Bell*”) (holding the term “toll billing records” means “billing records and telephone toll records (including the record of long distance numbers

⁶ Congress acknowledged that telephone companies might choose not to impose per call charges for some “toll telephone service.” For example, ETRA defined “toll telephone service” as, among other things, “a [non-local] service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications.” 79 Stat. at 146 (emphasis added). See also *Reese Bros.*, 447 F.3d at 233–34 (noting that before 1984, AT&T offered a type of “long-distance service[]” known as “Wide Area Telephone Service,” the bills for which “were based on a flat rate for unlimited calls”). As explained below, ECPA’s use of the term “long distance toll billing records” encompasses records of long distance calls, even if a telephone company uses “flat rate” (as opposed to per call) billing for long distance service.

and message unit detailing information)”) (quoting H.R. Rep. No. 99-647, at 69 (1986)); *People v. Guerra*, 478 N.E.2d 1319, 1321 (N.Y. 1985) (noting pen registers “provide a list of all numbers dialed, both local and long distance or toll calls,” and that such information is included in phone companies’ billing records).⁷ The reference to “toll billing records” covers this type of information.

The single occurrence of the words “billing records” in section 2709 applies to both “local” and “long distance toll” services. Because in the case of local service the phrase “billing records” covers records that could be used for billing, we would accord it the same meaning when the phrase applies to long distance service. Consequently, even if a provider does not impose per call charges for long distance service, we believe that the provider’s records, if suitable for billing, are subject to disclosure under an NSL.⁸

The interpretation that “billing records” extends to records usable for billing, even if not actually used for that purpose, is supported by the limited judicial authority on the point and by the legislative history of the 1996 amendments. Before 1996, 18 U.S.C. § 2703 authorized law enforcement officials to subpoena a

⁷ See also *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 174–75 (1977) (noting that phone companies use pen registers “for the purposes of checking billing operations,” among other things); *United States v. Clegg*, 509 F.2d 605, 608 & n.2 (5th Cir. 1975) (describing the “TTS 176” device, which “monitors the line to which it is attached and produces a paper tape record of the time and date of all outgoing telephone calls, local and long distance, complete and incomplete,” and which phone companies use “to show both that its billing procedures were bypassed and that completed calls were made”); *United States v. Fithian*, 452 F.2d 505, 506 (9th Cir. 1971) (noting that a phone company’s “business records necessarily must contain” the “records of calls from [a subscriber’s] residence”); *cf. Reporters Comm. for Freedom of Press v. AT&T Co.*, 593 F.2d 1030, 1046 n.49 (D.C. Cir. 1978) (noting that “a telephone subscriber has no Fourth Amendment interest in local call records obtained by means of a pen register installed without his knowledge”).

⁸ The use of per call charges may be less prevalent today than in 1996, when Congress amended ECPA. Cellular phone customers typically do not incur per call charges for either local or long distance service, and cellular phone use has multiplied since 1996. See *Statistical Abstract of the United States* at 720 (U.S. Census Bureau, 2007) (noting that there were fewer than 34 million cellular phone subscribers in the United States in 1995, whereas there were almost 208 million in 2005 (the most recent year for which statistics are available)). Partly in response to the pricing strategies employed by cellular phone companies, other telecommunications providers have shifted to “flat rate billing.” See, e.g., Kathleen Q. Abernathy, *Preserving Universal Service in the Age of IP*, 3 J. Telecomm. & High Tech. L. 409, 412 (2005) (describing “the increasing prevalence of bundled service plans” as an “important trend” in the telecommunications industry). As then-FCC Commissioner Abernathy explained, “For years, wireless carriers have offered buckets of any-distance minutes at flat rates, and now wireline carriers are offering packages that include local and long distance for a single price. In addition, many carriers offer business customers bundles that include local and long distance voice services, Internet access, and customer premises equipment.” *Id.* (footnote omitted). The provision of telephone service over Internet connections—as opposed to traditional wireline or wireless technologies—has further contributed to the decline in per call billing. See *id.*; see also Steven C. Judge, *VoIP: A Proposal for a Regulatory Scheme*, 12 Syracuse Sci. & Tech. L. Rep. 77 (2005) (“[I]nstead of paying a per minute charge for long distance calls, many [voice over internet protocol, or “VoIP”] providers provide a flat rate that includes both local- and long-distance calling.”). However providers may charge for such services, we conclude that ECPA covers any call record in a provider’s custody or possession that is suitable for billing.

subscriber's "telephone toll billing records" during the course of an official investigation. Similarly, 18 U.S.C. § 2709 enabled the Director of the FBI to use an NSL to obtain a subscriber's "toll billing records" during the course of an authorized foreign counterintelligence investigation. The United States District Court for the Western District of Missouri held that the term "telephone toll billing records," under section 2703, included

any record (except a record pertaining to the content of a conversation) maintained by an electronic communication service provider identifying the telephone numbers called from a particular telephone number or attributed to a particular account for which a communication service provider might charge a service fee. 'Telephone toll billing records' covers all records maintained of individual calls made from a particular telephone number or attributed to it that are *or could be* the subject of a particularized charge depending on the billing plan offered by the provider and accepted by the customer. *In other words, a telephone toll billing record is broad enough to cover all records of calls from or attributed to a particular number, regardless of whether, in fact, a separate charge is assessed for each call.*

Southwestern Bell, 894 F. Supp. at 359 (emphasis added). The court relied upon ECPA's legislative history, which indicates that "'toll billing records consist of information maintained by a wire or electronic communication service provider identifying the telephone numbers called from a particular phone or attributable to a particular account for which a communication service provider *might* charge a service fee.'" *Id.* at 358 (quoting 1993 U.S.C.C.A.N. at 1915). Accordingly, the court held that, even when a cellular phone subscriber had a monthly plan under which he did not pay a "toll" for any particular call, the record of every call he made, local or long distance, fell within the meaning of "telephone toll billing records" under section 2703.

In 1996, Congress amended section 2703, as well as section 2709, to ratify the decision in *Southwestern Bell*. See Intelligence Authorization Act for Fiscal Year 1997, Pub. L. No. 104-293, § 601, 110 Stat. 3461, 3469 (1996). The 1996 amendments inserted the words "local and long distance" before the words "toll billing records" in both section 2703 and section 2709. *Id.* The Senate Report explained that the amendments "make clear . . . that the phrase ['toll billing records'] applies to both local and long distance telephone toll billing records" in accordance with the decision in *Southwestern Bell*. S. Rep. No. 104-258, at 22 (1996), *reprinted in* 1996 U.S.C.C.A.N. 3945, 3967. The committee quoted the court's holding that a provider must disclose "'records that contain information which was used *or could be used* to charge for telephone calls or services.'" *Id.* (emphasis added).

We therefore conclude that the term “local and long distance toll billing records” extends to records of individual calls identifying the telephone numbers called from a particular telephone number or attributed to a particular account, whether or not the provider charges individually for each such call.⁹

B.

Telecommunications providers generally maintain call data in one of two forms: call records linked to particular accounts (such as records of a given customer’s calls and associated charges), and aggregate records (such as records of all calls routed through a particular call center on a particular day). *See, e.g., Ameritech Corp. v. McCann*, 403 F.3d 908, 910 (7th Cir. 2005). The aggregate records are generally stored on “searchable media” that a carrier could cull to extract records of calls to or from a particular number. *See id.* The records culled in this way could be used to bill for the service to a particular number, although they are not typically used for this purpose.

Because section 2709 covers records of calls for which a carrier could impose charges—even if the carrier does not actually do so—it does not matter whether the provider maintains those records in the form of billing statements that reflect actual per call charges on customers’ accounts. Under 18 U.S.C. § 2709(b)(1), an NSL may request “the name, address, length of service, and local and long distance toll billing records of a person or entity,” and the records of a subscriber’s calls are “records of [that] person or entity,” even if the calls of a particular subscriber are dispersed among the aggregate records of all calls going through a call center. Responding to the NSL, a provider must turn over any “local and long distance toll billing records” in its “custody or possession.” 18 U.S.C. § 2709(a). Even if a provider maintains its call data in aggregate form, the billing records are in the provider’s “custody or possession” and fall within section 2709. To comply with the NSL, therefore, the provider would have to extract the subscriber data from the aggregate records.

This conclusion is consistent with the Seventh Circuit’s decision in *McCann*, which interpreted 18 U.S.C. § 2706 (2000). Under section 2706, governmental entities, state or federal, must compensate providers for complying with certain requests or demands for information other than NSLs, except when a request seeks “records or other information maintained by a communications common carrier

⁹ Whether the statute should be read to cover “local . . . billing records” or “local . . . toll billing records” would not affect our analysis. *See* S. Rep. No. 104-258, at 22, *reprinted in* 1996 U.S.C.C.A.N. 3945, 3967 (“This amendment is a clarification of the meaning of the phrase ‘telephone toll billing records’ as used in [sections] 2703 and 2709.”). In either case, the phrase is a more detailed formulation of “toll billing records” in section 2709(a). A provider can disclose information if it is a “toll” record of an incoming or outgoing call, as explained above. If the information is not such a “toll” record, the provider can disclose it only if it is “subscriber information”—the “name, address, and length of service” of the subscriber. *See* 18 U.S.C. § 2709(a), (b)(1).

that relate to telephone toll records” and that request does not present an undue burden. In *McCann*, the court held that certain aggregate call data did not constitute such “records or other information” within the exception, because the provider did not “maintain” the data as sought there. 403 F.3d at 912 (characterizing the process of culling data as the “creat[ion]” of reports). The Department has questioned whether *McCann* was correctly decided. See U.S. Dep’t of Justice Ad Hoc Technology Working Group, 18 U.S.C. § 2706 (ECPA) *Cost Reimbursement Guidance* at 5 (May 25, 2005) (arguing that “there is a reasonably strong argument that *Ameritech Corp. v. McCann*’s interpretation of section 2706 is flawed”). Even if correct, *McCann*’s interpretation of section 2706 would not reach NSLs, which are issued under section 2709. The Seventh Circuit’s decision turned exclusively on the meaning of “maintain” in section 2706(c)—a term that does not appear in section 2709, compare *id.* § 2709(a) (referring to “records in [a carrier’s] custody or possession”)—and the court did not address the meaning of “telephone toll records,” let alone the meaning of “local and long distance toll billing records.”

As the FBI Memorandum notes, some providers have argued that culling records of individual calls from aggregate call data amounts to the “creation” of a new record, in contravention of *Southwestern Bell*, as well as the House report upon which that decision relied. See FBI Memorandum at 9. The *Southwestern Bell* court emphasized, however, that a carrier may be asked to turn over all call records in the carrier’s custody, even if a particular customer does not choose a per call billing plan. 894 F. Supp. at 359. To be sure, the FBI may not be able to force a communications provider to alter its business practices and, for example, create and maintain records of per call usage. See *id.* at 358–59 (quoting and relying upon H. Rep. No. 103-46, 1993 U.S.C.C.A.N. 1913, 1915, which provides that “the authority to obtain subscriber information and toll billing records under § 2709 does not require communication service providers to create records which they do not maintain in the ordinary course of business”). But to the extent that a communications provider, in the ordinary course of business, collects information regarding the calls made to or from a particular account and could use that information for billing a customer, such information—however it is stored—falls within section 2709.

At the same time, the FBI may not use section 2709 to demand that a telecommunications provider cull data if the search would be unduly costly or burdensome. An NSL is, in effect, an administrative subpoena: it is an agency order requiring the production of specified information, issued as part of an investigation. We would read section 2709 in light of the principle that, as the Supreme Court has held, the Fourth Amendment “in no way leaves a [firm] defenseless against an unreasonably burdensome administrative subpoena requiring the production of documents.” *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984). An administrative subpoena must be “sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.” *Id.* (quoting *See v. City of Seattle*, 387 U.S. 541, 544 (1967)). In

other contexts, ECPA deals with a possible undue burden by requiring the government to compensate the provider for the costs of the search. *See* 18 U.S.C. § 2706. Particularly because ECPA allows no such payment for complying with an NSL, we would construe section 2709 as not enabling the FBI to force a provider to cull data when it would be unduly costly or burdensome for the provider to do so. A provider would not have to comply with an unduly burdensome NSL.

Therefore, any call record that a communications provider keeps in the regular course of business and could use for billing a subscriber falls within the scope of section 2709. As in the case of administrative subpoenas, however, an NSL may not be unreasonably burdensome.¹⁰

III.

Finally, you have asked whether a provider, in answer to an oral request before service of an NSL, may tell the FBI whether a particular account exists. This information would be confined to whether a provider serves a particular subscriber or a particular phone number. We believe that ECPA ordinarily bars providers from complying with such requests.

Section 2702(a)(3) states that “a provider of . . . 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 . . . to any governmental entity.” 18 U.S.C. § 2702(a)(3). That a subscriber receives services from a particular provider is “information pertaining to” the subscriber. Indeed, section 2709 lists the subscriber’s name among the types of “subscriber information” that an NSL can request. Therefore, when the FBI identifies a subscriber by name, section 2702(a)(3) forbids a provider from divulging the existence of that person’s or entity’s subscription with the provider.

Although the question is far closer, we do not believe that this conclusion changes if the FBI identifies a phone number, rather than a customer’s name, where the FBI is asking whether the number has been given to a subscriber. The phrase “record or other information pertaining to a subscriber” is broad. The ordinary meaning of “pertaining,” in this phrase, would reach information that “relate[s] to” or “concern[s]” the subscriber, *Black’s Law Dictionary* 1165 (7th ed. 1999), or has “some connection with or relation to” him, *Webster’s Third New International Dictionary* 1688 (1993). The fact of a provider’s service to a given number constitutes “information pertaining to a subscriber,” because it indicates that the provider serves “a subscriber” (or, in some cases, each of several subscribers) with that phone number. The information is associated with a particular subscriber, even if that subscriber’s name is unknown.

¹⁰ We express no view on what would constitute an unreasonably burdensome request.

We do not believe that, for this analysis, it matters whether the information sought by the FBI has already been made public, unless the subscriber has given a consent broad enough to cover a response to the FBI's request. An example of such consent would be the subscriber's having a listed number. *See* 18 U.S.C. § 2702(c)(2). Without such consent, section 2702(a)(3), by its terms, bars a provider from supplying otherwise protected information, even if it has become public. Nor would it matter whether such information falls outside the category of "customer proprietary network information" under the Communications Act, so that its disclosure would not be unlawful under that statute. *See* 47 U.S.C. § 222(h) (2000). ECPA may forbid disclosure of particular information, even if the Communications Act does not.¹¹

Nevertheless, if the FBI asks only whether a number is among those assigned, or belonging, to the provider and not whether the provider has given it to a subscriber, we do not believe that the inquiry seeks "information pertaining to a subscriber." A provider's confirmation that a number is assigned, or belongs, to it would not reveal whether the number is being used by a subscriber.

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¹¹ A provider that does not serve a given individual or phone number would not appear to be revealing "information pertaining to a subscriber" by answering the FBI's request in the negative. Nevertheless, once a provider has given this negative answer in one instance, a response of "no comment" in a later instance could have the effect of disclosing "information pertaining to a subscriber." By entertaining the question at all, the provider would risk disclosing protected information.

Meaning of “Temporary” Work Under 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

A regulation proposed by United States Citizenship and Immigration Services providing that “temporary” work under the H-2B visa program “[g]enerally . . . will be limited to one year or less, but . . . could last up to 3 years” is based on a permissible reading of 8 U.S.C. § 1101(a)(15)(H)(ii)(b) and is consistent with the 1987 opinion of this Office addressing the meaning of “temporary” work under 8 U.S.C. § 1101(a)(15)(H)(ii)(a).

December 18, 2008

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL DEPARTMENT OF HOMELAND SECURITY

Section 1101(a)(15)(H)(ii)(a) of title 8 of the United States Code permits aliens to obtain visas (referred to as “H-2A” visas) to come “temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature.” Section 1101(a)(15)(H)(ii)(b) similarly permits aliens to obtain visas (referred to as “H-2B” visas) to come “temporarily to the United States to perform other temporary services or labor” if certain conditions are met. The regulation applicable to H-2A visas defines temporary work to mean “[e]mployment . . . where the employer’s need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than one year.” 8 C.F.R. § 214.2(h)(5)(iv) (2007). The regulation applicable to H-2B visas defines temporary work as “any job in which the petitioner’s need for the duties to be performed by the employee(s) is temporary, whether or not the underlying job can be described as permanent or temporary,” 8 C.F.R. § 214.2(h)(6)(ii)(A); the employer’s need “must be a year or less although there may be extraordinary circumstances where the temporary services or labor might last longer than one year.” 8 C.F.R. § 214.2(h)(6)(ii)(B).

United States Citizenship and Immigration Services (“USCIS”), the successor within the Department of Homeland Security (“DHS”) performing the immigration service and benefit functions of the Immigration and Naturalization Service (“INS”), proposes to revise the regulation governing H-2B visas. The new regulation would provide that “[e]mployment is of a temporary nature when the employer needs a worker for a limited period of time. The employer must establish that the need for the employee will end in the near, definable future.” Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers at 99 (draft final rule to be published in the Federal Register and codified at 8 C.F.R. § 214.2(h)(6)(ii)(B)) (“Draft Final Rule” or “Proposed 8 C.F.R. § 214.2(h)(6)(ii)(B)”; *see also* Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers, 73 Fed. Reg. 49,109, 49,121 (proposed Aug. 20, 2008). The regulation would further provide that “[g]enerally, that period of time will be limited to one year or less, but in the case of a one-time event could last up to 3 years.” Proposed 8 C.F.R. § 214.2(h)(6)(ii)(B).

You have asked whether the proposed regulation represents a permissible construction of the statute, and whether such an interpretation would be consistent with an earlier opinion of this Office addressing the meaning of “temporary” work under a then-recent amendment to section 1101(a)(15)(H)(ii)(a). See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 301, 100 Stat. 3359, 3411; *Temporary Workers Under § 301 of the Immigration Reform and Control Act*, 11 Op. O.L.C. 39 (1987) (“*Temporary Workers*”). We conclude that USCIS’s proposed rule is based on a permissible reading of the statute and is consistent with our 1987 opinion.¹

I.

Section 1101 does not define “temporary” work for purposes of H-2A or H-2B visas, nor does it indicate how long a position may last and still qualify as “temporary” work. The statute simply provides that an alien may come “temporarily” into the United States to perform “agricultural labor or services . . . of a temporary or seasonal nature” under an H-2A visa or to perform “other temporary service or labor” under an H-2B visa. 8 U.S.C. § 1101(a)(15)(H)(ii) (2006). In its ordinary sense, “temporary” means “lasting for a time only; existing or continuing for a limited time.” *Webster’s Third New International Dictionary* 2353 (1993). As we noted in our earlier opinion, this definition makes clear that “temporary” work lasts only “a limited period of time,” *Temporary Workers*, 11 Op. O.L.C. at 40–41 & n.5, but it does not tell us how limited that period must be. The legislative history of the statute is silent about the expected duration of “temporary” work.

If Congress has “directly spoken to the precise question at issue,” then the “unambiguously expressed intent of Congress” must be given effect. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). But where a statute is “silent or ambiguous with respect to the specific issue,” as section 1101 is here, the question “is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843; 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, and desired the agency . . . to possess whatever degree of discretion the ambiguity allows.”). In light of Congress’s silence, the question of how long a position may last and still be considered “temporary” is one that Congress left to USCIS to answer. See *Rosete v. Office of Pers. Mgmt.*, 48 F.3d 514, 518–19 (Fed. Cir. 1995) (granting

¹ This opinion memorializes informal advice that we provided to your Office in October 2007 and to the INS in January 2003.

deference under *Chevron* to agency’s interpretation of “temporary” under the Civil Service Retirement Act). See generally *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424–25 (1999) (“It is clear that principles of *Chevron* deference are applicable to [the Immigration and Nationality Act].”).

We conclude that USCIS’s proposed rule represents a permissible construction of 8 U.S.C. § 1101(a)(15)(H)(ii)(b) under *Chevron*. Although the proposed rule specifies a time frame for the duration of temporary work—“[g]enerally . . . one year or less, but . . . up to 3 years”—it emphasizes that the focus is on the employer’s need for the worker and whether that need is temporary. The proposed rule would make even clearer than the current rule that work will not be considered “temporary” unless it is restricted to a “limited period of time” and the employer’s “need for the employee will end in the near, definable future.” Proposed 8 C.F.R. § 214.2(h)(6)(ii)(B). This interpretation comports with the plain meaning of “temporary” and the agency’s longstanding policy of focusing on the nature of the employer’s need, see *In re Artee Corp.*, 18 I. & N. Dec. 366 (1982), which our 1987 opinion viewed as required by the statute and courts have upheld as reasonable. See *Temporary Workers*, 11 Op. O.L.C. at 41–42 (citing *In re Artee Corp.*); *Sussex Eng’g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 & n.4 (6th Cir. 1987); *N. Am. Indus., Inc. v. Feldman*, 722 F.2d 893, 901 (1st Cir. 1983); see also *Seven Star Inc. v. United States*, 873 F.2d 225, 226 (9th Cir. 1989) (affirming INS denial of visa under *In re Artee Corp.*); *Blumenfeld v. Att’y Gen.*, 762 F. Supp. 24, 28 n.5 (D. Conn. 1991) (same); *Wilson v. Smith*, 587 F. Supp. 470, 473 (D.D.C. 1984) (same); *Volt Tech. Servs. Corp. v. INS*, 648 F. Supp. 578, 582 (S.D.N.Y. 1986) (describing this view of section 1101(a)(15)(H)(ii) as “correct” interpretation of the statute). The proposed rule’s specification of a time frame for temporary work—“[g]enerally . . . one year or less, but . . . up to 3 years”—is also within USCIS’s discretion “[a]bsent clear congressional intent to the contrary.” *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 227 (5th Cir. 2001). Employment for up to three years may still be considered to “exist[] or continu[e] for a limited time,” *Webster’s Third New International Dictionary* at 2353, as long as the employer’s need for the worker is temporary. Although the word “temporary” is commonly applied to periods of a year or less,² it has also been applied with some frequency to periods of up to three years.³

² See, e.g., 2 U.S.C. § 72a(i) (2006) (authorizing congressional committees to procure “temporary” services of consultants “not in excess of one year”); 5 U.S.C. § 3109 (2006) (authorizing agency heads to procure “temporary” services of outside experts and consultants “not in excess of 1 year”); Pub. L. No. 107-228, § 321, 116 Stat. 1350, 1380 (2002) (defining “temporary appointment” to mean an “appointment that is limited by its terms to a period of one year or less”); 22 U.S.C. § 3949(a) (2006) (defining as a “temporary appointment” in the foreign service an appointment “which is limited by its terms to a period of one year or less”).

³ See, e.g., 5 U.S.C. § 3161(a) (2006) (defining “temporary organization” to include entities that exist for up to three years); *id.* § 3304a(a) (providing that “temporary” appointments in the competitive service

Although the current and the proposed rules both indicate that temporary work ordinarily would last one year or less, the proposed rule differs slightly from the current one in two respects: first, the current rule (but not the proposed one) specifies that the duration will exceed one year only in “extraordinary circumstances”; and second, the proposed rule (but not the current one) sets an upper limit of three years “in the case of a one-time event.” These minor differences are within the scope of USCIS’s interpretive discretion. Such changes are permissible if USCIS “adequately explains the reasons for [its change] of policy . . . ‘since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.’” *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996)). “[R]egulatory agencies do not establish rules of conduct to last forever . . . and . . . must be given ample latitude to adapt their rules and policies to the demands of changing circumstances.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); see also *Rust v. Sullivan*, 500 U.S. 173, 186–87 (1991); *Chevron*, 467 U.S. at 863–64. As set forth below, we conclude that USCIS has “adequately explain[ed] the reasons for [its change] of policy.” *Nat’l Cable & Telecomm. Ass’n*, 545 U.S. at 981 (internal quotation marks omitted).

We do not believe that USCIS’s proposed regulation for H-2B visas is impermissible because its time frame for “temporary” work would not be identical to that used for H-2A visas: Temporary work for H-2B visas would “[g]enerally . . . be limited to one year or less, but in the case of a one-time event could last up to 3 years,” Proposed 8 C.F.R. § 214.2(h)(6)(ii)(B), whereas temporary work for H-2A visas would be limited to one year or less absent “extraordinary circumstances,” 8 C.F.R. § 214.2(h)(5)(iv) (2007). Our 1987 opinion, it is true, observed that “[o]ne would expect . . . that ‘temporary’ would have the same meaning in both § 1101(a)(15)(H)(ii)(a) and (b),” because they are part of the same sentence. *Temporary Workers*, 11 Op. O.L.C. at 41. But subclauses (a) and (b) involve different (though related) classes of visas—H-2A visas apply to temporary

may last up to three years before conversion into career appointments); 7 U.S.C. § 6304(b)(6)(A) (2006) (providing that “temporary” appointments to a board may last for up to three years); 16 U.S.C. § 5952(11)(A) (2006) (permitting the award of “temporary” concessions contracts with terms of up to three years); 26 U.S.C. § 7805(e)(2) (2006) (allowing promulgation of “temporary” regulations for up to three years); 38 U.S.C. § 7405(c)(3) (2000) (allowing certain “temporary” appointments to last up to three years); 26 C.F.R. § 1.148-2(e) (2007) (allowing reinvestment of bond proceeds for “temporary periods” of up to three years); 30 C.F.R. § 250.302 (2007) (defining “temporary facility” to include activities conducted for up to three years); 49 C.F.R. § 555.15 (2007) (allowing “temporary” exemptions to last for three years). Although the term “temporary” is sometimes applied to periods extending beyond three years, see, e.g., 42 U.S.C. § 7651n(b)(2) (2000) (providing for “temporary” demonstration project of up to five years); *id.* § 8321(e) (2000) (providing for “temporary” exemption of up to five years), USCIS may reasonably determine that work lasting longer than three years is likely to be permanent rather than temporary in nature. Cf. *Temporary Workers*, 11 Op. O.L.C. at 41 n.7.

“agricultural labor or services,” H-2B visas to “other temporary services or labor,” 8 U.S.C. § 1101(a)(15)(H)(ii)(a), (b)—and thus may serve different purposes. If USCIS’s explanation for the different treatment is reasonable, both rules may be permissible interpretations of “temporary” work in 8 U.S.C. § 101(a)(15)(H)(ii)(a) and (b). *See Nat’l Ass’n of Cas. & Sur. Agents v. Bd. of Governors of Fed. Reserve Sys.*, 856 F.2d 282, 286–87 (D.C. Cir. 1988) (upholding agency interpretation of ambiguous statutory term that the agency had interpreted differently elsewhere in the statutory subsection) (“The Board’s interpretation of Exemption D cannot be successfully attacked as a matter of administrative law merely because the Board has otherwise construed the two companion grandfather clauses.”); *Common Cause v. FEC*, 842 F.2d 436, 441–42 (D.C. Cir. 1988) (similar); *cf. Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990) (“[I]t is not impermissible under *Chevron* for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes.”); *Comite Pro Rescate De La Salud v. Puerto Rico Aqueduct & Sewer Auth.*, 888 F.2d 180, 187 (1st Cir. 1989) (Breyer, J.) (concluding that EPA may interpret the same language found in different parts of a statute to mean different things where its interpretive authority is implicit in the statutory scheme).

The policy rationale you have offered, *see* Changes to Requirements Affecting H-2B Nonimmigrants and Their Employers, 73 Fed. Reg. at 49,115; *see also* Draft Final Rule at 56–64, supports different treatment of the H-2A and H-2B visa programs and adequately explains the need for changing the DHS H-2B visa regulation. DHS has indicated that temporary work under the H-2B program is much more likely than work under the H-2A program to involve a non-seasonal project, such as the construction of an office building, industrial facility, bridge, or a ship, which will have a definable end point but may require more than one year to complete. 73 Fed. Reg. at 49,115. The current H-2B rule’s requirement that employers provide evidence of extraordinary circumstances in order to employ temporary workers on a project longer than one year is thus impractical because it does not correspond to a prevalent need for H-2B workers. *See id.* Applying a general one-year limit to the H-2A visa program may not be similarly impractical in light of the largely seasonal nature of temporary work performed under that program. *See* Draft Final Rule at 58–59. USCIS thus could reasonably conclude that a more flexible rule that generally limits temporary work to one year but allows it to last up to three years better comports with the nature of temporary work in the H-2B context than in the H-2A context. Moreover, even after DHS promulgates its new H-2B visa regulation, its H-2A and H-2B visa rules would still be similar in essential respects: under both, temporary work would depend on the nature of the employer’s need and ordinarily would last for only one year, but could last longer. Although the H-2A visa regulations do not expressly provide for temporary employment lasting up to three years, those regulations recognize that an employer’s need for a temporary worker may last longer than one year, and potentially as long as three years, if an employer can show that “extraordinary

circumstances” have created a longer-term (but still temporary) need for the position. *See* 8 C.F.R. § 214.2(h)(5)(iv)(A).

II.

We also conclude that the proposed regulation is consistent with our 1987 opinion addressing “temporary” work under 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Our earlier analysis of the meaning of “temporary” work was based in significant part on “the present administrative interpretation of the word ‘temporary’” set forth in then-current Department of Labor and INS regulations for H-2 visas, *see Temporary Workers*, 11 Op. O.L.C. at 41, and this qualification suggests that our conclusion was subject to change if the agencies revisited their interpretation, as USCIS now proposes to do.⁴ Moreover, the INS had asked for “our opinion on what constitutes ‘temporary’ work” under 8 U.S.C. § 1101(a)(15)(H)(ii)(a), *Temporary Workers*, 11 Op. O.L.C. at 39, and we provided our view of the best reading of the statute, in the context of existing regulations, rather than the range of permissible agency interpretations. *See id.* at 43 (“[W]e believe a one-year

⁴ The Department of Labor and INS regulations that we relied upon in our 1987 opinion have since been revised. USCIS has defined “temporary work” in 8 U.S.C. § 1101(a)(15)(H)(ii)(b) as employment where the employer’s need lasts only one year absent extraordinary circumstances. 8 C.F.R. § 214.2(h)(6)(ii) (2007). By regulation, USCIS requires H-2B visa petitioners to obtain a certification of the Department of Labor that qualified U.S. workers are not available and the use of non-U.S. workers will not adversely affect the wages and working conditions of similarly employed U.S. workers. *Id.* § 214.2(h)(6)(iv)(A). To implement that requirement, the Department of Labor has adopted a procedure providing that “[a]s a general rule, the period of the employer’s need must be 1 year or less, although there may be extraordinary circumstances where the need may be for longer than 1 year.” Dep’t of Labor, *Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations* at 2 (Nov. 10, 1994) (“Labor H-2B Procedures”) (attachment to General Administration Letter No. 1-95) (available at http://wdr.doleta.gov/directives/attach/GAL1-95_attach.pdf, last visited Aug. 15, 2014). Neither the existing USCIS rule defining “temporary” work nor the Department of Labor procedures conflicts with our conclusion today. As noted above, USCIS may change its definition of “temporary,” provided it explains its reasons for the change and the change is within the range of permissible interpretations of the statute. Moreover, USCIS, not the Department of Labor, has statutory responsibility to administer and interpret 8 U.S.C. § 1101(a)(15)(H)(ii)(b). *See* 8 U.S.C. § 1103(a)(1) (2006). The Department of Labor procedures make clear Labor’s intent for the policy to conform to USCIS’s standards for determining the temporary nature of a job offer, not independently to define the nature of temporary work, *see* Labor H-2B Procedures at 2 (noting that procedures “conform[] DOL standards for determining the temporary nature of a job offer under the H-2B classification with those of INS”). Indeed, in the preamble to proposed amendments to its regulations, Labor has stated that it “defers to the Department of Homeland Security and will use [its] definition of temporary need as published in [its] Final Rule on H-2B” and thus “will consider a position to be temporary as long as the employer’s need for the duties to be performed is temporary or finite, regardless of whether the underlying job is temporary or permanent in nature, and as long as that temporary need . . . is less than 3 consecutive years.” Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes at 26, 33 (draft final rule to be published in the Federal Register).

limitation . . . best reflects Congress’ intent and will be administratively workable.”). Under *Chevron*, an agency construction of a statute must be sustained if it is reasonable, even if a better construction of the statute exists. See 467 U.S. at 843–44 & n.11; accord *Nat’l Cable & Telecomm. Ass’n*, 545 U.S. at 980 (“If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”). Because USCIS’s policy judgment is based on a reasonable interpretation of an ambiguous statute, our earlier assessment of the statute’s “best” reading, in the context of the regulations in effect at the time, 11 Op. O.L.C. at 41, cannot displace USCIS’s interpretation, as set forth in its proposed regulation. Cf. *Nat’l Cable & Telecomm. Ass’n*, 545 U.S. at 982–83 (“Only a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”).

Finally, our 1987 opinion recognized that “temporary” work could last for longer than one year, as we stated that temporary work was “*generally* of less than one year’s duration.” *Temporary Workers*, 11 Op. O.L.C. at 43 (emphasis added); see also *id.* at 40 (“[W]e have concluded that temporary work under § 1101(a)(15)(H)(ii)(a) includes any agricultural work where the employer needs a worker for, as a general rule, a year or less.”). We acknowledged that there may be “unusual circumstances where a ‘temporary’ job might last longer than a year.” *Id.* at 41. This understanding, like the current definitions of temporary work for H-2A visas under 8 C.F.R. § 214.2(h)(5)(iv) and for H-2B visas under 8 C.F.R. § 214.2(h)(6)(ii)(B), is not inconsistent with the proposed rule, under which temporary work will “[g]enerally . . . be limited to one year or less, but in the case of a one-time event could last up to 3 years.” Proposed 8 C.F.R. § 214.2(h)(6)(ii)(B).

Our 1987 opinion did reject a proposed INS regulation that would have permitted aliens to stay in the United States for up to three years for purposes of temporary work. See *Temporary Workers*, 11 Op. O.L.C. at 41. However, that proposed rule differed significantly from the current proposal: the INS rule would have permitted an alien to obtain an H-2A visa for any job in the United States for a period of up to three years without regard to the nature of the employer’s need. See *id.* at 40. We concluded that a “blanket assumption that all jobs are ‘temporary’ simply because the alien cannot occupy a job—any job—for more than three years . . . appears to be an interpretation not supported by the statute.” *Id.* at 41 & n.9. That is not true of USCIS’s proposed rule, which would classify work as “temporary” only where the employer’s need for the worker is temporary.

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