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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 twenty-one volumes of opinions published covered the years 1977 through 1997; the present volume covers 1998. Volume 22 includes Office of Legal Counsel opinions that the Department of Justice has determined are appropriate for publication. A substantial number of Office of Legal Counsel opinions issued during 1998 are not included.

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

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OF THE

OFFICE OF LEGAL COUNSEL

Application of 18 U.S.C. § 203 to Maintenance of Contingent Interest in Expenses Recoverable in Litigation Against the United States

18 U.S.C. § 203 does not prohibit a prospective government officer from maintaining upon his entry into government service a contingent interest in expenses recoverable in litigation involving the United States.

January 28, 1998

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum responds to your request for our opinion whether 18 U.S.C. § 203 prohibits a prospective government officer from maintaining a contingent interest in expenses recoverable in litigation involving the United States.* For the reasons set forth below, we conclude that § 203 would not prohibit the prospective officer from maintaining such an interest upon his entry into government service.

I. Background

The prospective officer's law firm represents plaintiffs on a contingency basis in a product liability suit against a corporation that petitioned for bankruptcy in May 1995, and the firm has continued to represent its clients in the bankruptcy proceeding. The law firm has advanced certain litigation expenses on behalf of its clients, making payments to cover, among other things, court costs, costs of medical examinations, telephone and facsimile charges, and deposition reporting costs. If the law firm's clients secure damages against the corporation, the firm will deduct these expenses from the award and receive a percentage of the remainder as a fee. It is not likely that the firm will recover its expenses before the prospective officer's projected entry into government service.

Section 203 of title 18 generally prohibits a federal officer or employee from receiving "compensation for any representational services," rendered "personally or by another" before a court or agency during the officer's or employee's government tenure, in connection with any proceeding in which the United States is a party or has a direct and substantial interest.[1] The United States is one of the

*Editor's Note: For privacy reasons, material has been redacted from this opinion that might identify the prospective government officer.

[1] In pertinent part, § 203 provides:

> (a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly—
>
> (1) . . . receives . . . any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another—
>
> . . . .

Continued

defendant corporation's creditors and is therefore a participant in the bankruptcy proceeding in which the law firm maintains a contingent interest. It has been the longstanding view of the Office of Legal Counsel that § 203 prohibits an individual entering government employment from maintaining a contingent interest in fees recoverable in a proceeding involving the United States.[2] The prospective government officer therefore proposes, upon entering government service, to disassociate himself from the litigation and to forfeit any entitlement to his share of *fees* contingent upon the plaintiffs' recovery. He would, however, retain an interest in his share of any repayment of *expenses* advanced, prior to his entry into government service, on behalf of the firm's clients. The question presented is whether § 203 prohibits the prospective officer from maintaining such an interest.

II. Discussion

A.

The starting point in assessing § 203's reach is, of course, the text of the statute itself. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). To determine whether § 203 prohibits this individual from retaining a contingent interest in the recovery of expenses, we must ask whether the payments that he would receive in the event that his clients recover damages are properly characterized as "compensation for . . . representational services." The term "compensation" is not defined in § 203 or related provisions of the federal criminal code, nor has any court considered, within the specific context of a prosecution under § 203

> (B) at a time when such person is an officer or employee . . . of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States,
>
> in relation to any proceeding . . . or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission,
>
> . . . .
>
> shall be subject to the penalties set forth in section 216 of this title.

18 U.S.C. § 203(a) (1994)

[2] *See, e.g.*, Memorandum for Files from Sol Lindenbaum, *Re: Application of 18 U.S.C. § 203*, at 1 (Dec. 16, 1980); Memorandum for Edwin L. Weisl, Jr., Assistant Attorney General, Land and Natural Resources Division, from Frank M. Wozencraft, Assistant Attorney General, Office of Legal Counsel, *Re: Interest of U.S. Attorney in Condemnation Suit—D.J. No. 33-36-650-2, Civil No. C-7779, Columbus, Ohio* at 1 (Nov. 9, 1966), Letter for Hon. Edward Weinberg, Deputy Solicitor, Department of the Interior, from Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel (July 24, 1963); *cf. Acceptance of Legal Fees by United States Attorney*, 6 Op. O.L.C. 602 (1982).

Although the rationale underlying this longstanding interpretation has never been articulated with clarity, the interpretation is consistent with a view of § 203 as primarily seeking to prevent the actual or apparent influence of an officer or employee over a proceeding involving the government by virtue of the individual's pecuniary interest in the proceeding's outcome. *See infra* pp. 4–6. A rule against retaining a contingent interest in fees reflects that a contingent fee covers the entire representation up to the payment, the amount remains uncertain until then, and the fee thus compensates, in part, for representational services performed after the employee began working for the United States. We need not address that interpretation here because it simply does not apply to reimbursement for already identified expenses, as we conclude below, payments offsetting expenses are not properly characterized as compensation for representational services.

or its predecessors, whether a client's reimbursement of expenses can constitute "compensation." The term "varies in its meaning depending on the words and the subject matter in connection with which it is used." 15A C.J.S. *Compensation* 101 (1967 & Supp. 1997). Here, Congress used "compensation" in connection with the qualifying phrase "for . . . representational services." The phrase is significant in two respects. First, in light of the focus on "services," the most natural reading of § 203 is that Congress intended to limit the statute's coverage to those forms of payment typically associated with the performance of personal services, such as fees, wages, salary, or commissions. Second, the use of the word "for" makes clear that § 203 embodies an element of exchange. Section 203 does not prohibit all compensation to a government officer or employee; rather, it targets compensation that the officer or employee receives *in exchange for* representational services rendered personally or by another. Put another way, the fact that a government officer or employee receives a monetary payment or something else of value will not alone trigger a violation of § 203. Nor is it sufficient that an officer or employee receives something of value *because* a representational service occurred during his or her government tenure. The provision requires that the officer or employee receive something of value *in exchange for the representational services* performed on the client's behalf during the officer's or employee's government tenure.

Because § 203 covers only payments received in exchange for representational services, it does not reach an officer's or employee's recovery of expenses advanced on a contingency basis on behalf of a client.[3] If litigation efforts on behalf of the prospective officer's clients prove successful, he will receive something of value: he will recoup costs that he otherwise would have been required to absorb. Nevertheless, the payments in question will not take a form typically associated with the performance of personal services, nor will they have been made in exchange for any representational services. It is true that the officer will receive payment only *because* another attorney performs the representational services that ultimately enable his clients to recover damages. It is also likely that the prospective officer or another attorney performed representational services *while* disbursing the funds for which he now seeks repayment. For example, a firm that advances funds to a third party or that pays court costs on a client's behalf is in fact performing representational services such as securing the appearance of a third party as a witness or ensuring that the client's action proceeds in the proper forum. It does not follow, however, that the recovery of expenses is properly characterized as a payment made *for* representational services. An

[3] Because this prospective officer is an attorney, our discussion necessarily focuses on the application of § 203 to attorneys' fee arrangements. Section 203, however, extends to one who "demands, seeks, receives, accepts, or agrees to receive or accept" compensation for representational services, "*as agent or attorney or otherwise.*" 18 U.S.C. § 203(a)(1) (emphasis added) We believe that our analysis would apply equally to non-attorneys who provide representational services, such as consultants and experts in engineering, accounting, and similar professional fields. As we discuss, § 203 would not extend to a contingent interest in the recovery of items billed in good faith as expenses.

attorney who arranges for the appearance of a witness or who pays court costs ordinarily receives a fee for performing these representational services, whether in the form of a fixed hourly rate or a contingent interest in the outcome of the case. *Above* that fee, the attorney also seeks reimbursement for the actual outlay of funds to the witness or the court on the client's behalf. Thus, an attorney who disburses funds on a client's behalf receives both a payment for performing representational services—namely, *any services connected with the disbursement*—and a payment to offset the *disbursement* itself. In this example, the acts of arranging for testimony and even of disbursing funds would be "representational services," so that the fee paid in exchange for these acts could properly be viewed as "compensation" for "representational services" within the meaning of § 203. In contrast, although the occasion for the reimbursement for expenses arises only *because* the attorney (or another) performed representational services, the reimbursement itself would be insufficient to trigger § 203. Section 203 targets only those payments made in exchange for representational services, not those made simply because representational services occurred.[4] Accordingly, the most natural reading of the language of § 203 suggests that Congress did not intend to prohibit an officer or employee from recovering expenses advanced on a contingency basis on behalf of a client.

B.

We must look not only to the language of § 203, but also "to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). Where a criminal statute is involved, however, "it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Id.* at 160. We conclude that although the history and purpose of § 203 provide some support for a broad reading of the statute, we are not faced with the sort of rare circumstance in which general policy concerns can trump the statutory text.

Section 203 was among several provisions addressing bribery, graft, and conflicts of interest revised by Congress in 1962. Act of Oct. 23, 1962, Pub. L. No. 87–849, 76 Stat. 1119, 1121.[5] Section 203 differed from its predecessor, 18 U.S.C. § 281, principally in targeting payments for representational services performed

[4] In some circumstances, an attorney may advance funds to pay the fee of a witness or consultant who performs services on a client's behalf. Some of the third party's services may be "representational" in nature. Nevertheless, the attorney who is reimbursed for the funds advanced is not "compensated" for "representational services." It is the third party who receives compensation for those services that he or she performed on the client's behalf. The attorney's right to reimbursement arises not from the fact that the third party has performed representational services, but from the fact that the attorney has satisfied the client's obligation to fund those services in the first instance.

[5] Section 203 was designed to "exten[d] and clarif[y]" its immediate predecessor, 18 U.S.C. § 281 (1956). H.R. Rep. No. 87–748, at 19 (1961). As enacted, § 203 did not prohibit compensation for services rendered in courts. Congress expanded the range of proceedings covered by § 203 in 1989. Ethics Reform Act of 1989, Pub. L. No. 101–194, § 402(1), 103 Stat. 1748.

on behalf of a client during an employee's government tenure (without regard for the timing of the payment), rather than targeting payments received during an employee's government tenure (without regard for the timing of the services). Leaving aside this shift in the timing of activities that § 203 covers, the core prohibition on an employee's receipt of compensation in connection with proceedings involving the government has remained largely intact since it was first enacted in 1864. The Act of 1864 prohibited a Member of Congress or an executive officer or employee from receiving "any compensation whatsoever, directly or indirectly, for any services rendered . . . either by himself or another, in relation to any proceeding . . . in which the United States is a party, or directly or indirectly interested, before any department, court-martial, bureau, officer, or any civil, military, or naval commission whatever." Act of June 11, 1864, ch. 119, 13 Stat. 123 ("1864 Act").[6] The statute was the last in a series of four mid-nineteenth century statutes designed to address abuses of public office. *See generally* Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* 31–36 (1960). In an extensive review of existing conflict of interest statutes undertaken in 1956, this Office examined the debates preceding the 1864 Act and identified two principal purposes for its passage. Memorandum for the Attorney General, from Frederick W. Ford, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Conflict of Interest Statutes* app. at 4–14 (Dec. 10, 1956), *reprinted in Federal Conflict of Interest Legislation: Hearings on H.R. 1900, Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 86th Cong., 619, 624–34 (1960) ("*Hearings*"). First, Congress sought to prevent "the exercise or abuse of official influence on the part of Government officials with respect to matters before Government departments, agencies or officers in which the United States is interested." *Id.* app. at 13, *reprinted in Hearings* at 633. Second, Congress sought to encourage officers of the government "to devote their full time to the government duties for which they were paid" and to remain unbiased in the discharge of those duties. *Id.; see id.* app. at 7, *reprinted in Hearings* at 627.

The 1864 Act's sponsors were concerned not only that public officials would actively seek to affect the result of a particular proceeding, but also that an individual could influence the proceeding's outcome merely by virtue of his or her status as a public official. As originally proposed, the provision barring the receipt of compensation during government service would have applied only to Members of Congress. *See id.* app. at 4–5, *reprinted in Hearings* at 624–25. The concern over the possibility of influence in matters involving the government emerged most clearly in debates over whether Congress should include proceedings before courts–martial among those proceedings in which its Members could not perform

[6] With the 1909 revision of the criminal code, Congress extended the provision to apply to Members of Congress from the time of their election. Act of March 4, 1909, ch. 321, sec. 113, 35 Stat. 1088, 1109. A 1940 amendment exempted retired officers of the armed forces. Act of Oct. 8, 1940, ch. 761, 54 Stat. 1021. Congress redesignated the provision as 18 U.S.C. § 281, section 203's immediate predecessor, in its 1948 revision of the criminal code.

services for compensation. *See id.* app. at 7–8, *reprinted in Hearings* at 627–28. Proponents of an amendment, ultimately adopted, to include proceedings before courts-martial noted in particular that the promotions of military officers sitting on a court-martial would depend on Senate action, and that Senators appearing before such officers could therefore exercise "undue and improper influence" over their decisions. *Id.* app. at 8, *reprinted in Hearings* at 628. Although Congress was primarily concerned with securing the integrity of departmental and other proceedings against the influence of its own Members—"whose favor may have much to do with the appointment to, or retention in, public position" of the government officials conducting those proceedings, *Burton v. United States*, 202 U.S. 344, 368 (1906)—Congress nevertheless extended the Act's prohibition on the receipt of private compensation during government service to all federal officers and employees.

To the extent that § 203 and its predecessors were designed to guard against the influence—actual or apparent—of government officials or employees in proceedings involving the government, or to guard against bias on the part of an officer with a direct interest in such a proceeding, it is possible to argue that the statute should reach a contingent interest in repayment of expenses as well as a contingent interest in repayment of fees. After all, whether an official's interest is one in expenses or fees does not alter the official's incentive to influence the outcome of a proceeding, the danger that an adjudicator would be affected by the knowledge that the official possesses an interest in the proceeding's outcome, or the possibility that the interest would cause the official to be biased in other government matters. At the same time, it is equally possible to argue that if the purposes alone are considered, then § 203 is far too broad, in that it reaches the interests of officials and employees who are unlikely to be in a position to exert influence over proceedings involving the government even if they have an incentive to do so. The purpose of § 203 and the language used to effect that purpose thus are not perfectly matched. It is for Congress to assess whether its purpose would be better served by a legislative extension of § 203 beyond compensation for representational services. We are not free to interpret § 203 without regard for its textual boundaries. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures . . . should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971).

Indeed, although the general purpose of § 203 and its predecessors might support similar treatment of contingent fees and contingent expenses, the historically *different* treatment of these two categories under professional ethics guidelines supports the conclusion that § 203, as presently drafted, reaches the former but not the latter. Before Congress's 1962 revision of the conflict-of-interest laws, § 203's predecessor, § 281, had been applied to restrict employees entering government service from receiving payments on contingent fee arrangements. In enacting

§ 203, Congress corrected one of § 281's perceived defects—namely, its coverage of payments for services wholly completed prior to the employee's entry into government service. *See* H.R. Rep. No. 87–748, at 9, 20 (1961); Staff of Subcomm. No. 5 of the House Comm. on the Judiciary, 85th Cong., Federal Conflict of Interest Legislation, pts. I and II, at 49 (Comm. Print 1958) ("Staff Report pts. I and II"). This Office has taken the position that, in adjusting the timing of services that the statute reaches, Congress did not alter the application of the provision to contingent fee arrangements under which a government employee stands to receive payments for services *not* wholly completed before the employee's entry into government service. *See supra* note 2.[7]

Even though Congress may have considered the application of the statute to employees holding interests in contingent fee arrangements and elected to retain that bar in cases in which representational services remained to be performed after the individual's entry into government service, it could not have contemplated the application of the new statute to a lawyer's contingent interest in recovery of expenses. At the time of § 203's enactment, ethical rules permitted attorneys to acquire a contingent interest in the recovery of fees, but not in the recovery of expenses. The American Bar Association's ("ABA") Canons of Professional Ethics, first adopted in 1908, permitted contingent fee arrangements "where sanctioned by law," so long as the arrangement was "reasonable under all the circumstances of the case." ABA Canons of Professional Ethics, Canon 13. Nevertheless, the ABA Canons prohibited an attorney from acquiring a contingent interest in the recovery of expenses. Under Canon 42, adopted in 1928, a lawyer could advance expenses of litigation on the client's behalf "as a matter of convenience," but only subject to reimbursement by the client, regardless of the outcome of the case. *See also* ABA Comm. on Professional Ethics and Grievances, Formal Op. 246 (1942). When the ABA promulgated its Model Code of Professional Responsibility in 1969, it retained this distinction between fees and expenses. As amended through 1980, the Code's Disciplinary Rules—prescriptive in nature and designed to govern disciplinary proceedings in those jurisdictions adopting the Code—provided that attorneys could "advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, *provided the client*

[7] Section 203(a), as ultimately passed in 1962, was identical in all relevant respects to the first paragraph of § 203 of H.R. 12547, 85th Cong. (1958), *reprinted in* Staff of the Antitrust Subcomm. of the House Comm. on the Judiciary, 85th Cong., Federal Conflict of Interest Legislation, pts. III, IV, and V, at 72–73 (Comm. Print 1958). In turn, that provision was based on a draft of revised § 281 proposed by the staff of the Antitrust Subcommittee of the House Committee on the Judiciary, which had been directed in 1957 to analyze existing federal conflict-of-interest laws with a view toward revision. In recommending a revision of § 281, the staff report acknowledged that existing § 281 covered individuals entering the government with a contingent interest in the outcome of a proceeding. The report stated that the proposed revision "would continue to affect officials who enter the Government as owners of, or who subsequently acquire, unliquidated or contingent interests in matters and proceedings in which the United States is interested." Staff Report pts. I and II, at 49. Thus, although the provision ultimately enacted as § 203(a) was designed to exempt compensation for services *wholly* completed prior to an individual's government employment, it was not designed to exempt compensation that an employee would receive only by virtue of services performed after he entered the government.

remains ultimately liable for such expenses." Model Code of Prof'l Responsibility DR 5-103(B) (1980) (emphasis added). It was not until 1983, when the ABA adopted its Model Rules of Professional Conduct ("Model Rules"), that arrangements for contingent recovery of expenses began to gain acceptance. Rule 1.8(e)(1) of the Model Rules permits a lawyer to "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter." Although a majority of states have adopted the Model Rules, some 17 states continue to prohibit the contingent recovery of litigation expenses.[8]

The historically distinct treatment under professional ethics standards of lawyers' arrangements for contingent recovery of fees and arrangements for contingent recovery of expenses—with the former commonly accepted in the civil context and the latter largely prohibited until 1983—counsels against assuming that § 203, as revised in 1962, should reach a contingent interest in expenses. Were we to conclude that § 203 reaches a contingent interest in recovery of expenses, we would be applying § 203 to a type of payment arrangement largely unknown in the legal profession at the time of the statute's enactment.

C.

The Office of Government Ethics ("OGE"), charged with providing overall policy direction for the ethics program in the executive branch, has expressed concern that exclusion of reimbursement for expenses from § 203's reach will lead to administrative difficulties, because the demarcation between those payments that are "for . . . representational services" and other payments is unclear. *See* Letter for Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, from Marilyn L. Glynn, General Counsel, Office of Government Ethics at 1–2 (Dec. 22, 1997). In particular, a professional fee for services may sometimes include a portion attributable to expenses—such as general overhead or the cost of in-house photocopying or computer research—incurred by the person providing the service. OGE therefore argues that § 203 should be interpreted to cover *all* types of payments made to an attorney in connection with representational services—including both compensation for services and payments reimbursing the attorney for expenses associated with those services. OGE suggests that any other approach would make it difficult to administer the statute in the same manner to attorneys with different billing practices.

[8] States that prohibit the contingent recovery expenses include those that have retained disciplinary rule 5-103(B) of the Code of Professional Responsibility, *see* DR 5–103(B) of the Iowa, Massachusetts, Nebraska, Ohio, Oregon, Tennessee, Vermont, and Virginia Codes of Prof'l Responsibility; *see also* Georgia Code of Prof'l Responsibility DR 5-103(C), N.Y. Comp Codes R & Regs tit. 22, § 1200 22(b)(1), and those that have varied rule 1.8(e)(1) of the Rules of Professional Conduct to require that the client remain ultimately responsible for repayment of advance expenses regardless of the outcome of the case, *see* Rule 1 8(e)(1) of the Arizona, Colorado, Michigan, South Dakota, and Washington Rules of Prof'l Conduct; *see also* New Mexico Rule of Prof'l Conduct R. 16-108(E)(1), North Carolina Rule of Prof'l Conduct R. 1.8(e).

We acknowledge that an interpretation of § 203 as covering anything less than all payments to an individual performing representational services may present a difficult accounting problem for an attorney who wishes, upon entering government service, to retain an interest in the recovery of advance expenses. But the possibility of administrative difficulties cannot compel an interpretation of § 203 that would criminalize more conduct than that which the statutory text clearly reaches. Moreover, there is no reason why application of § 203 cannot vary according to the billing practices of different professionals within the confines of applicable ethical standards. The American Bar Association's ethical rules limit the ability of attorneys to bill clients separately for certain expenses, such as general overhead expenses associated with maintaining an office. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 379, at 8 (1993) ("In the absence of disclosure to the client in advance of the engagement to the contrary, the client should reasonably expect that the lawyer's cost in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like would be subsumed within the charges the lawyer is making for professional services."). To the extent that state bar rules permit him to do so, an attorney can arrange in advance with the client to include certain other expenses associated with in-house services within a professional fee or to bill the client for those expenses separately. Section 203 reaches those items subsumed within a professional fee, but not those expenses separately billed to the client at actual cost.[9] Thus, an attorney who includes certain expenses within a professional fee may not retain a contingent interest in those expenses upon entering government service, whereas an attorney who bills the client separately for the same expenses may do so. In either case, the attorney's choice of payment arrangement forms the starting point for the analysis: nothing in § 203 requires equal treatment for attorneys who choose different payment structures. Indeed, similar questions arise in connection with attorney fee awards under federal or state law, and courts have deemed it appropriate to take into account prevailing billing practices in the legal market in question, as well as an attorney's particular practices, in determining what items may be awarded under the statute. *See, e.g., Missouri v. Jenkins*, 491 U.S. 274, 285–87 (1989) (attorney fee award under 42 U.S.C. § 1988), *Blum v. Stenson*, 465 U.S. 886, 895 (1984) (same). We are aware of no authority requiring uniformity in fee awards despite varied billing practices.

[9] In referring to the "actual cost" associated with in-house services, we do not intend to assign the phrase a technical meaning. Rather, the phrase is intended to make clear that § 203 does not permit an attorney to disguise items that would ordinarily be considered part of a professional fee—and therefore not recoverable on a contingent basis after an attorney enters government service—as expenses through a bad-faith agreement to charge the client an inflated amount for actual costs incurred.

* * *

In sum, we conclude that 18 U.S.C. § 203 does not prohibit this prospective government officer from maintaining a contingent interest in the recovery of advance expenses in litigation involving the United States. Section 203's prohibition on the receipt of "compensation" extends only to compensation "for . . . representational services." Although it is likely that others will perform additional representational services on behalf of the prospective officer's clients before the litigation is ultimately resolved, any payments that he will receive for past advances cannot be viewed as payments *for* these or, indeed, earlier representational services. The general purposes of § 203 might support the conclusion that § 203 should be extended to cover the payments contemplated here, but those general purposes cannot expand the statutory text.

DAWN JOHNSEN
Acting Assistant Attorney General
Office of Legal Counsel

Statute of Limitations and Settlement of Equal Credit Opportunity Act Discrimination Claims Against the Department of Agriculture

The Attorney General may not waive the statute of limitations in the litigation or compromise of pending claims against the United States.

Absent a specific provision to the contrary, a statute of limitations on civil actions also should apply to administrative settlements of claims arising under that statute pursuant to 31 U.S.C. § 3702.

31 U.S.C. § 3702 does not authorize the Department of Agriculture to pay compensatory damages in an administrative settlement of an ECOA claim if ECOA's two year statute of limitations has run.

Filing an administrative claim with USDA does not toll ECOA's statute of limitations.

Although ECOA's statute of limitations is, in appropriate circumstances, subject to the doctrines of equitable tolling and equitable estoppel, courts have rarely applied either doctrine against the United States.

January 29, 1998

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

This memorandum responds to your request for advice on whether the statute of limitations in the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (1994 & Supp. I 1995) ("ECOA"), applies to administrative settlements of ECOA claims. You also have asked us whether the government may waive the statute of limitations, and under what circumstances the statute of limitations might be tolled.

We have concluded that ECOA's statute of limitations does apply to administrative settlements of ECOA claims and that the statute of limitations cannot be waived by the United States, either in litigation or in the administrative process. As for tolling of the statute of limitations, we have concluded that filing an administrative complaint does not toll the limitations period for a civil action. While ECOA is, in relevant circumstances, subject to the doctrines of equitable tolling and equitable estoppel, courts infrequently apply these doctrines against the United States.

I. Background

In relevant part, ECOA prohibits any creditor from discriminating against any applicant, with respect to any aspect of a credit transaction, on the basis of race, color, religion, national origin, sex or marital status. 15 U.S.C. § 1691(a). A "creditor" under the act includes any person who regularly extends, renews, or continues credit. *Id.* § 1691a(e). A "person" is "a natural person, a corporation,

government or governmental subdivision or agency, trust, estate, partnership, cooperative, or association." *Id.* § 1691a(f).

Administrative enforcement of ECOA is divided among several federal agencies, each of which has authority over certain categories of creditors. *Id.* § 1691c(a). Enforcement responsibility not specifically committed to another federal agency is vested in the Federal Trade Commission ("FTC"), which is to use its powers under the Federal Trade Commission Act, 15 U.S.C.A. §§ 41–58 (West 1997), to enforce ECOA's requirements. 15 U.S.C. § 1691c(c). The Department of Agriculture's ("USDA's") farm credit programs fall under the authority of the FTC. The FTC has authorized USDA to process ECOA claims arising from USDA programs.[1]

Section 1691e of ECOA also provides for a private right of action against creditors who violate the discrimination prohibitions of the act. Under subsection (a), all creditors are liable for compensatory damages: "[a]ny creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class." *Id.* § 1691e(a). Subsection (d) authorizes the imposition of attorney's fees and costs in a successful action. *Id.* § 1691e(d). No private action may be brought later than two years after the occurrence of the violation, unless the Attorney General or the agency with administrative enforcement responsibility commences an enforcement proceeding within two years. In that case, an applicant may bring a civil action within one year of the commencement of the enforcement proceeding. *Id.* § 1691e(f).

In a 1994 opinion, this Office opined that ECOA applies to federal agencies and that it waives the sovereign immunity of the United States for monetary relief. Accordingly, we advised USDA that the Secretary could provide monetary relief, attorney's fees, and costs in administrative settlements of ECOA discrimination claims if a court could award such relief in an action by an aggrieved person. *Authority of USDA to Award Monetary Relief for Discrimination*, 18 Op. O.L.C. 52 (1994) ("USDA Opinion"). USDA accepts and processes ECOA complaints pursuant to its process for investigating any discrimination complaint in its programs, which is set forth at 7 C.F.R. § 15.52 (1997). Those regulations permit any person to file a written complaint regarding discrimination in any program or facility directly administered by USDA. *Id.*

In October of 1998, fourteen plaintiffs filed a class action suit against USDA alleging that USDA had discriminated against them, and other similarly situated individuals, on the basis of their race in the administration of farm loans and credit programs during the period of January 1983 to January 1997. *Pigford v. Glickman*, 182 F.R.D. 341 (D.D.C. 1998). The court granted a stay of that action to allow the plaintiffs and the United States to explore options for settling the

[1] Letter for Robert Franco, Associate Director, Office of Advocacy and Enterprise, U.S. Department of Agriculture, from David Medine, Associate Director for Credit Practices, Federal Trade Commission (Nov. 3, 1992) ("FTC Letter")

claims of the named plaintiffs and the putative class members. As part of the Department's consideration of settlement options, the Office of the Associate Attorney General asked this Office for oral advice on the application of ECOA's statute of limitations to claims in litigation and to claims in USDA's administrative settlement process. Subsequently, you asked for a formal opinion on the following questions: 1) can the United States waive the statute of limitations in an ECOA civil action; 2) does ECOA's statute of limitations apply to the administrative settlement of ECOA claims by USDA; 3) does the filing of an administrative complaint with USDA toll the statute of limitations; and 4) would the doctrines of equitable tolling or equitable estoppel apply to these cases?

Our analysis proceeds as follows. In Part II, we conclude that the Attorney General may not waive the statute of limitations in the litigation or compromise of these claims. In Part III, we conclude that because USDA may make administrative settlements of ECOA claims that include compensatory damages only where a court could award such relief, USDA may not waive the statute of limitations in administrative settlements. Part III also concludes that section 3702 of title 31 does not provide an independent basis of authority for the payment of administrative claims filed after expiration of the ECOA statute of limitations. Moreover, even where an administrative claim is filed within the ECOA statute of limitations, USDA may not make payment on the claim without relevant appropriations authority. We understand that USDA's appropriation authority, however, would provide no basis for paying compensatory damages under ECOA where the statute of limitations has expired and no timely claim was asserted in court. Part IV examines the circumstances in which ECOA's statute of limitations might be tolled. That part concludes that filing an administrative claim does not toll the statute of limitations on a civil action. It then concludes that although the doctrines of equitable tolling and equitable estoppel would apply to ECOA in appropriate circumstances, courts infrequently apply these doctrines against the United States.

II. Waiver in Litigation

Ordinarily, a civil action for compensatory damages under ECOA must be filed no later than two years from the date of occurrence of the violation. 15 U.S.C. § 1691e(f). However, when any agency responsible for administrative enforcement under § 1691c of ECOA commences an enforcement proceeding within two years from the date of the occurrence of the violation, or when the Attorney General commences a civil action under this section within two years from the date of the occurrence of the violation, "any applicant who has been a victim of the discrimination which is the subject of such proceeding or civil action may bring

an action under this section not later than one year after the commencement of that proceeding or action." 15 U.S.C. § 1691e(f).[2]

The federal courts and this Office have observed that the statute of limitations for a cause of action against the United States constitutes a term of consent to the waiver of sovereign immunity. *See* Memorandum for James W. Moorman, Assistant Attorney General, Land & Natural Resources Division, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Pueblo of Taos v. Andrus* at 2 n.1 (Mar. 30, 1979) (citing cases). The doctrine of sovereign immunity precludes suit against the United States without the consent of Congress, and the terms of its consent define the extent of a court's jurisdiction. *See United States v. Mottaz*, 476 U.S. 834, 841 (1986). In particular, " '[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity.' " *Id.* (quoting *Block v. North Dakota*, 461 U.S. 273, 287 (1983)). Because the terms of consent are established by Congress, *see id.*, modifying the terms of consent requires legislative action. *See, e.g., United States v. Garbutt Oil Co.*, 302 U.S. 528, 534–35 (1938) (discussing *Tucker v. Alexander*, 275 U.S. 228 (1927) ("no officer of the government has power to waive the statute of limitations")); *Overhauser v. United States*, 45 F.3d 1085, 1088 (7th Cir. 1995) (government officers have no general power to waive statutes of limitations in tax cases and are limited to specific statutory authorizations for such waivers). Thus the Attorney General cannot waive the statute of limitations in the litigation or in the compromise of these pending claims.[3]

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[2] For simplicity, this opinion will refer to ECOA's limitation period as a two-year restriction

[3] In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court ruled that a statute of limitations in suits against the federal government is presumptively subject to equitable tolling Some have suggested that the Court's decision to allow equitable tolling implies that it is now possible for the government itself to waive a legislatively imposed statute of limitations. There may be cases where, in the context of a specific statutory scheme, the courts would have the authority to hold that the government had waived the applicable statute of limitations, such as by failing to assert the defense in a responsive pleading. *See Johnson v. Sullivan*, 922 F.2d 346 (7th Cir. 1990) (en banc) (statutory requirement that plaintiff seek judicial review of denial of benefits within 60 days of receiving a final agency determination, or within such further time as the Secretary may allow, waived if not raised in a responsive pleading as an affirmative defense). The general rule, however, still remains that the limitations period is a condition of the waiver of sovereign immunity. *See Irwin*, 498 U.S. at 94; *Henderson v United States*, 517 U.S. 654, 678 n.3 (1996) (Thomas, J., dissenting) ("*Irwin* did mark a departure from our earlier, and stricter, treatment of statutes of limitations in the sovereign immunity context, but our decision in *United States v. Williams*, 514 U.S. 527 (1995), makes clear that statutes of limitations in suits brought against the United States are no less jurisdictional prerequisites than they were before *Irwin*.") (citations omitted); *see also Lawyers Title Ins. Co v Dearborn Title Corp.*, 118 F.3d 1157, 1166 (7th Cir. 1997) (unlike statutes of limitations in actions between private parties, limitations in suits against the United States are jurisdictional and not subject to waiver).

As a general matter, it seems clear that *Irwin* held that the doctrine of equitable tolling was implicitly included within the waiver of sovereign immunity granted by Congress as part of the statute. *Irwin*, 498 U.S. at 95–96 *Irwin* did not alter the well-established precedent that statutes of limitations reflect a condition on Congress's waiver of sovereign immunity. *See id.* at 94. The Court has repeatedly affirmed that principle. *See, e.g., United States v. Williams*, 514 U.S. 527, 534 (1995); *see also Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 769 (4th Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); *Dillard v. Runyon*, 928 F. Supp. 1316, 1324 (S.D.N.Y. 1996), *aff'd*, 108 F 3d 1369 (2d Cir. 1997); *cf. Calhoun County v. United States*, 132 F.3d 1100 (5th Cir. 1998) (*Irwin* reinterpreted the intent behind congressional waivers of sovereign immunity, but did not necessarily alter the nature of the conditions on that waiver). Indeed, the Court reaffirmed this principle just months before issuing its decision in *Irwin*, *see United States v. Dalm*, 494 U.S. 596, 608 (1990), and *Irwin* nowhere rejects *Dalm* or the cases cited therein. We therefore do not read *Irwin* to imply that the statute of limitations in a suit against the United States is waivable, either as an affirmative defense or at the discretion of an executive officer. *See Bath*

III. Administrative Settlements

A. *Authority for Administrative Settlements*

ECOA does not expressly address the administrative settlement of ECOA claims against federal agency creditors. This Office has previously opined that the Secretary of Agriculture may award monetary relief, attorney's fees, and costs in administrative settlements of ECOA discrimination claims if a court could award such relief in an action by an aggrieved person. USDA Opinion at 2. That opinion considered the applicability of 31 U.S.C. § 1301(a) (1994), which states that federal agencies may spend funds only on the objects for which they were appropriated. USDA Opinion at 2. "Consistent with this requirement, appropriations law provides that agencies have authority to provide for monetary relief in a voluntary settlement of a discrimination claim only if the agency would be subject to such relief in a court action regarding such discrimination brought by the aggrieved person." *Id.* (footnote omitted). The Comptroller General has applied the same principle in evaluating agency authority to settle claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e–17 (1994 & Supp. I 1995), and the Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 621–634 (West 1985 & Supp. III 1997). The Comptroller General ruled that an agency may provide back pay or attorney's fees only where such monetary relief would be available in a court proceeding on the claim. *See* USDA Opinion at 2 (discussing 62 Comp. Gen. 239 (1983); 64 Comp. Gen. 349 (1985)). Because ECOA waives sovereign immunity with respect to compensatory damages, *id.* at 17–19, agencies may provide compensatory damages in their voluntary settlement of discrimination claims if the conduct complained of violates ECOA. *See id.* at 20.

The Credit Practices Bureau of the FTC also has advised USDA that it may investigate and provide appropriate remedies for ECOA claims filed against USDA. The FTC authorized USDA to investigate ECOA complaints regarding USDA lending programs in a letter of understanding, *see* FTC Letter, and told us that it orally advised USDA that USDA may provide appropriate remedies for valid claims prior to litigation.

B. *Waiver of Statute of Limitations*

The same prohibition that applies to waiving the statute of limitations in litigation would apply to waiving the statute in any pre-litigation, administrative settlement of an ECOA claim at USDA. As our 1994 opinion explained, USDA's authority to use existing appropriations to pay administrative ECOA claims

Iron Works Corp v United States, 20 F 3d 1567, 1572 n 2 (Fed Cir 1994) ("Tolling is not the same as waiving Presumably, therefore, *Irwin* merely holds that those time limits, while jurisdictional, can be equitably tolled in certain circumstances ")

depends upon the existence of a viable civil action that could be brought by the aggrieved claimant. *See* USDA Opinion at 1–2. A court can award damages against the United States only where there has been a waiver of sovereign immunity. ECOA's waiver of sovereign immunity is valid only where a claim is filed before the expiration of the limitations period. Thus, if the statute of limitations has expired, a court cannot award damages on that claim, and the agency cannot rely on the existence of a viable ECOA claim as a basis for expending appropriated funds to pay compensatory damages as part of an administrative settlement.

C. *Applicability of 31 U.S.C. § 3702*

You have asked us to consider how the provisions of 31 U.S.C. § 3702, which governs the settlement of claims against the United States, apply to the settlement of ECOA claims. Prior to 1996, § 3702 authorized the General Accounting Office ("GAO") to settle all claims against the United States "except as provided in . . . another law." 31 U.S.C. § 3702 (1994 & Supp. III 1997).[4] A 1996 amendment to § 3702 transferred the settlement authority to various executive agencies, including the Office of Personnel Management, the Secretary of Defense, and the Office of Management and Budget. *See* 31 U.S.C.A. § 3702(a) (West 1983 & Supp. III 1997).

The term "settle" in § 3702 does not mean "compromise," but rather refers to an administrative determination of the amount of money (if any) due a claimant. *See* 3 Principles of Federal Appropriations Law 12–9 (2d ed. 1992) (citing *Illinois Surety Co. v. United States ex rel. Peeler*, 240 U.S. 214, 219–21 (1916)); *State v. Bowsher*, 734 F. Supp. 525, 530 n.4 (D.D.C. 1990). Claims presented for settlement under § 3702 must be received within six years from the date on which the claim arose, "except as provided in this chapter or another law." 31 U.S.C. § 3702(b)(1)(A).

You have asked us to consider in particular whether § 3702(b) would allow USDA to include compensatory damages in settlements of ECOA claims filed within six years of the accrual of the claim, even if ECOA's statute of limitations had run and a court could no longer award such damages. We have concluded, first, that § 3702 would apply only to those ECOA claims filed with USDA within the two-year statute of limitations in ECOA. Second, we have concluded that § 3702 provides no authority to pay a claim if funds have not otherwise been appropriated. USDA has informed us that it does not have appropriations authority to pay compensatory damages other than the authority that exists when a court could award such damages in a civil action. Thus, even if the appropriate statute

[4] As previously noted, ECOA vests the FTC with administrative enforcement responsibility not specifically committed to another federal agency, *see* 15 U.S.C. § 1691c(c), but does not expressly address the administrative settlement of ECOA claims against federal agency creditors. For the purposes of this opinion, we assume without deciding that neither ECOA nor the Federal Trade Commission Act provides for the settlement of claims against federal agency creditors within the meaning of § 3702(a), and that the provisions of § 3702 would apply to administrative settlements of these claims.

of limitations for an administrative claim under § 3702 were six years instead of two years, USDA could not pay compensatory damages as part of an administrative settlement if the two-year statute of limitations had run.

1. *Length of Limitations Period*

We start with the determination of the appropriate time limitation for ECOA claims. While the GAO has not issued any opinions regarding the settlement of ECOA claims, it has considered the interaction of § 3702(b) and other limitations periods on civil causes of action.[5] For many years, GAO's position was that statutes setting limitations on "causes of action" or "civil actions" applied only to judicial proceedings, and therefore claims filed with an agency rather than a court were subject to the six-year limitation of § 3702(b). *See, e.g.*, 51 Comp. Gen. 20, 22 (1971) (GAO will settle claims for communications services filed within six years notwithstanding shorter limitation on "actions at law" in the Interstate Commerce Act and the Communications Act); 57 Comp. Gen. 441, 443 (1978) (claims for overtime compensation may be filed up to six years after the claim first accrued notwithstanding the two or three-year limitation period in the Fair Labor Standards Act).

In a 1994 decision, GAO reconsidered and reversed this position. 73 Comp. Gen. 157 (1994). The relevant decision arose under the Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (1994) ("FLSA"). A claim for unpaid minimum wages, unpaid overtime compensation and liquidated damages under FLSA must be filed within two years of the time it first accrues, or three years if it arises out of a willful violation. 29 U.S.C. § 255 (1994). The claimant sought overtime compensation for the six-year period that preceded his claim. The Air Force, the claimant's employer, and the Office of Personnel Management ("OPM") argued that FLSA's two or three-year limitations period, rather than the six-year period in § 3702(b), should govern the claim. 73 Comp. Gen. at 160. In ruling against the claimant, GAO cited cases holding that when a statute creates a right that did not exist at common law and limits the time to enforce it, the lapse of time not only bars the remedy but extinguishes the underlying rights and liabilities of the parties. *See William Danzer Co. v. Gulf R.R.*, 268 U.S. 633, 635–36 (1925); *Kalmich v. Bruno*, 553 F.2d 549, 553 (7th Cir.), *cert. denied*, 434 U.S. 940 (1977) (cited in 73 Comp. Gen. at 161).[6] "Accordingly, a time limitation imposed on a statutorily created judicial cause of action will apply to administrative proceedings to adjudicate the same claims absent a specific provision to the con-

[5] Although the opinions and legal interpretation of the GAO and the Comptroller General often provide helpful guidance on appropriations matters and related issues, they are not binding upon departments, agencies, or officers of the executive branch *See Bowsher v. Synar*, 478 U.S 714, 727–32 (1986).

[6] OPM, which now has the authority to settle claims involving leave and compensation of federal civilian employees under § 3702(a)(2), informed us that it has continued to apply the FLSA statute of limitations to FLSA claims filed against federal agencies.

trary." 73 Comp. Gen. at 161. Because FLSA contained no provision indicating that a different limitations period should apply to administrative claims, GAO determined that the two or three-year statute of limitations in FLSA applies to the administrative settlement of FLSA claims under § 3702. *Id.*

We need not resolve here whether GAO's reversal of its long-standing position was warranted because we believe that, in light of subsequent congressional action, GAO's 1994 interpretation should now govern.[7] Following the GAO decision announcing that it would apply the two or three-year limitations period to FLSA claims, Congress enacted a grandfather provision to except those FLSA claimants who might have relied on the earlier GAO interpretation, but Congress did not amend the statute to alter the prospective application of the two or three-year limitations period. Under section 640 of the 1995 Treasury, Postal Service and General Government Appropriations Act, Congress directed GAO to apply a six-year statute of limitations to all FLSA claims filed before June 30, 1994; significantly, it did not alter the effect of the GAO decision as to claims filed after that date. *See* Pub. L. No. 103–329, § 640, 108 Stat. 2382, 2432 (1994).

In addition, Congress revisited the settlement of claims under § 3702 on three other occasions. In 1995, it amended section 640 by excluding from its coverage claims in which an employee received any compensation for overtime hours worked during the period covered by the claim, or claims for compensation for time spent commuting between an employee's residence and duty station. Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104–52, 109 Stat. 468, 468–69 (1995). Congress also transferred GAO's functions under several statutes, including § 3702, to the Office of Management and Budget, contingent upon the transfer of such personnel, budget authority, records and property as deemed necessary. *See* Legislative Branch Appropriations Act, 1996, Pub. L. No. 104–53, § 211, 109 Stat. 514, 535 (1995). Finally, in 1996, Congress amended the text of § 3702 itself, transferring the responsibility for settling claims to various executive branch agencies, including the Department of Defense and OPM. General Accounting Office Act of 1996, Pub. L. No. 104–316, § 202(n), 110 Stat. 3826, 3843–44. In none of these amendments did Congress alter the GAO's interpretation of the statute of limitations provision for FLSA claims filed after June 30, 1994.

Thus, in interpreting § 3702, we must consider that Congress has made specific adjustments to the statutory scheme in light of the GAO interpretation and left the agency's interpretation undisturbed. *See generally CFTC v. Schor*, 478 U.S. 833, 846 (1986). The legislative record is not limited to instances in which Congress revisited the statute and abstained from overturning the administrative construction. Although such action provides relevant, albeit uncertain, evidence

[7] We note that one district court has held that the two or three-year limitation in FLSA applies to both administrative and judicial claims. The court further stated that while it was aware that GAO had applied a six-year limitation to FLSA claims for many years, "GAO was wrong to do so" and had no such authority. *Adams v Bowsher*, 946 F. Supp 37, 42 (D.D.C. 1996).

of legislative intent, *see generally United States v. Wells*, 519 U.S. 482, 494 (1997) (finding legislative silence inconclusive because Congress has not spoken directly to the interpretive issue in question), here, Congress has done more than merely "kept its silence." *Schor*, 478 U.S. at 846. Rather, Congress has spoken directly to the interpretive issue in question by enacting legislation specifically related and responsive to the GAO interpretation. *See id.; Bell v. New Jersey*, 461 U.S. 773, 785 n.12 (1983); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381–82 (1969); *Zemel v. Rusk*, 381 U.S. 1, 11 (1965); *cf. Wells*, 519 U.S. at 494. While at one time, § 3702 may have been reasonably subject to conflicting interpretations, the statute cannot be divorced from the subsequent—and directly relevant—congressional action, which now forms a strong basis of support for the GAO interpretation.[8] Accordingly, absent a specific provision to the contrary, ECOA's limitation on civil actions also should apply to administrative settlements of ECOA claims.

As noted earlier, ECOA does not expressly address administrative claims against federal agency creditors, and its limitation provision does not specifically except administrative claims. Section 1691e establishes civil liability for any actual damages sustained by an applicant. 15 U.S.C. § 1691e(a). That section then provides that "[a]ny action under [§ 1691e] may be brought in the appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction." *Id.* § 1691e(f).

The language of ECOA's limitation provision is not as broad as that of the limitations provision in FLSA. The heading of § 1691e(f) is "Jurisdiction of courts; time for maintenance of action; exceptions," and the first sentence of subsection (f) authorizes bringing actions in an appropriate court. *Id.* The word "court" does not appear in FLSA's limitation provision. *See* 29 U.S.C. § 255 ("Any action commenced on or after May 14, 1947, to enforce any cause of action . . . if the cause of action accrues on or after May 14, 1947[,] may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued . . . .").

Based on these differences in text, the argument that § 1691e(f) of ECOA should be limited to judicial causes of action is stronger than that regarding § 255 of FLSA. There is nothing in ECOA's legislative history, however, to suggest that Congress intended to grant applicants with claims against federal agency creditors a different and longer limitations period than that available to applicants of private creditors. Moreover, ECOA's limitation provision is included in the same section as the provision that establishes the right to compensatory damages, and the limita-

[8] A 1951 opinion of the Attorney General concluded that a statute of limitations for suits brought against the Commodity Credit Corporation did not bar administrative payment of claims filed with the agency after the expiration of that limitations period. *Commodity Credit Corporation, Payment of Claims Barred by Statute of Limitations*, 41 Op Att'y Gen. 80 (1951) The 1951 opinion predates GAO's announcement of its revised interpretation of § 3702, and, more importantly, Congress's response to that revised interpretation The 1951 opinion therefore does not constitute precedent that counsels a different result in this matter

tion provision does not specifically except administrative claims from its provisions. *See* 15 U.S.C. § 1691e(a), (f). Accordingly, we conclude that ECOA's statute of limitations also applies to administrative settlements of ECOA claims.

2. *Appropriations Authorized to Pay Damages*

We next examine whether § 3702 provides an independent basis of authority to expend appropriations to pay claims in the absence of an ECOA claim that could be filed in court, so long as the claims are filed with the relevant agency within the appropriate statutory time period. Although § 3702 provides an independent administrative claims handling procedure, the statute does not provide an independent basis of authority for paying such claims. Rather, in order for payment of the claim to be lawful, there must be independent appropriations authority to pay the claim. Under § 3702(d), claims that may merit relief, but that cannot be "adjusted . . . using an existing appropriation," are to be referred to Congress for possible legislative action. 31 U.S.C. § 3702(d). A claim that is adjusted under § 3702 "using an existing appropriation" must be paid from either a pre-existing appropriations account for the year in which the claim accrued or, if such an account is not available, an account for the current year for the same object and purpose. *See id.* § 3702(d); 31 U.S.C. §§ 1552, 1553 (1994).[9] Thus, it is evident from the text of § 3702 that it provides no basis for paying any claims for which there is no independent appropriations authority, which would include ECOA claims involving compensatory damages or other relief that is not authorized by USDA's other operating and program authority.

OPM has informed us that it deems claims under FLSA to be timely if they are filed with OPM or the relevant agency within the statute of limitations, regardless of when or whether such claim is filed with a court. If this practice properly applied to ECOA claims, USDA could settle and pay any claims that were filed with USDA within the applicable two-year statute of limitations. However, OPM has informed us that the claims that it settles under § 3702 are claims for which there is an existing appropriation, such as claims relating to back pay, living expenses, overtime or holiday pay, or cost of living adjustments. While § 3702 provides the authority for OPM or an agency to examine and settle those claims, the authority to pay out funds to claimants arises from the underlying appropriation for overtime or living expenses. If benefits are due, OPM has explained to us, it directs the relevant agency to pay the claimant the administrative benefits to which he or she would have been entitled. There is no award of compensatory

[9] Under § 1552 of title 31, agencies are required to keep accounts open on fixed appropriations for five years. In settling a claim under § 3702 that accrued within five years, OPM explained that it would direct the relevant agency to pay the claim from the money remaining in its account for the relevant appropriation for the relevant year. If no funds remained in the account, or the claim accrued more than five years earlier (and the appropriations account has been closed), 31 U.S.C. § 1553 provides that any obligation that would have been properly charged to the closed appropriation account "may be charged to any current appropriation account of the agency available for the same purpose." *Id.* § 1553(b)(1).

damages. The authority to pay compensatory damages for an ECOA claim, in contrast, derives from the waiver of sovereign immunity in ECOA and is dependent upon the fact that a court could award such damages in a civil action. *See* USDA Opinion at 2, 20.

Accordingly, § 3702 does not provide an independent basis for USDA to pay compensatory damages for an ECOA claim. The requirement that claims settled pursuant to § 3702 be charged to the specific appropriation for the year in which the claim arose or to a current appropriation for the same purpose is in accord with our earlier conclusion that compensatory damages may only be paid out "if the agency would be subject to such relief in a court action." USDA Opinion at 2.

IV. Tolling of the Statute of Limitations

We next consider in what circumstances ECOA's statute of limitations might be tolled. First, we address whether filing an administrative claim tolls the statute of limitations. Second, we consider whether the statute of limitations is subject to equitable tolling. Finally, we consider whether a court might hold the United States estopped from raising the statute of limitations as a defense to all or a portion of a claim.

A. *Filing an Administrative Complaint*

As a general matter, courts do not toll a statute of limitations simply because the plaintiff is pursuing an alternative means of obtaining relief that is not a condition precedent to bringing suit under the relevant statute. *See Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980) (Title VII's statute of limitations not tolled during employer's consideration of grievance); *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236–37 (1976) (no tolling of period for filing EEOC claim during grievance-arbitration proceedings; collective bargaining rights are independent of those conferred by Title VII); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) (statute of limitations for claims brought under 42 U.S.C. § 1981 not tolled during processing of complaint under Title VII; § 1981 offers independent avenue of relief). While pursuit of mandatory administrative remedies can delay the start or running of a statute of limitations, pursuit of remedies that are merely permissive does not toll a limitations period. *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 56–57, 60–61 (D.C. Cir. 1987); *Conley v. International Brotherhood of Electrical Workers, Local 639*, 810 F.2d 913 (9th Cir. 1987) (filing of unfair labor practice charge with National Labor Relations Board does not toll limitations period applicable to lawsuit against union based on the charge; NLRB action was merely optional, though parallel, avenue of relief). An administrative procedure is "permissive" if its pursuit is not a pre-

condition to pursuit of a lawsuit. *Spannaus*, 824 F.2d at 58. Accordingly, if filing an ECOA complaint with USDA is a voluntary, permissive administrative remedy, filing an administrative claim would not toll the ECOA limitations period applicable to this lawsuit.

It appears that USDA's administrative process is a parallel, voluntary procedure. ECOA does not require an aggrieved applicant to file an administrative complaint against a government creditor before filing suit in court. Nor has the FTC, which has administrative enforcement responsibility for claims against the USDA, indicated in its regulations that exhaustion of an administrative process is required.

USDA has suggested that 7 U.S.C. § 6912(e) (1994) may require an ECOA claimant to exhaust administrative procedures before filing suit against the Secretary or the Department of Agriculture, and, accordingly, that the statute of limitations should be tolled pending resolution of the administrative process. Enacted in 1994, § 6912(e) states:

> Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against—
>
> (1) the Secretary;
> (2) the Department; or
> (3) an agency, office, officer, or employee of the Department.

Id.[10] USDA has promulgated regulations prohibiting discrimination in the administration of USDA programs and facilities. 7 C.F.R. pt. 15, subpt. B (1997). Under § 15.52(b) of those regulations, a person "may" file a written complaint of discrimination with the Office of Advocacy and Enterprise. 7 C.F.R. § 15.52(b). The complaint procedure in § 15.52 is not required by law, but it was established by the Secretary. Thus USDA has suggested that § 6912(e) requires that an ECOA claimant exhaust the administrative procedure in § 15.52 before bringing a civil action.

We do not think that the process for pursuing an ECOA claim under § 15.52 is an "administrative appeal procedure" within the meaning of § 6912(e). An ECOA claim under § 15.52 is not an "appeal" of a USDA program action. It is a separate determination of a complaint regarding discrimination in USDA's administration of its programs. The premise of an ECOA claim is that there has been a final agency determination on the underlying decision regarding the loan or benefit. Significantly, the decisions applying § 6912(e) to date all have involved

[10] Because this provision was not enacted until October 1994, it provides no grounds for tolling the statute of limitations on claims that accrued before October of 1992.

appeals of USDA decisions under statutes and programs administered by the USDA. *See Bastek v. Federal Crop Ins. Corp.*, 975 F. Supp. 534 (S.D.N.Y. 1997) (farmers must appeal deduction of salvage value and market price calculation in indemnity to Risk Management Agency); *In re Cottrell*, 213 B.R. 33 (M.D. Ala. 1997) (exhaustion applies to Rural Housing Services procedures, which are covered by National Appeals Division); *Calhoun v. USDA Farm Serv. Agency*, 920 F. Supp. 696 (N.D. Miss. 1996) (exhaustion applies to failure to give former owner preference in foreclosure sale where he could have appealed to National Appeals Division); *Gleichman v. USDA*, 896 F. Supp. 42 (D. Me. 1995) (plaintiffs must appeal suspension of participation in Rural Housing Service programs to Administrative Law Judge as provided in 7 C.F.R. § 3017.515 (1995)). We have found no decision that does not involve implementation of a USDA program.

We note that if § 6912(e) were found to apply to complaints under § 15.52, it would bar any plaintiff who has filed an administrative complaint from bringing suit under ECOA in the district court until USDA takes final action on the complaint. Because § 6912(e) places no time limits on the procedures established by the Secretary, moreover, plaintiffs could be barred from court for an indeterminate period of time. While we have found nothing in the legislative history of § 6912(e) that elaborates on its intended purpose, it seems unlikely that Congress intended such a result. The better interpretation, we believe, is that § 6912(e) applies to administrative procedures related to statutes or programs administered by USDA. Accordingly, § 15.52 is a permissive procedure, and filing an administrative complaint would not toll the statute of limitations.

B. *Equitable Tolling & Equitable Estoppel*

We next consider the application of equitable principles to these claims. Courts have attempted to distinguish the doctrine of equitable tolling from that of equitable estoppel by noting that equitable tolling principally "focuses on the plaintiff's excusable ignorance of the limitations period" and the "lack of prejudice to the defendant" while equitable estoppel "usually focuses on the guilty actions of the defendant." *See Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995) (quoting *Naton v. Bank of California*, 649 F.2d 691, 696 (9th Cir. 1981)).

1. *Equitable Tolling*

In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), the Supreme Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants . . . appl[ies] to suits against the United States." *Id.* at 95–96. However, "[f]ederal courts have typically extended equitable relief only sparingly" in suits against private parties, and "it is evident that

no more favorable tolling doctrine may be employed against the Government than is employed in suits between private litigants." *Id.* at 96. In *Irwin*, the Court observed that equitable tolling has been found where "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* (footnotes omitted). Courts have been less forgiving of "late filings where the claimant failed to exercise due diligence in preserving his legal rights." *Id.*

a. *Is ECOA Subject to Equitable Tolling?*

We thus begin with the presumption that equitable tolling applies to ECOA's statute of limitations, and consider whether there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply in a suit against the Government." *United States v. Brockamp*, 519 U.S. 347, 347 (1997). In *Brockamp*, the Court concluded that Congress did not intend for equitable tolling to apply to the time and related amount limitations for filing tax refund claims. The Court noted that "[o]rdinarily limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception." *Id.* at 350. The limitations provision at issue in *Brockamp*, 26 U.S.C. § 6511 was quite different. It set forth its time limitations "in a highly detailed technical manner" and imposed substantive limits on the amount recovered that were related to the time limitations. *Id.* In addition, the statute contained exceptions with special time limit rules for six types of claims, none of which addressed equitable tolling. Reading an implied equitable tolling provision into that statute, the Court observed, would work "linguistic havoc." *Id.* at 352. Moreover, tax law is not "normally characterized by case-specific exceptions reflecting individualized equities." *Id.*

In contrast, ECOA's statute of limitations is relatively straightforward:

> No such action shall be brought later than two years from the date of the occurrence of the violation, except that—
>
> > (1) whenever any agency having responsibility for administrative enforcement under section 1691c of this title commences an enforcement proceeding within two years from the date of the occurrence of the violation,
> > (2) whenever the Attorney General commences a civil action under this section within two years from the date of the occurrence of the violation,
>
> then any applicant who has been a victim of the discrimination which is the subject of such proceeding or civil action may bring

> an action under this section not later than one year after the commencement of that proceeding or action.

15 U.S.C. § 1691e(f). The structure of § 1691e(f) is more similar to the limitation provision in Title VII, to which the Court found equitable tolling applied in *Irwin*, than it is to the statute at issue in *Brockamp*. Like Title VII, moreover, ECOA is a remedial statute amenable to exceptions for individualized equities. Section 1691e(f) does contain explicit exceptions to the limitation period. But the exceptions in ECOA are not as numerous or as intricate as those in the provision in *Brockamp*. In addition, the exceptions in ECOA extend the limitations period to allow a plaintiff who becomes aware of discrimination after the government commences enforcement proceedings to bring an action. This purpose is not inconsistent with applying equitable tolling to the limitation period. We therefore conclude that ECOA's statute of limitations is, in appropriate circumstances, subject to the doctrine of equitable tolling.

b. *Is Equitable Tolling Warranted for these Claims?*

The application of the equitable tolling doctrine depends on the facts of each case. "The Supreme Court has suggested in *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147 (1984) (per curiam), that courts may properly allow tolling where 'a claimant has received inadequate notice, . . . where a motion for appointment of counsel is pending and equity would justify tolling the statutory period until the motion is acted upon, . . . where the court has led the plaintiff to believe that she had done everything required of her, . . . [or] where affirmative misconduct on the part of a defendant lulled the plaintiff into inaction.' " *Mondy v. Secretary of the Army*, 845 F.2d 1051, 1057 (D.C. Cir. 1988) (quoting *Baldwin*, 466 U.S. at 151 (citations omitted)). Courts have found notice inadequate where an agency fails to provide a claimant with notice required by statute. *See Coles v. Penny*, 531 F.2d 609, 614–17 (D.C. Cir. 1976) (statute of limitations tolled where EEOC failed to provide notice of right to sue as required by statute) (interpreting *Gates v. Georgia-Pacific Corp.*, 492 F.2d 292 (9th Cir. 1974) (tolling statute of limitations where EEOC failed to provide notice of right to sue required by its regulations)). In addition, failure to meet a statutory deadline " 'may be excused if it is the result of justifiable reliance on the advice of a government officer.' " *Bull S.A. v. Comer*, 55 F.3d 678, 681 (D.C. Cir. 1995) (quoting *Jarrell v. United States Postal Serv.*, 753 F.2d 1088, 1092 (D.C. Cir. 1985)). A final factor that courts have considered is whether the plaintiff was represented by an attorney. Courts are less likely to find equitable tolling if the plaintiff has legal representation. *See, e.g., Kelley v. NLRB*, 79 F.3d 1238 (1st Cir. 1996) (no tolling where NLRB employee erroneously informed attorney that NLRB would serve

defendant with charges because represented plaintiffs generally deemed to have constructive knowledge of regulatory requirements).

USDA has suggested, in particular, that the D.C. Circuit's decision in *Bull S.A.* might support an equitable tolling argument for the ECOA claimants. In *Bull S.A.*, the court held that a corporation justifiably relied on a sealed Certificate of Renewal for its trademark which stated that the renewal would last twenty years from May 15, 1972. In fact, the renewal should have run from May 15, 1971. The corporation missed the 1991 renewal deadline but applied within the proper time had the renewal in fact expired in 1992. *Bull S.A.*, 55 F.3d at 682. In finding that the period of renewal on Bull's trademark should be equitably tolled, the court stated that "Bull received an official government document, published under the signature and Seal of the Commissioner, that *certified* a renewal lasting until May 15, 1992. Once in receipt of this document, and, . . . absent any circumstances that would alert Bull to the error, Bull was entitled to rely on its validity." *Id.*

As a general matter, USDA has suggested that claimants may be able to argue that they justifiably relied on the conduct of USDA officials to conclude that filing an administrative complaint tolls ECOA's statute of limitations. The conduct in question includes failing to alert claimants of their right to pursue immediate relief under ECOA; inviting claimants to submit claims for compensatory damages upon a finding of discrimination; and engaging in settlement negotiations regarding damages. Because there is no legal requirement that the government provide potential ECOA plaintiffs with notice of the right to file a civil action, ECOA claimants will have difficulty asserting inadequate notice as a grounds for equitable tolling. *Compare Coles*, 531 F.2d at 614–17. Absent a more specific government statement that the filing of an administrative complaint tolled the limitations period on an ECOA civil action, it is unlikely that a court would find such conduct sufficient to apply equitable tolling. However, the application of the doctrine to a particular case will depend on the facts present in that case.

2. *Equitable Estoppel*

"The doctrine of equitable estoppel is not, in itself, either a claim or a defense. Rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct." *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988). While the Supreme Court has not foreclosed the possibility that equitable estoppel may lie against the United States, "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984) (footnote omitted). In fact, the Supreme Court has reversed every finding of equitable estoppel requiring the payment of money by the United States that it has reviewed. *See OPM v. Richmond*, 496

U.S. 414, 427 (1990); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). Thus, "despite the doctrine's flexibility in disputes between private parties, its application to the government must be rigid and sparing." *ATC*, 860 F.2d at 1111.

A party seeking to assert estoppel against the government must do more than establish the traditional private law elements of the doctrine, which are " 'false representation, a purpose to invite action by the party to whom the representation was made, ignorance of the true facts by that party, and reliance.' " *See id.* The litigant must also demonstrate that the government engaged in some sort of "affirmative misconduct," *OPM*, 496 U.S. at 421, and that there will be no "undue damage" to the public interest. *ATC*, 860 F.2d at 1111–12. Accordingly, reliance on a government official's misstatement is not sufficient to estop the United States. Because "parties dealing with the government 'are expected to know the law and may not rely on the conduct of Government agents contrary to law,' " *id.* at 1111 (quoting *Heckler*, 467 U.S. at 63), "there is no grave injustice in holding parties to a reasonable knowledge of the law." *Id.* at 1112.

Courts require special rigor in examining claims that would estop the government so as to entitle claimants to monetary payments not otherwise permitted by law. This concern is grounded in the principle of separation of powers. For "[i]f agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds, the control over public funds that the [Appropriations] Clause reposes in Congress in effect could be transferred to the Executive." *OPM*, 496 U.S. at 428. Moreover, "Congress has always reserved to itself the power to address claims of the very type presented by [a claimant arguing estoppel], those founded not on any statutory authority, but upon the claim that 'the equities and circumstances of a case create a moral obligation on the part of the Government to extend relief to an individual.' " *Id.* at 431 (referring to congressional reference cases and private legislation procedures).

A plaintiff seeking to estop the government from asserting the statute of limitations in these cases might make two arguments. First, claimants might argue that USDA's actions led them to believe its administrative process tolled the running of the statute of limitations on a civil action. Second, plaintiffs might argue that USDA told them that it would settle their claims in an administrative process, or led them to believe that relief would be available in the administrative process even if the statute of limitations ran on a judicial action. This belief, in turn, may have lulled claimants into believing that they would be compensated by USDA and that it therefore was unnecessary to seek relief in court.

Neither of these arguments is likely to succeed in the absence of affirmative misconduct by the government. To qualify as affirmative misconduct, a government official's conduct must amount to "more than mere negligence, delay, inaction, or failure to follow an internal agency guideline." *Ingalls Shipbuilding, Inc. v. Department of Labor*, 976 F.2d 934, 938 (5th Cir. 1992) (quoting *Mangaroo*

v. Nelson, 864 F.2d 1202, 1204–05 (5th Cir. 1989)). Courts look for evidence that an official's misstatement was made with "knowledge of its falsity or with intent to mislead." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1350 (5th Cir. 1996). We are unaware of any allegation that any USDA official knowingly misled these claimants. At most, it appears that any statements or impressions were based on the official's mistaken interpretation of the law. Courts have been unwilling to estop the government in circumstances where individuals relied on advice provided by government officials who would have been expected to have the relevant knowledge and authority. *See OPM*, 496 U.S. at 420 (employee's erroneous advice that income will not cause reduction in benefits does not estop government from reducing benefits); *Merrill*, 332 U.S. at 385–86 (government agent's erroneous advice that farmer's entire crop was insured does not estop government from denying benefits on crops excluded from coverage by statute); *Ingalls*, 976 F.2d at 937 (government cannot be estopped from assessing penalties for a delay in payment even though a deputy commissioner sent plaintiff a letter excusing any delay in payment); *ATP*, 860 F.2d at 1111–12 (SBA's assurance that it would guarantee payments of section 8(a) borrower was unauthorized and therefore cannot estop government). To our knowledge, the alleged government conduct at issue here is similar to that deemed insufficient to establish estoppel in these cases. However, the application of equitable estoppel to a specific case will depend on the facts present in that case.

V. Conclusion

ECOA's statute of limitations applies to both administrative and litigative settlements of ECOA claims, and it may not be waived by the executive branch. Because USDA's authority to pay compensatory damages is derived from the fact that a court could award such damages, USDA may not settle administrative claims after the statute of limitations has run. Section 3702 of title 31 does not provide an independent basis of authority for the payment of administrative claims filed after expiration of the ECOA statute of limitations. As for tolling, filing an administrative claim does not toll the statute of limitations on a civil action. While ECOA is subject to claims of equitable tolling or equitable estoppel in appropriate circumstances, courts have rarely applied either doctrine against the United States.

DAWN JOHNSEN
Acting Assistant Attorney General
Office of Legal Counsel

Reimbursement of Expenses Under 5 U.S.C. § 5503(a)

5 U.S.C. § 5503(a) does not prohibit individuals reappointed to the Board of Directors of the Civil Liberties Public Education Fund during a congressional recess from receiving reimbursement for travel, subsistence, and other necessary expenses associated with performing their functions.

February 2, 1998

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This memorandum confirms oral advice conveyed to your office that individuals appointed for a second time during a congressional recess to the Board of Directors of the Civil Liberties Public Education Fund may be reimbursed for expenses associated with performing their functions.

The nine-member Board of Directors of the Civil Liberties Public Education Fund makes disbursements from the Fund for research and educational activities concerning the relocation and internment of individuals of Japanese ancestry during World War II. 50 U.S.C. app. § 1989b–5(b) (1994). The Board's members are appointed by the President, with the advice and consent of the Senate, to three-year terms. *Id.* app. § 1989b–5(c)(2). In January 1995, the President submitted to the Senate the nominations of eight individuals for vacant Board positions, but the Senate Governmental Affairs Committee never acted upon those nominations. During an adjournment of the Senate in January 1996, the President exercised his power under the Recess Appointments Clause to fill the vacancies, placing the eight previously nominated individuals on the Board. *See* U.S. Const. art. II, § 2, cl. 3 ("The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."). The President subsequently renominated the eight individuals in January 1997, and the Senate Governmental Affairs Committee again did not act upon those nominations. The commissions of the eight recess-appointed individuals expired upon the adjournment *sine die* of the first session of the 105th Congress. *See id.*; 143 Cong. Rec. S12,713 (daily ed. Nov. 13, 1997); *id.* at H10,952.

Board members serve "without pay," but are reimbursed for "travel, subsistence, and other necessary expenses incurred by them in carrying out the functions of the Board." 50 U.S.C. app. § 1989b–5(c)(3). You asked whether 5 U.S.C. § 5503(a) (1994) would bar reimbursement for these expenses in the event that the President reappointed, during another congressional recess, the eight individuals whose commissions expired at the end of the first session of the 105th Congress.

In pertinent part, § 5503(a) provides: "Payment for services may not be made from the Treasury of the United States to an individual appointed during a recess of the Senate to fill a vacancy in an existing office, if the vacancy existed while

the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until the appointee has been confirmed by the Senate." This prohibition does not apply "if, at the end of the session, a nomination for the office, other than the nomination of an individual appointed during the preceding recess of the Senate, was pending before the Senate for its advice and consent." *Id.* § 5503(a)(2). Section 5503(a) has been interpreted as prohibiting "[p]ayment for services" to individuals receiving successive recess appointments. *See* Memorandum for John P. Schmitz, Deputy Counsel to the President, from Timothy E. Flanigan, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointment of Directors of the Federal Housing Finance Board* (Dec. 13, 1991); *Recess Appointments Issues*, 6 Op. O.L.C. 585, 586 (1982); *Recess Appointments*, 41 Op. Att'y Gen. 463, 472, 474, 480 (1960) (interpreting predecessor statute).

The fact that Board members commissioned for a second time under the Recess Appointments Clause cannot receive "[p]ayment for services" does not, however, resolve our inquiry. We must ask whether reimbursement for travel, subsistence, and other necessary expenses constitutes "[p]ayment for services" within the meaning of § 5503(a). We conclude that it does not.

The phrase "[p]ayment for services" is not defined in § 5503(a) or other provisions of title 5 governing pay administration. *See* 5 U.S.C. §§ 5501–5597 (1994 & Supp. II 1996). Nothing in § 5503(a) itself reveals which of two possible interpretations of the phrase is correct: a narrow interpretation, covering those forms of payment typically associated with the performance of personal services, such as fees, wages, salary, or commissions; or a broad interpretation, covering any form of payment that an individual would receive after having performed his or her government services, including a payment to offset expenses. The legislative history of § 5503(a), however, makes clear that the statute cannot be interpreted to cover reimbursement of travel, subsistence, and other expenses. Section 5503(a) was enacted as part of a 1966 *codification* of statutes relating to government employees and the organization and powers of federal agencies. *See* Act of Sept. 6, 1966, Pub. L. No. 89–554, 80 Stat. 378, 475. The Report of the Senate Committee on the Judiciary accompanying the proposed bill, H.R. 10104, 89th Cong. (1965), emphasizes that the bill's purpose was "to restate in comprehensive form, *without substantive change*, the statutes in effect before July 1, 1965." S. Rep. No. 89–1380, at 18 (1966) (emphasis added); *see id.* at 20 ("[T]here are no substantive changes made by this bill enacting title 5 into law."). Section 5503(a)'s predecessor, 5 U.S.C. § 56 (1964), stated: "No money shall be paid from the treasury, *as salary*, to any person appointed during the recess of the Senate, to fill a vacancy in any existing office, if the vacancy existed while the Senate was in session and was by law required to be filled by and with the advice and consent of the Senate, until such appointee has been confirmed by the Senate." (Emphasis added.) Even if there were ambiguity as to the scope of the

phrase "payment for services" in the current version, there is no ambiguity as to the scope of the phrase "paid . . . as salary" in the prior version. The term "salary" describes a fixed, periodic payment made in exchange for services. *See, e.g., Webster's Second New International Dictionary* 2203 (1935) (defining salary as "[t]he recompense or consideration paid, or stipulated to be paid, to a person at regular intervals for services"); *Benedict v. United States*, 176 U.S. 357, 360 (1900) ("The word 'salary' may be defined generally as a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered"). The term would not encompass reimbursement of expenses. If we were to interpret the substitution of the phrase "payment for services" for the phrase "paid . . . as salary" as broadening the scope of § 56 to cover expenses, then we would be disregarding clear direction that Congress intended no substantive changes to existing law. Indeed, the Report specifically describes the changes reflected in § 5503(a) as "[s]tandard changes . . . made to conform with the definitions applicable and the style of this title." S. Rep. No. 89–1380, at 105. The substitution of "payment for services" for "paid . . . as salary" thus merely clarifies that the statute reaches forms of payment that, like salary, compensate for the performance of personal services. *Cf. id.* at 20 ("The word 'pay' includes all terms heretofore in use representing salary, wages, pay, compensation, emoluments, and remuneration for services."). It provides no basis for concluding that § 5503(a) extends beyond payments that compensate for the performance of personal services, to reach other payments that, like reimbursement for expenses, are merely incidental to the performance of personal services.

It may be possible to argue that the purposes underlying the enactment of § 5503(a)'s predecessors support a broad interpretation of the current phrase "payment for services." As originally enacted in 1863, the statute provided that if a vacancy existed while the Senate was in session, a person receiving a recess appointment to fill that vacancy could not be paid from the Treasury until he or she had been confirmed by the Senate. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. 642, 646. This original restriction, which forced recess appointees to serve without salary, was intended to protect the prerogatives of the Senate by making recess appointments more difficult. *See* 61 Cong. Globe, 37th Cong., 3rd Sess. 565 (1863). In 1940, Congress amended the statute "to render the existing prohibition on the payment of salaries more flexible," H.R. Rep. No. 76–2646, at 1 (1940), and to alleviate what was perceived to be the "serious injustice" caused by the law as it then stood, S. Rep. No. 76–1079, at 2 (1939). *See* Act of July 11, 1940, ch. 580, 54 Stat. 751; *see also* 41 Op. Att'y Gen. at 474. Thus, as amended, 5 U.S.C. § 56 permitted the immediate payment of salary to certain recess appointees, including those not appointed during a previous congressional recess. Because Congress sought, even through this less stringent 1940 version of the statute, to prevent the payment of salary to individuals who had received a previous recess appointment, it could be argued that § 56 was designed in par-

ticular to prevent such successive recess appointments. That goal would be served by a prohibition on the reimbursement of expenses, just as it would be served by a prohibition on the payment of salary.

The Congress that enacted § 56, however, elected to prohibit salary payments, not salary payments *and* reimbursement of expenses. In light of Congress's clear intent to effect no substantive changes in the 1966 codification of title 5, § 5503(a)'s prohibition cannot be interpreted to sweep in something clearly outside the scope of § 56's prohibition—a recess appointee's receipt of reimbursement for expenses.

In sum, we conclude that 5 U.S.C. § 5503(a) does not prohibit individuals reappointed to the Board of Directors of the Civil Liberties Public Education Fund during a congressional recess from receiving reimbursement for travel, subsistence, and other necessary expenses associated with performing their functions.

DAWN JOHNSEN
Acting Assistant Attorney General
Office of Legal Counsel

Applicability of 18 U.S.C. §§ 431–433 to Limited Partnership Interests in Government Leases

The interests of two Members of Congress under a proposed real estate transaction involving limited partnership interests in government leases would fall within the prohibition of 18 U.S.C. § 431, and the "incorporated company" exception of 18 U.S.C. § 433 does not apply.

February 17, 1998

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

This memorandum responds to your request for our opinion on the applicability of 18 U.S.C. §§ 431–433 (1994) to the interests of two Members of Congress in contracts involving government leases under a proposed transaction.[1] Those provisions generally prohibit Members of Congress from entering into or holding contracts with federal agencies and render such contracts void. Specifically, you have asked: (1) whether the interests of the Members under the proposed transaction fall within the scope of 18 U.S.C. §§ 431 and 432; (2) whether the "incorporated company" exception of 18 U.S.C. § 433 is applicable; and (3) whether any or all of four alternatives to the proposed transactions would violate §§ 431 and 432. We conclude: (1) that the interests of the Members under the proposed transaction would fall within the prohibition of § 431; (2) that the "incorporated company" exception does not apply; and (3) that one of the alternatives would not violate § 431.

I.

The background and pertinent terms of the proposed transaction, as we understand them, are as follows.[2] Two Members of Congress have beneficial interests in several blind or excepted trusts that hold ownership interests in six entities (the "MOC Entities") None of the six MOC Entities currently holds a contract or lease with the Federal Government that would violate 18 U.S.C. §§ 431–433. However, a proposed transaction involving these six entities and two additional entities (the "non-MOC Entities") that do have current leases with federal agen-

[1] Letter for Dawn E Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Emily C. Hewitt, General Counsel, General Services Administration (Jan. 15, 1998) ("Hewitt Letter").

[2] These facts derive from information provided by you and by counsel for several entities that would contribute their assets under the proposed transaction. To the extent that additional facts are relevant, but have not been described to us, our conclusion could change *See* Hewitt Letter; Letter for Emily C Hewitt, General Counsel, General Services Administration, from Francis L. Coolidge, Ropes & Gray (Jan 14, 1998) ("Coolidge Letter I"); Letter for Emily C. Hewitt, General Counsel, General Services Administration, from Francis L Coolidge, Ropes & Gray (Jan. 29, 1998) ("Coolidge Letter II")

cies has raised the question whether the Members would be considered to hold interests in the leases under the proposed transaction.

The MOC and non-MOC Entities, which are owned and controlled by one family, have proposed entering into a transaction with a publicly traded real estate investment trust (the "REIT"), whereby the entities would contribute their assets to a currently existing limited partnership (the "Operating Partnership"). The REIT owns and manages, and is the sole general partner of, the Operating Partnership. In exchange for their contributions of assets, the entities would receive cash and preferred partnership units (the "OP Units") in the Operating Partnership. Thus, under the transaction, the leases with federal agencies held by the two non-MOC Entities would be contributed to the Operating Partnership.[3]

The OP Units provided to the entities would be a preferred class with a cumulative preference, vis-a-vis the Operating Partnership's common units, as to all distributions from the Operating Partnership. The distribution rate would be set at six percent (plus or minus) of the face value of the OP Units at the time of issuance. Each OP Unit would be convertible into a fixed number of common units of the Operating Partnership, which are redeemable for shares of the REIT or cash at the election of the owners. In addition, the Operating Partnership may unilaterally require conversion of the OP Units into common units ten years after the sale/contribution occurs.

Because leases with the Government would be held by the Operating Partnership under the transaction, and because the Members of Congress, through their trusts, would acquire ownership interests in the OP Units, the question arises whether the Members would hold interests in contracts with the Government in violation of 18 U.S.C. §§ 431–433.

II.

Section 431 of title 18 prohibits Members of Congress from entering into or holding contracts with any federal agency.[4] It also provides that any contracts made in violation of that section shall be void. Section 432 prohibits federal officers and employees from making contracts with Members of Congress.[5] Section

[3] Counsel for the entities also notes that it is possible, though not certain, that the Operating Partnership may have preexisting contracts or leases with federal agencies Coolidge Letter I at 2.

[4] 18 U S C § 431 provides, in relevant part

> Whoever, being a Member of or Delegate to Congress, or a Resident Commissioner, either before or after he has qualified, directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertakes, executes, holds, or enjoys, in whole or in part, any contract or agreement, made or entered into in behalf of the United States or any agency thereof, by any officer or person authorized to make contracts on its behalf, shall be fined under this title
>
> All contracts or agreements made in violation of this section shall be void, and whenever any sum of money is advanced by the United States or any agency thereof, in consideration of any such contract or agreement, it shall forthwith be repaid .

[5] 18 U.S C. § 432 provides

> Whoever, being an officer or employee of the United States, on behalf of the United States or any agency thereof, directly or indirectly makes or enters into any contract, bargain, or agreement, with any

433 sets forth certain exceptions to the applicability of §§ 431 and 432, including one for contracts with an "incorporated company for the general benefit of such corporation."[6] Since their initial enactment in 1808, these statutes have barred contracts between federal agencies and Members of Congress or partnerships in which Members of Congress have an interest.[7]

A. *Applicability of 18 U.S.C. § 431*

"Interpretation of a statute must begin with the statute's language." *Mallard v. United States Dist. Court*, 490 U.S. 296, 300 (1989). Section 431's language is broad, extending to the "undertak[ing], execut[ing], hold[ing], or enjoy[ing], in whole or in part" of a contract with the Government by a Member of Congress, "directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit." Thus, Attorneys General and our Office consistently have recognized that the statutory prohibition applies not only to Government contracts that are directly with a Member, but also to such contracts with a partnership in which a Member of Congress is a partner.[8] Government contracts with such partnerships have been considered permissible under § 431 only where the Member of Congress withdraws from the partnership or the Member properly relinquishes all interest in the contract (thus effectively making the contract one with a different partnership not including the Member).[9]

We believe that the interests of the two Members of Congress under the proposed transaction would fall within § 431's prohibitory language, for two reasons.

First, the preferred distribution rights in the OP Units represent ownership interests in the Operating Partnership, which would directly hold the Government

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Member of or Delegate to Congress, or any Resident 18 U.S.C. Commissioner, either before or after he has qualified, shall be fined under this title

[6] 18 U.S.C. § 433 provides, in relevant part:

Sections 431 and 432 of this title shall not extend to any contract or agreement made or entered into, or accepted by any incorporated company for the general benefit of such corporation . . . .

Any exemption permitted by this section shall be made a matter of public record.

[7] Act of Apr. 21, 1808, ch. 48, § 1, 2 Stat. 484; *see, e.g., United States v. Dietrich*, 126 F. 671 (C.C.D. Neb. 1904), *Authority of the Reconstruction Finance Corporation to Engage the Legal Services of a Member of Congress*, 38 Op. Att'y Gen. 213 (1935); *Members of Congress—Contracts Under Agricultural Adjustment Act and National Recovery Act*, 37 Op. Att'y Gen. 368 (1933); *Reclamation Service—Contracts—Members of Congress*, 26 Op. Att'y Gen. 537 (1908), *Contract with a Member of Congress*, 4 Op. Att'y Gen. 47 (1842); *Contracts with Members of Congress*, 2 Op. Att'y Gen. 38 (1826), Memorandum for Gerald D. Morgan, Special Counsel to the President, from Herbert Brownell, Jr., Attorney General, *Re: Approval of U.S. Senator as a CMS Vendor* (Aug. 1, 1955) ("Brownell Mem."). We are not authorized to provide legal advice to Members of Congress or to private persons. However, because the statutes in question also render prohibited Government contracts void and impose penalties upon federal employees, we are providing our legal views in response to your request.

[8] *See* 38 Op. Att'y Gen. at 215; 4 Op. Att'y Gen. at 49; Memorandum for Robert C. MacKichan, Jr., General Counsel, General Services Administration, from Lynda Guild Simpson, Deputy Assistant Attorney General, Office of Legal Counsel at 3 (Aug. 3, 1989) ("MacKichan Mem."); Brownell Mem. at 3.

[9] *See* 4 Op. Att'y Gen. at 49; Letter for Edward M. Shulman, Deputy Solicitor, Department of Agriculture, from J. Lee Rankin, Assistant Attorney General, Office of Legal Counsel at 1 (June 8, 1953). Even where the Member of Congress is specifically excluded from any partnership interest in the Government contract, this Office has expressed the caveat that "legality or illegality may depend, not simply upon a contract as it is phrased, but upon the actual working out of the arrangement." *Id.* at 2.

leases. The trusts' ownership of the OP Units, therefore, is tantamount to an ownership interest in the Government contracts. Moreover, because the Members of Congress are beneficiaries of the trusts, the trusts' ownership interests are equivalent to the Members' interests for purposes of § 431, which encompasses the holding of Government contracts "indirectly" and "by any other person in trust for [a Member]." The proposed transaction does not entail any segregation of revenues from the Government contracts in the distributions for the OP Units or any relinquishment of such revenues by the trusts. Rather, the distributions would reflect revenues from the Government contracts as well as other revenues generated by the Operating Partnership.[10]

We cannot agree that the statute excludes interests such as those in the OP Units because they are "too remote and contingent" to be covered. Coolidge Letter I at 6. The statute makes no exception for minor interests. It expressly encompasses the "indirect[]" holding, "in whole or in part," of Government contracts by Members of Congress. Moreover, even if such a standard applied, the interests here are not contingent. Thus, the interests in the Government contracts, by virtue of the OP Units, are actual ownership interests covered by the plain language of § 431.

Second, the trusts' interests in the OP Units include a right to convert the OP Units into common units of the Operating Partnership, which in turn are convertible into shares of the REIT. The common units "are identical in all respects to shares of the REIT," Coolidge Letter I at 4, the REIT being the sole general partner of the Operating Partnership. Holders of the common units of the Operating Partnership, like holders of the OP Units, would have an interest in the Partnership and its general income, including that from the Government contracts. Once again, since the income generated by the Government contracts would flow into the Partnership's general funds, a portion of which would be owed to common unit holders, the common units represent ownership interests in the Government contracts. Reconverting the common units into shares of the REIT would not change the result. Although the holder's ownership interest would be directly in the REIT rather than the Partnership, the REIT is the sole general partner of, and thus has ownership in, the Partnership. The ownership interest in the REIT therefore would be an indirect ownership interest in the Partnership, and hence in the Government contracts.

[10] The MOC and non-MOC Entities have identified a "modified" version of the proposed transaction to address this problem. *See* Coolidge Letter I at 8–9 n.3. Under the modified transaction, the distribution rate of the OP Units held by the MOC trusts would be reduced from six percent (more or less) of the face value of the OP Units to the extent the revenues of the Operating Partnership less any gross revenues from Government leases were insufficient to make those payments. Additionally, gross revenues from Government leases would be segregated so that distributions to the trusts, in all cases, would be made only from revenue other than that derived from Government leases. *See id*; Coolidge Letter II at 2. This modification avoids the first problem by ensuring that the trusts do not benefit from any Government leases in the distributions for the OP Units—either through the receipt of actual revenues generated by those leases or through the receipt of funds that would not have been paid but for the leases. As discussed below, however, the modified transaction does not address the second problem involving the conversion-right feature of the OP Units.

The fact that these interests are in the form of conversion rights does not remove them from the scope of § 431.[11] These conversion rights clearly represent a significant part of the value of the OP Units transferred under the proposed transaction. At any time an owner may exercise its right to convert the OP Units into common units of the Operating Partnership or shares of the REIT. An 1885 Attorney General opinion did conclude that a Member of Congress could serve as a bondsman or surety on a Government contract under the statute because the arrangement gave the Member no "immediate personal interest in [the contract's] benefits." 18 Op. Att'y Gen. at 287. In that situation, however, the Member's potential interest in the underlying Government contract depended entirely on contingencies outside his control. Here, in contrast, the owners would immediately enjoy the value coming from the unfettered ability to effect a conversion that would give them an interest in Government contracts.[12]

B. *Applicability of 18 U.S.C. § 433*

Section 433 provides that §§ 431 and 432 shall not extend to any contract with "any incorporated company for the general benefit of such corporation." On several occasions, Attorneys General and our Office have deemed particular contracts permissible under this exception; each case involved a *corporation* in which a Member of Congress had some interest.[13] Neither the Operating Partnership nor the REIT is a corporation.[14] Because the pertinent language of § 433 is unambiguous, we reject the contention that the "incorporated company" exception should be interpreted to cover either entity. *See Mallard*, 490 U.S. at 300.

Similar arguments under the same statute have been rejected in the past. Attorney General Cummings concluded that the statute "expressly excepts contracts with 'incorporated companies' and, as applied to unincorporated companies or partnerships, require[s] the application of the rule expressio unius est exclusio alterius." 38 Op. Att'y Gen. at 215. And in rejecting an argument that the "incorporated company" exception had been construed too broadly (as applying to all corporations), Attorney General Cummings again relied on the plain language of

[11] The "modified" version of the proposed transaction does not purport to alter the conversion rights attached to the OP Units, and it therefore retains an indirect interest in Government contracts prohibited by § 431. *See supra* note 10

[12] The value of the conversion right is reflected in the distinction between the third and fourth alternatives to the proposed transaction, under which the trusts would hold promissory notes in lieu of limited partnership interests. The third alternative retains a right of conversion into shares of the REIT common stock, while the fourth alternative includes no such conversion rights. The fourth alternative, however, includes a higher interest rate to compensate for the lack of conversion rights *See* Coolidge Letter I at 10–11.

[13] *See, e.g., Contract with Corporation Partly Controlled by Congressman*, 39 Op. Att'y Gen 165 (1938); *Advances by War Finance Corporation for Raising and Marketing Live Stock*, 33 Op Att'y Gen. 44 (1921); MacKichan Mem at 4–5 & n.10.

[14] The REIT is a Maryland trust with transferable shares Maryland law defines "real estate investment trust" as "an *unincorporated* trust or association formed under this title in which property is acquired, held, managed, administered, controlled, invested, or disposed of for the benefit and profit of any person who may become a shareholder " Md Code Ann., Corps. & Ass'ns § 8–101(b) (emphasis added)

the provision, noting that it had been reenacted several times without modification. 39 Op. Att'y Gen. at 170–71.

Even if Congress did not contemplate the status of limited partnerships and other unincorporated entities when it originally adopted the "incorporated company" exception in 1808, it had occasion to do so when it reenacted the exception in 1874, 1909, and 1948, and when it amended the section in other respects in 1961. *See* Letter for Kent Frizzell, Acting Secretary, Department of the Interior, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel at 3 n.1 (July 28, 1975). Indeed, Congress has shown that it knows how to specify the treatment of limited partnerships in other conflict of interest statutes, as evidenced by its amendment of title 18, § 208, in 1990, when it substituted the term "general partner" for "partner." *See* Act of May 4, 1990, Pub. L. No. 101–280, § 5(e)(2), 104 Stat. 149, 159. We believe that the phrase "incorporated company" in § 433 must be interpreted in a manner consistent with its plain meaning and that that meaning does not include unincorporated entities.

C. *Proposed Alternatives*

Four alternatives to the proposed transaction have been outlined by counsel for the MOC and non-MOC Entities.

Under the first alternative, each MOC Entity receiving OP Units and cash would distribute the cash to the owners of the Entity but would retain the OP Units for the benefit of the owners of the Entity (the trusts). Thus, the trusts' ownership interests in the Operating Partnership would be held through a limited liability company. Counsel argues that a limited liability company, like a limited partnership, should be treated as an "incorporated company" for purposes of § 433. Coolidge Letter I at 9–10. A limited liability company, however, is not an incorporated company. For the reasons explained above, the plain language of § 433 does not permit the exception to encompass unincorporated entities such as limited liability companies. This alternative therefore does not avoid the prohibition of § 431.

The second proposed alternative would provide that the trusts contribute their ownership interests in the MOC Entities to one or more S Corporations created for this specific purpose. Attorneys General and this Office have found the "incorporated company" exception of § 433 applicable to several transactions in which the Member's only interest in a Government contract is through ownership in a corporation.[15] Because the statute requires that the Government contract be "for the general benefit of such corporation," however, we have stated that the contract

[15] *See, e.g.*, 39 Op. Att'y Gen. 165 (1938), 33 Op. Att'y Gen. 44 (1921), MacKichan Mem. at 4–6, Letter for Ralph Werner, General Counsel, District of Columbia Redevelopment Land Agency, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel (Dec. 8, 1971); Memorandum for J. Lee Rankin, Assistant Attorney General, Executive Adjudications Division, from Edward S. Lazowska, Attorney-Adviser, Executive Adjudications Division (Feb. 6, 1953).

must be "entered into in good faith on behalf of the corporation rather than for the specific benefit of the congressman." MacKichan Mem. at 5. This Office has concluded that § 433 does not cover a corporation formed specifically to come within the "incorporated company" exception:

> In our view, the answer must be that generally speaking a corporation formed primarily for the purpose of avoiding the proscription of § 431 should not qualify for the corporate exception of § 433. To adopt the opposite position would be to render the statute almost meaningless, since any Member of Congress who wished to seek Government contracts would be able to do so by simply setting up a corporation. Moreover, it may be questioned whether a contract with a corporation established for the purpose of avoiding § 431 could properly be regarded as being "for the general benefit of . . . [the] corporation" within the meaning of § 433.

Letter for Kent Frizzell, Acting Secretary, Department of the Interior, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel at 4 (July 28, 1975). Because the S Corporations contemplated by the second alternative are to be created specifically for this transaction, *see* Coolidge Letter II at 3, and thus to avoid application of § 431, we believe that § 433's "incorporated company" exception would not apply.

The third alternative would be identical to the first, except that the trusts would liquidate their interests in the MOC Entities in exchange for a promissory note issued by the MOC Entities. The note would have the same stated interest rate of 6 percent (plus or minus) as that earned by the MOC Entities from the OP Units. The principal on the note would be due in 15 years (or sooner if the Operating Partnership unilaterally required the conversion of OP Units into common units) and would be convertible into shares of the REIT common stock. Under this scenario, the trusts would not hold any direct interest in the Operating Partnership, but would be creditors of the MOC Entities. We have concluded, however, that the right to convert to shares of the REIT is an interest in the Operating Partnership, and thus an interest in the Government contracts. We have also concluded that shares of the REIT do not fall within § 433's "incorporated company" exception. This alternative therefore would be prohibited by § 431.

The fourth and final alternative would be identical to the third, except that instead of a conversion feature attaching to the promissory note, the note would contain a higher stated interest in order to compensate for the loss of conversion rights. Because the trusts' relationship to the Operating Partnership would simply be a debtor-creditor relationship, the trusts would have no ownership interest in the Partnership or its Government contracts. Instead, the Partnership would owe the trusts the face value of the promissory note irrespective of the Partnership's

receipt of income from the Government contracts. Moreover, the amount due on the promissory note would not be based in any part on the value of any Government contracts held by the Operating Partnership. *See* Coolidge Letter II at 3. This alternative eliminates the indirect interests in the Government contracts created by the conversion rights included in the third alternative. Accordingly, the fourth alternative would not be prohibited by § 431.

III.

We conclude that the proposed transaction is prohibited by 18 U.S.C. § 431 and that it would not fall within the "incorporated company" exception of 18 U.S.C. § 433. Of the four proposed alternatives to the transaction, the fourth would be permissible under § 431.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of 18 U.S.C. § 431 to Limited Partnership Interests in Government Leases

A modified version of the proposed real estate transaction described in the February 17, 1998 opinion that gives the blind trusts no interest in any government contracts is permissible under 18 U.S.C. § 431

March 13, 1998

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

This memorandum responds to your March 4, 1998 follow-up letter regarding our February 17, 1998 opinion on the applicability of 18 U.S.C. §§ 431–433 (1994) to the interests of two Members of Congress in government contracts under a proposed real estate transaction.[1] In your letter, you raise the question whether a modified version of the transaction, as described by counsel for the interested entities, would be permissible under 18 U.S.C. § 431.[2] We conclude that the modified transaction as described by counsel would not violate 18 U.S.C. § 431.

Our February 17 opinion addressed several variations of a proposed transaction under which certain entities would contribute their assets to a limited partnership (the "Operating Partnership"), the sole general partner of which is a real estate investment trust (the "REIT"), in exchange for cash and preferred partnership units ("OP Units") in the Operating Partnership. Six of these entities (the "MOC Entities") are owned by trusts in which two Members of Congress have beneficial interests; none of the MOC Entities currently holds any contracts with the Federal Government. Two entities, however (the "non-MOC Entities"), have current leases with federal agencies. The contribution of the non-MOC Entities' assets to the Operating Partnership has prompted the question whether the proposed transaction would give the Members of Congress interests in Government contracts in violation of 18 U.S.C. § 431.

In our February 17 opinion, we concluded that the unmodified proposed transaction would be prohibited by § 431 because of two features of the OP Units to be received by the MOC Entities (and hence the trusts) under the transaction. First, the preferred distribution rights in the OP Units would be ownership interests in the Operating Partnership, and thus in the Government contracts held by the Partnership. *See* 22 Op. O.L.C. at 35–36. And second, the right to convert the

[1] *See Applicability of 18 U.S.C. §§ 431–433 to Limited Partnership Interests in Government Leases Under Proposed Transaction*, 22 Op. O.L.C. 33 (1998).

[2] *See* Letter for Emily Hewitt, General Counsel, General Services Administration, from Francis L. Coolidge, Ropes & Gray (Mar. 3, 1998) ("Coolidge Letter III") As with our February 17 opinion, the facts outlined in this memorandum derive from information provided by you and by counsel for the entities that would contribute assets under the transaction To the extent that additional facts are relevant, but have not been described to us, our conclusion could change *See* 22 Op. O.L.C. at 33 n.2

OP Units into common units of the Operating Partnership, and ultimately into shares of the REIT, would itself be a prohibited ownership interest in the Government contracts under § 431. *Id.* at 36.

Under the proposed modified transaction, the trusts, through the MOC Entities, would receive a discrete, alternate class of preferred partnership units in the Operating Partnership ("Alternate OP Units") rather than the OP Units. The face value of the Alternate OP Units would be based on the fair market value of the MOC Entities' assets, which do not include any Government contracts, and the distribution rate would be set at a fixed percentage of the face value.[3] Holders of the Alternate OP Units would be excluded from any benefit derived from any Government contracts held, or to be held, by the Operating Partnership. In particular, distributions made to holders of the Alternate OP Units would be reduced from the stated amount to the extent that the revenues of the Operating Partnership less any gross revenues from Government contracts were insufficient to make those payments; in addition, revenues from Government contracts would be segregated so that distributions to Alternate OP Unit holders, in all cases clearly would be made only from revenues not derived from Government contracts. *See* Coolidge Letter III, at 2. As noted in our February 17 opinion, this modification ensures that the trusts do not benefit from any Government contracts in the distributions for the units—either through the receipt of actual revenues generated by the Government contracts or through the receipt of funds that would not have been paid but for those contracts. *See* 22 Op. O.L.C. at 36 n.10. Thus, the proposed modification avoids the first problem identified in our opinion by eliminating the ownership interests in the Operating Partnership's Government contracts by virtue of limited partnership distributions.

Under the proposed modified transaction, the Alternate OP Units also would have no rights of conversion into either common units of the Operating Partnership or shares of the REIT. Instead, the Alternate OP Units would be redeemable by the owners solely for cash in the amount of their face value, and would be unilaterally called, at face value, by the Operating Partnership a fixed number of years after the transaction occurs. *See* Coolidge Letter III, at 2. Because the proposed modification eliminates the conversion-right feature of the OP Units, it avoids the second problem identified in our February 17 opinion.

[3] *See* Coolidge Letter III, at 1–2; Letter for Emily Hewitt, General Counsel, General Services Administration, from Francis L. Coolidge, Ropes & Gray (Mar. 12, 1998) ("Coolidge Letter IV") Although the distribution rate of the Alternate OP Units would be higher than that to be earned by the OP Units, counsel for the entities advises that higher rate reflects solely the lack of conversion rights in the Alternate OP Units and does not in any way reflect compensation for the value of Government contracts held, or to be held, by the Operating Partnership. *See* Coolidge Letter IV. Thus, neither the face value nor the distribution rate of the Alternate OP Units reflects the value of Government contracts. *Id*

As modified, therefore, the proposed transaction would not give the trusts any interest in Government contracts, and it would not be prohibited by § 431.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

The Vacancies Act

The Vacancies Act is not the exclusive authority for temporarily assigning the duties of a Senate-confirmed office. Statutes vesting an agency's powers in the agency head and allowing delegation to subordinate officials also may be used to assign, on an interim basis, the duties of certain vacant Senate-confirmed offices.

March 18, 1998

STATEMENT BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to present the Department's views about the Vacancies Act, 5 U.S.C. §§ 3345–3349 (1994 & Supp. III 1997).*

The principal question I want to address is whether the Vacancies Act is the exclusive statutory authority for temporarily assigning the duties and powers of a Senate-confirmed office. For decades, the Department of Justice has taken the position that statutes vesting an agency's powers in the agency head and allowing delegation to subordinate officials may be used to assign, on an interim basis, the powers of certain vacant Senate-confirmed offices. We recognize that some members of Congress, as well as the Congressional Research Service and the Comptroller General, have taken a different view of the statutes. But, as we will explain, we adhere to our long-standing interpretation.

The Vacancies Act enables officials to perform the duties of some Senate-confirmed positions, when the occupants of the positions have died or resigned or are sick or otherwise absent. Some provisions of the Act allow first assistants to serve. When the office of an agency head becomes vacant, for example, a first assistant may act under 5 U.S.C. § 3345. Under § 3346, first assistants sometimes may also act in vacant Senate-confirmed positions below the agency head, but only if the position is an office in a "bureau" and only if that "bureau" is in an executive or military department—that is, one of the fourteen departments listed at 5 U.S.C. § 101 (1994) or the Department of the Army, the Navy, or the Air Force (*id.* § 102). Section 3347 offers a procedure that may be used instead of service by a first assistant under §§ 3345 and 3346. Under § 3347, the President may detail a Senate-confirmed official from an executive or military department. Under any of these provisions, if the office becomes vacant because of death or resignation, the service by the acting official may not continue beyond 120

*Editor's Note. The Vacancies Act was supplanted by the Federal Vacancies Reform Act of 1998 *See* Pub. L No. 105–277, div C, tit. 1, § 151, 112 Stat 2681–611 to –616 (1998) (codified at 5 U.S.C. §§ 3345–3349d (Supp IV 1998)). Among other changes to prior law, the Federal Vacancies Reform Act of 1998 expressly eliminates the ability of an agency head to use his or her vesting-and-delegation authority to temporarily authorize an acting official 5 U.S.C § 3347(b).

days, unless the President makes a nomination for the vacant office. 5 U.S.C. § 3348.

In 1868, when Congress first passed the Vacancies Act in essentially its present form, it repealed the then-existing statutes on filling vacancies. Act of July 23, 1868, ch. 227, 15 Stat. 168, 169. Since 1868, however, Congress has enacted other statutes that, in our view, apply to vacancies at particular departments or agencies. Some of these statutes expressly refer to vacancies. Others—the category at issue here—vest the powers and duties of an agency in its head and allow delegation to subordinate officials.

The statutes for the Department of Justice illustrate this category. Under 28 U.S.C. § 509 (1994), "[a]ll functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General," with certain exceptions not relevant here. The Attorney General, under 28 U.S.C. § 510 (1994), "may from time to time make such provisions as [she] considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General." These provisions, which I will refer to as "vesting-and-delegation" statutes, enable the Attorney General to assign the duties and powers of a vacant office on an interim basis, and such assignments are not subject to the limits of the Vacancies Act.

At least since the Administration of President Herbert Hoover, Attorneys General appear to have acted on the conclusion that the vesting-and-delegation authority, derived from the 1870 law creating the Department, supplements the authority of the Vacancies Act of 1868 and permits the Attorney General to reassign the duties of such Senate-confirmed positions to other officials of the Department, outside the limits of the Vacancies Act.[1] Because of difficulties in researching old records, we have not been able to determine with certainty when the practice began. But we know that, at the very least, it goes back more than half of the Department's existence and about a third of the history of the Republic.

The statutory structure of the Department reinforces our position. In the vesting-and-delegation statutes, Congress gave the Attorney General wide discretion to assign duties and powers within the Department. Department officials below the Attorney General, for the most part, have few duties that are specifically imposed on them by statute. Instead, they carry out duties assigned by the Attorney General under 28 U.S.C. §§ 509 and 510. Sections 509 and 510 of title 28 derive from section 14 of the Department of Justice Act of 1870, *see* Act of June 22, 1870, ch. 150, 16 Stat. 162, 164, which became section 360 of the Revised Statutes and which was later codified at 5 U.S.C. § 311 (1926). The legislative history of the Department of Justice Act makes exactly the point that the statute did not

[1] *See, e.g.*, Order No. 2123 (Aug. 1, 1930) (designation of an Acting Assistant Attorney General for Criminal Division who served longer than the Vacancies Act allowed); Order No. 2047 (June 29, 1929) (designation of an Acting Assistant Attorney General for the Prohibition and Tax Division who also served longer than the Vacancies Act's limit).

divide the Department into bureaus, but let the Attorney General allocate the Department's responsibilities as appropriate. *See* Cong. Globe, 41st Cong., 2nd Sess. 3066 (1870) (Statement of Rep. Lawrence). Because the Attorney General's powers in this area are so broad and flexible, and because 28 U.S.C. § 510 specifically and clearly addresses the assignment of duties at the Department, we believe that the Attorney General has ample authority, outside the Vacancies Act, to provide for the temporary discharge of the duties of Department officers when their positions become vacant. *See* Memorandum for the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Designation of an Acting Deputy Attorney General* at 4–5 n.3 (Jan. 27, 1984).

The Attorney General's exercise of this authority in the designation of Bill Lann Lee as Acting Assistant Attorney General in charge of the Civil Rights Division shows how the vesting-and-delegation statutes supplement the Vacancies Act. Today, there is not a single duty that, by statute, can be performed only by the Assistant Attorney General in charge of the Civil Rights Division, and only one statute (concerning authorizations under the witness protection program in criminal civil rights cases, 18 U.S.C. § 3521(d)(3) (1994)) even mentions that Assistant Attorney General specifically. Even apart from the general vesting of power in the Attorney General under 28 U.S.C. § 509, Congress did not assign to the Assistant Attorney General in charge of the Civil Rights Division the authorities now exercised by that officer. Instead, Congress placed those authorities in the hands of the Attorney General herself and left it to her to decide who in the Department should carry out those duties. The Assistant Attorney General in charge of the Civil Rights Division accordingly exercises only the power that the Attorney General chooses to give him. *See* 28 C.F.R. § 0.50 (1997).[2] It would be anomalous indeed if the occurrence of a vacancy lessened her authority to assign duties in the way that best promotes the efficiency of the Department.[3]

We acknowledge that there are disagreements with our long-held legal view. Three major arguments have been advanced, to challenge our position. The first is that a provision of the Vacancies Act, 5 U.S.C. § 3349, makes that statute the exclusive means of designating an acting official in a vacant Senate-confirmed position and that Congress affirmed this conclusion when it amended the Vacancies Act in 1988. *See* Pub. L. No. 100–398, § 7, 102 Stat. 985, 988 (1988). The second is that our view of the law would permit the executive branch to evade the Senate's role of advice and consent. The third is that our interpretation, in effect, would nullify the Vacancies Act. We dispute each of these arguments.

[2] When the office of Assistant Attorney General is vacant, the Attorney General by regulation has assigned the duties set out in 28 C.F.R. § 0.50 to the ranking Deputy Assistant Attorney General or such other official as she designates. *Id* § 0.132(d).

[3] *See United States v. Giordano*, 416 U.S. 505, 513–14 (1974) (given 28 U.S.C. § 510, the argument "that merely vesting a duty in the Attorney General . . . evinces no intention whatever to preclude delegation to other officers in the Department of Justice, including those on the Attorney General's own staff" is "unexceptionable" as a general proposition, although in the particular instance the statute conferring the specific duty restricted delegation).

Section 3349, in its present form, states that "[a] temporary appointment, designation, or assignment of one officer to perform the duties of another under §§ 3345 or 3346 of this title may not be made otherwise than as provided by those sections, except to fill a vacancy occurring during a recess of the Senate." [4] When Congress amended the Vacancies Act in 1988, the Senate Committee asserted its belief that this "present language, however old, makes clear that the Vacancies Act is the exclusive authority for the temporary appointment, designation, or assignment of one officer to perform the duties of another whose appointment requires Senate confirmation." S. Rep. No. 100–317, at 14 (1988).

The Committee Report, by its terms, relies on the "may not be made otherwise" language of § 3349 for the conclusion that the Vacancies Act is the exclusive means for filling vacancies in Senate-confirmed offices. But even the Committee Report concedes that the Vacancies Act is not exclusive when there is "specific statutory language providing some other means for filling vacancies." S. Rep. No. 100–317, at 14. If the "may not be made otherwise" language were "clear" and excluded *all* other statutory means for filling vacancies, this exception recognized by the Senate Report would not exist. The disagreement, therefore, is not truly whether the Vacancies Act is exclusive, but whether vesting-and-delegation statutes are among those that supplement or displace the Vacancies Act.

The Department has long believed that vesting-and-delegation statutes, as well as statutes that name particular positions, may be used to assign the duties of vacant offices despite § 3349. Section 3349 derives from the Vacancies Act of 1868. Vesting-and-delegation statutes specifically applicable to particular departments were enacted after the Vacancies Act and supplement it, and § 3349 could not preclude later Congresses from granting this expanded authority.[5]

In our view, the 1988 Senate Report did not—indeed, could not—alter the law in this respect. In 1988, Congress neither amended nor even reenacted 5 U.S.C. § 3349. As Assistant Attorney General Barr wrote in 1989, the Senate Report is "subsequent legislative history," by which a congressional committee cannot "alter the proper construction of a statute." *Application of Vacancy Act Limitations to Presidential Designation of an Acting Special Counsel*, 13 Op. O.L.C. 144, 146 (1989).[6]

[4] The equivalent provision from the 1868 statute stated that "no appointment, designation, or assignment otherwise than as is herein provided, in the cases mentioned in the first, second, and third sections of this act, shall be made except to fill a vacancy happening during the recess of the Senate." 15 Stat. at 168. Congress enacted the present language in 1966, but the change was not intended to be substantive. *See* S. Rep. No. 89–1380, at 18 (1966).

[5] Under our view, the "may not be made otherwise than as provided" language of § 3349 still has meaning. The language supplies a rule of construction for the Vacancies Act. It excludes arguments that substantial compliance can satisfy the statute, but does not bar the use of other statutory authorities.

[6] In *Pierce v. Underwood*, 487 U.S. 552 (1988), a committee report interpreted a provision in the Equal Access to Justice Act that Congress was in the process of reenacting. The Supreme Court dismissed the interpretation.

> If this language [from the committee report] is to be controlling upon us, it must be either (1) an authoritative interpretation of what the 1980 statute meant, or (2) an authoritative expression of what the 1985 Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means.

Continued

Nor does the statement in the Senate Report become any more authoritative because Congress amended other sections of the Vacancies Act in 1988. On the contrary, Congress's amendment of other sections highlights its decision not to amend 5 U.S.C. § 3349. If Congress is to legislate, both houses must enact language that is presented to the President. *INS v. Chadha*, 462 U.S. 919 (1983). Here, in the face of a venerable administrative construction that could have been reversed through the enactment of just a few words, Congress did not touch the relevant portion of the Vacancies Act.

Our interpretation does not depreciate the Senate's role of advice and consent. Although, under our view of a vesting-and-delegation statute, there is no precise limit on the time during which an official may carry out the duties of a vacant Senate-confirmed office, our view does not mean that such an office may remain unfilled indefinitely. The President has a duty to make a nomination. The duty comes from law, indeed from the nation's highest law, the Constitution, which declares that the President shall nominate, and by and with the advice and consent of the Senate appoint, the principal officers of the United States. U.S. Const. art. II, § 2, cl. 2. Both the executive and legislative branches owe an obligation to perform their constitutional roles.

Finally, our position that vesting-and-delegation statutes permit the assignment, on an "acting" basis, of a vacant position's duties and powers does not nullify the Vacancies Act. The Vacancies Act continues to provide the legal authority invoked by the executive branch in a variety of circumstances. It confers the authority to fill the highest position at most agencies. It may offer the most efficient means for temporarily filling a vacant Senate-confirmed position at one department with an official from another, and it is generally the only legal authority by which the President himself can put an acting, rather than permanent, official in place within an executive department. Vesting-and-delegation statutes give authority to agency heads; the Vacancies Act gives authority to the President. Furthermore, the Vacancies Act creates an "automatic" procedure by which first assistants may act in vacant positions, without the need for standing regulations or individual orders issued under vesting-and-delegation statutes. Of course, when

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Nor can it reasonably be thought to be the latter—because it is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation

Id at 566–67 (Scalia, J.). For similar reasons, the 1988 Senate Report cannot be an authoritative expression of an earlier Congress's intent regarding 5 U.S.C. § 3349. Moreover, in contrast to the situation in *Pierce*, Congress did not even reenact 5 U.S.C. § 3349 in 1988.

these advantages lead to a use of the Vacancies Act, the authority conferred by the Vacancies Act carries with it the time limits of 5 U.S.C. § 3348.

JOSEPH N. ONEK
Principal Deputy Associate Attorney General

DANIEL KOFFSKY
Special Counsel
Office of Legal Counsel

Interpretation of Inspector General Act

Although it is a close question, the better interpretation of the Inspector General Act is that Congress did not intend to limit the phrase "recommendation that funds be put to better use" to only those audit recommendations that achieve identifiable monetary savings.

March 20, 1998

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION
AND THE
INSPECTOR GENERAL

You have asked us to resolve a dispute regarding the appropriate interpretation of the phrase "recommendation that funds be put to better use," as used in the Inspector General Act, 5 U.S.C. app. §§ 1–12 (1994) ("IG Act"). It is our understanding that the Justice Management Division ("JMD") and the Office of the Inspector General ("OIG") disagree as to which recommendations may properly be identified and reported by OIG as "funds put to better use." *See* Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Stephen R. Colgate, Assistant Attorney General for Administration, and Michael R. Bromwich, Inspector General, *Re: Audit Resolution Committee Request for Legal Opinion* (July 11, 1997). JMD asserts that " 'funds put to better use' may only be claimed when some type of savings results from the audit recommendation." *Id.* at 1. OIG, on the other hand, believes that the phrase also encompasses "recommendations that funds be redirected to achieve greater efficiency, accountability, or internal control objectives even though not necessarily monetized as savings." *Id.*

As we explain more fully below, we conclude that, although it is a close question, the better reading of the statute is that Congress did not intend to limit the phrase "recommendation that funds be put to better use" to only those audit recommendations that achieve identifiable monetary savings.

DISCUSSION

Section 5 of the IG Act requires each Inspector General to prepare semiannual reports "summarizing the activities of the Office" during the immediately preceding six-month period. 5 U.S.C. app. § 5(a). The statute specifies certain information that must, at a minimum, be contained in such reports. *Id.* Included among these requirements is:

> a listing, subdivided according to subject matter, of each audit report issued by the Office during the reporting period and for each audit report, where applicable, the total dollar value of questioned

> costs (including a separate category for the dollar value of unsupported costs) and the dollar value of recommendations that funds be put to better use.

Id. § 5(a)(6). The statute further requires separate statistical tables summarizing, with respect to audit reports pending and issued during the reporting period, decisions made by management as a result of those reports: one table concerns the status of management decisions in response to questioned costs, and the other concerns the status of management decisions in response to recommendations that funds be put to better use. *Id.* § 5(a)(8), (9).

The phrase "recommendation that funds be put to better use" is defined in the IG Act as follows:

> a recommendation by the Office that funds could be used more efficiently if management of an establishment took actions to implement and complete the recommendation, including—
>
> (A) reductions in outlays;
> (B) deobligation of funds from programs or operations;
> (C) withdrawal of interest subsidy costs on loans or loan guarantees, insurance, or bonds;
> (D) costs not incurred by implementing recommended improvements related to the operations of the establishment, a contractor or grantee;
> (E) avoidance of unnecessary expenditures noted in preaward reviews of contract or grant agreements; or
> (F) any other savings which are specifically identified.

Id. § 5(f)(4). Looking first only to that portion of the definition that precedes items (A) through (F), the critical interpretive question is whether "a recommendation . . . that funds could be used more efficiently" is limited to a recommendation that funds could be saved. An affirmative answer to this question requires equating efficiency with identifiable savings.[1] However, the dictionary defines "efficiency" as the "capacity to produce desired results with a minimum expenditure of energy, time, money, or materials." Webster's Third New International Dictionary 725 (1986). Pursuant to this definition, efficiency could include, but need not necessarily be limited to, monetary savings. Efficiency could be achieved, for example, by accomplishing a particular task in a shorter amount of time, thereby freeing up personnel resources to turn to another task. Although ultimately an agency may save money by saving energy, time, or materials, such savings may be neither identifiable nor quantifiable. We therefore conclude that, standing alone,

[1] We use the term "savings" as we understand JMD uses that term, i.e. an identifiable reduction in costs. *See* Webster's Third New International Dictionary 2020 (1986).

the definition of "recommendation that funds be put to better use" that precedes subsections (A) through (F) would best be interpreted as not requiring a demonstration of identifiable savings.

JMD further contends, however, that each of the examples that follows in subsections 5(f)(4)(A) through (F) refers to some type of savings, and therefore that the definition of "recommendation that funds be put to better use" also must be interpreted as limited to specifically identified savings. Under the long-established canon of *ejusdem generis*, where a general term follows a specific one, the general term should be construed to encompass only subjects similar in nature to those subjects enumerated by the specific words. 2A Norman J. Singer, *Sutherland Statutory Construction* §47.17 (5th ed. 1992). The doctrine is equally applicable where specific words follow general ones: application of the general term is then restricted to matters similar to those enumerated. *Id.* We note, however, that the rule is, like other canons of statutory construction, "only an aid to the ascertainment of the true meaning of the statute. It is neither final nor exclusive." *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 89 (1934). The canon should not govern "when the whole context [of a statute] dictates a different conclusion." *Norfolk and Western Ry. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991).

There are two separate *ejusdem generis* arguments to be made with respect to subsection 5(f)(4). The first relies upon the catchall reference in subsection 5(f)(4)(F) to "any other savings" to reinforce a conclusion from the text of subsections 5(f)(4)(A) through (E) that the categories itemized therein all enumerate various examples of savings. OIG, however, disputes that all of the examples listed in subsections (A) through (E) constitute savings. OIG concedes that (A) ("reductions in outlays") and (B) ("deobligation of funds") comprise savings, but questions whether (C) ("withdrawal of interest subsidy costs") would also fall into this category, especially if the interest subsidy is recaptured and reallocated elsewhere. *See* E-Mail for Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, and Janis Sposato, Deputy Assistant Attorney General, Justice Management Division, from Robert L. Ashbaugh, Deputy Inspector General, Office of Inspector General (Dec. 19, 1997). Similarly, OIG asserts that subsections (D) ("costs not incurred by implementing recommended improvements") and (E) ("avoidance of unnecessary expenditures") need not necessarily result in savings, if the funds recovered are reinvested in the program. *Id.* We believe, however, that the better reading of (C), (D), and (E) is that they *do* define different categories of savings. The language used in these subsections suggests funds recovered—e.g., "withdrawal of . . . costs," "costs not incurred," "avoidance of unnecessary expenditures"—and thus provides strong textual support for application of *ejusdem generis* in this context.

Under the second *ejusdem generis* argument, the general definition of "recommendation that funds be put to better use" that precedes subsections 5(f)(4)(A)

through (F) is limited by the items listed in those subsections, i.e. the definition is limited to identifiable savings. We believe this second argument, while not without merit, is less tenable in light of both the textual definition of "recommendation that funds be put to better use" and the legislative history of the IG Act.

Under the statute, a "recommendation that funds be put to better use" is a "recommendation . . . that funds could be used more efficiently if management of an establishment took actions to implement and complete the recommendation, including" the list of examples of savings in subsections (A) through (F). 5 U.S.C. app. § 5(f)(4). An interpretational difficulty is presented by the fact that the word "including" could be read to modify either the phrase "recommendation . . . that funds could be used more efficiently" or the phrase "actions to implement and complete the recommendation." If the list of examples of savings is read to modify the former, then the argument that "recommendation that funds be put to better use" is limited to savings is more forceful, for the various categories of savings would exemplify the kinds of final recommendations that management might make. However, if the list of savings instead modifies the noun "actions," then the categories of itemized savings offer examples of the kinds of actions management might take to "implement" a particular recommendation for greater efficiency. Under the second reading, achieving savings would be part of the *implementation* of the recommendation; the decision whether to reinvest those savings in the program from which they derived or to set them aside for some other purpose would *complete* the recommendation. Thus, a recommendation that funds be put to better use could require management to take steps to achieve savings and then reallocate those savings to the same program or others in order to realize a more efficient use of the funds, in terms of energy, time, or materials. The end result need not necessarily produce identifiable savings, even though savings would be achieved during one of the interim steps of the recommendation.

Although it is a close question, we think that the second reading better reconciles the list of examples in subsections 5(f)(4)(A) through (F) with the broader definition of "recommendation that funds be put to better use" preceding that list. In light of our conclusion that the term "efficiently" is not limited to identifiable savings, it is more consistent with this broader understanding to interpret subsections (A) through (F) as illustrative of the kinds of interim actions that might be taken to implement a particular recommendation.

Because it is a close textual question, we look to the legislative history of the 1988 amendments to the IG Act, in which the definition of "recommendation that funds be put to better use" first appeared, to see if we can find evidence of congressional intent. The history is not particularly helpful with respect to the question before us, but it does not contradict our textual interpretation. One of Congress's concerns in enacting the 1988 amendments was that the semi-annual reports of inspectors general varied widely in format and in the terms used to describe the audit resolution process. *See* S. Rep. No. 100–150, at 24 (1987).

Congress wanted to standardize the reporting process in order to develop "an overall picture of the Federal government's progress against waste, fraud and mismanagement." *Id.* At the same time, Congress enacted reforms "to provide for more independence for audit and investigative operations." H.R. Rep. No. 100-771, at 5 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3154, 3158 ("House Report"). The House hearings on the 1988 amendments affirmed Congress's "strong commitment to the IG concept and the indisputable preponderance of evidence that IG's have greatly improved operations in their departments and agencies, *in addition* to saving the American taxpayers literally billions of dollars." *Inspector General Act Amendments of 1988: Hearing on H.R. 4054 Before the Subcomm. on Legislation and National Security of the House Comm. on Government Operations*, 100th Cong. 21 (1988) (emphasis added) (statement of Rep. Horton) ("House Hearing").

Originally, neither the Senate bill (S. 908) nor the House bill (H.R. 4054) proposing the 1988 amendments to the IG Act included any reference to "recommendation that funds be put to better use." Rather, the phrase first appeared in H.R. 4054 after committee markup. The precise scope of the definition is not addressed in the legislative history. However, the House report offers some support for a broad reading of that phrase that comports with our interpretation of the text:

> The format speaks of "funds recommended to be put to better use." The committee intends that inspectors general report the amounts of *funds or resources* that will be used more efficiently as a result of actions taken by management or Congress if the inspector general's recommendation is implemented.

House Report at 19, *reprinted in* 1988 U.S.C.C.A.N. at 3172 (emphasis added). The committee's reference not only to "funds" but also to "resources" "that will be used more efficiently" is more consistent with an understanding of "recommendation that funds be put to better use" that includes non-monetized efficiencies.

Moreover, while we recognize that the statements of individual legislators have limited interpretive value, *see Garcia v. United States*, 469 U.S. 70, 76 (1984), we note a floor comment made by Senator Glenn, Chairman of the Senate Governmental Affairs Committee that considered S. 908, who praised the historical success of inspectors general in achieving both identifiable savings and non-quantifiable efficiencies:

> According to the most recent report from the Council that coordinates IG activities, in the past 5 years more than $92 billion have been recovered or put to better use because of the IG efforts.

> That comes out to about $18 billion per year. That is B for billion. That is a significant amount of money. *It could be even greater than that, because it is difficult to evaluate and quantify some of these savings where you are making more efficient use of money.*

134 Cong. Rec. 615 (1988) (statement of Sen. Glenn) (emphasis added). Although it is not clear that Senator Glenn, nor for that matter any other member of Congress who spoke about the proposed legislation, was thinking of the distinction between identifiable savings and other efficiencies in the context of "recommendation that funds be put to better use" at the time he made his statement, the comment suggests that Senator Glenn considered that funds "recovered or put to better use" would not necessarily be quantifiable.

CONCLUSION

Neither the text nor the legislative history of the IG Act offers clear evidence of how broadly Congress intended to define "recommendation that funds be put to better use." Nevertheless, we conclude that, on balance, the better interpretation of that term is that it not be limited to only those audit recommendations that achieve identifiable monetary savings.

DAWN JOHNSEN
Acting Assistant Attorney General
Office of Legal Counsel

Application of the Double Jeopardy Clause to Disgorgement Orders Under the Federal Trade Commission Act

In a civil suit brought by the Federal Trade Commission challenging unfair trade practices, the Double Jeopardy Clause of the Fifth Amendment is not implicated by a judgment requiring restitution and ordering that, in the event restitution is impracticable, the defendant pay money to the United States Treasury.

April 9, 1998

MEMORANDUM OPINION FOR THE UNITED STATES ATTORNEY
FOR THE CENTRAL DISTRICT OF CALIFORNIA

This memorandum responds to your request[1] for an opinion whether, in a civil suit brought by the Federal Trade Commission ("FTC") challenging unfair trade practices, the Double Jeopardy Clause of the Fifth Amendment to the Constitution is implicated by a judgment requiring restitution and ordering that, in the event restitution is impracticable, the defendant pay money to the United States Treasury. We conclude that the provision you describe raises no double jeopardy concerns.

I. Background

Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) (1994), authorizes the FTC to seek, and federal district courts to grant, preliminary and permanent injunctions against practices that violate any of the laws enforced by the FTC. The Courts of Appeals uniformly have held that this authority to issue injunctions carries with it the authority to impose the full range of equitable remedies, including rescission, restitution, and the like. *See, e.g., FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468–69 (11th Cir. 1996) (holding that Section 13(b) empowers district courts to order disgorgement); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314 (8th Cir. 1991) (holding that section 13(b) empowers district courts to order restitution); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571–72 (7th Cir.) (same), *cert. denied*, 493 U.S. 954 (1989); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1113 (9th Cir. 1982) (holding that section 13(b) empowers district court to order rescission of contract and freezing of assets); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 717–18 (5th Cir.) (holding that section 13(b) empowers district courts to order placement of funds in escrow), *cert. denied*, 456 U.S. 973 (1982). For purposes of this memorandum, we will assume that the district court's equitable authority extends to ordering the wrongdoer to disgorge ill-gotten gains even where it is not possible to reimburse the

[1] *See* Letter for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Nora M. Manella, United States Attorney (Apr. 3, 1997)

consumers who were injured by the defendants' wrongful conduct. *See Gem Merchandising Corp.*, 87 F.3d at 470 (concluding that disgorgement is an appropriate remedy under section 13(b); "Further, because it is not always possible to distribute the money to the victims of defendant's wrongdoing, a court may order the funds paid to the United States Treasury."); *see also FTC v. Pantron I Corp.*, 33 F.3d 1088, 1103 & n.34 (9th Cir. 1994) (directing district court to order appropriate monetary relief; noting that, if reimbursement of all consumers is impractical or impossible, district court may order another remedy that requires defendant to disgorge its unjust enrichment), *cert. denied*, 514 U.S. 1083 (1995).

You have informed us that the FTC "routinely" includes the following provision in settlements or judgments in civil cases brought under section 13(b):

> If the Commission, in its sole discretion, determines that redress is wholly or partially impracticable, any funds not so used shall be deposited in the United States Treasury.

An Assistant United States Attorney in your office has expressed concern that such a provision might create a double jeopardy problem if the United States Attorney's office later brings a criminal prosecution against the defendant based on the same conduct. We accordingly turn to that issue. The analysis that follows assumes that the monetary judgment imposed on the defendant is measured solely by the amount of money obtained by the defendant in violation of the Federal Trade Commission Act.

II. Discussion

The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Supreme Court has interpreted the clause to prohibit successive criminal punishments as well as successive prosecutions for the same criminal offense. *See Hudson v. United States*, 522 U.S. 93, 98–99 (1997); *United States v. Ursery*, 518 U.S. 267, 273 (1996); *United States v. Dixon*, 509 U.S. 688, 696 (1993). The question is whether an order that requires a defendant to disgorge ill-gotten gains is or can be "criminal punishment" for purposes of the Double Jeopardy Clause.

Prior to the Supreme Court's recent decision in *Hudson*, two lines of authority created some uncertainty as to when a nominally civil penalty constitutes a criminal punishment for double jeopardy purposes. Under the approach of *United States v. Ward*, 448 U.S. 242 (1980), and its progeny, a court's first task is to determine whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly" whether the penalty should be considered criminal or civil. *Id.* at 248. If the legislature " 'has indicated an intention to

establish a civil penalty, [the court must] inquir[e] further whether the statutory scheme [is] so punitive either in purpose or effect' as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'" *Hudson*, 522 U.S. at 99 (quoting *Ward*, 448 U.S. at 248–49, and *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1956)) (last alteration in original). In determining whether Congress provided a sanction so punitive in purpose or effect as to transform a civil remedy into a criminal penalty, the *Ward* Court treated several factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), as useful guideposts. *See Ward*, 448 U.S. at 248–49. Those factors include whether the sanction: (1) "involves an affirmative disability or restraint"; (2) "has historically been regarded as a punishment"; (3) "comes into play only on a finding of *scienter*"; (4) will, in operation, "promote the traditional aims of punishment-retribution and deterrence"; (5) applies to behavior that is already a crime; (6) may rationally be connected to an alternative purpose; and (7) "appears excessive in relation to the alternative purpose." *Kennedy*, 372 U.S. at 168–69. The *Ward* Court emphasized that "only the clearest proof" would suffice to transform what Congress intended to be a civil remedy into a criminal penalty. 448 U.S. at 249 (internal quotation marks omitted).

A second and somewhat inconsistent line of cases is based on *United States v. Halper*, 490 U.S. 435 (1989). In *Halper*, the respondent had first been convicted under the criminal false claims statute, 18 U.S.C. § 287 (1994) for submitting 65 inflated Medicare claims, resulting in a total loss to the government of $585. The government then sought penalties under the civil False Claims Act, 31 U.S.C. §§ 3729–3731 (1994), for the same conduct. Because the statute in question required a penalty of $2000 for each claim, plus double damages, the total civil penalty exceeded $130,000. In analyzing the respondent's claim that the penalty constituted punishment for double jeopardy purposes, the Court minimized the importance of the fact that the penalty was imposed in a nominally civil proceeding. 490 U.S. at 447 (in a court's assessment whether penalty constitutes punishment, "the labels 'criminal' and 'civil' are not of paramount importance"). Instead, the Court focused on whether the penalty served the "familiar" goals of punishment: retribution and deterrence. *Id.* at 448. Because the penalty was "overwhelmingly disproportionate" to the damage caused by the respondent's conduct, and therefore could not be characterized as serving a purely remedial purpose, the Court concluded that the penalty constituted "punishment" for double jeopardy purposes. *Id.* at 449.

The Supreme Court recently revisited the issue of when a nominally civil penalty can constitute criminal punishment for double jeopardy purposes. In *Hudson v. United States*, 522 U.S. 93, the Court considered whether monetary penalties and occupational debarment orders imposed following an administrative proceeding for violations of federal banking statutes would bar later criminal prosecution of the same underlying conduct. The Court concluded that neither the mone-

tary assessments nor the occupational debarment orders implicated the Double Jeopardy Clause, because neither type of penalty constituted a "criminal punishment." *Hudson*, 522 U.S. at 104–05. In the course of its analysis, the Court largely reaffirmed the *Ward* approach and abandoned the *Halper* approach. The *Hudson* Court concluded that *Halper* had deviated from *Ward*'s "longstanding double jeopardy principles," first by failing to evaluate the statute on its face to determine whether the legislature intended to establish a civil penalty, and second by elevating one of the *Kennedy* factors—whether the sanction appears excessive in relation to its nonpunitive purposes—"to dispositive status." *Hudson*, 522 U.S. at 101.

Under the principles of *Ward* as reaffirmed in *Hudson*, an order disgorging funds obtained by a defendant in violation of the Federal Trade Commission Act—even one requiring the deposit of some or all of the funds in the United States Treasury—would not implicate the Double Jeopardy Clause. First, section 13(b) authorizes the FTC to invoke a district court's equitable powers. Nothing in section 13(b) denominates the available remedies as "civil," but a district court exercises its equitable powers within the context of a civil action. *See* Fed. R. Civ. P. 2 and advisory committee note 2; *SEC v. Palmisano*, 135 F.3d 860, 865–66 (2d Cir.) (rejecting, in light of *Hudson*, claim that disgorgement order violated double jeopardy; concluding that "[t]he disgorgement remedy, which has long been upheld as within the general equity powers granted to the district court [under the securities laws], has not been considered a criminal sanction") (internal citations omitted), *cert. denied*, 525 U.S. 1023 (1998).

Second, applying the *Kennedy* factors that are of relevance here, there is little evidence, let alone the "clearest proof" required by *Ward*, 448 U.S. at 249, and *Hudson*, 522 U.S at 104–05, that an equitable disgorgement order is so punitive in purpose or effect as to render it criminal. First, disgorgement has not historically been viewed as punishment. *Palmisano*, 135 F.3d at 865–66; *see also Hudson*, 522 U.S. at 104 (noting that "the payment of fixed or variable sums of money is a sanction which has been recognized as enforceable by civil proceedings since the original revenue law of 1789") (internal quotation marks and alterations omitted). Second, restitution may be ordered without proof of *scienter*, that is, without proof of the defendant's subjective intent to defraud. *Amy Travel Serv.*, 875 F.2d at 573–74. Third, while a district court's power to require disgorgement does promote one of the traditional aims of punishment—namely, deterrence—this remedy only puts the offender back in the *status quo ante*. As the Court noted in *Hudson*, deterrence "may serve civil as well as criminal goals." 522 U.S. at 105 (internal quotation marks omitted). Fourth, while the defendant's conduct may be criminal as well as in violation of the civil provisions of the Federal Trade Commission Act, this is not necessarily so. In any event, in *Ward*, the Supreme Court found the fact that the conduct in question was criminal as well as subject to civil penalties insufficient by itself to demonstrate a punitive purpose

or effect. *See* 448 U.S. at 249–50; *see also Hudson*, 522 U.S. at 105 (concluding that, although the conduct for which monetary penalties and debarment orders were imposed "may also be criminal," "[t]his fact is insufficient to render the . . . sanctions criminally punitive"). Fifth, a disgorgement order may rationally be connected to nonpunitive purposes. An order of disgorgement redresses damages sustained by the government or the public or ensures that a defendant not profit from his illegal acts. Finally, because the sanction is necessarily measured by the harm to the government or public, it cannot be excessive in relation to its nonpunitive purposes.

A number of Courts of Appeals have concluded in other contexts that a disgorgement order is not "criminal punishment" for double jeopardy purposes. *See, e.g., Palmisano*, 135 F.3d at 865–66 (concluding, post-*Hudson*, that disgorgement order issued under securities laws is not criminal punishment); *United States v. Gartner*, 93 F.3d 633, 635 (9th Cir.) (reaching same conclusion prior to *Hudson*), *cert. denied*, 519 U.S. 1047 (1996); *SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (same); *United States v. Rogers*, 960 F. 2d 1501 (10th Cir.) (same), *cert. denied*, 506 U.S. 1035 (1992). We have found no case to the contrary and do not believe that the Supreme Court, particularly after *Hudson*, would arrive at any other conclusion. Since the rationale of these cases is that depriving a defendant of money obtained in violation of the law is not criminal punishment, it does not matter for double jeopardy purposes that the FTC is not able to provide restitution to the victims of the fraud. "[O]nce disgorgement is selected as the method of sanction, the amount must be reasonable, i.e. approximately equal to the unjust enrichment." *Hateley v. SEC*, 8 F.3d 653, 656 (9th Cir. 1993). We conclude that, as long as this condition obtains, the provision in FTC judgments you have described does not implicate the Double Jeopardy Clause.

DAWN E. JOHNSEN
Acting Assistant Attorney General
Office of Legal Counsel

Possible Bases of Jurisdiction for the Department of Justice to Investigate Matters Relating to the Assassination of Martin Luther King, Jr.

The Department of Justice may conduct an investigation relating to the assassination of Martin Luther King, Jr., to investigate the commission of federal crimes for which the applicable statute of limitations has run, in order to establish the facts of the crime, independent of whether such facts may lead to a prosecution.

The Department also has authority, under 28 U.S.C. § 533(3), to investigate the role of the Department or the Federal Bureau of Investigation in the original investigation of the King assassination. Such an investigation under § 533(3) could include a re-investigation of the facts surrounding the assassination itself in order to assess the conduct of the Bureau's original investigation and determine the accuracy and completeness of its findings.

April 20, 1998

MEMORANDUM OPINION FOR THE PRINCIPAL ASSOCIATE
DEPUTY ATTORNEY GENERAL

In connection with the Attorney General's consideration of a request from Coretta Scott King that the President or the Attorney General establish a commission to examine matters relating to the assassination of Martin Luther King, Jr., you have asked us whether there is legal authority for the Department of Justice to conduct an investigation relating to the assassination of Dr. King and the conviction of James Earl Ray for that murder.

First, we conclude that in addition to investigating federal crimes that may be currently prosecuted, the Department of Justice may also investigate the commission of federal crimes for which the applicable statute of limitations has run, in order to establish the facts of the crime, independent of whether such facts may lead to a prosecution. Second, we also conclude that the Department's authority to investigate official matters under the control of the Department, 28 U.S.C. § 533(3), provides an additional and independent basis for investigating the role of the Department or the Federal Bureau of Investigation in the original investigation of the King assassination. Such an investigation under § 533(3) could include a re-investigation of the facts surrounding the assassination itself in order to assess the conduct of the Bureau's original investigation and determine the accuracy and completeness of its findings.

I. Detection of Federal Crimes

The Attorney General is authorized to appoint officials to "detect and prosecute crimes against the United States." 28 U.S.C. § 533(1). Thus, as a preliminary matter, it is fundamental that the Attorney General may conduct an investigation

to "detect and prosecute" any federal crimes that may have been committed in connection with the King assassination. *See generally;* Memorandum for the Director of the Federal Bureau of Investigation, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: FBI Cooperation with Local Authorities;* at 1 (Nov. 9, 1977) (so long as there is a "legitimate basis for the view that the investigation of the underlying conduct may unearth violations of federal law, we believe the FBI is authorized to proceed with the investigation"). In this regard, we understand that the Criminal and Civil Rights Divisions are reviewing the relevant facts to determine whether there are grounds on which to conclude that a federal crime may have been committed in connection with the King assassination and whether such a crime may be currently prosecuted.

Even in circumstances where the applicable statute of limitations may have run and federal criminal violators may not be prosecuted, however, this Office has previously concluded that § 533(1) also provides authority to conduct an investigation the only purpose of which is to "detect" the commission of a federal crime. Memorandum for Jack W. Fuller, Special Assistant to the Attorney General, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Jurisdiction of the Department of Justice to Investigate the Assassination of President Kennedy* at 5 (July 28, 1976) ("Kennedy Assassination Opinion"). The Office of Legal Counsel reviewed this issue in similar circumstances when the Department of Justice was considering in 1976 whether it had authority to re-investigate the 1963 assassination of President Kennedy, notwithstanding the strong possibility that the statute of limitations might have run on any applicable federal crime. *See generally id.* There, this Office concluded that "[n]othing in the language" of § 533(1) precludes the Department from seeking to "'detect' crime when it cannot 'prosecute' the violators." *Id.* at 5.

The mere fact that the statute of limitations may have run does not "erase the crime itself." *Id.* Thus, in the Kennedy Assassination Opinion, Assistant Attorney General Scalia concluded that a criminal statute of limitations sets the outer limit of when it may be fair or reasonable to try a defendant for a particular crime; it does not mark the expiration of the federal interest in detecting and establishing the facts of such a crime.[1] Kennedy Assassination Opinion at 5 (*citing United States v. Marion*, 404 U.S. 307, 322 (1971)); *Toussie v. United States*, 397 U.S. 112, 114–15 (1970); *see also United States v. MacDonald*, 456 U.S. 1, 8 (1982); *United States v. Podde*, 105 F.3d 813, 820 (2d Cir. 1997); *United States v. Starrett*, 55 F.3d 1525, 1544 (11th Cir. 1995). Indeed, there may be "vital public interests"

[1] The Kennedy Assassination Opinion observed

> The central purpose of the [statute of limitations] is therefore served when prosecution is prevented To be sure, the reputations of persons who may have been involved in the assassination attempt could be injured if the detailed results of the investigation were made public But that is an interest protected by the general administrative policy of investigative secrecy, and not by the statute of limitations, and it might in some circumstances be outweighed by the public interest in the investigation, at least where the only reason for failure to bring a prosecution is the time bar

Id. at 5

served by establishing the facts surrounding the commission of a federal crime irrespective of whether the crime can be prosecuted. Kennedy Assassination Opinion at 5.

Thus, this Office found that the proposed departmental re-investigation of the Kennedy assassination might properly "serve to set to rest serious public misgivings . . . and possible distortion" regarding the manner or conclusions of the original investigation. *Id.* The Opinion also observed that the proposed re-investigation of the Kennedy assassination could be justified on the basis that it might "assist the Department in preventing such crimes in the future." *Id.*

The interests recognized in the Kennedy Assassination Opinion appear to apply with equal force to a possible federal re-investigation of the King assassination.[2] Accordingly, assuming that there are grounds on which to believe that a re-investigation of the King assassination might reveal a violation of federal law, the Kennedy Assassination Opinion provides precedent for initiating a re-investigation notwithstanding the fact that the applicable statute of limitations might have run.

II. Investigating "Official Matters" Within the Control of the Department of Justice

A second and independent basis of authority for conducting the investigation in question may be found in 28 U.S.C. § 533(3), which authorizes the Attorney General "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." This authority was also applied in the Kennedy Assassination Opinion.

Here, the Bureau's investigation at the time of the King assassination constitutes an "official matter under the control of the Department," and therefore is itself a basis for a current investigation. *See* Kennedy Assassination Opinion at 7 (Bureau's initial investigation of JFK assassination fell within scope of § 533(3) and provided basis for re-investigation). As was the case when this Office reviewed this issue in connection with a re-investigation of the assassination of President Kennedy, "a new investigation of the assassination could be justified on the ground that it is necessary, in light of subsequent public allegations, to review and evaluate the FBI's performance" in the investigation. *Id.*

The public allegations giving rise to the request for a re-examination of the facts surrounding the assassination of Dr. King similarly relate to the conduct of the Bureau in that investigation and whether the Bureau may possess relevant evidence bearing on the assassination that has not yet been disclosed. *See, e.g., Some Cases Never Close*, L.A. Times, Apr. 4, 1998, at B7 (editorial questioning

[2] We reiterate here the observation of Assistant Attorney General Scalia that we do not mean to suggest that these interests require an investigation. In our view these interests provide authority for such an investigation if the Attorney General determines that such an investigation is appropriate. *See* Kennedy Assassination Opinion at 5.

whether the FBI may possess additional information concerning a plot to assassinate Dr. King). Without necessarily giving credence to these allegations, the Attorney General might nonetheless wish to authorize an investigation to review and address them. If the Attorney General elects to do so, § 533(3) provides her with the relevant authority.

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Coverage Issues Under the Indian Self-Determination Act

The 1990 amendment to the Indian Self-Determination and Education Assistance Act of 1975 covers only those torts for which the Federal Tort Claims Act waives the sovereign immunity of the United States.

The 1990 amendment does not authorize or otherwise address representation of tribes or tribal employees who are sued in their individual capacities for constitutional torts

April 22, 1998

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

This memorandum responds to the request of the Torts Branch for our opinion regarding the scope of the 1990 amendment to the Indian Self-Determination and Education Assistance Act of 1975. Specifically, we have been asked (1) whether actions other than common law torts are covered by the 1990 amendment to the Act, and (2) whether the 1990 amendment authorizes representation of tribes or tribal employees sued in their individual capacities for constitutional torts.

For the reasons explained below, we conclude that the 1990 amendment to the Act covers only those torts for which the Federal Tort Claims Act waives the sovereign immunity of the United States. We further conclude that the 1990 amendment does not authorize or otherwise address representation of tribes or tribal employees who are sued in their individual capacities for constitutional torts.

I. Background

The Indian Self-Determination and Education Assistance Act, Pub. L. No. 93–638, 88 Stat. 2203 ("ISDA" or "Act"), was enacted in 1975 to further the goal of Indian self-determination by assuring maximum Indian participation in the management of federal programs and services for Indians. *See* 25 U.S.C. §§ 450, 450a (1994). The Act provides that tribes may enter into "self-determination contracts" with the Secretary of the Interior and the Secretary of Health and Human Services ("HHS") to administer programs or services that otherwise would have been administered by the federal government. *See* 25 U.S.C.§ 450f(a) (1994). Such programs include education, medical services, construction, and law enforcement.

In carrying out self-determination contracts under the ISDA, tribes were faced with substantial, and apparently unanticipated, indirect costs, such as the cost of liability insurance (particularly medical malpractice insurance). As a result, the funds originally earmarked for these programs were viewed by tribes, and recognized by Congress, to be inadequate. *See* S. Rep. No. 100–274, at 9, 26 (1987). To address this problem, Congress amended the ISDA in two ways in 1987 and 1988. First, it provided that for "personal injury" claims arising from the perform-

ance of medical functions under self-determination contracts, tribes and tribal contractors would be deemed part of the Public Health Service in the Department of Health and Human Services, thus making the Federal Tort Claims Act ("FTCA") applicable to that class of claims. Pub. L. No. 100–202, 101 Stat. 1329, 1329–246 (1987) (codified as amended at 25 U.S.C. § 450f(d) (1994)). Second, Congress amended the ISDA to require the federal government to obtain liability insurance for Indian tribes, tribal organizations, and tribal contractors carrying out self-determination contracts. *See* Pub. L. No. 100–472, § 201(c)(1), 102 Stat. 2285, 2289 (1988) (codified at 25 U.S.C. § 450f(c)(1) (1994)). In 1989 and 1990, Congress enacted, and then reenacted on a permanent basis, the provision at issue here, providing that "any civil action or proceeding" against "any tribe, tribal organization, Indian contractor or tribal employee" involving claims resulting from the performance of self-determination contract functions "shall be deemed to be an action against the United States" and "be afforded the full protection and coverage of the Federal Tort Claims Act." Pub. L. No. 101–121, § 315, 103 Stat. 701, 744 (1989); Pub. L. No. 101–512, tit. III, § 314, 104 Stat. 1915, 1959–60 (1990).

II. Actions Covered by the 1990 Amendment

The ISDA, as amended, provides in pertinent part:

> With respect to claims resulting from the performance of functions . . . under a contract, grant agreement, or any other agreement or compact authorized by the [ISDA] . . ., an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement: *Provided*, That after September 30, 1990, any civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the Federal Tort Claims Act . . . .

25 U.S.C. § 450f note (1994).[1]

[1] Pub L No 101–512, tit III, § 314, 104 Stat. 1915, 1959–60 (1990), as amended by Pub L No 103–138, tit. III, § 308, 107 Stat. 1416 (1993).

The first question to be addressed is whether the amendment's phrase "any civil action or proceeding involving such claims" refers only to common law tort actions or, instead, to a broader class of civil actions.[2] If it refers to all civil actions arising from the performance of ISDA functions by tribal entities, then any such action—including a contract action or a constitutional tort action—will be "deemed" an action against the United States and defended by the Attorney General under the amendment's proviso. If, on the other hand, the phrase refers only to common law tort actions, then the 1990 amendment has no effect on contract and other actions brought against tribal entities carrying out ISDA contracts.

A. The Statutory Language

"Interpretation of a statute must begin with the statute's language." *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989). At first blush, the language of the amendment appears to provide for broad coverage of civil actions. In particular, the proviso's language that "*any civil action or proceeding* . . . shall be deemed to be an action against the United States" seems literally to call for substitution of the United States in *any* civil action, whether based on state, federal, or tribal law, and whether based on contract, tort, or statute.

Other language in the amendment, however, arguably suggests a more limited scope of coverage. In particular, the phrase "any civil action or proceeding" must be read in conjunction with the phrase "full protection and coverage of the Federal Tort Claims Act." *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (stating the "cardinal rule" that a "statute is to be read as a whole"). Providing that a "civil action" be "afforded the full protection and coverage of the Federal Tort Claims Act" presumably suggests that the FTCA, 28 U.S.C. §§ 1346(b), 2671–2680, (1994 & Supp. III 1997), has some operative effect in allowing an action that would not otherwise be maintainable. The FTCA, however, waives the sovereign immunity of the United States only for certain tort claims under state law.[3] It does not address contract actions or any actions based on federal law. The statutory reference to FTCA "protection and coverage" therefore would seem to be meaningless to the extent that the statute covers contract actions and

[2] There are a number of possibilities as to what the class of covered civil actions could encompass. It might include (1) any action that is civil in nature, regardless of the type of claim or source of law, (2) any tort action, including constitutional tort actions, or (3) tort actions that are covered by the FTCA (essentially common law tort actions)

[3] This category includes (with certain exceptions set forth in 28 U.S.C.§ 2680):

> claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred

28 U S C. § 1346(b)(1) (Supp III 1997) The phrase "law of the place" has been interpreted to mean "law of the State" *Federal Deposit Ins Corp v Meyer*, 510 U.S 471, 478 (1994).

actions under federal law. *See* 2A Norman J. Singer, Sutherland Statutory Construction § 46.06, at 119 (5th ed. 1992) (statute should be construed to give meaning and effect to each term).

These interpretive issues support a conclusion that the statutory language is ambiguous. Accordingly, we turn next to the legislative history of the 1990 amendment to ascertain the intention of Congress. *See, e.g., Toibb v. Radloff*, 501 U.S. 157, 162 (1991) (legislative history should be consulted if statutory language is ambiguous).[4]

B. Legislative History

Although the legislative history of the 1990 amendment itself is relatively sparse, the history of the series of amendments leading up to the 1990 amendment is instructive. *See Bailey v. United States*, 516 U.S. 137, 147–48 (1995) (examining amendment history to interpret statutory language). As noted above, the amendment grew out of the crisis faced by tribes in meeting the high costs of liability insurance, particularly medical malpractice insurance, in carrying out ISDA contracts. *See* S. Rep. No. 100–274, at 9, 26. Thus, Congress in 1987 provided that, for "personal injury" claims arising from the performance of *medical* functions under ISDA contracts, tribes and tribal contractors would be deemed federal government entities, making the FTCA applicable.[5] It is fairly clear from the language ("personal injury") and legislative history of the 1987 amendment that it was intended to cover only tort claims cognizable under the FTCA.[6] It

[4] Of the few reported decisions making reference to the 1990 ISDA amendment, none has squarely addressed the scope of civil actions covered by it Dicta in two decisions, however, lend some support to an interpretation of the amendment as covering only tort claims cognizable under the FTCA *See Val-U Const Co v United States*, 905 F Supp 728, 732 (D S D 1995) (noting that classification of claim as "contract" or "negligence" claim is threshold issue in suit involving tribe's ISDA functions "because the FTCA waives sovereign immunity only for negligence claims"), *FGS Constructors, Inc v Carlow*, 823 F Supp. 1508, 1515 (D S D 1993) ("Pub. L No 101–512, § 314 extends the Court's jurisdiction *under the FTCA* to acts of Indian contractors taken in furtherance of contracts under the ISDEAA") (emphasis added), *see also FGS Constructors, Inc. v. Carlow*, 64 F 3d 1230, 1254 (8th Cir 1995) ("The ISDEAA limits the application of FTCA coverage to tort 'claims resulting from the performance of functions . . under a contract, grant agreement, or cooperative agreement authorized by the [ISDEAA]'.") (citing § 314 of Pub L. No. 101–512).

[5] The 1987 amendment to the ISDA provided

> [W]ith respect to claims for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, . . a tribal organization or Indian contractor carrying out a contract, grant agreement, or cooperative agreement under [the ISDA] is deemed to be part of the Public Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees . . are deemed employees of the Service while acting within the scope of their employment in carrying out the contract or agreement

Pub L No. 100–202, 101 Stat at 1329–246 (codified as amended at 25 U S.C § 450f(d))

[6] *See, e g.*, S. Rep. No 100–274, at 26 (amendment "provides that, for purposes of the Federal Tort Claims Act, employees of Indian tribes carrying out self-determination contracts are considered to be employees of the Federal Government"), *id.* at 27 ("The Committee amendment is not intended to expand the liability of the Federal Government to include claims for violation of statutory obligations not otherwise required of tribes "), *id* at 27–28 ("The amendment to the Act will not increase the Federal government's exposure under the Federal Tort Claims Act On the contrary, the amendment will only maintain such exposure at the same level that was associated with the operation of direct health care service programs by the Federal government prior to the enactment of the [ISDA] ")

is also noteworthy that one version of a related bill in the Senate included a provision that would have made the FTCA applicable to all functions performed by tribes under ISDA contracts—i.e., precisely what the 1990 amendment would provide if narrowly construed.[7] Congress also responded to the insurance-costs problem by providing in 1988 that the federal government would provide liability insurance for ISDA-contracting tribes. *See* Pub. L. No. 100–472, § 201(c)(1), 102 Stat. at 2289 (codified at 25 U.S.C. § 450f(c)(1)).[8]

The following year, Congress enacted an amendment containing the language at issue here, with the limitation that it applied to the performance of functions "during fiscal year 1990 only." Pub. L. No. 101–121, § 315, 103 Stat. at 744. The conference report explained:

> With regard to the liability insurance issue, as a temporary measure, the managers have included language in Title III of the Act *extending coverage under the Federal Tort Claims Act* to tribal contractors of both the Bureau [of Indian Affairs] ["BIA"] and the Indian Health Service ["IHS"]. In the interim, the managers expect the Bureau to work with the Indian Health Service and the Double Eagle, Inc. risk management group . . . and to provide a joint report to the Committee by February 1, 1990 identifying the costs and benefits of various liability coverage alternatives.

H.R. Conf. Rep. No. 101–264, at 33 (1989) (emphasis added); *see also id.* at 80 (amendment "expands the coverage of the Federal Tort Claims Act to the Bureau of Indian Affairs and the Indian Health Service for Indian contractors").

Finally in 1990 Congress made the amendment permanent by enacting section 314, title III, of Pub. L. No. 101–512, an appropriations act. It appears to have

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[7] This provision stated

> For purposes of chapter 171 and 1346 of title 28, United States Code [i.e., the FTCA], a tribal organization carrying out a contract, grant agreement, or cooperative agreement under [the ISDA] shall be deemed to be a Federal Agency while carrying out such contract or agreement and its employees . . . are deemed employees of the United States while acting within the scope of their employment in carrying out the contract or agreement.

S. Rep. No. 100-274, at 72, *see also* 134 Cong. Rec. 12,856 (1988). The provision was removed from the bill on the floor of the Senate, without debate, in favor of retention of the more limited medical function provision. *See id.* at 12,860 (1988). The import of the above-quoted provision for purposes of construing the 1990 amendment is not entirely clear. On the one hand, it reveals that Congress, at least in 1987 and 1988, was contemplating coverage of tribes only for FTCA-covered tort claims. On the other hand, it suggests that Congress knew how to provide for such a limited scope of coverage with clarity in 1988, but arguably failed to do so in the 1990 amendment.

[8] This provision states.

> Beginning in 1990, the Secretary shall be responsible for obtaining or providing liability insurance or equivalent coverage, on the most cost-effective basis, for Indian tribes, tribal organizations, and tribal contractors carrying out contracts, grant agreements and cooperative agreements pursuant to this Act. In obtaining or providing such coverage, the Secretary shall take into consideration the extent to which liability under such contracts or agreements are [sic] covered by the Federal Tort Claims Act

The final sentence, although somewhat cryptic, reveals Congress's awareness that FTCA coverage was being considered and that such coverage was also related to the insurance-costs problem.

done so in response to BIA's and IHS's failure to issue the requested report. As the House report explained:

> The Committee has included language to make the *extension of Federal Tort Claims protection* to tribal P.L. 93–638 [ISDA] contractors permanent. It is unfortunate that the Department did not respond in a timely manner to the Committee's direction last year to undertake a study to show if other means of meeting the legal requirement for the Secretary to provide liability coverage for tribal contractors would be preferable. However, since the Department delayed taking action to respond to this directive, the Committee has no choice but to provide the required liability coverage on a permanent basis by *extending the Federal Tort Claims Act coverage.*

H.R. Rep. No. 101–789, at 72 (1990) (emphasis added); *see also id.* at 133 (amendment "make[s] permanent the extension of Federal Tort Claims protection to tribal contractors"). These references suggest that the committee's focus was on the extension of coverage specifically under the FTCA.

Although the validity of presidential signing statements as legislative history is controversial, *see The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 135–37 (1993), we note that President Bush apparently interpreted the 1990 amendment narrowly. In noting his objection to the amendment, the President stated:

> The Act provides that Indian Tribes, tribal organizations, and Indian contractors and their employees shall be considered employees of the United States with respect to claims arising from contracts, grants, and cooperative agreements authorized by the [ISDA] . . . . *The effect of this provision would be to make the United States permanently liable for the torts of Indian Tribes, tribal organizations, and contractors.* This provision is fundamentally flawed because the United States does not control and supervise the day-to-day operations of the tribes, tribal organizations, and contractors.

2 *Pub. Papers of George Bush* 1558, 1559 (1990), *reprinted in* 1990 U.S.C.C.A.N. 3283–4, 3283–5 (Nov. 5, 1990) (emphasis added). The President's language suggests that he read the amendment to cover only tort claims. Presumably his objection would have been even stronger had he construed it to make the federal government liable for contract and other claims as well.

The one conclusion that emerges clearly from the legislative context and history is that Congress's focus was on extending FTCA coverage to ISDA-contracting tribes and tribal organizations (apparently in lieu of liability insurance). Testimony and statements made during hearings held in 1987, 1988, and 1990 similarly reflect an exclusive focus on extending FTCA coverage.[9] There is no indication in the legislative history (of either the 1990 amendment or its precursers) that Congress contemplated indemnification of tribes for contract claims or any other claims outside the scope of the FTCA (such as claims under federal law). The 1990 amendment grew out of an earlier provision (the medical-claim provision) that covers only FTCA torts. It followed Congress's consideration of a similar provision that clearly would have extended coverage only to FTCA torts. In the context of this history, the absence of any indication that Congress meant to extend coverage beyond the FTCA sphere is noteworthy. The legislative history therefore supports a narrow construction of the 1990 amendment as encompassing only claims that are cognizable under the FTCA.[10] *See Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) ("a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute"); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of the[ ] statute[ ] in light of the purposes Congress sought to serve.").

[9] *See, e.g., Department of the Interior and Related Agencies Appropriations for 1991 Hearings Before the Subcomm. on the Dept. of the Interior of the House Comm. on Appropriations*, 101st Cong. 1038 (1990) (statement of Eddie F. Brown, Asst. Secy. for Indian Affairs) (addressing language "to continue coverage of tribal contractors under the Federal Tort Claims Act"), *id.* at 846 (letter of John Jemewouk, Chairman, Alaska Native Health Board, Inc.) (discussing "wisdom (financially and policy-wise) of using the FTCA in lieu of insurance"), *Indian Self-Determination and Education Assistance Act Amendments of 1987: Hearing on S. 1703 Before the Senate Select Comm. on Indian Affairs*, 100th Cong. 25–26 (1987) (statement of Lionel John, Executive Director, United South and Eastern Tribes) (discussing "the issue of the tort claims coverage" and "afford[ing] the tribes the ability to get the tort coverage that the Federal Government, in fact, enjoys in similar situations"), *Indian Self-Determination and Education Assistant Act, Public Law 93–638: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong. 34 (1987) (Sen. Inouye, Chairman) (asking the extent to which indirect costs could be reduced "if tribes were afforded the same protection from tort liability Federal agencies enjoy under the Federal Tort Claims Act"), *id.* at 152 (statement of Sonosky, Chambers & Sachse on behalf of several tribes and tribal organizations) ("We also ask the Committee to consider extending FTCA coverage to the employees who work under 638 contracts with the BIA.").

[10] There is some legislative precedent for extending FTCA coverage to claims brought against entities that are not part of the federal government. In 1976, in response to an analogous insurance crisis faced by manufacturers of the swine flu vaccine, Congress provided that "personal injury" claims based on the vaccine "will be asserted directly against the United States under [the FTCA]." *Wolfe v. Merrill Nat'l Labs., Inc.*, 433 F. Supp. 231, 234 (M.D. Tenn. 1977) (quoting Swine Flu Act, Pub. L. No. 94–380, 90 Stat. 1113 (1976)). Similarly, Congress has extended FTCA coverage to contractors carrying out atomic weapons testing. *See* 42 U.S.C. § 2212(b)(1) (1994) ("The remedy against the United States provided by [the FTCA] for injury, loss of property, personal injury, or death shall apply to any civil action for injury, loss of property, personal injury, or death due to exposure to radiation based on acts or omissions by a contractor in carrying out an atomic weapons testing program under a contract with the United States.") Although none of the few decisions under these provisions addresses whether they encompass only torts that are cognizable under the FTCA, at least one court appears to have assumed that the latter provision is limited at least to tort claims. *See Hammond v. United States*, 786 F.2d 8, 12–13 (1st Cir. 1986) ("This is not the first time Congress has substituted the government as defendant in a certain category of *tort* suits and relegated plaintiffs to an FTCA remedy.") (emphasis added), *id.* at 14 ("It was neither arbitrary nor irrational for Congress to change the law so as to place putative plaintiffs in the same position as any other party suing the United States *in tort*.") (emphasis added).

C. Implications of Alternative Interpretations of the 1990 Amendment

In determining what Congress likely intended as to the scope of the 1990 amendment, it is also instructive to consider the implications and reasonableness of its various possible interpretations. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.").

1. Coverage of Contract Claims

A broad reading of the amendment would encompass not only tort claims, but also contract claims. If a tribe or tribal employee were sued on the basis of an alleged contract entered into while carrying out ISDA functions, and if the phrase "any civil action or proceeding" in the 1990 amendment included such a claim, then it would be "deemed to be an action against the United States" and the United States would be the necessary defendant. For any contract claim in excess of $10,000, exclusive jurisdiction would lie in the Court of Federal Claims. *See* 28 U.S.C. § 1346(a) (1994); 28 U.S.C.A. § 1491 (1994 & West Supp. 1997). As a consequence, a plaintiff would be required to file suit in the Court of Federal Claims in the first instance (or an action filed in a district court could be transferred under 28 U.S.C. § 1631 (1994)), and the United States would defend the claim like any such claim against the federal government. This reading gives rise to a somewhat cumbersome procedure for adjudicating contract claims involving tribal entities—requiring all such claims to be adjudicated in a specialized court in Washington, D.C. rather than locally—and it seems unlikely that Congress intended such a consequence in the absence of any specific legislative evidence that it did.

In addition, a structural anomaly regarding contractors potentially would follow from this broad construction of the amendment. Where a tribe hired a contractor to carry out ISDA functions (as many tribes do), any contract claim that the contractor might have against the tribe apparently would have to be against the United States. But because the 1990 amendment covers "tribal contractors" carrying out ISDA contracts as well as tribes, a subcontractor's breach-of-contract claim against the contractor, at least arguably, also would be deemed an action against the United States.[11] Thus, the contractor would be acting in the role of a government entity vis-a-vis the subcontractor, while acting as a private entity—and one potentially adverse to the government—vis-a-vis the tribe.

[11] *Compare FGS Constructors, Inc. v Carlow*, 64 F.3d 1230, 1234–35 (8th Cir 1995) (holding that the term "Indian contractor" in the 1990 amendment is limited to "tribe-related organizations" and does not include private entities), *with* 2 *Pub. Papers of George Bush* 1558, 1559 (1990), *reprinted in* 1990 U.S.C.C.A.N 3283–4, 3283–5 (Nov. 5, 1990) (1990 amendment makes the United States liable for torts of "Tribes, tribal organizations, and contractors").

These interpretive consequences, combined with (1) the difficulty of squaring contract claims with the statute's FTCA language and (2) the lack of any suggestion in the legislative history that Congress intended to cover contract claims, make this broad reading less reasonable than a reading that excludes contract claims.

Finally, regulations promulgated by the Departments of HHS and the Interior interpret the 1990 amendment to apply only to "*tort claims* arising from the performance of self-determination contracts under the authority of the [ISDA]." 25 C.F.R. § 900.205 (1997) (emphasis added).

2. Coverage of Non-FTCA Tort Claims

If contract claims are not within the scope of the 1990 amendment, the next question is which tort (or tort-like) claims are within its scope. The provision could extend broadly to constitutional tort claims and other federal claims that are outside the scope of the FTCA (such as Title VII of the Civil Rights Act of 1964). On the other hand, it could be limited to "common law torts"—or more precisely, only those torts that are cognizable under the FTCA. It should be noted in this regard that, although it is often stated that the FTCA covers "common law torts," courts have held that liability under the FTCA is determined by state statutory as well as common law.[12]

If the amendment is construed to cover constitutional tort (or "*Bivens*") claims,[13] then such an action against a "tribal employee" acting within the scope of employment in carrying out an ISDA contract would be "deemed to be an action against the United States." The FTCA, however, does not waive the sovereign immunity of the United States for constitutional tort claims. *Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. at 478. Therefore, a *Bivens* plaintiff would have no recourse against the United States—unless the 1990 amendment itself were a waiver of sovereign immunity. Waivers of the federal government's immunity, however, must be "unequivocally expressed" and "construed strictly in favor of the sovereign." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33, 34 (1992) (citations and internal quotation marks omitted). The 1990 amendment cannot plausibly be described as an "unequivocal" expression of Congress's intent to waive the government's immunity for constitutional tort claims. Thus, the United States would have an absolute immunity defense to a *Bivens* claim

[12] *See Richards v United States*, 369 U.S 1, 6–7 (1962) (referring to "principles of law developed in the common law and refined by statute and judicial decision in the various States"); *Jones v. United States*, 773 F 2d 1002, 1003 (9th Cir 1985) (state "statutory and decisional law governs the determination of the United States' liability under the FTCA"), *Waters v. United States*, 812 F Supp 166, 169 (N D. Cal 1993) (FTCA covers claim under state civil rights statute). It is clear, in any event, that constitutional tort claims and other claims based on federal law are not within the FTCA's waiver of sovereign immunity *See Federal Deposit Ins. Corp v Meyer*, 510 U.S. 471, 478 (1994)

[13] *See Bivens v. Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 U S. 388, 397 (1971) (recognizing cause of action against federal employees in their individual capacities for violations of constitutional rights)

brought under the 1990 amendment. Moreover, the amendment's language evidently would immunize the tribal employee from *Bivens* liability, a result that is anomalous given that federal employees generally are not so immunized.[14] As a result, a *Bivens* plaintiff would be without a remedy.[15] Such a result seems unlikely to have been an intended consequence of the 1990 amendment.

A broad construction of the 1990 amendment similarly might result in elimination of a constitutional remedy under the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301–1303 (1994), which provides that tribes "exercising powers of self-government" shall respect certain constitutional rights. 25 U.S.C. § 1302. Although the Supreme Court has held that remedies under the ICRA must be pursued in tribal court, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65–66 (1978), a tribe or tribal entity sued for conduct performed under an ISDA contract could reasonably argue that the 1990 amendment, if interpreted to cover "constitutional torts," immunizes it from liability under the ICRA based on such conduct because the action must be "deemed to be an action against the United States."

These implications of a broad construction of the 1990 amendment lend further support to the conclusion that it extends only to tort claims that are actionable under the FTCA.[16]

III. Representation of Tribes or Tribal Employees Sued for Constitutional Torts

The second question we have been asked is whether the 1990 amendment authorizes representation of tribes or tribal employees sued in their individual capacities for constitutional torts. Because of the amendment's "deemed to be

[14] The FTCA expressly removes constitutional claims from the class of claims for which the remedy against the United States is exclusive. *See* 28 U.S.C. § 2679(b)(2)(A).

[15] It should be noted that it is not entirely clear whether a constitutional tort action against a tribal employee (or an employee of a private contractor) carrying out an ISDA contract would be authorized under *Bivens* and its progeny in the first place. The courts of appeals are divided on the question whether a *Bivens* claim may be brought against individuals who are not federal officers or employees, and the Supreme Court has not addressed the question. Most courts that have resolved the issue have held that *Bivens* claims may be brought against nonfederal defendants engaged in federal action (or acting under color of federal law). *See Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 698–99 (6th Cir. 1996); *F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1318 n.3 (9th Cir. 1989) (citing cases); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 720 n.5 (10th Cir. 1988) (citing cases), *cf. West v. Atkins*, 487 U.S. 42, 54 (1988) (contractor physician acts under color of state law for purposes of 42 U.S.C. § 1983 when treating state inmate).

[16] An additional principle that is potentially relevant in this context is the canon of statutory construction that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). A broad construction of the 1990 amendment encompassing claims other than FTCA tort claims would appear to benefit tribes and tribal employees by providing immunization for constitutional tort and possibly contract and other claims as well as common law tort claims. It is not at all clear, however, that this result is the one "in favor of the Indians." Many of the plaintiffs in these cases presumably are themselves Indians, and therefore immunizing tribes may not benefit Indians overall, particularly to the extent that remedies under the Constitution and the Indian Civil Rights Act are vitiated entirely. *Cf. Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976) (canon has no application where "the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal members"). Even if this canon applied, it would not overcome the evidence of legislative history and other *United States v. Thompson*, 941 F.2d 1074, 1077–78 (10th Cir. 1991) (canon of construction in favor of Indians is applied when intent of Congress remains unclear after consideration of statutory language and legislative history), *cert. denied*, 503 U.S. 984 (1992).

an action against the United States" clause, the question of providing representation for tribes or tribal employees would arise only if the United States were not substituted in a constitutional tort action. We have concluded above that the amendment's language "any civil action or proceeding involving such claims" encompasses only tort claims that are cognizable under the FTCA, a category that does not include constitutional tort claims. Thus, the proviso's phrase "will be defended by the Attorney General" does not apply to constitutional tort claims and does not authorize representation with respect to such claims.

The only other language in the 1990 amendment that could arguably authorize such representation is the first portion of the provision, which states that "[w]ith respect to claims resulting from the performance of functions" under an ISDA contract, tribes are deemed to be part of the federal government and tribal employees are deemed employees of the government "while acting within the scope of their employment in carrying out the contract or agreement." This reference to "claims," however, must be read *in pari materia* with the amendment's subsequent proviso, to make sense of both the statute's structure and the legislative history and purpose. *See Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). Thus, the phrase "claims resulting from the performance of functions" is limited to tort claims that are actionable under the FTCA and does not refer to constitutional tort claims. Accordingly, the 1990 amendment does not authorize, or otherwise address, representation of tribes or tribal employees sued in their individual capacities for constitutional torts.[17]

IV. Conclusion

For the foregoing reasons, we conclude that the 1990 amendment to the Indian Self-Determination and Education Assistance Act (1) does not cover actions involving claims other than tort claims that are actionable under the Federal Tort Claims Act, and (2) does not authorize representation of tribes or tribal employees sued in their individual capacities for constitutional torts.

DAWN E. JOHNSEN
Acting Assistant Attorney General
Office of Legal Counsel

[17] We do not address whether federal representation of a tribe or a tribal employee sued for a constitutional tort may be authorized by any other statute, such as 28 U.S.C. § 517 (1994) (allowing the Attorney General to send an officer of the Department of Justice "to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State")

Authority of Executive Office of the President to Require Independent Agencies to Conduct Background Checks of Noncareer SES Candidates

No office or agency within the Executive Office of the President may require independent agencies to conduct certain background checks of candidates for noncareer Senior Executive Service positions.

April 30, 1998

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked whether the Office of Presidential Personnel ("Presidential Personnel") may require that so-called independent agencies ensure that candidates for noncareer Senior Executive Service ("SES") positions undergo certain reviews regarding their personal backgrounds, such as a review of Internal Revenue Service records about any tax delinquency. In particular, you have asked whether Presidential Personnel could prescribe such a rule for hiring noncareer SES personnel at the Merit Systems Protection Board. As we already have advised orally, we do not believe that any office or agency within the Executive Office of the President ("EOP"), including Presidential Personnel, may exercise that authority.[1]

Involvement by the EOP in particular hiring decisions for SES positions at independent agencies is specifically limited by 5 U.S.C. § 3392(d):

> Appointment or removal of a person to or from any Senior Executive Service position in an independent regulatory commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President.

5 U.S.C. § 3392(d) (1994). The Report of the Senate Committee on Governmental Affairs expressly noted that subsection (d) was added "in order to ensure that independent regulatory agencies are not subject to political control in the appointment of their top noncareer executives," and that "this insulation from the White House in appointments is necessary to maintain the independence of these agencies, as intended by the Congress." S. Rep. No. 95–969, at 76 (1978). Section 3392(d) thus specifically prohibits the EOP from reviewing any particular hiring decision for noncareer SES positions at independent agencies.

[1] Far more complicated questions would be presented if the President himself, using his constitutional authority as head of the executive branch, U.S. Const. art. II, § 1, and his statutory authority over the civil service, *see, e.g.*, 5 U.S.C. §§ 3301, 7301, directed independent agencies to follow the procedures in question. You have not asked us to address these questions at this time. If you wish us to do so, we would be happy to undertake that analysis.

A related provision governing appointment of personnel at the Merit Systems Protection Board contains parallel limitations on EOP review of appointment decisions. Section 1204 of title 5, which authorizes the Chairman of the Board to appoint personnel "as may be necessary to perform the functions of the Board," provides:

> Any appointment made under this subsection shall comply with the provisions of this title, except that such appointment shall not be subject to the approval or supervision of the Office of Personnel Management or the Executive Office of the President (other than approval required under section 3324 or subchapter VIII of chapter 33).

5 U.S.C. § 1204(j) (1994). The approval required by § 3324, referred to in parentheses, pertains to the appointment to a position "classified above GS–15," which (with certain exceptions) "may be made only on approval of the qualifications of the proposed appointee by the Office of Personnel Management." 5 U.S.C. § 3324(a) (1994). Subchapter VIII of chapter 33, in turn, refers to 5 U.S.C. §§ 3391–3397, and therefore incorporates the limitations on EOP and OPM approval set forth in § 3392. As the conference report explains, § 1204(j) was intended "to prevent 'political clearance' of appointments." S. Rep. No. 95–1272, at 133 (1978). It was thought to be "inappropriate for any unit of the White House or the Office of Personnel Management to screen such candidates." *Id.*

As this statutory scheme makes clear, Presidential Personnel is specifically prohibited from directly or indirectly reviewing the appointment of any particular individual to an SES position at an independent regulatory commission. These prohibitions apply with equal force to appointment or removal decisions regarding such positions at the Merit Systems Protection Board.

These provisions, while specifically applicable only to decisions about hiring or firing particular employees, also lead to the conclusion that Presidential Personnel cannot impose a more general requirement for the procedures to be followed by independent agencies in selecting SES personnel. Presidential Personnel could enforce such a requirement only by reviewing and refusing to approve particular candidates that independent agencies wanted to hire without completing the mandated procedures. But it is precisely such review and approval that 5 U.S.C. §§ 1204(j) and 3392(d) forbid.[2]

Finally, neither 5 U.S.C. § 1204(j) nor 5 U.S.C. § 3392(d) would bar Presidential Personnel from recommending to independent agencies that they conduct the background reviews at issue here. Such recommendations, unlike requirements, would

[2] We assume that the relevant question here is whether Presidential Personnel can "require" the general procedures in the sense of compelling obedience to them In concluding that Presidential Personnel may not compel obedience, we do not mean to suggest that it would be unlawful to issue such a directive, but rather that the directive would be legally ineffective unless Presidential Personnel took further steps that the law would forbid

not involve review or approval of particular candidates for hiring and therefore would not be barred by those statutes.

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Constitutionality of Proposed Limitations on Tobacco Industry

Congress has the authority under the Constitution to impose significant new regulations on tobacco companies, including (1) restrictions on advertising and marketing of tobacco products that are tailored to prevent access to advertising by minors; (2) contingent monetary exactions, to be collected from tobacco companies if tobacco use by minors fails to meet prescribed targets; and (3) requirements that companies disclose certain documents to the public and to federal regulators

Consent by the tobacco companies to increased federal regulation, which those companies might grant in order to qualify for federally prescribed limits on liability, would permit Congress to establish additional restrictions on tobacco advertising that it could not impose directly.

May 13, 1998

STATEMENT BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

Mr. Chairman, thank you for inviting the Department of Justice to testify regarding the constitutionality of limitations on the tobacco industry that are currently under consideration in the Senate. We begin by addressing Congress's constitutional authority to regulate the tobacco industry without that industry's consent. We will explain that, even in the absence of consent, the Congress may impose important restrictions on the tobacco industry in furtherance of the public health. Included among such permissible regulations are (1) meaningful restrictions on the advertising and marketing of tobacco products; (2) the direct imposition of "lookback" assessments; and (3) document disclosure requirements. We address these particular categories because some have questioned Congress's power in these areas. Finally, we address the benefits of obtaining industry consent.

I. *Congress Can Enact Comprehensive Tobacco Legislation Without the Industry's Consent*

Last September, the President announced five principal goals for comprehensive tobacco legislation. Those goals include:

> * a comprehensive plan to reduce teen smoking, including the imposition of assessments that would increase cigarette prices by amounts necessary to meet youth smoking targets;
>
> * express reaffirmation that the Food and Drug Administration ("FDA") has full authority to regulate tobacco products;
>
> * changes in the way the tobacco industry does business, especially in the area of advertising directed at children;

* progress toward other critical public health goals, such as the expansion of smoking cessation and prevention programs and the reduction of secondhand smoke; and

* protection for tobacco farmers and their communities.

Certainly there would be significant advantages to having the tobacco industry participate in the nation's effort to reduce youth smoking, hence the President has indicated that he would prefer the industry do so. But Congress has ample authority to enact comprehensive tobacco legislation that achieves these crucial goals without the industry's consent.

For example, consistent with the Constitution, Congress may enact, without industry consent, provisions that would:

* impose assessments on all tobacco manufacturers that would increase the price of cigarettes by $1.10 per pack over five years;

* confirm full FDA authority;

* establish marketing and advertising restrictions that would track the FDA's regulation;

* impose extensive labelling and ingredient disclosure requirements;

* fund programs that would protect tobacco farmers and their communities;

* impose significant lookback assessments that would ensure continued reductions in youth smoking;

* establish licensing and registration provisions that would prevent the creation of a black market; and

* require disclosure of relevant, non-privileged documents.

The Department believes that Congress can and should pass a law that achieves all of the above objectives, with or without the industry's consent. Every day we delay, 3,000 more of our children take up smoking; at present rates, 1,000 of them will die prematurely as a result. Congress has the constitutional power to rewrite their future with a comprehensive tobacco bill.

II. *Congress or the FDA Can Impose Marketing Restrictions on the Tobacco Industry Without Its Consent*

A. *Direct Imposition of the FDA Regulations*

Under prevailing Supreme Court precedent, the government has the authority to impose restrictions on tobacco product advertising, where such restrictions are appropriately tailored to prevent access to advertising by minors, who may not lawfully purchase the advertised product. Thus, while there are certain advertising restrictions that may need industry consent in order to survive constitutional challenge, it is important not to lose sight of the important advertising restrictions—such as those set forth in the FDA regulation—that may be imposed directly.

Under the test set out by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the threshold question is whether the regulated speech is "related to unlawful activity" or is misleading. *Id.* at 564. If so, the speech can be freely regulated by the government. Because children cannot lawfully purchase tobacco products, Congress may restrict tobacco advertising that promotes those unlawful transactions.

Tobacco advertising does, however, provide information to adults, who may lawfully purchase tobacco products. Thus, it is necessary to consider the remainder of the *Central Hudson* test in evaluating the constitutionality of restrictions on tobacco advertising. That test asks (1) "whether the asserted governmental interest is substantial;" (2) "whether the regulation directly advances the governmental interest asserted;" and (3) "whether [the regulation] is not more extensive than is necessary to serve that interest." *Id.* at 566. There is no question that the interest in protecting children from becoming addicted to tobacco products is substantial and that marketing restrictions such as those in the FDA's regulation advance that interest. That leaves only the last part of the test—the "fit."

This inquiry does not amount to a "least restrictive means" test. Instead, the Supreme Court's decisions require "reasonable" fit between the government's ends and the means chosen to accomplish those ends. *See Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989). The fit need not be perfect, only reasonable; it need not be the single best disposition, only one whose scope is in proportion to the interest served. *See id.* Accordingly, a commercial speech restriction will fail the narrow-tailoring requirement *only* if it "burden[s] substantially more speech than necessary." *United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993). Critically for present purposes, courts likely would find that a restriction is sufficiently tailored if it leaves open adequate alternative channels for the communication of commercial speech. *See Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995).

As we have argued in the pending litigation, the FDA's regulation falls within the permissible scope of the government's power. As the Supreme Court has made clear, "[t]he First Amendment's concern for commercial speech is based on the

informational function of advertising." *Central Hudson*, 447 U.S. at 563. The FDA regulations have been carefully tailored to preserve this informational function of tobacco advertising.

The FDA restrictions are also carefully tailored to achieve their end—reduction of tobacco product advertising to minors. Thus, the FDA regulation bars the use of image and color in the advertising of tobacco products but allows it in designated adult publications and facilities. It bans outdoor advertising—including so-called tombstone advertising—within 1,000 feet of schools and playgrounds, but allows tombstone advertising elsewhere. It prohibits brand-name sponsorship of athletic, social and cultural events, but permits sponsorship in company names. The regulation restricts those aspects of tobacco advertising that are most likely to be influential to minors while ensuring that adult publications and facilities are excepted from its reach and that basic product and price information will be generally available in other fora. For these reasons, the FDA regulation is fully constitutional.

We note that the Supreme Court's recent decision in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), is consistent with our analysis. There, the Court considered a broad ban on price advertising about alcohol products. A majority of the Court reaffirmed the continuing validity of the *Central Hudson* test in striking down the ban, and even Justice Stevens' arguably more protective approach did not purport to limit the ability of government to regulate advertising in a manner that is tailored to the legitimate interest in protecting those who are not lawful consumers of the product.

Indeed, the Court of Appeals for the Fourth Circuit recently applied the Court's decision in *44 Liquormart* in upholding a Baltimore city ordinance that substantially limited, but did not prohibit, the outdoor advertising of alcohol and tobacco products. *See Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Penn Adver. of Baltimore, Inc. v. Mayor of Baltimore*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997). The Fourth Circuit noted that, in contrast to the price advertising ban at issue in *44 Liquormart*, the Baltimore ordinance represented a tailored measure aimed at protecting minors who could not lawfully purchase tobacco or alcohol products. It was not a general prohibition aimed at keeping lawful consumers in the dark. We believe that this reasoning strongly supports the FDA regulation.

In light of these constitutional principles, Congress has the authority to impose significant restrictions on tobacco advertising in the absence of industry consent without infringing First Amendment rights. To that end, the Department believes that any comprehensive tobacco legislation must confirm FDA's authority to promulgate such regulations and must reaffirm the FDA's authority to have promulgated the advertising restrictions that are already on the books.

B. *Making Additional Advertising Restrictions Conditional*

Certain advertising restrictions that are set forth in the June 20th resolution, as well as several of the bills before the Senate, go beyond those contained in the FDA regulation. These additional advertising restrictions raise significant constitutional concerns that are not presented by the FDA regulation. They would restrict more substantially *adults'* access to commercial information because they generally do not contain the important exceptions for adult facilities and publications, and for geographic areas not frequented by children, that help to make the FDA regulation constitutional. As a result, legislation that directly imposed these additional restrictions would be vulnerable to significant constitutional challenge.

We believe, however, that legislation could be crafted, consistent with the Constitution, in which manufacturers could agree to comply with the additional restrictions in exchange for certain benefits. Such an agreement could be accomplished through a protocol between a participating manufacturer and the federal government, in which, among other things, a manufacturer could choose to receive certain benefits, such as limitations on liability, in return for an agreement not to engage in certain additional types of advertising of tobacco products. Although such provisions would present novel constitutional questions, we believe that they should be upheld.

C. *Application of the Unconstitutional Conditions Doctrine*

In our view, the "unconstitutional conditions" doctrine should not bar the government from including the additional advertising restrictions in a properly structured protocol. In general, the doctrine prohibits the government from conditioning benefits, such as federal funding, on the recipient's willingness to forego the exercise of constitutional rights. There are strong arguments, however, that the doctrine should apply with less force in this unique context.

First, virtually every speech restriction that the Supreme Court has analyzed under the unconstitutional conditions doctrine has involved a limitation on fully protected speech. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364 (1984). A strong argument can be made that there is more room in the commercial speech context for a distinction to be drawn between "burdens" and "benefits" than there is in the non-commercial speech context. The greater "hardiness" of commercial speech, inspired as it is by the profit motive, makes it less likely to be "chilled" by overbroad legislation. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). This same hardiness makes it less likely that the offer of government benefits will impermissibly "coerce" commercial speakers into foregoing the exercise of First Amendment rights. Thus, offers of benefits that would be suspect if put forth

in exchange for restrictions on political speech should not be similarly suspect if put forth in exchange for restrictions on commercial speech.

Second, we believe that a protocol could offer what should properly be understood to constitute a constitutionally permissible "benefit" rather than a constitutionally suspect "burden." Such a protocol could be structured so that a manufacturer that elects not to participate in the protocol would be no worse off than it would have been in the absence of the offer of the "benefit." A protocol of this sort would be distinguishable from the provision invalidated in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). There, the lead opinion explained that an otherwise unconstitutional prohibition on virtually all price advertising could not be justified as a permissible condition on a retailer's license to sell. That analysis should not bar the government from conditioning what could only be described as a benefit to the industry on a manufacturer's compliance with more limited advertising restrictions that are intended to serve a legitimate governmental interest.

As a result, although these are novel questions for which there is no clear precedent, we believe that legislation that contains the additional advertising restrictions in a conditional form can be drafted in a manner that should survive constitutional challenge. For example, a protocol between a participating manufacturer and the federal government, in which, among other things, the manufacturer chooses to accept certain limitations on liability in return for an agreement not to engage in the outdoor advertising of tobacco products, should survive constitutional challenge.

It is important to emphasize that our analysis of how the unconstitutional conditions doctrine should be applied in this context is predicated on the unique characteristics of commercial speech. A different analysis would apply to restrictions outside the commercial speech context, such as restrictions on lobbying by the tobacco industry. Therefore, we do not believe that Congress should enact legislation that includes any restrictions on political/noncommercial speech—whether imposed directly or conditionally. The inclusion of such restrictions would raise grave constitutional concerns.

III. *Congress Can Impose Lookback Assessments Without the Industry's Consent*

A. *Background*

A number of proposals for comprehensive tobacco legislation call for the imposition of "lookback" assessments from tobacco companies. Unlike the annual assessments, which apply regardless of the prevalence of youth smoking, lookback assessments are contingent and take effect only if reductions in tobacco use by minors fail to meet prescribed targets. There are two distinct types of possible lookback assessments, which could apply singly or in combination: industry-wide assessments based on aggregate figures for youth consumption of particular classes

of tobacco products, and company-specific assessments based on brand-by-brand youth consumption data.

Some observers have argued that the imposition of lookback assessments on tobacco companies that neither consented to the lookback regime nor violated specific marketing and distribution restrictions would violate rights guaranteed by the substantive component of the Due Process Clause of the Fifth Amendment, the Takings Clause, and the Bill of Attainder Clause.

We do not believe that these objections are well-founded. Properly designed lookback assessments, in our view, should survive constitutional challenge under current doctrine.

B. *Substantive Due Process*

Several of the pending tobacco bills propose to collect annual assessments from tobacco companies. These annual assessments are designed to serve two principal purposes—increasing price to dampen youth consumption and supporting other government efforts to reduce this consumption (and to address its adverse health effects). We are confident that the imposition of annual assessments on tobacco companies would be upheld as a reasonable means of promoting these legitimate federal objectives.

Lookback assessments, triggered by evidence of persistently high tobacco use by minors, can be structured to serve many of the same purposes as the annual assessments and thus be integrally related to achieving the principal objectives of those assessments. Lookback provisions supplement the annual assessments in the event that the annual assessments prove to be insufficient to achieve Congress's goals. At the same time, they encourage the industry—which may be uniquely situated to develop innovative strategies—to take action to minimize youth smoking. Thus, lookback provisions that augment the annual assessments are no less reasonable than the annual assessments themselves, and would survive a challenge under the Supreme Court's substantive due process jurisprudence.

In explaining the limited reach of substantive due process doctrine on legislation that regulates economic activity, the Supreme Court has stated that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). The Supreme Court has upheld various federal assessments designed to generate revenues needed to address the costs of particular economic activities. In *Turner Elkhorn*, for example, the Court upheld federal legislation that imposed liability on coal operators to finance black lung benefits for miners who retired before enactment of that legislation. Similarly, in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), the Court upheld the imposition of liability

on employers to meet pension shortfalls attributable to employers' earlier withdrawals from multi-employer pension plans.

In other contexts, the Supreme Court has exhibited a similar reluctance to upset legislative judgments pertaining to the proper adjustment of the "burdens and benefits of economic life." In two such cases, *Alaska Fish Salting & By-Prods. Co. v. Smith*, 255 U.S. 44 (1921) (Holmes, J., writing for a unanimous Court), and *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974), the Court upheld against substantive due process challenges substantial excise taxes designed for the purpose of inhibiting disfavored business activities.

These decisions strongly support Congress's authority to impose lookback assessments without regard to company consent. The proposed lookback assessments for tobacco companies would raise fewer constitutional questions than the assessments at issue in *Turner Elkhorn* and *Pension Benefit Guaranty* because the lookback assessments would be strictly prospective in operation. Unlike the businesses that incurred liability under the schemes upheld in these cases, no tobacco company would have to pay a lookback assessment based on events that occurred prior to enactment of the comprehensive tobacco bill. In other respects, lookback provisions would operate in a manner similar to the retroactive black lung and pension assessments that the Court upheld in *Turner Elkhorn* and *Pension Benefit Guaranty*. Moreover, although the assessments are not an excise tax, because they would increase prices in order to reduce youth tobacco consumption, they could be sustained based on the analysis that *Alaska Fish Salting* and *City of Pittsburgh* relied upon to uphold excise taxes on the disfavored activities at issue there.

While some pending bills refer to lookback assessments as "penalties," we believe that this phrasing does not accurately describe their function or purpose. To the contrary, they are inherently regulatory in nature, creating salutary incentives, raising prices, and otherwise supporting further efforts to reduce youth consumption, where such consumption has not been reduced sufficiently without them.

Company-specific assessments are a rational and constitutional approach as well. Like industry-wide assessments, they provide salutary incentives for tobacco companies both to comply with direct statutory and regulatory restrictions on marketing to minors and to devise additional measures to reduce youth tobacco consumption, based upon the companies' unique expertise on the causes of such consumption. Indeed, company-specific assessments may be crucial to the effectiveness of the overall lookback scheme because they relieve free-rider problems. Without company-specific assessments, individual companies might have incentives to recruit new underage users at the expense of the entire industry. Company-specific lookback assessments also will help pay for the increased costs to society of high rates of youth smoking, at the expense of companies who profit the most from sales to minors. They may, in addition, contribute to further price

increases where the annual assessments failed to prompt sufficient reductions in youth consumption. Thus, company-specific lookback assessments that are designed to serve these purposes are not "arbitrary and irrational" and therefore do not violate the substantive due process doctrine.

Some have argued that tobacco manufacturers should be given the opportunity to argue that they are "innocent" and that high youth consumption rates are not attributable to company misdeeds or failure aggressively to fight youth tobacco consumption. *See, e.g., Bennis v. Michigan*, 516 U.S. 442, 469 (1996) (Stevens, J., dissenting) (criticizing deterrent rationale that state offered to justify the forfeiture of an innocent co-owner's interest in a car that the other co-owner used to commit a crime). This argument, however, does not respond at all to some of the purposes behind lookback assessments, including, for example, raising the price. Moreover, even considering only the deterrence rationale, lookback assessments would survive constitutional scrutiny. Applying current doctrine, a court would be likely to accept the rationality of legislative judgments (1) that an "innocent company" defense would unduly undermine the deterrent effect of lookback incentives, or (2) that an innocent company defense should not be recognized because companies with excessive youth smoking rates could always do more to reduce youth consumption.

C. *The Just Compensation and Bill of Attainder Clauses*

Assertions that lookback assessments would violate the Just Compensation and Bill of Attainder Clauses are also unfounded. As Chief Justice Rehnquist observed for the Court in *Bennis*, when the federal government acquires property through the lawful exercise of powers other than the power of eminent domain, there is no requirement that it pay compensation. 516 U.S. at 454. Furthermore, the Supreme Court has stated that "it would be surprising indeed to discover" that economic regulation, though sustainable against a due process challenge, would nevertheless be found to violate the Takings Clause. *Concrete Pipe & Prods. of Cal. Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 641 (1993).

The Bill of Attainder Clause prohibits the singling out of particular individuals or entities for legislatively mandated punishment. *E.g., United States v. Brown*, 381 U.S. 437 (1965). The lookback provisions would apply to all manufacturers of tobacco products and would operate as one component of comprehensive industry-wide reform legislation. Legislation of this scope does not single out individuals or entities for adverse treatment within the meaning of the Bill of Attainder Clause. Moreover, as stated in the earlier discussion of substantive due process issues, there is no apparent need for Congress to structure lookback assessments as punishments for tobacco company misconduct.

IV. *Congress Can Impose Document Disclosure Requirements on the Tobacco Industry Without Its Consent*

Many of the proposed bills, as well as the June 20th resolution, include provisions that would require tobacco manufacturers to disclose corporate documents to the public and to make additional document disclosures to regulatory agencies, such as the FDA. These contemplated provisions often, but do not always, make consent to these disclosure requirements a condition of a participating manufacturer's receipt of certain specified benefits. Although some have argued that document disclosure requirements violate the Takings and Due Process Clauses, as well as Fourth Amendment rights, we believe that such requirements may be imposed consistent with the Constitution even in the absence of provisions conditioning benefits on industry consent.

As an initial matter, it is our understanding that any document disclosure provision, even if imposed directly, would be limited in application to those entities that wished to continue manufacturing tobacco products. In this respect, even seemingly mandatory document disclosure requirements are in an important sense "consensual" for purposes of evaluating challenges to them brought under the Takings or Due Process Clauses.

The leading case concerning the application of the Takings Clause to federal document disclosure requirements is *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). There, Monsanto sued the Environmental Protection Agency ("EPA") for the Agency's use and disclosure of health, safety, and environmental data that state law protected as trade secrets but that the company had submitted in order to register its products for sale within the United States as required by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). The Court found that Monsanto was entitled to compensation for EPA's use and disclosure of the information that the company had submitted between 1972 to 1978, when FIFRA contained an explicit assurance that registration data would be kept confidential. *Id.* at 1011. On the other hand, the Court rejected Monsanto's claim to compensation for EPA's use and disclosure of the data that the company had submitted before 1972 and after 1978, periods during which FIFRA contained no such assurance.

The Court specifically rejected Monsanto's argument that FIFRA's imposition of a data-disclosure requirement, as a precondition to the registration of pesticides for sale within the United States, represented an unconstitutional condition on access to a valuable government benefit:

> [A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data in

> exchange for the economic [benefit] of a registration can hardly be called a taking.

Id. at 1007.

Ruckelshaus suggests that continued authorization to market tobacco products within the United States constitutes a valuable governmental benefit that may be conditioned on document disclosure requirements. Following the enactment of federal legislation making these terms clear, any tobacco company that continued to sell its products within the United States would be treated as having accepted the federal disclosure program. *See id.* at 1007 n.11.

Moreover, the takings issue arose in *Ruckelshaus* only because federal law required the public disclosure of material that state law would clearly have protected as trade secrets. Some tobacco proposals are further insulated from a takings challenge because they require material that state law protects as trade secrets (or under attorney-client privilege) to be disclosed only to government officials on a confidential basis. The takings claim would then have to be either that (1) the documents themselves—rather than the proprietary information contained therein—constituted property that had been taken by federal law, or (2) the costs of complying with the disclosure provisions were sufficiently burdensome as to constitute a taking. Takings claims of these latter types are unlikely to succeed.

The D.C. Circuit's ruling that a federal statute requiring former President Nixon to make available his presidential papers constituted a taking is not to the contrary. *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992). *Ruckelshaus* suggests that a far different analysis should apply where, as here, the disclosure requirement is a legitimate condition on a regulated industry's receipt of a valuable governmental benefit—the continued authority to participate in the United States tobacco market. In addition, in contrast to the Nixon papers, it is doubtful that exclusive company access to the corporate records of the tobacco industry would have much value apart from the trade secret information contained therein, which we presume would not be made available to the public. Finally, it should be noted that many of the documents that would be subject to production have already been produced in the course of discovery in prior or pending litigation, and that such documents would be subject to discovery in future litigation.

We also believe that a due process challenge to the document disclosure provisions would fail. Such a provision would likely be assessed as economic regulation, which is ordinarily accorded a substantial presumption of constitutionality. *See Turner Elkhorn*, 428 U.S. at 15. Due Process, as applied to statutes imposing or adjusting economic burdens, generally requires no more than "a legitimate legislative purpose furthered by [a] rational means." *Pension Benefit Guarantee*, 467 U.S. at 729. Thus, so long as the disclosure requirement, as well as the attendant compliance costs, are rationally related to a legitimate governmental interest,

as we believe they would be, they should survive whatever due process challenge may arise.

Finally, we do not believe that the Fourth Amendment would bar the federal government from requiring manufacturers to submit a substantial number of their corporate records to a designated depository that would be open to public inspection. The Supreme Court has consistently upheld broad corporate disclosure requirements against Fourth Amendment challenge, whether such disclosure has been mandated by subpoena or by general legislation. *See California Bankers Ass'n v. Schultz*, 416 U.S. 21 (1974) (upholding the Bank Secrecy Act); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946) (upholding a subpoena). In so doing, the Supreme Court has explained that

> corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. . . . Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with law and the public interest.

California Bankers Ass'n, 416 U.S. at 65–66 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 651–52 (1950)) (citations omitted).

In sum, the industry's consent is not needed in order to permit the federal government to enact disclosure requirements on the tobacco industry. So long as the requirement would reasonably serve the federal government's regulatory interests and would not require tobacco companies to disclose documents that are privileged or to make public material that contains trade secrets, we see little risk of a successful constitutional challenge.

V. *The Advantages of Participation by the Industry*

Although Congress can enact effective tobacco legislation without industry consent, participation of the tobacco industry would have advantages. The tobacco industry is in the best position to change its business practices in a manner that keeps cigarettes away from children. Moreover, consent of the regulated entity would substantially minimize the likelihood that any constitutional challenge would succeed. Further, some restrictions, in particular certain advertising restrictions that go beyond the FDA regulation, may depend upon consent in order to survive constitutional review. Finally, there are other advantages to obtaining industry consent, such as reducing the likelihood of protracted legal challenges and minimizing delay in implementing the provisions of the Act.

Some of the bills before Congress seek to accomplish the reduction in litigation through provisions that would forbid tobacco companies from challenging the bill's advertising restrictions or that would withdraw benefits from companies if they brought a legal challenge to the restrictions. We do not believe that these are sound approaches because there is a significant chance that a court would invalidate such provisions as a restriction on fully protected First Amendment activity—namely, constitutional litigation.

We note, however, that a protocol could provide that manufacturers would receive benefits *only if* they were subject to certain legal requirements; thus, even if the provisions that directly imposed certain advertising restrictions were struck down, the manufacturers could still be made subject to those restrictions, which could be included as independent terms of the protocol. Manufacturers who signed on to the protocol would therefore have little incentive to challenge the direct imposition of the restrictions.

It is important to stress that consent is not a panacea and that even voluntary provisions would still be open to substantial challenge. We believe, however, that securing the industry's cooperation would reduce the risks of protracted litigation.

VI. *Conclusion*

The conclusion that should be drawn from this discussion is that there are advantages to having the tobacco industry's participation in the nation's effort to reduce youth smoking, but that Congress should not allow the lack of such consent to impede it from legislating to achieve the goals that the President has set forth for comprehensive tobacco legislation. Even in the absence of consent, Congress can increase the price of cigarettes, impose appropriately tailored, but still significant, advertising restrictions on the industry, and achieve the important public health goals that the President has identified.

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Whistleblower Protections for Classified Disclosures

A Senate bill addressing the disclosure to Congress of classified "whistleblower" information concerning the intelligence community is unconstitutional because it would deprive the President of the opportunity to determine how, when and under what circumstances certain classified information should be disclosed to Members of Congress.

A House bill addressing the same subject is constitutional because it contains provisions that allow for the exercise of the President's constitutional authority.

May 20, 1998

STATEMENT BEFORE THE
PERMANENT SELECT COMMITTEE ON INTELLIGENCE
U.S. HOUSE OF REPRESENTATIVES

I am pleased to be here to present the analysis of the Department of Justice concerning the constitutionality of S. 1668 and H.R. 3829, two bills that address disclosure to Congress of classified "whistleblower" information concerning the intelligence community.

As the Department has previously indicated, it is our conclusion that S. 1668, like the Senate passed version of section 306 of last year's Intelligence Authorization bill, is unconstitutional.[1] It is unconstitutional because it would deprive the President of the opportunity to determine how, when and under what circumstances certain classified information should be disclosed to Members of Congress—no matter how such a disclosure might affect his ability to perform his constitutionally assigned duties. In contrast, H.R. 3829 is constitutional because it contains provisions that allow for the exercise of that authority.

I begin by briefly summarizing the principal provisions of S. 1668 and H.R. 3829. I then review the relevant constitutional history and doctrine. I conclude by applying the relevant constitutional principles to the two bills. Because other witnesses at the hearing today can best address the practical concerns posed by legislation in this area, my remarks are limited to the relevant constitutional considerations.

I.

A.

S. 1668 would require the President to inform employees of covered federal agencies (and employees of federal contractors) that their disclosure to Congress

[1] In addition, the Department of Justice took a similar position with respect to comparable legislation in a brief that it filed in the Supreme Court in 1989 *See* Brief for Appellees, *American Foreign Serv Ass'n v Garfinkel*, 488 U.S 923 (1988) (No. 87-2127).

of classified information that the employee (or contractor) reasonably believes provides direct and specific evidence of misconduct "is not prohibited by law, executive order, or regulation or otherwise contrary to public policy." [2] The misconduct covered by the bill includes not only violations of law, but also violations of "any . . . rule[ ] or regulation," and it encompasses, among other things, "gross mismanagement, a gross waste of funds, [or] a flagrant abuse of authority." [3]

S. 1668 would thus vest any covered federal employee having access to classified information with a unilateral right to circumvent the process by which the executive and legislative branches accommodate each other's interests in sensitive information. Under S. 1668, any covered federal employee with access to classified information that—in the employee's opinion—indicated misconduct could determine how, when and under what circumstances that information would be shared with Congress. Moreover, the bill would authorize this no matter what the effect on the President's ability to accomplish his constitutionally assigned functions. As discussed below, such a rule would violate the separation of powers.[4]

B.

H.R. 3829 would amend the Central Intelligence Agency Act and the Inspector General Act of 1978 to provide a means for covered executive branch employees and contractors to report to the Intelligence Committees certain serious abuses or violations of law or false statements to Congress that relate to "the administration or operation of an intelligence activity," as well as any reprisal or threat of reprisal relating to such a report. Under H.R. 3829, any employee or contractor who wishes to report such information to Congress would first make a report to the inspector general for the Central Intelligence Agency or their agency, as appropriate. If the complaint appears credible, the relevant inspector general would be required to forward the complaint to the head of his or her agency, and the head of the agency would generally be required to forward the report to the Intelligence Committees. Moreover, if the inspector general does not transmit the complaint to the head of the agency, the employee or contractor would generally be

[2] Section 1(a)(1)(A)

[3] *Id.* 1(a)(2)(A), (C)

[4] The Supreme Court has employed three principles in resolving separation of powers disputes First, where "[e]xplicit and unambiguous provisions of the Constitution prescribe and define just how [governmental] powers are to be exercised," *INS v Chadha*, 462 U S 919, 945 (1983), the constitutional procedures must be followed with precision Second, where the effect of legislation is to vest Congress itself, its members, or its agents with "'either executive power or judicial power,'" the statute is unconstitutional *Metropolitan Wash Airports Auth. v Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S 252, 274 (1991) (citation omitted). Finally, legislation that affects the functioning of the Executive may be unconstitutional if it either "'impermissibly undermine[s]' the powers of the Executive Branch" or "'disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions'" *Morrison v Olson*, 487 U S 654, 695 (1988) (citations omitted) Because we conclude that S 1668 would violate separation of powers under even the most lenient of these tests, there is no need to resolve whether one of the more stringent standards applies

permitted to submit the complaint—under defined conditions—to the Committees directly.

Significantly, unlike S. 1668, H.R. 3829 provides that the head of the agency or the Director of Central Intelligence may determine "in the exceptional case and in order to protect vital law enforcement, foreign affairs, or national security interests" not to transmit the inspector general's report to the Intelligence Committees and not to permit the employee or contractor directly to contact the Intelligence Committees.[5] Whenever this authority is exercised, the head of the agency or the Director of Central Intelligence must promptly provide the Intelligence Committees with his or her reasons for precluding the disclosure. In this manner, H.R. 3829 would provide a mechanism for congressional oversight while protecting the executive interest in maintaining the strict confidentiality of classified information when necessary to the discharge of the President's constitutional authority. As a result, unlike S. 1668, H.R. 3829 is consistent with the constitutional separation of powers.

II.

A host of precedents, beginning at the founding of the Republic, support the view that the President has unique constitutional responsibilities with respect to national defense and foreign affairs.[6] As was recognized in the *Federalist Papers* and by the first Congresses, secrecy is at times essential to the executive branch's discharge of its responsibilities in these core areas. Indeed, Presidents since George Washington have determined on occasion, albeit very rarely, that it was

[5] *See id* § 2(a), proposed new paragraph (5)(E) to be added to subsection (d) of section 17 of the Central Intelligence Agency Act of 1949, 50 U S.C § 403q (1994 & Supp. II 1996), H R 3829, at § 2(b)(1), proposed new section 8H(e) to be added to the Inspector General Act of 1978, 5 U S.C app § 8 (1994 & Supp. II 1996).

[6] The President's national security and foreign affairs powers flow, in large part, from his position as Chief Executive, U S. Const art II, § 1, cl 1, and as Commander in Chief, *id* art II, § 2, cl 1 They also derive from the President's more specific powers to "make Treaties," *id* art II, § 2, cl. 2, to "appoint Ambassadors and Consuls," *id*, and to "receive Ambassadors and other public Ministers," *id*. art II, § 3 *See The Federalist No 64*, at 392–94 (John Jay) (Clinton Rossiter ed, 1961) The Supreme Court has repeatedly recognized the President's authority with respect to foreign policy *See, e g , Department of the Navy v Egan*, 484 U S 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive' ") (quoting *Haig v Agee*, 453 U.S 280, 293–94 (1981)), *Alfred Dunhill of London, Inc v Republic of Cuba*, 425 U S 682, 705 n.18 (1976) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch "), *United States v. Louisiana*, 363 U S 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"); *New York Times Co v United States*, 403 U.S 713, 741 (1971) (Marshall, J , concurring) ("it is beyond cavil that the President has broad powers by virtue of his primary responsibility for the conduct of our foreign affairs and his position as Commander in Chief"), *id* at 761 (Blackmun, J , dissenting) ("Article II vests in the Executive Branch primary power over the conduct of foreign affairs and places in that branch the responsibility for the Nation's safety "), *see also United States v Kin-Hong*, 110 F.3d 103, 110 (1st Cir 1997) ("[O]ur constitutional structure . places primary responsibility for foreign affairs in the executive branch . . . ."), *Ward v. Skinner*, 943 F 2d 157, 160 (1st Cir 1991) (Breyer, J) ("[T]he Constitution makes the Executive Branch primarily responsible" for the exercise of "the foreign affairs power "), *cert. denied*, 503 U S 959 (1992), *Sanchez-Espinoza v. Reagan*, 770 F 2d 202, 210 (D C Cir 1985) (Scalia, J) ("[B]road leeway" is "traditionally accorded the Executive in matters of foreign affairs ")

necessary to withhold from Congress, if only for a limited period of time, extremely sensitive information with respect to national defense or foreign affairs.[7]

Perhaps the most famous of the Founders' statements on the need for secrecy is John Jay's discussion in the *Federalist Papers*. Jay observed:

> There are cases where the most useful intelligence may be obtained, if the persons possessing it can be relieved from apprehensions of discovery. Those apprehensions will operate on those persons whether they are actuated by mercenary or friendly motives; and there doubtless are many of both descriptions who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The convention have done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest.[8]

Our early history confirmed the right of the President to decide to withhold national security information from Congress under extraordinary circumstances. In the course of investigating the failure of General St. Clair's military expedition of 1791, the House of Representatives in 1792 requested relevant documents from the executive branch.[9] President Washington asked the Cabinet's advice as to his proper response "because [the request] was the first example, and he wished that so far as it should become a precedent, it should be rightly conducted."[10] Washington's own view was that "he could readily conceive there might be papers of so secret a nature, as that they ought not to be given up."[11]

A few days later a unanimous Cabinet—including Secretary of State Thomas Jefferson, Secretary of the Treasury Alexander Hamilton, and Attorney General

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[7] *See History of Refusals by Executive Branch Officials to Provide Information Demanded by Congress*, 6 Op O.L.C. 751 (1982) (compiling historical examples of cases in which the President withheld from Congress information the release of which he determined could jeopardize national security).

[8] *The Federalist No. 64*, at 392 93 (John Jay) (Clinton Rossiter ed., 1961).

[9] For recent scholarly discussions of this episode and its significance for the development of separation of powers, *see* Gerhard Casper, *Separating Power* 28–31 (1997); David P. Currie, *The Constitution in Congress: The Federalist Period 1789–1801*, at 163–64 (1997).

An earlier episode had occurred in 1790 when, in response to a request from the House of Representatives, Secretary of State Thomas Jefferson furnished that body with a report on Mediterranean trade. The report also touched on advice provided by a confidential European source on the possibility of buying peace with Algiers, which was endangering that trade. Jefferson relayed the source's advice to the House, but stated that his or her "name is not free to be mentioned here." Report of Secretary of State Jefferson, Submitted to the House of Representatives (Dec. 30, 1790) and Senate (Jan. 3, 1791), *in* 1 *American State Papers. Foreign Relations* 105 (1791). Jefferson also submitted the report with a request that the Speaker treat it as a secret document; and when the report was received, the House's galleries were cleared. *See* Casper, *supra* at 47–50 The executive branch continues the practice of redacting identifying information on confidential sources when providing secret information to Congress.

[10] 1 *Writings of Thomas Jefferson* 303 (Andrew Lipscomb ed. 1903) (The Anas).

[11] *Id.*

Edmund Randolph—concurred. The Cabinet advised the President that, although the House "might call for papers generally," "the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public." [12] The Executive "consequently w[as] to exercise a discretion" in responding to the House request.[13] The Cabinet subsequently advised the President that the documents in question could all be disclosed consistently with the public interest.[14]

Although President Washington ultimately decided to produce the requested documents, they were actually produced only after the House, on April 4, 1792, substituted a new request apparently recognizing the President's discretion by asking only for papers "of a public nature." [15]

Two years later, President Washington adhered to his conclusion regarding the respective authorities of the executive and legislative branches. Acting upon the advice of Attorney General William Bradford and other Cabinet officers, Washington responded to an unqualified request from the Senate for correspondence between the Republic of France and the United States minister for France by providing the relevant correspondence, except for "those particulars which, in [his] judgment, for public considerations, ought not to be communicated." [16]

In 1796, when a controversy arose regarding whether President Washington could be required to provide the House of Representatives with records relating to the negotiation of the Jay Treaty, James Madison—who was then a Member of the House—conceded that even where Congress had a legitimate purpose for requesting information the President had authority "to withhold information, when of a nature that did not permit a disclosure of it at the time." [17]

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[12] *Id.* at 304.

[13] *Id.*

[14] *Id* at 305

[15] 3 Annals of Cong 536 (1792); *see also* Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power* 82–83 (1976), Casper, *supra* at 29.

[16] 4 Annals of Cong 56 (1794), *see* Sofaer, *supra* at 83–85. The Cabinet officers whom Washington consulted and who all agreed that he could withhold at least part of the material from the Senate were Hamilton, Randolph and Knox. *Id.* at 83 Randolph also informed Washington that he had met privately with Madison and with Justice James Wilson (another influential Framer), who provided similar advice *Id* at 83–84 n *. "[N]o further Senate action was taken to obtain the material withheld " *Id.* at 85.

[17] 5 Annals of Cong. 773 (1796) As President Washington observed in declining the House's request

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even, when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic: for this might have a pernicious influence on future negotiations; or produce immediate inconveniences, perhaps danger and mischief, in relation to other Powers

Id at 760. Washington had previously sought and received advice from Alexander Hamilton, then in private practice in New York Hamilton provided Washington with a draft answer to the House, which had stated in part "A discretion in the Executive Department how far and where to comply in such cases is essential to the due conduct of foreign negotiations " Letter from Alexander Hamilton to George Washington (Mar 7, 1796), *in* 20 The Papers of Alexander Hamilton at 68 (Harold C Syrett ed , 1974)

Although the Executive's concerns with the confidentiality of diplomatic materials certainly loomed large in the 1796 dispute, it would overstate the point to view the entire controversy as turning exclusively on the issue of "executive privilege " Washington rested his position partly on the alternative ground that the Constitution gave the House no role in the treaty-making process Moreover, it appears that the controversy "had a somewhat 'aca-

Congressional recognition of this power in the President extends well into recent times.[18] Moreover, since the Washington Administration, Presidents and their senior advisers have repeatedly concluded that our constitutional system grants the executive branch authority to control the disposition of secret information. Thus, then-Attorney General Robert Jackson declined, upon the direction of President Franklin Roosevelt, a request from the House Committee on Naval Affairs for sensitive FBI records on war-time labor unrest, citing (among other grounds) the national security.[19] Similarly, then- Assistant Attorney General William Rehnquist concluded almost thirty years ago that "the President has the power to withhold from [Congress] information in the field of foreign relations or national security if in his judgment disclosure would be incompatible with the public interest."[20]

The Supreme Court has similarly recognized the importance of the President's ability to control the disclosure of classified information. In considering the statutory question whether the Merit Systems Protection Board could review the revocation of an executive branch employee's security clearance, the Court in *Department of the Navy v. Egan* also addressed the President's constitutional authority to control the disclosure of classified information:

> The President . . . is the "Commander in Chief of the Army and Navy of the United States." U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. . . . This Court has recognized the Government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.[21]

Similarly, in discussing executive privilege in *United States v. Nixon*, a unanimous Supreme Court emphasized the heightened status of the President's privilege

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demic' character because the Senate had received all the papers, and the House members apparently could inspect them at the Senate." Casper, *supra* at 65

[18] *See, e.g.*, S Rep. No. 86–1761, at 22 (1960) (the Senate Committee on Foreign Relations, after failing to persuade President Kennedy to abandon his claim of executive privilege with respect to information relating to the U–2 incident in May, 1960, criticized the President for his refusal to make the information available but acknowledged his legal right to do so· "The committee recognizes that the administration has the legal right to refuse the information under the doctrine of executive privilege.").

[19] *See Position of the Executive Department Regarding Investigative Reports*, 40 Op. Att'y Gen. 45, 46 (1941)

[20] Memorandum from John R. Stevenson, Legal Adviser, Department of State, and William H Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Executive Privilege to Withhold Foreign Policy and National Security Information* at 7 (Dec. 8, 1969).

[21] *Department of the Navy v. Egan*, 484 U S. at 527 (citations omitted)

in the context of "military, diplomatic, or sensitive national security secrets." [22] Although declining in the context of that criminal case to sustain President Nixon's claim of privilege as to tape recordings and documents sought by subpoena, the Supreme Court specifically observed that the President had not "place[d] his claim of privilege on the ground that they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities." [23]

Other statements by individual Justices and the lower courts reflect a similar understanding of the President's power to protect national security by maintaining the confidentiality of classified information.[24] Justice Stewart, for example, discussed this authority in his concurring opinion in *New York Times Co. v. United States* (the "Pentagon Papers" case):

> [I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. . . . In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.
>
> I think there can be but one answer to this dilemma, if dilemma it be. The responsibility must be where the power is. If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. . . . [I]t is clear to me that it is the constitutional duty of the Executive . . . to protect the confidentiality necessary to carry out its respon-

[22] *United States v. Nixon*, 418 U.S. 683, 706 (1974), *see also id.* at 710, 712 n.19

[23] *Id.* at 710, *see also United States v. Reynolds*, 345 U.S. 1 (1953) (recognizing privilege in judicial proceedings for "state secrets" based on determination by senior Executive officials)

[24] *See, e.g., Webster v. Doe*, 486 U.S. 592, 605–06 (1988) (O'Connor, J., concurring in part and dissenting in part) ("The functions performed by the Central Intelligence Agency and the Director of Central Intelligence lie at the core of 'the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations'. . . . The authority of the Director of Central Intelligence to control access to sensitive national security information by discharging employees deemed to be untrustworthy flows primarily from this constitutional power of the President . . .") (citation omitted), *New York Times Co. v. United States*, 403 U.S. at 741 (Marshall, J., concurring) (case presented no issue "regarding the President's power as Chief Executive and Commander in Chief to protect national security by disciplining employees who disclose information and by taking precautions to prevent leaks"), *Greene v. McElroy*, 360 U.S. 474, 513 (1959) (Clark, J., dissenting) (it is "basic" that "no person, save the President, has a constitutional right to access to governmental secrets"); *Guillot v. Garrett*, 970 F.2d 1320, 1324 (4th Cir. 1992) (President has "exclusive constitutional authority over access to national security information"); *Dorfmont v. Brown*, 913 F.2d 1399, 1405 (9th Cir. 1990) (Kozinski, J., concurring) ("Under the Constitution, the President has unreviewable discretion over security decisions made pursuant to his powers as chief executive and Commander-in-Chief"), *cert. denied*, 499 U.S. 905 (1991)

sibilities in the fields of international relations and national defense.[25]

III.

In applying these constitutional principles to S. 1668 and H.R. 3829, we take as a given that Congress has important oversight responsibilities and a corollary interest in receiving information that enables it to carry out those responsibilities.[26] Those interests obviously include Congress's ability to consider evidence of misconduct and abuse by the Executive's agents. H.R. 3829, however, demonstrates that it is possible to develop procedures for providing Congress information it needs to perform its oversight duties, while not interfering with the President's ability to control classified information when necessary to perform his constitutionally assigned duties.

A.

In analyzing S. 1668, there is no need to resolve the precise parameters of the President's authority to control access to classified diplomatic and national security information. Instead, we have focused on the specific problem presented by the bill, which, in defined circumstances, gives a unilateral right of disclosure to every executive branch employee with access to classified information.[27] The reach of S. 1668 is sweeping: it would authorize any covered federal employee to foreclose or circumvent a presidential determination that restricts congressional access to certain classified information in extraordinary circumstances.

S. 1668 is inconsistent with Congress's traditional approach to accommodating the executive branch's interests with respect to national security information. In the National Security Act, for example, Congress itself recognized the need for heightened secrecy in certain "extraordinary circumstances affecting vital interests of the United States," and authorized the President to sharply limit congressional access to information relating to covert actions in such cases.[28] An example of

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[25] *New York Times Co v United States*, 403 U S at 728–30 (Stewart, J., concurring) (footnote omitted)

[26] *See, e g., McGrain v. Daugherty*, 273 U S 135 (1927)

[27] We do not use the word "right" in the sense of a legally enforceable right. Rather, the term is intended to convey our understanding that the bill would purport to require the President to inform employees that they have standing authorization or permission to convey national security information directly to Congress without receiving specific authorization to convey the particular information in question We have not analyzed the possible implications this legislation might have with respect to judicial enforcement of employee legal rights.

[28] *See* 50 U.S.C § 413b(c)(2) (1994) ("If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President "). Even with this more protective standard, President Bush expressly reserved his constitutional authority to withhold disclosure for a period of time *See* S Rep. No. 102–85, at 40 (1991) *See also* 50 U S C. § 413b(c)(3) (1994) ("Whenever a finding is not reported pursuant

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accommodation between the branches that is even more directly applicable to the present context is the National Security Act's recognition that the intelligence agencies on occasion need to redact sources and methods and other exceptionally sensitive intelligence information from materials they provide to the Intelligence Committees.[29]

In contrast, S. 1668 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.[30] 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. The Constitution does not permit Congress to authorize subordinate executive branch employees to bypass these orderly procedures for review and clearance by vesting them with a unilateral right to disclose classified information—even to Members of Congress. Such a law would squarely conflict with the Framers' considered judgment, embodied in Article II of the Constitution, that, within the executive branch, all authority over matters of national defense and foreign affairs is vested in the President as Chief Executive and Commander in Chief.[31]

It has been suggested that S. 1668 (at least with modest revisions) would strike an acceptable balance between the competing executive and legislative interests relating to the control of classified information, and would thus survive review under ordinary separation of powers principles.[32] That balance under S. 1668, however, would be based on an abstract notion of what information Congress might need to know relating to some future inquiry and what information the President might need to protect in light of some future set of world events. Such an abstract resolution of the competing interests at stake is simply not consistent with the President's constitutional responsibilities respecting national security and foreign affairs. He must be free to determine, based on particular—and perhaps

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to paragraph (1) or (2) of this section, the President shall fully inform the intelligence committees in a timely fashion and shall provide a statement of the reasons for not giving prior notice.").

[29] *See* 50 U.S.C. § 413a (1994) ("To the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall . . . keep the intelligence committees fully and currently informed of all intelligence activities . . .").

[30] *Cf. United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 468 (1951) ("When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure . . . , the usefulness, indeed the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious . . .").

[31] This is not to suggest that Congress wholly lacks authority regarding the treatment of classified information, *see New York Times Co. v. United States*, 403 U.S. at 740 (White, J., concurring), but rather that Congress may not exercise that authority in a manner that undermines the President's ability to perform his constitutionally assigned duties.

[32] *See Whistleblower Protections for Classified Disclosures: Hearings Before the Senate Select Comm. on Intelligence*, 105th Cong. 8 (1998) (statement of Prof. Peter Raven-Hansen).

currently unforeseeable—circumstances, that the security or foreign affairs interests of the Nation dictate a particular treatment of classified information.

Furthermore, S. 1668 also undermines the traditional, case-by-case process of accommodating the competing needs of the two branches—a process that reflects the facts and circumstances of particular situations. As one appellate court has observed, there exists "an implicit constitutional mandate to seek optimal accommodation [between the branches] through a realistic evaluation of the needs of the conflicting branches *in the particular fact situation.*" [33] Rather than enabling balances to be struck as the demands of specific situations require, S. 1668 would attempt to legislate a procedure that cannot possibly reflect what competing executive and legislative interests may emerge with respect to some future inquiry. It would displace the delicate process of arriving at appropriate accommodations between the branches with an overall legislated "solution" that paid no regard to unique—and potentially critical—national security and foreign affairs considerations that may arise. This approach contrasts with that of H.R. 3829, which would balance the competing legislative and executive interests at stake in a manner that would permit rational judgments to be made in response to real world events.

B.

H.R. 3829 does not present the constitutional infirmity posed by S. 1668. H.R. 3829 does not vest any executive branch employee who has access to classified information with a unilateral right to determine how, when and under what circumstances classified information will be disclosed to Members of Congress and without regard for how such a disclosure might affect the President's ability to perform his constitutionally assigned duties.

Instead, H.R. 3829 would establish procedures under which employees who wish to report to Congress must first submit their complaint to an inspector general, who would review it for credibility and then submit the complaint to the agency head before it is forwarded to Congress. This process would allow for the executive branch review and clearance process that S. 1668 would foreclose. H.R. 3829 would further authorize heads of agencies and the Director of Central Intelligence, upon the completion of that process, to decide not to transmit an employee's complaint to the Intelligence Committees, or allow the employee to contact the Committees directly, "in the exceptional case and in order to protect vital law enforcement, foreign affairs, or national security interests." [34] If such

[33] *United States v. American Tel & Tel Co*, 567 F 2d 121, 127 (D.C. Cir. 1977) (emphasis added).

[34] In light of S 1668's focus on the intelligence community and classified information, the Department's analysis of the bill's constitutionality has focused on its interference with the President's authority to protect confidential national security and foreign affairs information. Of course, other constitutionally-based confidentiality interests can be implicated by employee disclosures to Congress H R 3829 appropriately recognizes that such disclosures also should not compromise vital law enforcement interests

a decision were made, then the head of agency or Director of Central Intelligence would be required to provide the Committees with the reason for the determination.

Not only would H.R. 3829 thus avoid the constitutional infirmity of S. 1668 by allowing for review by the President or officials responsible to him, it would also allow for the operation of the accommodation process traditionally followed between the legislative and executive branches regarding disclosure of confidential information. Upon receipt of the explanation for a decision not to allow an employee complaint to go forward, the Intelligence Committees could contact the agency head or Director of Central Intelligence to begin the process of seeking to satisfy the Committees' oversight needs in ways that protect the executive branch's confidentiality interests. The bill's procedures are thus consistent with our constitutional system of separation of powers.

IV.

We recognize that Congress has significant interests in disclosure of evidence of wrongdoing or abuse. There is an inevitable tension, however, between preserving the secrecy necessary to permit the President to perform his constitutionally assigned duties and permitting the disclosures necessary to permit congressional oversight. Under relevant constitutional doctrine, Congress may not resolve this tension by vesting in individual federal employees the power to control disclosure of classified information. For this reason, we have concluded that S. 1668 is unconstitutional. H.R. 3829 does not contain this constitutional infirmity and is constitutional.

RANDOLPH D. MOSS
Deputy Assistant Attorney General
Office of Legal Counsel

Permissibility Under Posse Comitatus Act of Detail of Defense Department Civilian Employee to the National Infrastructure Protection Center

The proposed detail of a civilian employee of the Department of Defense to the National Infrastructure Protection Center, a component of the Federal Bureau of Investigation, is permissible under the Posse Comitatus Act.

May 26, 1998

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL BUREAU OF INVESTIGATION

This memorandum responds to your request that the Office of Legal Counsel consider the effect of the Posse Comitatus Act ("PCA"), 18 U.S.C. § 1385 (1994), on a proposed staffing and organizational arrangement whereby a civilian employee of the Department of Defense will be detailed to the National Infrastructure Protection Center ("NIPC") to serve in that office as a deputy chief. We conclude that the proposed arrangement is permissible under the PCA.

We draw our understanding of the proposed staffing and organizational arrangement of the NIPC from several discussions that we have had with your office and the Department of Defense and two memoranda that you have sent to us on this matter.[1] The NIPC is a component within the Federal Bureau of Investigation ("FBI") that, we understand, will coordinate and integrate the policy and planning of the United States government in connection with the security of the Nation's computer and information technology infrastructure. In addition, the NIPC will exercise supervision over certain FBI criminal investigations relating to matters of infrastructure security.

Under the organizational plan that you have described to us, the NIPC will be headed by a chief, who will be an official of the FBI. In addition, there will be two deputy chiefs. One deputy chief will be an FBI employee, and this FBI deputy will have supervisory authority over all criminal investigatory matters involving the NIPC. The second deputy chief will be detailed to the FBI from the Department of Defense pursuant to a memorandum of understanding ("MOU") between the two agencies.[2] The MOU will provide that the Defense deputy will have no supervisory authority over criminal investigatory matters. The Defense deputy will supervise other NIPC matters relating, for example, to policy

[1] Memorandum for Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, from Larry R. Parkinson, General Counsel, Federal Bureau of Investigation, *Re Request for Opinion on Certain Posse Comitatus Act Issues* (Mar. 25, 1998), and Memorandum for Beth Nolan, Deputy Assistant Attorney General, Office of Legal Counsel, from Larry R. Parkinson, General Counsel, Federal Bureau of Investigation, *Re Supplement to Posse Comitatus Act Opinion Request* (Apr. 23, 1998).

[2] By virtue of being a detailee to the FBI, the deputy chief from the Department of Defense will be, at least in some regards, an employee of the FBI. *See infra* note 5. For clarity, we refer to him here as the "Defense deputy."

and coordination. We further understand that your staffing arrangements call for the detailee from Defense to be a civilian employee of that department. Finally, we understand that in the event of a vacancy for any reason in the position of chief of NIPC, the FBI deputy chief will be first in the order of succession and that under no circumstances will the Defense deputy fill such a vacancy.

I.

Our review of this proposal begins with the text of the PCA. The PCA prohibits the use of "any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws."[3] 18 U.S.C. § 1385. The PCA does not, by its terms, apply to Navy or Marine Corps personnel. *Hayes v. Hawes*, 921 F.2d 100, 102–03 (7th Cir. 1990); *Electronic Surveillance Opinion* at 2 n.1.

The Department of Defense has implemented the restrictions of the PCA and related statutes through Departmental Directive 5525.5, "DoD Cooperation with Civilian Law Enforcement Officials" (Jan. 15, 1986). The Directive applies the restrictions of the PCA to the Navy and Marine Corps, as well as the Army and Air Force. Directive 5525.5(B). Unless we indicate otherwise by use of a more specific reference or citation, we use the term "PCA" to refer to the original statute itself, the related statutes, and the implementing Directive of the Department of Defense.

Relevant caselaw and opinions of this Office reflect the view that the PCA is intended to prohibit military personnel from directly coercing, threatening to coerce, or otherwise regulating civilians in the execution of criminal or civil laws. *See, e.g., Allred*, 867 F.2d at 871; *Bissonette v. Haig*, 776 F.2d 1384, 1390 (8th Cir. 1985); *Electronic Surveillance Opinion* at 7; Letter for Deanne Siemer, General Counsel, Department of Defense, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel at 2 (Mar. 24, 1978) (regarding use of military personnel to assist Department of Justice in fraud investigations against contractors for Department of Defense) ("Fraud Investigations Opinion").

In applying this general prohibition, courts and this Office have generally focused on three factors. First, the PCA is violated where civilian law enforcement authorities make "direct active use" of military personnel to execute the laws.

[3] The phrase "posse comitatus" translates from Latin as the "power of the county" and was used at common law to refer to local citizens over the age of 15 upon whom a sheriff could call for assistance in preventing any type of civil disorder *United States v Yunis*, 681 F Supp 891 n.1 (D.D.C 1988) (citations omitted), *aff'd*, 924 F.2d 1086 (D C. Cir. 1991) The PCA was adopted in 1878 in response to objections from southern States to the participation of the United States Army in civilian law enforcement during the Reconstruction period. *United States v Allred*, 867 F.2d 856, 870 (5th Cir. 1989), Memorandum for Jo Ann Harris, Assistant Attorney General, Criminal Division, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Use of Military Personnel for Monitoring Electronic Surveillance* at 7 (Apr. 5, 1994) ("*Electronic Surveillance Opinion*")

The PCA has been supplemented by other statutes, 10 U.S C §§ 371–382 (1994 & Supp. II 1996), which authorize military assistance to civilian law enforcement agencies in specific types of matters. Section 375 of title 10 requires the Secretary of Defense to prescribe "such regulations as may be necessary" to ensure that such assistance does not include certain direct participation by military personnel in civilian law enforcement matters, such as conducting searches and seizures or making arrests, *id.* § 375, as would be prohibited by the PCA itself. *See id.* § 378.

United States v. Red Feather, 392 F. Supp. 916, 921 (D.S.D. 1975); *see Yunis*, 681 F. Supp. at 892; *Military Use of Infrared Radars Technology to Assist Civilian Law Enforcement Agencies*, 15 Op. O.L.C. 36, 45–46 (1991); *Fraud Investigations Opinion* at 11, 15.

Second, the PCA may be violated when the use of military personnel pervades the activities of civilian law enforcement. *Hayes*, 921 F.2d at 104; *United States v. Bacon*, 851 F.2d 1312, 1313 (11th Cir. 1988); *United States v. Hartley*, 796 F.2d 112, 114 (5th Cir. 1986); *United States v. Hartley*, 678 F.2d 961, 978 (11th Cir. 1982); *Yunis*, 681 F. Supp. at 892; *United States v. Jaramillo*, 380 F. Supp. 1375 (D. Neb. 1974), *appeal dismissed*, 510 F.2d 808 (8th Cir. 1975); *Electronic Surveillance Opinion* at 9 (citing Yunis).

Third, the PCA prohibits military authorities from subjecting civilians to military regulations, proscriptions, or compulsions. *United States v. McArthur*, 419 F. Supp. 186 (D.N.D.1975), *aff'd sub nom. United States v. Casper*, 541 F.2d 1275 (8th Cir. 1976); *Yunis*, 681 F. Supp. at 892; 15 Op. O.L.C. at 45–46; *see also Bacon*, 851 F.2d at 1313 (citizenry may not be subjected to the "regulatory exercise of military power"); *Bissonette*, 776 F.2d at 1390 (military may not actually regulate, forbid or compel some conduct by civilians).

Military personnel may assist in civilian law enforcement where the participation does not run afoul of the factors identified above. *See, e.g., United States v. Stouder*, 724 F. Supp. 951, 953 (M.D. Ga. 1989) (Air Force personnel may assist in conduct of FBI investigation); *Electronic Surveillance Opinion* at 9 (military personnel may monitor electronic surveillance transmissions for use in civilian law enforcement); *Fraud Investigations Opinion* at 13–15 (military personnel may provide advice to FBI investigation and share relevant information). Thus, this Office has previously concluded that the PCA, although prohibiting direct interaction between the military and civilian personnel in most circumstances, permits a broad degree of cooperation between the military and civilian law enforcement. 15 Op. O.L.C. at 46 (citing legislative history of 10 U.S.C. §§ 371–382). More specifically, the PCA does not bar "military expert advice or technical assistance to civilian authorities." *Fraud Investigations Opinion* at 11. Such expert advice and technical assistance does not "create the danger of military compulsion of civilians," which Congress sought to prohibit through the PCA. *Id.; see also Bissonette*, 776 F.2d at 1390 (distinguishing between military assistance and support for civilian law enforcement from active participation that would constitute military compulsion of civilians).

In addition, where the military has "a legitimate interest" for its own proceedings or matters involving the "internal administration [of the military] or the performance of its proper functions," the military may participate, to the extent

of its interest, in civil law enforcement.[4] *Fraud Investigations Opinion* at 12, 14; *see, e.g., Bacon*, 851 F.2d at 1313 (military may aid civilian law enforcement investigation into illegal drug sales to "both civilians and army personnel"); *Fraud Investigations Opinion* at 13–15 (military may assist and participate in investigation into fraud by military contractors). Nothing in the PCA suggests that Congress intended to circumscribe military participation in legitimately military matters. *Id.* at 12–13.

II.

The staffing and organizational arrangements that you have proposed are permissible under the PCA because a civilian employee of the Department of Defense would not fall within the statutory or regulatory scope of the PCA.[5] By its plain terms, the PCA applies only to personnel who are "part" of the Army or Air Force. 18 U.S.C. § 1385 (unlawful to use "any part of the Army or Air Force as a posse comitatus to execute the law"); *see also Bacon*, 851 F.2d at 1313 (applying PCA to "military personnel"); *Hartley*, 796 F.2d at 114 (same); *Bissonette*, 776 F.2d at 1389 (applying PCA to "Army or Air Force personnel"); *Yunis*, 681 F. Supp. at 892 (applying PCA to "military personnel"); *see also Transportation Opinion* at 2 (military personnel detailed to civilian agency are not "part" of the military and not subject to PCA); 10 Op. O.L.C. at 121 (PCA does not apply to military personnel functioning in civilian capacity under civilian command); *cf.* Memorandum for Jamie Gorelick, Deputy Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Use of Military to Enforce Immigration Laws* at 9–10 (May 10, 1994) (distinguishing between "employees of the United States" and "members of the Armed Forces"). Similarly, the Defense Directive, extending the statutory restrictions to

[4] Conversely, the PCA prohibits military personnel in law enforcement matters "that were of concern only to the civil authorities." *Fraud Investigations Opinion* at 14. Military participation in such matters is impermissible because it would run afoul of the first factor in the PCA analysis, the direct active use of the military in civilian law enforcement. *See id.*

[5] Earlier opinions of this Office concluded that military personnel who are detailed to a civilian agency are not covered by the PCA because they are employees of the civilian agency for the duration of their detail, "subject to the exclusive orders" of the head of the civilian agency, and therefore "are not 'any part'" of the military for purposes of the PCA. Memorandum for Benjamin Forman, Assistant General Counsel, Department of Defense, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re Legality of deputizing military personnel assigned to the Department of Transportation* (Sept. 30, 1970) ("Transportation Opinion") (military personnel detailed to the Department of Transportation to serve as security guards on civilian aircraft), *see Assignment of Army Lawyers to the Department of Justice*, 10 Op. O.L.C. 115, 121 (1986) (PCA "would not be implicated if [Army] lawyers were detailed on a full-time basis . . . in an entirely civilian capacity under the supervision of civilian personnel")

The proposed duties of the Defense deputy, unlike those addressed in the opinions cited above, will involve supervisory authority and the formulation of policy. As a result, it is not settled whether the rule reflected in these earlier opinions—that military personnel detailed to a civilian agency are not covered by the PCA—would apply to a military officer detailed to the NIPC as a deputy chief. We do not rely, however, upon the status of the Defense deputy as a detailee for our conclusion in this opinion because we find that the fact that the Defense deputy will be a civilian employee of the Department of Defense makes the proposed arrangement permissible under the PCA. Thus, we have not resolved—and we do not address here—whether or not the PCA would permit a detailed military officer to serve as an NIPC deputy chief.

the Navy and Marine Corps, excludes from its scope civilian employees of the Department. Directive 5525.5(B)(3) (restrictions do not apply to a "civilian employee of the Department of Defense").[6] This Office has distinguished between civilian and military personnel by applying the PCA to "persons subject to military discipline." *Fraud Investigations Opinion* at 11.

In addition, the bifurcated structure of the NIPC and the particular duties to be assigned under the proposed arrangement appear to make it unlikely that the Defense deputy will "execute the laws" as that term is understood in the context of the PCA. Because the status of the Defense deputy as a civilian employee provides an independent basis for concluding that the proposed arrangement is permissible under the PCA, we do not resolve whether the structure of the NIPC and the duties of the Defense deputy provide an alternative basis for concluding that the proposed arrangement satisfies the PCA. Nonetheless, several considerations suggest that the proposed Defense deputy position, as you have described it, would be consistent with the PCA, independent of the civilian status of the occupant.[7]

The NIPC is structured so that the duties of the Defense deputy are separated from the oversight, control and conduct of NIPC criminal investigations. Thus, the actions that the Defense deputy will take appear unlikely to fall within the prohibitions of the PCA. The Defense deputy will have no direct or active involvement in criminal investigations. Moreover, the separation of the Defense deputy from criminal investigations diminishes the possibility that part of the military would "pervade" the civilian investigations effort. Finally, given the bifurcated structure, it seems unlikely that the Defense deputy would be in a position to engage in civilian law enforcement activities that would subject the citizenry to military power.[8]

The duties of the Defense deputy appear to correspond with those responsibilities that this Office previously has found to be consistent with the requirements of the PCA. As we understand it from your descriptions, the role of the Defense deputy in connection with the development of policy and planning in the NIPC appears consistent with the provision of expert advice to civilian law enforcement authorities. *See Fraud Investigations Opinion* at 12. Moreover, the planning and coordination function of the Defense deputy appears to fit squarely with the earlier

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[6] The exception for civilian employees does not extend to civilian employees who are "under the direct command and control of a military officer." Directive 5525.5(B)(3). We understand that the civilian employee to be detailed in connection with the NIPC deputy chief position will not be an individual from a component within the Department of Defense that is headed by a military officer. Thus, the Defense deputy will be a civilian employee within the meaning of the Directive.

[7] Because our assessment in this regard is not determinative, in the event that the Defense deputy position were filled by a member of the military, and thus someone potentially subject to the prohibitions of the PCA while at the NIPC, *see supra* note 5, we would require a detailed examination of the relevant structure and duties to determine whether they fully satisfy the requirements of the PCA.

[8] Because the proposed bifurcated structure appears to remove the Defense deputy from criminal investigative matters so completely, we have no occasion here to address the extent to which the PCA might permit the participation of the Defense deputy in the law enforcement duties of the NIPC.

observation of this Office that the PCA permits extensive cooperation between military and civilian officials without direct military participation in law enforcement. 15 Op. O.L.C. at 46.

In addition, we understand that the military has a significant interest in the maintenance of infrastructure security in connection with the operation of the Nation's defense systems and the prevention of hostile acts against the United States. Thus, the Defense deputy's involvement in the NIPC will advance legitimate military ends, thus satisfying one of the considerations that we have looked to in determining the applicability of the PCA. *See, e.g., Fraud Investigations Opinion* at 16 (concluding that the PCA permits military assistance to civilian law enforcement regarding matters related to the Department of Defense).

III.

Because the proposed deputy chief of the NIPC to be detailed to the FBI from the Department of Defense will be a civilian employee, the proposed arrangement is permissible under the PCA. In addition, the separation of the Defense deputy from the oversight and conduct of criminal investigations, although not a basis for our conclusion in this opinion, also appears to be consistent with the requirements of the PCA.

WILLIAM MICHAEL TREANOR
Deputy Assistant Attorney General
Office of Legal Counsel

Appointment of Vice Chair of Federal Reserve Board to Serve Concurrently as Chair of the District of Columbia Financial Responsibility and Management Assistance Authority

The Vice Chair of the Federal Reserve Board may also serve as Chair of the District of Columbia Financial Responsibility and Management Assistance Authority without violating sections 205 or 208 of title 18. Her dual service would also have to comply with the Federal Reserve Act's "entire-time" requirement.

June 1, 1998

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our views on whether the President may appoint Alice Rivlin to be Chair of the District of Columbia Financial Responsibility and Management Assistance Authority (the "Authority"), while Dr. Rivlin continues to serve in her current capacity as Vice Chair and a member of the Board of Governors of the Federal Reserve System (the "Federal Reserve Board"). Upon review of the federal conflict of interest statutes,[1] the prohibition on compensation for dual offices, and the requirements of the Federal Reserve Act, we conclude that the relevant statutory authorities do not prohibit the proposed appointment, but that Dr. Rivlin must continue to perform her duties as Vice Chair of the Federal Reserve Board on a full-time basis. She would thus have to work with the Federal Reserve Board and its General Counsel to ensure compliance with the Federal Reserve Act.

I. Background

Congress created the Authority in 1995,[2] pursuant to its constitutional authority over the District of Columbia.[3] The Authority is "an entity within the government of the District of Columbia." § 101(a), 109 Stat. at 100. It consists of five members appointed by the President, in accordance with specific statutory criteria,[4] one of whom is designated by the President to be the Chair of the Authority.

[1] We have consulted with the Office of Government Ethics with regard to the application of the conflict of interest statutes to this matter

[2] District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub L No 104-8, 109 Stat 97 (the "D.C. Financial Responsibility Act" or the "Act"). Subsequent to its 1995 enactment, the Act was amended several times in respects not material to the analysis below, unless otherwise cited.

[3] *Id* § 2(c)(2), 109 Stat. at 98 (*citing* U.S Const art 1, § 8, cl 17)

[4] The Act provides that a member of the Authority must be an individual who· "(1) has knowledge and expertise in finance, management, and the organization or operation of business or government, (2) does not provide goods or services to the District government [and does not have a close relative who does so], (3) is not an officer or employee of the District government, and (4) maintains a primary residence in the District of Columbia or has a primary place of business in the District of Columbia " § 101(c), 109 Stat at 101 We understand that you have determined that Dr. Rivlin would meet all of these criteria Accordingly, we do not address her qualifications for appointment

Id. § 101(b), (c). Congress intended for the Authority to assist the government of the District of Columbia in combating its financial and management problems by developing a "comprehensive approach to fiscal, management, and structural" issues. *Id.* § 2(a)(5), 109 Stat. at 98.

Dr. Rivlin was appointed by the President in 1996 as Vice Chair and a member of the Federal Reserve Board for a term of fourteen years. *See generally* 12 U.S.C. §§ 241–242 (1994).

II. Conflict of Interest Laws

A. Section 208 and the Prohibition on Acts Affecting a Personal Financial Interest

Section 208 of title 18 prohibits participation in any "particular matter" that may affect an individual's personal financial interest. The statute applies to any

> 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 . . . .

18 U.S.C. § 208(a) (1994). A personal financial interest is imputed to an individual if "his spouse, minor child, general partner, organization in which he is serving as officer, director, trustee, general partner or employee" has a financial interest in a matter covered by § 208. *Id.* Thus, the question arises whether the financial interest of the District of Columbia would be imputed to Dr. Rivlin by service on the Authority concurrent with her service in the Federal Reserve Board.

In fact, the statute is not implicated in this circumstance because, for purposes of § 208, the interests of the United States include those of the District of Columbia.[5] By grouping the District of Columbia together with the executive branch, independent agencies and Federal Reserve banks, § 208 effectively defines the interests of the United States that are protected under the statute as including those of the District of Columbia. *See Applicability of 18 U.S.C. § 208 to the Federal Communications Commission's Representative on the Board of Directors of the Telecommunications Development Fund*, 21 Op. O.L.C. 95, 96 (1997) ("FCC Opinion") (§ 208(a) applies only to conflicts between the federal government and outside organizations and does not encompass intra-governmental conflicts between entities covered by the provision).

The inclusion of the District of Columbia along with executive branch entities is not incidental. Before 1989, §§ 203, 205, and 207 of title 18, like § 208, all included the District of Columbia among the federal entities comprising the interests of the United States to be protected by the provisions. *See generally*

[5] Section 208, of course, would apply to Dr. Rivlin in her personal capacity.

18 U.S.C. §§ 203, 205, 207 (1988). In 1989, however, Congress amended §§ 203, 205, and 207 to separate the District of Columbia and specifically treat the interests of the District as distinct from those of the United States.[6] Although Congress made other changes to § 208 at that time, it did not alter the treatment of the District. Thus, we may infer that Congress has intentionally treated the interests of the United States and the District as identical for the purposes of § 208.[7]

In addition, our interpretation of § 208 in this circumstance is reinforced by opinions of this Office in connection with the earlier version of § 205 that included that the District of Columbia with the executive departments and agencies. Assistant Attorney General Rehnquist concluded that because the District of Columbia was included with executive departments and agencies in § 205, matters involving the District of Columbia were ones in which the United States had an interest within the meaning of the statute. Letter for Anthony L. Mondello, General Counsel, United States Civil Service Commission, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel (Mar. 26, 1970). This Office reiterated that conclusion on subsequent occasions before the 1989 amendments. *See e.g.*, Memorandum for James L. Byrnes, Associate Deputy Attorney General, from Margaret C. Love, Special Counsel, Office of Legal Counsel, *Re: Request for Approval of Outside Employment* at 1 n.1 (Sept. 24, 1987); *Government Lawyers' Pro Bono Activities in the District of Columbia*, 4B Op. O.L.C. 800 (1980); Memorandum for Daniel Skoler, Director, Office of Law Enforcement Programs, from Thomas E. Kauper, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Determination of Property of Federal Lawyers Representing Children in Juvenile Court Proceedings* (Apr. 7, 1970).

Finally, our conclusion is consistent with the general observation in an earlier opinion that the government ethics rule provide that "employees owe their duty to the government and its citizens, . . . not to the particular bureaucratic interests of their agency." Memorandum for Philip B. Heymann, Deputy Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Creation of an Office of Investigative Agency Policies* at 6 (Oct. 26, 1993). Thus, we need not examine here the particular interests of the Authority and the Federal Reserve System; for purposes of § 208, it is sufficient that Congress has treated the interests of the United States and the District of Columbia as singular.[8] *See* FCC Opinion, 21 Op. O.L.C. at 96.

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[6] *See generally* Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716.

[7] *See generally CFTC v. Schor*, 478 U.S. 833, 846 (1986).

[8] Nonetheless, we understand that in order to avoid even the appearance of a conflict between her obligations as Vice Chair of the Federal Reserve Board and Chair of the Authority, it is the intention of the President and Dr. Rivlin that in the event that she is appointed as Chair of the Authority, she would recuse herself from all matters relating to the issuance of District of Columbia bonds and the timing and nature of any other investment decisions by the District.

B. Section 205 and the Prohibition of Representation of Non-Federal Interests

Section 205 of title 18 prohibits any "officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States" from, *inter alia*, acting as an

> agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest.

18 U.S.C. § 205(a)(2) (1994). Unlike § 208, as we have already noted, § 205 treats the District of Columbia separately from the United States and, thus, for purposes of this statute, the interests of the District and the federal government are not identical. The separate treatment of the United States and the District of Columbia under § 205 raises the question whether Dr. Rivlin, as an officer of the United States covered by § 205(a) in her capacity as Vice Chair of the Federal Reserve System, may represent the interests of the Authority before any "department [or] agency" of the federal government, because the Authority is identified in the statute creating it as an entity of the District of Columbia government. § 101(a), 109 Stat. at 100.

We understand, as a preliminary matter, that the duties of the Chair of the Authority will invariably involve the kinds of activities that, if done on behalf of a truly non-federal entity, would constitute acting as an agent before departments and agencies of the executive branch.[9] Indeed, an express purpose of the Authority is to assist the District of Columbia in "achieving an appropriate relationship with the Federal Government," § 2(b)(4)(B), 109 Stat. at 98, and the Authority is directed by statute to make recommendations to, among others, the President. § 207(a), 109 Stat. at 133.

In addition, we assume for purposes of this analysis that the matters in which the Chair may engage in covered representational activities are ones in which the United States has a "direct and substantial interest." An express duty of the Authority is to examine, and make recommendations regarding, the "programmatic and structural relationship between the District government and the Federal Government." *Id.* §§ 2(b)(7), 109 Stat. at 99, 207(a)(2). The D.C. Financial Responsibility Act also observes that the problems of the District affect the "efficient operation of the Federal Government." *Id.* § 2(a)(9), 109 Stat. at 98. Moreover, the Authority is a creature of Congress's Article I power over the District and, we assume that any matters that might require or impel the Chair to

[9] Although the Chair is also likely to represent the Authority before members of Congress, § 205 does not cover such representational activities and, thus, this important aspect of the Chair's duties is not implicated here

represent the Authority before any executive department or agency would, in all reasonable likelihood, be ones that involved the interests of the United States.

Our analysis of § 205 turns on the nature of the interests to be represented by the Chair of the Authority. Notwithstanding that the Authority was established as an "entity within the government of the District of Columbia," the D.C. Financial Responsibility Act, taken as a whole, reflects the peculiarly federal nature of the Authority and leads to the conclusion that the interests to be represented by the Chair and members of the Authority are, for purposes of § 205, the interests of the United States. Thus, Dr. Rivlin's service as Chair of the Authority would not be inhibited by § 205.[10]

As we have observed, the Authority is a product and instrument of Congress's constitutional authority over the District of Columbia. The statute itself and its legislative history indicate clearly that the Authority was "created as part of the federal government's responsibility for governing the District of Columbia," and that "[w]hile the Authority is established as part of the District of Columbia government," it was Congress's "strong" intention that it "function and operate in an independent oversight capacity" separate and apart from the existing District government. H.R. Rep. No. 104–96, at 34, 52 (1995); *see* § 2(b), 109 Stat. at 98–99.

For example, it is significant that the statute defines the government of the District of Columbia to exclude the Authority. § 305(5), 109 Stat. at 152. Among the principle functions of the Authority is overseeing the creation of, and compliance with, a financial plan and budget for the District. *See generally id.* §§ 201–204, 109 Stat. at 108–19. In this regard, the Authority must approve any financial plan and budget before it is effective, *id.* § 201, and *no* bill passed by the District of Columbia Council and signed by the Mayor (or passed over the Mayor's veto) may take effect without the approval of the Authority. *Id.* § 203. The Authority is subject only to those District of Columbia laws that Congress has specified in the Act and, in general, "[n]either the Mayor nor the Council may exercise any control, supervision, oversight, or review of the Authority or its activities." *Id.* § 108(b)(1), 109 Stat. at 107. In any action brought by or against the Authority, the Authority is to be represented by counsel of its choosing and "in no instance may the Authority be represented by the Corporation Counsel of the District of Columbia."[11] *Id.* § 108(c).

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[10] Of course the requirements of § 205 would continue to apply to Dr Rivlin in her personal capacity

[11] There are additional features that reflect the separation of the Authority from the District of Columbia For example, no officer or employee of the District government is eligible for appointment to the Authority. § 101(c)(3), 109 Stat. at 101. The staff of the Authority may be appointed and paid without regard to the provisions of the D C Code and the procurement laws of the District do not apply to the Authority *Id* § 102(c)(2), 109 Stat at 102 The Authority is not liable for any obligations or claim against the District of Columbia. *Id.* § 104, 109 Stat. at 105, *amended by* Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub L No 104–134, 110 Stat 1321–106 The District may not borrow money, in certain circumstances, without the consent of the Authority § 204, 109 Stat at 119

In addition to being distinct from the District government, the federal nature of the Authority is evidenced by the fact that the Authority's powers are delegated and vested by federal statute, pursuant to specific constitutional authority, in individuals who are appointed by the President of the United States. Within this rubric of federal authority are specific provisions further reflecting the federal character of the Authority, as well as its separateness from the District. For example, the annual Federal payment to the District is, pursuant to the Act, deposited into an escrow account held by the Authority, to then be allocated to the District government in the Authority's discretion. *Id.* § 205(a)(1), 109 Stat. at 131.

Furthermore, any action brought against the Authority or otherwise arising, in whole or in part, out of the D.C. Financial Responsibility Act, must be brought in federal, rather than District of Columbia, court. *Id.* § 105(a), 109 Stat. at 105. The Authority is vested also with federal subpoena power. It may issue subpoenas and enforce them in the district courts of the United States under the Federal Rules of Civil Procedure. *Id.* § 103(e), 109 Stat. at 103. A review of the D.C. Financial Responsibility Act reveals a host of other examples.[12]

We also observe that our conclusion here is in accord with the interpretation that this Office has applied to § 205 in an analogous circumstance. This Office has previously concluded that § 205 does not prohibit a federal employee who is detailed to a state agency from representing the state agency before the federal agency from which he was detailed, where the detail and the representation of the state's interests are made in connection with a statutory scheme the purposes of which would be furthered by such representational conduct. *See generally Application of 18 U.S.C. §§ 203 and 205 to Federal Employees Detailed to State and Local Governments*, 4B Op. O.L.C. 498 (1980). Here, the D.C. Financial Responsibility Act provides for extensive cooperation between the Authority and federal agencies, including the provision of federal data and the detailing, even on a non-reimbursable basis, of federal employees to assist that Authority. In addition, although the Act prohibits employees of the District of Columbia government from serving on the Authority, it applies no such limit to the service of federal officials and employees. The general purposes of the Act and certain of its specific provisions suggest that the appointment of a federal official to the Authority and her representation of the Authority before federal agencies is consistent with, and would effectuate the purposes of, the Act.

[12] *See e.g.*, § 102(d), 109 Stat at 102 (upon request of the Chair, any Federal department or agency may detail its personnel to the Authority on a reimbursable or non-reimbursable basis to assist the Authority); *id.* § 102(e), *amended by* 110 Stat. at 1321-103 (federal employees who are employed by the Authority are treated as continuing their federal employment for purposes of the federal retirement system); *id.* (those Authority employees who join in the federal government upon leaving the Authority are entitled to credit for the full period of the individual's service with the Authority for purposes of determining federal leave); *id* § 103(f), *amended by* 110 Stat at 1321-102 (the Authority is authorized to procure from the General Services Administration any administrative support services that it may need); *id* § 103(c)(1), 109 Stat at 103 (the Authority is empowered to "secure directly" from any federal department or agency, with consent, any information it deems necessary to carry out its duties).

Because the Authority is an instrument of Congress's constitutional authority over the District of Columbia, a creature of federal law, vested with material attributes of federal authority, clearly and expressly distinct from the District of Columbia government, and composed of members appointed by the President, we conclude that the interests to be represented by the Authority are, for purposes of § 205, federal interests. Thus, if appointed as Chair of the Authority, Dr. Rivlin's dual service would not implicate § 205.

III. Dual Office-Holding

The fact that Dr. Rivlin would serve concurrently as Vice Chair of the Federal Reserve Board and Chair of the Authority raises the question whether this dual office-holding violates federal law. As a statutory matter,[13] a federal official is precluded from receiving compensation from more than one office. 5 U.S.C. § 5533 (1994 & Supp. IV 1997). This Office has previously observed that the repeal in 1964 of earlier legislation that prohibited dual office-holding, coupled with the enactment of the current provision barring only dual compensation, impliedly permits the concurrent holding of two offices so long as there is no dual compensation involved. Memorandum for James H. Thessin, Deputy Legal Advisor, from Randolph D. Moss, Deputy Assistant Attorney General, *Re: Dual Office-Holding* at 2 (Dec. 3, 1997) ("Dual Office-Holding Opinion"); Memorandum for Philip B. Heymann, Deputy Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Creation of an Office of Investigative Agency Policies* (Oct. 26, 1993) ("Investigative Agency Opinion"); *Dual Office of Chief Judge of Court of Veterans Appeals and Director of the Office of Government Ethics*, 13 Op. O.L.C. 241, 242 (1989). The proposed appointment of Dr. Rivlin would not violate the prohibition on dual compensation because the Chair and all members of the Authority serve without pay. § 101(d), 109 Stat. at 101.

Nor would Dr. Rivlin's dual office-holding run afoul of the incompatibility doctrine, which precludes dual office-holding arrangements when a single individual would be authorized by virtue of one office to review her own actions taken in the capacity of her other office.[14] *See generally* Investigative Agency Opinion at 6–8. Here, the two offices in question are not connected by any review authority that would implicate the incompatibility doctrine. *See* Memorandum for Arnold Intrater, General Counsel, Office of White House Administration, from John O.

[13] The Incompatibility Clause of the Constitution, U.S. Const. art. I, § 6, cl. 2, forbids members of Congress from holding any office under the United States. Neither the Incompatibility Clause nor any other constitutional provision bars an executive branch official from holding two offices.

[14] While this Office has continued to refer to the incompatibility doctrine in its opinions, we have reorganized that "[i]t is arguable that it has either fallen into desuetude or been repealed by statute." Memorandum for Edward C. Schmults, Deputy Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re Appointment of D. Lowell Jensen as Associate Attorney General* at 3, 4 (June 14, 1983) ("Associate Attorney General Opinion"); *see* Dual Office-Holding Opinion at 4 (quoting Associate Attorney General Opinion).

McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Dual Office of Executive Secretary of National Security Council and Special Assistant* (Mar. 1, 1988) (no incompatibility problem where office was not designed as check on the other); Memorandum for Fred F. Fielding, Counsel to the President, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Availability of Hatch Act Exemption for Individual Holding Dual Appointments as a Member of the White House Staff and Director of the White House Conference on Productivity* at 4 (Aug. 22, 1983) (finding no incompatibility problem because neither office is "formally subordinate to the other"); *Appointment of Deputy Director of the Council on International Economic Policy (CIEP) by Its Executive Director*, 1 Op. O.L.C. 28 (1977) (finding offices incompatible where official would be required to review his own actions).

IV. Requirement that Federal Reserve Board Members Devote Their "Entire Time" to the Business of the Board

As a member of the Federal Reserve Board, Dr. Rivlin is required under § 241 of title 12, to "devote [her] entire time to the business of the Board." On its face, this requirement would not necessarily prohibit Dr. Rivlin from serving on the Authority, although her performance of the responsibilities of her dual offices must comply with the "entire-time" requirement. "This provision has not been interpreted so literally as to preclude Board members from serving as members of commission or committees of a governmental or quasi-governmental nature established by statute or by Executive Order." Memorandum for Governor Brimmer, *Re: Service as member of Advisory Committee on Regional Economic Development* (July 21, 1967) ("Opinion of Federal Reserve Board").

This Office has previously reviewed a comparable requirement in another statute in circumstances similar to those addressed here. Memorandum for the Attorney General, from W. Wilson White, Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of University Dean as member of Tennessee Valley Authority* (Nov. 8, 1957) ("TVA Opinion") (whether university dean, on leave from university, could serve concurrently on the TVA and an advisory board to the Department of Agriculture). There, a federal official was subject to a prohibition that he not "be engaged in any other business" outside of official duties. TVA Opinion at 1 (quoting 16 U.S.C. § 831a(f)). The analysis of the TVA Opinion turned on the determination, principally a factual one, whether the second position is part-time and may be performed without impairing the full-time responsibilities imposed by the primary office. TVA Opinion at 2; *see also* Memorandum for Larry Eugene Temple, Special Counsel to the President, from Frank M. Wozencraft, Assistant Attorney General, Office of Legal Counsel, *Re: Dual service as an Executive Director of the Inter-American Development Bank and a Director of the Export-Import Bank of Washington* (Feb. 16, 1968) ("Export-

Import Bank Opinion") (analyzing, on factual grounds, whether service on an advisory committee was compatible with full-time nature of federal official's duties).

As we have already noted, the Chair of the Authority is an uncompensated position, § 101(d), 109 Stat. at 101, suggesting that it may be filled on a part-time basis. Moreover, we understand that the President and Dr. Rivlin intend that the position of Chair of the Authority be treated as a part-time position, emphasizing the temporary nature of the Authority and its role in shifting responsibility to the District government. *See id.* § 107, 109 Stat. at 106. You have explained that Dr. Rivlin would seek adequate support and staffing to ensure that hers is an oversight role compatible with part-time responsibilities.[15]

This Office did not interpret the comparable full-time requirement for service on the TVA as "an absolute bar" to any outside activities. TVA Opinion at 2. Rather, because the duties of the second, part-time position would be "occasional" and "intermittent," the TVA Opinion treated these features as evidence suggesting that the position would be compatible with the official's full-time obligations. In addition, the TVA Opinion treated the uncompensated nature of the secondary position as prima facie evidence that it is a part-time position compatible with full-time duties. TVA Opinion at 2; *see also* Export-Import Bank Opinion at 2.

The Federal Reserve Board analyzes its entire-time requirement based upon whether (1) the duties of the additional position would "substantially affect the Board member's ability to give full attention to the affairs of the Board," (2) whether the second position was "completely foreign or unrelated to the Board's work," and (3) whether the duties of the second position "would in any way involve a conflict of interest, *i.e.*, duties inconsistent with [the] duties [of] a Board member." Opinion of Federal Reserve Board at 1. The first of these factors is similar to that which this Office used in assessing the application of a comparable full-time requirement, and the third factor, concerning conflicting duties, is addressed above in this memorandum. The second factor has been applied by the Federal Reserve Board to permit a Board member to sit on the National Public Advisory Committee on Regional Economic Development, based on the reasoning that, inter alia, the functions of the regional economic committee "may not be directly related to the functions of the [Federal Reserve] Board, but, on the other hand, they are obviously not unrelated to the Board's functions, since the basic purpose of the Economic Development Act [creating the committee] is to maintain the national economy at a high level and particularly to alleviate unemployment in certain areas of the country through Federal financial assistance for public works and development facilities." Opinion of Federal Reserve Board at 2. Simi-

[15] Although we understand that the current Chair of the Authority has performed his functions in a full-time capacity, our conclusion is not altered. The Export-Import Bank Opinion observed that notwithstanding the fact that the previous occupant had treated the office as full-time, there was sufficient evidence that the position could be performed on a part-time basis Export-Import Bank Opinion at 2

larly, the Authority is charged with modifying and managing the District's fiscal policies, *see* § 2, 109 Stat. at 98, and Congress regarded such fiscal change as necessary to the "long-term economic health" of the region. *Id.* § 2(a)(8). Ultimately, however, this analysis is factual and forward looking and Dr. Rivlin would need to work with the Federal Reserve Board and its General Counsel to comply with the "entire-time" requirement.

V. Conclusion

For the reasons stated, we conclude that Dr. Rivlin's dual service as Vice Chair of the Federal Reserve Board and Chair of the Authority would be consistent with 18 U.S.C. §§ 205 and 208. Her dual service would also have to comply with the Federal Reserve Act's "entire-time" requirement.

TODD DAVID PETERSON
Deputy Assistant Attorney General
Office of Legal Counsel

Access to Criminal History Records by Non-Governmental Entities Performing Authorized Criminal Justice Functions

Non-governmental entities performing authorized criminal justice functions under contract with government law enforcement agencies may be granted access to criminal history records maintained under the authority of 28 U.S.C. § 534, subject to effective controls to guard against unauthorized use and to ensure effective oversight by the Department of Justice.

Because Department of Justice regulations implementing 28 U S C. § 534 do not affirmatively authorize dissemination of criminal history records to non-governmental entities under contract to assist law enforcement agencies, those regulations should be amended to provide such authorization before access is granted to those entities.

June 12, 1998

MEMORANDUM OPINION FOR THE DEPUTY DIRECTOR
FEDERAL BUREAU OF INVESTIGATION

This responds to your request for our legal opinion concerning the circumstances in which non-governmental entities performing criminal justice functions under contract with government law enforcement agencies may be granted access to criminal history records information ("CHRI") subject to the provisions of 28 U.S.C. § 534 (1994).[1] We conclude that the Attorney General, or her delegee,[2] may permit such access in appropriate circumstances under § 534. Should the Attorney General decide to do so, we believe that the governing regulation, 28 C.F.R. pt. 20 (1997), should be amended in accordance with the rulemaking requirements of the Administrative Procedure Act ("APA"), *see* 5 U.S.C. § 553 (1994), for the reasons discussed below.* Finally, any proposal to permit contractor access to CHRI must incorporate effective controls to guard against unauthorized use or release of CHRI by the contractors and to insure that the Department can maintain effective oversight.

I.

Section 534 directs the Attorney General to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records" and to "exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other

* Editor's Note. The Department's regulations have since been amended to authorize the category of controlled access discussed in this opinion *See* 28 C.F.R § 20 33(a)(7) (2000).

[1] Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Robert M Bryant, Deputy Director, FBI, *Re Access to and Dissemination of Information from the Department of Justice (DOJ) Criminal History Record Information (CHRI) System* (Oct. 3, 1997) ("FBI Memo")

[2] The Attorney General has delegated her CHRI exchange responsibilities to the Federal Bureau of Investigation ("FBI"). *See* 28 C.F R. §§ 0 85(b), 20 31(b) (1997).

institutions."[3] 28 U.S.C. § 534(a)(1), (4). The statute thus requires the Attorney General to collect, maintain, and exchange criminal identification records with federal, state, and local criminal justice agencies. Although the statute does not expressly preclude such agencies from sharing these records with third parties, it provides that "[t]he exchange of records and information authorized by subsection (a)(4) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies." *Id.* § 534(b). This office has previously construed the phrase "related agencies" to include only those agencies expressly authorized under § 534(a) to receive CHRI directly from the Department. *See* Memorandum to Files, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Railroad Police Access to FBI Criminal Identification Records* at 5 (June 22, 1978) ("Lawton Memo").

As we read the statute, it does not on its face forbid the government agencies that are authorized to receive CHRI from sharing it with private contractors assisting them in the performance of their duties. However, § 534(b) provides an enforcement mechanism that enables the Attorney General to oversee the use of CHRI by recipients. This statutory provision, which vests authority in the Attorney General to cancel CHRI exchange arrangements, contemplates that she may invoke that authority in order to guard against the improper use or redissemination of the CHRI that the FBI provides. Accordingly, as further discussed below, the statute would permit the Attorney General to authorize the disclosure of CHRI to private contractors performing criminal justice functions for government agencies that are authorized to receive CHRI, but any such authorization would have to impose controls on the recipients and their contractors to preserve the Attorney General's statutory oversight authority.

Rather than expressly prohibiting categories of CHRI disclosures, § 534(a)(4) merely limits mandatory CHRI exchanges to those that are for the "official use" of the designated "authorized officials." The text of § 534 does not address whether a private contractor acting under the direction, or on behalf, of such "authorized officials" could be said to be engaged in, enabling, or facilitating the "official use" of the CHRI by those officials.

On the other hand, § 534(b) pointedly discourages the "dissemination" of covered records outside "the receiving departments or related agencies," by providing that such dissemination "subject[s]" the noncompliant agency or department to possible cancellation of its exchange privileges under the statute. 28 U.S.C. § 534(b). Moreover, it is clear that this provision was intended "to protect the privacy of rap-sheet subjects," *Department of Justice v. Reporters Comm. for*

[3] The reference to "other institutions" does not generally provide for disclosure to non-governmental entities. *See* Memorandum for John Mintz, Legal Counsel, Federal Bureau of Investigation, from Robert Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Access to NCIC Files by National Center for Missing and Exploited Children* at 2 (July 31, 1984) ("NCMEC Memo") Rather, only certain "railroad police departments" and "police departments of private colleges or universities" are identified as entities "include[d]" within the meaning of that term 28 U S C § 534(d)

Freedom of the Press, 489 U.S. 749, 765 (1989), and should be applied in a manner consistent with this purpose.[4] Finally, as this office has previously observed, the only enforcement mechanism expressly authorized by § 534 is the Department's authority to cancel the direct recipient's authority to receive the information, and the statute should be construed to preserve this oversight authority. *See* Memorandum for Joseph H. Davis, Assistant Director, Legal Counsel Division, Federal Bureau of Investigation, from William P. Barr, Assistant Attorney General, Office of Legal Counsel, *Re: Proposal by Federally Chartered or Insured Financial Institutions to Disseminate FBI Criminal History Record Information to CARCO Group, Inc.* at 6–7 (Sept. 1, 1989) ("CARCO Memo"); Lawton Memo at 5. To the extent those recipients are permitted to disclose CHRI to their contractors, however, the Department's sole recourse under current regulations would be to rely on "the relationship between the local agency and the third party" to prevent abuses. Lawton Memo at 5. Thus, at least in the absence of effective controls over possible redissemination by the contractors, the Department's ability to limit the use of CHRI by recipients might be impaired if recipients were permitted to pass CHRI on to those contractors.

None of these considerations, however, compel a construction of the statute that precludes authorized criminal justice agencies from sharing CHRI with non-governmental contractors performing law enforcement functions where the arrangements are subject to appropriate controls. First, in providing that the exchange of CHRI is "subject to cancellation" if disseminated beyond the receiving agency or related agencies, Congress has delegated considerable discretion to the Attorney General to determine whether cancellation is appropriate in a given context. The statute does not require the Department to "terminate exchange relationships with users authorized under section 534(a)(1) if those users disseminate FBI criminal history records to unauthorized third parties." CARCO Memo at 6 n.12. This discretion would seem to carry with it the authority to determine that a particular class of disclosures—i.e., those made to contractors for law enforcement purposes and subject to appropriate controls—is consistent with the statutory purpose of facilitating law enforcement and not inconsistent with its purpose of protecting relevant privacy interests.

In addition, a strong argument can be made that disclosures of the sort contemplated would not constitute "dissemination" of the information, within the ordinary meaning of that word. Indeed, the dictionary defines "dissemination" to mean "to spread or send out freely or widely as though sowing or strewing

[4] Although at one time this privacy interest was thought to raise potentially significant constitutional limitations on the use of CHRI, thus requiring a narrow construction of the statute, *see Menard v Mitchell*, 328 F Supp. 718 (D D C. 1971), *rev'd sub nom Menard v Saxbe*, 498 F.2d 1017 (D.D.C. 1974), Lawton Memo at 4–5, subsequent developments in the law have made clear that the limitation is not constitutionally derived *See United States Secret Service Use of National Crime Information Center*, 6 Op. O.L C 313, 322 (1982). As a result, it is not necessary to construe the statute narrowly in order to avoid a significant constitutional problem. *Cf. Edward J DeBartolo Corp. v. Florida Gulf Coast Bldg & Constr. Trades Council*, 485 U S 568, 575 (1988); *NLRB v Catholic Bishop of Chicago*, 440 U.S 490, 500 (1979)

seed: make widespread." *Webster's Third International Dictionary* 656 (1986). Sharing information with contractors who are assisting in law enforcement and who are subject to carefully drawn controls would not appear to fall within this definition. Moreover, although the meaning of the phrase "dissemination" may well vary based on context,[5] it is clear that, at a minimum, the Attorney General could exercise her regulatory authority to define the term in a manner that would permit disclosures to contractors who are assisting law enforcement and who are subject to appropriate controls. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Such an interpretation would be consistent with both the language and purpose of the statute.

Although opinions issued by this office have at times taken a restrictive view of § 534, *see, e.g.*, Lawton Memo, we have not interpreted the term "dissemination" to encompass all disclosures of CHRI to non-governmental personnel.[6] Some of these opinions, however, have indicated that CHRI disclosures to non-governmental entities may be made only when the entity "is the only agency, public or private, performing a criminal justice function under public auspices." *See* Lawton Memo at n.5. In our view, these opinions overstate the statutory limitation on permissible disclosures made by authorized criminal justice agencies in this context. We believe that the proper interpretation is expressed in subsequent OLC opinions, which more aptly state that the receiving private entity must be one that "perform[s] quasi-governmental functions under strict governmental control." CARCO Memo at 4–5; Memorandum for Joseph H. Davis, Assistant Director, Legal Counsel, Federal Bureau of Investigation, from Douglas W. Kmiec, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Creation of a Public Registry of Law Enforcement Officers Killed in the Line of Duty* at 2 (July 1, 1988).

Finally, to the extent the Department must retain the ability adequately to control the use of CHRI, and to cancel the privileges of those who make or permit improper disclosures, we note that regulatory measures may be developed that would serve this purpose, while still allowing contractors to access relevant information.

Accordingly, we believe that disclosure of CHRI to authorized criminal justice contractors would not be forbidden by the provisions of § 534 itself. If carefully controlled, moreover, such disclosures would also be compatible with the statutory purpose of facilitating law enforcement while protecting the privacy interests affected.

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[5] *Compare Zimmerman v Owens*, 561 N W 2d 475 (Mich Ct App 1997) (holding that placement of a confidential child protective service report in public court file did not constitute a dissemination) *with Essential Information, Inc. v. United States Information Agency*, 134 F.3d 1165, 1168 (D C Cir 1998) (rejecting argument that the term "dissemination" connoted a much broader dispersal of materials than mere "disclosure" under the particular statute in question, but acknowledging that "the terms may be so distinguishable under some circumstances")

[6] *See, e.g*, NCMEC Memo at 3 (authorizing CHRI disclosure to private non-governmental entity, such as the National Center for Missing and Exploited Children, under limited circumstances and "subject to substantial governmental controls").

II.

In addition to § 534 itself, however, it is necessary to consider the currently existing regulations that implement the statute. *See* 28 C.F.R. pt. 20 (1997) (governing "Criminal Justice Information Systems") ("Part 20" or "CJIS Regulations"). Subpart C of part 20 applies to the CHRI systems maintained by the Department of Justice, other federal agencies, and by state and local criminal justice agencies insofar as they use the services of federal CHRI systems. *See* 28 C.F.R. § 20.30. The regulations provide that CHRI contained in systems maintained by the Department of Justice "will be made available":

> (1) To criminal justice agencies for criminal justice purposes; and
>
> (2) To Federal agencies authorized to receive it pursuant to Federal statute or Executive order.
>
> (3) Pursuant to Public Law 92–544 (86 Stat. 1115) for use in connection with licensing or local/state employment or for other uses only if such dissemination is authorized by Federal or state statutes and approved by the Attorney General of the United States.
>
> . . .
>
> (4) For issuance of press releases and publicity designed to effect the apprehension of wanted persons in connection with serious or significant offenses.

Id. § 20.33(a). The regulations further provide, consistent with § 534(b), that an agency's right to receive CHRI "is subject to cancellation if dissemination is made outside the receiving departments or related agencies." *Id.* § 20.33(b).

Nothing in the subpart C regulations authorizes the dissemination of CHRI to private entities acting on behalf of government criminal justice agencies. Closest is the authorization to disclose CHRI to "criminal justice agencies for criminal justice purposes," *id.* § 20.33(a)(1), but those agencies are expressly defined to include only "courts" and certain "government agencies [and] any subunit thereof," *id.* § 20.3(c). They do not include non-governmental agencies, even when under contract to perform criminal justice functions. Particularly when read in light of the regulatory purpose of protecting "individual privacy," *id.* § 20.1, it appears that section 20.33(a) was intended as an exhaustive list of the categories of authorized exchange for the covered records, and this office has previously

construed the provision in this manner.[7] Thus, section 20.33(a) does not affirmatively authorize dissemination of CHRI to non-governmental entities under contract to assist federal, state or local law enforcement agencies.

A more difficult question is whether such disclosure of CHRI to private contractors, where subject to strict controls over the handling and use of the CHRI, would constitute a "dissemination" for purposes of the regulation. Although one might plausibly argue that it would not, *see supra* n.5 and accompanying text, for a number of reasons we believe that such disclosures should not be authorized without first amending the regulations. Although we cannot say with certainty that such an action is legally required, the risks of not doing so are substantial.

At the outset, we note that it is more difficult to construe the regulation's use of the word "dissemination" in a manner that would allow contractor access than to do so with regard to the statute's use of the same word. In particular, subpart B of the regulations, which sets forth the rules governing certain state and local (as opposed to federal) criminal history record information systems, expressly authorizes disclosure to "individuals and agencies pursuant to a specific agreement with a criminal justice agency to provide services required for the administration of criminal justice." 28 C.F.R. § 20.21(b)(3). Because no similar provision appears in subpart C, which governs here, one might reasonably infer that such disclosures are not currently permitted under that provision.

Further, as noted in your memorandum of October 3, 1997, earlier opinions of this office have taken a restrictive view of the Department's authority to release CHRI to recipients not specifically identified in § 534,[8] and the Department historically has not permitted third-party access to CHRI. The courts have indicated that when an agency changes its interpretation of a regulation so fundamentally that it is equivalent to an amendment of the regulation, the change must be accomplished through notice-and-comment rulemaking. *See Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87 (1995); *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997), *cert denied*, 523 U.S. 1003 (1998).

Finally, by proceeding by notice-and-comment rulemaking, the Department will insure that its interpretation of § 534 receives the full weight of *Chevron* deference. Although the question is unsettled, a court might well provide less deference to an "interpretative" rule, which is not subject to formal rulemaking, than to a "legislative" rule, which is subject to the notice-and-comment process.[9] *Compare Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretative rules "not entitled to the same deference as norms that

[7] *See Federal Bureau of Investigations—Disclosure of Criminal Record—Admission to the Bar*, 3 Op. O.L.C. 55 (1979), *see also Utz v. Cullinane*, 520 F.2d 467, 477 n.20 (D.C. Cir. 1975) ("regulations set apparently stringent standards as to the maximum extent of dissemination")

[8] *See* FBI Memo at 4 n.3 (citing, *e.g.*, Lawton Memo and CARCO Memo)

[9] In our view, the availability of *Chevron* deference should turn on whether Congress intended for deference to apply, and not on whether a rule is "interpretative" or "legislative." We cannot say with any certainty, however, that a reviewing court would adopt this same view

derive from the exercise of the Secretary's delegated lawmaking powers'') (dicta) *with Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 182 (3d Cir. 1995) (*Chevron* deference is appropriate "even though the Secretary's interpretation is not contained in a 'legislative rule' "), *cert. denied*, 516 U.S. 1093 (1996). Receiving full *Chevron* deference, moreover, may prove important to sustaining the Department's position in potential litigation.

In light of all these considerations, we believe that to proceed without first amending the regulations in accordance with the APA would invite significant legal challenge.

III.

If a decision is made to amend the regulations to authorize provision of CHRI to criminal justice contractors, it is essential that this goal be achieved in a manner that will subject contractor access to effective controls against unauthorized use or further dissemination. As the Supreme Court has observed, Congress intended that § 534 be applied in a manner that is protective of "the privacy of rap-sheet subjects." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 749, 765. Moreover, § 534(b) provides for Department of Justice oversight of the dissemination of CHRI by giving the Attorney General the authority to cancel the exchange of CHRI if an unauthorized dissemination is made. The Department's responsibility to protect the privacy of CHRI will require, in our view, that it have at its disposal the means of controlling the use of this information.

The precise form of such controls will depend upon a variety of factors. As a starting point, however, the Department might consider whether the provisions governing CHRI access agreements between states and criminal justice contractors set forth in subpart B of the CJIS Regulations would provide an appropriate model. The subpart B regulations require that such agreements shall "limit the use of data to purposes for which given, insure the security and confidentiality of the data consistent with these regulations, and provide sanctions for violations thereof." 28 C.F.R. § 20.21(b)(3). We would, of course, be happy to consider whether any particular proposal satisfies statutory requirements.

Finally, we note that authorizing the provision of federal criminal history records to the entities in question would require compliance with the Privacy Act. *See* 5 U.S.C. § 552a (1994 & Supp. II 1996). The criminal history records maintained by the FBI and provided through the NCIC are part of a system of records that is subject to the Privacy Act. Accordingly, covered agencies may not disclose such records to other agencies or institutions unless the subject of the records consents or one of the statute's exemptions apply. *Id.* § 552a(b).[10]

[10] In defining covered "agencies," *see* 5 U.S.C. § 552a(a)(1), the Privacy Act adopts by cross-reference the Freedom of Information Act's definition of "agency," which "includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch

Continued

Here, the criminal justice or law enforcement uses for which the information would be provided would likely qualify for the issuance of a "routine use" exception to the Privacy Act's prohibitions against unconsented disclosures. *See* 5 U.S.C. § 552a(b)(3). A "routine use" means, with respect to the disclosure of a record, "the use of such record for a purpose which is compatible with the purpose for which it was collected." *Id.* § 552a(a)(7). We think that the uses of CHRI indicated in the examples you have submitted would generally be compatible with the law enforcement and related purposes for which it was collected by the FBI and other agencies. We have not undertaken, however, to determine whether these particular uses would qualify under any of the existing published routine uses applicable to the relevant systems of records. *See, e.g.*, Privacy Act of 1974; Modified Systems of Records Notice (Fingerprint Identification Records System), 61 Fed. Reg. 6385 (1996); Privacy Act of 1974; Modified System of Records Notice (NCIC), 60 Fed. Reg. 19,774 (1995). Before actually authorizing the disclosure of CHRI to private criminal justice contractors, the Justice Department should issue any new routine use notifications necessary to cover the particular disclosures in question.

RANDOLPH D. MOSS
Deputy Assistant Attorney General
Office of Legal Counsel

of the Government (including the Executive Office of the President), or any independent regulatory agency." 5 U.S.C. § 552(f)(1) (Supp. II 1996).

Waiver of Statutes of Limitations in Connection with Claims Against the Department of Agriculture

The Supreme Court's decision in *Irwin v. Department of Veterans Affairs* made no alteration in the fundamental rules governing waivers of sovereign immunity in actions against the United States *Irwin* and the cases following it therefore provide no support for the novel conclusion that the executive branch has the discretion to dispense with a congressionally mandated statute of limitations in litigation or the compromise of claims. Unless Congress provides to the contrary, adherence to the relevant statute of limitations remains a strict and non-waivable condition on suits against the federal government.

Enactment of legislation authorizing the payment of claims barred by the statute of limitations under the Equal Credit Opportunity Act is the necessary and constitutionally appropriate means of satisfying such claims.

June 18, 1998

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

This memorandum supplements advice that we provided to you previously in connection with the statute of limitations under the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. §§ 1691–1691f (1994). *See generally Statute of Limitations and Settlement of Equal Credit Opportunity Act Discrimination Claims Against the Department of Agriculture*, 22 Op. O.L.C. 11 (1998) ("ECOA Opinion").[1] The issues presented here as well as in our earlier ECOA Opinion arise in the context of pending[2] and potential claims against the Department of Agriculture ("USDA") based upon alleged racial discrimination during the period of January 1983 to February 1997, in connection with the administration of farm loans and credit programs in violation of ECOA.[3] In connection with an assessment of these claims by the Department of Justice, we provided advice regarding various issues including the applicable statute of limitations under ECOA, whether the limitations period applies to administrative settlements, and whether the limitations period may be waived.[4] *See* ECOA Opinion, 22 Op. O.L.C. at 13. We concluded that the executive branch does not have the legal authority intentionally to waive the statute of limitations under ECOA. This conclusion was based upon the long-standing principle that, unless Congress provides otherwise, the statute of limita-

[1] In analyzing the issues outlined above, we shall assume familiarity with the legal and factual matters discussed in the ECOA Opinion and shall summarize only briefly the relevant background

[2] *Pigford v. Glickman*, No. Civ 1:97CV01978, 1997 WL 429426 (D.D.C. 1997).

[3] ECOA, in relevant part, prohibits any creditor from discriminating against any applicant, with respect to any aspect of a credit transaction, on the basis of race, color, religion, national origin, sex or marital status. 15 U S C § 1691(a) The statute defines a creditor to include the United States. *Id.* § 1691a(e), (f)

[4] In our earlier opinion, we concluded that the applicable statute of limitations under ECOA is two years, that the statute of limitations applies to administrative settlements, and that it may not be waived by the United States in litigation or in the compromise of claims. *See* ECOA Opinion, 22 Op. O.L.C. at 13.

tions governing a cause of action against the United States is a condition on Congress's waiver of sovereign immunity. *See id.* at 14.

We now consider in greater detail whether the Supreme Court's decision in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), and the lower court cases following *Irwin* altered or undermined this principle and thus permit the executive branch intentionally to pay claims that are time-barred under the statute of limitations prescribed by Congress. In Part I, we analyze the nature of statutes of limitations governing suits against the United States. We show that Congress has plenary and exclusive authority to impose conditions upon the waiver of sovereign immunity, and upon the executive's authority to obligate the funds of the United States, and that it has long been settled law that a statute of limitations ordinarily is such a condition. In Part II, we address the scope and effect of *Irwin* and the relevant lower court decisions. We conclude that *Irwin* made no alteration in the fundamental rules governing waivers of sovereign immunity in actions against the United States. *Irwin* and the cases following it therefore provide no support for the novel conclusion that the executive has the discretion to dispense with a congressionally mandated statute of limitations in litigation or the compromise of claims.[5] Unless Congress provides to the contrary, adherence to the relevant statute of limitations remains a strict and non-waivable condition on suits against the federal government.[6]

We understand that Congress is considering, and the administration strongly endorses, legislation that would authorize the payment of time-barred claims under ECOA. In accordance with our analysis below, the enactment of such legislation is the necessary and constitutionally appropriate means of satisfying such claims.

I. Statutes of Limitations as a Condition on the Waiver of Sovereign Immunity

The doctrine of sovereign immunity precludes suit against the United States without the consent of Congress, and the terms of its consent define the conditions upon which such claims are permitted. *See United States v. Mottaz*, 476 U.S. 834, 841 (1986); *United States v. Mitchell*, 445 U.S. 535, 538 (1980). As Justice Holmes explained in *Reid v. United States*, 211 U.S. 529 (1909), "Suits against the United States can be maintained, of course, only by permission of the United States, and in the manner and subject to the restrictions that it may see fit to impose." *Id.* at 538; *see FHA v. Burr*, 309 U.S. 242, 244 (1940); *Munro v. United States*, 303 U.S. 36, 41 (1938). It is a cardinal rule of our system, furthermore, that the decision to waive sovereign immunity is the exclusive prerogative of Congress. *See generally OPM v. Richmond*, 496 U.S. 414 (1990); *Finn v. United*

[5] We thus adhere to the views we expressed earlier on the significance of *Irwin*. *See* ECOA Opinion, 22 Op O.L.C. at 14 n.3

[6] Congress did not provide to the contrary in ECOA and the statute is subject to the general principles discussed below

States, 123 U.S. 227 (1887). The executive and judicial branches therefore may not, without statutory authorization, waive the conditions upon which Congress consents to suits against the government. *See id.* at 229.

Congress's exclusive authority over the terms upon which the United States may be sued is rooted in Congress's plenary authority over the appropriation of federal funds. The Appropriations Clause of the Constitution provides, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. As a consequence, no money may be paid on a claim against the government unless a statute authorizes payment or mandates compensation. *United States v. Testan*, 424 U.S. 392, 398–400 (1976); *see also Richmond*, 496 U.S. at 424. The Supreme Court has emphasized that a fundamental purpose of the Appropriations Clause is to ensure that the government's funds are spent only "according to the letter of the difficult judgments reached by Congress." *Richmond*, 496 U.S. at 428; *see Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) ("no money can be paid out of the Treasury unless it has been appropriated by an act of Congress"); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850) ("not a dollar" of the funds in the Treasury may be "used in the payment of any thing not thus previously sanctioned" by Congress). Thus, "in the absence of clear Congressional authority, the other branches of government cannot effect payment of Treasury funds." *Speers v. United States*, 38 Fed. Cl. 197, 202 (1997) (citing *Richmond*).

The Supreme Court has recognized in many contexts the constitutional principle that federal monies can be paid only in accordance with the rules Congress has prescribed. In *OPM v. Richmond*, for example, the Court rejected the argument that the government could be estopped from denying monetary benefits not otherwise permitted by statute.[7] *See Richmond*, 496 U.S. at 424–29. In *Richmond*, a retired government employee lost certain benefits because, on the basis of erroneous advice from OPM, he took a job that paid a salary that placed him outside the statutory eligibility limits for the government benefits. *Id.* at 417–18. The Court rejected the estoppel argument and enforced the statutory ineligibility requirements because to require the payment of funds in contravention of statutory terms would "render the Appropriations Clause a nullity." *Id.* at 428. "If agents of the Executive were able, by their unauthorized oral or written statements to citizens, to obligate the Treasury for the payment of funds," the Court reasoned, "the control over public funds that the [Appropriations] Clause reposes in Congress in effect could be transferred to the Executive." *Id.* The Court cautioned that estoppel would, in effect, empower executive officials to dispense with statutory requirements not to their liking, by giving legal effect to their incorrect advice. *Id.* Further, the Court observed, executive officials are not free to ignore

[7] The Court in *Richmond* left open the possibility that "extreme circumstances . . . might support estoppel in a case *not* involving payment from the Treasury" 496 U.S. at 434 (emphasis added). "As for monetary claims," the Court concluded, "there can be no estoppel, for courts cannot estop the Constitution." *Id.*

statutory limitations on the payment of funds and to do so knowingly is a federal crime. *Id.* at 430 (citing 31 U.S.C. §§ 1341, 1350, the Anti-Deficiency Act).

The courts and the executive branch have long acknowledged that Congress's enactment of a statute of limitations applying to suits against the United States is a condition on Congress's consent to suit. It is a "basic rule" that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." *Block v. North Dakota*, 461 U.S. 273, 287 (1983); *see United States v. Dalm*, 494 U.S. 596, 608 (1990); *Mottaz*, 476 U.S. at 841; *see also* Memorandum for James W. Moorman, Assistant Attorney General, Land & Natural Resources Division, from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, *Re: Pueblo of Taos v. Andrus* at 2 n.1 (Mar. 30, 1979). The imposition by Congress of a statute of limitations creates a "condition or qualification of the right to a judgment against the United States" and, unless Congress may be deemed to have "conferred authority upon any of [the government's] officers to waive the limitation imposed by statute," the limitations requirement bars judgment against the United States and may not be waived.[8] *Finn*, 123 U.S. at 232–33.

This principle has repeatedly been reaffirmed by the Supreme Court and lower courts. For example, in *Munro v. United States*, 303 U.S. 36 (1938), a United States Attorney erroneously advised a claimant that service of process would toll the statute of limitations. The claim was filed after the limitations period had run, and the Supreme Court held that the suit was time-barred. *Id.* at 41. The U.S. Attorney "had no power to waive conditions or limitations imposed by statute in respect of suits against the United States." *Id.* (citing *Finn*). *See also United States v. Garbut Oil Co.*, 302 U.S. 528, 534 (1938) (holding that an agency head was without authority to waive the requirement of the statute of limitations). To the same effect, and more recently, in *Overhauser v. United States*, 45 F.3d 1085 (7th Cir. 1995), the court refused to give effect to an agreement by which, plaintiffs asserted, the government had waived the applicable statute of limitations. Chief Judge Posner wrote that "government officers have no general power to waive statutes of limitations in tax cases" and may do so only where there is a specific statutory authorization for such a waiver. *Id.* at 1088.

The power to modify or waive a statute of limitations imposed by Congress thus is entirely a prerogative of Congress. Congress alone has the power to determine the circumstances, if any, under which a claim time-barred under the relevant statute of limitations can be paid because of equitable considerations. As the Supreme Court emphasized in the *Richmond* case, the "whole history and practice" of Congress "with respect to claims against the United States" demonstrate

[8] We emphasize at the outset that the issue presented here is limited to statutes of limitations involving suits against the United States In the case of non-federal defendants, a congressionally established statute of limitations is a procedural device to protect defendants and promote judicial economy It is not a condition on the waiver of sovereign immunity and, accordingly, it generally may be waived by the defendant *See, e g., Lawyers Title Ins Corp v Dearborn Title Corp.*, 118 F.3d 1157, 1166 (7th Cir. 1997).

"the impossibility" of honoring claims against the government on the basis of equity but "in violation of a statute." 496 U.S. at 430. Congress has addressed the problem of meritorious but time-barred claims in a variety of ways, but its very actions in doing so bear witness to the principle that the decision to allow claims barred by a statute of limitations is exclusively congressional. *Id.* at 430–31. For example, from time to time Congress has passed legislation specifically designed to ameliorate the harsh effects of statutes of limitations by creating exceptions or modifications to the statute.[9] Under some statutory schemes, Congress has specifically empowered an executive agency to create or modify the applicable limitations period and thus to authorize its waiver in individual cases.[10] More generally, Congress has created the "congressional reference" procedure, 28 U.S.C. §§ 1492, 2509 (1994), which permits the consideration of the equities of time-barred claims, with Congress retaining the ultimate decision as to payment[11] and circumstances in which the statute of limitations can be disregarded.[12]

Thus, the long-established axiom is that Congress controls the waiver of sovereign immunity. Unless it authorizes another branch to ignore or modify the conditions upon which it waives that immunity, only Congress may establish or modify the terms under which the funds of the United States are to be obligated.

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[9] *See, e.g.*, Omnibus Budget Reconciliation Act of 1989, Pub. L. No 101–239, § 10302, 103 Stat 2106, 2481 (authorizing agency to waive statute of limitations where a claimant's untimely filing was caused by incorrect advice from the agency), Priv. L No 99–3, 100 Stat 4314 (1986) (waiving statutory deadline for particular claimant where claimant's petition was untimely due to misinformation from the agency), Legislative Branch Appropriations Act, 1993, Pub L No 102–392, 106 Stat 1703 (1992) (extending statute of limitations for suits for bodily injury and death under Migrant and Seasonal Workers Protection Act); Pub. L No 103–104, 107 Stat. 1025 (1993) (waiving applicable statute of limitations for takings cases arising out of creation of new national recreation area).

[10] *See, e g*, 42 U.S.C § 405(g) (1994) (claimant must seek judicial review within 60 days "or within such further time" as the agency may provide), 26 U.S.C. § 6532(a)(2) (1994) (statute of limitations may be extended for such time as agreed upon in writing by the agency and the claimant), *see BCS Financial Corp. v. United States*, 118 F.3d 522, 525 (7th Cir 1997) (when Congress has empowered an agency to create or modify the time limitations without further congressional action, "its application to a particular case can be waived" by the agency by virtue of its statutory authority)

[11] A congressional reference advises Congress whether, based on equitable considerations, a claim should be paid notwithstanding, inter alia, the "bar of any statute of limitation" 28 U.S.C. § 2509(c); *Menominee Indian Tribe of Wisconsin v. United States*, 39 Fed Cl 441, 456–57 (1997); *see also Banfi Products Corp v United States*, 40 Fed Cl 107 (1997); *Bear Claw Tribe Inc v. United States*, 37 Fed. Cl. 633 (1997). Under congressional reference procedures, either House of Congress may, by passage of a bill, refer a claim against the United States to the Court of Federal Claims. 28 U S C § 1492. A judge of the Court of Federal Claims, acting as a "hearing officer," makes an initial determination whether a claimant's demand is a "legal or equitable claim" or merely a "gratuity," and recommends the amount, if any, that is legally or equitably due the claimant 28 U S C. § 2509(c). The report and recommendation of the hearing officer is then reevaluated by a three-judge review panel of the court, before the report and recommendation is sent to Congress *Id* § 2509(d). A claim is not paid until Congress specifically appropriates the award by statute *See generally* Subcommittee on Immigration and Claims of the House Comm on the Judiciary, 105th Cong., *Rules of Procedure for Private Claims Bills* (Comm Print 1997), *see, e g*, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L No 105–119, § 114, 111 Stat. 2440, 2461 (1997) (appropriating funds for award recommended in *Estate of Braude v. United States*, 35 Fed Cl 99 (1996), *approved by review panel*, 38 Fed Cl. 476 (1997)).

[12] We have examined the statutory language of ECOA to determine whether the statute confers upon the Executive any discretion to waive the statute of limitations requirement We find nothing in ECOA to suggest that Congress has done so. Where Congress has conferred such authority, it has done so by affirmatively delegating some manner of discretion over the statute of limitations *See, e g*, 42 U S C. § 405(g) (claimant must seek judicial review within 60 days "or within such further time" as the agency may provide), 26 U.S.C. § 6532(a)(2) (statute of limitations may be extended for such time as agreed upon in writing by the agency and the claimant). Here, the statute is silent. Accordingly, the general prohibition on the waiver of a statute of limitations is applicable to ECOA.

For the executive branch to assert a general authority intentionally to waive statutes of limitations would represent a fundamental and far-reaching departure from constitutional principles previously recognized by all three branches of the government. To allow the executive to enlarge, in its discretion, a congressional waiver of sovereign immunity and to obligate the funds of the United States without statutory authorization would effect a significant alteration in the constitutional separation of powers, as traditionally understood, in an area of undisputed legislative primacy. It would be implausible to read a Supreme Court decision to cause such a seismic shift in our system of government unless the Court expressed a clear intention to do so.

We turn now to consider whether the Supreme Court's decision in *Irwin* wrought a fundamental change in the long-standing principles we have discussed.

II. The Scope and Effect of *Irwin*

A. The Supreme Court's Decision

In *Irwin v. Department of Veterans Affairs*, the Court held that a statute of limitations in a suit against the United States is presumed to be subject to the doctrine of equitable tolling. 498 U.S. at 96. The Court addressed the issue in the context of a late-filed Title VII action against the government. *Id.* at 91. At issue was whether "late-filed claims are jurisdictionally barred." *Id.* at 92. The Court's preliminary conclusion that the claim at issue "did not strictly comply" with the filing deadline, did not "end [its] inquiry." *Id.* at 93. Rather, the Court addressed whether a late-filed claim may be deemed to have satisfied the statute of limitations based upon the doctrine of equitable tolling.[13] *Id.*

The Court began its analysis by observing that in the context of a suit against the government, the Title VII statute of limitations "is a condition to the waiver of sovereign immunity and thus must be strictly construed." *Id.* at 94 (citation omitted). However, the Court noted the customary availability of equitable tolling in suits between private litigants,[14] and reasoned that:

> [M]aking the rule of equitable tolling applicable to suits against the Government . . . amounts to little, if any broadening of the congressional waiver. Such a principle is likely to be a realistic

[13] Equitable tolling principles would allow a late-filed claim to be heard where "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96 (footnotes omitted), *see* ECOA Opinion, 22 Op. O.L.C. at 23–26 (addressing equitable tolling principles generally and applying the doctrine to claims of alleged discrimination by USDA).

[14] The relevance of this point presumably is that Congress's toleration of the courts' practice of applying equitable tolling in these suits without any express statutory authorization is evidence that Congress regards the courts' practice as consistent with Congress's intentions in enacting statutes of limitations in the context of suits between private litigants.

> assessment of legislative intent as well as a practically useful principle of interpretation.

Id. at 95. The Court therefore adopted as a "general rule" a "rebuttable presumption" that the doctrine of equitable tolling can be applied to suits against the United States. *Id.*

Irwin does not assert any intention on the Court's part to make a fundamental modification in the principles governing waivers of sovereign immunity. Furthermore, the Court's reasoning is most naturally read as a reconfirmation of those principles. The opinion of the Court explicitly reiterated the long-standing view that statutes of limitations are congressionally imposed conditions on Congress's waiver of sovereign immunity. The considerations the Court adduced in adopting a presumption that equitable tolling applies—Congress's likely intentions and the *de minimis* effect the availability of equitable tolling would have on the scope of Congress's waiver of immunity—are relevant under the traditional understanding of Congress's plenary authority in this area. Precisely because Congress's authority is complete, its intentions are controlling and the Court should adopt the approach most likely to effectuate those intentions, including a likely intention to permit courts to deem the statute of limitations satisfied, here as elsewhere, by claimants who meet the rigorous standards of equitable tolling.[15] There is no obvious justification for interpreting *Irwin* as anything other than the application of settled principles to resolve a particular issue on which earlier cases were ambiguous.

We have considered, however, the possibility that *Irwin* so altered the legal principles governing this area that the Executive can waive a statute of limitations on the basis of equitable considerations alone. In support of this conclusion, a "waiver argument" might be fashioned as follows: prior to *Irwin*, it was assumed that the Constitution required the executive and judicial branches to respect statutes of limitations as absolute bars on late-filed claims against the United States; rigid maintenance of the limitations periods Congress prescribed was a necessary corollary of recognizing Congress's exclusive authority over the waiver of sovereign immunity. But *Irwin* may be read as demonstrating that the judicial branch is not absolutely bound by a congressionally prescribed limitations period in circumstances where an untimely claim deserves recompense on equitable grounds. Thus, the waiver argument would conclude, if courts are not bound absolutely by a limitations period, there is no reason that the executive branch does not have a similar discretion that would allow it to modify or waive a statute of limitations where, in the executive's determination, there are compelling equitable reasons for doing so.

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[15] An improperly narrow construction of Congress's waiver of sovereign immunity, like an unauthorized judicial expansion of the waiver, would be a usurpation of Congress's prerogative *See Irwin*, 498 U.S. at 94 (the Court is obliged "not to 'assume the authority to narrow the waiver that Congress intended,' or construe the waiver 'unduly restrictively' ") (citation omitted)

We do not find this interpretation of *Irwin* tenable. First, the waiver argument ignores *Irwin*'s pointed restatement of the traditional view that "the time limits imposed by Congress in a suit against the Government involve a waiver of sovereign immunity" and that Congress's imposition of a limitations period is "a condition to the waiver of sovereign immunity." 498 U.S. at 96, 94. A mere procedural requirement that can be dispensed with by another branch of government scarcely could be called a *condition* to recovering a money claim from the United States, and it would "involve" Congress's waiver of sovereign immunity only in the most trivial sense. Under the Court's reasoning, if a claimant satisfies a statute of limitations by virtue of equitable tolling, the statutory condition precedent has been met and the consent of Congress has been given. The opinion does not suggest that the statute of limitations is no longer a condition precedent, only that the condition may be satisfied by application of equitable tolling.

Second, the waiver argument ignores the reasons the Court gave in *Irwin* for adopting a rebuttable presumption that equitable tolling is available. The Court observed that its decision would "amount[] to little, if any, broadening of the congressional waiver" of sovereign immunity, and concluded that the presumption was consistent with Congress's intent in waiving sovereign immunity and subjecting the government to claims available against private parties. *Id.* at 95. In contrast, the conclusion that the executive may waive statutes of limitations would apparently vest the executive with full discretion to pay otherwise time-barred claims at its choosing, surely a quite substantial "broadening of the congressional waiver." No limiting principles parallel to those governing equitable tolling exist to guide the Executive's exercise of this discretion, and even if the Attorney General were to evolve such principles one could not impute to Congress the intent of permitting the Executive to act on them, at least with respect to statutes of limitations enacted in ignorance of their existence and content. Finally, in order to read *Irwin* as licensing executive waiver of limitations statutes we would have to reject the most natural reading of the decision in favor of an interpretation that attributes to the Court the intention of reworking long-standing and fundamental principles in an opinion that provides no indication of such an intention. We conclude that *Irwin* by itself provides no support for the waiver argument.

B. Post-*Irwin* Cases

Irwin has been the subject of extensive and sometimes inconsistent lower court interpretation since it was decided. We have considered, therefore, the possibility that post-*Irwin* caselaw extends the scope or meaning of the decision far enough to encompass executive waiver of statutes of limitations. We begin by noting that the Supreme Court's own cases before and after *Irwin* are entirely free of any indication that *Irwin* marked a departure from its well-established jurisprudence regarding sovereign immunity. Only months before issuing its decision in *Irwin*,

the Court reaffirmed that statutes of limitations are mandatory conditions upon Congress's consent to suit, *United States v. Dalm*, 494 U.S. 596, 608 (1990), a proposition that *Irwin* itself reiterates. 496 U.S. at 94. Following *Irwin*, in *United States v. Williams*, the Court once again emphasized that a waiver of sovereign immunity may not be enlarged "beyond the purview of the statutory language," 514 U.S. 527, 531 (1995) (citation omitted), language that is difficult to reconcile with the waiver argument reading of *Irwin*.[16] The Supreme Court has to date given no indication that it views *Irwin* as a landmark decision on the constitutional separation of powers.

The vast majority of lower court decisions following *Irwin* clearly reaffirm the rule that the government may not waive statutes of limitations. Many decisions, indeed, reaffirm this basic principle without addressing the argument that *Irwin* might have changed it,[17] a fact that supports our conclusion that nothing in *Irwin* itself provides a basis for arguing that the executive now possesses a generalized waiver authority. Among the cases that actually discuss the significance of *Irwin*, some courts have concluded that *Irwin* did not alter the rule that statutes of limitations are a strict condition on the waiver of sovereign immunity in suits against the United States.[18] These cases obviously support the conclusion that *Irwin* did not fundamentally rewrite the law governing this area.

Some courts, in cases involving a claim that equitable tolling should be applied, have stated that because statutes of limitations under *Irwin* are generally subject to equitable tolling they are not "jurisdictional" in nature, as was assumed before

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[16] Even with regard to *Irwin*'s treatment of equitable tolling, the Supreme Court has recently held that the doctrine does not apply in every case and to every statute of limitations, but depends upon "the text of the relevant statute" *United States v Beggerly*, 524 U S 38, 48 (1998). Indeed, the Court's decision in *Beggerly* further supports our understanding that *Irwin* simply permits the application of equitable tolling to suits against the government under certain circumstances and where consistent with the specific statute in question *Id*

[17] *See, e g , Flory v. United States*, 138 F 3d 157, 159 (5th Cir 1998), *Millares Guiraldes de Tineo v United States*, 137 F 3d 715, 719–20 (2d Cir 1998); *Loudner v United States*, 108 F.3d 896, 900 (8th Cir. 1997), *Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1454 (Fed Cir 1997), *Dahn v United States*, 127 F 3d 1249, 1252 (10th Cir 1997), *Nesovic v United States*, 71 F.3d 776, 777–78 (9th Cir 1995), *Widdoss v. Secretary of HHS*, 989 F 2d 1170, 1172 (Fed Cir), *cert denied*, 510 U S 944 (1993), *Richmond, Fredericksburg & Potomac R R. v. United States*, 945 F.2d 765, 769 (4th Cir. 1991), *Hart v United States*, 910 F.2d 815, 818–19 (Fed Cir 1990); *Levy v GAO*, No 97 CIV 4016 (MBM), 1998 WL 193191, at *1, 3 (S D.N Y Apr 22, 1998); *Wrona v United States*, 40 Fed. Cl 784, 787 (1998), *Alder Terrace Inc v United States*, 39 Fed Cl. 114 (1997), *aff'd*, 161 F 3d 1372 (Fed Cir 1998), *Entines v United States*, 39 Fed Cl 673, 678 (1997), *Campbell v United States*, 38 Fed Cl 524, 527, *aff'd*, 132 F 3d 53 (1997), *cert denied*, 523 U S 1078 (1998), *McDonald v United States*, 37 Fed. Cl 110, 113 (1997), *aff'd*, 135 F 3d 778 (1998), *RTC v Miramon*, 935 F Supp 838, 841 (E D. La 1996), *Catellus Dev Corp v United States*, 31 Fed Cl. 399, 404 (1994), *Mason v. United States*, 27 Fed Cl. 832, 836 (1993), *Laughlin v United States*, 22 Cl Ct 85, 99 (1990), *aff'd mem* , 975 F 2d 869 (Fed Cir. 1992)

[18] *See, e g., RHI Holdings, Inc v United States*, 142 F 3d 1459, 1461–63 (Fed Cir 1998), *Lawyers Title Ins. Corp. v. Dearborn Title Corp.*, 118 F.3d 1157, 1166 (7th Cir 1997), *Bath Iron Works Corp v United States*, 20 F 3d 1567, 1572 n.2 (Fed Cir 1994), *Vintilla v United States*, 931 F 2d 1444, 1446 (11th Cir 1991), *Scott v Reno*, No 97 Civ 5203 (RPP), 1998 WL 249178, at *3 (S D N.Y May 18, 1998), *Dillard v Runyon*, 928 F Supp. 1316, 1324 (S D N Y 1996), *aff'd*, 108 F 3d 1369, 1373–74 (2d Cir 1997), *Her v Secretary of HHS*, 33 Fed Cl 542, 544 (1995), *cf Calhoun County v United States*, 132 F 3d 1100, 1104 (5th Cir 1998) (*Irwin* reinterpreted the intent behind congressional waivers of sovereign immunity but did not alter the nature of the conditions of that waiver)

Irwin.[19] The question whether *Irwin* modified the jurisdictional nature of limitations provisions has various implications for federal court practice and procedure; for example, if a statute of limitations applicable to a suit against the government is no longer deemed jurisdictional, failure to comply with it is presumably "merely an affirmative defense which the [government] has the burden of establishing."[20] But the proper resolution of this debate over the effect of *Irwin* on the jurisdiction of the federal district courts is irrelevant to the question addressed here.

The conclusion that a statute of limitations is not a limitation on a court's jurisdiction does not in any way imply that the executive branch can intentionally waive compliance with the statute. The two concepts are not the same.[21] A court does not lack jurisdiction merely because the plaintiff fails to satisfy a condition precedent to obtaining judgment in its favor. *See Bell v. Hood*, 327 U.S. 678, 683 (1946). By the same token, the fact that a court has jurisdiction in no way implies that Congress has not imposed a condition precedent on the plaintiff's ability to obtain a judgment.

The Supreme Court recognized the latter point long ago in a case involving compliance with a statute of limitations in a suit against the government. "As the United States are not liable to be sued, except with their consent, it was competent for Congress to limit their liability, in that respect, to specified causes of action, brought within a prescribed period." *Finn*, 123 U.S. at 232, *citing Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1868). The Court concluded that the pending claim, "although by reason of its character 'cognizable by the [court],' cannot properly be made the basis of a judgment in that court" because it was barred by the statute of limitations. *Id.* at 231–32. The creation of a statute of limitations "makes it a condition or qualification of the right to a judgment

[19] *See, e.g., Fadem v. United States*, 52 F.3d 202, 206 (9th Cir. 1995); *Glarner v. Department of Veterans Administration*, 30 F.3d 697, 701–02 (6th Cir. 1994); *Washington v. Garrett*, 10 F.3d 1421, 1437 (9th Cir. 1993); *Ynclan v. Department of the Air Force*, 943 F.2d 1388, 1391 (5th Cir. 1991), *see also Becton v. Pena*, 946 F. Supp. 84, 86–87 (D.D.C. 1996) (questioning whether, after *Irwin*, statutes of limitation are jurisdictional).

[20] *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991) (citing Fed. R. Civ. P. 12(b)(1)). The *Schmidt* court noted other consequences that may follow from treating statutes of limitations as non-jurisdictional: the government should present the issue through a Rule 56 motion for summary judgment (or, presumably, a Rule 12(b)(6) motion for failure to state a claim) rather than under Rule 12(b)(1) (asserting a jurisdictional defect), and the court should view the facts concerning compliance with the statute in the light most favorable to the claimant. *Id.* at 640. *Slaaten v. United States*, 990 F.2d 1038, 1043 n.5 (8th Cir. 1993) (citing *Schmidt*), *but see Loudner v. United States*, 108 F.3d 896, 900 n.1 (8th Cir. 1997) (statutes of limitations are conditions precedent to the waiver of sovereign immunity and "failure to sue within the period of limitations is not simply a waivable defense, it deprives the court of jurisdiction to entertain the action").

[21] The assumption that if statutes of limitations are not "jurisdictional," they are therefore waivable rests on a misinterpretation of the many meanings that are ascribed to the term. *See Kanar v. United States*, 118 F.3d 527, 529–30 (7th Cir. 1997). The term "jurisdiction" is a short-hand that is used to refer to many things, including the subject matter jurisdiction of a court and whether a claim is one for which relief can be granted. *See, e.g., Bell v. Hood*, 327 U.S. 678, 682 (1946), *Kanar*, 118 F.3d at 529–30, *Spruill v. Merit Systems Protection Bd.*, 978 F.2d 679, 687–88 (Fed. Cir. 1992); *see also Carlisle v. United States*, 517 U.S. 416, 434–35 (1996) (Ginsburg, Souter, Breyer, JJ., concurring) (observing the many meanings, uses and misuses of the term "jurisdiction") Here, we are concerned with statutes of limitations only insofar as they constitute a condition precedent to the assertion of a valid claim for which relief can be granted.

against the United States."[22] *Id.* at 232. As *Finn* clearly states, regardless of whether a federal court has jurisdiction over a claim against the government, Congress's imposition of a statute of limitations creates a condition precedent that a plaintiff must satisfy in order to establish a claim against the United States for which relief can be granted. If a claimant has not satisfied this statutory condition precedent, sovereign immunity has not been waived.

Several of the cases discussing *Irwin* have specifically considered whether *Irwin* makes a statute of limitations in a suit against the United States subject to waiver and have concluded that the statute of limitations is not waivable.[23] These decisions clearly rest on the proposition that because a statute of limitations is one of the conditions that Congress placed on its consent to be sued, the executive branch has no authority, through waiver of the statute of limitations, to usurp the congressional prerogative to determine when the United States may be sued. As one court observed, "Tolling is not the same as waiving. Presumably, therefore, *Irwin* merely holds that those time limits, while jurisdictional, can be equitably tolled in certain circumstances." *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1572 n.2 (Fed. Cir. 1994).

Nothing in *Irwin* suggests that statutes of limitations are anything other than a term upon which the government consents to be sued. Whether some courts interpret *Irwin* to suggest that statutes of limitations are non-jurisdictional, does not provide authority for the conclusion that they are waivable. Thus, the vast majority of lower court cases decided since *Irwin* support or, at a minimum, are fully in accord with the traditional view that statutes of limitations that condition Congress's consent to suit are not waivable. The debate over *Irwin*'s implications for federal court jurisdiction in no way undermines this weight of authority. *See supra* notes 16–17 (collecting cases).

There are two post-*Irwin* cases, involving statutes of limitations that are conditions on the waiver of sovereign immunity,[24] that hold that the government's failure to plead a statute of limitations defense in its answer may result in the loss of the defense. *See Harris v. Secretary of Veterans Affairs*, 126 F.3d 339 (D.C. Cir. 1997); *Cedars-Sinai Medical Ctr. v. Shalala*, 125 F.3d 765, 770 (9th

[22] *Finn* also stated that it was the "duty" of a court to dismiss an untimely claim against the government regardless of "whether limitation was pleaded or not " 123 U.S at 232

[23] *Lawyers Title Ins Corp.*, 118 F 3d at 1166; *Alder Terrace, Inc* , 39 Fed Cl at 120, *Her*, 33 Fed. Cl. at 544; *McDonald*, 37 Fed Cl at 113, *RTC v Miramon*, 935 F. Supp at 841; *cf. BCS Financial Corp.*, 118 F.3d at 525 (statute of limitations may be waived where it is not congressional prerequisite to suit and agency is statutorily authorized to waive the limitations period)

[24] As we noted above, *supra* at note 10 and accompanying text, limitations periods over which Congress has vested an executive agency with discretion are not conditions on Congress's waiver of sovereign immunity The cases that hold that the government's failure timely to plead such a statute of limitations as an affirmative defense resulted in forfeiture of the defense are therefore irrelevant to the question we address in this part of our memorandum *See, e g , Bowden v. United States*, 106 F.3d 433, 437 (D C. Cir 1997), *Johnson v Sullivan*, 922 F 2d 346, 355 (7th Cir 1990), *Weinberger v Salfi*, 422 U.S 749, 763 (1975)

Cir. 1997).[25] In *Harris*, a panel of the D.C. Circuit concluded that a statute of limitations may be forfeited under the Federal Rules of Civil Procedure. 126 F.3d at 343–44. The court rested its decision on pre-*Irwin* circuit precedent, *see Mondy v. Secretary of the Army*, 845 F.2d 1051 (D.C. Cir. 1988), and reasoned that the plain meaning of Federal Rule of Civil Procedure 8(c) and the Rule's underlying policy of fair notice require the government to plead the defense or risk "forfeiture" of the defense. 126 F.3d at 343, 346.

Harris did not cite the Supreme Court's *Irwin* decision, nor did it address the doctrine of sovereign immunity and the constitutional principles that determine when and by whom immunity is waived. Because it fails to address long-standing sovereign immunity doctrine, *Harris* casts little light on the scope of that doctrine today. In addition, because *Harris* neither relies upon nor addresses *Irwin*, *Harris* cannot be read for the proposition that *Irwin* reversed long-standing Supreme Court caselaw concerning statutes of limitations. Even on the assumption that *Harris* was correctly decided, its conclusion that a procedural default by the government might entitle a time-barred plaintiff to avoid the effect of a statute of limitations provides no support for the proposition that the government may intentionally waive the statute of limitations. *Harris* is a case about the executive's obligations under the Rules of Civil Procedure, not about its discretion to disregard the limitations Congress has placed on the payment of federal funds.

In *Cedars-Sinai*, a panel of the Ninth Circuit considered a fact pattern similar to that at issue in *Harris*: the government had failed to plead the statute of limitations or indeed to mention it until it filed a reply memorandum in support of its motion to dismiss the action. 125 F.3d at 770. In reaching the same conclusion as the *Harris* court, that the government's failure to plead the defense could enable a late-filing claimant to evade the time bar of the statute, *Cedars-Sinai* cited *Irwin* for the proposition that statutes of limitations are not "jurisdictional," and on that basis asserted that "the statute of limitations may be waived by the" government. *Id.* at 770–71. The court briefly explained that "where the language of a statute of limitations does not speak of jurisdiction, but erects only a procedural bar, the Supreme Court has stated that recognition of traditional exceptions such as equitable tolling, waiver, and estoppel does little to broaden the congressional waiver of sovereign immunity." *Id.* at 770 (citing *Irwin*, 498 U.S. at 95).

Cedars-Sinai does indeed speak in terms of executive "waiver" of a statute of limitations, but we do not believe that it provides a proper basis for concluding that the executive may intentionally dispense with a congressionally prescribed limitations provision. As a preliminary matter, we note that the case did not concern or even address an attempt by the executive to permit a late-filing claimant

[25] The holdings in *Harris* and *Cedars-Sinai* are in tension with Supreme Court precedent in *United States v Sherwood*, 312 U S 584 (1941), the Court held that the government's consent to suit is limited by statute and that Congress's consent may not be affected by, nor enlarged by, the Federal Rules of Civil Procedure. *Id.* at 589–90 In discussing the cases' relevance to the question we are considering we do not mean to imply that they are correct.

to avoid the bar of the statute of limitations. Indeed, in *Cedars-Sinai*, the executive was vigorously asserting that the claimant was time-barred, and the precise question before the court was whether the government had raised the question too late. More importantly, the court's rationale is unpersuasive as applied to intentional waiver. As we have already discussed, it is incorrect to assume that the executive is free to waive the application of a statute of limitations because the statute is not jurisdictional for purposes of federal court practice and procedure. Furthermore, the *Cedars-Sinai* court's paraphrase of the Supreme Court's reasoning in *Irwin* significantly misstates what the Supreme Court actually said: *Irwin* did not rest the presumption that equitable tolling is available on whether the statute of limitations "speak[s] of jurisdiction," nor did it describe a statute of limitations that does not mention jurisdiction as "only a procedural bar," or state that recognizing "traditional exceptions such as . . . waiver, and estoppel does little to broaden the congressional waiver." *Compare Cedars-Sinai*, 125 F.3d at 770, *with Irwin*, 498 U.S. at 95.

Given the absence of any discussion of *Irwin* in *Harris* and the questionable treatment of *Irwin* in *Cedars-Sinai*, neither case leads us to conclude that *Irwin* altered the long-standing principle that the executive branch lacks an independent authority to waive a statute of limitations that is a condition on bringing suit against the United States. Even accepting the holdings of both cases, neither *Harris* nor *Cedars-Sinai* actually involved or addressed the power of the executive branch intentionally to waive the statute of limitations in order to benefit a meritorious but time-barred claimant. Thus, upon review of *Irwin* and subsequent caselaw, we find no basis on which to conclude that the executive intentionally may waive a statute of limitations that is a "condition or qualification of the right to a judgment against the United States," where Congress has vested the executive with no authority over the condition. *Finn*, 123 U.S. at 232.

III. Conclusion

We find no basis that would permit us to conclude that the Attorney General possesses a general authority to waive statutes of limitations or that ECOA itself confers specific authority to do so. The statute of limitations in ECOA is a condition to Congress's consent to suit against the government and the Executive therefore has no power to pay time-barred claims as if they were fully valid. To do so would be to usurp Congress's authority over the waiver of sovereign immunity and Congress's power to determine under what conditions the funds of the United States shall be obligated. *See, e.g., Richmond*, 496 U.S. at 428; *Finn*, 123 U.S. at 232–33.

We observe in this context that the Attorney General's broad litigation and settlement authority clearly permits her to compromise claims on the basis of her good faith assessment of the litigation risk that a court might find that claimants

satisfied the statute of limitations through equitable tolling and that their claims merited relief. *See The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 60 (1982). Her determination whether to compromise the claims on the basis of the litigation risk may be guided by her judgment that compromise, rather than litigation, would be in the best interests of the United States or would otherwise promote the ends of justice. *Id.* But her settlement authority does not allow her to discard a statutory requirement and determine that, on the basis of her own view of the equities, a claim should be paid, notwithstanding its legal invalidity. Rather, the Attorney General's obligation "to administer and enforce the Constitution of the United States and the will of Congress as expressed in the public laws," requires that she enforce statutes of limitations where they bar a plaintiff's claims. *See id.* at 62.

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Office of Legal Counsel

Appropriate Source for Payment of Judgments and Settlements in *United States v. Winstar Corp.*

The Federal Savings and Loan Insurance Corporation Resolution Fund is the appropriate source of payment for judgments against, and settlements by, the United States in *United States v Winstar Corp* and similar cases arising from the breach of certain agreements to which the Federal Savings and Loan Insurance Corporation was a party

July 22, 1998

MEMORANDUM OPINION FOR THE DEPUTY GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

On July 1, 1996, the Supreme Court decided *United States v. Winstar Corp.*, 518 U.S. 839 (1996). The Court held that the United States was liable in three cases for breaching contracts into which it had entered with entities that took over failing thrifts during the savings and loan crisis of the 1980's. Because the United States Court of Federal Claims ("CFC") had not yet determined the appropriate measure or amount of damages, the Supreme Court remanded for further proceedings. *Id.* at 910. After the *Winstar* decision was handed down, a large number of cases premised on identical or similar theories of relief that had been stayed pending the Supreme Court's decision were activated.[1] We understand that in virtually all of these cases, which are currently pending before the CFC or the United States Court of Appeals for the Federal Circuit, the government contests liability and/or disagrees with the plaintiffs regarding the appropriate measure or amount of damages.

You have asked for our views regarding the appropriate source for payment of judgments in the *Winstar*-related cases.[2] Because the government is currently considering the possibility of settling two of the three cases that the Supreme Court considered in *Winstar*, as well as certain other *Winstar*-related cases, you have also asked for our opinion regarding the appropriate source of funds for the payment of such settlements. The appropriate source of funds for a settled case is identical to the appropriate source of funds should a judgment in that case be entered against the government. *See Availability of Judgment Fund in Cases Not Involving a Money Judgment Claim*, 13 Op. O.L.C. 98, 103 (1989) ("[I]n determining whether a proposed settlement is payable from the Judgment Fund, the Attorney General or his designee should examine the underlying cause of action, and decide whether the rendering of a final judgment against the United States under such a cause would have required a payment from the Judgment

[1] For ease of discussion, we refer to both these cases and the cases decided by the Supreme Court in *Winstar* collectively as "*Winstar*-related cases."

[2] Although we provided the Federal Deposit Insurance Corporation the opportunity to provide its views on this matter, it declined to do so

Fund."); 3 Office of the General Counsel, United States General Accounting Office, Principles of Federal Appropriations Law 14–9 (2d ed. 1994) ("GAO Principles") (stating that compromise settlements have no effect on the source of funds).[3]

Our discussion of the appropriate source of funds necessarily is premised on courts finding the government liable or on the government entering into settlements based on the risk that a court would find the government liable. We do not, however, mean to suggest that we have reached any conclusions regarding the likelihood of such potential findings. We discuss cases in the context of a finding of government liability because it is only in those cases, and in settlements entered into due to the risk of such a finding, that the appropriate source of funds for the payment of judgments by the government is an issue.

We understand from the Commercial Litigation Branch of the Civil Division of the Department of Justice that, to the extent that the government has settled or is engaged in settlement negotiations in any of the *Winstar*-related cases, these cases involve "Assistance Agreements" or "Supervisory Action Agreements" to which the Federal Savings and Loan Insurance Corporation ("FSLIC") was a party. We have therefore limited our analysis of the appropriate source of payment for settlements or potential judgments to the *Winstar*-related cases in which FSLIC was a party to the underlying Assistance Agreements and Supervisory Action Agreements.[4]

Based upon the information currently available to us, we believe that the FSLIC Resolution Fund is the appropriate source of funds to pay judgments and settlements in *Winstar*-related cases in which FSLIC was a party to an Assistance Agreement or Supervisory Action Agreement.[5] Congress created the FSLIC Resolution Fund to assume, with a single statutory exception that is not relevant here, 12 U.S.C. § 1441a (1994), "all assets and liabilities of the FSLIC on the day before" FSLIC was abolished. 12 U.S.C. § 1821a(a)(2) (1994). Although the term "liabilities" is not defined in the statute, its ordinary meaning includes contingent liabilities, such as certain contractual obligations, and there is no reason to believe that Congress departed from this ordinary meaning when it created the FSLIC

[3] Although the opinions and legal interpretations of the General Accounting Office and the Comptroller General often provide helpful guidance on appropriations matters and related issues, they are not binding upon departments, agencies, or officers of the executive branch. *See Bowsher v. Synar*, 478 U.S. 714, 727–32 (1986).

[4] It is our understanding that whether an agreement qualifies as an "Assistance Agreement" or a "Supervisory Action Agreement" depends only on the labeling of the agreement, the terms were used interchangeably, although the term "Assistance Agreement" was more common. Telephone conversation between Caroline Krass, Attorney-Adviser, Office of Legal Counsel and Aaron Kahn, Principal Litigation Counsel, Office of the General Counsel, Office of Thrift Supervision, Department of the Treasury (June 30, 1998)

[5] In March 1996, prior to the Supreme Court's decision in *Winstar*, this Office opined that the FSLIC Resolution Fund was the proper source for payment of the judgment in *RTC v. FSLIC*, 25 F.3d 1493 (10th Cir. 1994) (*"Security Federal"*). *See* Letter for Ricki Helfer, Chairman, FDIC, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Reimbursement from the Federal Judgment Fund for Payment of Judgment in RTC v. FSLIC, (10th Cir. 1994)* (Mar. 18, 1996) ("Helfer Letter"). Our opinion expressly stated, however, that it was limited to the facts of *Security Federal*. *See id.* at 2 ("We have not attempted to determine and make no suggestion here as to the proper source of payment for any judgment that might be entered in the other goodwill/capital forbearance cases ").

Resolution Fund. Based on the Supreme Court's theory of liability in *Winstar*, we believe that the judgments or settlements in the *Winstar*-related cases in which FSLIC was a party to the underlying Assistance Agreements and Supervisory Action Agreements would qualify as "liabilities" of FSLIC under § 1821a(a)(2). Accordingly, in these cases, the potential judgments, and the settlements entered into to avoid the risk of such judgments, are payable from the FSLIC Resolution Fund. Because payment is "otherwise provided for" within the meaning of the Judgment Fund statute, the Judgment Fund is not available to pay such judgments and settlements. *See* 31 U.S.C. § 1304 (1994).

I. BACKGROUND

During the Great Depression, over 1,700 savings and loans, or "thrifts," failed because borrowers could not pay their mortgages. *See* H.R. Rep. No. 101–54, pt. 1, at 292 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 88 ("House Report"). As a result, thrift depositors lost approximately $200 million. In response, Congress took three actions to stabilize the thrift industry. First, in 1932, Congress created the Federal Home Loan Bank Board ("Bank Board") to channel funds to thrifts to finance home mortgages and to prevent foreclosures. *See* Pub. L. No. 72–304, ch. 522, 47 Stat. 725 (1932) (codified as amended at 12 U.S.C.A. §§ 1421–1449 (West 1989 & Supp. 1998)). Second, Congress passed the Home Owners' Loan Act of 1933, which authorized the Bank Board to charter and to regulate federal thrifts. *See* Pub. L. No. 73–43, ch. 64, 48 Stat. 128, 132–34 (1933) (codified as amended at 12 U.S.C. §§ 1461–1468c (1994 & Supp. II 1996)). Finally, in 1934, Congress created the Federal Savings and Loan Insurance Corporation, "under the direction of" the Bank Board, to insure thrift deposit accounts and to regulate all federally insured thrifts to ensure that their capital is unimpaired and that their financial policies and management are "safe." *See* Pub. L. No. 73–479, ch. 847, 48 Stat. 1246, 1256–61 (1934) (codified as amended at 12 U.S.C.A. §§ 1701–1750g (West. 1989 & Supp. 1998)); 12 U.S.C. § 1726(c) (1988) (repealed 1989).

A. The Savings and Loan Crisis of the Early 1980's

The savings and loan crisis of the early 1980's originated from the rising interest rates of the late 1970's and early 1980's. Many thrifts were locked into long-term, low-yield, fixed-rate mortgages created when interest rates were low, and thus the high interest rates caused the thrifts to experience large operating losses as they raised savings account interest rates in an effort to attract funds from depositors. *See Winstar*, 518 U.S. at 845 (plurality opinion); House Report at 291, *reprinted in* 1989 U.S.C.C.A.N. at 87. By 1981, thrifts' mortgage portfolios were yielding ten percent, but the thrifts were paying an average of eleven percent

for their funds, and between 1981 and 1983, 435 thrifts failed. *See* House Report at 296, *reprinted in* 1989 U.S.C.C.A.N. at 92. As the federal insurer of the thrift deposits, FSLIC was responsible for liquidating the failed thrifts, if necessary, and reimbursing depositors for the insured funds they had lost. FSLIC, however, lacked adequate assets to do so. In 1985, for example, FSLIC had $4.55 billion in its insurance fund, but the Bank Board estimated that it would cost $15.8 billion to liquidate all the thrifts deemed insolvent under generally accepted accounting principles ("GAAP"). *See Winstar*, 518 U.S. at 847 (plurality opinion).

In response to the crisis, Congress and the executive branch extensively deregulated the thrift industry to enable thrifts to compete with other financial services providers for funds and to broaden their investment powers. *See id.* at 845 (plurality opinion); House Report at 291, *reprinted in* 1989 U.S.C.C.A.N. at 87. In addition, the Bank Board lowered the capital requirement for thrifts from five percent to four percent of assets in 1980, and from four to three percent in 1982. *See Winstar*, 518 U.S. at 845–46 (plurality opinion). The capital requirement has been described as " 'the most powerful source of discipline for financial institutions.' " *Id.* at 845 (quoting Breeden, *Thumbs on the Scale: The Role that Accounting Practices Played in the Savings and Loan Crisis*, 59 Fordham L. Rev. S71, S75 (1991)). To give more leeway to the struggling thrifts, the Bank Board also promulgated new "regulatory accounting principles" that often replaced GAAP in determining whether thrifts could meet the Bank Board's capital requirement. "The reductions in required capital reserves," the plurality explained in *Winstar*, "allowed thrifts to grow explosively without increasing their capital base, at the same time deregulation let them expand into new (and often riskier) fields of investment." *Id.* at 846.

Based upon the facts before it, the plurality observed that, "[r]ealizing that FSLIC lacked the funds to liquidate all of the failing thrifts, the Bank Board chose to avoid the insurance liability by encouraging healthy thrifts and outside investors to take over ailing institutions in a series of 'supervisory mergers.' " *Id.* at 847. The plurality explained:

> Such transactions, in which the acquiring parties assumed the obligations of thrifts with liabilities that far outstripped their assets, were not intrinsically attractive to healthy institutions; nor did FSLIC have sufficient cash to promote such acquisitions through direct subsidies alone, although cash contributions from FSLIC were often part of a transaction. Instead, the principal inducement for these supervisory mergers was an understanding that the acquisitions would be subject to a particular accounting treatment that would help the acquiring institutions meet their reserve capital requirements imposed by federal regulations.

Id. at 848 (citations omitted).

According to the plurality in *Winstar*, the Bank Board and FSLIC[6] granted acquiring entities three different types of beneficial accounting treatment, often referred to as "forbearances," in connection with supervisory mergers. *Id.* at 848–56. First, the Bank Board and FSLIC "let the acquiring institutions count supervisory goodwill toward their reserve requirements." *Id.* at 850 (plurality opinion). Under the "purchase method" of accounting, "goodwill," i.e., the amount by which the purchase price of an acquired entity exceeds the fair value of all identifiable assets, could be counted as an intangible asset. *Id.* at 848–49 (plurality opinion). The plurality noted that, in the typical situation, the counting of goodwill as an intangible asset makes sense because a rational purchaser in a free market would not purchase a business for more than the fair value of the business's assets unless there were some "going concern" value that made up the difference. *Id.* at 849. In the supervisory mergers, however, this situation was not the case. Instead, "[b]ecause FSLIC had insufficient funds to make up the difference between a failed thrift's liabilities and assets, the Bank Board had to offer a 'cash substitute' to induce a healthy thrift to assume a failed thrift's obligations." *Id.* at 849–50 (plurality opinion). According to the plurality, that "cash substitute" permitted the healthy thrift to count the amount by which the liabilities of a failing thrift exceeded the fair value of its assets as an intangible asset, and was referred to as "supervisory goodwill." *Id.* Counting supervisory goodwill as an intangible asset that could be used to meet capital requirements was attractive to the acquiring entities because it prevented the negative net worth of the failing thrifts from being deducted from the acquiring entities' capital, thereby allowing them to avoid insolvency under federal requirements. *Id.* at 850 (plurality opinion).

Second, thrifts were permitted to take extended periods of time, up to forty years, to "depreciate" or amortize the value of supervisory goodwill, a questionable asset. The essence of supervisory goodwill was that it created a paper asset in a supervisory merger that was necessary because the liabilities of the institution being acquired exceeded the fair value of its assets. When the acquiring entity was permitted to extend the time to write down that paper asset, it understated for each reporting period the resulting amortization expense and reduction in its recorded assets and deferred a possible failure to meet capital requirements. *See id.* at 851 (plurality opinion).

In addition, thrifts were permitted to accelerate the recognition of capital gains to be realized on depreciated assets, when those benefits in fact arose over longer periods. The "gains" arose from the accretion of discounts on loans in portfolio. A thrift cannot sell at face value a loan bearing interest at a below-market interest rate. Instead, it accepts a discount from face value that would increase the effective rate on that asset to a market rate. As these loans approach maturity, the discount

[6] We refer to "the Bank Board and FSLIC" together for ease of discussion in this section of the memorandum, although both entities may not have been involved in all cases

decreases to zero. The acquiring entity would record the accretion of discount on its income statement as a gain, in the same fashion as it would for a bond in portfolio that it holds to maturity. The faster the thrift recognized the gains, the more income it could report in the short term. *See id.*

The amount of discount in a troubled thrift would generally approximate the amount of goodwill created by the supervisory merger. Ideally, a thrift should have written down its goodwill at the same rate it recognized gains from accretions of discount. The combination of the questionable practices of accelerating the rate of gain recognition and deferring the amortization of supervisory goodwill provided a method for unhealthy institutions to attempt to survive by engaging in supervisory mergers. According to the plurality in *Winstar*, "[t]he difference between amortization and accretion schedules thus allowed acquiring thrifts to seem more profitable than they in fact were." *Id.* at 853.

Third, the Bank Board and FSLIC generally permitted double-counting of cash contributions by FSLIC to supervisory mergers. While the acquiring entity was permitted to treat FSLIC's cash contribution as a credit for its capital requirement, described as a "capital credit," it was not required to subtract the amount of the contribution from the amount of supervisory goodwill. *Id.* Thus, the amount was, in effect, counted twice, once as a tangible asset—cash—and once as an intangible asset—supervisory goodwill. *Id.*

B. The Legislative Response: FIRREA

The regulatory measures taken in the 1980's by the Bank Board and FSLIC to prop up the failing thrift industry actually aggravated its decline by papering over inadequate reserves and encouraging thrifts to engage in risky loans and investments. *See Transohio Savings Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 602 (D.C. Cir. 1992); House Report at 298–99, *reprinted in* 1989 U.S.C.C.A.N. at 94–95. By 1988, FSLIC was insolvent by over $50 billion. *See* House Report at 304, *reprinted in* 1989 U.S.C.C.A.N. at 100. In response to this situation, and to restore the strength of the thrift industry and the deposit insurance fund, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act, Pub. L. No. 101–73, 103 Stat. 183 (1989) ("FIRREA"). *See* House Report at 291, *reprinted in* 1989 U.S.C.C.A.N. at 87. FIRREA was adopted, inter alia, to "promote, through regulatory reform, a safe and stable system of affordable housing finance," to "improve the supervision of savings associations by strengthening capital, accounting, and other supervisory standards," and to "curtail investments and other activities of savings associations that pose unacceptable risks to the Federal deposit insurance funds." FIRREA, § 101(1)–(3), 103 Stat. at 187 (codified at 12 U.S.C. § 1811 note (1994)).

FIRREA abolished both FSLIC and the Bank Board. FSLIC's thrift deposit insurance function was assumed by the Federal Deposit Insurance Corporation

("FDIC"), which became the manager of the new "Savings Association Insurance Fund." *See* 12 U.S.C. § 1811(a) (1994); H.R. Conf. Rep. No. 101–222, at 393, 394 (1989), *reprinted in* 1989 U.S.C.C.A.N. 432, 433 ("House Conference Report") (FIRREA gives FDIC "the duty of insuring the deposits of savings associations as well as banks."). In addition, FIRREA created a separate fund under the management of the FDIC called the FSLIC Resolution Fund. *See* 12 U.S.C. § 821a. The FSLIC Resolution Fund generally assumed all of the "assets and liabilities" of FSLIC as of the day before its abolition. *Id.* § 1821a(a)(2).

Each of the Bank Board's principal functions was transferred to a different agency upon its dissolution: (1) the supervision and regulation of the thrift industry was transferred to the Office of Thrift Supervision ("OTS") in the Department of the Treasury, *see* 12 U.S.C. § 1462a(e) (1994); 12 U.S.C. § 1813(q) (1994); House Conference Report at 404, *reprinted in* 1989 U.S.C.C.A.N. at 443; House Report at 453, *reprinted in* 1989 U.S.C.C.A.N. at 249; (2) the management and regulation of thrift deposit insurance through FSLIC was transferred to the FDIC, *see* 12 U.S.C. § 1811; (3) the oversight and supervision of the twelve regional Federal Home Loan Banks was transferred to the Federal Housing Finance Board, *see* 12 U.S.C. § 1422a (1994); 12 U.S.C. § 1422b (1994); and (4) the liquidation of the assets of failed thrifts was transferred to the Resolution Trust Corporation ("RTC") for those thrifts that became insolvent between 1989 and 1995, *see* 12 U.S.C. § 1441a. *See also* House Conference Report at 408–09, *reprinted in* 1989 U.S.C.C.A.N. at 447–48; *see generally American Fed'n of Gov't Employees, Local 3295 v. Federal Labor Relations Auth.*, 46 F.3d 73, 74 & n.1 (D.C. Cir. 1995); *Employment Status of the Members of the Board of Directors of the Federal Housing Finance Board*, 14 Op. O.L.C. 127 (1990).

FIRREA also required OTS to prescribe at least three capital requirements for thrifts—a leverage limit requiring thrifts to maintain core capital of at least three percent of the thrift's total assets; a tangible capital requirement of at least one-and-a-half percent of the thrift's total assets; and a risk-based capital requirement aligned with the risk-based capital requirement for national banks. *See* 12 U.S.C. § 1464(t)(1)–(2), (9) (1994). In addition, FIRREA gradually phased out over a five-year period the ability of thrifts to include "qualifying supervisory goodwill" in calculating core capital. *Id.* § 1464(t)(3)(A). Under FIRREA, OTS promulgated regulations equating capital credits with supervisory goodwill, thereby excluding such credits from satisfying the capital requirements. 12 C.F.R. § 567.1(w) (1990). As a result of these new strict requirements, "many institutions immediately fell out of compliance with regulatory capital requirements, making them subject to seizure by thrift regulators." *Winstar*, 518 U.S. at 858 (plurality opinion).

C. *United States v. Winstar*

The Supreme Court's *Winstar* decision addressed the consequences of the new capital requirements on three different institutions—Glendale Federal Bank, FSB, Winstar Corporation, and The Statesman Group, Inc.—that were parties to supervisory mergers. All three claimed financial losses due to the change in the regulatory structure caused by FIRREA, and they filed suit against the United States in the Court of Federal Claims on both contractual and constitutional theories. That court granted the plaintiffs' motions for partial summary judgment on contract liability because it found that the government had breached contractual obligations to permit the plaintiffs to count supervisory goodwill and capital credits toward their capital requirements. *Statesman Sav. Holding Corp. v. United States*, 26 Cl. Ct. 904 (1992) (granting summary judgment on liability to Statesman and Glendale); *Winstar Corp. v. United States*, 25 Cl. Ct. 541 (1992) (finding contract breached and entering summary judgment on liability); *Winstar Corp. v. United States*, 21 Cl. Ct. 112 (1990) (finding an implied-in-fact contract but requesting further briefing on other contract issues). After the cases were consolidated, a divided panel of the Federal Circuit reversed, holding that the parties did not clearly assign the risk of a subsequent change in the regulatory capital requirements to the government. *Winstar Corp. v. United States*, 994 F.2d 797, 811–13 (Fed. Cir. 1993). After rebriefing and reargument, the Federal Circuit, sitting *en banc*, reversed the panel and affirmed the CFC's rulings on liability, concluding that FIRREA breached the government's prior contractual obligations and that the government therefore was liable in money damages for the breach. *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995) (en banc).

Writing for a plurality of four,[7] Justice Souter first described the merger between Glendale and the First Federal Savings and Loan Association of Broward County, a thrift whose liabilities exceeded the fair value of its assets by over $700 million. FSLIC entered into a "Supervisory Action Agreement" ("SAA") with Glendale. *Winstar*, 518 U.S. at 861 (plurality opinion). The SAA contained an integration clause that, according to the plurality, incorporated by reference the Bank Board's resolution approving the merger, which in turn referred, inter alia, to a document stipulating that any supervisory goodwill would be treated in accordance with Bank Board Memorandum R–31b. That memorandum permitted the use of the purchase method of accounting and the recognition of supervisory goodwill as an asset subject to amortization. One of the reasons that the plurality interpreted the integration clause in the SAA to include the Board's resolutions and memoranda was that it would have been "irrational" for Glendale to enter into an agreement that immediately made it insolvent unless it obtained a contractual commitment that the policies identified in the resolutions and memoranda would continue.

[7] Justice Souter was joined by only two other Justices in two subsections of his opinion that discussed the government's "sovereign acts" defense. 518 U.S. at 896–903.

Id. at 862–63. The plurality agreed with the Federal Circuit's judgment that " 'the government had an express contractual obligation to permit Glendale to count the supervisory goodwill generated as a result of its merger with Broward as a capital asset for regulatory capital purposes.' " *Id.* at 864 (quoting *Winstar Corp. v. United States*, 64 F.3d at 1540).[8]

The Winstar merger resulted from FSLIC actively soliciting bids for the acquisition of Windom Federal Savings and Loan Association, a failing thrift. *Id.* (plurality opinion). FSLIC and Winstar Corporation, a group of private investors formed for the purpose of acquiring Windom, entered into an "Assistance Agreement" ("AA") under which FSLIC agreed to contribute $5.6 million in cash to the acquisition. The AA contained an integration clause that, according to the plurality, also incorporated the Bank Board's approval resolution and a forbearance letter signed by the Bank Board permitting the amortization of supervisory goodwill over thirty-five years. *Id.* Again, the plurality noted that it was apparent that " 'the intention of the parties [was] to be bound by the accounting treatment for goodwill arising in the merger.' " *Id.* at 866 (quoting *Winstar Corp. v. United States*, 64 F.3d at 1544).

When Statesman asked FSLIC for government assistance in purchasing a subsidiary of an insolvent thrift, FSLIC responded that it could only obtain such assistance if it purchased the parent thrift as well as three other unstable thrifts. Statesman and FSLIC entered into an AA under which FSLIC contributed $60 million to the acquisition, $26 million of which could be treated as a permanent capital credit for purposes of the regulatory capital requirement. Like the transactions with Glendale and Winstar, the plurality found that the AA contained an integration clause incorporating contemporaneous resolutions and letters issued by the Bank Board approving the use of supervisory goodwill to be amortized over a long period (this time twenty-five years). *Id.* at 867. Once again, the plurality accepted the Federal Circuit's finding that " 'the government was contractually obligated to recognize the capital credits and the supervisory goodwill generated by the merger.' " *Id.* (quoting *Winstar Corp. v. United States*, 64 F.3d at 1543).

Justice Souter, writing for the plurality, rejected the government's various common law defenses and held that the United States was liable for breach of contract. In characterizing the contracts at issue, the plurality emphasized that "[n]othing in the documentation or the circumstances of these transactions purported to bar the Government from changing the way in which it regulated the thrift industry." *Id.* Rather, Justice Souter explained:

[8] The government's petition for a writ of certiorari did not directly contest the existence of contracts between the government and plaintiffs, and therefore the question was not technically before the Court *See* 518 U.S. at 860–61 (plurality opinion); *United States v Winstar Corp*, 64 F 3d 1531 (Fed Cir 1995) (en banc), *petition for cert filed*, 64 U S L W. 3486 (U S Dec 1, 1995) (No 95–865) (listing as "questions presented" whether unmistakability doctrine, reserved powers doctrine, or sovereign acts doctrine should bar enforcement of alleged contracts) The Federal Circuit and the Court of Federal Claims, however, both found that contracts existed in the three transactions at issue in *Winstar, see Winstar Corp. v United States*, 64 F 3d at 1545, and the plurality seemed to accept the Federal Circuit's characterization of the contracts

> We read this promise as the law of contracts has always treated promises to provide something beyond the promisor's absolute control, that is, as a promise to insure the promisee against loss arising from the promised condition's nonoccurrence. Holmes's example is famous: "[i]n the case of a binding promise that it shall rain tomorrow, the immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee."

Id. at 868–69 (plurality opinion) (footnote omitted) (quoting Holmes, *The Common Law* (1881) in 3 The Collected Works of Justice Holmes 268 (S. Novick ed. 1995)). In other words, "the Bank Board and FSLIC . . . assumed the risk [that the law would] change," *id.* at 908 (plurality opinion), *see id.* at 883 (plurality opinion), and agreed to pay plaintiffs for the losses, if any, caused by such a change, *see id.* at 887 (plurality opinion) ("[T]he Government agreed . . . to indemnify its contracting partners against financial losses arising from regulatory change."). *See also id.* at 890 (plurality opinion). The plurality found that, "[w]hen the law as to capital requirements changed . . . the Government was unable to perform its promise and, therefore, became liable for breach." *Id.* at 870.

Justice Scalia, writing for himself and two other Justices, concurred in the judgment. He agreed with the plurality "that the contracts at issue in this case gave rise to an obligation on the part of the Government to afford respondents favorable accounting treatment, and that the contracts were broken by the Government's discontinuation of that favorable treatment, as required by FIRREA." *Id.* at 919 (Scalia, J., concurring). He also agreed that by promising to regulate the plaintiffs in a particular fashion into the future, "the Government had assumed the risk of a change in its laws." *Id.* at 924.

However, Justice Scalia disagreed with the approach used by the plurality to reject the government's "unmistakability" and "sovereign acts" defenses. According to Justice Scalia, by characterizing the contracts at issue as merely insurance against the contingency that the regulations might change, rather than as promises not to change the regulations, the plurality had incorrectly avoided making the determination whether the government was entitled to assert these defenses to contractual liability. *Id.* at 919. Justice Scalia argued that prior precedent had not made the availability of these defenses dependent upon the nature of the underlying contract, *id.*, and he suggested that, in any event, the contracts did appear to constrain the sovereign authority of the government insofar as they required the government to pay damages for undertaking a sovereign act. *Id.* at 919–20. With respect to this latter point, he added that "[v]irtually every contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance: 'The duty to keep a contract at

common law means a prediction that you must pay damages if you do not keep it,—and nothing else.' " *Id.* at 919 (quoting Holmes, *The Path of the Law* (1897), in 3 The Collected Works of Justice Holmes 391, 394 (S. Novick ed. 1995)). Nevertheless, Justice Scalia concluded that the government's contractual undertaking was sufficiently clear to overcome the "unmistakability" and "sovereign acts" defenses. *Id.* at 919–22, 923–24. He also concluded that, because the plaintiffs did not seek to enjoin the exercise of sovereign authority, but rather to receive damages for breach of contract, there was no force to the government's "reserved powers" defense, which he described as "[s]tand[ing] principally for the proposition that certain core governmental powers cannot be surrendered." *Id.* at 922–23. Finally, Justice Scalia rejected the government's defense that there was no "express delegation" of authority permitting the restraint of sovereign power. *Id.* at 923.

Although the plurality and Justice Scalia may have differed in their characterization of the relevance of the nature of the underlying contracts to the availability of certain governmental defenses, they agreed that the government had assumed the risk of regulatory change. They also were in general agreement on what constituted the breach of contract: the plurality adopted the Federal Circuit's conclusion that the breach occurred when, pursuant to the new requirements imposed by FIRREA, the federal regulatory agencies limited the use of supervisory goodwill and capital credits, *id.* at 870, and Justice Scalia found that the enactment and implementation of FIRREA gave rise to plaintiffs' claims of breach of contract. *Id.* at 920. Finally, both the plurality and Justice Scalia found that the Bank Board and FSLIC had sufficient authority to enter into the contracts: "the Bank Board and FSLIC had ample statutory authority to . . . promise to permit respondents to count supervisory goodwill and capital credits toward regulatory capital and to pay respondents' damages if that performance became impossible." *Id.* at 891 (plurality opinion); *see also id.* at 923 (Scalia, J., concurring) ("[W]hatever is required by the 'express delegation' doctrine is to my mind satisfied by the statutes which the principal opinion identifies as conferring upon the [Bank Board and FSLIC] authority to enter into agreements of the sort at issue here."). For such authority, the Court pointed both to FSLIC's statutory authority to enter into contracts under 12 U.S.C. § 1725(c) (1988) (repealed 1989), and to its authority in certain circumstances to guarantee an acquiring institution against certain losses in order to facilitate a merger or consolidation with a failed or failing thrift under 12 U.S.C. § 1729(f)(2) (1988) (repealed 1989). 518 U.S. at 890 (plurality opinion); *id.* at 923 (Scalia, J., concurring).

II. ANALYSIS

We understand that currently pending before the Court of Federal Claims and the Federal Circuit are more than one hundred cases premised on identical or

similar theories of relief as the three cases at issue in *Winstar*. We further understand that some of these cases involve AA's or SAA's entered into by FSLIC, and that FSLIC was involved in some but not all of the remaining cases. We address here only those cases in which FSLIC was a party to an AA or SAA. *See supra* p. 142.

There are two potential sources for the payment of judgments (or settlements) against the government in the cases considered here: the Judgment Fund or the FSLIC Resolution Fund. The "Judgment Fund" is a permanent and indefinite appropriation established by Congress in 1956 to pay certain final judgments, awards, compromise settlements, and interest and costs. The Automatic Payment of Judgments Act, ch. 748, § 1302, 70 Stat. 678, 694–95 (1956) (codified as amended at 31 U.S.C. § 1304). The Judgment Fund may be used to pay certain judgments and settlements when payment is "not otherwise provided for." *Id.* The question for our purposes is whether Congress "otherwise provided for" the payment of judgments and settlements in the *Winstar*-related cases addressed in this memorandum when it created the FSLIC Resolution Fund in 1989 to assume, with a single statutory exception that is not applicable here, 12 U.S.C. § 1441a, "all assets and liabilities of the FSLIC on the day before" FSLIC was abolished, 12 U.S.C. § 1821a(a)(2).

A. Availability of the Judgment Fund

Prior to the creation of the Judgment Fund, many agencies had to seek specific appropriations from Congress to pay judgments and settlements because agency operating appropriations are not generally available to make such payments. As a result of this burdensome process, payments were often unduly delayed, causing excess charges for post-judgment interest. *See Availability of the Judgment Fund for the Payment of Judgments or Settlements in Suits Brought Against the Commodity Credit Corporation Under the Federal Tort Claims Act*, 13 Op. O.L.C. 362, 363 (1989) ("CCC Opinion"). The Judgment Fund addressed this problem by eliminating the need for Congress to pass specific appropriations bills for the payment of judgments and settlements that were not "otherwise provided for." 31 U.S.C. § 1304; *see* CCC Opinion at 363; 3 GAO Principles at 14–24 to 14–26. This Office has explained that § 1304 was not "designed to shift liability to the United States Treasury from agencies that had specific and express statutory authority to pay judgments and settlements out of their own assets and revenues, but rather to eliminate the need for Congress to pass specific appropriations bills for the payment of judgments." CCC Opinion at 366.

Section 1304 provides in pertinent part:

> (a) Necessary amounts are appropriated to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when—
>
> (1) payment is not otherwise provided for;
>
> (2) payment is certified by the Secretary of the Treasury; and
>
> (3) the judgment, award, or settlement is payable—
>
> (A) under sections 2414, 2517, 2672, or 2677 of title 28; . . . .

31 U.S.C. § 1304(a) (1994 & Supp. II 1996). Thus a judgment or settlement may be paid out of the Judgment Fund only if three conditions are met: payment must not be "otherwise provided for;" the Secretary of the Treasury must certify payment; and the judgment must be payable pursuant to one of several specified statutory provisions.

Whether the Judgment Fund is available for payment of judgments and settlements in the *Winstar*-related cases addressed in this memorandum depends first upon whether such payment is "otherwise provided for" within the meaning of § 1304(a), i.e., whether there is another appropriation or fund that lawfully may be used for payment.[9] *See* 62 Comp. Gen. 12, 14 (1982); *see also* 3 GAO Principles at 14–25 (to determine whether Judgment Fund is available to pay a type of judgment that did not exist prior to the Fund's establishment, usually examine whether Congress has established a mechanism that is available for payment). Whether a payment is "otherwise provided for" is a question of legal availability rather than actual funding status. *See* Memorandum for Donald B. Ayer, Deputy Attorney General, from J. Michael Luttig, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Department of Energy Request to use the Judgment Fund for Settlement of Fernald Litigation* at 7 (Dec. 18, 1989) ("DoE Opinion") (citing 66 Comp. Gen. 157, 160 (1986)); *accord* 3 GAO Principles at 14–26. The Judgment Fund does not become available simply because an agency may have insufficient funds at a particular time to pay a judgment. *See id.*; DoE Opinion at 7. If the agency lacks sufficient funds to pay a judgment, but possesses statutory authority to make the payment, its recourse is to seek funds from Congress. *See* DoE Opinion at 8; 3 GAO Principles at 14–26. Thus, if another appropriation or fund is legally available to pay a judgment or settlement, payment is "otherwise provided for" and the Judgment Fund is not available.

[9] Because we conclude that payment for the judgments and settlements at issue fails to meet the "not otherwise provided for" requirement in § 1304(a), we express no opinion as to whether that provision's other two requirements are met

B. Availability of the FSLIC Resolution Fund

The FSLIC Resolution Fund ("FRF") is another possible source of payment for judgments against, or settlements by, the government, at least in the *Winstar*-related cases addressed in this memorandum. FIRREA simultaneously abolished FSLIC as of the date of enactment, August 9, 1989, and, except as provided in 12 U.S.C. § 1441a, transferred "all assets and liabilities of the [FSLIC] on the day before August 9, 1989" to the FRF, a separate fund to be managed by the FDIC.[10] 12 U.S.C. § 1821a(a)(2) (1994); *see* FIRREA § 401(a)(1) (codified at 12 U.S.C. § 1437 note (1994)). The FRF may not be commingled with any other FDIC funds or assets. *Id.* It was initially funded by FSLIC's transferred assets, income earned on those assets, certain liquidating dividends and payments on claims from receiverships, and borrowed funds. *Id.* § 1821a(b) (1994). From 1989 to 1992, the FRF was supplemented by certain assessments against members of the Savings Association Insurance Fund. *Id.* If these sources of funds "are insufficient to satisfy the liabilities of the FSLIC Resolution Fund, the Secretary of the Treasury shall pay to the Fund such amounts as may be necessary, as determined by the [FDIC] and the Secretary, for FSLIC Resolution Fund purposes." *Id.* § 1821a(c)(1) (1994). In addition, "[t]here are authorized to be appropriated to the Secretary of the Treasury, without fiscal year limitation, such sums as may be necessary to carry out [§ 1821a]." *Id.* § 1821a(c)(2) (1994). Because this language merely authorizes an appropriation, there would have to be an appropriation from which the Secretary of the Treasury could replenish the FRF. *See* 1 GAO Principles at 2–34 ("'The mere authorization of an appropriation does not authorize expenditures on the faith thereof . . . .'" (quoting 16 Comp. Gen. 1007, 1008 (1937)).

The question that we must answer in determining whether the FRF is available to pay judgments or settlements in the *Winstar*-related cases in which FSLIC was a party to an AA or SAA is one of congressional intent. We must decide whether Congress intended for the phrase "all assets and liabilities of the [FSLIC] on the day before August 9, 1989," which FIRREA transferred to the FRF, 12 U.S.C. § 1821a(a)(2), to encompass the kind of liability that would give rise to settlements by, or judgments against, the United States in *Winstar*-related cases of this type. If Congress did so intend, then the FRF is available to pay the judgments or settlements that arise out of such cases.[11] If not, then the FRF is not available to pay such judgments or settlements and, absent the existence of some other

[10] Section 1441a established the RTC and provided for its termination by December 31, 1995. *See* 12 U.S.C. § 1441a(b) (1994), 12 U.S.C. § 1441a(m)(1) (1994). Upon termination, all assets and liabilities of RTC were to be transferred to the FRF. *Id.* § 1441a(m)(2). If the RTC's assets exceeded its liabilities, FIRREA obligated the FRF to transfer any net proceeds from the sale of the assets to the Resolution Funding Corporation. *Id.*

[11] In addition to transferring the assets and liabilities of FSLIC to the FRF, it is clear that Congress also intended for judgments or settlements arising from the "liabilities of the [FSLIC]" to be paid out of the FRF. *See* 12 U.S.C. § 1821a(c) (providing for a "Treasury backup" if the funds in the FRF are insufficient to satisfy its liabilities), *id.* § 1821a(d) (limiting the payment of certain judgments to the assets of the FRF).

fund from which payment could be made, the Judgment Fund would be the appropriate source of payment.

We conclude that, in light of the relevant statutory text and legislative history, Congress intended the phrase "liabilities of the [FSLIC] on the day before August 9, 1989," 12 U.S.C. § 1821a(a)(2), to encompass the contingent liability that arose from the contractual obligations that, under the theory of liability set forth in *Winstar*, FSLIC had assumed prior to FIRREA's passage and that may, as a consequence of FIRREA's enactment and implementation, become definite liabilities resulting in judgments against, or settlements by, the United States. Our conclusion is based on three related determinations: (1) liability arising from AA's or SAA's to which FSLIC was a party constitute "liabilities *of the [FSLIC],*" *id.* (emphasis added), to the extent that the statutory term "liabilities" encompasses contingent liabilities; (2) the statutory phrase "*liabilities* of the [FSLIC]," *id.* (emphasis added), does encompass contingent liabilities arising from FSLIC contracts that may have created obligations leading to the payment of judgments or settlements by the United States in the class of *Winstar*-related litigation considered herein; and (3) the language "on the day before August 9, 1989," does not reflect Congress's intention to exclude contingent liabilities arising from such FSLIC agreements, even though it is the enactment of FIRREA, an event that took place after the "day before August 9, 1989," that might give rise to any such judgments or settlements. We therefore conclude that the FRF is the appropriate source of payment for such settlements or judgments. We note that our construction of § 1821a(a)(2) is consistent with the Tenth Circuit's decision in *Security Federal*, 25 F.3d 1493 (10th Cir. 1994).[12]

1.

It is our view that liabilities resulting from AA's or SAA's to which FSLIC was a party qualify as "liabilities *of the [FSLIC],*" 12 U.S.C. § 1821a(a)(2) (emphasis added), to the extent that the term "liabilities" encompasses contingent liabilities. As we have explained, the Supreme Court's decision in *Winstar* held the government liable insofar as the enactment and implementation of FIRREA resulted in the breach of AA's and SAA's that had been entered into with various plaintiffs. The Court concluded that these contracts provided for the assumption of the risk of regulatory change and constituted promises to pay plaintiffs damages

[12] The Tenth Circuit held in that case that the FRF is the appropriate source for payment of a judgment resulting from the breach of contractual obligations incurred by FSLIC where the breach occurred after FSLIC's abolition *Id* In reaching that conclusion, the court of appeals relied on §§ 1821a(a) and 1821a(d) to hold that the restitution to which the plaintiff investors were entitled should be paid from the FRF rather than the RTC's assets: "Because FIRREA designates the FSLIC Resolution Fund as the successor to FSLIC rights and obligations and limits recovery to the Fund's assets, the Fund is the proper source of restitution to the Investors." *Id.* at 1506; *cf* Helfer Letter (concluding that under § 1821a(d), the FRF rather than the Judgment Fund was the proper source for payment of the judgment in *Security Federal* because FDIC, FSLIC and FRF were all named defendants, the court ordered payment of the judgment from the FRF, and the case involved an AA negotiated and executed by FSLIC)

in case of breach. Under the theory of liability recognized in *Winstar*, a demonstration that the governmental party to the AA's or SAA's had the statutory authority to enter into them is critical to any claim that may be brought to enforce them. *Winstar*, 518 U.S. at 890–91 (plurality opinion); *id.* at 923 (Scalia, J., concurring). The Supreme Court recognized in *Winstar* that FSLIC had such authority to enter into agreements that provided for the assumption of the risk of regulatory change. *See id.* at 890 (plurality opinion); *see also id.* at 923 (Scalia, J., concurring). Accordingly, to the extent that the governmental liabilities arising out of these agreements in the *Winstar*-related cases constitute "liabilities" within the meaning of § 1821a(a)(2), it is fair to treat them as liabilities "of the [FSLIC,]" as any governmental obligation to pay, or settlement premised on such an obligation, would arise from contracts entered into by FSLIC.

Moreover, we do not believe that, for purposes of determining the statutory source of payment, such liabilities could be attributed to the Bank Board. In contrast to FSLIC, which exercised its contracting power in forging the underlying agreements, it is our understanding that, in the cases considered in this memorandum, the Bank Board was "acting through" FSLIC's authority to contract, *Winstar*, 518 U.S. at 890 (plurality opinion), and was not exercising authority in connection with the agreements that are the subject of this memorandum other than in its capacity as the "operating head" of FSLIC. House Report at 424, *reprinted in* 1989 U.S.C.C.A.N. at 220; *see* 12 U.S.C. § 1725(a) (1988) (repealed 1989) (establishing FSLIC "under the direction of" the Bank Board). Accordingly, for purposes of construing the statutory provision that established the FRF, any liabilities resulting from the agreements would be "liabilities" of FSLIC, rather than of the Bank Board.[13]

We also believe that, in light of the quasi-corporate nature of FSLIC, Congress would have intended to treat these liabilities as "liabilities of the [FSLIC.]" This conclusion is supported by the fact that Congress does not ordinarily intend for the Judgment Fund to serve as the source of payment for liabilities that result from the breach of contractual obligations of governmental entities such as FSLIC. Instead, Congress ordinarily expects that such liabilities will be paid out of the

[13] At least for purposes of § 1821a(a)(2), the fact that the "United States" appears as the defendant in the *Winstar*-related cases does not make any liabilities resulting from FSLIC agreements liabilities of the United States as a whole rather than of FSLIC. The styling of the captions in these cases simply reflects the requirement that all cases brought in the CFC must be brought against the "United States," *see* 28 U.S.C. § 1491(a) (1994), a requirement that obtains without regard to the source from which payments would be made for any liability that results from such litigation. Although 12 U.S.C. § 1821a(d) defines one class of judgments payable from the FRF as those "resulting from a proceeding to which [FSLIC] was a party prior to its dissolution or which is initiated against the [FDIC] with respect to [FSLIC] or with respect to the FSLIC Resolution Fund," we do not believe that this provision limits the liabilities transferred to the FRF to those resulting from actions in which FSLIC or the FDIC was named as a defendant. Instead, it is clear that, in light of the text, structure, and legislative history of § 1821a(d), Congress did not intend for this provision to limit the class of payable FSLIC liabilities, but rather to insure that the FDIC would only use FRF funds to pay those FSLIC liabilities that had been transferred to the FRF. *See* S. Rep. No. 101–19, at 319 (section 1821a(d) "insulates the FDIC and the other funds it manages from liabilities of FSLIC that are transferred to the [FRF]"), *see also* House Report at 335, *reprinted in* 1989 U.S.C.C.A.N. at 131 ("Any judgment resulting from any action which is initiated against the FDIC based upon FSLIC actions is limited to the assets of the FSLIC Resolution Fund.")

separate funds of such governmental entities. Accordingly, it seems entirely logical to conclude that Congress intended for the FRF to serve as the source of payment for all those liabilities that Congress, had it not abolished FSLIC, would have expected FSLIC to have paid out of its own funds. The FRF, after all, is the fund that Congress established in order to succeed generally to all of the assets and liabilities of FSLIC.

Our determination that FSLIC is the type of governmental entity that Congress ordinarily would expect to use its own funds to pay for liabilities resulting from the breach of its contractual obligations stems from both its statutory designation as a "government corporation" and an examination of the functions that it performs. For example, the General Accounting Office ("GAO") has generally found that judgments against a government corporation, such as FSLIC, *see* 31 U.S.C. § 9101(3)(E) (1988) (repealed 1989) (listing FSLIC as a wholly-owned government corporation), should be paid from the corporation's own funds:

> The theory is that a government corporation is set up to operate in a business-like manner. It is usually given considerable latitude in determining its expenditures; it is free of many of the restrictions on appropriated funds that apply to noncorporate agencies; and its statutory charter typically contains a 'sue and be sued' clause. Of particular relevance . . . a corporation may generally retain funds it receives in the course of its operations and is not required to deposit them in the Treasury as miscellaneous receipts. Also, unlike a regular government agency, a government corporation may procure liability insurance. This being the case, it is logical that losses incurred by a government corporation, whether by judgment or otherwise, should be treated as liabilities of the corporation and charged to corporate funds.

3 GAO Principles at 14–36.

This Office has not expressly considered or adopted GAO's reasoning regarding the appropriate source for payment of judgments against a government corporation. Our approach has been to focus on case-specific determinations of congressional intent. In *Availability of the Judgment Fund for the Payment of Judgments or Settlements in Suits Brought Against the Commodity Credit Corporation Under the Federal Tort Claims Act*, 13 Op. O.L.C. 362 (1989), for example, we analyzed whether the Judgment Fund was available to pay settlements for suits brought against the Commodity Credit Corporation ("CCC") under the Federal Tort Claims Act ("FTCA"), by searching for indications that Congress intended for the CCC to discharge its own debts, including judgments against it, from its own funds. *Id.* at 367. As evidence of such intent, we noted that: (1) for the first fifteen years of its existence, the CCC operated largely in a private manner; (2)

like similar government corporations, the CCC was exposed to legal liability through a sue-and-be-sued clause; and (3) the CCC was authorized to " 'determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid' " and to " 'make final and conclusive settlement and adjustment of any claims by or against the Corporation.' " *Id.* (quoting 15 U.S.C. § 714b(j), (k)). We found that "[s]ince the CCC thus has the authority to apply its own funds to the payment of 'any' of its judgment claims, it follows that the CCC's obligations arising from FTCA may be paid from corporate funds. Accordingly, payment of such FTCA judgments against the CCC is 'otherwise provided for' within the meaning of 31 U.S.C. § 1304(a)(1), and the Judgment Fund is not available for that purpose." *Id.*

The common thread running through our and the GAO's analysis is that, in determining whether Congress intended for an entity to pay judgments from its own funds, relevant considerations include whether: Congress has designated the entity as a government corporation; the government corporation operates in a private, or "business-like," manner, as evidenced by, for example, its latitude to determine its expenditures, its exemption from the normal restrictions on appropriated funds, or the type of program it runs; the government corporation is exposed to legal liability through a sue-and-be-sued clause; and the government corporation has a revolving fund through which it may retain funds received in the course of its income-generating operations and spend those funds on day-to-day expenses.

We believe that the relevant circumstances indicate that Congress intended for FSLIC to pay judgments against it from its own funds. Congress expressly designated FSLIC as a government corporation. *See* 31 U.S.C. § 9101(3)(E) (1988) (repealed 1989). In addition, while FSLIC in part performed an inherently governmental function in its role as a regulator of the thrifts, the deposit insurance function it performed was one that could have been performed by the private sector. FSLIC had considerable latitude to determine its necessary expenditures and could operate without considering the usual statutory provisions regarding the use of appropriated funds. *See* 12 U.S.C. § 1725(c)(5) (1988) (repealed 1989) (requiring FSLIC to "determine its necessary expenditures . . . and the manner in which the same shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds"). FSLIC also operated like a private business in that its real property was subject to state or local taxes. *See id.* § 1725(e). And FSLIC could sue and be sued. *See FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (citing 12 U.S.C. § 1725(c)(4) (1988)). Finally, FSLIC's insurance fund operated as a revolving fund—paying for both its current operating expenses and defaults on depositors' accounts out of premiums levied on the institutions it insured, without having to deposit its funds in the Treasury as miscellaneous receipts. *See* 12 U.S.C. § 1727(b) & (c) (1988) (repealed 1989) (providing for payment of premiums to FSLIC by insured institutions); *id.* § 1725(d)

(1988) (repealed 1989) ("Moneys of [FSLIC] not required for current operations shall be deposited in the Treasury of the United States, or upon the approval of the Secretary of the Treasury, in any Federal Reserve bank, or shall be invested in obligations of, or guaranteed as to principal and interest by, the United States."); *id.* § 1728 (1988) (repealed 1989) (providing for payment of insurance by FSLIC). Thus, it appears that Congress would have expected the liabilities of FSLIC that resulted from breaches of contracts into which FSLIC had entered to have been paid from FSLIC's insurance fund, and that Congress would have expected the liabilities at issue here to have been paid from that fund if they had become definite prior to FSLIC's abolition.

2.

There remains, then, the question whether the statutory term "liabilities" should be construed to encompass not only definite liabilities, such as a final judgment entered prior to FSLIC's abolition as the consequence of an AA or SAA entered into by FSLIC, but also such contingent liabilities as a contractual obligation that FSLIC had assumed in an AA or SAA but that had not been breached prior to the time FIRREA abolished FSLIC. FIRREA does not define the term "liabilities" in the phrase "liabilities of the [FSLIC]," 12 U.S.C. § 1821a(a)(2), but it is well-established that "the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In accord with this interpretive principle, the Supreme Court has explained that when a word or phrase in a statute has not been defined by Congress, it should ordinarily be construed in accordance with "its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. at 476 (relying on Black's Law Dictionary for the ordinary meaning of a term).

In ordinary usage, the term "liability" is "a broad legal term [that] has been referred to as of the most comprehensive significance, including almost every character of . . . responsibility, absolute, contingent, or likely." Black's Law Dictionary 914 (6th ed. 1990); *see id.* (liability "has been defined to mean: all character of debts and obligations . . . an obligation which may or may not ripen into a debt; any kind of debt or liability, either absolute or contingent, express or implied; condition of being actually or potentially subject to an obligation; condition of being responsible for a possible or actual loss, penalty, evil, expense, or burden; . . . every kind of legal obligation, responsibility or duty . . . present, current, future, fixed or contingent debts") (citations omitted); *cf.* Webster's Third New International Dictionary 1302 (1986) (defining "liability" as "the quality or state of being liable" and defining "liable" as "bound or obligated according to law or equity: responsible, answerable"); *Montauk Oil Transp. Corp. v. Tug*

"El Zorro Grande," 54 F.3d 111, 114 (2d Cir. 1995) (quoting Black's Law Dictionary as support for reading the term "liabilities" in a statute broadly to encompass civil penalties already imposed). Thus, the ordinary meaning of the term "liabilit[y]" strongly supports the conclusion that Congress intended the phrase "liabilities of the [FSLIC]" in § 1821a(a)(2) to include any contingent liability arising from promises made by FSLIC to insure against the risk of regulatory change, even though that liability had not become definite by the time of FSLIC's abolition.

Of course, we do not mean to suggest that the term "liabilities" is invariably best construed, regardless of context, to include contingent liabilities arising from agreements that have provided for the assumption of the risk of events that have not yet occurred. Here, however, the overall statutory context counsels in favor of giving the term "liabilities" its ordinary, expansive meaning. When FIRREA abolished FSLIC, it designated where the functions and the assets and liabilities of FSLIC would be transferred. *See supra*, p. 146–47; *see also* House Report at 438, *reprinted in* 1989 U.S.C.C.A.N. at 234 (explaining that the FRF "will assume all the assets and liabilities of the FSLIC except for those expressly transferred or assumed by the Resolution Trust Corporation"). Congress established the FRF to wind up all of FSLIC's affairs, *see* 12 U.S.C. § 1821a(f) (providing for dissolution of FRF "upon satisfaction of all debts and liabilities and sale of all assets"), and was careful not to extinguish existing obligations attributable to FSLIC's actions. *See* FIRREA, § 401(f) (codified at 12 U.S.C. § 1437 note (1994)) ("savings provision" explaining that the abolition of FSLIC "shall not affect the validity of any right, duty, or obligation of" FSLIC and providing for the continuation of all suits commenced against FSLIC). But nowhere in FIRREA did Congress expressly provide that it intended for the FRF to assume only definite, but not contingent, liabilities with respect to FSLIC.

It would be anomalous to conclude that Congress, in creating a detailed statutory framework intended to wind up the affairs of FSLIC, simply left unanswered the question where the contingent liabilities arising from FSLIC agreements that had not yet been breached should be transferred. This anomaly does not arise, however, if "liabilities" is construed consistent with its ordinary, broad meaning. For under such a construction, it is clear that Congress intended the FRF, which (with the sole exception of 12 U.S.C. § 1441a) Congress identified as the fund to which "all" of the FSLIC "liabilities" would be transferred, to be the source of payment for the subset of liabilities that were contingent prior to FSLIC's abolition.

Moreover, we have found no affirmative evidence in our review of the relevant legislative materials that Congress intended to exclude contingent liabilities from the "liabilities" that it plainly intended to transfer to the FRF. All of these materials are consistent with construing "liabilities" in a manner that would include the contingent liability attributable to the FSLIC agreements, and none provides a clear, contrary indication of congressional intent. In light of the expansive, ordi-

nary meaning of the term "liability," as well as the particular statutory context at issue here, the term "liabilities" in § 1821a(a)(2) should be construed to include the type of contingent liability that arose from AA's and SAA's that FSLIC entered into prior to its abolition. *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94–95 (1993) (in interpreting the meaning of a statutory provision, "we examine first the language of the governing statute, guided not by a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy") (quotations and citations omitted).

Certainly the statutory provision that addresses payments from the FRF arising from "legal proceedings," 12 U.S.C. § 1821a(d), does not manifest an intention on the part of Congress to exclude liabilities that were only contingent at the time of FSLIC's abolition. Instead, that provision makes clear that Congress fully expected the FRF to be the source of payment for FSLIC liabilities that would arise from litigation commenced only after FSLIC had been abolished. Section 1821a(d) provides: "Any judgment resulting from a proceeding to which [FSLIC] was a party prior to its dissolution or which is initiated against the [FDIC] with respect to [FSLIC] or with respect to the FSLIC Resolution Fund shall be limited to the assets of the FSLIC Resolution Fund." 12 U.S.C. § 1821a(d). The plain language of this provision indicates that Congress contemplated that judgments resulting from cases initiated against the FDIC after the enactment of FIRREA with respect to FSLIC's pre-FIRREA activities would be paid from the FRF. That is to say, Congress must have intended for the "liabilities of the [FSLIC]" transferred to the FRF to include at least some potential judgments resulting from actions by FSLIC prior to its abolition, brought against the FDIC as the successor to FSLIC's obligations. 12 U.S.C. § 1821a(a)(2). Yet, in addressing the availability of the FRF to pay such future judgments, Congress did not purport to limit the class of payable "liabilities:" Instead, Congress employed the broad phrase "any judgment," which comports with the expansive, ordinary meaning of "liabilities" that we believe Congress intended to adopt in § 1821a(a)(2).

Nor can it be argued that the particular class of future judgments and settlements at issue here—judgments and settlements that may arise from contractual agreements assuming the risk of regulatory change that, by definition, had not been breached prior to FSLIC's abolition—were so far beyond the contemplation of Congress at the time that it established the FRF that it would be implausible to construe the term "liabilities" in § 1821a(a)(2) to encompass them. As Justice Souter explained in *Winstar*, the effect that the enactment of FIRREA might have on the agreements was a subject of "intense concern" in the congressional debate over the legislation. 518 U.S. at 902 (plurality opinion).[14] For example, "[o]pponents of FIRREA's new capital requirements complained that '[i]n its

[14] This section of Justice Souter's plurality opinion and the other portions of the opinion cited in this paragraph were joined by only two other Justices

present form, [FIRREA] would abrogate written agreements made by the U.S. government to thrifts that acquired failing institutions by changing the rules in the middle of the game.''' *Id.* at 900–01 (plurality opinion) (quoting 135 Cong. Rec. 12,145 (1989) (statement of Rep. Ackerman)). More generally, Justice Souter noted that the effect that the legislation might have on existing FSLIC contracts was ''a focal point of the congressional debate,'' *id.* at 900 (plurality opinion), and that ''Congress itself expressed a willingness to bear the costs at issue here when it authorized FSLIC to 'guarantee [acquiring thrifts] against loss' that might occur as a result of a supervisory merger.'' *Id.* at 883 (quoting 12 U.S.C. § 1729(f)(2) (1988) (repealed 1989)). Given the attention in Congress to the question whether FIRREA would abrogate the agreements to assume the risk of regulatory change, it would appear reasonable to construe ''liabilities of the [FSLIC]'' to encompass any liability that might result from the breach of those agreements.

Finally, the relevant legislative history does not demonstrate that Congress intended for ''liabilities of the [FSLIC]'' to exclude contingent liabilities. In accordance with the natural reading of the term ''liabilities'' in § 1821a(a)(2), the earlier versions of the provision reported out of both the Senate and House committees specified that the types of liabilities that the FRF would inherit included ''debts, obligations, contracts and other liabilities of [FSLIC], matured or unmatured, accrued, absolute, contingent, or otherwise.'' S. Rep. No. 101–19, at 107–08 (Apr. 13, 1989); House Report at 64 (May 16, 1989) (identical language); *see also* S. Rep. No. 101–19, at 319 (explaining that ''[t]he liabilities transferred include FSLIC's outstanding obligations under assistance agreements with acquirers of failing thrift institutions''); House Report at 334, *reprinted in* 1989 U.S.C.C.A.N. at 130 (explaining that the FRF ''is the successor to the existing reserves and assets, debts, obligations, contracts and other liabilities of the FSLIC''). This explanatory language was deleted without any reference in the House Conference Report, and thus it could be argued that the deletion reflects Congress's intent to have adopted a narrower meaning of ''liabilities'' in the statute itself. We do not believe, however, that such a reading of the legislative history would be sound. To the contrary, the appearance of this broad description of liabilities in the Senate and House reports is consistent with the conclusion that Congress intended the term ''liabilities'' to retain its ordinary, and quite expansive, meaning, and that Congress simply deleted the explanatory language as unnecessary.

In evaluating the effect of the deletion of the explanatory language, we have reviewed the case law that concludes that Congress does not ordinarily ''intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'' *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987); *see also Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (Congress's deletion of provision ''strongly militates against a judgment that Congress intended a result that it expressly declined to enact''). There are certainly situations in which the

deletion of language that has appeared in an earlier, unenacted version of the legislation may be read to signal Congress's intention to have enacted a provision with a different meaning. There are also situations, however, where the deletion of the language that appeared in earlier versions of the bill merely reflects Congress's intention to have avoided an unnecessary redundancy that would have resulted from the inclusion of the additional language. *See Gemsco, Inc. v. Walling*, 324 U.S. 244, 263–65 (1945) (rejecting argument that deletion in conference of an illustrative parenthetical phrase from a bill meant that Congress intended to circumvent the authority conferred by the bill where parenthetical had been both inserted and deleted without comment); *see also Erie R.R. v. Tompkins*, 304 U.S. 64, 72–73 & n.5 (1938) (overturning the Court's previous interpretation of § 34 of the Federal Judiciary Act in part because of the "research of a competent scholar, who examined the original document") (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 51–52, 81–88, 108 (1923) (when the drafter of an amendment to § 34 replaced his original version's phrase "the Statute law of the several States in force for the time being and their unwritten or common law now in use, whether by adoption from the common law of England, the ancient statutes of the same or otherwise" with "laws of the several States," the latter was intended to be a concise summary that encompassed the former)).

Here, as we have explained, the ordinary meaning of the undefined term "liabilities" is perfectly consistent with the expansive descriptions of "liabilities" contained in the House and Senate reports.[15] In addition, the other indications of congressional intent that we have identified above do not suggest that Congress intended to depart from the ordinary meaning of "liabilities" in establishing the FRF. Indeed, they all suggest that Congress intended to ensure a comprehensive transfer to the FRF of all of the assets and liabilities that had formerly been FSLIC's. Accordingly, we believe that Congress would have indicated in some way its intention for the deletion of the explanatory language to exclude the ordinary meaning of the term "liabilities," rather than merely to eliminate redundancies, if it had intended that result. Thus, the legislative history concerning the use of the term "liabilities" in § 1821a(a)(2) is consistent with the conclusion that Congress intended for that term to retain its ordinary meaning.

[15] In reaching its conclusion in *Security Federal* that the FRF was the appropriate source of payment, the Tenth Circuit relied on the earlier, more complete, listing of the types of liabilities transferred to the FRF. *See* 25 F.3d at 1505 ("the FSLIC Resolution Fund . . . 'is the successor to the existing reserves and assets, debts, obligations, contracts and other liabilities of the FSLIC' " (quoting House Report at 334)). The court did not address, however, whether the deletion of that additional, descriptive language from the final version of § 1821a(a)(2), which uses only the term "liabilities," reflected Congress's intention to have adopted a narrower meaning of "liabilities"

3.

Although we believe that Congress intended the phrase "the liabilities of the [FSLIC]" to encompass contingent liabilities resulting from contracts in which FSLIC assumed the risk of regulatory change, we must still consider the effect of the remaining portion of the relevant statutory language—i.e., the portion of the statute that limits the liabilities of FSLIC to include only those that existed "on the day before August 9, 1989." It could be argued that the inclusion of this limiting language reflected Congress's intention to exclude liabilities resulting from breaches of contract caused by FIRREA's enactment and implementation, which, of course, occurred after August 8, 1989. Under that view, the phrase "liabilities of the [FSLIC]" on the day before it was abolished would encompass, for example, outstanding promissory notes for the cash assistance that FSLIC had promised to contribute to supervisory mergers. The phrase would not encompass mere contingent liabilities that were attributable to agreements by FSLIC that would not be breached until after August 8, 1989. We do not believe, however, that this argument has force.

As we have already explained, there is nothing in the term "liabilities" itself that would counsel in favor of construing it to exclude contingent liabilities resulting from FSLIC contracts that had not been breached as of August 8, 1989. Indeed, the ordinary meaning of that term points in the opposite direction, and we have found no evidence that Congress intended the date restriction in § 1821a(a)(2), i.e., the phrase "on the day before August 9, 1989," to limit the types of "liabilities" of FSLIC transferred to the FRF. We do not believe, for example, that Congress intended this date restriction to preclude the FRF from serving as the source of payment for judgments or settlements resulting from breaches of FSLIC agreements that occurred either on the date of FIRREA's enactment, or later, when FIRREA was implemented, and thus after "the day before August 9, 1989." Instead, we believe that the inclusion of the date restriction merely resulted from the timing of FSLIC's abolition; technically, FSLIC was abolished just after midnight on August 8, and thus the transfer to the FRF of FSLIC's liabilities as of midnight on August 8 makes sense as a matter of timing. Earlier versions of the bill reported out of both the House and Senate committees had used the phrase "[o]n the date of the dissolution of [FSLIC] in accordance with section 401 of [FIRREA]," *see* S. Rep. No. 101–19, at 107 (Apr. 13, 1989); House Report at 64 (May 16, 1989), and there is no indication in the House Conference Report that the substitution of "the day before August 9, 1989" for "the date of the dissolution of [FSLIC]" was intended to work any substantive change.

III. CONCLUSION

We conclude, therefore, that the transfer of "all assets and liabilities of the [FSLIC] on the day before August 9, 1989" to the FRF included not only the transfer of those liabilities that were definite on the day before FSLIC was abolished by reason of a judgment, or that arose from a breach of a contractual obligation that occurred on or before that date, but also those contingent liabilities that resulted from FSLIC's earlier assumption of the risk of adverse changes in the regulatory structure and that became definite only after FSLIC had been abolished. 12 U.S.C. § 1821a(a)(2). Because the FRF inherited these contingent liabilities from FSLIC, it also inherited the corresponding duty to pay damages once the regulatory structure changed. Thus, the FRF is legally available to pay judgments resulting from proceedings seeking to enforce this duty, and any settlements based on the risk of such judgments. Because payment is "otherwise provided for" within the meaning of the Judgment Fund statute, the Judgment Fund is not available to pay such judgments and settlements. *See* 31 U.S.C. § 1304. In sum, we believe that the FRF is the appropriate source of funds to pay judgments and settlements in *Winstar*-related cases in which FSLIC was a party to an Assistance Agreement or Supervisory Action Agreement.

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Office of Legal Counsel

Constitutional Concerns Raised by the Collections of Information Antipiracy Act

The proposed Collections of Information Antipiracy Act raises difficult and novel constitutional questions concerning Congress's power to restrict the dissemination of information. Congress may not, pursuant to the Intellectual Property Clause of the Constitution, create "sweat of the brow" protection for compiled facts, at least insofar as such protection would extend to what the Supreme Court has termed the nonoriginal portion of such a compilation. Either or both the Intellectual Property Clause and the First Amendment may impose limitations on the exercise of congressional power under the Commerce Clause that would raise serious constitutional concerns regarding the constitutionality of the bill.

July 28, 1998

MEMORANDUM OPINION FOR THE ASSOCIATE WHITE HOUSE COUNSEL

You have asked for our views on the constitutionality of the Collections of Information Antipiracy Act, H.R. 2652, 105th Cong. (1998), which passed the House on May 19, 1998. H.R. 2652 raises very difficult, and quite novel, constitutional questions, which are the subject of this memorandum. The following analysis is preliminary and general. We would, of course, be pleased to provide views directed to more specific questions that you might have.

The object of H.R. 2652 is, in effect, to provide a quasi-property right in certain collections of information that required great effort to compile. H.R. 2652 would impose liability upon anyone who "extracts, or uses in commerce, all or a substantial part, measured either quantitatively or qualitatively, of a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources, so as to cause harm to the actual or potential market of that other person, or a successor in interest of that other person, for a product or service that incorporates that collection of information and is offered or intended to be offered for sale or otherwise in commerce by that other person, or a successor in interest of that person." *Id.* § 2 (proposed 17 U.S.C. § 1202).

In assessing the constitutional concerns raised by the bill, which would provide what is known as "sweat of the brow" protection for certain compilations of factual material, we address three related questions:

> (i) whether the bill constitutes a valid exercise of Congress's power under the Intellectual Property Clause of the Constitution, art. I, § 8, cl. 8, which provides that Congress shall have the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries";

(ii) whether, if the bill does not constitute a valid exercise of Congress's power under the Intellectual Property Clause, it constitutes a valid exercise of Congress's power under the Commerce Clause, or whether the Intellectual Property Clause precludes such Commerce Clause legislation; and

(iii) whether, if the Intellectual Property Clause does not preclude Congress from exercising its commerce power to enact such legislation, the First Amendment restricts such an exercise of the commerce power.

As to the first question, the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991), indicates that Congress may not, pursuant to the Intellectual Property Clause of the Constitution, create such "sweat of the brow" protection for compiled facts, at least insofar as such protection would extend to what the Court termed the nonoriginal portion of such a compilation. As to the second and third questions, Supreme Court precedents do not provide clear guidance; it is fair to say, however, that either or both the Intellectual Property Clause and the First Amendment may impose limitations on the exercise of congressional power under the Commerce Clause that would raise serious constitutional concerns regarding the constitutionality of H.R. 2652.[1]

I. Description of H.R. 2652

The stated purpose of H.R. 2652 is to "complement" the protection that copyright law provides to collections of information. *See Collections of Information Antipiracy Act*, H.R. Rep. No. 105–525, at 5 (1998) ("House Report"). According to the House Report on H.R. 2652, the Supreme Court's decision in *Feist* (described in more detail below) has substantially reduced the incentives for the creation of compilations of information at the same time that "[c]opying large quantities of materials from another's collection, and using it in a competing information product—behavior that copyright protection may not effectively prevent—is cheaper and easier than ever, through digital technology now in widespread use." House Report at 7. The House Report recognizes that "[v]arious legal and technological options exist today for producers of collections of informa-

[1] It is a matter of some contention whether, and to what extent, the incentives that would be created by H.R. 2652 are necessary to stimulate a significant quantum of valuable compilations of facts that otherwise would remain uncompiled, or whether currently available incentives and legal protections are sufficient to ensure the continued wide dissemination of factual compilations in the public domain. *See, e.g.*, J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 Vand. L. Rev. 51, 113–36 (1997); Jessica Litman, *After Feist*, 17 U. Dayton L. Rev. 607, 611–13 (1992); Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information after Feist v. Rural Telephone*, 92 Colum. L. Rev. 338 (1992). This memorandum does not address the merits of this dispute, but, as we explain below, courts would be more likely to uphold the legislation against constitutional challenge if they were persuaded that it would increase, rather than decrease, the collection and use of information.

tion to protect their investments''—namely, copyright and state contract law. *Id.*[2] The House Report concludes, however, that these other existing tools are not ''adequate to address the crux of the problem,'' and that there are ''meaningful gaps in protection that can best be filled by a new federal statute.'' *Id.* at 7–8. In particular, ''the coverage of copyright law is limited after *Feist*, and the protection of a contract binds only the parties to that contract.'' *Id.* at 7.

The asserted ''goal'' of H.R. 2652 ''is to stimulate the creation of more collections [of information], as well as increased dissemination to the public, and to encourage more competition among producers.'' House Report at 8. In particular, the object of H.R. 2652 is to ''restore a modified form of the 'sweat of the brow' protection available in the past as a separate doctrine and then under copyright law, but under appropriate Constitutional power and with appropriate limitations.'' *Id.* at 9. The House Report asserts that the Act would not ''create a property right like copyright,'' but would instead establish ''a tort-based cause of action against misappropriation.'' *Id.*

H.R. 2652 would establish a new chapter in title 17, to be entitled ''Misappropriation of Collections of Information.'' The principal provision would establish a ''misappropriation'' tort, to be codified as 17 U.S.C. § 1202:

> Any person who extracts, or uses in commerce, all or a substantial part, measured either quantitatively or qualitatively, of a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources, so as to cause harm to the actual or potential market of that other person, or a successor in interest of that other person, for a product or service that incorporates that collection of information and is offered or intended to be offered for sale or otherwise in commerce by that other person, or a successor in interest of that person, shall be liable to that person or successor in interest for the remedies set forth in section 1206.

Any person injured by a use or extraction of information in violation of § 1202 could file a civil action in federal district court. *Id.* (proposed § 1206(a)). Such courts would have the power to issue injunctions enjoining any uses or extractions

[2] Increasingly, compilers of information—particularly those who incorporate such compilations in electronic form—package such compilations with a so-called ''shrinkwrap'' license (or ''click-on'' license, for documents posted on-line). This sort of ''contract'' purports to condition consumers' use of the product on the consumers' implicit agreement not to copy the information or disseminate it to others *See generally ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) Such contract-based restrictions might have a significant impact on the ability of users of factual compilations to copy or distribute the facts contained therein However, because of several unresolved questions concerning the enforceability of these contracts, the efficacy of this approach is unclear. *See, e g , id.* at 1453–55 (discussing whether contract claim is preempted by the Copyright Act and holding that it is not); *see also Cohen v. Cowles Media Co* , 501 U S 663, 669–71 (1991) (holding that the First Amendment does not prohibit a state from applying a ''generally applicable'' law of promissory estoppel to impose damages on a newspaper that revealed the identity of a source to whom it had promised confidentiality)

of information that would contravene § 1202. *Id.* (proposed § 1206(b)). Those courts also would be able to "impound[ ]" any "copies of contents of a collection of information extracted or used in violation of § 1202." *Id.* (proposed § 1206(c)). A prevailing plaintiff in a civil action would be entitled to treble damages, as well as any profits realized by the defendant, costs and attorneys' fees. *Id.* (proposed § 1206(d)). Willful violations would, under certain circumstances, be subject to criminal felony sanctions, including five years imprisonment. *Id.* (proposed § 1207(b)). No criminal or civil action could be maintained by virtue of a use or extraction "that occurs more than 15 years after the investment of resources that qualified the . . . collection of information for protection under [H.R. 2652]." *Id.* (proposed § 1208(c)). But this limitation might, for all intents and purposes, create perpetual liability, since every time the collection of information is "maintained," *id.* (proposed § 1202), that would be an "investment of . . . resources" that qualifies the "collection of information" for protection under proposed § 1202. Thus, if the collector "expand[s]" or "refresh[es]" the collection, arguably the fifteen-year period would start anew. *See* House Report at 21.

The proposed legislation sets forth six categories of what it terms "permitted acts." *See* proposed § 1203(a)–(f). The first subsection provides that the legislation shall not prevent "the extraction or use of an individual item, or other insubstantial part of a collection of information, in itself," but notes that repeated or systematic uses or extractions of individual items or insubstantial portions may not be used in a manner that would circumvent the general prohibition against uses or extractions. *Id.* (proposed § 1203(a)). The second subsection makes clear that the legislation shall not "restrict any person from independently gathering information or using information obtained by means other than extracting it from a collection of information gathered, organized, or maintained by another person through the investment of substantial monetary or other resources." *Id.* (proposed § 1203(b)). The third subsection provides that the legislation shall not restrict a person from using or extracting information contained in a compilation "for the sole purpose of verifying the accuracy of information independently gathered, organized, or maintained by that person." *Id.* (proposed § 1203(c)). The fourth subsection provides that extractions or uses "for nonprofit educational, scientific, or research purposes" shall not be prohibited unless such extractions or uses would "harm the actual or potential market for the product or service." *Id.* (proposed § 1203(d)). The fifth subsection provides an exception for uses or extractions "for the sole purpose of news reporting" in certain specific circumstances. *Id.* (proposed § 1203(e)). The sixth subsection permits "the owner of a particular lawfully made copy of all or part of a collection of information from selling or otherwise disposing of the possession of that copy." *Id.* (proposed § 1203(f)).

The proposed bill also contains a separate exclusion (with limited exceptions) for "collections of information gathered, organized, or maintained by or for a government entity, whether Federal, State, or local, including any employee or

agent of such entity." *Id.* (proposed § 1204(a)). This "exclusion," would be confined to collections of information gathered, organized, or maintained "in the course of performing governmental functions," and thus would not appear to exempt factual databases—even databases made available to the public—that were compiled by private parties using government funding, or pursuant to government contract. Finally, another section of the bill provides, in pertinent part, that an exclusion for "collections of information gathered, organized, or maintained in the course of performing governmental functions other than education or scholarship, by or for a government entity, whether Federal, State, or local, including any employee or agent of such entity, or any person exclusively licensed by such entity, within the scope of the employment, agency, or license." However, the exception for "education or scholarship" would mean that § 1202's "use or extraction" tort would still make the prohibition applicable to information compiled entirely by *public* colleges and universities. *See also* House Report at 17 (confirming that the statute would apply to information collected by "Federal or State educational institutions in the course of engaging in education or scholarship").

Particularly in light of the constitutional limitations that might apply to the type of protection afforded by H.R. 2652, the precise nature of the prohibitions, permissions and exemptions that are contained in the proposed bill are of critical importance. However, many of the critical, proposed statutory terms are not well-defined. Because of the ambiguity of many of these terms, it is impossible to know for certain how wide-ranging H.R. 2652's application would be. Nevertheless, in the remainder of this section, we identify some of the broadest and most ambiguous provisions of H.R. 2652 in order to clarify its possible scope.

To begin with, "information" would be defined to mean "facts, data, works of authorship, or any other intangible material capable of being collected and organized in a systematic way." Proposed § 1201(2). As a result, unlike the Copyright Act, the proposed legislation would provide protection that would not be limited to compilations of what have been termed expressive or original materials, concepts that we discuss in more detail below. The legislation would instead also provide protection to ordinary facts, which are not now subject to copyright protection and may be unsuited to such protection as a matter of constitutional law. In addition, the definition of "information" would not, from its face, appear to be limited to those compilations of information that are accessible only for a fee.

The proposed legislation also does not define either the term "extracts" or the phrase "uses in commerce." Given their seemingly expansive, ordinary meanings, these words would, standing alone, appear to give H.R. 2652 quite a broad scope. *See* House Report at 12 (explaining that the provision would cover any "dissemination to others"). Moreover, the bill does not expressly provide that the prohibition on uses or extractions would apply only to uses or extractions for commercial

purposes. In addition, the bill would not expressly limit liability to uses of information that is conveyed for a fee, or that is conveyed subject to contractual conditions on its further dissemination.[3] Finally, the provision would prohibit certain "uses" or "extractions" of even quantitatively insubstantial parts of a compilation, if the part in question is "qualitatively" substantial. The House Report provides the following elaboration on this point:

> Only portions of the collection that are substantial in amount or importance to the value of the collection as a whole would be covered. Qualitative harm may occur through the extraction of a qualitatively small but valuable portion of a collection of information. For example, the Physician's Desk Reference, a work that compiles generally available information about every prescription drug approved by the FDA, contains some several thousand drugs and is available to both consumers and medical professionals. If a second comer extracted information about the thousand most commonly prescribed medications and offered it for sale to the general public—for example under the title "Drugs Every Consumer Should Know"—that extraction and use, although a fraction of the total collection of information, would cause the kind of market harm that the Committee intends H.R. 2652 to prevent. Similarly, the extraction or use of real-time quotes for all technology stocks from a securities database, while constituting a relatively small portion of actively traded or volatile securities, may be of such "qualitative" importance to the value of the database that it creates the type of commercial harm that the Committee intends section 1202 to prevent.

House Report at 12.[4]

At the same time, the bill only prohibits extractions or uses in commerce that would "harm the actual or potential market" of the person who gathered, organized or maintained the collection of information. Proposed § 1202. The scope of this important limitation is unclear. The legislation would define "potential market" to mean "any market that a person claiming protection under section 1202 has current and demonstrable plans to exploit or that is commonly exploited

[3] Indeed, the proposed statute is intended to supplement, rather than to supplant, any contractual remedies that the compiler might have *See* § 1205(a)–(b) (expressly providing that state contract law is not preempted). Accordingly, it would prevent the "use" or "extraction" of data from a collection even if the creator of the collection had disseminated it freely, without any contractual limitations

[4] The prohibition against extracting or using such information would not (at least not expressly) be limited to the use or extraction of those parts of a collection that were compiled "through the investment of substantial monetary or other resources", instead, the prohibition apparently would apply to uses or extractions of a substantial part of a compilation, so long as the compilation itself (rather than the extracted components thereof) was "gathered, organized, or maintained through the investment of substantial monetary or other resources."

by persons offering similar products or services incorporating collections of information." Proposed § 1201(3). This definition is arguably an expansive one that would justify a very broad construction of what would constitute harm to the potential market. Under such a broad construction, even an individual's decision to download information that had been offered for sale, purchased, but then posted on the internet for free use by the purchaser could give rise to liability on the theory that such an "extraction" would decrease the "potential market" by depriving the initial seller of a potential buyer. So construed, even the provisions in H.R. 2652 that would exempt certain uses and extractions for scientific or educational purposes would do little to confine the reach of the bill. As noted above, these exemptions are themselves limited by the requirement that such uses or extractions not harm the potential market of the original compiler, and it would appear that any educational or scientific sharing of information could deprive a potential seller of a potential buyer.

In addition, H.R. 2652 does not include anything resembling the express exemptions found in the Copyright Act for uses that Congress previously has considered to be of particular public benefit. *See, e.g.*, 17 U.S.C.A. § 108 (concerning reproduction by libraries and archives), § 110(1) (concerning face-to-face teaching activities), § 110(2) (concerning performances and transmissions for educational purposes), § 110(3) (concerning performances in the course of religious services and assemblies), § 118 (concerning uses by noncommercial broadcasters). The absence of these express exemptions in what would be a statutory scheme closely related to the Copyright Act could be read to suggest that Congress intended to prohibit such uses.

There are, however, factors that counsel against a broad construction of "potential market," and thus that point toward a more limited construction of the scope of the protection that would be provided by H.R. 2652. As an initial matter, the broadest possible construction would raise very serious constitutional concerns that we discuss in the following sections, and thus courts may be likely to avoid such a construction for that reason alone.

In addition, the Copyright Act itself identifies harm to the "potential market" as one of the four statutory factors to be weighed in determining whether the "fair use" standard has been met, *see* 17 U.S.C.A. § 107(4), and thus the appearance of this same phrase in the proposed legislation may signal Congress's intention to incorporate the definition that has been developed in the copyright context. Moreover, H.R. 2652 would contain, in addition to the "harm to the potential market" requirement, the requirement that a use or extraction be of a substantial portion of the compilation. This limitation also appears to be analogous to one of the four statutory factors for determining "fair use" under the Copyright Act. *See* 17 U.S.C.A. § 107(3) (describing the factor as "the amount and substan-

tiality of the portion used in relation to the copyrighted work as a whole'').[5] Thus, there would appear to be some textual basis for concluding that H.R. 2652 is intended to incorporate, albeit implicitly, something like the ''fair use'' provision of the Copyright Act, and thus to limit to a significant degree the scope of the protection that the statute would provide.

If so, the Court's recent decision in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590–94 (1994), would be relevant to the construction of H.R. 2652. The Court there suggested that the potential market factor is satisfied for purposes of the Copyright Act when a copyrighted work is used in a way that would create, in effect, a substitute product in direct competition with the original. *See id.* at 590–94. The Court added, however, that when ''the second use is transformative, market substitution is less certain, and market harm may not be so readily inferred.'' *Id.* at 591. Applying that same approach here, H.R. 2652 would arguably reach, with some exceptions, only non-transformative uses for commercial purposes, as it would be only such uses that, in light of the ''fair use standard'' developed in copyright law, would result in harm to the potential market within the meaning of H.R. 2652. It is important in this regard to emphasize that the fair use standard in copyright law is an equitable one that requires a sensitive weighing of the statutory factors in light of the specific factual context at issue, *see id.* at 577 (''The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis.''), and that a determination as to fair use may also depend upon an evaluation of the ''good faith'' of the use, *see id.* at 585 n.18.

In sum, while it is clear that H.R. 2652 is intended to cover nonoriginal, factual material, which the Copyright Act does not (and, as we explain below, for constitutional reasons, probably could not be extended to reach), the scope of the protection that H.R. 2652 is intended to afford to such factual materials is far less clear. The ambiguity concerning the scope of the intended protection for factual material arises in large part because the legislation does not make clear whether it is intended to incorporate a version of the fair use provision that is contained in the Copyright Act or whether it is instead intended to reach broadly to encompass individual uses by noncompetitors for noncommercial purposes.

Suffice it to say that, notwithstanding the ambiguities in the text, to the extent the provision would prohibit extractions or uses of substantial portions of factual compilations by direct competitors, it is much more likely to be held constitutional than if it would prohibit extractions or uses by potential consumers for noncommercial purposes. By contrast, if the provision were construed to provide

[5] The two other statutory factors that are identified in the fair use provision of the Copyright Act are also arguably incorporated by H R 2652 The first factor is ''the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes'' 17 U S C A.§ 107(1) The second factor is ''the nature of the copyrighted work'' *Id.* § 107(2). These factors are also arguably implicitly encompassed by H R 2652, which applies to collections of information, broadly defined, with specific provisions permitting certain acts such as educational and scientific uses (to the extent that they would not harm the potential market)

protection against uses by potential consumers, and not simply direct competitors, it would appear to be of almost limitless scope and therefore to raise constitutional concerns that would appear insurmountable.[6] We explain, however, that even if the protection provided by H.R. 2652 were construed as limited direct competitors and to somehow distinguish between "fair" and "unfair" uses of collections of information, there would remain substantial constitutional questions concerning the degree to which any reuse of factual information that would not infringe on the originality of a work may be deemed by Congress to be in some sense "unfair" and therefore subject to regulation. In other words, it is unclear what "unfair uses" of factual material could be constitutionally prohibited. There is also little precedent to guide interpretation as to where the line between fair and unfair uses of factual information is intended to be drawn precisely because the Copyright Act, which codifies the "fair use" standard, does not provide protection for facts.

With this background concerning the proper construction of H.R. 2652 in place, we now turn to the constitutional analysis of the bill.

II. The Intellectual Property Clause

We understand that the proposed legislation is not necessarily intended to constitute an exercise of Congress's power under the Intellectual Property Clause, and that it is instead apparently premised on Congress's power to regulate interstate commerce. Nevertheless, it is instructive for purposes of analysis to examine, as an initial matter, whether the legislation could be premised on Congress's power under the Intellectual Property Clause. It is only to the extent that the legislation would fall outside the permissible scope of the power conferred by that clause that it would give rise to concerns that, as an exercise of the Commerce Power, it would impermissibly infringe on an implicit limitation contained in the Intellectual Property Clause.

The key precedent for assessing whether this proposed legislation would constitute a valid exercise of Congress's power under the Intellectual Property Clause is *Feist*. In *Feist*, the Supreme Court considered the extent to which the Copyright Act, 17 U.S.C.A. §§ 101–1101 (West 1996 & Supp. 1998), protected the listings

[6] Read literally, for example, § 1202 would appear to prevent the library from disseminating "substantial" (including "qualitatively" substantial) portions of the compilation to its patrons, and might prevent the patrons from using such compilations, since such patrons are part of a market or "potential market" for purchase of the book. Or, imagine a book that contains a great deal of unearthed factual material—such as valuable, accurate information on the dangers of prescription drugs (*see* House Report at 13), a thorough historical chronology of important events, or a comprehensive amalgamation of geographical or topographical data. If a subsequent researcher, scientist or historian concludes that a "qualitatively substantial" portion of such facts are important, and therefore posts them to the World Wide Web or includes them in a later work—or, possibly, if that later historian so much as "extracts" the facts by taking notes—he or she might possibly violate § 1202, whether or not that later work uses, incorporates, or transforms the facts in a manner that the compilation did not. *See* J.H Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 Vand. L. Rev. 51, 135, 143 n.424 (1997). Of course, the extreme nature of these examples may counsel in favor of a construction of H.R. 2652 that would exclude them.

in telephone directory white pages from copying by a competitor. In answering that statutory question, the Court did not confine itself to a conventional consideration of congressional intent. Instead, the Court first examined the constitutional limitations inherent in the power conferred by the Intellectual Property Clause, on which the Copyright Act was premised.[7] Only after having considered these background constitutional limitations on the exercise of the copyright power did it reach the conclusion that Congress did not intend the Copyright Act to extend protection to such listings. There is language in the opinion, however, that indicates that the Court also predicated its decision on a judgment that the Intellectual Property Clause would not empower Congress to provide copyright protection to either the listings themselves, or the facts contained in the listings, even if Congress intended to extend such protection.

In addressing the background constitutional limitations on the scope of the power conferred by the Intellectual Property Clause, the Court acknowledged that copyright protection may extend to factual compilations and to other "fact-based works," but concluded that the prerequisite for such protection is that the selection or arrangement of the facts is in some degree "original." 499 U.S. at 344–51. The Court explained that "[o]riginality is a constitutional requirement." *Id.* at 346. In order to satisfy this constitutional prerequisite of originality, the Court opined, the work in question must "possess[] at least some minimal degree of creativity." *Id.* at 345. In a factual compilation, this creativity can be present in the manner in which the compiler selects or arranges the facts. *Id.* at 348. Indeed, "[t]he vast majority of works make the grade quite easily, as they possess some creative spark, no matter how crude, humble, or obvious it might be." *Id.* at 345 (internal quotation marks omitted). The Court noted that "[o]riginality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying." *Id.*

Under *Feist*, however, even if a compilation is in some sense original, and thereby entitled to some copyright protection, "the copyright in a factual compilation is thin." *Id.* at 349. That is because, in such circumstances, the bulk of the material that comprises the work will, by definition, be facts that in and of themselves lack the originality that justifies protection pursuant to the Intellectual Property Clause. As the Court explained:

> The mere fact that a work is copyrighted does not mean that every element of the work may be protected. Originality remains the *sine qua non* of copyright; accordingly, copyright protection may extend only to those components of a work that are original to the author. Thus, if the compilation author clothes facts with an original collocation of words, he or she may be able to claim a copyright in

[7] There was no contention in *Feist* that the Copyright Act was premised on any source of power other than the Intellectual Property Clause

> this written expression. Others may copy the underlying facts from the publication, but not the precise words used to present them. . . .
>
> . . . Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another's publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. As one commentator explains it: "[N]o matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking . . . . [T]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas."

Id. at 348–49 (citations omitted) (quoting Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865, 1868 (1990)). Accordingly, as applied to a factual compilation that has nonoriginal written expression, the Court concluded that "only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art." *Id.* at 350.

Against this backdrop, the Court rejected the argument that the Copyright Act incorporated the "sweat of the brow" doctrine—namely, that, whether or not a factual compilation contained any degree of creativity, copyright still attached in order to compensate compilers for the hard work and resources that they expended in the course of compiling the facts. *Id.* at 352–54. Such a doctrine was not tethered to the originality requirement that the Court concluded was the sine qua non for copyright protection.

On the basis of its constitutional and statutory analysis, the Court concluded that the white pages at issue in *Feist* contained none of the creativity that would suffice to render a work "original." It therefore concluded that the listings were entitled to no protection under the Act, despite the fact that the defendant had copied significant portions of the plaintiff's compilation for use in its own competing white pages. The Court noted that the listings at issue fell into the "narrow category of works in which the creative spark is utterly lacking or so trivial as to be virtually nonexistent." *Id.* at 359. It explained that the white pages at issue are "entirely typical. Persons desiring telephone service in Rural's service area fill out an application and Rural issues them a telephone number. In preparing its white pages, Rural simply takes the data provided by its subscribers and lists it alphabetically by surname. The end product is a garden-variety white pages directory, devoid of even the slightest trace of creativity." *Id.* at 362. The Court

further explained that Rural could not claim "originality in its coordination and arrangement of facts. . . . [T]here is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly-rooted in tradition and so commonplace that it has come to be expected as a matter of course." *Id.* at 363.

The Court therefore concluded that both the compilation itself, and the particular pieces of information contained therein, lacked sufficient originality to warrant protection. The Court summarized its judgment as follows:

> We conclude that the names, towns, and telephone numbers copied by Feist were not original to Rural and therefore were not protected by the copyright in Rural's combined white and yellow pages directory. As a constitutional matter, copyright protects only those constituent elements of a work that possess more than a *de minimis* quantum of creativity. Rural's white pages, limited to basic subscriber information and arranged alphabetically, fall short of the mark. As a statutory matter, 17 U.S.C. § 101 does not afford protection from copying to a collection of facts that are selected, coordinated, and arranged in a way that utterly lacks originality. Given that some works must fail, we cannot imagine a more likely candidate. Indeed, were we to hold that Rural's white pages pass muster, it is hard to believe that any collection of facts could fail.

Id. at 363–64.

Despite the strong language contained in the opinion, an argument can be made that the Court's constitutional pronouncements in *Feist* were dictum because they were unnecessary to the disposition of the case. The Court in *Feist* was asked only to resolve a statutory issue concerning the scope of statutory protection for compilations under the Copyright Act. On the other hand, the Court in *Feist* plainly stated at numerous points that originality and creativity are constitutional prerequisites for copyright protection under Article I, Section 8, Clause 8 of the Constitution.[8] Those statements strongly indicate that the Court's decision rested on a constitutional, rather than merely a statutory, judgment.

Because the proposed bill would clearly provide protection for "collections of information" without regard to whether they are original, and because it would define "information" quite expansively, it would appear to protect even the type of noncreative white pages listing at issue in *Feist*, as well as similarly unoriginal factual compilations or facts within otherwise original compilations. In this respect, the prohibition in proposed section 1202 would go well beyond the "thin

[8] *See, e.g.*, 499 U.S. at 346 ("Originality is a constitutional requirement."), *id.* at 363 ("[a]s a constitutional matter," copyright protection requires "more than a de minimis quantum of creativity"). *See also* Paul Goldstein, *Copyright*, 55 Law & Contemp. Probs. 79, 88 (1992) (noting that *Feist* Court indicated thirteen times that originality was a constitutional requirement, and indicated sixteen times that creativity was a requirement of originality).

protection" for factual compilations recognized in *Feist*.[9] Accordingly, to the extent that the proposed bill would attempt to provide protection, pursuant to the Intellectual Property Clause rather than some other power, to the very type of unoriginal factual materials that were at issue in *Feist*, it would run afoul of recent Supreme Court precedent that is, if not binding, at a minimum a clear indication of how the Court would likely rule.

III. Possible Intellectual Property Clause Limitations on the Commerce Power

The House Report asserts that H.R. 2652 may be enacted "within Congress' authority to regulate interstate commerce under Article I, Section 8, Clause 3 of the Constitution." House Report at 9–10. Absent some external constitutional limitation, the bill would appear to constitute a valid exercise of the commerce power, as we understand that extractions, or uses in commerce, of substantial portions of collections of information would, in the aggregate, substantially affect interstate commerce. *See United States v. Lopez*, 514 U.S. 549 (1995).[10] This section examines the question whether the Intellectual Property Clause places an external limitation on such an exercise of the commerce power.

Feist does not provide clear guidance on the question. Nothing in *Feist* holds that the Intellectual Property Clause limits the scope of Congress's power under other Clauses, such as the Commerce Clause, and the opinion may be read to state limits that pertain to the exercise of the Intellectual Property Clause itself. At the same time, some language in *Feist* might also fairly be read to suggest, not only that the Intellectual Property Clause does not *authorize* sweat-of-the-brow protection for either unoriginal factual compilation or facts in otherwise original compilations, but also that the Intellectual Property Clause *prohibits* Congress from relying on any other constitutional power to afford copyright-like protection to facts and to the nonoriginal parts of factual compilations.

For example, the Court noted that "all facts . . . 'may not be copyrighted and are part of the public domain available to every person.'" 499 U.S. at 348 (emphasis added; citation omitted). *See also id.* at 349 (" '[N]o matter how much original authorship the work displays, the facts and ideas it exposes *are free for the taking*. . . . [T]he very same facts and ideas may be divorced from the context

[9] It is important to note, however, that, due to the breadth of the definition of "information," which expressly includes works of authorship, the bill also would appear to provide protection to many factual compilations that do possess the requisite creativity necessary for copyright protection under *Feist*. In addition, it would appear that at least some, and perhaps many, extractions or uses barred by the bill might infringe on sufficiently original characteristics of such work—such as unique arrangements or selections of the facts copied. We caution, however, that these valid applications of the bill might not provide much greater protection than would already be provided under the Copyright Act, although H R. 2652 would also provide for criminal sanctions. Moreover, even these seemingly valid applications of the bill would be authorized under the Intellectual Property Clause only insofar as the legislation satisfied the requirement that the "exclusive Right[s]" being conferred were for "limited Times." U.S. Const. art I, § 8, cl 8

[10] Of course, as we discuss below, too broad a construction of "harm to the potential market" would give rise to serious First Amendment concerns, and might, if particularly extreme, raise concerns under *Lopez* as well.

imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas.' '') (emphasis added) (quoting Ginsburg, *Creation and Commercial Value*, 90 Colum. L. Rev. at 1868). The Court also opined that it is a ''constitutional requirement'' that persons be permitted to use ''the fruit of the [factual] compiler's labor'' without compensation:

> It may seem unfair that much of the fruit of the compiler's labor may be used by others without compensation. As Justice Brennan has correctly observed, however, this is not ''some unforeseen byproduct of a statutory scheme.'' *Harper & Row*, 471 U.S., at 589 (dissenting opinion). It is, rather, ''the essence of copyright,'' *id.*, and a constitutional requirement.

Id.

The Court further explained that the constitutional objective is realized not only by providing intellectual property rights in expression, but also by permitting ideas and information to be disseminated freely:

> This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation, assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

Id. at 350.

Accordingly, one possible reading of the *Feist* decision is that a system in which the ''raw facts'' in a compilation may not be ''copied at will'' is a system that necessarily undermines the object of the Intellectual Property Clause—the progress of science and art—and is therefore unconstitutional. On this view, the clause would constitute not only a grant of power to Congress but also a limitation on Congress. *Cf. Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989) (discussing scope of federal preemption of state intellectual property law and stating that ''[a]s we have noted in the past, the [Intellectual Property] Clause contains both a grant of power and certain limitations upon the exercise of that power''); *Graham v. John Deere Co.*, 383 U.S. 1, 5–6 (1966) (explaining, again with reference to federal preemption of state law, that ''[t]he clause is both a grant of power and a limitation. . . . Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available.''); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964) (discussing scope of federal

preemption of state law and explaining that "[t]o forbid copying [under state law] would interfere with the federal policy, found in [Article] I, [section] 8, [clause] 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain").

If the Intellectual Property Clause precluded Congress from providing protection against the copying of nonoriginal portions of factual compilations, even pursuant to a power other than that conferred by that Clause, then Congress would not be able to use the Commerce Clause to avoid the implicit strictures of the Intellectual Property Clause that the Court in *Feist* could be said to have recognized, just as Congress may not use the Commerce Clause to avoid the Bankruptcy Clause's express requirement that bankruptcy laws be uniform, *see Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468–69 (1982). Under this reading, Congress's reliance on the commerce power would not obviate any of the constitutional problems concerning the exercise of congressional power under the Intellectual Property Clause that we have already identified.[11]

On the other hand, prior to *Feist*, the Court had recognized intellectual property interests not grounded in the Intellectual Property Clause. There are at least four notable circumstances outside the copyright context in which the Court has recognized such interests. Although these examples, together, indicate that there is no categorical prohibition on Congress's power to restrict the dissemination of data and other forms of "intellectual property" that are not copyrighted, neither do they make clear that Congress would have the power to enact legislation like H.R. 2652 under the Commerce Clause against a claim that the Intellectual Property Clause imposes a limitation. With one exception, the cases are distinguishable, and even that case does not, by itself, support legislation of this scope.

First, the Court has sanctioned federal limitations on the dissemination of information where the person who wishes to disseminate it received such information only on the condition that it remain secret or confidential, whether such condition was expressly set forth by contract or impliedly recognized as a matter of law. For example, the government is able to afford protection to factual information pursuant to its commerce power in order to protect trade secrets. *See Bonito Boats*, 489 U.S. at 155–57 (1989) (discussing compatibility of state trade secret protection with the federal intellectual property regime). *See also Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (federal court may impose protective order restricting party from revealing trade secrets that it obtained pursuant to compul-

[11] *See* Ginsburg, *No "Sweat"?*, 92 Colum. L. Rev. at 368 ("*Feist*'s claim that its standard of originality is 'constitutionally mandated' may impede enactment of a federal law protecting unoriginal compiled information under the Commerce Clause."), *id.* at 349 ("Justice O'Connor's opinion appears to enshrine a policy of free-riding in the Constitution").

sory discovery process).[12] These types of protection would appear to be distinguishable, however, from the type of protection that H.R. 2652 would provide.

H.R. 2652 would provide protection to compilers of information so that they would be able to offer the information to the public for a fee. By contrast, provisions that protect trade secrets do not restrict the manner in which information that is offered to the public in the market may be used. Such provisions instead simply provide protection to those persons who wish to keep information confidential and therefore to persons who have no interest in offering to the wider public for sale. As a result, trade secret protections do not interfere, at least directly, with the manner in which information that is made available for sale to the public might be used. By contrast, H.R. 2652 would impose direct limitations on the manner in which members of the public might use information that is, in some sense that may be constitutionally relevant, already in the public domain. *Cf. Bonito Boats*, 489 U.S. at 155–57 (explaining that state trade secrets protection is not preempted by federal patent laws because trade secrets protection does not interfere with policy that "matter once in the public domain must remain in the public domain").[13]

Second, protection may be afforded pursuant to the commerce power to deter false representation, or to protect consumers from confusion, as the trademark laws demonstrate. *See* The Lanham Act, 15 U.S.C. §§ 1501–1540 (1994). An analogy between H.R. 2652 and trademark protection would appear questionable, as the bill plainly provides protection that is not directed at avoiding confusion as to the identity of the source of the information. *See Bonito Boats*, 489 U.S. at 154–55 (distinguishing between traditional trade dress regulation and laws aimed at protecting factual information that would not sow confusion). Indeed, the provision would provide protection even if it were made perfectly clear, and no consumer could reasonably conclude otherwise, that the copier of the collection of information had not exerted personal effort in compiling the facts provided but had instead merely copied them from someone who had exerted such personal effort.

In one notable case, protection analogous to that afforded trademarks has been extended to a word, the use of which would not cause consumer confusion. *See San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 539 (1987). That case, however, is distinguishable. There, Congress had pro-

[12] *See also Carpenter v United States*, 484 U.S. 19 (1987) (conspiracy to trade on newspaper's confidential information is within reach of federal mail and wire fraud statutes), *Snepp v United States*, 444 U.S. 507 (1980) (government can, as a condition of employment, extract enforceable promise that employees will not reveal classified information they learn during their employ)

[13] We note, however, that in the specific context of libel law, a plurality of the Court in one notable case drew significance from the fact that information was provided only to a limited number of subscribers for a fee "[S]ince the credit report was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further, it cannot be said that the report involves any strong interest in the free flow of commercial information." *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (plurality opinion) (internal quotation marks and citations omitted) (permitting recovery of damages for defamatory statement not involving matters of public concern absent a showing of actual malice).

vided statutory protection for the use of the word "Olympic" in order to protect the commercial interests of the United States Olympic Committee and "the value [that] the USOC's efforts have given to [that word]." *Id.* at 541. That case did not involve protection of facts, as such, but rather of the special commercial value associated with the use of a particular word in a particular context. H.R. 2652, however, would appear to provide such broad protection that it would protect facts not for any special value apart from their ordinary meaning that has been given to them by the compiler's efforts but rather merely because the compiler expended effort in collecting them.

Third, state law has been used to provide protection against dissemination of certain "copied" materials to protect what has been termed "the right of publicity." *See Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 569 (1977). The right of publicity protection, however, only guards the use of an individual's "personality" and personal talents against unauthorized commercial exploitation. *See id.* For example, *Zacchini* concerned the legality of a news service's airing of film of an individual's paid human cannonball performance, against the wishes of the performer. The case therefore involved protection of a depiction of the performer's original performance, a "fact"—the performance—that existed only because of the performer's own efforts. The Court expressly noted that the right of publicity would not serve to prevent reporting of facts about the cannonball act, as opposed to display of the act itself in its entirety, *id.* at 574, and that the right was analogous to copyright's protection of original expression, *id.* at 577 n.13. *See also id.* at 569 (a case involving description of the act would be "a very different case"). By contrast, the protection provided by H.R. 2652 would extend to factual data that exists independently of the compiler's efforts.

Finally, competitive misappropriation of so-called "hot news" information has also been afforded protection by the Supreme Court as a matter of federal common law. *See International News Serv. v. Associated Press*, 248 U.S. 215 (1918). *International News Service* might provide some authority for the argument that Congress may use its Commerce Clause power to create certain torts relating to "misappropriation" of facts, even where the facts themselves may not be copyrighted pursuant to the Intellectual Property Clause.

In *International News Service*, the Court, without relying on the Intellectual Property Clause, recognized the permissibility of a certain limited form of liability for copying publicly disclosed information. The case arose prior to the Court's decision in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), and it represented an exercise of the Supreme Court's power to make federal common law pursuant to the grant of diversity jurisdiction. The case concerned a dispute that arose from a practice of the International News Service. The news agency systematically reviewed East Coast editions of newspapers published by subscribers to the Associated Press, copied or rewrote the stories contained therein, and published the stories in its own West Coast newspapers, some of which were delivered and

sold before rival Associated Press newspapers in the same cities. *International News Serv.*, 248 U.S. at 231. The Associated Press had not copyrighted its stories, *id.* at 233, and there was no established cause of action that the Associated Press could invoke to stop the International News Service practices.

The Court held that, even if the Associated Press did not have any property interest in its reported facts "as against the public," it had a "quasi property" right vis-a-vis the International News Service, which was "seeking to make profits at the same time and in the same field." *Id.* at 236. The Court used this quasi-property right to justify an injunction against the International News Service's "misappropriation" of Associated Press's reportage, because the International News Service was "endeavoring to reap where it has not sown." *Id.* at 239. The Court's holding "only postpone[d] participation by [the Associated Press's] competitor in the processes of distribution and reproduction of news that it has not gathered, and only to the extent necessary to prevent that competitor from reaping the fruits of [the Associated Press's] efforts and expenditure, to the partial exclusion of [the Associated Press]." *Id.* at 241.[14]

Although the legal status of the quasi-property right recognized in *International News Service*—and, more particularly, the scope of that right—is not entirely clear, *Feist* suggested that the so-called "hot news" misappropriation tort, at least as it was recognized in *International News Service* itself, could survive. The *Feist* Court explained that the *International News Service* Court had acknowledged that the news articles themselves were "copyrightable," but had then "flatly rejected" the view "that the copyright in an article extended to the factual information it contained." 499 U.S. at 353–54. Nevertheless, the Court noted that "[t]he Court ultimately rendered judgment for Associated Press on noncopyright grounds that are not relevant here." *Id.* at 354 n.*.

More generally, the *Feist* Court suggested that an "unfair competition" theory could be the basis for some anti-copying protection of nonoriginal factual compilations:

> Protection for the fruits of such research . . . may in certain circumstances be available under a theory of unfair competition. But to accord copyright protection on this basis alone distorts basic copyright principles in that it creates a monopoly in public domain materials without the necessary justification of protecting and encouraging the creation of "writings" by "authors."

[14] *International News Service* did not discuss the Intellectual Property Clause, except to note that

> [i]t is not to be supposed that the framers of the Constitution, when they empowered Congress 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries' (Const Art. I, § 8, par 8), intended to confer upon one who might happen to be the first to report a historic event the exclusive right for any period to spread the knowledge of it.

Id. at 234

499 U.S. at 354 (quoting Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 3.04, at 3–23 (1990) (footnote omitted)). The passage is obscure, and thus it is not exactly clear what protection might be available "under a theory of unfair competition," or even what the Court intended by the phrase "a theory of unfair competition." It is possible, however, that the passage provides further support for an argument that the misappropriation tort recognized in *International News Service* survives the *Feist* analysis as an example of permissible regulation of unfair competition.

Some insight into the possible meaning of the phrase "unfair competition" as it appears in *Feist* may be gleaned from Justice O'Connor's decision for the Court, two years prior to her opinion in *Feist*, in *Bonito Boats*. Justice O'Connor identified the "usual sense [in which] the term 'unfair competition' is understood" by tying it to trade dress protection:

> The law of unfair competition has its roots in the common-law tort of deceit: its general concern is with protecting consumers from confusion as to source. While that concern may result in the creation of "quasi-property rights" in communicative symbols, the focus is on the protection of consumers, *not the protection of producers as an incentive to product innovation.* Judge Hand captured the distinction well in *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 F. 299, 301 (CA2 1917), where he wrote:
>
> > "[T]he plaintiff has the right not to lose his customers through false representations that those are his wares which in fact are not, but he may not monopolize any design or pattern, however trifling. The defendant, on the other hand, may copy plaintiff's goods slavishly down to the minutest detail: but he may not represent himself as the plaintiff in their sale."

489 U.S. at 157 (emphasis added). As the Court in *Bonito Boats* concluded, "unfair competition" thus does not describe the object of a statute "aimed directly at preventing the exploitation of [publicly disclosed factual information]." *Id.* at 158. H.R. 2652 would be such a statute.

If this limited meaning of "unfair competition" were all that the Court intended to cover in the passage quoted above from *Feist*, then it would be difficult to rely on that passage as authority for the type of "unfair competition" protection contemplated here. On the other hand, the tort recognized in *International News Service* does appear to have been premised on the notion that the International News Service had engaged in "unfair competition," and thus that a legal remedy could be provided for such conduct even though the copyright power would not

provide the basis for such protection. As a result, the general reference in *Feist* to protection against unfair competition emanating from the exercise of a valid power other than the Intellectual Property Clause provides some basis for the congressional creation of a misappropriation tort, at least along the lines recognized in *International News Service.*

If, as seems fair to be the case, *Feist* does not foreclose Congress from enacting something approximating the misappropriation tort recognized in *International News Service* itself, there remains the question concerning the permissible scope of an extension of such a tort. There is little precedent to provide direct guidance on this point in part because there has been little legal development in the misappropriation tort itself since *Feist.* Indeed, even prior to *Feist,* due to the Court's decision in *Erie Railroad* limiting the authority of federal courts to engage in common lawmaking, federal courts had no occasion to expand upon the tort recognized in *International News Service.* State courts have also had little occasion to expand upon the tort recognized in *International News Service,* in part because of the preemptive effect of the Copyright Act. As explained in the recent case of *NBA v. Motorola, Inc.,* 105 F.3d 841, 852 (2d Cir. 1997), a state-law tort that would not be preempted by the Copyright Act must have the following essential elements: (i) the plaintiff generates or collects information at some cost or expense; (ii) the value of the information is highly time-sensitive; (iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it; (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; and (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.[15]

Unburdened as it is by limitations on judicial common lawmaking or federal preemption doctrine, Congress might have greater freedom than federal courts or states to expand upon the tort recognized in *International News Service.* It is plain, however, that H.R. 2652 would constitute, not a modest extension of the "hot news" misappropriation tort, but a dramatic extension of the tort recognized in the case. *See* House Report at 17 (explaining that H.R. 2652 would "preserve the holding" of *International News Service,* but would reach far beyond that case to make impermissible much conduct that does not fall within the "narrow scope," *id.,* of that holding). H.R. 2652 would not require, a civil plaintiff or a federal prosecutor, to prove that the value of the information be highly time-sensitive, or that the ability of other parties to free-ride on the efforts of the plain-

[15] Indeed, the "unusual circumstances" in *International News Service* itself may not have been limited to misappropriation simpliciter. The Associated Press alleged that the International News Service had done far more than simply republish the facts conveyed in the Associated Press's stories. The International News Service allegedly had bribed employees of Associated Press subscribers for an early look at breaking news, 248 U.S at 231, occasionally had sold Associated Press's stories "bodily," i.e., without rewriting them, *id.,* and had falsely represented to its readers that the news transmitted was the result of International News Services's own investigation, *id* at 242. Such factors, the Court acknowledged, "accentuat[ed] the wrong," even if they were not "the essence of it." *Id*

tiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. Moreover, due to the ambiguity as to the scope of the limitation that there must be a demonstration of harm to the potential market, it is not at all clear that H.R. 2652 would even require proof that the offending use or extraction be committed by a person in direct competition with a product or service offered by the plaintiff, or even that a use was nontransformative and for a commercial purpose. In contrast, the Court in *International News Service* repeatedly emphasized that the tort it was identifying would not extend to the copying and dissemination of news stories by members of the public, as opposed to by competitors of the Associated Press. 248 U.S. at 239–41.[16]

Accordingly, to the extent that *Feist* may be read to have construed the Intellectual Property Clause to have established a kind of constitutionally prescribed public domain for factual material on which Congress may not infringe (absent, perhaps, private contractual agreements), a broad expansion of the "hot news" tort would appear to raise serious constitutional concerns. H.R. 2652—which would apply well beyond the context of direct competitors, let alone the context of time-sensitive direct competition—would therefore raise substantial questions under *Feist* (and under the First Amendment, *see infra*) that would not be raised by a less ambitious statute that codified a limited *International News Service*-like tort. *See* Reichman & Samuelson, *Intellectual Property Rights in Data?*, 50 Vand. L. Rev. at 139–45.

IV. Possible First Amendment Limitations on the Commerce Power

Even if the Intellectual Property Clause does not itself impose constraints on Congress's Commerce Clause power, the First Amendment might nevertheless limit the type of protection that Congress can provide against the "use" and "extraction" of factual compilations.

One of the principal aims of the First Amendment is to "secure 'the widest possible dissemination of information from diverse and antagonistic sources.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (quoting *Associated*

[16] For example:

> Defendant insists that when, with the sanction and approval of complainant, and as the result of the use of its news for the very purpose for which it is distributed, a portion of complainant's members communicate it to the general public by posting it upon bulletin boards so that all may read, or by issuing it to newspapers and distributing it indiscriminately, complainant no longer has the right to control the use to be made of it; that when it thus reaches the light of day it becomes the common possession of all to whom it is accessible, and that any purchaser of a newspaper has the right to communicate the intelligence which it contains to anybody and for any purpose, even for the purpose of selling it for profit to newspapers published for profit in competition with complainant's members.
>
> The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of the purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted, but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter.

Id. at 239

Press v. United States, 326 U.S. 1, 20 (1945)). In accordance with this objective, the First Amendment imposes significant constraints on the ability of the government to restrict the dissemination of information that has been publicly disclosed and that the disseminator has lawfully obtained. For example, although the Supreme Court has been careful never to hold categorically that publication of lawfully obtained truthful information "is automatically constitutionally protected," *see The Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989), the Court has, on several occasions, held that "the government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a 'state interest of the highest order.'" *United States v. Aguilar*, 515 U.S. 593, 605 (1995) (quoting *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979)). *See also Butterworth v. Smith*, 494 U.S. 624, 632 (1990).[17] And even if the state has such an interest, "punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." *Florida Star*, 491 U.S. at 541.[18] What is more, even in situations in which the government hypothetically could impose subsequent sanctions for the publication or copying of certain information, there is a particular concern about imposing a prior restraint on a secondary recipient from disseminating noncommercial speech. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713 (1971). That is true even where the information was unlawfully obtained as an initial matter. *Id.*

To be sure, cases such as *New York Times v. Sullivan* and *Florida Star* are not directly on point. Those cases involved governmental attempts to suppress certain types of information from being disseminated on the basis of content. By contrast, H.R. 2652 would not target any particular types of messages for suppression. It would instead prescribe the means under which collections of information

[17] This same restriction does not necessarily apply if the information is secret, confidential, or classified, and is provided to another on the express condition that it not be further disclosed. For example, the Court has upheld the constitutionality of governmental restrictions on its own employees' activities to ensure that those employees do not disclose classified information belonging to the government itself. The Court explained in *Snepp v United States*, 444 U.S. 507, 509 n.3 (1980), that such restrictions on employee conduct generally will not violate the First Amendment so long as they are a "reasonable means" of protecting the government's "compelling interest in protecting . . . the secrecy of information important to our national security." Similarly, a court may provide trade secrets to a plaintiff as part of discovery in a civil lawsuit, subject to the condition that the plaintiff not further disseminate such secrets. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). And even a private party can create enforceable limits on the right to publish confidential information that it shares with another, pursuant to state laws of contract or promissory estoppel that are "generally applicable" (i.e., that do not single out speech for disfavored treatment). *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–71 (1991) (whereas First Amendment is not implicated by application of "generally applicable laws" to violations involving speech or the press, there is a greater constitutional problem where, as in *Florida Star*, the "State itself define[s] the content of publications that would trigger liability"). These cases would not be directly applicable to the proposed bill, however, in that they involved restrictions on the person to whom the information had been distributed under the confidentiality agreement, and not to restrictions on third parties who would be subsequent users or disseminators of such information.

[18] On occasion, the Court has indicated that this demanding standard applies only to information concerning "'a matter of public significance'" *See, e.g., Florida Star*, 491 U.S. at 533 (quoting *Smith*, 443 U.S. at 103). *See also Dun & Bradstreet*, 472 U.S. at 759 (plurality opinion) (speech on matters of "purely private concern" entitled to less First Amendment protection in defamation cases); *id.* at 764 (Burger, C.J., concurring in pertinent part), *id.* at 773–74 (White, J., concurring in pertinent part). *But see Florida Star*, 491 U.S. at 541 (omitting the "matter of public significance" standard in the Court's ultimate holding, quoted in the text above).

that had been complied may be used by others. Namely, it would require users, in certain circumstances, to expend great effort independently before using information contained in a collection that itself had been compiled only after great effort.

This ground of distinction hardly dispenses with the concern that H.R. 2652 trenches on First Amendment rights. Copyright protection similarly does not seek to suppress certain types of messages. It, too, merely prescribes the means by which information may be used by others. Nevertheless, the Court has concluded that the First Amendment may impose limitations on the types of material that may be copyrighted. Most significantly, in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), the Court explained that the First Amendment and the Copyright Act can be reconciled by virtue of the fact that copyright law already embodies a distinction between original forms of expression—which are copyrightable—and facts (and ideas)—which are not: [C]opyright's idea/expression dichotomy "strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression. No author may copyright his ideas or the facts he narrates. 17 U.S.C. § 102(b)." *Id.* at 556 (citation omitted). *See also New York Times Co.*, 403 U.S. at 726 n.* (Brennan, J., concurring); *Feist*, 499 U.S. at 344–45 ("The most fundamental axiom of copyright law is that '[n]o author may copyright his ideas or the facts he narrates.' ") (quoting *Harper & Row*, 471 U.S. at 556). Thus, for example, the Court held that although direct quotations from President Ford's biography were subject to copyright, the historical facts contained in that biography were not subject to copyright and could be freely copied. *See Harper & Row*, 471 U.S. at 565–66 & n.8 (applying copyright analysis only to "verbatim quotes" from the biography, and excluding from infringement consideration historical quotations attributed to third parties and to government documents). *See also Zacchini*, 433 U.S. at 574 (right of publicity would not serve to prevent reporting of facts about the cannonball act, as opposed to display of the act itself in its entirety); *id.* at 577 n.13 (noting analogy to copyright's expression/idea distinction).

The distinction referenced in *Harper & Row* may be understood to reflect the Court's understanding that, in order to reconcile and accommodate copyright and the First Amendment, no intellectual property rights can extend to facts that have been released in the public domain.[19] Moreover, even in the context of creative forms of expression that can be copyrighted (as opposed to factual information, which cannot), First Amendment values are further protected in the copyright law by virtue of the "latitude for scholarship and comment traditionally afforded by fair use." *Harper & Row*, 471 U.S. at 560. Furthermore, the Intellectual Property

[19] *Nimmer* explains that this would be so even where a great quantity of labor and expense were necessary to research and compile the facts: "Would anyone seriously suggest that the Washington Post was entitled to a copyright on the facts of the Watergate incident because its reporters, Woodward and Bernstein, through considerable labor, expense and ingenuity, discovered such facts?" 1 *Nimmer on Copyright* § 2.11[E], at 2-172.30 to 172.31.

Clause ensures that expression itself must enter the public domain after the "limited times" for which copyright protection is available. Indeed, where important factual information could not satisfactorily be conveyed except by certain unique expression, the First Amendment might even ensure that copyright protection for such expression be denied or limited. *See Nimmer on Copyright* § 1.10[C][2], at 1–85 to 1–92.

Accordingly, H.R. 2652, by providing protection for facts, raises serious First Amendment concerns. It would restrict the ability of persons to use and disseminate factual materials that are not protected by copyright, and it arguably would do so even in circumstances where the copyright law would not protect creative expression.

We can imagine two arguments that might be made in support of H.R. 2652 against a First Amendment challenge. First, it remains the case that in *International News Service*, the Court permitted a tort for the dissemination of information, as such. It is unclear to what extent the *International News Service* tort can be reconciled with modern First Amendment doctrine. Nevertheless, that case was approvingly cited in *San Francisco Arts & Athletics*, where the Court recognized the possibility that the unauthorized use of an Olympic logo could impermissibly undermine the "owner's" legitimate commercial interests, even in the absence of a demonstration that such a use would be confusing to consumers. 483 U.S. at 541. As the Court there explained, "[t]here is no question that this unauthorized use could undercut the [United States Olympic Committee's] efforts to use, and sell the right to use, the word in the future, since much of the word's value comes from its limited use." *Id.* at 539. Thus, "[e]ven though this protection may exceed the traditional rights of a trademark owner in certain circumstances, the application of the Act to . . . commercial speech is not broader than necessary to protect the legitimate congressional interest and therefore does not violate the First Amendment." *Id.* at 540. The Court went on to reject the claim that the restriction violated the First Amendment because it reached noncommercial, promotional uses of the word. "The mere fact that [petitioner] claims an expressive, as opposed to purely commercial, purpose, does not give it a First Amendment right to 'appropriat[e] to itself the harvest of those who have sown.'" *Id.* at 541 (quoting *International News Serv.*, 248 U.S. at 239–40). *San Francisco Arts & Athletics* did not consider a broad prohibition against the dissemination of factual information of the type that is at issue here; therefore it did not implicate the First Amendment doctrine discussed above. Nonetheless, that case's favorable reference to *International News Service* in response to a different First Amendment argument indicates that the former case provides some authority for a possible intellectual property exception to certain First Amendment constraints that would apply outside the intellectual property context.

Even if *International News Service* does indicate that the First Amendment permits some anti-copying protection for nonoriginal factual information, however,

it must be emphasized that H.R. 2652 raises serious constitutional concerns because it provides protection that is much broader than that at issue in *International News Service*. Unlike the "hot news" misappropriation tort that the Court recognized in *International News Service*, the bill would not create liability only for "competitive and systematic interference with dissemination of unpublished, partially published or access-controlled information," where "the timeliness of the information makes its commercial value of short duration." Ginsburg, *No "Sweat"?*, 92 Colum. L. Rev. at 357; *see also NBA v. Motorola*, 105 F.3d at 852.

Second, there is an important consideration that might distinguish H.R. 2652 from the prototypical First Amendment case where the government acts to limit the use of publicly available information. As we explained above, in the usual First Amendment cases, such as the ones cited at the beginning of this section, the government's restriction on the dissemination of information has the intent and effect of constricting the total quantum of information that the public could put to lawful and valuable use by singling out certain disfavored messages for suppression. Because H.R. 2652 would simply regulate the means by which information generally may be re-used, it arguably could be defended as a legitimate attempt to recognize individual rights in intellectual property in order to ensure in an overall increase in the amount of available, valuable factual information (because of the heightened incentives to compile facts). *See* Ginsburg, *No "Sweat"?*, 92 Colum. L. Rev. at 386. It could be argued that such a statute—like copyright's protection of creative expression—would secure a *wider* "dissemination of information from diverse and antagonistic sources," *New York Times*, 376 U.S. at 266, than would result from a regime in which factual compilations are protected against reproduction only by "thin" copyright and (perhaps) by state contract law.

We should note, however, that the above-stated rationale—that protection against reuse and copying of factual compilations could increase, rather than decrease, the existence of useful knowledge--would be in some tension with the premises of the Court's holdings in *Feist* and with the Court's and Congress's exclusion of copyright protection for facts, reflected in the Copyright Act and in cases such as *Harper & Row*. In those contexts, the Congress and the Court have concluded that, whereas protection against reuse of expression has the effect of increasing the output of unique and original writings, analogous protection of facts would, on the whole, impede the progress of knowledge. In addition, the strength of the argument would no doubt turn in large part on the scope of the protection afforded by H.R. 2652. To the extent it would apply even to non-commercial, transformative uses, it would appear to be far more vulnerable to constitutional attack on First Amendment grounds.

V. Possible Ways in Which H.R. 2652 Might be Narrowed

It may be the case that any "misappropriation" statute such as H.R. 2652 enacted pursuant to the Commerce Clause "may prove difficult to reconcile with *Feist*'s constitutionally derived endorsement of free-riding on previously gathered information." Ginsburg, *No "Sweat"?*, 92 Colum. L. Rev. at 341. Such a statute might also raise serious First Amendment problems, no matter how it is crafted. We do, however, believe that H.R. 2652 could be narrowed in several ways that would lessen the risk of constitutional invalidity. Each of these suggestions would have the effect of preserving more of what is now understood to constitute the public domain, in which facts could freely be copied in furtherance of important scientific, educational, and analogous objectives.

The easiest and most direct way to cabin the constitutional issues would be to limit the statutory liability to the sort of "hot news" misappropriation tort that the Court recognized in *International News Service*. The law could, for example, create liability for "competitive and systematic interference with dissemination of unpublished, partially published or access-controlled information," where "the timeliness of the information makes its commercial value of short duration." Ginsburg, *No "Sweat"?*, 92 Colum. L. Rev. at 357. The elements of a claim under such a statute could be: (i) that the plaintiff generates or collects information at some cost or expense; (ii) that the value of the information is highly time-sensitive; (iii) that the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it; (iv) that the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; and (v) that the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. *See NBA v. Motorola*, 105 F.3d at 852.

Absent such a fundamental change in H.R. 2652, the following changes would tend to alleviate some of the constitutional concerns[20]:

> 1. The provision could dispense with the time-sensitivity element of the *International News Service* tort of misappropriation, but still require proof that the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it; that the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; and that the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. Again, we

[20] We should not be understood as suggesting that any or all of these changes would, or would not, be preferable as a matter of policy

emphasize that a statute of even this more limited scope would still raise substantial constitutional concerns for the reasons provided in the previous sections.

2. The prohibition in § 1202 could be expressly limited to nontransformative uses and extractions by direct competitors in the particular market for the database in question.[21] This could be accomplished in part by expressly including a "fair use" exception akin to that contained in the Copyright Act, and other like statutory exceptions, at least as expansive as those found in the Copyright Act.[22] As noted at the outset, it may well be that H.R. 2652 is intended to incorporate something approximating the fair use standard for copyright by virtue of its reference to two of the four statutory fair use factors contained in the Copyright Act's fair use provision. Nonetheless, in light of the difficulties in determining how a fair use exception would apply to facts, given that it has thus far developed in the context of copyright, which does not protect facts, it would be advisable to be far more clear on this point than the present statute is. Moreover, for constitutional reasons, it would probably be advisable to provide even greater protection for the public's interest in freely exchanging information here than would be necessary outside the context of a statute that would provide intellectual property interests in factual information. As a result, a broad definition of fair use would be appropriate.

3. The duration of the protection could be substantially shortened, to the briefest period that would provide sufficient incentives for the data collection. Perpetual protection probably is unnecessary to provide sufficient incentive to the creation of databases.

4. Instead of effectively prohibiting certain use or extraction by subjecting it to potential treble-damage judgments, Congress could consider permitting widespread copying on reasonable terms and conditions, under a system of compulsory, nondiscriminatory licensing. That would allow the compiler to receive fair value for the cost of compiling, but might not unreasonably deter valuable reuses of the information.[23]

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[21] *See, e g*, Jessica Litman, *After Feist*, 17 U Dayton L Rev. at 615, Ginsburg, *No "Sweat"?*, 92 Colum. L. Rev at 386

[22] *See* Reichman & Samuelson, *Intellectual Property Rights in Data?*, 50 Vand. L Rev at 146, 155–57.

[23] *See* Ginsburg, *No "Sweat"?*, 92 Colum. L. Rev. at 386–87; Reichman & Samuelson, *Intellectual Property Rights in Data?*, 50 Vand L. Rev at 146

5. The provisions for injunctive relief and impoundment could be eliminated, in light of the disfavored status under the First Amendment of prior restraints. *Cf. Campbell*, 510 U.S. at 578 n.10.

6. The prohibition in § 1202 should be narrowed so that it extends, at most, only to those *portions* of a compilation that were gathered, organized or maintained through investment of substantial resources. There is little apparent justification for constraining third parties' use of portions of a collection that were not the result of such an investment.

VI. Conclusion

H.R. 2652, the Collection of Information Antipiracy Act, raises difficult and novel questions of constitutional law. It is clear, however, that, under current Supreme Court case law, the bill, in its current form, raises serious constitutional concerns.

WILLIAM M. TREANOR
Deputy Assistant Attorney General
Office of Legal Counsel

Ineligibility of New Jersey Transit Corporation Board Member for Appointment to Amtrak Board of Directors

A public member of the Board of Directors of the New Jersey Transit Corporation constitutes a representative of rail management under section 411(a) of the Amtrak Reform and Accountability Act of 1997 and is therefore ineligible for appointment to the Amtrak Board of Directors.

July 30, 1998

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This responds to your request for our opinion whether a public member of the Board of Directors of the New Jersey Transit Corporation ("NJTC") is eligible for appointment to the Amtrak Board of Directors, established pursuant to section 411(a) of the Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105–134, sec. 411(a), § 24302, 111 Stat. 2570, 2588 ("Amtrak Reform Act" or "Act"). We conclude that the NJTC Board member would be a "representative[ ] of . . . rail management" under that provision and would therefore be ineligible for appointment to the Amtrak Board unless he or she resigned from the NJTC Board.

I.

Criteria governing eligibility for appointment to the Amtrak Board are set forth in section 411(a) of the Amtrak Reform Act, which provides:

> (C) Appointments . . . shall be made from among individuals who—
>
> > (i) have technical qualifications, professional standing, and demonstrated expertise in the fields of transportation or corporate or financial management;
> > (ii) *are not representatives of rail labor or rail management*; and
> > (iii) in the case of 6 of the 7 individuals selected, are not employees of Amtrak or of the United States.

49 U.S.C.A. § 24302(a)(2)(C) (West Supp. 1998) (emphasis added).

The NJTC, on whose board the potential appointee serves, is a corporation established in the executive branch of the Government of New Jersey. *See* N.J. Stat. Ann. § 27:25–4.a (West Supp. 1998). The NJTC is located within the New Jersey Department of Transportation, although it "shall be independent of any supervision or control by the department or by any body or officer thereof." *Id.*

Under N.J. Stat. Ann. § 27:25–4.b, the NJTC is governed by its Board of Directors. The NJTC Board consists of seven members: the New Jersey Commissioner of Transportation and the New Jersey State Treasurer, who serve ex officio; another member of the executive branch of the New Jersey Government appointed by the Governor; and four "public members" appointed by the Governor. *Id.*

Under the Amtrak Reform Act, the NJTC is both a "rail carrier" and a "commuter authority." The Act defines the term "rail carrier" to mean "a person, *including a unit of State or local government*, providing rail transportation for compensation." 49 U.S.C.A. § 24102(7) (West Supp. 1998) (emphasis added). Congress added the underscored language in 1997 to clarify the scope of the definition. *See* Amtrak Reform Act, sec. 407, § 24102, 111 Stat. at 2586. The Amtrak Reform Act also defines "commuter authority" as "a State, local, or regional entity established to provide, or make a contract providing for, commuter rail passenger transportation." 49 U.S.C.A. § 24102(3). The NJTC is a State entity that provides commuter rail transportation for compensation, *see* N.J. Stat. Ann. § 27:25–5.n (West Supp. 1998), and therefore constitutes a "rail carrier" and a "commuter authority" within the meaning of the Amtrak Reform Act. The question is whether members of the board of directors of such an entity are "representatives of . . . rail management" for purposes of the Act.

II.

The term "representatives of . . . rail management" is not defined or explained in the text of the Amtrak Reform Act or otherwise in title 49 of the U.S. Code. The term, however, would certainly include those serving as the management of "rail carriers." Moreover, as discussed below, we conclude that officers and directors of a rail carrier are part of its management. Because the NJTC is a rail carrier, a member of its Board of Directors would be a "representative[ ] of . . . rail management."

We have considered the arguments supporting a contrary view. A memorandum on this issue, prepared by the law firm of Wilmer, Cutler & Pickering ("Wilmer, Cutler memorandum") and submitted to us by the American Public Transit Association, *see* Letter for Dawn E. Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Daniel Duff, Chief Counsel and Vice President for Government Affairs, American Public Transit Association (May 27, 1998), argues that NJTC board members are not covered by section 411(a)(2)(C)(ii) because it does not explicitly prohibit service by board members of commuter authorities. The memorandum points out that when Congress amended the definition of "rail carrier" to include units of state and local governments, it did not similarly amend the term "rail management" to refer expressly to such authorities. The memorandum therefore concludes that Congress did not intend "rail management" to reach the management of state and local commuter authorities.

Because the term "rail management" was undefined both before and after the 1997 amendments, however, we do not believe that any conclusion can be drawn from Congress's not adding a reference to state and local governments or "commuter authorities" in the provision concerning "rail management." Both before and after the amendments, the provision on "rail management" has not expressly referred to *any* specific rail entities, and the failure to mention commuter authorities therefore has no particular significance. We find more significant Congress's express inclusion in 1997 of state and local commuter authorities, such as the NJTC, in amending the definition of "rail carriers."

We further believe that a member of the board of directors of a corporate state commuter authority such as the NJTC is part of the authority's "management." Most pertinently, the New Jersey Public Transit Act explicitly provides that the NJTC is "governed by [the] board," N.J. Stat. Ann. § 27:25–4.b, and "[t]he powers of the corporation shall be vested in the members of the board thereof," *id.* § 27:25–4.e. Thus, even apart from principles of general corporation law (discussed below), the special statute establishing the NJTC makes it clear that its board is responsible for its governance and, it necessarily follows, its management.

It is well settled under the general corporate law of New Jersey, moreover, that the management of a corporation's affairs is ultimately vested in its board of directors. As amended in 1988, the New Jersey corporation statute provides: "The business and affairs of a corporation shall be managed by or under the direction of its board, except as in this act or in its certificate of incorporation otherwise provided." N.J. Stat. Ann. § 14A:6–1(1) (West Supp. 1998).[1] *See generally Francis v. United Jersey Bank*, 432 A.2d 814, 822–24 (N.J. 1981) ("[A]ll directors are responsible for managing the business and affairs of the corporation."); *Gabriel v. Auf Der Heide-Aragona, Inc.*, 82 A.2d 644, 649 (N.J. Super. Ct. App. Div. 1951). Thus, whether viewed from the standpoint of the NJTC's particular enabling statute or that of general New Jersey corporation law, members of the NJTC's board would constitute part of its "management." Moreover, nothing in the text or legislative history of section 411 of the Amtrak Reform Act indicates that Congress intended to depart from such generally recognized understandings of the term "management" when it decided to exclude representatives of rail management, as well as representatives of rail labor, from eligibility for the Amtrak Board. Indeed, the context of the provision and the related definitions in the Act strongly reinforce the view that the term "rail management" would include the directors of a commuter authority.

[1] The Commissioners' Comment explaining the 1988 amendments states "This section was revised to reflect the fact that corporations are managed by their officers with the board providing supervision and overall direction." N.J Stat Ann § 14A.6–1, Commissioners' Comment—1988 Amendments (West 1988) That corporate officers manage the business and affairs of a corporation under the supervision and direction of the board of directors by no means removes the directors from their ultimate responsibility for corporate management, as made clear in the text of the New Jersey statute

In this regard, we disagree with the argument in the Wilmer, Cutler memorandum that NJTC directors should not be considered representatives of management in this context because they may be analogized to so-called "independent outside directors" as that concept is used in the corporation law of some states. *See, e.g., Rowen v. Le Mars Mut. Ins. Co.*, 282 N.W.2d 639 (Iowa 1979). Outside directors are usually defined as those who are neither officers nor employees of the corporation (although directors with special knowledge or experience such as legal counsel, the corporation's banker, or representatives of major corporate suppliers may be viewed as inside directors notwithstanding their lack of affiliation with the corporation). *Id.* at 652. Although the outside director concept is sometimes pertinent for determining the relative responsibilities and liabilities of inside and outside directors for the day-to-day management of corporate affairs under state corporate law, *id.*, it does not divorce outside directors from their fundamental responsibility as directors for conducting the affairs of the corporation, *see, e.g., Smith v. Van Gorkom*, 488 A.2d 858, 889 (Del. 1985) (where all directors of corporation, outside as well as inside, took unified position, all would be treated as one in determination of whether they were entitled to the protection of the business judgment rule in their approval of cash-out merger of the corporation); *Francis v. United Jersey Bank*, 392 A.2d 1233, 1242 (N.J. Super. Ct. Law Div. 1978), *aff'd*, 407 A.2d 1253 (N.J. Super. Ct. App. Div. 1979), *aff'd*, 432 A.2d 814 (N.J. 1981) ("In legal contemplation there is no such thing as a 'figurehead' director."). More to the point, the inside/outside director dichotomy has little practical relevance to the NJTC board, none of whose members would be viewed as "inside" directors in the conventional sense but all of whom share collective responsibility for the governance of the NJTC. *See* N.J. Stat. Ann. § 27:25–4.a.

We conclude, therefore, that a member of the NJTC Board would be a "representative[ ] of . . . rail management" for purposes of the Amtrak Reform Act and is therefore ineligible for appointment to the Amtrak Board unless he or she resigns from the NJTC Board.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

Application of 18 U.S.C. § 208 to Service by Federal Officials on the District of Columbia Downtown Business Improvement District Corporation Board of Directors

A federal official serving on the Board of Directors of the District of Columbia Downtown Business Improvement District Corporation in his or her official capacity is not a director of an outside organization within the meaning of 18 U.S.C. § 208, and therefore the official's service is not barred by § 208.

August 7, 1998

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

This memorandum responds to your request for our opinion regarding the application of 18 U.S.C. § 208 (1994) to the service of federal officials on the board of the District of Columbia Downtown Business Improvement District Corporation ("the Downtown BID Corporation").[1] We have concluded that the District of Columbia ordinance authorizing the formation of BID Corporations eliminates the potential for conflict between a federal official's loyalty to the federal government and his or her fiduciary duty to the BID Corporation under District of Columbia law. Accordingly, a federal official who serves on the board of a BID Corporation in his or her governmental capacity will not be a director of an outside organization within the meaning of § 208, and that section's restrictions will not bar such service.

I. *The Downtown BID Corporation*

The Business Improvement Districts Act of 1996, D.C. Law 11-134 (Michie) (codified as amended at D.C. Code Ann. §§ 1-2271 to 2292 (Michie Supp. 1998)) ("the BID Act" or "the Act"), authorizes the formation of "business improvement district corporations," including a Downtown BID Corporation, to be organized under the District of Columbia's Nonprofit Corporation Act, D.C. Code Ann. §§ 29-501 to 599.16 (Michie 1996 & Supp. 1998). *Id.* §§ 1-2274(c), 1-2273. Each owner and commercial tenant of nonexempt real property within the boundaries described in the statute is a member of the Downtown BID Corporation. *Id.* § 1-2273. Once formed, a BID Corporation must apply for registration. If the application is accepted, a "BID tax" will be assessed on the owners of nonexempt property in the BID. *Id.* § 1-2285. Owners of exempt real property, including the District government and the federal government, may voluntarily make a payment to a BID Corporation in lieu of the BID tax. *Id.* § 1-2291. The revenues will

[1] Letter for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Emily C. Hewitt, General Counsel, General Services Administration (Aug. 26, 1997).

fund additional services and improvements to the area within the BID's boundaries. *See id.* §§ 1–2272(6), 1–2271(b), 1–2274(a)(2); Articles of Incorporation, District of Columbia Department of Consumer and Regulatory Affairs, Business Regulation Administration Certificate of Incorporation, art. III(A) (May 20, 1997) ("Articles of Incorporation").

The Downtown BID Corporation was incorporated in the District of Columbia on May 20, 1997. *See* Articles of Incorporation. It is governed by a board of directors, which "shall include owners . . . and commercial tenants, and also may include residents, community members, *and governmental officials*; provided, that not less than a majority of all Board members shall represent owners." D.C. Code Ann. § 1–2277(a) (emphasis added). Directors do not receive a salary or a fee for attending meetings, but may be reimbursed for actual and reasonable out-of-pocket expenses incurred in the performance of their duties. Bylaws of the Downtown Business Improvement District Corporation, art. IV(E) ("Bylaws"). Because the federal government owns and leases a substantial amount of property in the Downtown BID, and because the BID taxes may be passed through to the federal government under the terms of certain leases, the General Services Administration ("GSA") would like to have a representative on the board of the Downtown BID Corporation.

The Articles of Incorporation list thirty-seven initial directors, including Nelson Alcalde, GSA's Regional Administrator for the National Capital Region. Mr. Alcalde is listed by name, with no reference to his federal office. Articles of Incorporation, art. XIV. The initial board was to serve for 120 days, after which the directors were to be elected by the members of the BID. Bylaws, art. IV(B)(2). A director may be removed by a two-thirds vote of the other directors in office, but only for cause. Bylaws, art. IV(B)(6).

The participation of the federal government in the Downtown BID Corporation is expressly addressed just once in the corporation's bylaws. That provision sets out the formula for determining the number of votes to which each member of the corporation is entitled. The number of votes allocated to each member varies based on several factors, including the use of the property; whether the member is an owner, an owner/occupant, or a commercial tenant; the square footage of the property; and whether the property is exempt or nonexempt. Bylaws, art. VIII(C). Each owner of exempt real property in the BID area, "including the District of Columbia and the federal government, who becomes a member of the BID by voluntarily making payments to the BID," is to have a vote proportional to the ratio of its voluntary contribution and the BID tax that would be assessed on a nonexempt property of equal size. Bylaws, art. VIII(C)(8).

II. *Analysis*

Section 208 prohibits any officer or employee from participating "personally and substantially" as a government official in any "particular matter" in which an "organization in which he is serving as officer, director, trustee, general partner or employee . . . has a financial interest" unless he obtains a waiver or satisfies an exception outlined in § 208(b). 18 U.S.C. § 208(a) (1994). Ordinarily, § 208 disqualifies a government official from taking part in decisions affecting the financial interests of a private entity on whose board of directors he or she sits.

In a 1996 opinion, this office concluded that 18 U.S.C. § 208(a) "would prevent a government employee from serving on the board of directors of an outside organization in his or her official capacity, in the absence of: (1) statutory authority or a release of fiduciary obligations by the organization that might eliminate the conflict of interest, or (2) a waiver of the requirements of § 208(a), pursuant to 18 U.S.C. § 208(b)." *Service on the Board of Directors of Non-Federal Entities by Federal Bureau of Investigation Personnel in Their Official Capacities*, 20 Op. O.L.C. 379 (1996) ("FBI Memorandum"). Both a statute and a release by the organization (assuming such a release is permissible under state law), we reasoned, would overcome the inherent conflict of interest between a government employee's loyalty to the federal government and his or her fiduciary duty to an outside organization under state law. *See id.*[2]

The BID Act does not fit neatly into either of these previously recognized grounds for relief from the requirements of § 208. The BID Act is a District of Columbia ordinance, not a federal statute, and it does not provide a release on behalf of a BID Corporation. Nevertheless, the ordinance defines the duty of a federal official who serves as a BID Corporation director under District of Columbia law so as to eliminate the potential for a conflict of interest with the United States. The BID Act, we believe, provides for service by federal officials in their official capacities, and recognizes that federal officials, in cases of conflict, must give their allegiance to their federal employer. It thus provides the equivalent of a waiver of conflicting fiduciary duty. For that reason, we conclude that the prohibitions of § 208(a) would not bar a federal official from serving on a BID Corporation board in his or her official capacity.

[2] We have twice concluded that § 208 would apply to service on a private board where no statute provided for ex officio service and where it appeared that the director would owe the private corporation a fiduciary duty. *See* FBI Memorandum (concluding that § 208 would apply to the service of FBI personnel on non-federal non-profit entities in their official capacities); *Applicability of 18 U.S.C. § 208 to Proposed Appointment of Government Official to the Board of Connie Lee*, 18 Op. O.L.C. 136 (1994) (finding that § 208 would apply to a Treasury official serving on the board of a private, for-profit corporation owned in part by the federal government).

A.

We believe that § 1–2277 of the BID Act authorizes federal officials to serve as directors of a BID Corporation in an official capacity. Section 1–2277(a) of the BID Act provides that

> Board members shall include owners, or principals, agents, partners, managers, trustees, stockholders, officers, or directors of owners, and commercial tenants, and also may include residents, community members, *and government officials*; provided, that not less than a majority of all Board members shall represent owners.

Id. Given the pervasive presence of the federal government in the District of Columbia, it is reasonable to construe the term "government official" in a District of Columbia ordinance as including officials of the United States. This construction is consistent with the treatment of the District of Columbia and the federal government in the portion of the Downtown BID Corporation bylaws governing the voting rights of owners of exempt property. *See* Bylaws, art. VIII(C)(8) (an owner of exempt property, "including the District of Columbia and the federal government, who becomes a member of the BID by voluntarily making payments to the BID," is entitled to proportional vote).

Although the BID Act does not address whether a federal official who serves as a director does so in a personal or official capacity, the better interpretation is that § 1–2277(a) authorizes service in an official capacity. Statutes must be interpreted, if possible, to give each word some operative effect. *Walters v. Metropolitan Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955). If the District of Columbia Council ("Council") intended to allow government officials merely to serve in a personal capacity, it would not have been necessary, as a general matter, to include the term "government official" in the list of persons eligible for membership on the board. In most instances, a government official serving as a director in his or her personal capacity will be eligible as a member of one of the other categories enumerated in § 1–2277(a), such as a "community member," a "resident," or a "commercial tenant." Construing the term "government official" to authorize service in an official capacity gives that term a meaning not covered by those other categories. We therefore interpret § 1–2277 as authorizing a federal official to serve on the board of a BID Corporation in his or her official capacity.

B.

The BID Act does not expressly address the duty of a federal official serving on the board in the event that the interests of the BID Corporation conflict with

those of the federal government. To determine the scope of that duty, we must consider the purposes of the Act and attempt to construe the statute in a manner that effectuates the intent of the Council.

When interpreting a statute, "[w]e may presume 'that our elected representatives, like other citizens, know the law.' " *Director, Office of Workers' Compensation Programs v. Perini North River Assocs.*, 459 U.S. 297, 319 (1983) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 696–97 (1979)); *cf. Smith v. United States*, 597 A.2d 377, 382 n.11 (D.C. 1991) (presumption that Congress knows statutory construction given to prior statutory provisions when it incorporates them into later legislation also applies to D.C. Council). The District of Columbia's authorization for a federal official to serve in an official capacity occurred against two background principles of law that are relevant to our analysis. The first is that a federal government employee serving in an official capacity owes a duty of loyalty to the United States. *See, e.g.*, 18 U.S.C. §§ 201–209 (1994 & Supp. II 1996); *Crocker v. United States*, 240 U.S. 74 (1916) (allowing government to rescind contract where contractor would pay employee a portion of contract amount); *United States v. Carter*, 217 U.S. 286 (1910) (permitting government to recover $500,000 received by Army officer after using his influence to award a contract to a paying party). The District of Columbia has no authority to modify that duty. The second is that a director of a District of Columbia membership corporation owes a fiduciary duty to the corporation and its members, *Wisconsin Ave. Assocs. v. 2720 Wisconsin Ave. Cooperative Assoc.*, 441 A.2d 956, 962–63 (D.C.), *cert. denied*, 459 U.S. 827 (1982), but the District of Columbia has the authority to define and thus to modify the obligations of a director to a District of Columbia corporation under District of Columbia law. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93–198, §§ 302, 404(a), 87 Stat. 774, 784, 787 (1973) (vesting legislative power of the District in the Council).[3]

Considering these two background principles together, we conclude that when the Council authorized federal officials to serve as directors in their official capacities, it must be deemed to have anticipated that, in the event of a conflict between the interests of the BID Corporation and the interests of the United States, those officials would serve the interests of the United States. Because the Council has the authority to define the duty of a director under District of Columbia law, its authorization of official service by federal government officials is best read as implying that serving the interests of the United States in that situation would not violate the director's obligations to the BID Corporation under District of

[3] The District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub L No 104–8, 109 Stat 97, *did not* remove the legislative power from the Council, but did place significant limitations on the Council's authority. In any control year, the Council must submit each act passed by the Council and signed by the Mayor to the Control Board for review to determine if the act is consistent with the approved financial plan and budget *Id.* § 203(a), 109 Stat. at 116 If, within seven days, the Control Board concludes that the act is not consistent with those requirements, the act will not take effect *Id.* § 203(a)(5), 109 Stat. at 117.

Columbia law. Accordingly, in the event of any conflict, a federal official serving as a BID Corporation director in his or her governmental capacity is authorized by the BID Act to serve the interests of the United States without violating his or her duty to the BID Corporation under District of Columbia law. For that reason, § 208(a) would not bar the service of a federal official in his or her official capacity on the board of the Downtown BID Corporation.

III. *Conclusion*

Section 1–2277 of the BID Act authorizes federal officials to serve as BID Corporation directors in an official capacity. In so doing, that section impliedly authorizes a federal official who is serving as such a director to place the interests of the United States above those of the BID Corporation in the event of a conflict between the two. Therefore, the Act is the equivalent of a waiver of conflicting fiduciary duty. Thus, a GSA official serving on the board of the Downtown BID Corporation in his or her official capacity would not be a "director" within the meaning of § 208(a), and that section's proscriptions would not bar the official's service.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

Construction of State Reporting Requirements in Section 404 of the Personal Responsibility and Work Opportunity Reconciliation Act

The better interpretation of the state reporting requirements in section 404 of the Personal Responsibility and Work Opportunity Reconciliation Act is that they apply only to those state agencies administering the particular federally funded program in question, not to all state agencies in a State that receives funds under the program

August 18, 1998

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
IMMIGRATION AND NATURALIZATION SERVICE

Your Office has sought our views on the interpretation of section 404 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104–193, 110 Stat. 2105, 2267 (1996).[1] In general, covered "States" are required to report to the Immigration and Naturalization Service ("INS") identifying information concerning illegal aliens who receive benefits under the programs covered by the section. You have asked whether the administering federal agencies may adopt a "narrow" construction, rather than a "broad" one, of the meaning of the term "State" within the reporting requirement of the section. We conclude that the "narrow" construction is the better interpretation and should be adopted.

In general, section 404 of PRWORA, which is entitled "Notification and Information Reporting," requires state and federal agencies implementing certain federal benefits programs to report to the INS identifying information concerning aliens whom they know to be illegally in the United States. Subsection 404(b) imposes such reporting requirements on States receiving grants for the Temporary Assistance for Needy Families ("TANF") program, the successor to the Aid to Families With Dependent Children ("AFDC") program.[2] Subsection 404(c) requires such reporting from the Commissioner of the Social Security Administra-

[1] *See* Memorandum for Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, from David A. Martin, General Counsel, Immigration and Naturalization Service, *Re: Interpretation of Section 404 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193* (Dec. 31, 1996) (attaching Memorandum to Welfare Reform Task Force from Reporting/Tracking Working Group, *Re: Scope of State Reporting Requirements Under Section 404 of the Welfare Act* (Dec. 31, 1996) ("Working Group Memorandum")).

[2] Specifically, subsection 404(b) amends Part IV–A of the Social Security Act of 1935, ch. 531, 49 Stat. 620, 627 (1935) (codified as amended at 42 U.S.C. §§ 601–619 (1994 & Supp. III 1997), by adding a new section 411A, to read as follows:

> **Sec. 411A. State Required To Provide Certain Information**
>
> Each State to which a grant is made under section 403 shall, at least 4 times annually and upon request of the Immigration and Naturalization Service, furnish the Immigration and Naturalization Service with the name and address of, and other identifying information on, any individual who the State knows is unlawfully in the United States

tion ("SSA") in connection with the Supplemental Security Income ("SSI") program; of more relevance here, subsection (c) also requires the SSA, when making SSI agreements with the states, to "ensure that each [such] agreement . . . provides that the State shall furnish such information . . . with respect to any individual who the State knows is unlawfully in the United States." Subsection (d) requires such reporting from the Secretary of Housing and Urban Development ("HUD") in connection with certain federally funded housing assistance programs; in addition, it requires HUD to include, in certain housing contracts with any "public housing agency," that such agency shall furnish such information.

The Working Group established to consider the legal and administrative consequences of PRWORA has considered two rival interpretations of the scope of section 404's reporting requirements, with particular regard to the state reporting requirements in subsections (b) and (c).[3] On the "broad" view, the section requires states that receive TANF grants (or that enter into SSI contracts) to report information regarding aliens known *by any state agency* to be in the United States illegally.[4] On the "narrow" view, the reporting requirement is limited only *to those state agencies administering the particular federally funded program in question* (i.e., TANF in the case of subsection (b), SSI in the case of subsection (c)). The Working Group, with the concurrence of the Department of Health and Human Services,[5] concludes that section 404 should be interpreted narrowly, i.e., that only the particular state agencies that themselves administer the federal programs covered by the provision are required to report the presence of aliens whom they know to be in the United States illegally.

I.

In deciding between the two interpretations, we must, of course, begin with "'the language [of the statute] itself.'" *Ardestani v. INS*, 502 U.S. 129, 135 (1991) (citation omitted). Although the Working Group finds that "[i]ntuitively, the term 'State' would seem to comprehend any of the state's subordinate entities," it nonetheless concludes that there is "some ambiguity in the statute," Working Group Memorandum at 2. We agree.

To begin with, we think that ambiguity is built into a term as general and protean as "State." "[T]he word 'state' . . . can contain many meanings." *National*

[3] Because the relevant reporting requirement in subsection (d) relates to "public housing agencies," not to "States," it does not pose any comparable interpretative problem.

[4] States that participate in certain other federal programs must collect information regarding immigration status. *See* 42 U.S.C. § 1320b-7(d)(1)(A) (1994) (requiring state income and eligibility verification systems to include information "stating whether the individual [beneficiary] is a citizen or national of the United States, and, if that individual is not a citizen or national of the United States, that the individual is in a satisfactory immigration status") This information-gathering requirement pertains to the programs enumerated in § 1320b-7(b), including the medicaid, unemployment compensation, and the food stamp programs. In the course of gathering the covered information, a State may discover that an individual is not lawfully present in the United States.

[5] Letter for Randolph Moss, Deputy Assistant Attorney General, Office of Legal Counsel, from Harriet S. Rabb, General Counsel, Department of Health and Human Services (Feb. 18, 1997)

Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 587 (1949) (opinion of Jackson, J.).[6] To be sure, the term "State" often includes state agencies other than the particular agency that administers the program most relevant to the statute in which the term appears.[7] But our Office has also opined that the term "State" may be construed in light of the "overall legislative objective" of the statute in which it appears.[8] The construction of the term "State" will therefore often require "not only . . . consideration of the word[ ] [itself], but . . . as well, the context, the purposes of the law, and the circumstances under which the word[ ] [was] employed." *Puerto Rico v. Shell Co. (P.R.)*, 302 U.S. at 258.

Such considerations of context, structure and purpose confirm that the broad interpretation of "State" in subsections 404(b) and (c) is open to question. For example, a broad reading of subsection (b) would make the other reporting mandates in section 404 redundant. Although state participation in the TANF program (like state participation in the former AFDC program) is in a strict sense "voluntary,"[9] all the States, as a practical matter, can be expected to participate in TANF. It would follow, under the broad view, that "every state agency in the United States discovering an alien to be in the country unlawfully would have to furnish identifying information to the Service pursuant to subsection (b)." Working Group Memorandum at 4. However, subsection 404(c) separately provides for such reporting by state agencies under contracts relating to the SSI program; and subsection 404(d) requires public housing agencies—which might be counted as "state" agencies—to furnish such information under their contracts with HUD. The broad reading would seem to make these reporting requirements superfluous.

Moreover, PRWORA attaches reporting requirements to some federal programs administered by the states, but not to others. Thus, while section 404 attaches reporting requirements to state receipt of funds under the TANF, SSI and HUD programs, it does not attach them to funding under the Food Stamps or child care programs. These textual differences in the reporting obligations of the various state grantees "suggest that Congress intended to require reporting only by state

[6] *See also id.* at 623 (Rutledge, J., concurring) ("Key words like 'state,' 'citizen,' and 'person' do not always and invariably mean the same thing"). Similar ambiguities lurk in general terms such as "territory," *Puerto Rico v Shell Co. (P R)*, 302 U.S. 253, 258 (1937), and "possession," *Vermilya-Brown Co v. Connell*, 335 U S 377, 386 (1948). *See also District of Columbia v. Carter*, 409 U S. 418, 420 (1973) ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved"); *Romero v United States*, 38 F.3d 1204, 1208 (Fed Cir. 1994) ("[T]he plain language of the statute does not immediately tell us whether Puerto Rico may be considered a 'State or territory or possession' within 5 U S.C § 5517".).

[7] *See National Bureau of Standards—Services to State Institutions*, 24 Op. Att'y Gen. 667, 671 (1903) (term "State governments" within meaning of statute entitling such entities to free services of National Bureau of Standards did not refer only to department having custody of state standards, but also to other agencies "performing and discharging well-recognized functions of the State government," such as state universities)

[8] *Recovery of Interest on Advance Payments to State Grantees and Subgrantees*, 6 Op O.L.C 127, 132 (1982).

[9] *See Batterton v. Francis*, 432 U S. 416, 420 (1977) (AFDC program is a "cooperative venture[ ] of the Federal Government and the States"); *Rosado v Wyman*, 397 U S 397, 408 (1970) (state participation in AFDC program "is basically voluntary").

agencies implementing the specific programs referred to in section 404." Working Group Memorandum at 3.

Furthermore, section 434 of PRWORA, 110 Stat. at 2275, authorizes state and local governments, "[n]otwithstanding any other provision of Federal, State, or local law," to report information regarding an alien's immigration status, "lawful or unlawful," to the INS. On the broad reading, this provision also seems largely redundant. Congress would not have *permitted* the states under section 434 to report the immigration status of illegal aliens if, under section 404, it was effectively *mandating* that they report such information.

Finally, the Court has held that "Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously." *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 190 n.11 (1982). Here, a "broad" reading of the section would impose an extraordinary new obligation on the States, cutting across a range of state programs from drivers' licenses to the public schools. We think that if Congress had genuinely intended *all* state agencies, as opposed to the *administering* state agencies, to be subject to the reporting requirements of section 404, it could, and would, have made its intention more explicit.

Against these arguments, it might be said that the term "State" appears twice in subsection 404(b); that under normal rules of statutory construction it must therefore have a unitary meaning; that in its first occurrence—"State to which a grant is made under section 403"—it plainly refers to a "State" in the broad sense; and that the second occurrence of the term—"individual who the state knows is unlawfully in the United States"—must therefore have the same broad meaning. Even assuming, *arguendo*, that the term "state" is first used in the broad sense, we do not accept the suggested conclusion. While it is "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning," *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (citations and internal quotation marks omitted),[10] that "presumption is defeasible." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 292 (1993) (Souter, J., concurring in the judgment in part and dissenting in part).[11] Here, the presumption conflicts with other normal rules of construction, including the presumption that Congress does not legislate uselessly, and that all parts of

[10] *See also Gustafson v Alloyd Co*, 513 U S 561, 568, 573 (1995), *National Mut Ins Co v. Tidewater Transfer Co*, 337 U S at 587 (opinion of Jackson, J) ("While the word ['state'] is one which can contain many meanings, such inconsistency in a single instrument is to be implied only where the context clearly requires it "); *BFP v. Resolution Trust Corp*, 511 U.S 531, 557 (1994) (Souter, J , dissenting)

[11] *See also Helvering v Stockholms Enskilda Bank*, 293 U.S 84, 86–87 (1934), *Morse v Republican Party of Va*, 517 U S 186, 247 n.4 (1996) (Scalia, J , dissenting) So, for example, in *United States v Sheffield Bd of Comm'rs*, 435 U.S 110, 127 (1978), the Court noted that "the term 'State' does not have this [unitary] meaning throughout the [Voting Rights] Act " More recently, the Court declined to read the term "allowed secured claim" in one subsection of the Bankruptcy Code, 11 U.S.C § 506(d), as "an indivisible term of art defined by reference" to subsection (a) of the same provision *See Dewsnup v Timm*, 502 U S. 410, 415 (1992), *id* at 422 (Scalia, J , dissenting)

a statute should be given effect if possible.[12] Hence, the second occurrence of the term "state" in subsection 404(b) may have a narrower meaning than it bears in its first occurrence.

It might also be argued that the relevant occurrence of "State" in subsection 404(b) is unambiguous because the term "State" is *defined* under PRWORA's amendments for Part IV–A of the Social Security Act (where subsection 404(b) is to appear as section 411A). That definition is set forth in subsection 103(a) of PRWORA (to become in relevant part section 419(5) of the Social Security Act). 110 Stat. at 2160. The definition states that, "[e]xcept as otherwise specifically provided, the term 'State' means the 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, and American Samoa." *Id.* Arguably, this definition establishes two things: first, that the term "State" must be given a single, unitary meaning throughout Part IV–A, unless the statute itself specifies otherwise; second, that the term "State" has a referent broader than the TANF-administering state agencies.

We attribute a different purpose to the definition. But for the definitional references to the District of Columbia, Puerto Rico, the Virgin Islands, Guam and American Samoa, Part IV–A might not be held to apply to those entities.[13] The definition thus does not tell for or against either the broad or the narrow interpretation of "State." It signifies merely that, whether "state" includes all subordinate state agencies or only those that administer TANF, the same is to be true with respect to the District of Columbia (and the other non-"state" governments).

Accordingly, we believe that there is sufficient ambiguity in section 404's use of the term "State" to justify recourse to the provision's legislative history. We consider that history below.

II.

We believe that the language of the Conference Report on PRWORA, as well as that of the House and Senate Reports, supports the narrower interpretation. The Conference Report reads in relevant part as follows (H.R. Conf. Rep. No. 104–725, at 382 (1996), 1996 U.S.C.C.A.N. 2183, 2770):

> *House bill*
>
> . . .

[12] *See Mackey v Lanier Collection Agency & Serv.*, 486 U S 825, 837 & n 11 (1988), *Fidelity Fed Sav. & Loan Ass'n v de la Cuesta*, 458 U S. 141, 163 (1982); *Reiter v. Sonotone Corp*, 442 U S 330, 339 (1979)

[13] *See National Mut Ins. Co. v. Tidewater Transfer Co.*, 337 U S 582 (1949) a 1940 amendment to the Judiciary Act of 1789, which authorized federal courts to entertain diversity suits between citizens of states and citizens of the District of Columbia, the latter class of citizens could not have been parties to such actions, since the District of Columbia was not a "state" under pre-1940 statute), *cf. EEOC v Arabian Am Oil Co*, 499 U.S 244, 254 (1991) (noting the argument that the alien exemption provision of Title VII of Civil Rights Act, which makes the statute inapplicable to employment of aliens "outside any State," was intended to ensure that aliens in United States *possessions* were not protected by Act)

Agencies that administer SSI, housing assistance programs under the United States Housing Act of 1937, or block grants for temporary assistance for needy families (the successor program to AFDC) are required to furnish information about aliens they know to be unlawfully in the United States to the Immigration and Naturalization Service (INS) at least four times annually and upon INS request.

Senate amendment

Similar to House bill.

Conference agreement

The conference agreement follows the House bill and the Senate amendment.

The House Report adds, as a reason for the change in the law, that "[a]s public benefits are a magnet for illegal aliens to come to and stay in the U.S., welfare agencies should assist INS in its mandate to identify and remove illegal aliens from the country." H.R. Rep. No. 104–651, at 1445 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2770. The Senate Committee Print also includes this sentence. Staff of Senate Comm. on the Budget, 104th Cong., Committee Recommendations as Submitted to the Budget Committee on the Budget Pursuant to H.R. Con. Res. 178, at 219 (Comm. Print 1996).

In light of these statements, we concur that "the legislative history supports the narrow view." Working Group Memorandum at 5.

III.

We conclude that the "narrow" interpretation of the scope of section 404 is the better view of the section, and therefore that the various federal agencies administering the grants and contracts covered by section 404 should adopt that interpretation. Having found that the statutory text is ambiguous, we "appropriately may refer to [the] statute's legislative history to resolve [any] ambiguity." *Toibb v. Radloff*, 501 U.S. 157, 162 (1991); *see also Oklahoma v. New Mexico*, 501 U.S. 221, 237 (1991). As discussed above, the legislative history clearly supports the "narrow" construction.

RANDOLPH D. MOSS
Acting Assistant Attorney General
Office of Legal Counsel

Application of 18 U.S.C. § 208 to Service by Executive Branch Employees on Boards of Standard-Setting Organizations

Under 18 U S.C. § 208, a federal employee may serve as a member of the board of a private voluntary standards organization to the extent necessary to permit participation in his or her official capacity in the organization's standard-setting activities.

August 24, 1998

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF GOVERNMENT ETHICS

This responds to your request of August 10, 1998 for our opinion whether, absent a waiver, 18 U.S.C. § 208 (1994) would forbid employees of the executive branch from serving, in their official capacities, as members of the boards of private voluntary standards organizations. We believe that, to the extent necessary to permit the federal employees to take part in the standard-setting activities, § 208 does not bar such service.

Section 208 prohibits an officer or employee from taking part as a government official in any "particular matter" in which he or she has a financial interest. The statute imputes to the employee the financial interests of certain other persons and entities, including an "organization in which he is serving as officer, director, trustee, general partner or employee." 18 U.S.C. § 208(a). In an earlier opinion, we observed that when an employee is acting in his or her official capacity as a director or officer of an outside entity, the work for that entity necessarily entails official action affecting the entity's financial interests. We therefore concluded that, under 18 U.S.C. § 208, the "broad prohibition against conflicts of interest within the federal government would prevent a government employee from serving on the board of directors of an outside organization in his or her official capacity, in the absence of: (1) statutory authority or a release of fiduciary obligations by the organization that might eliminate the conflict of interest, or (2) a waiver of the requirements of § 208(a), pursuant to 18 U.S.C. § 208(b)." *Service on the Board of Directors of Non-Federal Entities by Federal Bureau of Investigation Personnel in Their Official Capacities*, 20 Op. O.L.C. 379, 379 (1996) ("FBI Opinion"). In particular, if "Congress has authorized the service by statute, the official 'serves . . . in an ex officio rather than personal capacity,' owes a duty only to the United States, and does not violate section 208." *Service by Federal Officials on the Board of Directors of the Bank for International Settlements*, 21 Op. O.L.C. 87 (1997) (citation omitted) ("FRB Opinion").

Since the FBI Opinion, we have had a number of occasions to consider whether particular statutes confer authority for service on outside boards. We have found such authority in a range of circumstances. Sometimes the statutes expressly contemplated official service on an outside board. *See* Memorandum for Files, from

Daniel Koffsky, Special Counsel, Office of Legal Counsel, *Re: Foundations and Commissions Under Fulbright Program* (Oct. 24, 1997); Memorandum for Files, from Daniel Koffsky, Special Counsel, Office of Legal Counsel, *Re: Service on Outside Board* (Feb. 27, 1998) (United States-India Fund for Cultural, Educational, and Scientific Cooperation). In another instance, the statute was less explicit, but we found the authority because service on the outside entity was a means by which the United States negotiated with foreign governments and "the breadth of the President's power [in that area] counsels a broad reading of congressional *authorization* for particular means by which the power may be exercised." FRB Opinion, 21 Op. O.L.C. at 89 (citation omitted). In one other instance, where the agency largely conducts its operations in secret and had to create the outside entity to preserve the secrecy of its work, we concluded that the outside organization was, for relevant purposes, a part of the federal government, and thus no conflict existed.

As this experience in applying the principles of the FBI Opinion has made clear, Congress has enacted a variety of arrangements contemplating, directly or indirectly, that federal employees will participate in outside organizations, including by serving on their boards, and it would frustrate these arrangements if such service were considered a disqualifying "director[ship]" under 18 U.S.C. § 208. *See Applicability of 18 U.S.C. § 208 to Proposed Appointment of Government Official to the Board of Connie Lee*, 18 Op. O.L.C. 136, 138 (1994) (categories of service considered outside statute). We believe that there are circumstances in which statutory authority for service on an outside board can be found even though Congress has not expressly addressed that service. When Congress has specifically provided for participation in outside organizations and such participation, to carry out the statutory purposes, entails service on a board, statutory authorization may be inferred.

Here, Congress has provided that, in general, federal agencies and departments "shall use technical standards that are developed or adopted by voluntary consensus standards bodies" and, in carrying out this requirement, "shall consult with voluntary, private sector, consensus standards bodies and shall, when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources, *participate with such bodies in the development of technical standards.*" National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104–113, § 12(d)(1) & (2), 110 Stat. 775, 783 (1996), 15 U.S.C. § 272 note (1994) (emphasis added). As the legislative history explains, Congress desired and anticipated that federal agencies would "work closely" with voluntary standard-setting organizations, that these organizations would "include active government participation," and that agencies would "work with these voluntary consensus standards bodies, whenever and wherever appropriate." H.R. Rep. No. 104–390, at 15, 25 (1995). When the board of an outside organization plays an integral role in the process of setting standards, it

would therefore frustrate the statute to forbid federal employees from being on the board. They could not then take the "active" role that Congress mandated. To carry out the statute, therefore, employees may serve on these outside boards without running afoul of 18 U.S.C. § 208, if the boards are engaged in the standard-setting activities in which Congress directed federal agencies to participate.

To be sure, § 208 allows for waivers when the employee's "interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect," 18 U.S.C. § 208(b)(1), and thus a conclusion that § 208 generally would bar employees from serving on standard-setting bodies in their official capacities would not necessarily have prevented the service in every instance. Nevertheless, reliance on the waiver procedure would not be consonant with the statutory scheme here. Congress itself has resolved the possible conflict between duties to the organization and duties to the United States, at least to the extent that the criminal prohibition may be at issue.

We would not reach the same conclusion, however, if the board of an organization had only administrative responsibilities and was not directly involved in standard-setting. In that event, the congressional direction to "participate . . . in the development of technical standards" would not apply. Consequently, in accordance with the FBI Opinion, § 208 would bar the service on the board, absent a waiver or an effective release from fiduciary duty.

Finally, you also ask us to confirm your view that an employee's service in an official capacity as the chair of a working committee or subcommittee of a standard-setting organization, to the extent the position imposes no fiduciary duty and creates no employer-employee relationship, would not implicate 18 U.S.C. § 208. We agree that service in such a position would not itself trigger the statute. Indeed, we are far from certain that a position other than one specified in § 208—"officer, director, trustee, general partner or employee"—could be the basis for imputing an organization's financial interest to the employee, even if that other position created a fiduciary duty to the organization. In any event, the positions you describe would not give rise to an imputed disqualification.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

Authority of the D.C. Council Under the Home Rule Act to Amend the Schedule of Heights of Buildings

The Council of the District of Columbia has the authority, under section 602(a)(6) of the Home Rule Act of 1973, to amend the Schedule of Heights of Buildings Adjacent to Public Buildings as long as any amendment is within the overall limitations set forth in the Building Height Act of 1910.

The D.C. Council's authority is not further restricted by the limitations contained in the Schedule of Heights that was in effect on December 24, 1973.

August 28, 1998

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

This memorandum responds to your request for our views regarding the authority of the Council of the District of Columbia to amend the Schedule of Heights of Buildings Adjacent to Public Buildings ("Schedule of Heights"). Specifically, we have considered whether, under section 602(a)(6) of the Home Rule Act of 1973, the Council has the authority to amend the Schedule of Heights as long as any amendment is within the overall limitations set forth in the Building Height Act of 1910. We conclude that the Council does have that authority, and that its authority is not further restricted by the limitations contained in the Schedule of Heights that was in effect in 1973.

I. Background

Section 5 of the Building Height Act of 1910, 36 Stat. 452 (codified as amended at D.C. Code Ann. § 5–405 (1994)) ("Height Act"), contains limitations on the permissible heights of buildings in the District of Columbia. Those limitations depend on the width of the street on which a building will front, and on whether the street is a business or a residential street. In addition, the Height Act provides that the maximum height of buildings on blocks adjacent to public buildings "shall be regulated by a schedule adopted by the Council of the District of Columbia." [1] Since 1910, the Commissioners of the District of Columbia, and

[1] Section 5 of the Height Act, as amended, provides in pertinent part:

(a) No building shall be erected, altered, or raised in the District of Columbia in any manner so as to exceed in height above the sidewalk the width of the street, avenue, or highway in its front, increased by 20 feet; but where a building or proposed building confronts a public space or reservation formed at the intersection of 2 or more streets, avenues, or highways, the course of which is not interrupted by said public space or reservation, the limit of height of the building shall be determined from the width of the widest street, avenue, or highway. . .

(b) No buildings shall be erected, altered, or raised in any manner as to exceed the height of 130 feet on a business street or avenue . . except on the north side of Pennsylvania Avenue between 1st and 15th Streets Northwest, where an extreme height of 160 feet will be permitted.

Continued

subsequently the Council, have exercised their authority to set such further height limitations under a Schedule of Heights in 15 different areas of the District adjacent to public buildings, including the blocks around the White House, the Supreme Court Building, and the House and Senate Office Buildings.

In 1973 Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93–198, 87 Stat. 774 (1973) (the "Home Rule Act"), which gave the Council broad legislative powers over "all rightful subjects of legislation within the District." D.C. Code Ann. § 1–204 (1992). That grant of authority, however, is not absolute. One of the limitations placed on the Council is set forth in section 602(a)(6) of the Home Rule Act:

> (a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to:
>
> . . . .
>
> (6) Enact any act, resolution, or rule which permits the building of any structure within the District of Columbia in excess of the height limitations contained in § 5–405, and in effect on December 24, 1973[.]

D.C. Code Ann. § 1–233(a)(6) (1992).[2]

The question posed here is whether the Home Rule Act's reference to "the height limitations contained in § 5–405, and in effect on December 24, 1973" includes the limitations contained in the Schedule of Heights that was in effect on December 24, 1973. If it includes those limitations, then the Council lacks the authority to amend the Schedule of Heights in a way that would make it less restrictive than it was on December 24, 1973.

(c) On a residence street, avenue, or highway no building shall be erected, altered, or raised in any manner so as to be over 90 feet in height at the highest part of the roof or parapet . . . .

(d) The height of a building on a corner lot will be determined by the width of the wider street.

. . .

(f) On blocks immediately adjacent to public buildings or to the side of any public building for which plans have been prepared and money appropriated at the time of the application for the permit to construct said building, the maximum height shall be regulated by a schedule adopted by the Council of the District of Columbia.

D.C. Code Ann § 5–405. As originally enacted, the Height Act granted the authority to adopt a schedule of heights to the District of Columbia Board of Commissioners That authority was transferred in 1967 to the newly created District of Columbia Council, *see* Reorganization Plan No. 3 of 1967, § 402, ¶ 120, D.C Code Ann. vol 1, p 126, 137 (1991), and in 1973 to the Council of the District of Columbia, *see* D.C Code Ann § 1–227(a) (1992)

[2] As originally enacted in 1973, section 602(a)(6) of the Home Rule Act was worded as follows·

(a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to—

. . . .

(6) enact any act, resolution, or rule which permits the building of any structure within the District of Columbia in excess of the height limitations contained in *section 5 of the Act of June 1, 1910 (D.C Code, sec 5–405), and in effect on the date of enactment of this Act*[ ]

Pub. L. No 93–198, § 602, 87 Stat 774, 813 (1973) (emphasis added)

Both the Council's General Counsel and the District's Corporation Counsel have concluded that section 602(a)(6) of the Home Rule Act does not refer to the height limitations contained in the Schedule of Heights, but refers only to the height limitations included in the Height Act of 1910 itself, as amended (§ 5–405 of the D.C. Code). Accordingly, in their view, the Council has the power to amend the Schedule of Heights to the extent that any such amendment is consistent with (i.e., no less restrictive than) the overall limitations set forth in the Height Act. *See* Memorandum for Linda W. Cropp, Chairman, Council of the District of Columbia, from Charlotte Brookins-Hudson, General Counsel, Council of the District of Columbia (Nov. 24, 1997); Letter for Linda W. Cropp, Chairman, Council of the District of Columbia, from John M. Ferren, Corporation Counsel, Government of the District of Columbia (Nov. 26, 1997) (''Corporation Counsel Letter'').

The National Capital Planning Commission, however, has expressed a contrary view. *See* Letter for Linda W. Cropp, Chairman, Council of the District of Columbia, from Harvey B. Gantt, Chairman, National Capital Planning Commission (Jan. 8, 1998). The Commission's view is based on a 1990 opinion letter from the Environment and Natural Resources Division of the Department of Justice (''ENRD''). *See* Letter for Linda Dodd-Major, General Counsel, National Capital Planning Commission, from Richard B. Stewart, Assistant Attorney General, Environment and Natural Resources Division, Department of Justice (Nov. 6, 1990), *reprinted in* 137 Cong. Rec. 5131 (1991) (''1990 ENRD Letter''). The principal conclusion of the 1990 ENRD Letter is that the Council's authority to amend the Schedule of Heights is subject to the other limitations set forth in the Height Act.[3] However, the letter also contains a paragraph (not necessary to its overall conclusion) discussing section 602(a)(6) of the Home Rule Act and concluding that the height limitations referred to in that section include the limitations in the December 1973 Schedule of Heights. *See id.* at 12 *reprinted in* 137 Cong. Rec. at 5133. Recently, ENRD has reevaluated the view expressed in this paragraph of the 1990 ENRD Letter and has concluded that it was in error. ENRD has consequently revoked the 1990 ENRD Letter. *See* Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division (June 30, 1998). For the reasons set forth below, we agree with ENRD's recent conclusion that both the plain meaning and the legislative history of the Home Rule Act support an interpretation under which the Council may amend the Schedule of Heights consistent with the statutory limitations in § 5–405 of the D.C. Code.

[3] The Council's General Counsel and the District's Corporation Counsel both agree with this conclusion, as do we.

II. Discussion

"Interpretation of a statute must begin with the statute's language." *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989). We believe that the plain language of section 602(a)(6) of the Home Rule Act supports the District's interpretation.

The statutory language restricts the range of the Council's authority to alter the Schedule of Heights to "the height limitations contained in § 5–405, and in effect on December 24, 1973." The height limitations set forth in the Schedule of Heights as of December 24, 1973, however, were not (and are not) "contained in" § 5–405 (§ 5 of the Height Act). Rather, that section contains certain specific height limitations (§ 5–405(a)-(d)) and also includes a provision that the Council shall further regulate the heights of buildings adjacent to public buildings by adopting a "schedule" (§ 5–405(f)). While § 5–405(f) may be considered an *authorization* to adopt height limitations, it is not itself a height limitation. The terms of the Schedule of Heights, on the other hand, are not contained in § 5–405 of the D.C. Code. Therefore, the statutory phrase "the height limitations contained in § 5–405" does not by its terms encompass the height limitations set forth in the Schedule of Heights.

The analysis is not altered when one considers the additional statutory language "and in effect on December 24, 1973." Because the pertinent phrases are joined by the conjunction "and," the "height limitations" identified by section 602(a)(6) of the Home Rule Act must be *both* "contained in § 5–405" *and* "in effect on December 24, 1973." The statute would be broader if it were phrased in the disjunctive, but it is not. Thus, under the natural reading of the language, that a height limitation is "in effect on December 24, 1973" does not bring it within the statute unless it is also "contained in § 5–405."

The 1990 ENRD Letter failed to recognize the significance of this language in its brief discussion of section 602(a)(6) of the Home Rule Act. It stated:

> Section 602(a)(6) prohibits the Council from enacting *any* act which permits the building of *any* structure that exceeds (1) the section 5–405 height limitations, or (2) the height limitations in effect on December 24, 1973—which include the Schedule of Heights as it existed at the time the Home Rule Act was enacted. In other words, under section 602(a)(2) [sic] of the Home Rule Act, the Council's authority under section 5–405(f) of the Height Act is limited to amending the Schedule of Heights to set height limits that are (1) lower than the applicable Height Act limits (for locations not included on the pre-Home Rule Schedule of Heights), or (2) lower than the pre-Home Rule Schedule of Heights limitations (for locations that are included in the pre-Home Rule Schedule). The

> Council is barred by section 602(a)(6) of the Home Rule Act from exceeding either of those limitations.

1990 ENRD Letter, at 12 *reprinted in* 137 Cong. Rec. at 5133. (footnote omitted). This discussion, however, does not follow the language of section 602(a)(6). In fact, its significant rephrasing of the statutory language—and in particular its substitution of disjunctive language—highlights the lack of support for this interpretation in the actual language of the statute. *See* Corporation Counsel Letter at 5. The natural reading of section 602(a)(6)'s language covers only those height limitations that are both "contained in § 5–405" and "in effect on December 24, 1973."

We have considered whether this reading of the statute renders superfluous the phrase "and in effect on December 24, 1973." *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06, at 119 (5th ed. 1992) (statute should be construed to give meaning and effect to each term). It would seem that Congress could have achieved the same result by referring to "the height limitations contained in § 5–405" *without* the additional "and in effect" phrase. As enacted in 1973, however, the Home Rule Act referred to "the height limitations contained in *section 5 of the Act of June 1, 1910* (D.C. Code, sec. 5–405)." *See supra* note 2. The Height Act was amended several times after 1910.[4] Thus, the additional phrase in the Home Rule Act—which originally was "and in effect on the date of enactment of this Act"—makes clear that the Council is bound not only by the limitations of the Height Act of 1910 itself, but also by all amendments to the Act that were in effect when the Home Rule Act was enacted. The phrase is therefore not superfluous.

The plain language of section 602(a)(6), in our view, does not cover the height limitations set forth in the Schedule of Heights. Even if the language were ambiguous, however, the legislative history would not warrant a contrary conclusion.

The House report on the Home Rule bill describes section 602(a)(6) as precluding the Council from "permitting the construction of buildings in excess of the present height limitations *set by Congress*." [5] Rep. Fauntroy similarly referred to "the height limitations *imposed by the Congress*." [6] Because the height limitations in the Schedule of Heights are set by the Council rather than Congress, these references support the view that section 602(a)(6) addresses only the limitations set forth in the Height Act.

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[4] *See, e g*. Act of June 7, 1924, ch 340, 43 Stat 647, Act of Feb 21, 1925, ch 289, 43 Stat. 961, Act of May 16, 1926, ch 150, 44 Stat 298, Act of April 29, 1930, ch 220, 46 Stat 258, Act of March 24, 1945, ch 37, 59 Stat 38, Act of Sept. 22, 1961, Pub L. No. 87–281, § 1, 75 Stat. 583

[5] H R. Rep No 93–482, at 15 (1973) (emphasis added), *see also id* at 37 (section-by-section analysis recites language of section 602(a)(6) without the final "and in effect on . " phrase)

[6] House Committee on the District of Columbia, 93d Cong., 2d Sess , Home Rule for the District of Columbia 1973–1974, Background and Legislative History 1125 (Comm Print 1974) (proceedings dated July 25, 1973) (emphasis added) ("Home Rule Act Legislative History")

The conference report describes section 602(a)(6) as providing that "the Council could not change building height limitations." [7] Similarly, Rep. Diggs, the chair of the House Committee on the District of Columbia, stated that the Council is "prohibited from modifying the building height limitations now in effect," [8] and from "increasing height limitations on buildings." [9] Such references are ambiguous. While they could arguably suggest a broader reading of section 602(a)(6) as including the Schedule of Heights limitations, they could also reasonably be construed as shorthand references to the limitations contained in the Height Act itself.

The strongest arguable basis in the legislative history for a contrary view appears to consist of two statements by Jacques DePuy, Counsel to the House Subcommittee on Government Operations of the Committee on the District of Columbia, during markup of the bill. Before the provision was drafted, he suggested that the Members might want to add "in the specific limitations of the Council an amendment *combining the existing height limitations.*" [10] And when presenting the provision, he stated:

> What we drafted was an amendment which would go to the limitations on the Council that the Council could not enact an act that permitted building above *existing height limitations*, and *freezing in what now is existing law*, and would prohibit the Council from allowing any building above that limitation.[11]

These statements could be read to support the view that Mr. DePuy contemplated a provision precluding the Council from broadening the height limitations in the Height Act as well as those in the Schedule of Heights in effect in 1973. Even these statements, however, are far from clear in their meaning. The reference to "freezing in what now is existing law," for example, could simply indicate that the Council would not have unrestricted authority to amend § 5–405, as it would with respect to many other provisions of the D.C. Code. Moreover, neither the congressional reports nor comments by Members of Congress reflect any intent on *their* part to include the separate Schedule of Heights restrictions in the scope of section 602(a)(6).

In sum, the legislative history does not reveal any clear or generally accepted intent on Congress's part to preclude the Council from making the Schedule of Heights less restrictive than it was at the time the Home Rule Act was adopted. Thus, even when the legislative history is consulted, it fails to overcome the nat-

[7] H R. Conf Rep No. 93–703, at 75 (1973).
[8] Home Rule Act Legislative History at 1358 (July 31, 1973)
[9] *Id.* at 3051 (Dec. 17, 1973)
[10] *Id* at 215 (May 17, 1973) (emphasis added).
[11] *Id* at 302 (May 21, 1973) (emphasis added).

ural reading of the statute as covering only those height limitations contained in the Height Act, as amended.

III. Conclusion

For the foregoing reasons, we conclude that the Council has the authority, under section 602(a)(6) of the Home Rule Act, to amend the Schedule of Heights as long as any amendment is within the overall limitations set forth in the Height Act of 1910, as amended (D.C. Code Ann. § 5–405), and that that authority is not further restricted by the limitations contained in the Schedule of Heights that was in effect on December 24, 1973.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

Official Service by State Department Employees on the Boards of American-Sponsored Schools Overseas

Official service by State Department employees on the boards of American-sponsored schools overseas is authorized by statute and does not violate 18 U.S.C § 208

September 11, 1998

LETTER OPINION FOR THE DEPUTY LEGAL ADVISER
DEPARTMENT OF STATE

This is in response to your letter of August 10, 1998, asking for our opinion whether 18 U.S.C. § 208 (1994), absent a waiver, bars employees of the State Department from serving in their official capacities on the boards of American-sponsored schools overseas. We agree with your conclusion that such service is authorized by statute and does not violate § 208.

Section 208 forbids employees from taking official action in which they have a financial interest. The statute also imputes to an employee the financial interests of "his spouse, minor child, general partner, *organization in which he is serving as officer, director, trustee, general partner or employee*, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment." 18 U.S.C. § 208(a) (emphasis added). We have previously concluded that because employees who serve on outside boards in their official capacities necessarily take official actions affecting the organizations' financial interests, this provision "prevent[s] a government employee from serving on the board of directors of an outside organization in his or her official capacity, in the absence of: (1) statutory authority or a release of fiduciary obligations by the organization that might eliminate the conflict of interest, or (2) a waiver of the requirements of § 208(a), pursuant to 18 U.S.C. § 208(b)." *Service on the Board of Directors of Non-Federal Entities by Federal Bureau of Investigation Personnel in Their Official Capacities*, 20 Op. O.L.C. 379, 379 (1996). You have asked whether there is statutory authority for employees of the State Department to serve on the boards of overseas schools, so that § 208 would not raise a bar.

By statute, the Secretary of State may, "in such manner as [she] deems appropriate and under such regulations as [she] may prescribe, establish, operate, and maintain primary schools, and school dormitories and related educational facilities for primary and secondary schools, outside the United States, make grants of funds for such purposes, or otherwise provide for such educational facilities." 22 U.S.C. § 2701 (1994). The Secretary has implemented this authority through regulation:

> The principal officer [at U.S. Missions abroad] designates an officer to be responsible for coordinating the post's interest in school activities. *If possible, the officer should be a member of the board*

> *of the local school receiving assistance.* When the administrative officer is personally responsible for administration of the grant, the administrative officer should not be a member of the school board.

2 FAM § 613 (TL: GEN-241; 8–26–86) (emphasis added). *See Kauffman v. Anglo-American School of Sofia*, 28 F.3d 1223, 1224 (D.C. Cir. 1994) (State Department employees serve on board of school).

In our view, the statute, as implemented in the regulation, authorizes official service on the boards of the schools. We recently observed that "Congress has enacted a variety of arrangements contemplating, directly or indirectly, that federal employees will participate in outside organizations, including by serving on their boards, and it would frustrate these arrangements if such service were considered a disqualifying 'director[ship]' under 18 U.S.C. § 208." *Application of 18 U.S.C. § 208 to Service by Executive Branch Employees on Boards of Standard-Setting Organizations*, 22 Op. O.L.C. 210, 211 (1998) (citation omitted). Therefore, if "Congress has specifically provided for participation in outside organizations and such participation, to carry out the statutory purposes, entails service on a board, statutory authorization may be inferred." *Id.* Here, Congress has enabled the Secretary to "operate" schools or "otherwise provide for such educational facilities" abroad "in such manner as [she] deems appropriate and under such regulations as [she] may prescribe." 22 U.S.C. § 2701. Congress thus has vested a wide authority in the Secretary to direct employees of the State Department to take part in the management of overseas schools, and the Secretary has carried out this authority by issuing a regulation expressly permitting service on outside boards. Under these circumstances, it would "frustrate [the] arrangements" enacted by Congress to read § 208 as a bar to service on these boards.

BETH NOLAN
Deputy Assistant Attorney General
Office of Legal Counsel

Disclosure to the Government, During the Guilt Phase of a Trial, of the Results of a Court-Ordered Mental Examination

The Fifth Amendment privilege against self-incrimination does not prohibit disclosure to the government, during the guilt phase of a trial, of the results of a court-ordered mental examination.

September 21, 1998

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

This memorandum responds to the Criminal Division's request for our opinion whether certain limitations on the disclosure of results of a court-ordered mental examination in a capital case are required to protect a defendant's Fifth Amendment privilege against compelled self-incrimination. In particular, the limitations would prevent disclosure, during the guilt phase of a capital trial, of the results of a mental examination ordered upon a defendant's notice of intent to introduce evidence of a mental condition bearing upon sentencing. As discussed below, principally because the Fifth Amendment's privilege against self-incrimination protects against the prosecution's direct or indirect use of compelled statements in a criminal case, not against the prosecution's possession of or access to such statements, we do not believe that a rule lacking such limitations would be facially defective. Nevertheless, in any given case, adherence to such limitations may aid the prosecution in establishing that, during the guilt phase of a capital trial, it made no use of statements, or the fruits of statements, obtained through a court-ordered mental examination of the defendant.

I. Background

This memorandum supplements our earlier advice regarding proposed amendments to Rule 12.2 of the Federal Rules of Criminal Procedure. *See* Memorandum for John C. Keeney, Acting Assistant Attorney General, Criminal Division, from Todd David Peterson, Deputy Assistant Attorney General, Office of Legal Counsel, *Proposed Revisions to Rule 12.2* (Apr. 20, 1998). The Advisory Committee on Criminal Rules has voted to approve in concept two amendments to Rule 12.2. The first would clarify that Rule 12.2(c) empowers a district court to order a mental examination of a defendant who gives notice under Rule 12.2(b) of an intent to offer expert testimony relating to a mental condition bearing on the issue of guilt. The second would amend Rules 12.2(b) and 12.2(c) to require reasonable notice to the government when the defendant in a capital case intends to offer expert testimony on a mental condition relevant to the issue of capital punishment and to allow the court to require the defendant to submit to a mental examination when such notice is given. The Department of Justice offered amend-

atory language for consideration at the Advisory Committee's April 27–28, 1998, meeting.[1] *See* Letter for David A. Schlueter, Professor of Law, St. Mary's University School of Law, from Mary Frances Harkenrider, Counsel to the Assistant Attorney General, Criminal Division and Roger A. Pauley, Director of Legislation, Office of Policy and Legislation, Criminal Division at 1–2 (Dec. 8, 1997) (''Criminal Division Letter'').

In our previous advice concerning the proposed amendments, we concluded (1) that the prosecution's use of evidence from a compelled psychiatric examination to rebut a defendant's testimony on mental status would not infringe a defendant's Fifth Amendment privilege against self-incrimination; and (2) that a federal court can constitutionally compel such an examination upon the defendant's filing of a notice to present evidence bearing upon guilt or capital sentencing, so long as the results of the examination are used solely in rebuttal and properly limited to the issue raised by the defense. We observed that current Rule 12.2(c) expressly meets this requirement: It provides that no statement made by the defendant during a court-compelled examination, no expert testimony based on the statement, and no other fruits of the statement shall be admitted in evidence against the defendant ''except on an issue respecting mental condition on which the defendant has introduced testimony.'' We noted that proposed Rule 12.2(c) included an additional safeguard for cases in which a capital defendant provides notice of intent to introduce expert testimony concerning a mental condition bearing upon sentencing: Amended Rule 12.2(c) generally would prohibit the disclosure of the results of a court-compelled examination to any attorney for the government ''unless and until the defendant is found guilty of one or more capital crimes and confirms

[1] The Department's proposed rule is set forth below (with new matter italicized):

Rule 12.2

(b) Expert Testimony of Defendant's Mental Condition. If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition bearing upon *(1)* the issue of guilt *or (2) whether in a capital case, a sentence of capital punishment should be imposed,* the defendant shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate

(c) Mental Examination of Defendant. In an appropriate case *pursuant to statutory authority or in which notice by the defendant has been given under subdivision (a) or (b),* the court may, upon motion of the attorney for the government, order the defendant to submit to an examination *The examination shall be conducted* pursuant to 18 U S.C 4241 *et seq or, in a case involving notice under subdivision (b), as otherwise ordered by the court The results of an examination conducted solely pursuant to notice under subdivision (b)(2) shall not be disclosed to any attorney for the government unless and until the defendant is found guilty of one or more capital crimes and confirms his or her intent to offer mental condition evidence in mitigation at the sentencing phase, except that such results may be earlier disclosed to an attorney for the government if the court determines (1) such attorney is not, and will not communicate the results to, an attorney responsible for conducting the prosecution on the issue of guilt, or (2) such disclosure will not tend to incriminate the defendant on the issue of guilt* No statement made by the defendant in the course of any examination provided for by this rule, whether the examination be with or without the consent of the defendant, no testimony by the expert based upon such statement, and no other fruits of the statement shall be admitted in evidence against the defendant in any criminal proceeding except on an issue respecting mental condition on which the defendant has introduced testimony

his or her intent to offer mental condition evidence in mitigation at the sentencing phase." Criminal Division Letter at 2. Disclosure before the defendant is found guilty would be permitted, however, if the district court determines (1) that the attorney for the government "is not, and will not communicate the results to, an attorney responsible for conducting the prosecution on the issue of guilt" or (2) that disclosure "will not tend to incriminate the defendant on the issue of guilt." *Id.* Our previous memorandum expressed no view on whether these disclosure limitations are constitutionally required. Following the April 27–28 meeting of the Advisory Committee, you asked us to consider whether these disclosure limitations are necessary to protect a defendant's Fifth Amendment privilege against self-incrimination.

II. Discussion

As noted, current Rule 12.2(c) provides that no statement made by the defendant during a court-compelled examination, no expert testimony based on the statement, and no other fruits of the statement shall be admitted in evidence against the defendant "except on an issue respecting mental condition on which the defendant has introduced testimony." There appears to be no proposal to eliminate this provision. Accordingly, for all cases in which the court is authorized to order an examination of the defendant—including, under the proposed amendment, cases involving a capital defendant who intends to introduce mental health evidence solely at sentencing—proposed Rule 12.2(c) would prohibit the use at trial of a defendant's statement or its fruits, except in rebuttal to the defendant's presentation of evidence. The question, then, is whether the defendant's Fifth Amendment privilege against self-incrimination protects against *more* than the prosecution's use at trial of the defendant's statement or its fruits—that is, whether the defendant's Fifth Amendment privilege protects against the prosecution's mere possession of or access to the results of a court-ordered mental examination.

A.

For purposes of this section, we assume that any waiver of a defendant's privilege against self-incrimination occurs when the defendant in fact introduces mental status testimony, rather than when the defendant gives notice of an intent to do so. On this theory, the statements the defendant makes at a pretrial court-ordered examination are in some sense "compelled." *Kastigar v. United States*, 406 U.S. 441 (1972), the leading Supreme Court case on the constitutionality of the federal witness immunity statute, 18 U.S.C. § 6002 (1994), offers some guidance on the extent to which the prosecution may make use of compelled statements. Under § 6002, a court may compel a witness to testify over a claim of the privilege against self-incrimination, "but no testimony or other information compelled

under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." *Id.* at 448–49. In *Kastigar*, the petitioners, individuals found in contempt of court for failing to testify before a grand jury after the district court ordered them to testify under a grant of immunity pursuant to § 6002, claimed that their refusal to comply with the district court's order was justified by the fact that the statute's grant of immunity was not coextensive with the Fifth Amendment privilege against self-incrimination. The Court rejected this claim:

> The statute's explicit proscription of the use in any criminal case of "testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information)" is consonant with Fifth Amendment standards. We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. . . . [The] sole concern [of the privilege] is to afford protection against being "forced to give testimony leading to the infliction of penalties affixed to . . . criminal acts." Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection.

Kastigar, 406 U.S. at 453 (second ellipsis in original) (footnote omitted). The language of *Kastigar* thus suggests that an infringement of the Fifth Amendment privilege against self-incrimination occurs not by virtue of the prosecution's mere possession of or access to compelled testimony, but by the "use and derivative use" of such compelled testimony. Indeed, in dictum in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), the Court relied on this passage in *Kastigar* to distinguish between the operation of the Fifth Amendment's privilege against self-incrimination and the Fourth Amendment's prohibition on unreasonable searches and seizures: "Although conduct by law enforcement officials prior to trial may ultimately impair [the defendant's privilege against self-incrimination], a constitutional violation occurs only at trial. The Fourth Amendment functions differently. It prohibits unreasonable searches and seizures whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is fully accomplished at the time of an unreasonable governmental intrusion." 494 U.S. at 264 (internal quotation marks and citation omitted).[2]

[2] In the recent case of *United States v Balsys*, the Court assumed for purposes of its analysis that the Fifth Amendment protects "against the Government's very intrusion through involuntary interrogation" 524 U S 666, 691 (1998). The Court rejected a defendant's claim that such protection is unconditional and therefore prevents the government from interrogating one who fears prosecution abroad In connection with its assumption, however, the Court

Continued

The Fifth Circuit recently recognized this distinction between a prosecutor's permissible access to compelled information and the unconstitutional use of such information against a defendant at trial. In *United States v. Hall*, 152 F.3d 381 (5th Cir. 1998), *cert. denied*, 526 U.S. 1117 (1999), the district court required a capital defendant to submit to a psychiatric examination by the government if the defendant wished to present his own psychiatric evidence in mitigation of punishment. Hall claimed on appeal that the district court should not have required him to submit to the government's examination absent an order denying the prosecution access to the results of the examination by requiring that those results remain under seal until the trial's penalty phase, noting that such a safeguard had been imposed in previous cases. *Id.* at 399 (citing *United States v. Beckford*, 962 F. Supp. 748, 761 (E.D. Va. 1997); *United States v. Haworth*, 942 F. Supp. 1406, 1408–09 (D.N.M. 1996); *United States v. Vest*, 905 F. Supp. 651, 654 (W.D. Mo. 1995)). The Fifth Circuit rejected the claim. While the court acknowledged that requiring that the results of a mental examination remain under seal until the penalty phase served "interests of judicial economy" by making it unnecessary for the court to determine whether the prosecution had made use of that material, it nonetheless concluded that "such a rule is not constitutionally mandated." *Id.* The court based this conclusion in part on the fact that the current version of Rule 12.2—which protects a defendant who is compelled to undergo a psychiatric examination by prohibiting the government from introducing the results of the examination as evidence before the defendant actually places his sanity in issue but does not forbid the prosecutor to obtain access to the results before that time—has "consistently been held to comport with the Fifth Amendment." *Id.* at 400 (citing *United States v. Lewis*, 53 F.3d 29, 35 n.9 (4th Cir. 1995); *United States v. Stockwell*, 743 F.2d 123, 127 (2d Cir. 1984)).

Similarly, several courts of appeals have considered, in the context of civil suits against state or local officials, whether use of a compelled statement in a criminal proceeding is a necessary element of a claimed infringement of the privilege against self-incrimination. The weight of authority suggests that, to claim a violation of the privilege, a plaintiff must allege the use of a statement in a criminal proceeding. *See Riley v. Dorton*, 115 F.3d 1159, 1164 (4th Cir.) ("[F]ollowing the plain text of the Amendment that '[n]o person . . . shall be compelled in any criminal case to be a witness against himself,' most courts refuse to find a Fifth Amendment violation even where statements were made, but were not actually used in a criminal proceeding" (alterations in original)), *cert. denied*, 522 U.S. 1030 (1997); *Weaver v. Brenner*, 40 F.3d 527, 535–36 (2d Cir. 1994) (rejecting the view that act of compelling a statement from the defendant is alone sufficient to state a Fifth Amendment violation; adopting view that "use of the

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acknowledged and did not question *Verdugo-Urquidez*'s statement that a violation of the privilege against self-incrimination occurs at trial, not when the testimony is taken. *Id.* at 692 n.12. Accordingly, we do not take the Court's discussion in *Balsys* to cast doubt upon *Kastigar*'s focus on use and derivative use of compelled testimony in a criminal case or upon the Court's reliance upon this focus in *Verdugo-Urquidez*.

compelled statements against the maker in a criminal proceeding'' and finding that statements were improperly used before the grand jury (internal quotation marks and citation omitted)); *Mahoney v. Kesery*, 976 F.2d 1054, 1061 (7th Cir. 1992) (''Fifth Amendment does not forbid the forcible extraction of information but only the use of information so extracted as evidence in a criminal case'' (citation omitted)); *Davis v. City of Charleston*, 827 F.2d 317, 322 (8th Cir. 1987) (finding no Fifth Amendment violation where suspect's statements were not used against her during trial). The Ninth Circuit alone has held otherwise. *See Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir.) (en banc) (holding that § 1983 claim for infringement of privilege against self-incrimination was stated by allegations that the plaintiff's statements were compelled, although the statements were never used), *cert. denied*, 506 U.S. 953 (1992). *See generally Guiffre v. Bissell*, 31 F.3d 1241, 1256 (3d Cir. 1994) (in qualified immunity context, concluding that plaintiff's Fifth Amendment claim against county officers who interrogated him did not rely on clearly established law; noting that the Ninth Circuit ''broke new ground'' in *Cooper* and that ''[t]he dissenting judges in *Cooper* presented a persuasive argument that the Fifth Amendment privilege against self-incrimination is not violated until evidence is admitted in a criminal case''); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 Mich. L. Rev. 907, 921 (1989) (arguing that ''unlike fourth amendment rights, fifth amendment rights are not violated unless and until the statement is used against the person making it'').

If a violation of a defendant's Fifth Amendment privilege against self-incrimination occurs through the use in a criminal case of the defendant's compelled statements or the fruits of such statements, it follows that a limitation on the use of statements obtained through a court-ordered mental examination of the defendant, or the fruits of such statements, is sufficient to protect the Fifth Amendment interests of a defendant who intends to raise a mental status defense. Put another way, even if statements made at a court-ordered mental examination following a notice of intent to introduce mental status evidence are properly viewed as ''compelled'' statements, it is the prosecution's *use* of such statements or their fruits at a criminal proceeding, not the fact that such statements were acquired or the prosecution's mere possession of them, that triggers any infringement of the defendant's Fifth Amendment privilege against self-incrimination.

We note that there is presently some tension among the circuits on a related issue that arises in connection with § 6002: whether the statute and the Fifth Amendment's privilege against self-incrimination prohibit so-called ''nonevidentiary'' uses of compelled testimony. Courts' treatment of this question may reflect how expansively they define the category of nonevidentiary uses. At least four courts of appeals have concluded that the Fifth Amendment privilege against self-incrimination does not prohibit nonevidentiary uses of compelled testimony,

where nonevidentiary use is described essentially as use by the prosecution in shaping its general trial strategy.[3] Other circuits, discussing an arguably broader category of possible nonevidentiary uses, have held that the Fifth Amendment bars such uses.[4]

We do not believe that cases concerning nonevidentiary uses of immunized testimony call into question the conclusion that the prosecution's possession of or access to statements obtained through a mental health examination ordered pursuant to Rule 12.2 is permissible under the Fifth Amendment. No court has held that the mere knowledge by the prosecution of compelled statements violates the Fifth Amendment. Any disagreement within the case law on what constitutes an impermissible "use" of a compelled statement does not bear upon the constitutional question whether a prosecutor may gain access to the results of a court-ordered psychiatric examination before the defendant seeks to place his mental condition in issue at trial. Rather, the conflicting authority bears upon whether a restriction on the prosecution's access should be adopted as a matter of policy. In those jurisdictions in which the tangential, nontestimonial "use" of compelled statements is deemed to violate the Fifth Amendment, the fact that a prosecutor has not had access to the results of a court-ordered examination will plainly make it easier to prove that the results of the examination have not been put to any improper use. *See Hall*, 152 F.3d at 399. In contrast, as a practical matter, a prosecutor who has had such access may be unable to prove that no improper use occurred.

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[3] *See United States v Serrano*, 870 F 2d 1, 17–18 (1st Cir 1989) (rejecting the view that Fifth Amendment is violated "merely because the immunized testimony might have tangentially influenced the prosecutor's thought processes in preparing the indictment and preparing for trial" (internal quotation marks omitted)), *United States v Mariani*, 851 F 2d 595, 601 (2d Cir. 1988) (tangential influence of immunized testimony on trial preparation does not constitute an impermissible use, "In view of the government's convincing proof that the evidence upon which it based its prosecution of Mariani came from legitimate independent sources, we cannot see how the government prosecutors' knowledge of Mariani's immunized testimony could be considered an impermissible use of that testimony "), *cert denied*, 490 U.S 1011 (1989), *United States v Velasco*, 953 F 2d 1467, 1474 (7th Cir 1992) (assuming that prosecution used defendant's proffer of testimony, made pursuant to an agreement under which government could not use the proffer against the defendant, "to shape [its] trial strategy," but concluding that *Kastigar* does not prohibit such use "[M]ere tangential influence that privileged information may have on the prosecutor's thought process in preparing for trial is not an impermissible 'use' of that information "), *United States v Byrd*, 765 F 2d 1524, 1531 (11th Cir 1985) (examining whether "advertent[ ] or inadvertent[ ] benefit" that prosecutor would derive "by virtue of consulting with investigative agents or others who have been exposed to the immunized testimony during the course of the . . investigation" would constitute an improper use under *Kastigar*; concluding that "a violation of the privilege against self-incrimination would not occur in any event unless such 'use' of the immunized testimony resulted in the introduction of evidence not obtained wholly from independent sources"); *see also United States v. Crowson*, 828 F.2d 1427, 1431–32 (9th Cir. 1987) (declining to decide whether nonevidentiary use comes within the prohibition of § 6002, but suggesting that, so long as government proves a prior, independent source for its evidence, any nonevidentiary use will be harmless), *cert denied*, 488 U S 831 (1988)

[4] *See United States v McDaniel*, 482 F 2d 305, 311 (8th Cir 1973) (reasoning that prosecutor's exposure to immunized testimony could assist the prosecutor in "focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy"; finding such uses impermissible), *United States v Semkiw*, 712 F 2d 891, 894 (3d Cir 1983) (following *McDaniel*); *see also United States v North*, 910 F 2d 843, 856 (D C. Cir.) (discussing tension among circuits on whether nonevidentiary uses of immunized testimony are permissible, assuming without deciding that such uses are impermissible), *modified in part*, 920 F 2d 940 (D C. Cir 1990), *cert. denied*, 500 U S 941 (1991)

In sum, because the Fifth Amendment privilege against self-incrimination protects against the use in a criminal case of a defendant's compelled statements or the fruits of such statements, not against the prosecution's mere possession of or access to such statements, a limitation on the use of statements obtained through a court-ordered mental examination of the defendant, or the fruits of such statements, is sufficient to protect the Fifth Amendment interests of a defendant who intends to introduce testimony on mental status. A rule lacking safeguards restricting the prosecution's access to the results of a court-ordered mental examination would not appear to be facially invalid under the Fifth Amendment.

B.

The conclusion that a rule lacking safeguards restricting the prosecution's access to the results of a court-ordered mental examination would not be facially defective under the Fifth Amendment does not necessarily end the inquiry. In any given case, adherence to safeguards such as those proposed in Rule 12.2(c) may aid the prosecution in establishing that, during the guilt phase of a capital trial, it made no use of statements, or the fruits of statements, obtained through a court-ordered mental examination of the defendant in connection with a notice of intent to introduce mental status testimony at sentencing. The importance of such safeguards depends largely on what kind of burden a court would place upon the prosecution in connection with a defendant's claim that the prosecution directly or indirectly used statements to which it was exposed by virtue of the sentencing-related mental examination.

The Fifth Circuit's analysis in *Hall* provides some guidance on this question. In *Hall*, the defendant claimed that an order sealing the results of the court-ordered mental examination was required to protect his Fifth Amendment privilege against self-incrimination. Otherwise, the defendant argued, "he could have no guarantee that the government would not utilize the results of the examination or the fruits thereof as evidence in the guilt phase of his trial." 152 F.3d at 399. In rejecting this claim, the Court of Appeals concluded that a defendant contending that there had been improper use of the fruits of a mental examination " 'must go forward with specific evidence demonstrating taint,' upon which the government 'has the ultimate burden of persuasion to show that its evidence is untainted.' " *Id.* (quoting *Alderman v. United States*, 394 U.S. 165, 183 (1969)). This evidentiary framework, the court concluded, "provides all of the protection against the introduction of the fruits of the government psychiatric examination prior to Hall's introduction of psychiatric evidence that the Constitution requires." *Id.*

In theory, the requirement that the defendant provide "specific evidence demonstrating taint" before the government is put to the burden of establishing that its evidence is untainted would distinguish cases involving prosecution access to a court-ordered mental examination from cases involving prosecution access to

immunized testimony. Under *Kastigar*, a defendant "need only show that he has testified under a grant of immunity [to matters related to the charges in the case] to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." 406 U.S. at 461–62; *see id.* at 460 ("A person accorded [use and derivative-use] immunity . . . and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. . . . '[T]he [prosecuting authorities] have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.' This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.") (citations omitted). To the extent that *Kastigar* requires the government to bear the "heavy burden" of establishing the sources of its evidence upon a relatively low threshold showing by the defendant, a policy preventing a prosecutor handling a particular criminal case from obtaining access to previous immunized testimony might be desirable because it would help the government in making the required showing. If a defendant who undergoes a court-ordered mental examination must make a higher threshold showing before the government is required to demonstrate an independent source for its evidence, a policy insulating a prosecutor from the results of the examination may take on less importance.

Hall appears to be the sole case directly addressing the proper evidentiary framework for a capital defendant's claim that the prosecution has improperly used the fruits of a court-ordered mental examination during the guilt phase of the trial. A handful of district courts have in capital cases imposed safeguards to ensure that the prosecution does not acquire the results of a mental health examination prior to the jury's verdict in the guilt phase, although it is unclear whether those safeguards were imposed for constitutional or prudential reasons. *See Beckford*, 962 F. Supp. at 764 (requiring the submission of results of examination under seal; "The results of any examination by the Government experts and the defense experts shall be released to the Government only in the event that the jury reaches a verdict of guilty on a capital charge as to that defendant, and only after that defendant confirms his intent to offer mental health or mental condition evidence in mitigation.") (footnote omitted); *Haworth*, 942 F. Supp. at 1408 (ordering that results of independent examination be filed under seal and released only after jury reaches guilty verdict); *Vest*, 905 F. Supp. at 654 (ordering that the results of mental health examination be released to the government "at the Court's discretion, and only in the event that the jury reaches a verdict of guilty as to that defendant"). One of these courts justified its order in part on the fact that "[m]aking the report of the examination available to the prosecution before [the] conclusion of the guilt phase would . . . lead to difficult problems respecting

the source of prosecution evidence and questioning in the guilt phase." *Beckford*, 962 F. Supp. at 762 n.11.

It is difficult to predict whether other courts will adopt the evidentiary framework that the Fifth Circuit found appropriate in *Hall*. The resolution of the issue may turn in part on the validity of an assumption made earlier in our discussion, that testimony provided at a court-ordered examination is "compelled" in the same sense as testimony given under a grant of use and derivative-use immunity. *See supra* p. 225. The Fifth Amendment problem would not arise if a court decided that a defendant's notice of an intent to introduce mental health evidence is similar to a defendant's notice that he will present an alibi defense: The information that the defendant is required to provide in connection with the notice is not properly viewed as "compelled." In *Williams v. Florida*, 399 U.S. 78 (1970), the Supreme Court upheld a Florida notice-of-alibi statute against a claim that the statute infringed the Fifth Amendment's privilege against self-incrimination. The Florida rule required the defendant to disclose to the prosecution the witnesses he proposed to use to establish his alibi defense. The Court reasoned that the information a defendant relying on a defense of alibi would ultimately have to reveal to carry the defense could not be viewed as "compelled" within the meaning of the Fifth Amendment (as applied to the states through the Fourteenth):

> The defendant in a criminal trial is frequently forced to testify himself and to call other witnesses in an effort to reduce the risk of conviction. . . . That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination. The pressures generated by the State's evidence may be severe, but they do not vitiate the defendant's choice to present an alibi defense and witnesses to prove it, even though the attempted defense ends in [a] catastrophe for the defendant. *However 'testimonial' or 'incriminating' the alibi defense proves to be, it cannot be considered 'compelled'* within the meaning of the Fifth and Fourteenth Amendments.

Id. at 83–84 (emphasis added). The Court attached no significance to the fact that the Florida notice-of-alibi rule required the defendant to disclose in advance of trial the witnesses he intended to use to establish the alibi defense:

> At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant

> as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense. . . . We decline to hold that the privilege against compulsory self-incrimination guarantees the defendant the right to surprise the State with an alibi defense.

Id. at 85–86. The *Williams* Court's conclusion that there is no constitutional significance to requiring that a defendant disclose, prior to trial, the information on which he will rely in his alibi defense suggests that the information the defendant must provide in connection with his alibi notice is not "compelled." By analogy, it could be argued that the testimony elicited at a court-ordered mental examination is not "compelled," because that examination simply provides information that the prosecution must necessarily acquire to have an opportunity to rebut a defense on which the defendant intends to rely.[5]

The analogy to notice-of-alibi cases is not perfect, however. What the defendant is required to provide to the prosecution in connection with his notice of alibi is the information that he will ultimately present at trial, if in fact he chooses to go through with an alibi defense. What the defendant provides during a court-ordered mental health examination may go beyond what he will ultimately present at trial, if in fact he chooses to go through with a mental status defense. Put another way, in a notice-of-alibi case, the information that the government acquires is consistent with the scope of the waiver of the defendant's self-incrimination privilege that will occur at trial if the defendant pursues an alibi theory. In a case involving notice of a mental status defense, even if the defendant introduces mental health evidence at trial and thereby waives his privilege against self-incrimination as to that evidence, the government may have acquired, through the examination, information that goes beyond the scope of the waiver. Moreover, it is unclear whether a court might distinguish the notice-of-alibi context on the ground that the government cannot be prejudiced at the guilt phase of a capital

[5] The Supreme Court's conclusion that the rule requiring a defendant to disclose alibi information does not "compel" the defendant to be a witness against himself within the meaning of the Fifth and Fourteenth Amendments, and the arguably analogous application in the context of psychiatric examinations under Rule 12.2, is not inconsistent with the ruling in *Estelle v Smith*, 451 U.S 454 (1981) In the latter case, the defendant was required to submit to a psychiatric exam without having been warned of his *Miranda* rights and without having placed his mental state, in issue The Court held that the introduction at the penalty phase of the defendant's statements during the examination violated the Fifth and Fourteenth Amendments In so ruling, the Court stated that "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id* at 468 This holding is consistent with the decision in *Williams* because in the context of the alibi rule—and, arguably, in the context of a mental examination under Rule 12 2—the defendant is deemed to make a voluntary disclosure in order to preserve his right to present certain evidence in his defense In *Estelle v Smith*, by contrast, the defendant did nothing to prompt the mental examination Indeed, the Supreme Court emphasized that the constitutional violation arose because the trial court had ordered the examination *sua sponte*, and it quoted with apparent approval the Fifth Circuit's acknowledgment of "the possibility that a defendant who wishes to use psychiatric evidence in his own behalf . can be precluded from using it unless he is [also] willing to be examined by a psychiatrist nominated by the state " 451 U S at 466 n 10 (quoting *Smith v Estelle*, 602 F 2d 694, 705 (5th Cir 1979)) (alteration in original)

case by the denial of access to information about the defendant's mental condition that would not be introduced, if at all, until the sentencing phase. Finally, we note that the Fifth Circuit's observation in *Hall* that the defendant "did not waive his Fifth Amendment privilege against self-incrimination merely by giving notice of his intention to submit expert psychiatric testimony at the sentencing hearing," 152 F.3d at 398, itself may be in tension with a conclusion that the analogy to the notice-of-alibi context is appropriate.

Even if the prosecution in a case involving a mental status defense acquires information going beyond the scope of the evidence that the defendant ultimately introduces, it is not clear that the government should, without a defendant providing specific evidence of taint, bear the burden of demonstrating an independent source for the evidence it seeks to present. In a *Kastigar*-type case, the prosecution, not the defendant, has set in motion the chain of events leading to the compelled testimony. The prosecution seeks an order granting immunity and compelling testimony over a claim of privilege, and the prosecution therefore bears the burden in a later criminal case of demonstrating that it has not improperly used the testimony. When a defendant seeks to introduce mental status evidence, the defendant, not the prosecution, has set in motion the chain of events leading to the court-ordered examination.[6] Even accepting the theory that testimony provided at a court-ordered examination is properly viewed as "compelled," to require the prosecution to establish an independent source for its evidence once a court-compelled examination occurs could lead to an odd result: A defendant could use a notice of an intent to introduce mental status evidence, coupled with a subsequent mental health examination, as a strategic device to put the prosecution to the burden of proving an independent source for its evidence, even though the defendant ultimately chooses not to introduce any mental status evidence at trial.

As this discussion suggests, it is difficult to predict with certainty (1) whether courts would treat statements made during a court-ordered mental examination related to sentencing as "compelled" statements; and (2) whether courts would impose upon the prosecution in a capital case a burden to demonstrate that it made no use of such statements during the guilt phase, without first requiring the defendant to come forward with specific evidence of taint. Safeguards such as those contained in proposed Rule 12.2 would, of course, aid the government

[6] The proposition that the defendant sets the process in motion is somewhat less obvious in a capital case where the defendant seeks to preserve the right to introduce psychiatric evidence only in mitigation of sentence in the event he is found guilty, a circumstance not addressed under the current rule. However, even in such circumstances, the psychiatric examination would be set in motion by virtue of the defendant's strategic choice rather than the prosecution's demand for affirmative evidence supporting a finding of guilt or of an aggravating sentencing factor. Further, as with the current version of Rule 12.2 as well as the alibi notice rule, the strategic choice the defendant must make is predicated on an assumption that the government's proof will suffice to support a finding of guilt. Therefore, we believe that there is no greater reason to impose the burden of proof on the government in a case where the defendant seeks to preserve his ability to introduce evidence of his mental condition only at the penalty hearing than there is in other cases where current law allows for a court-ordered psychiatric examination prior to trial.

in meeting a burden, similar to that imposed in *Kastigar*, to show that its case against the defendant is based on evidence obtained from independent sources.

We note, however, that a requirement that the prosecution establish in a capital case that it made no use of statements obtained through a court-ordered examination would be based on a theory that would apply equally in noncapital cases—that the defendant is at risk by virtue of the prosecution's access, prior to the defendant's presentation of mental status evidence, to the results of the examination of the defendant. For example, if a court orders a pretrial mental health examination based on a defendant's notice of intent to raise an insanity defense or a mental condition bearing on guilt, and the prosecution obtains the results of that examination, the prosecution may be exposed to the defendant's statements before the defendant presents his case and actually introduces testimony on mental condition. Cases discussing the Fifth Amendment implications of a court-ordered examination of defendants who intend to raise the insanity defense or to introduce testimony on a mental condition bearing upon guilt do not appear to suggest that the prosecution must, by virtue of its exposure to the defendant's statements, bear the burden of demonstrating an independent source for the evidence it intends to introduce against the defendant. *See, e.g., United States v. Byers*, 740 F.2d 1104, 1114–15 (D.C. Cir. 1984) (en banc) (plurality opinion of Scalia, J.) (rejecting dissenting judges' view that protection of self-incrimination privilege requires "intermediate safeguards" to "protect the values underlying the privilege" *id.* at 1155 (Bazelon, J., dissenting); concluding that "such fiats would be appended to, rather than contained within, the self-incrimination clause of the Fifth Amendment," *id.* at 1115); *see also Kelly v. Withrow*, 25 F.3d 363, 369 (6th Cir.) (holding that requirement that defendant submit to pretrial mental examination, following notice of intent to raise insanity defense, did not infringe defendant's privilege against self-incrimination; "[A] defendant's right not to incriminate himself is not violated per se by requiring him, in an appropriate case, to submit to a mental examination." (internal quotation marks omitted; alteration in original)), *cert. denied*, 513 U.S. 1061 (1994); *Giarratano v. Procunier*, 891 F.2d 483, 488 (4th Cir. 1989) (concluding that, since defendant had announced intention to introduce psychiatric evidence in mitigation at the sentencing phase of capital trial, prosecution could introduce psychiatric evidence even before defendant's expert testified), *cert. denied*, 498 U.S. 881 (1990); *Vardas v. Estelle*, 715 F.2d 206, 210 (5th Cir. 1983) (holding that introduction of evidence from pretrial mental examination did not infringe privilege against self-incrimination, where testimony of state psychiatrist was "offered solely in rebuttal to a defense of insanity, and . . . properly limited to that issue"), *cert. denied*, 465 U.S. 1104 (1984); *United States v. Madrid*, 673 F.2d 1114, 1121 (10th Cir.) (holding that admission of statements obtained during pretrial mental examination did not infringe defendant's privilege against self-incrimination where the defendant gave notice of his intent to raise the insanity defense before the examination occurred

and subsequently presented "substantial" psychiatric evidence), *cert. denied*, 459 U.S. 843 (1982). If a *Kastigar* burden applies to court-compelled mental examinations in capital cases, we believe that it would apply in other cases as well, but we have identified no noncapital cases concluding that it is appropriate to impose such a burden.

Conclusion

In sum, we do not believe that the Fifth Amendment's privilege against self-incrimination requires safeguards designed to prevent the prosecution from being exposed, during the guilt phase of a capital trial, to the results of a mental health examination ordered following a defendant's notice of intent to introduce evidence on a mental condition bearing upon sentencing. Even if statements made during such an examination are properly viewed as "compelled" statements, the Fifth Amendment's privilege against self-incrimination only precludes the prosecution from improperly using such statements, or the fruits of such statements, at trial. The prosecution's mere possession of or access to the results of the mental health examination would not implicate the Fifth Amendment's privilege against self-incrimination. It is unclear whether, in the absence of safeguards designed to withhold the results of a mental examination from the prosecution, a court would impose a burden on the prosecution to establish an independent source for its evidence without first requiring the defendant to demonstrate specific evidence of taint. Courts do not appear to impose such a burden outside of the capital context, even though the danger that the prosecution would directly or indirectly use statements provided during a mental health examination exists there as well. Nevertheless, if a court required the prosecution to establish that, at the guilt phase of a capital trial, it made no direct or indirect use of statements obtained through a sentencing-related mental examination of the defendant, the safeguards of proposed Rule 12.2(c) would facilitate the government's showing.

RANDOLPH D. MOSS
Acting Assistant Attorney General
Office of Legal Counsel

Lack of Authority of the Office of the United States Trade Representative to Represent Private Industry in Proceedings Before the United States International Trade Commission

The Office of the United States Trade Representative lacks authority under the Trade Act of 1974 or its own organic statute to provide legal representation to a private domestic industry in administrative proceedings before the United States International Trade Commission.

September 24, 1998

LETTER OPINION FOR THE DEPUTY GENERAL COUNSEL
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

This letter responds to your request for our opinion regarding the authority of the Office of the United States Trade Representative ("USTR") to provide legal representation to a private domestic industry in an administrative investigation before the United States International Trade Commission ("ITC").[1] Specifically, you have asked whether USTR attorneys may serve as legal counsel to a domestic industry in the context of an investigation to determine whether that industry is eligible for relief under section 202 of the Trade Act of 1974, as amended, 19 U.S.C. § 2252. We conclude that USTR is not authorized by the pertinent statutes to provide such representation.

Pursuant to 19 U.S.C. §§ 2251–2254 (1994), the President has the authority to take certain actions, including raising tariffs and imposing quotas, to benefit a domestic industry where the ITC determines that imports are a substantial cause of serious injury to the industry. Before such presidential action may be taken, the ITC must conduct an investigation (known as a "section 201 investigation"), make a determination that imports constitute a substantial cause (or threat) of serious harm to the industry, and recommend the action that would address the injury. *See id.* § 2252(a), (b), (e). In addition, with respect to any such determination by the ITC, an interagency trade organization chaired by the United States Trade Representative is directed to recommend "what action the President should take" to grant relief to the industry. *Id.* § 2253(a)(1)(C).

The statutory scheme providing for section 201 investigations and relief from import competition does not explicitly or implicitly provide for legal representation of a private domestic industry by USTR. Indeed, the specific roles that are mandated for USTR in that scheme make it clear that Congress did not contemplate such representation by USTR attorneys.

Under 19 U.S.C. § 2252(a)(1), a petition for relief may be filed with the ITC by "an entity, including a trade association, firm, certified or recognized union, or group of workers, which is representative of an industry." The statute directs

[1] Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Kenneth P Freiberg, Deputy General Counsel, Office of the United States Trade Representative (Sept 10, 1998)

that the ITC "shall promptly transmit copies of the petition to [USTR] and other Federal agencies directly concerned." *Id.* § 2252(a)(3). The petitioner may also submit to the ITC and USTR a plan to facilitate positive adjustment to import competition. *Id.* § 2252(a)(4). Before submitting such a plan, the petitioner and other entities representative of the industry may consult with USTR, or with any agency considered appropriate by USTR, to evaluate the adequacy of proposals in the plan. *Id.* § 2252(a)(5)(A). The statute directs USTR, upon receiving a request for such consultations, to "confer with the petitioner and provide such assistance, including publication of appropriate notice in the Federal Register, as may be practicable in obtaining other participants in the consultation." *Id.* § 2252(a)(5)(B). With respect to perishable agricultural and citrus products, petitioners may request USTR to make a provisional determination of injury due to imports, which triggers a request to the ITC for monitoring and investigation under a separate statute, 19 U.S.C. § 1332(g) (1994). *See id.* § 2252(d)(1).

The statutory scheme also mandates a specific role for the interagency trade organization established under 19 U.S.C. § 1872(a) (1994), the chairperson of which is the United States Trade Representative. Specifically, the statute provides that that organization shall, with respect to each determination of import injury by the ITC, "make a recommendation to the President as to what action the President should take." *Id.* § 2253(a)(1)(C). Among the factors that the President is to take into account in determining what action to take are various considerations involving the affected domestic industry, as well as considerations involving other industries, firms, and the U.S. economy generally. *See id.* § 2253(a)(2).

In short, the section 201 scheme gives USTR specific duties involving consultation with representatives of the affected industry and recommendations to the President as to what corrective action is appropriate. Because those statutory duties involve considerations beyond the interests of the industry, we believe that they are inconsistent with a role for USTR that would entail actual legal representation of the industry seeking relief. Moreover, neither this statute nor any other of which we are aware provides for dual roles for USTR that would include providing legal counsel for a private domestic industry in a section 201 proceeding.

Finally, nothing in USTR's organic statute, 19 U.S.C. § 2171 (1994), provides for this type of legal representation by USTR. Section 2171 sets forth the powers and duties of the United States Trade Representative—including developing, coordinating, and advising the President on international trade policy, conducting international trade negotiations, and issuing policy guidance to agencies on international trade—but does not include any power or duty that can be construed as a general authorization for providing the legal representation contemplated in your request.

For these reasons, we conclude that USTR is not authorized to have its attorneys serve as legal counsel to a private domestic industry in the context of a section 201 investigation.

RANDOLPH D. MOSS
Acting Assistant Attorney General
Office of Legal Counsel

The Authority of the Bureau of the Census to Adjust Population Data for Purposes Other Than Apportionment

The Commerce Department has the authority to use sampling and other recognized statistical procedures in order to correct the unadjusted population figures obtained in the decennial census for the year 2000, at least for purposes other than providing the basis for apportioning seats in the United States House of Representatives.

October 7, 1998

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF MANAGEMENT & BUDGET

You have asked for our opinion whether the Secretary of Commerce ("Secretary"), and the Secretary's subordinate, the Director of the Bureau of the Census, have the authority, under existing statutory law, to use sampling and other recognized statistical procedures in order to correct the unadjusted population figures obtained in the decennial census for the year 2000, at least for purposes other than providing the basis for apportioning seats in the United States House of Representatives. We believe that those officials have such authority.

Article I, Section 2, Clause 3, vests in Congress "virtually unlimited discretion in conducting the decennial 'actual Enumeration'" for which that Clause calls. *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996). "Through the Census Act, Congress has delegated its broad authority over the census to the Secretary. See 13 U.S.C. § 141(a)." *Id.* (footnote omitted). The Secretary's authority for establishing census procedures may be delegated to the Director of the Bureau of the Census. *See Franklin v. Massachusetts*, 505 U.S. 788, 792, *appeal dismissed*, 505 U.S. 1215 (1992).

The provision in the Census Act primarily governing the Secretary's conduct of the decennial census is 13 U.S.C. § 141 (1994) ("Population and other census information"). Subsection 141(a) provides in part (emphasis added):

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", *in such form and content as he may determine, including the use of sampling procedures and special surveys.*

Further, § 141(b) provides that "[t]he tabulation of total population by States under subsection (a) . . . as required for the apportionment of Representatives in Congress among the several States" is to be completed within nine months of the census date and reported to the President.

Although (as § 141(b) indicates) the "initial purpose" of the national decennial census was to provide a basis for apportioning seats in the House of Representatives among the States, "[t]he census today serves an important function in the allocation of federal grants to states based on population. In addition, the census also provides important data for Congress and ultimately for the private sector." *Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982). For example, "[t]he Federal Government considers census data in dispensing funds through federal programs to the States, and the States use the results in drawing intrastate political districts." *Wisconsin*, 517 U.S. at 5–6.[1]

The authority of the Secretary under § 141 over the procedures for conducting the census is unquestionably broad. *See Wisconsin*, 517 U.S. at 19; *Franklin*, 505 U.S. at 819 n.20 (Stevens, J., concurring) (§ 141(a) "gives the Secretary broad discretion with respect to the 'form and content' of the census"). As one appellate court has said:

> The Constitution directs Congress to conduct a decennial census, and the implementing statutes delegate this authority to the Census Bureau. U.S. Const. Art. I, § 2, cl. 3; 2 U.S.C. § 2a; 13 U.S.C. § 141. There is a little more to the statutes — they specify a timetable, and a procedure for translating fractional into whole seats — but they say nothing about how to conduct a census or what to do about undercounts.

Tucker, 958 F.2d at 1417.[2]

We recognize, of course, the disputed question whether 13 U.S.C. § 195 (1994) limits the authority of the Bureau to make statistical adjustments for the specific purpose of determining the population figures to be used in apportioning congressional seats. Section 195 ("Use of sampling") provides:

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[1] *See also* 13 U.S.C. § 141(e)(1) (requiring use of most recent data available from either decennial or mid-decade census for making eligibility determinations for federal grant programs based on taking account of data obtained in decennial census), *Franklin*, 505 U.S. at 814 (Stevens, J., concurring) ("[T]he census report is distributed to federal and state agencies because it provides the basis for the allocation of various benefits and burdens among the States under a variety of federal programs. The Secretary also transmits the census figures directly to the States to assist them in redistricting."); *Glavin v. Clinton*, 19 F. Supp. 2d 543, 550 (E.D. Va. 1998) (three-judge district court) ("[c]ourts recognize that there is a direct correlation between decennial census population counts and federal and state funding allocations"); *National Law Ctr. on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 183–84 (D.C. Cir. 1996) (plaintiffs "receive federal monies pursuant to a host of 'census-based' programs"); *City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993) ("many federal programs do disburse funds based upon population figures as reported in the decennial census"), *Tucker v. United States Dep't of Commerce*, 958 F.2d 1411, 1415 (7th Cir. 1992) ("the allocation of state and federal funds is heavily influenced by census figures"), *City of Willacoochee v. Baldrige*, 556 F. Supp. 551, 553 (S.D. Ga. 1983) (identifying two programs that "distribute benefits on the basis of population data supplied by the Census Bureau"); Jeffery S. Crampton, *Lies, Damn Lies and Statistics Dispelling Some Myths Surrounding the United States Census*, 1990 Det. C.L. Rev. 71, 87–91; Note, *Demography and Distrust: Constitutional Issues of the Federal Census*, 94 Harv. L. Rev. 841, 844–45 (1981).

[2] *See also City of Camden v. Plotkin*, 466 F. Supp. 44, 52–53 (D.N.J. 1978) (reviewing cases holding that there is only limited scope for judicial review of methods used by Bureau of Census).

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

This Office has followed several courts in concluding that § 195 does not bar the use of statistical adjustments even in determining the population count for use in apportionment. *See The Twenty-Second Decennial Census*, 18 Op. O.L.C. 184 (1994).[3] Two recent decisions, however, have held otherwise. *See Glavin*, 19 F.Supp. 2d at *550–53; United States House of Representatives v. United States Dep't of Commerce*, 11 F. Supp. 2d 76, 97–104 (D.D.C. 1998)(three-judge district court). The United States has appealed the latter of these two decisions to the Supreme Court, *see* Jurisdictional Statement, *United States Dep't of Commerce v. United States House of Representatives*, Sup. Ct. No. 98–404 (O.T. 1997), and we shall not address here the substantive question presented to the Court for review. The sole question we presently consider is whether, even if the "except" clause in § 195 limits the Secretary's authority to use statistically adjusted population figures for purposes of apportionment, §§ 141 and 195 otherwise authorize him to adjust such population data for all other purposes for which such data are used. In our opinion, the Secretary does possess such statutory authority under the Census Act.

First, the plain language of both § 141 and § 195 vests the Secretary with the authority to use methods of statistical adjustment in deriving final population figures. Section 141(a) authorizes theSecretary to "take a decennial census of population . . . *in such form and content as he may determine, including the use of sampling procedures and special surveys*" (emphasis added). Subsection 141(g) defines "census of population" to mean "a census of population, housing, and matters relating to population and housing." Thus, the Secretary is authorized to use techniques of statistical adjustment in determining population figures, as well as in collecting other types of information sought in the census. Similarly, the plain terms of § 195 affirmatively *direct* the Secretary to use sampling in "carrying out the provisions" of the Census Act "if he considers it feasible" to do so (again, with the arguable exception of apportionment). The provisions of the Act of course include the statutory charge to take a census *of the population.*

Even the two courts that have held that the "except" clause of § 195 limits the Secretary's authority under § 141 appear to acknowledge that the plain language of § 141 authorizes the Secretary to use sampling and other such statistical procedures in contexts other than apportionment. "A reading of the plain language

[3] *See also City of New York v United States Dep't of Commerce*, 34 F 3d 1114, 1124–25 (2d Cir 1994), *rev'd on other grounds sub nom*, *Wisconsin v City of New York*, 517 U.S 1 (1996); *Carey v. Klutznick*, 508 F. Supp 404, 415 (S.D N Y 1980), *City of Philadelphia v Klutznick*, 503 F Supp 663, 679 (E.D Pa 1980), *Young v Klutznick*, 497 F. Supp 1318, 1334–35 (E.D. Mich 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir 1981)

of Section 141 itself . . . establishes that Congress' intent was to authorize sampling for numerous purposes of the census other than congressional apportionment. . . . [T]he only plausible interpretation of the plain language and structure of the Act is that Section 195 prohibits sampling for apportionment *and Section 141 allows it for all other purposes.*" *Glavin*, 19 F. Supp. 2d at 551–53 (emphasis added). *See also United States House of Representatives*, 11 F. Supp. 2d at 104 ("sampling should be used *in any and all areas in which that use is legal and/or constitutional*, but . . . not . . . in . . . apportionment") (emphasis added)).

We note also that the House of Representatives takes the position that §§ 141 and 195 "indisputably permit (indeed, require) the use of sampling in the decennial census to collect a myriad of statistical data about our nation." Memorandum for Plaintiff United States House of Representatives in Support of its Motion for Summary Judgment, at 30, *United States House of Representatives v. United States Dep't of Commerce*, 11 F. Supp. 2d 76 (D.D.C. 1998). The House further argues that "[s]ection 141(a) gives the Secretary the general authority to use sampling and special surveys in the decennial census to collect data *respecting population* and housing. That section surely permits sampling in lieu of a complete enumeration for purposes other than apportionment." *Id.* at 37 (emphasis added).[4]

The legislative history of the provisions in question also supports the understanding advanced here. Consider first § 195. As originally enacted in 1957, § 195 authorized, rather than required, the use of sampling. *See* Pub. L. No. 85–207, § 14, 71 Stat. 481, 484 (1957) (Secretary "may, where he deems it appropriate, authorize . . . 'sampling' "); 18 Op. O.L.C. at 193–94. Congress amended the section in 1976 to *require* the Secretary to use sampling, whenever "feasible" (i.e., possible). *See* Pub. L. No. 94–521, § 10, 90 Stat. 2459, 2464 (1976); *City of New York*, 34 F.3d at 1125. The Conference Report states that the amendment "differ[ed] from the [original] provisions of section 195 which grant[ed] the Secretary discretion to use sampling when it [wa]s considered appropriate. The section, as amended, strengthens the congressional intent that, *whenever possible*, sampling shall be used." H.R. Conf. Rep. No. 94–1719, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5476, 5481 (emphasis added). *See also* S. Rep. No. 94–1256, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5463, 5468.

Section 141(a) was also amended by the same 1976 legislation. *See* Pub. L. No. 94–521, § 7(a), 90 Stat. at 2461. The amendatory language authorized the Secretary to take the decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." *Id.* The Senate Report on this amendment states that it was "added at the end of the subsection to encourage the use of sampling and surveys in the taking of the decennial census." S. Rep. No. 94–1256, at 4, *reprinted in* 1976 U.S.C.C.A.N. at 5466. More generally, in describing the purposes of the 1976 legislation as

[4] *See also United States House of Representatives*, 11 F. Supp. 2d at 103 (noting that the House views § 141(a) as conferring "broad authorization to use sampling in most aspects of data collection")

a whole, the Senate Report explained that one of its purposes was "to direct the Secretary of Commerce to use sampling and special surveys in lieu of total enumeration in the collection of statistical data whenever feasible." *Id.* at 1, *reprinted in* 1976 U.S.C.C.A.N. at 5464.

In light of the plain meaning of §§ 141 and 195, the judicial and congressional construction given to those sections, and the legislative history of the 1976 amendments to them, we conclude that they permit the Secretary to make statistical adjustment to an initial population count for — at least — all purposes other than providing the basis for apportionment.

In addition, we have reviewed the provisions of some 140 statutes that your Office advised us depend on population figures or census data for their implementation. We determined that nothing in the terms of any of these provisions prohibits the Bureau of the Census from using sampling in deriving population figures.

TODD D. PETERSON
Deputy Assistant Attorney General
Office of Legal Counsel

Presidential Determination Allowing Financial Assistance to Tibet

President Carter's 1980 Determination that financial assistance to the People's Republic of China would be in the national interest satisfies the requirements of section 2(b)(2) of the Export-Import Bank Act of 1945 and thus permits the Export-Import Bank to provide assistance to the region of Tibet, its provincial government, and its residents without any presidential action in addition to the prior determination made with respect to China.

November 6, 1998

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
EXPORT-IMPORT BANK

You have sought our advice regarding whether the Export-Import Bank may provide financial assistance to Tibetan entities in light of section 2(b)(2) of the Export-Import Bank Act of 1945 ("Act"), 12 U.S.C. § 635(b)(2) (1994). That section prohibits the Export-Import Bank ("Bank") from providing either direct or indirect financial assistance to a "Marxist-Leninist country, or agency or national thereof" and lists separately as such countries both the "People's Republic of China" ("China") and "Tibet." *Id.* The prohibition may be waived, however, whenever the President determines that assistance to a particular country would be in the national interest. *Id.* In 1980, President Carter made such a determination for assistance to China. *See* Pres. Determination No. 80–15, 45 Fed. Reg. 26,017 (1980) ("1980 Determination"). At that time, as now, the executive branch considered Tibet to be part of China.

Your inquiry raises the question whether a separate national interest determination needs to be made with respect to Tibet. We conclude that President Carter's 1980 Determination with regard to China satisfies the requirements of section 2(b)(2) with respect to both China and the region of Tibet and thus permits the Bank to provide direct or indirect assistance to the region of Tibet, its provincial government, and its residents.

I.

Section 2(b)(2) provides, in relevant part:

> The Bank in the exercise of its functions shall not guarantee, insure, extend credit, or participate in the extension of credit—(i) in connection with the purchase or lease of any product by a Marxist-Leninist country, or agency or national thereof; or (ii) in connection with the purchase or lease of any product by any other foreign country, or agency or national thereof, if the product to be pur-

> chased or leased by such other country, agency, or national is, to the knowledge of the Bank, principally for use in, or sale or lease to, a Marxist-Leninist country.

12 U.S.C. § 635(b)(2)(A). The section defines "Marxist-Leninist country" as "any country that maintains a centrally planned economy based on the principles of Marxism-Leninism, or is economically and militarily dependent on any other such country" and separately lists China and Tibet as two such countries. *Id.* § 635(b)(2)(B)(ii). The prohibition may be waived if the President determines either that "any country on the list . . . has ceased to be a Marxist-Leninist country," *id.* § 635(b)(2)(C), or that "guarantees, insurance, or extensions of credit by the Bank to a [Marxist-Leninist] country, agency or national . . . are in the national interest," *id.* § 635(b)(2)(D). A separate national interest determination must be made for each transaction for which the Bank would extend a loan in an amount equal to or in excess of $50 million. *Id.* All determinations must be reported to Congress. *Id.*

Pursuant to section 2(b)(2) of the Act, on April 2, 1980, President Carter determined that "it is in the national interest for the [Bank] to guarantee, insure, extend credit and participate in the extension of credit in connection with the purchase or lease of any product or service by, for use in, or for sale or lease to, the People's Republic of China." 1980 Determination.[1] The 1980 Determination continues in effect today for financial assistance to China other than loans of $50 million or more. When the Act was amended in 1986, the Conference Report explained that no new national interest determination would be needed for any country for which a general national interest determination had already been made. *See* H.R. Conf. Rep. No. 99–956, at 5 (1986) (Joint Explanatory Statement of the Committee of Conference), *reprinted in* 1986 U.S.C.C.A.N. 2472, 2473.

At the time President Carter made the 1980 Determination with respect to China, the official position of the executive branch was that Tibet is part of China. *See* Memorandum for Caroline Krass, Attorney-Adviser, Office of Legal Counsel, from Mary Comfort, Attorney-Adviser, Office of the Legal Adviser, Department of State (Oct. 16, 1998) ("State Memorandum"). In view of this underlying understanding, when President Carter determined that it was in the national interest

[1] Subsequent to the 1980 Determination, Presidents have repeatedly determined that it is in the national interest for the Bank to provide loans in excess of $50 million to China with regard to various projects. *See, e.g.*, Pres. Determination No. 81–12, 46 Fed. Reg. 45,927 (1981), Pres Determination 82–19, 47 Fed. Reg. 39,655 (1982); Pres Determination 88–11, 53 Fed Reg. 9423 (1988), Pres. Determination 88–25, 53 Fed Reg. 40,013 (1988); Pres Determination 96–37, 61 Fed Reg. 36,989 (1996), Pres. Determination 96–38, 61 Fed. Reg 36,991 (1996), Pres Determination 97–2, 61 Fed. Reg 59,805 (1996), Pres Determination 97–3, 61 Fed. Reg 59,807 (1996); Pres Determination 97–36, 62 Fed Reg 52,475 (1997) No President has issued a specific national interest determination for Tibet under section 2(b)(2), and any assistance from the Bank to the region of Tibet, its provincial government, or its residents in the form of a loan equal to or in excess of $50 million would require a new presidential determination under section 2(b)(2) *See* 12 U S C § 635(b)(2)(D)(ii).

for the Bank to provide assistance to China, he thereby determined that it was in the national interest for the Bank to provide assistance to Tibet.[2]

II.

Section 2(b)(2) clearly requires that, before the Bank may grant direct or indirect assistance to Tibet, its provincial government, or its residents, the President must make a determination either that such assistance is in the national interest, or that Tibet "has ceased to be a Marxist-Leninist country." 12 U.S.C. § 635(b)(2)(C), (D). As noted above, in 1980 President Carter made a national interest determination with respect to China, and at that time and since then, the United States has recognized China to include Tibet. *See* State Memorandum. In light of this history, we must consider whether President Carter's 1980 Determination is adequate to satisfy the requirements of section 2(b)(2) or whether Congress has required a separate Presidential determination regarding Tibet.

At the outset, we note that, particularly when considered in light of the relevant factual background, the statutory reference to the "Marxist-Leninist country" of Tibet is unclear. At the time of the 1980 Determination, as now, the official position of the executive branch was that there is no "country" of Tibet because the boundaries of China include Tibet. *See* State Memorandum. In addition, as a matter of actual governance, Tibet was and continues to be part of China. *See id.* "Tibetans hold Chinese passports, are represented in the National People's Congress (the national legislative body of China), and in every other respect are subject to Chinese rule." *Id.* Moreover, to the extent that some might argue that Tibet qualifies as an independent politically-defined "country," the argument presumably also would be that the leadership of that country would consist of the Dalai Lama and his supporters. To our knowledge, however, the Dalai Lama

[2] Subsequent to the 1980 Determination, the executive branch has consistently embraced the position that Tibet is part of China, rather than an independent foreign state. *See* The President's News Conference with President Jiang Zemin of China in Beijing, 1 Pub. Papers of William J. Clinton 1069, 1075 (1998) (expressing President Clinton's "agree[ment] that Tibet is a part of China, an autonomous region of China"); The President's News Conference with President Jiang Zemin of China, 2 Pub. Papers of William J. Clinton 1445, 1452 (1997) (expressing United States commitment that there will be "no attempt to sever Tibet from China"); Department of State, 105th Cong., *Country Reports on Human Rights Practices for 1996*, at 640 (Joint Comm. Print 1997) ("The United States recognizes the Tibet Autonomous Region . . . to be part of the People's Republic of China."); *Human Rights in Tibet: Hearing Before the Subcomms. on Human Rights and International Organizations, and on Asian and Pacific Affairs of the House Comm. on Foreign Affairs*, 100th Cong. 33 (1987) (statement of Ambassador J. Stapleton Roy, Deputy Assistant Secretary of State) ("[T]he United States Government considers Tibet to be a part of China and does not in any way recognize the Tibetan government in exile that the Dalai Lama claims to head."); Statement on Signing the Export-Import Bank Act Amendments of 1986, 2 Pub. Papers of Ronald Reagan 1390, 1391 (1986) ("1986 Signing Statement") ("The United States recognizes Tibet as part of the People's Republic of China.")

Congress, however, has at times expressed a different perspective. *See* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103–236, § 536, 108 Stat. 382, 481 (1994) ("Because Congress has determined that Tibet is an occupied sovereign country under international law," Congress has imposed a reporting requirement on the Secretary of State regarding, *inter alia*, the state of relations between the United States and "those recognized by Congress as the true representatives of the Tibetan people."), *see also* Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102–138, § 355, 105 Stat. 647, 713 (1991) ("It is the sense of the Congress that . . . Tibet . . . is an occupied country under the established principles of international law [and] Tibet's true representatives are the Dalai Lama and the Tibetan Government in exile as recognized by the Tibetan people . . . .")

and his supporters have never espoused Marxist-Leninist principles. *Id.* These countervailing concerns—indicating, on one hand, that Tibet is not a polity and, on the other, that if it were regarded as a polity it would not be Marxist-Leninist polity—make it difficult to interpret what the reference to the "Marxist-Leninist country" of Tibet means.

One possible reading that could be offered to resolve this problem is that Congress intended the term "country" in section 2(b)(2) to refer, not to polities, but to particular geographically-defined regions of the world, of which Tibet is one. If this were the best reading of the statute, a separate presidential determination would be necessary before financial assistance could be provided to the region of Tibet. We believe, however, that this reading of the provision is at odds with the statutory text and cannot be accepted. Section 2(b)(2) defines the term "Marxist-Leninist country" to mean "any country that maintains a centrally planned economy based on the principles of Marxism-Leninism, or is economically and militarily dependent on any other such country." 12 U.S.C. § 635(b)(2)(B)(i), (ii). This definition seems more consistent with a notion of politically-defined nations than geographically-defined regions. Only a polity, not a region, "maintains a centrally planned economy based on the principles of Marxism-Leninism." *Id.* The prohibition in section 2(b)(2) on assistance to any "national" of a Marxist-Leninist country also supports this interpretation. The term "national" indicates a political relationship with, and an obligation of permanent allegiance to, a nation. *See* Webster's Third New International Dictionary 1505 (1986) (defining "national" as "one that owes permanent allegiance to a nation without regard to place of residence or to possession of a more formal status (as that of citizen or subject)").

Textual analysis, then, indicates that the word "country" is best read to mean "polity." Given this reading of "country," interpreting section 2(b)(2) to require the issuance of a separate national interest determination for Tibet would raise the issue of the President's recognition power, which derives from the President's textually-committed powers to appoint ambassadors and to receive ambassadors and other public ministers. U.S. Const. art. II, §§ 2, 3; *see also Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994) ("President's power to recognize foreign governments is implicit in Sections 2 and 3 of Article II"). The President's recognition power is exclusive. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) ("Political recognition is exclusively a function of the Executive."); *Goldwater v. Carter*, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting) ("Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes."). It includes both the authority to recognize and the authority to refuse recognition to a foreign state or government. *See The Maret*, 145 F.2d 431, 442 (3d Cir. 1944) (President's recognition power includes authority to adopt a policy of non-recognition of a foreign sovereign); Restatement (Third) of the Foreign Relations

Law of the United States § 204 (1987) ("[T]he President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government."); *cf. Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg and Feldman Fine Arts*, 917 F.2d 278, 292–93 (7th Cir. 1990) (refusing to give effect to confiscatory decrees by the Turkish Federated State of Cyprus ("TFSC") because the TFSC was not recognized by the United States government).

The President's recognition power includes the authority to determine what territory the United States government will consider to fall within the sovereignty of a foreign government. *See Williams v. The Suffolk Ins. Co.*, 38 U.S. 415 (1839) (purely an executive decision to determine whether the Falkland Islands were subject to the jurisdiction of the "government of Buenos Aires"); *Bill to Relocate United States Embassy from Tel Aviv to Jerusalem*, 19 Op. O.L.C. 123 (1995) (to the extent that a bill sought to compel the President to recognize explicitly that Jerusalem was under Israel's sovereignty, it was inconsistent with the President's exclusive recognition power); *see also Constitutionality of Legislative Provision Regarding ABM Treaty*, 20 Op. O.L.C. 246, 251–52 (1996) (as part of the recognition power, President has sole authority to determine which states are the "successors" to a state, like the Soviet Union, that has been completely dissolved); *but cf. Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 380 (1948) (citing *Jones v. United States*, 137 U.S. 202 (1890) for the proposition that "the determination of sovereignty over an area is for the legislative and executive departments"). Congress thus clearly may not require the President to recognize Tibet as a sovereign government or, conversely, to recognize the borders of China so as to exclude Tibet. That is not to say that Congress could not, under any circumstances, require the President to make a determination with respect to the *region* of Tibet that is more specific than the 1980 Determination prior to making funds available to that region. But where Congress has not clearly done so—and, indeed, where, as here, there exists contrary textual evidence indicating that determinations were to be made concerning nations, not regions—we will not assume that Congress intended to so constrain the President in an area in which he exercises such great discretion.

Moreover, when Congress initially listed China and Tibet separately for purposes of section 2(b)(2), the position of the United States regarding the status of China and Tibet was not clear. As originally enacted, section 2(b)(2) codified a provision that had been inserted in the Bank's appropriations since 1964 that prohibited assistance to any "Communist country (as defined in section 620(f) of the Foreign Assistance Act of 1961, as amended)." Export-Import Bank Act Amendments of 1968, Pub. L. No. 90–267, § 1(c), 82 Stat. 47, 48; *see also Export-Import Bank Act—Procedure for Transactions with Communist Countries*, 42 Op. Att'y Gen. 479 (1974). Section 620(f) has separately listed the People's Republic of China and Tibet as "Communist countr[ies]" since the Foreign Assistance Act

("FAA") was amended in 1962. *See* Foreign Assistance Act of 1962, Pub. L. No. 87–565, § 301(d)(3), 76 Stat. 255, 261. We note, however, that when section 2(b)(2) was originally enacted in 1968, the United States government did not recognize the People's Republic of China as an independent country. In addition, the United States government's position on Tibet's status was "ambiguous." State Memorandum. A State Department spokesman stated at a press conference in 1959:

> [T]he historic position of the United States has been that Tibet is an autonomous country under Chinese suzerainty.[3] However, the United States Government has consistently held that the autonomy of Tibet should not be impaired by force. The United States has never recognized the pretensions to sovereignty over Tibet put forward by the Chinese Communist regime.

Transcript of Press and Radio News Conference (Sept. 11, 1959), *reprinted in* 1 Marjorie M. Whiteman, *Digest of International Law* 464 (1963);[4] *see also* Letter from Assistant Secretary of State Morton to Senator Wiley (Apr. 29, 1953), Whiteman, at 463–64; State Memorandum. Thus, in light of the ambiguity regarding the status of both the People's Republic of China and Tibet when section 2(b)(2) was enacted, we do not believe that Congress's separate listing of the two was an attempt to take the extraordinary step of forcing the President to recognize each as an independent, sovereign nation as a precondition for granting Export-Import Bank assistance.

When Congress amended section 2(b)(2) in 1986 to replace the cross-reference to section 620(f) of the FAA with a list of "Marxist-Leninist countries," it continued to list the People's Republic of China and Tibet separately. *See* Export-Import Bank Act Amendments of 1986, Pub. L. No. 99–472, § 8, 100 Stat. 1200, 1201. At that time, President Ronald Reagan objected to the separate listing of Tibet, explaining that, "The United States recognizes Tibet as part of the People's Republic of China. I interpret Tibet's inclusion as a separate country to be a technical oversight." *See* 1986 Signing Statement at 1391. Nonetheless, in 1992 Congress again listed the People's Republic of China and Tibet separately when it amended section 2(b)(2) to reduce the list of thirty "Marxist-Leninist countries" to nine. *See* Export Enhancement Act of 1992, Pub. L. No. 102–429, 106 Stat. 2186, 2194. The continuation of the separate listing in 1986 and 1992, after the United States government had recognized the People's Republic of China and in

[3] "Suzerainty" is defined as "the dominion, authority, or relation of a suzerain with regard to the subject person or state, esp[ecially] in the matter of control over the foreign affairs of such a state." Webster's Third New International Dictionary 2304–05 (1986). A "suzerain" is "a dominant state exercising varying degrees of control over a vassal state with regard to its foreign relations but allowing it sovereign authority in its internal affairs." *Id.* at 2304.

[4] China invaded Tibet in 1950.

the face of an executive branch policy that clearly recognized Tibet as a part of that country, raises the question whether, although the 1980 Determination covered the region of Tibet, these subsequent legislative changes have rendered that determination inadequate as to Tibet. We believe that the mere retention of the separate listing without a clearly articulated statutory purpose is insufficient to change the scope or effect of the 1980 Determination. Indeed, the 1986 Conference Report's explicit affirmation of the continuing validity of then-existing determinations strongly supports the view that Congress was not attempting to alter the consequences of pre-1986 determinations. The Report concluded, "Since the existing waiver authority is retained, for any country for which a general national interest determination has already been made prior to enactment of this bill, the legislation would not require the making of a new general national interest determination." H.R. Conf. Rep. No. 99–956, at 5, *reprinted in* 1986 U.S.C.C.A.N. 2472, 2473.[5]

In sum, it is our view that the 1980 Determination satisfies the requirements of section 2(b)(2) with respect to Tibet. We thus conclude that the Bank may provide direct or indirect assistance to the region of Tibet, the provincial government of Tibet, or Tibetan residents, other than loans equal to or in excess of $50 million, without any presidential action in addition to the prior determination made with respect to China.

RANDOLPH D. MOSS
Acting Assistant Attorney General
Office of Legal Counsel

[5] The same Congress that passed the 1992 amendment listing the People's Republic of China and Tibet separately despite President Reagan's 1986 statement that Tibet is part of the People's Republic of China, *see* Export Enhancement Act of 1992, Pub. L. No. 102–429, 106 Stat. 2186, 2194, expressed its view in unrelated legislation that Tibet is "an occupied country under the established principles of international law [and] Tibet's true representatives are the Dalai Lama and the Tibetan Government in exile as recognized by the Tibetan people." *See* Foreign Relations Authorization Act, Fiscal Years 1992 and 1993, Pub. L. No. 102–138, § 355, 105 Stat. 647, 713 (1991). While it is clear that Congress would like the President to recognize Tibet, that does not mean that the 1992 amendment to section 2(b)(2) was intended to require the President to make a new national interest determination specific to Tibet, especially since that would mean that, in the absence of such a determination, Tibet and its people currently would be ineligible for financial assistance from the Bank.

Miscellaneous Receipts Act Exception for Veterans' Health Care Recoveries

The Veterans Reconciliation Act of 1997 creates an exception to the Miscellaneous Receipts Act to the extent that a recovery or collection under the Federal Medical Care Recovery Act is based on medical care or services furnished under chapter 17 of title 38, United States Code, and thus allows the deposit of such a recovery or collection in the Department of Veterans Affairs Medical Care Collections Fund.

December 3, 1998

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

This responds to your request of May 28, 1998, that we examine whether certain funds received as part of a settlement under the Federal Medical Care Recovery Act, Pub. L. No. 87–693, 76 Stat. 593 (1962) ("MCRA"), codified as amended at 42 U.S.C. §§ 2651–2653 (1994 & Supp. II 1996), may be transferred to the Department of Veterans Affairs Medical Care Collections Fund ("VA Fund") notwithstanding the general requirement contained in the Miscellaneous Receipts Act ("MRA") that "an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim," 31 U.S.C. § 3302(b) (1994). For the reasons outlined below, it is our view that the portion of the settlement amount that was calculated to compensate the Government for its claims under MCRA for medical care or services furnished under chapter 17 of Title 38, which governs certain veterans' health benefits, may be transferred to the VA Fund by virtue of the Veterans Reconciliation Act of 1997, Pub. L. No. 105–33, § 8023(a)(1), 111 Stat. 251, 665, codified as amended at 38 U.S.C. § 1729A (Supp. IV 1998), which creates an exception to the MRA "to the extent that a recovery or collection under . . . [MCRA] is based on medical care or services furnished under this chapter [i.e. Chapter 17 of Title 38]." 38 U.S.C. § 1729A(b)(6). Because the information that you have provided does not allow us to determine the amount of the settlement that was intended to compensate the federal government for its claims under MCRA, however, we are unable to give any more specific guidance on this issue.[1]

I. *Settlement Background*

In 1993, numerous tort actions brought in federal district courts throughout the country by persons with hemophilia against manufacturers of blood products were centralized as Multidistrict Litigation No. 986 before Judge Grady in the Northern

[1] We have not been asked to address any other questions regarding this settlement

District of Illinois. In these cases, individuals with hemophilia who contracted the HIV virus, and representatives of the estates of such individuals who have died, sued several companies who extracted the blood proteins that hemophiliacs lack (known as Factors VIII and IX) from donated blood and provided these proteins in the form of "factor concentrates" to hemophiliacs for injection. In addition to suing these "Fractionaters," as the companies are known based on the manufacturing process involved, plaintiffs also sued the National Hemophilia Foundation and individual health care providers.[2]

Although the United States chose not to intervene in the suits, it also had potential claims against the Fractionaters, including those under MCRA based on the provision of certain health care to veterans.[3] MCRA provides a mechanism for the recoupment of certain medical costs and provides in relevant part:

> In any case in which the United States is authorized or required by law to furnish or pay for hospital, medical, surgical, or dental care and treatment . . . to a person who is injured or suffers a disease . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefor, the United States shall have a right to recover (independent of the rights of the injured or diseased person) from said third person, or that person's insurer, the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for and shall, as to this right be subrogated to any right or claim that the injured or diseased person . . . [or] . . . estate . . . has against such third person to the extent of the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for.

42 U.S.C. § 2651(a).

The Fractionaters commenced negotiations of a global settlement of the claims of the class members[4] and agreed to pay $100,000 for each approved claim, as well as a settlement with major private health care insurers, whom they agreed

[2] *See In re "Factor VIII or IX Concentrate Blood Products," Product Liab. Litig.*, 853 F. Supp 454 (Judicial Panel on Multidistrict Litigation 1993), *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F R.D 410 (N.D Ill 1994), *rev'd by order of mandamus, In the Matter of Rhone-Poulenc Rorer Inc*, 51 F 3d 1293 (7th Cir 1995), and *cert. denied*, 516 U.S. 867 (1995); *In re Factor VIII or IX Concentrate Blood Products Litig.*, 169 F.R.D 632 (N D Ill 1996)

[3] The draft memorandum from the Torts Branch to then-Acting Associate Attorney General John C Dwyer also discusses claims (and potentially applicable recoupment provisions regarding claims) based on the provision of health care services to government employees and their dependents under the Federal Employees Health Benefits Program as well as to individuals generally through the Medicare, Medicaid, and Indian Health Service programs. *See* Memorandum for John C. Dwyer, Acting Associate Attorney General, from Frank W Hunger, Assistant Attorney General, Civil Division, *Re. Affirmative Claims for Reimbursement of Federally-Funded Health Care Provided to Persons with Hemophilia Infected with HIV* (undated draft memorandum)

[4] At the request of the parties, Judge Grady approved a class specifically for settlement purposes after the Seventh Circuit had reversed Judge Grady's prior certification of a class for purposes of a trial. *See In the Matter of Rhone-Poulenc Rorer Inc.*, 51 F 3d at 1294–1304

to pay ten cents per insured life in exchange for full release of all reimbursement and subrogation claims for recovery of costs of care or treatment of class members arising from use of factor concentrates.

The Fractionaters also approached the federal government with an offer to settle any claims of the United States based on the provision of health care to hemophiliacs, including veterans, who contracted the HIV virus. The Torts Branch, in cooperation with the respective agencies responsible for the health care services involved, entered into an out-of-court settlement with the Fractionaters, under which the latter paid the United States ten cents per federal health care system beneficiary and released the United States from all claims and actions arising out of, or related to, the use of factor concentrates by claimants. In exchange, the United States released the Fractionaters from all claims for reimbursement of medical expenses, all claims and causes of action under certain civil fraud statutes, and common law contribution and indemnity rights related to Federal Tort Claims Act cases brought against the United States. *See* Settlement Agreement ¶¶ A & B.1–2.

The settlement figure was calculated based on agency estimates of the numbers of persons entitled to federally subsidized health care in each of the federal programs that the Torts Branch believed had potential claims of reimbursement against the Fractionaters. The total number of covered persons was estimated at 121,881,000, which included 25,881,000 veterans, yielding a final settlement amount of $12,188,100.[5] The Torts Branch entered into an out-of-court settlement that was conditioned on Judge Grady's entering a global settlement in the private litigation.

On May 8, 1997, Judge Grady entered a Final Order and Judgment approving a global settlement of the multidistrict litigation, and on August 15, 1997, the Torts Branch received four checks for a total of $12,188,100, which were deposited in the Treasury on August 19, 1997.

On March 25, 1998, the Department of Veterans Affairs requested that the amount of $2,510,457 (which represents the settlement that was calculated based on the veteran population of 25,881,000, i.e. $2,558,100, less the Department of Justice's 3% collection fee)[6] be deposited in the VA Fund pursuant to the Veterans Reconciliation Act, 38 U.S.C. § 1729A.

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[5] Agency estimates of covered individuals in the other programs that the Torts Branch identified as having potential claims against the Fractionaters were as follows: Medicare (38,600,000), Medicaid (38,700,000), Indian Health Services (1,500,000), Federal Employees Health Benefits Program (9,000,000), Civilian Health and Medical Program of the Uniformed Services (5,300,000), and Department of Defense (2,900,000).

[6] Pub L No. 103–121, § 108, 107 Stat 1153, 1164 (1993) provides: "Notwithstanding 31 U.S.C 3302 or any other statute affecting the crediting of collections, the Attorney General may credit, as an offsetting collection, to the Department of Justice Working Capital Fund, for fiscal year 1994 and thereafter, up to three percent of all amounts collected pursuant to civil debt collection litigation activities of the Department of Justice."

II. *Receipt of Payments*

As a general matter, the Miscellaneous Receipts Act requires that "[e]xcept as provided in § 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim." 31 U.S.C. § 3302(b). In addition to cases covered by the express exception in § 3718(b), which relates to payments to private counsel retained to assist in the pursuit of claims, the MRA generally does not govern in two situations: first, where an agency has statutory authority to direct funds elsewhere, and second, when receipts qualify as "repayments" to an appropriation. *See generally* 2 Office of the General Counsel, United States General Accounting Office, Principles of Federal Appropriations Law 6–108 (2d ed. 1992).[7]

In 1972 the Comptroller General opined with regard to MCRA (as it existed then), that "[t]his Act does not specify the disposition to be made of monies collected from third party tortfeasors and, consequently, unless a different disposition is otherwise provided, such collections are for deposit in the treasury as miscellaneous receipts as provided by § 3617, revised statutes 31 U.S.C. 484 [the predecessor to 31 U.S.C. § 3302(b)]." 52 Comp. Gen. 125, 126 (1972); *see also* 61 Comp. Gen. 537, 539 (1982) (summarizing holding of 1972 opinion). In 1997, however, Congress passed the Veterans Reconciliation Act of 1997, which established a Department of Veterans Affairs Medical Care Collections Fund, and expressly provided:

> Amounts recovered or collected after June 30, 1997, under any of the following provisions of law shall be deposited in the fund:
>
> . . . .
>
> (6) Public Law 87–693, popularly known as the "Federal Medical Care Recovery Act" (42 U.S.C. 2651 et seq.), to the extent that a recovery or collection under that law is based on medical care or services furnished under this chapter [i.e. Chapter 17 of Title 38, which governs hospital, nursing home, domiciliary, and medical care for veterans].

38 U.S.C. § 1729A(b).[8]

[7] The opinions and legal interpretations of the General Accounting Office and the Comptroller General often provide helpful guidance on appropriations matters and related issues, but they are not binding on departments, agencies, or officers of the executive branch. *See Bowsher v. Synar*, 478 U.S. 714, 727–32 (1986).

[8] In 1996 Congress had amended MCRA to allow amounts recovered for medical care furnished by military facilities to be credited to the appropriations supporting the facilities as prescribed by the Secretary of Defense. Pub. L. No. 104–201, § 1075(a)(5), 110 Stat. 2422, 2661 (1996) (codified as amended at 42 U.S.C. § 2651(f) (1994 & Supp. II 1996).

In our view, the Veterans Reconciliation Act allows the portion of the settlement amount that was based on claims under MCRA for medical care furnished or to be furnished by the Department of Veterans Affairs under Chapter 17 of Title 38 to be deposited in the VA Fund.[9] Even payment based on an abstract formula, such as ten cents per covered person, as opposed to a calculation of actual expenses for such claims, would qualify as long as the calculation was aimed solely at settling the MCRA claim.

MCRA specifically allows for the United States to recover for "the reasonable value of the care . . . furnished, to be furnished, paid for, or to be paid for." 42 U.S.C. § 2651(a). Thus, some estimate of the value of future costs would be inevitable in determining damages even in a direct court action against the tortfeasor. Moreover, in the context of a settlement, as long as the federal government had claims that it could assert in good faith under MCRA for such services, such claims could be relinquished in return for payment of a reasonable amount reflecting the value of the claims. The Attorney General has the authority to settle a claim consistent with the requirements of the specific scheme under which the claim arises. *See* 28 U.S.C. §§ 516, 519 (1994); *see generally Settlement Authority of the United States in Oil Shale Cases*, 4B Op. O.L.C. 756 (1980). Nothing in MCRA would appear to indicate that Congress intended to limit the Attorney General's discretion to determine a reasonable settlement amount. Even when that amount is determined based on an abstract formula, the government may still be recovering the money for purposes of satisfying the MCRA claim. For example, the government may have determined that the ten-cents-per-veteran formula is an appropriate approximation of the actual expenses incurred in providing MCRA recoverable Chapter 17 services to affected veterans. Thus, to the extent the ten-cents-per-veteran formula was aimed at determining a reasonable figure to compensate the United States for the relinquishment of its MCRA claims against the Fractionaters for Chapter 17 services, the resulting recovery would be "a recovery or collection under [MCRA] . . . based on medical care or services furnished" to veterans under Chapter 17. 38 U.S.C. § 1729A(b). Furthermore, because the payment of the settlement was apparently received on August 15, 1997, the recovery would appear to fall within the time limits of the Veterans Reconciliation Act.

We caution, however, that to the extent the settlement amount was calculated to include compensation to the United States for relinquishment of claims other than the MCRA claims that are outlined above (i.e. to the extent the settlement amount included compensation for claims that might have been made under, for

[9] In light of the formulation in MCRA providing for the recoupment of costs for care and treatment "furnished, to be furnished, paid for, or to be paid for," 42 U S C § 2651(a), we believe that the Veterans Reconciliation Act formulation concerning the transfer of funds recovered under MCRA for medical care or services "furnished under this Chapter," 38 U S C § 1729A(b), should be read as authorizing the transfer of funds recovered under MCRA for medical care or services that were furnished in the past or will be furnished in the future under Chapter 17.

example, the False Claims Act or civil monetary penalty laws, or for claims of common law contribution or indemnity rights relating to Federal Tort Claims Act cases), the amount of the settlement that was considered to compensate the United States for these other claims could not be deposited in the VA Fund. Similarly, we note that any MCRA claim recovery formula based on the entire veteran population must reflect only the government's claims regarding Chapter 17 services and must not include claims relating to services furnished or paid for under other health benefit programs, if the formula is intended to yield an amount that may be deposited in the VA fund.

Accordingly, we conclude that the share of the settlement amount attributable to MCRA recoverable Chapter 17 services rendered by the Department of Veterans Affairs (less the 3% Department of Justice collection fee) may be deposited in the Department of Veterans Affairs Medical Care Collections Fund. Thus, to the extent the ten-cents-per-veteran figure was intended to compensate the United States solely for its claims under MCRA for services furnished under Chapter 17 of Title 38, the portion of the settlement amount that was based on the size of the veteran population, less the 3% collection fee, may be deposited in the VA Fund. In light of the information that you have provided us, however, we are unable to determine the extent to which the settlement figure was aimed at compensating the government for its claims under MCRA, and we cannot reach a definitive conclusion on the actual amount that ultimately should be transferred to the VA Fund.

TODD DAVID PETERSON
Deputy Assistant Attorney General
Office of Legal Counsel

Proposed Settlement of *Diamond v. Department of Health & Human Services*

The Department of Health & Human Services may lawfully enter into a settlement providing that the positions of specific employees will not be reclassified until they vacate the positions if, in light of the facts of the case and recognizing the inherent uncertainty of litigation, the agency concludes that a court might find that there was a cognizable danger of recurrent sexual discrimination in the reclassifications in violation of Title VII of the Civil Rights Act of 1964.

December 4, 1998

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

This memorandum responds to your letter requesting our views on the lawfulness of a provision in a proposed settlement agreement in the case of *Sarah Diamond v. Department of Health & Human Services*, EEOC Case No. 110–96–8155X.[1] We conclude that on a finding of discrimination in the reclassification, a court could enjoin reclassification of the positions of specific employees if the court found some cognizable danger of recurrent violation. If the record contained abundant evidence of consistent past discrimination, a court would likely presume an injunction was appropriate unless the agency presented clear and convincing proof of no reasonable probability of future noncompliance with the law. If the court found only an isolated occurrence of discrimination, plaintiffs would have to provide additional evidence of the cognizable danger of a recurrent violation to justify such an injunction. If, in addition, the facts indicated that the affected employees were close to retirement or, for other reasons, expected to vacate the positions in a relatively proximate and definite period of time, the injunction would be less vulnerable to challenge as overbroad than if the employees were relatively new or otherwise could be expected to stay on for several years.

The Department of Health & Human Services ("HHS") thus may enter into a settlement providing that the positions of specific employees will not be reclassified until they vacate the positions if, in light of the facts and recognizing the inherent uncertainty of litigation, the agency concludes that a court might reasonably find that there was a cognizable danger of recurrent violation in the reclassifications. The risk that a court would find a cognizable danger of recurrent violation could be a risk of retaliation against the employees, of further use of discriminatory practices or procedures in the reclassification, or that the reclassification

[1] Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Harriet S Raab, General Counsel, Department of Health & Human Services (Jan. 2, 1997) ("HHS Memorandum") Ordinarily, an inquiry of this nature would be answered by the litigating division of the Department handling the matter, and this Office would merely provide advice to that division if requested. This matter, however, involves an inter-agency dispute, and because the matter is before the Equal Employment Opportunity Commission, there is no litigating division directly involved. We have obtained the views of the Office of Personnel Management, the Equal Employment Opportunity Commission, and the Civil Rights and Civil Divisions of the Department of Justice

of these employees would perpetuate the effects of past discrimination. This is not to say the agency must conclude that it believes future violations will occur. Rather, the agency may settle where it concludes, on the basis of a good faith assessment of the litigation risk, that there is a genuine risk of an adverse judgment on the question.

The lawfulness of including such a term in a settlement, therefore, depends upon the particular facts. Because we are not in a position, and have not been asked, to evaluate the factual predicate for the proposed settlement, including the circumstances surrounding the employment and reclassification of the three employees who will be permitted to remain in their pre-classification positions, we cannot reach a conclusion regarding the final legality of this provision. We conclude, however, that there could be facts under which such relief would be lawful.

I. Background

Under Title 5 of the United States Code, each position in a covered federal agency is placed in the appropriate "class" and "grade" based upon the level of difficulty, responsibility, and qualification requirements of the work. *See* 5 U.S.C. §§ 5101, 5106 (1994). The Office of Personnel Management ("OPM"), after consulting with the relevant agencies, is charged with developing the standards for placing positions in their proper class and grade. *See* 5 U.S.C. § 5105 (1994). A covered agency has the authority and obligation to "place each position under its jurisdiction in its appropriate class and grade in conformance with standards published by [OPM]." 5 U.S.C. § 5107 (1994). Periodically, OPM must review a sample of the positions in each agency "to determine whether the agency is placing positions in classes and grades in conformance with or consistently with published standards." 5 U.S.C. § 5110(a) (1994). If, during the review pursuant to § 5110(a), OPM finds that an agency has failed to place a position in its proper grade and class, the statute directs OPM to place the position in the appropriate grade and class. *Id.* § 5110(b). If OPM finds that an agency is not classifying positions in accordance with published standards, OPM "may revoke or suspend the authority granted to the agency by section 5107 . . . and require that prior approval of [OPM] be secured" before a classification decision becomes effective for payroll and personnel purposes. 5 U.S.C. § 5111 (1994).

This case arises from a 1995 position classification review at the Centers for Disease Control and Prevention ("CDC"), an agency of HHS. Pursuant to the review, CDC downgraded eighty-two administrative positions. Sixty-eight of the affected employees were women.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e–17 (1994 & Supp. II 1996), requires that "[a]ll personnel actions affecting employees or applicants for employment . . . in [federal] executive agencies . . . shall be made

free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–16(a). The Equal Employment Opportunity Commission ("EEOC") has authority to enforce Title VII against federal agencies through an administrative process. *See* 42 U.S.C. § 2000e–16(b). In February of 1996, Sarah Diamond, on behalf of herself and the other sixty-seven affected female employees, filed discrimination complaints against CDC and OPM with the EEOC challenging the classification review as discriminatorily targeting women's jobs for downgrading and as having a discriminatory impact on women employees.[2] *See* Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Lorraine Lewis, General Counsel, Office of Personnel Management at 12 (May 1, 1998) ("OPM Memorandum"). The complaints alleged that sex discrimination tainted "the entire process, from the identification of the positions which would be reviewed to the audits, and ultimately to the actual downgrades." HHS Memorandum at Attachment 4 (Complainants' Response to OPM's Motion to Dismiss at 7 (May 30, 1997)).

The administrative law judge ("ALJ") assigned to the cases ordered that OPM be joined with CDC as a defendant in a single, consolidated case. *See* HHS Memorandum at 3. In April of 1997, OPM unsuccessfully moved to dismiss the complaint. OPM argued that the complainants had not exhausted administrative remedies and that the EEOC had no jurisdiction over the case. OPM offered three theories as to why EEOC lacked jurisdiction. First, it argued that reclassifying a position is not a "personnel action" covered by Title VII. Second, OPM maintained that the EEOC did not have authority to remedy discrimination in a classification decision by ordering an agency to place a complainant in a grade different from the grade assigned by OPM. Third, OPM stated that the EEOC had no authority to review "the classification system"—i.e. any actions taken under the classification statutes and the corresponding OPM regulations. *Id.* at Attachment 2 (OPM's Motion to Dismiss at 8–10 (Apr. 25, 1997)). The EEOC denied the motion to dismiss. *Id.* at Attachment 6 (Order Denying Motion to Dismiss (Jun. 10, 1997)).

After the ALJ denied OPM's motion, CDC made efforts to locate other positions for the affected employees at their pre-review grade and pay. Many were moved to new positions. CDC restructured the duties of others in order to preserve their pre-review grade. At the time of the HHS request for our views, three class members remained for whom no grade-saving positions could be found. *See* HHS Memorandum at 2.

[2] To prevail on a disparate impact claim under Title VII, the complainant must prove that a particular employment practice causes a disparate impact on a group protected by the statute, and the employer must fail to demonstrate that the challenged practice is job related and consistent with business necessity *See* 42 U S C. § 2000e–2(k) (1994). If the employer proves the challenged practice is consistent with business necessity, the complainant will prevail only if she shows that an alternative employment practice, without a similarly discriminatory effect, will accomplish the employer's legitimate business purpose. *See id., Albemarle Paper Co v. Moody*, 422 U.S 405, 425 (1975).

On July 10, 1997, HHS and the class reached a tentative settlement agreement. Paragraph 1 of the settlement provided:

> The class members who have not (a) been placed in other positions at their original grade, or (b) otherwise voluntarily removed to another position, or (c) left the employment of the CDC, through resignation, retirement, or death, shall be allowed to remain in their current positions, at the grade they held prior to the classification review. Said positions will be subject to reclassification consistent with applicable classification standards when the class members who encumber them vacate said positions by any means, including but not limited to selection or reassignment to another position, resignation from CDC, retirement, or death.

OPM Memorandum at Attachment A (Settlement Agreement between Complainant Class and Department of HHS ¶ 1 (Nov. 7, 1997)) ("HHS Settlement Paragraph 1").

OPM objected to paragraph 1 of the proposed HHS settlement. OPM informed HHS that if HHS implemented this provision, OPM would, pursuant to 5 U.S.C. § 5111(a), revoke or suspend HHS's authority to classify positions at CDC. *See* HHS Memorandum at 4.

On November 7, 1997, HHS and the plaintiff class executed a settlement that included paragraph 1 but conditioned its implementation on two events: a determination by the Office of Legal Counsel ("OLC") that the provision was lawful, and agreement by OPM not to revoke the classification authority of HHS or CDC for implementing that paragraph. *See* OPM Memorandum at Attachment A (HHS Settlement ¶ 20).

HHS requested an OLC opinion on two questions.[3] First, in a lawsuit arising out of a reclassification, could the appropriate court-ordered relief, upon a finding of discrimination, include changing the complainant's classification back to the grade held prior to the discriminatory reclassification? Second, if such relief could be granted upon a finding of discrimination, could the agency grant such relief as part of a voluntary settlement? *See* HHS Memorandum at 13–14. HHS argued that the appropriate relief could include changing the complainant's classification back to his or her pre-review grade and that an agency could grant such relief as part of a voluntary settlement.

Upon receiving the HHS Memorandum, we requested the views of OPM, the EEOC, and the Civil and Civil Rights Divisions of the Department of Justice. The EEOC, the Civil Division, and the Civil Rights Division all concurred in

[3] Executive Order No. 12146 authorizes the Attorney General to issue binding resolutions of legal disputes between agencies whose heads serve at the pleasure of the President. Exec. Order No 12146, 3 C F.R 409 (1980). That function has been delegated to this office *See* 28 C.F R. § 0 25 (1998)

HHS's position.[4] On May 1, 1998, after reviewing the submissions of the other four offices, OPM submitted its views. OPM did not squarely address the questions posed by HHS, and its memorandum suggests that the grounds of dispute between HHS and OPM have narrowed. OPM now appears to agree that, upon a finding of discrimination, the appropriate relief could include returning the class members to the positions they were in before the discriminatory actions and that a court or the EEOC could order such relief. *See* OPM Memorandum at 2. However, OPM maintains that this relief should be followed by "a nondiscriminatory audit to determine the proper prospective grades of those positions." *Id.* OPM continues to believe that paragraph 1 of the HHS Settlement is unlawful insofar as it "goes beyond the appropriate relief and provides that the incumbents' positions will be subject to reclassification only after they are vacated by the class members who encumber them." *Id.* In OPM's view, that provision inappropriately proposes "to shield these positions from application of pertinent portions of title 5 as long as the class members remain in them." *Id.*

On June 6, 1998, OPM executed a settlement agreement with the class. *See* Settlement Agreement, *Diamond v. OPM*, EEOC No. 110–96–8167X (June 6, 1998) ("OPM Settlement"). The OPM Settlement notes OPM's objection to paragraph 1 of the HHS Settlement, and states that OPM cannot make a determination concerning the effect of paragraph 1 until OLC renders its opinion on the issues. *See* OPM Settlement at ¶ 1.

II. Analysis

Both OPM and HHS now appear to agree that the two questions submitted by HHS should be answered in the affirmative. First, in a case alleging discriminatory reclassification, the appropriate relief may include returning the complainant to the grade held prior to the discriminatory reclassification.[5] Second, because an agency settlement may include any relief that a court could award upon a finding of discrimination, an agency may grant such relief as part of a voluntary settlement.[6] OPM and HHS continue to disagree, however, on whether, upon a

[4] Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Frank W. Hunger, Assistant Attorney General, Civil Division, *Re: HHS/OPM Settlement Dispute* (Apr 20, 1998); Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Ellen J Vargyas, Legal Counsel, EEOC (Feb. 25, 1998), Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, *Re· HHS Request regarding settlement of Title VII reclassification claim* (undated)

[5] In addition, OPM appears no longer to contend that a reclassification is not a "personnel action" within the meaning of Title VII.

[6] It is established that "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII." *Local No 93, Int'l Ass'n of Firefighters v City of Cleveland*, 478 U S 501, 515 (1986) An agency therefore has the authority to settle an employment discrimination claim without a specific finding of discrimination *See Shaw v. Library of Congress*, 479 F Supp. 945 (D.D.C 1979) (agency settlement of Title VII claim may include retroactive promotion and back pay without adjudicating merits of claim); 29 C F R § 1614 603 (1998) (EEOC regulations require agencies to consider settlement throughout the administrative process). This Office has recognized this principle in concluding that an agency settlement may include money damages if a court could

Continued

finding of discrimination, the appropriate relief in this case could include relief of the nature and duration provided in paragraph 1. Specifically, OPM maintains that neither the EEOC nor a district court has the authority to bar reclassification of the complainants' positions until they cease to occupy the positions.

An agency may settle an employment discrimination claim without a specific finding of discrimination. *See supra* note 6. An agency settlement should be based on the agency's good faith assessment of the litigation risk that a court might find complainants entitled to relief. We derive this standard from that which governs the Attorney General in compromising or abandoning claims made against the United States in litigation. The Attorney General may "compromise claims on the basis of her good faith assessment of the litigation risk" that a court might find complainants entitled to relief. *See Waiver of Statutes of Limitations in Connection with Claims Against the Department of Agriculture*, 22 Op. O.L.C. 127, 139–40 (1998) ("USDA Opinion") (citing *The Attorney General's Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 60 (1982)).[7] Similarly, an agency settlement of a discrimination claim should be based on the agency's good faith assessment of the litigation risk that a court might find complainants entitled to relief. We therefore consider whether a court, upon a finding of discrimination, could order the relief specified in paragraph 1.

A.

Title VII requires that "[a]ll personnel actions affecting employees or applicants for employment . . . in [federal] executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–16(a). Title VII provides federal employees with both administrative and judicial remedies. The EEOC has authority to enforce Title VII against federal agencies "through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of [§ 2000e–16], and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section." 42

award such relief in an action by an aggrieved person upon a finding of discrimination *See Authority of USDA to Award Monetary Relief for Discrimination*, 18 Op. O.L.C. 52, 53 (1994) (concluding agency may provide money damages in the settlement of a claim under the Equal Credit Opportunity Act if a court could award monetary relief in a court action) ("Monetary Relief Opinion"). The Comptroller General has applied the same principle in evaluating agency authority to settle claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e–17 (1994 & Supp. II 1996), and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (1994 & Supp. II 1996) ("ADEA"). *See* Monetary Relief Opinion at 53 (discussing 62 Comp. Gen 239 (1983) and 64 Comp. Gen. 349 (1985)).

[7] "[The Attorney General's] determination whether to compromise the claims on the basis of the litigation risk may be guided by her judgment that compromise, rather than litigation, would be in the best interests of the United States or would otherwise promote the ends of justice. [6 Op. O.L.C. at 60]. But her settlement authority does not allow her to discard a statutory requirement and determine that, on the basis of her own view of the equities, a claim should be paid, notwithstanding its legal invalidity. Rather, the Attorney General's obligation 'to administer and enforce the Constitution of the United States and the will of Congress as expressed in the public laws,' requires that she enforce [statutory requirements] where they bar a plaintiff's claims. *See id.* at 62." USDA Opinion, 22 Op. O.L.C. at 140.

U.S.C. § 2000e–16(b). In addition, after completing the administrative process set forth in § 2000e–16(b), a federal employee may file a civil action against his or her agency employer under the provisions governing actions by non-federal employees, which are set forth at 42 U.S.C. § 2000e–5(f). *See* 42 U.S.C. § 2000e–16(c) & (d). Upon a finding that an employer has or is engaging in an unlawful employment practice charged in the complaint, "the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, *reinstatement* or hiring *of employees*, with or without back pay . . . , *or any other equitable relief as the court deems appropriate*." 42 U.S.C. § 2000e–5(g)(1) (emphasis added).

Congress vested broad equitable discretion in the district courts "to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 770–71 (1976). That discretion is not unbounded, but is guided by "the principled application of standards consistent with [legislative] purposes." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). A district court decision regarding a Title VII remedy "must therefore be measured against the purposes which inform Title VII." *Id.*

Congress enacted Title VII to accomplish two main purposes. "The primary objective was a prophylactic one"—to prevent employment discrimination and thereby "achieve equality of employment opportunities." *Id.* "It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.* at 418. An appropriate remedy under Title VII therefore may include relief, including injunctive relief, that will make the plaintiff whole, prevent future violations of the act, and prevent retaliation against complainants. *See Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998) (affirming district court approval of settlement where injunction redresses past and deters future discrimination in assignments and inhibits future retaliation).

"Once employment discrimination has been shown, . . . district judges have broad discretion to issue injunctions addressed to the proven conduct." *EEOC v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1578 (7th Cir. 1997). In determining whether to award injunctive relief, courts look "to whether the discriminatory conduct could possibly persist in the future." *Id.* at 1578–79; *cf. United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). In cases presenting "abundant evidence of consistent past discrimination," some courts have held that injunctive relief is mandatory "absent clear and convincing proof that there is no reasonable probability of further noncompliance with the law." *NAACP v. Evergreen*, 693 F.2d 1367, 1370 (11th Cir. 1982); *see James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 354 (5th Cir. 1977) (court should enter injunction unless it can discern "clear and convincing proof of no reasonable probability of further noncompliance with the law"); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1519 (9th

Cir. 1989) ("victims of employment discrimination generally are entitled to an injunction against future discrimination, unless the employer proves it is unlikely to repeat the practice"); *United States v. Gregory*, 871 F.2d 1239, 1246–47 (4th Cir. 1989) (where court found pattern or practice of discrimination against women, government need not provide any further evidence to justify an award of prospective relief). In cases presenting isolated occurrences of discrimination, in contrast, the decision to issue an injunction is in the discretion of the district court and some courts do not presume injunctive relief is appropriate. Instead, the plaintiff must demonstrate " 'that there exists some cognizable danger of recurrent violation, something more than the mere possibility.' " *Walls v. Mississippi State Dept. of Pub. Welfare*, 730 F.2d 306, 325 (5th Cir. 1984) (quoting *Grant*, 345 U.S. at 633);[8] *see EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 926 (11th Cir. 1990) (absent evidence of past discrimination, permanent injunction not mandatory); *EEOC v. General Lines, Inc.*, 865 F.2d 1555, 1565 (10th Cir. 1989) (requiring "some cognizable danger" of future violations); *Hayes v. Shalala*, 933 F. Supp. 21, 27 (D.D.C. 1996) (same). Generally, "courts have declined to issue injunctive relief where the employer has shown that its discrimination ceased well before the entry of judgment, where plaintiffs showed only isolated instances of discrimination by key individuals no longer employed, and where the employer otherwise has shown that injunctive relief is unnecessary to prevent future noncompliance." 2 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 1746–47 (Paul W. Cane, Jr., ed., 3d ed. 1996) (footnotes omitted).

The form of injunctive relief varies according to the specifics of the case. Courts often enjoin the use of specific, unlawful employment practices found discriminatory, and may enjoin the employer from future discrimination or retaliation against the plaintiffs and others in plaintiffs' class. *See id.* at 1744–46. A district court's judgment regarding the appropriate form of the injunction necessary to make the complainants whole and to prevent future violations of the act generally receives considerable deference. *See Albemarle*, 422 U.S. at 424–25; *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 931 (9th Cir. 1982) ("the particular remedy granted, however, is not limited to any specific or prescribed form; rather it is left largely to the broad discretion of the district court"); *Selgas v. American Airlines, Inc.*, 104 F.3d 9, 13 (1st Cir. 1997) ("Trial courts have discretion to fashion the awards in Title VII cases so as to fully compensate a plaintiff in a manner that suits the specific facts of the case; this discretion includes the selection of the elements which comprise the remedial recovery."). While it therefore is difficult to generalize about the degree to which injunctive relief must be tailored to preventing

[8] In *Grant*, the Supreme Court sustained the district court's refusal to award injunctive relief under the Clayton Act and held that the moving party must satisfy the court that injunctive relief is needed by demonstrating a cognizable danger of a recurrent violation The presumption that injunctive relief is warranted in cases with abundant evidence of consistent past discrimination is not inconsistent with this requirement. A plaintiff who shows that an employer engaged in a practice, pattern or policy of discrimination has thereby demonstrated that there is "some cognizable danger of recurrent violation" and therefore does not need to provide additional evidence to warrant injunctive relief

continued discrimination or its effects, or retaliation, it is clear that some fit is required. *See Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1215 (2d Cir. 1993) (upholding injunction against retaliation despite finding that last act of retaliation occurred ten years before in light of danger of future retaliation); *Gaddy v. Abex Corp.*, 884 F.2d 312, 318 (7th Cir. 1989) (holding injunction against retaliation overbroad where there had been no allegation that defendants had ever retaliated, but authorizing injunction tailored to findings of discrimination); *Pecker v. Heckler*, 801 F.2d 709, 711 n.3, 713 (4th Cir. 1986) (plaintiff who had proved discrimination and retaliation was entitled to injunction prohibiting such violations in the future); *Brady v. Thurston Motor Lines*, 726 F.2d 136, 146–47 (4th Cir. 1984) (upholding injunction covering employment practices found to have been discriminatory but directing modification to delete reference to job placement practices, with respect to which no discrimination findings were made); *EEOC v. AIC Sec. Investigations, Ltd.*, 823 F. Supp. 571, 580 (N.D. Ill. 1993) (injunction against retaliation not excessive where there was no allegation of retaliation but evidence demonstrated danger of retaliation), *aff'd in part and rev'd in part on other grounds*, 55 F.3d 1276 (7th Cir. 1995).

As for duration, permanent injunctive relief usually does not contain a termination date. *See, e.g., Malarkey*, 983 F.2d at 1215; *Gaddy*, 884 F.2d at 318; *Pecker*, 801 F.2d at 711 n.3, 713; *Brady*, 726 F.2d at 146–47. In some circumstances, however, courts do specify a limited time period for an injunction to remain in effect. *See AIC*, 823 F. Supp. at 580 (judgment under Americans with Disabilities Act shall remain in effect for three years).

B.

Paragraph 1 of the HHS Settlement provides for the positions of the three covered complainants to remain at their pre-review grade for as long as those complainants occupy the positions. This settlement provision is permissible if a court, upon a finding of discrimination, could enjoin the reclassification of the positions for as long as the plaintiffs occupy them.

Courts issue a wide range of types of injunctive relief under Title VII. They may, for example, prohibit the use of specific employment practices found to be unlawful, require the employer to take (or refrain from taking) specified steps to remedy and prevent unlawful practices, or, more generally, they may simply bar future discrimination or retaliation against the plaintiffs and others in plaintiffs' class. *See* Lindemann, *supra* at 1744–46. Paragraph 1 of the HHS Settlement appears to fall within the second category, prohibiting the agency from taking a specific action—reclassification—with respect to the positions of certain employees rather than barring the use of a specific standard or practice in reclassification, or simply barring discrimination or retaliation generally. That relief is analogous to lawful injunctions that preserve a complainant's salary or position

notwithstanding an employer's generally applicable personnel policies under which the salary or position might otherwise be downgraded. *See, e.g., Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 248 n.99 (5th Cir. 1974) (injunction requiring "red circling," whereby employees who transfer to new department as trainees to become eligible for higher paid and higher skilled work continue to receive wage rate of old job until eligible for higher pay in new department); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 665 (2d Cir. 1971) (same). In order to achieve the same effect of preserving the *status quo ante* for particular employees, other courts have required employers to obtain approval of changes in the employees' status, *see, e.g., United States v. City and County of San Francisco*, 699 F. Supp. 762, 768–69 (N.D. Cal. 1988) (enjoining demotions of firefighters, except for disciplinary reasons), or expressly placed the burden on the employer of showing that a proposed practice is nondiscriminatory, *see, e.g., Hameed v. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 396*, 637 F.2d 506, 517–18 (8th Cir. 1980) (enjoining use of selection criteria with disparate impact until such time as they are proved to be job related). These injunctive provisions were appropriate because they were necessary "to allow the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." *Franks*, 424 U.S. at 770–71.

Evaluation of whether paragraph 1 is an appropriate remedy—that is, whether it will make the complainants whole or prevent future violations of the act, including preventing retaliation—thus requires reference to the alleged violation that it is to remedy and to the danger of a recurrent violation. Complainants allege that the entire reclassification process was tainted by illegal discrimination. *See* HHS Memorandum at Attachment 4 (Complainant's Response to OPM's Motion to Dismiss at 7 (May 30, 1997)). The 1995 reclassification process included several steps. First, CDC conducted a position classification review. The initial CDC review identified questionable classification determinations, particularly in administrative and clerical support positions. Second, CDC conducted a detailed review of all positions in the administrative and clerical support occupational series. That review included audits of the duties and qualification requirements for each position. Third, based on the audits and classification standards developed by OPM, CDC identified several positions which appeared to be misclassified. Finally, CDC executed personnel actions to downgrade eighty-two positions. *See* OPM Memorandum at 11. The complaint alleged a pattern of intentional discrimination and disparate impact affecting all stages of the process.

OPM maintains that the appropriate remedy is to rescind the reclassification and then conduct a nondiscriminatory audit of the positions. The propriety of the proposed remedy, however, depends on the nature of the violation that the remedy is designed to redress. As noted above, the complaint alleges that the entire reclassification process violated Title VII. If a court were to agree, it might, in

light of all the circumstances, conclude that such pervasive discrimination indicates a cognizable danger of a recurrent violation that warrants an injunction against reclassification. Moreover, a court presented with evidence that an agency intended to continue to employ the very practices found discriminatory would have not only the authority, but the duty, to enjoin the agency from using those practices. *See Albermarle*, 422 U.S. at 418; *Roe v. Cheyenne Mountain Conference Resort*, 124 F.3d 1221, 1231 (10th Cir. 1997) (district court abused its discretion by failing to enter injunction in face of defendant employer's continued refusal to revoke its discriminatory policy). OPM's suggested remedy would not provide the requisite relief if there were a cognizable danger of recurrent violations and the agency failed to present clear and convincing proof that there is no reasonable probability of further noncompliance with the law.

On a finding of discrimination in the reclassification, a court could enjoin reclassification of the positions of specific employees if there exists " 'some cognizable danger of recurrent violation, something more than the mere possibility.' " *See Walls*, 730 F.2d at 325 (quoting *Grant*, 345 U.S. at 633). If the record contained "abundant evidence of consistent past discrimination," a court likely would presume an injunction was appropriate unless agencies could present "clear and convincing proof of no reasonable probability of future noncompliance with the law." *See Evergreen*, 693 F.2d at 1370. If the discrimination was found to be an isolated occurrence, plaintiffs would have to provide additional evidence of the cognizable danger of a recurrent violation. *See Walls*, 730 F.2d at 325.

The injunction must fit, to some degree, the possible recurrent violation it is to remedy. *See supra* Part II.A. We are not familiar with the factual record in this case, in particular the circumstances surrounding the employment of the three affected complainants. We can, however, conceive of findings that would justify such an injunction. If, for example, the record demonstrated a cognizable danger of retaliation against the three complainants or their class, an injunction barring reclassification of the positions of the three employees until they vacate the positions would address that possible recurrent violation. Such an injunction might also be justified where the record demonstrated a cognizable danger that the agency would use discriminatory practices or procedures in the reclassification, or that the reclassification of these employees would perpetuate the effects of past discrimination. If, in addition, the facts indicated that the affected employees were close to retirement or otherwise expected to vacate the positions in a relatively short period of time, the injunction would be less vulnerable to challenge as overbroad than if the employees were relatively new and could be expected to stay on for many years.

C.

OPM maintains that an injunction providing the relief specified in paragraph 1 would violate 5 U.S.C. §5107, which requires agencies to place positions in the appropriate class and grade pursuant to OPM's classification standards. In OPM's view, such an injunction also would contravene OPM's statutory authority to mandate and conduct reclassifications under 5 U.S.C. §§5110 and 5112. *See* OPM Memorandum at 13. OPM therefore argues that the settlement is barred under the principle that the authority to settle litigation "does not include license to agree to settlement terms that would violate the civil laws governing the agency." *See Executive Bus. Media v. Department of Defense*, 3 F.3d 759, 762 (4th Cir. 1993) ("*EBM*").

EBM involved a settlement arising from a publishing firm's allegations that the Department of Defense ("DOD") breached its contract to publish a DOD employee newsletter. The publishing firm offered to dismiss its suit if DOD modified the newsletter contract to provide for the firm to publish an annual DOD guidebook that was not covered by the original contract. Plaintiff EBM, a competitor publishing firm, sued to void the contract for the guidebook on grounds that DOD failed to comply with regulations requiring competitive bidding. The Fourth Circuit found in favor of the plaintiff, holding that the Attorney General's plenary authority over litigation "does not include license to agree to settlement terms that would violate the civil laws governing the agency." *EBM*, 3 F.3d at 762.

The proposed HHS Settlement can be distinguished from *EBM*. The relief provided in the *EBM* settlement was not within the class of remedies available to a court upon a finding of breach of contract. *See United States v. Sherwood*, 312 U.S. 584 (1941). If a court found that the CDC reclassification violated Title VII, *EBM* would not preclude the court from enjoining OPM and HHS from using any employment practices found discriminatory until those standards and procedures were found non-discriminatory. Nor would it preclude an order barring the reclassification of certain employees for a specific duration. In those circumstances, the injunction would not require the government to perform acts unauthorized by statute. Rather, it would order the government to cease discriminating in the performance of authorized acts.

If, as described above in part II.A, the *Diamond* settlement provision is sufficiently tied to a possible violation of Title VII and necessary to make plaintiffs whole, that provision differs from the guidebook contract offered in settlement in *EBM*. Title VII reflects a congressional determination that federal personnel decisions shall be free from discrimination, and that the equity powers of the courts are available to enforce this principle. By authorizing Title VII actions against federal agencies, Congress has empowered the courts to order the relief required to cure violations of the act. *See Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 291–92 (1960) ("When Congress entrusts to an equity court the enforce-

ment of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of the statutory purposes.''); *see also Porter v. Warner Holding Co.*, 328 U.S. 395, 397–98 (1946).

III. Conclusion

HHS may enter into a settlement providing that the positions of specific employees will not be reclassified until they vacate the positions if, in light of the facts and recognizing the inherent uncertainty of litigation, the agency concludes that a court might find that there was some cognizable danger of recurrent violation in the reclassifications. The possible finding of a cognizable danger of recurrent violation could be a danger of retaliation against the employees, of the use of discriminatory practices or procedures in the reclassification, or that the reclassification of these employees would perpetuate the effects of past discrimination. If, in addition, the facts indicated that the affected employees were close to retirement or otherwise expected to vacate the positions shortly, the provision would more closely fit the danger of a recurrent violation than if the employees were relatively new and could be expected to stay on for many years.

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