OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS

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Attorney General

Janet Reno

Assistant Attorney General

Office of Legal Counsel

Randolph D. Moss

Deputy Assistant Attorneys General

Office of Legal Counsel

Evan H. Caminker

Joseph R. Guerra

Vicki C. Jackson

Daniel L. Koffsky (Acting)

Cornelia T.L. Pillard

William M. Treanor

OFFICE OF LEGAL COUNSEL

Attorney-Advisers

(2000)

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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-three volumes of opinions published covered the years 1977 through 1999. The present volume covers 2000. Volume 24 includes Office of Legal Counsel opinions that the Department of Justice has determined are appropriate for publication. A substantial number of opinions issued during 2000 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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OPINION

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

Enforceability of 18 U.S.C. § 1302

Application of 18 U.S.C. § 1302 to prohibit the mailing of truthful advertising concerning certain lawful gambling operations would violate the First Amendment. Accordingly, the Department of Justice will refrain from enforcing the statute with respect to such mailings.

Letter Opinion for the Speaker of the House of Representatives

September 25, 2000

This is to inform you of the Department of Justice's determination that, in light of governing Supreme Court precedent, the Department cannot constitutionally continue to apply 18 U.S.C. § 1302 to prohibit the mailing of truthful information or advertisements concerning certain lawful gambling operations.

I.

The central opinion that informs the Department's decision is *Greater New Orleans Broadcasting Ass'n v. United States*, 522 U.S. 173 (1999). In that case, an association of Louisiana broadcasters and its members challenged the constitutionality of the federal statute prohibiting the broadcasting of information concerning lotteries and other gambling operations. The statute in question, 18 U.S.C. § 1304 (1994), provides in relevant part:

> Whoever broadcasts by means of any radio or television station for which a license is required by any law of the United States . . . any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . shall be fined under this title or imprisoned not more than one year, or both.

The broadcasters sought permission to broadcast advertisements for lawful casino gambling in Louisiana and Mississippi. The Supreme Court held that the First Amendment prohibits application of § 1304 "to advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, where such gambling is legal." 527 U.S. at 176.

The Court reviewed the constitutionality of § 1304 under the "commercial speech" test of *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). *See Greater New Orleans*, 527 U.S. at 183. Under that test, when a government regulation restricts truthful speech proposing lawful commercial activity, the court must "ask whether the asserted governmental interest is substantial." *Central Hudson*, 447 U.S. at 566. If the interest is substantial, the court determines whether the regulation "directly advances the govern-

mental interest asserted" and whether it "is not more extensive than is necessary to serve that interest." *Id.* As the Court observed in *Greater New Orleans*, "the Government bears the burden of identifying a substantial interest and justifying the challenged restriction." 527 U.S. at 183.

In the *Greater New Orleans* case, the government identified two basic governmental interests served by § 1304: minimizing the social costs associated with gambling or casino gambling by reducing demand, and "assisting States that 'restrict gambling' or 'prohibit casino gambling' within their borders." 527 U.S. at 185–87. The Supreme Court determined that, as applied to truthful advertising for lawful casino gambling by broadcasters located in states that permit such gambling, § 1304 does not directly advance either interest and is an impermissibly restrictive means of serving those interests. *Id.* at 188–96.

As to the government's interest in minimizing the social costs of casino gambling by reducing consumer demand, the Supreme Court concluded that "[t]he operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it." *Id.* at 190. The Court pointed to the various exceptions that Congress has engrafted onto § 1304 over the years, particularly the exception for broadcast advertisements for Indian gambling (*see* 25 U.S.C. § 2720 (1994)). The Court concluded that by permitting advertisements for Indian casino gambling and certain other kinds of gambling to be broadcast on a nationwide basis, Congress had effectively made it impossible for § 1304 to accomplish its original goal of minimizing the social costs of gambling by reducing consumer demand. In addition, the Court noted that Congress could have employed various "practical and nonspeech-related forms of [casino gambling] regulation," such as restrictions on casino admission and credit, that "could more directly and effectively alleviate some of the social costs of casino gambling." 527 U.S. at 192.

The Court also determined that the other asserted governmental interest, that of assisting States that restrict casino gambling, "adds little to [the government's] case." *Id.* at 194. First, the statutory exceptions that prevented § 1304 from directly and materially advancing the federal government's interest in minimizing the social costs of casino gambling were equally inimical to the efforts of non-casino states: "We cannot see how this broadcast restraint, ambivalent as it is, might directly and adequately further any *state* interest in dampening consumer demand for casino gambling if it cannot achieve the same goal with respect to the similar *federal* interest." *Id.* (emphasis added). Second, the Court concluded that § 1304 "sacrifices an intolerable amount of truthful speech about lawful conduct when compared to all of the policies at stake and the social ills that one could reasonably hope such a ban to eliminate." *Id.* The Court reasoned that prohibiting casino gambling advertisements in all States in order to protect the interests of non-casino States is "neither a rough approximation of efficacy, nor

a reasonable accommodation of competing State and private interests." *Id.* at 194–95.

The Court concluded by stating:

> Had the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in States that have legalized the underlying conduct, see [*United States v.] Edge [Broadcasting Co.*], 509 U.S. [418,] 428 [(1993)], this might be a different case. But under current federal law, as applied to petitioners and the messages that they wish to convey, the broadcast prohibition in 18 U.S.C. § 1304 and 47 CFR § 73.1211 violates the First Amendment.

Id. at 195.

II.

After the *Greater New Orleans* decision was issued, the Department was required to consider whether the application of § 1304 to the broadcasting of truthful advertisements for lawful casino gambling violates the First Amendment, regardless of whether the statute is applied to broadcasts originating in States that permit casino gambling (as was the case in *Greater New Orleans*) or in States that do not. This question arose in the case of *Players International, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997), *appeal pending*, No. 98–5127 (3d Cir. 1999). In a supplemental brief submitted to the Third Circuit on behalf of the United States, the Justice Department observed that "while the Court's *holding* in *Greater New Orleans* is confined to broadcasts originating in casino gambling States, the Court's *reasoning* indicates that section 1304, as currently written, cannot constitutionally be applied to broadcasts originating in non-casino States either." *See* Supplemental Brief for the Appellants at 6 (emphasis in original), *Players Int'l, Inc. v. United States* (No. 98–5127) ("U.S. Brief"). This view reflected the conclusion that the same deficiencies and inconsistencies that the Court in *Greater New Orleans* held to undermine the government interests there were also present when the statute was applied to broadcasts originating in non-casino States.

As noted above, the Court in *Greater New Orleans* found that § 1304 did not directly advance the government's interest in minimizing the social costs of casino gambling because the statutory exceptions to § 1304, particularly the exception for Indian gambling, preclude the statute from meaningfully reducing public demand for casino gambling. *See* 527 U.S. at 193–95. The exception for Indian gambling is *nationwide* in scope: advertisements for Indian gambling may be broadcast in every State, including States that prohibit private casino gambling. *See* 25 U.S.C. § 2720. The same is true of the other statutory exceptions to § 1304

except for the one covering state lotteries. *See* 18 U.S.C. § 1307(a) (1994). As a result, the Department determined that there is no reason to believe that § 1304 is any more effective in minimizing the social costs of casino gambling for residents of *non-casino* States than it is for residents of casino States. *See* U.S. Brief at 7.

The Court in *Greater New Orleans* also held that § 1304 was an impermissibly restrictive means of dealing with the social costs associated with casino gambling because those costs "could [be] more directly and effectively alleviate[d]" by "nonspeech-related forms of regulation." 527 U.S. at 192. The Department concluded that this determination, too, is equally applicable with respect to broadcasts originating in non-casino States. If measures such as "a prohibition or supervision of gambling on credit" are more effective than § 1304 with respect to gamblers who live in States that permit casino gambling, as the Court found, they would appear to be equally effective as to gamblers who visit from non-casino States. *Id.*

Finally, the Department decided that the Court's conclusion in *Greater New Orleans* that the federal goal of assisting non-casino States "adds little to [the] case," *id.* at 194, also holds true with respect to the application of § 1304 to broadcasts originating in non-casino States themselves. The Court stressed the fact that the "ambivalent" federal advertising restriction, with its exceptions for Indian gambling and other gambling activities, cannot "directly and adequately further any *state* interest in dampening consumer demand for casino gambling." *Id.* That reasoning would rebut the argument that the application of § 1304 in non-casino States directly advances the anti-gambling policies of those States.

Given these considerations, the Department's brief in *Players* asserted that § 1304 may not constitutionally be applied to broadcasters who broadcast truthful advertisements for lawful casino gambling, regardless of whether the broadcasters are located in a State that permits casino gambling or one that does not. In conjunction with the filing of that brief, the Solicitor General notified both Houses of Congress that the Department is no longer defending the constitutionality of § 1304 as applied to such broadcasts. *See* Letters for Hon. J. Dennis Hastert, Speaker of the House, U.S. House of Representatives, and for Hon. Patricia Mack Bryan, Senate Legal Counsel, U.S. Senate, from Seth P. Waxman, Solicitor General, U.S. Department of Justice (Aug. 6, 1999).

III.

In light of the *Greater New Orleans* decision, the U.S. Postal Service was faced with the question whether that opinion might also render unconstitutional certain applications of 18 U.S.C. § 1302, which prohibits the mailing of essentially the same kind of gambling-related matter covered by the analogous broadcast restrictions of 18 U.S.C. § 1304. Section 1302 provides in relevant part:

> Whoever knowingly deposits in the mail, or sends or delivers by mail:
>
> Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance;
>
> . . . .
>
> Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, ...
>
> . . . .
>
> Shall be fined under this title or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

The Postal Service therefore wrote the Department of Justice seeking its guidance as to whether § 1302 remained constitutionally enforceable.[1] The Service's letter stated: "Without some interpretation on this point the Postal Service will be in a position of receiving requests for mailing services and for interpretations of both our mailing requirements statutes and the criminal statute, which should be guided by the Department of Justice." The Service further expressed the view that, in light of the *Greater New Orleans* decision, § 1302 "is now indefensible in federal court." Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Elizabeth P. Martin, Chief Counsel, Consumer Protection Law, U.S. Postal Service (Oct. 19, 1999).

After thorough consideration of the matter, I have concluded that the application of 18 U.S.C. § 1302 to the mailing of truthful advertising concerning lawful gambling operations (except as to state-operated lotteries in some circumstances, *see* p. 8, *infra*) would be unconstitutional. I have further concluded that, because of such unconstitutionality, the Department should no longer enforce the statute against such mailings.

As reflected in the text of the respective statutes, § 1302 imposes restrictions on mailed communications regarding gambling or lottery matter that are nearly identical to those imposed by § 1304 with respect to broadcast communications on the same subject matter. Further, § 1302 is subject to the same weakening exceptions that the Supreme Court considered fatal to § 1304's constitutionality in *Greater New Orleans*. I therefore find no reasonable basis for distinguishing

[1] Letter for Josh Hochberg, Chief-Fraud Section, Criminal Division, U S. Department of Justice, from Elizabeth P. Martin, Chief Counsel, Consumer Protection, U.S. Postal Service, *Re Interpretation of Greater New Orleans Broadcasting Assoc., Inc.* (Aug 10, 1999)

the provisions of § 1302 from those of § 1304 with respect to the constitutional question presented here. The former's restrictions against the mailing of truthful information concerning lawful gambling activities conflict with First Amendment standards for the same reasons that apply to the latter's restrictions against broadcasting the same kind of information.

A.

Just as the First Amendment applies to the governmental restrictions on broadcasting challenged in *Greater New Orleans* and *Players*, it applies, as well, to the governmental restrictions on the dissemination of information through the mails that are at issue here. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (federal statute prohibiting unsolicited mailing of contraceptive advertisements held to be an unconstitutional restriction on commercial speech); *Blount v. Rizzi*, 400 U.S. 410, 416 (1971) (invalidating administrative restrictions on mailing of obscene matter and quoting Justice Holmes dissent in *Milwaukee Soc. Democratic Pub. Co. v. Burleson*, 255 U.S. 407, 437 (1921): "The United States may give up the post office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ."); *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (statute requiring Post Office to obtain authorization from addressee before delivering certain designated types of mail violates the addressee's First Amendment rights). As the Court observed in *United States Postal Service v. Greenburgh Civic Associations*, 453 U.S. 114 (1981), "[h]owever broad the postal power conferred by Article I may be, it may not of course be exercised by Congress in a manner that abridges the freedom of speech or of the press protected by the First Amendment to the Constitution."

The Supreme Court has indicated that federal government restrictions on postal communications involving commercial speech are to be evaluated using the same test applicable to broadcast communications involving commercial speech. The leading case is *Bolger*, in which the Court held that the provisions of 39 U.S.C. § 3001(e)(2), prohibiting the mailing of unsolicited advertisements for contraceptives, were unconstitutional as applied to the informational pamphlets at issue. In so holding, the Court applied precisely the same four-part test from *Central Hudson* for restrictions on commercial speech that it applied to the broadcast communications at issue in *Greater New Orleans*. *See* 463 U.S. at 68–69. I therefore conclude that the *Central Hudson* test is applicable to 18 U.S.C. § 1302, and with the same results reached in *Greater New Orleans*, insofar as that statute prohibits the mailing of truthful advertising concerning lawful gambling operations.

The Court's reasoning in *Greater New Orleans* with respect to § 1304 is directly applicable to § 1302. The mailing prohibition of § 1302, like the broadcasting

prohibition of § 1304, does not directly advance the federal government's interest in minimizing the social costs of casino gambling because it is subject to the very same nationwide statutory exceptions that the Supreme Court held fatally undermined the constitutionality of § 1304's analogous prohibitions against the broadcast of gambling advertisements. *See* 18 U.S.C. § 1307; 25 U.S.C. § 2720 ("sections 1301, 1302, 1303, and 1304 of title 18 shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter"). Thus, advertisements for State-conducted lotteries, Indian gaming operations, and the additional exemptions authorized by the Charity Games Advertising Clarification Act of 1988, 18 U.S.C. § 1307(a)(2), are exempted from the mailing provisions of § 1302 as well as from the broadcast provisions of § 1304. Accordingly, for the reasons set forth by the Supreme Court in *Greater New Orleans*, § 1302, like § 1304, cannot constitutionally be applied to prohibit the transmission of truthful information or advertisements concerning lawful gambling activities.[2]

This conclusion is not intended to address the question whether Congress could amend applicable statutory law in this area in a manner that would conform to the governing constitutional standards. As the Supreme Court explained in *Greater New Orleans* with reference to the restrictions on broadcast advertising contained in 18 U.S.C. § 1304, "[h]ad the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in States that have legalized the underlying conduct, this might be a different case." 527 U.S. at 195 (citation omitted). The Department is unable to conclude, however, that existing federal law respecting the mailing of information or advertisements concerning legal gambling (apart from State-operated lotteries) is any more satisfactory in this respect than the broadcast restrictions invalidated in *Greater New Orleans*.

B.

In assessing the impact of *Greater New Orleans* on § 1302's prohibitions against mailing of gaming information, I consider it important to emphasize that many significant applications of the statute should remain unaffected by that decision. Because the Department is not persuaded that the *Greater New Orleans* holding renders § 1302 unconstitutional in all its applications, my decision to restrict future enforcement of the statute is limited in scope. *See United States v. Grace*, 461

[2] Prior to the Supreme Court's opinion in *Greater New Orleans*, two district courts had rejected First Amendment challenges to § 1302 brought by a magazine that carried advertisements for lotteries and casinos, *Aimes Publications, Inc. v. U S Postal Service*, No. 86–1434, 1988 WL 19618 (D.D.C. 1988), and by an association of newspapers whose members wished to carry lottery advertising, *Minnesota Newspaper Ass'n, Inc v Postmaster General*, 677 F Supp. 1400 (D Minn 1987) (§ 1302 held constitutional as applied to lottery advertisements, but unconstitutional as applied to mailing of newspapers containing prize lists), *vacated as moot*, 490 U S 225 (1989). Because both of these decisions are grounded upon the courts' finding that the statute directly advances the government interests in minimizing the social costs associated with gambling, or supporting the policies of States that restrict or prohibit gambling, *see Aimes*, 1988 WL 19618, at *3 and *Minnesota Newspaper Ass'n*, 677 F Supp. at 1404–05, they cannot be reconciled with the subsequent holding in *Greater New Orleans* that the efficacy of the attempt to advance those interests is undercut by the statutory exemptions that permit the nationwide promotion of various kinds of gambling.

U.S. 171, 180–82 (1983). The Department continues to regard § 1302 as enforceable in a number of significant applications.

First, my non-enforcement decision is limited to mailed information and advertisements concerning *lawful* gambling activities. Neither the Department nor the Postal Service asserts that § 1302 is inapplicable to, or unenforceable against, the mailing of advertisements for illegal gambling activities, and nothing in *Greater New Orleans* establishes that § 1302 would be unconstitutional as applied to such advertising. *See* 527 U.S. at 184; *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 n.7 (1996).

Second, my decision applies only with respect to *truthful, nonmisleading* gambling advertisements. Neither the Department nor the Postal Service suggests that the First Amendment entitles anyone to mail false or misleading advertising. The Supreme Court repeatedly has held that false and misleading advertising is not protected by the First Amendment, and *Greater New Orleans* does not suggest otherwise. *See* 527 U.S. at 184–85; *Central Hudson*, 447 U.S. at 566.

Third, the mailings covered by my decision do not include advertisements concerning state-operated lotteries. The regulatory regime for state lottery advertising is different from that for advertising for other forms of lawful gambling: read together, 18 U.S.C. §§ 1302 and 1307(a)(1)(A) prohibit the mailing of advertisements for state lotteries contained in publications published in non-lottery States, while expressly exempting the mailing of such lottery advertisements contained in publications that are published in a lottery State. In *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993), the Supreme Court expressly upheld the constitutionality of the corresponding provisions of 18 U.S.C. §§ 1304 and 1307(a) that apply to broadcasters in non-lottery States and stressed that such application properly advanced the "congressional policy of balancing the interests of lottery and nonlottery States."

Finally, I note that this non-enforcement decision does not extend to the application of § 1302 insofar as that section applies to the use of the mails for the actual conduct or operation of gambling activities through the mails, as distinguished from informational or advertisement mailings. Rather, this decision applies only to the enforcement of § 1302 with respect to truthful informational mailings or advertisements concerning lawful gambling.

CONCLUSION

For the foregoing reasons, and subject to the above-stated qualifications, I have determined that the application of 18 U.S.C. § 1302 to prohibit the mailing of truthful, nonmisleading information or advertisements concerning lawful gambling

operations would be unconstitutional. Accordingly, the Department will refrain from enforcing the statute with respect to such mailings.

Sincerely,

JANET RENO
Attorney General

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Applicability of 18 U.S.C. § 205(a)(2) to Representation Before Non-Federal Agency

18 U.S.C. § 205(a)(2), which bars a Federal employee from acting as an agent or attorney before any "agency . . . in connection with any covered matter in which the United States is a party or has a direct and substantial interest," applies only to Federal agencies and does not apply to state agencies or agencies of the District of Columbia.

January 3, 2000

MEMORANDUM OPINION FOR THE DIRECTOR
DEPARTMENTAL ETHICS OFFICE
DEPARTMENT OF JUSTICE

You have asked whether a state agency or an agency of the District of Columbia comes within the term "agency" in 18 U.S.C. § 205(a)(2), which, among other things, bars a Federal employee from acting as an agent or attorney before any "agency . . . 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). We conclude that "agency" in that provision encompasses only Federal agencies and does not apply to state agencies or agencies of the District of Columbia.

I.

Section 205(a)(2) provides as follows:

> (a) Whoever, being 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, other than in the proper discharge of his official duties —
>
> . . . .
>
> (2) acts as 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;
>
> shall be subject to the penalties set forth in section 216 of this title.

18 U.S.C. § 205(a)(2). Congress enacted this provision in 1962 as part of Pub. L. No. 87–849, 76 Stat. 1119, 1122, a wholesale revision of the conflict-of-interest

laws. Section 205 was directed at conflicts of interest arising from the "opportunity for the use of official influence." *See* H.R. Rep. No. 87–748, at 21 (1961); *see also* Bayless Manning, *Federal Conflict of Interest Law* 85 (1964) ("The emphasis of Section 205 is upon action in a representative capacity, particularly in a situation involving direct confrontation between the government employee and other government employees.").

You have asked whether this provision prohibits a Federal government employee from engaging in representation in connection with a covered matter before a state agency or an agency of the District of Columbia, or whether the prohibition only applies to representation before a Federal agency. In a prior opinion, this Office concluded that the term "court" in the same provision covers state as well as Federal courts. *See* Letter for Anthony L. Mondello, General Counsel, United States Civil Service Commission, from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel at 1 (1970) ("1970 Opinion") ("The principle that stands clear in 18 U.S.C. 205 is that any federal or D.C. employee is precluded from acting as an attorney to prosecute a claim against the United States or to represent anyone in any court whatever, federal, state or otherwise, if the United States is a party to the proceeding or if a direct and substantial interest of the United States is involved in the proceeding.").[1] The question before us is whether to give a similar interpretation to the term "agency" in the provision.

II.

A.

"[W]e begin as we do in any exercise of statutory construction with the text of the provision in question, and move on, as need be, to the structure and purpose of the Act in which it occurs." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995). Because § 205 itself does not define "agency" or offer clear guidance as to its meaning, we turn to the statutory scheme in which it is found.

"Agency" is defined in 18 U.S.C. § 6 as follows:

> As used in this title: . . . .
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or

[1] The specific question raised in the 1970 Opinion was whether District of Columbia and Federal government attorneys could appear on a volunteer basis in District of Columbia courts to represent indigent persons asserting claims against the District of Columbia Based on the language and legislative history of the provision, Assistant Attorney General Rehnquist concluded that such representation is barred by § 205 because that provision's reference to matters "in which the United States is a party or has a direct and substantial interest" includes claims in which the District of Columbia is a party or has a direct and substantial interest. *See* 1970 Opinion at 2.

> bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

18 U.S.C. § 6 (1994). By its terms, this definition applies to the word "agency" in 18 U.S.C. § 205(a), thereby limiting § 205(a) to Federal agencies. Section 6 applies to the use of the term throughout title 18 unless the context indicates a more limited definition; it does not, in any event, permit a broader application to agencies outside the Federal government. Although § 205 is part of an amendment to title 18, added after the definition of "agency" in § 6, *see* ch. 645, 62 Stat. 683, 685 (1948) (definition of "agency"); Pub. L. No. 87–849, 76 Stat. at 1122 (adding § 205), the general rule of statutory construction is that a provision is to be read in its context and an amendment and the original provisions are to be read together "'as parts of an integrated whole.'" *Republic Steel Corp. v. Costle*, 581 F.2d 1228, 1232 (6th Cir. 1978) (quoting *Markham v. Cabell*, 326 U.S. 404, 411 (1945)), *cert. denied*, 440 U.S. 909 (1979); *see also* 1A Norman J. Singer, *Sutherland on Statutory Construction* § 22.35 (5th ed. 1991) ("Singer") ("The act or code as amended should be construed as to future events as if it had been originally enacted in that form. Provisions in the unamended sections applicable to the original section are applicable to the section as amended in so far as they are consistent . . . . [and] [w]ords used in the unamended sections are considered to be used in the same sense in the amendment.") (footnotes omitted).

This conclusion comports with the practice of this Office, which has often relied on § 6 as defining "agency" for purposes of the conflict-of-interest provisions. *See, e.g., Applicability of 18 U.S.C. § 207(a) to the Union Station Development Corporation*, 12 Op. O.L.C. 84, 84 (1988) ("In the past, we have looked to the definition of 'agency of the United States' in 18 U.S.C. § 6 to determine if an entity should be regarded as the United States for the purposes of the conflict of interest laws."); *Applicability of 18 U.S.C. § 205 to Union Organizing Activities of Department of Justice Employee*, 5 Op. O.L.C. 194, 195 (1981) (noting that in § 6 "the term 'agency' is defined for purposes of Title 18 generally"); *see also Government Attorneys' Participation as Plaintiffs in a Suit Against the Office of Personnel Management*, 5 Op. O.L.C. 74, 75 (1981) ("Generally, [the second clause of § 205] is interpreted to prohibit representational activity such as appearances in court, signing pleadings or letters, and direct contact with a *federal agency* on behalf of [a client].") (emphasis added).[2]

[2] Our conclusion also comports with relevant determinations of the Office of Government Ethics ("OGE") *See, e.g., Letter to an Employee*, 90 X 6, 1990 WL 485684 (OGE) (Apr 4, 1990) (§ 205 prohibits Federal employee from representation before Federal agency but not before state or local agency); *see also Memorandum from Stephen D Potts, Director, to Designated Agency Ethics Officials, General Counsels, and Inspectors General Regarding Amendments to 18 U S C § 205 and 18 U.S.C § 207*, 96 X 16, 1996 WL 931725 (OGE) (Aug 21, 1996) ("Section 205 of title 18, United States Code, prohibits an executive branch employee from acting as agent or attorney

Continued

We might well come to a different conclusion if there were specific language in § 205(a) manifesting an intent to give the term broader scope than the plain meaning of the statutory definition of "agency" in § 6.[3] Section 205(a), however, contains no explicit language broadening the definition of agency.

It also might be argued that the presence of the modifier "of the United States" where the term "agency" appears in the prefatory language in § 205(a) (referring to the covered officers and employees of Federal agencies) and the absence of that modifier in § 205(a)(2)'s reference to "any department, agency, court" (referring to the prohibited venues of representation) makes § 205(a)(2) applicable to actions before state agencies. Given that Congress included an express limitation to Federal agencies in the introductory portion of the statutory subsection, one might infer that the absence of any such express limitation in § 205(a)(2) suggests that § 205(a)(2) refers to a broader class of entities than does § 205(a), perhaps including state and local agencies. To conclude otherwise would arguably render the words "of the United States" surplusage. *See International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 80 (1991) (referring to general statutory principle that "each word in a statute should be given effect"); *see also* 2A Singer at § 46.06.

We do not believe, however, that such an inference is warranted. Although the legislative history offers little guidance as to the intent of the drafters on the scope of this term, it contains nothing indicating that inclusion of "of the United States" in paragraph (a) and the exclusion of that modifier in paragraph (a)(2) reflects an advertent choice to delineate different groups of entities. A number of the prior versions of the bill did include definitions of "agency" applicable to § 205. Some of these expressly limited "agency" to executive branch agencies, *see Federal Conflict of Interest Legislation: Hearings on H.R. 302, H.R. 3050, H.R. 3411,*

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before any Federal department, agency, or court in connection with [a covered matter] . . "), *Letter to the General Counsel of a Department*, 96 X 11, 1996 WL 931720, at 2 (OGE) (July 5, 1996) ("Subject to certain exceptions, [§ 205] prohibits a Government employee . . from acting as agent or attorney for anyone in any claim against the United States or from acting as agent or attorney for anyone before any department, agency, or court of the United States . . "), *Letter to a Designated Agency Ethics Official*, 95 X 2, 1995 WL 855428 (OGE) (Mar. 13, 1995) (same).

On the other hand, although this issue has never been addressed directly by case law, there are conflicting dicta in judicial opinions that discuss § 205 more generally. *Compare Van EE v. Environmental Protection Agency*, 55 F. Supp. 2d 1, 12 (D.D.C. 1999) (concluding that § 205 prohibits certain conduct before Federal agencies and is constitutional and noting that "[under § 205] plaintiff[, a Federal employee,] is free to represent [non-governmental organizations] in forums other than the federal government, such as state and local government"), *with Gray v. Rhode Island Dep't of Children, Youth and Families*, 937 F. Supp. 153, 158 (D. R.I 1996) (reversing disqualification of attorney for state agency from participating in litigation against another state agency based on state ethics rules and observing that, under Federal law, "[§ 205] prohibits an employee of the United States from acting as an attorney for anyone before any forum in which the United States is a party or has a substantial interest")

[3] It would be a different case, for example, if Pub. L. No. 87–849, enacting § 205 in 1962, contained a definition of "agency" that differed from the definition in § 6 so as to present a situation where " 'the new provisions and the . . unchanged portions of the original section cannot be harmonized, [in which case] the new provisions should prevail as the latest declaration of the legislative will.' " *American Airlines, Inc. v. Remis Indus., Inc.*, 494 F.2d 196, 200 (2d Cir. 1974) (quoting 1A Singer § 22.34). The conflict-of-interest provisions in chapter 11 of title 18, however, although including some definitions, *see* 18 U.S.C. § 201 (1994), do not contain a new definition of "agency." Other terms in the provision, notably "court," are not defined in 18 U.S.C. § 6 and therefore may be read more broadly

H.R. 3412, and H.R. 7139 Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 87th Cong. 5 (1961) ("Subcommittee Hearings") (reprinting § 2(a) of H.R. 3050), or defined "agency" in the bill by express reference to 18 U.S.C. § 6, *see* Subcommittee Hearings at 23 (reprinting § 2 of H.R. 7139); *id.* at 60 (discussing § 2 of proposed bill entitled "Executive Employees' Standards Act"). The deletion of any such definition or express cross-reference in the final version appears to reflect the recognition that a definition (or explicit reference to a definition) of "agency" in the conflict-of-interest bill was unnecessary given the existing definition in the criminal code.[4] That deletion thus should not be understood as an effort to broaden the definition of "agency." Moreover, the purpose of including a definition of "agency" in earlier versions of the bill was to clarify which Federal agencies were to be covered, not to address coverage of non-Federal entities.[5]

Additionally, the House Report on H.R. 8140, in its discussion of § 205, describes the provision as "prohibit[ing] officers and employees of the Government from acting as agent or attorney for anyone before a *Federal* agency or a court in connection with any matter in which the United States has a direct and substantial interest." H.R. Rep. No. 87–748, at 9–10 (1961) (emphasis added).[6] It is unclear why the same reference does not appear in the Senate Report in the next session on the same bill.[7] In any event, § 205 in H.R. 8140 — the bill which the House Report described as prohibiting representation before "a Federal agency" — included "of the United States" after "agency" in paragraph (a) but not in paragraph (a)(2); the language in the House Report thus indicates

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[4] *See, e.g.*, Subcommittee Hearings at 45 (analyzing H R. 3050 and noting that "[Section 2(a)] contains a definition of the word 'Agency' as used in the bill. Although the definition used may suffice, the terms involved have already been defined in section 6 of title 18, United States Code. In practice this last section has operated satisfactorily In the circumstances it would be desirable to model [the definition] upon 18 U S C 6") Arguably, cross-referencing § 6 in § 205 could have unnecessarily cast doubt on the applicability of § 6 to other provisions of Title 18 that lack any such express cross-reference

[5] *See, e.g.*, Subcommittee Hearings at 23 (reprinting § 2 of H.R. 7139) ("The terms 'department' and 'agency' shall have the meanings ascribed to them in section 6 of title 18, United States Code, but in no event shall they mean any agency of the legislative or judicial branch."), *id.* at 60 (discussing § 2 of proposed bill entitled "Executive Employees' Standards Act") (" 'Department' and 'agency' are defined as in 18 U S.C. 6. These terms are intended to include the independent regulatory agencies.").

[6] The version of the provision discussed in that report was substantially similar to the version that was enacted It provided as follows

> Whoever, being 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, including the District of Columbia, otherwise than in the proper discharge of his official duties —
>
> . . . .
>
> (2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other matter in which the United States is a party or has a direct and substantial interest —
>
> Shall be fined not more than $10,000 or imprisoned for more than two years, or both.

See H.R. Rep. No. 87–748, at 39

[7] *See* S. Rep No 87–2213, at 11 (1962), *reprinted in* 1962 U S C.C A N 3852, 3859 ("Section 205 . . extends its bar against a Government employee's private representational activities to all matters in which the United States is a party or has an interest Thus the section includes within its scope applications for licenses or other privileges, criminal proceedings, and other important matters not now covered.").

that use of the modifier "of the United States" in one part should not be read to suggest that a broader meaning of "agency" applies whenever that modifier is absent. Given the lack of explicit evidence of contrary intent in the legislative history or the text of § 205, we do not believe that the inferences from the use of modifiers in § 205 is sufficient to overcome the clear directive of § 6 that "agency" as used in § 205(a) covers "agencies of the United States" and not a broader class of agencies which might include state agencies.

B.

Whether § 205(a)(2) prohibits representation by United States government employees before an agency of the District of Columbia presents a closer question. Section 205 is structured so that the first subsection, 205(a), sets forth a prohibition on activities by Federal employees. The second subsection, 205(b), sets forth the prohibition on District of Columbia employees. Because it, too, uses the term "agency," and does so in a context that one might assume includes agencies of the District of Columbia, analysis of § 205(b)(2) assists in determining the scope of § 205(a)(2). Subsection 205(b)(2) states:

> Whoever, being an officer or employee of the District of Columbia or an officer or employee of the Office of the United States Attorney for the District of Columbia, otherwise than in the proper discharge of official duties —
>
> . . . .
>
> (2) acts as agent or attorney for anyone before any department, agency, court, officer, or commission in connection with any covered matter in which the District of Columbia is a party or has a direct and substantial interest;
>
> shall be subject to the penalties set forth in section 216 of this title.

18 U.S.C. § 205(b) (1994).

The definition of "agency" in 18 U.S.C. § 6 — which restricts an "agency" for purposes of that title to entities "of the United States" — does not specify whether "of the United States" encompasses the District of Columbia. The legislative history is unhelpful on this point. In light of this ambiguity, there are a number of possible interpretations of "agency" in § 205(a) and (b).[8] Because the

[8] For example, if "of the United States" as used in § 6 includes the District of Columbia, it could be that § 205(a) and § 205(b) would prohibit representation before both Federal and District of Columbia agencies by either Federal or District of Columbia employees, the former in covered matters in which the United States "is a party or has a direct and substantial interest," the latter in covered matters in which the District of Columbia "is a party or

text and legislative history of § 6, as well as the text of § 205, offer no clear answer, we turn to the structure and legislative history of § 205. We conclude that the best interpretation is that "agency" in § 205(a) applies only to Federal agencies while "agency" in § 205(b) applies only to District of Columbia agencies. While an interpretation giving the same term different meanings in different parts of the same provision ordinarily would be disfavored under canons of statutory construction, we conclude that the structure and legislative history of § 205, taken in conjunction with the text of § 6, compels different constructions of the term "agency" in § 205(a) and § 205(b).

Section 205 contains a list of entities before which employees may not engage in representational activities. The list of entities in § 205(a) is different from the list in § 205(b). The entities that are not included in § 205(b) — "court[s]-martial" and "civil, military, or naval" commissions — are, typically, solely Federal entities. This suggests that the entities listed in § 205(a) are intended to be Federal government entities while those listed in § 205(b) are intended to be District of Columbia government entities.

This interpretation is also supported by the minimal legislative history addressing the question whether § 205 applies to District of Columbia entities. Prior to 1989, the text of § 205 did not contain the current lettered paragraphs differentiating between applicability to Federal employees and District of Columbia employees. To the contrary, the earlier version of § 205 stated that, at least with regard to the question of which employees were covered by the prohibition, "agency of the United States" included the District of Columbia. The 1988 version, like the original 1962 version of § 205, *see* Pub. L. No. 87–849, 76 Stat. at 1122, provided as follows:

> Whoever, being 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, including the District of Columbia*, otherwise than in the proper discharge of his official duties —
>
> . . . .

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has a direct and substantial interest." Or one could conclude that the context of the prohibition in § 205(b), applying as it does only to District of Columbia employees, shows that the term "agency" in § 205(b) "was intended to be used in a more limited sense," 18 U.S.C. § 6, and thus applies only to representation before District of Columbia agencies. Under such an interpretation, Federal employees would be prohibited from representational activities before both Federal and District of Columbia agencies in covered matters where the United States "is a party or has a direct and substantial interest" under § 205(a)(2) but District of Columbia employees would only be prohibited from representational activities before District of Columbia agencies in covered matters where the District of Columbia "is a party or has a direct and substantial interest" under § 205(b)(2). A third possibility is that, although "of the United States" in § 6 includes both Federal and District of Columbia entities, the context of § 205(a) shows that the prohibition therein is intended to reach only the more limited class of Federal agencies while the context of § 205(b) shows that it is intended to reach only the more limited class of District of Columbia agencies. It is also possible that "of the United States" as used in § 6 does not reach the District of Columbia at all, in which case "agency" in § 205(a) would reach only Federal agencies while "agency" in § 205(b) would either only reach Federal, and not District of Columbia agencies, or would reach District of Columbia agencies based on the theory that § 205(b) is an anomalous provision to which § 6 for some reason is inapplicable.

> (2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest—
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. § 205 (1988) (emphasis added); *see also* H.R. Rep. No. 87–748, at 39 (quoting substantially similar language in proposed bill setting forth original version of provision).

The Ethics Reform Act of 1989, Pub. L. No. 101–194, 103 Stat. 1716, 1750, amended that provision to make it substantially similar to the current one, separating into distinct sections the prohibitions on Federal employees and District of Columbia employees. The little authoritative legislative history that there is regarding the separation of the provisions affecting Federal employees and District of Columbia employees supports the conclusion that it creates prohibitions for Federal employees with regard to Federal agencies and District of Columbia employees with regard to District of Columbia agencies. In the Report of the Bipartisan Task Force on Ethics on H.R. 3660, which eventually was enacted as Pub. L. No. 101–194, the section-by-section analysis notes that the bill amends § 205 "to treat officers and employees of the District of Columbia government separately from officers and employees of the Federal Government in the prohibition against acting as agent or attorney . . . for anyone in a matter before a Federal agency in the case of Federal employees, or a District government agency in the case of District employees." 135 Cong. Rec. 30,740, 30,757 (1989).

Other commentary indicates that the amendment was intended to remedy a perceived problem with the existing statute, which precluded Federal employees from appearing in District of Columbia fora. The Administration's proposed bill, although not adopted in its entirety, contained essentially the same language amending § 205 as was eventually included in the final legislation. In his testimony, Acting Associate Attorney General Joseph Whitley explained the proposed change to § 205 as follows:

> Turning to yet another area of concern to government employees who live in the District of Columbia, the President's bill removes a senseless impediment to their taking a full part in affairs of concern to their local neighborhoods. 18 U.S.C. 205 is a statute of fairly ancient vintage which prohibits all federal employees—including legislative staff, for example—from representing anyone

> before a federal or District of Columbia agency except in the performance of official duties. . . . The prohibition dates from the pre-home rule period for the District. It is a unique burden that falls on federal employees who reside in the city of Washington and is not shared by their fellow workers who live in any other state. *Section 111 of the President's bill would end this unjustifiable discrimination and allow federal employees to appear in a representative capacity before District of Columbia agencies. The representation would, of course, have to be without charge and concern a matter unrelated to the employee's official responsibilities.*

Effects of Federal Ethics Restrictions on Recruitment and Retention of Employees: Hearing Before the Subcomm. on Human Resources of the House Comm. on Post Office and Civil Service, 101st Cong. 35, 45 (1989) (statement of Joe D. Whitely, Acting Assoc. Attorney General) (emphasis added). This view is echoed in the March 1989 Report of the President's Commission on Federal Ethics Law Reform which recommended the same change to § 205:

> *As presently written, 18 U.S.C. §§ 203 and 205 prohibit all officers and employees of the federal government and the District of Columbia government from appearing before federal courts and agencies and entities of the District government.* The theory behind §§ 203 and 205 is that an employee should serve only one master and should not represent another entity against his primary employer. The laws do not reflect the current separate statutory status of the District government, however, and have the effect of precluding federal government employees from participating in outside charitable activities such as providing pro bono legal services to the poor in local courts. Another unfortunate effect is that law students who work as paralegals or clerks in federal or District government agencies are often precluded from participating in clinical legal programs sponsored by their law schools.

To Serve With Honor: Report of the President's Commission on Federal Ethics Law Reform 116 (1989) (emphasis added) ("Commission Report").[9] The Commission then proceeds to voice its agreement with the suggestion of the Office of Government Ethics that "if there is to be any coverage of District of Columbia employees, these sections be amended so that *federal employees are prohibited*

[9] The statement in the quoted text that the theory behind § 205 is "that an employee should serve only one master and should not represent another entity against his primary employer" might lead to the conclusion that Federal employees should be prohibited from all covered representational activities under § 205(a), even in District of Columbia agencies. However, other language in the Commission Report (discussed in the text, *infra*) disputes that conclusion.

only from appearing before federal agencies and courts, and District of Columbia employees are prohibited only from appearing before District agencies and courts.'' *Id.* (emphasis added). It recommends that § 205

> be amended so that [it] (1) no longer preclude[s] employees of the District of Columbia government from appearing before federal agencies and courts, [and] (2) no longer preclude[s] most federal employees from appearing before District of Columbia agencies.

Id. at 115.[10] While these sources are not the most authoritative types of legislative history, they are useful because they offer some insight into the purposes underlying the technical amendments leading to the separation of § 205(a) and § 205(b).

The structure and legislative history of § 205 show that the 1989 changes to § 205 were intended to differentiate between the agencies covered by the prohibition applicable to Federal employees and those covered by the prohibition applicable to District of Columbia employees. At least for purposes of § 205, then, ''agency'' in § 6, in the first instance, may be said to cover both Federal and District of Columbia agencies. In accordance with the express recognition in § 6 that this definition may be limited to a narrower scope by the context, the context of § 205(a) shows that the term in that provision is intended to reach only the more limited class of Federal agencies and the context of § 205(b) shows that the term there is intended to reach only the more limited class of District of Columbia agencies.

C.

Our conclusion that the term ''agency'' in § 205(a) should be construed to apply only to Federal agencies, and not state and local or District of Columbia entities, is reinforced by the rule of lenity which ''demand[s] resolution of ambiguities in criminal statutes in favor of the defendant.'' *Hughey v. United States*, 495 U.S. 411, 422 (1990); *see also Liparota v. United States*, 471 U.S. 419, 427 (1985) (''[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'') (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). That rule is particularly applicable, and a narrow construction of a criminal prohibition is warranted, where ''a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute.'' *Moskal v. United States*, 498 U.S. 103, 108 (1990) (citation omitted); *see also Chapman v. United States*, 500 U.S. 453,

[10] The qualification of ''most'' Federal employees refers to a recommended exception to this general rule for ''the United States Attorney's Office because of its unique role in prosecuting cases in both the United States District Court and the District of Columbia Superior Court Employees of the United States Attorney's Office should continue to be barred from appearing before entities of the District government except in accordance with their official duties.'' Commission Report, at 116. This exception was incorporated into the text of the statute. *See* 18 U.S.C. § 205(b)

463 (1991) (rule of lenity applicable where "there is a 'grievous ambiguity or uncertainty in the language and structure of the Act' ") (citation omitted). *Cf. Application of 18 U.S.C. § 205 to Proposed "Master Amici"*, 16 Op. O.L.C. 59, 64 (1992) (concluding that application of § 205 to activities by government attorneys as "master amici" before Court of Veterans Appeals is clearly prohibited by language, structure, legislative history, and motivating policies, and therefore, rule of lenity does not apply). Examination of the statutory structure and legislative history yields little definitive instruction as to the scope of "agency" in § 205(a) and (b); hence, the rule of lenity supports narrow readings of the term.

III.

We conclude that the prohibition in 18 U.S.C. § 205(a)(2) on a Federal government employee engaging in representation before an "agency" in connection with a covered matter in which the United States is a party or has a direct and substantial interest applies only to representation before a Federal agency and does not apply to such representation before state agencies or agencies of the District of Columbia.[11]

CORNELIA T.L. PILLARD
Deputy Assistant Attorney General
Office of Legal Counsel

[11] Of course, representation before a state, local, or other non-Federal entity may present a different case if a Federal employee sits on the non-Federal entity in his or her official capacity. Such a situation, which may in certain circumstances comprehend representation before a Federal agency for purposes of § 205(a), is beyond the scope of this opinion.

Authority of the Advisory Board for Cuba Broadcasting to Act in the Absence of a Presidentially Designated Chairperson

The advisory Board for Cuba Broadcasting has the authority to meet and to conduct business without a presidentially designated chairperson or an acting chairperson.

The advisory Board for Cuba Broadcasting does not have the authority to elect an acting chairperson.

January 4, 2000

MEMORANDUM OPINION FOR THE ADVISORY BOARD FOR CUBA BROADCASTING

You have asked for our opinion whether the Advisory Board for Cuba Broadcasting ("Board"), in the absence of a presidentially designated chairperson, may discharge its statutory responsibilities with a Board-elected acting chairperson.[1] Your letter indicates that the Board has attempted to meet with an acting chairperson whom the Board elected, but that these meetings have not taken place because the USIA and the International Broadcasting Board ("IBB") have declined to authorize the necessary travel orders. According to your letter, the USIA and the IBB did not authorize travel orders because they believe that the Board lacks authority to function without a presidentially designated chairperson.

Although your letter is somewhat ambiguous on the point, your framing of the issue appears to assume that the Board's ability to elect an acting chairperson is an essential condition for it to operate in the absence of a presidentially designated chairperson. Because we do not think it necessarily follows that the Board may meet and conduct its business only if there is a presidentially designated chairperson or an acting chairperson, we consider separately (1) whether the Board may carry out its statutory duties without a presidentially designated chairperson or an acting chairperson and (2) whether the Board has the authority to elect an acting chairperson. We conclude that the Board may meet and conduct business in the absence of a presidentially designated chairperson or an acting chairperson. We also conclude that the Board has no authority to elect an acting chairperson.

I. Background

The Board was established under section 5 of the Radio Broadcast to Cuba Act. Pub. L. No. 98–111, § 5, 97 Stat. 749, 750–51 (1983) (codified as amended at 22 U.S.C.A. § 1465c (West Supp. 1999)).[2] It consists of nine members

[1] *See* Letter for Randolph D Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Christopher D Coursen, Board (June 7, 1999). In addition to the views expressed in your letter, we have also considered the views of the United States Information Agency ("USIA"), which it provided at our request *See* Letter for Randolph D Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Les Jin, General Counsel, USIA (Oct. 1, 1999).

[2] The statutory provisions governing the Board, as amended, are collectively referred to as the "Act" in this memorandum

appointed by the President, with the advice and consent of the Senate. 22 U.S.C.A. § 1465c(a). The President designates one member to serve as chairperson. *Id.* The members are appointed to terms of three years and may continue to serve at the expiration of their terms until successors are appointed and qualified. *Id.* § 1465c(c).

Under the Act, the Board is to "review the effectiveness of the activities carried out under this subchapter [relating to radio broadcasting to Cuba] and the Television Broadcasting to Cuba Act and shall make recommendations to the President and the Broadcasting Board of Governors as it may consider necessary." *Id.* § 1465c(b). According to your letter, the Board conducts business through periodic meetings at which a quorum gathers to address issues within the Board's statutory purview. Because members of the Board are located throughout the country, it is necessary to provide travel orders to pay for members to attend these meetings.

Jorge Mas Canosa, who was the presidentially designated chairperson, died on November 23, 1997.[3] Since Mr. Mas's death, the Board has been without a presidentially designated chairperson. Nevertheless, it held two meetings, one in December 1997 and a second in February 1998, presided over by a member designated by the Board. On April 15, 1998, the Board voted to elect an acting chairperson to assume the functions otherwise performed by a presidentially designated chairperson. The Board has not met since that time, however, because the USIA and the IBB have rejected the Board's requests for travel orders on the ground that the Board lacks authority to function in the absence of a presidentially designated chairperson.

II. Authority of the Board to Conduct Business Without a Chairperson

We believe that, under the Act and general principles regarding the operation of boards, the Board has the authority to meet and to conduct business without either a presidentially designated or an acting chairperson. The Act vests the Board as a whole, rather than any individual member, with the authority and responsibility to carry out the statutory functions for which it was created:

> The Board shall review the effectiveness of the activities carried out under this subchapter and the Television Broadcasting to Cuba Act and shall make recommendations to the President and the Broadcasting Board of Governors as it may consider necessary.

22 U.S.C.A. § 1465c(b). In contrast, the Act assigns to the chairperson the single, managerial function of appointing the staff director for the Board. *See* Pub. L. No. 101–246, § 245(d), 104 Stat. 15, 62 (1990), as amended, *reprinted in* 22

[3] The factual background discussed in this paragraph is based on the facts as described in your letter requesting our opinion. *See supra* note 1.

U.S.C.A. § 1465c note. There is no suggestion in the language of the Act — let alone any express statement — that the Board is prohibited from meeting or conducting business without a presidentially designated or acting chairperson.

More generally, the Act expresses Congress's intent that the Board's operations not be terminated. In addition to providing that members of the Board may continue to serve after their terms have expired, 22 U.S.C.A. § 1465c(c), the Act states that, "[n]otwithstanding any other provision of law, the Board shall remain in effect indefinitely." *Id.* § 1465c(g).

Furthermore, no general principle prohibits the Board from meeting and acting in the absence of a chairperson. To the contrary, where no statutory provision or regulation expressly restricts a board's ability to meet or act, governing principles support the authority of that board to continue to carry out its functions. For example, this Office applied the principle "that the basic premise governing deliberative bodies is that the majority rules" when we resolved a dispute between members of the Architectural and Transportation Barriers Compliance Board ("Compliance Board") and its chairperson over the authority to call an additional meeting of the Compliance Board. *See* Letter for Mason H. Rose V, Chairperson, United States Architectural and Transportation Barriers Compliance Board at 2 (Sept. 17, 1981). Citing a Compliance Board rule under which "[e]mergency meetings of the Board shall be called by the Chairperson to deal with important matters arising between regular meetings which require urgent action," the chairperson argued that only he could call an additional meeting (unless the Board suspended the rules). *Id.* We distinguished the cited rule, since it addressed only emergency meetings and the members were seeking to call an additional, non-emergency meeting. *Id.* at 2–3. In addition, however, we considered the purpose and effect of the cited rule and concluded, against the backdrop of the majority-rule principle, that it was not intended to limit the Compliance Board's authority to call an emergency meeting. Rather, it was intended to set up an alternative mechanism to allow the chairperson to call an emergency meeting when circumstances, as a practical matter, prevented the board from doing so. *Id.* We then went on to consider whether, irrespective of the rule, the Compliance Board had the authority to call an additional, non-emergency meeting even though its rules only expressly provided for regular meetings and for emergency meetings. We concluded that the lack of an authorizing rule did not limit the Compliance Board's authority: "It would . . . be anomalous to conclude that the Board cannot deal with the situation because the rules are silent on the right to call an additional non-emergency meeting, however denominated. Giving credit to the presumption of majority rule stated at the outset, we conclude that a majority of the Board may act to do so." *Id.* at 4.[4]

[4] In contrast to the broad, general power of a board to act, a chairperson's authority is circumscribed It includes only powers expressly provided by statute, powers delegated by the board, and, perhaps, a limited set of powers inferred from the nature of being a chairperson *See, e.g.*, Memorandum for Susan Martin, Executive Director, National Commission on Libraries and Information Science, from John O. McGinnis, Deputy Assistant Attorney

Similarly, applying general principles regarding a board's authority to act, we opined that the Federal Home Loan Bank Board ("FHLBB") could meet and act when it had no chairperson. *Federal Home Loan Bank Board—Chairman—Vacancy—Reorganization Plan No. 3 of 1947 (5 U.S.C. App. 1), Reorganization Plan No. 6 of 1961 (5 U.S.C. App.)*, 3 Op. O.L.C. 283, 284 (1979) ("Federal Home Loan Bank Board Opinion"). In the absence of any specific statutory language barring the FHLBB from meeting and conducting business without a chairperson, we looked to the general principles of corporate common law to inform our decision. Under those common law principles, "business transacted at a meeting of a corporate board is valid so long as there is sufficient notice to the board members enabling them to attend, or if, in fact, all the members did attend," whether or not the board has a chairperson. *Id.* at 284 (citation omitted).[5] Accordingly, we concluded that, after the resignation of the chairperson of a three-person board, "if a meeting is held by the other two board members any action taken at such meeting may not properly be challenged on the ground that the calling of the meeting was not in conformance with the [statutory] plan." *Id.*[6]

III. Authority of the Board To Elect an Acting Chairperson

Although the Board has the authority to meet and to conduct business in the absence of a presidentially designated chairperson, we do not believe that it has either express or inherent authority to elect an acting chairperson. The only express grant of authority to designate a chairperson is given to the President. *See* 22 U.S.C.A. § 1465c(a) ("The President shall designate one member of the Board to serve as chairperson."). There is no suggestion in any provision of the Act that the Board has any authority or role in determining who will be the chairperson or in designating an acting chairperson. *Cf. George v. Ishimaru*, 849 F. Supp. 68 (D.D.C. 1994) (concluding that the commissioners had a role in designating the acting staff director because the underlying statutory scheme expressly provided that a staff director could not be appointed by the President without the

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General, Office of Legal Counsel, *Re Relationship Between Nat'l Comm'n on Libraries and Info Science and Advisory Comm. to White House Conference on Library and Info Services* at 6–7 (Feb. 12, 1990)

[5] With regard to these common law rules, *see, e g*, 2 William Meade Fletcher et al, *Fletcher Cyclopedia of the Law of Private Corporations* §§ 392, 404, 411 (perm ed rev vol 1998), William J Grange, *Corporation Law for Officers and Directors: A Guide to Correct Procedure* 383, 385 (1935) *See also* General Henry M Robert, *Robert's Rules of Order: Newly Revised* § 46, at 440 (9th ed 1990) (noting that meetings may be chaired by persons other than the chairperson)

[6] The principal functions assigned to chairpersons generally are presiding at meetings and, to a lesser extent, calling meetings As discussed above, we do not believe that the Act or any general principle regarding the operation of boards requires that these functions be performed only by a chairperson. Even if such a principle generally existed, however, it would be overcome with regard to advisory committees since the Federal Advisory Committee Act provides a potential statutory alternative to performance of these functions by a chairperson *See* Federal Advisory Committee Act § 10(e), *reprinted in* 5 U S C. app. at 1376 (1994) ("There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee."), *id.* § 10(f) ("Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government . . .")

concurrence of a majority of the commission), *vacated as moot*, No. 94–5111, 1994 WL 517746 (D.C. Cir. Aug. 25, 1994).

Furthermore, we do not believe that an authority of the Board to designate an acting chairperson is implied by the statutory structure as a whole. In the absence of a specific provision to the contrary, "it should be assumed that the power to designate an Acting Chairman remains in the President," when the President has exclusive authority under that act to designate the chairperson. *Federal Home Loan Bank Board Opinion*, 3 Op. O.L.C. at 283. While it might be possible that this presumption could be rebutted if a statute expressed a clear congressional intent for a board to operate without interruption and the appointment of an acting chairperson by the board was necessary to prevent such an interruption, we need not consider that question here. Because, as discussed in Part II, the Board is able to operate without an acting chairperson, an authority of the Board to designate an acting chairperson cannot be inferred from necessity.[7]

IV. Conclusion

Although the Board does not have the authority to elect an acting chairperson, it may meet and conduct business without a presidentially designated or an acting chairperson.

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

[7] It does not follow from the conclusion that the Board may not designate an acting chairperson that it also may not elect someone to chair a particular meeting. The authority to designate a chairperson and the authority to designate someone to preside at a particular meeting are not the same. Members of deliberative bodies may routinely preside at meetings in the absence of the chairperson. *See Robert's Rules of Order: Newly Revised* § 46, at 440. We express no view, however, on any possible effect § 10(e) of the Federal Advisory Committee Act may have on the applicability of this general practice to advisory committees. Furthermore, we do not address in this opinion the specific procedures through which the Board may meet and conduct business in the absence of a chairperson.

Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order

A presidential directive has the same substantive legal effect as an executive order. It is the substance of the presidential action that is determinative, not the form of the document conveying that action.

Both an executive order and a presidential directive remain effective upon a change in administration, unless otherwise specified in the document, and both continue to be effective until subsequent presidential action is taken.

January 29, 2000

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked our opinion whether there is any substantive legal difference between an executive order and a presidential directive. As this Office has consistently advised, it is our opinion that there is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is styled other than as an executive order. We are further of the opinion that a presidential directive would not automatically lapse upon a change of administration; as with an executive order, unless otherwise specified, a presidential directive would remain effective until subsequent presidential action is taken.

We are aware of no basis for drawing a distinction as to the legal effectiveness of a presidential action based on the form or caption of the written document through which that action is conveyed. *Cf.* Memorandum for Harold Judson, Assistant Solicitor General, from William H. Rose, *Re: Statement of Policy Regarding Certain Strategic Materials* (Aug. 28, 1945) (concluding that a letter from President Roosevelt stating the government's policy "constitute[d] a Presidential directive having the force and effect of law," notwithstanding its informality of form). It has been our consistent view that it is the substance of a presidential determination or directive that is controlling and not whether the document is styled in a particular manner. This principle plainly extends to the legal effectiveness of a document styled as a "presidential directive."

Moreover, as with an executive order, a presidential directive would not lose its legal effectiveness upon a change of administration. Rather, in our view, because a presidential directive issues from the Office of the Chief Executive, it would remain in force, unless otherwise specified, pending any future presidential action. *Cf.* Memorandum for Michael J. Egan, Associate Attorney General, from John M. Harmon, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Proposed Amendments to 28 CFR 16, Subpart B* (Apr. 21, 1977) (raising possible concerns about a proposal to delegate to the Deputy Attorney General certain authorities to invoke executive privilege because such a delegation could potentially be inconsistent with a 1969 Memorandum from President Nixon on executive privilege). Indeed, Presidents have frequently used written forms

other than executive orders to take actions that were intended to have effect during a subsequent administration. For example, delegations of presidential authority under 3 U.S.C. § 301 have been made pursuant to presidential memoranda.[1] *See also, e.g.*, Memorandum Establishing a Federal Energy Management Program, 3 Pub. Papers of Gerald R. Ford 1015 (1976) (including a directive to be carried out for FY 1977).

You have also inquired whether a presidential directive could be published in the Federal Register. It is our understanding that any presidential determination or directive can be published in the Federal Register, regardless of how it is styled. At present, a range of presidential determinations and directives styled other than as executive orders are routinely published in the Federal Register. *See, e.g.*, Presidential Determination Pursuant to Section 2(c)(1) of the Migration and Refugee Assistance Act of 1962, as amended, 64 Fed. Reg. 65,653 (1999); Report to the Congress Regarding Conditions in Burma and U.S. Policy Toward Burma, 64 Fed. Reg. 60,647 (1999) (memorandum directing the Secretary of State to transmit report to Congress). We see no reason to believe that the Federal Register would decline to publish the contemplated directive.[2]

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

[1] At various points over time, Presidents have delegated presidential functions both by executive order and by presidential memorandum *Compare* Delegation of Authority Under Section 1401(b) of the National Defense Authorization Act for Fiscal Year 2000 (Public Law 106–65), 65 Fed. Reg. 3119 (2000), *with* Exec Order No 10250 (1951), *reprinted as amended in* 3 U S C. § 301 app (1994) (delegation of functions to the Secretary of the Interior).

[2] Because the decision whether an item can be published is made by the Office of the Federal Register, we would suggest confirming this with that office

Starting Date for Calculating the Term of an Interim United States Attorney

Under 28 U.S.C. § 546(c)(2), the 120-day term of an interim United States Attorney appointed by the Attorney General is calculated from the date of the appointment, rather than the date on which the vacancy occurred.

March 10, 2000

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

You have asked for our opinion whether the 120-day term of an interim United States Attorney appointed by the Attorney General begins to run on the date of the vacancy or on the date of the appointment. *See* 28 U.S.C. § 546 (1994). Although under a number of statutes the term of service is calculated from the date of the vacancy,[1] the 120-day period in § 546(c)(2) is calculated from the date of the appointment by the Attorney General.

Subsection 546(a) provides that the Attorney General may, subject to certain limitations, "appoint a United States attorney for the district in which the office of United States attorney is vacant." Subsection 546(c), in turn, delimits the term during which such a United States Attorney may serve. Under that provision, a United States Attorney appointed by the Attorney General may serve until the earlier of (1) the qualification of a United States Attorney appointed by the President under 28 U.S.C. § 541 or (2) "the expiration of 120 days after appointment by the Attorney General under this section." 28 U.S.C. § 546(c).[2]

Our conclusion that the 120 days begins upon appointment by the Attorney General is based first and foremost on the plain language of § 546(c)(2). *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" (internal citation omitted)). The 120-day time period, by the terms of the statute, unambiguously begins with the Attorney General's appointment: "the expiration of 120 days *after appointment by the Attorney General* under this section." 28 U.S.C. § 546(c)(2) (emphasis added).

The language, moreover, is consistent with the nature of the appointment under § 546. Unlike statutes providing for the designation of an acting officer, § 546 provides for the appointment of a full fledged United States Attorney. *See United*

[1] *See, e.g.*, 5 U.S.C. § 3346(a)(1) (Supp IV 1998) ("may serve in the office—(1) for no longer than 210 days beginning on the date the vacancy occurs"), 28 U.S.C § 992(a) (1994) (six year staggered terms for members of the United States Sentencing Commission).

[2] In addition to appointment by the Attorney General, § 546 provides a second mechanism for appointing an interim United States Attorney If the 120-day term of a United States Attorney appointed by the Attorney General expires, the district court "may appoint a United States attorney to serve until the vacancy is filled" 28 U.S C § 546(d).

States v. Gantt, 194 F.3d 987, 999 n.5 (9th Cir. 1999) ("Section 546(d) appointments are fully-empowered United States Attorneys, albeit with a specially limited term, not subordinates assuming the role of 'Acting' United States Attorney."). As a general rule, "when a statute provides for an [officer] to serve a term of years, the specified time of service begins with the appointment," except for a multi-member body with staggered terms, in which case the term is calculated from the expiration of the prior term in order to maintain the stagger. *Term of a Member of the Mississippi River Commission*, 23 Op. O.L.C. 123, 123 (1999). Since there is no issue regarding staggered terms here, the general rule would apply.

In addition, while we are unaware of any cases specifically addressing when the 120-day period begins, courts have generally assumed that that period is calculated from the date of the appointment, rather than from the date of the vacancy. When explaining that the 120-day period under § 546(c)(2) has expired in particular cases, courts have usually identified the date on which the appointment was made and the date 120 days after the appointment, without referring to when the vacancy itself first arose. *See, e.g., United States v. Colon-Munoz*, 192 F.3d 210, 216 (1st Cir. 1999), *cert. denied*, 529 U.S. 1055 (2000); *In re Grand Jury Proceedings*, 673 F. Supp. 1138, 1139 (D. Mass. 1987).

Finally, because the authority for the Attorney General to appoint a United States Attorney was added to § 546 as a late amendment to more general legislation, there is very little legislative history on the provision. The legislative history that exists, however, is consistent with the conclusion that the 120-day period is to be calculated from the date of the appointment, rather than from the date of the vacancy: "a person appointed by the Attorney General *serves only for 120 days*, or until a person appointed to the office by the President has qualified, if that is earlier." 132 Cong. Rec. 32,806 (1986) (statement of Rep. Berman) (emphasis added). The focus is on the length of the interim United States Attorney's service, rather than the length of time since the vacancy arose. *Cf. Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 209 (D.C. Cir. 1998) (concluding that the language of the Vacancies Act supports calculating its time limits from the President's designation, rather than the vacancy, because the Act speaks in terms of "how long the position may be 'filled,' not when the President must do the filling").

For these reasons, we conclude that the 120-day period in § 546(c)(2) is calculated from the date of the appointment by the Attorney General.

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

Enforcement of INA Employer Sanctions Provisions Against Federal Government Entities

Section 274A of the Immigration and Nationality Act, which establishes employer verification requirements and authorizes the Immigration and Naturalization Service to take enforcement actions against employers for failure to comply with those requirements, authorizes imposition of employer sanctions against federal government entities.

The INS can exercise this enforcement authority against persons and entities within all three branches of the federal government in a manner consistent with the Constitution.

March 15, 2000

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
IMMIGRATION AND NATURALIZATION SERVICE

You have requested our advice as to whether section 274A of the Immigration and Nationality Act ("INA"), which establishes employer verification requirements and authorizes the Immigration and Naturalization Service ("INS") to take enforcement action against employers for failure to comply with those requirements, can be applied to federal government entities, in light of the possible constitutional concerns that such enforcement action might raise. As we explain more fully below, we believe that section 274A clearly contemplates the imposition of employer sanctions against federal government entities. Moreover, with respect to employers within all three branches, we conclude that the INS can exercise its authority to take enforcement actions against such persons or entities consistent with the Constitution.

BACKGROUND

Section 274A of the INA provides for the assessment of civil monetary penalties and cease and desist orders against any "person or other entity" who has knowingly hired, or knowingly continued to employ, any unauthorized alien or who has failed to comply with the employment verification system mandated by section 274A(b).[1] 8 U.S.C. §§ 1324a(e)(4)–(e)(5) (1994 & Supp. II 1996). As used in section 274A, the term "entity" includes "an entity in any branch of the Federal Government." *Id.* § 1324a(a)(7).

The INS has the authority to investigate complaints of potential violations of section 274A by inspecting employment eligibility verification forms maintained by employers and compelling the production of evidence or the attendance of witnesses by subpoena. *Id.* § 1324a(e)(2). If, based upon such an investigation, the INS determines that an employer has violated section 274A, it serves a Notice

[1] Criminal penalties and injunctive relief may also be imposed against persons or entities engaged in a "pattern or practice of violations" of section 274A. *See* 8 U.S.C. § 1324a(f)(1)–(2)

of Intent to Fine (''NIF'') on the employer. 8 C.F.R. § 274a.9 (1998). An employer served with a NIF may request an evidentiary hearing before an Administrative Law Judge (''ALJ''). 8 U.S.C. § 1324a(e)(3). If the employer does not request a hearing, the NIF becomes a final, unappealable order, *id.*; if a hearing is requested, the ALJ's subsequent decision and order become the final decision and order of the Attorney General, unless a reviewing official or the Attorney General herself modifies or vacates the order, pursuant to regulations. *See id.* § 1324a(e)(7).

Section 274A also provides for judicial review and judicial enforcement of final orders. Under section 274A(e)(8), ''[a] person or entity adversely affected by a final order respecting an assessment may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order.'' 8 U.S.C. § 1324a(e)(8). If a person or entity refuses to comply with any final order, the statute provides that ''the Attorney General shall file a suit to seek compliance with the order in any appropriate district court of the United States.'' *Id.* § 1324a(e)(9).

DISCUSSION

As noted above, section 274A authorizes the INS to assess civil monetary penalties against any ''person or other entity'' that violates the employment verification provisions of that section. Section 274A(a)(7) provides: ''For purposes of this section, the term 'entity' includes an entity in any branch of the Federal Government.'' 8 U.S.C. § 1324a(a)(7).

We must first determine whether Congress intended to authorize the INS to assess administrative penalties and otherwise bring enforcement proceedings against governmental employers. A straightforward reading of the statutory text leads us to conclude that that was clearly Congress's intent. Prior to passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (''IIRIRA''), Pub. L. No. 104–208, 110 Stat. 3009–546, section 274A contained no provision defining the scope of the term ''entity.'' In fact, this Office determined in 1992 that the absence at that time of any definition of the phrase ''person or other entity'' from the INA, together with the lack of evidence that Congress intended the phrase to include federal agencies, precluded application of the term ''entity'' to a federal government agency in the context of the employer anti-discrimination provision of section 274B. *See Enforcement Jurisdiction of the Special Counsel for Immigration Related Unfair Employment Practices*, 16 Op. O.L.C. 121, 123–24 (1992).

In 1996, Congress amended section 274A to make clear that the term ''entity'' did apply to federal government entities. Section 412(d) of IIRIRA added new subparagraph 274A(a)(7) to the INA:

> "Application to Federal Government—For purposes of this section, the term 'entity' includes an entity in any branch of the Federal Government."

8 U.S.C. § 1324a(a)(7). We believe the language of that provision is manifest: for purposes of section 274A, the term "entity" applies to all federal government employers, including agencies within the executive, judicial and legislative branches. The House Conference Report accompanying IIRIRA confirms our reading of section 412(d): "This provision clarifies that the Federal government must comply with section 274A of the Immigration and Nationality Act . . . ." H.R. Conf. Rep. No. 104–828, at 237 (1996). The plain text of the statute, together with its legislative history, thus leaves no question as to Congress's intent that federal government entities be covered by section 274A, including the investigation, assessment and enforcement provisions of section 274A(e).

Having concluded that Congress intended to authorize the INS to assess civil penalties and bring enforcement actions against other governmental employers, we further conclude that the INS can exercise that authority consistent with the Constitution. Because different constitutional issues are raised by INS enforcement of section 274A against executive agencies, the judiciary, and Congress, we will separately address application of the statute to each branch.

Enforcement Actions Against Executive Branch Agencies

The President has authority under Article II of the Constitution to supervise the executive branch, which includes the authority to resolve disputes within that branch. Authorizing the INS to assess civil penalties against other agencies does not give rise to a constitutional problem under Article II. The critical point is that the INA "does not preclude the President from authorizing any process he chooses to resolve disputes between [the INS] and other federal agencies regarding the assessment of administrative penalties." *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act*, 21 Op. O.L.C. 109, 116 (1997) ("EPA Opinion"). Under section 274A, any agency that disputes an INS assessment has the opportunity to voice its objections in an administrative hearing before an ALJ, whose decision is subject to review by the Attorney General or her delegate. 8 U.S.C. § 1324a(e)(7). There is no limitation in the statute on the President's authority to review the matter if he chooses to do so, and the absence of any such restriction on his discretion is dispositive. EPA Opinion, 21 Op. O.L.C. at 116.

In the context of one federal executive agency assessing civil penalties against another, the statutory provision of judicial procedures to enforce those penalties also might be thought to raise constitutional concerns related to the Article III limitation on the jurisdiction of the federal courts to actual cases and controversies.

The civil action provisions contained in sections 274A(e)(8) and (9) might be construed to suggest that one executive branch agency may sue another in federal court over an administrative penalty. This Office has consistently held that " 'lawsuits between two federal agencies are not generally justiciable.' " EPA Opinion, 21 Op. O.L.C. at 111 (quoting *Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131, 138 (1989)). Federal courts may adjudicate only actual cases and controversies, and a lawsuit involving the same party as both plaintiff and defendant — which would generally be the result if one executive agency sued another — does not constitute an actual controversy.

However, in practice, such a scenario would not arise, for the internal executive branch dispute-resolution process described above would either obviate the need for a final administrative order or preclude noncompliance with such an order. In the event of any dispute between INS and another executive agency as to a civil penalty assessment, the President, as head of the executive branch, has the authority either to direct the Attorney General not to impose a final order or to order the agency to comply with such an order. In either case, the judicial review provisions of sections 274A(e)(8) and (9) simply would not be triggered.[2]

Enforcement Actions Against the Judiciary

As noted above, the definition of "person or other entity" applies to the judicial branch, as well as to the legislative and executive branches. Application of section 274A to the judiciary raises questions concerning the possible assertion of judicial immunity.

We do not believe that any plausible claim of judicial immunity from section 274A could be made in the wake of *Forrester v. White*, 484 U.S. 219 (1988). In *Forrester*, the Supreme Court concluded that questions regarding the scope of absolute judicial immunity must be evaluated in light of the purposes served by such immunity. *Id.* at 226–27. That "functional approach" looks at the nature of the official functions exercised and evaluates "the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Id.* at 224. The Court in *Forrester* applied the functional approach to reject a judge's claim of absolute immunity from civil liability for his decision to demote and discharge a probation officer. In doing so, the Court distinguished between "judicial acts" and "the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Id.* at 227. It reasoned that, with respect to the latter category, the danger of "officials' being deflected from the effective performance of their duties" was not substantial enough to warrant absolute immunity. *Id.* at 230. The Court held that administra-

[2] Indeed, the Executive Branch has various procedures in place to avoid litigation and promote internal dispute resolution *See, e g* , Exec. Order No 12146, 3 C.F R. 409 (1979)

tive decisions, including personnel decisions, are not regarded as judicial acts and thus are not immunized "even though they may be essential to the very functioning of the courts." *Id.* at 228.

Forrester's holding makes clear that personnel decisions such as those that are the subject of section 274A enforcement actions do not warrant absolute judicial immunity. Such actions fall into the category of "administrative, legislative, or executive functions" that a judge might perform, rather than "judicial acts" that merit the protection offered by absolute immunity.

Nor do we see any separation of powers problem with executive enforcement of section 274A against the judiciary. The Supreme Court has made clear that not all interactions between the judiciary and the executive branches, even those that might be categorized as "quite burdensome," are necessarily constitutionally forbidden. *Clinton v. Jones*, 520 U.S. 681, 702 (1997). It is only where the burden imposed by one branch is so onerous as to "impair another in the performance of its constitutional duties" that the general separation of powers principle is violated. *Id.* at 701 (citing *Loving v. United States*, 517 U.S. 748 (1996)). Although an enforcement action under section 274A would impose some administrative burdens upon its subject—to the extent, for example, that it required compliance with subpoenas issued or cooperation with investigative efforts—such burdens would certainly not be so demanding as to interfere with the judiciary's proper execution of its constitutional obligations. *See Mistretta v. United States*, 488 U.S. 361, 409 (1989) (President's appointment and removal power over federal Sentencing Commission does not "prevent[], even potentially, the Judicial Branch from performing its constitutionally assigned functions").

Indeed, in the context of criminal law enforcement, courts have consistently upheld the power of the executive branch to prosecute sitting judges, notwithstanding the more significant intrusion upon the judiciary occasioned by such enforcement, and have rejected the judges' claims that such executive action undermines judicial autonomy. *See, e.g., United States v. Claiborne*, 727 F.2d 842, 845–49 (9th Cir. 1984); *United States v. Hastings*, 681 F.2d 706, 709–11 (11th Cir. 1982); *United States v. Isaacs*, 493 F.2d 1124, 1142–44 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). As the court in *Hastings* explained in rejecting a rule that would have granted sitting federal judges immunity from criminal prosecution: "[T]he minuscule increment in judicial independence that might be derived from the proposed rule would be outweighed by the tremendous harm that the rule would cause to another treasured value of our constitutional system: no man in this country is so high that he is above the law." 681 F.2d at 711. If executive enforcement of the criminal laws against the judiciary (which could include indictment, prosecution, and imprisonment of a sitting judge) does not undermine judicial independence, we cannot say that the comparatively negligible intrusion upon the judiciary that might be occasioned by executive enforcement of section 274A is a threat to judicial autonomy.

Enforcement Actions Against Congress

For similar reasons, we see no general separation of powers problem with applying section 274A against Congress. The more significant question is whether enforcement actions may be initiated against Members of Congress or congressional offices consistent with the legislative immunity accorded by the Speech or Debate Clause of the Constitution.[3] The Speech or Debate Clause provides that, "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6, cl. 1.

In interpreting the Speech or Debate Clause, the Supreme Court has not confined its protections literally to "Speech or Debate in either House" but has given it "a practical rather than a strictly literal reading which would limit the protection to utterances made within the four walls of either Chamber." *Hutchinson v. Proxmire*, 443 U.S. 111, 124 (1979). Thus, in *United States v. Johnson*, 383 U.S. 169 (1966), the Court foreclosed prosecution of a Member of the House of Representatives for allegedly taking a bribe in return for delivering a speech on the floor of the House. The indictment necessarily focused upon both Johnson's motives in making the speech and the contents of the speech itself, and the Court concluded that the Congressman's motive "is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *Id.* at 180. In holding Johnson immune from prosecution under the Speech or Debate Clause, however, the Court emphasized that its holding was limited to the facts before it, and reserved the question whether Speech or Debate immunity would preclude "a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *Id.* at 185.

Six years later, in *United States v. Brewster*, 408 U.S. 501 (1972), the Supreme Court resolved that question by holding that Speech or Debate immunity did not bar prosecution of a member of Congress for soliciting and receiving sums of money in return for "official acts performed by him in respect to his action, vote and decision" on proposed postal rate legislation, where the Member could successfully be prosecuted without inquiry into either legislative acts or their motivation:

> The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation

[3] With respect to the applicability of section 274A against Congress, we will here address only the general question of the availability of speech and debate immunity We do not address the more specific question of who the proper defendant may be in individual enforcement actions. We also do not address the question whether the constitutional privilege against arrest except in cases of "Treason, Felony and Breach of the Peace" that is accorded Members during sessions of Congress would preclude enforcing a subpoena in an administrative proceeding against a Member while Congress is in session U S Const art I, § 6, cl. 1. *See Gravel v. United States*, 408 U S. 606, 614–15 (1972).

> of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.
>
> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. . . . Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment.

Id. at 526.

Accordingly, the Court in *Brewster* confirmed that the Clause does not protect all conduct relating in any way to the legislative process, but is "limited to an act which was clearly a part of the legislative process — the *due* functioning of the process." *Id.* at 515–16 (emphasis in original). Proper attention to the history and purposes of the Clause, including the underlying separation of powers concerns, did not justify a broader reading:

> We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to "relate" to the legislative process.

Id. at 516.

The Court further clarified the proper scope of the Speech or Debate Clause in *Gravel v. United States*, 408 U.S. 606 (1972), decided the same day as *Brewster*. Senator Gravel made copies of the Pentagon Papers part of the public record of a meeting of the Senate subcommittee that he chaired. Subsequently, the press reported that Senator Gravel had separately made arrangements with a private press to publish the papers. A federal grand jury that was investigating alleged criminal conduct with respect to the public disclosure of these classified documents subpoenaed Senator Gravel's aide to testify, and Senator Gravel sought to quash the subpoena under the Speech or Debate Clause.[4] *Id.* at 608–09. The Court held that the action under scrutiny — the publication by a nongovernmental

[4] The Court concluded that "the Speech or Debate Clause applies not only to a Member [of Congress] but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Id.* at 618

press of classified documents—was not "protected speech or debate within the meaning of Art. I, § 6, cl. 1 of the Constitution." *Id.* at 622.

The Court began its analysis by noting that simply because "Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature." *Id.* at 625. It then explained:

> The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Id. The hearings were complete and the record of the hearings was available. Subsequent publication of the Pentagon Papers by a nonprofit press was neither requested nor authorized by the Senate and "was in no way essential to the deliberations of the Senate." *Id.* Because questioning regarding that publication did not "threaten the integrity or independence of the Senate by impermissibly exposing its deliberations to executive influence," the Court determined that this conduct was not protected by the Speech or Debate Clause. *Id.*

Although the Supreme Court has thus delineated the general scope of Speech or Debate immunity, it has not yet resolved the question of its applicability to employment-related decisions. In *Davis v. Passman*, 442 U.S. 228 (1979), the Court specifically reserved the question whether a Congressman's allegedly discriminatory decision to fire his administrative assistant was shielded by the clause. *Id.* at 236 n.11, 248–49. Two courts of appeals, however, have addressed this issue.

In the original panel decision in *Davis*,[5] the Fifth Circuit determined that the Speech or Debate Clause did not protect a Congressman from a suit by a former aide who alleged that the Congressman unconstitutionally discriminated against her on the basis of her sex when he dismissed her. 544 F.2d 865, 878 (5th Cir. 1977), *rev'd on other grounds*, 571 F.2d 793 (1978) (*en banc*), *rev'd*, 442 U.S. 228 (1979). The Senator had written the aide a letter commending her job performance, but concluding that it was "essential that the understudy to [his] Administra-

[5] The original panel decision in *Davis* was the only decision in the history of that case to address the Speech or Debate Clause issue. The Fifth Circuit, in its *en banc* opinion, did not reach the Speech or Debate Clause question because it concluded that the plaintiff could not maintain a private cause of action under the due process clause of the Fifth Amendment. *Davis v Passman*, 571 F.2d 793, 801 (5th Cir 1978). The Supreme Court reversed on that question, holding that both a cause of action and a damages remedy could be implied under the Fifth Amendment, however, because the *en banc* Court of Appeals had not considered the Speech or Debate Clause issue, the Supreme Court also declined to reach it *Davis*, 442 U.S at 236 n 11, 248–49

tive Assistant be a man." *Id.* at 867 n.1. Reciting familiar passages from *Gravel* that limit the scope of the clause to "legislative acts," the panel concluded:

> [R]epresentatives are not immune from inquiry into their decisions to dismiss staff members. Such dismissal decisions certainly are not "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings . . . ." [quoting *Gravel*, 408 U.S. at 625]. Peripheral or tangential activities of a representative must not be confused with the legislative core. . . . When members of Congress dismiss employees they are neither legislating nor formulating legislation. The fear of judicial inquiry into dismissal decisions cannot possibly affect a legislator's decisions on matters pending before Congress. The democratic process remains unfettered.

Id. at 880. Its holding, the panel believed, "g[a]ve effect to the Supreme Court's mandate in *Gravel*: 'Legislators ought not to stand above the law they create but ought generally to be bound by it as are ordinary persons.'" *Id.* at 881 (quoting *Gravel*, 408 U.S. at 615). Because exceptions to the constitutional premise that all persons are equal before the law "must be limited, guarded, and sparingly employed," the court insisted that "Davis is entitled to have her claim heard on the merits." *Id.*

The Court of Appeals for the District of Columbia Circuit concluded almost a decade later, however, that legislative immunity did shield a Congressman from a suit challenging an employment decision. *Browning v. Clerk, U.S. House of Representatives*, 789 F.2d 923 (D.C. Cir.), *cert. denied*, 479 U.S. 996 (1986). In *Browning*, a black woman who was discharged from her job as Official Reporter of the House of Representatives claimed that her dismissal was racially motivated, in violation of the Fifth Amendment. 789 F.2d at 924–25. The court, relying on *Gravel*, asserted that:

> Personnel decisions are an integral part of the legislative process to the same extent that the affected employee's duties are an integral part of the legislative process. . . . Thus, if the employee's duties are an integral part of the legislative process, such that they are directly assisting members of Congress in the "discharge of their functions," personnel decisions affecting them are correspondingly legislative and shielded from judicial scrutiny.

Id. at 928–29 (citation omitted). Applying this standard, the court discussed at length the importance of the role of an Official Reporter in the communicative and deliberative processes of Congress, and concluded that such reporting was

indeed an integral part of legislative functioning. *Id.* at 929–30. In coming to this conclusion, the court pointed out that, in order to resolve Browning's claims, the judiciary

> would necessarily have to inquire about matters at the very heart of the legislative process, such as the nature of the hearings to which Browning was assigned, the purposes underlying those hearings, and whether Browning's performance frustrated those purposes.

Id. at 930.

There are two ways to read the decision in *Browning*. First, *Browning* could be read for the proposition that, in determining whether Speech or Debate immunity attaches to any particular employment decision, the proper focus is whether judicial scrutiny of that decision would necessitate any inquiry into legislative conduct or motivations. If so, then the employment decision relates sufficiently to the legislative process to merit immunity. *See id.; see also* House of Representatives' Brief in Opposition to Petition for Certiorari, *Browning v. Clerk, House of Representatives* (No. 86–547), at 5. Alternatively, *Browning* could be read more broadly, to suggest that the applicability of Speech or Debate immunity in the employment context depends solely upon the nature of the employment at issue. If the employee's duties can be said to be an "integral part of the legislative process," immunity attaches to any personnel decisions regarding that employee; if the employee's duties cannot be so characterized, it does not. *Browning*, 789 F.2d at 929.

While we acknowledge that there is language in *Browning* to support the second reading that focuses on employment duties, Supreme Court Speech and Debate precedents, as well as the specific facts of *Browning*, compel our conclusion that the decision must be read more narrowly.[6] Under *Gravel* and *Brewster*, the mere

[6] We note too that there is some question whether and how the Supreme Court's ruling in *Forrester v. White* bears on *Browning*. As noted above, *Forrester* requires a "functional" approach to claims of absolute judicial immunity in the context of employment decisions. The distinction that *Forrester* makes between "judicial acts" and "the administrative, legislative, or executive functions that judges may occasionally be assigned by law to perform" is based on the rationale that, with respect to the latter category, the danger of "officials' being deflected from the effective performance of their duties" is not substantial enough to warrant absolute immunity *Forrester*, 484 U.S. at 230. That rationale could be applied equally to the administrative functions of the legislative branch, such as hiring of personnel, and verification that they are not unauthorized aliens.

In the wake of *Forrester*, the District of Columbia Circuit, in *Gross v. Winter*, 876 F.2d 165 (D.C. Cir. 1989), applied *Forrester*'s functional approach in rejecting a D.C. Council member's claim of legislative immunity for her allegedly discriminatory decision to fire a probation officer *Gross* recognized that "[t]he Supreme Court's strict 'functional' immunity analysis in *Forrester* . contrasts with the employee-centric approach this court took in *Browning*." *Id.* at 171 The court found *Forrester*, not *Browning*, controlling:

> The functions of probation officers and legislative aides are therefore equally important to the due functioning of the judicial and legislative processes, respectively Nonetheless, under *Forrester*, the functions judges and legislators exercise in making personnel decisions affecting such employees are administrative, not judicial or legislative. *Forrester*'s functional approach also forecloses the somewhat curious logic that the greater the employee's importance to the legislative process the greater should be the state legislator's freedom to violate that employee's constitutional rights

fact that an individual may have some duties that relate to core legislative processes does not make all matters bearing on that person's employment "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel*, 408 U.S. at 625. As the Court noted in *Brewster*, in a passage relied upon in *Browning*: "The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Id.* at 528, *quoted in* 789 F.2d at 927. Under that standard, even if a particular employee's duties could be said to relate to the legislative process, there might be any number of purely administrative decisions made with respect to that employee that would have nothing to do with the employee's fulfillment of his or her duties and that therefore would not merit legislative immunity.[7]

The Speech or Debate Clause arguably was implicated in *Browning* not because the job of official reporter for the House of Representatives included duties that were integral to the legislative process, 789 F.2d at 928, but because the disputed factual issue in the employment claim was whether the reporter was fired for poor job performance or for racial reasons. *Id.* at 930. We believe that the more sweeping language in *Browning* must be read in light of those facts. The District of Columbia Circuit court concluded that the particular employment decision at issue in *Browning* presented a risk of judicial second-guessing of judgments "at the very heart of the legislative process." *Id.* at 930. Legislative immunity was warranted in *Browning*, on the narrower view, because assessing the adequacy of Browning's job performance would have required the trial court to "inquire into matters at the very heart of the legislative process" — such as the nature and purpose of the hearings to which Browning had been assigned. *Id.*

In contrast, permitting the INS to enforce section 274A against Congress would not, thwart any of the purposes underlying the Speech or Debate Clause, for

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Id at 172 However, in applying *Forrester* to a case involving a D.C. Council member rather than a Member of Congress, the court in *Gross* expressly noted that it was not reaching the question "whether special considerations applicable to members of Congress, such as separation-of-powers concerns, continue to justify the absolute immunity standard for congressional personnel decisions adopted in *Browning*." *Id* More recently, in *United States v. Rostenkowski*, 59 F.3d 1291, 1303 (D.C. Cir 1995), the District of Columbia Circuit again reserved the question whether *Browning* remained good law after *Forrester*, because the employees at issue lacked "even the most tangential relationship to the 'legislative process'" and employment decisions respecting them thus could not be immunized even under the broadest reading of *Browning*.

[7] The broader reading of *Browning* is out of step not only with the Supreme Court's precedents, but also with the District of Columbia Circuit's own prior law The *Browning* court appeared to misread an earlier decision, *Walker v. Jones*, 733 F.2d 923 (D.C Cir 1984), in which the court denied Speech or Debate Clause immunity to congressional defendants who dismissed a food service manager for allegedly discriminatory reasons *Id* at 931. *Browning* cited *Walker* as the genesis of a standard focusing on the nature of the employee's duties, and immunizing all personnel decisions with respect to employees whose duties closely relate to the legislative process *Id* at 925. In fact, *Walker* — like *Johnson*, *Brewster*, and *Gravel* — properly focused directly on the legislator's actions, and considered the employee's duties only as potentially relevant to the question whether a personnel action regarding that employee might implicate the legislator's motives *Id*

executive enforcement would not involve inquiry into legislative acts or the motives for legislative acts. Nor would it "threaten the integrity or independence of [Congress] by impermissibly exposing its deliberations to executive influence." *Gravel*, 408 U.S. at 625. Section 274A applies to the "hiring, recruiting, or referring" of individuals for employment in the United States, and requires employers to verify, by examining certain specified documents, that individuals being considered for employment are not unauthorized aliens. 8 U.S.C. § 1324a(b), (b)(1). Once the employer has examined these documents, the employer must attest in writing to the verification and must retain the verification form for future inspection. *Id.* § 1324a(b)(1)(A), (b)(3). Any investigation by the INS as to whether an employer has complied with these verification requirements or whether the employer knowingly hired or continued to employ an unlawful alien thus would not involve inquiry into the employee's duties or job performance. Rather, such an investigation would require examination of the verification form, and possibly the circumstances surrounding the employer's execution of that form, including whether the employer had complied in good faith with the attestation and document retention requirements. Regardless of how integrally connected to the legislative process the employee's duties might be, the actions of a Member of Congress, in complying with these verification requirements or in knowingly hiring an unlawful alien, could not be characterized as "legislative acts," and any inquiry into section 274A compliance would not reach such legislative acts or the motives underlying them. The ministerial requirements imposed under section 274A are at most "casually or incidentally related to legislative affairs." *Brewster*, 408 U.S. at 528. Like the conduct at issue in *Brewster*, knowingly hiring an unlawful alien "is, obviously, no part of the legislative process or function; it is not a legislative act." *Id.* at 526. We therefore conclude that executive enforcement of section 274A against legislative branch entities is not precluded by the Speech or Debate Clause.

CONCLUSION

The plain language of section 274A makes clear that its enforcement provisions apply to persons and entities within all three branches of the federal government. We conclude that the INS can exercise its enforcement authority under section 274A against persons and entities within the executive, judicial, and legislative branches in a manner consistent with the Constitution.

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

Date of Appointment for Purposes of Calculating the Term of an Interim United States Attorney

The appointment date of an interim United States Attorney appointed by the Attorney General is established by the Attorney General's intent, and here the form of order used by the Attorney General expressly states her intent — that the appointment is made upon satisfaction of the conditions that the office is vacant and that the designee has taken the oath of office.

March 16, 2000

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

In a memorandum dated March 10, 2000, we concluded that the 120-day period of service provided in 28 U.S.C. § 546(c)(2) (1994) for an interim United States Attorney appointed by the Attorney General is calculated from the date of the appointment, rather than from the date of the vacancy. *See Starting Date for Calculating the Term of an Interim United States Attorney*, 24 Op. O.L.C. 31 (2000). The form of order typically used by the Attorney General to appoint an interim United States Attorney provides: "This order shall 'be effective' once the office is vacant and the oath of office has been taken." *See, e.g.*, A.G. Order No. 2291–2000 (Mar. 6, 2000). You have now asked whether, under this form of order, the 120 days is calculated from the date the Attorney General signs the order or from the date the designee takes the oath of office. We have concluded that the date of the appointment is established by the Attorney General's intent. Here, the Attorney General's intent is expressly stated in the order: the appointment is made upon satisfaction of the conditions that the office is vacant and the designee has taken the oath of office.

Although the appointment of an interim United States Attorney is typically done through the issuance of an Attorney General order, the order itself is not the appointment; instead, the order is conclusive evidence of that appointment. *Cf. United States v. Le Baron*, 60 U.S. (19 How.) 73, 78 (1856); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155–56 (1803). The determinative issue is the Attorney General's intent regarding the date of the appointment. As a result, the date of the appointment will not always be the same as the date on which the order is signed.

In the absence of evidence of a contrary intent, an appointment is made on the date that the instrument evidencing that appointment is signed. *See, e.g.*, Memorandum for Fred F. Fielding, Counsel to the President, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of New Members to the International Trade Commission* 7 (Mar. 22, 1984). Here, however, the instrument evidencing the appointment (the Attorney General order) clearly expresses a different intent. Accordingly, when an order of this form is used, the appointment does not occur, and the 120-day period provided for in

§ 546(c)(2) does not begin, until the date on which the conditions of the order are met, i.e., the office is vacant and the designee has taken the oath of office.[1]

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

[1] A third, possible position would be that — regardless of the Attorney General's intent — the appointment is synonymous with the complete investiture of the office, and therefore the date of the appointment is the date on which the interim United States Attorney takes office. Precedent has long established, however, that the appointment and the taking of the office are two separate matters that do not necessarily coincide. *See, e.g., Le Baron*, 60 U.S. at 78.

Continuation of Federal Prisoner Detention Efforts During United States Marshals Service Appropriation Deficiency

It is doubtful that the "authorized by law" exception to the Antideficiency Act would allow the United States Marshals Service to continue to provide prisoner detention-related functions during a deficiency in its Federal Prisoner Detention budget, but it is likely that the "emergency" exceptions set forth in § 1342 and § 1515 of that statute would apply, in many, if not all, circumstances.

April 5, 2000

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
UNITED STATES MARSHALS SERVICE

I. Introduction and Summary

Facing a possible deficiency in its FY 1999 Federal Prisoner Detention Budget ("FPD"), the Marshals Service sought our opinion on the potential applicability of certain exceptions to the Antideficiency Act, 31 U.S.C. §§ 1341–1342, 1349–1350, 1511–1519 (1994). *See* Memorandum for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Deborah C. Westbrook, General Counsel, United States Marshals Service, *Re: Possible Anti-Deficiency Act Violation—Request for Legal Opinion* (Dec. 23, 1998) ("USMS Memorandum"). In response to this request, we issued an interim opinion outlining the USMS's affirmative obligation to address the anticipated deficiency in the FPD appropriated budget either by procuring supplemental funding through reprogramming or by curtailing expenditures and obligations that would eventually cause a deficiency or necessitate supplemental appropriation. *See United States Marshals Service Obligation to Take Steps to Avoid Anticipated Appropriations Deficiency*, 23 Op. O.L.C. 105 (1999) ("Interim Opinion"). It is our understanding that, in the end, the Marshals Service was able to avoid the potential deficiency, and thus was not required to face the question of whether, and in what manner, it could continue to perform its mission after having expended all appropriated funds.

Although the current threat of deficiency has passed, you have asked that we nonetheless consider whether the "authorized by law" or "emergency" exceptions contained in the Antideficiency Act are applicable to the prisoner detention functions performed by the USMS. We conclude that it is doubtful that the "authorized by law" exception would permit the USMS to continue to provide prisoner detention-related functions during a deficiency, but it is likely that the USMS could in many, if not all, circumstances continue to perform detention functions under the "emergency" exceptions set forth in § 1342 and § 1515 of the Antideficiency Act. We stress, however, that this authority only permits entering into an obligation to make payment for services, and related material, during a period of deficiency and does not authorize actually making payment on such

obligations without returning to Congress for an appropriation. We also stress, as we did in our Interim Opinion, that the USMS would, if again faced with a risk of deficiency, have an affirmative obligation to take steps, to the extent possible, to avoid the deficiency.

II. Analysis

As we indicated in our Interim Opinion, the Antideficiency Act reinforces the prohibition in Article 1, Section 9 of the Constitution that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const. art. I, § 9, cl. 7, by imposing administrative and criminal penalties on officers and employees of the United States Government and the District of Columbia who "make or authorize an expenditure or obligation exceeding an amount available in an appropriation" or "involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." *See* 31 U.S.C. § 1341; *see also id.* § 1349 (subjecting Antideficiency Act violators to "appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office"); *id.* § 1350 (imposing a criminal fine of not more than $5,000 and/or a term of imprisonment for not more than two years for Antideficiency Act violations). It establishes a broad prohibition against such expenditures, indeed even against attempts to incur obligations in excess of appropriated funds, and admits only two statutory exceptions, the exception for services "authorized by law" and for "emergencies involving the safety of human life or the protection of property." *See* 31 U.S.C. §§ 1341, 1342; *but see Armster v. United States Dist. Court for the Cent. Dist.*, 792 F.2d 1423 (9th Cir. 1986) (holding that Seventh Amendment right to a jury trial in civil cases precluded court system from suspending civil trials as part of an effort to comply with the Antideficiency Act).

Previously, we have most often examined the "authorized by law" and "emergency" exceptions in the context of a lapsed appropriation.[1] Your request calls for us to interpret those exceptions in the context of an appropriation that has not lapsed but, instead, is likely to be exceeded. We think our more recent precedents concerning lapsed appropriations are relevant to our analysis of the exceptions that apply where an agency has exhausted its appropriated funds and therefore review some of the history and principles outlined in our earlier memoranda.

[1] *See, e.g., Effect of Appropriations for Other Agencies and Branches on the Authority to Continue Department of Justice Functions During the Lapse in the Department's Appropriations*, 19 Op. O.L.C. 337 (1995); *Maintaining Essential Services in the District of Columbia in the Event Appropriations Cease*, 12 Op. O.L.C. 290 (1988); *Continuation of Agency Activities During a Lapse in Both Authorization and Appropriation*, 6 Op. O.L.C. 555 (1982); *Payment of Travel Costs to Witnesses During a Period of Lapsed Appropriations*, 5 Op. O.L.C. 429 (1981); *Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriation*, 4A Op. O.L.C. 16 (1980).

A. "Authorized By Law" Exception of Section 1341 of the Antideficiency Act.

We begin with the "authorized by law" exception set forth in § 1341 of the Antideficiency Act, which was first incorporated into the statute in 1905. Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257; *see also* 39 Cong. Rec. 3690–92, 3780–81 (1905). Section 1341 provides, in relevant part, that:

> [a]n officer or employee of the United States Government or of the District of Columbia government may not—(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [or] (B) involve either government in a contract or obligation for the payment of money before an appropriation is made *unless authorized by law.*

31 U.S.C. § 1341 (emphasis added). Although § 1341 creates a general prohibition against expenditures in excess of appropriations, we have interpreted its "authorized by law" provision to permit the obligation of funds in advance of appropriations, where such obligations are:

> (1) funded by moneys, the obligational authority of which is not limited to one year, e.g., multi-year appropriations; (2) authorized by statutes that expressly permit obligations in advance of appropriations; or (3) authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency.

Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. O.L.C. 1, 5 (1981) ("1981 Civiletti Opinion").

Because the obligational authority for the FPD appropriations is limited to one year and we are aware of no statute expressly giving the USMS authority to carry out its prisoner detention functions despite a lack of available funds, the issue here is whether authority for the continuance of such functions during a funding deficiency can be inferred from the broadly defined powers and duties of the USMS. Under 28 U.S.C. § 566(a) (1994), the "primary role and mission of the United States Marshals Service" is "to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals and the Court of International Trade." Among other duties, the USMS must "execute all lawful writs, process, and orders issued under the authority of the United States," *id.* § 566(c); may make certain arrests, *id.* § 566(d); may provide defined protective services, *id.* § 566(e)(1)(A); and may "investigate such fugitive matters . . . as directed by the Attorney General," *id.*

§ 566(e)(1)(B). Moreover, in executing the laws of the United States, each U.S. Marshal is vested with the same sweeping authority as that vested under state law in the sheriff of the state in which the Marshal is serving. 28 U.S.C. § 564 (1994).

We doubt that the authority to obligate expenditures in the face of a deficiency can be inferred from the USMS duties described in § 566. Although the USMS is statutorily required to "execute[ ] and enforce all orders of the United States District Courts," including orders remanding prisoners to the custody of the USMS, and is authorized to arrest, and thus to hold, certain persons,[2] we have previously stated that "statutory authority to incur obligations in advance of appropriations . . . may not ordinarily be inferred, in the absence of appropriations, from the kind of broad, categorical authority, standing alone, that often appears . . . in the organic statutes of government agencies." 5 Op. O.L.C. at 4. A conclusion that obligations in excess of appropriations are "authorized by law" must be supported by something more than a finding that the functions for which the obligations are to be made can reasonably be said to fall within the agency's general responsibilities. *Id.* For that reason, Attorney General McReynolds concluded in a 1913 opinion that, without more, the Postmaster General's broad authority for operating the mail service would be insufficient authorization for attempting to avoid an interruption in such service by obligating funds in excess of appropriations to employ temporary mail carriers. *Postal Service — Employment of Temporary and Auxiliary Clerks and Letter Carriers*, 30 Op. Att'y Gen. 157, 160–61 (1913); *see also* 5 Op. O.L.C. at 5.

Although we recognize that there is an argument that the USMS's statutory obligation to "provide for the security . . . of the United States" confers the special authority contemplated by the "authorized by law" exception, we cannot conclude with any certainty that permission to continue the performance of prisoner detention functions in the face of a deficiency can reasonably be inferred from this provision. The legal and administrative precedents do not provide any clear direction on this point, but raise doubt about the argument. In your memorandum, you suggested that authorization for expenditures in excess of appropriation might be found in court orders requiring the USMS to transport and detain federal prisoners. USMS Memorandum at 4–6. In our view, the "authorized by law" exception must refer to congressional, as opposed to judicial, authorization to expend funds. The Antideficiency Act was intended to reaffirm *congressional* control of the purse. *See* Interim Opinion, 23 Op. O.L.C. at 108. As a result, it is necessary to consider whether Congress, at least implicitly, "authorized" the expenditure of funds in excess of appropriations in order to satisfy court orders

[2] *See* 28 U.S.C. §§ 564, 566(a) and (d). *See also* 28 C.F.R. § 0.111(k) (1999) (Director of USMS shall direct and supervise "[s]ustention of custody of Federal prisoners from the time of their arrest by a marshal or their remand to a marshal by the court, until the prisoner is committed by order of the court to the custody of the Attorney General for the service of sentence, otherwise released from custody by the court, or returned to the custody of the U[nited] S[tates] Parole Commission or the Bureau of Prisons ")

requiring the USMS to detain prisoners. This inquiry, however, would seem to lead back to the guiding principle that statutory authority contained in an agency's organic statute generally provides an insufficient basis to satisfy the "authorized by law" exception to the Antideficiency Act. Thus, finding no clear authority for USMS detention-related expenditures in excess of appropriation, we look next to whether the prisoner detention functions performed by the USMS fall within the "emergency" exception contained in the Antideficiency Act.

B. "Emergency" Exception of Section 1342 of the Antideficiency Act.

The second exception from the Antideficiency Act's proscription is for "emergencies involving the safety of human life or the protection of property" and is contained in § 1342 of the Act. Under that provision,

> [a]n officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law *except for emergencies involving the safety of human life or the protection of property.*

31 U.S.C. § 1342 (emphasis added). Although this provision refers only to the acceptance of voluntary services, we have previously interpreted its exception also to permit agencies to "incur obligations in advance of appropriations for material to enable the employees involved to meet the emergency successfully." 5 Op. O.L.C. at 11. Significantly, this provision authorizes entering into obligations to pay for services, and related material, but it does not itself authorize making payment on any such obligations. *See* Memorandum for Alice Rivlin, Director, Office of Management and Budget, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Government Operations in the Event of a Lapse in Appropriations* at 6 (Aug. 16, 1995) ("Rivlin Memorandum"). Before payment could be made in case of a deficiency, it would be necessary to return to Congress for an appropriation. *See id.*

The exception for "emergencies" contained in § 1342 has long been recognized as an important component of the Antideficiency Act. 5 Op. O.L.C. at 8. It bears noting, however, that the earliest version of the statute, enacted in 1870, included no exception for emergency situations. *Id.* It set forth only a very general prohibition against the expenditure of "any sum in excess of appropriations" or "involv[ing] the Government in any contract for the future payment of money in excess of such appropriations."[3] Congress did not include an exception for

[3] *See* Rev Stat § 3679, Act of July 12, 1870, 16 Stat. 230, 251. As we noted in our Interim Opinion, the Antideficiency Act has been amended a number of times since its enactment in 1870. *See, e.g.*, Act of Mar. 3, 1905, ch. 1484, § 4, 33 Stat. 1214, 1257, Act of Feb. 27, 1906, ch. 510, § 3, 34 Stat. 27, 48, Act of Aug. 23, Continued

emergencies until 1884, when, as part of an urgent deficiency appropriation, it enacted a measure designed to curb the incidence of claims for compensation stemming from the unauthorized provision of services to the government by non-governmental employees, and claims advanced by government employees seeking compensation for services performed after hours. 5 Op. O.L.C. at 8. Legislators were concerned that a complete ban on all "voluntary" or non-gratuitous services would impede federal "life-saving" measures undertaken during periods of lapsed or exhausted appropriations, and urged the adoption of an exception for emergency situations. *See* 15 Cong. Rec. 2143 (1884) (statement of Sen. Beck). The provision adopted in 1884 read as follows:

> To enable the Secretary of the Interior to pay the employees temporarily employed and rendering service in the Indian Office from January first up to July first, eighteen hundred and eighty-four, two thousand one hundred dollars, and *hereafter no Department or officer of the United States shall accept voluntary service for the Government or employ personal service in excess of that authorized by law except in cases of sudden emergency involving the loss of human life or the destruction of property.*

Act of May 1, 1884, ch. 37, 23 Stat. 15, 17 (emphasis added).

Congress amended other aspects of the Antideficiency Act in the years following initial adoption of the "emergency" exception, but did not alter that provision until 1950, when it enacted the modern version of the Antideficiency Act. *See* Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 595, 765. The Comptroller General and the Director of the Bureau of the Budget jointly proposed new language in a 1947 report to Congress recommending certain changes in the Antideficiency Act and its administration. *See Report and Recommendations by the Director of the Bureau of the Budget and the Comptroller General of the United States with respect to the Antideficiency Act and Related Legislation and Procedures* 29–31 (June 5, 1947) (attachment to Letter for Honorable Styles Bridges, Chairman, Senate Committee on Appropriations) ("Antideficiency Act Report"). Congress accepted this recommendation and revised the language concerning the provision of emergency services in the context of an appropriations deficiency as follows:

> No officer or employee of the United State shall accept voluntary service for the United States or employ personal service in excess

1912, ch. 350, § 6, 37 Stat 360, 414, Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 595, 765; Act of Aug 1, 1956, ch. 814, § 3, 70 Stat 782, 783, Pub. L. No 85–170, § 1401, 71 Stat 426, 440 (1957), Pub. L. No 93–344, § 1002, 88 Stat. 297, 332 (1974), Pub. L. No. 93–618, § 175(a), 88 Stat. 1978, 2011 (1975); Pub. L. No. 101–508, § 13213(a), 104 Stat. 1388, 1388–621 (1990).

> of that authorized by law, *except in cases of emergency involving the safety of human life or the protection of property.*

Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 595, 765 (emphasis added). Neither the 1947 report nor the legislative history sheds any light on why the language of this provision was amended to focus on "cases of emergency," rather than on "cases of sudden emergency."[4] In a 1981 opinion, however, Attorney General Civiletti inferred from the plain language of the amendment an intent "to broaden the authority for emergency employment." 5 Op. O.L.C. at 9. He explained that, "[i]n essence, [Congress] replaced the apparent suggestion of a need to show absolute necessity with a phrase more readily suggesting the sufficiency of a showing of reasonable necessity in connection with the safety of human life or the protection of property in general." *Id.* He also identified two rules for identifying the functions for which emergency services could be procured:

> First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question.

Id. at 8.

In 1990, Congress added a clarifying statement to the "emergency" exception incorporated in the 1950 Act. The clarifying provision reads:

> As used in this section, the term "emergencies involving the safety of human life or the protection of property" does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.

[4] The section of the 1947 Comptroller General and Bureau of the Budget report addressing this provision merely provides information on the desired effect of the revised language and explains that "[t]his clause is intended to permit apportionments on a basis indicating a necessity for a deficiency or a supplemental estimate when the rate of obligating an appropriation must be increased to provide for emergencies involving the safety of human life or the protection of property." Antideficiency Act Report at 29. Report sections discussing the predecessor to § 1515, which contains a similar "emergency" exception from the apportionment requirements of the Antideficiency Act, do, however, offer insight into the purpose underlying amendments made to the apportionment statute. The report drafters described the version of that statute employing the phrase "some extraordinary emergency or unusual circumstance which could not be anticipated at the time of making such an apportionment" as "vague." Antideficiency Act Report at 30. They also included the phrase "emergenc[ies] involving the safety of human life or the protection of property" in the draft bill included in the document they submitted to Congress. *See* Antideficiency Act Report, att. at 1; *see also* Act of Sept. 6, 1950, ch. 896, § 1211, 64 Stat. 595, 765 (incorporating a variation of the recommended language).

31 U.S.C. § 1342. The legislative history underlying the inclusion of the clarifying statement is sparse. *See* Rivlin Memorandum at 8. In a 1995 opinion, in which we considered the meaning of the 1990 amendment, we noted that the reference to the amendment appearing in a conference report concerning the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101–508, 104 Stat. 1388, suggests that the change was made to narrow the range of functions that could reasonably be understood to fall within the "emergency" exception, and to avoid the possibility that the 1981 Civiletti Opinion might be read to permit the continuance of too broad of an array of government services during a shutdown. The conference report explained that:

> The [bill] also makes conforming changes to title 31 of the United States Code to make clear that funds sequestered are not available for expenditure and that ongoing, regular operations of the Government cannot be sustained in the absence of appropriations, except in limited circumstances. These changes guard against what the conferees believe might be an overly broad interpretation of an opinion of the Attorney General issued on January 16, 1981, regarding the authority for the continuance of Government functions during the temporary lapse of appropriations, and affirm that the constitutional power of the purse resides with Congress.

H.R. Rep. No. 101–964, at 1170 (1990), *reprinted in* 1990 U.S.C.C.A.N. 2374, 2875. Although it is evident that the amendment was "intended to limit the coverage of [the term emergency], narrowing the circumstances that might otherwise be taken to constitute an emergency within the meaning of the statute," the amendment did not require a dramatic change in this Office's approach to and interpretation of the "emergency" exception. *See* Rivlin Memorandum at 8. We concluded that we might avoid misinterpretation of the 1981 Civiletti Opinion by replacing the phrase "in some degree" in the second of the interpretative rules outlined in the opinion with the phrase "in some significant degree," but we already were interpreting the "emergency" exception narrowly, encompassing only those cases of threat to human life or property in which "the threat can be reasonably said to [be] near at hand and demanding of immediate response." *Id.* at 7. The clarifying text added by the 1990 amendment merely provided a gloss on the term "emergency," reinforcing what is implicit in the concept of an emergency — that there must exist an imminent threat or set of circumstances requiring an immediate response or action. *Id.* at 8–9.

Against this backdrop, we now consider the question whether the prisoner-detention functions performed by the USMS fall within the "emergency" exception on the ground that a decision not to continue them in the face of an appropriations deficiency would pose a threat to the safety of human life or to property that

could reasonably be described as near at hand or imminent. As we have noted, under 28 U.S.C. § 566, the USMS must provide for the security of the United States courts, and is responsible for executing and enforcing federal court orders. *See also* 28 U.S.C. § 564 (providing Marshals with "the same powers which a sheriff of the State may exercise in executing the laws thereof"). In this capacity, and under its FPD appropriation, the USMS shoulders primary responsibility, not only for transporting prisoners ordered to appear in federal court, but also for providing them with food, shelter, and medical services during the pendency of their court proceedings. This task is usually accomplished through contracts executed with local jails and prisons for the care and supervision of federal detainees. In a typical year, the USMS has more than 20,000 such detainees in its custody.[5]

It is likely that even a temporary suspension of the prisoner detention functions provided by the USMS would in many, and perhaps all, circumstances create an emergency involving the safety of human life or the protection of property within the meaning of § 1342. Certainly, to the extent suspension of prisoner detention functions would require the release of dangerous prisoners, or would preclude the provision of essential prisoner care or supervision, the exception would apply. In our judgment, hardship of this sort is what Congress intended to avoid in creating an "emergency" exception to the Antideficiency Act, and it satisfies the rigorous § 1342 standard identified in our earlier opinions on this subject.

It is possible that the failure to perform specific FPD functions would not rise to this level, and that the failure to provide certain benefits to federal prisoners would pose no imminent threat to the safety of human life or the protection of property. Some prisoners, might, for example, be transferred to the custody of the Bureau of Prisons and some services provided to prisoners might be terminated without posing a risk to the safety of human life or the protection of property. For this reason, should an unavoidable deficiency occur in the future, it will be necessary to evaluate obligations on a case-by-case basis. It seems clear to us, however, that at least a substantial portion of FPD-related obligations will likely fall within the exception. The precise application of the "emergency" exception, however, cannot be specified in the abstract and will inevitably turn on particular facts and circumstances.

Our conclusion that many, if not all, FPD-related obligations will likely fall within the "emergency" exception is bolstered by administrative determinations previously made by the Office of Management and Budget ("OMB") in the context of anticipated or actual appropriations lapses. In September of 1980, OMB prepared for the possibility of an appropriations lapse by issuing a memorandum instructing agencies on the activities and functions that could lawfully continue in the event Congress failed to pass a continuing resolution for fiscal year 1981. The memorandum listed activities related to the "[c]are of prisoners and other

[5] *FY 1997 Annual Report of the U.S. Marshals Service* at 3–9 (1998).

persons in the custody of the United States'' among the functions protecting life and property for which obligations could be incurred without running afoul of § 1341's prohibition. Memorandum for Heads of Executive Departments and Agencies, from James T. McIntyre, Jr., Director, Office of Management and Budget, *Re: Agency Operations in the Absence of Appropriations* at 2 (Sept. 30, 1980). A year later, in 1981, OMB issued another memorandum listing prisoner care-related services among those agency services that could continue despite a lack of appropriations, when delay in the passage of an appropriation for fiscal year 1982 again required agencies to prepare for an orderly shutdown of non-essential government services and operations. Memorandum for Heads of Executive Departments and Agencies, from David A. Stockman, Director, Office of Management and Budget, *Re: Agency Operations in the Absence of Appropriations* at 2 (Nov. 17, 1981). Similarly, past policies of the Department of Justice regarding the continuation of operations during an appropriations lapse also provide support for our conclusion. In a 1996 memorandum approved by this Office, the Department of Justice listed ''functions relating to the incarceration of prisoners'' among those that could lawfully continue during a lapse in appropriations. Memorandum for Heads of Department Components, from Stephen R. Colgate, Assistant Attorney General for Administration, *Re: Effects of Continuing Resolutions on Department of Justice Resources*, att. at 4 (Apr. 1, 1996).

C. Emergency Exception of Section 1515 of the Antideficiency Act.

We understand your request also to include the question whether the USMS could invoke the ''emergency'' exception as a basis for failing to apportion funds under § 1512 of the Antideficiency Act.[6] As we explained in our Interim Opinion, an ''emergency'' exception similar to that set forth in § 1342 applies to § 1512's apportionment requirement. *See* Interim Opinion, 23 Op. O.L.C. at 106 n.2. Section 1515(b)(1), (b)(1)(B) provides, *inter alia*, that

> an official may make, and the head of an executive agency may request, an apportionment under section 1512 of this title that would indicate a necessity for a deficiency or supplemental appropriation only when the official or agency head decides that the action is required because of . . . *an emergency involving the safety of human life, the protection of property, or the immediate welfare of individuals* . . . .

31 U.S.C. § 1515(b)(1), (b)(1)(B) (emphasis added).

[6] Section 1512(a) provides, in relevant part, that ''an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for [that] period '' 31 U S.C § 1512(a).

Although, as we indicated in our Interim Opinion, we think it unlikely that a finding that an agency qualifies for an exception to the apportionment requirements of § 1512 would also be enough automatically to exempt that agency from § 1341's more demanding mandate, *see* Interim Opinion, 23 Op. O.L.C. at 106 n.2, we think it clear that, if an agency's functions fall within § 1342's exception for emergency situations, the standard for the "emergency" exception under § 1515 also will be met. We have previously held that § 1342 and § 1515, "[a]s provisions containing the same language, enacted at the same time, and aimed at related purposes . . . should be deemed in *pari materia* and given a like construction," and can find no justification for following a different course in this case. 5 Op. O.L.C. at 9 n.11 (citing *Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973)); *see also* General Accounting Office, 2 *Principles of Federal Appropriations Law* 6–82 to 6–83 (2d ed. 1992). Thus, for the reasons identified in the previous section of this memorandum, we conclude that it is likely that many, if not all, of the prisoner-detention functions performed by the USMS would satisfy the § 1515 standard for "emergenc[ies] involving the safety of human life."

Conclusion

We conclude that the § 1342 and § 1515 exceptions for "emergencies involving the safety of human life or the protection of property" would likely apply to many, if not all, of the USMS's prisoner-detention functions. A determination whether particular obligations would satisfy this narrow exception, however, cannot be made in the abstract and would require case-by-case evaluation. Although the conclusion we reach here would permit the USMS to continue many, if not all, of its prisoner detention-related functions despite a deficiency in its FPD budget, we reaffirm the principles articulated in our Interim Opinion, and thus emphasize that the USMS is not free to invoke the "emergency" exception in the absence of an actual deficiency in its apportioned funds or overall appropriation. The USMS is under a general statutory obligation to reduce its prisoner detention-related expenditures to avoid the need for deficiency spending.

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

Applicability of the Federal Vacancies Reform Act to Vacancies at the International Monetary Fund and the World Bank

The United States Executive Director and the Alternate United States Executive Director at the International Monetary Fund and the World Bank are not part of an Executive agency, and therefore vacancies in those offices are not covered by the Federal Vacancies Reform Act.

May 11, 2000

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

You have requested our opinion whether the Federal Vacancies Reform Act ("Vacancies Reform Act" or "Act"), 5 U.S.C. §§ 3341–3349d (Supp. IV 1998), applies to vacancies in the offices of the United States Executive Director ("USED") and the Alternate United States Executive Director ("Alternate USED") at the International Monetary Fund ("IMF").[1] This memorandum confirms our oral advice that the Act does not apply to these offices. By its terms, the Act applies only to a Senate-confirmed office "of an Executive agency." We believe that the better view, based on the information provided by the Treasury Department, is that the U.S. representatives are not part of an "Executive agency" and are therefore not covered by the Act.

After our oral advice about the U.S. representatives to the IMF, you asked for our opinion whether the Vacancies Reform Act applies to vacancies in the offices of the United States Executive Director and the Alternate United States Executive Director at the International Bank for Reconstruction and Development ("World Bank"). The Treasury Department has informed us that the USEDs and Alternate USEDs at the IMF and the World Bank are similar with regard to the relevant facts discussed in this opinion. On that basis, we conclude that the USED and Alternate USED at the World Bank are similarly outside the scope of the Vacancies Reform Act because they are not part of an "Executive agency."

I. The United States Representatives to the IMF

A. *The United States Executive Director and Alternate United States Executive Director*

The IMF was established under an agreement negotiated at the 1944 Bretton Woods Conference. *See* IMF, *What is the International Monetary Fund?, available at* http://www.imf.org/external/pubs/ft/exrp/what.htm (visited Mar. 29, 2000) ("IMF Website Summary"). The United States agreed to join the IMF in 1945

[1] In this memorandum, the USED and the Alternate USED at the IMF are referred to jointly as the "U.S. representatives to the IMF" or, simply, the "U.S representatives."

under the authority of the Bretton Woods Agreements Act. *See* 22 U.S.C. § 286 (1994). An international organization currently made up of 182 member countries, the IMF promotes international monetary cooperation, facilitates the expansion and balanced growth of international trade, and promotes exchange stability. *See* IMF Website Summary; Articles of Agreement of the International Monetary Fund, art. I, *available at* http://www.imf.org/external/pubs/ft/aa (visited Mar. 29, 2000) (''Articles of Agreement'').

The authority of the IMF is vested in a Board of Governors, consisting of a Governor and an alternate Governor from each member country. *See* Articles of Agreement, art. XII, § 2; IMF Website Summary. The Board of Governors has delegated substantial authority to the IMF's Executive Board, and it is the Executive Board that carries out the IMF's day-to-day operations and makes most of its decisions. *See* Articles of Agreement, art. XII, §§ 2 & 3; By-Laws, Rules, and Regulations of the International Monetary Fund, § 15, *available at* http://www.imf.org/external/pubs/ft/bl (visited Mar. 29, 2000); William N. Gianaris, *Weighted Voting in the International Monetary Fund and the World Bank*, 14 Fordham Int'l L.J. 910, 913–14 (1990/1991). The Executive Board is made up of 24 Executive Directors, with a Managing Director serving as chairperson. Articles of Agreement, art. XII, § 3(b). Eight of these Executive Directors represent individual member countries, including the United States, and each of these eight Executive Directors is appointed by the country that he or she represents. The remaining sixteen are elected by the Governors and represent groupings of the remaining member countries. *See id.* Sched. E; IMF Website Summary.

The Executive Director and the Alternate Executive Director for the United States are appointed by the President, by and with the advice and consent of the Senate, to two-year terms, with the right to hold over in office until a successor has been appointed. 22 U.S.C. § 286a(a), (b) (1994). The USED and Alternate USED serve as representatives of the United States and present this Government's views at the IMF. *See* IMF Website Summary; Letter for David R. Brennan, Deputy General Counsel, Department of the Treasury, from Margery Waxman, General Counsel, Office of Personnel Management, *Re: Whether the U.S. Alternate Executive Director of IMF is Within the Executive Branch for the Purpose of Qualifying for SES Benefits under 5 U.S.C. § 3392(c)*, at 4 (Nov. 4, 1980) (''OPM Opinion'') (''[T]hese positions are designed to serve the President in the exercise of his Executive branch functions concerning the implementation of foreign policy.''). The Secretary of the Treasury (''Secretary'') has principal responsibility for instructing the U.S. representatives to the IMF on the positions and votes of the United States. *See, e.g.*, Exec. Order No. 11269, at § 3(a), *reprinted as amended in* 22 U.S.C. § 286b note (1994); 22 U.S.C. §§ 262h, 262k(b), 262m–2(b), 286a(d)(3); 286e–8; 286e–13 (1994).

B. *The Federal Vacancies Reform Act*

Except for those offices expressly exempted by 5 U.S.C. § 3349c, the Vacancies Reform Act applies to any vacancy in an office of an "Executive agency" to which appointment is required to be made by the President, with the advice and consent of the Senate.[2] The USED and the Alternate USED are both appointed by the President, with the Senate's advice and consent, 22 U.S.C. § 286a(a), (b), and neither office is expressly excluded from coverage by 5 U.S.C. § 3349c. Accordingly, the critical issue in determining whether the Vacancies Reform Act applies to the USED and the Alternate USED is whether they are officers "of an Executive agency" within the Act.

The use of the phrase "of an Executive agency" imposes a meaningful limitation on the scope of the Act. "Executive agency" is a specific, defined term in title 5, and is narrower than the executive branch as a whole. *See Haddon v. Walters*, 43 F.3d 1488 (D.C. Cir. 1995). The Vacancies Reform Act incorporates the title 5 definition of an "Executive agency," except that the Act adds the Executive Office of the President to the definition and excludes the General Accounting Office. *See* 5 U.S.C. § 3345(a); *see also* S. Rep. No. 105–250, at 12 (1998) ("'Executive agency' is defined at 5 U.S.C. § 105."); *Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 61–62 (1999). By its plain language, therefore, the Act does not necessarily reach all Senate-confirmed offices, but only those in "an Executive agency."

To be sure, at least one statement in the legislative history of the Act could support the proposition that Congress intended to cover all Senate-confirmed offices in the executive branch, except for those offices expressly excluded by § 3349c:

> Section 3345 states that the provisions of the Act will apply to any officer in any executive agency, other than the General Accounting Office, if that officer's appointment is made by the President, subject to the advice and consent of the Senate. Unlike current law, *this change will make clear that the Vacancies Act, as amended by this legislation, applies to all executive branch officers whose appointment requires Senate confirmation, except for those officers described in Section 3349c.*

144 Cong. Rec. S12,824 (daily ed. Oct. 21, 1998) (statement of Sen. Byrd) (emphasis added). Nevertheless, this remark in a floor statement, which does not even specifically address the possibility that a Senate-confirmed office in the

[2] The Vacancies Reform Act is not necessarily the only method, however, of filling such offices on a temporary basis. The Act also expressly preserves other statutory authorities that designate a specific officer to serve as the acting officer for a vacant office or that authorize the President, a court, or the head of an Executive department to designate an acting officer. 5 U.S.C. § 3347(a)(1).

Executive branch might be outside any "Executive agency," cannot overcome the plain language defining the reach of the Act.

Section 105 defines an "Executive agency" as "an Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 105 (1994). These three terms are defined in §§ 101, 103, and 104 of title 5. Neither the IMF nor the office of the U.S. representatives to the IMF is a "Government corporation." Accordingly, whether the USED and the Alternate USED are officers of an Executive agency turns on whether they are in either (i) an Executive department or (ii) an independent establishment.

C. *Are the United States Executive Director and Alternate United States Executive Director Part of the Department of the Treasury?*

Because the Department of the Treasury is an Executive department, *see* 5 U.S.C. § 101, an officer in the Department of the Treasury is an officer of an Executive agency within the Act. *Cf.* Memorandum for Files, from Daniel L. Koffsky, Acting Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Permanent Representative to the United Nations* (July 14, 1998) ("1998 UN Memo") (concluding that the United States Permanent Representative to the United Nations is in the State Department and therefore an officer of an Executive agency). The information provided to us by the Treasury Department indicates that the Treasury Department has a more direct and substantial relationship with the U.S. representatives to the IMF than does any other Executive department. If the U.S. representatives are *within* any Executive department, that department would be the Treasury Department.

Although the issue is not entirely free from doubt, we conclude that, on balance, the better view is that the USED and the Alternate USED are not in the Department of the Treasury. In an Appendix, we set out the factors relevant to the analysis. Some of these factors strongly indicate that the U.S. representatives are not part of the Treasury Department. Although others might suggest that the U.S. representatives are in the Treasury Department, a closer examination reveals that the relationship of the U.S. representatives to the Treasury Department is quite limited in scope and frequently ambiguous even within that limited area.

For some of the most central elements of personnel administration, the U.S. representatives are unconnected to the Department of the Treasury. The Treasury Department is not responsible for setting or paying the salaries of the U.S. representatives. *See* 22 U.S.C. § 286a(d). Nor does the Treasury Department carry the U.S. representatives on its employment rolls. Furthermore, the staff for the U.S. representatives are not Treasury Department employees, but instead are employees of the IMF; and if they come to the IMF from the Treasury Department, they are officially separated from the Treasury Department, removed from

the Treasury Department's employment rolls, and transferred to the employment of the IMF.[3]

The Vacancies Reform Act appears in Title 5 and uses Title 5's definition of "Executive agency." Title 5 largely deals with personnel matters. If, for these essential aspects of personnel administration, the U.S. representatives have no connection to the Treasury Department, the compelling implication is that the U.S. representatives are not located in the Treasury Department.

The strongest factor potentially arguing in favor of the view that the U.S. representatives to the IMF are part of the Treasury Department is that they receive their instructions through the Secretary of the Treasury. *See, e.g.*, Exec. Order No. 11269, at § 3(a), *reprinted in* 22 U.S.C. § 286b note (delegating to the Secretary the President's authority to instruct United States representatives to the international financial organizations). This factor alone, however, does not mean that the U.S. representatives to the IMF are part of the Treasury Department. By statute, the power to instruct is vested in the President, not the Secretary of Treasury. As a practical matter, the President cannot personally perform all of the duties for which he is ultimately responsible, and here he has chosen to delegate the task of conveying the Government's instructions. That the President has determined that the Secretary of Treasury is best suited to be principally responsible for providing the instructions to the U.S. representatives cannot, as a legal matter, make the U.S. representatives part of the Treasury Department.

Moreover, the history by which the Secretary became responsible for instructing the U.S. representatives to the IMF is consistent with the view that they are not part of the Treasury Department. Originally, in the Bretton Woods Agreements Act of 1945, Congress made the National Advisory Council on International Monetary and Financial Problems responsible for instructing the U.S. representatives, under the general direction of the President. 22 U.S.C. § 286b(b)(4). In 1965, President Johnson abolished the Council and transferred to himself all of its functions, including the responsibility for instructing the U.S. representatives to the IMF. Reorg. Plan No. 4 of 1965, at §§ 1(b) & 3(a), *reprinted in* 5 U.S.C. app. at 1519 (1994). In a 1966 Executive Order, the President delegated to the Secretary of Treasury the authority to instruct the representatives. Exec. Order No. 11269, at § 3(a), *reprinted in* 22 U.S.C. § 286b note. It thus seems quite unlikely that the U.S. representatives would originally have been considered within the Department of the Treasury; and nothing in the later history of the President's delegation to the Secretary of his authority to instruct the U.S. representatives indicates that, in addition to delegating the authority to instruct, the President

[3] On rare occasions, additional Treasury employees, beyond the usual staff of the U.S. representatives, may be detailed to the IMF. Under such details, the individual would remain a Treasury employee Such details may be, and are, also made to a range of international organizations under the same authority and conditions as they are made to the IMF. As details of Treasury employees to the UN Secretariat would not suggest that the UN Secretariat is part of the Treasury Department, details to the IMF also do not suggest that the U.S. representatives are part of the Treasury Department

intended to transfer the legal, administrative location of the U.S. representatives to the Treasury Department. Nor does Congress's passage, after the Executive Order, of statutes directing or authorizing the Secretary to instruct the U.S. representatives as to certain specific issues, *see, e.g.*, 22 U.S.C. §§ 262h, 262k(b), 262m–2(b), 286a(d)(3), 286e–8, 286e–13, show any intent to alter the administrative location of the U.S. representatives. These statutes appear to reflect the reality of the delegation made by the Executive Order, rather than any unstated intent to move the U.S. representatives into the Treasury Department.

The Treasury Department has some responsibility for the bookkeeping and agency contributions associated with the U.S. representatives's receipt of certain employment benefits, *see* 22 U.S.C. § 276c–2 (Supp. IV 1998), but the provision assigning this task ultimately serves to demonstrate that the U.S. representatives are *not* otherwise part of the Treasury Department. Under § 276c–2, "[t]he Treasury Department shall serve as the employing office" in administering the employment benefits. If the U.S. representatives were already part of the Treasury Department, there would be no need for the statute to specifically denominate Treasury as the employing office, because it would already be the employing office as a result of the administrative location of the U.S. representatives.[4]

Finally, although the Treasury Department gives ethics advice to the U.S. representatives, we have been informed that it does not do so as a result of any determination that it is legally required to take this role. Furthermore, the Secretary of Treasury, we understand, probably has never been asked to grant the U.S. representatives a waiver under the authority of 18 U.S.C. § 208 (1994), as delegated by the President to agency heads with respect to Presidential appointees in their agencies, *see* Exec. Order No. 12731, § 401, 3 C.F.R. 306 (1991).

As these factors show, the determination whether the U.S. representatives are part of the Treasury Department requires fact-specific analysis, and the limited situations in which this Office has previously addressed whether an officer or entity is part of an Executive department do not present perfect analogies. Nevertheless, we believe that our prior advice in those cases is consistent with the conclusion here that the U.S. representatives are not part of the Treasury Department.

We have twice before considered the somewhat analogous question of whether the United States Mission to the United Nations ("Mission") is in the Department

[4] It could also be argued, more generally, that no separate provision would be needed to provide these benefits, which are available generally to members of the civil service within the Treasury Department, if the U.S. representatives were already employed there. Further, § 276c–2 places "in the discretion of the Secretary of the Treasury" the decision whether to provide these benefits to the U.S. representatives It would arguably be anomalous for Congress to vest the Secretary with such discretion regarding the benefits of U.S. representatives if they were part of Treasury, since that discretion does not exist as to other employees and officers of the Treasury Department While we tend to think that this is further evidence that the U.S representatives are not within the Treasury Department, we also recognize that there is a counter argument to this line of reasoning—namely, that an express grant of benefits was necessary to overcome the prohibition in 22 U S C § 286a(d)(1) on any person's receiving "any salary or other compensation from the United States" for serving as an Executive Director or Alternate at the IMF or World Bank. As a result, we do not place any reliance on this argument in concluding that the U.S representatives are not part of the Treasury Department.

of State. In the first of these matters, the status of the Mission determined both whether a vacancy in a Senate-confirmed position in the Mission could be filled under the old Vacancies Act and whether a Senate-confirmed officer, also in the Mission, could be the officer designated by the President to fill that vacancy. *See* Memorandum for Files, from Daniel L. Koffsky, Special Counsel, Office of Legal Counsel, *Re: Vacancy at United States Mission to the United Nations* at 1 (Apr. 8, 1996) ("1996 UN Memo"). In the second of these matters, we reaffirmed our conclusion that the Mission was in the State Department and concluded that therefore the United States Permanent Representative to the United Nations could be detailed under the unamended Vacancies Act to fill a vacancy in the Department of Energy. *See* 1998 UN Memo at 1. Although a significant factor in the Office's conclusion that the Mission is in the State Department was that instructions for the Permanent Representative were sent through the Secretary of State, there the Secretary's power to give instructions was statutory, and in any event that power was not the sole or determinative factor. *See* 1996 UN Memo at 1–2; 1998 UN Memo at 2. To the contrary, the conclusion was premised on a significant number of additional factors demonstrating the Mission's administrative location within the State Department. We noted, among other factors, that the State Department exercises fiscal control over the Mission through control of the Mission's appropriations; the Permanent Representative is carried on the State Department's employment rolls; there is a "home desk" for the Mission within the State Department; the administrative officers within the State Department treat the Permanent Representative as an official of the Department; the State Department handles the FOIA, whistleblower, and ethics work for the Mission; and the Inspector General for the State Department exercises jurisdiction over the Mission. *See* 1996 UN Memo at 2; 1998 UN Memo at 2. As demonstrated above and in the information in the Appendix, these factors are generally not present with regard to the U.S. representatives. Moreover, unlike the situation with the U.S. representatives and Treasury, there were no significant factors indicating that the Mission was not part of the State Department.[5] *See also, e.g.*, Memorandum for Ginger Lew, General Counsel, Department of Commerce, from Dawn Johnsen, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: ADEA and Regional Fishery Management Councils* at 4 & n.1 (Mar. 14, 1995) ("Regional Fishery Management Councils Opin."); Memorandum for Frank K. Richardson, Solicitor, Department of the Interior, et al., from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Status of the Navajo and Hopi*

[5] The only potentially contrary factor identified was an inconsistency among State Department wire diagrams; some clearly identified the Permanent Representative as part of the State Department, whereas other wire diagrams appeared to suggest that the Mission had a relationship to State more akin to an independent agency. 1998 UN Memo at 2 n 1. The Treasury organizational charts and wire diagrams, in contrast, are consistent in not including the U.S representatives as part of the Treasury Department

Indian Relocation Commission and Removability of its Commissioners at 10–11 (Jan. 17, 1985).[6]

D. *Do the United States Representatives to the IMF Constitute an Independent Establishment?*

Because the U.S. representatives to the IMF are neither in a Government corporation nor part of an executive department, they are part of an Executive agency only if they are an independent establishment. Section 104 defines an independent establishment as follows: "For the purpose of this title, 'independent establishment' means — (1) an establishment in the executive branch (other than the United States Postal Service or the Postal Rate Commission) which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and (2) the General Accounting Office." 5 U.S.C. § 104. While this definition is quite broad, its plain language requires that a collection of offices meet three requirements in order to constitute an independent establishment: (1) it must be an "establishment"; (2) it must be "in the executive branch"; and (3) it must not be a part of an Executive department, military department, Government corporation, or another independent establishment. The U.S. representatives to the IMF can satisfy the third requirement, but not the first two. Accordingly, we conclude that they are not an independent establishment within the meaning of § 104.

To the extent that the U.S. representatives are an indivisible part of the IMF, they would only be part of an independent establishment if the IMF is itself an independent establishment. The IMF, however, is not within the executive branch. It is instead an international institution made up of representatives from over 180 member countries. *See* OPM Opin. at 3 ("IMF clearly is not within the Executive Branch"). As a result, IMF as a whole cannot constitute an independent establishment.

Further, while the U.S. representatives may be officers in the executive branch, *see* OPM Opin., their "office" at IMF does not constitute an "establishment." The term "establishment" embodies the idea of a free-standing entity with its own structure and unity. For example, one dictionary defines "establishment," in relevant part, as follows:

> c: a permanent civil or military force or organization; d: a more or less fixed and usu. sizable place of business or residence together with all the things that are an essential part of it (as grounds, fur-

[6] Nor is our conclusion here inconsistent with OPM's conclusion that the Alternate USED is within the executive branch for the purpose of qualifying for SES benefits. OPM Opin. at 3–5. The question whether a position is within the executive branch is different from whether it is within the Treasury Department or whether the U.S. representatives constitute an independent establishment. Moreover, OPM, in discussing persons who went from Treasury to be the Alternate USEDs, states that, although they never left the executive branch, they left the Treasury Department. *Id.* at 4–5.

> niture, fixtures, retinue, employees); e: a public or private institution (as a school or hospital)

Webster's Third New International Dictionary of the English Language, Unabridged 778 (1993). The office of the U.S. representatives is not of this character. It is not in any sense an independent, free-standing establishment. It is instead a component part of the IMF. The office is fully funded by the IMF, with the IMF setting and paying the compensation of the U.S. representatives and their staff, as well as the office's operating expenses. The office, moreover, with the exception of the U.S. representatives, is staffed by employees of the IMF who owe their principal obligations to the IMF, rather than the federal government. *See* By Laws of the IMF, Rule N–3 (employees of the IMF, in contrast to representatives of the member nations, owe their exclusive loyalty to the IMF); OPM Opin. at 4 ("[W]e would make the distinction between [U.S. representatives] and United States employees who transfer to international organizations to serve the organizations in their area of expertise without any direct accountability to the United States.").

Beyond the language of the statute, there is little relevant guidance in OLC opinions, case law, or the legislative history of § 104. On a few occasions, we have considered whether an entity is an independent establishment. These matters, however, generally involved situations in which it was clear that the entity was an establishment and was in the executive branch; the only question was whether it was independent or a part of an Executive department. For example, we concluded that the Commission on Fine Arts is an independent establishment because it is a congressionally created, free-standing entity entirely financed by the federal government. Memorandum for Charles H. Atherton, Secretary, Commission of Fine Arts, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of Executive Order 11988, entitled "Floodplain Management," to the Commission of Fine Arts* at 2–3 (Nov. 14, 1980); *see also, e.g.*, Memorandum for Edward A. Frankle, General Counsel, NASA, from J. Michael Luttig, Assistant Attorney General, Office of Legal Counsel, *Re: Department of Transportation Licensing Under the Commercial Space Launch Act* at 16 (Nov. 15, 1990) (concluding NASA is an independent establishment because it has a presidentially appointed head who is responsible for exercise of all powers of NASA under only the supervision and direction of the President); Regional Fishery Management Councils Opin. at 4 & n.1 (the Councils are part of Commerce because their primary purpose is to advise the Secretary, the majority of voting members are appointed by the Secretary, the Secretary controls what administrative staff Councils may have and the procedures the Councils follow, and Commerce pays the compensation and expenses of the Councils and their staffs).

With regard to the definition of "executive agency" set out in 40 U.S.C. § 472(a) (1994), which we compared to the "nearly identical language in the definition of 'executive agency' in title 5's general provision (5 U.S.C. § 105)," we noted that certain less substantial and well delineated entities within the Executive Office of the President might not constitute independent establishments. Memorandum for Bernard Nussbaum, Counsel to the President, from Daniel L. Koffsky, Acting Assistant Attorney General, *Re: Use of GSA Authority to Accept Gift of Equipment* at 5–6 (Aug. 3, 1993). In particular, we concluded that while the Executive Office of the President and some of its principal components, such as the Office of Management and Budget, appear to fall within the ordinary meaning of an independent establishment, "[i]t is much less certain whether more *ad hoc* and less formal entities under the [Executive Office of the President] would meet this definition." *Id.* at 5; *see also Haddon*, 43 F.3d at 1489–90 (staff of the Executive Residence are not employees within an Executive agency).[7]

E. *Conclusion*

We recognize that Congress may not have had any specific intent to exclude these offices from the scope of the Vacancies Reform Act. By its terms, however, the Vacancies Reform Act applies only to vacancies in Senate confirmed offices that are part of an "Executive agency." While this defined term is quite broad and includes almost all Senate confirmed, executive branch offices, its use in the Act has the consequence that, to be covered by the Act, an office must be not just an office in the executive branch, but an office in an Executive department, Government corporation, or independent establishment. Because the U.S. representatives to the IMF are not part of an Executive department, Government corporation, or independent establishment, vacancies in those offices are not covered by the Vacancies Reform Act. We stress, however, that the category of executive branch offices that are not part of an Executive agency is extremely narrow. In fact, that category may well be limited to a set of offices within international financial institutions that are similarly situated to the United States Executive Director and Alternate United States Executive Director at the IMF.

II. The United States Representatives to the World Bank

The Department of the Treasury has informed us that the United States Executive Director and the Alternate United States Executive Director at the World Bank are similarly situated to the USED and Alternate USED at the IMF with regard to the factors relevant to our determination that the USED and Alternate USED

[7] Section 104 of title 5 was added as a new provision to the United States Code as part of the codification of title 5. *See* Pub L. No 89–554, 80 Stat. 378, 379 (1966). The revision notes on § 104 contained in the House and Senate reports are brief and do not shed light on the issue considered in this memorandum *See* H.R. Rep. No. 89–901, at 6 (1965), S Rep No 89–1380, at 22–23 (1966).

at the IMF are not covered by the Vacancies Reform Act. Accordingly, for the reasons discussed in part I of this memorandum, vacancies in the offices of the United States Executive Director and the Alternate United States Executive Director at the World Bank also are outside the coverage of the Vacancies Reform Act.

Conclusion

Because the United States Executive Directors and the Alternate United States Executive Directors at the IMF and the World Bank are not part of an "Executive agency," vacancies in those offices are not covered by the Vacancies Reform Act.

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

APPENDIX

Our conclusion is based on the following information about the U.S. representatives to the IMF and their relationship with the Treasury Department:[8]

* The U.S. representatives receive instructions on voting and policy matters from the Secretary of the Treasury. *See, e.g.*, Exec. Order No. 11269, at § 3(a), *reprinted as amended in* 22 U.S.C. § 286b note; 22 U.S.C. §§ 262h, 262k(b), 286a(d)(3).

* The U.S. representatives are eligible, in the discretion of the Secretary of the Treasury, to receive employee benefits: "Notwithstanding the provisions of any other law, [U.S. representatives at international financial organizations] shall, if they are citizens of the United States, in the discretion of the Secretary of the Treasury, each be eligible on the basis of such service and the total compensation received therefor, for all employee benefits afforded employees in the civil service of the United States." 22 U.S.C. § 276c–2; *see also* OPM Opinion, at 3 n.2 (Alternate USED eligible, in the discretion of the Secretary, for SES retirement benefits and health, life, and disability coverage).

* Section 276c–2 further provides: "*The Treasury Department shall serve as the employing office for collecting, accounting for, and depositing* in the Civil Service Retirement and Disability Fund, Employees Life Insurance Fund, and Employees Health Benefits Fund, all retirement and health insurance benefits payments made by these employees, and shall make any necessary agency contributions from funds appropriated to the Department of the Treasury." 22 U.S.C. § 276c–2 (emphasis added).

* Treasury provides ethics advice to the U.S. representatives, since the U.S. representatives do not have an internal source for such advice, and the U.S. representatives are directed to file disclosure forms and generally to comport themselves as if covered by the ethics rules. Nevertheless, the Treasury Department does not perform these functions as a result of any determination that it is legally required to take this role, and Treasury seriously doubts that it has ever been asked to provide a § 208(b) waiver to any USED or Alternate USED.

[8] Except for various of the statutory references, this information was provided to us by the Department of the Treasury

* The salaries of the U.S. representatives are set and paid by the IMF. *See* 22 U.S.C. § 286a(d)(1) ("No person shall be entitled to receive any salary or other compensation from the United States for services as a Governor, executive director, councillor, alternate, or associate."). Federal law limits the salaries that IMF may pay the U.S. representatives, capping them at the rate of a level IV of the Executive Schedule for the USED and a level V for the Alternate USED. *Id.* § 286a(d)(2). *See also* Foreign Operations, Export Financing, and Related Agencies Appropriations Act, 1999, Pub. L. No. 105–277, § 534, 112 Stat. 2681, 2681–181 (1998) (annual appropriations rider prohibiting payment of appropriate funds to an international financial institution if statutory pay prohibitions are violated).

* IMF is similarly responsible for the salaries of the staff and other expenses of the office of the U.S. representatives.

* The office of the U.S. representatives is typically staffed by four to six additional people. The secretaries who work in the office are employed by the IMF. The office also typically includes an advisor and two or three assistants who are usually from Treasury. These individuals are transferred to the IMF under 5 U.S.C. § 3582 (1994 & Supp. IV 1998). Upon being transferred to the IMF, these individuals are separated from Treasury and are no longer Treasury employees. They are not carried on Treasury's books and are not covered by the conflict-of-interest rules or standards of conduct applicable to Treasury employees. The only elements of employment that they retain are re-employment rights and the right to count their years of service at the IMF toward retirement eligibility.[9]

* In a few instances, Treasury employees have also been detailed to the office of the U.S. representatives under 5 U.S.C. § 3343 (1994) when there was a pressing need for additional assistance. These details are rare and have generally only been for short periods of time.

* The IMF receives an annual lump-sum contribution from the United States. These contributions flow through Treasury, but

[9] *See also* OPM Opin. at 4 (distinguishing staff transferred from Treasury to assist the U S representatives from the representatives because the staff are "without any direct accountability to the United States" and "are separated from their United States employment for the period of their international service, and by statute, under prescribed conditions, are given reemployment rights to their former positions").

Treasury does not exercise any discretion over the payment or how the funds will be used by the IMF.

* Treasury does not consider the U.S. representatives to the IMF to be part of Treasury for purposes of FOIA. More specifically, Treasury indicated that it does not ask the U.S. representatives for documents in responding to FOIA requests addressed to Treasury if, e.g., the request concerns questions about the international financial organizations. As a matter of interbranch cooperation, Treasury does provide information about the IMF in response to inquiries from Congress and the General Accounting Office.

* The U.S. representatives are not treated as part of the Treasury Department in the Department's organizational charts and wire diagrams.

Authority for Military Police to Issue Traffic Citations to Motorists on Bolling Air Force Base

Military police have the authority to issue citations, enforceable in federal court, to motorists who violate traffic laws on Bolling Air Force Base.

Congress has given the General Services Administration limited authority over military installations for the narrow purpose of issuing and enforcing the regulations related to motor vehicle violations.

June 5, 2000

MEMORANDUM OPINION FOR THE DEPUTY GENERAL COUNSEL
DEPARTMENT OF DEFENSE

This memorandum responds to a request from the Air Force Judge Advocate General's Office ("Air Force JAG") and the United States Attorney's Office for the District of Columbia ("U.S. Attorney's Office") concerning the authority of military police to issue citations, enforceable in federal court, to motorists who violate traffic laws on Bolling Air Force Base in the District of Columbia ("District" or "D.C.").[1] We conclude that the military police may properly issue such citations pursuant to a delegation from the General Services Administration ("GSA") of the authority GSA possesses under 40 U.S.C. §§ 318–318d to issue regulations governing GSA-controlled property and to enforce these regulations in federal courts, as provided for by Congress when it amended 40 U.S.C. § 318c in 1996.

The Air Force JAG's Office has expressed concern that this delegation procedure implies that GSA has charge and control over military bases. *See* Memorandum for HQ USAF/JAG Attn: Colonel Stucky, from 11WG/JA, William T. Burke, Captain, USAF, Assistant Staff Judge Advocate, *Re: 40 U.S.C. § 318* (Aug. 14, 1996) ("Stucky Memorandum"). Based on our review of the text of the relevant statutory provisions, the statutory scheme, and the legislative history, we conclude that, in amending 40 U.S.C. § 318c in 1996, Congress did not alter longstanding statutory provisions and place military bases under GSA's charge and control. Rather, it has given GSA limited authority over military installations for the narrow purpose of issuing and enforcing the regulations related to motor vehicle violations covered by § 318c(b)(1).

[1] The Air Force initially sought review of this matter by the U.S Attorney's Office *See* Letter for Rhonda C. Fields, Chief, Economic Crimes Section, Criminal Division, U.S. Attorney's Office, from Robert S Schwartz, Colonel, USAF, Staff Judge Advocate (Sept 9, 1996). The U.S. Attorney's Office determined that the legal questions presented should be forwarded to the Office of Legal Counsel for review and decision *See* Letter for Robert S. Schwartz, Colonel, USAF, Staff Judge Advocate, from Rhonda C. Fields, Chief, Economic Crimes Section, Criminal Division, U.S. Attorney's Office (Sept 17, 1996) ("Fields Letter") On behalf of your office, you have also asked us to respond to this request.

I

For approximately one year in the early 1970s, the U.S. Attorney's Office prosecuted all traffic violations occurring at military installations within D.C. before United States Magistrates in federal district court. *See* Letter for Martin R. Hoffman, General Counsel, Department of Defense, from Earl J. Silbert, United States Attorney at 1 (May 31, 1974) ("Silbert Letter"). These prosecutions relied on the Assimilative Crimes Act, 18 U.S.C. § 13 (Supp. IV 1998) ("ACA"), which adopts for each federal enclave the criminal law of the state within which the enclave is located. Were the ACA applicable in the District of Columbia, violations of local D.C. law on federal enclaves in the District would become federal crimes that could be prosecuted in federal court. After closer review of the applicable law, however, the U.S. Attorney concluded in 1974 that the ACA did not permit such an incorporation of local law for federal enclaves in the District. *See* Silbert Letter at 1. According to the U.S. Attorney, without operation of the ACA, a federal magistrate had no jurisdiction over traffic violations. *Id.* The U.S. Attorney also concluded that D.C. Superior Court would offer an alternate forum for such prosecutions or that federal legislation could be enacted specifically to govern military installations. *Id.* at 2.

In a 1984 opinion concerning the investigative jurisdiction of the Federal Bureau of Investigation in the District of Columbia, we addressed whether federal enclave jurisdiction extended to federal buildings and installations in the District. *See* Memorandum for Stephen S. Trott, Assistant Attorney General, Criminal Division, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel *Re: FBI Investigative Jurisdiction in Washington, D.C.* at 1 (Feb. 7, 1984) ("Olson Memo"). The U.S. Attorney's Office — consistent with the Silbert Letter — did not argue that the ACA applied to federal sites in the District. The issue was whether title 18 offenses applicable in the " 'special maritime and territorial jurisdiction of the United States' " applied in the District. *See id.* at 8 n.7 (quoting 18 U.S.C. § 7). In concluding that 18 U.S.C. § 7 did not confer jurisdiction over federal crimes committed on federal sites in the District, we observed that there were two reasons why neither 18 U.S.C. § 7 (the federal enclave statute) nor 18 U.S.C. § 13 (the ACA) — "related" provisions, Olson Memo at 7 — applied in the District. First, the ACA, on its face, incorporates *state* offenses, not acts " 'made penal by a law of Congress,' " such as the D.C. Code. *See id.* at 8 (quoting 1984 version of 18 U.S.C. § 13). Second, the rationale for both the federal enclave jurisdiction provision and the ACA "is to fill the jurisdictional gap created when the federal government acquires, and a State cedes, land." *Id.* In the case of the District of Columbia, because the D.C. Code functions as the equivalent of state law, no such gap exists. *Id.* Thus, based on an examination of the legislative history, case law, and the structure and legislative history of the criminal code of which both the ACA and the federal enclave jurisdiction statute were

part, we concluded that Congress intended to exclude the District of Columbia from the scope of federal enclave jurisdiction. *Id.* at 4–10. Consequently, the ACA could not support federal court prosecution of violations of the D.C. Code on federal enclaves in the District of Columbia. *Id.* at 8. A footnote in that opinion noted:

> We are informed that the military authorities in the District of Columbia intend to employ federal magistrates to preside over prosecutions of civilians who commit offenses on military reservations within the District. To the extent these prosecutions would be based on federal enclave jurisdiction . . . rather than . . . federal criminal jurisdiction . . . or territorial jurisdiction . . . our conclusion indicates that such prosecutions would be unauthorized.

Id. at 13 n.11 (citations omitted).

According to conversations with the GSA General Counsel's Office in December 1998, GSA began, in the 1980s, receiving requests from military components for delegation of authority to issue and enforce traffic regulations for military installations. *See* Telephone Interview with Scarlett D. Grose, Assistant General Counsel, Real Property Division, GSA (Dec. 8, 1998) ("Grose Interview"); Telephone Interview with Harmon Eggers, Acting Associate General Counsel, Real Property Division, GSA (Dec. 3, 1998). In 1981 GSA delegated authority to the Department of Defense ("DoD") pursuant to which DoD issued DoD Directive No. 5525.4, entitled *Enforcement of State Traffic Laws on DoD Installations* ("DoD Directive"). *See* DoD Directive No. 5525.4 (Nov. 2, 1981), *reprinted in* 32 C.F.R. pt. 634, app. C (1997). That directive was issued pursuant to policies "for the enforcement, on DoD military installations, of those state vehicular and pedestrian traffic laws that cannot be assimilated" under the ACA. *See* 32 C.F.R. § 210.1. The directive mandates that "[a]ll persons on a military installation shall comply with the vehicular and pedestrian traffic laws of the state in which the installation is located," 32 C.F.R. pt. 634, app. C ¶C(2); delegates to "installation commanders of all DoD installations in the United States and over which the United States has exclusive or concurrent legislative jurisdiction . . . the authority to establish additional vehicular and pedestrian traffic rules and regulations," *id.* ¶C(3); and establishes penalties set forth in 40 U.S.C. § 318c for such violations, 32 C.F.R. pt. 634, app. C ¶C(4).[2] The delegation from the GSA states that the GSA "authorizes the Secretary of Defense to assist in controlling vehicular and pedestrian traffic on military installations in the United States"

[2] 40 U.S.C. § 318c(a) provides that "whoever violates any rule or regulation promulgated pursuant to section 318a . . . shall be fined not more than $50 or imprisoned not more than thirty days, or both." 40 U.S.C. § 318a authorizes the GSA to "to make all needful rules and regulations for the government of the property under [its] charge and control, and to annex to such rules and regulations such reasonable penalties, within the limits prescribed in section 318c of this title, as will ensure their enforcement."

pursuant to authority vested in the GSA by the Federal Property and Administrative Services Act of 1949 ("FPASA") and the Act of June 1, 1948. *Id.* (Enclosure No. 1). Neither the DoD Directive nor the delegation from the GSA explains why GSA delegation is either appropriate or necessary in order for the DoD to issue such regulations.

In 1996, the U.S. Attorney's Office called our 1984 opinion to the attention of the Air Force and informed the Air Force that it would no longer prosecute certain violations without a determination by our Office that federal jurisdiction over those violations was proper. *See* Fields Letter.

II

The GSA has general authority under 40 U.S.C. §§ 318–318d to issue and enforce regulations for federal property and thereby has general responsibility for the protection and policing of that property. This includes the authority "to make all needful rules and regulations for the government of the property under [its] charge and control." *See* 40 U.S.C. § 318a. Under this authority, the GSA has issued regulations governing such matters as vehicular and pedestrian traffic, drug and alcohol use, operation of gambling devices, and collection of private debts on GSA-controlled property. *See* 41 C.F.R. §§ 101–20.300 to 101–20.315 (1997). Violations of these regulations are subject to fines of not more than $50 or imprisonment for not more than thirty days, or both. *See* 40 U.S.C. § 318c; 41 C.F.R. § 101–20.315.

Under the same statutory scheme, GSA is authorized to "appoint uniformed guards [of the GSA] as special policemen . . . for duty in connection with the policing of all buildings and areas owned and occupied by the United States and under the charge and control of the Administrator." 40 U.S.C. § 318(a). The duties of these officers include enforcing regulations promulgated under § 318a, including traffic regulations where applicable. Section 318 continues:

> Special policemen appointed under this section shall have the same powers as sheriffs and constables upon property referred to in subsection (a) . . . to enforce the laws enacted for the protection of persons and property, and to prevent breaches of the peace, to suppress affrays or unlawful assemblies, and to enforce any rules and regulations promulgated by the [GSA] for the property under [its] jurisdiction; except that the jurisdiction and policing powers of such special policemen shall not extend to the service of civil process.[3]

[3] The powers held by sheriffs and constables under the common law include "the power to prevent and detect crime, to arrest criminals, and to protect life and property" *Holland v. Commonwealth*, 502 S E.2d 145, 148 (Va. Ct App. 1998). One state court has concluded that

Continued

Id. § 318(b). According to the GSA General Counsel's office, violations of regulations under this provision rarely give rise to prosecutions — usually, offenders are simply escorted off the property. *See* Grose Interview at 2. When they are prosecuted, violators are tried before a federal magistrate. *Id.* The special police officer's authority extends only to the boundary of the federal property, and officers are not currently permitted to exercise any authority on the surrounding property.

This statutory authority of GSA, however, does not encompass military installations. The GSA's policing and protection power extends only to "the government of the property under [its] charge and control." 40 U.S.C. § 318a. While this limitation is not further defined in that statute, 40 U.S.C. § 285 (1994) defines "Buildings under control of Administrator of General Services" as follows:

> All courthouses, customhouses, appraiser's stores, barge offices, and other public buildings outside of the District of Columbia and *outside of military reservations*[4] which have been purchased or erected, or are in course of construction, or which may be erected or purchased out of any appropriation under the control of the Administrator of General Services, together with the site or sites thereof, are expressly declared to be under the exclusive jurisdiction and control and in the custody of the Administrator of General Services . . . .

Id. (emphasis added).[5] Both the GSA and the representatives of the Air Force agree that the military installation is not within GSA's jurisdiction for purposes

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the common law power of the sheriff to make arrests without warrant for felonies and for breaches of the peace committed in his presence . . . [is] so widely known and so universally recognized that it is hardly necessary to cite authority for the proposition . . . [Thus], [u]nless the sheriff's common law power to make warrantless arrests for breaches of the peace committed in his presence has been abrogated, it is clear that a sheriff (and his deputies) may make arrests for motor vehicle violations which amount to breaches of the peace committed in [his] presence

Commonwealth v Leet, 641 A.2d 299, 303 (Pa. 1994) (citation omitted); *see also Prosser v. Parsons*, 141 E 2d 342, 345 (S.C 1965) (common law power of sheriff and constable to arrest without warrant felons or persons reasonably suspected of having committed a felony and those who had committed a misdemeanor in his presence which amounted to a breach of the peace "is not applicable to any violation of the criminal laws of this State committed within the view of such an officer") (citing 5 Am. Jur. (2d) Arrest, Sec. 24, *et seq.*); *Commonwealth v Taylor*, 677 A.2d 846 (Pa. Super. Ct 1996) (constables possess power to make warrantless arrests for felony, violations of drug laws).

[4] Although there is no definition in title 40 for "military reservation," "reservation" is defined in title 16 (which concerns conservation), for purposes of title 16, chapter 12, as follows:

> "[R]eservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks.

16 U S C § 796(2) (1988); *see also Black's Law Dictionary* 1307 (6th ed. 1990) ("A reservation is a tract of land, more or less considerable in extent, which is by public authority withdrawn from sale or settlement, and appropriated to specific public uses; such as parks, military posts, Indian lands, etc ")

[5] This provision is based on a similar provision in the Sundry Civil Appropriation Act of July 1, 1898, placing the control of these buildings in the Department of Treasury. As the debate on this provision indicates, the first version of this provision had neither the exceptions for "the District of Columbia" nor "military reservations."

of 40 U.S.C. §§ 318–318d. On its face, then, the GSA is not an obvious source of authority to police military installations in the District of Columbia.

In internal memoranda responding to questions raised by the U.S. Attorney's Office about authority for federal prosecution of motor vehicle offenses on military installations in the District of Columbia, the Air Force suggests that GSA's statutory authority to extend its rules to property under the control of other departments or agencies of the United States may be applicable. *See* Memo for Record, from William T. Burke, Captain, USAF, Assistant Staff Judge Advocate, *Re: 40 U.S.C. § 318—Enforcement of Local Traffic Laws on Bolling AFB* (Aug. 15, 1996) ("Burke Memo"). According to the Burke Memo, the predecessor statute to 40 U.S.C. § 318, enacted in 1948, "authorized the Administrator of Federal Works to make all needful rules and regulations for the property under the charge and control of the Federal Works Agency [("FWA") the predecessor to the GSA]. Furthermore, section 3 of that statute authorized the Administrator to *extend* such rules to property of the United States under the control of other departments or agencies of the United States." Burke Memo at ¶2. As currently codified, this section provides as follows:

> Upon the application of the head of any department or agency of the United States having property of the United States under its administration and control, the Administrator of General Services or officials of the Administration . . . are authorized to detail any such special policemen for the protection of such property and if he deems it desirable, to extend to such property the applicability of any such regulations and to enforce the same as set forth herein
>
> . . . .

40 U.S.C. § 318b. This provision empowers GSA to provide policing of military installations outside GSA's charge and control only if GSA details its own officers to provide the policing services. In this case, however, it is not the GSA special police who are policing the military installations, but rather the military's own police. Section 318b, then, does not provide a complete basis for GSA to delegate to DoD policing authority for property under DoD's (rather than GSA's) charge and control.

See 31 Cong. Rec 3506 (1898). An amendment was proffered exempting the District of Columbia *Id.* Upon the reading of the bill, Senator Hawley pointed out the problem that the "provision puts the entire control of [a post office on a military reservation] in the hands of the Treasury Department. The supreme control of it has to be in the commanding officer really—the final control." *Id* The following brief colloquy ensued

> [Sen] Allison The Senator will see that the provision as it came from the House placed all public buildings under the control of the Secretary of the Treasury We have inserted the words "outside the District of Columbia" How would it do to say "outside of the District of Columbia and military reservations?"
>
> [Sen] Hawley· I think there would be less likely to be any controversy in that case.

Id The amendment was then adopted. *See* 31 Cong Rec 5604 (1898) (Statement of Conference Report)

The Burke Memo suggests a mechanism for filling the gap. It notes that "Section 103(d) [of FPASA, the 1949 Act that created the GSA] authorized the newly created Administrator of the GSA 'to delegate and to authorize successive redelegation of any authority transferred to or vested in him by this Act to . . . the head of any other Federal Agency.' " Burke Memo at ¶3. GSA could delegate both the authority to provide protection and the authority to appoint special police to DoD for property under DoD's charge and control.[6] *Id.* at ¶4.

GSA has relied on a similar delegation procedure in other contexts where similar authority concerns have been raised, such as providing security for the National Security Agency ("NSA"). According to the GSA, it "does not have charge and control over property on military reservations," which includes property of the NSA. *See* Letter for George Fruchterman, Legislation and Regulatory Counsel Division, Office of General Counsel, NSA, from Scarlett D. Grose, Assistant General Counsel, Real Property Division, GSA (Oct. 9, 1997) ("Grose Letter"). Nevertheless, the GSA concluded that it could delegate its statutory authority "upon application by the head of the agency . . . to detail GSA special police to NSA for the protection of property under NSA's charge and control" through "[s]ection 205(d) of the [FPASA]" which "authorizes the Administrator to delegate any authority transferred or vested in him under [FPASA] to the head of any other Federal agency." *Id.* at 1. By a delegation of its authority to protect property under NSA's charge and control along with its authority to appoint special police under 40 U.S.C. §318, GSA could confer on NSA the authority "to appoint special police for the protection of property under [NSA's] charge and control." Grose Letter at 2.

Although §205 of FPASA, 40 U.S.C. §486 (1994), may have offered authority for delegation by GSA to DoD prior to the 1996 amendment, now there is a statutory provision directly providing for the delegation of authority in this specific circumstance by GSA to DoD. As a result, reliance on §486 is no longer needed. In 1996, Congress amended 40 U.S.C. §318c by adding the following provision:

> (b)(1) Whoever violates any military traffic regulation shall be fined an amount not to exceed the amount of the maximum fine for a like or similar offense under the criminal or civil law of the State, territory, possession, or district where the military installation in which the violation occurred is located, or imprisoned for not more than 30 days, or both.

[6] Section 103 of the FPASA transfers all functions of the FWA to the GSA. Section 205(d) of the FPASA, now codified at 40 U.S.C. §486(d), authorizes the new agency's Administrator to delegate and redelegate "any authority transferred to or vested in him by [FPASA]" to any official in the GSA or the head of any other Federal agency. Section 205(e) of FPASA, now §486(e), grants the GSA Administrator similar authority to delegate functions to heads of other Federal agencies. It appears to us that §486(e) is the more appropriate source of authority for the delegation at issue here.

> (2) For purposes of this subsection, the term "military traffic regulation" means a rule or regulation for the control of vehicular or pedestrian traffic on military installations that is promulgated by the Secretary of Defense, or the designee of the Secretary, under the authority delegated pursuant to section 318a of this title.

40 U.S.C. § 318c(b).[7] This amendment provides the DoD with independent statutory authority to issue rules for regulating traffic on base, the violations of which would be federal offenses, so DoD need no longer rely on the delegation authorities in § 486, provided it obtains GSA authorization.

On its face, it is unclear from the statutory scheme of 40 U.S.C. §§ 318–318d why Congress would direct the DoD to turn to GSA for this authority. Nor does the legislative history of this amendment aid in explaining why Congress utilized this mechanism for authorizing DoD to issue these regulations. The provision was added by an amendment contained in the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104–201, § 1067, 110 Stat. 2422, 2654 (1996). On June 25, 1996, the text of the provision that was eventually enacted first appears, as a bill, S. 1745, 104th Cong. (1996), with no discussion accompanying its appearance. *See* 142 Cong. Rec. 15,198 (1996). The next day, Senator Hutchison offered the provision as amendment No. 4319 to the defense authorization bill with the stated purpose, "To increase penalties for certain traffic offenses on military installations" and reported that the amendment was cleared by the other side, and the amendment passed soon after. *See* 142 Cong. Rec. 15,386 (1996). The title of the provision as introduced suggests that the purpose of the amendment was to *increase* penalties, not to give DoD authority to issue and enforce regulations regarding traffic offenses. The Conference Report on H.R. 3230, which replaced the competing House and Senate versions of the defense authorization bill, on the other hand, states only that the Senate version "contained a provision (sec. 1079) that would *allow* the Secretary of Defense or his designee to promulgate rules or regulations concerning traffic offenses committed on military installations and apply the surrounding community's authorized punishments to those offenses in specified circumstances. . . . The House recedes on this." H.R. Conf. Rep. No. 104–724, at 793 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2948, 3300 (emphasis added). No mention is made in the conference report about the fact that the provision, according to its original title, purported only to increase penalties; rather, the provision is now entitled "Assimilative crimes authority for traffic offenses on military installations (sec. 1067)," *id.*, and the report suggests

[7] The Air Force JAG's Office and the U S Attorney's Office were concerned that the reference to "state vehicular and pedestrian traffic laws" in the DoD Directive would not include assimilation of laws in the District. *See* Memorandum for HQ USAF/JG, Attn. Colonel Stucky, from 11WG/JA, Robert S. Schwartz, Colonel, USAF, Staff Judge Advocate, *Re: Applicability of 40 U S C. § 318 to the District of Columbia* at ¶4 (Sept. 26, 1996). This concern is presumably mooted by the language of 40 U S C § 318c(b)(1) which refers expressly to "district" laws as well as state and other local laws

it was intended to "allow" the Secretary to issue these rules and regulations.[8] The National Defense Authorization Act for Fiscal Year 1997, of which this provision was part, became law on September 23, 1996.

Although the legislative history of this amendment sheds no light as to why Congress adopted this means of giving the military authority to issue regulations governing traffic violations on military bases, a transmittal to this Office from DoD's Office of General Counsel includes a two-page request from DoD to Congress in 1996 for a similar provision and an accompanying section-by-section analysis. This analysis suggests that the request for this amendment was prompted by federal court decisions, *see, e.g., United States v. Golden*, 825 F. Supp. 667 (D.N.J. 1993), that the ACA does not permit the assimilation of non-criminal state offenses on federal installations. *See* Fax Transmission for Robert Delahunty, Special Counsel, Office of Legal Counsel, from Nicole M. Doucette, Office of General Counsel, Department of Defense, *Re: Enforcement of Traffic Violations on Military Installations in DC* (Apr. 17, 1997) ("Doucette Fax"). The DoD version included in this request was modified before it was introduced in Congress; unlike the version that was introduced, the DoD version references the ACA and increases the fines for such violations to $1000. Nevertheless, the section-by-section analysis's explanation of the delegation procedure is consistent with the approach Congress adopted in the enacted law. It sets forth the procedure as follows:

> Where state law cannot be assimilated, persons may be prosecuted under section 318c of title 40, United States Code. This section authorizes prosecution for a violation of a regulation to control Federal property promulgated by the Administrator of the General Services Administration under section 318a of title 40. With respect to military installations, the Administrator has delegated the authority to promulgate regulations to the Secretary of Defense, who has in turn delegated the authority to the commanders of military installations. Under this authority, the military services have by joint regulation adopted state traffic laws. Installation commanders may issue additional regulations.

See Draft Legislative Proposal *in* Doucette Fax at 5. While this request does not provide the legal rationale for turning to the GSA for delegation of authority over traffic law on military bases, and does not examine whether GSA has or should be given charge and control over the military installations, the analysis does sug-

[8] Although the 1996 amendment does not directly provide for an increase in penalties, it does permit both criminal or civil prosecution of the offense based on the law of the surrounding jurisdiction, thus potentially broadening the scope and severity of available penalties *See* 40 U S C §318c(b)(1) (violations "shall be fined an amount not to exceed the amount of the maximum fine for a like or similar offense under the criminal or civil law of the State, territory, possession, or district where the military installation" is located)

gest that Congress may have opted for the somewhat unwieldy procedure of directing the GSA to delegate to the Secretary of Defense the authority to issue the regulations, who in turn redelegates this authority to the installation commanders, who are then responsible for enforcing these motor vehicle regulations on the installations, based on the suggestion of the DoD.[9] More importantly, however, the amendment also establishes that violations of these regulations are federal offenses regardless of whether they may or not be otherwise assimilated under the ACA.

It appears from some of the correspondence that has been forwarded to us, as well as conversations subsequent to the 1996 amendment, that the Air Force is concerned that adopting the procedures set forth in the 1996 amendment to the GSA policing and protection authority provisions with regard to Bolling Air Force Base would imply that with that amendment Congress placed military installations under GSA's charge and control. *See* Telephone Interview with Major Mark Strickland, Legal Counsel's Office, Bolling Air Force Base (Dec. 3, 1998); Stucky Memorandum at ¶3. We consider this to be an implausible reading of the statutory scheme. It would require reading the 1996 amendment effectively to repeal the exception in § 285 for military reservations. It is unlikely that Congress would seek to effect a wholesale repeal of § 285, placing public buildings and surrounding sites on military reservations under GSA's charge and control, with no discussion of the implications of such a change. Indeed, such a reading would be contrary to general principles of statutory interpretation. *See* 1A Norman J. Singer, *Sutherland Statutory Construction* § 23.10 (5th ed. 1993) ("The presumption against implied repeals is founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation. Therefore, the drafters should expressly designate the offending provisions rather than leave the repeal to arise by implication from the later enactment . . . ."). Because there is no evidence in the legislative history of any intent to repeal any part of § 285, we do not read the 1996 amendment to 40 U.S.C. § 318 as an implied repeal of the exception in § 285 pertaining to military reservations: "[I]n the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable or if the later act covers the whole subject of the earlier one and is clearly intended as a substitute." *Id.* § 23.09. Section 318 of title 40, as amended in 1996, and § 285, although intuitively inconsistent, are reconcilable, obviating any need to find an implied repeal of § 285. The 1996 amendment to § 318 may be read, consistent with § 285, as a limited grant of authority to GSA over military installations for the narrow purpose of regulating traffic on the installations. The 1996 amendment gives GSA no additional authority over military property. It may be, however, that because the existing

[9] Perhaps Congress, in view of the history of delegations by GSA, selected the procedure that most closely matched the practice, even if that procedure was unwieldy.

delegation is based on the previous statutory scheme, a new delegation based on the 1996 amendment to § 318 is required.[10]

III

In the 1996 amendment to 40 U.S.C. §§ 318–318d, Congress gave the Secretary of Defense the power to issue regulations to enforce local traffic law on bases and enforce such violations as federal offenses. The 1996 amendment mandates, however, that in order to issue and enforce these regulations, the Secretary of Defense must initially obtain an appropriate delegation of authority from the GSA. GSA is authorized by its governing statutes to issue regulations for federal property under its charge and control; appoint special police officers to enforce those regulations; and impose certain statutorily limited penalties for violations of these regulations which are rendered federal offenses. Although the legislative history of the 1996 amendment offers little insight into the underlying congressional intent, consistent with general principles of statutory interpretation and the statutory scheme, we conclude that in amending § 318c in 1996, Congress did not intend to change the statutory definition of property under GSA charge and control. Rather, Congress granted GSA authority over military installations for the sole purpose of regulating traffic on the base and directed it to delegate this authority to the Secretary of Defense. The traffic violations may then be prosecuted pursuant to the DoD's regulations. Adopting such a procedure does not place military installations such as Bolling Air Force Base under GSA's authority

[10] Air Force personnel have also expressed concerns that any such traffic enforcement actions taken by the military police against civilians may violate the Posse Comitatus Act ("PCA"). We do not believe that these concerns are warranted. The PCA provides as follows:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385 (1994). The weight of authority indicates that the detention and arrest of civilians by military police for on-base violations of civil law is not prohibited by the PCA. *See United States v Banks*, 539 F.2d 14, 16 (9th Cir. 1976) (affirming authority of military police to detain and arrest civilian for heroin possession on base and turn over to civilian authorities, holding "[PCA] does not prohibit military personnel from acting upon on-base violations committed by civilians"); *United States v. Dillon*, 983 F. Supp. 1037 (D. Kan. 1997) (upholding DUI conviction subsequent to arrest on military base); *Eggleston v. Dep't of Revenue, Motor Vehicle Div.*, 895 P.2d 1169, 1170 (Col. Ct. App 1995) (PCA does not prohibit military personnel from acting upon criminal violations committed by civilians on military base "because the power to maintain order, security, and discipline on a military facility is necessary for military operations"); *Municipality of Anchorage v King*, 754 P.2d 283 (Alaska Ct App. 1988) (holding no violation of PCA where military police arrested civilian at entry to base for DUI and turned him over to civilian authorities) Although never addressing the specific question of issuing traffic tickets and summonses, we have in the past "conclude[d] that the Posse Comitatus Act does not restrict the use of military police on a military reservation to maintain order by apprehending civilians who commit crimes on the reservation." *Law Enforcement at San Onofre Nuclear Generation Plant*, 1 Op O.L.C 204, 209 (1977) (citing prior OLC opinions), *see also Use of Military Personnel to maintain Order Among Cuban Parolees on Military Bases*, 4B Op O L.C. 643, 646 (1980) ("In interpreting the applicability of the prohibition of the Posse Comitatus Act to the use of military personnel, the Department of Justice and the Department of Defense generally have been careful to distinguish between the use of such personnel on military bases, on the one hand, and off military bases on the other."). Even if such activities might otherwise be prohibited by the PCA, moreover, in the 1996 amendment, Congress expressly authorized the Secretary of Defense to obtain authority for enforcing traffic control on bases, thereby arguably creating an exception to any posse comitatus problems.

except for the narrow purpose contemplated by the statute of issuing motor vehicle regulations. In order to ensure that the current delegation is proper, we recommend that the Secretary of Defense obtain a new delegation from GSA reflecting 40 U.S.C. § 318c, as amended, and issue an updated directive.

WILLIAM MICHAEL TREANOR
Deputy Assistant Attorney General
Office of Legal Counsel

EPA Assessment of Penalties Against Federal Agencies for Violation of the Underground Storage Tank Requirements of the Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act authorizes the Environmental Protection Agency to assess penalties against federal agencies for violations of RCRA's underground storage tank provisions. EPA's underground storage tank field citation procedures do not violate RCRA or the Constitution.

June 14, 2000

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF DEFENSE
AND
THE GENERAL COUNSEL
ENVIRONMENTAL PROTECTION AGENCY

The Department of Defense ("DOD") has asked for our opinion resolving a dispute between it and the Environmental Protection Agency ("EPA") concerning whether the Resource Conservation and Recovery Act of 1976, Pub. L. No. 94–580, § 2, 90 Stat. 2795 ("RCRA") (codified as amended at 42 U.S.C. §§ 6901–6992k (2000)), authorizes EPA to assess penalties against federal agencies for violations of RCRA's underground storage tank ("UST") provisions, 42 U.S.C. §§ 6991–6991i. DOD has also asked whether EPA's procedures for field citation of UST violations comply with statutory and constitutional requirements.[1] We conclude that RCRA clearly grants EPA the authority to assess penalties against federal agencies for UST violations and that EPA's UST field citation procedures do not violate RCRA or the Constitution.

I.

A.

A straightforward reading of RCRA's statutory text and the relevant legislative history leads us to conclude that it was clearly Congress's intent to authorize EPA

[1] *See* Memorandum for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Judith A Miller, General Counsel, DOD, *Re: Constitutional and Statutory Validity of Administrative Assessment of Fines Against Federal Facilities Under Sections 6001, 9001, 9006, and 9007 of the Solid Waste Disposal Act for Alleged Violations Relating to Underground Storage Tanks* (Apr. 16, 1999) ("DOD Memorandum"); Memorandum for Randolph Moss from Judith Miller, *Re. Constitutional and Statutory Validity of Administrative Assessment of Fines Against Federal Facilities Under Sections 6001, 9001, 9006, and 9007 of the Solid Waste Disposal Act for Alleged Violations Relating to Underground Storage Tanks—ADDITIONAL INFORMATION* (June 1, 1999); Memorandum for Randolph Moss from Gary S. Guzy, Acting General Counsel, EPA, *Re: Constitutional and Statutory Validity of Administrative Assessment of Penalties Against Federal Facilities under Subtitle I of the Resource Conservation and Recovery Act (RCRA)* (July 14, 1999) ("EPA Memorandum").

to assess penalties against federal agencies for violation of the UST requirements. Section 9006(a)(1) of Subtitle I of RCRA, the subtitle regulating underground storage tanks, states that whenever "any person is in violation of any requirement of [Subtitle I]," EPA may issue an administrative order requiring compliance. 42 U.S.C. § 6991e(a)(1). Section 9006(c) of Subtitle I provides that the order "shall . . . assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements." 42 U.S.C. § 6991e(c).

Section 9006 of Subtitle I thus authorizes EPA to assess penalties against persons who violate UST requirements. Section 9001, the Subtitle I definitions section, provides that "[t]he term 'person' . . . includes . . . the United States Government," 42 U.S.C. § 6991(6), thus strongly supporting the view that section 9006 applies to the United States. We do not need to decide, however, whether sections 9001 and 9006 of Subtitle I, standing alone, provide a sufficiently clear statement of congressional intent with respect to assessments against federal agencies, because that intent is made abundantly clear by section 6001(b) of RCRA, which applies to all subtitles of RCRA and which expressly addresses EPA administrative enforcement actions against federal facilities. Section 6001(b) provides that

> [t]he [EPA] Administrator may commence an administrative enforcement action against any department, agency, or instrumentality of the executive, legislative, or judicial branch of the Federal Government pursuant to the enforcement authorities contained in this [title]. The Administrator shall initiate an administrative enforcement action against such a department, agency, or instrumentality in the same manner and under the same circumstances as an action would be initiated against another person.

42 U.S.C. § 6961(b)(1). In our view, in light of section 9006's authorization of EPA to enforce the UST requirements by assessing penalties, section 6001(b)'s authorization of EPA to bring enforcement actions against federal agencies "pursuant to the enforcement authorities contained in this [title] . . . in the same manner and under the same circumstances as an action would be initiated against another person" is unmistakably clear in authorizing assessment of those penalties against federal agencies.

This conclusion is confirmed by the legislative history of section 6001(b). That provision was added to RCRA by the Federal Facility Compliance Act of 1992 ("FFCA"), which was enacted to "clarify provisions concerning the application of certain requirements and sanctions to Federal facilities." Preamble to the FFCA, Pub. L. No. 102–386, 106 Stat. 1505, 1506 (1992). The Senate Report accompanying the FFCA stated that

> [t]he clarification of this authority is necessary because, in the past, other Federal agencies, including the DOJ, have disputed EPA's authority to issue administrative orders against other Federal agencies. The Reagan Administration sought to invoke the "unitary executive" theory to prevent the EPA from issuing administrative orders against other Federal agencies. . . .
>
> . . . .
>
> Accordingly, the language contained in the [FFCA] with respect to administrative orders clarifies existing law, so as to provide the EPA with clear administrative enforcement authority sufficient to ensure Federal facility compliance.

S. Rep. No. 102–67, at 5–6 (1991). The House Report contains a similar rationale for the clarification.[2]

Moreover, the legislative history of the FFCA clearly demonstrates that Congress intended to authorize EPA to assess penalties against federal agencies. The Senate Report's section on "Background and Need for the Legislation" cited longstanding "difficulties with Federal facility compliance" and then stated that "[t]he ability to impose fines and penalties for violations of the Nation's environmental statutes is an important enforcement tool. As the EPA testified before the Committee, 'penalties serve as a valuable deterrent to noncompliance and to help focus facility managers' attention on the importance of compliance with environmental requirements.'" *Id.* at 4. The House Report also reflects a legislative intent to authorize the EPA to issue administrative penalty orders against federal agencies: "[I]n issuing a final order or agreeing to a consent order to resolve any violations . . . , the Committee intends that provisions for stipulated penalties be included in the order if that is the normal practice in such orders resolving violations by other persons." H.R. Rep. No. 102–111, at 17.

In sum, we conclude that the plain text of the statute, together with its legislative history, leaves no question as to Congress's intent to authorize EPA to assess

[2] The House Report observed that

> [EPA's] broad administrative order and penalty authority was provided by Congress in 1976 to assist the Administrator in resolving violations of [RCRA].
>
> Until challenged by the [Department of Energy] in 1986 at Rocky Flats, Colorado and Hanford, Washington, the EPA program policy for RCRA called for the use of administrative orders to resolve violations by federal agencies. Legally, the General Counsel of EPA has maintained that the authority to issue administrative compliance orders to other federal agencies "is clearly provided under the Act and that our exercise of such authority would not offend any constitutional principles." Letter dated August 1, 1986 from Francis Blake to F. Henry Habicht, Assistant Attorney General. That position is eminently sound.
>
> By adding subsection (b) to Section 6001, this bill reaffirms the original intent of the act authorizing administrative enforcement actions against federal facilities. It further provides that when the Administrator exercises his discretion to initiate an administrative action against a federal facility, the administrative enforcement action shall be initiated in the same manner and under the same circumstances as an action would be initiated against another person.

H.R. Rep No 102–111, at 16 (1991).

penalties against federal agencies for violation of the UST requirements of RCRA.[3]

B.

DOD argues against the foregoing conclusion by focusing on the differences in wording between sections 6001(a) and 9007(a) of RCRA. *See generally* DOD Memorandum at 4–9. DOD relies on the fact that section 6001(a), which applies to solid and hazardous wastes but not to the underground storage tanks at issue in this opinion, contains an express statement that penalties may be assessed against federal agencies,[4] while section 9007(a), which applies to underground storage tanks, does not contain such a statement.[5]

DOD observes that the last two sentences of the relevant portion of section 6001(a), *see supra* note 4, which expressly state that federal agencies may be subject to penalties and fines, were added by Congress in 1992 in the FFCA, after the Supreme Court had held in *Department of Energy v. Ohio*, 503 U.S. 607 (1992), that the first sentence, which contains more general language stating only that federal agencies "shall be subject to, and comply with, all Federal, State, interstate, and local requirements," was insufficient to waive the sovereign immunity of the United States against liability to the State of Ohio for penalties and fines. Stressing that section 9007(a), the provision applicable to underground storage tanks, contains only the more general language of the first sentence of section 6001(a) and was not amended by Congress after *DOE v. Ohio*, DOD concludes

[3] We do not agree with DOD's position, *see* DOD Memorandum at 3, 17–21, that we must find "an unequivocal expression" of a congressional intent to authorize EPA to assess penalties against federal agencies This Office applies the "unequivocal expression" standard to issues of waiver of sovereign immunity, *see Authority of USDA to Award Monetary Relief for Discrimination*, 18 Op. O.L.C. 52, 54–55 (1994), but where the issue is whether Congress has authorized a federal agency to assess penalties against another federal agency, sovereign immunity is not implicated. Moreover, to the extent some form of a clear statement is required, *see Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act*, 21 Op O.L.C. 109, 111–13 (1997) ("Clean Air Act Opinion"), the evidence of congressional intent here is abundantly clear

[4] Section 6001(a) provides, in the part relied upon by DOD, as follows:

> Each department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements . respecting control and abatement of solid waste or hazardous waste disposal and management . . . The Federal, State, interstate, and local . . requirements referred to in this subsection include . all civil and administrative penalties and fines, regardless of whether such penalties or fines are punitive or coercive in nature . . . . The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement (including . . any civil or administrative penalty or fine referred to in the preceding sentence . . .).

42 U S C § 6961(a). *See* DOD Memorandum at 7.

[5] Section 9007(a) provides as follows:

> Each department, agency, and instrumentality of the executive, legislative and judicial branches of the Federal Government having jurisdiction over any underground storage tank shall be subject to and comply with all Federal, State, interstate, and local requirements, applicable to such tank, both substantive and procedural, in the same manner, and to the same extent, as any other person is subject to such requirements, including payment of reasonable service charges Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal court with respect to the enforcement of any such injunctive relief.

42 U.S.C § 6991f(a)

that "the specific federal facility language of § 9007 does not permit inclusion of punitive fines in administrative orders for alleged UST violations by federal agencies." DOD Memorandum at 3.

DOD's reliance on the difference between sections 6001(a) (waiving sovereign immunity as to solid and hazardous waste claims by non-federal claimants) and 9007(a) (apparently not waiving sovereign immunity as to underground storage tanks claims by non-federal claimants) is misplaced. The federal facility provision of RCRA that governs this opinion is not section 9007(a), but rather section 6001(b). The FFCA's amendment to section 6001(a) and its addition of section 6001(b) served fundamentally different purposes. The former amendment was enacted to provide, in response to *Department of Energy v. Ohio*, an unequivocal expression of congressional intent to waive sovereign immunity against imposition of penalties and fines against federal facilities in response to claims by *non-federal* claimants. In contrast, the addition of the latter provision was to provide a clear statement, in response to "unitary executive" arguments advanced by the Department of Justice, that the *federal* government enforcement agency (EPA) was authorized to bring administrative actions, which include imposition of penalties, against federal facilities. The doctrine of sovereign immunity does not apply to enforcement actions by one federal government entity against another, and thus the pointed language included in section 6001(a) to waive sovereign immunity is inapposite to and was not included in section 6001(b).

The FFCA's legislative history states quite clearly this distinction between the sovereign immunity focus of the amendment to section 6001(a) and the intra-executive branch focus of the addition of section 6001(b). The Senate Report states in the first paragraph of its "Purpose and Summary" section that "[t]he purpose of the [FFCA] is to make the waiver of sovereign immunity contained in section 6001 . . . clear and unambiguous with regard to the imposition of civil and administrative fines and penalties." S. Rep. No. 102–67, at 1. The final paragraph of that introductory section states that "[t]he FFCA *also* provides that the Administrator of the EPA may commence an administrative enforcement action against any Federal department, agency, or instrumentality." *Id.* at 2 (emphasis added). The Senate Report goes on to discuss sections 6001(a) and 6001(b) under separate headings. The former is discussed under the "Waiver of Sovereign Immunity" heading, while the latter is discussed under the "EPA Administrative Order Authority" heading. The section 6001(a) discussion, as the heading indicates, is clearly about waiver of sovereign immunity, a doctrine that concerns the immunity of the federal government against being sued in court, which includes having penalties enforced against it in court,[6] while the section 6001(b) discussion concerns whether, in the non-judicial, intra-executive branch context, one federal agency

[6] *See* S Rep. No 102–67, at 4 ("At present, RCRA is the only major Federal environmental statute for which several federal courts of appeal have held that it is ambiguous whether sovereign immunity has been waived with respect to the imposition of fines and penalties. It is necessary to clarify this ambiguity to improve the pace of clean-up of existing contamination from past practices and to deter future violations ").

may administratively impose penalties against another federal agency.[7] The discussion in the House Report is similar in this regard.[8]

In sum, section 6001(b), not section 9007(a), is controlling here. The fact that Congress responded to *Department of Energy v. Ohio* by waiving sovereign immunity for solid and hazardous wastes in section 6001(a), but did not at the same time similarly amend section 9007(a) regarding underground storage tanks, is immaterial to the issue before us. As discussed above, section 6001(b) is the RCRA provision addressing EPA enforcement actions against federal agencies. Section 6001(b) applies to all subtitles of RCRA, including the underground storage tank subtitle, and it clearly incorporates EPA's penalty authority under the UST enforcement provisions in section 9006.

C.

DOD presents, as a separate argument, the appropriations law position that "in the absence of specific legislative authority, neither appropriated funds of the Department of Defense, nor those of any other Federal agency may lawfully be used for the payment of administrative penalties." DOD Memorandum at 15. *See generally id.* at 15–17. We disagree with this broad statement, but recognize that particular appropriations provisions might limit or preclude payment of an administrative fine. Because the issue of particular appropriations provisions has not been briefed to us, however, we do not reach this more specific inquiry.

In general, there does not need to be specific legislative authority authorizing an agency to pay these penalties other than the specific legislative authority that we have already concluded exists for EPA to assess the penalties. An agency would typically have authority to pay the penalties that have been lawfully assessed against it in the course of its conduct of agency business, pursuant to the "necessary expense" principle of appropriations law. Under that principle,

> a general appropriation may be used to pay any expense that is necessary or incident to the achievement of the underlying objectives for which the appropriation was made. General Accounting Office, *Principles of Federal Appropriations Law* 3–12 to 3–15 (1982). If the agency believes that the expenditure bears a logical relationship to the objectives of the general appropriation, and will make a direct contribution to the agency's mission, the appropriation may be used.

[7] As discussed above, *supra* at 86–88, this portion of the Senate Report clearly sets forth the intra-executive branch focus of the addition of section 6001(b).

[8] *Compare* H.R Rep No 102–111, at 5–6 (general discussion); *id* at 6 ("The Committee intends for this legislation to overturn any court decisions which have restricted in any fashion the waiver of sovereign immunity provided in Section 6001."), *with id* at 16–17 (general discussion); *id.* at 16 ("By adding subsection (b) to Section 6001, this bill reaffirms the original intent of the act authorizing administrative enforcement actions against federal facilities ").

Indemnification of Department of Justice Employees, 10 Op. O.L.C. 6, 8 (1986). *See also* General Accounting Office, *Principles of Federal Appropriations Law* 4–16 (2d ed. 1991) ("The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available."). In our view, the payment of administrative expenses in the course of implementing a statutory program, such as statutorily-authorized administrative penalties assessed by another federal agency, constitutes a cost of doing business and therefore "bears a logical relationship to the objectives of [the assessed agency's] general appropriation, and will make a direct contribution to the agency's mission." 10 Op. O.L.C. at 8.

The bases for our conclusion that RCRA grants EPA the authority to assess penalties against federal agencies for UST violations also support the corollary conclusion that as a general matter statutory authority exists for the penalized federal agencies to use appropriated funds to pay the penalties. Because we conclude that RCRA does authorize EPA to assess penalties against federal agencies, we further conclude, under the "necessary expense" principle, that agency appropriations will, absent a statutory limitation, be available to pay the penalties.[9]

Of course, appropriations authority will turn on the meaning of particular statutory provisions, and in a particular circumstance an appropriations act or other statute might include terms that explicitly or implicitly preclude payment. We do not address in this opinion the possible application of section 8149 of the Department of Defense Appropriations Act for Fiscal Year 2000, which prohibits DOD's use of appropriated funds "for the payment of a fine or penalty that is imposed against the Department of Defense or a military department arising from an environmental violation at a military installation or facility unless the payment of the fine or penalty has been specifically authorized by law." Pub. L. No. 106–79, § 8149, 113 Stat. 1212, 1271 (1999). This provision was enacted into law after DOD and EPA had completed their submissions to us for this opinion, and we have not heard from DOD or EPA regarding their interpretation of this provision. We have also very recently become aware that legislation currently pending in the Senate would add a provision to the U.S. Code that would supersede section 8149 and prohibit such a payment by DOD without specific authorization only if the amount of the fine or penalty is $1.5 million dollars or more or if the

[9] In the analogous context of Internal Revenue Service ("IRS") assessments of penalties against federal agencies, the Comptroller General has concluded that, "*[i]n the absence of a statutory provision requiring payment*, the appropriations of [federal] agencies are not available for payment of interest and penalties" to the IRS for the agencies' failure to pay employment taxes for their employees. *Federal Agency Payment of Penalties and Interest on Federal Employment Taxes*, B–161,457, 1978 WL 9910, at *1 (C G May 9, 1978) (emphasis added) The clear implication of the Comptroller General's opinion is that a statutory provision requiring payment would support using agency appropriations to make such payment Although the opinions and legal interpretations of the Comptroller General, a legislative branch official, are not, of course, binding upon departments, agencies, or offices of the executive branch, *see Bowsher v. Synar*, 478 U.S 714, 727–32 (1986), they often provide helpful guidance on appropriations matters and related issues. We find persuasive the cited Comptroller General opinion, as well as the *Principles of Federal Appropriations Law* discussions cited in the text

fine or penalty is based on "the application of economic benefit criteria or size-of-business criteria." National Defense Authorization Act for Fiscal Year 2001, S. 2549, 106th Cong., § 342 (as reported by the Senate Armed Services Committee on May 12, 2000). If DOD or EPA would like us to address questions relating to these or similar provisions, we would be happy to do so after receiving further submissions from DOD and EPA.

II.

The second question that DOD raises is whether EPA's procedures for field citation of UST violations comply with statutory and constitutional requirements. Under EPA's procedures, an EPA inspector, functioning much like a police officer handing out a traffic ticket, issues field citations directly to violators.[10] As described by EPA:

> EPA uses the field citation program to address many prevalent, clear-cut violations that are relatively easy to correct. Typically, an UST field citation is a one-page document which includes an order pursuant to RCRA § 9006 to address violations listed in RCRA § 9006(d), coupled with an abbreviated settlement agreement. . . . The recipient of the field citation may either settle by accepting the field citation, paying a small penalty and returning to compliance within a certain time frame, or may refuse to accept the citation. EPA automatically withdraws the field citation if the recipient refuses to accept it. EPA would then consider anew whether to issue an administrative order. These orders are governed by the more formal 40 C.F.R. Part 22 hearing procedures. Field citations offer a less resource-intensive approach to bring facilities with minor violations back into compliance than more formal methods of UST enforcement.

EPA Memorandum at 14.

DOD argues that EPA's field citation program does not comply with section 6001(b)(2) of RCRA, which provides that "[n]o administrative order issued to [a federal] department, agency, or instrumentality shall become final until such department, agency, or instrumentality has had the opportunity to confer with the Administrator." 42 U.S.C. § 6961(b)(2). DOD asserts that the statute is violated because the field citation program does not give federal agencies an opportunity to confer with the Administrator.

[10] The "traffic ticket" analogy is EPA's own program characterization. EPA's guidance for the UST field citation program states that "[o]ne enforcement option is the use of field citations, 'traffic ticket'-styled citations issued on-site by inspectors, generally carrying a penalty." Office of Solid Waste and Emergency Response Directive 9610.16, *Guidance for Federal Field Citation Enforcement* at 1 (Oct. 1993)

We do not agree that the field citation program violates or is otherwise inconsistent with section 6001(b)(2). The statute requires only that an enforcement order not become final unless there is an opportunity for a recipient federal agency to confer with the Administrator. The program complies with that requirement. A field citation becomes final only if the recipient does not contest the citation and instead consents by signing the citation and agreeing to pay a small penalty. By consenting, the recipient agency, in effect, waives the opportunity to confer with the Administrator. Non-consent, in contrast, results in immediate withdrawal of the citation. In that circumstance, there remains no order at all, much less a final order. EPA then considers whether to bring another enforcement action, and recipient agencies may contest any such action and request a conference with the Administrator. Thus, the statutory right to confer with the Administrator is preserved for any situation where there is an actual dispute between EPA and a recipient agency.

DOD also argues that the field citation procedure precludes the President from exercising his supervisory authority under Article II of the Constitution. As DOD sees it:

> [P]resented with a UST field citation, a federal agency must either pay the amount imposed by EPA without debate (and thereby deprive the Attorney General and the President of any supervisory role in the resolution of interagency disputes) or allow the field citation to lapse and face the consequences [of] EPA's other [enforcement] options. . . . In DoD's experience, the formal proceeding can be 'more stringent' than the field citation by a factor in excess of 10 times. . . . Thus, an installation commander with a meritorious defense (but a shortage of discretionary funds with which to pay administrative penalties) might be hard pressed to elect the formal route simply to preserve the principle that the President has a Constitutional right to supervise the executive branch. That being the case, the UST field citation process has effectively thwarted the Constitutional principle on which the OLC rested its [Clean Air Act Opinion].

DOD Memorandum at 13–14.

We do not believe that the field citation procedures raise a separation of powers issue. The issue discussed in our Clean Air Act Opinion concerned the separation of powers implications of a possible interpretation of an Act of Congress that might infringe upon the President's supervisory authority over the executive branch. No separation of powers issue is raised, however, by the application within the executive branch of an administrative procedure established by EPA, an agency of the executive branch. There is no question that the President retains

the authority to supervise the field citation program for UST violations, including the authority to direct the EPA to change the program if he believes doing so would facilitate his supervision.

Moreover, even if EPA's field citation procedures were congressionally mandated and thus potentially gave rise to a separation of powers issue, we believe that constitutional concern would be more apparent than real because the procedures do not interfere with or limit the President's exercise of his constitutional authority to supervise the executive branch. The program affects in a binding way only those cases in which a citation recipient consents; if the recipient contests a citation, it is automatically withdrawn and no dispute remains for the President to resolve. If EPA subsequently brings an enforcement action, all of the normal dispute resolution procedures will be available at that time, including the statutory right to confer with the Administrator. The absence of any restriction on the President's authority to review such a dispute is dispositive of any separation of powers question. *Id.*[11]

DOD's section 6001(b)(2) and Article II arguments boil down to the position that a federal agency recipient of a UST field citation from an EPA inspector is entitled to contest the citation before the Administrator of EPA (under the statutory argument) or the President (under the constitutional argument). Although it is no doubt within the power of the Administrator or the President to adopt such a process for these "traffic tickets," neither the statute nor the Constitution requires the process.

III.

In summary, we conclude that RCRA clearly grants EPA the authority to assess penalties against federal agencies for UST violations and that EPA's UST field citation procedures do not violate RCRA or the Constitution.

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

[11] Nor do we see a constitutional question presented by the hypothetical scenario where an installation commander agrees to a field citation rather than run the risk of receiving a significantly heavier penalty in a formal proceeding. Procedures such as plea bargaining in order to avoid the risk of a substantially higher penalty, or settling civil claims in order to avoid a potentially much costlier judgment, are quite common and not problematic so long as the plea or settlement is voluntary and not the result of coercion. *Cf Brady v. United States*, 397 U.S. 742, 749–55 (1970) (affirming finding of voluntariness where defendant pleaded guilty rather than risk death penalty). We do not perceive any lack of voluntariness or any coercion inherent in the EPA field citation program

Applicability of the Post-Employment Restrictions of 18 U.S.C. § 207(c) to Assignees Under the Intergovernmental Personnel Act

The post-employment restrictions of 18 U S.C. § 207(c) apply to persons who are assigned from a university or a state or local government to the Department of Energy under the Intergovernmental Personnel Act and are compensated at or above the ES–5 level, except for those who occupy positions ordinarily below the ES–5 level and who receive salaries only from the detailing employers, with the federal agency reimbursing those employers for an amount less than an ES–5 salary.

June 26, 2000

MEMORANDUM OPINION FOR THE
ACTING DEPUTY ASSISTANT GENERAL COUNSEL
DEPARTMENT OF ENERGY

You have asked for our opinion whether the post-employment restrictions of 18 U.S.C. § 207(c) (1994 & Supp. IV 1998) apply to certain persons assigned from a university or a state or local government to the Department of Energy ("DOE") under the Intergovernmental Personnel Act, 5 U.S.C. §§ 3371–3376 (1994 & Supp. IV 1998) ("IPA"), if the assignees are compensated at or above the ES–5 level. The assignees in question, in our view, fall into four groups: (1) those who occupy positions normally compensated at or above the ES–5 level but who receive salaries to which the federal contribution is only partial and does not reach the ES–5 level; (2) those who occupy positions ordinarily below the ES–5 level and who receive salaries paid to them in part by their employing federal agency; (3) those who occupy positions ordinarily below the ES–5 level and who receive salaries only from the university or state or local government, with the agency reimbursing that employer for an amount equal to or greater than an ES–5 salary; and (4) those who occupy positions ordinarily below the ES–5 level and who receive salaries only from the university or state or local government, with the agency reimbursing that employer for an amount less than an ES–5 salary.[1] We conclude that section 207(c) covers the first three categories of assignees, but not the fourth.

[1] You drew the categories somewhat differently in your submissions. Letter for Dawn Johnson, Acting Assistant Attorney General, Office of Legal Counsel, from Susan F. Beard, Deputy Assistant General Counsel for Standards of Conduct, Department of Energy (Nov 24, 1997), *see also* Letter for Daniel L. Koffsky, Special Counsel, Office of Legal Counsel, from Susan F. Beard, Deputy Assistant General Counsel for Standards of Conduct, Department of Energy (May 18, 1998) ("DOE Memorandum").

I.

Under 18 U.S.C. § 207(c), certain federal officers and employees are subject to a post-employment "cooling off" restriction, which prohibits them, within one year of the end of their employment, from making,

> with the intent to influence, any communication to or appearance before any officer or employee of the department or agency in which such person served . . . , on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of such department or agency.

See 18 U.S.C. § 207(c)(1).[2] Although a number of the provisions in section 207 apply to all executive branch employees,[3] section 207(c) applies only to those employees who occupy one of the high-level or senior positions identified by the statute.[4] *Id.* The positions identified by section 207(c) are those (1) compensated at a rate of pay specified according to subchapter II of chapter 53 of title 5; (2) compensated at a basic rate of pay that, excluding locality-based pay and other similar adjustments, is equal to or greater than the rate of basic pay for level 5 of the Senior Executive Service ("ES–5"); (3) filled through appointment by the President or Vice-President under 3 U.S.C. §§ 105, 106 (1994); or (4) held by a commissioned officer of the uniformed services in a pay grade of O–7 or above. 18 U.S.C. § 207(c)(2).

All of the assignees in question here receive compensation at a rate greater than the ES–5 level. The question is whether they are "*employed in a position* . . . for which the basic rate of pay . . . is equal to or greater than the rate of basic pay payable for [ES–5]." 18 U.S.C. § 207(c)(2)(A)(ii) (emphasis added).

The IPA provides two methods by which employees may be temporarily assigned from a university or a state or local government to work for a federal agency. Under the first, the assignee is "appointed" in the agency and becomes entitled to a federal salary in accordance with the laws governing the pay of federal employees. 5 U.S.C. § 3374(a)(1) & (b). Under the second, the assignee is "detailed" to a federal agency and is not entitled to federal pay, "except to the extent that the pay received from the [detailing employer] is less than the appro-

[2] Section 207 has seven specific exceptions *See* 18 U.S.C. § 207(j)(1)–(6); *see also id.* § 207(j)(7).

[3] *See, e.g.*, 18 U.S.C. § 207(a)(1) (1994) (life-time ban on representation involving certain matters in which an employee was personally and substantially involved during government service); *see also* 18 U.S.C. § 207(a)(2) (two-year ban on involvement in proceedings pertaining to certain matters previously pending under a former employee's official responsibility), 18 U.S.C. § 207(b) (one-year ban on involvement in negotiations pertaining to certain treaties previously pending before a former employee's agency) Other provisions in section 207 apply only to members of Congress or their employees *See, e.g.*, 18 U.S.C. § 207(e).

[4] Section 207(d) is similarly limited, applying only to very senior personnel specified in that provision of the statute. *See* 18 U.S.C. § 207(d) (1994)

priate rate of pay which the duties would warrant." *Id.* § 3374(a)(2) & (c)(1). The federal agency may reimburse the detailing employer, in whole or in part, for the detailee's pay. *Id.* § 3374(c). Employees assigned under either of these methods may receive compensation exceeding the ES–5 level under a number of different circumstances.

II.

We turn first to assignees who occupy positions ordinarily compensated at the ES–5 level or above, when the federal contribution to their salaries is less than the amount of ES–5 compensation. These assignees may be detailed to such positions, with the employer paying all or at least most of their salaries. Apparently, DOE also appoints some of these assignees and receives reimbursement from the detailing employers.[5] *See* Office of Personnel Management, *A Handbook on the Intergovernmental Personnel Act Mobility Program*, at 3 (1998) ("OPM Handbook") ("Cost-sharing arrangements for mobility assignments are negotiated between the participating organizations."). These assignees, we believe, are covered by section 207(c).

The IPA declares that all detailees and appointees to federal agencies are federal employees for purposes of section 207. 5 U.S.C. § 3374(b) & (c)(2).[6] Because section 207(c), by its terms, covers federal employees who occupy positions compensated at a "basic rate of pay . . . equal to or greater than the rate of basic pay payable for [ES–5]," 18 U.S.C. § 207(c)(2)(A)(ii), and because assignees in this first category occupy such positions and, in fact, receive pay above the ES–5 level, they seem to fall squarely within section 207(c).

This conclusion fits the purposes of section 207(c). Congress intended section 207(c), first enacted in title V of the Ethics in Government Act of 1978, Pub. L. No. 95–521, 92 Stat. 1824, 1864,[7] to curb the influence that a former employee who carried out high or senior-level duties and responsibilities could exert, by virtue of special knowledge and a supervisory role, over former colleagues and subordinates.[8] The danger Congress sought to avoid arose from the nature of the

[5] Editor's Note. Subsequent to the issuance of this opinion, DOE informed this Office that it has never had a practice of appointing some assignees and receiving reimbursement from the detailing employers

[6] *See* 5 U.S.C. § 3372 (providing that an employee assigned from an institution of higher education to a federal agency receives the same treatment as an employee of a state or local government assigned to such an agency); *see also Applicability of 18 U.S.C. § 207(c) to President-Elect's Transition Team*, 12 Op O.L.C. 264 (1988).

[7] Title V was passed as part of an effort to develop federal ethics rules that could "prevent corruption and other official misconduct" and to "avoid *even the appearance* of public office being used for personal or private gain." Senate Comm on Governmental Affairs, *Public Officials Integrity Act of 1977*, S. Rep. No. 95–170, at 78 (1977), *reprinted in* Senate Comm on Governmental Affairs, 96th Cong., *Office of Government Ethics and Federal Post-Employment Restrictions. Legislative History of Titles IV and V of the Ethics in Government Act of 1979, As Amended* 75, 78 (Comm Print 1980) ("Governmental Affairs Report") (emphasis added).

[8] As a report summarizing title V explained, section 207(c) was "intended to eliminate a major part of the problems relating to the exertion of influence by former [high-level] employees over their former colleagues and subordinates after they leave the government. The one year bar as to such contacts has the effect of removing the opportunity for such influence for the period when, as a practical matter, such contacts would be viewed as having such effect." Governmental Affairs Report at 120

duties the federal employee performs, for which the employee's pay is a proxy. We find nothing to indicate that Congress believed that assignees performing high-level or senior duties while in a federal agency — as indicated by the pay to which the federal government had found occupants of their positions to be entitled — somehow would not pose this danger of undue influence merely because the federal government did not pay their entire salaries.[9]

The conclusion that the assignees here are subject to the requirements of section 207(c) is also supported by the legislative history of section 3374. Although the legislative history of section 3374, which was enacted eight years before section 207(c)'s passage,[10] could not refer specifically to the one-year "cooling off" period, the committee report expressed Congress's understanding that "[a]n employee who is detailed to the Federal Government would remain a State government employee for most purposes . . . [but such employees] would be considered Federal employees for the purpose of certain Federal employee laws including those relating to conflict of interest." *See* H.R. Rep. No. 91–1733, at 19 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5879, 5897–98.

To be sure, the federal agency's contribution to the salaries of assignees in this first category would fall below the ES–5 level, but in this instance there would be no reason to believe that the allocation of financial responsibility would be based on a decision by the agency that the responsibilities of the assignee would not justify the total salary to be received. The position would remain classified at ES–5. In paying less than this amount, the federal agency would just be gaining a benefit from the non-federal employer's willingness to continue the assignee's pay.

III.

We turn next to detailees who occupy positions ordinarily below the ES–5 level, but who are compensated at or above that level because of a federal payment that supplements the salary they receive from their university or state or local government employers. We understand that, in DOE's view, these assignees, although paid at the ES–5 level, should not be regarded as senior employees, as long as the positions they hold would ordinarily come within the General Schedule. *See* DOE Memorandum at 1. Two arguments are advanced in support of this position. First, positions covered by the General Schedule are typically

[9] Indeed, although we do not place reliance on subsequent legislative history, we note that lawmakers, in the year after section 207(c)'s enactment, were concerned that these requirements would make it difficult to move back and forth between positions in the federal government and positions in universities or state and local governments. *See* 125 Cong Rec 11,474 (1979) (statement of Rep Ford) ("[W]e spend several million dollars a year on the Intergovernmental Personnel Act, which is designed to let us lend to the State governments and for the State governments to lend back to us people with particular expertise, but the way this bill is written, it will leave the mistake that we made in the last Congress. That mistake says that no one can leave the Federal Government and go work for the State government.")

[10] *See* Pub L. No 91–648, 84 Stat 1909, 1923 (1971)

regarded as non-senior, with duties and responsibilities that, while perhaps important, are generally not considered high- level. *Id.* Second, DOE generally provides funding to supplement the university or government salary that an assignee would otherwise receive not to compensate for senior or high-level duties, but to ensure that DOE remains competitive with private-sector or academic institutions employing individuals with qualifications and backgrounds similar to those of its employees. *Id.* at 2.

We believe the language of section 3374(c) of the IPA forecloses the argument that a detailee in this category is not "employed in a position . . . for which the basic rate of pay . . . is equal to or greater than the rate of basic pay payable for [ES–5]," 18 U.S.C. § 207(c)(2)(A)(ii), whether or not the detailee holds a position ordinarily covered by the General Schedule. Detailees are not entitled to any pay directly from a federal agency *unless* the agency has determined that

> the pay [to be received by the detailee] . . . is less than the appropriate rate of pay which [his or her] duties would warrant under the applicable pay provisions of this title or other applicable authority.

5 U.S.C. § 3374(c)(1). Thus, under section 3374, an agency may supplement the pay of an IPA detailee only if it determines that the salary the detailee would ordinarily receive would not adequately reflect the importance of the federal duties and responsibilities to be performed.

Because of the standard set out in section 3374, the detailees to DOE who receive salary supplements bringing them to or above the ES–5 level must be considered senior or high-level employees. As a matter of law, an agency's decision under section 3374 to supplement the pay of detailees rests on a determination that the duties to be performed warrant pay at the level selected. In deciding to supplement the pay of detailees to reach the ES–5 level, DOE has thus resolved that, whatever the usual nature of the positions in which they are employed, those persons are performing duties and responsibilities comparable to those carried out by ES–5 level employees. Put differently, DOE has essentially decided that, for the positions the detailees *actually* occupy, the rate of pay exceeds ES–5.

Our conclusion squares with a 1996 decision of the Office of Government Ethics ("OGE"). OGE concluded that section 207(c)'s post-employment restrictions apply to an IPA detailee compensated at the ES–5 level or above. Ethics in Government Reporter, OGE Informal Advisory Letter 96 x 14, at 2 (Aug. 2, 1996). In that case, OGE considered the applicability of section 207(c) to the proposed post-employment activities of an employee detailed from a state university to a federal agency. Rejecting the argument that an agency could properly regard a supplement to the individual's salary as "an allowance or fringe benefit" rather than "basic pay," OGE concluded that section 207(c) applies to detailees whose

basic rate of pay is supplemented to a level above that paid to an ES–5. OGE reasoned, as we do here, that an agency may supplement the pay of a detailee only after making a determination that his or her duties warrant the additional compensation.

IV.

In the final two situations, an IPA detailee occupies a position ordinarily compensated at a salary less than the ES–5 level but receives from his or her university or state or local government employer a salary equal to or greater than ES–5. The agency then reimburses the detailing employer, in whole or in part. In one of the situations, the amount of that reimbursement from the agency to the university or state or local government is equal to or greater than an ES–5 salary; in the other, it is less. In both situations, while the position *ordinarily* would carry a compensation below the triggering level, the position would appear, *in the actual circumstances*, to carry a compensation above that level.

If the federal contribution reaches the triggering level, we believe that section 207(c) would apply. The decision by a federal agency about the amount of that contribution necessarily rests on a judgment about the value of the services to the federal government. Section 207(c) uses the government's decision about such compensation as a proxy for the employee's responsibility, without requiring any examination into whether, in the particular case, the employee's responsibility is less than the compensation would suggest.

DOE argues, however, that some detailees who occupy positions classified under the General Schedule receive more than an ES–5 salary only because "these positions are very difficult to fill at the GS pay rates, which are not competitive with private-sector or academic positions that require similar qualifications." DOE Memorandum at 2. The detailees, DOE contends, still "perform[] GS level duties." *Id.* at 1. This argument assumes that "GS level duties" are uniformly of a nature that would not confer post-employment influence on those who discharged these duties. In practice, however, positions classified under the General Schedule may entail quite weighty responsibility. Employees paid under the General Schedule, for example, regularly appear on behalf of the United States before the Supreme Court. Section 207(c) obviates the need for a case-by-case assessment whether the responsibilities of a particular position are important enough to enable an occupant of the position to exercise post-employment influence. The ES–5 standard in section 207(c) provides a bright-line rule based only on the level of pay. Here, whatever the nominal pay that DOE ascribes to the positions at issue, the agency, in fact, is willing to pay more than an ES–5 salary. In this event, we believe that section 207(c) applies, even if in some instances the statutory proxy exaggerates the employee's level of responsibility.

On the other hand, if the federal contribution is less than the triggering level, we believe that the restriction of section 207(c) would not apply. Although the language of section 207(c) might be read to reach the employee who receives compensation above the triggering ES–5 amount even when the government's share is less than that level, the language by no means compels that interpretation. We believe that the "basic rate of pay" for the position is best read to refer to the minimum pay that the federal agency has determined should be paid to the occupant of a given position. The federal agency can make that determination in one of three ways: (1) by classifying the position at a certain pay level; (2) by deciding what amount of money to contribute to a non-federal employer; or (3) by deciding what supplement to a non-federal payment is required to make the total pay reflect "the appropriate rate of pay which [his or her] duties would warrant" under section 3374(c). When the federal agency does not supplement a detailee's pay to ensure that his or her total pay is commensurate with federal responsibilities normally compensated at or above the ES–5 level, and when it reimburses the detailing employer an amount less than that level, the agency cannot be said to have made a determination that the detailee's federal duties warrant compensation at the triggering level specified in the statute. *See* OPM Handbook at 3 ("Cost-sharing arrangements should be based on the extent to which the participating organizations benefit from the assignment."). Rather, in such circumstances, the detailee's receipt of pay at or above the ES–5 level reflects a decision by the *detailing employer* about the suitable level of the detailee's pay. That decision may reflect a judgment based on any number of factors, including the value to the detailing employer of the detailee's federal experience, or a desire to accommodate the interests of a valued employee, but it in no sense reflects a judgment by the *federal agency* that the detailee's federal responsibilities warrant pay at or above the ES–5 level.

We recognize that this interpretation creates an apparent anomaly. Two detailees making the same salary, with the federal contribution the same in both cases, may be treated differently. If a detailee receives most of his salary from the detailing employer but also obtains a supplement from his agency that raises his compensation above the ES–5 level, he or she will become subject to section 207(c). *See* Part III, *supra*. If a detailee is paid the same total salary, all from the detailing employer, and the federal agency reimburses the detailing employer an amount equal to the first detailee's salary supplement, but that salary supplement is less than an ES–5 salary, section 207(c) would not apply. The apparent anomaly results, however, from the determination about a detailee's duties that 5 U.S.C. § 3374(c)(1) requires the agency to make before it can directly pay a detailee. When an agency reimburses the detailing agency by an amount less than

an ES–5 salary, by contrast, there is no ground for concluding that the agency has made the necessary determination about the detailee's duties.[11]

Conclusion

We therefore conclude that assignees who are compensated at or above the ES–5 level are high-level or senior officials and are subject to the post-employment restrictions of section 207(c), except for those receiving their salaries from their detailing employers, with the federal reimbursement to those employers falling below the ES–5 level.

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

[11] It is of course possible that an agency might view a detailee's duties as warranting pay at the ES–5 level, but still be able to arrange a lower reimbursement amount with the detailing employer This anomaly results from Congress's decision to adopt a bright line rule using agency decisions about compensation as a proxy for responsibilities

Division of Powers and Responsibilities Between the Chairperson of the Chemical Safety and Hazard Investigation Board and the Board as a Whole

Under the Clean Air Act Amendments of 1990 and general principles governing the operation of boards, the day-to-day administration of Chemical Safety and Hazard Investigation Board matters and execution of Board policies are the responsibilities of the chairperson, subject to Board oversight, while substantive policymaking and regulatory authority is vested in the Board as a whole.

In disputes over the allocation of authority in specific instances, the Board's decision controls, as long as it is not arbitrary or unreasonable.

June 26, 2000

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

You have asked for our opinion regarding the legal division of powers and responsibilities between the chairperson of the United States Chemical Safety and Hazard Investigation Board ("Board") and the Board as a whole. This memorandum responds to your request.

The Board was established under section 301 of the Clean Air Act Amendments of 1990 (the "Act") as a tenure-protected agency charged with investigating and monitoring accidental chemical releases at industrial facilities and in transport. *See* Pub. L. No. 101–549, § 301, 104 Stat. 2399, 2565–70 (1990) (codified at 42 U.S.C. § 7412(r)(6) (1994)). The Act provides that the Board "shall consist of 5 members, including a Chairperson, who shall be appointed by the President, by and with the advice and consent of the Senate." 42 U.S.C. § 7412(r)(6)(B). "The Chairperson," the Act continues, "shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board." *Id.* The Act vests in the Board a range of powers and responsibilities relating to investigating, monitoring, and reporting accidental chemical releases. *See id.* § 7412(r)(6)(C)–(S). It further provides that "[t]he Board is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions and duties." *Id.* § 7412(r)(6)(N).

As we understand it, a basic disagreement has existed for some time between the former chairperson of the Board, who resigned as chairperson on January 12, 2000, but is still a Board member, and the other Board members regarding the relative authority of the chairperson and the Board as a whole under this statutory scheme.[1] The former chairperson maintains that "the statute provides [the chair-

[1] The Board's Office of General Counsel, at the request of the Board, examined this issue and presented a written opinion to the Board on August 30, 1999. *See* Memorandum for the Chemical Safety and Hazard Investigation Board, from Christopher Warner, General Counsel, *Re: Board Governance Issues* (Aug. 30, 1999) ("Warner Memorandum"). When this opinion failed to resolve the dispute, both the chairperson and the other Board members, in separate letters, requested our views on the subject *See* Letter for Beth Nolan, Assistant Attorney General, Office

person] . . . with complete authority over all aspects of the [Board] except that all of the Board Members must vote on three items: approval of Board Investigation Reports, recommendations to the Administrator of [the Environmental Protection Agency (EPA)] and the Secretary of Labor, and approval of regulations to be published in the *Federal Register*." December Hill Letter at 1. The Board, by contrast, believes that the Act places day-to-day administration of the Board in the chairperson's hands, subject to the Board's general policies and directives, while conferring on the Board responsibility for the various substantive functions that are outlined in its statute; that the Board decides whether a matter is an administrative concern of the chairperson or a substantive concern of the Board, as long as its views are reasonable; and that, in the absence of Board policy on a specific issue, the chairperson possesses substantial discretion to act on his own. *See* Warner Memorandum at 2; November Board Letter (stating that the Board believes that the Warner Memorandum is correct).

We believe that, under the Act and general principles governing the operation of boards, the day-to-day administration of Board matters and execution of Board policies are the responsibilities of the chairperson, subject to Board oversight, while substantive policymaking and regulatory authority is vested in the Board as a whole. In disputes over the allocation of authority in specific instances, the Board's decision controls, as long as it is not arbitrary or unreasonable.

We note at the outset that we do not address the details of how these principles apply to specific management and governance areas in which disagreements might arise between the chairperson and the Board.[2] Indeed, when addressing a similar set of questions regarding the relative authority of the chairman of the Interstate Commerce Commission ("Commission") and the Commission members over the administrative and substantive affairs of the Commission, we observed that "this Office is neither well-suited nor sufficiently well-versed, as a practical matter, in the internal workings of the Commission to provide more than a general response" to the questions being addressed. Memorandum for Reese K. Taylor, Jr., Chairman, and Heather Gradison, Commissioner, Interstate Commerce Commission, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel at 1 (Dec. 8, 1983). We think that an apt observation in the Board's case as well. Nevertheless, we believe that our discussion of the Board's organization and of the background principles governing deliberative bodies against which it operates should be sufficient to guide you in resolving disagreements about the proper balance of authority in the Board's affairs.

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of Legal Counsel, from the Chemical Safety and Hazard Investigation Board (Nov 16, 1999) ("November Board Letter"); Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Paul L. Hill, Jr., Chairperson, Chemical Safety and Hazard Investigation Board (Dec 1, 1999) ("December Hill Letter"). Both have agreed to be bound by our opinion *See* November Board Letter; December Hill Letter at 2.

[2] *See* Warner Memorandum at 18–31, 18 (analyzing specific management and governance areas with an eye toward "limit[ing] areas of potential disagreement"). By this statement, we mean neither to call into question nor to affirm the specific legal conclusions of the Board's General Counsel in this regard

We begin with the language of the Act. As noted above, the Act provides that the chairperson "shall be the Chief Executive Officer of the Board and shall exercise the executive and administrative functions of the Board." 42 U.S.C. § 7412(r)(6)(B). The terms "Chief Executive Officer" and "executive and administrative functions" are decidedly vague, and nowhere does the Act define them. Even so, the terms do provide some general guidance on the proper division of authority between the chairperson and the Board as a whole. They make clear that it is the "executive" and "administrative" aspects of the Board's business — as opposed to its substantive and policymaking functions as laid out in the rest of the statute (*see id.* § 7412(r)(6)(C)–(S)) — that are the province of the chairperson as chairperson. The chairperson, in other words, superintends and carries out the day-to-day activities necessary to effectuate the Board's substantive decisions.[3] He does not, absent some form of Board approval (such as an express delegation by the Board or the Board's acquiescence in the chairperson's actions, *see infra* pp. 108–10), make those decisions by himself.

The Act also empowers the Board to "establish such procedural and administrative rules as are necessary to the exercise of its functions and duties." 42 U.S.C. § 7412(r)(6)(N); *see also* S. Rep. No. 101–228, at 236 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3385, 3620 ("The Board is given authority to promulgate administrative rules as may be necessary to carry out its functions."). These could include rules bearing on matters of internal Board governance (such as voting procedures and the delegation of Board authority and responsibilities) as well as rules governing the conduct of Board business with the public (such as investigations and hearings). To the extent the Board establishes such rules, the chairperson, as the Board's administrative and executive officer, must put them into practice.

Furthermore, the chairperson is subject in the exercise of his functions and duties as chairperson to oversight by the Board as a whole and to such general policies and decisions that the Board is authorized to make. Indeed, that this must be so flows from the very nature of the chairperson's office as the executor and administrator of the Board's decisions and policies, which the Board can modify or amend as circumstances or programmatic objectives require. It is also spelled out in the Act's legislative history, which unambiguously states that "[t]he chair's conduct of the executive function is subject to oversight by the Board as a whole." S. Rep. No. 101–228, at 229, *reprinted in* 1990 U.S.C.C.A.N. at 3613.

To be sure, this does not mean that the Board, exercising its oversight authority and its powers to make substantive decisions and "such procedural and administrative rules as are necessary to the exercise of its functions and duties," may or should attempt to address itself to the plethora of minute administrative prob-

[3] Webster's Third New International Dictionary of the English Language defines "execute" as, among other things, "to put into effect" and "to carry out fully." *Webster's Third New International Dictionary of the English Language, Unabridged* 794 (1993). It defines "administer" as, among other things, "to manage the affairs of." *Id* at 27; *see also Webster's Ninth New Collegiate Dictionary* 434 (1986) (stating that "execute" and "administer" both mean "to carry out the declared intent of another").

lems bound up with the operation of a complex organization. Some degree of managerial discretion is inherent in the concept of an executive or administrative office, and the statutory assignment of the Board's executive and administrative functions to the chairperson necessarily vests the chairperson with a degree of managerial autonomy on which the Board, in the proper exercise of its powers, cannot trench. Likewise, some day-to-day aspects of Board affairs may be so unrelated to the Board's effective execution of its statutory responsibilities that they cannot be said to be proper objects of the full Board's authority. At the same time, however, any number of Board activities or day-to-day aspects of Board business, while at least in part administrative and even seemingly mundane, may involve or affect the Board's duties and functions in ways that are of legitimate concern to the Board as a whole. Where that is the case, it is the prerogative of the Board to pass upon such issues in ways appropriate to its function as a policymaking and rule-setting body.

Aside from the general delineation of powers, the Act itself does not address, with specificity or precision, when particular aspects of Board business should be said to be a legitimate concern of the Board as a whole or, in contrast, should be left to the chairperson as the Board's executive and administrative officer. The Act's legislative history does state that, while the Board has the power to hire staff, "[t]he chairperson of the Board is given authority for directing the work and assignments of the staff except that each Board member shall be assigned such personal staff as are necessary to carry out responsibilities of a member." S. Rep. No. 101–228, at 229, *reprinted in* 1990 U.S.C.C.A.N. at 3613. Immediately following this statement, however, is the declaration that "[t]he chair's conduct of the executive function is subject to oversight by the Board as a whole." *Id.* So even when it comes to directing staff work and assignments, the legislative history appears to contemplate that the chairperson may have to answer to the Board in some respects. Again, however, the statute does not specify the precise bounds of the Board's oversight authority.

In light of the lack of explicit statutory guidance on the issue, we believe that, under the general principles of corporate common law that we have previously found instructive in similar cases, the Board as a whole, acting reasonably, has the final authority to resolve disputes over whether a specific matter is within its oversight authority or is an administrative or executive concern of the chairperson or a legitimate concern of the Board as a whole. Our past opinions addressing governance issues raised by multi-member boards and commissions have repeatedly recognized that basic and well-established principles of corporate common law make clear "that the basic premise governing deliberative bodies is that the majority rules." Letter for Mason H. Rose V, Chairperson, United States Architectural and Transportation Barriers Compliance Board, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel at 2 (Sept. 17, 1981) ("Rose Letter"); *see also* S. Rep. No. 101–228, at 229, *reprinted in*

1990 U.S.C.C.A.N. at 3613 (stating that "[t]he Board will operate by majority vote").[4] In resolving a dispute between members of the Architectural and Transportation Barriers Compliance Board ("Compliance Board") and its chairperson over the authority to call an additional meeting of the Compliance Board, for example, we relied on the majority-rule principle to conclude that the Compliance Board had the authority to call an additional non-emergency meeting despite the lack of a rule authorizing it to do so. *See* Rose Letter at 4. We observed that, given that principle, "[i]t would . . . be anomalous to conclude that the Board cannot deal with the situation because the rules are silent" on the issue. *Id.* Likewise, on separate occasions, we applied general principles regarding a board's authority to act to conclude that both the Federal Home Loan Bank Board and the Advisory Board of Cuba Broadcasting could meet and conduct business without a properly appointed chairperson. In both cases we pointed out that, in the absence of specific statutory prohibitions barring the boards from acting without a chairperson, business transacted at board meetings would be valid so long as the meetings complied with basic rules of corporate common law governing notice to and attendance of board members. *See Federal Home Loan Bank Board—Chairman—Vacancy—Reorganization Plan No. 3 of 1947 (5 U.S.C. App. 1), Reorganization Plan No. 6 of 1961 (5 U.S.C. App.)*, 3 Op. O.L.C. 283, 284 (1979); *Authority of the Advisory Board for Cuba Broadcasting to Act in the Absence of a Presidentially Designated Chairperson*, 24 Op. O.L.C. 24, 25–27 (2000). Finally, we noted when passing on an issue concerning the legal authority of the National Commission on Neighborhoods to enter into a proposed agreement that where a statute "is silent as to [a c]ommission's internal organization, practices, and procedures[, t]he clear implication is that these matters are to be decided by the members of the [c]ommission." *National Commission on Neighborhoods (Pub. L. 95–24)—Powers—Appropriations*, 2 Op. O.L.C. 366, 367 n.5 (1977); *cf.* Memorandum for Tim Saunders, Acting Executive Clerk, Executive Clerk's Office, from Richard Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of a Chairperson of the World War II Memorial Advisory Board* at 2 (Nov. 21, 1994) (noting that, if a chairperson were appointed to the World War II Memorial Advisory Board, the board would remain "free under general parliamentary law to make or amend its own rules for such matters as conducting business and calling meetings"). These principles, we believe, apply with equal force here.

These principles also undermine the former chairperson's view that the Act's designation of the Board's chairperson as its "Chief Executive Officer" significantly expands the chairperson's statutory responsibilities and powers beyond

[4] With regard to these common-law principles, *see, e.g.*, 2 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* §§ 392, 495 (perm. ed. rev vol. 1998); Robert S. Stevens, *Handbook on the Law of Private Corporations* §§ 145, 161 (2d ed. 1949); William J. Grange, *Corporation Law for Officers and Directors A Guide to Correct Procedure* 381–89 (1935), *see also* General Henry M Robert, *Robert's Rules of Order Newly Revised* § 1, at 4, § 43, at 395 (9th ed 1990).

those which he might otherwise have (i.e., as simply the "chairperson"). October Hill Letter at 1–2. The term "Chief Executive Officer" ("CEO") comes from corporate law. CEOs and presidents of corporations, as a matter of corporate common law, are "subordinate in legal authority" to their corporations' boards of directors. Grange, *supra* note 4, at 450; *see* 2 Fletcher et al., *supra* note 4, § 495, at 528; Stevens, *supra* note 4, § 164, at 768. Their specific powers derive in large part from the resolutions and by-laws passed by those boards and from the practice and custom of the particular corporation. *See, e.g.*, Grange, *supra* note 4, at 451–52 (stating that the "chief determining factor is the usage of the particular corporation" and that "[i]n brief, the president exercises such powers as he is given by the board, or as he may assume with the board's acquiescence"); 2A William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 553, at 14 (perm. ed. rev. vol. 1982) (observing that the powers of a corporate president may be enlarged by a board's "practice of permitting him to do certain things without objection"). Thus, while it may not be unusual for a president and CEO of a corporation to possess substantial authority over corporate affairs, such authority exists largely as a matter of the board's grace and does not deprive the board of its ultimate authority to manage corporate business. *See, e.g.*, 2 Fletcher et al., *supra* note 4, § 495, at 528–29 (a board's delegation of authority to corporate officers does not mean that the board has abdicated its authority and does not deprive the board of its stated authorities and responsibilities); Stevens, *supra* note 4, § 164, at 768 (whatever the precise duties and powers of a corporate president, "the authority and duty to manage the corporate business is vested exclusively in the board of directors"). Nothing in the Act suggests that this general understanding of what it means to be a CEO should not obtain in the specific case of the Board.

We do not agree that the Act provides the chairperson "with complete authority over all aspects of the [Board] except that all of the Board Members must vote on three items: approval of Board Investigation Reports, recommendations to the Administrator of EPA and the Secretary of Labor, and approval of regulations to be published in the *Federal Register*." December Hill Letter at 1. In support of that reading, the former chairperson points out that "[t]he Congress has repeatedly segregated these responsibilities through 'reorganization plans' of various multi-member boards and commissions in the past." *Id.* But whatever the import of such reorganization plans,[5] the Act itself in no way suggests that the Board's

[5] A large number of reorganization plans exist, most of which can be found in appendix 1 to title 5 of the United States Code, and we have not examined the provisions of each one in detail However, our brief review of the plans has revealed no evidence of the repeated segregation of responsibilities of the sort described in the former chairperson's submission. *See generally* 5 U.S.C app. 1. In fact, such plans are generally intended only to improve the efficiency of the housekeeping and day-to-day operations of multi-member bodies by placing primary responsibility for such affairs with a chairperson, not to effect a large-scale transfer of significant powers and authorities to the chairperson from the body as a whole. *See, e.g.*, David M. Welborn, *Governance of Federal Regulatory Agencies* 9 (1977) (discussing reorganizations), *see also* Special Message to the Congress Transmitting Reorganization Plans 1 Through 13 of 1950, *Pub. Papers of Harry S. Truman* 199, 202 (1950) ("[T]hat under these . . . plans

Continued

chairperson is vested "with complete authority over all aspects" of Board business except the three responsibilities just mentioned. Indeed, as we explain above, the language of the Act and the general principles of corporate common law against which it must be read belie that conclusion. The Act's legislative history does mention these responsibilities in the context of delegation, stating that the Board "may (by vote) delegate responsibilities to the chairperson or other member, except that it shall require a majority vote of the full Board to issue a report on the cause or probable cause of an accident, make a recommendation to the Administrator [of EPA] or the head of another Federal agency, or promulgate a rule." S. Rep. No. 101–228, at 229, *reprinted in* 1990 U.S.C.C.A.N. at 3613. This statement, however, only makes clear Congress's intent that the Board not delegate these responsibilities to the chairperson or any other single member. It does not suggest that these responsibilities are the only ones that are, in the first instance, vested in the full Board. In fact, by stating that the Board may delegate all other responsibilities, it suggests the opposite, for the Board could not make the delegation if those responsibilities were committed to the chairperson instead of the Board as a whole.

Along similar lines, we do not attribute great significance to the fact that, as is apparent from the Act's legislative history, Congress contemplated that the Board would be "modeled on the structure, activities and authorities of the National Transportation Safety Board (NTSB), an independent Federal agency which investigates accidents in the transportation industry." S. Rep. No. 101–228, at 228, *reprinted in* 1990 U.S.C.C.A.N. at 3612. Even if the chairperson of the NTSB is the chief moving force on the NTSB and principally responsible for executing its policies, it does not follow that the Board's chairperson also should be understood to have expansive authority over nearly all of the Board's affairs. *See* October Hill Letter at 2; December Hill Letter at 1. The division of authority at the NTSB upon which the former chairperson focuses is much less a matter of statutory mandate than it is a matter of the development, through collegial practice and over time, of the NTSB's own internal policies concerning delegation of authority to the NTSB chairperson, the NTSB's acquiescence in the chairperson's assertion of authority over certain substantive areas, and the general evolution of the NTSB's current allocation of responsibilities. *See, e.g.*, Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from the Chemical Safety and Hazard Investigation Board at Attach. 1 (Dec. 27, 1999) (discussing development of division of responsibilities at the NTSB). Indeed, as it existed in 1990, when the Act was passed, the statute establishing the NTSB stated that "[t]he Chairman . . . shall be governed by the general policies established by the Board, including any decisions, findings, deter-

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the commissions retain all substantive responsibilities deserves special emphasis. The plans only eliminate multi-headed supervision of internal administrative functioning. The commission[s] retain policy control over administrative activities since these are subject to the general policies and regulatory decisions, findings, and determinations of the commissions.").

minations, rules, regulations, and formal resolutions." Pub. L. No. 93–633, § 303(b)(3), 88 Stat. 2156, 2167 (1975).[6] The legislative history emphasized this point. "The Chairman," it provided, "is to be the chief executive officer of the Board, but in acting as such, he is subject to the decisions and policies decided upon by the entire Board, and it is intended that each member shall participate actively in all aspects of the executive function." S. Rep. No. 93–1192, at 43 (1974).

That the NTSB's chairperson may, as a matter of internal NTSB policy and longstanding practice, exercise significant authority and influence over many substantive and procedural aspects of NTSB operations does not dictate that the Board's chairperson be allowed to do the same. Had Congress intended that result, it could have looked to the specifics of the division of authority within the NTSB in 1990 and spelled out a similar division of authority more explicitly in the Act. It did not do so. Instead, as discussed above, the Act leaves the Board free to shape and structure the details of its own internal operations in large part as it sees fit, and to do so in a practical matter, over time and on a case-by-case basis as its goals and agenda demand. The Board ultimately may or may not think it appropriate to follow a course similar to that of the NTSB. In any event, the Board's determination of the appropriate division of authority between itself and its chairperson will of necessity turn on considerations of internal administration and practical working arrangements within the Board.

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

[6] At the time of the Act's passage, the NTSB's organic statute provided in pertinent part as follows

> The Chairman shall be the chief executive officer of the Board and shall exercise the executive and administrative functions of the Board with respect to the appointment and supervision of personnel employed by the Board, the distribution of business among such personnel and among any administrative units of the Board; and the use and expenditure of funds . . . The Chairman . . . shall be governed by the general policies established by the Board, including any decisions, findings, determinations, rules, regulations, and formal resolutions

Pub L No 93–633, § 303(b)(3), 88 Stat. 2156, 2167 (1975)

Whether a Former President May Be Indicted and Tried for the Same Offenses for Which He was Impeached by the House and Acquitted by the Senate

The Constitution permits a former President to be indicted and tried for the same offenses for which he was impeached by the House of Representatives and acquitted by the Senate.

August 18, 2000

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

We have been asked to consider whether a former President may be indicted and tried for the same offenses for which he was impeached by the House and acquitted by the Senate.[1] In 1973, in a district court filing addressing a related question in the criminal tax evasion investigation of Vice President Agnew, the Department took the position that acquittal by the Senate creates no bar to criminal prosecution. A 1973 Office of Legal Counsel ("OLC") memorandum discussing the same question adopted the same position. As far as we are aware, no court has ever ruled on this precise issue. During the impeachment of Judge Alcee Hastings in the late 1980s, though, a district court and both the House and Senate passed on the related question whether an acquittal in a criminal prosecution should bar an impeachment trial for the same offenses. Each of those bodies concluded that the Constitution permits an official to be tried by the Senate for offenses of which he has been acquitted in the courts. Although we recognize that there are reasonable arguments for the opposing view, on balance, and largely for some of the same structural reasons identified in the United States's filing in the Agnew case and the 1973 OLC memorandum, we think the better view is that a former President may be prosecuted for crimes of which he was acquitted by the Senate. Our conclusion concerning the constitutional permissibility of indictment and trial following a Senate acquittal is of course distinct from the question whether an indictment should be brought in any particular case.

This memorandum has three parts. First, we review the reasoning of the United States's filing in the Agnew case and of the 1973 OLC memorandum. Second, we consider in greater depth the arguments for and against the constitutional permissibility of criminal prosecution of officials for the same offenses of which they have been acquitted by the Senate. Third, we summarize and consider the significance of the Hastings impeachment process and of the Senate trials of two

[1] In the context of successive trials in the courts, double jeopardy claims often raise the preliminary question whether the offenses charged in the second proceeding are the same as those that formed the basis for the first proceeding. *See, e.g., United States v. Dixon*, 509 U.S. 688, 696 (1993); *Blockburger v United States*, 284 U.S. 299 (1932). We understand the question posed to assume that this issue has been resolved, and thus we express no view on how the issue might arise or be resolved in the circumstance of criminal prosecution following an impeachment trial.

other federal judges who were impeached and convicted during the 1980s following criminal prosecution.

I. The 1973 Justice Department Documents

A. The United States's Brief in the Grand Jury Investigation of Vice President Agnew

In 1972, the United States Attorney for the District of Maryland empaneled a grand jury to investigate criminal charges against Vice President Spiro Agnew. The Vice President filed a motion with the district court supervising the grand jury seeking to enjoin the grand jury from investigating or indicting him, claiming that his office gave him immunity from indictment and criminal trial. The United States filed a brief, signed by Solicitor General Robert Bork, opposing the Vice President's motion. The brief's central contention was that "all civil officers of the United States other than the President are amenable to the federal criminal process either before or after the conclusion of impeachment proceedings." Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity, In Re Proceedings of the Grand Jury Impaneled December 5, 1972: Application of Spiro T. Agnew, Vice President of the United States, Civ. No. 73–965 (D. Md. filed Oct. 5, 1973) at 3 ("Agnew Brief").

One of the arguments the brief addresses is the contention that the Impeachment Judgment Clause, Article I, Section 3, Clause 7 of the Constitution dictates that impeachment must precede indictment. That clause provides:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

In response to the argument that impeachment must precede prosecution, the brief first states, "As it applies to civil officers other than the President, the principal operative effect of Article I, Section 3, Clause 7, is solely the preclusion of pleas of double jeopardy in criminal prosecutions following convictions upon impeachments." Agnew Brief at 7. It goes on, however, to contend that the clause allows criminal prosecution upon acquittal by the Senate as well. *See id.* at 8.

It then provides, though in very summary form, five arguments for that conclusion. First, impeachment and trial by the Senate, on the one hand, and prosecution in the courts, on the other, "serve different ends." *Id.* Although the brief does not actually spell out those different ends, they seem to be protection of our institutions of government from corrupt or incompetent officials, on the one hand, and punishment of those individuals, on the other. The only illustration the brief

offers is that "a civil officer found not guilty by reason of insanity in a criminal trial could certainly be impeached nonetheless." *Id.* at 9. In a related vein, the brief argues that trial on impeachment is a civil proceeding akin to deportation rather than a criminal proceeding. *Id.* at 10 n.**. Second, the brief points out that impeachment trials "may sometimes be influenced by political passions and interests that would be rigorously excluded from a criminal trial." *Id.* at 9. Third, an acquittal by the Senate will often rest on a determination by at least a third of the Senate that the conduct alleged, though proven, does not amount to a high crime or misdemeanor. Such a judgment in no way reflects a determination that the conduct is not criminal in the ordinary sense. *Id.* Fourth, if the scope of the Impeachment Judgment Clause were restricted to convicted parties, "the failure of the House to vote an impeachment, or the failure of the impeachment in the Senate, would confer upon the civil officer accused complete and — were the statute of limitations permitted to run — permanent immunity from criminal prosecution however plain his guilt." *Id.* at 9–10.[2] Fifth, such a view would give Congress an indirect power of pardon — via impeachment and acquittal — even though the Constitution vests the President alone with the power to pardon. *Id.* at 10.

B. The 1973 OLC Memorandum

In 1973, this Office prepared a memorandum on the amenability of the President, the Vice President, and other civil officers to federal criminal prosecution while in office. The memorandum's central conclusion was that all federal officers and the Vice President, but not the President, are amenable to federal prosecution while in office. The memorandum did not discuss at any length the question whether a former President who has been acquitted by the Senate may be indicted and criminally tried. It did spend considerable time, however, refuting the notion that the Impeachment Judgment Clause required officers to be impeached by the House and tried by the Senate before they may be criminally prosecuted. Instead, the memorandum stated, "[t]he purpose of this clause . . . is to permit criminal prosecution in spite of the prior adjudication by the Senate, *i.e.*, to forestall a double jeopardy argument." Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution While in Office*

[2] The brief does not explain why the House's failure to impeach would, on any reading of the Impeachment Judgment Clause, act as a bar Even if one took the view that the Impeachment Judgment Clause's reference to "the party convicted" implied that acquitted parties could not be criminally prosecuted, that implication would naturally extend only to individuals who had been impeached by the House and acquitted by the Senate. (In regular criminal proceedings, jeopardy does not attach until the jury has been sworn, *see, e.g., Crist v. Bretz*, 437 U.S 28, 35–38 (1978), or, in a bench trial, the first witness has taken the stand, *see, e g., id* at 37 n.15 At the time of the drafting of the Constitution, the common law rule was that jeopardy did not attach until the jury had rendered a verdict. *See, e.g.*, 2 William Hawkins, *A Treatise of the Pleas of the Crown* 527 (6th ed 1787)) The brief appears to treat an impeachment investigation and a rejection of articles of impeachment by the House as a type of acquittal We are unaware of any commentator or Member of Congress who has adopted this position

at 3 (Sept. 24, 1973) ("1973 OLC Memo"). In support of that claim, the memorandum cited a passage from the argument made by Luther Martin in his role as defense counsel in the impeachment trial of Justice Chase in 1805[3] and quoted a passage from Justice Joseph Story's 1833 *Commentaries on the Constitution.*[4] Story, the memorandum suggested, took the position that neither conviction nor acquittal by the Senate would bar a criminal prosecution. *Id.* at 2 n.2. The reasoning supporting our embrace of the position we attributed to Story was contained in a single sentence in a footnote: "The conclusion that acquittal by the Senate does not bar criminal prosecution follows from the consideration that such an acquittal may be based . . . on jurisdictional grounds, *e.g.*, that the defendant is not an officer of the United States in the constitutional sense, or on discretionary grounds, *e.g.*, that the defendant no longer is an officer of the United States and unlikely to be reappointed or reelected, or on grounds which are partly jurisdictional and partly substantive, *e.g.*, that the offense was not of an impeachable nature." *Id.* The memorandum thus rested its conclusion on a somewhat elaborated version of the third argument made in the United States's brief in the Agnew case.

II. The Arguments Considered in Greater Depth

There appear to be two possible bases in the Constitution for the claim that a former President who was acquitted by the Senate while he was in office may not be criminally prosecuted for the same offenses: the Impeachment Judgment Clause and the Double Jeopardy Clause. We will consider each in turn.

A. The Impeachment Judgment Clause

[3] The citation is 14 Annals of Congress 432 (1805). Martin had been a delegate from Maryland at the Constitutional Convention The memorandum cited a portion of Martin's speech at the Chase trial for the proposition that "Article 1, section 3, clause 7 was designed to overcome a claim of double jeopardy rather than to require that impeachment must precede any criminal proceedings" 1973 OLC Memo at 3 In support of his larger argument that impeachable offenses were limited to indictable offenses, Martin imputed to the House managers the view that "a judge is only removable from office on account of crimes committed by him as a judge, and not for those for which he would be punishable as a private individual" 14 Annals of Cong 431 (1805) If that were true, Martin argued, a judge might be convicted and punished in the courts for burglary or receiving stolen goods and "yet he could not be removed from office, because the offence was not committed by him in his judicial capacity, and because he could not be punished *twice* for the same offence." *Id.* That implication, Martin explained, must be wrong.

> The truth is, the framers of the Constitution, for many reasons, which influenced them, did not think proper to place the officers of the Government in the power of the two branches of the Legislature, further than the tenure of their office. Nor did they choose to permit the tenure of their offices to depend upon passions or prejudices of jurors The very clause in the Constitution, of itself, shows that it was intended the persons impeached and removed from office might still be indicted and punished for the same offence, else the provision would have been not only nugatory, but a reflection on the enlightened body who framed the Constitution; since no person ever could have dreamed that a conviction on impeachment and a removal from office, in consequence, for one offence, could prevent the same person from being indicted and punished for another and different offence.

Id. at 432.

[4] We discuss the Story passage *infra* pp. 126–27 & n 44.

1. The Argument That Senate Acquittal Bars Subsequent Prosecution

The Constitution itself expressly authorizes indictment and trial of officials who have been impeached and *convicted.* As noted above, Article I, Section 3, Clause 7 of the Constitution states:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law.

The clause is ambiguous when it comes to officials who have been impeached and not convicted. Some commentators have argued that the reference to "the Party convicted" implies that the exception to the double jeopardy principle created by the clause does not extend to parties who are impeached but not convicted.[5] Judge Alcee Hastings made the same argument in challenging the Senate's jurisdiction to try him on impeachment after he had been tried and acquitted in a federal criminal prosecution.[6]

This argument rests on the well-known canon of statutory construction, *expressio unius est exclusio alterius*, "the expression of one is the exclusion of others." *United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988). The Impeachment Judgment Clause says "the party convicted," not "the party, whether convicted or acquitted." Its failure to mention parties acquitted by the Senate implies that they, unlike convicted parties, are not subject to regular criminal prosecution.

This argument has some force. The Court has regularly relied on the *expressio unius* canon. *See, e.g., Custis v. United States*, 511 U.S. 485, 491–492 (1994); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 457 (1974). Although the canon has most often been applied to statutes, rules, and contracts, the Court has used it as well in analyzing constitutional provisions. *See, e.g., U.S. Terms Limit, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995) (qualifications for Representatives specified in the Qualifications Clause are exclusive). Indeed, one might argue that the canon has particular strength when applied to constitutional provisions because, as the Court has noted, those provisions are likely to be drawn with particular care. *See, e.g., Township*

[5] *See* Joseph Isenberg, *Impeachment and Presidential Immunity from Judicial Process*, 18 Yale L. & Pol'y Rev 53, 92–93 (1999), Jay S. Bybee, *Who Executes the Executioner? Impeachment, Indictment and Other Alternatives to Assassination*, 2 NEXUS 53, 58–59, 63 (1997).

[6] *See Impeachment of Judge Alcee L. Hastings: Motions of Judge Alcee L. Hastings to Dismiss Articles I–XV and XVII of the Articles of Impeachment Against Him and Supporting and Opposing Memoranda*, S Doc. No 101–4, at 48–57 (1989) ("Hastings Motions to Dismiss")

of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 674–75 (1873) ("[t]he case as to the [Michigan] constitution is a proper one for the application of the maxim, 'Expressio unius . . .'. The instrument is drawn with ability, care, and fulness of details"). In addition, if the Impeachment Judgment Clause is understood as creating an exception to the general background rule of a prohibition on successive prosecutions, the *expressio unius* canon is particularly apt since it has often been wielded to support the conclusion that when a statute identifies specific exceptions to a general rule it by implication prohibits other exceptions. *See, e.g., Leatherman*, 507 U.S. at 168; *TVA v. Hill*, 437 U.S. 153, 188 (1978); *City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 22 (1898); *Arthur v. Cumming*, 91 U.S. 362, 363 (1875); *Sturges v. Collector*, 79 U.S. (12 Wall.) 19, 27 (1870).

The *expressio unius* argument gains plausibility from a comparison of the federal Impeachment Judgment Clause with the equivalent clauses in state constitutions. Of the forty-five state constitutions that authorize impeachment and limit the punishment upon conviction, all forty-five provide for further prosecution in the courts. In doing so, however, only fifteen follow the federal wording of "the party convicted" [7]; thirty, by contrast, expressly provide that the party impeached is liable to criminal proceedings regardless of the outcome of the legislative trial.[8]

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[7] *See* Conn Const. art 9, § 3; Del Const. art 6, § 2; Haw Const art. III, § 19; Ky Const § 68; Mass Const ch. I, § 2, art 8, Mich. Const. art. 11, § 7, para 4, Minn. Const. art. 8, § 2, Miss Const. § 51, N H. Const art. 39, N.J Const. art. 7, § 3, para 3, R I Const art. XI, § 3, Tex. Const. art. 15, § 4, Vt. Const. § 58; Va. Const. art IV, § 17; W Va. Const. art IV, § 9

[8] *See* Ala. Const. art. 7, § 176, Alaska Const. art. 2, § 20, Ariz. Const. art. 7, pt 2, § 2; Ark Const art 15, § 1; Cal. Const art IV, § 18; Colo Const art. XIII, § 2, Fla. Const. art. III, § 17; Ga Const art 3, § 7, para 3; Idaho Const art V, § 3; Ill Const art. IV, § 14, Iowa Const art. III, § 20, La Const. art. X, § 24, Me. Const. art III, § 7, Mo Const art. VII, § 3; Mont Const art V, § 13, Nev Const art 7, § 2, N M. Const. art IV, § 36; N.Y. Const art. VI, § 24, N C. Const. art. IV, § 4, N.D. Const. art XI, § 10, Okl Const art. VIII, § 5; Penn Const. art VI, § 6, S C Const art XV, § 3, S D Const. art. XVI, § 3; Tenn Const. art. V, § 4, Utah Const art VI, § 19; Wash Const art. V, § 2; W.Va Const. art IV, § 9; Wisc. Const art VII, § 1, Wyo. Const § 18.

We have found references to the difference between the wording of the federal clause and that of many of the state constitutions in only two judicial decisions, one of which relies upon the other *State ex. rel. Christian v Rudd*, 302 So 2d 821, 825 (Fla Dist. Ct. App 1974), *vacated in part on other grounds, Rudd v State ex. rel. Christian*, 310 So.2d 295 (Fla.1975), *In re Investigation by Dauphin County Grand Jury*, 2 A 2d 804, 808 (Pa 1938) In the Pennsylvania case, a district attorney began a grand jury investigation of several state officials, the state House of Representatives initiated an impeachment investigation of the same officials, and the House investigating committee then sought a writ of prohibition preventing the grand jury investigation from going forward. The legislative committee argued, among other things, that the state constitution required impeachment to precede criminal prosecution The court rejected that argument, stating

> The delegation to the House of Representatives of the sole power of impeachment did not have the effect of depriving the court of its power to continue the investigation in the existing proceeding of crimes constituting misdemeanor in office. This is emphasized by the provision in section 3 of the sixth article, P S. Const art 6, § 3, that "the person accused [in impeachment proceedings], whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment and punishment according to law." The two proceedings are independent of each other and, as the Declaration of Rights shows, were intended to be kept independent proceedings. The provision that the accused shall be liable to indictment "whether convicted or acquitted" does not require halting criminal proceedings until after the impeachment The provision was probably inserted so that there might be no doubt that the result of a trial in either proceeding should not be a bar to the trial in the other Petitioner refers to the corresponding provision of the federal constitution and quotes from number LXV of The Federalist, to support the argument that the impeachment trial should precede the criminal proceeding. But the federal constitution, U S C.A. Const art 1, § 3, cl.

Continued

Moreover, express provisions concerning those acquitted in impeachment trials are not a recent innovation. The first state constitution to include a reference making clear that an impeachment acquittal created no bar to criminal prosecution was the Pennsylvania charter of 1790.[9] That State's constitution, like many others, says that "the party, whether convicted or acquitted" is liable to prosecution in the courts.[10] Perhaps most telling is the New York constitution, the original 1777 version of which contained language strikingly similar to that later included in the U.S. Constitution and which may well have been the source of the wording for the federal clause.[11] In the mid-nineteenth century, the New York charter was amended to refer to "the party impeached" rather than "the party convicted" precisely because of a concern that the latter phrase might be understood to give immunity from criminal prosecution to those who had been impeached and acquitted.[12]

Finally, the *expressio unius* argument rests on more than the wording of the Impeachment Judgment Clause. The framers might well have had a principled

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7 deals only with conviction, not with conviction or acquittal. "But the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law." Our constitution subjects the accused to prosecution regardless of whether "convicted or acquitted" in the impeachment trial, thereby indicating that, as the result of the impeachment trial should be immaterial in its effect on the criminal trial, there would be no reason for delaying the criminal proceeding.

Id at 808 The Florida case similarly involved a state official's claim that impeachment must precede indictment. *See State ex rel Christian v. Rudd*, 302 So.2d at 824–25

[9] *See* 5 Francis Newton Thorpe, *The Federal and State Constitutions* 3097 (1909; reprint 1993) ("Thorpe"). The clause was added at the suggestion of James Wilson, who had been a delegate to both the federal constitutional convention and the Pennsylvania ratifying convention. Pennsylvania adopted its first state constitution in 1776. In 1789, the state legislature called a convention to draft a new charter. *See generally* Joseph S. Foster, *The Politics of Ideology: The Pennsylvania Constitutional Convention of 1789–1790*, 59 Penn Hist. 122 (1992). The convention met for three months, offered its draft constitution for popular discussion, then met again to finalize the document. The initial draft upon which the convention's first session based its discussions used the phrase "the party convicted" in its impeachment judgment clause *See Minutes of the Convention of the Commonwealth of Pennsylvania, Which Commenced at Philadelphia, on Tuesday the Twenty-fourth Day of November, in the Year of Our Lord One Thousand Seven Hundred and Eighty-nine, for the Purpose of Reviewing, and if They See Occasion, Altering and Amending, the Constitution of this State* 39–40 (1789). The convention approved that language and included it in the document circulated for popular discussion *See id.* at 64, 96–97, 130. When the convention re-convened, Wilson moved successfully to change the language to "the party, whether convicted or acquitted," and that change survived a later challenge by a very lopsided vote. *See id* at 155 (Wilson motion and approval without division), 175 (rejection of motion to strike the amended sentence rejected 51–7).

[10] *See also* Ariz Const art 7, pt 2, §2, Cal. Const art IV, § 18 ("but the person convicted or acquitted remains subject to criminal punishment according to law"), Colo. Const. art. XIII, § 2; Fla. Const. art. III, § 17 ("conviction or acquittal shall not affect the civil or criminal responsibility of the officer"); Ill Const art. IV, § 14; Iowa Const art III, § 20; Me Const art. III, § 7; Mont Const art. V, § 13, Nev Const art. 7, § 2; N M Const art IV, § 36; N.D. Const. art XI, § 10; S D Const. art. XVI, § 3; Utah Const. art. VI, § 19; Wash. Const. art. V, § 2; Wyo. Const § 18

[11] *See infra* 121–22 & n.25.

[12] The change was made at the state constitutional convention of 1846 The 1777 constitution had been replaced in 1821, but the phrase "the party convicted" was retained *See* 5 Thorpe, *supra* at 2647 The relevant portion of the draft constitution submitted to the 1846 convention also used "the party convicted " A delegate from Orange County, John W. Brown, moved the amendment changing the word "convicted" to "impeached." Several delegates spoke in favor of the proposed amendment. A Mr. Worden observed that there "certainly was a difficulty, as a party tried on articles of impeachment and acquitt[ed], might throw himself on the great principle that a man shall not twice be put in jeopardy for the same offence and he might plead his acquittal as a bar to an indictment in a court of law " S. Croswell & R. Sutton, *Debates and Proceedings in the New-York State Convention, for the Revision of the Constitution* 434–437 (1846); *Journal of the Convention of the State of New-York, Begun and Held at the Capitol in the City of Albany, on the First Day of June, 1846*, at 15, 734–35 (1846)

basis for treating acquittals and convictions by the Senate distinctly. The American rule of double jeopardy derives from the common law pleas of *auterfois acquit*, formerly acquitted, and *auterfois convict*, formerly convicted.[13] As Blackstone explained, both pleas are grounded in the "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence," [14] and the Double Jeopardy Clause, in giving that maxim constitutional stature, embraces the protections both against re-prosecution following acquittal and against re-prosecution following conviction.[15] But, as the Supreme Court has explained, the rationales for the two components of the double jeopardy rule are somewhat different. "The primary purpose of foreclosing a second prosecution after conviction . . . is to prevent a defendant from being subjected to multiple punishments for the same offense." *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 307 (1984). By contrast, the "primary goal of barring reprosecution after acquittal is to prevent the State from mounting successive prosecutions and thereby wearing down the defendant." *Id.* "The underlying idea," the Court has repeatedly affirmed,

> one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187–88 (1957).

The central innovation of the Impeachment Judgment Clause, as explained more fully below, was the restriction on the types of sanctions the Senate could impose when it convicted someone upon impeachment. Breaking with English practice, in which the House of Lords could impose regular criminal punishments up to death, the framers provided that the Senate could do no more than remove an offender from office and disqualify him from future federal officeholding. The framers might reasonably have concluded that their innovative restriction of

[13] The best histories of the development of the double jeopardy principle in English law are Martin Friedland, *Double Jeopardy* 5–15 (1969) and Jill Hunter, *The Development of the Rule Against Double Jeopardy*, 5 J. Legal Hist. 3 (1984); *see also* Jay A. Sigler, *Double Jeopardy* 1–37 (1969), Sigler, *A History of Double Jeopardy*, 7 Am. J. Legal Hist. 283 (1963), Marion Kirk, *"Jeopardy" During the Period of the Year Books*, 82 U. Pa. L. Rev. 602 (1934), George C. Thomas III, *Double Jeopardy* 71–86 (1998). For some of the Supreme Court's leading discussions of double jeopardy history, *see United States v. Wilson*, 420 U.S. 332, 339–42 (1975); *Benton v Maryland*, 395 U S 784, 795–96 (1969), *Bartkus v. Illinois*, 359 U.S. 121, 151–55 (1959) (Black, J., dissenting)

[14] 4 William Blackstone, *Commentaries on the Laws of England* 329 (1772, reprint 1967) ("Blackstone's *Commentaries*"), *see also* 2 Hawkins, *supra* chs 35–36, at 523–37, Thomas Wood, *An Institute of the Laws of England* 664–65 (8th ed 1754), 2 Matthew Hale, *The History of the Pleas of the Crown* chs 31–32, at 240–55 (1st Am. ed 1847)

[15] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend V.

impeachment sanctions justified a relaxation of the normal ban on multiple punishments — and thus a relaxation of the former jeopardy principle in the case of Senate convictions — in order to ensure that federal officials did not escape the punishments suffered by offenders against the criminal law who held no federal office. No similar relaxation, they might have reasoned, was warranted in the case of successive trials following acquittals. The central rationales of the ban on successive trials — the unfairness of the government's repeatedly subjecting an individual to the ordeal and expense of prosecution and the unfairness of giving the government a chance to hone its case and thus to secure the conviction of an innocent party — arguably still applied. Thus the use of the phrase "the party convicted" in a restrictive sense might well have had a perfectly reasonable basis in the underlying concerns of the double jeopardy rule.[16]

Moreover, if the Impeachment Judgment Clause is seen not as addressing double jeopardy concerns per se, but rather as providing protections for officers accused of wrongdoing, its silence about parties acquitted by the Senate makes sense and suggests the framers thought acquittal by the Senate would bar criminal prosecution. The Impeachment Judgment Clause provides protection most directly by depriving the Senate of the ability to impose regular criminal punishments, but it also ensures that even those convicted by the Senate will get a regular trial, with a jury and other guarantees, rather than having additional punishments imposed in some more summary proceeding. As Hamilton put it in *Federalist 65*, the guarantee of trial in the courts following trial in the Senate provides "the double security, intended them by a double trial." [17] Once the defendant-protecting function of the Impeachment Judgment Clause is recognized, its silence about acquitted parties is most reasonably understood as reflecting the assumption that such parties, like those acquitted in the courts, would not be subject to further prosecution.

Even apart from the special functions of the Impeachment Judgment Clause, the framers might have considered protection of the finality of acquittals more fundamental than protection of the finality of convictions.[18] The one state constitution in the revolutionary period that contained a double jeopardy clause only barred re-trials when there had been an acquittal,[19] as did one of the two state

[16] One might perhaps find evidence of this distinction between finality of acquittals and the dangers of successive trials, on the one hand, and finality of convictions and the dangers of multiple punishments, on the other, in the New York ratifying convention's proposal for a federal double jeopardy clause: "That no Person ought to be put twice in Jeopardy of Life or Limb for one and the same Offence, nor, unless in case of impeachment, be punished more than once for the same Offence " 4 Bernard Schwartz, *Roots of the Bill of Rights* 912 (1971).

[17] *The Federalist*, *supra* at 442.

[18] Blackstone, for example, stated that "it is contrary to the genius and spirit of the law of England to suffer any man to be tried twice for the same offence in a criminal way, especially if acquitted upon the first trial." 4 Blackstone's *Commentaries*, *supra* at 256, *see also* Hunter, *supra*

[19] The New Hampshire Constitution of 1784, in one of its few breaks with the Massachusetts Constitution of 1780, included a double jeopardy clause. It provided. "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." 4 Thorpe, *supra* at 2455.

proposals for a federal double jeopardy clause.[20] In the case law that has grown up under the federal Double Jeopardy Clause, the Supreme Court has recognized that "[a]n acquittal is accorded special weight." *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *see Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("the Double Jeopardy Clause attaches special weight to judgments of acquittal"). The special place of acquittals helps explain several asymmetries in double jeopardy law, notably that the Constitution places no restrictions on defendants' ability to appeal convictions but prevents government appeals of acquittals that would lead to re-trial. *See United States v. Wilson*, 420 U.S. 332, 345, 352 (1975).

2. The Impeachment Judgment Clause Permits Prosecution Following Acquittal: Textual and Historical Considerations

Despite its initial plausibility, we find this interpretation of the Impeachment Judgment Clause ultimately unconvincing for several reasons.

a. *Expressio Unius* Is Only an Aid to Construction

The *expressio unius* canon is only an aid to interpretation, an aid that cannot trump larger considerations of context and purpose. Although the Court has regularly endorsed *expressio unius* arguments, it has also regularly rejected them. *See, e.g., Freightliner Corp. v. Myrick*, 514 U.S. 280, 288–89 (1995) (statutory preemption); *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 703 (1991) (methods of rebuttal in regulations; citing Sunstein, 90 Columbia L. Rev. at 2190, n.182 for the proposition that "the principle of *expressio unius est exclusio alterius* 'is a questionable one in light of the dubious reliability of inferring specific intent from silence' "); *Sullivan v. Hudson*, 490 U.S. 877, 892 (1989); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n.23 (1983); *Bingler v. Johnson*, 394 U.S. 741, 749–50 (1969). Again and again, the Court has cautioned that the maxim "is an aid to construction, not a rule of law," *Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940), and that "[h]owever well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts construe the details of an act in conformity with its dominating general purpose [and] will read text in the light of context," *SEC v. C.M. Joiner Leasing*

[20] The Maryland ratifying convention suggested adding the following clause. "That there shall be a trial by jury in all criminal cases, according to the course of the proceedings in the state where the offence is committed, and that there be no appeal from matter of fact, or second trial after acquittal, but this provision shall not extend to such cases as may arise in the government of the land or naval forces." 2 *Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 550 (Jonathan Elliot, ed., 2d ed. 1836; reprint 1941) ("Elliot's *Debates*")

Corp., 320 U.S. 344, 350–51 (1943); *see Herman & MacLean*, 459 U.S. at 387 n.23.[21]

b. Origins of the Impeachment Judgment Clause and Early Understandings

We are unaware of any evidence suggesting that the framers and ratifiers of the Constitution chose the phrase "the party convicted" with a negative implication in mind. In its most recent decision approving an *expressio unius* argument concerning the meaning of a constitutional provision, the Court noted that it found the argument compelling in significant part because such direct evidence of the framers' intent was available. *See U.S. Terms Limit, Inc.*, 514 U.S. at 793 n.9. Here, by contrast, the record offers no similar signs of awareness that "the party convicted" would be read to exclude acquitted parties from the effect of the Impeachment Judgment Clause's final sentence. Indeed, while a number of participants in the ratification debates and several early commentators simply repeated the words of the Impeachment Judgment Clause in describing it, at least two influential participants in the debate, one Member of Congress in the early republic, and at least one of our most distinguished early constitutional commentators understood the clause to allow prosecution of parties who had been acquitted by the Senate as well as of those who had been convicted.

In 1787, impeachment already had a long history in Britain, but in Britain conviction on impeachment might result in a wide array of criminal penalties, including fines, imprisonment, and even execution.[22] Restriction of the punishments attendant on conviction by the legislature to removal and disqualification was an American innovation developed over the course of the seventeenth and eighteenth centuries.[23] Five of the state constitutions from the revolutionary period expressly addressed the types of punishments that conviction on impeachment could bring,[24] and three of the five contained language that the drafters of the federal clause may well have borrowed. New York's charter of 1777 created a court for the trial of impeachments consisting of the members of the senate, the chancellor, and the judges of the supreme court, and provided that "no judgment

[21] *See also Ford v United States*, 273 U.S. 593, 611 (1927) ("This maxim properly applies only when in the natural association of ideas in the mind of the reader that which is expressed is so set over by way of strong contrast to that which is omitted that the contrast enforces the affirmative inference that that which is omitted must be intended to have opposite and contrary treatment")

[22] *See, e.g.*, 2 Joseph Story, *Commentaries on the Constitution of the United States* 251–52 (1833, reprint 1994) ("Story's *Commentaries*"); 2 Richard Wooddeson, *A Systematical View of the Laws of England* 611–14 (1792), Raoul Berger, *Impeachment: The Constitutional Problems* 67 (1974)

[23] *See* Peter C. Hoffer & N.E.H. Hull, *Impeachment in America 1635–1805*, at xi, 97 (1984)

[24] Virginia's constitution of 1776 provided that a convicted party "shall be either forever disabled to hold any office under government, or be removed from such office *pro tempore*, or subjected to such pains or penalties as the laws shall direct." 7 Thorpe, *supra* at 3818. Delaware's 1776 constitution similarly provided that a convicted party "shall be either forever disabled to hold any office under government, or removed from office *pro tempore*, or subjected to such pains and penalties as the laws shall direct." It also stated that "all officers shall be removed on conviction of misbehavior at common law, or on impeachment, or upon the address of the general assembly." 1 *id.* at 566

of the said court . . . shall . . . extend farther than to removal from office, and disqualification to hold or enjoy any place of honor, trust, or profit under this State. But the party so convicted shall be, nevertheless, liable and subject to indictment, trial, judgment, and punishment, according to the laws.'' [25] The Massachusetts constitution of 1780 and the New Hampshire constitution of 1784 (largely patterned on its Massachusetts predecessor) made their senates the court for the trial of impeachments and then stated that ''[t]heir judgment, however, shall not extend further than to removal from office, and disqualification to hold or enjoy any place of honor, trust, or profit, under this Commonwealth: But the party so convicted, shall be, nevertheless, liable to indictment, trial, judgment, and punishment, according to the laws of the land.'' [26]

At the federal Constitutional Convention, most of the debate over impeachment concerned three subjects: the wisdom of allowing impeachment of the President, the tribunal in which impeachments should be tried, and the nature of the offenses that should impeachable.[27] The limitation on the types of punishments available on conviction and the provision for criminal prosecution despite conviction on impeachment were proposed by the Committee of Detail, to which the Convention

[25] 5 Thorpe, *supra* at 2635. The phrase ''the party convicted'' was apparently in the draft constitution that formed the starting point for debate at the New York convention of 1776–1777. A committee composed of John Jay, Gouverneur Morris, Robert R. Livingston, William Duer, John Sloss Hobart, Abraham Yates, Jr., Robert Yates, Henry Wisner, William Smith, John Broome, Samuel Townsend, Charles DeWitt, and John Morin Scott prepared that draft over the course of several tumultuous months, with the first three named taking the lead roles. *See* Bernard Mason, *The Road to Independence: The Revolutionary Movement in New York 1773–1777*, at 213–49 (1966); 1 Charles Z. Lincoln, *The Constitutional History of New York* 484–539 (1906). The draft apparently originally provided that ''no Judgment or Sentence of the said Court . . . shall extend farther than to removal from office and Disqualification to hold or enjoy any place of Honour, Trust, or Profit under this State. But the party convicted shall nevertheless be afterwards subject to a farther trial in the Supreme Court by a jury of the Country and to such additional Punishment according to the nature of the Offense and the law of the land as the Judgment of the said court shall be inflicted.'' Lincoln, *supra* at 539. On a motion seconded by Jay and Scott, the convention changed the last sentence to its final form. *See* 1 *Journals of the Provincial Congress, Provincial Convention, and Committee of Safety and Council of the State of New-York 1775–1776–1777*, at 878 (1842).

[26] 3 Thorpe, *supra* at 1897 (Massachusetts), 4 *id.* at 2461 (New Hampshire). The somewhat sketchy records of the Massachusetts convention show that this language was included in the draft constitution that provided the starting point for discussion at the convention (and that it had also appeared in the rejected draft constitution of 1778). *See Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts Bay, From the Commencement of Their First Session, September 1, 1779, to the Close of Their Last Session, June 16, 1780*, at 201, 262 (1832). It apparently provoked little or no discussion. When the 1778 draft constitution had been circulated, at least one town included an objection to that document's impeachment judgment clause among its list of criticisms. The town of Sutton attacked the failure to define impeachable offenses clearly, and noted that ''[i]f he has broken any Law, why is not to be tryed by a jury as expressed in Article XXXII, but if he has broken any Law he is to be indited tried and punished beside! so that a Man is to have two trials and two punishments for one crime; the one without Law and another according to Law; shocking to humane Nature! we never know when we are safe, when we are transgressors, or when we have done receiving punishments for a fault or pretended one!'' *The Popular Sources of Political Authority* 236 (Oscar & Mary Handlin, eds., 1966) (''Handlin & Handlin'').

[27] *See* 2 *The Records of the Federal Convention of 1787*, at 39, 53–54, 64–69, 493, 522–23, 545, 550–52 (Max Farrand, ed., rev. ed. 1966) (''Farrand''). In the debate over making the President subject to impeachment, Benjamin Franklin, for example, argued in favor of retaining the impeachment mechanism, noting that, in the absence of a peaceful method for removing the head of state, assassination had often been the only method for achieving the same end. ''It would be the best way therefore,'' he argued, ''to provide in the Constitution for the regular punishment of the Executive when his misconduct should deserve it and for his honorable acquittal when he should be unjustly accused.'' *Id.* at 65, *see also id.* at 68 (''Had [the Prince of Orange] been impeachable, a regular and peaceable inquiry would have taken place and he would if guilty have been duly punished, if innocent restored to the confidence of the public'')

on July 23 gave the assignment of crafting a draft constitution based on the convention's deliberations so far. That committee made its report on August 6.[28] Their report made the Supreme Court the tribunal for trying impeachments, and the Impeachment Judgment Clause appeared in the final section of the their proposed judiciary article.[29] The convention approved it, apparently without division.[30] The Impeachment Judgment Clause remained unchanged throughout the debate over the proper tribunal for trying impeachments and the eventual giving of that responsibility to the Senate.[31] When the Committee of Style and Arrangement near the end of the convention reported the clause in its present terms,[32] it occasioned no debate except a proposal, rejected by the convention, to add a provision that a party impeached be suspended from office until tried and acquitted.[33]

To sum up, then, the Impeachment Judgment Clause was written as part of a draft constitution that made the Supreme Court, not the Senate, the tribunal for trying impeachments. The records of the Convention do not show any discussion of whether the change in the impeachment court had any effect on the meaning of the clause. More broadly, the records do not reflect any substantive discussion of the clause's meaning.

As in the Convention, so during the ratification debates most of the discussion of impeachment concerned the proper tribunal for trying impeachments and the range of impeachable offenses. Critics of the Constitution questioned the Senate's role as the court for impeachments, and several state ratifying conventions proposed alternative bodies, at least for the trial of Senators.[34] References to the Impeachment Judgment Clause were rare.

Some commentators, in describing the Clause, simply repeated its own terms or mentioned only the particular circumstance it explicitly sanctioned: liability

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[28] On the appointment of the committee, *see* 2 *id* at 85, 95–96, 97, 106 The members were John Rutledge of South Carolina, Edmund Randolph of Virginia, Nathaniel Gorham of Massachusetts, Oliver Ellsworth of Connecticut, and James Wilson of Pennsylvania. For their report, *see id.* at 185–89

[29] *See* 2 *id.* at 187.

[30] *See* 2 *id.* at 438 & nn 12–13 As Farrand explains, there is a discrepancy on this score between the convention's printed journal and Madison's notes. *Cf* 2 Story's *Commentaries, supra* § 786, at 254–55.

[31] *See* 2 *Farrand, supra* at 334, 337, 367, 422, 423, 427, 431, 438, 444, 473, 493, 495, 500, 522–24, 530, 545, 551, 554, 587, 592, 612–13

[32] *See* 2 *id* at 585, 592.

[33] *See* 2 *id.* at 612–13.

[34] The defendant in the first federal impeachment, William Blount, was a Senator (or former Senator) The House adopted a resolution of impeachment, the Senate expelled Blount the next day, and several months later the House adopted articles of impeachment *See* 3 Asher C Hinds, *Hinds' Precedents of the House of Representatives* 646–50 (1907) (*"Hinds' Precedents"*)) Blount challenged the Senate's jurisdiction on several grounds, one of which was that Senators are not "civil Officers" and thus not subject to impeachment *See* U S. Const. art II, § 4 The Senate's decision that it lacked jurisdiction has generally been taken as establishing that Senators are not liable to impeachment. *See generally* Buckner F. Melton, Jr , *The First Impeachment. The Constitution's Framers and the Case of Senator William Blount* (1998) At the time of the ratification debates, though, many participants thought Senators (like members of the House of Lords in England) would be subject to impeachment. *See, e.g.*, 2 *The Documentary History of the Ratification of the Constitution* 492 (Merrill Jensen et al , eds. 1976–) ("DHRC") (statement of James Wilson in the Pennsylvania ratifying convention); 4 Elliot's *Debates, supra* at 33 (statement of Mr Taylor in the North Carolina ratifying convention); *see also* Jackson Turner Main, *The Anti-Federalists* 139 & n.73 (1961) (collecting additional remarks in ratification debates assuming that Senators would be subject to impeachment).

to prosecution following conviction by the Senate. Hamilton devoted *Federalist No. 65*, for example, to a defense of the selection of the Senate as the tribunal for trying impeachments. One of his claims for the Senate's superiority over the Supreme Court was that, if impeachments were tried before the Supreme Court, the same body would improperly have final review over each of the two trials to which an impeached official might be subjected. For "[t]he punishment, which may be the consequence of conviction upon impeachment," he noted, "is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country; he will still be liable to prosecution and punishment in the ordinary course of law." [35] Others invoked the Clause in order to defend the Senate's judicial role by stressing the limited nature of its judgments. Tench Coxe, a leading advocate of the Constitution in Pennsylvania, in an essay assessing the roles assigned to the newly designed Congress, parried the contention that the Senate had unwisely been given judicial functions, by pointing out that the Senate "can only, by conviction on impeachment, *remove and incapacitate a dangerous officer*, but the punishment of him as a criminal *remains within the province of the courts of law to be conducted under all the ordinary forms and precautions*, which exceedingly diminishes the importance of their judicial powers." [36] Still other commentators held up the Impeachment Judgment Clause as evidence that the newly created federal executive would not be able to abuse his power without facing severe punishment. A Virginia supporter of the Constitution argued that should the President "at any time be impelled by ambition or blinded by passion, and boldly attempt to pass the bounds prescribed to his power, he is liable to be impeached and removed from office; and afterwards he is subject to indictment, trial, judgment, and punishment according to law." [37]

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[35] *The Federalist No 65*, at 442 (Jacob E Cooke, ed , 1961); *see also The Federalist No 69*, at 463 (Alexander Hamilton) ("The President of the United States would be liable to be impeached, tried, and upon conviction of treason, bribery, or other high crimes or misdemeanors, removed from office, and would afterwards be liable to prosecution and punishment in the ordinary course of the law"), *The Federalist No. 77*, at 520 (Alexander Hamilton) (the President is "at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to the forfeiture of life and estate by subsequent prosecution in the common course of law").

[36] An American Citizen II, 2 DHRC, *supra* at 143; *see also* A Democratic Federalist, *id* at 297 (The Senate "can take no cognizance of a private citizen and can only declare a dangerous public officer no longer worthy to serve his country. To punish him for his crimes, in body or estate, is not within their constitutional powers. They must consign him to a jury and a court, with whom the deprivation of his office is to be no proof of guilt"); An American Citizen IV, 13 DHRC, *supra* at 434, A Patriotic Citizen, 18 DHRC, *supra* at 10 ("the people . . are not only vested with the power of election of impeachment, and dismission from office for misdemeanors, and of further punishing the culprits by the violated laws of their country")

[37] *Americanus I*, 8 DHRC, *supra* at 203 William Symmes, a delegate to the Massachusetts Ratifying Convention, noted the same checks in a letter to a friend but questioned whether they would be effective· "If [the President] make a bad treaty, what then? Why he may be impeached, if anybody dares impeach him before ye very Senate that advised ye measure And if convicted, what? He shall be removed from his office, & perhaps disqualified to hold any other And after this he may chance to lose his head by a trial at Law, if ye Judges, whom he has appointed, will bid ye Jury to convict him." Letter from William Symmes, Jr., to Peter Osgood, Jr., 14 DHRC, *supra* at 113–14, *see also* James Iredell in the first North Carolina Ratifying Convention, 4 Elliot's *Debates*, *supra* at 114 ("The punishment annexed to this conviction on impeachment can only be removal from office, and disqualification to hold any place of honor, trust, or profit But the person convicted is further liable to trial at common

Continued

These remarks on the Impeachment Judgment Clause reflect the two concerns motivating it. Because impeachment was designed to serve above all as a legislative check on executive power,[38] the Impeachment Judgment Clause was intended to make sure both that the special legislative court for the largely political offenses justifying impeachment would be able to impose only political, not ordinary criminal, punishments and that offenders who also violated regular criminal laws would not stand above the law because they had been officeholders when they committed their misdeeds. Presumably, these commentators did not address the consequences of acquittal by the Senate because that was not a subject the Impeachment Judgment Clause addressed. Indeed, if the Impeachment Judgment Clause were intended to imply that acquittal by the Senate would block criminal prosecution for the same offenses, one would expect that at least one participant in the process of framing and ratifying the Constitution would have pointed out this negative implication. We are aware of none.

Two well-informed participants did, however, understand the Impeachment Judgment Clause to imply that an acquittal, like a conviction, would not bar criminal prosecution for the same offences. James Wilson, a leading figure at the Constitutional Convention (and member of the Committee of Detail, which drafted the Impeachment Judgment Clause), and at the Pennsylvania ratifying convention, and later an Associate Justice of the Supreme Court, revealed such an understanding in remarks during the Pennsylvania ratifying convention. Assuming, as many did during the ratification debates, that Senators as well as executive and judicial officers would be liable to impeachment, Wilson responded to the charge that the Senate could not serve as an effective impeachment court for its own members. Noting that one third of the Senate faced re-election every two years, Wilson suggested that voters would throw out those who behaved improperly and that enough new Senators would regularly be added so that personal connections or collective involvement in the impeachable acts would not prevent fair trials. Moreover, he argued, "Though they may not be convicted on impeachment before the Senate, they may be tried by their country; and if their criminality is established, the law will punish."[39] Edmund Pendleton, the President of the Virginia Supreme Court and of the Virginia Ratifying Convention, apparently interpreted the Impeachment Judgment Clause in this way as well. Shortly after the comple-

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law, and may receive such common-law punishment as belongs to a description of such offences, if it be punishable by that law"); 4 *id.* at 45 (Mr. MacLaine, repeating Impeachment Judgment Clause verbatim and observing: "Thus you find that no offender can escape the danger of punishment").

[38] Judges were made subject to impeachment near the end of the Constitutional Convention, after nearly all of the substantive discussion of the impeachment power had taken place *See* 2 Farrand, *supra* at 545, 552 That discussion focused on relations between the legislature and the executive

[39] 2 DHRC, *supra* at 492. Wilson was also the one who, three years later, proposed the change from "the party convicted" to "the party, whether convicted or acquitted" in the Pennsylvania constitution of 1790 *See supra* n.9 It is unclear what conclusion, if any, to draw from Wilson's role in re-wording the impeachment judgment clause in the Pennsylvania constitution — whether it suggests that he thought his initial reading of the federal impeachment judgment clause was erroneous or whether he was instead seeking to clarify something that he thought was implicit in the wording of the federal clause

tion of the Constitutional Convention, Madison sent Pendleton a copy of the Constitution for his consideration. In his generally favorable response, Pendleton confessed his leeriness of impeachments because of their susceptibility to partisan misuse, but noted that the impeachment power "is in the hands of the House of Representatives, who will not use it in the case Supposed, or if they do, and meet the obstruction, may yet resort to the courts of Justice, *as an Acquital would not bar that remedy.*" [40]

At least some participants in the first federal impeachment trial, that of Senator William Blount of Tennessee in 1798, shared Wilson's and Pendleton's understanding of the Impeachment Judgment Clause. In a debate over whether an impeachment trial was a criminal proceeding and thus whether the House should instruct the managers to request that the Senate compel the defendant's appearance, Samuel Dana, a Representative from Connecticut, observed that "[w]ere the offence to be considered as a crime, merely, the judgment of the court should involve the whole punishment; whereas, it has no connexion with punishment or crime, as, whether a person tried under an impeachment be found guilty or acquitted, he is still liable to a prosecution at common law." [41]

Two of our earliest and most eminent commentators on the Constitution also addressed the implications of the Impeachment Judgment Clause for Senate acquittals. St. George Tucker, a distinguished jurist and editor of an edition of Blackstone's *Commentaries* that gained widespread use in the early nineteenth-century United States, included the first extended commentary on the new federal constitution since the ratification debates as an appendix to his edition of Blackstone. In a section questioning the wisdom of making the Senate the tribunal for trying impeachments, Tucker acknowledged that "a person convicted upon an impeachment, shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law." In a footnote he then added: "And as a conviction upon an impeachment, is no bar to a prosecution upon an indictment, so perhaps, an acquittal may not be a bar." [42] If Tucker thought the implication of the Impeachment Judgment Clause that Senate acquittals would be no bar to criminal prosecution was only possible, Justice Story seemed to take the point for granted in his 1833 *Commentaries on the Constitution.* Story observed that if the Senate had been given the authority to mete out regular criminal punishments, "then, *in case of an acquittal*, there cannot be another trial of the party for the same offence in the common tribunals of justice" because the common law double jeop-

[40] Letter from Edmund Pendleton to James Madison, Oct 8, 1787, 10 DHRC, *supra* at 1773 (emphasis added). On Oct. 28, Madison responded to Pendleton's long letter with a short one, stating, "The remarks which you make on the Act of the Convention appear to me to be in general extremely well founded" 10 *The Papers of James Madison* 223 (1977). Madison then mentioned two particular points: the prohibition in Article I, Section 9, Clause 6 on states establishing customs duties, and the prohibition in article 6 on religious tests for federal office. The rest of the letter was about the prospects for ratification in the various states. *See id.* at 223–24 Pendleton's response to Madison's Oct. 28 letter has apparently been lost *See id.* at 444

[41] 9 Annals of Congress 2475 (1798).

[42] 1 St. George Tucker, *Blackstone's Commentaries* 337 & n.* (Philadelphia, William Y. Birch et al. 1803, reprint 1996) ("Tucker's Blackstone")

ardy principle would forbid it.[43] Without the Impeachment Judgment Clause, Story contended, "it might be a matter of extreme doubt" whether, in light of the double jeopardy rule, "a second trial for the same offence could be had, *either after an acquittal*, or a conviction in the court of impeachments."[44] In Story's view, the Impeachment Judgment Clause removed any doubt about a double jeopardy bar in the case of Senate acquittals no less than in the case of Senate convictions.

c. Reading the Impeachment Judgment Clause as a Whole

That two participants in the ratification process and a number of other early readers of the Constitution did not understand "the party convicted" as containing a negative implication concerning parties acquitted by the Senate fits our understanding of the role of the Impeachment Judgment Clause as a whole. The clause as a whole serves to make clear how the methods for punishing misconduct by high officials in the new American national government would differ from those in the English system. Indeed, the clause might well be called the Impeachment Conviction or Impeachment Punishments Clause.[45] Again, in England, the House of Lords could not only remove officials from office and disqualify them from holding office, but also impose a full range of criminal punishments on impeachment defendants, including, for example, banishment, forfeiture of estate, imprisonment, and death. In the new American national government, the first sentence of the Impeachment Judgment Clause establishes that the Senate would be limited to the first two sanctions: removal and disqualification. That restriction would raise the question whether the other punishments the founding generation was accustomed to seeing imposed by the House of Lords could be imposed at all under the new American government. If the Senate could not impose such sanctions, perhaps nobody could. In support of that view, the phrase "Judgment in cases of impeachment" might have been read to mean the entire group of sanctions imposed by any tribunal considering a case arising from facts that led to an impeachment.[46] The Impeachment Judgment Clause's second part makes clear that the restriction on sanctions in the first part was not a prohibition on further punishments; rather, those punishments would still be available but simply not

[43] 2 Story's *Commentaries*, *supra* at 250 (emphasis added)

[44] *Id* at 251 (emphasis added) Story's reasoning does not seem to us to be entirely clear He does not directly address the significance of the phrase "the party convicted." Although much of his discussion of the function of the final sentence of the Impeachment Judgment Clause is focused on, if not limited to, parties convicted by the Senate, his ultimate description of that sentence seems clearly to assume that it creates no bar to prosecution following acquittal by the Senate

[45] In using the term "Impeachment Judgment Clause," we follow Laurence Tribe *See* 1 Laurence Tribe, *American Constitutional Law* 159 n.32 (3d ed 2000)

[46] While such a broad reading of "Judgment in cases of impeachment" seems in tension with the apparently narrower meaning of the phrase "cases of impeachment" in the jury trial guarantee, *see* U S Const. art. III, § 2, cl 3, Madison used the same phrase in his proposal for the Double Jeopardy Clause in a way that comports with the broader meaning "No person shall be subject, except in cases of impeachment, to more than one punishment, or one trial for the same offence." *Creating the Bill of Rights The Documentary Record from the First Federal Congress* 12 (Helen E Veit, Kenneth R. Bowling & Charlene Bangs Bickford, eds., 1991) ("Veit").

to the legislature. The courts would be the bodies entrusted with imposing those punishments even on high officials. The clause's final sentence ensured that high officials would be fully punished for their misdeeds. Thus, because the clause addressed a problem concerning the nature of punishments and the institutions entrusted with imposing them—a problem created by the American break from longstanding English practice—it simply had no need to address the effect of acquittal by the Senate.

d. Impeachment and Jeopardy: Early Understandings

We recognize that the final sentence of the Impeachment Judgment Clause might be read instead as a partial response to a perceived double jeopardy problem raised by that very American innovation. Indeed, the *expressio unius* argument sketched earlier in this memorandum rests on the assumption that the founders understood an impeachment trial as an instance of jeopardy within the meaning of the double jeopardy rule and consciously chose to override that rule in the case of Senate convictions but not acquittals. We find that assumption hard to square with the little evidence we have concerning the framers' and ratifiers' understanding of the possible applicability of the double jeopardy rule to the novel impeachment proceeding created by the Constitution in which the only sanctions upon conviction were removal and disqualification.

The principle of double jeopardy, though not called by that name, was well known at the time of the founding. And some participants in the process of drafting and ratifying the Constitution may well have thought that the restriction of impeachment sanctions to removal and disqualification did not remove impeachment trials from the principle's operation. The citizens of Sutton, Massachusetts, for example, responding in 1778 to a draft state constitution that included an impeachment judgment clause very similar to what was later included in the federal constitution, expressed their conviction that a provision for "two trials and two punishments for one crime" was "shocking to humane Nature!" [47]

We think it unlikely, though, that most of the framers or ratifiers had such a clear view that the double jeopardy rule applied to the new species of impeachment trial they had created. Indeed, the formulations of the rule in the sources upon which the framers and ratifiers most heavily relied restricted its reach to cases where the defendant's life was at stake. Blackstone, for example, stated the governing maxim as "no man is to be brought into jeopardy of his life, more than once, for the same offence." [48] Other leading writers on criminal law

[47] Handlin & Handlin, *supra* at 236. *See supra* n 26

[48] 4 Blackstone's *Commentaries*, *supra* at 329

expressed the principle in similar terms.[49] When, just two years after the drafting of the Constitution, the First Congress proposed a double jeopardy clause as part of the Bill of Rights amendments, it too restricted the principle's reach, using the phrase "life or limb." Even if "life" and "life or limb" in this context were understood to encompass all felonies,[50] and thus some statutory offenses for which the penalties were significant terms of imprisonment, those expressions still limited the reach of the double jeopardy principle to cases where at least the defendant's liberty was at stake.[51] On that understanding, a proceeding in which conviction could bring no more than removal and disqualification simply did not amount to an instance of jeopardy.

A number of comments by participants in the framing and ratification of the Constitution support this view of the relationship between the double jeopardy rule and the new American impeachment process. Those comments interpret the restriction of impeachment sanctions to removal and disqualification as a decisive break with the English practice of criminal punishments in impeachments and thus view those limited sanctions as distinct from the normal criminal punishments that were necessary to place someone in jeopardy.

At the Constitutional Convention, Gouverneur Morris explained his shift from opposition to, to support of, Presidential impeachment in part based on the limited nature of the punishments the court of impeachment should be empowered to impose. "Our Executive," Morris explained, "was not like a magistrate having a life interest, much less like one having an hereditary interest in his office. He may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard agst it by displacing him. . . . The Executive ought therefore to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment. For the latter he should be punished not as a man, but as an officer, and punished only by degradation from office." [52] Morris thus clearly distinguished between mere removal from office, a sanction aimed at protecting the public from corrupt or otherwise dangerous officials, and regular criminal punishments, aimed at preventing crime by invading the offender's liberty or property.

Participants in the ratification debates similarly pointed out that the punishments imposable by the Senate were political, not criminal, sanctions, aimed more at protecting the integrity of the government than at penalizing the offender. Tench

[49] *See* 2 Hawkins, *supra* at 524 ("a man shall not be brought into danger of his life for one and the same offence, more than once"), Wood, *supra* at 664 ("For one shall not be brought into Danger of his Life for the same offence, more than Once")

[50] For discussions of the possible meanings of "life or limb," *see* Thomas, *supra* at 119–22 (1998), Stephen N. Limbaugh, Jr., *The Case of Ex Parte Lange (or How the Double Jeopardy Clause Lost Its "Life or Limb")*, 36 Am. Crim L. Rev 53, 65–66 (1999), Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 Yale L J 1807, 1810–12 (1997)

[51] Admittedly, the one revolutionary state constitution that contained a double jeopardy clause did not contain such a limiting phrase. *See supra* n.19.

[52] 2 Farrand, *supra* at 68–69

Coxe, in one of his *American Citizen* essays, stressed that the Senate "can only, by conviction on impeachment, *remove and incapacitate a dangerous officer*, but the punishment of him as a criminal *remains within the province of the courts of law.*" [53] In another essay, Coxe made the same point more fully. The Senate, as the impeachment court, "can produce no punishment in person or property, *even on conviction.* Their whole judicial power lies within a narrow compass. They can take no cognizance of a private citizen and can only declare any dangerous public officer no longer worthy to serve his country. To punish him for his crimes, in body or estate, is not within their constitutional powers." [54] In the first North Carolina ratifying convention, William Lenoir made the same point more concisely. The punishment for conviction on impeachment, he noted, was "[o]nly removal from office and future disqualification. It does not touch life or property." [55] Thus, if they thought about a double jeopardy problem at all, many among the framers and ratifiers probably thought the restriction on impeachment sanctions in the first part of the Impeachment Judgment Clause took care of the problem. Whether for that reason or because they thought the Impeachment Judgment Clause simply did not address the issue, James Wilson and Edmund Pendleton concluded (as did Representative Dana, Justice Story, and perhaps St. George Tucker) that the Impeachment Judgment Clause allowed prosecution following acquittal by the Senate.

The *expressio unius* reading of the Impeachment Judgment Clause assumes that the founding generation understood an impeachment trial to be an instance of jeopardy within the meaning of the double jeopardy rule. The evidence on point is sparse, but much of it supports the opposite conclusion, namely, that the framers and ratifiers believed that an impeachment trial where only removal and disqualification were at stake did not constitute an instance of jeopardy.

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[53] 2 DHRC, *supra* at 143.

[54] 2 DHRC, *supra* at 297, *see also* 13 *id.* at 434 ("In all criminal cases, where the property, liberty, or life of the citizen is at stake, he has the benefit of a jury. If convicted on impeachment, which is never done by a jury in any country, he cannot be fined, imprisoned, or punished, but only may be disqualified from doing public mischief by losing his office, and his capacity to hold another")

[55] 4 Elliot's *Debates, supra* at 204; *but see Federalist No. 65*, at 442 (Alexander Hamilton) (referring to the Senate's power to dispose of an impeachment respondent's "fame and his most valuable rights as a citizen"); 2 Elliot's *Debates, supra* at 45 (comment of Gen. Brooks at the Massachusetts ratifying convention that disqualification from federal office "is great punishment"), *cf Proceedings of the U.S. Senate in Impeachment Trial of Alcee L. Hastings*, S Doc. 101–18, at 736 (1989) ("Hastings Trial Proceedings") (statement of Sen Specter) We find the use of the word "punishment" in these debates of little significance in resolving the double jeopardy question addressed here. As we explain more fully below, many sanctions that in common parlance might be characterized as punishments are not criminal punishments within the meaning of the double jeopardy rule For example, one might speak of a civil forfeiture as a form of punishment, but it does not normally constitute criminal punishment triggering the protection of the Double Jeopardy Clause *See United States v. Ursery*, 518 U.S. 267, 274–88 (1996). Moreover, a number of these statements using the word "punishment" point out precisely how limited the "punishments" available upon conviction by the Senate were *See, e.g.*, 2 DHRC, *supra* at 297 (statement of Tench Coxe), 4 Elliot's *Debates, supra* at 114 (statement of James Iredell in North Carolina ratifying convention).

B. Structural Considerations

Our examination of the Impeachment Judgment Clause's text and history reveals little support for reading into it an implied prohibition on the criminal prosecution of those acquitted by the Senate. At the same time, while there is some support in the history for the proposition that criminal trial could follow Senate acquittal, that evidence is hardly decisive. Text and history ultimately leave the question unresolved. Given that basic uncertainty, three structural considerations lead us to conclude that acquittal by the Senate should not prevent regular prosecution. The first rests on the special function of impeachment within the scheme of separation of powers. The second and third rest on the distinctive qualities of impeachment verdicts by the Senate as compared to verdicts by criminal juries.

The first structural consideration is perhaps the most fundamental. Impeachment and criminal prosecution serve entirely distinct goals. Impeachment is one of several tools placed in the hands of Congress in order to enable it to check the other branches and thus to maintain the proper separation of powers. The limitation on impeachment sanctions to removal and disqualification from office and the requirement that removal be mandatory upon conviction show that impeachment is designed to enable Congress to protect the nation against officers who have demonstrated that they are unfit to carry out important public responsibilities, not to penalize individuals for their criminal misdeeds. The limitation on sanctions imposable by the Senate reflects the conviction that the national legislature is not to be trusted with dispensing criminal punishments, sanctions aimed not at protecting the integrity of the government's operations but at penalizing individuals by taking away their life, liberty, or property. Thus the Impeachment Judgment Clause's limitation on Senatorial sanctions is of a piece with the Bill of Attainder Clause and the Ex Post Facto Clause, provisions in the Constitution also aimed at breaking decisively with the long English practice of legislatively imposed punishments. Under our constitutional system, the job of determining guilt that may result in criminal punishment is reserved to the courts, where both the original Constitution and the Bill of Rights ensure that individuals will not suffer those especially severe sanctions without being afforded a number of procedural protections. Impeachment serves the remedial and protective function of guarding the government's integrity and thus its effective functioning, a function appropriately entrusted to the legislature. Trials that may lead to the imposition of criminal punishments must be supervised by the courts, the branch of the national government both suited and required to guard the defendant's procedural rights.[56]

[56] As James Wilson put it in his Law Lectures of 1792, "Impeachments, and offences and offenders impeachable, come not in those descriptions, within the sphere of ordinary jurisprudence They are founded on different principles; are governed by different maxims, and are directed to different objects." 1 *The Works of James Wilson* 408 (James D Andrews, ed., 1896). The staff of the House Judiciary Committee made the same point at the time of the investigation of President Nixon: "Impeachment and the criminal law serve fundamentally different purposes Impeachment is the first step in a remedial process—removal from office and possible disqualification from holding future office. The purpose of impeachment is not personal punishment, its function is primarily to maintain constitutional govern-

A second, closely related structural consideration favoring prosecution following acquittal by the Senate is that an acquittal by the Senate may well rest on a legal judgment rather than on a judgment that the respondent did not commit the acts alleged in the articles of impeachment, that is, a judgment that the respondent is not factually guilty. Most often that non-factual basis for acquittal will be that although the respondent carried out the charged acts, those acts do not amount to "high crimes or misdemeanors."[57] Sometimes, though, it may be that the Senate lacks the authority to try the respondent. Indeed, of the eight instances in which the Senate has failed to convict officers impeached by the House, most may fairly be attributed in significant part either to qualms about the charged conduct meeting the constitutional standard for impeachable offenses or to jurisdictional doubts.[58] It makes little sense for a judgment unrelated to factual guilt to prevent bringing a former official to justice for criminal conduct. As the Supreme Court has explained in justifying the distinction between re-trials following reversals of convictions due to trial errors and those due to evidentiary insufficiency, "it would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States v. Tateo*, 377 U.S. 463, 466 (1964); *see Burks*, 437 U.S. at 15–16. Similarly, it would be a high price indeed for society to pay for every accused official spared removal from office by the Senate's judgment that the offense fell short of the constitutional standard, or that it lacked the authority to try the official, to be free — unlike citizens possessing no federal office — from prosecution for criminal conduct.

Of course, in the case of trials before the courts our double jeopardy jurisprudence does give *jury* verdicts of not guilty, regardless of their basis, an absolutely prohibitive effect on re-trials for the same offenses. *See, e.g., Sanabria v. United States*, 437 U.S. 54, 64, 75 (1978). While jury verdicts of not guilty are normally based on insufficiency of the government's proof, they may be based as well on jurors' judgments unconnected to the defendant's factual innocence, for example, on their disagreement with the judge's statement of the governing law, their belief that the likely punishment is excessive, or their disapproval of what they take to be improper prosecutorial motives or methods. Although juries lack

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ment." Staff of the House Comm on the Judiciary, 93d Cong., 2d Sess., *Constitutional Grounds for Presidential Impeachment* 24 (Comm Print 1974); *see also Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr., A Judge of the United States District Court for the Southern District of Mississippi*, S. Doc 101–22, at 36 (1989) ("Walter Nixon Trial Proceedings") (brief of the House of Representatives in support of the articles of impeachment: "Impeachment is not a criminal proceeding. It is a remedial process designed to protect our institutions of government and the American people from individuals who are unfit to hold positions of public trust")

[57] *Cf.* Hoffer & Hull, *supra* at 114 (statement of Edmund Burke in impeachment trial of Warren Hastings "The labour will be on the criminality of the facts, where proof, as I apprehend, will not be contested")

[58] *See*, for example, the cases of Senator William Blount (1799); Associate Justice Samuel Chase (1805); District Judge James H. Peck (1831), President Andrew Johnson (1868), Secretary of War William W. Belknap (1876); District Judge Charles Swayne (1905)

the legal right to engage in such nullification absent legislative authorization, *see Sparf & Hansen v. United States*, 156 U.S. 51, 59–107 (1895), they undoubtedly possess the power to do so.[59] If juries' ability to acquit against the evidence does not diminish the effect of their acquittals as bars to successive prosecutions, why should the Senate's authority to acquit on legal grounds justify relaxing the double jeopardy effect of their acquittals?

The difference between the two cases lies in the different functions served by the Senate in an impeachment trial and by a jury in a criminal trial. The Senate's verdict is different from a criminal jury's in two crucial respects.

First, except in cases of treason or bribery, the Senate's judgment, unlike a jury's, inescapably involves a crucial legal judgment: whether the conduct charged constitutes a "high crime or misdemeanor." The jury in a criminal trial is above all a fact-finder; at least in the federal system, its ability to nullify based on its own view of the law is tolerated only because it is essential to preserving the independence of juries from judicial coercion and second-guessing. While the Senate in an impeachment trial takes on the jury's role of fact-finder, it also assumes the judge's role of interpreter of the governing law. Far from constituting a power necessary to protect another function, the Senate's judgment whether the charged offenses constitute "high crimes and misdemeanors" is an essential part of its function, one entrusted to it by the Constitution.

Second, and more importantly, the Senate's verdict differs from a jury's because the legal judgment the Senate must make is also a special kind of political judgment. The drafters of the Constitution probably assigned the Senate, rather than the regular courts, the task of trying impeachments in part because they recognized that impeachment trials necessarily involve making political judgments. As Hamilton observed in *Federalist 65*, impeachable offenses "are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[60] The Senate's judgment is political in two senses. The uncertain contours of the phrase "high crimes and misdemeanors" mean they must in each case determine whether the charged conduct constitutes a sufficiently serious breach of the public trust to warrant conviction. That determination will appropriately draw on their knowledge of history, their understanding of the character of the office involved, and their realistic appraisal of the derelictions charged. Their determination will necessarily be shaped by the Constitution's mandate that conviction means removal from office. U.S. Const. art. II, § 4. In order to convict an officer, they must be convinced that his conduct merits his loss of position. In the case of the President, who has been elected

[59] *See also* Richard St. John, Note, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking*, 106 Yale L.J. 2563 (1997). Indeed, some leading commentators have suggested that the absoluteness of the double jeopardy bar created by jury acquittals can be explained only as a shield of the jury's authority to nullify. *See* Peter Westen & Richard Drubel, *Toward A General Theory of Double Jeopardy*, 1979 Sup. Ct. Rev. 81, 122–55 (1978).

[60] *The Federalist*, *supra* at 439; *see also* 1 *The Works of James Wilson*, *supra* at 408.

by the entire nation (and who cannot remain in office for more than four years without again facing the electorate), they must decide whether to undo the will of the people.[61] Moreover, the necessary link between conviction and removal introduces a second political dimension to the Senate's judgment as well. Even if they conclude that the charged conduct would normally merit removal, they must weigh the strength of that conviction against their judgment about the harmful consequences for the nation of removal at a particular moment in our nation's history. If, for example, our country were in the midst of a war, the Senate might well conclude that an acquittal of the President would be the wiser course simply because his removal would be too costly to the successful prosecution of the war.

The necessarily legal and political judgment embodied in a Senate acquittal is distinct from a determination whether the charged conduct violates the regular criminal laws and does not turn on the determination of factual guilt or innocence. It is ultimately the unreviewability of the jury's making of that factual determination that drives the absoluteness of the ban on re-trial for offenses of which a jury has acquitted a defendant. No such institutional imperative requires a similar ban following Senate acquittals. On the contrary, the unavoidably legal and political character of Senate acquittals suggests the inappropriateness of such a ban.[62]

A third structural reason that acquittal by the Senate should not prevent criminal prosecution flows from the framers' concern that partisan loyalties or popular sentiment might influence the Senate's decision to convict or acquit. One of the

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[61] One might argue that if the President's alleged conduct violates a regular criminal law, and the Senate acquits based on a judgment that the conduct does not amount to a high crime or misdemeanor and thus does not merit removal, a ban on post-acquittal prosecution would not impose a serious cost given the double jeopardy principles arguably at stake. Even if an impeachment trial is not technically a criminal proceeding and thus the defendant has not been placed in jeopardy within the meaning of the double jeopardy rule, he has still been subjected to an expensive, trying public ordeal. His accusers have still had a chance to try out their evidence and arguments, a dry run from which subsequent prosecutors may derive advantage. Thus criminal prosecution after an impeachment acquittal arguably still implicates some of the concerns that underlie the double jeopardy rule. Given those concerns, the need to prosecute an offense the Senate has determined does not warrant removal might not be thought sufficient to tip the scale in favor of allowing prosecution following Senate acquittal.

Whatever force this objection may have, we think it does not bear on the question of whether indictment is constitutionally permissible. It simply does not address the fact that the Constitution gives the Senate a judgment to make—whether the charged acts warrant removal from office—that is distinct from the judgment placed in the hands of a criminal jury. Moreover, this argument does not account for the possibility that the Senate might conclude, given the circumstances of the nation at the time, that removal is not an appropriate political remedy even for a serious crime.

[62] *Accord* Charles L. Black, Jr., *Impeachment: A Handbook* 40–41 (1974); 1 Tribe, *supra* at 160.

In *Ashe v. Swenson*, 397 U.S. 436 (1970), the Court held that the Double Jeopardy Clause incorporates the rule of collateral estoppel in criminal cases. *See also Brown v. Ohio*, 432 U.S. 161, 166 n.6 (1977). It thus bars successive prosecutions even in some instances where the offenses are not the same. The court in the second prosecution must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 U.S. at 444 (citation and internal quotation marks omitted). Based on this principle, which the Court has also held is incorporated by the Due Process Clause, *see id.* at 445, a party acquitted by the Senate might argue that if the record of the Senate trial shows that the Senate could only rationally have based its acquittal on rejection of a factual finding necessary to his subsequent conviction, the subsequent prosecution would be barred. We express no view about the correctness of this legal argument. Even if one were to accept it, though, given the varied non-factual bases on which the Senate might acquit and the difficulty of ascertaining the basis for a decision by a body with one hundred independently-minded members, we think the required showing would be exceedingly difficult to make.

reasons the framers limited the punishments for conviction on impeachment was their fear that impeachments were liable to partisan abuse. As Hamilton noted in *Federalist 65*, "[t]he prosecution of them . . . will seldom fail to agitate the passions of the whole community, and to divide it into parties, more or less friendly or inimical, to the accused. In many cases, it will connect itself with pre-existing factions, and will inlist all their animosities, partialities, influence and interest on one side, or on the other; and in such cases there will always be the greatest danger, that the decision will be regulated more by the comparitive strength of parties than by the real demonstrations of innocence or guilt." [63] The Constitution's requirements that Senators take an oath before convening as an impeachment court and that a two-thirds vote is necessary for conviction were designed to guard against the influence of these political forces. *See* U.S. Const. art. I, § 3, cl. 6. Its specification that the Chief Justice rather than the Vice President should preside when the President is tried reflects a similar concern with impeachment verdicts being swayed by immediate political interests. *See id.* If the Vice President presided, he might encourage conviction so as to boost himself into the Presidency, especially if the Vice President and President were rivals, a realistic possibility before the 12th Amendment reformed the electoral college in 1804. But, as a number of participants in the ratification debates pointed out, partisanship and transitory political passions may sway the Senate to acquit as well as to convict.[64] Just as the possibility of partisan convictions helps explain the limitation on impeachment punishments and the lifting of the double jeopardy bar for Senate convictions, so the possibility of partisan acquittals supports the lifting of the double jeopardy bar for Senate acquittals.

C. The Double Jeopardy Clause

The Double Jeopardy Clause of the Fifth Amendment provides that "[n]o person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. For several reasons, we think a party acquitted by the Senate may not rely on the Double Jeopardy Clause as a bar to prosecution in the courts for the same offenses.

1. Original Understandings

First, the history of the Double Jeopardy Clause suggests that its drafters understood the phrase "in jeopardy of life or limb" to exclude impeachment proceedings. The Clause's legislative history, like that of the Bill of Rights amendments as a whole, is sparse. We know that in Madison's proposal to the House,

[63] *Id.* at 439–40

[64] *See, e.g.*, Letter from William Symmes, Jr., to Peter Osgood, Jr , 14 DHRC, *supra* at 113–14, 4 Elliot's *Debates*, *supra* at 45–46 (statement of Mr. Taylor in North Carolina ratifying convention), *id.* at 117 (statement of Mr. Spencer); *id* at 125 (statement of Mr Porter)

what became the Double Jeopardy Clause was expressed in these terms: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence."[65] Several House members suggested deleting the phrase "or one trial," but their motion was defeated.[66] The version adopted by the House followed Madison's phrasing.[67] In response, the Senate initially adopted a version of the clause that deleted the reference to impeachment and added the phrase "life or limb": "No person shall be subject to be twice put in jeopardy of life or limb by any public prosecution for the same offence."[68] The Senate adopted the ultimate wording by omitting "by any public prosecution" when it combined the double jeopardy provision with the other clauses that make up what became the Fifth Amendment.[69]

One might argue that the Senate's deletion of the House's exception for impeachments suggests an intent to include impeachments within the Double Jeopardy Clause's scope.[70] But while we lack direct evidence of the purpose of the Senate's change in language, that explanation seems unlikely. The wording of related amendments suggests that a more likely explanation for the removal of the exception for impeachments was a recognition that the use of the phrase "life or limb" by itself restricted the reach of the clause to a subset of ordinary criminal cases. In Madison's original proposal, the jury trial and grand jury guarantees had been grouped together in an amendment separate from the double jeopardy guarantee. The jury trial provision included an express exception for impeachments and the grand jury clause an implicit one: "The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service in time of war, or public danger,) shall be by an impartial jury of the vicinage . . . ; and in all crimes *punishable with loss of life or member*, presentment or indictment by a grand jury shall be an essential preliminary."[71] Clearly impeachments, not indictments, were the preliminary step toward trial before the Senate. The emphasized phrase seems to have been under-

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[65] 1 Annals of Cong 451–52 (Joseph Gales, ed., 1789), Veit, *supra* at 5

[66] *Id.* at 180, 186–87, 199.

[67] *Id.* at 39.

[68] *Id* at 39 n.4, *The Complete Bill of Rights* 301 (Neal Cogan ed., 1997) ("Cogan") As noted above, two state ratifying conventions, Maryland's and New York's, had proposed amendments including a double jeopardy guarantee *See* 2 Elliot's *Debates*, *supra* at 550; 4 Schwartz, *supra* at 912. The wording of the New York proposal was: "That no Person ought to be put twice in Jeopardy of Life or Limb for one and the same Offence, nor, unless in case of impeachment, be punished more than once for the same Offence " *Id* The Senators from New York were Rufus King and Philip Schuyler. 9 *Documentary History of the First Federal Congress* xxix (Kenneth R. Bowling & Helen E Veit eds., 1988). King had been a delegate to the Constitutional Convention (from Massachusetts), *see* 3 Farrand, *supra* at 557, but neither he nor Schuyler had been members of the New York ratifying convention, 2 Elliot's *Debates*, *supra* at 206–07

[69] Veit, *supra* at 39 n 14; Cogan, *supra* at 302–07

[70] *See Hastings Trial Proceedings*, *supra* at 736 (statement of Sen Specter).

[71] Veit, *supra* at 13

stood to exclude impeachment proceedings[72] and to identify a group of serious crimes, probably most if not all felonies (when tried in the regular courts).[73] The Senate's substitute for the House version of the Double Jeopardy Clause omitted the express exception for impeachments and added the phrase "life or limb" in one fell swoop. Given Madison's earlier restrictive use of the similar phrase "loss of life or member," it makes more sense to understand the Senate's deletion of the impeachment exception as an acknowledgment that the use of "life or limb" made the express exception for impeachments unnecessary than to view the deletion in isolation as an attempt to bring impeachment within the Double Jeopardy Clause's reach.

Second, our interpretation of the legislative history of the Double Jeopardy Clause fits with the dominant understanding of the reach of the double jeopardy rule at the time of the founding. As we explained above, under that understanding the rule was limited to proceedings that placed the defendant in risk of at least liberty if not life, and thus a trial in which removal and disqualification are the only possible sanctions does not fit within the rule.[74]

2. Current Double Jeopardy Doctrine

The Court uses a two-step approach to determining whether a proceeding constitutes an instance of jeopardy. First, it looks to the legislature's intent. *See, e.g., Hudson*, 522 U.S. at 103. If the legislature intended the proceeding to be criminal, then the Double Jeopardy Clause applies. If the legislature intended the proceeding to be civil, then the Court looks to a series of factors designed to identify criminal punishments. If those factors clearly show that the legislature has provided for the imposition of criminal punishment, the Double Jeopardy Clause will apply despite the legislature's claim that the proceeding is civil.

At both the first and second steps of this method, we think the better view is that an impeachment trial does not constitute an instance of jeopardy within the meaning of the Double Jeopardy Clause.

At the first step, one might argue that the references to impeachment in the Constitution suggest that it is a criminal proceeding. Article III, Section 2, Clause 3 mandates that the "Trial of all Crimes, except in cases of impeachment, shall be by Jury." Article II, Section 4's definition of impeachable offenses limits that group to treason, bribery "or other high Crimes and Misdemeanors." The Presi-

[72] This is so despite the fact that one of the two impeachable offenses specified in the Constitution was treason, which was punishable in the regular English courts by death (and was made a capital crime by the first federal criminal statute, *see* Act of Apr 30, 1790, ch. ix, 1 Stat. 112).

[73] The House substituted the phrase "capital, or otherwise infamous crime," but apparently without any change in meaning intended. *See* Cogan, *supra* at 266–67, 269–70. Roger Sherman of Connecticut had proposed the phrase "any crime whereby he may incur loss of life or any infamous punishment." *Id.* at 266.

[74] *See supra* pp. 125–26, 128–30.

dent's pardon power, in Article II, Section 2, Clause 1, extends to all "Offenses against the United States, except in cases of impeachment." [75]

We find this view unconvincing for several reasons. First, the uses of the term "crimes" in connection with impeachments occur precisely in contexts that distinguish impeachments from regular criminal proceedings. The reference in Article III, Section 2, Clause 3 establishes that parties who have been impeached, unlike regular criminal defendants, are not entitled to a jury, one of the most fundamental safeguards in our system of criminal justice. The definition of impeachable offenses in Article II, Section 4 was designed to capture more than ordinary crimes. Second, as we have tried to show above, the framers and ratifiers understood the limited nature of the sanctions available to the Senate as marking out impeachments as distinct from regular criminal proceedings.[76]

Third, the practice of the Senate under the Constitution suggests that, while impeachment trials are akin to criminal trials in many respects, they are fundamentally different from criminal trials in ways that remove Senate trials from the reach of the double jeopardy rule. The clearest examples of this are perhaps the Senate's standard of proof and its methods for taking evidence. Senators have not considered themselves bound to apply the beyond-a-reasonable-doubt standard of proof required in criminal trials.[77] *See In re Winship*, 397 U.S. 358, 361–64 (1970) (Due Process Clause mandates beyond-a-reasonable-doubt standard of proof in criminal trials). In one recent impeachment, the Senate overwhelmingly rejected a motion requiring that standard.[78] Since the early part of this century, moreover, the Senate has empowered a committee to take evidence on its behalf rather than hearing the evidence itself, and the Senate has now employed that method on

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[75] In 1796, the House of Representatives requested the opinion of Attorney General Charles Lee on the proper method of proceeding against a judge of the Supreme Court for the Northwest Territory who had been accused of various improprieties in the conduct of his judicial duties. The Attorney General responded, in part

> A judge may be prosecuted in three modes for official misdemeanors or crimes. by information, or by an indictment before an ordinary court, or by impeachment before the Senate of the United States The last mode, being the most solemn, seems, in general cases, to be best suited to the trial of so high and important an officer; but, in the present instance, it will be found very inconvenient, if not entirely impracticable, on account of the immense distance of the residence of the witnesses from this city [Philadelphia]. In the prosecution of an impeachment, such rules must be observed as are essential to justice; and, if not exactly the same as those which are practiced in ordinary courts, they must be analogous, and as nearly similar as to them as forms will permit

3 *Hinds' Precedents*, *supra* at 982 In light of the great distance between the Territory and the national capital, the Attorney General recommended that the case be brought by information or indictment in the regular courts *Id* at 982–83; *see also* 1 *American State Papers* 151 (1834) The House apparently agreed with the recommendation, and took no further action *See id* at 157

[76] *See supra* pp 127–30

[77] *See, e.g*, *Proceedings of the United States Senate in the Trial of Impeachment of Halsted L. Ritter*, S Doc No 74–200, at 657 (1936) ("Ritter Trial Proceedings") (statement of Sen McAdoo); Hastings Trial Proceedings, *supra* at 711, 776–77 (statements of Sens Bingaman and Lieberman). Many Senators have based their votes on the beyond-a-reasonable-doubt standard.

[78] *Proceedings of the U S Senate in the Impeachment Trial of Harry E. Claiborne*, S. Doc No 99–48, at 105–09, 150 (1986) ("Claiborne Trial Proceedings") (motion rejected 75–15)

three occasions.[79] Such a delegation of the responsibility to hear the evidence conflicts with our understanding of the factfinder's essential role in a criminal trial.

The text of the Constitution, the evidence concerning the founders' understanding of the new process of impeachment they were creating, and the Senate's practice suggest that the framers and ratifiers conceived of impeachment trials, as Judge Gesell has observed, as *sui generis* proceedings, bearing some characteristics of criminal trials but clearly lacking many others. *Hastings v. United States Senate*, 716 F. Supp. 38, 41 (D.D.C. 1989). Although the evidence is hardly unmixed, we think it weighs in favor of the view that the framers and ratifiers did not consider an impeachment trial an instance of jeopardy within the meaning of the double jeopardy rule.

In the regular case of legislatively created proceedings, the Court has developed and employed the second step of its two-step test in order to prevent legislators from evading the requirements of the Double Jeopardy Clause simply by labeling a proceeding civil rather than criminal or calling a monetary sanction a tax rather than a fine.[80] But when it comes to the framers' establishment of a new and distinctive process of impeachment, this need to second-guess legislative judgments by looking behind direct evidence of intent simply does not arise. As a result, we believe, when examining a special proceeding whose relationship to regular criminal proceedings the framers defined, the first step of the process should end our analysis (especially if the evidence at that step is clear).

Even if one were to go on to the second step of current double jeopardy analysis and judge whether an impeachment trial is a criminal proceeding by determining whether the sanctions upon conviction are criminal punishments,[81] the result would only confirm the conclusion reached so far: that an impeachment trial is not a criminal proceeding within the meaning of the Double Jeopardy Clause. With the possible exception of a few years in the early 1990s, the Supreme Court has for several decades applied an open-ended multi-factor test to determine whether a sanction constitutes criminal punishment. Originally developed in a non-Double Jeopardy case, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the seven factors are, in the Court's view, "neither exhaustive nor dispositive," *United States v. Ward*, 448 U.S. 242, 249 (1980), but "useful guideposts," *Hudson*, 522 U.S. at 99. They are: "(1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*";

[79] *See* Stephen Burbank, *Alternative Career Resolution: An Essay on the Removal of Federal Judges*, 76 Ky L. Rev. 643, 647–48 (1988).

[80] *See, e.g., United States v. Chouteau*, 102 U S 603 (1880), *United States v LaFranca*, 282 U.S 568 (1931), *Helvering v Mitchell*, 303 U S. 391 (1938), *Kennedy v Mendoza-Martinez*, 372 U S. 144 (1963); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994); *Ursery v. United States*, 518 U S. 267 (1996).

[81] For examples of applying this analysis to formally civil proceedings, *see, e g., Hudson*, 522 U S. at 99; *Illinois v Vitale*, 447 U.S. 410, 415 (1980); *Breed v. Jones*, 421 U.S 519 (1975); *Helvering v. Mitchell*, 303 U.S 391, 399–401 (1938).

(4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned." *Id.* at 99–100 (internal quotation marks omitted).

Of the seven *Mendoza-Martinez* factors, five strongly indicate that removal is not criminal punishment, one points more tentatively in that direction, and one points tentatively towards treating removal as a criminal sanction. Disqualification presents a much closer question because at least one, and possibly two, of the factors that favor treating removal as a non-criminal sanction suggest that disqualification is a criminal punishment; moreover, in a post-Civil War decision, the Supreme Court in dictum characterized disqualification in an impeachment judgment as punishment at least for purposes of bill of attainder and *ex post facto* analysis. *See Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320 (1866). Still, we believe that those factors in the case of disqualification are not dispositive and that the *Mendoza-Martinez* factors as a whole still support classifying disqualification as a non-criminal sanction.

The first *Mendoza-Martinez* factor, whether the sanction is an "affirmative disability or restraint," is the one that weighs in favor of treating removal as a non-criminal sanction while its significance for disqualification is less clear. Neither removal nor disqualification imposes an affirmative restraint because neither restricts the physical liberty of the sanctioned individual. In addition, removal clearly does not constitute an affirmative disability because it imposes no lasting restrictions on the offender.

The question whether disqualification from all federal offices is an affirmative disability is a close one, and we think the better view is that it does constitute such a disability. The difficulty of the question stems in part from a degree of inconsistency between the Court's bill of attainder and *ex post facto* cases, in which it developed the notion of disability as punishment, and its double jeopardy decisions.

The Court first used the phrase "affirmative disability or restraint" three years before *Mendoza-Martinez* in *Flemming v. Nestor*, 363 U.S. 603 (1960), a challenge to a provision of the Social Security Act taking away Social Security benefits from all individuals who were deported for certain reasons, including (in Nestor's case) past membership in the Communist Party. The Supreme Court upheld the law, rejecting, among other contentions, claims that the statute constituted a bill of attainder or an *ex post facto* law. Necessary to both contentions was the proposition that the sanction constituted punishment. The Court explained that the punitive character of a sanction is a question of legislative purpose. *See id.* at 616; *cf., e.g., DeVeau v. Braisted*, 363 U.S. 144, 160 (1960). In determining that the statute before it did not have a punitive purpose, the Court considered several

circumstances, the first of which was that "the sanction is the mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed." *Flemming*, 363 U.S. at 617.

The *Flemming* Court looked back to two post-Civil War decisions striking down laws on bill of attainder and *ex post facto* grounds. In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), the Court invalidated a provision of the Missouri constitution requiring all those who would hold a state office, teach, be an officer of a corporation, an attorney, or a clergyman to take an oath affirming, among other things, that they had never aided or expressed sympathy for those engaged in rebellion against the United States or evaded the draft. Cummings was a Catholic priest who had not taken the oath and yet was serving a church in the state, and he had been convicted and fined. Referring to the "disabilities" imposed by the state constitution, the Court rejected Missouri's contention that punishment was restricted to deprivations of life, liberty, or property:

> The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. *Disqualification from office may be punishment, as in cases of conviction upon impeachment.* Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment . . . .
>
> The theory upon which our political institutions rest is, that all men have certain inalienable rights — that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

Id. at 320, 321–22 (emphasis added). Punishment, in the Court's view, therefore "embrac[ed] deprivation or suspension of political or civil rights." *Id.* at 322.[82]

In *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), decided the same day, the Court struck down for similar reasons a federal law making the taking of a similar oath concerning participation in or support for the Confederate cause a condition for practice of law in federal court. The Court stated that "exclusion from any

[82] The Court quoted the first of these paragraphs with approval in *United States v Brown*, 381 U.S. 437, 448 (1965).

of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct." *Id.* at 377.[83]

The Court next addressed these issues in *United States v. Lovett*, 328 U.S. 303 (1946), in which the Court invalidated as a bill of attainder an appropriations act that prohibited any federal agency from paying any further compensation to three particular federal employees, apparently because of the belief that they were, in the words of the act's principal sponsor, " 'crackpot, radical bureaucrats' and affiliates of 'Communist front organizations.' " *Id.* at 308–09. After an examination of the act's origins, the Court concluded that its purpose was "permanently to bar them from government service," *id.* at 313, and so it determined to judge the act on that basis. The Court likened the act to those voided in *Cummings* and *Garland* because it

> 'operate[d] as a legislative decree of perpetual exclusion' from a chosen vocation. *Ex Parte Garland*, *supra*, [71 U.S.] at 377. This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, 18 U.S.C. 2; acceptance of bribes by members of Congress, 18 U.S.C. 199, 202, 203; or by other government officials, 18 U.S.C. 207; and interference with elections by Army and Navy officers, 18 U.S.C. 58.

Id. at 316.[84]

The broad statements in *Cummings*, *Garland*, and *Lovett* that permanent exclusion from a profession or federal office or employment constitutes a disability and punishment stand in some tension with the Court's pronouncements in two

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[83] *See also Pierce v Carskadon*, (16 Wall) 234 (1872), striking down, on the authority of *Cummings* and *Garland*, a West Virginia statute imposing a similar exculpatory oath as a condition of the right to petition for the reopening of certain sorts of civil judgments.

The *Garland* Court, though relying directly on *Cummings*, did, however, make one statement that may suggest that *Cummings* should not be read in quite the sweeping terms its own language might suggest. The Court noted that "[t]he profession of an attorney and counsellor is not like an office created by an act of Congress, which depends for its continuance, its powers, and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution Attorneys and counsellors are not officers of the United States, they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers They are officers of the court . " *Ex parte Garland*, 71 U.S at 378 (1867)

The Court also stated "The attorney and counsellor being, by the solemn judicial act of the court, clothed with his office, does not hold it as a matter of grace and favor The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court, for moral or professional delinquency.

"The legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in the case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution " *Id* at 379–80.

[84] For a longer list, *see DeVeau v Braisted*, 363 U S 144, 159 (1960).

of its leading double jeopardy decisions. In *Helvering v. Mitchell*, 303 U.S. 391 (1938), the Court's seminal New Deal decision marking its willingness to give Congress greater leeway to impose civil sanctions free from the constraints of the Double Jeopardy Clause, the Court found a special "tax" imposed on those who fraudulently underreported their income on their federal tax return to be a civil sanction and thus imposable despite the defendant's prior acquittal of a criminal charge, based on the same acts, of fraudulently evading payment of his full income tax bill. In assessing whether the special tax was a punitive or remedial sanction, the Court observed that one remedial sanction "which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted." *Id.* at 399. As examples, the Court gave deportation of aliens and disqualification of attorneys to practice before certain courts. *Id.* at 399 n.2. Sixty years later, in its most recent decision to address these issues, the Court expressly endorsed that conclusion. In *Hudson v. United States*, 522 U.S. 93 (1997), the Court held that permanent exclusion from employment by any federally insured bank did not constitute criminal punishment. It reached that conclusion by applying the *Mendoza-Martinez* factors, and it stated that "the sanctions imposed do not involve an 'affirmative disability or restraint,' as that term is normally understood. While petitioners have been prohibited from further participating in the banking industry, this is 'certainly nothing approaching the "infamous punishment" of imprisonment.' *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)." *Id.* at 104.[85]

Whatever tension may exist between the more sweeping language in *Cummings*, *Garland*, and *Lovett*, on the one hand, and *Helvering* and *Hudson*, on the other, the latter decisions do not directly reject the Court's earlier statements as applied to disqualification from federal office. Even if one took the view (supported perhaps by *Garland*, but not *Lovett*) that the right to hold congressionally established federal offices is a "privilege voluntarily granted," *Helvering*, 303 U.S. at 399, it would be much more difficult to characterize the right to run for those elective offices created by Constitution in similar terms. The qualifications for those offices are established by the Constitution, and may not be modified by either Congress or the States. *See Powell v. McCormack*, 395 U.S. 486 (1969); *U.S. Terms Limit, Inc. v. Thornton*, 514 U.S. 779 (1995). Disqualification from those constitutionally created offices, if not from legislatively created ones, constitutes an affirmative disability.[86]

[85] *See also Ex parte Wall*, 107 U.S. 265, 288 (1883) (upholding the summary disqualification from practice in a particular federal district court of an attorney who participated in the lynching of a prisoner); *Hawker v. New York*, 170 U S 189, 196–99 (1898) (upholding state statute prohibiting those ever convicted of a felony from practicing medicine); *United States v. Rusk*, 96 F 3d 777, 778–79 (5th Cir. 1996) (collecting pre-*Hudson* court of appeals decisions finding debarment from regulated industries or professions to be civil sanctions, not criminal punishment).

[86] A significant bit of evidence supporting that view appears in the text of the Fourteenth Amendment. Section 3 of that amendment disqualified from federal office all those who, as federal or state officeholders, had taken an oath to support the Constitution and then had participated in or aided insurrection against the federal government. The final sentence of the section then states "But Congress may by a vote of two-thirds of each House, remove such *disability*." U.S Const. amend. XIV, § 3 (emphasis added)

The second *Mendoza-Martinez* factor is whether the sanction "has historically been regarded as punishment." Although the historical record is not unambiguous, we think that, as discussed earlier in this memorandum, both the evidence concerning the framing and ratification of the Constitution and the predominant views expressed by participants in impeachment trials support the judgment that removal and disqualification for conviction upon impeachment have been seen not as criminal punishments but as sanctions with principally remedial goals. The actions by the House and Senate in the 1980s judicial impeachments discussed in the next part of this memorandum, each of which involved a defendant previously prosecuted in the courts, also support that conclusion.

At least two considerations may be raised against this view, however. First, while removal has an obvious remedial goal and effect, disqualification's remedial function may be less clear. As the record of impeachment trials suggests, though, Representatives and Senators have seen disqualification's non-punitive purpose as preventive or protective. Disqualification prevents those who have abused positions of public trust from doing so again and thus protects the integrity of the government's activities. Admittedly, in one of its bill of attainder cases, the Court has expressed some skepticism about this sort of argument. In *United States v. Brown*, 381 U.S. 437 (1965), the Court undid as a bill of attainder a criminal statute prohibiting anyone who had been a member of the Communist Party within the past five years from being an officer or employee of a labor union. The Solicitor General argued that the statute's prohibition on union employment or officership did not constitute punishment because it "was enacted for preventive rather than retributive reasons — that its aim is not to punish Communists for what they have done in the past, but rather to keep them from positions where they will in the future be able to bring about undesirable events," *id.* at 456–57, an argument the Court had apparently embraced fifteen years earlier in *American Communications Ass'n v. Douds*, 339 U.S. 382, 413–14 (1950). This time around, the Court was unwilling to follow the government's reasoning: "It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent — and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment." *Brown*, 381 U.S. at 458. But this statement from *Brown* is inapposite to the question before us. That a criminal punishment may aim to prevent further criminality does not mean that all sanctions with preventive ends are criminal. Indeed, most regulatory sanctions count prevention among their prominent goals. It is the centrality of prevention, as compared to retribution and deterrence, that helps mark disqualification by the Senate as a non-criminal sanction. *See Hudson*, 522 U.S. at 105 (the presence of one arguably punitive purpose is insufficient to brand a sanction as criminal).

A second, more historically grounded, objection to the view that removal and disqualification is not punishment rests on the significant number of federal criminal statutes that have authorized removal or disqualification from federal office as a punishment for crime.[87] At the state level, statutory or constitutional provisions for removal and disqualification of officials convicted of crime are even more common.[88] None of these federal statutes provides for disqualification from office as the sole result of a conviction,[89] and all but one of them may properly be viewed, as is true of similar state-law provisions, as mandating collateral and remedial consequences of criminal conviction rather than as defining one of the punishments for the specified crimes. *See United States v. Waddell*, 112 U.S. 76, 82 (1884) ("this language . . . is not the sentence of the court, but an indelible disgrace affixed to the party convicted by the declaration of the law itself").[90] Indeed, so learned a jurist as Justice Story wrote in 1833 that "[i]n the ordinary course of the administration of criminal justice, no court is authorized to remove, or disqualify an offender, as a part of its regular judgment. If it results at all, it results as a consequence, and not as a part of the sentence."[91] If there have been one or two instances in which disqualification was made part of the punishment itself, they are exceptions to the general pattern of disqualification as a legislatively mandated collateral consequence of criminal conviction, designed to protect the public from unfit officers rather than to punish the offender convicted of such a crime.

The import of the third *Mendoza-Martinez* criterion is uncertain. On the one hand, several considerations suggest that a finding of scienter is not absolutely necessary for impeachment. Other than by implication in the definition of impeachable offenses, the Constitution does not impose a scienter requirement. Moreover, in the second federal impeachment, the Senate convicted and removed a federal judge for drunkenness on the bench and for flagrantly erroneous rulings in a forfeiture proceeding despite the fact that it heard evidence submitted by the judge's son that the judge was insane and had been at the time of the charged

[87] A dozen of these statutes passed before the Civil War, four by the first Congress, are discussed in Maria Simon, *Bribery and Other Not So "Good Behavior": Criminal Prosecution as a Supplement to Impeachment for Federal Judges*, 94 Colum. L. Rev. 1617, 1636–47 (1994). One of the criminal provisions of the Civil Rights Act of 1870 (the predecessor of 18 U.S.C § 241) mandated disqualification for those convicted of conspiring to deprive someone of his or her federal rights *See, e.g., United States v. Waddell*, 112 U S 76 (1885). For more recent examples, many of which are the successors of these early statutes, *see Lovett*, 328 U S. at 316, *DeVeau*, 363 U S. at 158–59. At least four of the statutes providing for disqualification from federal office of those convicted of particular offenses remain in the U.S Code *See* 8 U S.C. § 1425 (desertion and draft evasion); 18 U S C. § 201 (bribery of federal officials, witnesses), § 592 (military interference at polls), § 593 (military interference in elections)

[88] *See, e.g.*, 10 A L R 5th 139 (1993)

[89] One of the statutes, that prohibiting desertion from the military and draft evasion, imposes disqualification from office along with deprivation of citizenship. *See* 8 U S C. § 1425.

[90] The one that is harder to square with this view is the bribery statute, 18 U S C § 201, which (since it was amended in 1962, *see* S. Rep. No. 87-2213 (1962)) leaves the imposition of disqualification to the discretion of the court *See also Ex parte Wilson*, 114 U.S 417, 427 (1885) (referring to disqualification in 1790 bribery act as "punishment"), *Mackin v United States*, 117 U.S. 348, 352 (1886) (describing disqualification in one provision of Civil Rights Act of 1870 as "in the nature of an additional punishment").

[91] 2 Story's *Commentaries, supra* § 784, at 254.

conduct. The conviction of Judge Pickering has been seen by some as an instance of conviction of a defendant lacking a criminal mental state.[92] Furthermore, given that the ultimate touchstone for conviction upon impeachment is conduct that clearly demonstrates unfitness for office, before more modern solutions, *see* U.S. Const. amend. XXV (providing procedures for coping with Presidential incapacity); Judicial Councils Reform and Judicial Disability Act, 28 U.S.C. § 372 (authorizing methods short of removal to cope with judicial incapacity), impeachment might well have been the only avenue for removal of officers who were clearly incapable of carrying out their duties.[93] The difficulty of determining whether an impeachable offense must include an element of scienter stems in part from the fact that conduct need not be previously defined as criminal in order to support an impeachment charge and in part from the somewhat uncertain meaning of the term "scienter."

On the other hand, two considerations support the conclusion that scienter is a necessary element of an impeachable offense. First, the evolution of the language defining impeachable offenses at the Constitutional Convention suggests that the framers sought to exclude mere negligence in the meeting of official responsibilities.[94] The phrase originally adopted to define the scope of impeachable conduct was "malpractice or neglect of duty."[95] Later on the Convention considered limiting impeachable offenses to treason and bribery, or perhaps "corruption" as well.[96] Near the end of their meetings, several delegates thought this definition was too limited and suggested adding "maladministration." Madison, however, objected that this term was too loose and would leave the President serving at the "pleasure of the Senate."[97] The Convention then settled on "other high crimes and misdemeanors" apparently as a compromise, broadening the impeachable offenses beyond treason and bribery but restricting them more narrowly than mere "maladministration." That progression suggests that the framers considered something beyond negligence in the handling of official responsibilities as necessary to impeachable conduct, trusting that elections would provide sufficient check against the less culpable forms of misconduct.

Second, as Madison's comment about the danger of impeachment being wielded as a tool of political control suggests, impeachment should not be used as a means to punish officials for reasonable, good-faith disagreements over the reach of statutory or constitutional provisions. The acquittal of Justice Chase, for example, stands for the proposition that impeachment should not lie simply because Con-

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[92] *Cf.* Agnew Brief at 9 (asserting that acquittal based on insanity should not bar impeachment)

[93] *See The Federalist No. 79*, *supra* at 533 (Alexander Hamilton) (ambiguous suggestion that insanity, if not other causes of inability, would justify impeachment and removal), *but see id* (stating that the Constitution does not include any provision for removing judges based on "inability")

[94] *See* Office of Legal Counsel, The Law of Impeachment, Appendix I: The Concept of Impeachable Offense 10–15 (1974)

[95] *See* 1 Farrand, *supra* at 88; 2 *id.* at 64–69, 116.

[96] *See id.* at 185–86, 499.

[97] *Id at 550.*

gress concludes that a judge has taken an erroneous view of the law.[98] The acquittal of President Johnson similarly stands for the proposition that a President should not be impeached simply because he refuses to carry out a law that he reasonably believes is unconstitutional. *Cf. Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199 (1994) (outlining circumstances in which President may appropriately decline to execute statutory provisions he believes are unconstitutional).

The fourth *Mendoza-Martinez* factor is whether the sanction will "promote the traditional aims of punishment — retribution and deterrence." We think the answer here is "no." As the discussion of the Impeachment Judgment Clause during the ratification debates suggests, contemporaries understood the regular criminal punishments available in addition to removal and disqualification as the vehicles for exacting retribution. While removal and disqualification are likely to have, and were intended to have, some deterrent effect, that is true of virtually any governmental exaction. Accordingly, the Court has reasoned, "the mere presence of [a deterrent] purpose is insufficient to render a sanction criminal, as deterrence 'may serve civil as well as criminal goals.' " *Hudson*, 522 U.S. at 105 (citations omitted); *see also United States v. Ursery*, 518 U.S. at 292.

Under the fifth *Mendoza-Martinez* factor, "whether the behavior to which [they] appl[y] is already a crime," the sanctions that the Senate may impose are not criminal punishments. Of course, only conduct that is already defined as criminal will provide a basis for subsequent criminal prosecution of an impeached official, and thus only cases involving criminal conduct will raise the double jeopardy issue addressed in this memorandum. But as the development of impeachment law before the Constitution, the debates at the time of the founding, and the history of impeachments under the Constitution show, despite the protestations of many impeachment defendants to the contrary, officials may be impeached and convicted for conduct that is not prohibited by the regular criminal laws.[99]

The sixth and seventh *Mendoza-Martinez* factors are whether a purpose other than punishment may "rationally" be assigned to the sanction and whether the sanction "appears excessive in relation to the alternative purpose assigned." In our view, these are the most important considerations for they go most directly to the ultimate question of legislative (or drafters' and ratifiers') purpose. The same sanction may have either a punitive or a non-punitive purpose and thus may be characterized as criminal punishment in one circumstance and as a civil sanction in another. *Compare, e.g., Flemming*, 363 U.S. at 617 (imprisonment as punishment); *Mendoza-Martinez*, 372 U.S. at 165 (deprivation of nationality in one section of the Immigration and Nationality Act as punishment), *with Bell v. Wolfish*, 441 U.S. 520, 533–39 (1979) (imprisonment in the context of reasonable

[98] *See, e g., William H Rehnquist, Grand Inquests* 114 (1992).

[99] *See* Hull & Hoffer, *supra* at 78, 116–23, 261–62; Michael J. Gerhardt, *The Federal Impeachment Process* chs. 1, 2, 9 (2d ed 2000); Rehnquist, *supra* at 274

pre-trial detention not punishment); *Mendoza-Martinez*, 372 U.S. at 164 (interpreting *Perez v. Brownell*, 356 U.S. 44 (1958) as based on view that deprivation of nationality in another section of Immigration and Nationality Act not punishment). Ultimately it is the purpose for which the sanction is applied that will determine its character.

And when it comes to disqualification, the Court has emphasized, from its post-Civil War bill of attainder decisions to the modern era, that it is the closeness of the fit between the causes of disqualification and the positions from which the individual is disqualified that most clearly reveals a non-punitive purpose. In *Cummings*, the Court concluded that the disqualifying provision in the Missouri constitution was a penalty largely because it was "evident from the nature of the pursuits and professions of the parties, placed under disabilities by the constitution of Missouri, that many of the acts, from the taint of which they must purge themselves, have no possible relation to their fitness for those pursuits and professions." *Cummings*, 71 U.S. at 319; *see also Garland*, 71 U.S. at 379–80. In *Dent v. West Virginia*, 129 U.S. 114 (1889), a decision upholding West Virginia's medical licensure statute, Justice Field, who had written the majority opinions in both *Cummings* and *Garland*, distinguished those decisions by explaining that they turned on the conclusion that "as many of the acts from which the parties were obliged to purge themselves by the oath had no relation to their fitness for the pursuits and professions designated, . . . the oath was not required as a means of ascertaining whether the parties were qualified for those pursuits and professions, but was exacted because it was thought that the acts deserved punishment." *Id.* at 126; *see also Hawker v. New York*, 170 U.S. 189, 198–99 (1898). More recently, in *Flemming v. Nestor*, 363 U.S. 603 (1960), the Court endorsed the same view: "Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified." *Id.* at 614.

Here, the core "source of the legislative concern," abuse of federal office, is precisely "the activity or status from which the individual is barred." The non-punitive purpose which may rationally be assigned to removal and disqualification is keeping government authority out of the hands of those who have demonstrated their disregard for the obligations of public office. In relation to that purpose, these sanctions, far from being excessive, are deftly tailored. Unlike the prohibitions in *Cummings* and *Garland*, they do not reach beyond the exact sphere of the misconduct and thus the threat: federal office.

The Court's statement in *Cummings* that disqualification in an impeachment judgment constitutes punishment does not dissuade from concluding that such disqualification is not punishment within the meaning of the Double Jeopardy Clause. The statement in *Cummings* was dictum unsupported by any reasoning

concerning the special character or function of impeachment proceedings.[100] Moreover, as the Court's more recent bill of attainder decisions suggest, the range of sanctions that count as punishment for purposes of the Bill of Attainder Clause may well be broader than the range of penalties that amount to criminal punishment under the Double Jeopardy Clause. In *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984), the Court stated that it looks to three considerations in determining whether a statute inflicts punishment for bill of attainder purposes: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.' " *Id.* at 852 (quoting *Nixon v. General Servs. Admin.*, 433 U.S. 425, 473, 475–76 (1977)). The second of those criteria is quite similar to the sixth *Mendoza-Martinez* factor. But the Court's recent bill of attainder criteria leave out a number of the *Mendoza-Martinez* factors that would tend to narrow the class of punitive sanctions — whether the sanction constitutes an affirmative disability or restraint, whether a finding of scienter is necessary, and whether the conduct to which it applies is already criminal. Recognizing that criminal punishments under the Double Jeopardy Clause may form a subset of punishments under the Bill of Attainder Clause also helps relieve the apparent tension between, on the one hand, the bill of attainder decisions' assertions that disqualification from a profession constitutes punishment, and, on the other, *Helvering*'s and *Hudson*'s holdings that bars on participation in particular professions did not amount to punishment within the meaning of the Double Jeopardy Clause.

On balance, then, we conclude that removal and disqualification when imposed by the court of impeachments are best seen as special civil sanctions rather than as criminal punishments. The historical evidence demonstrating the founders' intent to break with the English tradition of criminal punishments and to codify the American practice of limited impeachment sanctions, the record of impeachment trials showing the House's and Senate's endorsement of that view, and even the criteria of current double jeopardy law all support the conclusion that the sanctions the Constitution places in the Senate's hands are not criminal punishments within the meaning of the Double Jeopardy Clause.[101]

[100] Moreover, *Cummings*' flat statement that disqualification upon impeachment constitutes punishment seems inconsistent with its own emphasis on whether the sanction is closely tied to fitness to hold the office or practice the occupation, an emphasis stressed in several of its later decisions.

[101] Having considered the Impeachment Judgment Clause and the Double Jeopardy Clause at some length, we should briefly note that we think the Due Process Clause of the Fifth Amendment does not create a bar to prosecution following acquittal by the Senate. The Due Process Clause incorporates the guarantees of the Double Jeopardy Clause, *see Benton v. Maryland*, 395 U.S. 784 (1969), but it offers little, if any, additional protection, *see Dowling v United States*, 493 U.S 342, 352–54 (1990) ("Beyond the specific guarantees in the Bill of Rights, the Due Process Clause has limited operation. . . . We decline to use the Due Process Clause as a device for extending double jeopardy protection to cases where it would otherwise not extend.") In the special circumstance of prosecutions following

III. The 1980s Impeachment Trials

The "case law" that gives meaning to the constitutionally defined process of impeachment is made largely by Congress. The three impeachment trials carried out during the 1980s bolster the proposition that the Constitution permits prosecution of a former official for the same offenses of which he has been acquitted by the Senate.

After a 50-year hiatus as a court of impeachments, the Senate tried and convicted three district court judges during the 1980s. In each case, the defendant had previously been prosecuted in the courts. In each case, the defendant challenged the propriety of his impeachment both in court and before Congress. As a result, these proceedings gave the courts and Congress an opportunity to address whether former conviction or acquittal in the courts should bar trial before the Senate for the same offenses. One district court and both houses of Congress concluded that prior criminal judgments did not preclude impeachment and conviction for the same offenses.

Judge Harry E. Claiborne and Judge Walter L. Nixon were both tried and convicted of federal offenses.[102] Although they were not the first federal judges to be found guilty of crimes while in office, they were the first to refuse to resign their judicial posts.[103] The House thus impeached them for the offenses of which they had already been convicted (as well as other conduct) and the Senate tried and convicted them and removed them from office.

Neither Claiborne nor Nixon directly argued to the House or Senate that double jeopardy should bar their impeachment and trial. On the contrary, in Claiborne's case the House managers contended that the House and Senate should each be bound by the guilty verdicts rendered by the jury that had sat in the judge's criminal trial, and Claiborne argued that the impeachment process was distinct from regular prosecution and that separation of powers and due process concerns

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impeachment trials, the Constitution establishes the process that is due For the reasons given in the last two sections of this memorandum, we believe that process includes the possibility of prosecution following acquittal by the Senate

In individual cases, parties acquitted by the Senate and then prosecuted in the courts for the same offenses might raise due process claims based on the particular circumstances of their cases. For example, an individual might argue that the extensive publicity surrounding his impeachment by the House and trial in the Senate made it impossible for him to receive a fair trial in the courts. *See, e g , Nebraska Press Ass'n v. Stuart*, 427 U S. 539, 551–56 (1976). We do not address these sorts of as-applied due process claims. Our analysis is limited to determining whether the Constitution as a general matter prohibits or permits criminal prosecution for the same offenses of which a party was acquitted by the Senate.

[102] Claiborne, a district judge for the District of Nevada, was convicted in 1984 on two counts of willfully underreporting his income on federal income tax returns After Claiborne was indicted, he filed a motion to quash, claiming that the Constitution required that he be impeached and removed from office before he could be criminally indicted. The district court rejected the motion, and on interlocutory review a special panel of three circuit court judges from outside Claiborne's circuit affirmed *United States v. Claiborne*, 765 F.2d 784, 788–89 (9th Cir 1985); 781 F.2d 1327, 1327–30 (Reinhardt, J., dissenting from denial of rehearing en banc). Nixon, chief judge of the District Court for the Southern District of Mississippi, was convicted in 1986 of two counts of perjury before a grand jury (and acquitted of one count of bribery and one other count of perjury) *See United States v. Nixon*, 816 F 2d 1022, 1023–25 (5th Cir. 1987)

[103] *See United States v Isaacs*, 493 F 2d 1124 (7th Cir 1974) (Circuit Judge Otto Kerner), *see generally* Joseph Borkin, *The Corrupt Judge* (1962)

required the House and Senate to do their own factfinding.[104] In both cases, the Senate accepted the evidence from the prior criminal trials, took some evidence of its own, and apparently did not consider itself bound by the juries' verdicts.[105]

Although neither the House nor the Senate squarely passed on double jeopardy challenges in the Claiborne and Hastings cases, the fact that they impeached, tried, and convicted the defendants indicates that they found that prior conviction was no bar to trial before the Senate on the same charges.[106] The House's and Senate's actions thus suggest that they did not consider trial before the Senate an instance of jeopardy within the meaning of the Double Jeopardy Clause.

It may be argued that, although trial before the Senate is an instance of jeopardy, the Impeachment Judgment Clause permits such trial following criminal conviction. That Clause expressly allows for criminal trial after conviction by the Senate. So, one might argue, it permits the reverse sequence as well: trial before the Senate following criminal conviction. By similar logic, if the Impeachment Judgment Clause bars prosecution following Senate acquittal, it should bar trial in the Senate following acquittal in the courts. In carrying out the impeachment trial of Judge Alcee Hastings, however, the Senate rejected this view that the relationship between criminal prosecution and impeachment trials could turn on whether the prior judgment was a conviction or an acquittal.

Following a jury trial, Judge Alcee Hastings was acquitted in 1983 of conspiring to take a bribe and of obstructing justice. In 1988, pursuant to 28 U.S.C. § 372(c), the 11th Circuit Judicial Council certified to the Judicial Conference of the United States that Hastings had engaged in conduct that might constitute an impeachable offense and the Judicial Conference made a similar certification to the House of Representatives. The House impeached Hastings in 17 articles, the first of which was in substance the bribery charge upon which he had been acquitted and 14

[104] *See* 1 *Report of the Senate Impeachment Trial Committee. Hearings Before the Senate Impeachment Trial Committee*, 99th Cong. 22–25, 44–69, 108–10, 147–67, 170–86, 252–71 (1986) ("Report of the Claiborne Senate Impeachment Trial Committee") Claiborne apparently argued that if the Senate were to accept the House managers' view that they were bound to convict based on the jury verdict, that would violate the double jeopardy ban on multiple punishments *See* Claiborne Trial Proceedings, *supra* at 57, 60–61, 207–08 Apparently accepting that the Senate had resolved these matters in the Claiborne case, Nixon did not squarely raise them In the course of opposing a House managers' motion for the Senate to accept the entire record of his criminal trial, Nixon briefly argued that criminal prosecutions and impeachment trials were "independent" proceedings. 1 Report of the Claiborne Senate Impeachment Trial Committee, *supra* at 212, 213.

[105] *See, e.g.*, Claiborne Trial Proceedings, *supra* at 303–04 (statement of Sen Hatch), 312 (statement of Sen Dixon), 314 (statement of Sen. Specter), 340 (statement of Sen Mitchell), 341–43 (statement of Sen. Mathias), 352–53 (statement of Sen Bumpers), Walter Nixon Trial Proceedings, *supra* at 443–45 (statement of Sen Levin), 446–48 (statement of Sen. Grassley), 452 (statement of Sen. Jeffords), 459 (statement of Sen Murkowski)

[106] Claiborne was convicted on three of four articles of impeachment The three articles upon which he was convicted by the Senate all charged the income tax evasion upon which he had previously been convicted in the courts He was acquitted on the fourth (article III), which charged him with the fact of having been convicted of tax evasion in court. *See* Claiborne Trial Proceedings, *supra* at 290–97.

Nixon was convicted on two impeachment articles and acquitted on a third The two upon which he was convicted by the Senate charged the lying before a grand jury upon which he had previously been convicted in court. *See* Walter Nixon Trial Proceedings, *supra* at 432–34; 4B *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr Hearings Before the Senate Impeachment Trial Committee*, 101st Cong 469–77, 493 (1989). The third charged a series of false statements, including some made to the grand jury and some made to a Justice Department attorney and an FBI agent. *See* Walter Nixon Trial Proceedings, *supra* at 6.

of which alleged that he had repeatedly lied under oath at his criminal trial. In 1989, the Senate tried and convicted Hastings on the first article and eight of the ones charging lying at his criminal trial.

The Investigating Committee of the Eleventh Circuit Judicial Council, which consisted of three circuit judges and two district court judges, briefly considered whether Judge Hastings' acquittal should bar his impeachment by the House and trial by the Senate (and thus the Committee's making of a recommendation of impeachment). They concluded that it should not for three principal reasons.[107] First, the Committee thought it obvious that a conviction in the courts would not bar impeachment and legislative trial, and they could see no distinction between convictions and acquittals in this respect. Second, they reasoned that "impeachment does not serve the same purpose as a criminal prosecution. Impeachment is remedial and designed to protect the institution of government from corrupt conduct." [108] Third, they noted that the standard of proof was higher in a criminal prosecution than in an impeachment trial.[109]

The House Judiciary Committee also found no double jeopardy bar. The Committee took the view that "impeachment is not a criminal proceeding" because the possible sanctions upon conviction are "remedial or prophylactic, rather than criminal or punitive." [110] The House adopted the articles by a vote of 413–3.[111]

Just before the Senate took up the House's charges, Judge Hastings brought suit against the Senate and some of its officers seeking to enjoin his impeachment trial on double jeopardy grounds, among others. District Judge Gerhard Gesell rejected Hastings' double jeopardy contention and dismissed the action. Judge Gesell reasoned as follows:

> Impeachment trials are sui generis: in several instances in the Constitution, impeachment is distinguished from criminal proceedings. The accused has no right to a jury, and the President may not pardon a person convicted by impeachment. The Framers understood that impeachment trials were fundamentally political, which seems to indicate that impartiality—however much it has been present and is to be desired—is not guaranteed. It is clear that the federal rules of evidence do not apply in impeachment trials, and the Constitution itself does not require unanimity among the Senators sitting in judgment. Senators determine their own burdens of proof: they need not be persuaded beyond a reasonable doubt that the defendant committed each and every element of every

[107] *In the Matter of the Impeachment Inquiry Concerning U.S. District Judge Alcee L. Hastings. Hearings Before the Subcommittee on Criminal Justice of the House Comm on the Judiciary*, 100th Cong app 1, at 347–49 (1987).

[108] *Id* at 348

[109] The Committee also noted that it had considered evidence that had not been presented to the jury. *Id* at 349.

[110] H.R. Rep. No. 100–810, at 62 (1988)

[111] 134 Cong Rec 20,221 (1988); *see id.* at 20,206–22

> Article. Deviating from English precedent, the Framers sharply limited the remedies or punishment available upon conviction to disqualification and removal from office . . . .

Hastings v. United States Senate, 716 F. Supp. 38, 41 (D.D.C. 1989). Judge Gesell read the Impeachment Judgment Clause as "acknowledg[ing] separate and different roles for the executive's power of prosecution and the legislature's impeachment powers. It is unthinkable that the executive branch could effectively prevent an impeachment by purporting to try a judge or that the judiciary could prevent an impeachment by accepting a plea. Rather, the executive and legislative branches have different roles to play if a judge engages in criminal behavior." *Id.* at 42. The court of appeals affirmed on non-justiciability grounds rather than reaching the merits of any of Judge Hastings' contentions. *Hastings v. United States Senate*, 887 F.2d 332 (D.C. Cir. 1989) (unpublished).

Judge Hastings renewed his double jeopardy argument before the Senate in a motion to dismiss.[112] He made the *expressio unius* argument based on the Impeachment Judgment Clause, urging that the Clause "creates an express exception for a '*party convicted*' of an impeachable offense[, but] no exception for a *party acquitted*." [113] He pointed out that Madison's proposed double jeopardy clause had included an exception for impeachments, which had been deleted by the Senate. He noted the constitutional provisions suggesting that an impeachment trial is a criminal proceeding, and he argued that the *Mendoza-Martinez* factors pointed in the direction of treating impeachment trials as criminal proceedings. Finally, he argued that the "core policies" promoted by the double jeopardy rule favored prohibiting Senate trials following acquittal in the courts. As the Supreme Court stated in *Green v. United States*, 355 U.S. 184, 187–88 (1957), "[t]he underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

The Senate denied Hastings' motion by a vote of 92–1.[114] In statements inserted into the record following the final vote to convict, several Senators addressed the double jeopardy issue. They explained their judgment that trial by the Senate was not a criminal proceeding and that it therefore did not constitute an instance of jeopardy within the meaning of the Double Jeopardy Clause.[115]

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[112] Hastings Motions to Dismiss, *supra* at 48–66, Hastings Trial Proceedings, *supra* at 18–29

[113] Hastings Motions to Dismiss, *supra* at 49

[114] Hastings Trial Proceedings, *supra* at 55.

[115] *Id.* at 711 (statement of Sen. Bingaman), 714–44 (statement of Sen Specter), 761 (statement of Sen Hatch), 773 (statement of Sen Dole), 776–77 (statement of Sen Lieberman)

The Hastings impeachment trial provides additional support for the notion that an impeachment trial is not a jeopardy within the meaning of the Double Jeopardy Clause and that an acquittal by the Senate should not block a criminal prosecution for the same offenses.

We recognize that several arguments might be made to limit the significance of the Hastings case (and of the Claiborne and Nixon cases) for the question we are addressing, but we find none of them convincing.

First, one might argue that trial in the Senate following acquittal in the courts (as in the Hastings case) is different from trial in the courts following acquittal in the Senate (the situation we are considering) because of the different standards of proof required in the two proceedings. A jury verdict of not guilty means the prosecution has failed to prove beyond a reasonable doubt that the defendant is guilty. The Senate might conclude that such a verdict presented no obstacle to their trial of the defendant on the same charges because, quite consistently with the jury's verdict, they might conclude that the House managers had shown, under some lower standard of proof (whether preponderance or clear and convincing), that the defendant had committed the charged acts. The reverse sequence would still be impermissible because a verdict of not guilty in the Senate under the lower standard of proof would be inconsistent with a finding of guilty under the more demanding beyond-a-reasonable doubt standard required in court.

We find this explanation of the significance of the Hastings case unconvincing for two reasons. First, the argument concerns collateral estoppel — the principle that an issue finally resolved in one proceeding as between two parties may not be re-examined in a subsequent proceeding — not double jeopardy. It is true that the resolution of a factual issue in favor of a defendant under the beyond-a-reasonable-doubt standard is no bar to consideration of the same issue under a more lenient standard of proof. Thus, for example, collateral estoppel is no bar to a civil proceeding alleging that a defendant committed certain acts following acquittal of the same defendant on criminal charges requiring proof of the same acts. *See, e.g., Helvering v. Mitchell*, 303 U.S. 391, 397–98 (1938). But, as the Supreme Court has repeatedly explained, even where collateral estoppel creates no obstacle to a successive trial, double jeopardy still may. That is because it is the risk of criminal punishment, regardless of the form of the proceeding or the standard of proof, that determines whether the two proceedings constitute impermissible successive jeopardies. *See, e.g., id.* at 398–405. Thus, for the Senate to try Judge Hastings after his criminal trial, it would not have been enough for the members of that body to have concluded that the reduced standard of proof removed any collateral estoppel problem. They would also have to have concluded that trial before the Senate was not an instance of jeopardy.

Second, we find little, if any, evidence in the record of the Senate trial of Judge Hastings suggesting that the Senators relied on this argument. Judge Hastings presented the double jeopardy issue squarely to the Senate, which considered it both

in a motion to dismiss and in its final judgment.[116] Of the fifteen Senators who inserted statements in the record explaining their final votes, several addressed the double jeopardy question, but none did so in terms of the difference in the standards of proof.[117]

One might also try to cabin the significance of the Hastings case by contending that the Senate's decision to try Judge Hastings turned on the judicial character of his office and that the decision therefore does not serve as a precedent for the treatment of executive branch officials. The argument would go as follows. The "good behavior" standard governing judicial tenure imposes standards of propriety, and of the appearance of propriety, on federal judges that do not apply to executive officials. Because of these particularly rigorous standards of behavior, conduct short of the criminal may nonetheless be outside the bounds of judicial good behavior. Thus acquittal of serious crimes might still leave a judge open to fair condemnation as having deviated from the path of good behavior and thus as meriting removal from office.[118]

Even if this argument for the significance of the good behavior standard were correct as a theoretical possibility, the records of the Hastings impeachment proceedings offer little, if any, evidence suggesting that the standard influenced the Senate's resolution of the double jeopardy issue it confronted.[119]

Finally, regarding the Claiborne and Nixon cases, one might argue that the Senate's decision to proceed rested not on a judgment that Senate trial did not constitute an instance of jeopardy but on a decision that the need to remove federal judges who had been convicted of felonies was so imperative that it outweighed otherwise applicable double jeopardy principles. After all, federal judges, unlike federal executive officials, have life tenure, so impeachment provides the only

[116] *See* Hastings Motions to Dismiss, *supra* at 48–66; Hastings Trial Proceedings, *supra* at 20–22, 38, 55; *id.* at 735–41 (statement of Sen Specter), 772–73 (statement of Sen. Dole); 776–77 (statement of Sen. Lieberman); 799 (statement of Sen. Kohl). For example, in his statement on the floor of the Senate opposing Judge Hastings's motions to dismiss, House Manager Bryant stated.

> Finally, the Senate should not ignore the 200 years of precedent establishing that Judge Hastings' double jeopardy argument has no sound legal or historical basis.
>
> Respondent's argument rests entirely on a single false premise that impeachment is somehow criminal in nature. Judge Hastings must convince you that an impeachment trial is a criminal proceeding, for then and only then would double jeopardy even arguably apply. Impeachment, as all precedents indicate, is not a criminal proceeding. Rather, the Constitution establishes — and the framers, the Congress and constitutional scholars have consistently concluded — that impeachment is a remedial proceeding designed to protect the institutions of Government and the American people from abuse of the public trust In this country, impeachment has never functioned as a criminal process. Impeachment does not require an indictable offense as a basis for removal from office. Impeachment does not require proof beyond a reasonable doubt to establish the allegations. Impeachment does not call for trial by jury. Impeachment is not subject to Presidential pardon And above all, the purpose of impeachment is not to punish an individual, but rather to preserve and protect our constitutional form of Government

Id at 38

[117] *See* Hastings Trial Proceedings, *supra* at 735–41 (statement of Sen. Specter), *id.* at 772–73 (statement of Sen Dole); *id* at 776–77 (statement of Sen. Lieberman), *id* at 799 (statement of Sen Kohl)

[118] *See, e.g.*, Ritter Trial Proceedings, *supra* at 644–45 (statement of Sens Borah, LaFollette, Frazier, and Shipstead), *id.* at 645–47 (statement of Sen. Thomas).

[119] *See* Hastings Trial Proceedings, *supra* at 709–99 (Senators' statements), *id* at 758 (statement of Sen Grassley), *id* at 773 (statement of Sen. Dole); *see also id* at 24 (statement of counsel for Judge Hastings).

political mechanism to remove them from office. If the Senate had proceeded on that basis, we would expect to find some discussion of the dilemma involved. We are aware of none in the record of those proceedings.

The three judicial impeachment trials of the 1980s support the conclusion that the Senate does not view impeachment trials as instances of jeopardy within the meaning of the Double Jeopardy Clause. The Hastings case, moreover, demonstrates that the Senate sees no difference between prior acquittal and prior conviction in this regard.

IV. Conclusion

We conclude that the Constitution permits a former President to be criminally prosecuted for the same offenses for which he was impeached by the House and acquitted by the Senate while in office.

As the length of this memorandum indicates, we think the question is more complicated than it might first appear. In particular, we think that there is a reasonable argument that the Impeachment Judgment Clause should be read to bar prosecutions following acquittal by the Senate and that disqualification from federal office upon conviction by the Senate bears some of the markers of criminal punishment. Nonetheless, we think our conclusion accords with the text of the Constitution, reflects the founders' understanding of the new process of impeachment they were creating, fits the Senate's understanding of its role as the impeachment tribunal, and makes for a sensible and fair system of responding to the misdeeds of federal officials.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

Constitutionality of 18 U.S.C. § 1120

Congress has clear constitutional authority to proscribe killings committed by escaped federal inmates serving life sentences, as provided in 18 U S C § 1120, where the killings facilitate the escape or the avoidance of recapture.

Congress's penological and custodial interests in ensuring the incapacitation of life-sentenced federal inmates provide compelling support for the constitutionality of 18 U.S C. § 1120 even when it is applied with respect to a post-escape killing that is not related to the escape or subsequent efforts to avoid recapture.

August 31, 2000

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

This memorandum responds to a request of the Criminal Division for our opinion concerning the constitutionality of 18 U.S.C. § 1120 (2000), which makes it a federal criminal offense, punishable by death in some cases, for an inmate serving a life sentence in a federal correctional institution to kill a person following escape from such institution. *See* Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from John C. Keeney, Deputy Assistant Attorney General, Criminal Division, *Re: Request Concerning 18 U.S.C. 1120* (July 6, 1998). You have asked whether this statute can survive a constitutional challenge as lying beyond Congress's Article I powers or whether, to survive such challenge, it should be amended to require that the killing in question be done to further the escape or to avoid recapture.

Title 18, section 1120(b) provides: "A person, having escaped from a Federal correctional institution where the person was confined under a sentence for a term of life imprisonment, kills another shall be punished as provided in sections 1111 and 1112." [1] Section 1111 authorizes the death penalty or life imprisonment for certain murders in the first degree and authorizes a term of years or life imprisonment for certain murders in the second degree, *see* 18 U.S.C. § 1111(b) (1994); section 1112 provides terms of imprisonment and/or fines for certain manslaughters. *Id.* § 1112(b).[2]

[1] Your inquiry refers to future killings or "criminal act[s]" by an escaped federal prisoner Because § 1120 applies only to killings committed by federal escapees, our assessment is limited to that category of crimes

[2] Section 1120 was enacted as a small part of the voluminous Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 60012(a), 108 Stat 1796, 1973, and we have found no pertinent legislative history revealing the reasons prompting its passage *See generally* Violent Crime Control and Law Enforcement Act of 1994 — Conference Report, 140 Cong Rec 23,929 (1994)

We note that death sentences authorized under 18 U S C § 1120(b), like other federal death sentences, must conform to statutory standards for the consideration of individual aggravating and mitigating factors which have been held to satisfy the requirements of the Eighth Amendment *See* 18 U S.C. §§ 3591–3598 (1994 & West Supp 2000); *see, e.g., United States v. Webster*, 162 F 3d 308 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999) (upholding constitutionality of federal death penalty procedures). Our analysis here does not address whether particular killings covered by the statute may be eligible for the death penalty under Eighth Amendment standards, but focuses on the question whether such killings are a proper subject for federal criminal legislation in the first instance

On its face, § 1120 applies to all post-escape killings. We think it clear that Congress has constitutional authority to proscribe those killings which assist in either effectuating or prolonging the escape. Although the issue is novel, we also believe there is a compelling argument that Congress may proscribe and punish any other killing, even if not escape-related, that is committed by an escaped federal prisoner who has been sentenced to life imprisonment.

I. GENERAL CONGRESSIONAL AUTHORITY TO ENSURE THE EFFECTIVE FUNCTIONING OF A FEDERAL PRISON SYSTEM

The United States Constitution clearly contemplates that Congress will enact a federal criminal code and provide for its administration. Several clauses refer either to specific federal crimes or to classes thereof. *See, e.g.*, U.S. Const. art. III, § 3, cl. 1 (defining federal crime of treason); U.S. Const. amend. V (requiring grand jury presentment or indictment for "a capital, or otherwise infamous crime"). Other clauses refer to the procedures for prosecuting or trying such crimes. *See, e.g.*, U.S. Const. art. III, § 2, cl. 3 (jury and venue requirements for the "Trial of all Crimes"); U.S. Const. amend. V (prescribing procedural safeguards for criminal prosecutions); U.S. Const. amend. VI (same). Of course, Congress has no blanket authority to enact a federal criminal code; rather, Congress may enact specific criminal statutes only insofar as the power to do so is granted or implied by Congress's enumerated powers, *see, e.g., United States v. Fox*, 95 U.S. 670, 672 (1877) ("Any act, committed with a view of evading the legislation of Congress passed in the execution of any of its powers . . . may properly be made an offence against the United States."),[3] as supplemented by the Necessary and Proper Clause,[4] *see, e.g., Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958) ("penal remedies may be provided by Congress under the explicit authority to 'make all Laws which shall be necessary and proper for carrying into Execution' the other powers granted by Art. I, § 8"), or in some instances is implied by the structure and history of other constitutional provisions.[5] But whatever the

[3] Federal courts have upheld as within congressional authority numerous federal criminal statutes protecting or implementing a wide range of national powers. *See, e.g., United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998) (Congress validly enacted criminal legislation against hostage taking to effectuate U.S. treaty obligations under the Hostage Taking Convention); *United States v. Dittrich*, 100 F.3d 84, 87 (8th Cir. 1996) (statute making it a felony to steal property from a federal Post Office "is well within" congressional authority).

[4] Congress shall have power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." U.S. Const. art. I, § 8, cl. 18.

[5] *See, e.g., Ex parte Garnett*, 141 U.S. 1, 12–15 (1891) (congressional power to enact or modify maritime code, as distinct from power to regulate interstate or foreign commerce, is fairly implied by historical inference and the grant of admiralty and maritime jurisdiction to Article III courts); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615–22 (1842) (upholding congressional power to enact legislation enforcing Fugitive Slave Clause even though Clause grants no express power to Congress); *Burroughs v. United States*, 290 U.S. 534, 544–49 (1934) (upholding Federal Corrupt Practices Act based on implied congressional power to safeguard presidential elections); *cf. United States v. Eichman*, 496 U.S. 310, 316 n.6 (1990) (conceding that "the Government has a legitimate interest in preserving the [United States] flag's function as an 'incident of sovereignty,'" though holding that criminalizing flag-burning does not advance this interest).

particulars, the notion that Congress may establish a federal criminal code is firmly grounded.

It is equally well established that, in addition to enacting a federal criminal code, Congress may create and maintain an effective criminal justice system to prosecute and punish criminal conduct. This Office has previously opined that Congress's constitutional authority to provide for the housing and confinement of federal pre-trial detainees rests on a broader congressional authority "to provide for an orderly federal system of criminal justice." *See Congressional Authority to Require the States to Lodge Federal Pre-Trial Detainees*, 5 Op. O.L.C. 142, 142–43 (1981). As that opinion stated:

> Although this power is not expressly enumerated in Article I, § 8 of the Constitution, the exercise of such power is necessary and proper, under Article I, § 8, clause 18, to provide for an orderly federal system of criminal justice contemplated by several other provisions of the Constitution. *See, e.g.*, Art. II, § 3 [President's authority to "take care that the laws be faithfully executed"]; Art. III, § 2, cl. 3 [provision for trial of crimes by jury in the State where committed]; Fifth Amendment [provisions for grand jury indictment, ban on double jeopardy, privilege against self-incrimination, and due process of law]; Sixth Amendment [right to speedy trial by impartial jury, compulsory process to obtain witnesses, assistance of counsel, and the Confrontation Clause]; Eighth Amendment [prohibitions against excessive bail and cruel and unusual punishment].

Id. This broad authority to establish and maintain an effective regime of criminal law enforcement extends to the operation of federal correctional facilities. *See, e.g., Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989) (describing the legitimacy of the federal government's interest in maintaining the security of federal prisons as "beyond question" in upholding constitutionality of regulations restricting prisoner receipt of pornography); *Ponzi v. Fessenden*, 258 U.S. 254, 262–63 (1922) (acknowledging numerous federal statutes providing the Attorney General with authority to secure and maintain the custody of inmates serving federal sentences); *United States v. Berrigan*, 482 F.2d 171, 182 (3d Cir. 1973) ("The power to fashion rules governing the movement of contraband as it relates to the federal prison system resides with Congress."); *cf. Greenwood v. United States*, 350 U.S. 366, 373–75 (1956) (the power to prosecute federal offenses entails the auxiliary authority to provide for the secure detention of an accused person who is mentally incompetent to stand trial pending possible recovery of sufficient competence); *United States v. Perry*, 788 F.2d 100, 111 (3d Cir. 1986) (where Congress has the power to prescribe criminal activities, "it has the auxiliary authority, under

the necessary and proper clause, to resort to civil commitment to prevent their occurrence").

The test for whether § 1120 lies within Congress's implied authority is whether it is "plainly adapted" to support the legitimate ends of congressional regulation, including the safe and effective functioning of the federal penal system as well as the more specific ends (such as the regulation of interstate commerce) contemplated by Congress's enumerated powers.[6] *See, e.g., McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819) (affirming that a government granted specific enumerated powers "must also be intrusted with ample means for their execution"); *id.* at 421 ("Let the end be legitimate . . . and all means which are appropriate, which are plainly adapted to that end . . . are constitutional."); *Burroughs v. United States*, 290 U.S. 534, 547–48 (1934) ("If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone."). The federal courts have long held that this standard requires only "that the effectuating legislation bear a rational relationship to a permissible constitutional end." *Lue*, 134 F.3d at 84.

II. SECTION 1120'S APPLICATION TO KILLINGS RELATED TO THE INITIAL ESCAPE OR SUBSEQUENT EFFORTS TO AVOID DETECTION AND RECAPTURE

As a general matter, "the federal government has a significant and substantial interest in keeping prisoners confined and preventing them from escaping." *United States v. Evans*, 159 F.3d 908, 912 (4th Cir. 1998).[7] Your request letter assumes that Congress has the further power to criminalize killings committed by escaped life-sentenced prisoners to effectuate their initial escape or to avoid subsequent

[6] Section 1120 cannot be defended in its entirety as an independent exercise of Congress's expressly enumerated power to regulate interstate commerce. Section 1120 contains no jurisdictional element ensuring that any prosecuted killing affects interstate commerce, and it is difficult to argue that an escapee killing (or even escapee killings viewed cumulatively) constitutes "economic activity [that] substantially affects interstate commerce." *United States v Lopez*, 514 U.S 549, 560 (1995). *See United States v Morrison*, 529 U S 598, 617 (2000) ("We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce.")

[7] Accordingly, Congress has proscribed escapes in section 751(a) of title 18, which provides.

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined under this title or imprisoned not more than five years, or both; or if the custody, or confinement is for extradition, or for exclusion or expulsion proceedings under the immigration laws, or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined under this title or imprisoned not more than one year, or both.

18 U.S.C § 751(a) (1994)

recapture ("escape-related" killings). We agree with this assumption, for the following reasons.

First, Congress plainly has a legitimate interest in punishing federal inmates who kill others (whether prison officials, law enforcement personnel, or private citizens) during their initial escape. This application of § 1120 is reasonably adapted to deterring such inmates from using potentially deadly force in the course of effecting and prolonging their escapes. Moreover, such legislation is reasonably adapted to deterring federal inmates from attempting escape in the first place. The need to commit violent acts that might result in death, at times, will be a reasonably foreseeable consequence of an escape attempt; additional penalties for such killings thus provide an added measure of deterrence against such attempts. Furthermore, Congress might reasonably determine that the imposition of death and other severe penalties is an appropriate means to deter escape and escape-related killings by inmates serving life sentences, for whom lesser sanctions would have little force.[8] Thus, as applied to killings that help to effectuate an escape, § 1120 rationally furthers Congress's legitimate interest in maintaining the efficacy and security of federal prisons.[9]

Second, Congress has a legitimate interest in punishing escapees who kill others (again, whether prison officials, law enforcement personnel, or private citizens) as a means of forestalling subsequent recapture and return to prison. Absent the threat of additional punishment, escapees who already face a "natural life sentence" [10] upon their return to the penitentiary will have much to gain and little to lose by using lethal force to frustrate a recapture attempt. Moreover, inmates considering an escape attempt can reasonably foresee the need to use lethal force to avoid subsequent recapture even if their initial attempt is successful; additional penalties for such killings thus assist in deterring such initial attempts.

This interest in deterring recapture-avoiding killings is not limited to killings that frustrate a specific effort by law enforcement officials to bring the escapee into custody, but more broadly includes killings designed to prevent the escapee's

[8] It might be argued that the deterrent effect of the *non-capital* penalties authorized under § 1120 is only marginal when applied to inmates already serving life sentences. The imposition of an additional sentence, however, may have substantial impact where, for example, the inmate nurtures some hope of obtaining reversal of his first life sentence through further appeals, or the inmate nurtures some hope of early release. The resulting deterrence thus provides a rational basis for the non-capital penalties § 1120 provides.

[9] Indeed, with respect to this application, § 1120 largely overlaps with 18 U.S.C. § 1111 (1994), which makes a killing committed during the "perpetration of . . . any . . . escape" a species of felony-murder when it occurs "[w]ithin the special maritime and territorial jurisdiction of the United States." In 1984, Congress added escape and some other crimes to the statutory list of felonies triggering the federal felony-murder rule precisely because Congress thought that escape and the other added crimes "pose as great if not a greater threat to human life than the four already listed." S. Rep. No. 98-225, at 311 (1983).

[10] The statutory definition of "life imprisonment" includes "a sentence for the term of natural life, a sentence commuted to natural life, an indeterminate term of a minimum of at least fifteen years and a maximum of life, or an unexecuted sentence of death." 18 U.S.C. § 1120(a), *id.* § 1118(b). Thus some escapees could violate § 1120 even though it had not been definitively determined at the time of the violation that they would remain incarcerated for the rest of their lives. Some of § 1120's deterrent effects discussed in the text do not apply as forcefully to such individuals. To clarify the discussion, we use the term "natural life sentence" to refer to a sentence that clearly requires an inmate to remain imprisoned for the rest of his life.

status from even being discovered by such officials. Well after a successful escape, an escapee might divulge his history and wanted status to a friend or co-worker, and then later learn there is reason to fear the confidant will intentionally turn him in or perhaps even unintentionally give his identity away. Or the escapee might keep his identity and past a secret, but nevertheless worry that a friend or co-worker has become suspicious and is on the verge of discovering his status as a fugitive from justice. Perhaps most commonly, the escapee might subsequently engage in some illegal conduct (say, robbing a liquor store) and worry that a witness's description will lead to his arrest, which eventually will lead authorities to discover his wanted status. In each of these and similar circumstances Congress might reasonably conclude that, absent § 1120, an escapee already subject to a natural life sentence upon recapture would have little to lose and much to gain by killing the friend, co-worker, or witness before she wittingly or even unwittingly brings the escapee's status to the attention of the authorities. Indeed, this incentive to kill to avoid detection is a product of the federal sentencing regime itself. Absent § 1120, the escapee would know that detection would lead to his return to prison for life, and that a killing to avoid detection would lead (as a practical matter) to the very same punishment under federal law; thus absent § 1120 it would be rational for the escapee to kill in order to reduce the risk of detection.[11] Surely Congress has a legitimate interest in counteracting the perverse incentive that life imprisonment terms otherwise create, by imposing an additional sanction for detection-avoiding killings.

Thus, Congress has an interest in proscribing escapee killings that are connected to the initial effort to escape or subsequent efforts to remain at large. Criminal regulation of killings in these circumstances falls comfortably within Congress's authority to protect and effectuate its enumerated Article I powers through maintenance of an effective criminal justice and penal system.

III. SECTION 1120'S APPLICATION TO KILLINGS UNRELATED TO THE INITIAL ESCAPE OR SUBSEQUENT EFFORTS TO AVOID DETECTION AND RECAPTURE

Your inquiry concerns application of 18 U.S.C.A. § 1120 to killings that are unrelated to the initial effort to escape or subsequent efforts to avoid recapture or remain undetected ("non-escape-related" or "unrelated" killings). For example, § 1120 could encompass a killing that occurs many years later during a domestic dispute or a drunken barroom brawl. You have inquired whether § 1120's application to such non-escape-related killings is constitutionally permissible. The novel question presented is whether this statutory application is ration-

[11] This calculus could be different in circumstances where the escapee has strong reason to believe that his killing to avoid detection would be punished by death pursuant to a state law criminal prosecution. It is plainly reasonable, however, for Congress to ensure that the federal sentencing scheme does not create incentives for escaped life prisoners to kill in those states that do not authorize the death penalty for such killings.

ally related to a legitimate federal interest, or, if not, whether the statute's overbroad coverage can nevertheless be justified.[12]

We note at the outset that the rationales discussed in Part II supporting congressional authority to proscribe escape-related killings do not persuasively extend to unrelated killings. For example, the deterrence justification supporting § 1120's application to killings that assist in the initial escape or thwart subsequent recapture does not provide a plausible rationale for § 1120's application to killings unrelated to escape. By definition, penalizing such unrelated killings will not encourage escapees to take greater precautions to avoid using deadly force during efforts to escape or avoid recapture. Moreover, penalizing unrelated killings will likely have little influence in discouraging federal inmates from attempting to escape in the first place. While inmates might reasonably foresee the need to use deadly force while escaping and forestalling recapture, they are less likely to foresee a need to use deadly force outside of these moments, and thus the extra sanction for doing so would not form part of their escape-planning calculus. Unlike additional sanctions for escape-related killings, then, additional sanctions for unrelated killings would likely have little effect on either decisions to escape or the use of care in doing so.

Moreover, federal life sentences do not create any perverse incentive for escapees to commit non-escape-related killings when they are otherwise minding their own business and not in fear of being detected and subsequently recaptured. To the contrary, a successful escapee has every incentive not to kill unless his detection is imminent, because the killing itself would attract attention and make discovery of his fugitive status more likely. Accordingly, § 1120's sanctions for such unrelated killings cannot be upheld on the theory that they eliminate a perverse incentive to kill otherwise created by a natural life sentence.

Nevertheless, we believe a compelling case can be made that the federal government has a legitimate penological interest in ensuring that an escaped life-sen-

[12] If a particular defendant charged with violating § 1120 has committed an escape-related killing, a court will probably not allow that defendant to challenge § 1120 on the ground that it is unconstitutional as applied to non-escape-related killings. Outside of the First Amendment and perhaps a few other contexts where courts are particularly concerned about an overbroad statute's chilling effect on constitutionally protected behavior, "[t]he traditional rule is that 'a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court.' " *Los Angeles Police Dept. v United Reporting Publ'g Corp.*, 528 U.S. 32, 38 (1999) (citations omitted). The Supreme Court has applied this approach in cases concerning congressional power as well as those concerning individual rights *See, e.g., United States v. Raines*, 362 U.S. 17, 20–22 (1960) (precluding state official from challenging Congress's authority pursuant to Section Two of the Fifteenth Amendment to proscribe race-based interference with statutory voting rights on the ground that the proscription unconstitutionally applied to private citizens as well as state officials), *Salinas v. United States*, 522 U.S. 52, 61 (1997) (when application of statutory provision in a specific case "did not extend federal power beyond its proper bounds," Court did not inquire whether provision exceeded Congress's power with respect to its "application in other cases")

However, a defendant whose conduct arguably is non-escape-related may challenge the statute as lying beyond Congress's authority, such a defendant would be arguing that the statute cannot constitutionally be applied to him personally As a practical matter, since § 1120 does not now require a prosecutor to prove as an element of the offense that the killing is escape-related, it may be unclear whether the killing can be so described (unless, for example, the evidence demonstrates clearly that the killing occurred during the initial prison break) If it is unclear, the defendant would likely have standing to challenge § 1120's breadth

tenced prisoner does not threaten the public's safety through violent criminal behavior during the entire period he remains at large. Once an individual has been charged, tried, and duly convicted of a federal offense, the federal government acquires a strong penological interest in regulating that individual's subsequent behavior so as to promote society's welfare. Congress may authorize the executive to seek, and the judiciary to impose, a wide range of criminal sentences designed to achieve such diverse goals as retribution, rehabilitation, general deterrence, specific deterrence, and incapacitation. This latter interest in incapacitation is designed to protect the public from further criminal activity by the particular inmate during his term of punishment. *See, e.g., United States v. Brown*, 381 U.S. 437, 458 (1965) ("One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm . . . ."). This interest is particularly strong with respect to a life-sentenced inmate, since Congress and other actors in the criminal justice system have deemed it appropriate to sequester him from the public for the remainder of his life.[13]

The federal government's powerful interest in preventing a life-sentenced inmate from endangering the public does not dissipate simply because the inmate manages to escape the confines of federal custody. To the contrary, all of Congress's legitimate penological objectives are undermined each and every day that an escaped federal prisoner remains at large, since each day free undermines the sentence's retributive, rehabilitative, and deterrent value and, most relevantly, directly thwarts the goal of public protection through incapacitation. For this very reason, the Supreme Court has characterized escape from federal prison as a "continuing offense" rather than one which is completed the moment escape is effectuated:

> [W]e think it clear beyond peradventure that escape from federal custody as defined in § 751(a) is a continuing offense and that an escapee can be held liable for failure to return to custody as well as for his initial departure. *Given the continuing threat to society*

[13] This point holds even for those inmates for whom it had not been definitively determined that they would remain incarcerated for the rest of their natural lives (i.e., inmates not subject to a "natural life sentence," *see supra* note 10). For such inmates, society has still determined that their crimes merit a maximum of life imprisonment, and their sentences would permit the possibility of such a fate

One might query whether Congress has a legitimate interest in protecting the public from all violent recidivism or only from those violent acts that independently violate federal (as opposed to state) law While we have found no case law directly on point, we think the better view is that, once a person is duly charged and convicted of a federal offense, Congress's valid penological interests in incapacitating, deterring, and even rehabilitating that person extend to all dangerous aspects of her behavior We note that federal courts have long considered state-law offenses as relevant factors in determining the appropriate sentence for federal criminal activity, *see, e.g., United States v Carroll*, 3 F 3d 98, 101–03 (4th Cir. 1993), and similarly federal courts have long required federal convicts sentenced to probation or released on parole to refrain from subsequent state-law offenses as a condition of their continued release.

Moreover, as a practical matter, federal prosecution and incarceration often preempt state prosecution and incarceration of the same offender for the same or related conduct If the federal government had not incarcerated (and then let escape) a particular offender, she might well have been incarcerated in state prison during the period of the federal escape and thus have been incapable of committing state-law crimes Arguably, the preemptive effect of federal prosecution gives Congress an interest in and even responsibility to prevent that offender from engaging in further harmful conduct that violates state law during her federal term of imprisonment.

> *posed by an escaped prisoner*, "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one."

United States v. Bailey, 444 U.S. 394, 413 (1980) (emphasis added; citation omitted). Thus, "every day away from custody serves as a 'continuing threat to society,' and until recapture or surrender is an ongoing act of escaping." [14]

The continuing nature of the relationship between the escapee and the federal government can be viewed from the government's perspective as well. "A prisoner who has escaped from the custody of a sovereign remains in the 'constructive custody' of that sovereign." *Potter v. Ciccone*, 316 F. Supp. 703, 706 (W.D. Mo. 1970). Not only does this constructive custodial relationship give the government a continuing interest in the escapee's activities, but the government's earlier failure to maintain its physical custody over the inmate arguably places it under a special responsibility to recapture the escapee and to ensure the public's safety during the interim.

We believe that this confluence of penological and custodial interests supports the conclusion that Congress has the constitutional authority to proscribe and punish all killings by escaped life-sentenced prisoners, even those lacking a direct nexus to either the initial effort to flee or subsequent attempts to avoid detection and recapture. Every killing committed by an escaped life-sentenced prisoner frustrates the original life sentence's purpose of protecting the public from dangerous recidivism through incapacitation — and does so in the most egregious manner possible. Moreover, both the convict's continued commission of the escape and the federal government's initial failure in maintaining physical custody are contributing causes in the event of any subsequent killing by the escapee. Under these circumstances, the government's ongoing constructive-but-no-longer-physical custody gives it strong reason to secure its penological objectives pending recapture. As a result, Congress has a legitimate interest in deterring such escapee killings, and prosecuting and punishing such killings as federal crimes distinct from the underlying and continuing offense of escape is plainly adapted to that end.

A supportive, albeit imperfect, analogy can be drawn between Congress's interest in proscribing escapee killings by life-sentenced inmates and Congress's well-established interest in imposing release conditions on inmates given lesser sentences. Congress has long authorized courts to sentence certain offenders to

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[14] *United States v. Audinot*, 901 F.2d 1201, 1203 (3d Cir. 1990) (citation omitted); *see also, e.g., United States v. Tapia*, 981 F.2d 1194, 1196 (11th Cir. 1993) (same); *United States v. Lopez*, 885 F.2d 1428, 1435 (9th Cir. 1989) (same).

We do not mean to suggest that, given this characterization of escape as a "continuing offense," every post-escape killing is properly considered an instance of felony-murder on the theory that the killing occurred "during" the escape. For purposes of 18 U.S.C. § 1111, which includes a felony-murder provision criminalizing "[e]very murder . . . committed in the perpetration of, or attempt to perpetrate, any escape," the temporal duration of an escape's "perpetration" may not extend this far. The "continuing offense" characterization does, however, appropriately emphasize the extent to which each day of unlawful freedom undermines the penological objectives of the original sentence, particularly the objective of protecting the public from dangerous recidivist acts

terms of probation, subject to their compliance with various conditions on their conduct; violation of these conditions can result in revocation of the offenders' probationary status.[15] Congress has also long authorized periods of supervised release (formerly called parole) following the completion of a term of imprisonment, again subject to various conditions on behavior.[16] One condition that must be imposed under either release regime is that the released offender commit no further state or local (as well as federal) crimes.[17] In addition, sentencing courts frequently impose discretionary conditions on particular offenders that might well lie beyond Congress's authority to impose on the general population.[18] Imposing such discretionary conditions is considered appropriate where doing so furthers the federal government's legitimate penological interests in deterrence, incapacitation, and rehabilitation.[19] Given the historical pedigree of these release regimes, we believe that Congress's authority to impose such conditions as part of a general sentencing scheme is beyond serious dispute and may safely serve as a benchmark for the scope of congressional power.[20] The assumed constitutional foundation for the regimes is that Congress acquires a legitimate penological interest in regulating the behavior of federal convicts released on probation or parole, even if absent the conviction Congress could not similarly regulate the same behavior.

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[15] Permissible probation conditions are currently specified by section 3563(b) of the Sentencing Reform Act of 1984, Pub. L. No. 98–473, 98 Stat. 1993 (1984) (codified as amended 18 U.S.C. §§ 3551–3742 (1994 & West Supp.)).

[16] Section 3583 of the Sentencing Reform Act of 1984 codifies sentencing courts' authority to impose discretionary conditions of supervised release following imprisonment. Under the earlier parole system, the parole board could release an inmate on a supervised basis before the inmate's sentence was fully served, but any conditions of release terminated when the inmate's original sentence terminated. Under the newer system of supervised release, an inmate must serve the full term of imprisonment as originally sentenced, and if the sentencing court deems it necessary, an additional term of supervised release.

[17] *See* 18 U.S.C. § 3563(a) ("The court shall provide, as an explicit condition of a sentence of probation—(1) for a felony, a misdemeanor, or an infraction, that the defendant not commit another Federal, state, or local crime during the term of probation."), *id.* § 3583(d) ("The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision . . ."). *Cf. Johnson v. United States*, 529 U.S. 694 (2000) (case involving supervised release revocation when offender committed state-law forgery offenses).

[18] *See, e.g., United States v. Tonry*, 605 F.2d 144 (5th Cir. 1979) (upholding condition preventing offender from running for state political office); *United States v. Martinez*, 988 F. Supp. 975 (E.D. Va. 1998) (upholding condition restricting offender's driving activities).

[19] *See, e.g., United States v. Schave*, 186 F.3d 839, 841 (7th Cir. 1999):

> The district court may impose a specific condition of supervision so long as the condition. (1) is reasonably related to specified sentencing factors, namely the nature and circumstances of the offense and the history and characteristics of the defendant; (2) is reasonably related to the need to afford adequate deterrence, to protect the public from further crimes of the defendant, and to provide the defendant with needed education or vocational training, medical care, or other correctional treatment in the most effective manner, (3) involves no greater deprivation of liberty than is reasonably necessary to achieve these goals; and (4) is consistent with any pertinent policy statements issued by the Sentencing Commission.

See also id. at 844 (condition is permissible if it "reasonably serves the aim of preventing [the offender] from repeating his criminal activities and of protecting the public from potential recidivism").

[20] We have found no case considering a challenge to Congress's Article I power to authorize a sentencing court to impose the "violate no state law" condition or another condition that Congress could not impose on the general public. A few cases have rejected more specific federalism-based challenges to the imposition of probation or release conditions. *See, e.g., Tonry*, 605 F.2d at 148–50 (rejecting claim that condition prohibiting offender from running for state political office unconstitutionally intruded upon state's prerogative to supervise its own elections). Such cases at least imply that the imposition of such conditions lies within Congress's Article I authority.

This benchmark supports the constitutionality of § 1120. If Congress has a legitimate penological interest in regulating the conduct of convicts who are lawfully released either instead of or after serving a prescribed term of imprisonment, *a fortiori* Congress has a legitimate penological interest in regulating the conduct of convicts who *unlawfully release themselves* prior to completion of their imprisonment terms. Escaped convicts pose the same if not greater dangers to public safety during their period of unlawful release, and the fact that any future killing occurs during their ongoing commission of the "continuing offense" of escape makes the federal interest in deterring such behavior seem all the more substantial.

We recognize that § 1120 and the probation and supervised release regimes are not on all fours. When an offender violates a condition of her probation or release, she does not thereby (necessarily or even usually) commit a new federal crime, and the revocation of her probation or release is not considered a punishment for such new misconduct. Rather, the "additional" penalty imposed is considered part of the original, conditional sentence for the underlying offense.[21] The source of congressional power to impose this "additional" penalty, therefore, is the same as the source of congressional power to impose the fixed aspects of the original sentence, to wit: either an enumerated or implied power to govern individual conduct or the Necessary and Proper Clause applied in relation thereto. *See supra* Part I. For example, Congress's power to impose both imprisonment and probation conditions on an offender convicted of counterfeiting stem directly from Congress's Article I authority to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States." U.S. Const. art. I, § 8, cl. 6. By contrast, § 1120 makes post-escape killing an entirely new crime subject to a new criminal sanction, rather than a post conviction event that modifies the original life sentence for the original crime. One might argue, therefore, that Congress's power to punish post-escape killings cannot similarly be considered to flow directly from its power to impose the underlying life sentence in the first place. If so, then unlike the probation and supervised release statutes, § 1120 must be defended as an appropriate means of serving a *generalized* penological interest — precluding escapes from thwarting the incarceration objectives of life imprisonment — rather than as an appropriate means of serving the *specific* penological objective of punishing the original underlying offense. In this sense, while both § 1120 and the probation and supervised release statutes operate to regulate the outside-prison conduct of persons serving federally imposed sentences (including some conduct that lies beyond Congress's ability to regulate for the population at large), the argument for congressional authority over federal convicts in the § 1120 context may be somewhat more attenuated. But even though the

[21] *See, e.g., Johnson*, 529 U.S. at 700 (characterizing "postrevocation sanctions as part of the penalty for the initial offense" rather than "construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release"), *United States v. Meeks*, 25 F.3d 1117, 1120–23 (2d Cir. 1994) (canvassing arguments and concluding that "any provision for punishment for a violation of supervised release is an increased punishment for the underlying offense")

analogy is imperfect, we believe the interests underlying Congress's well-established practice of authorizing release conditions, including compliance with state criminal laws, supports our conclusion that Congress has a legitimate penological interest in regulating the conduct of escaped life-sentenced prisoners sufficient to justify federal proscription of all post-escape killings.

We recognize that both *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), reflect a heightened judicial sensitivity to the breadth of federal regulatory power. We do not, however, read these decisions as calling into serious question this particular justification for § 1120's application to non-escape-related killings. In embracing a more restrictive view of Congress's Commerce Clause power than that reflected in prior case law, the Court expressed its concern that allowing Congress to "pile inference upon inference," *Lopez*, 514 U.S. at 567, in order to connect an intrastate activity to interstate commerce would "convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States," *id.*, and threaten to obliterate the "distinction between what is truly national and what is truly local." *Morrison*, 529 U.S. at 617–18. The Court was particularly concerned that an expansive understanding of the commerce power would threaten the states' traditional authority to regulate intrastate criminal activity. *See Lopez*, 514 U.S. at 561 n.3 ("Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.' ") (citation omitted); *Morrison*, 529 U.S. at 618 ("[W]e can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.").

The context in which these concerns were voiced was quite different, however, and such concerns have significantly less force as applied to § 1120's proscription of non-escape-related killings by escapees from life imprisonment. First, one need not "pile inference upon inference" in any troublesome manner to justify this proscription. As explained in Part I, Congress's authority to construct and operate a criminal justice system in general and a penal regime in particular is well grounded and unquestioned. Sustaining § 1120's application to non-escape-related killings requires only one additional step, the recognition that even such killings undermine Congress's legitimate penological and custodial interests in protecting the public from violent federal convicts who should be in prison rather than at large.

Second, the justification for upholding this application of § 1120 would not come close to supporting a general congressional police power. To be sure, the broadest conception of this justification might give one pause. Taken to its extreme, this incapacitation rationale could permit Congress to punish any public-threatening conduct by any federal escapee, whether the conduct is life-threatening or not, whether the escapee is a felon or a misdemeanant, and whether the frustrated prison sentence is a term of life or a term of months. Indeed, this rationale

might extend as well to some or perhaps even all federal convicts placed on probation or supervised release, since they might also pose some threat to public safety during their terms of sentence. Thus perhaps Congress could extend the rationale offered here for § 1120's application to non-escape-related killings to criminalize (with appropriate due process protections) a great deal of conduct by probationers or parolees that heretofore has been governed solely by state law.

But this concern about the incapacitation rationale's potential breadth does not counsel strongly against § 1120's constitutionality, for two reasons. First, even the largest class of persons plausibly subject to federal regulation under this rationale — all federal convicts during the entire period of their sentences — remains relatively small, encompassing only those persons who have already been prosecuted, convicted, and sentenced for violating a valid federal criminal statute. Thus the broadest possible application of this justification for § 1120 would hardly approach a general police power of the sort rejected by the Court in *Lopez* and *Morrison*. Second, the rationale might not extend so broadly. Arguably, the shorter the sentence and the less serious the post-release conduct, the less that conduct contravenes Congress's penological and custodial interests. The rationale for federal criminal proscription of such conduct might extend only to serious misconduct by those serving long custodial sentences. This would limit the ultimate scope of Congress's regulatory authority over federal convicts and assuage the concerns reflected in *Lopez* and *Morrison*, and nevertheless such authority would still cover all of the conduct proscribed by § 1120, since Congress's penological and custodial interests are clearly at their zenith when applied to the narrow realm of killings by life-sentenced escapees. When a life-sentenced federal prisoner escapes and kills, the federal government's failure to maintain physical custody is indisputably a but-for cause of the death, no matter when or why it occurs, and Congress's interest in ensuring that society is permanently protected from a dangerous felon has been frustrated in the most egregious manner possible.[22]

[22] Assuming *arguendo* that a court found this defense unpersuasive and concluded that § 1120's application to non-escape-related killings does *not* itself serve legitimate federal interests, this application might nevertheless be defended on the ground that *most* of the statute's applications are constitutional and thus § 1120 is not so overbroad as to warrant invalidation. One might argue that a high percentage of escapee killings are escape-related; indeed, if the category of "killings to avoid detection" is very broadly defined, perhaps most killings could plausibly be characterized as lying within it. Moreover, Congress might believe that even in those cases where a sufficient connection between a killing and recapture- or detection-avoidance exists to justify federal jurisdiction, the connection will frequently be quite difficult for prosecutors to prove. Thus § 1120's application to all killings might be defended on the ground that this coverage is only slightly overbroad, and its overbreadth is justified as enabling prosecutors to avoid facing some difficult proof problems. *Cf. Westfall v. United States*, 274 U.S. 256, 259 (1927) ("[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so.")

This defense, while plausible, also raises some difficulties. First, the fact that Congress has neither articulated this rationale nor made findings about its empirical plausibility will likely give courts some pause. A court might be reluctant to assume that most escapee killings are escape-related without any congressional findings to that effect. Moreover, it is uncertain whether a court would characterize the desire to avoid making the prosecutor prove facts that otherwise seem necessary to establish federal jurisdiction as a legitimate federal interest.

IV. CONCLUSION

Congress has clear constitutional authority to proscribe killings by escaped life-sentenced inmates which either effectuate or prolong the escape. Whether Congress has power to proscribe killings that are unrelated to such efforts presents a novel question. We believe that Congress's penological and custodial interests in ensuring the incapacitation of life-sentenced inmates notwithstanding their escape from prison provide a compelling argument for upholding § 1120's constitutionality even with respect to non-escape-related killings.

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

Application of 18 U.S.C. § 209 to Employee-Inventors Who Receive Outside Royalty Payments

A federal government employee who obtains patent rights to an invention made in the course of federal employment ordinarily does not violate 18 U.S.C. § 209 by licensing the patent rights to a private entity and receiving royalty payments in exchange

September 7, 2000

MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF GOVERNMENT ETHICS

You have asked for our opinion whether a federal government employee who obtains patent rights to an invention made in the course of federal employment violates 18 U.S.C. § 209 by licensing the patent rights to a private entity and receiving royalty payments in exchange. *See* Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Stephen D. Potts, Director, Office of Government Ethics (Oct. 19, 1999) ("Potts letter"). We conclude that § 209 ordinarily does not ban outside royalty payments to employee-inventors.

I.

Section 209(a) states:

> Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or
>
> Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection shall be subject to the penalties set forth in section 216 of this title.

18 U.S.C. § 209(a) (1994). This provision, as the Court of Appeals for the Ninth Circuit has explained, bars "(1) an officer or employee of the executive branch or an independent agency of the United States government from (2) receiving

salary or any contribution to or supplementation of salary from (3) any source other than the United States (4) as compensation for services as an employee of the United States." *United States v. Raborn*, 575 F.2d 688, 691–92 (9th Cir. 1978). You have asked us to focus on the third and fourth elements, *see* Potts letter at 2, and we accordingly assume that the first two elements — that an employee-inventor is an "officer or employee of the executive branch" or an "independent agency," and that royalty payments constitute a "contribution to or supplementation of salary" — would be established here.

The government has the right to obtain the "entire right, title and interest in and to all inventions made by any Government employee (1) during working hours, or (2) with a contribution by the Government of facilities, equipment, materials, funds, or information, or of time or services of other Government employees on official duty, or (3) which bear a direct relation to or are made in consequence of the official duties of the inventor." Exec. Order No. 10096, 3 C.F.R. 292 (1949–1953 comp.). If an agency determines that the government's contribution to the employee's invention is "insufficient equitably to justify" the government's obtaining all rights to the invention, or that the agency has "insufficient interest" in the invention, it "shall leave title to such invention in the employee," subject to an irrevocable, nonexclusive license to the government. *Id.* We understand that employee-inventors who are allowed to retain patent rights in their inventions often enter into licensing agreements with private entities, under which they receive royalty payments. *See* Potts letter at 1. In some instances, an employee-inventor may continue to develop the invention as part of his or her job responsibilities and may participate in a cooperative research and development agreement ("CRADA") between the agency and a private entity. *See id.*

II.

You have suggested that the third element of a § 209 violation — receipt of payment *from a source other than the United States* — might not be satisified here because the government could be deemed the source of outside royalty payments to employee-inventors. *See* Potts letter at 2–3; *see also* 18 U.S.C. § 209(a) (forbidding salary supplementation "from any source other than the Government of the United States"). We do not believe that this argument can be sustained.

The closest analogue appears to be set out in an opinion of our Office from 1993. There, we considered the government's practice, under the Federal Technology Transfer Act ("FTTA"), 15 U.S.C. §§ 3701–3717 (1994 & Supp. IV 1998), of sharing with an employee-inventor the royalties that the government received from licensing the employee's invention. These payments to the employee, we concluded, did not place the employee in the position of violating 18 U.S.C. § 208, which generally forbids an employee from working on a par-

ticular matter in which he or she has a financial interest.[1] *See Ethics Issues Related to the Federal Technology Transfer Act of 1986*, 17 Op. O.L.C. 47, 50 (1993). The FTTA, as then written, required government agencies to "pay at least 15 percent of the royalties or other income the agency receives on account of any invention to the inventor . . . if the inventor . . . assigned his or her rights in the invention to the United States." 15 U.S.C. § 3710c(a)(1)(A)(i) (1994). Because the government paid the royalties at issue, we determined that they did not constitute an outside financial interest implicating § 208. *See* 17 Op. O.L.C. at 50–51.[2] Although the opinion primarily dealt with § 208, we also concluded, on the same reasoning, that employees receiving such payments would not violate § 209(a). *See id.* at 51.

Here, although private entities pay the royalties, employee-inventors acquire patent rights only because the government has decided not to exercise its right to obtain title. *See* Potts letter at 3. We agree, therefore, that the royalties come from the government in an indirect sense. Nonetheless, the royalties at issue in our 1993 opinion came *directly* from the government and *indirectly* from a private source; here the converse is true. *See* 17 Op. O.L.C. at 51 ("Since an employee receives section 7 payments from the federal agency holding the rights to the invention, the payments are not subject to § 209(a)'s prohibition."). Rather than incidentally benefitting by receiving a portion of the royalties from an agreement between the government and a private entity, employee-inventors in the present case are themselves entering into licensing agreements to which the government is not a party. The payments here are thus critically different from those addressed in our 1993 opinion. Here, the indirect connection between the government and the royalty payments cannot negate their direct connection to a nongovernmental source. Accordingly, we conclude that the third element of § 209 could be met, and we turn to the fourth element.

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[1] Section 208(a) states.

> Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, a Federal Reserve bank director, officer, or employee, or an officer or employee of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, 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, has a financial interest [s]hall be subject to [specified] penalties
>
> . . . .

18 U S C § 208(a) (1994)

[2] We reasoned that such payments would become part of the inventor's federal employment contract, would necessarily be known to the government, and therefore would not implicate the central concerns of § 208. *See id.*

III.

You have expressed the concern that outside royalty payments might be viewed as compensation "for the employee's past or present services to the Government in developing the invention." Potts letter at 6. We recognize that the statute might be given that interpretation. Nonetheless, we believe that, on the better view, the payments would not meet this element of the statute.

In a 1997 opinion, we interpreted § 209 to require an "intentional, direct link" between the outside compensation and the employee's government service. *Applicability of 18 U.S.C. § 209 to Acceptance by FBI Employees of Benefits Under the "Make a Dream Come True" Program*, 21 Op. O.L.C. 204, 206 (1997). We did not read § 209 to prohibit "all non-government payments to an individual where there is any nexus between the payment and the individual's employment by the government." *Id.* at 209. We largely relied on an amendment of the provision in 1962, by which Congress deleted the phrase "in connection with" from the earlier version and substituted the "as compensation for" language. Congress made this change because the former phrase was thought ambiguous and "capable of an infinitely broad interpretation." *Id.* at 206 (citing H.R. Rep. No. 87–748, at 13, 25 (1961)). "The amendment was designed to clarify that there must be a *direct link* between the contribution to or supplementation of salary and the employee's services to the government." *Id.* (emphasis added).

No intentional, direct link between an employee-inventor's government services and the licensing of patent rights would typically exist here. Our 1997 opinion identified several factors that should be taken into consideration when construing the "as compensation for" requirement of § 209, where the existence of an intentional, direct link is unclear. Those factors include:

> (1) whether there is a substantial relationship or pattern of dealings between the agency and the payor; (2) whether the employee is in a position to influence the government on behalf of the payor; (3) whether the expressed intent of the payor is to compensate for government service; (4) whether circumstances indicate that the payment was motivated by a desire other than to compensate the employee for her government service . . .; (5) whether payments would also be made to non-government employees; and (6) whether payments would be distributed on a basis unrelated to government service.

Id.

Three of these factors support the conclusion that outside royalty payments generally are not intended to be compensation for government services. It is unlikely that a payor would expressly indicate an intent "to compensate for government service." *Id.* (third factor). To the contrary, the circumstances typically would

indicate that the payor "was motivated by a desire other than to compensate the employee for her government service" *Id.* (fourth factor)—the desire to obtain property rights to an invention that it views as valuable. This value would not normally come from the fact that the employee-inventor developed his or her invention while working as a government employee. Presumably, a payor would be just as interested in acquiring rights to such an invention if the inventor were not a federal employee. Moreover, the payments "would be distributed on a basis unrelated to government service." *Id.* (sixth factor). They would not be calibrated to reflect the amount of government time the employee devoted to developing the invention but only to the value of the invention. In sum, these factors point to the conclusion that payors would not be compensating employee-inventors for government service, but instead would be motivated by the economic advantages of securing property rights to a potentially valuable invention. "This Department has consistently construed § 209(a) and its predecessor, 18 U.S.C. § 1914, to forbid *only* payments *intended to serve* as additional compensation to an individual for undertaking or performing government service." *See Gifts Received on Official Travel*, 8 Op. O.L.C. 143, 144 (1984) (citing 41 Op. Att'y Gen. 217, 221 (1955); 39 Op. Att'y Gen. 501, 503 (1940)) (emphasis added) (internal quotation marks omitted).

One other factor—"whether payments would also be made to non-government employees"—at the least would not point to the contrary conclusion. We have not been apprised of any situation in which a particular licensee has entered into licensing agreements only with government-employed inventors, or in which, in instances where patent rights are held jointly by a federal employee and another inventor who is not employed by the federal government, a licensee has paid a disproportionately large share of the royalties to the federal employee.

The two remaining factors set forth in our 1997 opinion—"whether there is a substantial relationship or pattern of dealings between the agency and the payor" and "whether the employee is in a position to influence the government on behalf of the payor," 21 Op. O.L.C. at 206—may be applicable to some, though not all, licensing arrangements between a private entity and a government employee. Even in those circumstances in which these factors are present, however, we believe the independent prohibition in 18 U.S.C. § 208 should ensure that royalty payments are not made "as compensation for" the employee-inventor's government services. These two factors follow from the Supreme Court's explication of § 209 in *Crandon v. United States*, 494 U.S. 152, 158 (1990). The *Crandon* Court observed that § 209 was intended to prevent an outside payor from having a "hold on the employee deriving from his ability to cut off one of the employee's economic lifelines," and to address the tendency of an employee "to favor his outside payor even though no direct pressure is put on him to do so." *Id.* at

165 (quoting Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* 211 (1960)) (internal quotation marks omitted).[3]

Where a private entity purchases the right to use a government employee's valuable patent rights and the employee does no further work relating to the patent, neither the "substantial relationship" nor the "position to influence" factors should typically apply. In such situations, therefore, royalty payments would not, absent unusual circumstances, constitute "compensation for" government services. According to your letter, however, in some cases, "employee[-inventor]s may continue to work, as part of their official duties, on certain aspects of the product or process for which they have been permitted to obtain certain patent rights. This additional work may include, among other things, technical improvements to the invention or research on new uses for the invention." Potts letter at 1; *see also* 17 Op. O.L.C. at 47 (discussing this practice). When the government and the payor are collaborating through a CRADA, there would likely be a "substantial relationship or pattern of dealings between the agency and the payor." 21 Op. O.L.C. at 206. Even when there is no CRADA, concerns may be raised if in developing or refining the invention the employee-inventor "is in a position to influence the government on behalf of the payor." *Id.*

Nevertheless, in the context of employee-inventors who receive outside royalty payments, these concerns are largely eliminated by the independent prohibition of § 208. *Cf. Crandon*, 494 U.S. at 166 (noting that "the [§ 209] concern that the employee might tend to favor his former employer" can be addressed by "other rules [that] disqualify the employee from participating in any matter involving a former employer"). Section 208 requires employee-inventors to recuse themselves from agency actions when they have a financial interest in a particular matter. Section 208 thus bars employee-inventors who receive outside royalty payments from continuing to participate in research concerning their inventions, including CRADAs. *See* 17 Op. O.L.C. at 53. This prohibition on participation in matters in which employee-inventors have financial interests prevents them from being "in a position to influence the government on behalf of the payor," even if "there is a substantial relationship or pattern of dealings between the agency and the payor." 21 Op. O.L.C. at 206.[4]]

To be sure, § 208 may be waived "upon a written determination that the disqualifying interest of the employee is 'not so substantial as to be deemed likely to affect the integrity of the services which the government may expect' from the employee." *See Waiver of the Application of Conflict of Interest Laws for*

[3] The Court noted that § 209 is also aimed at preventing the "suspicion and bitterness among fellow employees and other observers" that can occur when employees are receiving compensation from outside sources *Id.*

[4] We do not address whether there could be facts under which an employee-inventor would have a financial interest under § 208 *before* licensing an invention However, although our 1993 opinion did not reach this issue, it noted that after the government decides not to take up foreign patent rights (but before the employee-inventor licenses those rights), the employee-inventor's possession of foreign patent rights "consitute[s] an integral part of the FTTA incentive program created by Congress" and "that § 208 can and should be interpreted as consistent with the provisions of the FTTA." 17 Op O L C. at 50, 53

Members of the President's Commission on Strategic Forces, 7 Op. O.L.C. 10, 12–13 (1983) (quoting 18 U.S.C. § 208(b)). Nevertheless, although that determination is left to the discretion of the official who appointed the employee, "[i]t is the responsibility of that official to exercise his considerable discretion soundly and in good faith, after a careful and thorough consideration of all of the pertinent facts." *Id.* at 14–15. In these circumstances, possible concerns about the divided loyalty of an employee are adequately addressed under § 208, including the standards for waivers. *See* 5 C.F.R. § 2640.301 (2000).

In view of § 208, a broad interpretation of § 209 would not advance any statutory purpose. *Cf.* Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. Rev. 57, 80 (1992) ("The law prohibits not private gain per se, but rather prohibits private gain that impairs the integrity of services provided to the government, that creates the appearance of misuse of government office, or that requires others to pay to receive access to or services from the government."). Indeed, a ban on employee-inventors' receiving any royalties from their inventions might well run counter to congressional intent. As the *Crandon* Court recognized, § 209 was not intended to "impair the ability of the Government to recruit personnel of the highest quality and capacity." 494 U.S. at 166 (quoting Message from the President of the United States Relative to Ethical Conduct in the Government, H.R. Doc. No. 145, 87th Cong., 1st Sess. 2 (1961)). We understand that a ban on outside royalties could impede, perhaps severely, the government's ability to attract and retain talented employees in the relevant labor markets because it would increase the already considerable income gap between private and public sector employment. *See* Potts letter at 12 ("The application of section 209 to this situation would mean that employee-inventors would have to leave Government if they wanted to commercialize patents obtained under section 8" of the FTTA.); *cf. Crandon*, 494 U.S. at 167 n.22 ("The reach of [§ 209's predecessor] had long been recognized as a serious obstacle to recruitment of men for government office . . . .").

An overly broad interpretation of § 209 would also frustrate the purposes of the FTTA. Congress passed the FTTA to increase use of federally-developed technology by the private sector in order "to improve the economic, environmental, and social well-being of the United States." 15 U.S.C. § 3702. Congress expected employee-inventors to obtain and exploit patent rights to their inventions when the government opted not to retain its rights. *See* S. Rep. No. 99–283, at 14 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3442, 3456. As we observed in our opinion interpreting § 208 and the FTTA, "[i]t is well settled that statutes must be construed as consistent if possible." 17 Op. O.L.C. at 50 (citing *Watt v. Alaska*, 451 U.S. 259, 266–67 (1981) and *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989)). "[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly

amended." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (quoting *United States v. Estate of Romani*, 523 U.S. 517, 530–31 (1998)); *see also Patterson*, 491 U.S. at 181 (stating that courts should hesitate to "read an earlier statute broadly where the result is to circumvent" a later-enacted statutory scheme). If § 209 were interpreted to prohibit employee-inventors from licensing their inventions to private entities, the exploitation of those inventions would languish because employees would have little incentive to "move the[ir] invention[s] into the private sector." S. Rep. No. 99–283, at 14, *reprinted in* 1986 U.S.C.C.A.N. at 3456. Such a construction would hinder one of the FTTA's purposes.[5]

Finally, to the extent that the "as compensation for services" language of § 209 is ambiguous, it should be interpreted in light of the rule of lenity. *See Crandon*, 494 U.S. at 182–83 (Scalia, J., concurring in the judgment) (referring to that language as a "troublesome phrase" devoid of a "clear and constant meaning"); *id.* at 178 (describing administrative interpretations of the phrase as "unpredictable"); *see also* Nolan, *supra*, at 102 (describing § 209's meaning as "uncertain" and noting that "interpretations of section 209 and its predecessors have sometimes been tortured"). Interpreting different language in § 209, the *Crandon* Court looked to this "time-honored interpretive guideline" that ambiguities in criminal statutes should be construed narrowly because of the due process requirement of "fair warning of the boundaries of criminal conduct." *Crandon*, 494 U.S. at 158 (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)). In general, "[c]riminal statutes should be given the meaning their language most obviously invites. Their scope should not be extended to conduct not clearly within their terms." *United States v. Williams*, 341 U.S. 70, 82 (1951) (plurality opinion).

Conclusion

We therefore conclude that, in the usual case, § 209 does not bar employee-inventors from receiving outside royalties. As you observe in your letter, "in any section 209 analysis, the facts of individual cases would have to be examined." Potts letter at 11 n.7. In the typical case, however, we do not think that outside royalties would be paid "as compensation for [the employee-inventor's] services as an officer or employee of the executive branch." 18 U.S.C. § 209(a).

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

[5] As you note, the legislative history of the FTTA indicates that Congress intended to "make no changes in the conflict of interest laws affecting Federal employees or former Federal employees." Potts letter at 5 (quoting S. Rep. No. 99–283, at 10, *reprinted in* 1986 U.S.C.C.A.N. at 3451). As discussed above, however, we believe that § 209 is best read as ordinarily not barring outside royalty payments. On this view, it was not necessary for Congress to amend that section when it enacted the FTTA.

Applicability of the Privacy Act to the White House

The Privacy Act does not apply to the White House Office, which is also known as the Office of the President

September 8, 2000

STATEMENT BEFORE THE
SUBCOMMITTEE ON CRIMINAL JUSTICE, DRUG POLICY
AND HUMAN RESOURCES
COMMITTEE ON GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

Good morning, Mr. Chairman and Members of the Subcommittee. I am pleased to be here today to testify regarding the Department of Justice's ("Department") longstanding position that the Privacy Act of 1974 ("Privacy Act"), 5 U.S.C. § 552a (1994 & Supp. IV 1998), does not apply to the White House Office, which is also known as the Office of the President. In my testimony today, I will generally refer to that Office as the White House Office. In explaining our position regarding the White House Office, I will set forth the standards that also govern the applicability of the Privacy Act to the other components of the Executive Office of the President ("EOP").[1]

The Department's legal position that the Privacy Act does not apply to the White House Office was stated in an Office of Legal Counsel opinion in April 1975, less than four months after the Privacy Act was enacted, by then Assistant Attorney General Antonin Scalia,[2] and it has been reiterated in subsequent Office of Legal Counsel opinions and briefs filed by the Department in litigation. As I will explain, the position rests on three premises. First, the Privacy Act, by its terms, applies only to "agencies." Second, the Privacy Act defines the term "agency" to mean the same thing as the term means in the Freedom of Information Act, 5 U.S.C. § 552 (1994 & Supp. II 1996). Third, the Supreme Court has concluded that the White House Office is not an "agency" within the meaning of the FOIA.

[1] The EOP is made up of a number of different components, one of which is the White House Office. Other components of the EOP include the Office of Management and Budget, the National Security Council, and the Council of Economic Advisors. As will be discussed *infra*, both the legislative history of the Freedom of Information Act ("FOIA") and Supreme Court caselaw make clear that certain components of the "Executive Office of the President" are not encompassed in that term as it is used in the FOIA definition of "agency."

[2] Letter for the Honorable James T. Lynn, Director, Office of Management and Budget, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel (Apr. 14, 1975) ("Scalia Opinion").

I.

The Privacy Act governs the collection, maintenance, use, and disclosure of information concerning individuals by federal agencies. As a review of the various provisions of the Privacy Act will reveal, the requirements of the Act by their terms apply only to federal "agencies." *See* 5 U.S.C. § 552a.[3] *See also Dong v. Smithsonian Inst.*, 125 F.3d 877, 878 (D.C. Cir. 1997) ("requirements of the Act . . . apply to 'agencies' "), *cert. denied*, 524 U.S. 922 (1998). In defining the term "agency" in the Privacy Act, Congress incorporated by reference the definition of "agency" set forth in the FOIA, providing that "the term 'agency' means agency as defined in section 552(e) of [the FOIA]." 5 U.S.C. § 552a(a)(1).[4] Therefore, the applicability of the Privacy Act to the White House Office turns on whether the White House Office is an "agency" as defined in the FOIA.

Congress enacted the FOIA definition of "agency" in 1974, just 40 days before the Privacy Act was enacted. *See* 88 Stat. 1561, 1564 (1974). That definition provides as follows:

> For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

In enacting this definition, Congress sought to codify the test enunciated by the Court of Appeals for the District of Columbia Circuit in *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971), under which the term "agency" as used in the FOIA does not include units within the EOP whose "sole function [is] to advise and assist the President." *Id.* at 1073–75. The Conference Report to the 1974 FOIA amendments provides that:

> With respect to the meaning of the term "Executive Office of the President" the conferees intend the result reached in *Soucie v. David* . . . . The term is not to be interpreted as including the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President.

[3] *See, e.g.*, 5 U.S.C. §§ 552a(b) ("[n]o agency shall . "); 552a(c) ("[e]ach agency, with respect to each system of records under its control, shall . "), 552a(d) ("[e]ach agency that maintains a system of records shall .")

[4] Until 1986, the FOIA's definition of agency was codified at 5 U.S.C. § 552(e). The Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, § 1802(b), 100 Stat. 3207, 3207–49, recodified the definition (without substantive change) at 5 U.S.C. § 552(f). No conforming amendment was made to the Privacy Act to reflect the current location of FOIA's definition.

H.R. Conf. Rep. No. 93–1380, at 14–15 (1974); S. Conf. Rep. No. 93–1200, at 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6267, 6285.

The Supreme Court held in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980), that the FOIA definition of "agency" does not include the Office of the President (which is also known as the White House Office). The Court stated that "[t]he legislative history is unambiguous . . . in explaining that the 'Executive Office' does not include the Office of the President" because the legislative history plainly specified that "'the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President' are not included within the term 'agency' under the FOIA." *Id.* at 156 (citation omitted).

Adhering to the test set forth in *Kissinger* and *Soucie*, the D.C. Circuit Court of Appeals has consistently concluded that the President's immediate personal staff and units in the EOP whose sole function is to advise and assist the President are not considered "agencies" for purposes of the FOIA. *See Armstrong v. Executive Office of the President*, 90 F.3d 553, 557–66 (D.C. Cir. 1996) (National Security Council not an "agency" under the FOIA), *cert. denied*, 520 U.S. 1239 (1997); *Meyer v. Bush*, 981 F.2d 1288, 1292–98 (D.C. Cir. 1993) (President's Task Force on Regulatory Relief not an "agency" under the FOIA); *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038, 1040–41 (D.C. Cir. 1985) (Council of Economic Advisers not an "agency" under the FOIA). *See also Ryan v. Department of Justice*, 617 F.2d 781, 789 (D.C. Cir. 1980) (the FOIA "defines agencies as subject to disclosure and presidential staff as exempt").[5]

In particular, the D.C. Circuit has made it clear—as did the Supreme Court in *Kissinger*—that the White House Office is among the components of the EOP that are exempt from the FOIA definition of "agency." *See Meyer*, 981 F.2d at 1293 & n.3 ("[t]he President's immediate personal staff . . . would encompass at least those approximately 400 individuals employed in the White House Office"); *id.* at 1310 (Wald, J., dissenting) ("[w]e and the Supreme Court have interpreted 'immediate personal staff' to refer to the staff of the Office of the President, also known as the White House Office"); *National Security Archive v. Archivist of the United States*, 909 F.2d 541, 545 (D.C. Cir. 1990) (White House Counsel exempt from the FOIA as an entity within the White House Office forming part of the President's immediate personal staff).

In sum, because the Privacy Act incorporates by reference the FOIA definition of "agency," and because it is settled that the White House Office is not an agency under the FOIA, the Department has concluded that the White House Office is not an agency under the Privacy Act.

[5] The D.C. Circuit has held that the Council on Environmental Quality, another component of the EOP, is an "agency" under FOIA. *Pacific Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259 (D.C. Cir. 1980).

II.

The District Court's decision in *Alexander v. Federal Bureau of Investigation*, 971 F. Supp. 603 (D.D.C. 1997), which rejected this analysis, is in our opinion incorrectly decided. In that case, Judge Royce Lamberth took the view that the FOIA definition does not govern whether the Privacy Act applies to the "immediate staff of the President." *Id.* at 606. In his view, "agency" means one thing for the Privacy Act and another for the FOIA because the purposes of the two statutes are different. Congress precluded this interpretative move, however, when it affirmatively stated that the term should have the same meaning in both statutes. The text of the Privacy Act is straight-forward. Section 552a(a)(1) provides that, for purposes of the Privacy Act, "the term 'agency' means agency as defined in section 552(e)" of title 5 of the United States Code—the FOIA definition of agency.[6]

Congress could not have been more clear about the relationship of the meaning of the word "agency" in the two statutes. Thus, as the D.C. Circuit has observed, the Privacy Act "borrows the definition of 'agency' found in FOIA." *Dong v. Smithsonian Inst.*, 125 F.3d at 878. The Privacy Act language conclusively bars an interpretation that would attach different meanings to the term. As then-Assistant Attorney General Scalia stated in his 1975 Office of Legal Counsel opinion addressing which units of the Executive Office of the President are covered by the Privacy Act: "It is essential, of course, that we apply the same conclusion to both the Freedom of Information Act and the Privacy Act." Scalia Opinion at 2.

The *Alexander* decision stands in stark contrast to the D.C. Circuit's analysis in *Rushforth v. Council of Economic Advisers*, 762 F.2d 1038 (D.C. Cir. 1985), in which the court addressed the question of whether the President's Council of Economic Advisers ("CEA") is an agency for purposes of the Government in the Sunshine Act, which, like the Privacy Act, incorporates the FOIA's definition of agency. After determining that the CEA is not an agency under the FOIA, *id.* at 1040–43, the Court reasoned that "[i]nasmuch as the [CEA] is not an agency for FOIA purposes, it follows *of necessity* that the CEA is, under the terms of the Sunshine Act, not subject to that statute either. The reason is that the Sunshine Act expressly incorporates the FOIA definition of agency." Id. at 1043 (emphasis

[6] As a practical matter, the suggestion that Congress had different meanings in mind is rebutted by the legislative history. The Privacy Act was pending in Congress at the same time as the 1974 amendments to the FOIA, and became law on December 31, 1974, only 40 days after passage of the FOIA amendments on November 21, 1974 *See* 88 Stat 1896, 1910, 88 Stat 1561, 1565; *Duffin v. Carlson*, 636 F.2d 709, 711 (D C Cir. 1980) Indeed, on the same day that the FOIA was passed, Congressman Moorhead, a member of the FOIA Conference Committee, stated, during the floor debate on the Privacy Act, that "'[a]gency' is given the meaning [under the Privacy Act] which it carries elsewhere in the Freedom of Information Act" 120 Cong Rec 36,967 (1974) (statement of Cong Moorhead). There is no indication in the legislative history of the Privacy Act that the very same Congress which had just amended the FOIA's definition of the term "agency" had a different understanding of that term in mind when, only 40 days later, it incorporated that definition by reference, and without further gloss, for purposes of the Privacy Act

added) (citation omitted). The court did not ask whether the Sunshine Act and FOIA served similar purposes; it recognized that Congress had definitively resolved the question whether the term "agency" had different meanings under the two statutes.

Moreover, last month District Judge June Green issued an opinion in which she did not follow Judge Lamberth's analysis, but held instead that the Privacy Act does not apply to the White House Office. *See Barr v. Executive Office of the President*, No. 99-cv-1695 (D.D.C. Aug. 9, 2000) (memorandum order) (Green, J.). The Court concluded that:

> It is a fair construction of the Privacy Act to exclude the President's immediate personal staff from the definition of "agency." As the Privacy Act borrows the FOIA definition, it fairly borrows the exceptions thereto as provided in legislative history and by judicial interpretation. This construction of the term "agency," applying the FOIA definition equally to the Privacy Act, properly avoids constitutional questions.

Id. at 6.

In light of our disagreement with the analysis in the *Alexander* decision, the Department does not believe that the decision requires that the White House modify its records management practices to come into compliance with the Privacy Act. The D.C. Circuit agreed with this view in its recent appellate opinion in *Alexander*, stating that, notwithstanding Judge Lamberth's decision, "[i]n activities unrelated to [the *Alexander*] case, the White House, as it has done for many years on the advice and counsel of the Department of Justice, remains free to adhere to the position that the Privacy Act does not cover members of the White House Office." [7]

WILLIAM TREANOR
Deputy Assistant Attorney General
Office of Legal Counsel

[7] *In Re: Executive Office of the President*, 215 F.3d 20, 24 (D.C. Cir. 2000) (noting that "District Court decisions do not establish the law of the circuit, . . . nor, indeed, do they even establish 'the law of the district' ") (citations omitted)

Administration of Coral Reef Resources in the Northwest Hawaiian Islands

The President may use his authority under the Antiquities Act to establish a national monument in the territorial sea and a national monument in the exclusive economic zone to protect marine resources.

The President may not establish a national wildlife refuge in the territorial sea or the exclusive economic zone using the implied power to reserve public lands recognized in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915).

The authority to manage national monuments can, under certain circumstances, be shared between the Department of the Interior and other agencies, but the Fish and Wildlife Service must maintain sole management authority over any national wildlife refuge area within a monument. Regulations applicable to national monuments trump inconsistent fishery management plans, but the establishment of a national monument would not preclude the establishment of a national marine sanctuary in the same area.

September 15, 2000

MEMORANDUM OPINION FOR THE SOLICITOR
DEPARTMENT OF THE INTERIOR,

THE GENERAL COUNSEL
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

AND

THE GENERAL COUNSEL
COUNCIL ON ENVIRONMENTAL QUALITY

On May 26, 2000, President Clinton issued an Executive Order directing the development and protection of a scientifically based, comprehensive national system of marine protected areas. Exec. Order No. 13158, 65 Fed. Reg. 34,909 (2000). At the same time, the President also issued a Memorandum to the Secretaries of the Interior and Commerce stating that, "it is in the best interest of our Nation, and of future generations, to provide strong and lasting protection for the coral reef ecosystem of the Northwest Hawaiian Islands." Memorandum for The Secretary of the Interior and The Secretary of Commerce, *Re: Protection of U.S. Coral Reefs in the Northwest Hawaiian Islands* (May 26, 2000). In that Memorandum, the President directed both Secretaries, "working cooperatively with the State of Hawaii and consulting with the Western Pacific Fisheries Management Council, to develop recommendations within 90 days for a new, coordinated management regime to increase protection of the ecosystem and provide for sustainable use." *Id.* The President further directed that the Secretaries consider whether the President should "extend permanent protection to objects

of historic or scientific interest or to protect the natural and cultural resources of this important area." *Id.*

About one month after the President issued the Memorandum to the Secretaries of the Interior and Commerce, our office received a joint memorandum from the Department of the Interior, the Department of Commerce, and the Council on Environmental Quality, posing a series of legal questions relating to possible steps that the President could take to protect the marine environment of the coral reef resources of the Northwest Hawaiian Islands. Memorandum for Randolph Moss, Assistant Attorney General, Office of Legal Counsel, from John Leshy, Solicitor, Department of the Interior, James Dorskind, General Counsel, National Oceanic and Atmospheric Administration ("NOAA"), and Dinah Bear, General Counsel, Council on Environmental Quality, *Re: Request for Opinion Regarding Administration of Coral Reef Resources in the Northwest Hawaiian Islands* (June 30, 2000) ("Joint Memo").[1] We were asked whether the President could use his authority under the Antiquities Act, 16 U.S.C. §§ 431–433 (1994), to establish a national monument either in the territorial sea of the United States 3–12 miles seaward of the baseline or in the exclusive economic zone ("EEZ") 12–200 miles seaward of the baseline in order to protect coral reef resources. We were also asked whether the President could establish a national wildlife refuge in either the territorial sea or the EEZ. Finally, we were asked a series of questions relating to how such a national monument or wildlife refuge could be managed. These questions involve the relationship of a variety of statutes, including the Antiquities Act, the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C.A. §§ 1801–1802, 1811, 1851–1857 (1985 & West Supp. 2000) (in relevant part) ("MSFCMA"), the National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd–668ee (1994 & Supp. IV 1998) ("NWRSAA"), and the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431–1445b (1994 & Supp. IV 1998) ("NMSA").

In light of the time frame within which policymakers were working, we provided a short summary of our answers on August 18, 2000. *See* Memorandum for John Leshy, Solicitor, Department of the Interior, James Dorskind, General Counsel, National Oceanic and Atmospheric Administration, and Dinah Bear, General Counsel, Council on Environmental Quality, from Randolph D. Moss,

[1] We also received numerous other helpful submissions from the Department of the Interior, NOAA, the Department of State, the Department of Defense, and the Environmental and Natural Resources Division of the Department of Justice. *See* Letter for Randolph Moss, Assistant Attorney General, Office of Legal Counsel, from John D Leshy, Solicitor, Department of the Interior (July 17, 2000), Letter for Randolph Moss, Assistant Attorney General, Office of Legal Counsel, from James Dorskind, General Counsel, NOAA (July 24, 2000) ("NOAA Letter"); Memorandum for Randolph Moss, Assistant Attorney General, Office of Legal Counsel, from Susan Biniaz, Assistant Legal Advisor Oceans, International Environmental and Scientific Affairs, Department of State, *Re State Department Views Regarding ENRD Memo Addressing Authority to Protect Coral Reefs in the Northwest Hawaiian Islands* (Aug 14, 2000) ("State Memo"); Letter for Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, from Michael F. Lohr, Rear Admiral, JAGC, U.S Navy, DoD Representative for Ocean Policy Affairs (Aug. 14, 2000), Memorandum for Randolph Moss, Assistant Attorney General, Office of Legal Counsel, from Lois J. Schiffer, Assistant Attorney General, ENRD, *Re: ENRD Views Regarding Authority to Protect Coral Reefs in the Northwest Hawaiian Islands* (Aug 8, 2000).

Assistant Attorney General, Office of Legal Counsel, *Re: Administration of Coral Reef Resources in the Northwest Hawaiian Islands* (Aug. 18, 2000). We explained in that memorandum that a comprehensive written opinion explaining those answers would follow in the coming weeks.

Consistent with our earlier advice, we conclude that the President could use his authority under the Antiquities Act to establish a national monument in the territorial sea. Although the question is closer, we also believe the President could establish a national monument in the EEZ to protect marine resources. We are unconvinced, however, that the President could establish a national wildlife refuge in either area based on implied authority rooted in practice. Finally, with respect to the management issues, we believe that the Department of the Interior must have management authority over any national monument, that the Fish and Wildlife Service cannot share management responsibilities with another agency over any national wildlife refuge area within a national monument, that fishery management plans issued under the MSFCMA must be consistent with regulations applicable to national monuments, and that the establishment of a national monument would not preclude the establishment of a national marine sanctuary in the same area under the NMSA.

I. Establishing a National Monument under the Antiquities Act

A. The Territorial Sea

The territorial sea is the area immediately adjacent to the coast of a nation. *See, e.g.*, Restatement (Third) of The Foreign Relations Law of the United States § 511(a) (1987) ("Restatement Third"). International law permits a nation to claim as its territorial sea an area up to twelve miles from its coast. *Id.* A nation is sovereign in its territorial sea. *See Legal Issues Raised by Proposed Presidential Proclamation To Extend the Territorial Sea*, 12 Op. O.L.C. 238, 240 (1988) ("OLC Territorial Sea Opinion"). Indeed, "[s]ubject to [innocent passage rules], the coastal state has the same sovereignty over its territorial sea, and over the air space, sea-bed, and subsoil thereof, as it has in respect of its land territory." Restatement Third § 512; *see also Church v. Hubbart*, 6 U.S. (2 Cranch) 187, 234 (1804) ("The authority of a nation within its own territory is absolute and exclusive. The seizure of a vessel within the range of its cannon by a foreign force is an invasion of that territory, and is a hostile act which it is its duty to repel. But its power to secure itself from injury may certainly be exercised beyond the limits of its territory."); OLC Territorial Sea Opinion at 240 ("Indeed, a nation has the same sovereignty over the territorial sea as it has over its land territory.").

Although the United States for many years claimed a three-mile territorial sea, in 1988 President Reagan extended the territorial sea to twelve miles. Proclamation

No. 5928, 3 C.F.R. 547 (1989) ("The territorial sea of the United States henceforth extends to 12 nautical miles from the baselines of the United States determined in accordance with international law."). The proclamation noted that extension of the territorial sea "will advance the national security and other significant interests of the United States" and, consistent with international law, provided that "the ships of all countries enjoy the right of innocent passage" through the territorial sea. *Id.* The proclamation also provided, however, that it did not "extend[ ] or otherwise alter[ ] existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom." *Id.*

But for the U.S. Government's conveyance to the various states of "all right, title, and interest of the United States, if any it has, in and to all said [submerged] lands, improvements, and natural resources" up to three miles from the baseline in the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301–1315 (1994) ("SLA"), the Antiquities Act would authorize the President to establish a national monument in the territorial sea up to three miles seaward of the baseline. The Antiquities Act authorizes the President "to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments." [2] The relevant issue is whether the United States "controls" the submerged lands and waters within the first three miles of the territorial sea for purposes of the Antiquities Act. Neither the Act, nor its brief attendant Congressional reports,[3] nor any case law that we were able to find sheds light on the meaning of the word "control" as used by the Act. The dictionary definition of "control," however, is "to exercise restraining or directing influence over." [4] Case law in a range of contexts interpreting the word is to the same effect.[5] Because the United States Government maintains sovereignty over the territorial sea to almost the same extent that it maintains sovereignty over its land territory, it therefore "control[s]" the area within the traditional territorial sea of three miles for purposes of the Antiquities Act.[6] Rein-

[2] Although the Antiquities Act refers to "lands," the Supreme Court has recognized that it authorizes the reservation of "waters located on or over federal lands." *United States v. California*, 436 U.S. 32, 36 n.9 (1978). *See also Cappaert v. United States*, 426 U.S. 128, 138–42 (1976). The Court has also made clear that the Antiquities Act can be used to protect objects of scientific interest, as well as historic interest *See id* at 142 (rejecting argument that Antiquities Act may only be used to protect archeologic sites); *Cameron v. United States*, 252 U.S. 450, 455 (1920) (upholding President's authority to establish a monument to protect the Grand Canyon)

[3] *See* S. Rep. No. 59-3797 (1906) (one page); H.R. Rep. No. 59-2224 (1906) (eight pages).

[4] Webster's Third New International Dictionary 496 (1993); *see also* Black's Law Dictionary 330 (7th ed. 1999) ("to exercise power or influence over")

[5] *See, e.g., Martin v. State*, 372 N.E.2d 1194, 1197 n.5 (Ind. Ct. App. 1978) ("'Control' means the ability to exercise a restraining or directing influence over something."), *Speaks v. State*, 239 A.2d 600, 604 (Md. App. 1968) ("'Control', as used in [a drug possession statute], is given its ordinary meaning, namely, 'to exercise restraining or directing influence over' "); *Kim v. Convent of the Sacred Heart*, 1998 WL 563960, at *3 (D. Conn. 1998) ("The term 'control' simply means 'the power or authority to manage, superintend, direct or oversee.' "). *See also* 17 C.F.R. § 230.405 (2000) (securities regulation) ("The term *control* . . . means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person . . .").

[6] The fact that under international law and the terms of the 1988 proclamation nations other than the United States retain the right of "innocent passage" through the three mile territorial sea would not alter this analysis

forcing this conclusion is the Supreme Court's treatment of the Antiquities Act in *United States v. California*, 436 U.S. 32 (1978). In that case, the Court resolved a dispute between the United States and California concerning who had dominion over submerged lands and water within a national monument established in 1949 within a one-mile belt off of the California coast. Although the Court ultimately held that Congress, through the SLA, had conveyed the United States's interest in the submerged lands to California, it noted along the way that: "There can be no serious question . . . that the President in 1949 had power under the Antiquities Act to reserve the submerged lands and waters within the one-mile belts as a national monument, since they were then 'controlled by the Government of the United States.'" *Id.* at 36.

The question, then, is whether this analysis applies in the 3–12 mile range as a result of President Reagan's 1988 proclamation extending the territorial sea to twelve miles. Critical to answering this question is determining the significance of the disclaimer in the proclamation providing that it does not "exten[d] or otherwise alte[r] existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom." There are two possible ways to interpret this disclaimer. One interpretation would be that the disclaimer prevents the proclamation from affecting the scope of any statute in any way in the absence of Congressional legislation adopting the proclamation as part of domestic law.[7] A second

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The Antiquities Act only requires that the Government exert "contro[l]" over the area. Nothing in the language of the statute requires that the Government maintain absolute control over the area without exceptions. The best reading of the statute, on the contrary, is that it requires only some significant quantum of control, which is easily satisfied within the territorial sea. *See United States v. California*, 436 U.S. at 36. The regulations and other laws that apply within the monument, however, if they are to comport with customary international law, would have to be subject to the international law right of innocent passage, although international law also allows coastal states to regulate innocent passage for particular purposes, including to prevent pollution, Restatement Third § 513(2)(b), and to conserve the living resources of the sea, *id.* § 513 cmt. c(iv). Nothing in the Antiquities Act prohibits the President from establishing a monument subject to preexisting easements and reservations, and indeed previous monuments have been subject to such reservations. *See, e.g.*, Proclamation No. 7295, 65 Fed. Reg. 24,095, 24,098 (2000) (establishing Giant Sequoia National Monument and providing that "[n]othing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation" and that "[n]othing in this proclamation shall be deemed to affect existing special use authorizations"), Proclamation No. 3443, 3 C.F.R. 152, 153 (1961) (establishing Buck Island Reef National Monument and providing that no instrumentality of the United States "shall adopt or attempt to enforce any rule . . . restricting or reducing the existing fishing . . . bathing or recreational privileges by inhabitants of the Virgin Islands").

[7] A variety of Congressional statements express this view. *See, e.g.*, H.R. Rep. No. 105–236, at 21 (1997) (expressing view that "while the President has the authority to expand our territory and sovereignty, only Congress has the authority to exercise legislative jurisdiction" and noting that unamended laws had been enforced only to the three mile limit); 137 Cong. Rec. 33,702, 33,702 (1991) (statement of Congressman Walter B. Jones) ("The Presidential proclamation explicitly provides that the extension of the territorial sea to 12 miles does not alter existing State or Federal law. In other words, the United States has a 12-mile territorial sea in the eyes of the rest of the world, but until Congress amends Federal laws to conform to the extended territorial sea, existing authorities only apply within the former 3-mile territorial sea. This disclaimer means that Congress has the responsibility of completing what the President could only begin. If the United States is to have a meaningful 12-mile territorial sea, it must have the statutory authority to enforce its laws in the extended maritime zone. Only Congress can amend U.S. laws to accomplish this."). Representatives of the executive branch have also occasionally expressed this view. *See Territorial Sea Extension, Hearing Before the Subcomm. on Oceanography and Great Lakes of the House Comm. on Merchant Marine and Fisheries*, 101st Cong. 142 (1989) (statement of Rear Admiral Joseph E. Vorbach, Chief Counsel, U.S.C.G.) ("[T]he Coast Guard's statutory authorities have not been changed by the Proclamation. Accordingly, the definitions and application of jurisdictional terms relied on by the Coast Guard to carry out its missions,

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interpretation would be that, as a result of the disclaimer, the proclamation, acting alone, does not extend the reach of a statute unless Congress intended that the statute be linked to the extent of the territorial sea as that area may be defined at any given time. This latter interpretation is strongly supported by our 1988 opinion, which, although it was issued in anticipation of the proclamation, and therefore did not analyze the precise language of the proclamation, nonetheless assumed that, "[b]y its terms, the proclamation will make clear that it is not intended to affect domestic law." OLC Territorial Sea Opinion at 253. Our opinion observed that because "Congress may . . . have enacted statutes that are intended to be linked to the extent of the United States' territorial sea under international law," the proclamation might change the reach of some statutes. *Id.* "The issue . . . in determining the effect of the proclamation on domestic law," we observed, "is whether Congress intended for the jurisdiction of any existing statute to include an expanded territorial sea." *Id.* We further explained that the "most important consideration in determining whether Congress intended a statute to be affected by a change in the breadth of the territorial sea is the language of the statute." *Id.* We continued:

> If a statute includes a provision that simply overlaps or coincides with the existing territorial sea — such as the provision "three miles seaward from the coast of the United States" — the operation of the statute will probably not, in the absence of special circumstances, be affected by a change in the territorial sea. Indeed, the statute does not appear to invoke the concept of the territorial sea at all, except for denoting an area that coincides with the territorial sea. A similar case is presented by a statute that uses the term "territorial sea" but then defines it as "three miles seaward from the coast of the United States." Although the statute refers to the territorial sea, the definition reveals that Congress understood the area involved as the three-mile territorial sea in existence when the statute was enacted.
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> Of course the more difficult cases will arise where Congress has used more ambiguous language. The best example is a statute which refers to the term "territorial sea" without further defining it. Congress could have intended the term to refer to the three miles that history and existing practice had defined or Congress could have intended the statute's jurisdiction to always track the extent of the United States' assertion of territorial sea under international law.

which have traditionally been applied to the previous territorial sea limit of 3 nautical miles, have not changed To fully enforce these statutes between 3 and 12 nautical miles, Congressional action is necessary to extend such federal laws beyond 3 nautical miles.")

> A determination of congressional intent in these circumstances will therefore require further inquiry into the purpose and structure of a particular statute, and may include reference to the legislative history, the interpretation of the statute by the executive branch and the courts, and the meaning of similar statutes governing the same subject matter.

Id. at 253–54. Thus, our 1988 opinion took the position that the proclamation would, with respect to some statutes, have domestic legal consequences and set forth an analytic approach for determining which statutes would be affected by the proclamation.

Although that opinion is not directly controlling here because it did not analyze the specific language of the proclamation, a recent decision of the Second Circuit Court of Appeals has analyzed that specific language and has explicitly adopted the analysis of our opinion in its interpretation of the disclaimer. *In re Air Crash off Long Island*, 209 F.3d 200 (2d Cir. 2000). In that case, the court considered whether the Death on the High Seas Act ("DOHSA"), which provides for a right of action to redress a death "caused by wrongful act . . . occurring on the high seas beyond a marine league from the shore of any State," 46 U.S.C. § 761 (1994), but which does not allow plaintiffs to recover nonpecuniary damages, applied to a crash that occurred approximately eight miles off the coast of the United States. Both parties agreed that, had the crash occurred before the 1988 proclamation had been issued, the crash would have occurred beyond United States territorial waters so that DOHSA would apply to bar plaintiffs from recovering nonpecuniary damages. 209 F.3d at 212. "The issue, therefore, [was] whether after issuance of the Proclamation, DOHSA applied to the waters between three and 12 miles from the shore." *Id.* Defendants pointed to the disclaimer to argue that the proclamation did not affect the scope of DOHSA, but the Second Circuit, quoting our 1988 opinion, disagreed. *Id.* at 213. Instead, it held, "the impact of the Proclamation must be assessed on a statute-by-statute basis." *Id.* Analyzing the background and legislative history of DOHSA, the court concluded that Congress had intended "to exclude all state and federal territorial waters from its scope." *Id.* It continued:

> Nothing in DOHSA's history or purpose provides a persuasive reason to fix immutably the scope of the statute to the boundary between United States territorial waters and nonterritorial waters as it existed in [the year of the statute's enactment]. Thus, plaintiffs are correct in concluding that the effect of the Proclamation is to move the starting point of the application of DOHSA from three to 12 miles from the coast. Plaintiff's interpretation of the Proclamation does not change DOHSA, but designates certain addi-

> tional waters to which DOHSA does not apply. If Congress in 1920 had included a definition of "high seas" as "waters outside United States or state territorial waters, where no nation is sovereign," as we believe it essentially did, the Proclamation would not change this definition. Indeed, if the Proclamation is construed to create a zone of federal territorial waters subject to DOHSA, then this would violate the disclaimer. DOHSA would effectively be amended by excluding federal territorial waters up to three miles from its coverage, but including federal territorial waters between three and 12 miles. Such an effect would be inconsistent with Congress's intent to exclude all federal territorial waters from the scope of DOHSA.

Id. at 213–14. Although it is unclear whether or not the dissent also reflects the view that our analytic framework was legally determinative,[8] the dissent employed that framework and found that in light of the specific language and legislative history of the Act, DOHSA applied in the disputed zone. *Id.* at 219–20 (Sotomayor, J., dissenting) (noting that OLC's analytical framework "comports with the classical canons of statutory construction").[9]

[8] The dissent's view of the effect of the disclaimer is unclear On the one hand, it says that "[b]ecause the Proclamation expressly states that it does not 'alter' any 'rights, legal interests or obligations' under federal law, an expansion of the U.S territorial sea for international law purposes should not alter the breadth of the territorial seas for domestic purposes," 209 F.3d at 217 (Sotomayor, J , dissenting), which would seem to suggest that the proclamation, standing alone, could have no affect on the reach of any domestic statute On the other hand, only a few pages later, the dissent adopts the analytical framework of our 1988 opinion and proceeds to apply it to DOHSA *See id* at 220 In any event, the dissenting opinion does not cause us to alter our view that the 1998 proclamation has domestic legal effects with respect to particular statutes.

[9] A handful of other cases that have considered the effect of the disclaimer have reached results that are somewhat in tension with the Second Circuit's decision in *In re Air Crash off Long Island* For example, in *Francis v. Hornbeck Offshore (1991) Corp*, 1997 WL 20740 (E D La. 1997), a two paragraph unpublished decision, a district court in Louisiana held that DOHSA did not apply to an accident occurring eight nautical miles from the coastline, noting that "Proclamation 5928, by its own terms, does not alter DOHSA's application beyond one marine league from shore." *Id* at *1. This one sentence treatment of the disclaimer's effect, however, is, in our view, not as persuasive or authoritative as the Second Circuit's reasoned decision. Likewise, in *Blome v. Aerospatiale Helicopter Corp*, 924 F Supp 805 (S D Tex 1996), *aff'd*, 114 F.3d 1184 (5th Cir 1997) (unpublished summary opinion), a district court in Texas concluded "that the only natural interpretation of DOHSA is that the statute applies to deaths occurring more than one marine league from shore unless the death occurred in state territorial waters " *Id* at 812 In other words, the court found that DOHSA could apply to waters within twelve miles from shore But the holding of the case was simply that DOHSA does not apply to deaths occurring in state territorial waters, and any observation the court made regarding the geographical scope of DOHSA was dicta Finally, in *United States v. One Big Six Wheel*, 166 F 3d 498 (2d Cir. 1999), the Second Circuit held that a provision in the Antiterrorism and Effective Death Penalty Act ("AEDPA") defining territorial waters as extending out to twelve miles for purposes of criminal jurisdiction did not affect the reach of the Gambling Ship Act, which effectively defined territorial waters as extending only to three miles The court noted that the AEDPA provision "references Presidential Proclamation 5928, [but that the] . . . Proclamation explicitly limits its application by declaring that 'nothing in this Proclamation . . . extends or otherwise alters existing Federal or State law " *Id* at 501. But *One Big Six Wheel*, as *In re Air Crash off Long Island* notes, *see* 209 F 2d at 212, is consistent with *In re Air Crash off Long Island*, because the court rested its decision on an analysis of the intent of Congress as expressed through the specific language of the Gambling Ship Act. The court concluded "There is no indication that Congress now intends to prohibit shipboard casinos to the full extent of the nation's territorial reach. [T]he term 'territorial waters' used [in the Gambling Ship Act] is not coextensive with the extent of the nation's criminal jurisdiction, rather, it specifies geographically where a certain kind of offshore gambling is a criminal activity and where it is licit. However one expands the territory

The Second Circuit's analysis is persuasive. In light of its opinion, we believe it is appropriate to apply the analytical framework of our 1988 opinion to determine whether the Antiquities Act applies in the 3–12 mile range. Analyzing the language of the statute, we think that Congress intended for the reach of the Antiquities Act to extend to any area that at the particular time the monument is being established is in fact "owned or controlled" by the U.S. Government, even if it means that the area covered by the Act might change over time as new lands and areas become subject to the sovereignty of the nation. As our 1988 opinion indicates, the particularly difficult cases arise when statutes are ambiguous as to whether they are linked to a specific and fixed geographic area or instead to a potentially fluctuating area defined by the range and extent of U.S. sovereignty, dominion, or authority. Unlike the hypothetical examples we considered in our 1988 opinion, the Antiquities Act is not at all ambiguous as to this point. It refers neither to the "territorial sea" nor to an area that coincides with the original three mile territorial sea. Instead, it simply refers to all lands "owned or controlled" by the U.S. Government. Because the reach of the Antiquities Act extends to lands "controlled" by the U.S. Government, its reach changes as the U.S. Government's control changes.[10] One example that supports this interpretation of the Act is President Kennedy's designation of the Buck Island Reef National Monument in the U.S. Virgin Islands, an area that was not part of the United States or its territories in 1906, when Congress passed the Antiquities Act.[11] Although the establishment of the Buck Island monument does not directly resolve the issue presented to us here—the monument was established within 3 miles of the baseline and before the 1988 proclamation—it does stand for the underlying principle that when the United States gains control over lands and areas that it did not control in 1906, that land is nonetheless covered by the Antiquities Act. Furthermore, the purpose of the Act—to authorize the President to take action to protect the nation's objects of historic and scientific interest, *see* S. Rep. No. 59–3797, at 1 (1906) (noting that the preservation of historic and prehistoric ruins and monuments on the public lands of the United States is "of great importance")—is consistent with the notion that the President should be able to take such an action in any area that is under U.S. Government control. Therefore, based

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in which one's conduct might be proscribed that territorial expansion does not criminalize offshore gambling that the Gambling Ship Act itself does not forbid " 166 F.3d at 502.

[10] We also note that our conclusion, discussed below, that President Reagan's proclamation extending the EEZ to 200 miles gives the President authority to establish a national monument under the Antiquities Act to protect marine resources in the EEZ is an independent source of authority for establishing a national monument in the territorial sea from 3–12 miles Prior to 1988, but after President Reagan extended the EEZ to 200 miles in 1983, the U.S. exerted as much control in the 3–12 mile zone as it currently does in the 12–200 mile zone. The extension of the territorial sea from three to twelve miles in 1988 could hardly be said to have decreased U.S control over the 3–12 mile region Thus, if the United States has sufficient control now over the EEZ for the President to establish a national monument there to protect marine resources, it necessarily follows that, regardless of the meaning of the disclaimer in the 1988 proclamation, the President has the authority to establish a national monument to protect marine resources in the 3–12 mile area

[11] Proclamation No 3443, 3 C F.R. 152 (1959–1963)

on the language and purpose of the Antiquities Act, as well as the administrative practice under that Act, we conclude that the President can establish a national monument under the Antiquities Act within the territorial sea from 3–12 miles seaward from the baseline.

The Fifth Circuit's decision in *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), is not to the contrary. In that case, the court considered whether the remains of a Spanish Galleon located on the outer continental shelf beyond the territorial sea were on lands "owned or controlled" by the Government for purposes of the Antiquities Act. The court rejected the argument that the Outer Continental Shelf Lands Act, 16 U.S.C. §§ 1331–1333 (1994 & Supp. IV 1998) (in relevant part) (authorizing U.S. Government control over mineral resources on the outer continental shelf) ("OCSLA"), gave the Government control over those lands for purposes of the Antiquities Act. The Court there observed, "an extension of jurisdiction for purposes of controlling the exploitation of the natural resources of the continental shelf is not necessarily an extension of sovereignty." 569 F.2d at 339. The case, however, was decided before President Reagan extended the territorial sea to twelve miles, and its analysis regarding the OCSLA is inapposite because, unlike the extension of the territorial sea, which gave the Government near total sovereign control over the sea up to twelve miles seaward of baseline, the OCSLA gave the Government control only over mineral resources, which is unrelated to control over historic objects like the shipwreck at issue in the case. *Treasure Salvors* did not consider the situation like the one at issue here, in which the President, through an executive proclamation, has given the U.S. near complete sovereignty over the area in question. Indeed, the decision was based on the premise that there had not been such an extension of sovereignty. *Id.*

The Department of Commerce, through NOAA, has argued that, because the United States does not own the territorial sea in the traditional property sense, but instead holds it in public trust for its citizens, Congress does not have power under the Property Clause of the Constitution, U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."), to authorize the President through the Antiquities Act to establish a national monument in that area. Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from James Dorskind, General Counsel, National Oceanic and Atmospheric Administration (July 24, 2000) ("NOAA Letter"). We believe, however, that Congress does have such authority under the Constitution. To begin with, we are not convinced that the Property Clause provides the only source of authority for Congress to make such an authorization; the Foreign Commerce Clause, which authorizes Congress to "regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, the Interstate Commerce Clause, which authorizes Congress to regulate commerce "among the

several States," *id.*, and the Admiralty Clause, U.S. Const. art. III, § 2,[12] might also confer this authority upon Congress. Moreover, NOAA's position would appear to be inconsistent with the Court's language in *United States v. California* recognizing the President's authority to establish a monument in the territorial sea. Indeed, on at least one occasion, the President has exercised his authority under the Antiquities Act to create a monument in the territorial sea — the Buck Island Reef National Monument in the U.S. Virgin Islands. NOAA's position would call this long-standing monument designation into question. What is decisive, however, is the fact that the Supreme Court has held that the Property Clause authorizes Congress to dispose of lands within the territorial sea. *See Alabama v. Texas*, 347 U.S. 272, 273–74 (1954) (per curiam). Although the public trust doctrine, which the Court did not address in *Alabama*, might limit in some ways the extent of the Government's control over the territorial sea,[13] the Government nonetheless maintains ample room under the doctrine to exercise dominion over that area to protect it and its resources for public enjoyment. Moreover, the creation of a national monument to protect living marine resources would be consistent with the Government's role as public trustee. *See, e.g., Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 360–65 (N.J. 1984) (explaining that the "public trust" doctrine, which holds that tidal waters are held for the public by the sovereign in public trust, ensures that the public will have "reasonable enjoyment" of the sea). In our view, then, because the territorial sea is subject to the sovereignty of the United States, Congress may regulate it under the Property Clause.

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[12] *See In re Garnett*, 141 U.S. 1, 12 (1891) (holding that Congress's power to make amendments to the maritime law of the country "is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends"); Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 47 (2d ed. 1975) ("A second inference . . . from the conferring of the judicial power in admiralty cases was to the effect that Congress thereby was empowered to alter and supplement the general maritime law. Many statutes — some of great importance — have been passed in the exercise of this power. None, apparently, has ever been declared unconstitutional. Some have added to the judicial jurisdiction; some have changed or filled out substantive rules of maritime law; a few have added whole new chapters of law to the corpus."), *see also id.* at 31 (noting that the high seas are "[o]bviously" included in maritime jurisdiction).

[13] It is not entirely clear whether and how the public trust doctrine applies to federally controlled waters. *Compare United States v. 1.58 Acres*, 523 F. Supp. 120, 124–25 (D. Mass. 1981) (finding that federal government's control over land below the low water mark was restricted by public trust duties) *with United States v. 11.037 Acres*, 685 F. Supp. 214, 216–17 (N.D. Cal. 1988) (deciding that tidal land condemned in eminent domain proceedings by United States was no longer subject to state public trust easement). If the doctrine does apply in the territorial sea, it would place some limits on the federal government's control over that area. For example, the public trust doctrine might place some limits on conveying submerged lands subject to the doctrine outright to private individuals or entities. *See* Andrea Marston, *Aquaculture and the Public Trust Doctrine: Accommodating Competing Uses of Coastal Waters in New England*, 21 Vt. L. Rev. 335, 343–44 (1996) (summarizing public trust doctrine as it is generally applied by the states), *In re Sanborn*, 562 P.2d 771, 776 (Haw. 1977) (noting that ownership of land held in public trust "may not be relinquished, except where relinquishment is consistent with certain public purposes"). Moreover, the sovereign must take actions to protect the area held in public trust and to manage it for the public benefit. *See* Marston, *supra*, at 341 ("[T]oday, every state is obligated to preserve and protect the public trust waters for recognized trust uses.").

B. The EEZ

The EEZ is "a belt of sea beyond the territorial sea that may not exceed 200 nautical miles from the baseline from which the breadth of the territorial sea is measured." Restatement Third § 511(d). The Restatement Third summarizes the international customary laws governing the EEZ: [14]

> § 514 Exclusive Economic Zone
>
> In the exclusive economic zone . . . :
>
> (1) The coastal state has
>
> (a) sovereign rights for the purpose of exploring, exploiting, conserving, and managing the natural resources of the sea-bed and subsoil and of the superjacent waters, and engaging in other activities for the economic exploration and exploitation of the zone, and
>
> (b) authority, subject to limitations, to regulate (i) the establishment and use of artificial islands, and of installations and structures for economic purposes; (ii) marine scientific research; and (iii) the protection of the marine environment.
>
> (2) All states enjoy, as on the high seas, the freedoms of navigation and overflight, freedom to lay submarine cables and pipelines, and the right to engage in other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships or aircraft.

Id. § 514.

[14] Although this section is based on the Law of the Sea Convention, which the United States has not ratified, the basic rules contained in the section (concerning the EEZ) have also become "effectively established as customary law" and are therefore binding as a matter of international law even on nations that are not party to the Convention *See* Restatement Third § 514 cmt a. Moreover, several Presidents, including President Clinton, have stated publicly that the United States should abide by general rules established in the Convention *See, e.g.*, S. Treaty Doc. 103–39, at III (Oct. 7, 1994) (President Clinton, upon submitting Convention to the Senate for its advice and consent to ratification, noting that "it has been the policy of the United States to act in a manner consistent with its provisions relating to traditional uses of the oceans and to encourage other countries to do likewise"), *Statement On United States Oceans Policy*, 1 Pub. Papers of Ronald Reagan 378–79 (Mar. 10, 1983) (President Reagan characterizing LOS Convention "provisions with respect to traditional uses of the oceans" as "generally confirm[ing] existing maritime law and practice and fairly balanc[ing] the interests of all states" and stating that "the United States is prepared to accept and act in accordance with the balance of interests relating to traditional uses of the oceans — such as navigation and overflight"). *See also The Paquete Habana*, 175 U.S. 677, 700 (1900) (customary international law constitutes U.S. domestic law in the absence of controlling executive or legislative action).

Under customary international law, coastal states may take certain actions to protect the marine environment in their EEZ. Comments to the Restatement explain that although coastal states do not have sovereignty over the EEZ, they do possess sovereign rights for specific purposes. *Id.* § 514 cmt. c. One of these purposes is the conservation of the "natural resources of the sea-bed and subsoil and of the superjacent waters." *Id.* § 514(1)(a); *see also* § 514 cmt. f ("The coastal state is obligated to ensure, through proper conservation and management measures, that living resources in the exclusive economic zone are not endangered by over-exploitation."). To further this purpose, coastal states possess the authority to protect the marine environment. *Id.* § 514(1)(b)(iii). The authority of coastal states to take actions to protect this environment, however, is limited by a variety of customary rules of international law. For example, as § 514(2) of the Restatement notes, states may navigate ships through, fly planes over, and install pipelines under the EEZs of other states. Moreover, coastal states may only enforce rules and regulations to protect the environment if those rules are consistent with international norms. As one comment explains: "These grants of power are further circumscribed by rules contained in Parts V, XII, and XIII of the Convention . . . . Among these are rules requiring coastal states to ensure that their laws and regulations for the prevention, reduction, and control of pollution from vessels conform and give effect to generally accepted international rules and standards, to adjust their enforcement measures to the gravity of the violation, and to impose only monetary penalties." *Id.* § 514 cmt. c; *see also* cmt. i (noting that a coastal state can enforce its own laws and regulations "adopted in accordance with applicable international rules and standards").

In 1983, President Reagan established the EEZ of the United States out to 200 miles. Proclamation No. 5030, 3 C.F.R. 22 (1984).[15] The proclamation claimed for the United States, "to the extent permitted by international law . . . sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources, both living and non-living, of the seabed and subsoil and the superjacent waters." *Id.* at 23. It further provided that, "[w]ithout prejudice to the sovereign rights and jurisdiction of the United States, the Exclusive Economic Zone remains an area beyond the territory and territorial sea of the United States in which all States enjoy the high seas freedoms of navigation, overflight, the laying of submarine cables and pipelines, and other internationally lawful uses of the sea." *Id.* In the statement accompanying the proclamation, President Reagan explained: "The Exclusive Economic Zone established today will also enable the United States to take limited additional steps to protect the marine environment. In this

[15] Prior to this proclamation, Congress, in the Fishery Conservation and Management Act (now the MSFCMA), asserted authority over the living resources of the Fishery Conservation Zone, which extended from the seaward boundary of the coastal states out to 200 miles, and continental shelf fishery resources beyond 200 miles. The MSFCMA was amended after the proclamation to change the term "Fishery Conservation Zone" to "exclusive economic zone." *See, e.g.*, 16 U.S.C. § 1801(b)(1) (stating congressional purpose to exercise "sovereign rights for the purposes of . . . managing all fish within the exclusive economic zone established by Presidential Proclamation 5030, dated March 10, 1983.")

connection, the United States will continue to work through the International Maritime Organization and other appropriate international organizations to develop uniform international measures for the protection of the marine environment while imposing no unreasonable burdens on commercial shipping." *Statement on United States Oceans Policy*, 1 Pub. Papers of Ronald Reagan at 379.

Although the question is closer than the previous question regarding the territorial sea, we believe that the quantum of U.S. "control" over the EEZ is sufficient to allow the President to establish a national monument in the EEZ under the Antiquities Act to protect the marine environment.[16] We reach this conclusion on the basis of a combination of two factors. First, under customary international law and the 1983 proclamation, the United States maintains a significant amount of overall authority to exercise restraining and directing influence over the EEZ. It possesses sovereign rights to explore, conserve, and manage the natural resources of the seabed and subsoil, and it may engage in activities for the economic exploration and exploitation of the EEZ. Restatement Third § 514(1)(a); Proclamation No. 5030. *See also* Proclamation No. 2667, 3 C.F.R. 67 (1943–1948) (President Truman proclaims that "the United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control"). It also has the authority, albeit subject to some limitations, to establish and use artificial islands, installations, and structures in the EEZ for economic purposes, and to protect the marine environment. Restatement Third § 514(b); Proclamation No. 5030. Finally, to the extent that the EEZ overlaps with the contiguous zone of the United States, which extends to 24 miles seaward of the baseline as a result of President Clinton's 1999 proclamation, *see* Proclamation No. 7219, 3 C.F.R. 98 (2000), the United States also may exercise "the control necessary to prevent infringement of its customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea, and to punish infringement of the above laws and regulations. . . ." *Id.*; *see also* Convention on the Territorial Sea and the Contiguous Zone, art. 24, 15 U.S.T. 1606 (entered into force Sept. 10, 1964) (treaty to which U.S. is a party allowing coastal states, "[i]n a zone of the high seas contiguous to its territorial sea" to "exercise the control necessary to: (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; [and] (b) Punish infringement of the above regulations committed within its territory or territorial sea."). The United States, in sum, exerts greater restraining and directing influence

[16] This does not necessarily mean, however, that the Antiquities Act would allow the President to establish a national monument to protect other types of objects or interests that the United States does not have sovereign rights over in the EEZ under customary international law. The State Department has argued that even if the United States "controls" the EEZ for purposes of regulating natural resources, and can therefore establish a national monument to protect such resources, it does not "control" the EEZ for purposes of regulating non-natural resources, and could not establish a monument for those purposes. State Memo at 1–2. We express no view as to whether the President could establish a monument to protect non-natural resources such as historic shipwrecks.

over the EEZ than any other sovereign entity, and that influence, as an overall matter, is extensive.

Second, the United States possesses substantial authority under international law to regulate the EEZ for the purpose of protecting the marine environment. This is true under customary international law, *see* Restatement Third § 514(b)(iii), the 1983 proclamation, *see* Proclamation No. 5030, and the Law of the Sea Convention,[17] which appears not only to allow the United States to take action to protect marine resources, but also to require some such actions. For example, the Convention requires coastal states to "promote the objective of optimum utilization of the living resources in the exclusive economic zone," art. 62(1), "determine the allowable catch of the living resources in its exclusive economic zone," art. 61(1), "ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation," art. 61(2), and manage both anadromous and catadromous species of fish in the EEZ, arts. 66–67. Moreover, the Convention provides that nothing in the part of the convention governing the EEZ "restricts the right of a coastal State . . . to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for" in that part. Art. 65. Finally, the Convention provides that coastal states shall take "all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source," art. 194(1), and those measures "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life," art.194(5). In our view, although a close question, the authority the United States possesses under international law to protect the marine environment in the EEZ, in combination with the overall amount of restraining and directing influence that the United States exerts in the EEZ, *see supra*, give the United States sufficient "control" over the EEZ for the President to invoke the Antiquities Act for the purposes of protecting the marine environment.[18]

As it does with respect to the territorial sea, NOAA also claims that Congress does not possess authority under the Property Clause to authorize the President, through the Antiquities Act, to establish a national monument in the EEZ because the EEZ does not belong to the United States in the traditional property sense. Although the question is closer than the question regarding the territorial sea, we believe that Congress does possess such authority. As discussed previously, we think that the Property Clause is not the only relevant source of Congressional authority — both the Commerce Clause (foreign and interstate) and the Admiralty

[17] The United States has recognized that it should generally abide by the rules established in the Convention. *See supra* note 14

[18] For the same reasons, we believe that *Treasure Salvors*, which was decided before President Reagan extended the EEZ to 200 miles, does not govern this question. Unlike the OCSLA, which gave the U S sovereign rights only over mineral rights on the Outer Continental Shelf, the extension of the EEZ gave the U.S. certain sovereign rights over the marine environment as well Unlike the OCSLA, then, the extension of the EEZ gave the U.S. "control" over that area for purposes of establishing a national monument to protect marine resources

Clause may give Congress sufficient power to authorize the President to establish a monument in the EEZ. In any event, we believe that the Property Clause provides the requisite source of constitutional authority. Congress's power under the Property Clause is not limited to making rules and regulations to govern property that the Government owns in fee simple. The Property Clause authorizes Congress to take actions to protect and govern some lesser property interests as well. For example, in 1957, Attorney General Brownell issued an opinion finding that the Property Clause gave Congress the power to make needful rules and regulations regarding an option to revert title included in a deed conveyed to Milwaukee, Wisconsin that could be exercised if the conveyed land were ever alienated, because such a right was a "future interest and a species of property." *Waiver of Option of United States to Revert Title to Land in Event of Alienation*, 41 Op. Att'y Gen. 311, 312–13 (1957).[19] Although the operative phrase of the Property Clause — "belonging to" — may connote a stronger property interest than the word "control," which is used in the Antiquities Act, we believe that the significant amount of control and sovereign rights that the United States possesses over the EEZ are sufficient to authorize Congress to make rules and regulations governing the EEZ, at least with respect to protecting marine resources. First, the sovereign rights possessed by the United States in the EEZ are more substantial than the contingent future interest that was found to be sufficient for Property Clause purposes in the Attorney General's 1957 opinion; indeed, the "sovereign rights for . . . exploiting, conserving, and managing" possessed by the United States constitute a property interest of great scope and significance. Moreover, as the D.C. Circuit has held, the Property Clause applies to property essentially held in trust by the government for private parties, *Arizona v. Bowsher*, 935 F.2d 332, 334–35 (D.C. Cir. 1991) (finding that Property Clause applies to moneys held by the Department of Treasury even though individuals with unknown whereabouts held claims against the United States in amounts exactly matching the funds), and the "sovereign rights for . . . conserving [] and managing" reflect a similar authority to control property for purposes of stewardship. *Cf. United States v. Louisiana*, 339 U.S. 699, 705 (1950) (after holding that U.S. has

[19] *See also United States v Brown*, 384 F.Supp 1151, 1157 (E.D. Mich. 1974) ("[F]or the Property Clause to be properly invoked as a basis for congressional enactment, some actual and substantial property interest of the federal government must be involved"), *rev'd on other grounds*, 557 F 2d 541 (6th Cir 1977), *United States v. Davis*, 872 F. Supp 1475 (E D. Va. 1995) (adopting *Brown*'s Property Clause analysis), *aff'd*, 98 F.3d 141 (4th Cir. 1996) *Cf. Cappaert*, 426 U S at 138 (Property Clause empowers United States to reserve unappropriated appurtenant water when it reserves land for a federal purpose to the extent needed to accomplish the purpose of the reservation), *Federal "Non-Reserved" Water Rights*, 6 Op O L C 328, 346 (1982) ("It is now settled that when the federal government reserves land for a particular federal purpose, it also reserves, by implication, enough unappropriated water as is reasonably necessary to accomplish the purposes for which Congress authorized the land to be reserved . . ."). We recognize, however, that the Property Clause may not authorize Congress to make needful rules and regulations to govern objects and areas over which it has only a very limited property interest. *See, e g., Prize German Vessel Allocated to United States Transferred to Canada*, 41 Op Att'y Gen. 41, 43 (1949) (Property Clause does not apply when United States holds ship only as a bailee and when there is a "binding obligation upon the United States to transfer possession of and such title as it may have to the [ship] to the country to which it was finally allocated").

dominion in the three-mile belt of territorial sea, addressing claim that Louisiana claimed property interest in area outside that belt and saying: "If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows a fortiori that the ocean beyond that limit also is.").

Although the President may establish a national monument in the EEZ, the rules and regulations that govern activities within that monument must nonetheless be consistent with recognized rules of international law,[20] some of which might allow activities otherwise prohibited in national monuments by Department of the Interior regulations or require the United States to take certain international actions before prohibiting certain conduct within the monument. Although we do not undertake here exhaustively to identify all such rules, we note that customary international law allows all states certain freedoms within the EEZs of other states, including the freedoms of navigation and overflight, and the right to lay submarine cables and pipelines. Moreover, the Law of the Sea Convention, the rules of which the United States generally abides by, *see supra* note 14, contains very specific rules regarding regulation of pollution from vessels of other states. For instance, the Convention provides that coastal states, "acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, whenever appropriate, of routing systems designed to minimize the threat of accidents which might cause pollution of the marine environment." Art. 211(1).[21] The Convention also contains specific provisions governing the rights and powers of coastal states to enforce their laws and regulations. *See* Art. 220; Restatement Third § 514 cmt i. Therefore any designation of a national monument in the EEZ should specify

[20] President Reagan's proclamation establishing the EEZ explicitly provided that the United States would only exercise sovereign rights there "to the extent permitted by international law." Proclamation No 5030. We have assumed for purposes of this opinion that the President intends to act in conformity with President Reagan's proclamation when taking any action to protect the coral reef resources of the Northwest Hawaiian Islands

[21] In a section that appears particularly relevant to the issue of what international law limitations might apply to the establishment of rules and regulations applicable within the monument, the Convention continues:

> Where the international rules and standards referred to [in the just-quoted section] are inadequate to meet special circumstances and coastal States have reasonable grounds for believing that a particular, clearly defined area of their respective exclusive economic zones is an area where the adoption of special mandatory measures for the prevention of pollution from vessels is required for recognized technical reasons in relation to its oceanographical and ecological conditions, as well as its utilization or the protection of its resources and the particular character of its traffic, the coastal States, after appropriate consultations through the competent international organization with any other States concerned, may, for that area, direct a communication to that organization, submitting scientific and technical evidence in support and information on necessary reception facilities. Within 12 months after receiving such a communication, the organization shall determine whether the conditions in that area correspond to the requirements set out above *If the organization so determines, the coastal States may, for that area, adopt laws and regulations for* the prevention, reduction and control of pollution from vessels implementing such international rules and standards or navigational practices as are made applicable, through the organization, for special areas These laws and regulations shall not become applicable to foreign vessels until 15 months after the submission of the communication to the organization

Art 211(6)(a).

that only regulations and restrictions that are consistent with international law will apply within the monument.

II. Establishing a National Wildlife Refuge

The Department of the Interior has argued that, in addition to establishing a national monument under the Antiquities Act, the President could also designate, in either the territorial sea or the EEZ, a national wildlife refuge that would be governed by the NWRSAA and regulations applicable to that Act. Because the NWRSAA does not itself contain a provision authorizing the President to withdraw land for a wildlife refuge, however, the Department of the Interior argues that the President could rely on the implied authority to reserve public lands recognized in *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). In that case, President Taft, responding to a rapidly depleting supply of oil available to the federal government, issued a proclamation withdrawing several million acres of oil rich lands from private mineral entry pending legislation to keep the lands in federal ownership. The Supreme Court affirmed the President's implied power to withdraw public lands in the public interest without specific statutory authorization, relying on a long historical practice that Congress, through inaction, had affirmed through its acquiescence. As the Court said in connection with the 252 instances of Presidential withdrawal that it had identified:

> The Executive, as agent, was in charge of the public domain; by a multitude of orders extending over a long period of time, and affecting vast bodies of land, in many States and Territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power in view of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen.

Id. at 475.

As the Department of the Interior also recognizes, however, the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1784 (1994 & Supp. IV 1998) ("FLPMA"), enacted in 1976, provides that "[e]ffective on and after the date of approval of this Act, the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress (U.S. v. Midwest Oil Co., 236 U.S. 459) . . . [is] repealed." FLPMA § 704(a), 90 Stat. at 2792. The plain language of this statute would appear to preclude the President from relying on the authority of *Midwest Oil* to establish a national wildlife refuge. To support its view that such authority is still available to the President, the

Department of the Interior points to the definition section of the FLPMA, which provides that the term "public lands" means "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management . . . except—(1) lands located on the Outer Continental Shelf." 43 U.S.C. § 1702(e). This provision, along with the history leading up to the enactment of the FLPMA,[22] the Department of the Interior argues, indicates that the repeal of the *Midwest Oil* authority extends only to withdrawals of lands that are not on the Outer Continental Shelf and would therefore not preclude the President from using this authority to withdraw lands for a national wildlife refuge in either the territorial sea or the EEZ.

The Department of the Interior also argues that the relationship between the executive and legislative branches regarding public land withdrawals "reflects a continuing dialogue" and that the FLPMA's purported repeal of the *Midwest Oil* power "does not mean the Presidential authority is completely dead." For this latter point, the Department of the Interior points to the fact that after Congress passed the Pickett Act in 1910,[23] which authorized the President to make temporary withdrawals for public purposes (subject to private mining exploration and purchase), Presidents continued to make permanent withdrawals based on the *Midwest Oil* power, Attorney General Jackson issued an opinion upholding this practice,[24] and at least one court affirmed the President's power to make such withdrawals, *Portland General Electric Co. v. Kleppe*, 441 F. Supp. 859, 861–62 (D. Wyo. 1977). The Department further cites what it refers to as the "leading public land law treatise," which, pointing to the Pickett Act/*Kleppe* example, says: "[T]he implied executive withdrawal power did not arise from affirmative legislation; it arose from congressional inaction in the face of executive action. It logically follows that the nonstatutory power is not subject to simple repeal. Instead, it would seem regenerable and effective against private benefit seekers until Congress objects to its exercise." 2 George Cameron Coggins & Robert L. Glicksman, *Public Natural Resources Law* § 10D.03[2][b] (2000).

Based on the materials submitted to us, we are unconvinced that the President has the authority to establish or expand a wildlife refuge within the U.S. territorial sea or the EEZ using the presidential authority recognized in *Midwest Oil*.[25]

[22] The FLPMA's withdrawal provisions, we are told by the Department of the Interior, grew out of a study done for the Public Land Law Review Commission by Charles Wheatley. Neither this study nor the Commission's subsequent report, we have been further informed, appears to have devoted any attention to withdrawals of areas in marine waters. The Commission's report led directly to the enactment of the FLPMA. According to the Department of the Interior, this history indicates that "[t]here is no evidence that Congress was concerned at all with executive branch withdrawals in marine waters when it sought to repeal the implied authority of the President upheld in *Midwest Oil* in the Federal Land Policy and Management Act." *See* Memorandum for William Treanor & Jay Wexler, Office of Legal Counsel, from John D. Leshy, Solicitor, Department of the Interior 1 (Aug. 11, 2000).

[23] June 25, 1910, ch. 421, 36 Stat. 847 (repealed by FLPMA).

[24] *Withdrawal of Public Lands*, 40 Op. Att'y Gen. 73, 77 (1941).

[25] We express no view, however, on whether the President could establish a national wildlife refuge for national defense or foreign affairs purposes. Such an action might be justified as an exercise of the President's constitutional authority, as opposed to implied authority rooted in practice. To our knowledge, no defense or foreign affairs rationale

Continued

Although it does appear that Congress was not concerned with the territorial sea or the EEZ when it enacted FLPMA, the section repealing the *Midwest Oil* power contains no exceptions, and the most natural reading of that section is that Congress intended to restrict the President's withdrawal authority to only that authority specifically provided by statute. The Department of the Interior's position would, in effect, read the phrase "public lands," defined by the Act to exclude lands located on the Outer Continental Shelf, into § 704(a). That section, however, does not include that phrase, but instead appears to cover all possible withdrawals. Moreover, the legislative history of FLPMA supports the view that Congress intended to repeal all implied withdrawal power. *See* H.R. Rep. No. 94–1163, at 29 (1976) ("The main authority used by the Executive to make withdrawals is the 'implied' authority of the President recognized by the Supreme Court in *U.S. v. Midwest Oil Co.* (236 U.S. 459). The bill would repeal this authority and, with certain exceptions, all identified withdrawal authority granted to the President or the Secretary of the Interior."); H.R. Conf. Rep. No. 94–1724, at 66 (1976) ("The House amendments (but not the Senate bill) provided for the repeal of practically all existing executive withdrawal authority. The conferees agreed to this repeal to the extent provided for by the House."). Given the plain language of the statute, we think it likely that a court would find that § 704(a) of the FLPMA prohibits the President from relying on the implied *Midwest Oil* authority to withdraw lands, regardless of where those lands are located.

Moreover, while it may be the case that the history of executive withdrawal of public lands has taken place as part of a dialogue with Congress, we do not think this history makes it clear that the President may continue to make *Midwest Oil* withdrawals in the territorial sea or EEZ following the enactment of FLPMA. First, the current situation is distinguishable from the situation addressed in Attorney General Jackson's 1941 opinion and in *Kleppe*. There, Congress had enacted a law that specifically authorized the President to make temporary withdrawals, and the question was whether that law implicitly repealed the President's authority under *Midwest Oil* to make permanent withdrawals. The Attorney General opinion, in upholding the President's authority to make permanent withdrawals, said that: "All that the act of 1910 expressly does is to authorize such temporary withdrawals, subject to certain limitations. It expressly negatives no power possessed by the President." 40 Op. Att'y Gen. at 77. Here, by contrast, the question is whether Congress's clear language repealing the *Midwest Power* really means what it seems to mean, and, unlike in the case of the Pickett Act, here Congress has indeed "expressly negativ[ed]" a power previously possessed by the President. In light of this difference, we do not think the President could properly rely on the 1941 Attorney General opinion or *Kleppe* to withdraw lands

has been put forward as a justification for the potential national wildlife refuge in the Northwest Hawaiian Islands. We also express no view as to whether the President possesses statutory authority under the OCSLA to set aside areas for the protection of fish and wildlife resources.

pursuant to *Midwest Oil*.[26] Second, although a pattern or practice of executive withdrawals of lands in the territorial sea or EEZ made pursuant to the implied *Midwest Oil* power following the enactment of FLPMA might indicate Congressional acquiescence to such withdrawals and might provide a basis for justifying the continued assertion of the *Midwest Oil* power in those areas, we have been told by the Department of the Interior that no such practice exists.[27]

III. Management Issues

A. Management of National Monuments

We have been asked a number of questions relating to how a national monument in the territorial sea or the EEZ could lawfully be managed. The first set of issues is whether management for a monument established in either the territorial sea or the EEZ could be delegated to an agency other than the Department of the Interior and whether management for such a monument could be shared between the Department of the Interior and another agency. The short answer is as follows: The President may delegate management responsibilities for such a monument to an agency other than the Department of the Interior if that agency has some independent statutory authority to manage the relevant resource, but the Department of the Interior must maintain concurrent management of the monument. Management for such a monument can generally be shared between the Department of the Interior and another agency, but if the monument overlays a national wildlife refuge area, the Fish and Wildlife Service ("FWS") of the Department of the Interior must maintain sole management authority over the part of the monument that is also a refuge area.

Although the Antiquities Act does not itself restrict the President's ability to delegate management of a national monument to whichever agency he deems appropriate, current law does require that the Department of the Interior maintain management authority over all national monuments. Acting under a 1933 statute that authorized the President to reorganize the Government, see Title IV, Act of

[26] The Department of the Interior points out that on at least one occasion it has relied upon its interpretation of FLPMA to transfer jurisdiction over offshore submerged lands from one Interior agency to another without going through the procedurally elaborate withdrawal provisions of § 204 of FLPMA. Memorandum for William Treanor & Jay Wexler, Office of Legal Counsel, from John Leshy, Solicitor, Department of the Interior (Aug. 14, 2000). Our conclusion regarding the continuing effectiveness of the *Midwest Oil* power, however, turns solely on our interpretation of the specific language and legislative history of § 704(a) of FLPMA and should not be read to affect how the Department of the Interior may interpret § 204 of that Act.

[27] We have been told that Presidents have established several national wildlife refuges encompassing oceanic waters. *See* Joint Memo, attached Coral Reefs Background Paper at 5 (describing the establishment of the Yukon Delta National Wildlife Refuge in 1929, the Hawaiian Islands National Wildlife Refuge in 1909, and the Midway Atoll National Wildlife Refuge in 1903). NOAA, on the other hand, claims that "[r]efuge jurisdiction over submerged lands and marine resources in some existing refuges is also unclear, at best." NOAA Letter at 2. The answer to the question posed to us does not turn on which of these accounts is correct, however, because none of the information we have received from the interested agencies indicates that the President has attempted to rely on the *Midwest Oil* power to withdraw submerged lands following the enactment of FLPMA.

March 3, 1933, ch. 212, 47 Stat. 1489, 1517, amended by Title III, Act of March 20, 1933, ch. 3, 48 Stat. 8, 16, President Roosevelt issued a reorganization plan providing in part that: "All functions of administration of . . . national monuments . . . are consolidated in the National Park Service in the Department of the Interior . . .; except that where deemed desirable there may be excluded from this provision any public building or reservation which is chiefly employed as a facility in the work of a particular agency." Exec. Order No. 6166, *reprinted in* 5 U.S.C. § 901 note (1994). Congress subsequently ratified this reorganization plan in 1984. Act of Oct. 19, 1984, Pub. L. No. 98–532, 98 Stat. 2705.[28] Although Executive Order No. 6166 requires that administration of national monuments be consolidated in the National Park Service ("NPS"), the Secretary of the Interior may exercise his authority under Reorg. Plan No. 3 of 1950, 3 C.F.R. § 1003 (1950), 43 U.S.C. § 1451 note (1970), 64 Stat. 1262 (1950), also ratified by Congress in 1984, which permits him to authorize the performance of any function of a Department officer, agency, or employee by any other officer, agency, or employee of the Department, to redesignate NPS's authority over the monument to any other agency within the Department, including the FWS. Letter for Thomas Lambrix, Domestic Policy Council, from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel (Aug. 30, 1979) ("Although the Park Service is vested by Executive Order No. 6166 with the authority to administer monuments, the Secretary of the Interior, under Reorganization Plan No. 3 of 1950 . . . has discretionary authority to transfer the functions of administering monuments elsewhere within his Department.").

We have previously opined that nothing in Executive Order No. 6166 precludes the President from designating an agency other than the Department of the Interior as a management authority for a national monument, so long as the Department of the Interior has a concurrent role in management and so long as the other agency has some independent statutory authority to manage the relevant resource.

[28] This Act provided: "Section 1 The Congress hereby ratifies and affirms as law each reorganization plan that has, prior to the date of enactment of this Act, been implemented pursuant to the provisions of chapter 9 of title 5, United States Code, or any predecessor Federal reorganization statute Sec. 2. Any actions taken prior to the date of enactment of this Act pursuant to a reorganization plan that is ratified and affirmed by section 1 shall be considered to have been taken pursuant to a reorganization expressly approved by Act of Congress." The legislative history of this Act indicates Congress was concerned that certain reorganization plans had been promulgated pursuant to statutes that contained legislative veto provisions invalidated by *INS v. Chadha*, 462 U S 919 (1983), and wanted to "ensure that the authority of agencies affected by past reorganization plans is not disrupted," H R. Rep. No. 98–1104, at 4426 (1984). Although the 1933 statute that provided the President authority to issue Executive Order No. 6166 did not contain a legislative veto provision, nothing in the plain language of the statute limits its application to reorganization plans issued pursuant to unconstitutional statutes, and it would seem anomalous for Congress to have decided to ratify as law only those reorganization plans that were in effect illegal, while not ratifying those that were issued pursuant to constitutional statutes We therefore disagree with the suggestion of the Congressional Research Service that the 1984 Act might not have in fact ratified as law the 1933 executive order. *See* Pamela Baldwin, Congressional Research Service, *Legal Issues Raised by the Designation of the Grand Staircase-Escalante National Monument* 14 (Dec. 13, 1996) (arguing that because the 1933 statute did not suffer from a *Chadha* problem, the "1933 E O. and associated reorganization were not defective and did not need to be ratified as law by Congress in the 1984 Act" and that therefore "arguably, the consolidation of management of national monuments in the NPS was and is wholly an executive act, and may not need a subsequent act of Congress to change the consolidation of management in NPS").

See Management of Admiralty Island and Misty Fiords National Monuments, 4B Op. O.L.C. 396 (1980) ("Hammond Memo"). In a dispute that arose after the designation of national monuments on national forest lands, we explained that because neither the designation of a national monument under the Antiquities Act nor Executive Order No. 6166 expunged the national forest status of the underlying lands, the Department of Agriculture was not legally barred from helping to administer those lands through that Department's Forest Service, the agency responsible for the management of national forest lands. *Id.* at 398. We further concluded that under Executive Order No. 6166, the NPS was also "authorized to participate in the management of these monuments." *Id.* at 399. In light of the fact that both agencies possessed appropriate authority, we approved of a plan for the two agencies to "enter into a memorandum of understanding to govern the management of these monuments, accounting for the land use standards binding on the departments and specifying each department's regulatory and budgetary responsibilities." *Id.* We have subsequently approved for legality several national monument proclamations authorizing agencies other than the Department of the Interior to assume primary management authority but requiring those agencies to consult with the Secretary of the Interior when developing management plans and regulations to govern the monument. *See, e.g.*, Proclamation No. 7295, 65 Fed. Reg. 24,095, 24,098 (2000) (establishing Giant Sequoia National Monument, authorizing Secretary of Agriculture to manage national monument on national forest lands, and requiring the Secretary of Agriculture to consult with the Secretary of the Interior when "developing any management plans and any management rules and regulations governing the monument").[29] Although no precise rules have been developed to govern how management authority must be allocated between the Department of the Interior and other managing agencies, the administrative practice discussed above requires that the Department of the Interior be consulted on all significant management decisions relating to the national monument and have the opportunity to bring any issue upon which it disagrees with the other managing agency or agencies to the President or his delegee for resolution.

Next, we were asked whether it would affect the President's management options if the monument encompassed a portion of the coral reef ecosystem currently within the Northwest Hawaiian Islands National Wildlife Refuge. We conclude that the President's options would be limited in such a situation because the NWRSAA requires that the FWS maintain sole and exclusive management authority over all national wildlife refuge areas. Although the plain language of the statute does not itself expressly mandate such exclusive management — the statute only says that all refuge areas "shall be administered by the Secretary through the United States Fish and Wildlife Service," 16 U.S.C. § 668dd(a)(1) (Supp. IV 1998) — the legislative history of the amendments to the Act adding

[29] Our office reviews all executive orders and proclamations for form and legality. *See* 28 C.F.R. § 0.25(b) (1999)

this language and subsequent court decisions make clear that exclusive jurisdiction is required. As the legislative history indicates, the amendments to the Act were intended to redress the existing problem of dual management over refuge areas, which the Senate thought undermined protection of fish and wildlife resources in those areas. S. Rep. No. 94–593, at 2 (1976) (noting that "[j]oint jurisdiction over [refuge] areas has been a source of difficulty for both [FWS and the Bureau of Land Management], and it has long been felt that there should be a resolution to the problem"); *id.* (quoting several reports noting problems with split administration of refuge areas); *id.* at 5 (explaining rejection of House version which would have allowed "unworkable" dual administration of refuge areas). The Senate Report accompanying the bill amending the Act specifically explained, in language that could hardly be clearer, that dual administration of refuge areas would be prohibited by the Act:

> Subsection (a)(1) of the bill would amend the first sentence of section 4(a) of the Administration Act by adding a new provision that would require all units of the system to be administered by the Secretary of the Interior through the U.S. Fish and Wildlife Service. This will address two problems that have been brought to the Committee's attention. First, the Fish and Wildlife Service would be clearly designated as the agency through which the Secretary would be required to administer the units of the System, thereby eliminating the possibility of the Secretary delegating this authority to the Bureau of Land Management or any other Interior agency. Second, *there will be no joint administration of any units within the System by the U.S. Fish and Wildlife Service and any other agency.*

Id. at 6 (emphasis added). Relying on this legislative history, a district court in Alaska, in a decision summarily affirmed by the Ninth Circuit, held that the Department of the Interior could not designate lead management responsibility over a national wildlife refuge area to the U.S. Geological Survey. *Trustees for Alaska v. Watt*, 524 F. Supp. 1303, 1308–10 (D. Alaska 1981) ("Joint administration over the Refuge is forbidden by Congress."), *aff'd*, 690 F.2d 1279 (9th Cir. 1982) (per curiam); *see also Wyoming v. United States*, 61 F. Supp.2d 1209, 1220 (D. Wyo. 1999) (analyzing text of the NWRSAA and concluding that "it is evident that Congress left little room for any other entity to exert management control over national refuges"). In light of this legislative history and case law, we believe that if a monument encompasses a wildlife refuge area, the part of the monument that is also a refuge area would have to be managed exclusively by FWS and that the Secretary of the Interior would not be able later to transfer such management authority over that area to any other agency within the Department of the

Interior.[30] The rest of the monument could be managed by FWS, NPS, or a combination of either of these two agencies and an agency outside of the Department of the Interior which has some statutory authority for managing the relevant resources.

B. Effect of the MSFCMA on Establishment and Management of National Monuments

The next set of management questions posed to us regards the effect of the MSFCMA on the potential establishment and management of a national monument in the EEZ. We were asked whether the fact that such a monument may encompass a portion of the coral reef ecosystem that is subject to fishery management under the MSFCMA would have any bearing on management issues or whether it would have any effect on the President's authority to establish the monument. The fact that such a monument would encompass an area subject to fishery management under the MSFCMA would not have any bearing on whether the President could establish a monument there. Such an overlap would, however, have some bearing on which agencies the President could designate to manage the monument to the extent that in such overlapping areas NOAA would have independent statutory authority to manage fishery resources and could therefore be designated as a management authority for that region for the purposes of conserving fishery resources consistent with the MSFCMA.

The Antiquities Act provides only that the President may designate a national monument on any lands "owned or controlled by the Government of the United States." 16 U.S.C. § 431 (1994). Nothing in that Act precludes the President from declaring a national monument on lands that are currently managed by an agency under any other statute or applicable law. Nor have we found any provision in the MSFCMA that would preclude the President from designating a monument in waters administered under that statute. Moreover, this Office has several times approved for legality proclamations designating monuments on lands already reserved under other statutes for management by agencies other than the Department of the Interior. *See, e.g.*, Hammond Memo (monument on national forest lands); Proclamation No. 7319, 65 Fed. Reg. 37,253 (2000) (establishing Hanford Reach National Monument on lands managed by the Department of Energy); Proclamation No. 7295, 65 Fed. Reg. 24,095 (2000) (establishing Giant Sequoia National Monument on national forest lands). Therefore, the fact that the Depart-

[30] With respect to transferring management of a refuge from FWS to another agency within the Department of the Interior, the Reorganization Act of 1950, in our view, would be trumped by the more specific amendments to the NWRSAA, which prohibit such a transfer We do not believe the same can be said, however, of the 1984 Act ratifying Executive Order No 6166, which requires the NPS to administer all national monuments The language of Executive Order No. 6166 does not provide for exclusive NPS jurisdiction over national monuments, and we are aware of no legislative history, analogous to the relevant legislative history of the NWRSAA, which would indicate an intention on the part of President Roosevelt or the Congress to require such exclusive jurisdiction over national monuments

ment of Commerce might be authorized by statute to manage fishery resources in the area to be designated as a national monument does not prohibit the President's designation of that area as a monument under the Antiquities Act.

Resolution of the management question requires consideration of the specific provisions of the MSFCMA. That Act establishes a national program to conserve and manage the nation's fishery resources and habitats. Section 101(a) of the Act provides that the United States "claims, and will exercise in the manner provided for in this chapter, sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone." 16 U.S.C. § 1811(a). The Act establishes eight regional Fishery Management Councils that are required to develop fishery management plans to manage and conserve fishery resources. *Id.* §§ 1851, 1852, 1853(a). The plans are submitted to the Secretary of Commerce for approval. *Id.* § 1854(a). The Secretary of Commerce may also, in certain specified situations, develop his own fishery management plans. *Id.* § 1854(c). Fishery management plans, we are told by NOAA, can incorporate a wide range of fishery management measures, including time and area closures, size and bag limits, gear restrictions, permit requirements, or the establishment of marine reserves where all fishing is prohibited. NOAA Letter at 6. The Act provides that all fishery management plans must be consistent with "national standards, . . . regulations implementing recommendations by international organizations in which the United States participates . . . and any other applicable law," *id.* § 1853(a)(1)(c), and that the Secretary of Commerce must review all plans to determine "whether [they are] consistent with the national standards, the other provisions of this chapter, and any other applicable law," *id.* § 1854(a)(1)(A).

Because the MSFCMA only gives the Department of Commerce the authority to manage one type of activity — namely fishery conservation — in certain areas, rather than giving it general management authority over those areas, and because the Act provides that the fishery management plans developed or approved by the Secretary of Commerce must be consistent with other applicable laws, there would not seem to be any inherent management conflicts between the MSFCMA and a monument established under the Antiquities Act. The President could give general management authority over the monument to the Department of the Interior, and the Department of Commerce would continue to approve and develop fishery management plans for the relevant area consistent with other laws applicable to the area covered by the national monument, including regulations that apply to land under the jurisdiction of the Department of the Interior and any specific measures set out in the proclamation designating the monument. Alternatively, for areas of the monument that do not overlap a refuge area but do overlap areas managed by the Department of Commerce under the MSFCMA, the President could provide in the proclamation that the Department of Commerce will share management authority for those portions of the monument with the

Department of the Interior with respect to fishery-related activities,[31] so long as the Department of the Interior maintains at least consultation authority with respect to all significant management decisions.

Next, we were asked whether regulations made applicable to a national monument take precedence over inconsistent MSFCMA regulations. Because the MSFCMA provides that fishery management plans must be consistent with "any other applicable law," we think that monument regulations would take precedence over inconsistent fishery management plans developed pursuant to the MSFCMA, unless the regulations provide otherwise. NOAA argues that the "other applicable law" language in the MSFCMA applies only to "other laws for preparing and implementing fishery regulations." [32] Letter for William Treanor, Deputy Assistant Attorney General, Office of Legal Counsel, from James A. Dorskind, General Counsel, NOAA at 4 (Aug. 14, 2000). In our view, however, the language of MSFCMA — which specifically refers to "*any* other applicable law," is not limited to certain types of laws but is instead comprehensive in scope and would apply to any other law applicable in the area governed by the Act, including regulations applicable to national monuments. The legislative history of the Act confirms that fishery management plans must be consistent with all other applicable laws.[33] Moreover, case law from the Ninth Circuit and elsewhere indicates that the "any other applicable law" language of the MSFCMA is broad in scope and encompasses both procedural and substantive laws.[34] We do not address, however, the extent to which the President could fashion the monument proclamation to allow the development of fishery management plans that would provide for taking

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[31] We do not address whether the Department of Commerce may draw upon its statutory authority under the NMSA to manage a national monument with respect to activities that are not related to fishery management.

[32] NOAA also argues that the MSFCMA provides that fishery management authority within the EEZ shall be exercised "in the manner provided for in" that Act . On this basis, it argues that the Secretary of Commerce has exclusive authority to manage fish in the EEZ NOAA Letter at 5–7 But that exclusive authority is subject to the terms of the Act itself, which provides that all fishery management plans must be consistent with other applicable laws. Moreover, the Department of Commerce contends that because the Antiquities Act does not apply in the EEZ, it does not constitute an "other applicable law" for purposes of the MSFCMA. *Id* at 7. But our answer to this question assumes that the Antiquities Act does apply in the EEZ, if it does not, then the President could not establish a monument there in the first instance, and management issues would not even arise

[33] *See, e.g* , S. Rep. No. 94–711, at 40 (1976) ("The Secretary's review shall be designed to determine whether the fishery management plan is consistent with the national standards for fishery conservation and management, the other provisions and requirements of this legislation and *any* other applicable law " (emphasis added)); S Rep. No 94–416, at 37 (1975) ("Once a council completes its plans and recommended regulations and submits them to the Secretary, the Secretary would review the regulations and determine whether they are consistent (1) with the national standards, and (2) with the provisions and requirements of this Act and *any* other applicable law " (emphasis added)), H.R. Rep. No 94–948, at 40 (1976) ("The Secretary's review shall be designed to determine whether the fishery management plan is consistent with . . *any* other applicable law." (emphasis added))

[34] *See, e g* , *Parravano v. Babbitt*, 70 F 3d 539, 544 (9th Cir. 1995) ("Indian fishing rights that exist under federal law may constitute 'any other applicable law ' "); *id* at 547 ("When the [fishery management] councils' recommendations threaten conservation goals or undermine other federal laws and obligations, the Secretary must reject them."), *Washington State Charterboat Ass'n v Baldrige*, 702 F 2d 820, 823 (9th Cir 1983) (holding that treaties negotiated between the United States and several Pacific Indian tribes in the 1850s establishing the rights of treaty fishers constituted "other applicable law" under the MSFCMA), *Greenpeace v. National Marine Fisheries Serv.*, 80 F Supp.2d 1137, 1144 n 7 (W D Wash. 2000) (noting that the National Marine Fisheries Service had admitted to the court that fishery management plans must comply with the Endangered Species Act under "any other applicable law" provision of MSFCMA)

of some fish within the monument or refuge by providing, for example, that any regulations pertaining to the monument would have to be consistent with the fishery plans developed under the MSFCMA.

C. Effect of Establishment of a National Monument on the Secretary of Commerce's Authority to Establish a National Marine Sanctuary under the NMSA

Finally, we were asked whether regulations applicable to a national monument would preclude the establishment of a marine sanctuary under the NMSA or would take precedence over regulations issued under the NMSA. The NMSA authorizes the Secretary of Commerce to:

> designate any discrete area of the marine environment as a national marine sanctuary and promulgate regulations implementing the designation if the Secretary — (1) determines that the designation will fulfill the purposes and policies of this chapter and (2) finds that (A) the area is of special national significance due to its resource or human-use values; (B) existing state and Federal authorities are inadequate or should be supplemented to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education; (C) designation of the area as a national marine sanctuary will facilitate the objectives in subparagraph (B); and (D) the area is of a size and nature that will permit comprehensive and coordinated conservation and management.

16 U.S.C. § 1433(a). The Secretary is required to consider various factors when determining whether a proposed sanctuary meets these standards, *id.* § 1433(b), and must follow a detailed process for designation and promulgation of applicable regulations, *id.* § 1434. The Act makes it unlawful for anyone to destroy or injure sanctuary resources. *Id.* § 1436.

The existence of regulations applicable to a monument would not preclude establishment of a marine sanctuary under the NMSA. Indeed, the Act specifically envisions that other regulatory schemes could be applicable to the area sought to be designated as a sanctuary. For example, the Act lists as one of its purposes the need "to provide authority for comprehensive and coordinated conservation and management of these marine areas, and activities affecting them, in a manner that complements *existing regulatory authorities*." *Id.* § 1431(b)(2) (emphasis added). The existence of other regulatory schemes, however, might limit the discretion of the Secretary of Commerce to designate a marine sanctuary because the NMSA allows the Secretary to designate such a sanctuary only if existing

federal authorities are "inadequate or should be supplemented." *Id.* § 1433(a)(2)(B). The Secretary of Commerce would therefore have to consider whether the designation of the relevant area as a monument sufficiently protected the marine resources in question, and could only designate the area as a marine sanctuary if he found that such a designation was insufficient to protect those resources or that the regulations applicable to the monument should be supplemented to protect those resources. On the other hand, that very limitation also suggests an intent on the part of Congress that NMSA regulations that are more stringent with respect to protecting marine resources would in fact trump other relevant regulations, such as monument regulations, that are not so stringent. The purpose of the NMSA would appear to be to allow the Secretary of Commerce the authority to provide more protection to marine areas than is already provided by other regulatory regimes.

IV. Conclusion

We have concluded that the President may establish a national monument pursuant to the Antiquities Act in both the territorial sea and the EEZ. We are unconvinced, however, that the President would have the authority to establish a national wildlife refuge in either the territorial sea or the EEZ using the implied power of *Midwest Oil.* With respect to management issues, we find that authority to manage monuments can, under certain circumstances, be shared between the Department of the Interior and other agencies, that the FWS must maintain sole management authority over any national wildlife refuge area within a monument, that regulations applicable to national monuments trump inconsistent fishery management plans, and that the establishment of a national monument would not preclude the establishment of a national marine sanctuary in the same area.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

Applicability of Government Corporation Control Act to "Gain Sharing Benefit" Agreement

The Government Corporation Control Act does not require the National Aeronautics and Space Administration to obtain legislative authorization before entering into a "gain sharing benefit" agreement with a private corporation that grants NASA deferred cash payments based on an increase in the value of the corporation's common stock.

September 18, 2000

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION
AND
THE GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

This memorandum resolves a dispute between the National Aeronautics and Space Administration ("NASA") and the Office of Management and Budget ("OMB") regarding whether the proposed terms of an agreement between NASA and a private corporation would violate the Government Corporation Control Act ("GCCA"). Specifically, we have been asked whether 31 U.S.C. § 9102 (1994) requires NASA to obtain legislative authorization before entering into a "gain sharing benefit" agreement with a private corporation that grants NASA deferred cash payments based on an increase in the value of the corporation's common stock. For the reasons explained below, we conclude that section 9102 of title 31 does not require NASA to obtain legislative authorization in order to enter into the proposed agreement.

I. Background

In October 1999, Congress established a Space Station Commercial Development Demonstration Program giving NASA authority "to establish a demonstration regarding the commercial feasibility and economic viability of private sector business operations involving the International Space Station." Pub. L. No. 106–74, § 434, 113 Stat. 1047, 1097 (1999). As part of this program, NASA issued a public request for "entrepreneurial offers" in December 1999 seeking private sector interest in development of multi-media products and services related to the development of the International Space Station ("ISS") and the exploration of space. NASA received many responsive offers and selected Dreamtime Holdings, Inc. ("Dreamtime") to enter negotiations for a collaborative agreement. Dreamtime is a privately held Delaware corporation. NASA informs us that Dreamtime was not formed by NASA, is not owned by any individuals directly or indirectly associated with NASA, and was created without any support from

NASA. As part of the collaborative agreement, Dreamtime is required to negotiate agreements with four independent companies that will likely receive substantial equity positions in the corporation.

Under the proposed agreement, NASA and Dreamtime will each make contributions as part of a collaborative commercial enterprise involving the ISS, pursuant to Pub. L. No. 106–74. *See* Agreement for Collaboration on Multi-Media Activities between the National Aeronautics and Space Administration and Dreamtime Holdings, Inc. (May 17, 2000) (the "Agreement"). This legislation not only authorizes the creation of a commercial demonstration program but also permits NASA to collect and retain receipts from the commercial use of the ISS. The legislative history indicates the law was intended to permit NASA to negotiate market-based levels of payment for relevant goods and services. *See* H.R. Conf. Rep. No. 106–379, at 153 (1999) ("In order to encourage private investment and increase economic activity in low earth orbit, NASA may negotiate for payments, at a value set by the private market, and retain any funds received in excess of costs for re-investment in the station economic development program."). Pursuant to the agreement, the parties will share use of high definition television equipment provided by Dreamtime, and NASA will provide access to and accommodations for Dreamtime's television equipment and services on the Space Shuttle, on the ISS, and at various NASA locations. Dreamtime will use the equipment and access to produce images for its commercial distribution, with special emphasis on the Internet. NASA will receive rights to use the images for agency purposes, including public affairs, scientific and engineering needs, research and development, and various missions and operations. In addition, the parties agree to collaborate on the development of educational products and documentary programming, with the goal of increasing public awareness of the ISS and its related programs. To assist in the development of these products and programs, NASA will make its still, film, and video archives available to Dreamtime for digitization and enhancement. The proposed agreement has a seven-year term with an option for a five-year extension. NASA informs us that, according to current estimates, its contributions to the endeavor would be worth approximately $38 million, and Dreamtime's contribution would be $100 million over the term of the agreement.

Dreamtime has offered to provide a gain-sharing benefit ("GSB") to NASA as financial remuneration. Article II of the Agreement sets forth the terms of the GSB arrangement, which permits NASA to receive a monetary benefit from the success of the endeavor. In exchange for its collaboration, NASA would receive a contractual right to cash payments based on the appreciation of Dreamtime's stock. The GSB tracks the fluctuation in value of an amount of stock equal to twenty-five percent of the initial capitalization of the corporation with some subsequent adjustments, and the right to payment vests at a rate of twenty-five percent per year for four years with certain time restrictions. The GSB is not transferable by NASA, except that it may be transferred to an ISS-related non-governmental

organization, if such an organization is ultimately established. *See* Agreement, art. II; Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Edward A. Frankle, General Counsel, National Aeronautics and Space Administration (May 12, 2000) ("NASA Letter #1"), encl. 2.

OMB takes the position that the proposed GSB provision would run afoul of the GCCA because NASA would be "establish[ing] or acquir[ing]" a corporation to "act as an agency" without specific authorization by law. Letter for Daniel Koffsky, Acting Deputy Assistant Attorney General, Office of Legal Counsel, from Robert G. Damus, General Counsel, Office of Management and Budget at 1 (May 26, 2000) ("OMB Letter"). NASA disagrees, arguing that the agency played no role in the establishment of Dreamtime and that the payment of a GSB cash award based on Dreamtime's stock performance does not amount to acquisition of the corporation. *See* NASA Letter #1; Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Edward A. Frankle, General Counsel, National Aeronautics and Space Administration (June 8, 2000) ("NASA Letter #2"). Furthermore, NASA argues that Dreamtime is a private company engaged in a collaborative commercial endeavor and does not "act as an agency" within the meaning of the GCCA. NASA Letter #1, at 4. Our Office has been asked to resolve this dispute.

II. Discussion

The dispute between OMB and NASA centers on section 304(a) of the GCCA, codified at 31 U.S.C. § 9102 (1994). Section 9102 of title 31 provides that "[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action." We conclude that, under the proposed GSB agreement, NASA would not "establish or acquire" Dreamtime and Dreamtime would not "act as an agency" within the meaning of 31 U.S.C. § 9102.[1] Accordingly, authorizing legislation for the agreement is not required under the GCCA. We offer no view on the policy implications of the proposed financial arrangement between NASA and Dreamtime.

[1] In the last ten years, we have provided a detailed analysis of GCCA issues on two occasions The more recent of these was a request for advice from the National Endowment for the Arts ("NEA") concerning whether the NEA could create a separate nonprofit organization as a fundraising auxiliary to the agency. Letter for Karen Christensen, General Counsel, National Endowment for the Arts, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel (Oct. 30, 1995). The earlier opinion concerned the creation of a corporation by employees of the Small Business Administration ("SBA") to liquidate the assets of a failed SBA investment company Memorandum for Susan S. Engeleiter, Administrator, Small Business Administration, from J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Government Corporation Control Act* (June 6, 1990) These two opinions provide the framework for our analysis of the present question

A.

First, we consider whether NASA's proposed GSB arrangement with Dreamtime would constitute the establishment or acquisition of a corporation. OMB argues that the GSB provision amounts to an *acquisition* of the company under the GCCA because the GSB is designed to track the value of twenty-five percent of the initial capitalization of the company. According to OMB, the GSB is "a right substantially equivalent in all material respects to ownership of non-voting common stock" and should be treated as stock ownership. OMB Letter at 2. In addition, OMB contends that NASA *established* Dreamtime within the meaning of section 9102 because "it is not clear that the corporation would or could exist in the form contemplated absent the agreement with NASA, nor is it clear that the resulting entity would have any reality as an ongoing enterprise without NASA." *Id.* at 3.

We believe that, under the contemplated agreement, NASA would neither acquire nor establish the corporation. In our opinion for the National Endowment for the Arts ("NEA"), although we ultimately concluded that the NEA could not create a nonprofit organization to serve as a fundraising auxiliary to the agency without specific congressional authorization, we repeated our prior advice that "an agency probably cannot be said, within the meaning of the statute, to have established or acquired a corporation to act as an agency unless the government holds an ownership interest or exercises legal control." Letter for Karen Christensen, General Counsel, National Endowment for the Arts, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel at 1 (Oct. 30, 1995) ("NEA Opinion"). We also warned that the ambiguity in the term "establish" suggested that—even where there is no such ownership or control—an agency should avoid excessive government involvement in the formation or operation of a corporation in the absence of a law authorizing the agency to do so. *Id.* We noted that

> the Endowment must maintain a distance between itself and any outside organization that may be created to raise funds. Not only must the Endowment not own or control the corporation, but the corporation must be free to adopt and change its charter and by-laws to the same extent as any other non-government corporation. Furthermore, no officials of the Endowment should serve on the board of the non-profit corporation.

Id. at 2. We acknowledged that the Endowment could have some involvement with the corporation without running afoul of the GCCA. For instance, it could encourage private parties to form a corporation, and it could make suggestions about the substance of the corporate charter or by-laws. We further concluded

that "[t]he Endowment could also take part in joint activities with the corporation," so long as the NEA officials "act at all times in the interests of the United States, rather than the corporation." *Id.* at 3.

We continue to believe, as we noted in our NEA Opinion, that an agency cannot be said to *acquire* a corporation unless it "holds an ownership interest or exercises legal control." NASA does not hold such an interest or exercise such control with respect to Dreamtime. It merely holds a contractual right to cash payments that are determined by reference to the value of the corporation's stock. NASA does not own stock or any other equity interest and, to our knowledge, has no representative on the corporation's Board of Directors. Even if the economic or market value of NASA's contractual right is substantially equivalent to the value of non-voting stock, NASA is not a Dreamtime stockholder and cannot be said to have ownership or control in the company.

Furthermore, we do not believe that NASA can be said to have *established*, *created*, or *organized* Dreamtime within the meaning of the GCCA.[2] As we noted in the NEA Opinion, the relevant question is whether NASA has excessive involvement in the formation or operation of the corporation, even in the absence of legal ownership or control.[3] We have been informed that Dreamtime was created by private investors who have no direct or indirect association with NASA and that Dreamtime was formed without any support or encouragement from NASA. Dreamtime adopted its by-laws and charter without any input from NASA, and remains free to make its own business decisions and to change its by-laws and charter as appropriate without interference or approval by NASA. Neither NASA's collaboration with Dreamtime since the latter's creation nor the fact that Dreamtime's ultimate success is dependent upon that collaboration is evidence of any government involvement in the company's formation or operation. Indeed, we specifically noted in our NEA Opinion that agencies remain free under the GCCA to participate in joint activities with private corporations, so long as the agency acts exclusively in the interest of the United States.

We do not find support for OMB's position on these questions in the legislative history of the GCCA, which reveals that the law's intent was to stop agencies

[2] As originally enacted, section 304(a) of the Act stated that "[n]o corporation shall be created, organized, or acquired hereafter by any officer or agency of the Federal Government or by any Government corporation for the purpose of acting as an agency or instrumentality of the United States," except as specifically authorized by statute. GCCA, Pub L. No. 79-248, ch 557, 59 Stat. 597, 602 (1945) When section 304(a) was recodified in 1982, the phrase "created, organized, or acquired" was changed to "establish or acquire," but Congress stated that the changes should not be interpreted as substantive. Pub. L. No. 97-258, § 4(a), 96 Stat 877, 1067 (1982).

[3] A recent Comptroller General opinion echoes this understanding of the phrase "establish or acquire" in the GCCA In a 1998 opinion, the Comptroller General held that the Federal Communication Commission's role in forming two nonprofit corporations to administer certain functions of its universal service programs violated the GCCA "In our view, the Control Act prohibits an agency from creating or *causing creation* of a corporation to carry out government programs without explicit statutory authorization" Matter of the Honorable Ted Stevens, B-278,820, 1998 WL 465124, at *4 (C.G. Feb. 10, 1998) (Emphasis added.). The opinions and legal interpretations of the General Accounting Office and the Comptroller General often provide helpful guidance on appropriations matters and related issues. However, they are not binding upon departments, agencies, or officers of the Executive Branch *See Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986)

from creating instrumentalities of the United States Government under state or local law and to bring corporate agencies performing government functions under congressional oversight and control. The GCCA was the product of a lengthy congressional inquiry into agency practice of creating private corporations to conduct government business. In August 1944, the Joint Committee on the Reduction of Nonessential Federal Expenditures released a comprehensive report about such corporations. S. Doc. No. 78–227 (1944) ("Joint Committee Report"). The Joint Committee Report recommended a variety of legislative measures, and in 1945 Congress acted on those recommendations to pass the GCCA, Pub. L. No. 79–248, ch. 557, 59 Stat. 597 (1945). Most of the Act's provisions were designed to regulate or facilitate congressional oversight of the financial transactions of certain enumerated "wholly owned" and "mixed-ownership" government corporations, but section 304 concerned the creation of corporations to act as government agencies.

The Senate Committee report accompanying the bill stated:

> It does not seem desirable to continue any longer this anomalous situation in which an instrumentality of the Federal Government is technically a creature of a State or local government. Moreover, some of these corporations were chartered without specific authority of Congress. The bill provides that no wholly owned Government corporation created by or under the laws of any State, Territory, or possession of the United States or any political subdivision thereof, or under the laws of the District of Columbia, shall continue as an agency or instrumentality of the United States after June 30, 1948 . . . . It further provides that no corporation shall be created, organized, or acquired hereafter by any officer or agency of the Federal Government or by any Government corporation for the purpose of acting as an agency or instrumentality of the United States, except by act of Congress or pursuant to an act of Congress specifically authorizing such action.

S. Rep. No. 79–694, at 13–14 (1945); *accord* H.R. Rep. No. 79–856, at 11 (1945). In passing this legislation, Congress was focused on agencies that formed private corporations to perform government functions, thus removing those functions from effective congressional oversight. Neither the language of the statute nor the legislative history supports the theory that Congress was concerned with financial agreements between government agencies and the private corporations with which they do business that involve no government formation, ownership, or control of the private corporation.

Indeed, it is worth noting that the legislative history of the statute authorizing NASA to carry out this very program — the International Space Station Commer-

cial Development Demonstration Program — suggests that Congress sought to encourage collaborative commercial ventures in which NASA's compensation was set by reference to market value. The House Conference Report stated that "the conferees have included bill language establishing a demonstration program intended to test the feasibility of commercial ventures using the station, and whether or not it is possible to operate the station in accordance with business practices. In order to encourage private investment and increase economic activity in low earth orbit, NASA may negotiate for payments, at a value set by the private market, and retain any funds received in excess of costs for re-investment in the station economic development program." H.R. Conf. Rep. No. 106–379, at 152–53 (1999). The GSB provision is a market-based payment agreement. While the GSB arrangement may be novel, and perhaps has some risk associated with it, Congress apparently contemplated the economic implications of setting payments at a value dictated by the private market before authorizing the program. For the reasons discussed above, we conclude that NASA's proposed GSB agreement with Dreamtime does not constitute the establishment or acquisition of a corporation within the meaning of 31 U.S.C. § 9102.

B.

Even if there were some doubt as to whether the proposed GSB provision *did* constitute the acquisition or establishment of Dreamtime for purposes of the Act, congressional authorization would only be required if NASA established or acquired Dreamtime *to act as an agency*. Based on our understanding of the proposed arrangement between NASA and Dreamtime, we do not believe that Dreamtime would act as an agency within the meaning of 31 U.S.C. § 9102.

In a 1990 opinion, we considered whether the Small Business Administration's ("SBA") creation of a corporation under Delaware law to liquidate the assets of a failed Small Business Investment Company licensed by the SBA after it was appointed to serve as a receiver constituted the establishment of a corporation *to act as an agency*. Memorandum for Susan S. Engeleiter, Administrator, Small Business Administration, from J. Michael Luttig, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Government Corporation Control Act* (June 6, 1990) ("SBA Opinion"). An "agency" is defined as "a department, agency, or instrumentality of the United States Government." 31 U.S.C. § 101 (1994). Referring to this definition, we concluded that the corporation formed by the SBA acted as an instrumentality of the government under the GCCA. Our analysis first considered the commonly understood meaning of the term instrumentality and the legislative history of section 304:

> In common usage, an instrumentality is a thing through which a person or entity acts. The term implies both [1] that the thing is

> controlled by another actor and [2] that the thing is or may be deliberately used to accomplish the actor's objectives. This common sense definition is supported by section 304(b) of the Act and its legislative history. As noted previously, section 304(b) required any wholly owned government corporation chartered under state or local law to discontinue service "as an agency or instrumentality of the United States" and to liquidate after June 30, 1948, unless reincorporated by Congress. That section was aimed at 18 specific corporations chartered under state or local law that had been identified by the [Joint Commission Report]. . . . The language of section 304(b) shows, and the legislative history confirms, that Congress viewed these 18 corporations as instrumentalities of the federal government. . . . Consistent with the commonly accepted meaning of "instrumentality," each of these corporations was wholly owned by the United States, and thus subject to its control, and each was established or acquired to perform one or more tasks on the government's behalf or for its benefit.

SBA Opinion at 8–9 (numbers added). Second, we examined the use of the term "instrumentality" in other legal contexts and developed a list of four factors to consider in deciding whether a corporation is a government instrumentality: (1) whether the entity was created by the government; (2) the extent of government control over its operations; (3) the source of the entity's funding; and (4) the purposes for which it was created and the functions it performs.[4] *Id.* at 11–13.

Subsequent federal case law, as well as an opinion by the Comptroller General, supports this analytical framework, and indeed, appears to recognize somewhat greater flexibility than we have endorsed. In *Varicon International v. OPM*, 934 F. Supp. 440 (D.D.C. 1996), the district court considered whether the Office of Personnel Management violated the GCCA when it created a private company, the United States Investigations Service ("USIS"), to perform background investigations previously completed by the agency. Relying on *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995), in which the Supreme Court considered whether the National Railroad Passenger Corporation was an agency or instrumentality of the government for purposes of individual rights guaranteed by the Constitution, the district court applied a similar multi-factor test to conclude that USIS did not act as an agency under 31 U.S.C. § 9102:

> The record currently before the court indicates that USIS is a private company owned by its employees . . . ; none of the USIS

[4] We also noted that the factors would vary in importance depending upon the particular statute or doctrine being applied: "Since the purpose of the Government Corporation Control Act was to assert greater federal dominion over the financial affairs of entities controlling federal funds, the source of the entity's funding is more important here than it might be in other contexts." SBA Opinion at 12

> employees will be employed in any manner or in any capacity by the government; the government will have no control over the USIS board of directors, management, or employees, except as provided for in the contract; the government will not own or have any rights or obligations to own any USIS stock; the government will have no right or ability to appoint members of the USIS board of directors; and, the government has no obligation to or intention to make payments to or otherwise financially assist USIS except as provided under the contract in payment for service performed under the contract. . . . [I]t is the court's conclusion that USIS appears to be a private corporation which was awarded a government contract, and not a corporation which is acting as a federal agency.

934 F. Supp. at 447. Furthermore, in a 1992 opinion concerning the applicability of the GCCA to the creation of Federally Funded Research and Development Centers, the Comptroller General applied similar criteria, observing that " 'agents or instrumentalities of the United States' are component parts of the federal government which are vested, by law, with the authority to act on behalf of the United States, or to fulfill some statutory mission of the federal government." Matter of the Honorable David Pryor, 71 Comp. Gen. 155, 158 (1992).

The factual context of the creation and operation of Dreamtime, when measured against the commonly understood meaning of the term "instrumentality" and the four-part test set forth in our SBA Opinion, leads to the conclusion that Dreamtime was not established or acquired to act as an agency under 31 U.S.C. § 9102. First, as we discussed above, Dreamtime was created by private individuals who are not associated with NASA. While it is true that Dreamtime was formed in response to NASA's published notice of its intent to enter collaborative ISS commercial agreements with private business partners, the corporation was created without the support or encouragement of the agency. Second, NASA owns no part of Dreamtime and exercises no control over its operations. Dreamtime is owned by private shareholders and, as we understand it, no government employees serve on the company's Board of Directors. NASA Letter #1, at 4. Third, Dreamtime is funded by private sources, not funds drawn from the federal Treasury or other federal assets. *See* Agreement, art. IV ("NASA will not provide any appropriated funds to Dreamtime under this Agreement.").

The final factor — the purposes for which Dreamtime was created and the functions it performs — is the most complicated to apply here. Our SBA Opinion stated that the corporation created by the SBA amounted to a government instrumentality because it "was created to benefit SBA and to assist the agency in accomplishing its goals. No private entities profit from [the corporation's] operations except perhaps indirectly, as paid contractors of the corporation." SBA Opinion at 13. At first blush, Dreamtime seems to be similarly situated because the corporation was

created specifically in response to statutory authorization for the Space Station Commercial Development Demonstration Program, and the access to high definition television that Dreamtime provides will, in fact, assist NASA in accomplishing its statutory mission of space exploration. However, Dreamtime was not formed for NASA's exclusive benefit, nor to carry out any statutory function delegated to the agency by Congress. While the collaborative agreement is designed to benefit both Dreamtime and NASA, Dreamtime has its own stake in the arrangement — the production of high definition television images for its commercial use on the Internet and elsewhere. This is entirely separate from NASA's purpose in entering the agreement, which includes the right to use the images for NASA public affairs, scientific and engineering concerns, research and development, and missions and operations. Since Dreamtime is not owned, controlled, or funded by NASA or any other government agency, and it does not perform any statutory functions assigned to NASA, we conclude that the corporation was not established to act as an instrumentality of the United States government.[5]

III. Conclusion

The GCCA does not require NASA to obtain legislative authorization to enter an agreement to receive a GSB in the form of cash payments based on the value of a percentage of Dreamtime's stock. The GSB does not constitute stock ownership, and it does not give NASA any control over the corporation. Furthermore, NASA cannot be said to have established Dreamtime within the meaning of 31 U.S.C. § 9102. Even if the GSB agreement were found to constitute establishment or acquisition of Dreamtime by NASA, the GCCA would not be implicated because Dreamtime could not be said to "act as an agency" under the GCCA.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

[5] This conclusion is further supported by article XIII of the Agreement, which states that "[a]lthough this Agreement reflects a decision on the part of the Parties to enter into a multi-media collaboration, the Parties are independent of each other, and nothing herein will be deemed to create any legal partnership, joint venture, or association between the Parties."

A Sitting President's Amenability to Indictment and Criminal Prosecution

The indictment or criminal prosecution of a sitting President would unconstitutionally undermine the capacity of the executive branch to perform its constitutionally assigned functions

October 16, 2000

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

In 1973, the Department concluded that the indictment or criminal prosecution of a sitting President would impermissibly undermine the capacity of the executive branch to perform its constitutionally assigned functions. We have been asked to summarize and review the analysis provided in support of that conclusion, and to consider whether any subsequent developments in the law lead us today to reconsider and modify or disavow that determination.[1] We believe that the conclusion reached by the Department in 1973 still represents the best interpretation of the Constitution.

The Department's consideration of this issue in 1973 arose in two distinct legal contexts. First, the Office of Legal Counsel ("OLC") prepared a comprehensive memorandum in the fall of 1973 that analyzed whether all federal civil officers are immune from indictment or criminal prosecution while in office, and, if not, whether the President and Vice President in particular are immune from indictment or criminal prosecution while in office. *See* Memorandum from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel, *Re: Amenability of the President, Vice President and other Civil Officers to Federal Criminal Prosecution while in Office* (Sept. 24, 1973) ("OLC Memo"). The OLC memorandum concluded that all federal civil officers except the President are subject to indictment and criminal prosecution while still in office; the President is uniquely immune from such process. Second, the Department addressed the question later that same year in connection with the grand jury investigation of then-Vice President Spiro Agnew. In response to a motion by the Vice President to enjoin grand jury proceedings against him, then-Solicitor General Robert Bork filed a brief arguing that, consistent with the Constitution, the Vice President could be subject to indictment and criminal prosecution. *See* Memorandum for the United States Concerning the Vice President's Claim of Constitutional Immunity (filed Oct. 5, 1973), *In re Proceedings of the Grand Jury Impaneled December 5, 1972:*

[1] Since that time, the Department has touched on this and related questions in the course of resolving other questions, *see, e.g., The President—Interpretation of 18 U.S.C. § 603 as Applicable to Activities in the White House*, 3 Op. O.L.C. 31, 32 (1979); Brief for the United States as Amicus Curiae in Support of Petitioner at 15 n.8, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95-1853), but it has not undertaken a comprehensive reexamination of the matter. We note that various lawyers and legal scholars have recently espoused a range of views of the matter. *See, e.g., Impeachment or Indictment: Is a Sitting President Subject to the Compulsory Criminal Process: Hearings Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 105th Cong. (1998).

Application of Spiro T. Agnew, Vice President of the United States (D. Md. 1973) (No. 73–965) ("SG Brief"). In so arguing, however, Solicitor General Bork was careful to explain that the President, unlike the Vice President, could not constitutionally be subject to such criminal process while in office.

In this memorandum, we conclude that the determinations made by the Department in 1973, both in the OLC memorandum and in the Solicitor General's brief, remain sound and that subsequent developments in the law validate both the analytical framework applied and the conclusions reached at that time. In Part I, we describe in some detail the Department's 1973 analysis and conclusions. In Part II, we examine more recent Supreme Court case law and conclude that it comports with the Department's 1973 conclusions.[2]

I.

A.

The 1973 OLC memorandum comprehensively reviewed various arguments both for and against the recognition of a sitting President's immunity from indictment and criminal prosecution. What follows is a synopsis of the memorandum's analysis leading to its conclusion that the indictment or criminal prosecution of a sitting President would be unconstitutional because it would impermissibly interfere with the President's ability to carry out his constitutionally assigned functions and thus would be inconsistent with the constitutional structure.

1.

The OLC memorandum began by considering whether the plain terms of the Impeachment Judgment Clause prohibit the institution of criminal proceedings against any officer subject to that Clause prior to that officer's conviction upon impeachment. OLC Memo at 2. The memorandum concluded that the plain terms of the Clause do not impose such a general bar to indictment or criminal trial prior to impeachment and therefore do not, by themselves, preclude the criminal prosecution of a sitting President. *Id.* at 7.[3]

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[2] Implicit in the Department's constitutional analysis of this question in 1973 was the assumption that the President would oppose an attempt to subject him to indictment or prosecution. We proceed on the same assumption today and therefore do not inquire whether it would be constitutional to indict or try the President with his consent.

The Department's previous analysis also focused exclusively on federal rather than state prosecution of a sitting President. We proceed on this assumption as well, and thus we do not consider any additional constitutional concerns that may be implicated by state criminal prosecution of a sitting President. *See Clinton v Jones*, 520 U S 681, 691 (1997) (noting that a state criminal prosecution of a sitting President would raise "federalism and comity" concerns rather than separation of powers concerns)

[3] In a memorandum prepared earlier this year, we concluded that neither the Impeachment Judgment Clause nor any other provision of the Constitution precludes the prosecution of a former President who, while still in office, was impeached by the House of Representatives but acquitted by the Senate *See Whether a Former President May*

Continued

The Impeachment Judgment Clause provides:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

U.S. Const. art. I, § 3, cl. 7. The textual argument that the criminal prosecution of a person subject to removal by impeachment may not precede conviction by the Senate arises from the reference to the "Party convicted" being liable for "Indictment, Trial, Judgment and Punishment." This textual argument draws support from Alexander Hamilton's discussion of this Clause in *The Federalist Nos.* 65, 69, and 77, in which he explained that an offender would still be liable to criminal prosecution in the ordinary course of the law after removal by way of impeachment. OLC Memo at 2.[4]

The OLC memorandum explained, however, that the use of the term "nevertheless" cast doubt on the argument that the Impeachment Judgment Clause constitutes a bar to the prosecution of a person subject to impeachment prior to the termination of impeachment proceedings. *Id.* at 3. "Nevertheless" indicates that the Framers intended the Clause to signify only that prior conviction in the Senate would not constitute a bar to subsequent prosecution, not that prosecution of a person subject to impeachment could occur only after conviction in the Senate. *Id.* "The purpose of this clause thus is to permit criminal prosecution in spite of the prior adjudication by the Senate, *i.e.*, to forestall a double jeopardy argument." *Id.*[5]

Be Indicted and Tried for the Same Offenses for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op O.L.C. 111 (2000)

[4] In *The Federalist No 69*, Hamilton explained:

> The President of the United States would be liable to be impeached, tried, and upon conviction . . removed from office, and would *afterwards* be liable to prosecution and punishment in the ordinary course of law. The person of the King of Great Britain is sacred and inviolable: there is no constitutional tribunal to which he is amenable, no punishment to which he can be subjected without involving the crisis of a national revolution

The Federalist No. 69, at 416 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added). Similarly, in *The Federalist No 65*, he stated

> the punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. *After* having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.

Id. at 398–99 (emphasis added). Moreover, in *The Federalist No. 77*, he maintained that the President is "at all times liable to impeachment, trial, dismission from office . . . and to the forfeiture of life and estate by *subsequent* prosecution in the common course of law." *Id.* at 464 (emphasis added) In addition, Gouverneur Morris stated at the Convention that "[a] conclusive reason for making the Senate instead of the Supreme Court the Judge of impeachments, was that the latter was to try the President after the trial of the impeachment." 2 *Records of the Federal Convention of 1787*, at 500 (Max Farrand ed., 1974).

[5] In our recent memorandum exploring in detail the meaning of the Impeachment Judgment Clause, we concluded that the relationship between this clause and double jeopardy principles is somewhat more complicated than the 1973 OLC Memo suggests *See Whether a Former President May Be Indicted and Tried for the Same Offenses*

The OLC memorandum further explained that if the text of the Impeachment Judgment Clause barred the criminal prosecution of a sitting President, then the same text would necessarily bar the prosecution of all other "civil officers" during their tenure in office. The constitutional practice since the Founding, however, has been to prosecute and even imprison civil officers other than the President while they were still in office and prior to their impeachment. *See, e.g., id.* at 4–7 (cataloguing cases). In addition, the conclusion that the Impeachment Judgment Clause constituted a textual bar to the prosecution of a civil officer prior to the termination of impeachment proceedings "would create serious practical difficulties in the administration of the criminal law." *Id.* at 7. Under such an interpretation, a prosecution of a government official could not proceed until a court had resolved a variety of complicated threshold constitutional questions:

> These include, *first*, whether the suspect is or was an officer of the United States within the meaning of Article II, section 4 of the Constitution, and *second*, whether the offense is one for which he could be impeached. *Third*, there would arise troublesome corollary issues and questions in the field of conspiracies and with respect to the limitations of criminal proceedings.

Id. The memorandum concluded that "[a]n interpretation of the Constitution which injects such complications into criminal proceedings is not likely to be a correct one." *Id.* As a result, the Impeachment Judgment Clause could not itself be said to be the basis for a presidential immunity from indictment or criminal trial.

2.

The OLC memorandum next considered "whether an immunity of the President from criminal proceedings can be justified on other grounds, in particular the consideration that the President's subjection to the jurisdiction of the courts would be inconsistent with his position as head of the Executive branch." OLC Memo at 18. In examining this question, the memorandum first considered the contention that the express, limited immunity conferred upon members of Congress by the Arrest and Speech or Debate Clauses of Article I, Section 6 of the Constitution necessarily precludes the conclusion that the President enjoys a broader, implicit immunity from criminal process.[6] One might contend that the Constitution's grant

for Which He Was Impeached by the House and Acquitted by the Senate, 24 Op. O L C at 128–30. Nothing in our more recent analysis, however, calls into question the 1973 OLC Memo's conclusions.

[6] Article I, Section 6, Clause 1 provides

> The Senators and Representatives shall . . . in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going

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of a limited immunity to members of Congress reflects a determination that federal officials enjoy no immunity absent a specific textual grant.

The OLC memorandum determined that this contention was not "necessarily conclusive." OLC Memo at 18. "[I]t could be said with equal validity that Article I, sec. 6, clause 1 does not confer any immunity upon the members of Congress, but rather limits the complete immunity from judicial proceedings which they otherwise would enjoy as members of a branch co-equal with the judiciary." *Id.* Thus, in the absence of a specific textual provision withdrawing it, the President would enjoy absolute immunity. In addition, the textual silence regarding the existence of a presidential immunity from criminal proceedings may merely reflect the fact that it "may have been too well accepted to need constitutional mention (by analogy to the English Crown), and that the innovative provision was the specified process of impeachment extending even to the President." *Id.* at 19. Finally, the historical evidence bearing on whether or not an implicit presidential immunity from judicial process was thought to exist at the time of the Founding was ultimately "not conclusive." *Id.* at 20.

3.

The OLC memorandum next proceeded to consider whether an immunity from indictment or criminal prosecution was implicit in the doctrine of separation of powers as it then stood. OLC Memo at 20. After reviewing judicial precedents and an earlier OLC opinion,[7] *id.* at 21–24, the OLC memorandum concluded that "under our constitutional plan it cannot be said either that the courts have the same jurisdiction over the President as if he were an ordinary citizen or that the President is absolutely immune from the jurisdiction of the courts in regard to any kind of claim." *Id.* at 24. As a consequence, "[t]he proper approach is to find the proper balance between the normal functions of the courts and the special responsibilities and functions of the Presidency." *Id.*

The OLC memorandum separated into two parts the determination of the proper constitutional balance with regard to the indictment or criminal prosecution of a sitting President. First, the memorandum discussed whether any of the considerations that had lead to the rejection of the contention that impeachment must precede criminal proceedings for ordinary civil officers applied differently with respect to the President in light of his position as the sole head of an entire branch of government. *Id.*[8] Second, the memorandum considered "whether criminal pro-

to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place

[7] *See* Memorandum from Robert G Dixon, Jr , Assistant Attorney General, Office of Legal Counsel, *Re Presidential Amenability to Judicial Subpoenas* (June 25, 1973).

[8] We note that the statements quoted in footnote 4 above from *The Federalist Papers* and Gouverneur Morris, which provide that the President may be prosecuted *after* having been tried by the Senate, are consistent with the conclusion that the President may enjoy an immunity from criminal prosecution while in office that other civil officers do not The quoted statements are not dispositive of this question, however, as the OLC memorandum

ceedings and execution of potential sentences would improperly interfere with the President's constitutional duties and be inconsistent with his status." *Id.*

a.

The OLC memorandum's analysis of the first of these questions began with a consideration of whether the nature of the defendant's high office would render such a trial "too political for the judicial process." OLC Memo at 24. The memorandum concluded that the argument was, as a general matter, unpersuasive. Nothing about the criminal offenses for which a sitting President would be tried would appear to render the criminal proceedings "too political." The only kind of offenses that could lead to criminal proceedings against the President would be statutory offenses, and "their very inclusion in the Penal Code is an indication of a congressional determination that they can be adjudicated by a judge and jury." *Id.* In addition, there would not appear to be any "weighty reason to differentiate between the President and other officeholders" in regard to the "political" nature of such a proceeding "unless special separation of powers based interests can be articulated with clarity." *Id.* at 25.

The memorandum also considered but downplayed the potential concern that criminal proceedings against the President would be "too political" either because "the ordinary courts may not be able to cope with powerful men" or because no fair trial could be provided to the President. *Id.* Although the fear that courts would be unable to subject powerful officials to criminal process "arose in England where it presumably was valid in feudal time," "[i]n the conditions now prevailing in the United States, little weight is to be given to it as far as most officeholders are concerned." *Id.* Nor did the memorandum find great weight in the contention that the President, by virtue of his position, could not be assured a fair criminal proceeding. To be sure, the memorandum continued, it would be "extremely difficult" to assure a sitting President a fair trial, *id.*, noting that it "might be impossible to impanel a neutral jury." *Id.* However, "there is a serious 'fairness' problem whether the criminal trial precedes or follows impeachment." *Id.* at 26. And "the latter unfairness is contemplated and accepted in the impeachment clause itself, thus suggesting that the difficulty in impaneling a neutral jury should not be viewed, in itself, an absolute bar to indictment of a public figure." *Id.*

The OLC memorandum next considered whether, in light of the President's unique powers to supervise executive branch prosecutions and assert executive

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recognized. Some statements by subsequent commentators may be read to contemplate criminal prosecution of incumbent civil officers, including the President. *See, e.g.*, William Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1829) ("But the ordinary tribunals, as we shall see, are not precluded, either before or after an impeachment, from taking cognizance of the public and official delinquency."). There is also James Wilson's statement in the Pennsylvania ratification debates that "far from being above the laws, he [the President] is amenable to them in his private character as a citizen, and in his public character by *impeachment*." 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (Jonathan Elliot ed., 2d ed. 1836).

privilege, the constitutional balance generally should favor the conclusion that a sitting President may not be subjected to indictment or criminal prosecution. *Id.* at 26. According to this argument, the possession of these powers by the President renders the criminal prosecution of a sitting President inconsistent with the constitutional structure. It was suggested that such powers, which relate so directly to the President's status as a law enforcement officer, are simply incompatible with the notion that the President could be made a defendant in a criminal case. The memorandum did not reach a definitive conclusion on the weight to be accorded the President's capacity to exercise such powers in calculating the constitutional balance, although it did suggest that the President's possession of such powers pointed somewhat against the conclusion that the chief executive could be subject to indictment or criminal prosecution during his tenure in office.

In setting forth the competing considerations, the memorandum explained that, on the one hand, "it could be argued that a President's status as defendant in a criminal case would be repugnant to his office of Chief Executive, which includes the power to oversee prosecutions. In other words, just as a person cannot be judge in his own case, he cannot be prosecutor and defendant at the same time." *Id.* This contention "would lose some of its persuasiveness where, as in the *Watergate* case, the President delegates his prosecutorial functions to the Attorney General, who in turn delegates them [by regulation] to a Special Prosecutor." *Id.* At the same time, the status of the Watergate Special Prosecutor was somewhat uncertain, as "none of these delegations is, or legally can be, absolute or irrevocable." *Id.* The memorandum suggested, therefore, that even in the Watergate matter there remained the structural anomaly of the President serving as the chief executive and the defendant in a federal prosecution brought by the executive branch.[9]

The OLC memorandum also considered the degree to which a criminal prosecution of a sitting President is incompatible with the notion that the President possesses the power to assert executive privilege in criminal cases. The memorandum suggested that "the problem of Executive privilege may create the appearance of so serious a conflict of interest as to make it appear improper that the President should be a defendant in a criminal case." *Id.* "If the President claims the privilege he would be accused of suppressing evidence unfavorable to him. If he fails to do so the charge would be that by making available evidence favorable to him he is prejudicing the ability of future Presidents to claim privilege." *Id.* Ulti-

[9] This particular concern might also "lose some of its persuasiveness" with respect to a prosecution by an independent counsel appointed pursuant to the later-enacted Ethics in Government Act of 1978, 28 U.S.C §§ 49, 591 *et seq.*, whose status is defined by statute rather than by regulation. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court rejected the argument that the independent counsel's statutory protection from removal absent "good cause" or some condition substantially impairing the performance of his duties, *id.* at 663, violates the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, or separation of powers principles more generally, 487 U.S. at 685–96. But since the 1973 OLC memorandum did not place appreciable weight on this argument in determining a sitting President's amenability to criminal prosecution, and since we place no reliance on this argument at all in our reconsideration and reaffirmation of the 1973 memorandum's conclusion, *see infra* part IIB, we need not further explore *Morrison*'s relevance to this argument.

mately, however, the memorandum did not conclude that the identification of the possible incompatibility between the exercise of certain executive powers and the criminal prosecution of a sitting President sufficed to resolve the constitutional question whether a sitting President may be indicted or tried.

b.

The OLC memorandum then proceeded to the second part of its constitutional analysis, examining whether criminal proceedings against a sitting President should be barred by the doctrine of separation of powers because such proceedings would "unduly interfere in a direct or formal sense with the conduct of the Presidency." OLC Memo at 27. It was on this ground that the memorandum ultimately concluded that the indictment or criminal prosecution of a sitting President would be unconstitutional.

As an initial matter, the memorandum noted that in the *Burr* case, *see United States v. Burr*, 25 F. Cas. 187 (C.C. D. Va. 1807) (No. 14,694), President Jefferson claimed a privilege to be free from attending court in person. OLC Memo at 27. Moreover, "it is generally recognized that high government officials are excepted from the duty to attend court in person in order to testify," and "[t]his privilege would appear to be inconsistent with a criminal prosecution which necessarily requires the appearance of the defendant for pleas and trial, as a practical matter." *Id.* The memorandum noted, however, that the privilege against personal appearance was "only the general rule." *Id.* The memorandum then suggested that the existence of such a general privilege was not, by itself, determinative of the question whether a sitting President could be made a defendant in a criminal proceeding. "Because a defendant is already personally involved in a criminal case (if total immunity be laid aside), it may be questioned whether the normal privilege of high officials not to attend court in person applies to criminal proceedings in which the official is a defendant." *Id.*

Even though the OLC memorandum suggested that the existence of a general privilege against personal appearance was not determinative, the memorandum did conclude that the necessity of the defendant's appearance in a criminal trial was of great relevance in determining how the proper constitutional balance should be struck. By virtue of the necessity of the defendant's appearance, the institution of criminal proceedings against a sitting President "would interfere with the President's unique official duties, most of which cannot be performed by anyone else." *Id.* at 28. Moreover, "[d]uring the past century the duties of the Presidency . . . have become so onerous that a President may not be able fully to discharge the powers and duties of his office if he had to defend a criminal prosecution." *Id.* Finally, "under our constitutional plan as outlined in Article I, sec. 3, only the Congress by the formal process of impeachment, and not a court by any process should be accorded the power to interrupt the Presidency or oust an incumbent."

Id. The memorandum rejected the argument that such burdens should not be thought conclusive because even an impeachment proceeding that did not result in conviction might preclude a President from performing his constitutionally assigned duties in the course of defending against impeachment. In contrast to the risks that would attend a criminal proceeding against a sitting President, "this is a risk expressly contemplated by the Constitution, and is a necessary incident of the impeachment process." *Id.*

As a consequence of the personal attention that a defendant must, as a practical matter, give in defending against a criminal proceeding, the memorandum concluded that there were particular reasons rooted in separation of powers concerns that supported the recognition of an immunity for the President while in office. With respect to the physical disabilities alone imposed by criminal prosecution, "in view of the unique aspects of the Office of the President, criminal proceedings against a President in office should not go beyond a point where they could result in so serious a physical interference with the President's performance of his official duties that it would amount to an incapacitation." *Id.* at 29. To be sure, the concern that criminal proceedings would render a President physically incapable of performing constitutionally assigned functions would not be "quite as serious regarding minor offenses leading to a short trial and a fine." *Id.* But "in more serious matters, *i.e.*, those which could require the protracted personal involvement of the President in trial proceedings, the Presidency would be derailed if the President were tried prior to removal." *Id.*

The OLC memorandum also explained that the "non-physical yet practical interferences, in terms of capacity to govern" that would attend criminal proceedings against a sitting President must also be considered in the constitutional balance of competing institutional interests. *Id.* In this regard, the memorandum explained that "the President is the symbolic head of the Nation. To wound him by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." *Id.* at 30. In light of the conclusion that an adjudication of the President's criminal culpability would be uniquely destabilizing to an entire branch of government, the memorandum suggested that "special separation of powers based interests can be articulated with clarity" against permitting the ordinary criminal process to proceed. *Id.* at 25. By virtue of the impact that an adjudication of criminal culpability might have, a criminal proceeding against the President is, in some respects, necessarily political in a way that criminal proceedings against other civil officers would not be. In this respect, it would be "incongruous" for a "jury of twelve" to undertake the "unavoidably political" task of rendering judgment in a criminal proceeding against the President. *Id.* at 30. "Surely, the House and Senate, via impeachment, are more appropriate agencies for such a crucial task, made unavoidably political by the nature of the 'defendant.'" *Id.* The memorandum noted further that "[t]he genius of the jury trial" was to provide a forum for ordinary people to pass on

"matters generally within the experience or contemplation of ordinary, everyday life." *Id.* at 31. The memorandum therefore asked whether it would "be fair to such an agency to give it responsibility for an unavoidably political judgment in the esoteric realm of the Nation's top Executive." *Id.*

In accord with this conclusion about the propriety of leaving such matters to the impeachment process, the memorandum noted that "[u]nder our developed constitutional order, the presidential election is the only national election, and there is no effective substitute for it." *Id.* at 32. A criminal trial of a sitting President, however, would confer upon a jury of twelve the power, in effect, to overturn this national election. "The decision to terminate this mandate . . . is more fittingly handled by the Congress than by a jury, and such congressional power is founded in the Constitution." *Id.* In addition, the impeachment process is better suited to the task than is a criminal proceeding because appeals from a criminal trial could "drag out for months." *Id.* at 31. By contrast, "[t]he whole country is represented at the [impeachment] trial, there is no appeal from the verdict, and removal opens the way for placing the political system on a new and more healthy foundation." *Id.*

4.

The OLC memorandum concluded its analysis by addressing "[a] possibility not yet mentioned," which would be "to indict a sitting President but defer further proceedings until he is no longer in office." OLC Memo at 29. The memorandum stated that "[f]rom the standpoint of minimizing direct interruption of official duties — and setting aside the question of the power to govern — this procedure might be a course to be considered." *Id.* The memorandum suggested, however, that "an indictment hanging over the President while he remains in office would damage the institution of the Presidency virtually to the same extent as an actual conviction." *Id.* In addition, there would be damage to the executive branch "flowing from unrefuted charges." *Id.* Noting that "the modern Presidency, under whatever party, has had to assume a leadership role undreamed of in the eighteenth and early nineteenth centuries," the memorandum stated that "[t]he spectacle of an indicted President still trying to serve as Chief Executive boggles the imagination." *Id.* at 30.

The memorandum acknowledged that, "it is arguable that . . . it would be possible to indict a President, but defer trial until he was out of office, without in the meantime unduly impeding the power to govern, and the symbolism on which so much of his real authority rest." *Id.* at 31. But the memorandum nevertheless concluded that

> [g]iven the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency

> both foreign and domestic, there would be a Russian roulette aspect to the course of indicting the President but postponing trial, hoping in the meantime that the power to govern could survive.

Id. In light of the effect that an indictment would have on the operations of the executive branch, "an impeachment proceeding is the only appropriate way to deal with a President while in office." *Id.* at 32.

In reaching this conclusion regarding indictment, the memorandum noted that there are "certain drawbacks," such as the possibility that the statute of limitations might run, thereby resulting in "a complete hiatus in criminal liability." *Id.* As the statute of limitations is ultimately within the control of Congress, however, the memorandum's analysis concluded as follows: "We doubt . . . that this gap in the law is sufficient to overcome the arguments against subjecting a President to indictment and criminal trial while in office." *Id.*

B.

On October 5, 1973, less than two weeks after OLC issued its memorandum, Solicitor General Robert Bork filed a brief in the United States District Court for the District of Maryland that addressed the question whether it would be constitutional to indict or criminally try a sitting President. Then-Vice President Agnew had moved to enjoin, principally on constitutional grounds, grand jury proceeding against him. *See* SG Brief at 3. In response to this motion, Solicitor General Bork provided the court with a brief that set forth "considerations based upon the Constitution's text, history, and rationale which indicate that all civil officers of the United States other than the President are amenable to the federal criminal process either before or after the conclusion of impeachment proceedings." *Id.*[10]

1.

As had the OLC memorandum, the Solicitor General's brief began by noting that "[t]he Constitution provides no explicit immunity from criminal sanctions for any civil officer." SG Brief at 4. Indeed, the brief noted that the only textual grant of immunity for federal officials appears in the Arrest and Speech or Debate Clauses of Article I, Section 6. In referring to these clauses, the brief rejected the suggestion that the immunities set forth there could be understood to be a partial withdrawal from members of Congress of a broader implicit immunity that all civil officers, including the President, generally enjoyed; indeed, "[t]he intent

[10] Unlike the OLC memorandum, the Solicitor General's brief did not specifically distinguish between indictment and other phases of the "criminal process." While explaining that "the President is immune from indictment and trial prior to removal from office," SG Brief at 20, the brief did not specifically opine as to whether the President could be indicted as long as further process was postponed until he left office.

of the Framers was to the contrary." SG Brief at 5.[11] In light of the textual omission of any express grant of immunity from criminal process for civil officers generally, "it would require a compelling constitutional argument to erect such an immunity for a Vice President." *Id.*

In considering whether such a compelling argument could be advanced, the brief distinguished the case of the President from that of the Vice President. Although the Vice President had suggested that the Impeachment Judgment Clause itself demonstrated that "impeachment must precede indictment" for all civil officers, the records of the debates of the constitutional convention did not support that conclusion. *Id.* The Solicitor General argued, in accord with the OLC memorandum, that the "principal operative effect" of the Impeachment Judgment Clause "is solely the preclusion of pleas of double jeopardy in criminal prosecutions following convictions upon impeachments." *Id.* at 7. In any event, the discussion of the Impeachment Judgment Clause in the convention focused almost exclusively on the Office of the President, and "the Framers did not debate the question whether impeachment generally must precede indictment." *Id.* at 6.

To the extent that the convention did debate the timing of impeachment relative to indictment, the brief explained, the convention records "show that the Framers contemplated that this sequence should be mandatory only as to the President." *Id.* Moreover, the remarks contained in those records "strongly suggest an understanding that the President, as Chief Executive, would not be subject to the ordinary criminal process." *Id.* The Framers' "assumption that the President would not be subject to criminal process" did not, however, rest on a general principle applicable to all civil officers. *Id.* Instead, the assumption was "based upon the crucial nature of his executive powers." *Id.* As the brief stated:

> The President's immunity rests not only upon the matters just discussed but also upon his unique constitutional position and powers . . . . There are substantial reasons, embedded not only in the constitutional framework but in the exigencies of government, for distinguishing in this regard between the President and all lesser officers including the Vice President.

Id. at 7.

2.

In explaining why, as an initial matter, the Vice President could be indicted and tried while still in office, the brief argued that indictment would not effect the de facto removal of that officer. SG Brief at 11. "[I]t is clear from history

[11] In this respect, the Solicitor General's brief more forcefully rejected this suggestion than did the OLC memorandum, which reasoned that the clauses gave rise "with equal validity" to competing inferences on this point *See* OLC Memo at 18

that a criminal indictment, or even trial and conviction, does not, standing alone, effect the removal of an impeachable federal officer." *Id.* at 11–12. The brief noted the past constitutional practice of indicting and even convicting federal judges during their tenure, as well as the fact that Vice President Aaron Burr "was subject to simultaneous indictment in two states while in office, yet he continued to exercise his constitutional responsibilities until the expiration of his term." *Id.* at 12. "Apparently, neither Burr nor his contemporaries considered him constitutionally immune from indictment. Although counsel for the Vice President asserted that Burr's indictments were 'allowed to die,' that was merely because 'Burr thought it best not to visit either New York or New Jersey.'" *Id.* at 12 n* (citations omitted). The brief therefore determined that "[c]ertainly it is clear that criminal indictment, trial, and even conviction of a Vice President would not, *ipso facto*, cause his removal; subjection of a Vice President to the criminal process therefore does not violate the exclusivity of the impeachment power as the means of his removal from office." *Id.* at 13.

The brief did conclude, however, that the "structure of the Constitution" precluded the indictment of the President. *Id.* at 15. In framing the inquiry into whether considerations of constitutional structure supported the recognition of an immunity from criminal process for certain civil officers, the brief explained that the "Constitution is an intensely practical document and judicial derivation of powers and immunities is necessarily based upon consideration of the document's structure and of the practical results of alternative interpretations." *Id.* As a consequence,

> [t]he real question underlying the issue of whether indictment of any particular civil officer can precede conviction upon impeachment — and it is constitutional in every sense because it goes to the heart of the operation of government — is whether a governmental function would be seriously impaired if a particular civil officer were liable to indictment before being tried on impeachment.

Id. at 15–16. Given that the constitutional basis for the recognition of a civil officer's immunity from criminal process turned on the resolution of this question, the answer "must necessarily vary with the nature and functions of the office involved." *Id.* at 16.

The brief then proceeded to consider the consequences that criminal prosecutions would have on the performance of the constitutional functions that are the responsibility of various civil officers. As a matter of constitutional structure, Article III judges should enjoy no constitutional immunity from the criminal process because while a "judge may be hampered in the performance of his duty when he is on trial for a felony . . . his personal incapacity in no way threatens the ability of the judicial branch to continue to function effectively." *Id.* at 16.

Similarly, no such immunity should be recognized for members of Congress. The limited immunity in the Arrest and Speech or Debate Clauses reflected

> a recognition that, although the functions of the legislature are not lightly to be interfered with, the public interest in the expeditious and even-handed administration of the criminal law outweighs the cost imposed by the incapacity of a single legislator. Such incapacity does not seriously impair the functioning of Congress.

Id. at 16–17.

The brief argued that the same structural considerations that counseled against the recognition of an immunity from criminal process for individual judges or legislators also counseled against the recognition of such an immunity for the Vice President:

> Although the office of the Vice Presidency is of course a high one, it is not indispensable to the orderly operation of government. There have been many occasions in our history when the nation lacked a Vice President, and yet suffered no ill consequences. And, as has been discussed above, at least one Vice President successfully fulfilled the responsibilities of his office while under indictment in two states.

Id. at 18 (citation omitted). The brief noted that the Vice President had only three constitutional functions: to replace the President in certain extraordinary circumstances; to make, in certain extraordinary circumstances, a written declaration of the President's inability to discharge the powers and duties of his office; and to preside over the Senate and cast the deciding vote in the case of a tie in that body. *Id.* at 19. None of these "constitutional functions is substantially impaired by [the Vice President's] liability to the criminal process." *Id.*

3.

The Solicitor General's brief explained that recognition of presidential immunity from criminal process, in contrast to the vice presidential immunity, was compelled by a consideration of the constitutional structure. After noting that "[a]lmost all legal commentators agree . . . that an incumbent President must be removed from office through conviction upon an impeachment before being subject to the criminal process," SG Brief at 17, the brief repeated its determination that the Framers assumed "that the nation's Chief Executive, responsible as no other single officer is for the affairs of the United States, would not be taken from duties that only he can perform unless and until it is determined that he

is to be shorn of those duties by the Senate." *Id.* A proper understanding of the constitutional structure reflects this shared assumption; in this regard it is "noteworthy that the President is the only officer of government for whose temporary disability the Constitution provides procedure to qualify a replacement." *Id.* at 18. This provision constituted a textual recognition "that the President is the only officer of government for whose temporary disability while in office incapacitates an entire branch of government." *Id.*

Finally, the brief noted that the conclusion that the Framers assumed that the President would enjoy an immunity from criminal process was supported by other considerations of constitutional structure beyond the serious interference with the capacity of the executive branch to perform its constitutional functions. The "Framers could not have contemplated prosecution of an incumbent President because they vested in him complete power over the execution of the laws, which includes, of course, the power to control prosecutions." *Id.* at 20.

C.

The foregoing review demonstrates that, in 1973, the Department applied a consistent approach in analyzing the constitutional question whether a sitting President may be subject to indictment and criminal prosecution. Both the OLC memorandum and the Solicitor General's brief recognized that the President is not above the law, and that he is ultimately accountable for his misconduct that occurs before, during, and after his service to the country. Each also recognized, however, that the President occupies a unique position within our constitutional order.

The Department concluded that neither the text nor the history of the Constitution ultimately provided dispositive guidance in determining whether a President is amenable to indictment or criminal prosecution while in office. It therefore based its analysis on more general considerations of constitutional structure. Because of the unique duties and demands of the Presidency, the Department concluded, a President cannot be called upon to answer the demands of another branch of the government in the same manner as can all other individuals. The OLC memorandum in particular concluded that the ordinary workings of the criminal process would impose burdens upon a sitting President that would directly and substantially impede the executive branch from performing its constitutionally assigned functions, and the accusation or adjudication of the criminal culpability of the nation's chief executive by either a grand jury returning an indictment or a petit jury returning a verdict would have a dramatically destabilizing effect upon the ability of a coordinate branch of government to function. The Department therefore concluded in both the OLC memorandum and the Solicitor General's brief that, while civil officers generally may be indicted and criminally prosecuted during their tenure in office, the constitutional structure permits a sitting President

to be subject to criminal process only after he leaves office or is removed therefrom through the impeachment process.

II.

Since the Department set forth its constitutional analysis in 1973, the Supreme Court has decided three cases that are relevant to whether a sitting President may be subject to indictment or criminal prosecution.[12] *United States v. Nixon*, 418 U.S. 683 (1974), addressed whether the President may assert a claim of executive privilege in response to a subpoena in a criminal case that seeks records of communications between the President and his advisors. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), and *Clinton v. Jones*, 520 U.S. 681 (1997), both addressed the extent to which the President enjoys a constitutional immunity from defending against certain types of civil litigation, with *Fitzgerald* focusing on official misconduct and *Jones* focusing primarily on misconduct "unrelated to any of his official duties as President of the United States and, indeed, occurr[ing] before he was elected to that office." *Id.* at 686.[13]

None of these cases directly addresses the questions whether a sitting President may be indicted, prosecuted, or imprisoned.[14] We would therefore hesitate before

[12] We do not consider either *Nixon v Administrator of General Services*, 433 U S. 425 (1977), or *Morrison v. Olson*, 487 U.S 654 (1988), to be directly relevant to this question, and thus we do not discuss either of them extensively. *Nixon v Administrator of General Services* involved a suit brought by former President Nixon to enjoin enforcement of a federal statute taking custody of and regulating access to his Presidential papers and various tape recordings, in part on the ground that the statute violated the separation of powers While the case did analyze the separation of powers claim under a balancing test of the sort we embrace here, *see infra* text accompanying note 17, the holding and reasoning do not shed appreciable light on the question before us

Morrison v Olson considered and rejected various separation of powers challenges to the independent counsel provisions of the Ethics in Government Act of 1978, which authorized a court-appointed independent counsel to investigate and prosecute the President and certain other high-ranking executive branch officials for violations of federal criminal laws *Morrison* focused on whether a particular *type* of prosecutor could pursue criminal investigations and prosecutions of executive branch officials, in a case involving the criminal investigation of an inferior federal officer The Court accordingly had no occasion to and did not consider whether the Act could constitutionally be invoked to support an independent counsel's indictment of a sitting President.

[13] The Court noted that Jones's state law claim for defamation based on statements by "various persons authorized to speak for the President," 520 U S. at 685, "arguably may involve conduct within the outer perimeter of the President's official responsibilities" *Id.* at 686 For purposes of this memorandum, we use the phrase "unofficial conduct," as did the Court, *see id.* at 693, to refer to conduct unrelated to the President's official duties. *Compare Nixon v. Fitzgerald*, 457 U S. at 756 (recognizing "absolute Presidential immunity from damages liability for acts within the 'outer perimeter' of his official responsibility").

[14] *See United States v. Nixon*, 418 U S. at 687 n 2 (expressly reserving the question whether the President can constitutionally be named an unindicted co-conspirator). *See also Jones v. Clinton*, 36 F Supp 2d 1118, 1134 n.22 (E D Ark 1999) ("[T]he question of whether a President can be held in criminal contempt of court and subjected to criminal penalties raises constitutional issues not addressed by the Supreme Court in the *Jones* case.") As a matter of constitutional practice, it remains the case today that no President has ever so much as testified, or been ordered to testify, in open court, let alone been subject to criminal proceedings as a defendant. *Clinton v. Jones*, 520 U.S at 692 n 14.

In the reply brief for the United States in *United States v Nixon*, in response to President Nixon's argument that a sitting President was constitutionally immune from indictment and therefore immune from being named an unindicted co-conspirator by a grand jury, Watergate Special Prosecutor Leon Jaworski argued that it was not settled as a matter of constitutional law whether a sitting President could be subject to indictment. *See* Reply Brief for the United States, *United States v. Nixon*, 418 U S. 683 (1974) (No 73-1766). He therefore argued that the Court

Continued

concluding that judicial statements made in the context of these distinct constitutional disputes would suffice to undermine the Department's previous resolution of the precise constitutional question addressed here. In any event, however, we conclude that these precedents are largely consistent with the Department's 1973 determinations that (1) the proper doctrinal analysis requires a balancing between the responsibilities of the President as the sole head of the executive branch against the important governmental purposes supporting the indictment and criminal prosecution of a sitting President; and (2) the proper balance supports recognition of a temporary immunity from such criminal process while the President remains in office. Indeed, *United States v. Nixon* and *Nixon v. Fitzgerald* recognized and embraced the same type of constitutional balancing test anticipated in this Office's 1973 memorandum. *Clinton v. Jones*, which held that the President is not immune from at least certain judicial proceedings while in office, even if those proceedings may prove somewhat burdensome, does not change our conclusion in 1973 and again today that a sitting President cannot constitutionally be indicted or tried.

A.

1.

In *United States v. Nixon*, the Court considered a motion by President Nixon to quash a third-party subpoena duces tecum directing the President to produce certain tape recordings and documents concerning his conversations with aides and advisers. 418 U.S. at 686. The Court concluded that the subpoena, which had been issued upon motion by the Watergate Special Prosecutor in connection

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should not rely on the assumption that a sitting President is immune from indictment in resolving the distinct question whether the President could be named an unindicted co-conspirator In so arguing, the Special Prosecutor rejected the President's contention that either the historical evidence of the intent of the Framers or the plain terms of the Impeachment Judgment Clause foreclosed the indictment of a sitting President as a constitutional matter *See id.* at 24 ("nothing in the text of the Constitution or in its history . imposes any bar to indictment of an incumbent President"), *id* at 29 ("[T]he simple fact is that the Framers never confronted the issue at all ") The Special Prosecutor then argued, as the Department itself had concluded, that "[p]rimary support for such a prohibition must be found, if at all, in considerations of constitutional and public policy including competing factors such as the nature and role of the Presidency in our constitutional system, the importance of the administration of criminal justice, and the principle that under our system no person, no matter what his station, is above the law." *Id.* at 24–25. The Special Prosecutor explained that the contention that the President should be immune from indictment because the functioning of the executive branch depends upon a President unburdened by defending against criminal charges "is a weighty argument and it is entitled to great respect." *Id.* at 31. He noted, however, that "our constitutional system has shown itself to be remarkably resilient" and that "there are very serious implications to the President's position that he has absolute immunity from criminal indictment." *Id* at 32 In particular, the Special Prosecutor argued that to the extent some criminal offenses are not impeachable, the recognition of an absolute immunity from indictment would mean that "the Constitution has left a *lacuna* of potentially serious dimensions " *Id.* at 34. The Special Prosecutor ultimately concluded that "[w]hether these factors compel a conclusion that as a matter of constitutional interpretation a sitting President cannot be indicted for violations of federal criminal laws is an issue about which, at best, there is presently considerable doubt." *Id.* at 25. He explained further that the resolution of this question was not necessary to the decision in *Nixon*, because the Court confronted only the question whether the President could be named an unindicted co-conspirator—an event that "cannot be regarded as equally burdensome." *Id* at 20.

with the criminal prosecution of persons other than the President, satisfied the standards of Rule 17(c) of Federal Rules of Criminal Procedure.[15] The Court therefore proceeded to consider the claim "that the subpoena should be quashed because it demands 'confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce.'" *Id.* at 703 (citation omitted).

In assessing the President's constitutional claim of privilege, the Court first considered the relevant evidence of the Framers' intent and found that it supported the President's assertion of a constitutional interest in confidentiality. *Id.* at 705 n.15. The Court also rejected the suggestion that the textual omission of a presidential privilege akin to the congressional privilege set forth in the Arrest and Speech or Debate Clauses was "dispositive" of the President's claim. *Id.* at 705 n.16. Considering the privilege claim in light of the constitutional structure as a whole, the Court concluded that,

> [w]hatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

Id. at 705–06 (footnote omitted). Such a privilege must be recognized, the Court said, in light of "the importance of . . . confidentiality of Presidential communications in performance of the President's responsibilities." *Id.* at 711. The interest in the confidentiality of Presidential communications was "weighty indeed and entitled to great respect." *Id.* at 712.

The Court next considered the extent to which that interest would be impaired by presidential compliance with a subpoena. The Court concluded that it was quite unlikely that the failure to recognize an absolute privilege for confidential presidential communications against criminal trial subpoenas would, in practical consequence, undermine the constitutional interest in the confidentiality of such communications. "[W]e cannot conclude that advisers will be moved to temper

[15] In response to an earlier subpoena, President Nixon had asserted that, as a constitutional matter, he was absolutely immune from judicial process while in office The United States Court of Appeals for the District of Columbia Circuit rejected that contention. *See Nixon v Sirica*, 487 F 2d 700 (D C. Cir. 1973). The D C. Circuit explained that the President's constitutional position could not be maintained in light of *United States v Burr*, 25 F Cas 187 (C.C.D Va 1807) (No 14,694), and it rejected the contention that the Supreme Court's decision in *Mississippi v Johnson*, 71 U.S. (4 Wall.) 475 (1866), was to the contrary 487 F.2d at 708–12 We note that the Department's 1973 analysis did not depend upon a broad contention that the President is immune from all judicial process while in office Indeed, the OLC memorandum specifically cast doubt upon such a contention and explained that even Attorney General Stanbery had not made such a broad argument in *Mississippi v Johnson See* OLC Memo at 23 ("Attorney General Stanbery's reasoning is presumably limited to the power of the courts to review official action of the President")

the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Id.* Finally, the Court balanced against the President's interest in maintaining the confidentiality of his communications "[t]he impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions." *Id.* at 707. The Court predicated its conclusion on the determination that "[t]he need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *Id.* at 709.

The assessment of these competing interests led the Court to conclude that "the legitimate needs of the judicial process may outweigh Presidential privilege," *id.* at 707, and it therefore determined that it was "necessary to resolve those competing interests in a manner that preserves the essential functions of each branch." *Id.* Here, the Court weighed the President's constitutional interest in confidentiality, *see id.* at 707–08, against the nation's "historic commitment to the rule of law," *id.* at 708, and the requirement of "the fair administration of criminal justice." *Id.* at 713. The Court ultimately concluded that the President's generalized interest in confidentiality did not suffice to justify a privilege from all criminal subpoenas, although it noted that a different analysis might apply to a privilege based on national security interests. *Id.* at 706.

2.

In *Nixon v. Fitzgerald*, the Supreme Court considered a claim by former President Nixon that he enjoyed an absolute immunity from a former government employee's suit for damages for President Nixon's allegedly unlawful official conduct while in office. The Court endorsed a rule of absolute immunity, concluding that such immunity is "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." 457 U.S. at 749.

The Court reviewed various statements by the Framers and early commentators, finding them consistent with the conclusion that the Constitution was adopted on the assumption that the President would enjoy an immunity from damages liability for his official actions. *Id.* at 749, 751 n.31. The Court once again rejected the contention that the textual grant of a privilege to members of Congress in Article I, Section 6 precluded the recognition of an implicit privilege on behalf of the President. *See id.* at 750 n.31.

But as in *United States v. Nixon*, the Court found that "the most compelling arguments arise from the Constitution's separation of powers and the Judiciary's historic understanding of that doctrine," *Id.* at 752 n.31. It emphasized that "[t]he

President occupies a unique position in the constitutional scheme . . . as the chief constitutional officer of the Executive Branch." *Id.* at 749–50. Although other government officials enjoy only qualified immunity from civil liability for their official actions, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. Such lawsuits would be likely to occur in considerable numbers since the "President must concern himself with matters likely to 'arouse the most intense feelings.'" *Id.* at 752. Yet, the Court noted, "it is in precisely such cases that there exists the greatest public interest in providing an official 'the maximum ability to deal fearlessly and impartially' with the duties of his office." *Id.* (citations omitted). The Court emphasized that the "visibility" of the President's office would make him "an easily identifiable target for suits for civil damages," and that "[c]ognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve." *Id.* at 753.

The Court next examined whether the constitutional interest in presidential immunity from civil damages arising from the performance of official duties was outweighed by the governmental interest in providing a forum for the resolution of damages actions generally, and actions challenging the legality of official presidential conduct in particular. The Court concluded that it was appropriate to consider the "President's constitutional responsibilities and status as factors counseling judicial deference and restraint." *Id.* at 753. As the Court explained,

> [i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch.

Id. at 753–54 (citations omitted). In performing this balancing, the Court noted that recognition of a presidential immunity from such suits "will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive," in light of other mechanisms creating "incentives to avoid misconduct" (including impeachment). *Id.* at 757. The Court concluded that the constitutional interest in ensuring the President's ability to perform his constitutional functions outweighed the competing interest in permitting civil actions for unlawful official conduct to proceed.

3.

In *Clinton v. Jones*, the Court declined to extend the immunity recognized in *Fitzgerald* to civil suits challenging the legality of a President's unofficial conduct. In that case, the plaintiff sought to recover compensatory and punitive damages for alleged misconduct by President Clinton occurring before he took federal office. The district court denied the President's motion to dismiss based on a constitutional claim of temporary immunity and held that discovery should go forward, but granted a stay of the trial until after the President left office. The court of appeals vacated the order staying the trial, while affirming the denial of the immunity-based motion to dismiss. The Supreme Court affirmed, permitting the civil proceedings to go forward against the President while he still held office.

In considering the President's claim of a temporary immunity from suit, the Court first distinguished *Nixon v. Fitzgerald*, maintaining that "[t]he principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct." *Clinton v. Jones*, 520 U.S. at 692–93. The point of immunity for official conduct, the Court explained, is to "enabl[e] such officials to perform their designated functions effectively without fear that a particular decision may give rise to personal liability." *Id.* at 693. But "[t]his reasoning provides no support for an immunity for *unofficial* conduct." *Id.* at 694. Acknowledging *Fitzgerald*'s additional concern that " '[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government,' " the Court treated this prior statement as dictum because "[i]n context . . . it is clear that our dominant concern" had been the chilling effect that liability for official conduct would impose on the President's performance of his official duties. *Id.* at 694 n.19 (quoting *Nixon v. Fitzgerald*, 457 U.S. at 751).

After determining that the historical evidence of the Framers' understanding of presidential immunity was either ambiguous or conflicting and thus could not by itself support the extension of presidential immunity to unofficial conduct, *see id.* at 695–97, the Court considered the President's argument that the "text and structure" of the Constitution supported his claim to a temporary immunity. The Court accepted his contention that "the doctrine of separation of powers places limits on the authority of the Federal Judiciary to interfere with the Executive Branch," *id.* at 697–98, and conceded that the powers and obligations conferred upon a single President suggest that he occupies a " 'unique position in the constitutional scheme.' " *Id.* at 698 (quoting *Nixon v. Fitzgerald*, 457 U.S. at 749). But "[i]t does not follow . . . that separation-of-powers principles would be violated by allowing this action to proceed." *Id.* at 699.

Rather than claiming that allowing the civil suit would either aggrandize judicial power or narrow any constitutionally defined executive powers, the President

argued that, as an inevitable result of the litigation, "burdens will be placed on the President that will hamper the performance of his official duties," *id.* at 701, both in the *Jones* case and others that might follow. The Court first rejected the factual premise of the President's claim, asserting that the President's "predictive judgment finds little support in either history or the relatively narrow compass of the issues raised in this particular case." *Id.* at 702. "As for the case at hand," the Court continued, "if properly managed by the District Court, it appears to us highly unlikely to occupy any substantial amount of petitioner's time." *Id.* The Court emphasized at the outset that it was not "confront[ing] the question whether a court may compel the attendance of the President at any specific time or place," *id.* at 691, and it "assume[d] that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person." *Id.* at 691–92.

Moreover, the Court explained, "even quite burdensome interactions" between the judicial and executive branches do not "necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Id.*; *see also id.* at 703 ("that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the Chief Executive is not sufficient to establish a violation of the Constitution"). Noting that courts frequently adjudicate civil suits challenging the legality of official presidential actions, the Court also observed that courts occasionally have ordered Presidents to provide testimony and documents or other materials. *Id.* at 703–05 (citing *United States v. Nixon* as an example). By comparison, the Court asserted, "[t]he burden on the President's time and energy that is a mere byproduct of [the power to determine the legality of his unofficial conduct through civil litigation] surely cannot be considered as onerous as the direct burden imposed by judicial review and the occasional invalidation of his official actions." *Id.* at 705.

Finally, the Court agreed with the court of appeals that the district court abused its discretion by invoking its equitable powers to defer any trial until after the President left office, even while allowing discovery to continue apace. The Court observed that such a "lengthy and categorical stay takes no account whatever of the respondent's interest in bringing the case to trial," *id.* at 707, in particular the concern that delay "would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party." *Id.* at 707–08. On the other hand, continued the Court, assuming careful trial management, "there is no reason to assume that the district courts will be either unable to accommodate the President's [scheduling] needs or unfaithful to the tradition — especially in matters involving national security — of giving 'the utmost deference to Presidential responsibilities.'" *Id.* at 709 (quoting *United States v. Nixon*, 418 U.S. at 710–11). On this

basis, the Court determined that a stay of any trial pending the President's leaving office was not supported by equitable principles.[16]

B.

We believe that these precedents, *United States v. Nixon*, *Nixon v. Fitzgerald*, and *Clinton v. Jones*, are consistent with the Department's analysis and conclusion in 1973. The cases embrace the methodology, applied in the OLC memorandum, of constitutional balancing. That is, they balance the constitutional interests underlying a claim of presidential immunity against the governmental interests in rejecting that immunity. And, notwithstanding *Clinton*'s conclusion that *civil* litigation regarding the President's unofficial conduct would not unduly interfere with his ability to perform his constitutionally assigned functions, we believe that *Clinton* and the other cases do not undermine our earlier conclusion that the burdens of *criminal* litigation would be so intrusive as to violate the separation of powers.

1.

The balancing analysis relied on in the 1973 OLC memorandum has since been adopted as the appropriate mode of analysis by the Court. In 1996, this Office summarized the principles of analysis for resolving separation of powers issues found in the Court's recent cases. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 133–35 (1996). As noted there, " 'the proper inquiry focuses on the extent to which [a challenged act] pre-

[16] One final recent precedent merits brief mention. the federal district court's decision to hold President Clinton in civil contempt for statements made in the course of a deposition taken in the *Jones* case and to order him to pay expenses (including attorneys' fees) to the plaintiff and costs to the court. *See Jones v. Clinton*, 36 F Supp 2d 1118 (E.D. Ark 1999) This decision was not appealed, and for purposes of our analysis here we assume arguendo that it is correct But a court order citing a sitting President for civil contempt does not support the proposition that a sitting President can be subject even to criminal contempt sanctions, let alone indictment and criminal prosecution. Civil contempt differs from criminal contempt because the former is designed to ensure compliance with court orders or to remedy harms inflicted upon another litigant, while criminal contempt is intended to punish the commission of a public wrong *See United Mine Workers v Bagwell*, 512 U.S 821, 826–30 (1994) A civil contempt proceeding is thus not likely to be either as consuming of the defendant's time or as detrimental to the defendant's public standing as a criminal contempt proceeding; that is particularly true when the civil contempt sanction takes the form of an award of costs to the court or other litigant. Significantly, the district court that imposed the contempt citation emphasized the narrow scope of its decision. *See Jones*, 36 F Supp. 2d at 1125 (explaining that "the Court recognizes that significant constitutional issues would arise were this Court to impose sanctions against the President that impaired his decision-making or otherwise impaired him in the performance of his official duties," and emphasizing that "[n]o such sanction will be imposed") The court further noted that, while "the power [upheld by the Supreme Court in *Clinton v. Jones*] to determine the legality of the President's unofficial conduct includes with it the power to issue civil contempt citations and impose sanctions for his unofficial conduct which abuses the judicial process," *id*, the Supreme Court's decision did not imply the existence of any authority to impose criminal sanctions on the President, *id.* at 1134 n.22 ("the question of whether a President can be held in criminal contempt of court and subjected to criminal penalties raises constitutional issues not addressed by the Supreme Court in the *Jones* case") For these reasons, this distinct court decision does not affect our analysis of the soundness of the Department's 1973 conclusion that it would be unconstitutional to indict or prosecute a President while he remains in office

vents the Executive Branch from accomplishing its constitutionally assigned functions.' " *Id.* at 133 (quoting *Administrator of General Services*, 433 U.S. at 443). The inquiry is complex, because even where the acts of another branch would interfere with the executive's "accomplishing its functions," this "would not lead inexorably to" invalidation; rather, the Court "would proceed to 'determine whether that impact is justified by an overriding need to promote' " legitimate governmental objectives. *Id.* (quoting *Administrator of General Services*, 433 U.S. at 443).

These inquiries formed the basis for the Court's analysis in *United States v. Nixon*, where the Court employed a balancing test to preserve the opposing interests of the executive and judicial branches with respect to the President's claim of privilege over confidential communications. The Court's resort to a balancing test was quite explicit. *See e.g.*, 418 U.S. at 711–12 ("In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in the performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice."). In *Nixon v. Fitzgerald*, the Court's recognition of an absolute presidential immunity from civil suits for damages concerning official conduct also reflected a balance of competing interests. As the Court explained, "[i]t is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States. But our cases also have established that a court, before exercising jurisdiction, must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." 457 U.S. at 753–54. And in *Clinton v. Jones*, the Court again acknowledged that " '[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.' " 520 U.S. at 701 (quoting *Loving v. United States*, 517 U.S. 748, 757 (1996)).[17]

We now explain why, in light of the post-1973 cases, we agree with the 1973 conclusions that indicting and prosecuting a sitting President would "prevent the executive from accomplishing its constitutional functions" and that this impact cannot "be justified by an overriding need" to promote countervailing and legitimate government objectives.

[17] Although the Court in *Clinton v Jones* did not explicitly use the language of "balancing" to weigh the President's interests against those of the civil litigant, the Court did assess both what it saw as the rather minor disruption to the President's office from defending against such civil actions as well as the interests in the private litigant in avoiding delay in adjudication *See id.* at 707–08 In any event, the Court may not have explicitly invoked the second part of the analysis (weighing the intrusions on the executive branch against the legitimate governmental interests opposed to immunity), because it found the burdens of civil litigation insufficiently weighty to warrant an extended inquiry. *See Administrator of General Services*, 433 U.S at 443 (emphasis added) (explaining that when there is a potential for disruption of presidential authority, "the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions *Only where the potential for disruption is present* must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."), *cited with approval in Clinton v Jones*, 520 U.S. at 701

2.

Three types of burdens merit consideration: (a) the actual imposition of a criminal sentence of incarceration, which would make it physically impossible for the President to carry out his duties; (b) the public stigma and opprobrium occasioned by the initiation of criminal proceedings, which could compromise the President's ability to fulfill his constitutionally contemplated leadership role with respect to foreign and domestic affairs; and (c) the mental and physical burdens of assisting in the preparation of a defense for the various stages of the criminal proceedings, which might severely hamper the President's performance of his official duties. In assessing the significance of these burdens, two features of our constitutional system must be kept in mind.

First, the Constitution specifies a mechanism for accusing a sitting President of wrongdoing and removing him from office. *See* U.S. Const. art. II, § 4 (providing for impeachment by the House, and removal from office upon conviction in the Senate, of sitting Presidents found guilty of "Treason, Bribery or other high Crimes and Misdemeanors"). While the impeachment process might also, of course, hinder the President's performance of his duties, the process may be initiated and maintained only by politically accountable legislative officials. Supplementing this constitutionally prescribed process by permitting the indictment and criminal prosecution of a sitting president would place into the hands of a single prosecutor and grand jury the practical power to interfere with the ability of a popularly elected President to carry out his constitutional functions.

Second, "[t]he President occupies a unique position in the constitutional scheme." *Fitzgerald*, 457 U.S. at 749. As the court explained, "Article II, § 1 of the Constitution provides that '[t]he executive Power shall be vested in a President of the United States . . . .' This grant of authority establishes the President as the chief constitutional officer of the Executive branch, entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity." *Id.* at 749–50. In addition to the grant of executive power, other provisions of Article II make clear the broad scope and important nature of the powers entrusted to the President. The President is charged to "take Care that the Laws be faithfully executed." *See* U.S. Const. art. II, § 3. He and the Vice President are the only officials elected by the entire nation. *See id.* art. II, § 1. He is the sole official for whose temporary disability the Constitution expressly provides procedures to remedy. *See id.* art. II, § 1, cl. 6; *id.* amend. XXV. He is the Commander in Chief of the Army and the Navy. *See id.* art. II, § 2, cl. 2. He has the power to grant reprieves and pardons for offenses against the United States. *See id.* He has the power to negotiate treaties and to receive Ambassadors and other public ministers. *See id.* art. II, § 2, cl. 2. He is the sole representative to foreign nations. He appoints all of the "Judges of the supreme Court" and the principal officers of the government. *See id.* art. II, § 2, cl. 2. He is the only constitutional officer

empowered to require opinions from the heads of departments, *see id.* art. II, § 2, cl. 1, and to recommend legislation to the Congress. *See id.* art. II, § 3. And he exercises a constitutional role in the enactment of legislation through the presentation requirement and veto power. *See id.* art. I, § 7, cls. 2, 3.

Moreover, the practical demands on the individual who occupies the Office of the President, particularly in the modern era, are enormous. President Washington wrote that "[t]he duties of my Office * * * at all times * * * require an unremitting attention," Brief for the United States as Amicus Curiae in Support of the Petitioner at 11, *Clinton v. Jones*, 520 U.S. 681 (1997) (No. 95–1853) (quoting Arthur B. Tourtellot, *The Presidents on the Presidency* 348 (1964)). In the two centuries since the Washington Administration, the demands of government, and thus of the President's duties, have grown exponentially. In the words of Justice Jackson, "[i]n drama, magnitude and finality [the President's] decisions so far overshadow any others that almost alone he fills the public eye and ear." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring). In times of peace or war, prosperity or economic crisis, and tranquility or unrest, the President plays an unparalleled role in the execution of the laws, the conduct of foreign relations, and the defense of the Nation. As Justice Breyer explained in his opinion concurring in the judgment in *Clinton v. Jones*:

> The Constitution states that the "executive Power shall be vested in a President." Art. II, § 1. This constitutional delegation means that a sitting President is unusually busy, that his activities have an unusually important impact upon the lives of others, and that his conduct embodies an authority bestowed by the entire American electorate. . . . [The Founders] sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many.

520 U.S. at 711–12. The burdens imposed on a sitting President by the initiation of criminal proceedings (whether for official or unofficial wrongdoing) therefore must be assessed in light of the Court's "long recogni[tion of] the 'unique position in the constitutional scheme' that this office occupies." *Id.* at 698 (quoting *Nixon v. Fitzgerald*, 457 U.S. at 749).

a.

Given the unique powers granted to and obligations imposed upon the President, we think it is clear that a sitting President may not constitutionally be imprisoned. The physical confinement of the chief executive following a valid conviction

would indisputably preclude the executive branch from performing its constitutionally assigned functions. As Joseph Story wrote:

> There are . . . incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office . . . .

3 Joseph Story, *Commentaries on the Constitution of the United States* 418–19 (1st ed. 1833) (*quoted in Nixon v. Fitzgerald*, 457 U.S. at 749).[18]

To be sure, the Twenty-fifth Amendment provides that either the President himself, or the Vice-President along with a majority of the executive branch's principal officers or some other congressionally determined body, may declare that the President is "unable to discharge the powers and duties of his office," with the result that the Vice President assumes the status and powers of Acting President. *See* U.S. Const. amend. XXV, §§ 3, 4. But it is doubtful in the extreme that this Amendment was intended to eliminate or otherwise affect any constitutional immunities the President enjoyed prior to its enactment. None of the contingencies discussed by the Framers of the Twenty-fifth Amendment even alluded to the possibility of a criminal prosecution of a sitting President.[19] Of course, it might be argued that the Twenty-fifth Amendment provides a mechanism to ensuring that, if a sitting President were convicted and imprisoned, there could

[18] *See also* Alexander M. Bickel, *The Constitutional Tangle*, The New Republic, Oct 6, 1973, at 14, 15 ("In the presidency is embodied the continuity and indestructibility of the state It is not possible for the government to function without a President, and the Constitution contemplates and provides for uninterrupted continuity in that office. Obviously the presidency cannot be conducted from jail, nor can it be effectively carried on while an incumbent is defending himself in a criminal trial ").

[19] The Framers of the Twenty-fifth Amendment were primarily concerned with the possibility that a sitting President might be unable to discharge his duties due to incapacitation by physical or mental illness *See generally Hearings on Presidential Inability Before the Subcomm. on Constitutional Amendments of the Senate Comm on the Judiciary*, 88th Cong. (1963), *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 88th Cong. (1964); *Hearings on Presidential Inability Before the House Comm on the Judiciary*, 89th Cong. (1965), *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcomm on Constitutional Amendments of the Senate Comm. on the Judiciary*, 89th Cong. (1965) ("1965 Senate Hearings"); *Selected Materials on the Twenty-Fifth Amendment*, S. Doc. No 93–42 (1973) which includes Senate Reports Nos 89–1382 and 89–66 But the amendment's terms "unable" and "inability" were not so narrowly defined, apparently out of a recognition that situations of inability might take various forms not neatly falling into categories of physical or mental illness *See, e.g*, 1965 Senate Hearings at 20 ("[T]he intention of this legislation is to deal with any type of inability, whether it is from traveling from one nation to another, a breakdown of communications, capture by the enemy or anything that is imaginable. The inability to perform the powers and duties of the office, for any reason is inability under the terms that we are discussing ") (statement of Sen Bayh); John D Feerick, *The Twenty-fifth Amendment* 197 (1976) ("Although the terms 'unable' and 'inability' are nowhere defined in either Section 3 or 4 of the Amendment (or in Article II), this was not the result of an oversight. Rather, it reflected a judgment that a rigid constitutional definition was undesirable, since cases of inability could take various forms not neatly fitting into such a definition."). Thus, while imprisonment appears not to have been expressly considered by the Framers as a form of inability, the language of the Twenty-fifth Amendment might be read broadly enough to encompass such a possibility

be a transfer of powers to an Acting President rather than a permanent disabling of the executive branch. But the possibility of Vice-Presidential succession "hardly constitutes an argument in favor of allowing other branches to take actions that would disable the sitting President." [20] To rationalize the President's imprisonment on the ground that he can be succeeded by an "Acting" replacement, moreover, is to give insufficient weight to the people's considered choice as to whom they wish to serve as their chief executive, and to the availability of a politically accountable process of impeachment and removal from office for a President who has engaged in serious criminal misconduct.[21] While the executive branch would continue to function (albeit after a period of serious dislocation), it would still not do so as the people intended, with their elected President at the helm.[22] Thus, we conclude that the Twenty-fifth Amendment should not be understood *sub silentio* to withdraw a previously established immunity and authorize the imprisonment of a sitting President.

b.

Putting aside the possibility of criminal confinement during his term in office, the severity of the burden imposed upon the President by the stigma arising both from the initiation of a criminal prosecution and also from the need to respond to such charges through the judicial process would seriously interfere with his ability to carry out his constitutionally assigned functions. To be sure, in *Clinton v. Jones* the Supreme Court rejected the argument that a sitting President is constitutionally immune from civil suits seeking damages for unofficial misconduct. But the distinctive and serious stigma of indictment and criminal prosecution imposes burdens fundamentally different in kind from those imposed by the initiation of a civil action, and these burdens threaten the President's ability to act as the Nation's leader in both the domestic and foreign spheres. *Clinton*'s reasoning does not extend to the question whether a sitting President is constitutionally immune from criminal prosecution; nor does it undermine our conclusion that a proper balancing of constitutional interests in the criminal context dictates a presidential immunity from such prosecution.

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[20] 1 Laurence H. Tribe, *American Constitutional Law* § 4–14, at 755 n.5 (3rd ed. 2000)

[21] If the President resists the conclusion that he is "unable" to discharge his public duties, a transition of power to the Vice President as Acting President depends on the concurrence of both Houses of Congress by a two-thirds vote But this ultimate congressional decision does not transform the process into a politically accountable one akin to impeachment proceedings, for the situation forcing Congress's hand would have been triggered by the decision of a single prosecutor and unaccountable grand jury to initiate and pursue the criminal proceedings in the first place

[22] Although we do not consider here whether an elected President loses his immunity from criminal prosecution if and while he is temporarily dispossessed of his presidential authority under either § 3 or § 4 of the Twenty-fifth Amendment, structural considerations suggest that an elected President remains immune from criminal prosecution until he permanently leaves the Office by the expiration of his term, resignation, or removal through conviction upon impeachment

The greater seriousness of criminal as compared to civil charges has deep roots not only in the Constitution but also in its common law antecedents. Blackstone distinguished between criminal and civil liability by describing the former as a remedy for "public wrongs" and the latter as a response to "private wrongs." 4 William Blackstone, *Commentaries* *5. As he explained, "[t]he distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity." *Id.* This fundamental distinction explains why a criminal prosecution may proceed without the consent of the victim and why it is brought in the name of the sovereign rather than the person immediately injured by the wrong. The peculiar public opprobrium and stigma that attach to criminal proceedings also explain, in part, why the Constitution provides in Article III for a right to a trial by jury for all federal crimes, *see Lewis v. United States*, 518 U.S. 322, 334 (1996) (Kennedy, J. concurring), and provides in the Sixth Amendment for a "speedy and public trial," U.S. Const. amend. VI, *see Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967) (pendency of an indictment "may subject [the defendant] to public scorn" and "indefinitely prolong[ ] this oppression, as well as the 'anxiety and concern accompanying public accusation' ") (citation omitted).[23]

The magnitude of this stigma and suspicion, and its likely effect on presidential respect and stature both here and abroad, cannot fairly be analogized to that caused by initiation of a private civil action. A civil complaint filed by a private person is understood as reflecting one person's allegations, filed in court upon payment of a filing fee. A criminal indictment, by contrast, is a public rather than private allegation of wrongdoing reflecting the official judgment of a grand jury acting under the general supervision of the District Court. Thus, both the ease and public meaning of a civil filing differ substantially from those of a criminal indictment. *Cf. FDIC v. Mallen*, 486 U.S. 230, 243 (1988) ("Through the return of the indictment, the Government has already accused the appellee of serious wrongdoing.").[24] Indictment alone risks visiting upon the President the disabilities that

[23] In *Klopfer*, the Supreme Court held that the Sixth Amendment right to a speedy trial is violated by the practice of having a prosecutor indefinitely suspend a prosecution after a grand jury returns an indictment. One of the purposes of the speedy trial right is to enable the defendant to be freed, as promptly as reasonably possible, from the "disabling cloud of doubt and anxiety that an overhanging indictment invariably carries with it." 1 Laurence H Tribe, *American Constitutional Law* § 4–14, at 756. *Cf In re Winship*, 397 U.S. 358, 363 (1970) ("The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction ").

[24] In *Mallen*, for example, the Court rejected a due process challenge to a statute authorizing the immediate suspension for up to 90 days, without a pre-suspension hearing, of a bank officer or director who is indicted for a felony involving dishonesty or breach of trust. In describing the significance of indictment for purposes of the due process calculus, the Court observed as follows

> The returning of the indictment establishes that an independent body has determined that there is probable cause to believe that the officer has committed a crime . This finding is relevant in at least two

stem from the stigma and opprobrium associated with a criminal charge, undermining the President's leadership and efficacy both here and abroad. Initiation of a criminal proceeding against a sitting President is likely to pose a far greater threat than does civil litigation of severely damaging the President's standing and credibility in the national and international communities. While this burden may be intangible, nothing in the Supreme Court's recent case law draws into question the Department's previous judgment that "to wound [the President] by a criminal proceeding is to hamstring the operation of the whole governmental apparatus, both in foreign and domestic affairs." OLC Memo at 30.

c.

Once criminal charges are filed, the burdens of responding to those charges are different in kind and far greater in degree than those of responding to civil litigation. The Court in *Clinton v. Jones* clearly believed that the process of defending himself in civil litigation would not impose unwieldy burdens on the President's time and energy. The Court noted that "[m]ost frivolous and vexatious litigation is terminated at the pleading stage or on summary judgment, with little if any personal involvement of the defendant." 520 U.S. at 708. Moreover, even if the litigation proceeds all the way to trial, the Court explicitly assumed that "there would be no necessity for the President to attend in person, though he could elect to do so." *Id.* at 692.

These statements are palpably inapposite to criminal cases. The constitutional provisions governing criminal prosecutions make clear the Framers' belief that an individual's mental and physical involvement and assistance in the preparation of his defense both before and during any criminal trial would be intense, no less so for the President than for any other defendant. The Constitution contemplates the defendant's attendance at trial and, indeed, secures his right to be present by ensuring his right to confront witnesses who appear at the trial. *See* U.S. Const. amend. VI; *Illinois v. Allen*, 397 U.S. 337, 338 (1970) ("One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."); *see also* Fed. R. Crim. P. 43(a); *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (Due Process Clause also protects right to be present). The Constitution also guarantees the defendant a right to counsel, which is itself premised on the defendant's ability to communicate with such counsel and assist in the preparation of

important ways First, the finding of probable cause by an independent body demonstrates that the suspension is not arbitrary Second, the return of the indictment itself is an objective fact that will in most cases raise serious public concern that the bank is not being managed in a responsible manner.

486 U S at 244–45.

his own defense. *See* U.S. Const. amend. VI.[25] These protections stand in stark contrast to the Constitution's relative silence as to the rights of parties in civil proceedings, and they underscore the unique mental and physical burdens that would be placed on a President facing criminal charges and attempting to fend off conviction and punishment. These burdens inhere not merely in the actual trial itself, but also in the substantial preparation a criminal trial demands.

It cannot be said of a felony criminal trial, as the Court said of the civil action before it in *Clinton v. Jones*, that such a proceeding, "if properly managed by the District Court, . . . [is] highly unlikely to occupy any substantial amount of petitioner's time." *Clinton*, 520 U.S. at 702.[26] The Court there emphasized the many ways in which a district court adjudicating a civil action against the President could and should use flexibility in scheduling so as to accommodate the demands of the President's constitutionally assigned functions on his time and energy. *See id.* at 706 (noting that a district court "has broad discretion to stay proceedings as an incident to its power to control its own docket").[27] The Court explicitly "assume[d] that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule." *Id.* at 691–92. The Court thus concluded that "[a]lthough scheduling problems may arise, there is no reason to assume that the district courts will be . . . unable to accommodate the President's needs." *Id.* at 709.[28]

Although the Court determined in *Clinton v. Jones* that "[t]he fact that a federal court's exercise of its traditional Article III jurisdiction may significantly burden the time and attention of the chief Executive is not sufficient to establish a violation of the Constitution," 520 U.S. at 703, this determination must be understood in light of the Court's own characterizations of the manageable burdens imposed

[25] In theory, of course, the President could decline to appear at his own criminal trial, notwithstanding the strong Anglo-American tradition against trials *in absentia* But availability of this option says little about the constitutional issue, there is no evidence that the Framers intended that the President waive an entire panoply of constitutional guarantees and risk conviction in order to fulfill his public obligations.

[26] With respect specifically to concerns about mental preoccupation, the Court in *Clinton v. Jones* "recognize[d] that a President, like any other official or private citizen, may become distracted or preoccupied by pending litigation," 520 U.S at 705 n.40, but likened this distraction to other "vexing" distractions caused by "a variety of demands on their time, . . . some private, some political, and some as a result of official duty." *Id* As a "predictive judgment," *id.* at 702, however, the level of mental preoccupation entailed by a threat of criminal conviction and imprisonment would likely far exceed that entailed by a private civil action

[27] In his opinion concurring in the judgment, Justice Breyer further emphasized the Court's assumptions with respect to the scheduling flexibility properly due the President by the district court He explained that he agreed "with the majority that the Constitution does not automatically grant the President an immunity from civil lawsuits based upon his private conduct " 520 U S. at 710. Nevertheless, he emphasized that

> once the President sets forth and explains a conflict between judicial proceeding and public duties, the matter changes At that point, the Constitution permits a judge to schedule a trial in an ordinary civil damages action (where postponement normally is possible without overwhelming damage to a plaintiff) only within the constraints of a constitutional principle—a principle that forbids a federal judge in such a case to interfere with the President's discharge of his public duties.

Id.

[28] The Court added that, "[a]lthough Presidents have responded to written interrogatories, given depositions, and provided videotaped trial testimony, no sitting President has ever testified, or been ordered to testify, in open court " *Id.* at 692 n 14. In criminal litigation, as compared to civil litigation, however, the presence of the accused is a *sine qua non* of a valid trial, absent extraordinary circumstance.

by civil litigation. By contrast, criminal proceedings do not allow for the flexibility in scheduling and procedures upon which *Clinton v. Jones* relied. Although the Court emphasized that "our decision rejecting the immunity claim and allowing the case to proceed does not require us to confront the question whether a court may compel the attendance of the President at any specific time or place," *id.* at 691, a criminal prosecution would require the President's personal attention and attendance at specific times and places, because the burdens of criminal defense are much less amenable to mitigation by skillful trial management. Indeed, constitutional rights and values are at stake in the defendant's ability to be present for all phases of his criminal trial. For the President to maintain the kind of effective defense the Constitution contemplates, his personal appearance throughout the duration of a criminal trial could be essential. Yet the Department has consistently viewed the requirement that a sitting President personally appear at a trial at a particular time and place in response to judicial process to raise substantial separation of powers concerns. *See* Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutional Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution* (Oct. 17, 1988).[29]

In contrast to ordinary civil litigation, moreover, which the Court in *Clinton v. Jones* described as allowing the trial court to minimize disruptions to the President's schedule, the Sixth Amendment's guarantee to criminal defendants of a "speedy and public trial," U.S. Const. amend. VI, circumscribes the trial court's flexibility. Once a defendant is indicted, his right to a speedy trial comes into play. *See United States v. Marion*, 404 U.S. 307 (1971) (defendant's speedy trial right is triggered when he is "accused" by being indicted). In addition, under the federal Speedy Trial Act, the trial judge's discretion is constrained in order to meet the statutory speedy trial deadlines. *See* 18 U.S.C. §§ 3161–3174 (1994). While a defendant may waive his speedy trial rights, it would be a peculiar constitutional argument to say that the President's ability to perform his constitutional

[29] The Kmiec memorandum explained that "it has been the rule since the Presidency of Thomas Jefferson that a judicial subpoena in a criminal case may be issued to the President, and any challenge to the subpoena must be based on the nature of the information sought rather than any immunity from process belonging to the President." *See* Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re Constitutional Concerns Implicated by Demand for Presidential Evidence in a Criminal Prosecution* at 2 (Oct. 17, 1988). However, the memorandum proceeded to explain, "[a]lthough there are no judicial opinions squarely on point, historical precedent has clearly established that sitting Presidents are not required to testify in person at criminal trials." *Id.* at 3 (reviewing precedents). The memorandum noted in particular that Attorney General Wirt had advised President Monroe in 1818 that "[a] subpoena ad testificandum may I think be properly awarded to the President of the U.S. . . . But if the presence of the chief magistrate be required at the seat of government by his official duties, I think those duties paramount to any claim which an individual can have upon him, and that his personal attendance on the court from which the summons proceeds ought to be, and must, of necessity, be dispensed with . . . ." *Id.* at 4 (quoting Opinion of Attorney General Wirt, January 13, 1818, *quoted in* Ronald D. Rotunda, *Presidents and Ex-Presidents as Witnesses. A Brief Historical Footnote*," 1975 U. Ill. L. F. 1, 6). The memorandum concluded that "the controlling principle that emerges from the historical precedents is that a sitting President may not be required to testify in court at a criminal trial because his presence is required elsewhere for his 'official duties'—or, in the vernacular of the time, required at 'the seat of government.'" *Id.* at 6 (citations and footnote omitted).

duties should not be considered unduly disrupted by a criminal trial merely because the President could, in theory, waive his personal constitutional right to a speedy trial. The Constitution should not lightly be read to put its Chief Executive officer to such a choice.

In sum, unlike private civil actions for damages — or the two other judicial processes with which such actions were compared in *Clinton v. Jones* (subpoenas for documents or testimony and judicial review and occasional invalidation of the President's official acts, *see* 520 U.S. at 703–05) — criminal litigation uniquely requires the President's *personal* time and energy, and will inevitably entail a considerable if not overwhelming degree of mental preoccupation.[30] Indictment also exposes the President to an official pronouncement that there is probable cause to believe he committed a criminal act, *see, e.g., United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297–98 (1991), impairing his credibility in carrying out his constitutional responsibilities to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and to speak as the "sole organ" of the United States in dealing with foreign nations. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936); *see also Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (describing the President "as the Nation's organ for foreign affairs"); *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."). These physical and mental burdens imposed by an indictment and criminal prosecution of a sitting President are of an entirely different magnitude than those imposed by the types of judicial process previously upheld by the Court.

It is conceivable that, in a particular set of circumstances, a particular criminal charge will not in fact require so much time and energy of a sitting President so as materially to impede the capacity of the executive branch to perform its constitutionally assigned functions. It would be perilous, however, to make a judgment in advance as to whether a particular criminal prosecution would be a case of this sort. Thus a categorical rule against indictment or criminal prosecution is most consistent with the constitutional structure, rather than a doctrinal test that would require the court to assess whether a particular criminal proceeding is likely to impose serious burdens upon the President.[31]

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[30] While illustrating the potentially burdensome nature of judicial review of Presidential acts with the "most dramatic example" of *Youngstown Sheet & Tube Co. v Sawyer*, 343 U S 579 (1952) (invalidating President Truman's order directing the seizure and operation of steel mills), the Court mentioned "the substantial time that the President must necessarily have devoted to the matter as a result of judicial involvement" *Clinton v Jones*, 520 U S at 703. Of course, it is most frequently the case that the President spends little or no time *personally* engaged in such confrontations, with the task of defending his policies in court falling to subordinate executive branch officials *See, e g.*, Maeva Marcus, *Truman and the Steel Seizure Case* 102–77 (1977) (describing in detail Department of Justice attorneys' involvement in the steel seizure litigation without discussing any role played personally in the litigation by President Truman). Such a routine delegation of responsibilities is unavailable when the President personally faces criminal charges

[31] *Cf. Clinton v Jones*, 520 U.S at 706 ("Indeed, if the Framers of the Constitution had thought it necessary to protect the President from the burdens of private litigation, we think it far more likely that they would have

3.

Having identified the burdens imposed by indictment and criminal prosecution on the President's ability to perform his constitutionally assigned functions, we must still consider whether these burdens are "justified by an overriding need to promote" legitimate governmental objectives, *Administrator of General Services*, 433 U.S. at 443, in this case the expeditious initiation of criminal proceedings. *United States v. Nixon* underscored the legitimacy and importance of facilitating criminal proceedings in general. Although Nixon did not address the interest in facilitating criminal proceedings against the President, it is fair to say that there exists an important national interest in ensuring that no person—including the President—is above the law. *Clinton v. Jones* underscored the legitimacy and importance of allowing civil proceedings against the President for unofficial misconduct to go forward without undue delay. Nevertheless, after weighing the interests in facilitating immediate criminal prosecution of a sitting President against the interests underlying temporary immunity from such prosecution, considered in light of alternative means of securing the rule of law, we adhere to our 1973 determination that the balance of competing interests requires recognition of a presidential immunity from criminal process.

Recognizing an immunity from prosecution for a sitting President would not preclude such prosecution once the President's term is over or he is otherwise removed from office by resignation or impeachment.[32] The relevant question, therefore, is the nature and strength of any governmental interests in *immediate* prosecution and punishment.

With respect to immediate punishment, the legitimate objectives of retribution and specific deterrence underlying the criminal justice system compete against a recognition of presidential immunity from penal incarceration. The obvious and overwhelming burdens that such incarceration would impose on the President's ability to perform his constitutionally assigned functions, however, clearly support the conclusion that a sitting President may not constitutionally be imprisoned upon a criminal conviction. *See supra* note 18 and accompanying text. The public's general interest in retribution and deterrence does not provide an "overriding need" for immediate as opposed to deferred incarceration.

With respect to immediate prosecution, we can identify three other governmental interests that might be impaired by deferring indictment and prosecution

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adopted a categorical rule than a rule that required the President to litigate the question whether a specific case belonged in the 'exceptional case' subcategory")

[32] The temporary nature of the immunity claimed here distinguishes it from that pressed in *Nixon v. Fitzgerald*, which established a permanent immunity from civil suits challenging official conduct. The temporary immunity considered here is also distinguishable from that pressed by the President but rejected in *United States v. Nixon*, since the claim of executive privilege justifying the withholding of evidence relevant to the criminal prosecution of other persons would apparently have suppressed the evidence without any identifiable time limitation. The asserted privilege might therefore have forever thwarted the public's interest in enforcing its criminal laws. *See United States v. Nixon*, 418 U.S. at 713 ("Without access to specific facts a criminal prosecution may be totally frustrated.").

until after the accused no longer holds the office of President: (1) avoiding the bar of a statute of limitations; (2) avoiding the weakening of the prosecution's case due to the passage of time; and (3) upholding the rule of law. We consider each of these in turn.

The interest in avoiding the statute of limitations bar by securing an indictment while the President remains sitting is a legitimate one. However, we do not believe it is of significant constitutional weight when compared with the burdens such an indictment would impose on the Office of the President, especially in light of alternative mechanisms to avoid a time-bar. First, a President suspected of the most serious criminal wrongdoing might well face impeachment and removal from office before his term expired, permitting criminal prosecution at that point. Second, whether or not it would be appropriate for a court to hold that the statute of limitations was tolled while the President remained in office (either as a constitutional implication of temporary immunity or under equitable principles[33]), Congress could overcome any such obstacle by imposing its own tolling rule.[34] At most, therefore, prosecution would be delayed rather than denied.

Apart from concern over statutes of limitations, we recognize that a presidential immunity from criminal prosecution could substantially delay the prosecution of a sitting President, and thereby make it more difficult for the ultimate prosecution to succeed.[35] In *Clinton v. Jones*, the Court observed that — notwithstanding the continuation of civil discovery — "delaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party." 520 U.S. at 707–08.

[33] Federal courts have suggested that, in proper circumstances, criminal as well as civil statutes of limitation are subject to equitable tolling. *See, e.g., United States v. Midgley*, 142 F.3d 174, 178–79 (3d Cir 1998) ("Although the doctrine of equitable tolling is most typically applied to limitation periods on civil actions, there is no reason to distinguish between the rights protected by criminal and civil statutes of limitations.") (internal quotation omitted); *cf United States v. Levine*, 658 F.2d 113, 119–21 (3d Cir 1981) (noting that criminal statutes of limitations have a primary purpose of providing fairness to the accused, but are "perhaps not inviolable" and are subject to tolling, suspension, and waiver). Equitable tolling, however, is invoked only sparingly, in the "rare situation where [it] is demanded by sound legal principles as well as the interests of justice" *Alvarez-Machain v. United States*, 107 F 3d 696, 701 (9th Cir 1996) (tolling two-year limitation period for FTCA actions where plaintiff had been incarcerated for two years)

[34] *See, e.g*, 18 U S C. § 3287 (1994) (suspension of criminal statutes of limitation for certain fraud offenses against the United States until three years after the termination of hostilities); *United States v. Grainger*, 346 U.S 235 (1953) (applying this statutory suspension). We believe Congress derives such authority from its general power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U S Const. art I, § 8, cl. 18. *Cf. Clinton v. Jones*, 520 U.S. at 709 ("If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation."). Indeed, without deciding the question, we note that Congress may have power to enact a tolling provision governing the statute of limitations for conduct that has already occurred, at least so long as the original statutory period has not already expired *Cf United States v. Powers*, 307 U S. 214 (1939) (rejecting *Ex Post Facto* challenge to a prosecution based on a statute extending the life of a temporary criminal statute before its original expiration date); *cf., e.g., United States v Grimes*, 142 F.3d 1342, 1350–51 (11th Cir. 1998) (collecting decisions rejecting *Ex Post Facto* challenges to statutes extending the limitations period as applied to conduct for which the original period had not already run), *cert denied*, 525 U S. 1088 (1999)

[35] In theory, the delay could be as long as 10 years, for a President who originally assumes the office through ascension rather than election and then fully serves two elected terms. *See* U S. Const. amend. XXII, § 1 Given quadrennial elections and the possibility of impeachment, however, it seems unlikely that a President who is seriously suspected of grave criminal wrongdoing would remain in office for that length of time

The Court considered this potential for prejudice to weigh against recognition of temporary immunity from civil process. We believe that the costs of delay in the criminal context may differ in both degree and kind from delay in the civil context.[36] But in any event it is our considered view that, when balanced against the overwhelming cost and substantial interference with the functioning of an entire branch of government, these potential costs of delay, while significant, are not controlling. In the constitutional balance, the potential for prejudice caused by delay fails to provide an "overriding need" sufficient to overcome the justification for temporary immunity from criminal prosecution.

Finally, recognizing a temporary immunity would not subvert the important interest in maintaining the "rule of law." To be sure, as the Court has emphasized, "[n]o man in this country is so high that he is above the law." *United States v. Lee*, 106 U.S. 196, 220 (1882). Moreover, the complainant here is the Government seeking to redress an alleged crime against the public rather than a private person seeking compensation for a personal wrong, and the Court suggested in *Nixon v. Fitzgerald* that "there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions," 457 U.S. at 754 n.37; *see id.* (describing *United States v. Nixon* as "basing holding on special importance of evidence in a criminal trial and distinguishing civil actions as raising different questions not presented for decision"). However, unlike the immunities claimed in both *Nixon* cases, *see supra* note 32, the immunity from indictment and criminal prosecution for a sitting President would generally result in the delay, but not the forbearance, of any criminal trial. Moreover, the constitutionally specified impeachment process ensures that the immunity would not place the President "above the law." A sitting President who engages in criminal behavior falling into the category of "high Crimes and Misdemeanors," U.S. Const. art. II, § 4, is always subject to removal from office upon impeachment by the House and conviction by the Senate, and is thereafter subject to criminal prosecution.

4.

We recognize that invoking the impeachment process itself threatens to encumber a sitting President's time and energy and to divert his attention from

[36] On the one hand, there may be less reason to fear a prejudicial loss of evidence in the criminal context A grand jury could continue to gather evidence throughout the period of immunity, even passing this task down to subsequently empaneled grand juries if necessary. *See* Fed. R. Crim. P 6(e)(3)(C)(iii) Moreover, in the event of suspicion of serious wrongdoing by a sitting President, the media and even Congress (through its own investigatory powers) would likely pursue, collect and preserve evidence as well These multiple mechanisms for securing and preserving evidence could mitigate somewhat the effect of a particular witness's failed recollection or demise By contrast, many civil litigants would lack the resources and incentives to pursue and preserve evidence in the same comprehensive manner

On the other hand, the consequences of any prejudicial loss of evidence that does occur in the criminal context are more grave, given the presumptively greater stakes for both the United States and the defendant in criminal litigation *See United States v Nixon*, 418 U S at 711–13, 713 (in emphasizing the importance of access to evidence in a pending criminal trial, giving significant weight in the constitutional balance to "the fundamental demands of due process of law in the fair administration of criminal justice").

his public duties. But the impeachment process is explicitly established by the Constitution. While in some circumstances an impeachment and subsequent Senate trial might interfere with the President's exercise of his constitutional responsibilities in ways somewhat akin to a criminal prosecution, "this is a risk expressly contemplated by the Constitution, and it is a necessary incident of the impeachment process." OLC Memo at 28. In other words, the Framers themselves specifically determined that the public interest in immediately removing a sitting President whose continuation in office poses a threat to the Nation's welfare outweighs the public interest in avoiding the Executive burdens incident thereto.

The constitutionally prescribed process of impeachment and removal, moreover, lies in the hands of duly elected and politically accountable officials. The House and Senate are appropriate institutional actors to consider the competing interests favoring and opposing a decision to subject the President and the Nation to a Senate trial and perhaps removal. Congress is structurally designed to consider and reflect the interests of the entire nation, and individual Members of Congress must ultimately account for their decisions to their constituencies. By contrast, the most important decisions in the process of criminal prosecution would lie in the hands of unaccountable grand and petit jurors, deliberating in secret, perhaps influenced by regional or other concerns not shared by the general polity, guided by a prosecutor who is only indirectly accountable to the public. The Framers considered who should possess the extraordinary power of deciding whether to initiate a proceeding that could remove the President — one of only two constitutional officers elected by the people as a whole — and placed that responsibility in the elected officials of Congress. It would be inconsistent with that carefully considered judgment to permit an unelected grand jury and prosecutor effectively to "remove" a President by bringing criminal charges against him while he remains in office.

Thus, the constitutional concern is not merely that any *particular* indictment and criminal prosecution of a sitting President would unduly impinge upon his ability to perform his public duties. A more general concern is that permitting such criminal process against a sitting President would affect the underlying dynamics of our governmental system in profound and necessarily unpredictable ways, by shifting an awesome power to unelected persons lacking an explicit constitutional role vis-a-vis the President. Given the potentially momentous political consequences for the Nation at stake, there is a fundamental, structural incompatibility between the ordinary application of the criminal process and the Office of the President.

For these reasons we believe that the Constitution requires recognition of a presidential immunity from indictment and criminal prosecution while the President is in office.

In 1973, this Department concluded that a grand jury should not be permitted to indict a sitting President even if all subsequent proceedings were postponed until after the President left office. The Court's emphasis in *Clinton v. Jones* on the interests of Article III courts in allowing ordinary judicial processes to go forward against a sitting President, and its reliance on scheduling discretion to prevent those processes from interfering with performance of the President's constitutional duties, might be thought to call this aspect of the Department's 1973 determination into question. We have thus separately reconsidered whether, if the constitutional immunity extended only to criminal prosecution and confinement but not indictment, the President's ability to perform his constitutional functions would be unduly burdened by the mere pendency of an indictment against which he would need to defend himself after leaving office.

We continue to believe that the better view of the Constitution accords a sitting President immunity from indictment by itself. To some degree, indictment alone will spur the President to devote some energy and attention to mounting his eventual legal defense.[37] The stigma and opprobrium attached to indictment, as we explained above, far exceed that faced by the civil litigant defending a claim. Given "the realities of modern politics and mass media, and the delicacy of the political relationships which surround the Presidency both foreign and domestic," there would, as we explained in 1973, "be a Russian roulette aspect to the course of indicting the President but postponing trial, hoping in the meantime that the power to govern could survive." OLC Memo at 31.[38] Moreover, while the burdens imposed on a sitting President by indictment alone may be less onerous than those imposed on the President by a full scale criminal prosecution, the public interest in indictment alone would be concomitantly weaker assuming that both trial and punishment must be deferred, and weaker still given Congress' power to extend the statute of limitations or a court's possible authority to recognize an equitable tolling.

Balancing these competing concerns, we believe the better view is the one advanced by the Department in 1973: a sitting President is immune from indictment as well as from further criminal process. Where the President is concerned,

[37] *Cf Moore v. Arizona*, 414 U.S. 25, 27 (1973) (indictment with delayed trial "may disrupt [a defendant's] employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends") (citations omitted) Indeed, indictment coupled with temporary immunity from further prosecution may even magnify the problem, since the President would be legally stigmatized as an alleged criminal without any meaningful opportunity to respond to his accusers in a court of law

[38] Our conclusion would hold true even if such an indictment could lawfully be filed, and were filed, under seal. Given the indictment's target it would be very difficult to preserve its secrecy *Cf United States v Nixon*, 418 U S. at 687 n.4 (noting parties' acknowledgment that "disclosures to the news media made the reasons for continuance of the protective order no longer meaningful," with respect to the "grand jury's immediate finding relating to the status of the President as an unindicted co-conspirator") Permitting a prosecutor and grand jury to issue even a sealed indictment would allow them to take an unacceptable gamble with fundamental constitutional values

only the House of Representatives has the authority to bring charges of criminal misconduct through the constitutionally sanctioned process of impeachment.

III.

In 1973, the Department of Justice concluded that the indictment and criminal prosecution of a sitting President would unduly interfere with the ability of the executive branch to perform its constitutionally assigned duties, and would thus violate the constitutional separation of powers. No court has addressed this question directly, but the judicial precedents that bear on the continuing validity of our constitutional analysis are consistent with both the analytic approach taken and the conclusions reached. Our view remains that a sitting President is constitutionally immune from indictment and criminal prosecution.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

Title III Electronic Surveillance Material and the Intelligence Community

Under Title III of the Omnibus Crime Control and Safe Streets Act, law enforcement officials may share with the intelligence community information obtained through surveillance authorized by courts pursuant to Title III where it is done to obtain assistance in preventing, investigating, or prosecuting a crime.

Law enforcement may also share with the intelligence community information obtained through surveillance authorized by courts pursuant to Title III where the information is of overriding importance to national security or foreign relations and disclosure is necessary for the President to discharge his constitutional responsibilities over these matters.

October 17, 2000

MEMORANDUM OPINION FOR THE COUNSEL
OFFICE OF INTELLIGENCE POLICY AND REVIEW

You have requested our opinion on the extent to which law enforcement officials may share with the intelligence community information obtained through court-authorized electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act. We believe that such information may be shared in limited situations, namely, (1) where law enforcement shares the information with the intelligence community to obtain assistance in preventing, investigating, or prosecuting a crime; and (2) where the information is of overriding importance to national security or foreign relations and where disclosure is necessary for the President to discharge his constitutional responsibilities over these matters. As we have noted in a similar context, "this constitutional authority should not be exercised as a matter of course, but rather only in extraordinary circumstances and with great care." *Disclosure of Grand Jury Material to the Intelligence Community*, 21 Op. O.L.C. 159, 160 (1997). Given the extraordinary nature of this authority, we recommend that proper officials (e.g., the Attorney General or the Deputy Attorney General) be consulted before any such constitutionally-based disclosure is made.

I.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510–2522 (1994 & Supp. II 1996), requires the government, unless otherwise permitted, to obtain an order of a court before conducting electronic surveillance. The government is permitted to seek such orders only in connection with the

investigation of the criminal offenses enumerated in § 2516 of title 18.[1] Any interception not permitted by Title III is prohibited and subject to criminal and civil sanctions.[2]

Title III also governs the subsequent use and disclosure of information obtained as a result of court-authorized electronic surveillance.[3] Section 2517 of title 18 provides in pertinent part:

> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.[4]

18 U.S.C. § 2517 (1994). Section 2517(1) thus permits disclosure of court-authorized Title III information from one "investigative or law enforcement officer" to another, while Title III Electronic Surveillance Material and the Intelligence Community § 2517(2) permits an "investigative or law enforcement officer" law-

[1] 18 U S C. § 2516 (1994 & Supp II 1996). With respect to the authority to intercept communications in connection with federal investigations, § 2516 distinguishes between wire and oral communications, on the one hand, and electronic communications, on the other. Section 2516(1) empowers certain senior officials in the Department of Justice to authorize an application for a court order approving interception of wire and oral communications where the interception may provide evidence of certain serious federal offenses, such as bribery, unlawful use of explosives, witness tampering, assassination, racketeering, gambling, embezzlement, bank fraud, sexual exploitation of children, mail fraud, counterfeiting, sale and transportation of obscene matter, and firearms violations Section 2516(3), in contrast, permits an application for interception of electronic communications where the interception may provide evidence of any federal felony.

With respect to the authority to intercept communications in connection with state investigations, § 2516(2) does not distinguish among wire, oral, and electronic communications. Section 2516(2) empowers the principal prosecuting attorney of a state or subdivision thereof to apply to a state court for an intercept order in conformity with Title III, if state law also authorizes such an application and if the interception would provide evidence of certain serious offenses, including murder, kidnapping, gambling, and extortion.

[2] In this memorandum, we do not address and express no opinion regarding use and disclosure of electronic surveillance information obtained in conformity with Title III but without a court order, such as one-party consent recordings In addition, we do not consider electronic surveillance information obtained pursuant to the Foreign Intelligence Surveillance Act of 1978, 50 U S.C. §§ 1801–1811 (1994).

[3] For purposes of this memorandum, we assume that the information to be shared was obtained pursuant to and maintained in conformity with all of the requirements of Title III

[4] Section 2517(3) further permits the lawful recipient of Title III information to disclose that information while testifying under oath in court or similar proceedings Section 2517(5) authorizes use and disclosure as permitted in § 2517(1) and (2) of Title III information relating to offenses other than those specified in the electronic surveillance application

fully in possession of Title III information to "use" the information. The disclosure or use of information under these two sections must be "appropriate to the proper performance of the official duties" of the investigative or law enforcement officers involved. A number of courts have stated that, under Title III, any electronic surveillance or subsequent disclosure of Title III information is prohibited unless expressly permitted. *See In re Grand Jury*, 111 F.3d 1066, 1078 (3d Cir. 1997); *In re Motion to Unseal Elec. Surveillance Evidence (Smith v. Lipton)*, 990 F.2d 1015, 1018 (8th Cir. 1993); *United States v. Underhill*, 813 F.2d 105, 107 (6th Cir.), *cert. denied*, 482 U.S. 906 (1987); *United States v. Dorfman*, 690 F.2d 1230, 1232 (7th Cir. 1982).

II.

A.

Section 2517(1) permits disclosure of Title III information from one "investigative or law enforcement officer" to another, "to the extent that such disclosure is appropriate to the proper performance of the official duties" of the officer making or receiving the disclosure. Section 2510(7) of title 18 defines "investigative or law enforcement officer" as follows:

> "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

18 U.S.C. § 2510(7) (1994). Courts have taken a reasonably broad view of the scope of this definition, holding, for example, that § 2510(7) covers an Assistant United States Attorney working on a civil forfeiture case, *United States v. All Right, Title and Interest in Five Parcels of Real Property and Appurtenances Thereto Known as 64 Lovers Lane*, 830 F. Supp. 750, 760 (S.D.N.Y. 1993), the committee of the House of Representatives considering the impeachment of a federal judge, *In re Grand Jury Proceedings (Appeal of Judge Alcee L. Hastings)*, 841 F.2d 1048 (11th Cir. 1988), as well as a state attorney grievance commission empowered by law to investigate the offenses enumerated in 18 U.S.C. § 2516, *In re Elec. Surveillance (Berg v. Michigan Attorney Grievance Comm'n)*, 49 F.3d 1188 (6th Cir. 1995). Several courts have held that prison officials are also within the definition of § 2510(7). *See, e.g., United States v. Sababu*, 891 F.2d 1308, 1328–29 (7th Cir. 1989). *See also Bureau of Prisons Disclosure of Recorded Inmate Telephone Conversations*, 21 Op. O.L.C. 11, 15 n.10 (1997). An "inves-

tigative or law enforcement officer," however, must have the power to investigate or make arrests for offenses enumerated in § 2516.[5] Absent some specific authority to investigate or make arrests for such offenses, a member of the intelligence community is not an investigative or law enforcement officer for purposes of Title III. We are aware of no such authority.[6] As a result, § 2517(1), which permits disclosure of Title III information to other investigative or law enforcement officers, does not apply to disclosures to the intelligence community.[7] Accordingly, if an investigative or law enforcement officer is permitted to disclose Title III information to a member of the intelligence community, that disclosure must constitute a "use" that is "appropriate to the proper performance of the official duties" of the disclosing officer.

B.

We must therefore consider the circumstances under which sharing information with the intelligence community would be "appropriate to the proper performance of [the] official duties" of a law enforcement officer. For the reasons that follow, we conclude that the text, legislative history, and purpose of Title III suggest that disclosure to the intelligence community would be permissible when an investigative or law enforcement officer seeks to obtain assistance in the prevention, investigation, or prosecution of a criminal offense.

The structure of § 2517 suggests that Congress intended the phrase "appropriate to the proper performance of . . . official duties" to be construed narrowly. Congress included the limiting phrase both in § 2517(1), governing one law enforcement officer's disclosure of intercepted communications to another, and in § 2517(2), governing a law enforcement officer's use of intercepted communications. In support of an expansive reading of the phrase in § 2517(2), it could be argued that a government employee in one agency has a general duty to share with another government entity information that would be relevant to the latter's

[5] Such offenses would include all federal felonies, *see* 18 U S C § 2516(1), (3), and state offenses designated in § 2516(2) *See supra* note 1.

[6] We note that the Central Intelligence Agency ("CIA") is specifically denied by statute "police, subpoena, or law enforcement powers or internal security functions " 50 U S.C. § 403–3(d)(1) (1994). As discussed below, however, we do not believe that statutory restrictions on the domestic or law enforcement activities of the CIA (or other agencies within the intelligence community) would prevent officers within the intelligence community from providing certain assistance to law enforcement officers upon request. *See infra* pp. 270–71.

[7] When we refer to the intelligence community in this context, we do mean to include those members, such as FBI agents, who meet the statutory definition of an "investigative or law enforcement officer " We recognize that officers empowered to investigate violations of the offenses enumerated in § 2516 could also have duties related to counterintelligence that do not involve prevention, investigation, or prosecution of criminal conduct. In such circumstances, disclosure of Title III information is permissible under § 2517(1) if the disclosure is "appropriate to the proper performance of the official duties of the officer making or receiving the disclosure " As discussed *infra* section II B, Congress appears to have intended the phrase "appropriate to the proper performance of the official duties" to encompass duties related to the prevention, investigation, or prosecution of criminal conduct. Accordingly, we do not believe that Title III would authorize the disclosure of electronic surveillance information solely for intelligence purposes, even if the disclosing or receiving officer is also authorized to perform law enforcement functions. *See also infra* note 12.

mission, and that it would therefore be "appropriate to the proper performance" of a law enforcement officer's duties to share Title III information with another government agency for purposes entirely unrelated to the law enforcement officer's own investigative activities. This broad construction of the phrase "appropriate to the proper performance of . . . official duties" in § 2517(2), however, cannot be squared with the existence of the virtually identical phrase in § 2517(1). First, under basic canons of statutory construction, the phrases must be interpreted consistently. *See, e.g., Sullivan v. Stroop*, 496 U.S. 478, 484–85 (1990); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). If § 2517(2) broadly permits the disclosure of Title III information to individuals who are not law enforcement officers for purposes unrelated to law enforcement, then § 2517(1) would permit disclosure among law enforcement officers also for purposes unrelated to law enforcement. If so, the phrase "appropriate to the proper performance of . . . official duties" would constitute only a highly elastic limitation on disclosure among law enforcement officers — a result that seems unlikely in light of Congress's effort in Title III to protect privacy to the maximum extent possible, consistent with permitting electronic surveillance for law enforcement purposes, *see infra* pp. 268–70. The most natural reading of the language is, to the contrary, that the disclosure must be appropriate to the proper performance of *law enforcement* duties. Second, had Congress intended to permit broad sharing of Title III information among government entities with varying missions, it could more easily have done so in § 2517(1), by authorizing law enforcement officers to disclose Title III information to government employees generally rather than solely to other law enforcement officers.

The legislative history of Title III and the case law support an interpretation confining the phrase "appropriate to the proper performance of . . . official duties" in § 2517(1) and (2) to the law enforcement functions of the officer. The only nontestimonial use of Title III information discussed in the legislative history of Title III is the "use of the contents of intercepted communications, for example, to establish probable cause for arrest, to establish probable cause to search, or to develop witnesses." S. Rep. No. 90–1097, at 99 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2188 (citations omitted). Relying on this passage, the U.S. Court of Appeals for the District of Columbia Circuit has stated that Congress sought in § 2517 to serve "criminal law investigation and enforcement objectives." *American Friends Serv. Comm. v. Webster*, 720 F.2d 29, 73 (D.C. Cir. 1983) (invalidating order authorizing National Archives and Records Service to inspect Title III materials held by the FBI in part because disclosure to the Archives would not serve law enforcement objectives and therefore would not be authorized by § 2517(1) or (2)); *see In re Disciplinary Proceedings Against Spinelli*, 515 A.2d 825, 830–31 (N.J. Super. Ct. Law Div. 1986) (holding that disclosure provisions of state statute similar to § 2517 did not authorize release of wiretap material to police chief for disciplinary proceedings against officer

because this was an employment, not a law enforcement, use); *see also Lam Lek Chong v. DEA*, 929 F.2d 729, 734 (D.C. Cir. 1991) (following *Webster*). Consistent with this legislative purpose, the uses of Title III information permitted by courts have all related to law enforcement. *See, e.g., Certain Interested Individuals v. Pulitzer Pub'g Co.*, 895 F.2d 460, 465 (8th Cir.) (use of Title III information to obtain search warrant), *cert. denied*, 498 U.S. 880 (1990); *United States v. Gerena*, 869 F.2d 82, 84–86 (2d Cir. 1989) (use of Title III information in legal briefs and memoranda filed under seal with court); *United States v. O'Connell*, 841 F.2d 1408, 1417–18 (8th Cir.) (disclosure of Title III information to a secretary and to an intelligence analyst who were assisting the law enforcement officer in the investigation was "probably" permissible under § 2517(2)), *cert. denied*, 487 U.S. 1210 (1988); *United States v. Ricco*, 566 F.2d 433, 435 (2d Cir. 1977) (use of suppressed Title III wiretaps to refresh a witness's recollection for trial), *cert. denied*, 436 U.S. 926 (1978); *United States v. Rabstein*, 554 F.2d 190, 193 (5th Cir. 1977) (use of duplicate tapes during investigation to obtain voice identifications); *United States v. Hall*, 543 F.2d 1229, 1233 (9th Cir. 1976) (use of Title III information to make an arrest and conduct subsequent search), *cert. denied*, 429 U.S. 1075 (1977); *United States v. Vento*, 533 F.2d 838, 855 (3d Cir. 1976) (use of Title III information to obtain an additional wiretap authorization); *United States v. Canon*, 404 F. Supp. 841, 848–49 (N.D. Ala. 1975) (use of duplicate tapes during investigation to obtain voice identifications); *see also United States v. Martinez*, 101 F.3d 684 (Table), 1996 WL 281570 (2d Cir. 1996) (unpublished opinion) (allowing informant to listen to Title III tapes during the investigation is permitted under § 2517(2)), *cert. denied*, 520 U.S. 1270 (1997); *Birdseye v. Driscoll*, 534 A.2d 548, 552 (Pa. Commw. Ct. 1987) (use by prosecutors of electronic surveillance information in appeal from trial court order permissible under state statute modeled after Title III).

The principal cases suggesting a possible exception to the "law enforcement only" rule are several involving the disclosure of Title III information to the IRS for civil tax purposes. In these cases, courts permitted use of the Title III information in the civil tax proceeding. *See Spatafore v. United States*, 752 F.2d 415, 417–18 (9th Cir. 1985); *Griffin v. United States*, 588 F.2d 521, 525–26 (5th Cir. 1979); *Fleming v. United States*, 547 F.2d 872, 873–74 (5th Cir.), *cert. denied*, 434 U.S. 831 (1977); *Estate of Robert W. Best v. Commissioner*, 76 T.C. 122, 140–42 (1981). Each court relied, however, on the fact that the information had already been publicly disclosed in court in a criminal prosecution. None of the courts addressed whether disclosure would have been permissible under § 2517(2) in the absence of prior disclosure in the criminal action. The legislative history of Title III explicitly states that the statute was not intended to restrict disclosure of information already publicly known. *See* S. Rep. No. 90–1097, at 93, *reprinted in* 1968 U.S.C.C.A.N. at 2181 ("The disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowl-

edge' would not be prohibited."). Accordingly, we do not believe that this line of cases speaks directly to the circumstances under which § 2517(2) permits law enforcement officers to disclose Title III information. Similarly, although the Sixth Circuit in *Resha v. United States*, 767 F.2d 285 (6th Cir. 1985), permitted introduction in a civil tax proceeding of Title III information provided to the IRS by law enforcement officers, the court declined to address whether § 2517(2) authorized the disclosure. No criminal prosecution had resulted from the wiretaps, and, accordingly, the Title III information had not been disclosed in court. In the civil tax proceeding, the trial court excluded the Title III information. The appellate court reversed, holding that Title III's prohibition on the use of intercepted wire or oral communications in court, 18 U.S.C. § 2515, requires exclusion when the original wiretap is illegal, but not when lawfully obtained information is illegally disclosed. Because the court concluded that § 2515 did not bar introduction of the Title III information whether or not § 2517(2) permitted the FBI to disclose the information to the IRS, the court declined to address whether the disclosure was proper.[8]

The conclusion that § 2517(2) authorizes disclosure of Title III material only for purposes related to law enforcement is buttressed by the purpose of Title III: to maximize privacy, consistent with permitting electronic surveillance for law enforcement purposes. Title III was passed in response to the Supreme Court's decisions in *Katz v. United States*, 389 U.S. 347 (1967), which held that electronic surveillance was a search under the Fourth Amendment and thus required a court-approved search warrant, and *Berger v. New York*, 388 U.S. 41 (1967), which set forth stringent particularity requirements for electronic surveillance warrants. Title III represented a compromise between those who would have prohibited electronic surveillance altogether and those who wanted broadly to permit its use for

[8] In *Boettger v. Miklich*, 633 A.2d 1146 (Pa. 1993), the Pennsylvania Supreme Court held that a state provision virtually identical to § 2517(2) prohibited a law enforcement officer from disclosing wiretap information to federal and state tax authorities. In addition, although the Sixth Circuit in *Resha* held that § 2515 does not prohibit the introduction in civil proceedings of lawfully intercepted but illegally disclosed information and declined to address whether § 2517(2) authorized the disclosure, the court below had directly considered the issue and had held that § 2517(2) did not authorize the disclosure *See Scott v. United States*, 573 F. Supp. 622, 625 (M.D. Tenn. 1983), *rev'd on other grounds sub nom. Resha v. United States*, 767 F.2d 285 (6th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986). Accordingly, the only two cases directly addressing whether § 2517(2) authorizes law enforcement officers to provide Title III material to tax authorities—*Scott* and *Boettger*—held that such disclosure violated the statute.

One other case might arguably be interpreted to suggest an exception to the "law enforcement only" rule. In *64 Lovers Lane*, 830 F. Supp. at 760, the court upheld the disclosure of wiretap evidence by state law enforcement officers to an Assistant United States Attorney ("AUSA") prosecuting a civil forfeiture action arising out of the state criminal investigation. The court's analysis in that case was principally, if not exclusively, focused on the applicability of the statutory definition of an "investigative or law enforcement officer," as this appears to have been the only issue raised *Id.* Regarding "appropriate use," the opinion simply states: "Since receipt and use of wiretap evidence is plainly appropriate for Assistant United States Attorneys prosecuting a civil forfeiture proceeding, disclosure of wiretap evidence to them would seem covered by § 2517(1)." *Id.* The opinion contains no further analysis or discussion of the issue. We note, however, that the decision is not necessarily inconsistent with the "law enforcement only" rule. In addition to criminal prosecutions, the rule also arguably might extend, at least in certain circumstances, to other types of judicial or trial proceedings that grow out of a criminal investigation. *Cf. In re Grand Jury Proceedings*, 841 F.2d at 1054 (congressional committee is an "investigative officer" for purposes of 18 U.S.C. § 2517(1) when conducting impeachment proceeding).

law enforcement. *See Certain Interested Individuals*, 895 F.2d at 467; *Gerena*, 869 F.2d at 84; *In re Application of Nat'l Broad. Co.*, 735 F.2d 51, 53 (2d Cir. 1984). The Supreme Court, in an oft-quoted passage, has said that "although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern." *Gelbard v. United States*, 408 U.S. 41, 48 (1972) (footnote omitted); *see also Forsyth v. Barr*, 19 F.3d 1527, 1534 (5th Cir. 1994) (quoting *Gelbard*); *Lam Lek Chong*, 929 F.2d at 732 (same); *In re Motion to Unseal Elec. Surveillance Evidence*, 990 F.2d at 1018 (same); *In re Application of Nat'l Broad. Co.*, 735 F.2d at 53 (same); *In re New York Times (United States v. Biaggi)*, 828 F.2d 110, 115 (2d Cir. 1987) ("It is obvious that although Title III authorizes invasions of individual privacy upon compliance with certain stringent conditions, the protection of privacy was an overriding congressional concern."); *United States v. Cianfrani*, 573 F.2d 835, 856 (3d Cir. 1978) ("Congress's overriding interest in protecting privacy to the maximum extent possible is evident in Title III. The legislative history of the statute emphasizes the concern of its drafters that the Act preserve as much as could be preserved of the privacy of communications, consistent with the legitimate law enforcement needs that the statute also sought to effectuate.").

Reflecting this concern for privacy, the First and Third Circuits have held that the government may not introduce in a criminal prosecution wire or oral communications obtained in violation of Title III, or evidence derived therefrom, even when private parties having no connection to the government unlawfully intercepted the communications. *See* 18 U.S.C. § 2515;[9] *In re Grand Jury*, 111 F.3d at 1077; *United States v. Vest*, 813 F.2d 477, 481 (1st Cir. 1987). *Contra United States v. Murdock*, 63 F.3d 1391, 1404 (6th Cir. 1995), *cert. denied*, 517 U.S. 1187 (1996). Similarly, the D.C. and Ninth Circuits have held that § 2511(1)(c) and (d) prohibit a law enforcement officer from disclosing or using communications if the officer has reason to know that a private party intercepted such communications unlawfully, and that § 2517(1) and (2) do not establish an exception to this prohibition. *Berry v. Funk*, 146 F.3d 1003, 1012–13 (D.C. Cir. 1998); *Chandler v. United States Army*, 125 F.3d 1296, 1301–02 (9th Cir. 1997). *But see Forsyth*, 19 F.3d at 1545 (holding that, where government was unaware for the bulk of its investigation that communications were illegally intercepted, use and disclosure of illegally intercepted communications was permissible; suggesting in dicta that government could use and disclose communications even if it knew that the private party who provided the communications had intercepted them unlawfully). Additionally, several courts have found that the privacy interests protected by Title III outweigh the public's and the press's qualified right of access to materials filed in connection with pretrial proceedings, where such access would

[9] Section 2515 provides that no wire or oral communication or evidence derived therefrom may be introduced in any judicial, administrative, or legislative proceeding if "the disclosure of that information would be in violation of this chapter." Section 2515 does not cover electronic communications.

reveal communications intercepted by law enforcement and the parties to the intercepted communications have not yet had the opportunity to challenge the legality of law enforcement's action.[10]

For all of these reasons, we conclude that the phrase "use . . . appropriate to the proper performance of . . . official duties" under § 2517(2) comprehends use by the law enforcement officer in his or her law enforcement work. It does not follow, however, that Title III information can never be shared with persons who are not law enforcement officers. Courts have recognized that a "use . . . appropriate to the proper performance of [the law enforcement officer's] official duties" under § 2517(2) may involve the disclosure of Title III information to persons who are not law enforcement officers for the purpose of obtaining assistance in enforcing the law. For example, in obtaining a voice identification, a law enforcement officer may disclose electronic surveillance information to a potential witness without violating Title III. *See, e.g., Canon*, 404 F. Supp. at 848–49. Similarly, we believe that a law enforcement officer may disclose information obtained through a Title III intercept to an officer within the intelligence community in order to acquire intelligence information relevant to preventing, investigating, or prosecuting a crime. As we concluded with respect to grand jury materials, *see Disclosure of Grand Jury Material to the Intelligence Community*, 21 Op. O.L.C. at 161, despite statutory restrictions on the CIA's role in exercising domestic or law enforcement functions, the CIA may engage in activities, such as collecting and providing information in response to specific requests from law enforcement or general law enforcement requirements, that do not constitute the exercise of law enforcement powers. *Cf.* 50 U.S.C. § 403–5a (Supp. II 1996) (authorizing elements of the intelligence community, "upon the request of a United States law enforcement agency," to "collect information outside the United States about individuals who are not United States persons. Such elements may collect such information notwithstanding that the law enforcement agency intends to use the

[10] *See, e.g., Certain Interested Individuals*, 895 F.2d at 466–67 (recognizing qualified First Amendment right of access to affidavits filed in support of search warrant and containing Title III material, but upholding order redacting Title III materials where individuals had not been indicted), *In re Globe Newspaper Co.*, 729 F.2d 47, 53–54 (1st Cir. 1984) (upholding order closing bail hearing that would reveal Title III material, where defendants had not yet had an opportunity to test whether law enforcement legally obtained the Title III material), *Dorfman*, 690 F.2d at 1234–35, 1233 (holding that First Amendment does not require unsealing of Title III evidence submitted in a suppression hearing, noting that "the strict prohibition in Title III against disclosure of unlawfully obtained wiretap evidence would be undermined by public disclosure of wiretap evidence at a suppression hearing before the judge ruled on the lawfulness of the wiretaps"), *Cianfrani*, 573 F.2d at 856–57 & n.10 (acknowledging right of access to pretrial court proceedings, but concluding that limitations on disclosure are permissible where court has not yet determined the legality of the interception), *United States v. Shenberg*, 791 F. Supp. 292, 293–94 (S.D. Fla. 1991) (holding that, until admissibility of intercepted material has been determined, "the privacy interests of the defendants and the goal of Title III outweigh the public's interest in present access to the Title III intercepted conversations"); *In re Sealed Search Warrant for Cubic Corp.*, No. 88-2945M, 1989 WL 16075, at *2–4 (S.D. Cal. Feb. 22, 1989) (denying press access to portions of search warrant and affidavit reflecting intercepted communications, where parties to intercepted communications had not been charged with a crime), *see also Gerena*, 869 F.2d at 85–86 (acknowledging qualified First Amendment right of access to pretrial motion papers containing Title III materials; remanding for consideration of whether redaction or sealing of such materials was required to protect defendants' privacy and fair trial interests)

information collected for purposes of a law enforcement investigation or counter-intelligence investigation.'').

Thus, for example, a law enforcement officer may share electronic surveillance information arising in connection with a terrorism investigation with the intelligence community for the purpose of obtaining intelligence information concerning the structure of the terrorist organization or specific individuals who are under investigation.[11] Law enforcement officials are charged with investigating numerous crimes related to national security, and the assistance of the intelligence community may be essential to preventing, investigating, or prosecuting such crimes. *See, e.g.*, 28 U.S.C. § 533 note (1994) (''Subject to the authority of the Attorney General, the FBI shall supervise the conduct of all investigations of violations of the espionage laws of the United States by persons employed by or assigned to United States diplomatic missions abroad. All departments and agencies shall report immediately to the FBI any information concerning such a violation.''); 50 U.S.C. § 402a(c)(i)(A) (1994) (requiring agency heads to ensure that the FBI ''is advised immediately of any information, regardless of its origin, which indicates that classified information is being, or may have been, disclosed in an unauthorized manner to a foreign power or an agent of a foreign power''). Foreign intelligence information may also assist law enforcement in preventing, investigating, or prosecuting crimes with an extraterritorial component, such as various narcotics offenses or financial crimes.

In sum, we conclude that § 2517(2) permits a law enforcement officer to share information obtained through court-authorized electronic surveillance with members of the intelligence community where the officer seeks to obtain assistance in preventing, investigating, or prosecuting a crime. A disclosure in these circumstances would constitute a ''use . . . appropriate to the proper performance of [the law enforcement officer's] official duties.'' Disclosure of Title III information by law enforcement officers to members of the intelligence community, other than to obtain assistance in law enforcement activities, is not permitted by this section.[12]

[11] We discuss informational assistance by the intelligence community for illustrative purposes only. We do not intend to suggest that the intelligence community's role in assisting law enforcement is limited to providing informational support.

[12] We further conclude that Title III information lawfully disclosed by a law enforcement officer to a member of the intelligence community in order to obtain law enforcement assistance, or disclosed by one member of the intelligence community to another in order to carry out the request for assistance, may not thereafter be disclosed by the member of the intelligence community for intelligence purposes, unless the information has previously been publically disclosed. *Cf. infra* note 17 (distinguishing between disclosure in order to obtain law enforcement assistance and disclosure based on President's constitutional authority over national security or foreign relations). To be sure, Title III's explicit prohibitions on disclosure and use of intercepted communications extend only to illegally intercepted communications, 18 U.S.C § 2511(1)(c), (d) (criminalizing disclosure or use where an individual has reason to know that ''the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection''), and legally intercepted communications where the disclosure is made ''with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation,'' *id* § 2511(1)(e) Nevertheless, § 2517 authorizes disclosure of lawfully obtained wire evidence by individuals who are not law enforcement officers only in the specific circumstance of testimony under oath, § 2517(3), thereby implying ''that what is not permitted is forbidden, though not necessarily under pain of criminal punishment'' *Dorfman*, 690 F.2d at 1232,

C.

In 1980, this Office opined that Title III permitted the Department "to disclose tapes of court-authorized interceptions of wire communications in response to a proper request or demand by a congressional committee unless, in the Department's judgment, such disclosure would be improper because of [the Department's] duty faithfully to execute the criminal laws." *See Disclosure of Court-Authorized Interceptions of Wire Communications to Congressional Committees*, 4B Op. O.L.C. 627, 627 (1980). This Office reached this conclusion by reasoning that the proper performance of the official duties of Department personnel includes responding to requests for information from congressional committees, and that such disclosure would constitute a "use" of Title III information "appropriate to the proper performance of [the law enforcement officer's] official duties" under § 2517(2). The analysis underlying the conclusion of our 1980 opinion is in some tension with cases decided since the opinion was issued, *see, e.g., Webster*, 720 F.2d at 73; *In re Disciplinary Proceedings Against Spinelli*, 515 A.2d at 830–31; *see also Lam Lek Chong*, 929 F.2d at 734, and with the analysis of the text, legislative history, and purpose of Title III set forth above, *see supra* pp. 265–70. To the extent that the analysis reflected in the 1980 opinion suggests that the phrase "appropriate performance of [the law enforcement officer's] official duties" includes all actions that law enforcement officers might take in their official capacities, regardless of whether they relate to law enforcement, the analysis is inconsistent with that set forth above and we therefore disavow it.[13]

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see also In re Motion to Unseal Elec. Surveillance Evidence, 990 F.2d at 1018 ("Congress provided for very limited disclosure of any wiretap evidence that is obtained . When addressing disclosure of the contents of a wiretap, the question is whether Title III specifically authorizes such disclosure, not whether Title III specifically prohibits the disclosure, for Title III prohibits all disclosures not authorized therein."). If Congress intended to permit any person who lawfully receives Title III information to disclose it freely prior to its public disclosure in court, then § 2517(3), which authorizes a witness who has received such information to disclose it while giving testimony under oath, would be entirely superfluous

We recognize that, as a practical matter, Title III material may be reflected in the thinking of a member of the intelligence community (or a law enforcement officer who also has duties related to counterintelligence, *see supra* note 7), even if he or she does not disseminate the information The fact that a particular individual cannot purge a thought, however, does not mean that the dissemination of Title III information should be unrestricted

[13] As noted above, however, the U.S. Court of Appeals for the Eleventh Circuit has held that when Congress is effectively acting in a law enforcement capacity, such as when it considers impeachment, it may receive Title III information as an "investigative or law enforcement officer" under § 2517(1). *See In re Grand Jury Proceedings*, 841 F 2d at 1054 In dissent, Judge Jones took issue with this conclusion *Id* at 1057 ("I hold the view that to allow the House Committee to fall within this definition is to interpret the statute in a way in which Congress never intended and in a way in which it should not be construed ")

We note that the analysis of the 1980 opinion of this Office is at least implicitly inconsistent with the majority opinion in *Hastings* If law enforcement officers have a general duty to make Title III information available to other government entities that may benefit from it, then § 2517(2) would have authorized disclosure of the Title III information in question in *Hastings*, and the court never would have had to address whether Congress may receive information under § 2517(1) as an "investigative or law enforcement officer" when it considers impeachment

III.

We next consider the possible effect of § 104(a) of the National Security Act ("NSA"), which provides:

> To the extent recommended by the National Security Council and approved by the President, the Director of Central Intelligence shall have access to all intelligence related to the national security which is collected by any department, agency, or other entity of the United States.[14]

Section 1.6(a) of Executive Order No. 12333 implements the NSA and provides:

> The heads of all Executive Branch departments and agencies shall, in accordance with law and relevant procedures approved by the Attorney General under this Order, give the Director of Central Intelligence access to all information relevant to the national intelligence needs of the United States, and shall give due consideration to the requests from the Director of Central Intelligence for appropriate support for Intelligence Community activities.

36 C.F.R. 204 (1982). We have analyzed these provisions in a related memorandum[15] and will not repeat the analysis here. For purposes of this memorandum we will assume that, at least on some occasions, Title III electronic surveillance will yield information that would otherwise be disclosable under § 104(a) and the Executive Order. We conclude, however, for the same reasons that the NSA does not supersede or override restrictions on the use of grand jury information, that it also does not supersede or override the restrictions of Title III.

Title III prohibits every disclosure that it does not explicitly authorize. Nothing in the language of § 104(a)—a provision added to the National Security Act in 1992—refers to Title III information, there is nothing in the legislative history of that section that suggests that Congress considered Title III information, and the implementing executive order is qualified by the phrase "in accordance with law," which at least suggests that existing law was not modified. Moreover, as we noted in our recent memorandum concerning grand jury disclosure, *see supra* note 15, the legislative history of § 104(a) suggests that Congress itself intended no change in existing law.

The Supreme Court held in *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 573 (1983), that the Court would not construe a statute as overriding pre-existing rules of grand jury secrecy unless Congress affirmatively expressed its intent to

[14] 50 U.S.C. § 403-4(a) (1994). Section 104 of the National Security Act was added in 1992, as part of the Intelligence Authorization Act for Fiscal Year 1993. Pub. L. No. 102-496, § 705(a)(3), 106 Stat. 3188, 3192 (1992).

[15] *Disclosure of Grand Jury Material to the Intelligence Community*, 21 Op. O.L.C. at 161-67

do so. Title III does not have the historical roots of the grand jury secrecy rules. Nonetheless, a similar approach is appropriate. In *In re Application of National Broadcasting Co.*, 735 F.2d at 51, the Second Circuit considered a 1970 amendment to 18 U.S.C. § 2517(3). Section 2517(3) permits persons lawfully in possession of Title III information to disclose that information under oath in any proceeding held under the authority of the United States. Prior to 1970, such disclosure could be made only in criminal proceedings. Read literally, the 1970 amendment would permit civil litigants to compel the production of Title III information at trial. The Second Circuit found no evidence that Congress intended this result. Because of the privacy interests involved, the history of Title III as a compromise between those who wanted to ban wiretaps altogether and those who wanted broadly to permit electronic surveillance for law enforcement, the fact that Title III provided very limited exceptions to an otherwise complete ban on electronic surveillance, and the constitutional concerns that would be raised by a contrary conclusion, the Second Circuit refused to construe § 2517(3) to extend to civil litigants in the absence of evidence that Congress intended this result. 735 F.2d at 53–54.

In light of the privacy interests underlying Title III, and in the absence of at least some evidence that Congress intended to create a new exception to Title III's limits on disclosure, we believe it unlikely that a court would interpret § 104(a) to permit otherwise prohibited disclosure of Title III information to members of the intelligence community.

IV.

Finally, we believe that in extraordinary circumstances electronic surveillance conducted pursuant to Title III may yield information of such importance to national security or foreign relations that the President's constitutional powers will permit disclosure of the information to the intelligence community notwithstanding the restrictions of Title III. The legal basis for this conclusion is set forth in our memorandum on grand jury disclosures. *See* 21 Op. O.L.C. at 172–75; *see also Disclosure of Grand Jury Matters to the President and Other Officials*, 17 Op. O.L.C. 59 (1993). As we stated there, the Constitution vests the President with responsibility over all matters within the executive branch that bear on national defense and foreign affairs, including, where necessary, the collection and dissemination of national security information.[16] Because "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security

[16] *Cf. Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("The President, after all, is the 'Commander in Chief of the Army and Navy of the United States.' U.S. Const., Art. II, § 2. His authority to . . . control access to information bearing on national security . . . flows primarily from this constitutional investment of power . . . and exists quite apart from any explicit congressional grant. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."), House Permanent Select Committee on Intelligence, 106th Cong., *Record of Proceedings on H.R. 3829, the Intelligence Community Whistleblower Protection Act* 11 (Comm. Print 1998) (Statement of Randolph D. Moss).

of the Nation," *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)), the President has a powerful claim, under the Constitution, to receive information critical to the national security or foreign relations and to authorize its disclosure to the intelligence community. Where the President's authority concerning national security or foreign relations is in tension with a statutory rather than a constitutional rule, the statute cannot displace the President's constitutional authority and should be read to be "subject to an implied exception in deference to such presidential powers." *Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.). We believe that, if Title III limited the access of the President and his aides to information critical to national security or foreign relations, it would be unconstitutional as applied in those circumstances.

Accordingly, law enforcement officers who acquire information vital to national security or foreign relations would be obliged to convey it to the appropriate superiors (e.g., the United States Attorney), who would report it to the Attorney General or Deputy Attorney General, who would in turn report it to the President or his designee. The President (or appropriate officials acting on his behalf, such as the Attorney General) would be authorized to share such crucial information with his executive branch subordinates, including intelligence community officials, to the extent necessary to discharge his constitutional responsibilities.[17] Of course, this constitutional authority should not be exercised as a matter of course. Rather, it should only be exercised in extraordinary circumstances and with great care, and only where disclosure is necessary to the discharge of the President's constitutional responsibilities over matters of national security or foreign affairs. Even then, any contemplated exercise of this authority would necessitate careful consideration of the intrusion on privacy that might result.

Nor do we believe that disclosure of Title III information in these circumstances would violate the Fourth Amendment. Even if a disclosure of Title III information (as distinct from the seizure of the information) could otherwise violate the Fourth Amendment in some circumstances — a matter we do not address — we do not believe that this is an impediment to disclosure of Title III information of serious foreign affairs or national security import to the President. As we noted in our 1997 grand jury memorandum, the Supreme Court has recognized in other contexts that government actions overriding individual rights or interests may be justified where necessary to prevent serious damage to the national security or foreign policy of the United States. *See Haig*, 453 U.S. at 309 (invoking the principle that the Constitution's guarantees of individual rights do not make it a "suicide

[17] As previously noted, when law enforcement shares Title III information with the intelligence community to obtain assistance in law enforcement, that information may not subsequently be disclosed or used solely for intelligence purposes. *See supra* note 12. In contrast, when the President's constitutional authority over national security or foreign relations is the source of the authority to disclose Title III information to intelligence community officials, and when further disclosure within the community is necessary to the discharge of the President's constitutional responsibilities, Title III cannot constitutionally be applied to preclude such disclosure.

pact''); *American Communications Ass'n v. Douds*, 339 U.S. 382, 408–09 (1950) (to the same effect). We consider it very unlikely that the Court would conclude that the Fourth Amendment prohibits the disclosure of information vital to the national security or foreign relations of the United States.[18]

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

[18] Indeed, courts have found a foreign intelligence exception to the warrant requirement of the Fourth Amendment *See, e.g., United States v Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980) (foreign intelligence exception to the Fourth Amendment warrant requirement, in view of ''the need of the executive branch for flexibility, its practical experience, and its constitutional competence'' for foreign affairs), *cert. denied*, 454 U S 1144 (1982); *see also United States v. United States District Court*, 407 U S 297, 321–22 (1972) (warrant required for domestic security electronic surveillance, but Court explicitly disclaims any intent to decide whether warrant clause applies to surveillance of foreign powers or their agents). The Foreign Intelligence Surveillance Act of 1978, 50 U S C §§ 1801–1811, permits foreign intelligence surveillance on a showing of probable cause that differs from that applicable in criminal cases, and if the surveillance discloses criminal activity, the information obtained through the surveillance may be admissible in a subsequent criminal prosecution. *See United States v Isa*, 923 F 2d 1300 (8th Cir. 1991), *United States v Pelton*, 835 F 2d 1067 (4th Cir. 1987), *cert denied*, 486 U.S. 1010 (1988). Consistent with these cases, we believe that, to the extent that the Fourth Amendment might otherwise limit disclosure of Title III information, disclosure of information vital to national security or foreign affairs similarly is not limited by the Fourth Amendment

Section 235A of the Immigration and Nationality Act

Section 235A of the Immigration and Nationality Act requires the Attorney General to establish and maintain certain preinspection stations, provided the foreign countries concerned have consented to the establishment of such stations on their territory and provided that certain other preconditions have been satisfied.

Section 235A does not oblige the Attorney General or any other executive branch official to enter into diplomatic negotiations with foreign countries in order to obtain their consent to the establishment of preinspection stations on their territory, and it does not require that preinspection stations be established before the preconditions have been satisfied. Accordingly, section 235A does not unconstitutionally infringe on the President's authority to conduct diplomatic relations.

October 23, 2000

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
IMMIGRATION AND NATURALIZATION SERVICE

You have requested our opinion whether section 235A of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1225a, which requires the Attorney General to establish and maintain immigration preinspection stations in certain foreign airports, unconstitutionally infringes on the President's authority to conduct diplomatic relations with other nations. As we explain more fully below, we believe that section 235A requires the Attorney General to establish and maintain certain preinspection stations provided the foreign countries concerned have consented to the establishment of such stations on their territory and provided that certain other preconditions have been satisfied. Section 235A does not, however, oblige the Attorney General or any other executive branch official to enter into diplomatic negotiations with foreign countries in order to obtain that consent, and it does not require that preinspection stations be established before the preconditions have been satisfied.

BACKGROUND

Section 235A was added to the INA by section 123 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009–546, 3009–560 ("IIRIRA"). It mandates the establishment of immigration "preinspection" stations at certain foreign airports.[1] Prior to the passage of section 235A, the INA authorized, but did not require, the establishment of preinspection stations, and the relevant statutory provisions were neither modified

[1] "Preinspection" generally refers to immigration inspection procedures conducted at foreign ports of embarkation by United States authorities for passengers seeking entry into the United States In some instances, immigration preinspection is accompanied by U S. Customs clearance as well. Sites containing both immigration and customs inspection are generally called "preclearance" sites *See, e.g.*, Agreement Between the Government of the United States of America and the Government of Canada on Air Transport Preclearance, May 8, 1974, art I(a), 25 U S T 763 ("U S.-Canada Agreement"). Section 235A refers only to preinspection.

nor repealed by passage of section 235A. Specifically, under INA § 103(a)(7), 8 U.S.C. § 1103(a)(7), the Attorney General "may, with the concurrence of the Secretary of State, establish offices of the [INS] in foreign countries." Pursuant to that authority, the INS established and maintains preinspection stations at airports in Canada, Ireland, Bermuda, and several other ports of embarkation in the Caribbean. Establishing those stations involved entering into diplomatic negotiations with the foreign countries involved. *See, e.g.*, U.S.-Canada Agreement, 25 U.S.T. at 763.

In contrast, section 235A requires (and does not merely authorize) the establishment of preinspection stations. Section 235A(a)(1), which is entitled "New Stations," provides:

> Subject to paragraph (5), not later than October 31, 1998, the Attorney General, in consultation with the Secretary of State, shall establish and maintain preinspection stations in at least 5 of the foreign airports that are among the 10 foreign airports which the Attorney General identifies as serving as last points of departure for the greatest numbers of inadmissible alien passengers who arrive from abroad by air at ports of entry within the United States. Such preinspection stations shall be in addition to any preinspection stations established prior to the date of the enactment of such Act [September 30, 1996].

Additionally, section 235A(a)(4), which is entitled "Additional Stations," provides:

> Subject to paragraph (5), not later than October 31, 2000, the Attorney General, in consultation with the Secretary of State, shall establish preinspection stations in at least 5 additional foreign airports which the Attorney General, in consultation with the Secretary of State, determines, based on the data compiled under paragraph (3) and such other information as may be available, would most effectively reduce the number of aliens who arrive from abroad by air at points of entry within the United States who are inadmissible to the United States. Such preinspection stations shall be in addition to those established prior to the date of the enactment of such Act [September 30, 1996] or pursuant to paragraph (1).[2]

[2] Section 235A(a)(3), which is referenced in section 235A(a)(4), provides

Not later than November 1, 1997, and each subsequent November 1, the Attorney General shall compile data identifying —

(A) the foreign airports which served as last points of departure for aliens who arrived by air at United States ports of entry without valid documentation during the preceding fiscal years,

(B) the number and nationality of such aliens arriving from each such foreign airport, and

Continued

Finally, sections 235A(a)(1) and (4) are both "[s]ubject to" section 235A(a)(5), which identifies certain "[c]onditions":

> Prior to the establishment of a preinspection station the Attorney General, in consultation with the Secretary of State, shall ensure that—
>
> (A) employees of the United States stationed at the preinspection station, and their accompanying family members will receive appropriate protection;
>
> (B) such employees and their families will not be subject to unreasonable risks to their welfare and safety; and
>
> (C) the country in which the preinspection station is to be established maintains practices and procedures with respect to asylum seekers and refugees in accordance with the Convention Relating to the Status of Refugees (done at Geneva, July 28, 1951), or the Protocol Relating to the Status of Refugees (done at New York, January 31, 1967), or that an alien in the country otherwise has recourse to avenues of protection from return to persecution.

These requirements stand as conditions precedent to the statutory duty to establish any of the preinspection stations called for by sections 235A(a)(1) and (4): the Attorney General must ensure that they are met "[p]rior to the establishment of a preinspection station," INA § 235A(a)(5), and the statutory requirement that preinspection stations be established by defined dates is "[s]ubject to" these preconditions. *Id.* § 235A(a)(1) and (4).[3]

After the enactment of section 235A, a working group consisting of representatives from the INS and the Department of State was established to identify potential sites for preinspection stations. The working group ultimately identified sixteen potential sites (in fifteen countries) for preinspection stations that met the criteria set forth in section 235A.[4] The Commissioner of the INS sent a letter to the Department of State requesting that it ascertain, *inter alia*, whether countries containing the sites identified by the working group were willing to allow preinspection stations on their territory. The State Department then instructed

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(C) the primary routes such aliens followed from their country of origin to the United States

[3] Preinspection stations may be established for a variety of reasons, including passenger convenience *See, e g*, U.S -Canada Agreement, preamble, 25 U.S T at 764 (stating that "preclearance facilitates air travel between the two countries") It is clear from the text of section 235A that the preinspection stations it contemplates are intended to decrease the number of inadmissible aliens entering the United States The legislative history confirms this point *See* H.R. Rep No 104-469, 177-78 (1996) ("[P]assengers refused permission [at a preinspection station] to board [an airplane bound for the United States], on the ground that they do not have valid documents to be admitted or are otherwise inadmissible, will be prevented from even reaching a U.S port of entry, thus reducing the burden on INS inspection facilities and the likelihood that unauthorized aliens will enter the U S ")

[4] Those sites are· London, Mexico City, Tokyo, Amsterdam, Frankfurt, Paris, Taipei, Seoul, Caracas, Santo Domingo, Kingston, Sao Paolo, Rome, Guadalajara, Guatemala City, and Port au Prince *See* Memorandum for Chris Sale, Deputy Commissioner, INS, from Michael D. Cronin, Assistant Commissioner, INS, *Re· Preinspection Working Group* at 5–6 (July 22, 1997).

American embassies and consulates in the relevant countries to explore that issue with host country officials. In a letter dated January 20, 1998, the Assistant Secretary of State for Consular Affairs reported that "only one [country] (Jamaica) gave preliminary indication that it would support establishment of an INS preinspection station." Letter for Hon. Doris Meissner, Commissioner, INS, from Mary A. Ryan, Assistant Secretary for Consular Affairs, Dept. of State at 2 (Jan. 20, 1998) ("Ryan Letter").[5] To date, no preinspection stations have been established pursuant to section 235A.

DISCUSSION

To determine whether section 235A unconstitutionally intrudes on the President's authority to conduct foreign relations, we begin by identifying section 235A's precise requirements. For present purposes, this involves interpreting sections 235A(a)(1), (4), and (5). The first two provisions stipulate how many preinspection stations are to be established and maintained, the criteria those stations must meet, and the dates by which they are to be established. The third specifies certain conditions that must be met before a preinspection station is established.

Sections 235A(a)(1) and (4) both direct the Attorney General, in consultation with the Secretary of State, to "establish" (and, in the case of section 235A(a)(1), "maintain") preinspection stations meeting certain criteria. Section 235A(a)(1) provides that, by October 31, 1998, the Attorney General "shall establish and maintain preinspection stations in at least 5 of the foreign airports that are among the 10 foreign airports which the Attorney General identifies as serving as last points of departure for the greatest numbers of inadmissible alien passengers who arrive from abroad by air at ports of entry within the United States." *Id.* Section 235A(a)(4) provides that, by October 31, 2000, she "shall establish preinspection stations in at least 5 additional foreign airports which the Attorney General, in consultation with the Secretary of State, determines, based on the data compiled under paragraph (3) and such other information as may be available, would most effectively reduce the number of aliens who arrive from abroad by air at points of entry within the United States who are inadmissible to the United States." *Id.* Sections 235A(a)(1) and (4) thus appear to contemplate a two-step process. First, the Attorney General is to identify potential sites for preinspection stations that meet the criteria set out in the relevant section. Second, she is to establish such stations at a minimum number of sites by the dates prescribed.

[5] The Ryan Letter noted that "[o]ne country (Dominican Republic) indicated it might be willing to allow a preinspection station, but only if full preclearance was allowed, i.e. customs inspections as well." Ryan Letter at 2. The Ryan Letter further explained that fourteen countries were "queried" *Id.* at 2. As to the fifteenth country, Guatemala, the Ryan Letter explained that "[o]ur embassy in Guatemala has not yet been able to obtain an initial reaction from authorities in that country." *Id.*

Additionally, however, sections 235A(a)(1) and (4) both provide that their requirements are "[s]ubject to" section 235A(a)(5), which, in turn, sets out certain conditions that must be met before a preinspection station is established. *See supra* p. 279 (quoting section 235A(a)(5)). The ordinary meaning of "subject to" includes "governed or affected by." *Black's Law Dictionary* 1425 (6th ed. 1990). Thus, sections 235A(a)(1) and (4), including the deadlines they prescribe, are "governed or affected by" the conditions set out in section 235A(a)(5).[6] Once the Attorney General identifies a potential site for a preinspection station, the requirement that it be "established" by a particular date does not take effect until the Attorney General is able to ensure that the site meets section 235A(a)(5)'s conditions.

Section 235A does not specify precisely how the Attorney General is to ensure that the sites she selects for preinspection stations meet section 235A(a)(5)'s conditions or how she is to go about establishing and maintaining such stations once they meet those conditions. Because the preinspection stations are to be located in foreign countries, establishing those stations is not entirely within the control of the Attorney General or, indeed, the executive branch as a whole. Rather, preinspection stations can only be established after the United States obtains the consent of the foreign countries concerned. *See, e.g.*, U.S.-Canada Agreement, *supra*.[7]

For two reasons, we do not read section 235A as requiring the executive branch to seek or obtain such consent. First, such a reading would impose on the executive branch the obligation to achieve outcomes beyond its control. While the Executive may negotiate with foreign sovereigns in an effort to obtain their consent to the establishment of preinspection stations within their territory, it is not within the Executive's power to ensure that such consent is actually given. Similarly, the Attorney General's ability to ensure that section 235A(a)(5)'s conditions are met depends at least in part on the cooperation of the relevant foreign government, cooperation that she cannot guarantee. Providing "appropriate protection" to federal employees working at preinspection stations, protecting those employees and their families from "unreasonable risks to their welfare and safety," and ensuring that aliens in a foreign country receive appropriate "protection from return to persecution" are all undertakings that require the cooperation and participation of the foreign sovereign concerned. *Id.* Without that cooperation and participation, it is not possible for the Attorney General herself either to ensure

[6] *Cf American Rivers v. FERC*, 201 F 3d 1186, 1204 (9th Cir. 2000) ("We therefore interpret 'subject to paragraph (2)' to mean precisely what it says subsection 10(j)(1) is governed or affected by subsection 10(j)(2) ")

[7] This is true both as a practical matter and as a matter of customary international law Under the latter, it is generally well-settled that an agent of a state may not act on the state's behalf within foreign territory without the consent of the foreign sovereign *See, e.g.*, Ian Brownlie, *Principles of Public International Law* 306–07 (3d ed 1979); Hans Kelsen, *Principles of International Law* 317–18 (2d ed 1966) ("That the territory enclosed by the boundaries of a state legally belongs to this state or — as it is usually characterized — that it is under the territorial supremacy or sovereignty of this state means that all individuals staying on this territory are, in principle, subjected to the legal power of that state and only of that state.")

that section 235A(a)(5)'s conditions are met or to establish and maintain preinspection stations as required by sections 235A(a)(1) and (4).

We presume that section 235A is not intended to demand the impossible of the Attorney General. *See McNeil v. Time Ins. Co.*, 205 F.3d 179, 187 (5th Cir. 2000) ("It is a flawed and unreasonable construction of any statute to read it in a manner that demands the impossible."); *Ambassadors and other Public Ministers of the United States*, 7 Op. Att'y Gen. 186, 218 (1855) (Cushing, Att'y Gen.) ("[I]t is unreasonable to presume in any circumstances . . . that Congress intended to enact what is unreasonable."). Accordingly, we do not read section 235A as requiring the executive branch to obtain either foreign countries' consent to the establishment of preinspection stations or their cooperation in ensuring that section 235A(a)(5)'s conditions are met with respect to those stations.

Second, we do not read section 235A to require the Executive to enter into diplomatic negotiations to obtain foreign countries' consent to the establishment of preinspection stations, because such a requirement would unconstitutionally infringe on the President's foreign affairs power. The Constitution commits to the President the responsibility for conducting the nation's foreign affairs.[8] That responsibility includes the " 'exclusive authority to determine the time, scope, and objectives' " of all international negotiations. *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 41 (1990) (quoting 2 Pub. Papers of Ronald Reagan 1541, 1542 (1987) (President Reagan's statement on signing the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989)). If section 235A were construed to require the Executive to negotiate with foreign countries in an attempt to obtain their consent to the establishment of preinspection stations, it would unconstitutionally intrude on that exclusive authority. Such a reading would run afoul of the principle that Congress may not require the Executive to "initiate discussion with foreign nations" or "order[ ] the Executive to negotiate and enter into treaties" or other types of international agreements. *Earth Island Inst. v. Christopher*, 6 F.3d 648, 652–53 (9th Cir. 1993); *see* 2 Pub. Papers of William J. Clinton 1685, 1688 (1999) (President Clinton's statement on signing the National Defense Authorization Act for Fiscal Year 2000) ("Congress may not direct that the President initiate discussions or negotiations with foreign governments."). It would also impermissibly specify the precise subject matter of the Executive's communications with foreign governments. *See id.* at 2035, 2036 (President Clinton's statement on signing Legislation to Locate and Secure the

[8] *See* U.S. Const. art. II, §§ 1–3, *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy [i]s the province and responsibility of the Executive' ") (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)), *Alfred Lord Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705–06 n.18 (1976) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch."); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"), *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."); Thomas Jefferson, *Opinion on the Powers of the Senate Respecting Diplomatic Appointments* (Apr. 24, 1790), *in* 16 *The Papers of Thomas Jefferson* 378, 379 (Julian P. Boyd ed. 1961) ("The transaction of business with foreign nations is Executive altogether.").

Return of Zachary Baumel, a United States Citizen, and Other Israeli Soldiers Missing in Action) ("To the extent that this provision can be read to direct the Secretary of State to take certain positions in communications with foreign governments, it interferes with my sole constitutional authority over the conduct of diplomatic negotiations."); *2 Pub. Papers of William J. Clinton* 1815, 1815 (1996) (President Clinton's statement on signing the Sustainable Fisheries Act) ("Under our Constitution, it is the President who articulates the Nation's foreign policy and who determines the timing and subject matter of our negotiations with foreign nations.").[9] Accordingly, because section 235A does not expressly require the Executive to negotiate with foreign countries on the topic of preinspection stations, and because such a requirement would violate the constitutional separation of powers, we conclude that the statute should not be construed to so require.[10]

CONCLUSION

In sum, we conclude that under section 235A, the Attorney General is required to identify certain potential sites for preinspection stations that fit the criteria set forth in sections 235A(a)(1) and (4). Before any such station is established, she is also required to ensure that the conditions prescribed in section 235A(a)(5) are satisfied. A condition precedent both to the satisfaction of section 235A(a)(5)'s conditions and to the actual establishment of any preinspection station is that the foreign government concerned agree to the establishment of the station. Construing section 235A as requiring the executive branch to fulfill that condition would both oblige the Executive to achieve outcomes beyond its control[11] and infringe on the Executive's broad authority over foreign affairs. Accordingly, we do not read

[9] *See also Issues Raised by Foreign Relations Authorization Bill*, 14 Op O L C at 41 ("The President is the constitutional representative of the United States with regard to foreign affairs He manages our concerns with foreign nations, and must necessarily be most competent to determine when, how, *and upon what subjects* negotiations may be urged with the greatest prospect of success.") (emphasis added) (quoting Reports of the Senate Committee on Foreign Relations, S. Doc. No. 231, pt 8, 56th Cong., 2d Sess. 24 (1901)); H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 Geo. Wash L Rev. 527, 558 (1999) ("[T]he executive's power over negotiations vests in it the discretion to determine the goals as well as the modes of diplomacy.").

[10] Our approach on this point is consistent with the Supreme Court's admonition to interpret statutes so as to avoid constitutional questions where possible. *See Jones v. United States*, 524 U.S. 848, 857 (2000) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter") (quoting *United States ex rel Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)); *Jones v. United States*, 526 U S. 227, 239 (1999); *Califano v. Yamasaki*, 442 U S. 682, 693 (1979), *Crowell v Benson*, 285 U S 22, 62 (1932), *cf. Ashwander v TVA*, 297 U S 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.")

[11] We note that executive branch officials have, since the passage of section 235A, raised the issue of preinspection stations with a number of foreign governments After a joint INS-Department of State working group identified sixteen potential sites for preinspection stations, the State Department instructed American embassies and consulates in the countries concerned to explore the preinspection issue with host country officials. *See supra* pp 279–80 Only one of the countries queried gave preliminary indication that it would support the establishment of a preinspection station within its territory *See supra* pp 279–80 & note 5; Ryan Letter at 2 Without that support, the establishment of preinspection stations in those countries does not appear possible.

section 235A as requiring the Executive either to seek or to obtain the consent of foreign countries to the establishment of preinspection stations within their territory.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

Applicability of 18 U.S.C. § 207(d) to Certain Employees in the Treasury Department

The post-employment restrictions of 18 U.S.C. § 207(d), which cover officials paid "at" the rate for level I of the Executive Schedule, do not apply to officials paid at a higher rate. Those officials are instead subject to the restrictions of 18 U.S.C. § 207(c).

November 3, 2000

MEMORANDUM OPINION FOR THE ASSISTANT GENERAL COUNSEL
DEPARTMENT OF THE TREASURY

You have asked for our opinion whether the post-employment restrictions of 18 U.S.C. § 207(d) (1994), which apply to "very senior" executive branch personnel, cover certain employees of the Department of the Treasury ("Treasury") who are compensated at a rate of pay exceeding that for level I of the Executive Schedule ("level I"). *See* Letter for Randolph Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Kenneth R. Schmalzbach, Assistant General Counsel, Department of the Treasury (Mar. 17, 2000) ("Schmalzbach letter"). We conclude that § 207(d) does not apply to the Treasury Department employees specified in your letter.

I.

Section 207(d) states:

> (1) [A]ny person who . . . is employed in a position in the executive branch of the United States (including any independent agency) *at a rate of pay payable for level I of the Executive Schedule* . . . and who, within 1 year after the termination of that person's service in that position, knowingly makes, with the intent to influence, any communication to or appearance before any person described in paragraph (2), on behalf of any other person (except the United States), in connection with any matter on which such person seeks official action by any officer or employee of the executive branch of the United States, shall be punished as provided in section 216 of this title.
>
> (2) Persons who may not be contacted—The persons referred to in paragraph (1) with respect to appearances or communications . . . are—(A) any officer or employee of any department or agency in which such person served in such position within a period of 1 year before such person's service or employment with the United States Government terminated, and (B) any person

> appointed to a position in the executive branch which is listed in section 5312, 5313, 5314, 5315, or 5316 of title 5.

18 U.S.C. § 207(d) (emphasis added).

We understand that there are some Treasury employees, including some at the Internal Revenue Service ("IRS") and some at the Office of Thrift Supervision ("OTS"), whose salaries exceed the rate of pay for level I. *See* Schmalzbach letter at 2–3. These employees' salaries are authorized by three statutory provisions. First, the Secretary of Treasury may request approval from the Office of Management and Budget to disburse "critical pay" for one or more positions within the IRS. 5 U.S.C. § 9502(a) (Supp. IV 1998). Second, the Secretary may "fix the compensation of, and appoint individuals to, designated critical administrative, technical, and professional positions needed to carry out the functions of the Internal Revenue Service." *Id.* § 9503(a). Both of these provisions allow the employees' salaries to exceed the salary for level I officials ($157,000), but not that of the Vice President ($181,400). *See id.* §§ 9502(b) & 9503(a)(7). Third, the Director of OTS, a Treasury Department component, may fix the salaries of OTS employees "without regard to the provisions of other laws applicable to officers or employees of the United States." 12 U.S.C. § 1462a(h)(1) (1994).

The issue here is whether employees receiving, under these provisions, pay exceeding that for level I are subject to the general "cooling off" prohibition of 18 U.S.C. § 207(c) (1994 & Supp. IV 1998) or the broader prohibition of 18 U.S.C. § 207(d). Under § 207(c), for one year after leaving a "senior" position, a former official may not make any communication to or appearance before his or her former agency with an intent to influence, in connection with seeking official action, unless one of several statutory exceptions applies. Moreover, the scope of § 207(c) ordinarily is subject to narrowing, as to certain categories of former officials, if the Director of the Office of Government Ethics ("OGE") determines that an agency or bureau within another agency should be treated as a separate agency because it "exercises functions which are distinct and separate from the remaining functions of the department or agency and that there exists no potential for use of undue influence or unfair advantage based on past Government service." *Id.* § 207(h)(1). Insofar as § 207(c) would otherwise raise a bar, this determination enables anyone formerly employed in such a separate agency or bureau to make communications to or appearances before other components of the larger agency. You give, as an example, a representation before OTS by a former official of the IRS. Schmalzbach letter at 2. A former "very senior" official covered by § 207(d), however, may not make a communication to or appearance before any official of his or her former agency and is not eligible for any narrowing determination by OGE; and former very senior officials are under an additional prohibition reaching communications to or appearances before any official, whether at the former agency or another one, if the current official is in

an Executive Schedule position under 5 U.S.C.A. §§ 5312–5316 (West Supp. 2000).

II.

The text of subsection (d) is unambiguous. Because the bar applies to "any person . . . employed in a position in the executive branch of the United States (including any independent agency) *at* a rate of pay payable for level I of the Executive Schedule," 18 U.S.C. § 207(d)(1) (emphasis added), the language signifies that § 207(d) applies only to employees whose pay is the same as that of a level I official.[1]

An examination of § 207 as a whole buttresses this interpretation. The language describing the scope of subsection (d) is notably different from that of subsection (c), which includes employees whose basic rate of pay "is *equal to or greater than* the rate of basic pay payable for level V of the Senior Executive Service." 18 U.S.C. § 207(c)(2)(A)(ii) (emphasis added); *see also id.* § 207(c)(2)(A)(iv) (stating that subsection (c) also applies to officers of the uniformed services whose pay grade "is pay grade 0–7 or above"). Congress presumably was aware that various statutes authorized pay above that for level I, yet chose the narrower and more targeted language of subsection (d). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Bates v. United States*, 522 U.S. 23, 29–30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also Crandon v. United States*, 494 U.S. 152, 166–67 (1990) (looking to the ethics statute as a whole in interpreting a particular provision).

This reading may appear to lead to anomalous consequences. Section 207 uses a former official's salary as a proxy for ability to exercise influence, so that higher salaries in general lead to greater post-employment restrictions. *See* Memorandum for Susan F. Beard, Acting Deputy Assistant General Counsel, Department of Energy, from Daniel L. Koffsky, Acting Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of the Post-Employment Restrictions of 18 U.S.C. § 207(c) to Assignees Under the Intergovernmental Personnel Act* at 3–4 (June 26, 2000). Here, former officials who received pay above level I would be subject to lesser restrictions than the lower-paid former officials who were paid at level I. This apparent anomaly, however, can be resolved in light of the statutory purpose. The officials paid at level I, listed in 5 U.S.C.A. § 5312, include the members of the cabinet, the Director of the Office of Management and Budget, and the Commissioner of Social Security. Section 207(d) also specifically applies to the Vice President of the United States. *See* 18 U.S.C. § 207(d)(1)(A). As you observe, the Treasury employees in question here lack

[1] The legislative history, which scarcely refers to subsection (d), does not suggest a broader interpretation.

the authority and stature of level I officials, whose positions create the potential "to exercise unusual continuing influence over former Level I colleagues for a period of time after leaving the Government." Schmalzbach letter at 4. Unlike the Secretary of the Treasury, these IRS employees are typically hired for temporary work and do not have offices of substantial, continuing authority. *See, e.g.*, 5 U.S.C. § 9503. Although the tenure of the OTS employees in question is not similarly limited by statute, they are subordinate to the Director of OTS, who himself is subordinate to the Secretary. Thus, these OTS employees also lack the stature of level I officials. In sum, the Treasury employees in question, while receiving a higher salary than officials paid at level I, will have less ability to exercise post-employment influence than those listed in 5 U.S.C.A. § 5312, and their former positions will also be far less likely to create an appearance of undue influence.

In arriving at this conclusion, we are also mindful, too, that "[c]riminal statutes should be given the meaning their language most obviously invites. Their scope should not be extended to conduct not clearly within their terms." *United States v. Williams*, 341 U.S. 70, 82 (1951) (plurality opinion); *see also Crandon*, 494 U.S. at 168. Because the apparent anomaly can be reconciled, we would not give § 207(d) a broader reading than the language would suggest.

One problem remains. If the salary of the Treasury employees in question had been set *exactly* at the rate for level I, subsection (d) by its terms would seem to apply. Although the Treasury employees happen now to be paid at a rate that *exceeds* the salary fixed for level I, *see* Schmalzbach letter at 3, other employees in the future might receive pay exactly at the level I rate. Thus, lowering the pay for one of these subordinate positions to the rate for level I would have the truly anomalous effect of increasing the post-employment restrictions. This result, however, follows from the precise language chosen by Congress. Furthermore, in view of the present opinion, any future decision to set a salary exactly at the rate for level I will presumably reflect at least an administrative determination that the more stringent post-employment restrictions should apply.[2]

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

[2] As this discussion indicates, we do not believe that § 207(d) applies exclusively to officials listed in 5 U.S.C.A. § 5312, *see* Schmalzbach letter at 1 n.1, but rather to any executive branch employee who is paid the same level I rate of pay that the officials listed in 5 U.S.C.A. § 5312 receive.

Definition of "Candidate" Under 18 U.S.C. § 207(j)(7)

For purposes of the "on behalf of a candidate" exemption contained in section 207(j)(7) of title 18, a successful candidate should be viewed as seeking office until the candidate assumes the office to which he or she has been elected.

November 6, 2000

MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF GOVERNMENT ETHICS

You have asked for our opinion regarding the application of the exemption contained in 18 U.S.C. § 207(j)(7) (Supp. IV 1998) to the activities of certain former executive branch employees who serve on a Presidential transition team. Specifically, you have asked us when an individual ceases to be a candidate for purposes of this exemption.

Subsection (c) of § 207 prohibits certain former officers or employees of the executive branch from communicating on behalf of any person except the United States, within one year of termination, with the department or agency in which the officer or employee served. In the case of certain "very senior personnel of the executive branch," including the Vice President, subsection (d) extends this ban to communications to certain high level officials in other agencies. Subsection (j)(7)[1] provides an exemption from this restriction for individuals who communicate or appear solely on behalf of a candidate in his or her capacity as a candidate so long as, at the time of the communication or appearance, the person is not employed by a person or entity other than the candidate (except for a person or entity who only represents or advises candidates). Subsection (7)(j)(C)(i) defines the term "candidate" to mean:

> [A]ny person who seeks nomination for election, or election, to Federal or State office or who has authorized others to explore on

[1] Subsections (j)(7)(A), (B) provide:

(A) Except as provided in subparagraph (B), the restrictions contained in subsections (c), (d), and (e) shall not apply to a communication or appearance made solely on behalf of a candidate in his or her capacity as a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party

(B) Subparagraph (A) shall not apply to —

(i) any communication to, or appearance before, the Federal Election Commission by a former officer or employee of the Federal Election Commission; or

(ii) a communication or appearance made by a person who is subject to the restrictions contained in subsections (c), (d), or (e) if, at the time of the communication or appearance, the person is employed by a person or entity other than —

(I) a candidate, an authorized committee, a national committee, a national Federal campaign committee, a State committee, or a political party, or

(II) a person or entity who represents, aids, or advises only persons or entities described in subclause (I)

18 U.S C. § 207(j)(7)(A), (B).

> his or her behalf the possibility of seeking nomination for election, or election, to Federal or State office.

18 U.S.C. § 207(j)(7)(C)(i).

The exemption provided for in § 207(j)(7) was added to the ethics statute in August of 1996 by the Office of Government Ethics Authorization Act of 1996. *See* 110 Stat. 1566, 1567 (1996). At a minimum, the definition of "candidate" set forth in subsection (j)(7)(C)(i) explicitly establishes that a person holds the status of a candidate so long as he "seeks . . . election" to office. Ordinarily, a candidate would be thought to seek election to an office up to the point at which his or her election to that office is determined. In the case of the office of President and Vice President, the actual election of the candidate takes place through the electoral college. *See* U.S. Const. art. II, § 1 & amend. XII. After the state electors cast their votes, the outcome of the election is declared by the President of the Senate, who, in the presence of the entire Congress, counts the votes. U.S. Const. amend. XII; *see also* 3 U.S.C. § 15 (1994) (after President of the Senate counts the vote, his announcement will be deemed a sufficient declaration of the persons elected to President and Vice President). You have informed us that the votes of the electors will likely be tallied on January 6, 2001. *See also* 3 U.S.C. § 15. Under the Constitution, until the votes of the electors have been tallied and certified, all candidates for President and Vice President retain their status as candidates. Neither the President nor the Vice President is "elected" until the conclusion of that procedure. *See* U.S. Const. art. II, § 1 & amend. XII.

You have noted, however, that "even if a candidate continues to be a candidate up to the day of the presentation of the electors' votes to the Congress, this would still leave a significant period of time in which transition activities will continue prior to the day of the inauguration of the President." Letter for Randolph D. Moss, Assistant Attorney General , Office of Legal Counsel, from F. Gary Davis, Acting Director, Office of Government Ethics at 2 (Oct. 6, 2000). Implicit in your letter is the question whether a candidate for President or Vice President can be deemed a "candidate" up until the point of inauguration in order to permit an orderly and effective transition from one elected official to another.[2] The general understanding of a "candidate" is "one that presents himself or is presented by others . . . as suitable for and aspiring to an office." Webster's Third New International Dictionary at 325 (1993). This is consistent with the statutory definition, which refers to a person who "seeks nomination for election, or election." To "elect," in the context of an election to office, is generally defined as "to

[2] We previously addressed the issue of whether the one year bar prohibiting certain former government employees from contacting their former agency, contained in 18 U.S.C. § 207(c), applied to former government employees who were working for the President-elect's transition team *See Applicability of 18 U.S.C. § 207(c) to President-Elect's Transition Team*, 12 Op. O.L.C 264 (1988) However, that advice predated the enactment of § 207(j)(7)'s exemption.

choose (a person) for an office," and when used as an adjective ordinarily means "chosen for office or position but not yet installed." *Id.* at 731. This would appear to support a reading of the statute that would terminate a person's status as a candidate once the final selection had taken place, even though he or she had not yet been sworn into office. As previously discussed, for a presidential candidate, this would occur on January 6th.

However, in light of the legislative history and purpose of this statutory amendment, giving the term "candidate" its ordinary meaning in applying this exemption creates an irrational distinction between those communications made by former government officials and employees on behalf of a candidate prior to that candidate's election and those communications that take place after the election, when the candidate has become the President-elect or Vice President-elect. When the literal interpretation of a statute would produce an absurd result, the words at issue should be given alternative meaning to avoid such a consequence. *Green v. Bock Laundry Machines Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring). *See also South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998). In this case, not only do the legislative history and purpose of this statutory amendment support an application of the word "candidate" that is broader in scope than its ordinary meaning, extending until the person in question assumes office, but they also make clear that a narrower interpretation would yield a bizarre result.

The House Report to the ethics amendment explains that:

> The purpose of the post-employment restrictions for former staff is to prevent pecuniary gain by individuals due to a prior relationship within his or her former office. In the case of a leave of absence or resignation to work on a campaign, however, the "cooling-off" period should not apply.

H.R. Rep. No. 104–595, at 9 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1356, 1364. Accordingly, communications or appearances "made solely on behalf of a candidate . . . are excepted from the post-employment restrictions." *Id.* Congress enacted this exception to ensure that the ethics statute did not have an unintended, and wholly irrational, consequence. Without it, a person who worked for a member of Congress or the President or Vice President, and then joined that person's campaign team, would have committed a criminal offense if he or she communicated with that person or his or her staff within a one year period. As Senator Levin explained:

> What we overlooked at the time was the situation where congressional staff and top executive department officials may leave their Government positions to work on the reelection campaigns of the

> persons for whom they worked while in the Government. For example, the administrative assistant of one of our colleagues may take a leave of absence and work on the reelection campaign for that same Member. If that happens, that administrative assistant should not be barred from contacting the Member or his staff on behalf of the campaign, since the interests of the campaign and the Member are really the same. Such a bar, which was never intended, would basically make such employment impossible.

142 Cong. Rec. 18,869, 18,871 (1996). Senator Cohen, in articulating his support of the bill, made it clear that fear of a former government employee taking unfair advantage of his access to his former office was not an issue:

> [L]eaving Government service to work on a campaign doesn't involve the kind of abuse the revolving door rules are intended to address, that is, individuals trading on Government information and access for private gain.

Id. at 18,870. Representative Canady further articulated the principle behind the amendment as

> one of allowing necessary communications integral to any campaign-related employment. Therefore, where the intention of the former employee is to participate in the electoral process subject to the narrow exception established by the protection of this bill, the revolving door restrictions of title 18 will no longer apply.

Id. at 12,943, 12,945. Senator Levin also emphasized that the amendment would in no way undermine the general purposes of the ethics statute because:

> this bill would not permit [a] former staff person to contact his or her former office during the 1 year cooling off period on behalf of a client for whom he is serving as a lobbyist. The exception this bill makes is only for contacts by former staff on behalf of the campaign organizations of the Member or President-Vice President for whom the staff person previously worked. This limitation avoids giving an otherwise reasonable exception an unintended consequence.

Id. at 18,871.

Communications made by individuals who work solely for a candidate after the election but prior to that candidate being sworn into office are equally as unlikely to result in private pecuniary gain for the former government employee

and serve the same legitimate purposes as communications made by such individuals prior to the voting that determines the winner of the election. The purpose of the subsection (j) exemption is to permit communications necessary to the campaign-related responsibilities of the employee. In light of these concerns and policies, we can discern no rational basis, under the subsection (j) exemption, for permitting a former government official to communicate with his former office on behalf of a candidate prior to January 5th, but prohibiting that same communication after the candidate's formal election on January 6th. In fact, it would seem logical that the principles of the ethics statute are even less at risk when the communication is made exclusively on behalf of a President-elect, rather than on behalf of a mere candidate for that office. To construe the statute to create such a distinction would be to create an absurdity.[3]

We acknowledge that the case of a former executive branch agency official or employee who joins a President-elect's transition team to assist with issues related to his or her former agency presents a slightly different situation than a former presidential, vice presidential or congressional staff member. In this situation, even absent the (j)(7) exemption, the former agency official would be able to communicate freely with his or her "candidate" and his or her candidate's office. Instead, the prohibition would apply to his or her communications with another government agency with which the President-elect or Vice President-elect presumably has an interest in dealing. Congress may not have had this precise situation in mind when it passed subsection (j)(7). However, the policy behind prohibiting a former government official from exercising undue influence on behalf of a private client or otherwise trading on government information or access for private gain, which is the concern expressed by Congress in the legislative history of the amendment, simply does not apply in this context either.

In sum, permitting an employee successfully to carry out his or her transition responsibilities may be even more crucial to the effective operation of our political system than the need to permit an employee to fulfill his or her campaign responsibilities. As we have previously acknowledged, the orderly transfer of the executive powers "is one of the most important public objectives in a democratic society." 12 Op. O.L.C. at 264. The transition period insures that the candidate will be able to perform effectively the important functions of his or her new office as expeditiously as possible. Therefore, to give full effect to the clear congressional intent behind subsection (j), it is apparent that individuals who otherwise meet the specifications and limitations of § 207(j)(7)(A) & (B) should be deemed to be communicating on behalf of a "candidate" through the point at which that "candidate" assumes the office to which he or she was elected.[4] In other words,

[3] This conclusion is consistent with our discussion of the purpose of the Act contained in the opinion cited in footnote 2.

[4] Certainly the same policy concerns do not apply to a candidate who is not elected to the office which he or she seeks Rather, a candidate who is not elected to office would lose his or her status as a candidate at the point the outcome of the election was finalized

for purposes of § 207 (j), a successful candidate should be viewed as seeking office until he or she actually assumes that office. After that point, any communications by the former employee on behalf of the office holder will be communications on behalf of the "United States," and therefore exempt from the prohibitions of the Act. *See* 18 U.S.C. § 207(c)(1).

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

State Taxation of Income of Native American Armed Forces Members

The Soldiers' and Sailors' Civil Relief Act prohibits States from taxing the military compensation of Native American armed forces members who are residents or domiciliaries of tribal reservations from which they are absent by reason of their military service.

November 22, 2000

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF DEFENSE

This memorandum responds to your letter to the Acting Associate Attorney General requesting advice as to whether States may tax the military compensation earned by Native American service members who are residents or domiciliaries of federally recognized tribal reservations. As we explain more fully below, we conclude that the Soldiers' and Sailors' Civil Relief Act, construed in light of general principles of federal Indian law, prohibits States from taxing the military compensation of Native American service members who are residents or domiciliaries of tribal reservations, and who are absent from those reservations by virtue of their military service.

BACKGROUND

Pursuant to agreements between the States and the Department of Treasury entered into under 5 U.S.C. § 5517 (1994 & Supp. IV 1998),[1] the Department of Defense generally withholds state income tax from the military compensation of service members, including Native American service members, unless the member appropriately claims exemption. Several members of Congress recently wrote to the Secretary of Defense, the Attorney General, and the Secretary of the Interior, asking for their personal intervention to ensure that Native American service members who claim a federally recognized Indian reservation as their legal

[1] 5 U S C § 5517 provides, in pertinent part:

(a) When a State statute—

(1) provides for the collection of a tax either by imposing on employers generally the duty of withholding sums from the pay of employees and making returns of the sums to the State, or by granting to employers generally the authority to withhold sums from the pay of employees if any employee voluntarily elects to have such sums withheld; and

(2) imposes the duty or grants the authority to withhold generally with respect to the pay of employees who are residents of the State; the Secretary of the Treasury, under regulations prescribed by the President, shall enter into an agreement with the State within 120 days of a request for agreement from the proper State official The agreement shall provide that the head of each agency of the United States shall comply with the requirements of the State withholding statute in the case of employees of the agency who are subject to the tax and whose regular place of Federal employment is within the State with which the agreement is made. In the case of pay for service as a member of the armed forces, the preceding sentence shall be applied by substituting "who are residents of the State with which the agreement is made" for "whose regular place of Federal employment is within the State with which the agreement is made."

domicile are not subject to such withholding. *See* Letter for Hon. William S. Cohen, Secretary of Defense, Hon. Janet Reno, Attorney General, and Hon. Bruce Babbitt, Secretary of the Interior, from Hon. George Miller, Senior Democratic Member, House Committee on Resources, et al. (July 18, 2000) ("Miller letter"). The letter stated that under section 514 of the Soldiers' and Sailors' Civil Relief Act ("SSCRA"), ch. 581, 56 Stat. 769, 777 (codified as amended at 50 U.S.C. app. § 574 (1994)), a military service member "does not lose his permanent residence or domicile solely because of [his] absence [from the place of residence or domicile] in compliance with military orders," and it maintained that the SSCRA "applies to Native Americans as it does to all other Americans residing in lands under the jurisdiction of the United States." Miller letter at 2. Accordingly, the letter asserted, "[a] Native American's domicile should therefore remain unchanged by military service, and a tribal member who resides on a reservation would enjoy the same tax status (i.e. immunity) he had enjoyed in his home state." *Id.* The letter concluded by stating that "[t]he Department [of Defense] should change these [Native American] service members' [income tax] withholding forms to reflect an exemption from state withholding as authorized in the Treasury Financial Manual instructing federal agencies on deductions and withholding issues," and it urged that "no greater burden of proof should be placed on tribal members to establish residency than on any other member of the military." *Id.* at 3.

After receiving the Miller letter, you wrote to the Acting Associate Attorney General requesting an opinion from the Department of Justice as to the applicability of the SSCRA to Native American service members who claim a federally recognized tribal reservation as their residence or domicile. *See* Letter for Dan Marcus, Acting Associate Attorney General, from Douglas A. Dworkin, General Counsel, Department of Defense (Aug. 9, 2000) ("Dworkin letter"). Your letter noted that while no federal court has yet addressed this question, three state tribunals have concluded that they lacked the authority to impose an income tax on the military compensation of Native Americans domiciled on tribal reservations within their respective States. *Id.* at 1.[2] In order to determine whether to continue withholding state income tax from the military pay of those Native American service members who claim a tribal reservation as their residence or domicile, you asked the Department of Justice to provide its opinion on the matter.[3]

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[2] *See Fatt v. Utah State Tax Comm'n*, 884 P.2d 1233 (Utah 1994); *Turner v. Wisconsin Dep't of Revenue*, WI St Tax Rep (CCH) P 202-744 (1986), Letter for Emil B. Beck, from Gregory B Radford, Assistant Director, Personal Taxes Division, North Carolina Department of Revenue, *Re: Docket No. 99-386* (Jan. 25, 2000)

[3] Your letter asked the Department to address three sets of questions:

1 Is a tribal reservation a residence or domicile in a "State, Territory, possession, or political subdivision of any of the foregoing" such that the provisions of 50 U S C app. § 574 preserve it as the exclusive residence or domicile of a person who is away from such residence or domicile pursuant to military orders? Is the member not also a resident or domiciliary of the state in which the reservation is located?

2. Is the military compensation earned by a Native American while away from his or her domicile on a tribal reservation pursuant to military orders deemed to have been earned exclusively on the reserva-

Continued

DISCUSSION

Determining whether States may, consistent with the SSCRA, tax the military compensation of Native American service members who claim a federally recognized tribal reservation as their place of domicile or residence requires interpreting relevant provisions of the SSCRA against the backdrop of general principles of federal Indian law. We therefore outline some relevant aspects of those general principles before proceeding to discuss the SSCRA and its application here.

General Principles of Federal Indian Law

Historically, the Supreme Court has applied two related principles to States' attempts to exercise jurisdiction over Indian tribes, their reservations, and their members. The first is that of Indian sovereignty. This principle is generally associated with Chief Justice Marshall's explanation that Indian nations are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). Building on *Worcester*, subsequent Supreme Court decisions held that "[i]t followed from this concept of Indian reservations as separate, although dependent nations, that state law could have no role to play within the reservation boundaries." *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 168 (1973); *see County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 257 (1992) (describing the Court's decision in *Worcester* as concluding that "within reservations state jurisdiction would generally not lie").

More recently, however, the Indian sovereignty doctrine has lost some of its "independent sway," *County of Yakima*, 502 U.S. at 257, and has given way to a second principle: federal preemption. *See McClanahan*, 411 U.S. at 172 ("[T]he trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption."). The source of this principle is the Constitution, which assigns to the federal government the responsibility for regulating commerce with Indian tribes and for treaty-making. *See* U.S. Const. art. I, § 8, cl. 3; *id.* art. II, § 2, cl. 2; *see also McClanahan*, 411 U.S. at 172 n.7; *Williams v. Lee*, 358 U.S. 217, 219 n.4 (1959). In light of that grant of federal authority, cases raising questions about the boundaries of permis-

tion, so as to exempt it from income taxation by the state in which the reservation is located under the rule set forth in *McClanahan* [*v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973),] and subsequent cases? If so, does this apply to all tribal reservations of federally recognized tribes?

3. If it is the opinion of the Department of Justice that Native Americans who claim a tribal reservation as their domicile are not subject to state income tax with respect to their military compensation, will that opinion serve as the basis for us to terminate state tax withholding if a member certifies that he or she meets the stated criteria?

Dworkin letter at 2.

sible state jurisdiction over Indian tribes, their members, and their lands are now typically resolved by giving "individualized treatment" to the "particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). The Indian sovereignty doctrine remains relevant, however, as "a backdrop against which the applicable treaties and federal statutes must be read." *McClanahan*, 411 U.S. at 172.In the area of state taxation, the Supreme Court's application of the federal preemption and Indian sovereignty principles has yielded certain specific rules, two of which are relevant to the matter before us. First, "absent cession of jurisdiction or other federal statutes permitting it," States may not tax "Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation." *Mescalero*, 411 U.S. at 148 (describing the rule announced in *McClanahan*, 411 U.S. at 164); *County of Yakima*, 502 U.S. at 258 ("[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation [in this area] unless it has 'made its intention to do so unmistakably clear.'") (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985)).[4] Second, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero*, 411 U.S. at 148–49. In the state taxation context, this second rule means that if a Native American resident of a tribal reservation earns income outside that reservation but within the State in which the reservation is located, then, absent federal law to the contrary, the State may tax that income. *Id.*[5]

In cases not squarely controlled by these two rules, the Court applies the federal preemption principle against the backdrop of the Indian sovereignty principle. Preemption analysis asks whether the state law or action at issue "stands as an obstacle to the accomplishment and execution of the full purposes and objectives

[4] Before announcing this rule, the *McClanahan* Court analyzed, *inter alia*, the particular nineteenth century treaty that the federal government had entered into with the Navajo Nation, and the Arizona Enabling Act, both of which contained language indicating that the federal government's authority over Navajo reservations was exclusive. *See* 411 U.S. at 173–75. Thus, *McClanahan* might be read as having turned on a case-specific preemption holding — a determination that the treaty, enabling act, and other federal legislation relevant to the case preempted the state taxation at issue But the Court did not, in fact, find any specific federal preemption. As then — Associate Justice Rehnquist later explained, "[a]lthough no legislation directly provided that Indians were to be immune from state taxation under these circumstances, the enactments reviewed were certainly suggestive of that interpretation . The [*McClanahan*] Court therefore declined to infer a congressional departure from the prior tradition of Indian immunity absent an express provision otherwise." *Washington v Confederated Tribes*, 447 U.S. 134, 179 (1980) (Rehnquist, J , concurring in part and dissenting in part); *see* Felix Cohen, *Handbook of Federal Indian Law* 269–70 (1982 ed) (noting that *McClanahan* held the state tax at issue to intrude on a sphere of activities subject only to federal and tribal authority, "despite the lack of any specific conflict with tribal law") That is, *McClanahan* announced a generally applicable default rule that prohibits state taxation of "reservation lands and reservation Indians" except where authorized by Congress, *County of Yakima*, 502 U S at 258, and it analyzed the relevant treaty, enabling act, and other legislation simply to confirm that Congress had not given such authorization in that case *See* Thomas C Mundell, *The Tribal Sovereignty Limitation on State Taxation of Indians: From* Worcester *to* Confederated Tribes *and Beyond*, 15 Loy. L.A L. Rev 195, 216–17 (1982)

[5] It is not clear whether this rule also extends to off-reservation income generated outside the State where the reservation is located *See infra* note 11

of Congress." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)); *see Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977). To the extent the analysis involves the interpretation of a federal statute, the Court has emphasized that statutes affecting Indians "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. at 766; *see Bryan v. Itasca County*, 426 U.S. 373 (1976); *Choate v. Trapp*, 224 U.S. 665 (1912). "[I]n examining the preemptive force of the relevant federal legislation," courts "are cognizant of both the broad policies that underlie the legislation and the history of tribal independence in the field at issue." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176 (1989).

The Soldiers' and Sailors' Civil Relief Act

The SSCRA was enacted in 1940. *See* Act of Oct. 17, 1940, ch. 888, 54 Stat. 1178 (codified as amended at 50 U.S.C. app. §§ 501–593 (1994)). It was "[i]n many respects . . . a reenactment" of legislation that had been passed in 1918 and had expired at the end of World War I. *Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993); *see* Act of Mar. 8, 1918, ch. 20, 40 Stat. 440 ("Act of Mar. 8, 1918").[6] Noting the substantial similarities between the 1918 and 1940 statutes, the Supreme Court observed that the legislative history of the former could provide useful indications of congressional intent with respect to the latter. *See Boone v. Lightner*, 319 U.S. 561, 565 (1943). That earlier legislative history indicates that Congress intended to "protect[ ] . . . persons in military service of the United States in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation." Act of Mar. 8, 1918, § 100.

Congress amended the SSCRA in 1942, in part in order to "make available additional and further relief and benefits to persons in the military and naval forces." S. Rep. No. 77–1558, at 2 (1942). The 1942 amendments added section 514, ch. 581, 56 Stat. 769, 777 (codified as amended at 50 U.S.C. app. § 574 (1994)). The first two sentences of the current version of that provision are reproduced below:

> For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State, Territory, possession, or political subdivision of any of the foregoing, or by the District of Columbia, such person shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or

[6] Both the House and Senate Reports accompanying the SSCRA's passage in 1940 described it as "in substance, identical with the [1918 Act]." H.R. Rep No 76–3001, at 3 (1940), S Rep. No 76–2109, at 4 (1940).

> political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District, and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State, Territory, possession, or political subdivision, or district.

50 U.S.C. app. § 574(1).[7] Section 514's first sentence generally provides that, for purposes of state and local income and property taxation, a military service member's residence in a "State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia," shall not change solely because the service member is absent from his place of residence in compliance with military orders. *Id.* The second sentence generally provides that, for purposes of income and property taxation imposed by any "State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia," military compensation earned within such a jurisdiction by a service member who does not reside there shall not be deemed income earned within the jurisdiction. *Id.* Taken together, these provisions have the effect, inter alia, of "prevent[ing] multiple State taxation of the property and income of military personnel serving within various taxing jurisdictions through no choice of their own." H.R. Rep. No. 77–2198, at 6 (1942); S. Rep. No. 77–1558, at 11.

In the legislative history to the SSCRA's 1942 amendments, Congress made clear that "[a]ny doubts that may arise as to the scope and application of the act should be resolved in favor of the person in military service involved." H.R. Rep. No. 77–2198, at 2; S. Rep. No. 77–1558, at 2. The Supreme Court, in turn, has emphasized that the SSCRA "is always to be liberally construed," *Boone*, 319 U.S. at 575, and should be read "with an eye friendly to those who dropped

[7] Although the concepts of "residence" and "domicile" may in some settings have slightly different legal consequences, *see Black's Law Dictionary* 1309 (6th ed. 1990) (comparing and distinguishing the two terms), section 514 uses them together without distinguishing them. For purposes of state taxation, therefore, section 514 preserves military service members' pre-service domicile and residence in precisely the same manner. Because the two concepts are not distinguished for these purposes, the balance of this memorandum generally uses the term "residence."

their affairs to answer their country's call," *California v. Buzard*, 382 U.S. 386, 395 (1966) (quoting *Le Maistre v. Leffers*, 333 U.S. 1, 6 (1948)). Of course, the protections afforded by section 514 are not without limits. As the Supreme Court has explained, "[s]ection 514 does not relieve servicemen stationed away from home from all taxes of the host State." *Sullivan v. United States*, 395 U.S. 169, 180 (1969) (holding that section 514's provisions do not extend to sales and use taxes in the host state). With respect to income and property taxes, however, the caselaw emphasizes the need for a liberal construction. *See Buzard*, 382 U.S. at 395. Thus, although section 514's "predominant legislative purpose" is to protect military personnel from "multiple State taxation" of their income and property, *Sullivan*, 395 U.S. at 180, the Court has not limited the scope of section 514 to this one problem:

> [T]hough the evils of potential multiple taxation may have given rise to this provision, Congress appears to have chosen the broader technique of the statute carefully, freeing servicemen from both income and property taxes imposed by any state by virtue of their presence there as a result of military orders. It saved the sole right of taxation to the state of original residence *whether or not that state exercised the right.* Congress, manifestly, thought that compulsory presence in a state should not alter the benefits and burdens of our system of dual federalism during service with the armed forces.

Dameron v. Brodhead, 345 U.S. 322, 326 (1953) (emphasis added).[8] This broad statutory purpose and presumption in favor of the military service member necessarily informs our application of section 514 to the instant matter.

Section 514 and the Military Income of Native American Service Members

In order to determine whether section 514 of the SSCRA permits States to tax the military income of Native American service members whose residence is on a tribal reservation, it is useful first to distinguish among the States that might attempt to impose such taxation. They fall into three general categories: States where the service member works but only because of his military service; States where the service member lives but only because of his military service; and States containing the tribal reservation on which the service member lived until commencing his military service. We address these categories in turn.

[8] In *Sullivan*, the Court explained that, although it had previously described section 514's purpose broadly in *Dameron*, the provision's "predominant legislative purpose" is "to prevent multiple State taxation." 395 U.S. at 180. Because "the substantial risk of double taxation under multi-state ad valorem property taxes does not exist with respect to sales and use taxes," the Court concluded that section 514's protections do not cover host States' sales and use taxes. *Id.*

Section 514 explicitly addresses both the first and second categories. As to the first, the second sentence of section 514 provides, in pertinent part:

> For the purposes of taxation in respect of the personal property, income, or gross income of any such person by any State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such State, Territory, possession, political subdivision, or District.

50 U.S.C. app. § 574(1). This provision prevents a State from taxing military compensation earned in its jurisdiction by service members who are not otherwise residents of the State. *See Dameron*, 345 U.S. at 326 (section 514 "saved the sole right of taxation to the state of original residence whether or not that state exercised the right"). As to the second category, the first sentence of section 514 provides that no person shall be deemed "to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State, Territory, possession, or political subdivision of any of the foregoing, or the District of Columbia, while and solely by reason of being . . . absent" from his pre-military service residence. 50 U.S.C. app. § 574(1). This provision clearly prohibits a State from taxing the military income of a service member who lives in that State solely in order to comply with his service obligations. *See Buzard*, 382 U.S. at 393 ("The very purpose of § 514 in broadly freeing the nonresident serviceman from the obligation to pay property and income taxes was to relieve him of the burden of supporting the governments of the States where he was present solely in compliance with military orders."). For Native Americans, like other military service members, neither the State where a service member works due only to military orders nor a state in which a service member lives due only to such orders may tax the service members' military income.

The third category presents a somewhat more complex case. In order to determine whether the SSCRA permits the State containing a service member's reservation residence to tax his military income, we look initially to the first sentence of section 514. That sentence provides that a military service member "shall not be deemed to have lost a residence or domicile in any State, Territory, possession, or political subdivision of any of the foregoing, or in the District of Columbia, solely by reason of being absent therefrom in compliance with military or naval orders." 50 U.S.C. app. § 574(1). A threshold question is whether this provision preserves the tribal residence of Native Americans. For three reasons, we conclude that it does.

First, an Indian reservation is arguably a "residence . . . in [a] State." That is, since an Indian reservation is located within the geographical boundaries of a State or States, a Native American who resides on a reservation has a residence in a State just as, for example, one who resides in a particular city has a residence in the State containing that city. *See Cohen, supra* note 4, at 649 ("[T]ribal lands within the boundaries of state or organized territories have always been considered to be geographically part of the respective state or territory."). Thus, the first sentence of section 514 arguably provides that a Native American service member shall not be deemed to have lost her residence on a reservation located within a State "solely by reason of being absent therefrom in compliance with military or naval orders." 50 U.S.C. app. § 574(1).

Second, and alternatively, while neither the text of the SSCRA nor its legislative history defines the terms "State, Territory, possession, or political subdivision," an Indian reservation might itself be regarded as a "Territory" for purposes of section 514. Although territories are not generally understood to be subsumed within State boundaries, "when Congress uses the term 'territory', this may be meant to be synonymous with 'place' or 'area', and not necessarily to indicate that Congress has in mind the niceties of language of a political scientist." *Moreno Rios v. United States*, 256 F.2d 68, 71 (1st Cir. 1958). Accordingly, the precise scope of the term "Territory" depends on the purpose and nature of the particular statute in which it is used. *See 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.").[9] There is no

[9] In *United States ex rel Mackey v Coxe*, 59 U S. (18 How) 100 (1855), for example, the Court held that for purposes of a federal full faith and credit statute covering "letters testamentary or of administration . granted, by the proper authority in any of the United States or the territories thereof," a Cherokee Indian reservation "may be considered a territory of the United States." *Id.* at 103–04; *see id.* at 103 (explaining that the Indian reservation was "not a foreign, but a domestic territory—a territory which originated under our constitution and laws"), *see also, e.g., In re Larch*, 872 F 2d 66, 68 (4th Cir. 1989) (holding that "the Cherokee tribe is a 'state' " under the Parental Kidnapping Prevention Act, which defines "State" as "a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States," 28 U S.C. § 1738A(b)(8)); *Jim v. CIT Fin. Servs Corp*, 87 N M. 362, 363 (1975) (citing *Mackey* and holding that "the Navajo Nation is a 'territory' within the meaning of [28 U S.C § 1738]"); Cohen, *supra* note 4, at 383, 385, 649 n.42 (noting that "territory" has been held to encompass tribal reservations in some contexts). Similar results have been reached in interpreting state statutes. In *Tracy v. Super. Ct.*, 168 Ariz 23 (1991) (en banc), for example, the Supreme Court of Arizona considered whether a Native American tribe could be considered a "territory" under Arizona's Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, Ariz. Rev. Stat §§ 13–4091 to 13–4096 (1989) The court noted that "Indian tribes . have often been regarded as territories for purposes of various statutory enactments," *Tracy, 168 Ariz.* at 32 (collecting cases), and explained that "[t]he proper approach is to analyze each statute, in terms of its purpose and policy, to determine whether Indian tribes may be regarded as territories within the statute's intent " *Id.* at 33. After undertaking that approach, the court concluded that "a tribe may be considered a territory for purposes of statutory enactments such as the one now before us " *Id.* at 44

The Supreme Court has, however, indicated its support for the opposite conclusion in other statutory contexts. *See, e.g., New York ex rel. Kopel v. Bingham*, 211 U S 468, 474–75 (1909) (citing with approval *Ex Parte Morgan*, 20 F. 298, 305 (W D Ark. 1883), in which a district court held that the Cherokee nation was not a "territory" under the federal extradition statute). And at least one lower federal court has concluded that a tribal reservation does not constitute a "Territory" under 28 U S.C. § 1738 (1994), the general full faith and credit statute. *See Wilson v. Marchington*, 127 F 3d 805, 808–09 (9th Cir 1997), *cert. denied*, 523 U S 1074 (1998) But in *Wilson*, the

indication in either the text of section 514 or its legislative history that Congress intended to define "Territory" narrowly so as to exclude Native American service members from the statute's protections. Thus, it is arguable that the term as employed in section 514 should be read to include Indian reservations.

Third, even assuming an Indian reservation is not a "Territory" or a "residence . . . in [a] State" within the meaning of section 514, we think it is clear that the statute's recitation of jurisdictions is not intended and should not operate as a limitation on the protection the SSCRA affords to all service members. By its terms, the first sentence of section 514 covers military compensation earned by "any person." 50 U.S.C. app. § 574(1). As the Supreme Court has explained, in the absence of a clear expression to the contrary, "a general statute in terms applying to all persons includes Indians and their property interests." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960). Here, there is no indication that Congress intended to exclude Native American residents of tribal reservations from section 514's coverage. Any residual ambiguity on this point is settled by Congress's specific guidance to resolve "[a]ny doubts that may arise as to the scope and application of the [SSCRA] . . . in favor of the person in military service involved," H.R. Rep. No. 77–2198, at 2, by the Supreme Court's holding that the SSCRA is "always to be liberally construed," *Boone*, 319 U.S. at 575, and by the Court's similar directive that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions to be interpreted to their benefit," *Blackfeet Tribe*, 471 U.S. at 766. In light of these directives, we conclude that section 514 should be read to preserve the reservation residence of Native American service members.[10]

Next, we consider what consequences flow from section 514's preservation of Native Americans' reservation residence. It might be argued that, even though section 514 preserves a service member's pre-service residence, the State con-

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Ninth Circuit based its holding not on a general finding that tribal reservations are not territories, but on the fact that, after 28 U.S.C. § 1738 was enacted, Congress passed a number of other statutes expressly extending full faith and credit to certain tribal proceedings. *See* 127 F.3d at 809 (citing 25 U.S.C. §§ 2201–2211 (1983), 25 U.S.C. § 1725(g) (1980), and 25 U.S.C. §§ 1901 *et seq.*). The court observed that "[i]f full faith and credit had already been extended to Indian tribes, enactment of [the later statutes] would not have been necessary." *Id.* Here, in contrast, there is no post-section 514 legislation to undermine the argument that section 514's use of the word "Territory" should be read to encompass tribal reservations.

[10] It is true that the Supreme Court has "repeatedly said that tax exemptions are not granted by implication," and "[i]t has applied that rule to taxing acts affecting Indians as to all others." *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943). Accordingly, in *Oklahoma Tax Commission* the Court held that "[i]f Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion can not rest on dubious inferences." *Id.* at 607; *see Mescalero*, 411 U.S. at 156–57. Here, however, it is clear that by passing section 514 Congress did indeed intend to grant a tax exemption to military service members. That is, the statute satisfies the requirement that Congress state its intent to grant a tax exemption "in plain words." *Okla. Tax Comm'n*, 319 U.S. at 607. The question is how that exemption applies to Native Americans who reside on tribal reservations. In such circumstances, courts follow the rule that "ambiguous statutes . . . are to be construed in favor of Indians, and this canon of statutory construction applies to tax exemptions." *Confederated Tribes v. Kurtz*, 691 F.2d 878, 881 (9th Cir. 1982), *see Blackfeet Tribe*, 471 U.S. at 766, *see also Cotton Petroleum Corp.*, 490 U.S. at 176–77 ("[F]ederal pre-emption [of state taxing authority] is not limited to cases in which Congress has expressly—as compared to impliedly—pre-empted the state activity.").

taining a Native American service member's reservation may still tax his military compensation to the same extent as it may tax the military compensation of other service members whose pre-service residence is in that State. That argument is premised on the theory that Native Americans who live on their reservation are residents of both their reservation and the State in which it is located, and that section 514 preserves both those residences for income tax purposes. Absent federal law to the contrary, a State may tax off-reservation, in-state income earned by reservation Indians whose reservation is in that State. *See Mescalero*, 411 U.S. at 148–49 ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State."). Arguably, *Mescalero* implicitly recognizes that Native Americans who live on a reservation are residents of both their reservation and the State containing it, and that once they leave the reservation to work they are subject to the generally applicable tax laws to which all other residents of the State are subject, including tax liability for both in-state and out-of-state income. The validity of this view is unclear.[11] We need not attempt to resolve the issue here, however, because we conclude the SSCRA, especially when read in light of general principles of federal Indian law, preempts any authority a State containing a Native American's tribal residence may otherwise have to tax that Native American's military income.

[11] This uncertainty is due in part to the fact that while *Mescalero* made clear that a State may tax the off-reservation income of a Native American resident of a reservation within that State, it did not specify the precise source of that taxing power. As a general matter, a State may "tax all the income of its residents, even income earned outside the taxing jurisdiction." *Okla. Tax Comm'n v Chickasaw Nation*, 515 U S. 450, 462–63 (1995). But for nonresidents, a State generally may tax only income earned within the jurisdiction. *Id.* at 463 n 11 It is unclear which head of taxing authority supports the decision in *Mescalero* If it is the former, then the State may also tax the out-of-state income of Native Americans who reside on reservations within the State; if it is the latter, the State may not.

At bottom, the question here concerns the precise relationship between Native Americans residing on reservations and the States in which those reservations are located The question is not easily answered. On the one hand, there may be some basis for States to treat reservation Indians working off the reservation as full state residents. Indeed, it is clear that Native Americans are deemed state residents for certain purposes. *See Goodluck v Apache County*, 417 F Supp 13 (D. Ariz. 1975), *aff'd*, 429 U.S 876 (1976). "They have the right to vote, to use state courts, and they receive some state services." *McClanahan*, 411 U.S. at 173 (footnotes omitted). At least one court has relied on these facts to conclude that "[a]n enrolled member of a tribe living on a reservation is subject to three levels of governmental jurisdiction: the tribe, the state, and the federal government Being a resident of one does not remove the person from the jurisdiction of the others. An enrolled member of a tribe living on the tribe's reservation remains domiciled in the state and is a resident of the state for limited purposes." *Esquiro v Dept of Revenue*, 14 Or. Tax 130, 134 (Or. Tax 1997), *aff'd*, 328 Or 37 (Or. 1998). On the other hand, a leading treatise on federal Indian law suggests that reservation Indians working off the reservation are, for taxation purposes at least, in the same position as nonresidents working in the State. "[A]n Indian residing within a reservation but earning some income off the reservation can be taxed to the extent of the off-reservation income, *provided that the State bases its income tax on place of earning*." Cohen, *supra* note 4, at 417 (emphasis added). A federal district court recently took a similar approach. *See Lac du Flambeau Band of Lake Superior Chippewa Indians v. Zeuske*, 145 F. Supp.2d 969 (W D Wis. 2000). In that case, the court held that Wisconsin lacked the authority to tax income earned outside Wisconsin by a Native American resident of a tribal reservation located within Wisconsin According to the court, "[t]he state may tax persons resident within its borders who do not live on reservations because it has conferred upon these persons the benefit of domicile and its accompanying privileges and advantages. It has not conferred the same benefit upon tribal members residing on reservations, however. The right of tribal members to reside on the reservation derives from treaties entered into by the tribe in the nineteenth century." *Id* at 976

As noted above, preemption analysis asks whether "under the circumstances of th[e] particular case, [the State's] law stands as anobstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier*, 529 U.S. at 873 (quoting *Hines*, 312 U.S. at 67); *see Freightliner*, 514 U.S. at 287. Determining what constitutes a "sufficient obstacle" in this sense is "informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

> [W]hen the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished — if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect — the state law must yield to the regulation of Congress within the sphere of its delegated power.

Id. (quoting *Savage v. Jones*, 225 U.S. 501, 533 (1912)).

The Supreme Court has explained that "[t]he very purpose of § 514 in broadly freeing the nonresident serviceman from the obligation to pay property and income taxes was to relieve him of the burden of supporting the governments of the States where he was present solely in compliance with military orders." *Buzard*, 382 U.S. at 393; *see also Dameron*, 345 U.S. at 326. As this passage suggests, section 514 is intended to provide that if an individual works in a certain jurisdiction because his military service requires him to be there, he should not be subject to any different burdens by virtue of that compulsory presence.[12] More specifically, compulsory presence in a particular place may not subject the service member to taxing authorities to which he was not already subject prior to his military service.

Before beginning military service, a Native American resident of a tribal reservation who does not work outside the reservation is not subject to taxation by the State in which the reservation is located. *See McClanahan*, 411 U.S. at 164. If that State were to tax that individual's military income on the theory that it is income earned off-reservation, it would subject him to an income tax to which he was not previously subject, and it would do so by virtue of his compulsory presence in a particular jurisdiction. Section 514's broad, generous purpose is to prevent precisely that eventuality.

[12] The legislative history to the SSCRA's predecessor supports this reading. *See* Act of Mar. 8, 1918, § 100 (Congress intended to "protect[] persons in military service of the United States in order to *prevent prejudice or injury to their civil rights during their term of service* and to enable them to devote their entire energy to the military needs of the Nation.") (emphasis added).

We recognize, of course, that some Native American service members could have been subjected to state income tax prior to joining one of the armed services. Under *Mescalero*, a State containing a Native American's tribal residence may, absent federal law to the contrary, subject that tribal member to income tax for income earned outside the reservation. *See* 411 U.S. at 148–49.[13] Prior to enlisting in the military, however, such an individual was not subject to state income tax in a general sense; rather, she was subject to such tax only to the extent that her income was earned outside a reservation. When a reservation Indian enters military service and is directed to perform that service outside her reservation, any income she earns for that service is earned off the reservation because of military orders. Thus, were a State to impose a tax on that military compensation, the tax would be incident to the service member's compulsory presence and work outside her tribal reservation. That is, the tax would result from the individual's compliance with military orders. Such a tax would run afoul of what the *Dameron* Court identified as section 514's core purpose: to protect military service members from being subjected to taxing authorities that rely solely on the members' compulsory presence in a particular jurisdiction as the basis for taxing them. *See* 345 U.S. at 326.[14]

We presume that section 514 was not designed to afford less protection to Native Americans than to other members of the military. *See Fed. Power Comm'n*, 362 U.S. at 120 ("[G]eneral Acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary."). Indeed, we are obliged under both federal Indian law and the SSCRA to construe any textual ambiguity on this point in favor of more, rather than less, protection. *See Blackfeet*

[13] As discussed above, *see supra* note 11, it is unclear whether a State's authority to tax income earned in the State by a Native American resident of a reservation who is working off the reservation is based on the State's authority to tax all residents of the State or the State's authority to tax income earned within the State by nonresidents working there. To the extent that a State's authority to tax such tribal members is based, not on the individual's residence in that State, but on the place where the income is generated, then, wholly apart from any tax exemption conferred by the SSCRA, the only tribal residents whose military income could possibly be subject to state taxation would be those who perform military service within the State in which their reservation residence is located. In light of our analysis of the SSCRA's preemptive force, we need not, and do not, reach that issue here. *See supra* p. 11.

[14] We have found one case, *United States v. Kansas*, 810 F.2d 935 (10th Cir. 1987), that is arguably in tension with this analysis, but the outcome reached in that case is not contrary to the conclusion we reach here. In *Kansas*, the Tenth Circuit held that Kansas did not violate section 514 of the SSCRA by taking the military income of nonresident service members into account when determining the rate of income tax to be levied on their nonmilitary income earned in Kansas (typically by the service member's spouse). *See id.* at 936–38 & n.2. Although the court noted that "higher tax rates and, consequently, higher taxes on nonmilitary Kansas source income can result from including military pay in the state's rate-setting formula," *id.* at 936, it concluded that "[n]either the legislative history nor the plain language of the SSCRA prohibits the use of the described military income in formulas which set rates of taxation on other income." *Id.* at 938. The court specifically rejected the federal government's contention that "the potentially higher rates on Kansas source income constitute 'an indirect tax on the military compensation of nonresident military personnel,'" and held that "[t]here is here a potentially higher tax on Kansas source income, nothing more." *Id.* (citation omitted). *Kansas* does not bear directly on the precise question at issue here, since in that case the service member was already subject to some host state income tax for nonmilitary income. But insofar as it may stand for the proposition that a military service member may be forced to shoulder a greater state income tax burden as a direct consequence of his compulsory presence in a particular jurisdiction in compliance with military orders, we find the Tenth Circuit's reasoning to conflict with section 514's broad, generous purpose as identified by the Supreme Court in *Dameron*, 345 U.S. at 326, *Buzard*, 382 U.S. at 393, and elsewhere.

Tribe, 471 U.S. at 766 (statutes affecting Indians "are to be construed liberally in favor of Indians, with ambiguous provisions to be interpreted to their benefit"); H.R. Rep. No. 77–2198, at 2 ("Any doubts that may arise as to the scope and application of the act should be resolved in favor of the person in military service involved."); *Boone*, 319 U.S. at 575 (SSCRA "is always to be liberally construed"); *Le Maistre*, 333 U.S. at 6 (SSCRA is to be read "with an eye friendly to those who dropped their affairs to answer their country's call."). Accordingly, we conclude that where a Native American service member who claims a tribal reservation as her residence earns military compensation outside that reservation by virtue of her compliance with military orders, section 514 prohibits the State containing the service member's reservation residence from taxing that military compensation.[15]

Finally, you have asked whether our opinion constitutes an adequate legal basis for the Department of Defense to terminate state income tax withholding for Native American service members who certify that they have met the specified criteria. Pursuant to statute, the Attorney General is responsible for providing legal advice to the heads of departments within the Executive Branch. *See* 28 U.S.C. § 512 (1994) ("The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department."). The Attorney General has delegated that responsibility to the Office of Legal Counsel. *See* 28 C.F.R. § 0.25(a) (2000) (assigning to the Assistant Attorney General, Office of Legal Counsel, the responsibility for "[p]reparing the formal opinions of the Attorney General" and for "rendering informal opinions and legal advice to the various agencies of the Government"). In that regard, the legal advice of the Office of Legal Counsel constitutes the legal position of the Executive Branch, unless overruled by the President or the Attorney General. *See* H. Jefferson Powell, *The Constitution and the Attorneys General* xv (1999) ("The published opinions of the Attorneys General and, since 1977, of the Office of Legal Counsel, . . . constitute the formal legal views of that branch of the federal government charged with the faithful execution of the laws."). Accordingly, to the extent that a Native American service member can demonstrate residence on a federally recognized tribal reservation in a manner that satisfies the Defense Department's current standards for establishing entitlement to an exemption from state income tax withholding under section 514 of the SSCRA, the

[15] As discussed above, *see supra* note 4, the *McClanahan* rule barring state taxation of income earned on a reservation is a "categorical" one, *County of Yakima*, 502 U.S at 258, and prohibits state taxation of Indian lands and reservation Indians except where authorized by Congress But the rule would not apply — and our conclusion regarding the effect of the SSCRA could well be different — in a situation where Congress had separately authorized a State or States to tax the reservation income of a reservation Indian. We are aware of no such authorization. The *McClanahan* Court surveyed a number of federal statutes in this area, and concluded that they manifest "Congress' intent to maintain the tax-exempt status of reservation Indians." 411 U S. at 176. Similarly, in *Bryan v Itasca County*, the Court held that although 28 U S C § 1360 grants certain States jurisdiction over private civil litigation involving reservation Indians in state court, it does not grant those States general civil regulatory authority over reservation Indians *See* 426 U.S. at 385, 388–90. The Court therefore held that the statute does not empower States to tax property on a reservation

Defense Department may rely on the advice provided in this opinion and not withhold state income tax from such a service member's military compensation. *Cf. Smith v. Jackson*, 246 U.S. 388, 390–91 (1918) (concluding that the Auditor of the Panama Canal Zone should have followed the ruling of the Attorney General on a question of federal statutory law).[16]

CONCLUSION

For the foregoing reasons, we conclude that section 514 of the SSCRA prohibits States from taxing the military compensation of Native American service members who are residents of tribal reservations.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

[16] Moreover, we are informed by the Department's Tax Division that to the extent that Native American service members properly claiming a tribal reservation as their residence become involved in legal proceedings concerning their possible liability for state income tax on their military compensation, the Tax Division will, upon request from the Defense Department, provide legal representation to such service members where appropriate

Use of Agency Resources to Support Presidential Transition

We adhere to the conclusion in our December 14, 1992 Memorandum that, under the Presidential Transition Act of 1963, an executive agency or department may provide office space, secretarial services, and other support services to members of the transition team from agency appropriations without reimbursement from the transition appropriation when the provision of such space and support by the agency, rather than by the transition team itself, would minimize disruption to the agency's operations caused by the transfer of the leadership of the agency.

Our conclusion in the 1992 Memorandum is not affected by the October 12, 2000 amendment to the Transition Act. Direct support services and office space for those workshops and orientations that the amendment authorizes should be provided by GSA out of the appropriation for the transition, unless their provision by a particular agency would minimize disruption of the agency's mission or operations

November 22, 2000

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

This memorandum responds to your inquiry whether our 1992 opinion about the provision of office space and support services by executive agencies and departments for activities related to the transition of the President-elect continues to reflect our view of the law. Memorandum for C. Boyden Gray, Counsel for the President, from Timothy E. Flanigan, Assistant Attorney General, Office of Legal Counsel, *Re: Use of Agency Resources to Support the Presidential Transition* (Dec. 14, 1992) ("1992 Memorandum").[1] As discussed below, we adhere to the advice provided in that memorandum.

The 1992 Memorandum addresses the circumstances under which executive agencies and departments may provide office space and support services to members of the presidential transition team without reimbursement from the transition appropriation. The Presidential Transition Act of 1963, Pub. L. No. 88–277, 78 Stat. 153 (1964) (codified as amended at 3 U.S.C. § 102 note) ("Transition Act"), authorizes the General Services Administration ("GSA") to provide appropriate office space and support services to the transition team. At the same time, the Transition Act indicates that each individual agency's mission includes those activities necessary to minimize transition-related disruptions to the agency's work. Thus, general agency appropriations are available to further that mission. In reconciling the availability of both general agency and transition appropriations for transition-related office space and support services, we relied upon the principle of appropriations law that when Congress has provided for more than one appropriation in the same area, the appropriations generally are to be interpreted

[1] The 1992 Memorandum clarified advice we provided during the 1988 the presidential transition *See* Memorandum for Arthur B. Culvahouse, Jr., Counsel to the President, from Douglas W Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Executive Agency Assistance to the Presidential Transition* (Jan. 3, 1989)

so as to minimize overlap between the two. Our 1992 Memorandum concluded that agencies could provide office space, secretarial services, and other support services from agency appropriations without reimbursement from the transition appropriation when the provision of such space and support by the agency, rather than by the transition team itself, would minimize disruption to the agency's operations caused by the transfer of the leadership of the agency.

Our conclusion in the 1992 Memorandum is not affected by the October 12, 2000 amendment to the Transition Act. Presidential Transition Act of 2000, Pub. L. No. 106–293, 114 Stat. 1035 (2000) (''2000 Amendment''). Among other things, this amendment authorizes GSA to pay the expenses for briefings, workshops, and other activities to familiarize key prospective presidential appointees with the issues that typically confront new political appointees.[2] *Id.* § 2(3). Such activities may include interchanges with individuals in the outgoing administration currently employed by an executive agency or department in order to give new officials the benefit of the experience of the former administration. *Id.* The legislative history indicates that the Senate Committee on Governmental Affairs believed that the most beneficial format for such orientations would be informal discussions and workshops coordinated by GSA. *See* S. Rep. No. 106–348 (2000). The amendment also authorizes ''orientations'' for the same key prospective appointees addressing issues such as records management and human resources and performance-based management. 2000 Amendment § 2(3). The Senate report emphasizes that the amendment ''only affects the key political appointments in the executive branch agencies and in the Executive Office of the President.'' S. Rep. No. 106–348, at 6. Consistent with our 1992 Memorandum, we believe that direct support services and office space for these workshops and orientations should be provided by GSA out of the appropriation for the transition, unless their provision by a particular agency would minimize disruption of the agency's mission or operations. An example, discussed in our prior opinion, might include circumstances where an agency decides that internal agency information would be best safeguarded if support staff assisting with the transition were responsible to, and therefore funded by, the agency.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

[2] The 2000 Amendment also authorizes the development of a transition directory by the Administrator of GSA in consultation with the Archivist of the United States and consultation by the Administrator with any candidate for President or Vice President before the election to develop a systems architecture for computer and communications systems to coordinate a transition to federal systems if the candidate is elected. 2000 Amendment § 2(3)

Payment of Attorney's Fees in Litigation Involving Successful Challenges to Federal Agency Action Arising Under the Administrative Procedure Act and the Citizen-Suit Provisions of the Endangered Species Act

For purposes of settling attorney's fees claims in a case arising under both section 10 of the Administrative Procedure Act and the citizen-suit provisions of the Endangered Species Act, federal litigators, in allocating hours and costs between the APA-Equal Access to Justice Act and ESA claims, should subordinate EAJA section 2412(d) to ESA section 11(g)(4). Under this approach, hours and costs necessary to both counts should be assigned to the ESA claim for attorney's fees purposes, leaving only the hours and costs necessary only to the APA claim to be paid under EAJA

November 27, 2000

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
ENVIRONMENT AND NATURAL RESOURCES DIVISION

You have asked us to determine how federal litigators, in settling attorney's fees claims in litigation arising under both section 10 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704 (1994), and the citizen-suit provision of the Endangered Species Act ("ESA"), ESA § 11(g), 16 U.S.C. § 1540(g) (1994), should allocate opposing parties' hours and costs between the APA and ESA claims. Fees attributable to APA claims are paid out of agency funds, while fees attributable to ESA section 11(g) claims are paid out of the permanent indefinite appropriation for the payment of judgments against the United States, commonly known as the judgment fund. *See* 31 U.S.C. § 1304 (1994 & Supp. IV 1998). Accordingly, to settle attorney's fees claims in suits presenting both classes of claims, federal litigators must allocate opposing parties' compensable hours and costs between these two classes in order to determine the amounts of funding to be drawn from agency funds and the judgment fund.

Attorneys in the Wildlife and Marine Resources Section ("Wildlife Section") of the Environment and Natural Resources Division ("ENRD") contacted us in May 1999 concerning the allocation issue posed by their efforts to settle an opponent's fees claim in *Pacific Coast Federation of Fishermen's Assoc. v. National Marine Fisheries Service*, Civ. No. 97–775 (W.D. Wash.) ("the Umpqua River litigation"), a multi-claim suit involving APA and ESA challenges to federal land management decisions affecting the Umpqua River cutthroat trout. In June and July 1999, we provided oral advice concerning the proposed Umpqua River settlement. In December 1999, we provided a brief written summary of our views, which the Wildlife Section had requested as a source of guidance for attorneys in other pending APA-ESA cases. This memorandum responds to your subsequent request for a fuller, more formal statement of our views.

I. The Payment of Opponents' Attorney's Fees in Multi-claim Litigation Arising under the APA and the ESA

In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court found that certain claims challenging agency action designating critical habitat for endangered species were reviewable under the ESA's citizen-suit provision, while related claims concerning agency compliance with ESA data collection requirements were reviewable only under the APA. *See* 520 U.S. at 170–78. Under *Bennett*, suits against federal agencies involved in the administration of the ESA can present related claims arising under the APA and the ESA's citizen-suit provision. The Umpqua River litigation is one such suit. There, federal litigators determined that it would be in the government's interest to settle a multi-claim suit on terms that would afford the plaintiffs substantial relief under one of their five APA claims (count V of the Third Amended Complaint) and under their only ESA citizen-suit claim (count VI). Plaintiffs' claims for attorney's fees and costs were also included in the settlement discussions.

Fee awards for the successful prosecution of APA claims are governed by section 2412(d) of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d) (1994 & Supp. IV 1998). Agencies must pay section 2412(d) judgments out of their own funds. *Id.* § 2412(d)(4). However, agencies may interpose several defenses to section 2412(d) fees claims that are not generally available in other contexts. In particular, an agency can avoid paying EAJA fees, even to a prevailing party, if it can show (1) that the claimant failed to satisfy the EAJA-specific means test for recovery of fees and costs, *see* 28 U.S.C. § 2412(d)(2)(B) (barring recovery by individuals with more than $2 million in net assets and by profit-making enterprises with more than $7 million in net assets or more than 500 employees); (2) that the government's position was substantially justified, *id.* § 2412(d)(1)(A); (3) that special circumstances make an award of attorney's fees unjust, *id.*; or (4) that the claimant failed to file a section 2412(d) petition within 30 days of final judgment, *id.* § 2412(d)(1)(B). *See generally Commissioner v. Jean*, 496 U.S. 154, 158 (1990) (summarizing preconditions to fee-award eligibility under EAJA section 2412(d)). In addition, attorney's fees under EAJA are subject to an hourly cap, currently set at $125 per hour, which can only be exceeded if a court determines "that an increase in the cost of living [since 1996, when the current hourly cap was set] or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." *See* 28 U.S.C. § 2412(d)(2)(A)(ii).

Fee awards for the successful prosecution of ESA citizen-suit claims are governed by section 11(g)(4) of the Act, 16 U.S.C. § 1540(g)(4). Section 11(g)(4) authorizes the award of attorney's fees "whenever the court determines such award is appropriate." The Supreme Court has construed this language to require that at least "some success on the merits be obtained before a party becomes

eligible for a fee award." *See Ruckelshaus v. Sierra Club*, 463 U.S. 680, 682 & n.1 (1983). The United States pays section 11(g) attorney's fees out of the judgment fund. *See* 31 U.S.C. § 1304; *see also* 28 U.S.C. §§ 2414, 2517 (1994) (procedures for the payment of judgments). In opposing section 11(g) fees claims, the United States cannot invoke any of the special defenses to liability that exist under EAJA, although special jurisdictional defenses to ESA citizen-suits may be available to defeat fees claims in some cases. *See* ESA § 11(g)(2), 16 U.S.C. § 1540(g)(2). Hourly rates used to determine section 11(g)(4) fees awards are not subject to a statutory cap; they are generally paid at rates that courts determine to be "reasonable" under the circumstances. Accordingly, hours allocated to ESA claims may be compensated at a higher rate than hours allocated to related EAJA claims. *Compare, e.g., Jones v. Espy*, 10 F.3d 690 (9th Cir. 1993) (due to EAJA cap on hourly rates, prevailing plaintiff in litigation against federal and state defendants recovers at a lower rate for hours allocated to the federal claims than for hours allocated to the state claims).

II. The Allocation of Opposing Attorneys' Hours and Costs Between Their Successful APA and ESA Claims in the Umpqua River Litigation

The Wildlife Section, after deciding to pursue a comprehensive settlement of the Umpqua River litigation, encompassing attorney's fees as well as merits issues, sought our assistance in determining the proper allocation of hours and costs between the APA-EAJA claim set forth in count V of the third amended complaint and the ESA citizen-suit claim set forth in count VI. Additionally, the Wildlife Section pointed out that the Umpqua River plaintiffs had amended their complaint to add count VI after summary judgment motions on the first four APA counts had been fully briefed, and asked whether this relatively late presentation of the ESA citizen-suit claim should affect the allocation of hours and costs in the Umpqua River case.

For the reasons described below, we conclude that the ESA fees provision should take precedence over EAJA section 2412(d) — *i.e.*, that hours and costs necessary to both successful counts should be allocated to the ESA claim for attorney's fees purposes. We also believe that the timing of the ESA count does not necessarily preclude allocation of hours and costs — even hours spent and costs incurred prior to the amendment of the complaint — to the ESA claim.

A. The Allocation of Hours and Costs Between Successful Claims that Implicate Different Fee-Shifting Provisions

A proper allocation of hours and costs between APA-EAJA and ESA claims for settlement purposes should follow the same analysis that the Department would urge a court to follow in adjudicating the same allocation question. In our view,

a court would properly resolve the fees phase of the Umpqua River litigation (following a judgment for the plaintiffs on counts V and VI) by undertaking a two-stage allocation of hours and costs among the claims that the plaintiffs presented. The court would, first, allocate total hours and costs between successful claims (counts V and VI) and unsuccessful claims (counts I through IV) and, second, allocate hours and costs attributed to the successful claims between count V, which implicates the fee-shifting requirements of EAJA section 2412(d), and count VI, which implicates the requirements of ESA section 11(g)(4). We believe that the proper framework for both stages of this analysis may be found in *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

The allocation of hours and costs between successful and unsuccessful claims calls for a relatively straightforward application of *Hensley v. Eckerhart*. Although *Hensley* was specifically concerned with the allocation of costs and hours between successful and unsuccessful claims in civil rights litigation governed by the fee-shifting provisions of 42 U.S.C. § 1988 (1994 & Supp. IV 1998), the Court indicated that its approach there was "generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party,'" 461 U.S. at 433 n.7, and lower courts have relied upon *Hensley* in allocating costs and hours between successful and unsuccessful claims in fees litigation arising under a variety of other fee-shifting statutes.[1] Under *Hensley*, courts determine how much of a fees claimant's work was reasonably necessary to the litigation of the successful claims (that is, how much "involve[d] a common core of facts or [was] based on related legal theories") and whether the degree of success was commensurate with the effort expended. *Id.* at 434–36. If successful and unsuccessful claims were closely related, so that all of the hours and costs at issue contributed to the prosecution of the successful claims, and the claimant's victory on those claims produced significant results, a claimant's costs and hours may be fully compensated. On the other hand, if successful and unsuccessful claims implicated different facts and legal theories, so that identifiable categories of work did not contribute to the prosecution of the successful claims, or if the successful claims achieved only partial or limited relief, appropriate reductions must be made.

Because the proposed Umpqua River settlement would give plaintiffs at least some of the relief sought under two distinct claims that implicate two distinct fee-shifting mechanisms, this case requires a second allocation of costs and hours

[1] *See, e.g., George Hyman Constr Co v. Brooks*, 963 F.2d 1532, 1536 (D.C Cir. 1992) (finding that *Hensley* requires allocation between successful and unsuccessful claims in case arising under the Longshore and Harbor Workers' Compensation Act; noting that "lower courts have adopted [*Hensley*'s] instructions in a wide array of statutory settings"), *Conservation Law Found. of New England, Inc. v Secretary of the Interior*, 790 F.2d 965, 969–70 (1st Cir. 1986) (work on unsuccessful claims arising under the Outer Continental Shelf Lands Act was sufficiently related to work on successful claims airing under the National Environmental Policy Act ("NEPA") to justify compensation, although work on unsuccessful ESA claims was insufficiently related to the NEPA claims and should have been excluded from the fees award); *Citizens Council of Delaware County v Brinegar*, 741 F.2d 584, 596 (3d Cir. 1984) ("sufficient interrelationship" existed among successful and unsuccessful NEPA claims for the district court to avoid apportioning hours and costs among claims "based on the success or failure of any particular legal argument advanced by the plaintiffs").

between those two claims — the count V APA claim, fees for which are governed by EAJA section 2412(d), and the count VI citizen-suit claim, fees for which are governed by ESA section 11(g)(4). We believe that a court, in addressing this aspect of the problem, would apply EAJA section 2412(d) only as a fall-back to other fee shifting provisions, such as ESA section 11(g)(4). A court following this approach would, in essence, apply the *Hensley* framework a second time to determine which of the hours and costs attributable to the successful claims were reasonably necessary to the litigation of the non-EAJA claim and allocate only the residual hours and costs to the section 2412(d) fees claim.

Two provisions of EAJA indicate that section 2412(d) should be assigned this secondary role. Section 2412(d)(1)(A) states that the United States may be ordered to pay fees and expenses under section 2412(d), "[e]xcept as otherwise specifically provided by statute." A separate, uncodified provision establishes even more clearly section 2412(d)'s subordinate status, stating that nothing in section 2412(d) "alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law which authorizes an award of such fees and other expenses to any party other than the United States that prevails in any civil action brought by or against the United States." *See* Pub. L. No. 96–481, § 206, 94 Stat. 2321, 2330 (1980), *as amended by* Pub. L. No. 99–80, § 3, 99 Stat. 183, 186 (1985), *reprinted in* 28 U.S.C. § 2412 note (1994). The legislative history of EAJA further supports this reading. In reporting out the bill that became EAJA, the House Judiciary Committee stated that

> [S]ection [2412(d)] is not intended to replace or supercede any existing fee-shifting statutes . . . in which Congress has indicated a specific intent to encourage vigorous enforcement, or to alter the standards or the case law governing those Acts. It is intended to apply only to cases (other than tort cases) where fee awards against the government are not already authorized.

H.R. Rep. No. 96–1418, at 18 (1980). In addition, the Committee observed that section 206 (section 6 of the bill before the Committee) "reinforce[d] the statutory language and emphasize[d] the Congressional intent that the provisions of section 2412(d) . . . shall not supercede or alter existing statutory authority for fee awards against the government." *Id.* at 19; *cf. United States v. 329.73 Acres of Land, Situated in Grenada and Yalobusha Counties, Mississippi*, 704 F.2d 800, 807 (5th Cir. 1983) (en banc) (EAJA section 206 "operates to leave intact the more expansive pre-Act fee-shifting statutes that permit award of attorneys' fees against the government").

Application of the *Hensley* methodology to the second-stage allocation issue presented here is consistent with the courts' extension of *Hensley* to cases involving fee-eligible and fee-ineligible claims. Although *Hensley* involved the

allocation of hours and costs between successful and unsuccessful claims, a number of courts have applied its methodology to allocations between successful fee-eligible and fee-ineligible claims.[2] Following the framework set forth in *Hensley*, these courts have examined whether work on the fee-ineligible claims was reasonably necessary to the prosecution of the fee-eligible claims and whether the results obtained on the fee-eligible claims were commensurate with the expenditures incurred. So too here, we believe that a court would first attribute to the ESA claim all work reasonably related to the prosecution of that claim. Those hours and costs would be evaluated for compensation under the ESA, with payments adjusted in the event that the degree of success was not commensurate with expenditures. Remaining fees and costs would be evaluated for compensation under the more restrictive standards of section 2412(d) of EAJA, subject to the same possibility of reduction for partial or limited success.

In reaching this view of the proper allocation of hours and costs between APA-EAJA and ESA claims, we have considered arguments that sovereign immunity principles require allocation of a greater proportion of a prevailing party's litigation efforts to EAJA-eligible claims. Waivers of sovereign immunity, including waivers of federal immunity to fees awards, are strictly construed in favor of the sovereign. *See Ardestani v. INS*, 502 U.S. 129, 137 (1991) ("The EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity. Any such waiver must be strictly construed in favor of the United States."); *Ruckleshaus v. Sierra Club*, 463 U.S. at 685–86 (sovereign immunity principles require a narrow construction of the appropriateness standard for fees awards set forth in section 307(f) of the Clean Air Act, which governs fees awards in citizen suits against the United States, as well as against private parties); *In re North*, 94 F.3d 685, 689 (D.C. Cir. 1996) (per curiam) ("Sovereign immunity prevents the award of costs or fees against the United States absent specific statutory authorization."). Because the United States, in defending fees claims under EAJA section 2412(d), can invoke special defenses to liability (including the substantial justification defense and financial eligibility tests for recovery), and a fees cap that are unavailable to it in fees litigation governed by ESA section 11(g), sovereign immunity principles arguably require allocation of the greatest possible proportion of a pre-

[2] *See, e.g., Entertainment Research Group, Inc. v. Genesis Creative Group, Inc.*, 122 F.3d 1211, 1230–31 (9th Cir. 1997) (upholding, under the test of relatedness established in *Hensley*, district court decision that prevailing defendants were entitled to fees for successful defense against copyright claims but not for successful defenses of unrelated claims to which no fee-shifting statute applied), *cert. denied*, 523 U.S. 1021 (1998), *Bridges v. Eastman Kodak, Co.*, 102 F.3d 56, 59 (2d Cir. 1996) (affirming, under *Hensley*, district court's determination that plaintiff's success justified a full award of fees where plaintiff prevailed on fee-eligible and fee-ineligible claims), *cert. denied*, 520 U.S. 1274 (1997), *see also, e.g., Andrews v. United States*, 122 F.3d 1367, 1376 (11th Cir. 1997) (dictum) (efforts devoted to fee-ineligible tort claim cannot be attributed fee-eligible CERCLA claim); *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1329 (8th Cir. 1995) (plaintiff in ERISA action prosecuting both personal claims, for which fees were not available, and representative claims, for which fees were available, entitled to full recovery because all time was necessary to the fee-eligible claims; analysis conforms to but does not cite *Hensley*)

vailing party's hours and costs to the EAJA-eligible claim rather than the ESA-eligible claim.

This analysis is flawed in two respects. First, allocating litigation effort to non-EAJA claims would not lead to uniformly lower fees awards. In some multi-claim lawsuits, the United States may have jurisdictional defenses to the non-EAJA claims that do not apply to the EAJA claims.[3] Similarly, in some multi-claim lawsuits, liability for fees and costs allocated to non-EAJA claims may be divided among the United States and other, non-federal defendants while liability for fees and costs allocated to the EAJA claims falls solely on the United States. And in some cases fees awarded under the non-EAJA fee-shifting authority may be lower than fees awarded for the same efforts under EAJA because of fee ceilings and other statute-specific restrictions.[4] It would seem a novel application of sovereign immunity doctrine for a court to base the relationship between EAJA and other fee-shifting statutes on a broad and uncertain generalization that the allocation of litigation effort to EAJA claims leads to smaller fee awards. Second, and more fundamentally, even if it were certain that aggregate federal liability for fees would be reduced by an approach that increased the proportion of total hours and costs allocated to EAJA claims, the language of EAJA section 2412(d) would preclude such an approach. EAJA was clearly written to function as a fallback waiver of sovereign immunity. Congress explicitly instructed that section 2412(d) should not be construed to alter or modify other fee-shifting provisions. Allocating effort between non-EAJA and EAJA claims under the *Hensley* rule for successful and unsuccessful claims conforms to this instruction; adjusting this allocation to bring a greater proportion of total effort within the coverage of section 2412(d) would disregard it.

One judicial decision might appear to rely upon sovereign immunity principles to allocate a higher proportion of hours and costs to EAJA than would be proper under the *Hensley* framework. In *Slugocki v. United States*, 816 F.2d 1572, *cert. denied*, 484 U.S. 976 (1987), the Federal Circuit rejected a district court's application of *Hensley*'s relatedness test in a case involving successful EAJA and non-EAJA claims. There, the court of appeals reversed the district court's award of fees in a multi-claim overtime pay suit under fee-shifting provisions of the Fair Labor Standards Act ("FLSA"). Prevailing plaintiffs in the case, a class of Deputy U.S. Marshals, alleged that certain overtime practices of the Marshals Service violated 5 U.S.C. § 5542 prior to 1975 and the FLSA from 1975 onward (following the amendment of the FLSA to bring the Deputy Marshals within its coverage). Although the plaintiffs cited EAJA as well as the FLSA fees provision in their fees application, the trial court awarded fees under the FLSA for the entire suit, concluding that the "FLSA and Title 5 claims were too interrelated to be

[3] *See, e.g.*, ESA § 11(g)(2)(A)(i), 16 U.S.C. § 1540(g)(2)(A)(i) (jurisdictional requirement that citizen plaintiffs provide written notice of their intent to sue at least sixty days before filing complaint)

[4] *See, e.g.*, 42 U.S.C. § 300aa-15(b) (1994) (fees awards under the Vaccine Act capped at $30,000)

segregated" under the *Hensley* standard. 816 F.2d at 1579 (summarizing district court ruling). The court of appeals reversed, stating that "allowance of attorneys' fees for appellees' Title 5 claims as a part of the FLSA award does not represent strict observance of limitations on the Government's waiver of sovereign immunity." *Id.* The court of appeals implicitly rejected the district court's finding of relatedness and remanded with instructions to "segregate" work performed on the Title 5 and FLSA claims and evaluate the Title 5 work under EAJA.[5]

We interpret the court of appeals' decision in *Slugocki* as merely overturning a trial court's misapplication of *Hensley*'s relatedness standard in the circumstances of a particular lawsuit. Although the decision might also be read to require a different approach to the allocation of hours and costs in litigation involving successful EAJA and non-EAJA claims, we think that this interpretation would be inconsistent with the EAJA's specific instructions concerning the relationship between section 2412(d) and alternative fee-shifting provisions. These provisions, in our view, fully support application of the *Hensley* framework to multi-claim cases involving successful EAJA and non-EAJA claims.

Finally, in arriving at our view of the proper method for allocating hours and expenses between APA-EAJA and ESA citizen-suit fees claims, we have also considered how the allocation method that we have described might affect the financial incentive that section 2412(d) establishes for agencies to ensure that their legal positions are substantially justified. Under most fee-shifting statutes, including ESA section 11(g)(4), awards of fees and expenses against the government are paid from the judgment fund. Awards under EAJA section 2412(d), in contrast, are "paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise." 28 U.S.C. § 2412(d)(4). The legislative history of section 2412(d)(4) indicates that Congress intended for the payment of fee awards from agency funds to operate as a financial incentive for agencies to avoid legal positions that courts could find to lack substantial justification.[6] Thus, our conclusion that hours and costs should be allo-

[5] The court recited a passage from *Hensley* that characterized " 'evaluation of the interrelatedness of several claims within a single lawsuit' " as " 'a task for the district court that had and decided the case, subject to appellate review for abuse of discretion,' " but distinguished *Hensley* on grounds that "all of the claims in *Hensley* fell within an express waiver of sovereign immunity contained in section 42 U.S.C. § 1988." *Id.* (quoting *Hensley*, 461 U.S. at 453–54 (Brennan, J., concurring in part and dissenting in part)). The court of appeals appears to have been unaware that the passage it quoted, which it ascribed to the Supreme Court, was actually part of Justice Brennan's opinion explaining his reasons for concurring in part and dissenting in part.

[6] The current language of section 2412(d)(4) originated with the 1985 legislation that revised and reenacted EAJA, which had lapsed in accordance with sunset provisions contained in the original Act. *See* Pub. L. No. 99–80, § 2(d), 99 Stat. 183, 185 (codified at 28 U.S.C. § 2412(d)(4) (1994)). The Senate Judiciary Committee explained that the revised language, which clarified that section 2412(d) awards must be paid from agency funds, was intended to "return[ ] the law to the Senate's intent when the bill was originally passed." S. Rep. No. 98–586, at 19–20. The Committee's original intentions concerning the funding of section 2412(d) awards were set forth in a 1979 report, which explained that the contemporaneous Senate bill included an agency funding requirement in order to "make the individual agencies and departments accountable for [their] actions." S. Rep. No. 96–253, at 21. A 1980 House-Senate conference eliminated the original Senate bill's agency funding language, substituting language that made it difficult to determine how Congress intended to fund section 2412(d) awards. *See generally Funding of Attorney Fee Awards Under the Equal Access to Justice Act*, 6 Op. O.L.C. 204, 212 (1982) (original Act's funding provisions, although ambiguous, were best understood to require that at least some section 2412(d) awards be paid "from general

cated to APA-EAJA claims only if they were not reasonably necessary to the claimant's prosecution of ESA citizen-suit claims might be questioned on grounds that other approaches to the allocation of hours and costs among claims would strengthen financial incentives for agencies to avoid unjustified positions.

We recognize that other conceivable approaches to the allocation of hours and expenses between EAJA and non-EAJA claims, such as allocation based on rough comparisons of the relative importance of the various claims, might give agencies stronger financial incentives to ensure that their legal positions are substantially justified. It is clear, however, that EAJA did not make the establishment of such incentives the overriding objective of federal law governing fees awards against the United States. Congress, as we have seen, expressly relegated section 2412(d) to a secondary role. Section 2412(d) has no application if Congress has "specifically provided by statute" an alternative fee-shifting scheme for the claim at issue, 28 U.S.C. § 2412(d)(1)(A), and does not operate to "alter[ ], modif[y] repeal[ ], invalidate[ ], or supersede[ ]" any other fee-shifting statute, Pub. L. No. 96–481, § 206, 94 Stat. at 2330 (as amended). In fact, EAJA itself subjected the United States to a wide range of new fees claims that are decided without regard to whether the United States was substantially justified and paid out of the judgment fund when claimants prevail. *See* 28 U.S.C. § 2412(b) (1994) (United States liable for fees and expenses under existing fee-shifting statutes and common-law doctrines "to the same extent that any other party would be liable"). In short, the tendency for the allocation method that we have described to limit the effectiveness of section 2412(d)'s financial incentives on agencies in the context of multi-claim litigation is simply one manifestation of the limited scope that Congress has provided for the operation of section 2412(d).

B. The Timing of the ESA Claim

The Umpqua River litigation, in addition to requiring elaboration of a general framework for the allocation of hours and costs between APA-EAJA and ESA citizen-suit claims, also posed the question of whether the allocation in this particular case should be affected by the claimant's relatively late presentation of the ESA citizen-suit claim. We were informed that the Third Amended Complaint in the Umpqua River case, which added count VI, was filed after the parties had filed summary judgment briefs on counts I through IV, though before the parties had filed briefs on count V and the district court had ruled on the first five counts. We were asked whether this circumstance should affect the allocation of hours and costs between counts V and VI.

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funds appropriated to the agencies against whom awards were entered") The amendment of section 2412(d)(4) in 1985, as explained by the Senate Judiciary Committee's report, was meant to establish the clear emphasis on financial accountability that the Senate had advocated in 1979

There is little discussion of this type of timing issue in reported fee-shifting cases. Our analysis is based primarily on the Supreme Court's consideration of a related question in *Smith v. Robinson*, 468 U.S. 992 (1984). Prevailing plaintiffs in that case initially challenged state officials' refusal to provide certain educational services to a handicapped child under federal and state statutes that did not authorize fee-shifting under the circumstances presented there. Toward the conclusion of trial court proceedings in the case, however, plaintiffs added an equal protection claim and then relied on this claim as the basis for a fee request under 42 U.S.C. § 1988. Plaintiffs did not add the equal protection claim until after they had obtained a Rhode Island Supreme Court ruling establishing their statutory right to the relief they sought. The Court stated that the late-filed equal protection claim had "added nothing to petitioners' [statutory] claims" and should therefore be regarded as having had "nothing to do with plaintiffs' success" on the merits. 468 U.S. at 1009 n.12. Under these circumstances, the Court found, the equal protection claim could not provide the basis for a fees award. *Id.* The Court remarked, however, that claims added before success has been assured on other grounds can serve as the basis for a fee award, stating that "[t]here is, of course, nothing wrong with seeking relief on the basis of certain statutes because those statutes provide for attorney's fees, or with amending a complaint to include claims that provide for attorney's fees." *Id.*; *see also Seybold v. Francis P. Dean, Inc.*, 628 F. Supp. 912, 914 (W.D. Pa. 1986) (holding that a fee-eligible federal claim, though never stated in a complaint, was properly before the court through constructive amendment). We are insufficiently familiar with the facts of the Umpqua River litigation to have a view on the role of count VI in the case. The preceding passage from *Smith*, however, makes clear that hours and costs may be allocated to a claim that is added after litigation is well underway — even if that claim is added for the purpose of establishing a right to fees — provided that the later-filed claim contributes to the plaintiffs' success on the merits, and hours and costs are properly attributable to that claim in accordance with the principles discussed above.

Although *Smith* indicates that hours and costs can be allocated to a fee-eligible claim that is added by amendment, it does not address whether such allocations should include hours and costs expended before the filing of the relevant amended complaint. We recognize that some work performed prior to the introduction of a later-filed fee-eligible claim, at least in some situations, could not reasonably be deemed to "relate" to that claim under the *Hensley* allocation methodology. For example, we do not believe that work performed on a fee-ineligible claim before the claimant could reasonably have anticipated the eventual filing of the later fee-eligible claim can be said to relate to the claim under *Hensley*.[7] Accord-

[7] Restrictions on the allocation of pre-filing hours and costs to late-filed fee-eligible claims presumably will not apply to essential pre-filing efforts, such as the factual investigations, research, and drafting that normally precede the filing of a complaint or amended complaint

ingly, we believe that *Hensley* itself places limits on the allocation of early litigation efforts to later-filed fee-eligible claims.

In the present case, however, we are aware of no circumstance that would preclude an allocation of early litigation efforts to count VI of the Umpqua River litigation. Count VI was filed approximately five months after the plaintiffs commenced this action by filing a four-count APA action and a request for emergency injunctive relief. Plaintiffs, however, must have formed plans to file their citizen-suit claim at least two months before the filing date, since ESA section 11(g) requires plaintiffs to provide at least sixty days' notice before filing a citizen-suit. Moreover, we are advised that, in the view of trial counsel for the government, the eventual addition of a citizen-suit claim — following the requisite notice and delay — appears to have been a part of plaintiffs' litigation strategy from the outset. In view of these circumstances, we can find no per se bar to the allocation of previously incurred hours and costs to the later-filed citizen-suit claim in the Umpqua River litigation.

III. CONCLUSION

Based on the foregoing analysis, we conclude that, in allocating hours and costs between the APA-EAJA and ESA claims in the Umpqua River litigation, federal litigators should subordinate EAJA section 2412(d) to ESA section 11(g)(4). Under this approach, hours and costs necessary to both counts should be assigned to the ESA claim for attorney's fees purposes, leaving only the hours and costs necessary only to the APA claim to be paid under EAJA. We also conclude that the timing of the ESA citizen-suit claim, which was added after significant development of the APA issues had already occurred, does not preclude allocation of hours and costs to the ESA claim, so long as those hours and costs were reasonably necessary to litigation of the ESA claim as well.

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

Authority of the General Services Administration to Provide Assistance to Transition Teams of Two Presidential Candidates

The Presidential Transition Act of 1963, with certain limited exceptions, authorizes the Administrator of the General Services Administration to provide transition assistance only for those services and facilities necessary to assist the transition of the "President-elect" and the "Vice-President-elect," as those terms are defined in the Act. Since there cannot be more than one "President-elect" and one "Vice-President-elect" under the Act, the Act does not authorize the Administrator to provide transition assistance to the transition teams of more than one presidential candidate.

November 28, 2000

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked our opinion whether, under the Presidential Transition Act of 1963, as amended,[1] the Administrator of the General Services Administration ("Administrator") has the authority to provide transition assistance to more than one presidential candidate in circumstances in which it remains unclear after the election which of two candidates will become the President of the United States. With the limited exceptions set forth below in note 3, the Act authorizes the Administrator to expend the funds appropriated to implement the Act only for those services and facilities that are necessary to assist the transition of the "President-elect" and the "Vice-President-elect." *See* Presidential Transition Act, § 3(a). The terms "President-elect" and "Vice-President-elect" are defined under the Act to mean the individuals that the Administrator determines are "the apparent successful candidates for the office of President and Vice-President, respectively." *Id.* § 3(c). Since there cannot be more than one "President-elect" and one "Vice-President-elect" under the Act, the Presidential Transition Act does not authorize the Administrator to provide transition assistance to more than one transition team.[2]

As summarized above, the assistance that the Administrator is authorized to provide under the Presidential Transition Act is expressly tied to the Administrator's determination of a "President-elect" and a "Vice-President-elect." "President-elect" and "Vice-President-elect" are defined terms under section 3(c) of the Act, which provides:

> The terms "President-elect" and "Vice-President-elect" as used in this Act shall mean such persons as are the apparent successful candidates for the office of President and Vice President, respec-

[1] The Presidential Transition Act is set out in the notes to § 102 of title 3 of the United States Code *See* 3 U S C. § 102 (1994). The Act has also recently been amended For those amendments, see Presidential Transition Act of 2000, Pub L No 106–293, 114 Stat. 1035 (2000).

[2] This memorandum addresses only the narrow question of the Administrator's authority to provide assistance under the Presidential Transition Act It does not address whether the Administrator, or any other department or agency, may have separate authority to provide transition assistance to more than one transition team.

> tively, as ascertained by the Administrator following the general elections held to determine the electors of President and Vice President in accordance with title 3, United States Code, sections 1 and 2.

Id. § 3(c). As a matter of the statutory definition, as well as common usage, there can be only one "President-elect" and "Vice-President-elect" from any election.

It is only to that "President-elect" and that "Vice-President-elect" that the Administrator is authorized by the Act to provide transition assistance. Section 3(a) of the Act, which sets out the services and facilities that the Administrator is authorized to provide, specifically states:

> The Administrator of General Services . . . is authorized to provide, upon request, to each President-elect and each Vice-President-elect, for use in connection with his preparations for the assumption of official duties as President or Vice President necessary services and facilities, including [the assistance specifically identified in subparagraphs (a)(1) through (a)(10)].

Id. § 3(a). Accordingly, by its terms, the Act generally authorizes assistance only to the "President-elect" and the "Vice-President-elect." Consistent with this general structure, the subparagraphs within subsection 3(a), which list specific services and facilities that the Administrator is authorized to provide, also generally make explicit reference to the President-elect and the Vice-President-elect. For example, subparagraph 3(a)(2) authorizes the payment of compensation to the "members of the office staffs designated by *the* President-elect or Vice-President-elect." Without the existence of a President-elect or Vice-President-elect, there can be no staff who have been designated and to whom compensation may therefore be paid. *See id.* § 3(a)(2) (emphasis added); *see also id.* §§ 3(a)(1), (3)–(5), (7), 3(b), 3(d), 3(e).[3] Similarly, the provisions in section 5 of the Act for the disclosure of financing and personnel information related to the transition are also expressly premised on, and limited to, the "President-elect" and the "Vice-President-elect." Each subsection in section 5 begins with language along the lines

[3] The only exceptions to the general structure of section 3 limiting assistance to a "President-elect" are two provisions from the 2000 amendments that appear to envision the expenditure of funds prior to the determination of a "President-elect." *See* Pub. L. No. 106-293, § 3 (relevant provisions added as subparagraphs (9) and (10) of the Presidential Transition Act). These additional provisions, by their distinct language and functions, reinforce the general limitation that assistance may be provided only to a "President-elect." In particular, subparagraph (10) expressly provides that it applies to the "candidates." *See* Presidential Transition Act, § 3(a)(10) ("Notwithstanding subsection (b), consultation by the Administrator with *any candidate* for President or Vice President to develop a systems architecture plan for the computer and communications systems of the candidate to coordinate a transition to Federal systems, if the candidate is elected." (emphasis added)). Subparagraph (9) involves the development by the General Services Administration of a transition directory on the officers, organization, and statutory and administrative authorities, functions, duties, responsibilities, and mission of each department and agency—expenditures that are preparatory to transition for whomever is determined to be the "President-elect" and that are not materially altered by multiple transition teams since the directory would remain the same.

of the following: "*The* President-elect and Vice-President-elect (as a condition for receiving services under section 3 and for funds provided under section 6(a)(1)) shall disclose to the Administrator . . . ." *E.g., id.* § 5(a)(1) (emphasis added); *see also* §§ 5(b)(1), 5(c). We thus believe that both the specific terms and the general structure of the Act preclude the Administrator from relying upon this Act to provide assistance to more than one transition team.

The most plausible contrary argument for providing assistance to multiple transition teams, notwithstanding the clear language and structure of the Act, would be that such assistance is necessary under present circumstances because of the shortened time period for the transition. In support of this argument, it is clear, both in the section of the Act stating Congress's purpose and similar expressions of purpose in the legislative history, that the Act was intended "to promote the orderly transfer of executive power." *Id.* § 2. In this regard, the Act states:

> Any disruption occasioned by the transfer of the executive power could produce results detrimental to the safety and well-being of the United States and its people. Accordingly, it is the intent of the Congress that appropriate actions be authorized and taken to avoid or minimize any disruption.

Id. See also, e.g., H.R. Rep. No. 88–301, at 4 (1963) ("[T]he size and complexity of our Federal Government today, to say nothing of the difficult domestic and international problems that the President must face, make it a vital necessity that the machinery of transition be as smooth as possible and that sufficient resources are at hand to properly orient the new national leader in whatever manner is required. . . . Under present conditions, a new President, in one sense, begins working for the Government the morning after the election."); 109 Cong. Rec. 13,349 (1963) (statement of Rep. Joelson) ("In that interim time he is called upon probably to make more fateful decisions than he will have to make after he is, indeed, sworn into office. For that reason it is up to us to see that he has the tools and the implements.").

We doubt that this expression of intent would, in any event, be sufficient to overcome the evidence from the express terms and structure of the Act that funds appropriated to implement the Act are not available in circumstances in which the Administrator cannot ascertain who the apparent victorious candidate is. The legislative history, moreover, makes clear that Congress did not intend the Presidential Transition Act to be available until an apparent President-elect emerged.

During debate on the bill, concern was raised about the effect that an Administrator's determination of the "President-elect" could potentially have on a close election. *See* 109 Cong. Rec. 13,348–49 (1963). As part of that debate, Representative Gross expressed the concern that, in connection with the voting of the electoral college, "those designated as President and Vice President by the present

Administrator of General Services would be given psychological and other advantages by designating them as President and Vice President." *Id.* at 13,348. In response, Representative Fascell, who was the sponsor of the bill and the House manager, stated as follows: "I do not think so, because if they were unable at the time to determine the successful candidates, *this act would not be operative.* Therefore *in a close contest, the Administrator would not make the decision.*" *Id.* (emphasis added). Representative Gross, however, remained concerned and continued to press the issue. In response to those further inquires, Representative Fascell again responded: "There is nothing in the act that requires the Administrator to make a decision which in his own judgment he could not make. *If he could not determine the apparent successful candidate, he would not authorize the expenditure of funds to anyone; and he should not.*" *Id.* (emphasis added).

Representative Gross was not the only member concerned about the issue, which was raised again later in the debate by Representative Haley:

> I notice that these funds can be used immediately after the general election in November. But how would this situation work, for instance, if the President or, at least, before the determination of the votes in the electoral college, suppose that some person was, say, three or four votes shy? How would this Administrator determine who was in a position to expend these funds?

Id. at 13,349. In response, Representative Fascell quoted the section of the bill defining "President-elect" and "Vice-President-elect" and stated:

> This act and the Administrator could in no way, in any way, affect the election of the successful candidate. The only decision the Administrator can make is who the successful candidate — the apparent successful candidate — for the purposes of this particular act in order to make the services provided by this act available to them. And, *if there is any doubt in his mind, and if he cannot and does not designate the apparently successful candidate, then the act is inoperative.* He cannot do anything. *There will be no services provided and no money expended.*

Id. (emphasis added). *See also id.* (statement of Rep. Fascell) ("In the whole history of the United States, there have been only three such close situations. It is an unlikely proposition, but if it were to happen, if the administrator had any question in his mind, he simply would not make the designation in order to make the services available as provided by the act. If as an intelligent human being and he has a doubt, he would not act until a decision has been made in the electoral college or in the Congress.").

It is clear from the legislative history that Congress understood and intended that the Presidential Transition Act would simply be unavailable to fund transition services and facilities in circumstances in which the winner of the election is not apparent. This is consistent with the plain language and structure of the Act, which, with the two exceptions noted above in note 3, authorizes the Administrator to provide transition assistance only to the "President-elect" and the "Vice-President-elect." Accordingly, the Presidential Transition Act would not authorize the Administrator to expend the funds appropriated to implement the Act to provide transition assistance to multiple transition teams.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

Authorization for Continuing Hostilities in Kosovo

Pub L. No. 106–31, the emergency supplemental appropriation for military operations in Kosovo, constituted authorization for continuing hostilities after the expiration of sixty days under section 5(b) of the War Powers Resolution.

December 19, 2000

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum memorializes and explains advice we provided to you in May of 1999 regarding whether Pub. L. No. 106–31, 113 Stat. 57 (May 21, 1999), the emergency supplemental appropriation for military operations in Kosovo, constituted authorization for continuing hostilities after the expiration of sixty days under section 5(b) of the War Powers Resolution, Pub. L. No. 93–148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548 (1994)) (the "WPR"). This Office advised that the appropriation did constitute such authorization. Subsequently, the district court for the District of Columbia and the Court of Appeals for the D.C. Circuit decided a lawsuit brought against the President by thirty-one members of Congress, who claimed that the President had violated the Constitution and the WPR by involving the United States in hostilities in Kosovo without congressional authorization. Neither the district court nor the court of appeals reached the merits of the plaintiffs' claims. The district court dismissed the suit for lack of standing, *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999), and the D.C. Circuit affirmed the dismissal, also on standing grounds, 203 F.3d 19 (D.C. Cir.), *cert. denied*, 531 U.S. 815 (2000).

Section I of this memorandum summarizes the relevant provisions of the WPR, including section 8(a)(1), which provides that authorization may not be inferred from appropriation laws that do not specifically refer back to the WPR. Section II shows that the relevant case law, historical practice, and basic principles of constitutional law lead to the conclusion that appropriation laws may authorize military combat. Section III shows that section 8(a)(1) does not bar later Congresses from authorizing military operations through appropriations (an interpretation that would be unconstitutional), but instead has the effect of creating a background principle that may inform the interpretation of later Acts of Congress. Section IV shows that by enacting Pub. L. No. 106–31, Congress intended to enable the President to continue U.S. participation in Operation Allied Force. Finally, Section V presents this Office's conclusion that, even taking account of the background principle established by section 8(a)(1), Pub. L. No. 106–31 authorized the President to continue military operations in Kosovo.[1]

[1] Previous Administrations have expressed different views concerning the constitutionality of the WPR. *Compare* President Nixon's Veto of the War Powers Resolution, H.R. Doc. No 93–171, at 1 (1973) (calling "unconstitutional" Continued

I. The War Powers Resolution and Authorization of Hostilities

The WPR is framework legislation that sets forth procedures for reporting and authorizing hostilities. The statute begins with a congressional declaration of purpose:

> It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

50 U.S.C. § 1541(a).[2] This section summarizes the most important provisions of the statute.

The "core" of the WPR "resides in sections 4(a)(1) and 5(b)." John Hart Ely, *War and Responsibility* 48 (1993).[3] Section 4(a)(1) of the WPR requires the President to submit a report to Congress whenever, "[i]n the absence of a declaration of war," United States Armed Forces are introduced "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." 50 U.S.C. § 1543(a)(1). Section 5(b) requires the President to "terminate any use of the United States Armed Forces with respect to which [a] report [under section 4(a)(1)] was submitted (or required) [within 60 days thereafter]" unless the Congress takes certain enumerated actions to authorize continuing combat or "is physically unable to meet as a result of an armed attack upon the United States." 50 U.S.C. § 1544(b). The 60 day period may be extended

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the provision in the WPR that "would automatically cut off certain authorities after sixty days unless the Congress extended them"), *with* "Ask President Carter". Remarks During a Telephone Call — in Program on the CBS Radio Network," 1 Pub Papers of Jimmy Carter 324 (Mar 5, 1977) (noting that WPR is an "appropriate reduction" in the President's power), *Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A Op. O.L.C. 185, 196 (1980) ("We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of § 1544(b) of the Resolution"). In light of our conclusion that Congress lawfully authorized continued hostilities beyond the 60-day statutory limit, we have no occasion to consider any constitutional arguments that might be made.

[2] The WPR had its origins in the Vietnam War. *See* 119 Cong. Rec. 1394 (1973) (statement of Senator Javits) ("[WPR was] an effort to learn from the lessons of the last tragic decade of war in Vietnam which has cost our Nation so heavily in blood, treasure, and morale. The War Powers Act would assure that any future decision to commit the United States to any warmaking must be shared in by the Congress to be lawful"); *see also* Thomas F. Eagleton, *War and Presidential Power* 107–123 (1974) (discussing background of WPR in Vietnam War). For discussion of initial attempts to enact war powers legislation, *see* Thomas F. Eagleton, *Congress and the War Powers*, 37 Mo. L. Rev 1, 18–20 (1972); William B. Spong. Jr., *Can Balance Be Restored in the Constitutional War Powers of the President and Congress?*, 6 U Rich L Rev 1, 18–28 (1971). Senator Eagleton introduced a war powers bill into the Senate in 1971 and played a prominent role in the Senate debates over war powers legislation Senator Spong, in conjunction with Senators Javits and Eagleton, managed the Senate War Powers legislation for the Foreign Relations Committee *See* Eagleton, *supra*, at 134

[3] We have outlined the general structure of the War Powers Resolution in *Overview of the War Powers Resolution*, 8 Op. O L.C. 271 (1984).

for an additional 30 days if the President certifies to Congress that "unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in bringing about a prompt removal of such forces." *Id.* Thus, when a report under section 4(a)(1) is filed (or required to be filed), section 5(b)'s 60 day (or, in appropriate circumstances, 90 day) "clock" begins to run.[4]

Under section 5(b), Congress may, within the 60 day period, authorize continuing hostilities after that period by any one of three methods: (1) by a declaration of war; (2) by enacting a "specific authorization for such use of United States Armed forces"; or (3) by "extend[ing] by law such sixty-day period." 50 U.S.C. § 1544(b). The section thus functions essentially as a burden-shifting device. As Judge Joyce Hens Green has observed:

> [T]he automatic cutoff after 60 days was intended to place the burden on the President to seek positive approval from the Congress, rather than to require the Congress positively to disapprove the action, which had proven so politically difficult during the Vietnam war. To give force to congressional power to declare war, Presidential warmaking would not be justified by congressional silence, but only by a congressional initiative . . . .

Crockett v. Reagan, 558 F. Supp. 893, 899 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983).[5] In addition to requiring the President to seek approval for continuing hostilities, section 5(b) is also designed to hold Congress responsible for the ultimate decision over war and peace.[6]

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[4] The full text of section 5(b) reads as follows:

> Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces

50 U S.C § 1544(b)

[5] *See also* S Rep. No 93–220, at 28 (1973) ("The way the bill is constructed . the burden for obtaining an extension under section 5 rests on the President He must obtain specific, affirmative, statutory action by the Congress in this respect."), *War Powers Legislation, 1973: Hearings Before the Senate Comm on Foreign Relations*, 93d Cong 243 (1973) (statement by Senator Jacob K. Javits) ("The Senate bill, in Section 5 particularly, is very deliberately constructed so as to throw the burden of proof on the President to convince the Congress, with respect to the question of authorizing an extension of his 'emergency' involvement of the Armed Forces in hostilities. I think it is essential, when the President has acted in the absence of a declaration of war, that the burden be on him to convince the Congress that he has acted in response to a bona fide emergency "); 119 Cong Rec. 24,541 (1973) (remarks of Sen. Javits).

[6] *See* S. Rep. No 93–220, at 19 (WPR "would not have been necessary if Congress had defended and exercised its responsibility in matters of war and peace"); 119 Cong Rec. 24,544–45 (1973) (statement of Sen. Stennis) ("[I]f this bill becomes law it will signal that the members of Congress are willing to assume a heavy duty — the duty

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By its terms, the statute contemplates possible mechanisms for authorizing hostilities other than a declaration of war. The decision as to which legal vehicle to choose is within Congress's power: it is well established that "it is constitutionally permissible for Congress to use another means than a formal declaration of war to give its approval to a war." *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973). *See also Montoya v. United States*, 180 U.S. 261, 267 (1901) ("We recall no instance where Congress has made a formal declaration of war against an Indian nation or tribe; but the fact that Indians are engaged in acts of general hostility to settlers, especially if the government has deemed it necessary to despatch a military force for their subjugation, is sufficient to constitute a state of war."); *Berk v. Laird*, 317 F. Supp. 715, 722 (E.D.N.Y. 1970) (noting that plaintiff's memorandum of law had listed 159 instances of the use of U.S. forces abroad from 1798 to 1945, of which only six involved formal declarations of war by either side), *aff'd sub nom., Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1971); *Hamilton v. McClaughry*, 136 F. 445, 449 (D. Kan. 1905) ("A formal declaration of war . . . is unnecessary to constitute a condition of war."); *United States v. Castillo*, 34 M.J. 1160, 1164 (N.M.C.M.R. 1992) ("Congress may assent to the waging of war by means other than a formal declaration of war, and what form it chooses to record that assent is within its discretion to decide."). Moreover, in the period since the WPR was enacted, Congress has explicitly authorized hostilities under the statute without declaring war.[7] Congress has in fact often authorized hostilities by legislative measures other than formal "declarations of war" since the days of the early republic.[8] Indeed, at the time of the Founding, formal

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to use their best judgment and to share with the President the responsibility for the most important decision a nation can make, the decision of whether or not to go to war."); Thomas F. Eagleton, *The August 15 Compromise and the War Powers of Congress*, 18 St. Louis U L.J. 1, 8 (1973) ("[I]t should be more apparent now than ever that Congress will not exercise its war powers unless legislation is enacted clearly reaffirming that Congress alone must bear the responsibility for authorizing the commitment of American forces to hostile action."), *War Powers Legislation, 1973: Hearings Before the Senate Comm on Foreign Relations*, 93d Cong. 20 (1973) (statement of Prof Alexander M Bickel, Yale University Law School) ("Congress will not likely—I had nearly said, cannot ever—be brought to resume exercise of its share of the war power through specific actions until it has in declarative fashion reallocated a share of the responsibility to itself. The people tend not to hold Congress responsible, and its own Members tend to avoid the responsibility."), Ely, *supra*, at 48 ("Like the Gramm-Rudman-Hollings Budget Control Act of 1985 and other recent 'framework' legislation, the War Powers Resolution is designed to force a decision regarding matters that Congress has in the past shown itself unwilling to face up to . . . [Section 5(b)] provides that once the Resolution is triggered by the commitment of troops, Congress itself has sixty days to make the critical decision on war and peace ")

[7] The joint resolution authorizing the Persian Gulf War in 1991, Pub L No. 102–1, 105 Stat. 3 (1991) (reprinted at note following 50 U S C § 1541), for example, "is not styled a declaration of war and does not appear to be so," *Castillo*, 34 M.J. at 1164; nonetheless, it unquestionably (and in terms) provided specific statutory authorization within the meaning of section 5(b) for the conflict that ensued, *see* note at § 2(c)(1) ("Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.") (internal citations omitted). Similarly, the Multinational Force in Lebanon Resolution, Pub. L. No 98–119, 97 Stat 805 (1983), *reprinted at* note following 50 U S.C. § 1541, expressly authorized the continued presence of United States Armed Forces in Lebanon for 18 months following the date of the statute's enactment and did not involve a declaration of war *See id.* § 2(c) ("The Congress intends this joint resolution to constitute the necessary specific statutory authorization under the War Powers Resolution for continued participation by United States Armed Forces in the Multinational Force in Lebanon ")

[8] *See, e.g., Bas v. Tingy*, 4 U S (4 Dall.) 37 (1800) (awarding compensation under Act of Congress dealing with recapture of ships from "the enemy", France deemed "the enemy" although Congress had not declared war during

"declarations" of war were increasingly rare in state practice,[9] and prominent legal theorists known to the Founders had analyzed other legal devices for authorizing war.[10] Moreover, whatever their view of the scope of the President's authority to conduct hostilities, scholars agree that Congress could authorize conflict through measures other than a formal declaration of war.[11]

Finally, section 8(a) of the WPR elaborates on the "specific authorization" option:

> Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred —

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period of quasi-war with France after 1798), Abraham D. Sofaer, *War, Foreign Affairs and Constitutional Power The Origins* 139, 164 (1976) (noting that, with respect to the quasi-war with France, President Adams "gradually convinced Congress to authorize hostilities without a declaration" and that, in *Bas v. Tingy*, "[t]he Supreme Court unambiguously confirmed the power of Congress to authorize hostilities in any degree without declaring war"), Gerhard Casper, *Separating Power Essays on the Founding Period* 62 (1997) (discussing Congress's decision not to declare war with Algiers, as requested by President Madison, but to authorize limited naval warfare instead), Louis Fisher, *Presidential War Power* 17–18 (1995) (arguing that Congress had authorized quasi-war with France through several dozen bills supporting military action by President Adams); *id* at 13 (noting that Congress authorized early Indian wars through legislation authorizing protection of frontier); Erwin N. Griswold, *The Indochina War—Is It Legal, reprinted in* 117 Cong Rec 28,977 (1971) ("The notion of a war authorized by Congress in a fashion less dramatic than a formal declaration of war has been accepted since the earliest years of our national existence."), Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *Re: The President and the War Power· South Vietnam and the Cambodian Sanctuary* at 25 (May 22, 1970) ("The Gulf of Tonkin Resolution "expressly authorized extensive military involvement by the United States . . . To reason that if the caption 'Declaration of War' had appeared at the top of the resolution, this involvement would be permissible, but that the identical language without such a caption does not give effective congressional sanction to it at all, would be to treat this most nebulous and ill defined of all areas of the law as if it were a problem in common law pleading."), Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 Chi -Kent L Rev. 131, 139–40 (1971) ("[T]here is utterly no reason to think that Congress has only the mega-power to declare war . . . and no mini- or intermediate power to commit the country to something less than a declared war. Congress . . . has the necessary-and-proper power, the power to do anything that is necessary and proper to carry out the functions conferred upon it and upon any other department or officer of the government. If in the conditions of our day it is necessary to carry out the power to declare war by taking measures short of a declaration of war, everything in the scheme of government set up by the Constitution indicates that Congress has the needed authority.").

[9] Thus, when France in 1778 entered the Revolutionary War as an ally of the Colonies against Great Britain, it did not issue a "Declaration of War" —although it did so in June, 1779 *See* Samuel Flagg Bemis, *The Diplomacy of the American Revolution* 136, 145 (1967 reprint of 1935 ed)

[10] *See* W. Taylor Reveley III, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?* 54–55 (1981) (Legal theorists known to Founders had "examined in detail undeclared or 'imperfect' war, noting that it was generally limited in scope, designed to redress grievances, and prosecuted through restricted government action or private war making under letters of marque and reprisal [U]ndeclared war was the norm in eighteenth-century European practice, a reality brought home to Americans when Britain's Seven Years' War with France began on this continent.") *See also The Federalist No. 25*, at 161 (A. Hamilton) (Jacob E. Cooke ed , 1961) ("[T]he ceremony of a formal denunciation of war has of late fallen into disuse "), William Michael Treanor, *Fame, The Founding, and The Power to Declare War*, 82 Cornell L Rev. 695, 709 (1997).

[11] *See, e g* , Ely, *supra*, at 25 (noting that the idea that congressional combat authorizations must be labeled "declarations of war" is "manifestly out of accord with the specific intentions of the founders" and that "most eighteenth-century wars were not 'declared' in so many words, a fact of which the founders took specific and approving note "), Fisher, *supra*, at 9 (1995) ("The framers were well aware that nations approved war either by declaration or authorization "), Charles A Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale L J. 672, 694 (1972) ("In sum, familiarity with Grotius and his successors and with then-recent history would have suggested to one in the late 1780's that undeclared war was no oddity .").

> (1) from any provision of law . . . including any provision contained in any appropriations Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter.

50 U.S.C. § 1547(a)(1).

Like section 5(b), section 8(a) implicitly recognizes that Congress may authorize hostilities by means other than a declaration of war. Because it purports to allow Congress to authorize hostilities through appropriation statutes that specifically invoke the WPR, section 8(a) further recognizes that appropriation statutes may, under some circumstances, authorize hostilities.

II. Appropriations and Authorization of Military Combat

The Supreme Court has recognized that, as a general matter, appropriation statutes may "stand[] as confirmation and ratification of the action of the Chief Executive." *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947). Congress may also "amend substantive law in an appropriations statute, as long as it does so clearly." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440 (1992). "'[W]hen Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.' *United States v. Dickerson*, 310 U.S. 554, 555 (1940). 'The whole question depends on the intent of Congress as expressed in the statutes.' *United States v. Mitchell*, 109 U.S. 146, 150 (1883)." *United States v. Will*, 449 U.S. 200, 222 (1980).

Indeed, on numerous occasions, the Supreme Court has applied this general principle to find that Congress had authorized or ratified executive branch action through appropriation measures. For example, in *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147 (1937), the Court held that Congress had ratified the abolition of the Shipping Board and the transfer of its functions to the Department of Commerce by a series of subsequent appropriation acts. Likewise, in *Wells v. Nickles*, 104 U.S. 444, 447 (1881), the Court found that Congress had authorized the Department of the Interior to appoint agents to protect timber on government land through "appropriations made to pay for the services of these special timber agents." And in *Ludecke v. Watkins*, 335 U.S. 160, 173 n.19 (1948), the Court explained that Congress had "recognized . . . the President's powers under the Alien Enemy Act of 1798" to remove enemy aliens summarily in time of declared war "by appropriating funds" for the maintenance, care, detention, surveillance, and transportation of such aliens. *See also Ex Parte Mitsuye Endo*, 323 U.S. 283, 303 n.24 (1944) (noting that to authorize executive action through

appropriations, Congress "must plainly show a purpose to bestow the precise authority which is claimed"); Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 Yale L.J. 181, 271 (1945) (noting that Congressional approval of American membership in international organizations such as the Pan-American Union "may readily be inferred from [a] long series of acts appropriating funds to defray the United States' aliquot portion of operating expenses").

The notion that Congress can authorize hostilities through appropriation laws follows directly from this general principle. As Ely explains:

> Throughout the course of the [Vietnam] war, hundreds of billions of dollars were appropriated to support it, and the draft was repeatedly extended. Supporters understandably cited these measures as further congressional authorization.
>
> The law generally pertaining to authorization by appropriation is about what first-order common sense suggests it should be. If there is no reason to infer that Congress knew what the agency or program in question was about, the fact that it was buried in an appropriations measure is typically not taken to constitute authorization of it. If the program was conspicuous, it is. Indeed, assuming sufficient notice of what was going on, appropriations may in some ways constitute unusual evidence of approval, in that typically Congress acts twice—once to authorize the expenditure and again to appropriate the money.

Ely, *supra*, at 27. Indeed, Congress has on numerous occasions authorized U.S. involvement in armed conflict at least in part through appropriation laws. As we explained in our 1984 overview of the WPR, "[p]rior to the enactment of the WPR, many enactments of Congress, especially appropriations measures, could justifiably have been regarded by the Executive as constituting implied authority to continue the deployment of our armed forces in hostilities." 8 Op. O.L.C. at 273 n.4. In several instances in early Administrations, appropriation laws played an important role in authorizing or ratifying presidential use of the Armed Forces in situations of conflict. For example, President George Washington "used force against the Wabash Indians pursuant to a statute that provided forces and authorized the call-up of militia to protect frontier inhabitants from the hostile incursions of Indians. This statute, along with the requests and debates that accompanied it, *and the appropriations that followed its adoption*, made clear that Congress approved the military engagements Washington undertook against the Wabash." Abraham D. Sofaer, *The Power Over War*, 50 U. Miami L. Rev. 33, 41 (1995) (emphasis added) (footnote omitted); *see also* John C. Yoo, *The Continuation of*

Politics By Other Means: The Original Understanding of War Powers, 84 Cal. L. Rev. 167, 291 (1996) (noting of Washington's campaign against the Indians in the Northwest that "Congress' approval of the appropriation . . . constituted an explicit authorization of the President's war plans."). Congress also authorized President Adams to conduct the undeclared Quasi-War against France in part by appropriating funds to strengthen the military. *See* Sofaer, *War, Foreign Affairs and Constitutional Power, supra* at 139–66 (describing appropriation laws and other measures by which Congress authorized hostilities against France); Yoo, *supra*, at 292 ("Congress approved Adams' designs to wage a naval war against France by supplying the funds for the bulked up military."). Another instance in which appropriation laws or procurement statutes were thought by some members of Congress to provide some measure of authority for the use of force occurred in the course of the Monroe Administration's efforts to annex Florida. *See* Sofaer, *The Power Over War, supra*, at 47–48 ("A long and important Congressional debate followed these events. . . . The classic arguments concerning the meaning of the power to declare war were made on both sides of the issue, including the argument that Congress had authorized the actions in Florida by providing the funds to pay the militia."); *see also* David P. Currie, *Rumors of Wars: Presidential and Congressional War Powers, 1809–1829*, 67 U. Chi. L. Rev. 1, 14–15 (2000) (noting George Poindexter's argument that Congress had authorized President Monroe to order General Jackson to cross into Spanish territory to wage defensive war on the Seminoles by appropriating funds for the action).

So-called "Indian" wars, which were common in American history, were also not declared wars; rather, Congress was said to have authorized or ratified them by a variety of means, including voting appropriations to pay the troops called out and to defray the expenses of campaigns. *See Alire v. United States*, 1 Ct. Cl. 233, 238 (1865) (quoting report of the Secretary of War that says: "And Congress has seldom failed to recognize and ratify [the so-called 'Indian wars'], by voting appropriations and to pay the troops called out and defray the expenses incident to such expeditions."), *rev'd on other grounds*, 73 (6 Wall.) U.S. 573 (1867). In 1838, Attorney General Butler opined that war had been waged on the Seminole Indians "by authority of the legislative department, to whom the power of making war has been given by the constitution," because Congress had both "recognised the commencement of these hostilities, and appropriated money to suppress them," and because it had later made "[s]everal appropriations for the same object." *Existence of War With the Seminoles*, 3 Op. Att'y Gen. 307 (1838). In 1905, a district court held that President McKinley's intervention in China during the Boxer Rebellion constituted war, and was ratified by Congress's decision to vote wartime pay to the troops who served on the expedition. *See Hamilton*, 136 F. at 451. It has also been argued that Congress ratified the Korean War by enacting several major pieces of war-related legislation during that con-

flict, including a bill to increase taxes by $4.7 billion to help pay for the war. *See* Ely, *supra*, at 11 ("[B]efore the war was over Congress had voted draft extensions and special appropriations which by some people's lights constituted sufficient authorization . . . .").

The most conspicuous example of Congress authorizing hostilities through its appropriations power occurred during the War in Vietnam. *See* William C. Banks & Peter Raven-Hansen, *National Security Law and the Power of the Purse* 119 (1994) ("The paradigm of what we have called legitimating appropriations — appropriation measures from which the executive infers authority for national security actions — is the succession of appropriations for military activities in Southeast Asia during the Vietnam War."). In that war, the State Department Legal Adviser argued that Congress had authorized the conflict, not only through the Gulf of Tonkin Resolution, 78 Stat. 384 (1964), but also by enacting supplemental appropriations bills. Noting that the Gulf of Tonkin Resolution provided that Congress could terminate that statute by concurrent resolution, and that Congress had not in fact done so, Leonard Meeker, the State Department's Legal Adviser during the Johnson Administration, pointed out that

> [i]nstead, Congress in May 1965 approved an appropriation of $700 million to meet the expense of mounting military requirements in Viet-Nam. (Public Law 89–18, 79 Stat. 109.) The President's message asking for this appropriation state[s] that this was "not a routine appropriation. For each Member of Congress who supports this request is also voting to persist in our efforts to halt Communist aggression in South Vietnam." The appropriation act constitutes a clear congressional endorsement and approval of the actions taken by the President.
>
> On March 1, 1966, the Congress continued to express its support of the President's policy by approving a $4.8 billion supplemental military authorization by votes of 392–4 and 93–2. An amendment that would have limited the President's authority to commit forces to Viet-Nam was rejected by a vote of 94–2.

Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, 54 Dep't St. Bull. 474, 487–88 (1966) (footnote omitted).[12]

Five years later, the Solicitor General Erwin Griswold made similar arguments. Maintaining that the Vietnam War was congressionally authorized, Griswold said:

[12] Senator Eagleton objected to the State Department's reasoning because "I could not accept the idea that broad appropriations acts authorizing money for a large number of vital governmental functions could be read as specific authorizations for hostilities." Eagleton, *supra*, at 125. However, the State Department's argument rested, not on such broad appropriation acts, but on specific appropriations for the war in Vietnam *See* Pub L No 89–18, 79 Stat 109 (1965) (appropriating $700 million "upon determination by the President that such action is necessary in connection with military activities in southeast Asia")

> Perhaps even more important than the Tonkin Gulf Resolution is the fact that Congress has consistently backed and supported the actions of the President in all the intervening years. Early in 1965, President Johnson asked for and obtained a special appropriation of seven hundred million dollars, for the express purpose of carrying on military action in Southeast Asia. This was granted by an Act of Congress approved on May 7, 1965. The vote in Congress was 408 to 7 in the House, and 83 to 3 in the Senate. This is an unusual appropriations act, in that it consists of a single item. Thus, there is no possibility that it passed through Congress by inadvertence, or that the report for it may have been coerced, as in the case of a rider. . . . After this, there were many legislative acts by Congress, taken in full knowledge of the situation in Southeast Asia, and in support of the President's actions.

Erwin N. Griswold, *The Indochina War—Is It Legal?, reprinted in* 117 Cong. Rec. 28,978 (1971).

Several courts and legal scholars have agreed that the appropriations provided by Congress to fund the war played an important (and in some cases dispositive) role in authorizing armed conflict in Vietnam. For example, directly following his observation that Congress can authorize executive action through appropriations if the program in question is "conspicuous," Professor Ely notes: "In this case, it would be an understatement to say that the program for which Congress was appropriating funds (and extending the draft) was conspicuous. In May of 1965 Congress enacted a special appropriation of $700 million for 'military activities in southeast Asia.' " Ely, *supra*, at 27; *see also id.* at 27–30 (explaining why appropriations constituted authorization and rejecting arguments to the contrary); *Da Costa v. Laird*, 448 F.2d 1368, 1369 (2d Cir. 1971) ("[T]here was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive, even in the absence of the Gulf of Tonkin resolution."); *Berk*, 317 F. Supp. at 724–28 (reviewing appropriations acts for Vietnam War, and holding that they authorized hostilities); *Orlando*, 443 F.2d at 1042 (identifying appropriation bills, as well as the Tonkin Gulf Resolution and the extension of the Military Selective Service Act, as demonstrating that "[t]he Congress and the Executive have taken mutual and joint action in the prosecution and support of military operations in Southeast Asia from the beginning of those operations"); *Mitchell*, 488 F.2d at 615 (concluding otherwise but noting that "[t]he overwhelming weight of authority . . . holds that the appropriation, draft extension, and cognate laws enacted with direct or indirect reference to the Indo-China war . . . did constitute a constitutionally permissible form of assent."); Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and*

Responsibility: Constitutional Lessons of Vietnam and Its Aftermath, 92 Mich. L. Rev. 1364, 1392 (1994) ("[S]tatutes—defense appropriation acts, defense authorizations—can serve as the basis on which the President may validly commit U.S. forces without further returning to Congress for fresh mandates beyond those given by statute. This was the history of the entirely valid constitutional authorization of the Vietnam War, and Ely forthrightly, and, I think, courageously, acknowledges this."); Norman A. Graebner, *The President As Commander in Chief: A Study in Power*, in *Commander in Chief: Presidential Leadership in Modern Wars* 42 (Joseph G. Dawson, III ed., 1993) ("A congressional majority underwrote the war in Vietnam from 1961 until 1973 through its power of the purse; that war always belonged to Congress as much as to the presidents. They fought it together.").[13]

Finally, although the court of appeals in *Holtzman v. Schlesinger*, 484 F.2d 1307, 1313 (2d Cir. 1973), invoked the political question doctrine and thus did not reach the merits of the claim that President Nixon lacked the authority for the bombing of Cambodia after the cease-fire in Vietnam and the removal of United States prisoners of war from that country, it indicated that, if it had reached the merits, it would have found that a provision of the Joint Resolution Continuing Appropriations for Fiscal 1974, Pub. L. No. 93–52 (1973), "support[ed] the proposition that the Congress has approved the Cambodian bombing." *See also* Thomas F. Eagleton, *The August 15 Compromise and the War Powers of Congress*, 18 St. Louis U. L.J. at 1 ("On June 29 . . . [i]t was clear that neither the American people nor Congress wanted a continuation of the bombing. But before that legislative day was over, Congress would authorize a forty-five day war in Indochina.").

Some have argued that, on the contrary, appropriation statutes that fund ongoing war efforts do not constitute authorization of those war efforts. *See* Francis D. Wormuth & Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* 227–34 (2d ed. 1989); *War Powers Legislation: Hearings Before the Senate Comm. on Foreign Relations*, 92d Cong. 23 (1973) (statement of Professor Alexander M. Bickel) ("To appropriate money in support of a war the President is already waging, it seems to me, is no more to ratify his action in responsible fashion than to appropriate money for the payment of

[13] It has also been suggested that even after the repeal of the Gulf of Tonkin Resolution, *See* Pub. L No. 91–672, § 12, 84 Stat. 2053, 2055 (1971) (repealing Gulf of Tonkin Resolution), Congress' continuing appropriations for the war effort were sufficient to authorize continuing hostilities in Vietnam. As Ely notes

> [The intentions of those who voted to repeal the Tonkin Gulf Resolution] would not have mattered, had the Tonkin Gulf Resolution stood as of 1971 as the only congressional authorization for the war· When the only authorization goes, the war goes, irrespective of what people think they are up to However, by 1971 the situation was far from that: Congress had by then, by a number of appropriations measures, quite pointedly reiterated its authorization of the war. Moreover, and not surprisingly under the circumstances, it continued after its repeal of the Tonkin Gulf Resolution to appropriate funds for military activities in Southeast Asia, and to extend the draft
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> Tantalizing as the repeal must thus have seemed to those wishing to mount a legal attack on the war, it unfortunately was just more of Congress's playing Pontius Pilate

Ely, *supra*, at 33

his salary."); *Mitchell*, 488 F.2d at 615 ("This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war."); *Campbell*, 203 F.3d at 31 n.10 (Randolph, J., concurring) (citing and quoting *Mitchell* for the same proposition). This argument can take one of two forms. First, one could argue that a general defense-related appropriation statute does not authorize the ongoing hostilities because it provides only general defense-related funds and does not indicate any approval of the specific hostilities at issue. While this might be true, it does not undermine the basic principle explained above — that an appropriation statute specifically and conspicuously aimed at funding hostilities may constitute authorization of those hostilities. Second, some have argued that appropriations, regardless of how specific they may be with respect to ongoing war efforts, should not be interpreted to authorize continuing military operations because those appropriations could just as easily be understood as providing resources for men and women already in combat, simply to ensure that they do not suffer as a result of a disagreement between the Executive and the Congress regarding the wisdom of the deployment. *See, e.g., Mitchell*, 488 F.2d at 615 (declining to decide whether President Nixon had exceeded his constitutional power on political question grounds, but noting that, "in voting to appropriate money or to draft men a Congressman is not necessarily approving the continuation of a war no matter how specifically the appropriation or draft act refers to that war. . . . An honorable, decent, compassionate act of aiding those already in peril is no proof of consent to the actions that placed and continued them in that dangerous posture.").[14] Although this may be true in some cases, in other cases, as Ely explains, this proposition "doesn't make sense . . . [because] Congress could [phrase] its funds cut-off as a phase out, providing for the protection of the troops as they [are] withdrawn." Ely, *supra*, at 29. Congress took such a step with respect to hostilities in Somalia in November of 1993, when it provided that funds could be obligated beyond March of 1994 only "to protect American diplomatic facilities and American citizens, and noncombat personnel to advise the United Nations commander in Somalia." Pub. L. No. 103–139, § 8151(b)(2)(B), 107 Stat. 1418, 1476 (1993). Alternatively, Congress could preclude the use of funds to introduce additional troops, as it did through the 1971 Cooper-Church Amendment, which provided that "none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia." Pub.

[14] *See also* Note, *Congress, The President, and the Power to Commit Forces to Combat*, 81 Harv. L Rev 1771, 1801 (1968) ("The difficulty with the argument [that appropriations constitute approval of warmaking] is that since such appropriations must generally come after the hostilities have already begun, the effective choice remaining to Congress is likely to be severely limited")

L. No. 91–652, § 7(a), 84 Stat. 1942, 1943 (1971).[15] In the end, the question whether a particular targeted appropriation constitutes authorization for continuing hostilities will turn on the specific circumstances of each case.[16]

In sum, basic principles of constitutional law — and, in particular, the fact that Congress may express approval through the appropriations process — and historical practice in the war powers area, as well as the bulk of the case law and a substantial body of scholarly opinion, support the conclusion that Congress can authorize hostilities through its use of the appropriations power. Although it might be the case that general funding statutes do not necessarily constitute congressional approval for conducting hostilities, this objection loses its force when the appropriations measure is directly and conspicuously focused on specific military action.

III. Appropriations and the War Powers Resolution

This section analyzes whether the WPR bars Congress from authorizing military operations through an appropriation measure unless the appropriation measure "states that it is intended to constitute specific statutory authorization within the meaning of this chapter." 50 U.S.C. § 1547(a)(1) (section 8(a)(1) of the WPR). We conclude that the WPR does not constitute such a bar, but instead has the effect of establishing a background principle against which to interpret later Acts of Congress.

Section 5(b) of the WPR permits continuation of hostilities when a congressional enactment represents "specific authorization for such use of United States Armed Forces." 50 U.S.C. § 1544(b). As has been discussed, courts, government officials, and scholars have repeatedly (although not uniformly) recognized that appropriation statutes may constitute authorization for conflict. Thus, if the WPR did not provide any further interpretive gloss on the question, it would appear that an appropriation statute — if enacted for the purpose of continuing hostilities — would be "specific authorization." Section 8(a) of the WPR, however, provides that authority "shall not be inferred . . . from any provision of law

[15] Banks and Raven-Hansen explain the difficulty with the objection that it is impossible to construe national security appropriations as ratification because of the circumstances of their enactment:

> The objection is exaggerated and ahistorical. It seems to proceed on the assumption that Congress's choices are all or nothing, fund or deny all funding. But the Vietnam War itself showed that Congress has intermediate options, including funding phaseouts, prospective cutoffs, and, subject to separation of powers limits, area limitations. In fact, given the scope of the president's commander-in-chief powers, it is doubtful that Congress constitutionally *could* cut off the funds so abruptly that American lives would be placed at grave risk.

Banks & Raven-Hansen, *supra*, at 135. In addition to the Vietnam phase-out appropriations, Banks and Raven-Hansen also point to the Boland Amendments, which limited how funds appropriated for support of the Contras could be used, *see, e.g.*, Pub. L. No. 97–377, § 793, 96 Stat. 1830, 1865 (1982) (providing that funds could not be used by the Central Intelligence Agency or the Department of Defense to "furnish military equipment, military training or advice . . . for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras"), as an example of such a "restrictive appropriation." *See* Banks & Raven-Hansen, *supra*, at 137–48.

[16] We explain in Part IV, *infra*, why the circumstances here lead us to conclude that Pub. L. No. 106–31 constituted authorization for continuing hostilities in the Federal Republic of Yugoslavia.

. . . including any provision contained in any appropriations Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter." 50 U.S.C. § 1547(a). In assessing whether an appropriation statute can constitute authorization, the critical question thus becomes how to understand section 8(a)(1).

The precursor of section 8(a)(1) is section 3(4) of S. 440, the version of the WPR passed by the Senate. That section provided that a specific statutory authorization shall not be inferred (A) from any provision of law hereafter enacted, including any provision contained in any appropriations Act, unless such provision specifically authorizes the introduction of such Armed Forces in hostilities . . . and specifically exempts the introduction of such Armed Forces from compliance with the provisions of this Act.[17]

The most significant interpretive guide to this language is the Senate Report, which stated: "The purpose of this clause is to counteract the opinion in the *Orlando v. Laird* decision of the Second Circuit Court holding that passage of defense appropriations bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam war." S. Rep. No. 93–220, at 25. In *Orlando*, the court of appeals had rejected the argument of the plaintiff enlisted men that "congressional authorization cannot, as a matter of law, be inferred from military appropriations or other war-implementing legislation that does not contain an express and explicit authorization for the making of war by the President." 443 F.2d at 1043.

The House version of the WPR did not contain an analogous provision.[18] The Conference Report indicates that the Senate version was the source of the "specific statutory authorization" language in the final bill. *See* H.R. Conf. Rep. No. 93–547, at 2 (1973). That language, according to the Senate report on S. 440, was intended to "guard against the passage of another resolution of the Tonkin Gulf type" by requiring that "any area resolutions, to qualify under this bill as a grant of authority to introduce the armed forces into hostilities . . . meet certain carefully drawn criteria — as spelled out in the language of [§ 8(a)(1)]." S. Rep. No. 93–220, at 24. The Report further explained that "authorization to continue using the Armed Forces is to come in the form of specific statutory [authorization] for this purpose. This is to avoid any ambiguities such as possible efforts to construe general appropriations or other such measures as constituting the necessary

[17] S 440, as passed by the Senate on July 20, 1973, is reprinted in William B Spong, Jr., *The War Powers Resolution Revisited: Historic Accomplishment or Surrender?*, 16 Wm & Mary L. Rev 823, 878–82 (1975).

[18] Section 4(b) of H.J. Res. 542, passed by the House on July 18, 1973, provided that "[w]ithin one hundred and twenty calendar days after a report is submitted or is required to be submitted pursuant to section 3, the President shall terminate any commitment and remove any enlargement of United States Armed Forces with respect to which such report was submitted, unless the Congress enacts a declaration of war or a specific authorization for the use of United States Armed Forces," but the House version neither defined "specific authorization" nor provided that an appropriations measure not referring back to the WPR could not constitute such an authorization. *See* Spong, *supra*, at 874–77 (reprinting H J. Res. 542)

authorization for such 'continued use.'" *Id.* at 29. Congress thus required that authorizing legislation expressly reference the WPR to avoid "any ambiguities" regarding congressional intent to sanction continued hostilities.

To the extent, however, that this interpretation would take from Congress a constitutionally permissible method of authorizing war, it runs afoul of the axiom that one Congress cannot bind a later Congress. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (noting that, in contrast to a constitution, legislative acts are "alterable when the legislature shall please to alter [them]"); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (noting that "[t]he correctness of [the] principle," "that one legislature is competent to repeal any [law] which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature," "can never be controverted"); *Street v. United States*, 133 U.S. 299, 300 (1890) (statute "was not intended to have, [and] could not have, any effect on the power of a subsequent Congress" to enact a different policy).[19] Underlying this axiom is the principle that one Congress cannot surrender through legislation power that the Constitution vests in Congress. To believe otherwise would be to assume that "new legislators [could] automatically be bound by the policies and undertakings of earlier days." *United States Trust Co.*, 431 U.S. at 45 (Brennan, J., dissenting).

Applying this general principle to the issue of section 8(a)(1)'s constitutionality, Professor Philip Bobbitt has argued that, were section 8(a)(1) read to bind subsequent Congresses, it would be unconstitutional:

> [F]ramework statutes — like Gramm-Rudman, for example — cannot bind future Congresses. If Congress can constitutionally authorize the use of force through its appropriations and authorization procedures, an interpretive statute that denies this inference — as does . . . the original War Powers Resolution — is without legal effect. On the other hand, if one Congress could bind subsequent Congresses in this way, it would effectively enshrine itself in defiance of [an] electoral mandate. Imagine, for example, a statute that provided that no appropriations or authorization provision shall exceed a term of six months or an act that forbade the President from interpreting any subsequent statute as permitting him to issue regulations to enforce that statute unless specifically authorized to

[19] *See also United States Trust Co. v. New Jersey*, 431 U.S. 1, 45 (1977) (Brennan, J., dissenting); *Community-Service Broad. of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1113 (D.C. Cir. 1978) ("Congress is generally free to change its mind, in amending legislation Congress is not bound by the intent of an earlier body"), *Puerto Rico — United States Bilateral Pact of Non-territorial Permanent Union and Guaranteed Citizenship Act. Hearing on H.R. 4751, Before the House Comm. on Resources*, 107th Cong. 17 (2000) (Statement of William M. Treanor, Deputy Assistant Attorney General, Office of Legal Counsel) ("[A]s a general matter, one Congress cannot bind a subsequent Congress"); Memorandum for the Special Representative for Guam Commonwealth, from Teresa Wynn Roseborough, Deputy Assistant Attorney General, *Re. Mutual Consent Provisions in The Guam Commonwealth Legislation* 6 (July 28, 1994) ("[O]ne Congress cannot bind a subsequent Congress, except where it creates vested rights enforceable under the Due Process Clause of the Fifth Amendment")

> do so therein. A rule of interpretation, if it contravenes a valid constitutional power — in this case, . . . that a subsequent Congress could constitutionally endorse a war by an appropriations and authorization statute — would amount to a restriction on the ability of a Congress to repeal by inference preexisting law. Such a fresh hurdle to later legislation is nowhere authorized by the Constitution and is inconsistent with the notion of legitimacy derived through the mandate of each new Congress.

92 Mich. L. Rev. at 1399.[20]

This argument is compelling. If section 8(a)(1) were read to block all possibility of inferring congressional approval of military action from any appropriation, unless that appropriation referred in terms to the WPR and stated that it was intended to constitute specific authority for the action under that statute, then it would be unconstitutional. As discussed in the previous section, under the Constitution, Congress can authorize or ratify presidential engagement in hostilities through an appropriation law. One statute, such as the WPR, cannot mandate that certain types of appropriation statutes that would otherwise constitute authorization for conflict cannot do so simply because a subsequent Congress does not use certain "magical passwords." *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (holding that detailed procedures established by the Immigration and Naturalization Act applied despite discrepancies between that Act and the Administrative Procedure Act ("APA") and despite the fact that the APA provided that exemptions from its requirements must be expressly indicated). As Banks and Raven-Hansen have put it, "[i]t follows that the 93d Congress that enacted the War Powers Resolution cannot control the way in which [a later] Congress express[es] their intent." Banks & Raven-Hansen, *supra*, at 131.

In order to avoid this constitutional problem, we do not interpret section 8(a)(1) as binding future Congresses but instead as having the effect of establishing a background principle against which Congress legislates. In our view, section 8(a)(1) continues to have operative legal effect, but only so far as it operates to inform how an executive or judicial branch actor should interpret the intent

[20] In Congressional testimony in 1986, the Legal Adviser to the State Department, Abraham Sofaer, found that "serious constitutional problems exist with respect to Section 8(a)," because "one Congress by statute can[not] so limit the constitutional options of future Congresses." *See* Abraham D. Sofaer, *The War Powers Resolution and Antiterrorist Operations*, 86 Dept St. Bull 68, 69 (Aug 1986). In 1988, however, Judge Sofaer cast the problem primarily as a matter of construction, not of constitutionality, although it would appear that Judge Sofaer's construction of the statute was intended to avoid constitutional concerns *See The War Power After 200 Years Congress and the President at a Constitutional Impasse Hearings Before the Special Subcomm. On War Powers of the Senate Comm. On Foreign Relations*, 100th Cong 148 (1988) (testimony of Legal Adviser Sofaer) ("Section 8. The problem there is not so much constitutional Section 8 was an effort to get people to focus on the War Powers Resolution, but not an effective effort in limiting the types of approvals that can be obtained."), *id.* at 1066 ("In our view, Section 8(a) ineffectively attempts to restrict the rights of future Congresses to authorize deployments in any way they choose "). As President Nixon correctly said in his Veto Message following initial passage of the WPR, Congress can affect the Executive's conduct of military operations through a variety of means, and "[t]he authorization and appropriations process represents one of the ways in which such influence can be exercised." Pub Papers of Richard Nixon 893, 895 (1973).

of subsequent Congresses that enact appropriation statutes that do not specifically reference the WPR.[21] On the question whether an appropriation statute enacted by a subsequent Congress constitutes authorization for continued hostilities, it is the intent of the subsequent Congress, as evidenced by the text and legislative history of the appropriation statute, that controls the analysis. The existence of section 8(a)(1) might affect this analysis. If the appropriation statute is entirely ambiguous as to whether it constitutes authorization for continuing hostilities, for example, it might be proper for a judicial or executive branch actor to conclude that, because the subsequent Congress was aware of the background principle established by section 8(a)(1), its failure to refer specifically back to the WPR evidences an intent not to authorize continuing hostilities. If, however, Congress, in enacting an appropriation statute, demonstrates a clear intent to authorize continuing hostilities, then it would be appropriate to conclude that the appropriation statute does authorize those hostilities, even though the statute does not specifically refer back to the WPR. Under these circumstances, the appropriation statute would supersede or work an implied partial repeal of section 8(a)(1).[22] In other words, section 8(a)(1) establishes procedural requirements that, under the statute, Congress must follow to authorize hostilities; nonetheless, a subsequent Congress remains free to choose in a particular instance to enact legislation that clearly authorizes hostilities and, in so doing, it can decide not to follow the WPR's procedures. This position is consistent with the approach taken by our Office at about the time of the WPR's enactment. In a 1973 opinion, we stated:

> Strictly speaking, such a provision [§ 8(a)(1)] is probably not binding on future Congresses. For example, should the legislative history of a future appropriations statute make it clear that particular hostilities are authorized, that should constitute a valid authorization, because future Congresses are free to adopt any of the customary modes of manifesting their intention. However, as a practical matter, a court would probably attach some significance to this subsection should a claimed statutory authorization for hostilities be doubtful.

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[21] *Cf* Cass R Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv L. Rev 405, 452 (1989) (noting that canons of construction have "actually influenced judicial behavior insofar as they reflected background norms that helped to give meaning to statutory words or to resolve hard cases")

[22] Although the law disfavors implied repeals, particularly with respect to appropriation statutes, *see Tennessee Authority v. Hill*, 437 U.S. 153, 190 (1978), the presumption against implied repeals can be overcome if the statutory language or legislative history evidences an intent to repeal the prior statute. *See Will*, 449 U.S at 222 ("[W]hen Congress desires to suspend or repeal a statute in force, there can be no doubt that . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise . . The whole question depends on the intention of Congress as expressed in the statutes." (citations and internal quotation marks omitted)) As described below, this standard is satisfied here.

Memorandum for the Hon. William E. Timmons, Assistant to the President for Legislative Affairs, from Robert G. Dixon, Assistant Attorney General, Office of Legal Counsel, *Re: The "War Powers Resolution"* at 15 (Nov. 16, 1973).

This reading of section 8(a)(1) finds support in a series of cases interpreting statutes similar in form to section 8(a)(1). For example, in the case of *Great N. Ry. Co. v. United States*, 208 U.S. 452 (1908), the Court addressed whether one criminal law repealed a prior criminal law so as to deprive the government of the right to prosecute for violations of the prior law committed before the subsequent law was enacted. The Court considered this question in light of section 13 of the Revised Statutes,[23] which provided that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty . . . incurred under such statute, unless the repealing act shall so expressly provide." *Id.* at 465. In addressing the effect of section 13 on the interpretation of the subsequent criminal law, the Court wrote: "As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment." *Id.* The Court observed that section 13 "must be enforced unless, either by express declaration or necessary implication, arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving effect" to that section. *Id. See also Hertz v. Woodman*, 218 U.S. 205, 218 (1910) ("The repealing act here involved includes a saving clause, and if it necessarily, or by clear implication, conflicts with the general rule declared in § 13, the latest expression of the legislative will must prevail."); *Warden v. Marrero*, 417 U.S. 653, 659 n.10 (1974) ("[O]nly if [the subsequently enacted statute] can be said by fair implication or expressly to conflict with [the previously enacted saving clause] would there be reason to hold that [the subsequently enacted statute] superseded [the saving clause]."); *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 787, 789 (1st Cir. 1996) (characterizing a law that provided that "[t]he provisions of any federal law . . . for the benefit of Indians . . . shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine" as "an interpretive aid [that] serves both to limn the manner in which subsequently enacted statutes should be written to accomplish a particular goal and to color the way in which such statutes thereafter should be read," and noting that "[the law] binds subsequent Congresses only to the extent that they choose to be bound"). The Supreme Court's observation that a statute should not be given effect if, "by express declaration or necessary implication, arising from the terms of the law as a whole, it results that the legislative mind will be set at naught," *Great N. Ry. Co.*, 208 U.S. at 465, is consistent with the view expressed in our 1973 opinion that a statute evidencing a "clear" intent to authorize hostilities will operate to authorize those hostilities even though it does not refer back to

[23] Rev. Stat § 13, U.S. Comp. Stat 1901, p 6.

the WPR. To interpret section 8(a)(1) to bar such a statute from authorizing hostilities would set the "legislative mind" that enacted the appropriation statute "at naught." [24]

Academic commentators have understood section 8(a)(1) in a similar fashion. Professors Banks and Raven-Hansen, for example, have argued that although section 8(a)(1) counsels against inferring authorization from an ambiguous appropriation law, an appropriation statute that clearly authorizes hostilities nonetheless constitutes authorization for those hostilities despite section 8(a)(1):

> We conclude . . . that the resolution's clear statement requirement does not control the construction of subsequent appropriations or other legislation. Instead, absent ambiguities, it is their own plain words and their enactors' legislative intent that controls their construction. As a result, a legitimating appropriation may authorize or ratify a deployment of U.S. armed forces into hostilities even if it omits the resolution's magic passwords and thus violates its clear statement provision. . . . This is not to make a dead letter out of the whole of the War Power Resolution's rule of construction. Its self-referential insistence on "passwords" is without effect. We never have occasion to need the rest of it, if we can ascertain the meaning and intent of a legitimating appropriation from its plain words or clear legislative history. If we cannot, then the resolution's clear statement requirement sounds a useful advisory caution against inferring authority from ambiguous appropriations measures, and thus operates like any canon of statutory construction, by supplying helpful, but not controlling guidance in statutory construction.

Banks & Raven-Hansen, *supra*, at 129, 131. Similarly, Professor Ely writes that section 8(a)(1) "gave us [ ] a strong rule of construction, telling us how to read the intent of later congresses," although he further notes that unless the Resolution is repealed, a subsequent congress can only authorize hostilities through an appropriation statute under "extreme circumstances." Ely, *supra*, at 129.[25]

[24] The *Great Northern* Court looked solely to the subsequent statute's text to determine whether it conflicted with the prior statute *See* 208 U S at 466–70. As we explain below, under a pure textual analysis, Pub L No. 106–31 evidences a clear intent to authorize hostilities despite section 8(a)(1) In at least one recent case, however, a court looked both to text and legislative history to determine whether a subsequent statute repealed a prior statute *See Passamaquoddy*, 75 F.3d at 790–91 (analyzing Senate Report), *see also Will*, 499 U S at 222 In our view, this approach is more consistent with the current practice of statutory interpretation *See, e g , Murphy Bros , Inc v. Michetti Pipe Stringing, Inc* , 526 U S 344, 351–55 (1999) (analyzing text and legislative history in resolving statutory interpretation question) We explain below why the legislative history also supports our interpretation of Congress's intent in enacting Pub. L. No. 106–31

[25] Although we agree generally with the approach of Banks and Raven-Hansen, we are reluctant to characterize section 8(a)(1) as a "rule of construction " Such a characterization might be read to suggest that the Congress that enacted section 8(a)(1) intended it simply as one measure of how to interpret the intent of subsequent Congresses,

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The determination of whether any particular appropriation statute that does not refer back to the WPR constitutes authorization for continuing hostilities will necessarily depend on the facts of each case. Certain types of evidence will be highly probative of an intent to authorize ongoing military operations. For example, evidence demonstrating that Congress was concerned with funding a specific military effort, as opposed to making general defense appropriations, would tend to show such an intention. Likewise, in a case where the President has requested an appropriation in order to continue military operations, evidence showing that Members of Congress were specifically aware of the purposes of the appropriation request will tend to show that Congress intended to authorize continuing military operations as required by the WPR. Finally, if Congress appropriates funds only for protection of troops already committed or prohibits the use of appropriated funds for the introduction of new troops, a presumption might arise that Congress did not intend to authorize continuing hostilities but instead intended simply to protect troops already on the ground. On the other hand, unlimited appropriations would tend to suggest an intent to authorize continuing hostilities. In short, where Congress, in passing an appropriations bill, clearly intends to authorize conflict, the WPR cannot be read to deny legal effect to that clear intent.

IV. Pub. L. No. 106–31 and Congressional Authorization of the War in Kosovo

This section shows that, in passing Pub. L. No. 106–31, Congress clearly intended to authorize continuing military operations in Kosovo. The section begins by providing an overview of the events in Congress leading to the passage of Pub. L. No. 106–31 and of the statute's text. It concludes that, in the absence of the WPR, Pub. L. No. 106–31 would have constituted congressional authorization of military operations in Kosovo. The following three parts look closely at the statute's text and legislative history to determine whether Pub. L. No. 106–31 constituted "specific authorization" under section 5(b)(2) of the WPR. It concludes that the statute constituted such "specific authorization."

1. Overview

The "clock" established in section 5(b) of the WPR began running in the present case on March 26, 1999, when the President, citing national security con-

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a view which seems in tension with the language and purpose of the WPR. We nonetheless agree that, in effect, section 8(a)(1) operates like a rule of construction. Likewise, although we agree with Professor Ely that section 8(a)(1) "tell[s] us how to read the intent of later congresses," we are reluctant to agree with his characterization of the section as "a strong rule of construction" Ely, *supra*, at 129. We also do not agree with Ely that a subsequent Congress can authorize hostilities through appropriations only in "extreme circumstances." *Id* In other words, section 8(a)(1) establishes procedural requirements that a subsequent Congress must follow to authorize hostilities, unless that subsequent Congress decides not to follow those procedures and instead chooses to enact legislation that "expressly or by necessary implication," *Great N Ry.*, 208 U S at 465, authorizes hostilities (A subsequent Congress could, of course, also choose to repeal section 8(a)(1) of the WPR outright)

cerns, informed Congress that U.S. military forces had begun a series of air strikes in the Federal Republic of Yugoslavia. *See* Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 1 Pub Papers of William J. Clinton 459 (1999). As the President explained to the Speaker of the House:

> At approximately 1:30 p.m. eastern standard time, on March 24, 1999, U.S. military forces, at my direction and in coalition with our NATO allies, began a series of air strikes in the Federal Republic of Yugoslavia (FRY) in response to the FRY government's continued campaign of violence and repression against the ethnic Albanian population in Kosovo. The mission of the air strikes is to demonstrate the seriousness of NATO's purpose so that the Serbian leaders understand the imperative of reversing course; to deter an even bloodier offensive against innocent civilians in Kosovo; and, if necessary, to seriously damage the Serbian military's capacity to harm the people of Kosovo. In short, if President Milosevic will not make peace, we will limit his ability to make war.

Id. The President concluded the letter by informing the Speaker, as is customary, that he was "providing th[e] report as part of [his] efforts to keep the Congress fully informed, consistent with the War Powers Resolution." *Id.* at 460.

Approximately three weeks after sending this letter, the President, through the White House budget office, formally submitted a request to Congress for $6 billion to fund continuing efforts in Kosovo. *See* Guy Gugliotta & Helen Dewar, *$6 Billion Requested for Kosovo Emergency*, The Washington Post, April 20, 1999, at A15. Of this amount, close to $5 billion was to be used for continued air operations and war material through September 30, 1999, and the rest was intended to assist the hundreds of thousands of ethnic Albanian refugees who were fleeing from Kosovo. *Id.* The congressional leadership promptly made clear their intention to use the request as a vehicle to augment defense spending more generally and called for defense funding far in excess of the requested $6 billion. *Id.* (indicating House Majority Leader Richard K. Armey's belief that "[e]ven $10 billion would be insufficient").

Debate over the continuing military operations in Kosovo intensified on April 28, 1999, when the House considered and voted on four different Kosovo-related measures.[26] First, the House defeated two measures introduced by Representative

[26] Prior to these measures, the Senate, on March 23, 1999, passed a concurrent resolution providing that "the President of the United States is authorized to conduct military air operations and missile strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia." 145 Cong Rec. S3118 (daily ed. Mar. 23, 1999) (reprinting S. Con Res 21, 106th Cong (1999)) The following day, the House passed, by a vote of 424–

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Tom Campbell: H. Con. Res. 82, 106th Cong. (1999), a concurrent resolution directing the President to remove the Armed Forces from Serbia within 30 days, and H.J. Res. 44, 106th Cong. (1999), declaring a state of war between the United States and Serbia. *See* 145 Cong. Rec. H2414 (daily ed. Apr. 28, 1999) (reprinting H. Con. Res. 82); *id.* at H2426–27 (recording vote); *id.* at H2427 (reprinting H.J. Res. 44); *id.* at H2440–41 (recording vote). The House also voted 249–180 to support H.R. 1569, 106th Cong. (1999), blocking funding for ground troops without additional specific authorization from Congress, *see* 145 Cong. Rec. H2400 (reprinting measure); *id.* at H2413–14 (recording votes), and tied, 213–213, on S. Con. Res. 21, 106th Cong. (1999), a concurrent resolution stating that the President "is authorized to conduct military air operations and missile strikes" against Serbia. *See id.* at H2441 (reprinting resolution); *id.* at H2451–52 (recording vote). As highlighted by the debates concerning these measures, there can be no doubt that members of Congress were fully cognizant of the WPR and the 60-day time clock.[27]

Despite these votes, the appropriation effort moved forward. Following testimony by Secretary of Defense Cohen before the Subcommittee on Defense on April 21, and after a public markup on April 29, the House Appropriations Committee reported H.R. 1664, 106th Cong. (1999), entitled "[a] bill making emergency supplemental appropriations for military operations, refugee relief, and humanitarian assistance relating to the conflict in Kosovo, and for military operations in Southwest Asia for the fiscal year ending September 30, 1999, and for other purposes," to the full House on May 4. 145 Cong. Rec. H2634 (daily ed. May 4, 1999). The $12.9 billion bill provided the funds requested by the President for military operations in Kosovo, as well as over $6 billion in other military funding, for such things as spare parts, depot maintenance, recruiting, and readiness training. *See* H.R. 1664, ch. 3; *see also* Andrew Taylor, *Paying for the Kosovo Air War: How Much is Too Much?*, CQ Weekly, at 1014 (May 1, 1999). Following a floor debate on May 6, the House passed H.R. 1664 the same day by a vote of 311–105. 145 Cong. Rec. H2895 (daily ed. May 6, 1999).

1, a resolution noting the President's authorization of U S. participation in NATO military operations and resolving "[t]hat the House of Representatives supports the members of the United States Armed Forces who are engaged in military operations against the Federal Republic of Yugoslavia" *Id* at H1660, H1668–69 (daily ed. Mar 24, 1999) (reprinting H.R Res. 130, 106th Cong. (1999))

[27] For example, Congressman Spratt pointed out that "[w]ithin 60 days of a deployment, when we are notified by the President, we can enact a specific authorization of such use of the Armed Forces. That was laid out for us when we passed the War Powers Resolution" *Id.* at H2387. Other speakers made similar points *See id* at H2386 (remarks of Cong Chambliss) ("I do not think that now is the time to have a constitutional showdown on the War Powers Act"), *id* at H2389 (remarks of Cong. Stark) (H. Con. Res. 82 "is of the highest priority because we must exercise our obligation under the War Powers Act to debate the use of military force"), *id* at H2423 (remarks of Cong. Leach) ("The vote [we take] on this resolution and the others we will take today are necessitated by . the War Powers Resolution "). Still more pointedly, Congressman Kucinich reminded the House that "Section 5 of the War Powers Resolution states that the President must terminate the use of force after 60 days unless Congress, first, declares war, second, enacts explicit authorization of the use of force; or third, extends the 60-day period" *Id.* at H2446.

The next week, the House and Senate held a joint conference on H.R. 1664 and H.R. 1141, 106th Cong. (1999), another emergency supplemental funding bill that up to that point had focused on providing relief to Central American nations devastated by hurricanes. During the three day conference, the conferees stripped H.R. 1664 of the appropriations relating to Kosovo and other military funding and added those appropriations to H.R. 1141. *See* H.R. Conf. Rep. No. 106–143, at 61 (1999) ("The conferees have agreed to include in this conference report on H.R. 1141 matters addressed in the House version of H.R. 1664 as an expedient approach to getting appropriations enacted into law for the important requirements related to the conflict in Kosovo and Southwest Asia (Operation Desert Fox)."). As the conference report explained, "the conference agreement recommend[ed] a total of $10,196,495,000 in new budget authority for the Department of Defense, for costs resulting from ongoing contingency operations in Southwest Asia and Kosovo, as well as other urgent high priority military readiness matters." *Id.* at 75. Specifically, the conferees agreed to provide $5,007,300,000 "for the 'Overseas Contingency Operations Transfer Fund' for costs relating to Operation Allied Force and related NATO activities concerning Kosovo, and operations in Southwest Asia. Of this amount, $3,907,300,000 is provided for personnel and operations costs stemming from these operations. An additional $1,100,000,000 is provided on a contingent emergency basis to meet expected munitions and readiness-related Kosovo expenses, and will be made available only to the extent funds are requested in a subsequent budget request by the President." *Id.* at 76. The conferees further agreed to appropriate $984,300,000 for munitions procurement "associated with operations in Kosovo and Southwest Asia," *id.*, and $16,469,000 "for additional military personnel pay and allowances in support of contingency operations in Southwest Asia," *id.* They also agreed to appropriate $475,000,000 "to be used for construction of mission, readiness and force protection items in relation to the conflict in the Balkans, and other contingencies throughout the region." *Id.* at 81. Finally, the conferees appropriated over $1 billion for Kosovo humanitarian assistance, including $149,200,000 for "humanitarian food aid in the Balkans and other regions of need," *id.* at 74, $105,000,000 "for assistance for Albania, Macedonia, Bulgaria, Bosnia-Herzegovina, Montenegro, and Romania, and for investigations and related activities in Kosovo and in adjacent entities and countries regarding war crimes," *id.* at 79, and $100,000,000 "for costs related to assisting in the temporary resettlement of displaced Kosovar Albanians," *id.* at 81.

The House debated H.R. 1141 on May 18 and passed the bill by a 269–158 vote on the same day. *See* 145 Cong. Rec. H3269 (daily ed. May 18, 1999). The Senate debated the bill on May 20 and passed it by a 64–36 vote on the same day. *See* 145 Cong. Rec. S5682 (daily ed. May 20, 1999).

The bill signed by the President, entitled "[a]n Act [m]aking emergency supplemental appropriations for the fiscal year ending September 30, 1999, and for other

purposes," appropriated well over $5 billion to fund efforts in Kosovo. The principal provision concerning funding, found in Chapter 3 of Title II of the bill (the Title entitled "Emergency National Security Supplemental Appropriations"), reads as follows:

> OPERATION AND MAINTENANCE
> Overseas Contingency Operations Transfer Fund
> (Including Transfer of Funds)
>
> For an additional amount for "Overseas Contingency Operations Transfer Fund", $5,007,300,000, to remain available until expended: *Provided*, That the entire amount made available under this heading is designated by the Congress as an emergency requirement pursuant to section 251(b)(2)(A) of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended: *Provided further*, That of such amount, $1,100,000,000 shall be available only to the extent that the President transmits to the Congress an official budget request for a specific dollar amount . . . .

113 Stat. at 76–77. Another section of Chapter 3 appropriates $300,000,000

> to remain available for obligation until September 30, 2000 . . . only for the accelerated acquisition and deployment of military technologies and systems *needed for the conduct of Operation Allied Force*, or to provide accelerated acquisition and deployment of military technologies and systems as substitute or replacement systems for other United States regional commands which have had assets diverted as a result of Operation Allied Force.

Id. at 78 (emphasis added). The other relevant appropriations discussed in the Conference Report are found in various Chapters of Title II of the bill. *See, e.g.*, Chapter 1 (food assistance); Chapter 3 (personnel, procurement); Chapter 4 (humanitarian assistance); Chapter 5 (resettlement); Chapter 6 (construction).[28]

Finally, section 2006 of the bill provides as follows:

> Sec. 2006. (a) Not more than 30 days after the date of the enactment of this Act, the President shall transmit to Congress a report,

[28] For example, Chapter Four of the bill provides "[f]or an additional amount for 'Economic Support Fund,' $105,000,000, to remain available until September 30, 2000, for assistance for Albania, Macedonia, Bosnia-Herzegovina, Bulgaria, Montengro, and Romania, and for investigations and related activities in Kosovo and in adjacent entities and countries regarding war crimes." 113 Stat. at 84. Chapter Five provides "[f]or an additional amount for 'Refugee and Entrant Assistance,' such sums as necessary to assist in the temporary resettlement of displaced Kosovar Albanians, not to exceed $100,000,000, which shall remain available through September 30, 2001." *Id* at 85.

in both classified and unclassified form, on current United States participation in Operation Allied Force. The report should include information on the following matters:

(1) a statement of the national security objectives involved in United States participation in Operation Allied Force;

(2) an accounting of all current active duty personnel assigned to support Operation Allied Force and related humanitarian operations around Kosovo to include total number, service component and area of deployment (such accounting should also include total numbers of personnel from other NATO countries participating in the action);

(3) additional planned deployment of active duty units in the European Command area of operations to support Operation Allied Force, between the date of the enactment of this Act and the end of fiscal year 1999;

(4) additional planned Reserve component mobilization, including specific units to be called up between the date of the enactment of this Act and the end of fiscal year 1999, to support Operation Allied Force;

(5) an accounting by the Joint Chiefs of Staff on the transfer of personnel and material from other regional commands to the United States European Command to support Operation Allied Force and related humanitarian operations around Kosovo, and an assessment by the Joint Chiefs of Staff of the impact any such loss of assets has had on the warfighting capabilities and deterrence value of these other commands;

(6) levels of humanitarian aid provided to the displaced Kosovar community from the United States, NATO member nations, and other nations (figures should be provided by country and the type of assistance provided whether financial or in-kind); and

(7) any significant revisions to the total cost estimate for the deployment of United States forces involved in Operation Allied Force through the end of fiscal year 1999.

> (b) OPERATION ALLIED FORCE. — In this section, the term "Operation Allied Force" means operations of the North Atlantic Treaty Organization (NATO) conducted against the Federal Republic of Yugoslavia (Serbia and Montengro) during the period beginning on March 24, 1999, and ending on such date as NATO may designate, to resolve the conflict with respect to Kosovo.

113 Stat. at 80.

Pub. L. No. 106–31 specifically appropriated over $5 billion to fund continuing hostilities in Kosovo, but it did not make specific reference to the WPR.[29] The WPR's 60 day clock ran on May 25, four days after the President signed Pub. L. No. 106–31.[30]

As will be shown in greater detail in the following subparts, the congressional debates and the text of Pub. L. No. 106–31 make clear that Congress was unquestionably aware that it was funding the hostilities in Kosovo. Moreover, the appropriations bill was specifically targeted in substantial degree to the President's request for funds to continue the military action in Kosovo. Congress, in other words, used its constitutional authority to appropriate funds to allow the President to continue hostilities in the Federal Republic of Yugoslavia. In light of the nature of the bill and the historical precedent, discussed above, for Congress to authorize hostilities through appropriations measures, Pub. L. No. 106–31 would, in the absence of the WPR, have constituted constitutionally adequate authorization for continued bombing in the region.

2. Text

On its face, H.R. 1664 provided authorization, in the form of an appropriations measure, for continuing military operations — or, more specifically, for continuing United States participation in the NATO air campaign — in Kosovo. The bill itself was entitled "[a]n Act Making emergency supplemental appropriations *for military operations*, refugee relief, and humanitarian assistance *relating to the conflict in Kosovo*" (emphasis added). In bearing that title, H.R. 1664 plainly indicated the main purpose for which the appropriated funds would be spent. Although H.R.

[29] In this respect, Pub. L No. 106–31 differs from sections 2 and 6 of the Multinational Force in Lebanon Resolution, 97 Stat. at 805, and from section 2(c)(1) of the Authorization for Use of Military Force Against Iraq Resolution, 105 Stat. at 4, both of which referred back to section 5(b) of the WPR *See supra* note 7

[30] Although neither the district court nor the Court of Appeals addressed the merits of the suit brought against the President by 31 Members of Congress, *see supra* p. 328, District Court Judge Friedman did observe in dicta that Pub. L No. 106–31 did not constitute an "authorization" within the meaning of the WPR *See Campbell*, 52 F Supp.2d at 44 n 9 ("While neither the defeat of the House concurrent resolution nor the passage of the Appropriations Act constitutes an 'authorization' within the meaning of the War Powers Resolution, see 50 U S.C. § 1547, congressional action on those measures is relevant to the legislative standing analysis.") For reasons described in this opinion, we conclude that the appropriation did constitute authorization to continue Operation Allied Force, regardless of whether Congress complied with the legislative requirements specified by an earlier Congress in the WPR

1141 did not bear a title explicitly referencing the conflict in Kosovo, its title (indicating that it was a "emergency supplemental appropriatio[n]") as well as its direct connection to H.R. 1664, made it clear that it too was substantially, if not primarily, concerned with funding the ongoing military effort in Kosovo.

Furthermore, particular provisions of the appropriation statute underscore that Congress, in enacting the appropriation, authorized the President to continue military operations in Kosovo for an indeterminate period, but at least to the end of Fiscal Year 1999.[31] For example, section 2006(b) defines the phrase "Operation Allied Force" as the "operations of the North Atlantic Treaty Organization (NATO) conducted against the Federal Republic of Yugoslavia (Serbia and Montenegro) during the period beginning on March 24, 1999, and ending on such date as NATO may designate, to resolve the conflict with respect to Kosovo." 113 Stat. at 80. Moreover, section 2006(a) requires that the President, "*[n]ot more than 30 days after the enactment of this Act*, . . . transmit to Congress a report . . . on current United States participation in Operation Allied Force." *Id.* (emphasis added). The report is to include a statement of national security objectives involved in Operation Allied Force, § 2006(a)(1), as well as information regarding additional planned deployment of certain active duty units to support Allied Force between the date of enactment and the end of fiscal year 1999, § 2006(a)(3), additional planned reserve component mobilization, including specific units to be called up between the date of enactment and the end of fiscal year 1999 to support Allied Force, § 2006(a)(4), and any significant revisions to the total cost estimate for the deployment of U.S. forces involved in Allied Force through the end of fiscal year 1999, § 2006(a)(7).[32]

These reporting requirements make sense only on the assumption that the President was authorized to continue United States participation in Operation Allied Force for at least thirty days after the enactment of Pub. L. No. 106–31, a period that necessarily extended beyond May 25, when the 60 day "clock" had expired. Indeed, the reporting requirements assume that the President could deploy additional active duty units in support of Operation Allied Force, and could mobilize reserves to that end, at various times between the enactment of the bill and *the end of Fiscal Year 1999*—a period that again extended well beyond the 60 day "clock." Finally, section 2006(a)(7) signaled that Congress wished to keep informed of the estimated costs of deploying United States forces in Operation Allied Force through the end of the fiscal year. Taken together, these provisions show that Members of Congress foresaw the possibility that the President would

[31] We note that Chapter 3 of Title II, which substantially met the Administration's request for supplemental funding for the Kosovo operation, appropriates $5,007,300,000 "to remain available until expended." 113 Stat at 76 Thus, these funds were to remain legally available for expenditure *even after the end of Fiscal Year 1999. Id* Insofar as Congress authorized the continuation of hostilities by providing these funds, it therefore did not sunset that authorization on September 30, 1999

[32] *Id.* We have been informed that the President submitted this report to Congress on August 19, 1999

continue the deployment after May 25, and that they were prepared to fund continued military hostilities through at least the end of Fiscal Year 1999.[33]

More generally, Pub. L. No. 106–31 met the President's request for emergency supplemental funding for the very explicit purpose of continuing military operations in Serbia and Kosovo. The obvious and stated purpose of the Administration in seeking this supplemental funding was to meet anticipated expenses of the campaign, including any expenses that would be incurred for operations after May 25. In furnishing such funds, Congress clearly endorsed and authorized the Administration's plans. Indeed, specific line items in the bill demonstrate Congress's belief that Operation Allied Force could continue after May 25. For example, Chapter 3, dealing in part with procurement, appropriated $300 million "to remain available for obligation until September 30, 2000 . . . only for the accelerated acquisition and deployment of military technologies and systems *needed for the conduct of Operation Allied Force*, or to provide accelerated acquisition and deployment of military technologies and systems as [a] substitute or replacement systems for other United States regional commands which have had assets diverted as a result of Operation Allied Force." 113 Stat. 78 (emphasis added). Again, the funding of "accelerated acquisition and deployment" of military technologies "needed for the conduct of Operation Allied Force" unquestionably assumed that that need might exist, and could lawfully be met, after May 25. *Id.*

Furthermore, both H.R. 1141 and H.R. 1664 were plainly identified as *emergency, supplemental* appropriations. Thus, Congress was well aware that the bill was an extraordinary measure, wholly outside the routine budget process for the regular funding of Department of Defense activities. This was free-standing and widely publicized legislation, introduced soon after several major Congressional debates on the Administration's policy, for the explicit purpose of funding continuing military operations in Kosovo. Congress decided to fund that operation.

3. Legislative History

The legislative history of Pub. L. No. 106–31 strongly confirms this understanding of the bill's intent and effect. This part analyzes that history in four stages: (a) Secretary of Defense William S. Cohen's explanation of the Administration's request for emergency supplemental funding made on April 21, 1999, to the Defense Subcommittee of the House Appropriations Committee; (b) the House Appropriations Committee's consideration of H.R. 1664; (c) the first House

[33] Indeed, the House Appropriations Committee Report states that "[t]he Committee recognizes that the specific budget estimates underlying the supplemental requests for Kosovo operations may require adjustments due to the evolving nature of the air campaign, changes in deployment schedules and operational tempo, and other requirements associated with current operations and currently planned forces which were not identified at the time the supplemental request was developed." H.R. Rep. No 106–125, at 4 (1999)

floor debate on H.R. 1664 on May 6, 1999; and (d) the final House and Senate votes on H.R. 1141 on May 18 and 20, 1999, respectively.

a. Secretary Cohen's Testimony

The Administration's statement to Congress of the purposes of seeking the supplemental appropriation weigh heavily in favor of construing Pub. L. No. 106–31 as an authorization to continue Operation Allied Force beyond the May 25 cutoff.[34] Of particular importance is Secretary of Defense William S. Cohen's testimony at an April 21, 1999 hearing by the Subcommittee on Defense of the House Committee on Appropriations, in support of the Administration's request for the supplemental appropriation. *See Department of Defense Appropriations for 2000: Hearings Before the Defense Subcomm. of the House Comm. on Appropriations*, 106th Cong. 288 (1999) (Statement of William S. Cohen, Secretary of Defense). Secretary Cohen made plain the Administration's intent to use the proposed funding to go forward with Operation Allied Force, if necessary for a prolonged period. He stated:

> This is an emergency, non-offset supplemental totaling $6.05 billion: $5.458 billion for DoD and $591 million for the State Department and international assistance programs. The DoD portion of the supplemental has these major components:
>
> Kosovo Military Operations ($3.3 billion). The request funds projected force levels and the current high operating tempo through the end of the fiscal year. All U.S. forces that have been deployed or ordered to deploy are assumed to remain in theater and operate at current sortie and strike levels. The request does not fund possible deployment of U.S. ground forces to Kosovo or peacekeeping operations or reconstruction there.
>
> . . . .
>
> NATO is engaged in a serious military effort in Kosovo. It will not be quick, easy, or neat. We have to be prepared for the possibility of casualties among NATO forces. But we cannot falter, and we will not fail.

Id. 291–92.

[34] We note also that the President advised Congress that "[i]t is not possible to predict how long either of these operations [air strikes and relief efforts] will continue. The duration of the deployments depend[s] upon the course of events in Kosovo . . . ." Letter for Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 1 Pub Papers of William J Clinton 579, 520 (1999)

Secretary Cohen's statements plainly advised Congress of the Administration's determination to pursue military operations, if necessary, for an indefinite period beyond May 25, and he specifically requested Congress to fund such operations at least "through the end of the fiscal year." [35]

b. House Appropriations Committee Action

Shortly before the House Appropriations Committee considered H.R. 1664 on April 29, Representative William Young, the Chairman of the Committee, stated that "[t]his $12.9 billion bill recognizes that we are more deeply involved in Kosovo than we were led to believe and that unless [President] Milosevic has a major change of heart, our involvement will be deeper than originally anticipated." *Chairman Young Announces Kosovo Emergency Supplemental Bill*, www.house.gov/appropriations/news/106–1/pr00kosovo.html (Apr. 27, 1999). During the mark-up itself, Congressman Young said, "I'm not sure what message [Milosevic] got from that [the House's April 28 votes on authorizing military action], but I can guarantee you when we pass this bill today, there will be no doubt in the mind of Mr. Milosevic where we stand; that this Congress stands behind our troops no matter where they are or what they're doing. And we're going to provide them with what they need to accomplish their mission . . . ." Verbatim Transcript, House of Representatives, Appropriations Committee Markup, 1999 WL 252365 (F.D.C.H.) at 22–23 (Apr. 29, 1999) ("Transcript"). *See also* Tom Raum, *Committee Approves Kosovo Funds*, 1999 WL 17061956 (Apr. 29, 1999); Bill Ghent, *Report on Markup of Draft (Unnumbered): House Appropriations Panel Approves $13 Billion Kosovo Emergency Bill*, LEGI–SLATE Report for the 106th Congress, at 2 (Apr. 29, 1999).[36]

Also during the mark-up, Congressman Obey clearly explained the Administration's purpose in seeking the emergency appropriation, and the length of the operations it was intended to fund. He said:

> Now let me explain what it is we're doing.
>
> In the administration's request for DOD, they asked for $5.5 billion for military operations. To reimburse them for previous costs in Iraq they asked for $272 million, and in Kosovo they asked for

[35] *Id* at 291 Further, according to press reports, during the hearing Secretary Cohen "several times described the $6 billion as sufficient to fund through September the operations of an intensified air campaign, to replenish already expended munitions and anticipated munitions needs and to call up and deploy nearly 26,000 reservists" Guy Gugliotta & Bradley Graham, *GOP Sees Opportunity for More Military Money*, The Washington Post, Apr. 22, 1999, at A18.

[36] Other Members of Congress made similar statements before the House floor debate on the bill For example, according to press reports, Congressman David Dreier, the Chairman of the House Rules Committee (which framed the rules for the debate over H R 1664), expressed the view that "President Clinton is acting within his authority and 'Congress cannot hamstring his ability' to win the war." John Godfrey, *Heated Debate Likely on Funding*," The Washington Times, May 6, 1999, at A12

> $3.3 billion. That was meant to finance the salaries, maintenance, operation, the whole shebang, for 500 U.S. aircraft that General Clark initially asked for, for the 82 additional aircraft that he got a month ago, and the 300 more that he's requested which have not yet arrived.
>
> It is meant to finance total saturation bombing of all air space in Yugoslavia 24 hours a day *for the remainder of the fiscal year.* It is a huge operation.

Transcript at 42 (emphasis added).

c. The House May 6 Floor Debate

The floor debate on H.R. 1664 on May 6 also demonstrates that the House clearly understood that it was funding military operations that could well continue for months after May 25. At the start of that debate, Congressman Obey stated squarely that

> [t]he administration has asked about $6 billion to cover the cost of this war, plus they have asked for humanitarian assistance. The amount that they have requested will pay for an 800-plane war, 24 hours a day bombing of virtually every target in Yugoslavia that one could imagine anywhere. That will be sustained on a daily basis *through the end of the fiscal year.*

145 Cong. Rec. H2827 (daily ed. May 6, 1999) (remarks of Cong. Obey) (emphasis added); *see also id.* at H2856 (remarks of Cong. Obey).

Congressman Young, also speaking at the start of the debate, discounted the April 28 House votes on the Kosovo operation as "votes that gave Members an opportunity to voice their opinion in resolutions that were not truly binding," and argued that the vote on H.R. 1664 "is the real message. This is a message to Milosevic that we are serious. This is a message to our troops that we are serious in providing them with what they need to accomplish their mission and to give themselves a little protection while they are at it." *Id.* at H2828; *see also id.* at H2858 (remarks of Cong. Lewis); *id.* at H2890 (remarks of Cong. Wicker); *but see id.* at H2818 (remarks of Cong. Goss) ("[L]ast week's debate on the War Powers Act showed that Congress was of many minds on the policy issue, but this debate today is not about policy. . . . It is about money."). Speaker Hastert likewise emphasized the need to support troops in action, stating that "[l]ast week, the House spoke on the President's policies concerning the engagement in Kosovo; and, [c]learly, the House had some misgivings about those poli-

cies. But today, let there be no mistake, the United States Congress stands with its soldiers, sailors, and airmen as they defend America." *Id.* at H2822.

Some Members specifically argued that funding was necessary to continue Operation Allied Force. Congressman Dreier maintained that "the price of failure in Kosovo is simply too great at this point. . . . Congress must ensure that the resources are available to carry out that strategy." *Id.* at H2821. Congressman Skelton said that the appropriation "ensures that our military has more than adequate resources to carry out the Kosovo air campaign." *Id.* at H2829. Congressman Knollenberg stated that, while he had "strong reservations about the decisions that have led us to this point," he "believe[d] it is important . . . that NATO continue its operation." *Id.* at H2833. Congressman Gilman interpreted passage of the appropriation as showing that "we are fully supportive of what our military is doing at the present time in Kosovo." *Id.* at H2834 (remarks of Cong. Gilman).

Opponents of the bill also saw it as authorizing continuing operations in Kosovo. Congressman Stark specifically noted that "[a]ppropriating defense funds for the attack on Yugoslavia gives the President the authorization needed under the War Powers Act to continue the air strikes and allow[s] him to use ground troops if necessary. However, if funds were withheld, the President would be required to remove the troops from their current mission by May 25, 1999." *Id.* at H2839. Congressman Paul, another opponent, stated that "[f]unding is an endorsement of the war. We must realize that it is equivalent to it. We have not declared this war. If we fund it, we essentially become partners to this ill-advised war." *Id.* at H2819.

d. House and Senate Consideration of Final Bill

In addition to the numerous explicit references to the Kosovo conflict contained in the joint conference report described above, the floor debates on the final version of H.R. 1141 also demonstrate that Congress intended to enable the President to continue the campaign for an indefinite period after the WPR's 60 day "clock" had run.

(i)

As he had done in the May 6 debate, Congressman Young again explained to the House the significance of the appropriation for the campaign in Kosovo:

> A no vote will be sending a message to Milosevic that we are not really serious about bringing him to heel. He does not need to get that message, he has got enough problems already. A no vote will be against those soldiers and sailors and airmen and marines and

> coastguardsmen who are involved in this conflagration, or war . . . .

145 Cong. Rec. H3263 (daily ed. May 18, 1999).

Congressman Lewis was no less clear and emphatic:

> This bill is committed to funding our effort in Kosovo . . . . As we move into the months ahead, none of us can predict what the cost might be. But this bill is a reflection of the fact that the House wants to make sure that adequate funding is present no matter how long the war may extend itself. . . .
>
> I must say, Mr. Speaker, one of the messages we are sending here to our troops that is especially important involves the advanced funding of pay adjustments for the troops. That essentially tells them in clear terms that the House is not only supporting their effort in Kosovo, but intends to continue to support their service for the country as long as it might continue in the months and the years ahead.

Id. at H3256.

Other speakers stressed the need to fund the NATO mission in Kosovo. Congressman Dreier found the bill "absolutely necessary to offset the very significant costs of the Kosovo campaign. . . . [I]t is now a very clear national interest that both the United States of America and the North Atlantic Treaty Organization alliance prevail in this conflict." *Id.* at H3232–33. Congressman Levin argued that "[t]he House should move quickly to approve the urgently needed funding to continue NATO's military operations against Slobodan Milosevic's forces in Kosovo." *Id.* at H3263. Congressman Bliley said that the bill would "support NATO so that we can bring the conflict in Kosovo to a speedy and successful conclusion." *Id.* at H3267.

As in the May 6 debate, other House members emphasized the need to support troops in combat. Congressman Regula stated that "the purpose of this bill is to support our troops overseas." *Id.* at H3257. Congressman Packard said that "H.R. 1141 supports America's troops, and regardless of whether you agree with the policies of this Administration, we can't afford to neglect the needs of those who must carry them out." *Id.* at H3259. Congressman Weygand voted for the bill "because I believe it is absolutely necessary to provide our troops with the tools and support they need to complete their mission." *Id.* at H3264.

Opponents of the bill also repeated their warnings that the bill would allow the continuation of hostilities. Congressman Kucinich thought that the bill "contains provisions that will enable the prosecution of a wide war against the Federal

Republic of Yugoslavia, even though Congress has expressly voted not to declare war." *Id.* at H3226. Congressman Paul said, "the real principle here today that we are voting on is whether or not we are going to fund an illegal, unconstitutional war. It does not follow the rules of our Constitution. It does not follow the rules of the United Nations Treaty. It does not follow the NATO Treaty. And here we are just permitting it, endorsing it but further funding it." *Id.* at H3228.

(ii)

The Senate debated H.R. 1141 two days after the House vote. The Senate's consideration of the Kosovo appropriation was much less extensive than the House's. As Senator Byrd observed on May 20, 1999—the day H.R. 1141 was debated and voted on in the Senate—"[T]he first time the Kosovo funding has been before the Senate is today in the form of this conference agreement on H.R. 1141." 145 Cong. Rec. S5646 (daily ed. May 20, 1999).[37]

Although most of the speakers in the Senate debate focused on other aspects of the bill, an opponent, Senator Fitzgerald, spelled out very precisely the effect that passage of the appropriation would have on the issue of war powers:

> [I]n the past, American presidents have argued that a congressional appropriation for U.S. military action abroad constitutes a congressional authorization for the military action. I will not vote for an authorization of money that may be construed as authorizing, or encouraging the expansion of, the President's military operations in Kosovo. I will oppose the appropriation of almost $11 billion for a war I have consistently spoken out against.

145 Cong. Rec. S5665 (daily ed. May 20, 1999).[38]

[37] The Senate was aware, well before the floor debate on H R. 1141, of the effect of the WPR on its deliberations over Kosovo. Earlier in the session, Senator McCain had introduced a measure, S.J. Res 20, to authorize the President to use "all necessary force" to achieve the goals of Operation Allied Force. *Id* at 2. Although the Senate had at first seemed unlikely to take up that measure, "Senate Parliamentarian Bob Dove announced April 28 . that the resolution fit the criteria for triggering the War Powers Resolution, even though it was not designed with that in mind." Pat Towell, *Congress Set To Provide Money, But No Guidance, for Kosovo Mission*, *C.Q. Weekly*, May 1, 1999, at 1037. When the Senate debated S.J. Res 20 on May 3, 1999, Senator Feingold drew attention to the fact that the measure "has been determined to be privileged under the terms of . . the War Powers Resolution," and emphasized that "[n]ot only must [the WPR] be taken seriously, but because of the appropriate ruling of the Parliamentarian . . , it is being taken seriously." 145 Cong. Rec S4525 (daily ed May 3, 1999) (remarks of Sen Feingold). Further, he added that before the Parliamentarian's ruling, "many people did not realize for a while, that the War Powers Resolution and its clock were ticking" *Id* S J. Res. 20 was tabled by the Senate by a 78–22 vote on May 4, 1999. 145 Cong. Rec. S4616 (daily ed May 4, 1999) Later, the Senate passed a concurrent resolution authorizing the President to conduct military air operations and missile strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia. *See supra note 26*.

[38] Senator Gorton, another opponent of the bill, also objected that it would "pay for the costs of the war in the Balkans." *Id.* at S5650

Speaking immediately after Senator Fitzgerald, Senator Dodd, a supporter of the bill, explained that the appropriation would indeed support the continuation of military action:

> The original intent of the President's request for emergency appropriations from Congress was to provide our men and women in uniform with the equipment and materiel they need to effectively strike the Yugoslav military. While I am heartened by recent reports of a possible diplomatic solution, we must remain prepared to continue our military efforts in the absence of an enforceable diplomatic solution which meets NATO's conditions.
>
> . . . .
>
> Our military, however, cannot effectively combat this evil if we in the Congress fail to offer them our support. One month ago, President Clinton sent a request to Congress for $6 billion in order to fund our military operations *through the end of the fiscal year.* That money is included in this bill.

Id. at S5666 (emphasis added).

Senator Stevens, the Chairman of the Senate Appropriations Committee, asserted that the funding was intended to provide for military operations in Kosovo through the remainder of the *calendar* (not merely fiscal) year:

> Hopefully we will not have to see another emergency supplemental with regard to the conduct of the Kosovo operation during the period of time we will be working on the regular appropriations bills for the year 2000. In effect, we have reached across and gone in — probably this bill should be able to carry us, at the very least to the end of this current calendar year. The initial requests of the President took us to the end of the fiscal year on September 30.

Id. at S5644.

As in the House debate, several speakers voiced the need to support troops in ongoing combat. For example, Senator Warner said, "I support this bill for one simple reason — we are at war. As we speak, we have military forces engaged in combat — going in harm's way — in the skies over the Balkans and Iraq. Whether or not there is agreement on how these risk-taking operations are being prosecuted is not now the question. We must support our military forces who are risking their lives daily to carry out the missions they have been assigned." *Id.* at S5661. *See also id.* at S5650–51 (remarks of Sen. Hutchison); *id.* at S5656–57 (remarks of Sen. Domenici); *id.* at S5662–63 (remarks of Sen. Durbin); *id.* at S5664–65 (remarks of Sen. Harkin).

V. Pub. L. No. 106–31 and the War Powers Resolution

As described in the preceding section, the text of Pub. L. No. 106–31 and the legislative record as a whole make clear that Congress intended, by enacting the President's request, to enable the President to continue U.S. participation in Operation Allied Force for as long as funding remained available, *i.e.*, through at least the end of the fiscal year on September 30, and indeed even longer.[39] Congress was repeatedly advised of this effect by its own Members (both supporters and opponents of continuing the operation) and by Administration witnesses. For at least the month that the Administration's request was pending, and at a time when the duration of hostilities was uncertain, Congress was aware that a vote for the bill would be a vote to authorize the campaign.[40]

In this context, the concerns that have been voiced about finding congressional authorization in general appropriation statutes are not applicable. The purposes of both H.R. 1664 and H.R. 1141 were plain on the face of the bills. Nor was this a case in which the Committees with jurisdiction over war powers "would [have been] somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple- and brief-insertion of some inconsistent language in Appropriations Committees' Reports." *Hill*, 437 U.S. at 191 (rejecting Authority's argument that a series of appropriations funding the Tellico Dam Project constituted an implied repeal of the Endangered Species Act). In this case, "Congress as a whole was aware of" the basic terms of the special, emergency appropriation for continuing military operations in Kosovo. *Id.* at 192. The bill was surely among the most visible and important pieces of legislation introduced

[39] As noted above, the core appropriation of some $5 billion was "available until expended." 113 Stat at 76–77 In other words, it was a "no-year" appropriation that remained legally available even after September 30.

[40] In reaching this conclusion, we need not and do not decide that the appropriation authorized the introduction of United States Forces onto the ground in Serbia or Kosovo Interpretation of Pub. L No 106–31 must take into account the House of Representatives' vote on April 28 to block funding for ground troops without additional specific authorization from Congress, the President's Letter to the Speaker of the House of Representatives of April 28, 1999, agreeing not to deploy ground troops in a "non-permissive environment" without first "ask[ing] for Congressional support,"*see* 145 Cong Rec. H2883 (daily ed. May 6, 1999) (reprinting letter); *see also* 145 Cong. Rec. H2405 (daily ed Apr. 28, 1999) (remarks of Cong Gephardt, explaining President's representations), 145 Cong Rec S4531 (daily ed. May 3, 1999) (reprinting similar letter of April 28, 1999, to Senate Majority Leader); Chairman Young's statement that "[t]here is nothing in [H.R 1664] that would authorize any money to be used to deploy ground troops into Kosovo," 145 Cong. Rec H2882 (daily ed. May 6, 1999); Congressman Lewis's statement during the House Appropriations Committee's mark-up that "not a dime of these funds will be spent for troops being placed in Kosovo," Transcript at 10; and Secretary Cohen's statement of April 21 that the supplemental appropriation will not fund the introduction of ground troops to Kosovo. Moreover, on May 25, 1999, Senator Warner, speaking in opposition to a proposed rider to S. 1059, 106th Cong (1999), the Department of Defense authorization bill for Fiscal Year 2000 that would have required Congressional authorization before United States ground troops could be deployed in Yugoslavia, stated that, on that day, the Secretaries of State and Defense and the National Security Adviser, in a meeting with Senators, had "said without any equivocation whatsoever that the President would formally come to the Congress and seek legislation" before deploying ground troops 145 Cong. Rec. S5939 (daily ed May 25, 1999) In light of those actions and statements, which of course were closely contemporaneous with Congressional consideration of H.R. 1664 and H.R. 1141, it is unlikely that Congress intended to provide authorization for the introduction of ground troops into Serbia or Kosovo by enacting this appropriation. We note, however, that the House voted on May 6 to reject an amendment, proposed by Congressman Istook, to ban the use of the supplemental appropriation to fund the deployment of ground troops into Yugoslavia, "except in time of war." 145 Cong. Rec H2879, H2891–92 (daily ed. May 6, 1999).

before the first session of the 106th Congress, and both the Administration and individual members pointedly and publicly underscored its significance. Finally, unlike, for example, the Tellico Dam appropriations involved in *Hill*, which "represented relatively minor components of the lump-sum amounts" of the Authority's entire budget, H.R. 1141 was a freestanding bill that, in the form in which it was presented by the Administration, focused narrowly on military spending for Operation Allied Force. *Id.* at 189.[41] In sum, H.R. 1141 was intended to enable the President to continue Operation Allied Force, and to furnish him with the necessary funds for doing so, even if that operation were not brought to a successful conclusion by May 25. Pub. L. No. 106–31 is thus analytically similar to earlier congressional appropriation statutes, discussed in Section II, that authorized executive branch action (including the statutes that played a role in authorizing conflict).

The House's votes on the four other Kosovo-related measures on April 28 do not lead us to change our conclusion. *See supra* pp. 348–49. Although the House did defeat the resolution declaring a state of war between the United States and Serbia and passed a resolution blocking funding for ground troops without additional specific authorization, it also defeated a resolution that would have directed the President to remove the Armed Forces from the region and tied on the resolution that would have specifically authorized the President to conduct military air operations against Serbia. The message of all these votes is ambiguous. The only clear message that Congress sent regarding the continuation of military operations in Serbia is Pub. L. No. 106–31, which appropriated over $5 billion to continue these operations. As we have already explained, this was sufficient to constitute specific authorization within the meaning of the WPR.

Moreover, the argument, explained earlier, see *supra* p. 338–39, and invoked by Judge Randolph in his concurrence in *Campbell*,[42] that appropriation statutes should not be understood as authorizing hostilities because they might just as easily be intended to protect troops already committed, carries little weight here. We recognize that a number of statements made by Members of Congress (*e.g.*, Senator Warner, Congressman Weygand) indicate an intention to "support" already committed troops. These isolated statements, however, do not demonstrate that Congress did not intend to authorize continuing hostilities. The United States did not have ground troops in combat in Serbia or Kosovo at the time Pub. L. No. 106–31 was enacted, but rather was engaged in an air campaign in which U.S. forces were in harm's way only for the length of each sortie flown. If Con-

[41] Although Pub L. No 106–31 of course ended up making a range of appropriations in addition to those for the Kosovo effort, the legislative history makes clear that the bill's central, overriding purpose was to fund the hostilities in Yugoslavia.

[42] *See Campbell*, 203 F.3d at 31 n.10 (Randolph, J., concurring) ("The majority attaches some importance to Congress's decision to authorize funding for Operation Allied Force and argues that Congress could have denied funding if it wished to end the war. However, in *Mitchell v. Laird* we held that, as 'every schoolboy knows,' Congress may pass such legislation, not because it is in favor of continuing the hostilities, but because it does not want to endanger soldiers in the field. The War Powers Resolution itself makes the same point.")

gress did not intend to authorize continuing hostilities, but instead intended only to protect previously deployed troops, it could have, and most likely would have, styled its rejection of authorization for continuing hostilities by either phasing out appropriated funds over time, as it did in the case of Somalia, or by prohibiting the use of funds for certain purposes, as it did with the Cooper-Church amendment. Here, Congress chose neither option. Instead, it appropriated funds "until expended" without placing any limitations on the use of those funds. The actual steps taken by Congress demonstrate that it intended to authorize the President to continue hostilities, and, in particular, to continue the air campaign. *See Berk*, 317 F. Supp. at 724 (noting that even though some Members of Congress stated that "their votes for the appropriation did not constitute approval of an undeclared war [in Vietnam]," nonetheless the appropriation "gave Congressional approval to military expenditures in Southeast Asia"); *id.* at 728 (finding that the "disclaimers by individual Congressmen of any approval of the Vietnam conflict" could only " 'disclose the motive and could not disprove the fact of authorization' " (citation omitted)). In light of Congress's possible alternatives, reading the statements at issue as indicating an intent to protect already deployed troops simply "doesn't make sense." Ely, *supra*, at 129. It is more reasonable to interpret those statements as indicating an intent to "support" American troops by authorizing the President to continue hostilities so those troops would be able to complete their missions successfully.

Section 8(a)(1) does not lead to a contrary conclusion. As discussed above, that section cannot constitutionally be read to take from Congress a mechanism for authorizing war permitted by the Constitution. Instead, it has the effect of establishing a background principle against which Congress legislates. Section 8(a)(1) means, then, that it cannot be "inferred" — to quote the language of the provision — that Congress has authorized the continuation of conflicts from the mere fact that it has enacted an appropriation statute (unless the statute references the WPR). Nonetheless, if the text and legislative history of the appropriation statute make clear that it was Congress's clear intent to authorize continued operations, that intent is controlling, even if the statute does not reference the WPR. Such an appropriation statute is an implied partial repeal of section 8(a)(1) (or a supersession of section 8(a)(1)). For reasons already discussed, Pub. L. No. 106–31 is such a statute.[43]

Finally, it is worth observing that, in this case, the underlying purpose of the WPR's "clock" was fully satisfied. That clock functions to ensure that, where the President commits U.S. troops to hostilities without first obtaining congres-

[43] For all the reasons discussed in this opinion, the maxim discussed above-that the law disfavors implied repeals, *see supra note 22* — does not apply. This is not a case, for example, in which a Member of Congress would have had to "scrutiniz[e] in detail the [Appropriation] Committee proceedings" to become aware of the discrepancy between section 8(a)(1) and Pub. L. No 106–31. *Tennessee Valley Authority*, 437 U S at 189 n.35. Indeed, because Pub L No 106–31 was among the most prominent pieces of legislation pending before the 106th Congress, and because both the Administration and individual Members of Congress strongly and visibly underscored the significance of the legislation, "Congress as a whole was aware of" the basic terms of Pub. L No 106–31 *Id* at 192

sional authorization, Congress has the opportunity to consider the merits of the President's actions and to decide whether those hostilities may continue. Here, the President ordered a series of air strikes in the Federal Republic of Yugoslavia "to demonstrate the seriousness of NATO's purpose so that the Serbian leaders understand the imperative of reversing course; to deter an even bloodier offensive against innocent civilians in Kosovo; and, if necessary, to seriously damage the Serbian military's capacity to harm the people of Kosovo." Letter for the Speaker from the President, 1 Pub. Papers of William J. Clinton at 959. Congress then had the opportunity to deliberate on the wisdom of the President's actions, which it did, considering several resolutions relating to the military efforts in Kosovo. After all of those deliberations, Congress decided to use one of its most important constitutional powers over war and peace — its appropriation power-specifically to fund the ongoing military effort. By doing so, it authorized the President to continue military activities in the region.

Conclusion

Pub. L. No. 106–31 constituted Congressional authorization for continuing bombing efforts in Kosovo even after the running of the 60 day clock established by section 5(b) of the WPR. Interpreted in light of constitutional concerns, section 8(a)(1) of the WPR does not lead to an alternative result; properly read, section 8(a)(1) simply has the effect of establishing a background principle against which subsequent Congresses legislate when they enact appropriation statutes. Section 8(a)(1) creates procedural requirements that subsequent Congresses must follow to authorize hostilities. If a subsequent Congress, however, chooses in a particular instance to enact legislation that either expressly or by clear implication authorizes hostilities, it may decide not to follow the WPR's procedural requirements. In this case, read in light of the background principle established by section 8(a)(1), the text and legislative history of Pub. L. No. 106–31 make clear that Congress intended to authorize continuing hostilities in the Federal Republic of Yugoslavia.

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

Whether the President May Have Access to Grand Jury Material in the Course of Exercising His Authority to Grant Pardons

The President, in the exercise of his pardon authority and responsibilities under Article II, Section 2, Clause 1 of the Constitution, may request that the Pardon Attorney include grand jury information in any recommendation the Attorney may make in connection with a pardon application if the President determines that his need for such information in considering that application outweighs the confidentiality interests embodied in Rule 6(e) of the Federal Rules of Criminal Procedure.

The prohibition in Rule 6(e) cannot constitutionally be applied to prevent the President from obtaining grand jury information already in the possession of the executive branch when the President determines that, for purposes of making a clemency decision, his need for that information outweighs the confidentiality interests embodied in Rule 6(e).

December 22, 2000

MEMORANDUM OPINION FOR THE PARDON ATTORNEY

You have requested our opinion concerning the permissibility of attorneys' in the Department of Justice disclosing grand jury information to the President for his use in evaluating an application for clemency. You would like to have access to such information and be able to disclose it to the President in the course of making a pardon recommendation to him. Specifically, you cite an applicant's alleged perjury before a grand jury as an example of grand jury information that would be material to your evaluation and recommendation to the President concerning a clemency application, particularly where that perjury is related to the facts and circumstances of the offense for which clemency is sought.

We conclude that the President, in the exercise of his pardon authority and responsibilities under Article II, Section 2, Clause 1 of the United States Constitution, may request that you include such information in any recommendation you make in connection with a pardon application if he determines that his need for such information in considering that application outweighs the confidentiality interests embodied in Rule 6(e) of the Federal Rules of Criminal Procedure. In light of such a request, Department of Justice attorneys may disclose relevant grand jury material to you and, ultimately, to the President.

Rule 6(e), which has the force of law pursuant to 28 U.S.C. §§ 2072, 2074 (1994), governs the recording and disclosure of grand jury proceedings. As part of establishing these procedures, Rule 6(e)(2) sets forth a "General Rule of Secrecy" providing that certain persons, including attorneys for the Government, "shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules." Under this rule, no attorney for the Department of Justice may disclose "matters occurring before the grand jury" to any other person, unless one of the rule's enumerated exceptions applies.[1] None of the excep-

[1] For the exceptions provided for in the rule, *see* Fed R. Crim. P. 6(e)(3)(A)–(E).

tions enumerated in Rule 6(e) would appear to apply to this situation.[2] Nevertheless, we conclude that this prohibition cannot constitutionally be applied to prevent the President from obtaining information already in the possession of the executive branch when the President determines that, for purposes of making a clemency decision, his need for that information outweighs the confidentiality interests embodied in Rule 6(e).

We have previously concluded that, apart from Rule 6(e)'s enumerated exceptions to its prohibition against disclosure of grand jury material, the disclosure of such material to the President could in some circumstances be authorized on broader constitutional grounds. *See Disclosure of Grand Jury Matters to the President and Other Officials*, 17 Op. O.L.C. 59, 65–69 (1993); *Disclosure of Grand Jury Material to the Intelligence Community*, 21 Op. O.L.C. 159, 172–75 (1997) ("Shiffrin Memorandum"). *Cf. Sharing Title III Electronic Surveillance Material with the Intelligence Community*, 24 Op. O.L.C. 262, 274–76 (2000), (Title III information may be disclosed to President where it is of overriding importance to national security or foreign relations and necessary for discharge of President's constitutional responsibilities over these matters). Our 1993 memorandum concerned the question whether, and under what circumstances or conditions, the Attorney General may disclose grand jury material covered by Rule 6(e) in briefings presented to the President and other members of the National Security Council. The 1997 Shiffrin Memorandum concerned the permissibility of prosecutors' in the Department of Justice disclosing grand jury information to agencies in the intelligence community for certain official purposes. In both opinions, we considered the President's broad Article II responsibility to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and, in particular, his constitutionally based responsibilities for national defense and foreign affairs. We concluded that, in rare circumstances, these Article II responsibilities may independently justify the disclosure of pertinent grand jury information to him and certain of his advisors. *Cf. Craig v. United States*, 131 F.3d 99, 103 (2d Cir. 1997) (recognizing exceptions to Rule 6(e) beyond those enumerated in the rule).

In the context of the question presented by you, we are concerned with a specifically enumerated and exclusive constitutional presidential power — the President's power to grant pardons under Article II, Section 2, Clause 1 of the United States Constitution. The Constitution provides that the President "shall have Power to

[2] We are unable to conclude that providing the President with grand jury material for the purpose of making a fully informed decision on a clemency matter falls within Rule 6(e)(3)(A)(ii)'s exception permitting disclosure to such government personnel "as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." The information being provided to you and the President is for the purpose of assisting the President in exercising his pardon power discretion, which we view as entirely distinct from the Department of Justice's execution and enforcement of the criminal laws of the United States. Nor can we conclude that Rule 6(e)(3)(C)(i)'s exception permitting the district court to direct disclosure "preliminary to or in connection with a judicial proceeding" is applicable here. *Cf. In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261, 1271 (11th Cir. 1984) (although judicial investigating committee's consideration of complaint against Article III judge was similar to a judicial proceeding covered by Rule 6(e)(3)(C)(i), that exception did not apply).

grant Reprieves and Pardons for Offenses against the United States, in the Course of Exercising His Authority to Grant Pardonsexcept in Cases of Impeachment." U.S. Const. art. II, § 2, cl. 1. The assignment of the pardon power to the President alone was the product of a considered decision by the Framers. Before making that choice, the Framers debated, and rejected, possible limitations on the President's authority to grant pardons. A proposal to restrict the President's pardon power by requiring consent of the Senate to pardon decisions was soundly defeated. *See* 2 Max Farrand, *The Records of the Federal Convention of 1787* at 419 (rev. ed. 1966). Similarly, in considering the more modest proposal of denying the President the authority to grant pardons in "cases of treason," Gouverneur Morris and James Wilson argued that the pardon power should be left with the Executive and not the Legislature. *See id.* at 626. Rufus King likewise asserted that he "thought it would be inconsistent with the Constitutional separation of the Executive and Legislative powers to let the prerogative be exercised by the latter." *Id.* In response, James Madison "admitted the force of [the] objections to the Legislature," but argued that treason presented a special case. *Id.* at 627. In the end, even this more limited motion failed by a vote of 8 to 2. *Id.* In *The Federalist No. 74*, Alexander Hamilton explained the value of leaving the pardon power exclusively to the President: "As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance." *The Federalist Papers* at 447–48 (Clinton Rossiter ed., 1961).

The Supreme Court's decisions recognize that the pardon power is different from many other presidential powers in that it is textually committed exclusively to the President. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) ("[t]o the executive alone is intrusted the power of pardon"); *see also Public Citizen v. Department of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) (noting that pardon power is "commit[ted] . . . to the exclusive control of the President"). The Court has explained that:

> The power thus conferred is unlimited, with the exception [of impeachments]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.

Ex Parte Garland, 71 U.S. (4 Wall.) 333, 380 (1866). Since the pardoning power is an "enumerated power" of the Constitution, "its limitations, if any, must be found in the Constitution itself," *Schick v. Reed*, 419 U.S. 256, 267 (1974), and the President's pardon power "cannot be modified, abridged, or diminished by the Congress," *id.* at 266. The Court has repeatedly affirmed this principle that the President's pardon power must be left unfettered and is not subject to congressional encroachment. *See, e.g., id.* at 266 (pardon power "flows from the Constitution alone, not from any legislative enactments" and "cannot be modified, abridged, or diminished by the Congress"); *Ex parte Grossman*, 267 U.S. 87, 120 (1925) ("The executive can reprieve or pardon all offenses . . . without modification or regulation by Congress."); *see also Vincent v. Schlesinger*, 388 F. Supp. 370, 374 (D.D.C. 1975) (Congress cannot subject pardon process to the procedural requirements of the Administrative Procedure Act).

Because the President's pardon authority is plenary, statutes that seek to impose what may seem to be only minor incursions on the President's discretion are unconstitutional. *See Grossman*, 267 U.S. at 121 ("[W]hoever is to make [the pardon power] useful must have *full discretion* to exercise it. . . . Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it.") (emphasis added); *Schick*, 419 U.S. at 263 ("[T]he draftsmen of [the pardon clause] spoke in terms of a 'prerogative' of the President, which ought not be 'fettered or embarrassed.' ") (quoting *The Federalist No. 74* (Alexander Hamilton)).[3] Even statutes of general application are invalid as applied if, in a particular application, they serve no purpose other than that of regulating the exercise of an exclusive presidential power. In *Public Citizen*, the Supreme Court addressed whether the Federal Advisory Committee Act ("FACA"), which requires, among other things, that advisory committee minutes, records, and reports be open to the public, applies to consultations between the Department of Justice and the American Bar Association ("ABA") concerning potential judicial nominees. 491 U.S. at 443–45. FACA did not purport to regulate directly the manner in which the President exercised his exclusive constitutional power to nominate judges or to regulate any aspect of the content of the Department's advice to the President concerning potential judicial nominees. Nonetheless, the district court concluded that opening consultations between the Department and an outside advisory group to the public "infringed unduly on the President's Article II power to nominate federal judges," a finding that prompted the majority of the Court to interpret the statute not to apply to the Department's consultations with the ABA so as to avoid the "serious constitutional problems" raised by a contrary interpretation. *Id.* at 466–67. Justice Kennedy's opinion concurring in

[3] The Court has likewise recognized that the Judiciary cannot constrain the exercise of the pardon power. This principle is illustrated by the Court's decision in *Grossman*. In that case, the Court upheld the President's right to pardon an individual for a criminal contempt of court despite the argument that extending the President's pardon power to a judicially imposed contempt of court would violate the constitutionally mandated separation of executive and judicial powers because the contempt power is so indispensable to a judge. 267 U.S. at 120–21.

the judgment, which was joined by Chief Justice Rehnquist and Justice O'Connor, reached the constitutional issue and concluded that FACA's procedural requirements could not apply to the President's nomination power because "[n]o role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment." *Id.* at 483 (Kennedy, J., concurring). Citing the Court's cases on the pardon power, Justice Kennedy stated: "[W]here the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate *any* intrusion by the Legislative Branch." *Id.* at 485.

Rule 6(e), of course, is a rule of general application that is neither intended nor designed to regulate or affect the President's pardon power. Instead, the rule serves broad interests in regulating the secrecy of grand jury proceedings.[4] Even as applied to the exercise of the President's pardon power, moreover, Rule 6(e) continues to serve these interests, and thus application of the rule in a way that incidently affects the President's pardon power, unlike application of FACA to the nominations process, cannot be said to serve no purpose other than that of regulating the exercise of an exclusive presidential power.

Nevertheless, it is equally true that application of Rule 6(e) in this context conflicts with the President's interest in having access to information that is legitimately in the possession of his subordinates and relevant to the exercise of his constitutionally enumerated and exclusive pardon power. In such a case, it is appropriate to resolve this conflict through a balancing approach that asks:

> whether the statute at issue prevents the President " 'from accomplishing [his] constitutionally assigned functions,' " and whether the extent of the intrusion on the President's powers "is justified by an overriding need to promote objectives within the constitutional authority of Congress."

Public Citizen, 491 U.S. at 484–85 (Kennedy, J., concurring) (quoting *Morrison v. Olson*, 487 U.S. 654, 695 (1988), quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977)).[5]

In performing such a balancing of interests, it is important to keep in mind that the factors bearing on the President's decision to exercise his pardon power, as an act of mercy, are subjective and undefined. *See* Letter from Daniel Lyons, Pardon Attorney, to Senator Styles Brides (Jan. 10, 1952) ("In the exercise of

[4] *Cf. United States v. Sells Engineering*, 463 U.S. 418, 424–25 (1983) (recognizing that the grand jury is a constitutionally "enshrined" "instrument of justice in our system of criminal law," and that the secrecy of its proceedings is critical to furthering its purposes).

[5] On the other hand, where Congress purports to regulate an exclusive, constitutionally enumerated presidential power, or where general law applies in an area in which Congress has no constitutional interest of its own, the President's interest is given priority without a need to engage in a balancing of interests since the Constitution entrusts to the President alone the decision to exercise that power *See Public Citizen*, 491 U.S. at 484–85 (Kennedy, J. concurring) ("[W]here the Constitution by explicit text commits the power at issue to the exclusive control of the President, [the Supreme Court has] refused to tolerate *any* intrusion by the Legislative Branch.").

his pardoning power, the President is amenable only to the dictates of his own conscience, unhampered and uncontrolled by any person or branch of Government''). Moreover, ''the very essence of the pardoning power is to treat each case individually.'' *Schick*, 419 U.S. at 265.[6] Where the President has to make a pardon judgment, information concerning alleged perjury before a grand jury by an applicant may be material to the President's evaluation of that applicant's character and circumstances. Confronted with evidence that a person committed perjury before a grand jury, the President might conclude that the person should not be pardoned for committing a different offense because that person is a ''fit object of [the law's] vengeance'' and undeserving of mercy. *The Federalist No. 74*, at 448. By restricting the President's access to information already in the possession of the Executive Branch that he considers relevant to a pardon decision, Rule 6(e) effectively prevents the President from accomplishing his constitutionally assigned function by depriving him of information that he has determined he needs to discharge that function.

Such an interference with the discharge of an exclusive constitutional prerogative is not justified by any ''overriding need to promote objectives within the constitutional authority of Congress.'' *Public Citizen*, 491 U.S. at 484–85. The Supreme Court has identified ''several distinct interests served by safeguarding the confidentiality of grand jury proceedings.'' *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218–19 (1979). Those interests are:

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Id. at 219.

The Court has also recognized, however, that ''the concerns that underlie the policy of grand jury secrecy are implicated to a much lesser extent when the disclosure merely involves Government attorneys.'' *United States v. John Doe, Inc. I*, 481 U.S. 102, 112 (1987); *see also Sells Engineering*, 463 U.S. at 445

[6] Of course, the intensely subjective nature of a pardon decision does not mean that the President could choose, in his discretion, to grant pardons, for example, in exchange for cash payments The remedy for such a misuse of the power would be removal from office after impeachment and conviction for treason, bribery, or other high crimes and misdemeanors U.S Const art. II, § 4

("Nothing in *Douglas Oil*, however, requires a district court to pretend that there are no differences between governmental bodies and private parties."). That point is particularly pertinent here. Because the President and the Department of Justice have traditionally treated the Department's deliberations in connection with a pardon recommendation as confidential, *see* Letter from Janet Reno, Attorney General, to The President at 3 (Sept. 16, 1999) (detailing Department's practice of declining to recognize congressional right to compel disclosure of pardon materials), any disclosure of material protected by Rule 6(e) to the President and those assisting him in the exercise of his pardon power is likely to have, at most, a minimal effect on grand jury secrecy because the dissemination will be so limited.[7] The balance of competing constitutional interests, therefore, weighs heavily in favor of the President. Accordingly, because application of Rule 6(e) in accordance with its plain terms could, in this context, unduly fetter or abridge the President's exercise of his exclusive constitutional authority to pardon, it should be read to be "subject to an implied exception in deference to such presidential powers." *Rainbow Navigation, Inc. v. Dep't of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.).

Invocation of this exception, however, presents certain practical difficulties. Although the President may consider information concerning an applicant's possible perjury before a grand jury to be relevant to the exercise of his pardon power, he will not know that such information exists until it is brought to his attention. Rule 6(e), however, prohibits prosecutors from sharing such information with your office because it only permits a prosecutor to share grand jury material with other Department of Justice attorneys for the purpose of assisting them in enforcing federal criminal law, *see Sells Engineering*, 463 U.S. at 428, and, as noted above, sharing such information with Department attorneys who assist the President in the exercise of his pardon power is not a disclosure made in aid of federal law enforcement. *See supra*, note 2. Moreover, due to the intrinsically subjective nature of the President's pardon decision, it is difficult for anyone other than the President to assess the materiality of information to the exercise of his pardon authority. Therefore, absent a request by the President, a prosecutor should not disclose grand jury material to the President, or to your office on behalf of the President, based on his or her own assumption that the President's need for such information outweighs the interests of grand jury secrecy.

The President may, we believe, avoid this apparent conundrum by issuing a standing request for certain grand jury material, to the extent it exists, relating to particular issues that he deems relevant to his pardon decisions. That standing request may also provide that prosecutors are permitted to share such grand jury material with identified Department of Justice officials (such as the Attorney Gen-

[7] In this regard, as highly sensitive material, we advise that all reasonable precautions be taken to safeguard the confidentiality of this material and to ensure that it is shared only with those who require access to it in order to advise the President on pardon matters

eral or Deputy Attorney General, in consultation with the Pardon Attorney) for the purpose of having them make the preliminary determination whether the grand jury information is sufficiently relevant to the pardon decision to warrant its being provided to the President. Any such standing directive, however, should be carefully written to make clear that disclosures of grand jury material should not be routine, but rather should be made only when certain factors indicate the existence of material relevant to the President's decisionmaking process. These procedures will help insure that such disclosures fall within the category of material that the President has specified as being relevant to his decisionmaking process. Alternatively, disclosure might be authorized on a case-by-case basis as deemed appropriate by the President.

We have concluded in past opinions that, when disclosure of grand jury material is made to the President pursuant to Article II of the Constitution rather than Rule 6(e), prior judicial approval of such disclosure is not constitutionally required. 17 Op. O.L.C. at 68; 21 Op. O.L.C. at 174–75. Similarly, the requirement contained in Rule 6(e)(3)(B), that the court supervising the grand jury must be notified of the names of the people to whom a disclosure was made, does not apply to constitutionally sanctioned disclosures made outside the context of Rule 6(e). *Id.* These same principles apply to any disclosures made under a directive from the President for grand jury materials he deems relevant to his pardon decisions because such a directive would also rest on the President's exercise of an Article II power.[8]

RANDOLPH D. MOSS
Assistant Attorney General
Office of Legal Counsel

[8] In considering disclosure to the President of grand jury material on the basis of non-exclusive constitutional authority, we have noted that the risk of constitutional confrontation could be minimized by seeking the approval of the district court that impaneled the grand jury, invoking the court's inherent authority to disclose grand jury materials for reasons other than those specified in Rule 6(e) 21 Op O.L C. at 175 *See also Craig v. United States*, 131 F.3d 99, 103 (2d Cir 1997) (district court has discretion to go beyond exceptions listed in Rule 6(e) to determine whether special circumstances exist), *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F 2d 1261, 1268 (11th Cir 1984) (district court can fashion alternative method for disclosure under its general supervisory authority over grand jury proceedings and records) *Cf* Letter to Michael Shaheen, Special Counsel/Project Manager, Department of the Treasury Internal Revenue Service Criminal Investigation Division Review, from Eric H Holder, Jr , Deputy Attorney General, *Re: Review of CID Grand Jury Procedures* (Feb. 12, 1999) (recommending seeking court orders authorizing the review of the activities of the Criminal Investigative Division), Memorandum for Michael Shaheen, Jr., Counsel, Office of Professional Responsibility, from Robert B Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re Disclosure of Grand Jury Material to the Office of Professional Responsibility* (Jan. 6, 1984) (recommending seeking court review for disclosure of grand jury material to OPR pursuant to Rule 6(e) for use in investigating charges that prosecutors have engaged in misconduct) Here, however, due to the intrinsically subjective nature of the President's pardon decision, we question whether a court could appropriately assess the materiality of information to the exercise of his pardon authority Moreover, as previously discussed, the President and the Department of Justice have traditionally treated the Department's deliberations in connection with a pardon recommendation as confidential. *See* Letter from Janet Reno, *supra*, at 3. Accordingly, we believe that the prudential rule of seeking court approval for the release of material protected by Rule 6(e) would not apply here, since seeking court approval would necessitate revealing an aspect of departmental or presidential deliberations in connection with a pending pardon application to individuals beyond those the President deems necessary to advise him regarding the exercise of his constitutional prerogative