OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES,
THE ATTORNEY GENERAL,

AND OTHER EXECUTIVE
OFFICERS OF THE FEDERAL
GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

EDITOR: Nathan A. Forrester
ASSOCIATE EDITOR: Kevin J. Barber

VOLUME 36

2012

WASHINGTON
2021

OFFICE OF LEGAL COUNSEL
(2012)

Attorney General

Eric H. Holder, Jr.

Assistant Attorney General
Office of Legal Counsel

Virginia A. Seitz

Deputy Assistant Attorneys General
Office of Legal Counsel

John E. Bies
Benjamin C. Mizer
Daniel L. Koffsky
Caroline D. Krass (Principal)
H. Jefferson Powell
Cristina M. Rodríguez
Karl R. Thompson

OFFICE OF LEGAL COUNSEL
(2012)

Attorneys

Kwaku A. Akowuah
Amin Aminfar
Paul P. Colborn
  (Special Counsel)
Christopher C. Fonzone
Nathan A. Forrester
Rosemary A. Hart
  (Special Counsel)
Laura Eddleman Heim
Kelley Brooke Hostetler
David M. Lehn
Jaynie R. Lilley
Jane E. Kucera
Robert A. Parker
Zachary S. Price
Thomas B. Pulham
Daphna Renan
Matthew D. Roberts
  (Senior Counsel)
Bonnie I. Robin-Vergeer
Nitin Shah
Jeffrey P. Singdahlsen
  (Senior Counsel)
Peter A. Winn

FOREWORD

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

The Attorney General is responsible, "from time to time," to "cause to be edited, and printed in the Government Printing Office [Government Publishing Office], such of his opinions as he considers valuable for preservation in volumes." 28 U.S.C. § 521. The Official Opinions of the Attorneys General of the United States comprise volumes 1–43 and include opinions of the Attorney General issued through 1982. The Attorney General has also directed OLC to publish those of its opinions considered appropriate for publication on an annual basis, for the convenience of the Executive, Legislative, and Judicial Branches and of the professional bar and general public. These OLC publications now also include the opinions signed by the Attorney General. The first 35 published volumes of the OLC series covered the years 1977 through 2011. The present volume 36 covers 2012.

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

Opinion of the Attorney General

Contents *Page*

Assertion of Executive Privilege Over Deliberative Materials Generated in Response to Congressional Investigation Into Operation Fast and Furious (June 19, 2012) 1

Opinions of the Office of Legal Counsel

Contents *Page*

Recess Appointments Amid Pro Forma Senate Sessions (January 6, 2012) 15

State of Residence Requirements for Firearms Transfers (January 30, 2012) 49

Use of FY 2009/2010 Funds by the General Services Administration to Assist the Department of Veterans Affairs in Acquiring Human Resources for FY 2012 (March 2, 2012) 59

State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments (March 5, 2012) 77

Altering Puerto Rico's Relationship with the United States Through Referendum (March 7, 2012) 93

Online Terms of Service Agreements with Open-Ended Indemnification Clauses Under the Anti-Deficiency Act (March 27, 2012) 112

Whether Reservists Must Exhaust Available Leave Under 5 U.S.C. § 6323(b) Before Taking Leave Under 5 U.S.C. § 6323(a) (April 3, 2012) 129

Appointment of Uncompensated Special Attorneys Under 28 U.S.C. § 515 (April 25, 2012) 153

Duty to Report Suspected Child Abuse Under 42 U.S.C. § 13031 (May 29, 2012) 167

Exempting the Records of the SEC Fraud Surveillance Team from Reporting Obligations in the Privacy Act (July 3, 2012) 186

Requiring Identifying Information for Access to Financial Disclosure Reports During the Period Governed by Section 11(a) of the STOCK Act (August 22, 2012) 198

Authority of the Department of Labor to Control the Disclosure of Federal Employees' Compensation Act Records Held by the United States Postal Service (November 16, 2012) 217

Residence Requirement for Assistant United States Attorneys Under 28 U.S.C. § 545(a) (November 20, 2012) 237

OPINION

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

Assertion of Executive Privilege Over Deliberative Materials Generated in Response to Congressional Investigation Into Operation Fast and Furious

Executive privilege may properly be asserted in response to a congressional subpoena seeking internal Department of Justice documents generated in the course of the deliberative process concerning the Department's response to congressional and related media inquiries into Operation Fast and Furious.

June 19, 2012

THE PRESIDENT
THE WHITE HOUSE

Dear Mr. President:

I am writing to request that you assert executive privilege with respect to confidential Department of Justice ("Department") documents that are responsive to the subpoena issued by the Committee on Oversight and Government Reform of the United States House of Representatives ("Committee") on October 11, 2011. The subpoena relates to the Committee's investigation into Operation Fast and Furious, a law enforcement operation conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") and the United States Attorney's Office for the District of Arizona to stem the illegal flow of firearms from the United States to drug cartels in Mexico ("Fast and Furious"). The Committee has scheduled a meeting for June 20, 2012, to vote on a resolution holding me in contempt of Congress for failing to comply with the subpoena.

I.

The Committee's subpoena broadly sweeps in various groups of documents relating to both the conduct of Operation Fast and Furious and the Department's response to congressional inquiries about that operation. In recognition of the seriousness of the Committee's concerns about both the inappropriate tactics used in Fast and Furious and the inaccuracies concerning the use of those tactics in the letter that the Department sent to Senator Grassley on February 4, 2011 ("February 4 Letter"), the Department has taken a number of significant steps in response to the Committee's oversight. First, the Department has instituted various reforms to

ensure that it does not repeat these law enforcement and oversight mistakes. Second, at my request the Inspector General is investigating the conduct of Fast and Furious. And third, to the extent consistent with important Executive Branch confidentiality and separation of powers interests affected by the Committee's investigation into ongoing criminal investigations and prosecutions, as well as applicable disclosure laws, the Department has provided a significant amount of information in an extraordinary effort to accommodate the Committee's legitimate oversight interests, including testimony, transcribed interviews, briefings and other statements by Department officials, and all of the Department's internal documents concerning the preparation of the February 4 Letter.

The Committee has made clear that its contempt resolution will be limited to internal Department "documents from after February 4, 2011, related to the Department's response to Congress." Letter for Eric H. Holder, Jr., Attorney General, from Darrell E. Issa, Chairman, Committee on Oversight and Government Reform, U.S. House of Representatives at 1–2 (June 13, 2012) ("Chairman's Letter"). I am asking you to assert executive privilege over these documents. They were not generated in the course of the conduct of Fast and Furious. Instead, they were created after the investigative tactics at issue in that operation had terminated and in the course of the Department's deliberative process concerning how to respond to congressional and related media inquiries into that operation.

In view of the significant confidentiality and separation of powers concerns raised by the Committee's demand for internal documents generated in response to the Committee's investigation, we consider the Department's accommodations regarding the preparation of the February 4 Letter to have been extraordinary. Despite these accommodations, however, the Committee scheduled a vote on its contempt resolution. At that point, the Department offered an additional accommodation that would fully address the Committee's remaining questions. The Department offered to provide the Committee with a briefing, based on documents that the Committee could retain, explaining how the Department's understanding of the facts of Fast and Furious evolved during the post-February 4 period, as well as the process that led to the withdrawal of the February 4 Letter. The Committee, however, has not accepted the Department's offer and has instead elected to proceed with its contempt vote.

As set forth more fully below, I am very concerned that the compelled production to Congress of internal Executive Branch documents generated in the course of the deliberative process concerning its response to congressional oversight and related media inquiries would have significant, damaging consequences: It would inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and effectively to congressional oversight. This would raise substantial separation of powers concerns and potentially create an imbalance in the relationship between these two coequal branches of the government. Consequently, as the head of the Department of Justice, I respectfully request that you assert executive privilege over the identified documents. This letter sets forth the basis for my legal judgment that you may properly do so.

II.

Executive privilege is "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). It is "a necessary corollary of the executive function vested in the President by Article II of the Constitution." *Congressional Requests for Confidential Executive Branch Information*, 13 Op. O.L.C. 153, 154 (1989) (Barr, Ass't Att'y Gen.) ("*Congressional Requests*"); *see* U.S. Const. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); U.S. Const. art. II, § 3 (The President shall "take Care that the Laws be faithfully executed[.]"). Indeed, executive privilege "has been asserted by numerous Presidents from the earliest days of our Nation, and it was explicitly recognized by the Supreme Court in *United States v. Nixon*." *Congressional Requests*, 13 Op. O.L.C. at 154.

The documents at issue fit squarely within the scope of executive privilege. In connection with prior assertions of executive privilege, two Attorneys General have advised the President that documents of this kind are within the scope of executive privilege. *See Assertion of Executive Privilege Concerning the Dismissal and Replacement of U.S. Attorneys*, 31 Op. O.L.C. 1, 6–7 (2007) (Clement, Acting Att'y Gen.) ("*U.S. Attorneys Assertion*") ("communications between the Department of Justice and the White House concerning . . . possible responses to congressional

and media inquiries about the U.S. Attorney resignations" "clearly fall within the scope of executive privilege"); *Assertion of Executive Privilege Regarding White House Counsel's Office Documents*, 20 Op. O.L.C. 2, 3 (1996) (Reno, Att'y Gen.) ("*WHCO Documents Assertion*") (concluding that "[e]xecutive privilege applies" to "analytical material or other attorney work-product prepared by the White House Counsel's Office in response to the ongoing investigation by the Committee").

It is well established that "[t]he doctrine of executive privilege . . . encompasses Executive Branch deliberative communications." *Assertion of Executive Privilege Over Communications Regarding EPA's Ozone Air Quality Standards and California's Greenhouse Gas Waiver Request*, 32 Op. O.L.C. 1, 2 (2008) (Mukasey, Att'y Gen.) ("*EPA Assertion*"); *see also, e.g.*, *U.S. Attorneys Assertion*, 31 Op. O.L.C. at 2; *Assertion of Executive Privilege with Respect to Clemency Decision*, 23 Op. O.L.C. 1, 1–2 (1999) (Reno, Att'y Gen.) ("*Clemency Assertion*"). The threat of compelled disclosure of confidential Executive Branch deliberative material can discourage robust and candid deliberations, for "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process." *Nixon*, 418 U.S. at 705. Thus, Presidents have repeatedly asserted executive privilege to protect confidential Executive Branch deliberative materials from congressional subpoena. *See, e.g.*, *EPA Assertion*, 32 Op. O.L.C. at 2–3; *Assertion of Executive Privilege Concerning the Special Counsel's Interviews of the Vice President and Senior White House Staff*, 32 Op. O.L.C. 7, 8–9 (2008) (Mukasey, Att'y Gen.) ("*Special Counsel Assertion*"); *Assertion of Executive Privilege with Respect to Prosecutorial Documents*, 25 Op. O.L.C. 1, 2 (2001) (Ashcroft, Att'y Gen.); *Clemency Assertion*, 23 Op. O.L.C. at 1–4; *Assertion of Executive Privilege in Response to a Congressional Subpoena*, 5 Op. O.L.C. 27, 29–31 (1981) (Smith, Att'y Gen.) ("*1981 Assertion*").

Because the documents at issue were generated in the course of the deliberative process concerning the Department's responses to congressional and related media inquiries into Fast and Furious, the need to maintain their confidentiality is heightened. Compelled disclosure of such material, regardless of whether a given document contains deliberative content, would raise "significant separation of powers concerns," *WHCO Docu-*

ments Assertion, 20 Op. O.L.C. at 3, by "'significantly impair[ing]'" the Executive Branch's ability to respond independently and effectively to matters under congressional review. *U.S. Attorneys Assertion*, 31 Op. O.L.C. at 7 ("the ability of the Office of the Counsel to the President to assist the President in responding to [congressional and related media] investigations 'would be significantly impaired' if a congressional committee could review 'confidential documents prepared in order to assist the President and his staff in responding to an investigation by the committee seeking the documents'") (quoting *WHCO Documents Assertion*, 20 Op. O.L.C. at 3) (alterations omitted); *see generally The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 126–28, 133–35 (1996) (explaining that, under Supreme Court case law, congressional action that interferes with the functioning of the Executive Branch, including "attempts to dictate the processes of executive deliberation," can violate general separation of powers principles); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (congressional enactment that "disrupts the proper balance between the coordinate branches" may violate the separation of powers).

Congressional oversight of the process by which the Executive Branch responds to congressional oversight inquiries would create a detrimental dynamic that is quite similar to what would occur in litigation if lawyers had to disclose to adversaries their deliberations about the case, and specifically deliberations about how to respond to their adversaries' discovery requests. As the Supreme Court recognized in establishing the attorney work product doctrine, "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947). Were attorney work product "open to opposing counsel on mere demand," the Court explained, "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial . . . , [a]nd the interests of the clients and the cause of justice would be poorly served." *Id.* at 511.

Similarly, in the oversight context, as the Department recognized in the prior administration, a congressional power to request information from the Executive Branch and then review the ensuing Executive Branch discussions regarding how to respond to that request would chill

the candor of those Executive Branch discussions and "introduce a significantly unfair imbalance to the oversight process." Letter for John Conyers, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, and Linda T. Sanchez, Chairwoman, Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, from Richard A. Hertling, Acting Assistant Attorney General, Office of Legislative Affairs at 3 (Mar. 26, 2007). Such congressional power would disserve both Branches and the oversight process itself, which involves two co-equal branches of government and, like litigation, often is, and needs to be, adversarial. We recognize that it is essential to Congress's ability to interact independently and effectively with the Executive Branch that the confidentiality of internal deliberations among Members of Congress and their staffs be protected against incursions by the Executive Branch. *See Gravel v. United States*, 408 U.S. 606, 616 (1972) ("The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch."). It is likewise essential to the Executive Branch's ability to respond independently and effectively to matters under congressional review that the confidentiality of internal Executive Branch deliberations be protected against incursions by Congress.

Moreover, there is an additional, particularized separation of powers concern here because the Committee's inquiry into Fast and Furious has sought information about ongoing criminal investigations and prosecutions. Such information would itself be protected by executive privilege. *See, e.g.*, *Assertion of Executive Privilege in Response to Congressional Demands for Law Enforcement Files*, 6 Op. O.L.C. 31, 32 (1982) (Smith, Att'y Gen.) ("[I]t has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances."). Consequently, the Department's deliberations about how to respond to these congressional inquiries involved discussion of how to ensure that critical ongoing law enforcement actions are not compromised and that law enforcement decisionmaking is not tainted by even the appearance of political influence. *See, e.g.*, *id.* at 33 (noting "substantial danger that congressional pressures will influence the

course of the investigation . . . [and] potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods, or strategy" (internal quotation marks omitted)). Maintaining the confidentiality of such candid internal discussions helps preserve the independence, integrity, and effectiveness of the Department's law enforcement efforts.

III.

A congressional committee "may overcome an assertion of executive privilege only if it establishes that the subpoenaed documents are '*demonstrably critical* to the responsible fulfillment of the Committee's functions.'" *Special Counsel Assertion*, 32 Op. O.L.C. at 11 (emphasis added) (quoting *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 731 (D.C. Cir. 1974) (en banc)); *see also, e.g.*, *U.S. Attorneys Assertion*, 31 Op. O.L.C. at 2 (same); *Clemency Assertion*, 23 Op. O.L.C. at 2 (same); *Nixon*, 418 U.S. at 707 ("[I]t is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch."). "Those functions must be in furtherance of Congress's legitimate *legislative* responsibilities," *Special Counsel Assertion*, 32 Op. O.L.C. at 11 (emphasis added), for "[c]ongressional oversight of Executive Branch actions is justifiable only as a means of facilitating the legislative task of enacting, amending, or repealing laws." *1981 Assertion*, 5 Op. O.L.C. at 30–31; *see also, e.g.*, *Special Counsel Assertion*, 32 Op. O.L.C. at 11; *U.S. Attorneys Assertion*, 31 Op. O.L.C. at 2–3; *McGrain v. Daugherty*, 273 U.S. 135, 176 (1927) (congressional oversight power may be used only to "obtain information in aid of the legislative function"); *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 504 n.15 (1975) ("The subject of any [congressional] inquiry always must be one on which legislation could be had." (internal quotation marks omitted)).

A.

The Committee has not satisfied the "demonstrably critical" standard with respect to the documents at issue. The Committee has said that it needs the post-February 4 documents "related to the Department's response to Congress" concerning Fast and Furious in order to "examine the

Department's mismanagement of its response to Operation Fast and Furious." Chairman's Letter at 1–2. More specifically, the Committee has explained in the report that it is scheduled to consider at its June 20 contempt meeting that it needs these documents so that it can "understand what the Department knew about Fast and Furious, including when and how it discovered its February 4 letter was false, and the Department's efforts to conceal that information from Congress and the public." Comm. on Oversight & Gov't Reform, U.S. House of Representatives, *Report* at 33 (June 15, 2012). House leaders have similarly communicated that the driving concern behind the Committee's scheduled contempt vote is to determine whether Department leaders attempted to "mislead or misinform Congress" in response to congressional inquiries into Fast and Furious. *See* Letter for Eric H. Holder, Jr., Attorney General, from John A. Boehner, Speaker, U.S. House of Representatives, et al. at 1 (May 18, 2012).

At the threshold, it is not evident that the Committee's asserted need to review the management of the Department's response to congressional inquiries furthers a *legislative* function of Congress. *See WHCO Documents Assertion*, 20 Op. O.L.C. at 4 (noting the question of "the extent of Congress's authority to conduct oversight of the executive branch's response to oversight . . . must be viewed as unresolved as a matter of law in light of the requirement that there be a nexus to Congress's legislative authority"). In any event, the purported connection between the congressional interest cited and the documents at issue is now highly attenuated as a result of the Department's extraordinary efforts to accommodate the Committee's interest in this regard. Through these efforts, the Department has amply fulfilled its constitutional "obligation . . . to make a principled effort to acknowledge, and if possible to meet, the [Committee's] legitimate needs." *1981 Assertion*, 5 Op. O.L.C. at 31; *see also, e.g.*, *United States v. AT&T Co.*, 567 F.2d 121, 127, 130 (D.C. Cir. 1977) ("[E]ach branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. . . . Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.").

Specifically, the Department has already shared with the Committee over 1300 pages of documents concerning the drafting of the February 4

Letter, in acknowledgment that the February 4 Letter contained inaccurate information. In addition, numerous Department officials and employees, including the Attorney General, have provided testimony and other statements concerning both the conduct of Fast and Furious and the Department's preparation and withdrawal of the February 4 Letter. This substantial record shows that the inaccuracies in the February 4 Letter were the inadvertent product of the fact that, at the time they were preparing that letter, neither Department leaders nor the heads of relevant Department components on whom Department leaders reasonably relied for information knew the correct facts about the tactics used in Fast and Furious. Department leaders first learned that flawed tactics may have been used in Fast and Furious when public allegations about such tactics surfaced in early 2011, after such tactics had been discontinued. But Department leaders were mistakenly assured by the heads of relevant Department components that those allegations were false. As the Department collected and reviewed documents to provide to the Committee during the months after submitting the February 4 Letter, however, Department leaders came to understand that Fast and Furious was in fact fundamentally flawed and that the February 4 Letter may have been inaccurate. While the Department was developing that understanding, Department officials made public statements and took other actions alerting the Committee to their increasing concern about the tactics actually used in Fast and Furious and the accuracy of the February 4 Letter. When the Department was confident that it had a sufficient understanding of the factual record, it formally withdrew the February 4 Letter. All of this demonstrates that the Department did not in any way intend to mislead the Committee.

The Department continued its extraordinary efforts at accommodating the Committee by recently offering to provide the Committee with a briefing, based on documents that the Committee could retain, explaining further how the Department's understanding of the facts of Fast and Furious evolved during the post-February 4 period, as well as the process that led to the withdrawal of the February 4 Letter. The Department believes that this briefing, and the accompanying documents, would have fully addressed what the Committee described as its remaining concerns related to the February 4 Letter and the good faith of the Department in responding to the Committee's investigation. The Committee, however, has not accepted this offer of accommodation.

Finally, the Committee's asserted need for post-February 4 documents is further diminished by the Inspector General's ongoing investigation of Fast and Furious, which was undertaken at my request. As an Executive Branch official, the Inspector General may obtain access to documents that are privileged from disclosure to Congress. The existence of this investigation belies any suspicion that the Department is attempting to conceal important facts concerning Fast and Furious from the Committee. Moreover, in light of the Inspector General's investigation, congressional oversight is not the only means by which the management of the Department's response to Fast and Furious may be scrutinized.

In brief, the Committee received all documents that involved the Department's preparation of the February 4 Letter. The Committee's legitimate interest in obtaining documents created after the February 4 Letter is highly attenuated and has been fully accommodated by the Department. The Committee lacks any "demonstrably critical" need for further access to the Department's deliberations to address concerns arising out of the February 4 Letter.

B.

The Department's accommodations have concerned only a subset of the topics addressed in the withheld post-February 4 documents. The documents and information provided or offered to the Committee address primarily the evolution of the Department's understanding of the facts of Fast and Furious and the process that led to the withdrawal of the February 4 Letter. Most of the withheld post-February 4 documents, however, relate to other aspects of the Department's response to congressional and related media inquiries, such as procedures or strategies for responding to the Committee's requests for documents and other information. The Committee has not articulated *any* particularized interest in or need for documents relating to such topics, let alone a need that would further a legislative function.

"Broad, generalized assertions that the requested materials are of public import are simply insufficient under the 'demonstrably critical' standard." *U.S. Attorneys Assertion*, 31 Op. O.L.C. at 4; *see also, e.g.*, *Congressional Requests*, 13 Op. O.L.C. at 160 ("'A specific, articulated need for information will weigh substantially more heavily in the constitutional balanc-

ing than a generalized interest in obtaining information.'" (quoting *1981 Assertion*, 5 Op. O.L.C. at 30)). Moreover, "Congress's legislative function does not imply a freestanding authority to gather information for the sole purpose of informing 'the American people.'" *Special Counsel Assertion*, 32 Op. O.L.C. at 13. The "only informing function" constitutionally vested in Congress "'is that of informing itself about subjects susceptible to legislation, not that of informing the public.'" *Id.* (quoting *Miller v. Transamerican Press, Inc.*, 709 F.2d 524, 531 (9th Cir. 1983)). In the absence of any particularized legitimate need, the Committee's interest in obtaining additional post-February 4 documents cannot overcome the substantial and important separation of powers and Executive Branch confidentiality concerns raised by its demand.

* * * * *

In sum, when I balance the Committee's asserted need for the documents at issue against the Executive Branch's strong interest in protecting the confidentiality of internal documents generated in the course of responding to congressional and related media inquiries and the separation of powers concerns raised by a congressional demand for such material, I conclude that the Committee has not established that the privileged documents are demonstrably critical to the responsible fulfillment of the Committee's legitimate legislative functions.

IV.

For the reasons set forth above, I have concluded that you may properly assert executive privilege over the documents at issue, and I respectfully request that you do so.

ERIC H. HOLDER, JR.
Attorney General

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Recess Appointments Amid Pro Forma Senate Sessions

A twenty-day Senate recess may give rise to presidential authority to make recess appointments.

Congress's provision for pro forma sessions during that twenty-day period does not have the legal effect of interrupting the recess for purposes of the Recess Appointments Clause.

In this context, the President has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and may exercise his power to make recess appointments.

January 6, 2012

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT*

On December 17, 2011, the Senate agreed by unanimous consent to "adjourn and convene for pro forma sessions only, with no business conducted," every Tuesday and Friday between that date and January 23, 2012. 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). During that period, on January 3, 2012, the Senate convened one such pro forma session to begin the second session of the 112th Congress and adjourned less than a minute later under its prior agreement. 158 Cong. Rec. S1 (daily ed. Jan. 3, 2012); *see also* U.S. Const. amend. XX, § 2. You asked whether the President has authority under the Recess Appointments Clause, U.S. Const. art. II, § 2, cl. 3, to make recess appointments during the period between January 3 and January 23 notwithstanding the convening of periodic pro forma sessions. We advised you that he does. This opinion memorializes and elaborates on that advice.

This Office has consistently advised that "a recess during a session of the Senate, at least if it is of sufficient length, can be a 'Recess' within the meaning of the Recess Appointments Clause" during which the President may exercise his power to fill vacant offices. Memorandum for Alberto R.

---

* Editor's Note: The Supreme Court considered the questions addressed in this opinion in *NLRB v. Noel Canning*, 573 U.S. 513 (2014), and held that the Recess Appointments Clause empowers the President to fill vacancies during intrasession recesses "of substantial length," but that the Senate is in session for purposes of the Clause during a pro forma session in which the Senate retains the capacity to conduct business under its rules. *Id.* at 527, 550. The Court therefore held that three appointments made by President Obama during the period at issue in this opinion were invalid. *Id.* at 557.

Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments in the Current Recess of the Senate* at 1 (Feb. 20, 2004) ("Goldsmith Memorandum").[1] Although the Senate will have held pro forma sessions regularly from January 3 through January 23, in our judgment, those sessions do not interrupt the intrasession recess in a manner that would preclude the President from determining that the Senate remains unavailable throughout to "'receive communications from the President or participate as a body in making appointments.'" *Intrasession Recess Appointments*, 13 Op. O.L.C. 271, 272 (1989) (quoting *Executive Power—Recess Appointments*, 33 Op. Att'y Gen. 20, 24 (1921) ("Daugherty Opinion")). Thus, the President has the authority under the Recess Appointments Clause to make appointments during this period. The Senate could remove the basis for the President's exercise of his recess appointment authority by remaining continuously in session and being available to receive and act on nominations, but it cannot do so by providing for pro forma sessions at which no business is to be conducted.

I.

Beginning in late 2007, and continuing into the 112th Congress, the Senate has frequently conducted pro forma sessions during recesses occurring within sessions of Congress. These pro forma sessions typically last only a few seconds, and apparently require the presence of only one Senator.[2] Senate orders adopted by unanimous consent provide in advance

[1] "A recess between sine die adjournment of one session and the convening of the next is also known as an intersession recess. A recess within a session is also known as an intrasession recess." Henry B. Hogue & Richard S. Beth, Cong. Research Serv., *Efforts to Prevent Recess Appointments Through Congressional Scheduling and Historical Recess Appointments During Short Intervals Between Sessions* 3 n.6 (2011). "The number of days in a recess period is ordinarily calculated by counting the calendar days running from the day after the recess begins and including the day the recess ends." Goldsmith Memorandum at 1.

[2] *See, e.g.*, 157 Cong. Rec. D1404 (daily ed. Dec. 30, 2011) (noting that day's pro forma session lasted from 11:00:02 until 11:00:34 a.m.); *id.* at D903 (daily ed. Aug. 12, 2011) (noting that day's pro forma session lasted from 12:00:08 until 12:00:32 p.m.); 156 Cong. Rec. D1067 (daily ed. Oct. 26, 2010) (noting that day's pro forma session lasted from 12:00:04 until 12:00:31 p.m.); 154 Cong. Rec. D1257 (daily ed. Oct. 30, 2008) (noting that day's pro forma session lasted from 9:15:00 until 9:15:08 a.m.); *id.* at D665

that there is to be "no business conducted" at such sessions. *See, e.g.*, 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011); *id.* at S7876 (daily ed. Nov. 18, 2011); *id.* at S6891 (daily ed. Oct. 20, 2011); *id.* at S6009 (daily ed. Sept. 26, 2011); *id.* at S5292 (daily ed. Aug. 2, 2011); *id.* at S3465 (daily ed. May 26, 2011); 156 Cong. Rec. S7775 (daily ed. Sept. 29, 2010); 154 Cong. Rec. S10,958 (daily ed. Dec. 11, 2008); *id.* at S10,776 (daily ed. Nov. 20, 2008); *id.* at S8077 (daily ed. Aug. 1, 2008); *id.* at S2194 (daily ed. Mar. 13, 2008); *id.* at S1085 (daily ed. Feb. 14, 2008); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007); *id.* at S14,661 (daily ed. Nov. 16, 2007); *accord* 154 Cong. Rec. S4849 (daily ed. May 22, 2008) (recess order stating that "no action or debate" is to occur during pro forma sessions).[3] The Senate Majority Leader has stated that such pro forma sessions break a long recess into shorter adjournments, each of which might ordinarily be deemed too short to be considered a "recess" within the meaning of the Recess Appointments Clause, thus preventing the President from exercising his constitutional power to make recess appointments. *See* 154 Cong. Rec. S7558 (daily ed. July 28, 2008) (statement of Sen. Reid); *see also* 153 Cong. Rec. S14609 (daily ed. Nov. 16, 2007) (statement of Sen. Reid) ("[T]he Senate will be coming in for pro forma sessions . . . to prevent recess appointments.").

While this practice was initiated by Senate action, more recently the Senate's use of such sessions appears to have been forced by actions of the House of Representatives. *See generally* Henry B. Hogue & Richard S. Beth, Cong. Research Serv., *Efforts to Prevent Recess Appointments Through Congressional Scheduling and Historical Recess Appointments During Short Intervals Between Sessions* 5–8 (2011). On May 25, 2011, twenty Senators noted the Senate's use of pro forma sessions in 2007 and "urge[d] [the Speaker of the House] to refuse to pass any resolution

---

(daily ed. May 27, 2008) (noting that day's pro forma session lasted from 9:15:02 until 9:15:31 a.m.).

[3] We are aware of only two occasions in this period in which a Senate order did not provide that no business would be conducted in pro forma sessions held during a recess. On the first, the relevant order provided that there would be "no business conducted, except with the concurrence of the two leaders," 154 Cong. Rec. S10,504 (daily ed. Oct. 2, 2008); on the second, the relevant order was silent, *id.* at S6336 (daily ed. June 27, 2008). It is unclear, however, whether the use of pro forma sessions on the latter occasion was intended to prevent recess appointments, as only one pro forma session was scheduled during the ten-day recess. *See id.*

to allow the Senate to recess or adjourn for more than three days for the remainder of the [P]resident's term." Press Release, Senator David Vitter, *Vitter, DeMint Urge House to Block Controversial Recess Appointments* (May 25, 2011), http://vitter.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases. The next month, eighty Representatives similarly requested that the Speaker, House Majority Leader, and House Whip take "all appropriate measures . . . to prevent any and all recess appointments by preventing the Senate from officially recessing for the remainder of the 112th Congress." Letter for John Boehner, Speaker of the House, et al., from Jeff Landry, Member of Congress (June 15, 2011), http://landry.house.gov/sites/landry.house.gov/files/documents/Freshmen%20Recess%20Appointment%20Letter.pdf. Consistent with these requests, "no concurrent resolution of adjournment ha[s] been introduced in either chamber since May 12, 2011." Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* 3 (rev. Dec. 12, 2011). And because the Constitution provides that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days," U.S. Const. art. I, § 5, cl. 4, both Houses have convened pro forma sessions during periods of extended absence.

Public statements by some Members of the Senate reveal that they do not consider these pro forma sessions to interrupt a recess. *See, e.g.*, 157 Cong. Rec. S6826 (daily ed. Oct. 20, 2011) (statement of Sen. Inhofe) (referring to the upcoming "1-week recess"); *id.* at S5035 (daily ed. July 29, 2011) (statement of Sen. Thune) (calling on the Administration to send trade agreements to Congress "before the August recess" even though "[w]e are not going to be able to consider these agreements until September"); *id.* at S4182 (daily ed. June 29, 2011) (statement of Sen. Sessions) ("Now the Senate is scheduled to take a week off, to go into recess to celebrate the Fourth of July[.]"); 156 Cong. Rec. at S8116–17 (daily ed. Nov. 19, 2010) (statement of Sen. Leahy) (referring to the period when "the Senate recessed for the elections" as the "October recess"); 154 Cong. Rec. S7984 (daily ed. Aug. 1, 2008) (statement of Sen. Hatch) (referring to upcoming "5-week recess"); *id.* at S7999 (daily ed. Aug. 1, 2008) (statement of Sen. Dodd) (noting that Senate would be in "adjournment or recess until the first week in September"); *id.* at S7713 (daily ed. July 30, 2008) (statement of Sen. Cornyn) (referring to the

upcoming "month-long recess"); *see also id.* at S2193 (daily ed. Mar. 13, 2008) (statement of Sen. Leahy) (referring to the upcoming "2-week Easter recess").

Likewise, the Senate as a body does not uniformly appear to consider its recess broken by pre-set pro forma sessions. The Senate's web page on the sessions of Congress, which defines a recess as "a break in House or Senate proceedings of three days or more, excluding Sundays," treats such a period of recess as unitary, rather than breaking it into three-day segments. *See* United States Senate, The Dates of Sessions of the Congress, http://www.senate.gov/reference/Sessions/sessionDates.htm (last visited ca. Jan. 2012). The Congressional Directory of the 112th Congress, published by Congress, *see* 44 U.S.C. § 721(a), does the same. *See 2011–2012 Congressional Directory* 538 n.2 (Joint Comm. on Printing, 112th Cong., comp. 2011). More substantively, despite the pro forma sessions, the Senate has taken special steps to provide for the appointment of congressional personnel during longer recesses (including this one), indicating that the Senate recognizes that it is not in session during this period for the purpose of making appointments under ordinary procedures.[4] And when messages are received from the President during the recess, they are not laid before the Senate and entered into the Congressional Record until the Senate returns for a substantive session, even if pro forma sessions are

[4] *See, e.g.*, 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (providing that "notwithstanding the upcoming recess or adjournment of the Senate, the President of the Senate, the President pro tempore, and the majority and minority leaders [are] authorized to make appointments to commissions, committees, boards, conferences, or interparliamentary conferences authorized by the law, by concurrent action of the two Houses, or by order of the Senate"); *id.* at S7876 (daily ed. Nov. 18, 2011) (similar); *id.* at S5292 (daily ed. Aug. 2, 2011) (similar); *id.* at S3463 (daily ed. May 26, 2011) (similar); 156 Cong. Rec. S7775 (daily ed. Sept. 29, 2010) (similar); 154 Cong Rec. S10,958 (daily ed. Dec. 11, 2008) (similar); *id.* at S10,776 (daily ed. Nov. 20, 2008) (similar); *id.* at S10,427 (daily ed. Oct. 2, 2008) (similar); *id.* at S8077 (daily ed. Aug. 1, 2008) (similar); *id.* at S6332 (daily ed. June 27, 2008) (similar); *id.* at S4848 (daily ed. May 22, 2008) (similar); *id.* at S2190 (daily ed. Mar. 13, 2008) (similar); *id.* at S1085 (daily ed. Feb. 14, 2008) (similar); 153 Cong. Rec. S16,060 (daily ed. Dec. 19, 2007) (similar); *id.* at S14,655 (daily ed. Nov. 16, 2007) (similar). The Senate has taken similar steps before recesses that are not punctuated by pro forma sessions. *See, e.g.*, 156 Cong. Rec. S6974 (daily ed. Aug. 5, 2010) (providing for appointment authority before an intrasession recess expected to last for thirty-nine days); 153 Cong. Rec. S10,991 (daily ed. Aug. 3, 2007) (same, recess of thirty-two days).

convened in the meantime.[5] On the other hand, we have been informed that at least during the August 2008 recess, the Senate Executive Clerk did not return pending nominations when the Senate went into recess pursuant to Senate Standing Rule XXXI, which provides for the return of nominations that have not been acted upon when the Senate recesses "for more than thirty days." Senate Rule XXXI(6), Standing Rules of the Senate, *in Senate Manual*, S. Doc. No. 112-1, at 58 (2011) ("Senate Standing Rules"). This omission may reflect the Executive Clerk's treatment of that impending recess as a series of shorter adjournments rather than a single thirty-eight-day recess.

II.

To address the President's authority to make recess appointments during a recess including pro forma sessions, we consider two distinct issues: The first is whether the President has authority to make a recess appointment during the recess at issue here, an intrasession recess of twenty days. We conclude that he does. The opinions of the Attorney General and this Office, historical practice, and the limited judicial authority that exists all provide strong support for that conclusion.

Thereafter, we consider whether the President is disabled from making an appointment when the recess is punctuated by periodic pro forma sessions at which Congress has declared in advance that no business is to be conducted. Based primarily on the traditional understanding that the Recess Appointments Clause is to be given a practical construction focusing on the Senate's ability to provide advice and consent to nominations, we conclude that while Congress can prevent the President from making any recess appointments by remaining continuously in session and available to receive and act on nominations, it cannot do so by conducting pro forma sessions during a recess. The question is a novel one, and the

---

[5] *See, e.g.*, 157 Cong. Rec. S7905 (daily ed. Nov. 28, 2011) (message from the President "received during adjournment of the Senate on November 21, 2011," laid before the Senate); *id.* at S7881 (daily ed. Nov. 25, 2011) (record of pro forma session with no mention of receipt of presidential message); *id.* at S7879 (daily ed. Nov. 22, 2011) (same); S6916 (daily ed. Oct. 31, 2011) (message from the President "received during adjournment of the Senate on October 25, 2011," laid before the Senate); *id.* at S6895 (daily ed. Oct. 27, 2011) (record of pro forma session with no mention of receipt of presidential message).

substantial arguments on each side create some litigation risk for such appointments. We draw on the analysis developed by this Office when it first considered the issue. *See* Memorandum to File, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Lawfulness of Making Recess Appointment During Adjournment of the Senate Notwithstanding Periodic "Pro Forma Sessions"* (Jan. 9, 2009).

A.

The Recess Appointments Clause of the Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. The Department of Justice "has long interpreted the term 'recess' to include intrasession recesses if they are of substantial length." *Intrasession Recess Appointments*, 13 Op. O.L.C. at 272; *see also* Goldsmith Memorandum at 1–2; *Recess Appointments During an Intrasession Recess*, 16 Op. O.L.C. 15, 15–16 (1992); *Recess Appointments—Compensation (5 U.S.C. § 5503)*, 3 Op. O.L.C. 314, 316 (1979); *Recess Appointments*, 41 Op. Att'y Gen. 463, 468 (1960); Daugherty Opinion, 33 Op. Att'y Gen. at 21–22, 25.

Under a framework first articulated by Attorney General Daugherty in 1921, and subsequently reaffirmed and applied by several opinions of the Attorney General and this Office, the "constitutional test for whether a recess appointment is permissible is whether the adjournment of the Senate is of such duration that the Senate could 'not receive communications from the President or participate as a body in making appointments.'" *Intrasession Recess Appointments*, 13 Op. O.L.C. at 272 (quoting Daugherty Opinion, 33 Op. Att'y Gen. at 24).[6] Although "the line of

[6] In 1868, Attorney General Evarts approved the contemplated appointments of three officials during a fifty-six-day intrasession recess of the Senate without remarking upon the nature of the recess. *See Case of District Attorney for Eastern District of Pennsylvania*, 12 Op. Att'y Gen. 469, 469–70 (1868) (observing that the office "is now vacant during the recess of the Senate" and opining that "it is competent for the President to grant a commission"); *see also Case of the Collectorship of New Orleans*, 12 Op. Att'y Gen. 449 (1868); *Case of the Collectorship of Customs for Alaska*, 12 Op. Att'y Gen. 455 (1868). It is possible that Attorney General Evarts was not aware that the Senate had merely adjourned to a date certain: he referred in each opinion to the "late session" of the Senate. *See, e.g.*, 12 Op. Att'y Gen. at 451. Attorney General Knox, too, was apparently

demarcation can not be accurately drawn" in determining whether an intrasession recess is of sufficient length to permit the President to make a recess appointment, "the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate." Daugherty Opinion, 33 Op. Att'y Gen. at 25; *see also id.* ("Every presumption is to be indulged in favor of the validity of whatever action [the President] may take."); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 161 (1996) ("Dellinger Opinion") ("[T]he President has discretion to make a good-faith determination of whether a given recess is adequate to bring the Clause into play."). "Ultimately, resolution of the question whether an adjournment is of sufficient duration to justify recess appointments requires the application of judgment to particular facts." *Intrasession Recess Appointments*, 13 Op. O.L.C. at 273.

We have little doubt that a twenty-day recess may give rise to presidential authority to make recess appointments. Attorneys General and this Office have repeatedly affirmed the President's authority to make recess appointments during intrasession recesses of similar or shorter length. *See, e.g.*, Goldsmith Memorandum at 2–3 (recognizing President's authority to make a recess appointment during an intrasession recess of eleven days); *Recess Appointments During an Intrasession Recess*, 16 Op. O.L.C. at 15–16 (same, eighteen days); *Intrasession Recess Appointments*, 13 Op. O.L.C. at 272–73 (thirty-three days); *Recess Appointments*, 41 Op. Att'y Gen. at 464–65 (thirty-six days); Daugherty Opinion, 33 Op. Att'y Gen. at 25 (twenty-eight days).[7]

---

unaware of this fact when he cited one of these opinions to support his conclusion that it is only the "period following the final adjournment for the session which is *the recess* during which the President has power to fill vacancies" and remarked that "[t]he opinions of Mr. Wirt . . . and all the other opinions on this subject relate only to appointments during the recess of the Senate between two sessions of Congress." *Appointments of Officers—Holiday Recess*, 23 Op. Att'y Gen. 599, 601–02 (1901). The Daugherty Opinion reversed Attorney General Knox's conclusion about appointments in intrasession recesses.

[7] In 1985, the Office "cautioned against a recess appointment during [what was mistakenly believed to be] an 18-day intrasession recess," *Intrasession Recess Appointments*, 13 Op. O.L.C. at 273 n.2 (citing Memorandum for the Files from Herman Marcuse, Attorney-Adviser, Office of Legal Counsel, *Re: Recess Appointments to the Export*

The recess appointment practice of past Presidents confirms the views expressed in these opinions. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (relying on the accumulated "historical gloss" to discern the scope of presidential authority where "the source of the President's power to act . . . does not enjoy any textual detail"); *see also Evans v. Stephens*, 387 F.3d 1220, 1225–26 (11th Cir. 2004) (en banc) (relying in part on historical practice to reject "the argument that the recess appointment power may only be used in an intersession recess"). Intrasession recesses were rare in the early years of the Republic; when they occurred, they were brief. *See Congressional Directory* 522–25 (listing five intrasession recesses before the Civil War, ranging from five to twelve days in length). But as intrasession recesses became common, so too did intrasession recess appointments. President Johnson is believed to have made the first intrasession recess appointments in 1867. Henry B. Hogue, The Law: *Recess Appointments to Article III Courts*, 34 Presidential Stud. Q. 656, 666 (2004).[8] "The length of the recess may have triggered the appointments, because none of the intrasession recesses taken by the Senate until that time had lasted more than 15 days." *Id.* Presidents Harding and Coolidge each made intrasession recess appointments in the 1920s (during recesses of twenty-eight and fourteen days, respectively), *see* 61 Cong. Rec. 5646 (1921) (recess from Aug. 24, 1921, until Sept. 21, 1921); *id.* at 5737 (recess appointment to the Register of the Land Office made on Aug. 30, 1921); 69 Cong. Rec. 910 (1927) (recess from Dec. 21, 1927, until Jan. 4, 1928); Declaration of Ronald R. Geisler, Chief Clerk of the Executive Clerk's Office, Exhibit B, *Bowers v. Moffett*, Civ. Action No. 82-0195 (D.D.C. Jan. 22, 1982) (recess appointment to the Interstate

---

Import Bank (Jan. 28, 1985) ("Marcuse Memorandum")). This reluctance was attributable in part to factors other than the length of the recess, and we did "not say that [the appointments] would be constitutionally invalid as a matter of law," Marcuse Memorandum at 1–3. Regardless, the caution was not heeded, and the appointments were made in a fourteen-day intrasession recess. *Id.* at 4.

[8] As an analyst from the Congressional Research Service has explained, "it is virtually impossible" to identify all recess appointments before 1965, because before that date "recess appointments were recorded in a haphazard fashion." Memorandum for Senate Committee on Banking, Housing and Urban Affairs, from Rogelio Garcia, Analyst in American National Government, Government Division, Congressional Research Service, Library of Congress, *Re: Number of Recess Appointments, by Administration, From 1933 to 1984*, at 1 (Mar. 13, 1985).

Commerce Commission made January 3, 1928), and "[b]eginning in 1943, presidents started to routinely make recess appointments during long intrasession recesses." Hogue, *Recess Appointments*, 34 Presidential Stud. Q. at 666; *see also* 139 Cong. Rec. 15,273 (1993) (compilation of intrasession recess appointments from 1970 to 1993). The last five Presidents have all made appointments during intrasession recesses of fourteen days or fewer.[9]

There is significant (albeit not uniform) evidence that the Executive Branch's view that recess appointments during intrasession recesses are constitutional has been accepted by Congress and its officers. Most relevant, in our view, is the Pay Act, 5 U.S.C. § 5503 (2006), which sets out the circumstances in which a recess appointee may be paid a salary from the Treasury. The Attorney General has long taken the position that the Act constitutes congressional acquiescence to recess appointments under circumstances where the Act would permit payment. *See Recess Appointments*, 41 Op. Att'y Gen. at 466. In 1948, the Comptroller General considered whether the Act permitted the payment of officials appointed during an intrasession recess. *Appointments—Recess Appointments*, 28 Comp. Gen. 30 (1948). After acknowledging the "accepted view" that an intrasession recess "is a recess during which an appointment may properly be made," the Comptroller General concluded that the Act was intended to permit payment to all who are appointed "during periods when the

[9] For example, using the method of counting explained above, *see supra* note 1, President Obama made three recess appointments during a twelve-day recess; President George W. Bush made twenty-one appointments across several eleven-day recesses, four appointments during a twelve-day recess, and four appointments during a fourteen-day recess; President Clinton made one recess appointment during a ten-day recess, another appointment during an eleven-day recess, and seventeen appointments across several twelve-day recesses; President George H.W. Bush made fourteen appointments during a thirteen-day recess; and President Reagan made two appointments during a fourteen-day recess. *See Press Release, President Obama Announces Recess Appointments to Key Administration Positions* (July 7, 2010), http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions-0; Henry B. Hogue & Maureen Bearden, Cong. Research Serv., RL33310, *Recess Appointments Made by President George W. Bush, January 20, 2001–October 31, 2008*, at 9–10 (2008); Rogelio Garcia, Cong. Research Serv., RL30821, *Recess Appointments Made by President Clinton* 9 (2001); Rogelio Garcia, Cong. Research Serv., *Recess Appointments Made by President George Bush* 3 (1996); Rogelio Garcia, Cong. Research Serv., *Recess Appointments Made by President Reagan* 8 (1988).

Senate is not actually sitting and is not available to give its advice and consent in respect to the appointment, irrespective of whether the recess of the Senate is attributable to a final adjournment *sine die* or to an adjournment to a specified date." *Id.* at 34, 37. "Considering that the Comptroller General is an officer in the legislative branch, and charged with the protection of the fiscal prerogatives of the Congress, his full concurrence in the position taken by the Attorney General . . . is of signal significance," *Recess Appointments*, 41 Op. Att'y Gen. at 469, and in the more than sixty years since the opinion was issued, Congress has not amended the statute to compel a different result.[10]

While there is little judicial precedent addressing the President's authority to make intrasession recess appointments, what decisions there are uniformly conclude that the President does have such authority. In the only federal court of appeals decision squarely on point, the en banc Eleventh Circuit upheld the recess appointment of a judge made during an eleven-day intrasession recess. *See Evans*, 387 F.3d at 1224–26 (concluding "Recess of the Senate" as used in the Recess Appointments Clause includes intrasession recesses and declining to set a lower limit on their length). *But see id.* at 1228 n.2 ("Although I would not reach this ques-

---

[10] Certain language in an 1863 report of the Senate Judiciary Committee could be read to suggest that the Committee believed that recess appointments could be made only during intersession recesses. *See* S. Rep. No. 37-80, at 3 (1863) ("It cannot, we think, be disputed that the period of time designated in the clause as 'the recess of the Senate,' includes the space beginning with the indivisible point of time which next follows that at which it adjourned, and ending with that which next precedes the moment of the commencement of their next session."). But the question addressed by the Committee in 1863 related to timing of the occurrence of the vacancy, not the nature of the recess during which the vacancy occurred. Moreover, a subsequent report by the Committee defined a recess functionally in terms that have since been adopted by the Attorney General and this Office as setting forth the test for determining when an intrasession recess is of sufficient length to give rise to the President's power under the Recess Appointments Clause. *See* S. Rep. No. 58-4389, at 2 (1905) (defining a recess as "the period of time . . . when, because of its absence, [the Senate] can not receive communications from the President or participate as a body in making appointments"); *see also infra* pp. 32–33.

A draft legal brief prepared, but never filed, by the Senate Legal Counsel in 1993 took the position that "the text and purpose of the Recess Appointments Clause both demonstrate that the recess power is limited to Congress' annual recess between sessions." 139 Cong. Rec. 15,267, 15,268 (1993). Because a resolution directing the Counsel to appear in the litigation was never offered, however, it is unclear whether the views expressed in the brief garnered the support of a majority of the Senate.

tion, the text of the Constitution as well as the weight of the historical record strongly suggest that the Founders meant to denote only intersession recesses." (Barkett, J., dissenting)). Lower courts, too, have recognized the President's power to make intrasession recess appointments. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 239 F. Supp. 2d 1367, 1374 n.13 (Ct. Int'l Trade 2002) ("The long history of the practice (since at least 1867) without serious objection by the Senate . . . demonstrates the legitimacy of these appointments."); *Gould v. United States*, 19 Ct. Cl. 593, 595–96 (1884) ("We have no doubt that a vacancy occurring while the Senate was thus temporarily adjourned . . . could be and was legally filled by the appointment of the President alone." (dictum)). The Supreme Court, however, has never decided the issue.[11]

Due to this limited judicial authority, we cannot predict with certainty how courts will react to challenges of appointments made during intrasession recesses, particularly short ones.[12] If an official appointed during the current recess takes action that gives rise to a justiciable claim, litigants might challenge the appointment on the ground that the Constitution's reference to "the Recess of the Senate" contemplates only the recess at the end of a session. That argument and the Department of Justice's response

---

[11] Justice Stevens filed a statement respecting the denial of certiorari in *Evans* expressing his view that the "case . . . raises significant constitutional questions regarding the President's intrasession appointment" of a circuit judge and that "it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession 'recesses.'" *Evans v. Stephens*, 544 U.S. 942, 942–43 (2005) (Stevens, J., respecting denial of certiorari). It is unclear whether the Justice's concerns related specifically to recess appointments of Article III judges or extended to executive branch appointments.

[12] Scholarly opinion is divided on the proper interpretation of the Recess Appointments Clause, although advocates for a more limited recess appointment power recognize that their view has not prevailed. *Compare* Edward A. Hartnett, *Recess Appointments of Article III Judges: Three Constitutional Questions*, 26 Cardozo L. Rev. 377, 424 (2005) ("[T]he recess appointment power is best understood as available during both intersession and intrasession Senate recesses of more than three days."), *with* Michael B. Rappaport, *The Original Meaning of the Recess Appointments Clause*, 52 UCLA L. Rev. 1487, 1487 (2005) (arguing that "the Constitution permits recess appointments only during an intersession recess," but acknowledging that "[t]he prevailing interpretation . . . allows the President to makes recess appointments . . . during intrasession recesses of ten days and perhaps of even shorter duration").

have been discussed at length during litigation over a judicial recess appointment. *See, e.g.*, Brief for the Intervenor United States, *Stephens*, 387 F.3d 1220 (No. 02-16424); Response Brief of Plaintiffs-Appellees and United States Senator Edward M. Kennedy as Amicus Curiae Supporting Plaintiffs-Appellees, *Stephens*, 387 F.3d 1220 (No. 02-16424); *see also supra* note 11.

We conclude that the President's authority to make recess appointments extends to an intrasession recess of twenty days.

B.

The second question we consider is whether Congress can prevent the President from making appointments during a recess by providing for pro forma sessions at which no business is to be conducted, where those pro forma sessions are intended to divide a longer recess into a series of shorter adjournments, each arguably too brief to support the President's recess appointment authority. We believe that Congress's provision for pro forma sessions of this sort does not have the legal effect of interrupting the recess of the Senate for purposes of the Recess Appointments Clause and that the President may properly conclude that the Senate is unavailable for the overall duration of the recess.[13]

---

[13] Because we conclude that pro forma sessions do not have this effect, we need not decide whether the President could make a recess appointment during a three-day intrasession recess. This Office has not formally concluded that there is a lower limit to the duration of a recess within which the President can make a recess appointment. Attorney General Daugherty suggested in dictum in his 1921 opinion that "an adjournment of 5 or even 10 days [could not] be said to constitute the recess intended by the Constitution," 33 Op. Att'y Gen. at 25. As a result, "[t]his Office has generally advised that the President not make recess appointments, if possible, when the break in continuity of the Senate is very brief," *The Pocket Veto: Historical Practice and Judicial Precedent*, 6 Op. O.L.C. 134, 149 (1982); *see, e.g.*, *Recess Appointments—Compensation (5 U.S.C. § 5503)*, 3 Op. O.L.C. 314, 315–16 (1979) (describing informal advice against making recess appointments during a six-day intrasession recess in 1970). Notwithstanding Attorney General Daugherty's caution, we advised in 1996 that "recess appointments during [a] 10-day intrasession recess would be constitutionally defensible," although they would "pose significant litigation risks." Memorandum for John M. Quinn, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments* (May 29, 1996). And both this Office and the Department of Justice in litigation have recognized the argument that "the three days set by the Constitution as the time during which one House may adjourn without the consent of the other,

1.

The Appointments Clause of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. Const. art. II, § 2, cl. 2. The Recess Appointments Clause immediately follows and confers on the President the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." *Id.* art. II, § 2, cl. 3. The Clause was adopted at the Constitutional Convention without debate. *See* 2 The Records of the Federal Convention of 1787, at 533, 540 (Max Farrand ed., rev. ed. 1966).[14] Alexander Hamilton described the Clause in *The Federalist* as providing a "supplement" to the President's appointment power, establishing an "auxiliary method of appointment, in cases to which the general method was inadequate." *The Federalist No.*

U.S. Const. art. I, § 5, cl. 4, is also the length of time amounting to a 'Recess' under the Recess Appointments Clause." Goldsmith Memorandum at 3; Memorandum for John W. Dean III, Counsel to the President, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments* at 3–4 (Dec. 3, 1971); Brief for the United States in Opposition at 11, *Evans v. Stephens*, 544 U.S. 942 (2005) (No. 04-828) ("[T]he Recess Appointments Clause by its terms encompasses all vacancies and all recesses (with the single arguable exception of *de minimis* breaks of three days or less[.]" (citing U.S. Const. art. I, § 5, cl. 4)); *infra* pp. 47–48; *see also* Hartnett, 26 Cardozo L. Rev. at 424 ("[T]he recess appointment power is best understood as available during both intersession and intrasession Senate recesses of more than three days."). *But see* Brief for the United States at 14–18, *Mackie v. Clinton*, Civ. Action No. 93-0032-LFO (D.D.C. 1993) (arguing that "there is no lower time limit that a recess must meet to trigger the recess appointment power" (capitalization omitted)).

[14] The Clause, which was proposed by a North Carolina delegate, is generally considered to have been based on a similar provision then in the North Carolina Constitution. *See* 2 David K. Watson, *The Constitution of the United States* 988 (1910) ("The [Recess Appointments Clause] was doubtless taken from the Constitution of North Carolina, which contained a similar clause." (footnote omitted)); Thomas A. Curtis, Note, *Recess Appointments to Article III Courts: The Use of Historical Practice in Constitutional Interpretation*, 84 Colum. L. Rev. 1758, 1770 n.71 (1984) (noting that the provision was proposed by a delegate from North Carolina; that the language tracks that of the North Carolina provision; and that the federal power is similar in scope to the power in North Carolina's Constitution at that time). Because the North Carolina *legislature* was then generally responsible for appointments, the executive could make appointments only when the legislature was not in session to do so.

67, at 409 (Clinton Rossiter ed., 1961). The Clause was necessary because "it would have been improper to oblige [the Senate] to be continually in session for the appointment of officers," and it "might be necessary for the public service to fill [vacancies] without delay." *Id.* at 410.

Other contemporaneous writings likewise emphasize that the recess appointment power is required to address situations in which the Senate is unable to provide advice and consent on appointments. *See* 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, at 135–36 (Jonathan Elliott ed., 2d ed. 1836) ("Elliott's Debates") (statement of Archibald Maclaine at North Carolina ratification convention) (July 28, 1788) ("Congress are not to be sitting at all times; they will only sit from time to time, as the public business may render it necessary. Therefore the executive ought to make temporary appointments, as well as receive ambassadors and other public ministers. This power can be vested nowhere but in the executive, because he is perpetually acting for the public; for, though the Senate is to advise him in the appointment of officers, &c., yet, during the recess, the President must do this business, or else it will be neglected; and such neglect may occasion public inconveniences."); *cf.* Letters of Cato IV, *reprinted in* 2 *The Complete Anti-Federalist* 114 (Herbert J. Storing ed., 1981) ("Though the president, during the sitting of the legislature, is assisted by the senate, yet he is without a constitutional council in their recess . . . .").[15] Thus, from the days of the Founding, the Recess Appointments Clause has been considered implicated when the Senate is not "in session for the appointment of officers." *The Federalist No. 67*, at 410.

Nineteenth-century sources reflect this understanding. Justice Story framed the issue in terms of the Senate's ability to review nominations:

---

[15] *See also* 2 Elliott's Debates 513 (statement of James Wilson at Pennsylvania ratification convention) ("[T]here is only left the power of concurring in the appointment of officers; but care is taken, in this Constitution, that this branch of business may be done without [the Senate's] presence"); *id.* at 534 (statement of Thomas M'Kean) (Dec. 11, 1787) ("Nor need the Senate be under any necessity of sitting constantly, as has been alleged; for there is an express provision made to enable the President to fill up all vacancies that may happen during their recess[.]"); 3 Elliott's Debates 409–10 (statement of James Madison at the Virginia convention) ("There will not be occasion for the continual residence of the senators at the seat of government. . . . It is observed that the President, when vacancies happen during the recess of the Senate, may fill them till it meets.").

"There was but one of two courses to be adopted [at the Founding]; either, that the senate should be perpetually in session, in order to provide for the appointment of officers; or, that the president should be authorized to make temporary appointments during the recess, which should expire, when the senate should have had an opportunity to act on the subject." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1551, at 410 (1833); *id.* § 1552, at 411 (discussing renomination when "the senate is assembled"). And as early as the Monroe Administration, the Executive Branch's analysis of the Clause had begun to focus on the availability of the Senate to be consulted on nominations. *See, e.g.*, *Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. 631, 633 (1823) ("[A]ll vacancies which . . . happen to exist at a time when *the Senate cannot be consulted as to filling them*, may be temporarily filled by the President[.]") (emphasis added); *Power of President to Fill Vacancies*, 3 Op. Att'y Gen. 673, 676 (1841) ("[T]he convention very wisely provided against the possibility of such evils [i.e., "interregna in the executive powers"] by enabling and requiring the President to keep full every office of the government during a recess of the Senate, *when his advisers could not be consulted*[.]") (emphasis added); *Power of President to Appoint to Office during Recess of Senate*, 4 Op. Att'y Gen. 523, 526 (1846) ("[T]he vacancy happened at a time, and continues now to exist, *when the President cannot obtain the advice and consent of his constitutional advisers*. . . . [T]his vacancy happening from the inaction of the Senate on the nomination made[] is within the meaning of the [Recess Appointments Clause], and may be filled by an Executive Appointment." (emphasis added)).

Opinions of the Attorney General have construed the Clause in order to fulfill its purpose that there be an uninterrupted power to fill federal offices. Thus, Attorney General Wirt advised in 1823 that "whensoever a vacancy shall exist which the public interests require to be immediately filled, and in filling which, the advice and consent of the Senate cannot be immediately asked, because of their recess, the President shall have the power of filling it by an appointment" because "[t]he substantial purpose of the constitution was to keep these offices filled; and powers adequate to this purpose were intended to be conveyed." *Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. at 632; *see also Power of President to Fill Vacancies*, 3 Op. Att'y Gen. at 675 (affirming the President's power to

make a second recess appointment after the Senate failed to act on a nomination during the term of the first appointment because "the President, charged with the high duty of giving full effect to the law, must have a power like its own existence—perpetual"); *President's Power to Fill Vacancies in Recess of the Senate*, 12 Op. Att'y Gen. 32, 38 (1866) (same, because "as to the executive power, it is always to be in action, or in capacity for action; and . . . to meet this necessity, there is a provision . . . against vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies").[16]

Subsequent Attorneys General and, later, this Office have continued to place central importance on the Senate's availability to give advice and consent. In his seminal opinion concluding that a significant intrasession adjournment is a "recess" in which recess appointments can be made, Attorney General Daugherty focused on this point: "Regardless of whether the Senate has adjourned or recessed, the real question . . . is whether *in a practical* sense the Senate is in session so that *its advice and consent can be obtained*." Daugherty Opinion, 33 Op. Att'y Gen. at 21–22 (second emphasis added); *see also id.* at 25 ("Is the Senate absent so that it can not receive communications from the President or participate as a body in making appointments?"). Thus, in determining whether an intrasession adjournment constitutes a recess in the constitutional sense, the touchstone is "its *practical effect*: *viz*., whether or not the Senate is *capable of exercising its constitutional function* of advising and consenting to executive nominations." *Recess Appointments*, 41 Op. Att'y Gen. at 467 (emphasis added); *accord Intrasession Recess Appointments*, 13 Op.

---

[16] Indeed, in construing the phrase "happen during the Recess" in the Recess Appointments Clause to mean "happen to exist" rather than originate in the recess, Attorney General Wirt identified two possibilities: one was "most accordant with the letter of the constitution; the second, most accordant with its reason and spirit." *Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. at 632. He chose the "construction of the constitution which is compatible with its spirit, reason, and purpose." *Id.* at 633. The courts have subsequently endorsed the construction adopted by Wirt. *See, e.g.*, *Evans*, 387 F.3d at 1226–27; *United States v. Woodley*, 751 F.2d 1008, 1012–13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 710–14 (2d Cir. 1962); *In re Farrow*, 3 F. 112, 115–16 (N.D. Ga. 1880). *But see Schenck v. Peay*, 21 F. Cas. 672, 674–75 (E.D. Ark. 1869) (finding recess appointment unlawful where the vacancy "existed, but did not happen, during the recess of the senate"); *In re District Attorney of United States*, 7 F. Cas. 731, 734–38 (E.D. Pa. 1868) (casting doubt on such an appointment).

O.L.C. at 272. That understanding has been embraced by some prominent commentators as well. *See* Louis Fisher, *Constitutional Conflicts between Congress and the President* 38 (5th ed. 2007) ("A temporary recess of the Senate, 'protracted enough to prevent that body from performing its functions of advising and consenting to executive nominations,' permits the President to make recess appointments." (quoting *Recess Appointments*, 41 Op. Att'y Gen. at 466)).

Significantly, a century ago, the Senate Judiciary Committee adopted a functional understanding of the term "recess" that focuses on the Senate's ability to conduct business. In rejecting the theory that President Theodore Roosevelt could make recess appointments during a brief "constructive recess" between two sessions of Congress, the Committee wrote of the Recess Appointments Clause:

> It was evidently intended by the framers of the Constitution that [the word "recess"] should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It means, in our judgment, . . . the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions*; when its members owe no duty of attendance; when its Chamber is empty; when, because of its absence, it can not receive communications from the President *or participate as a body in making appointments*. . . . Its sole purpose was to render it certain that at all times there should be, whether the Senate was in session or not, an officer for every office, entitled to discharge the duties thereof.

S. Rep. No. 58-4389, at 2 (1905) (second emphasis added); *see also* Daugherty Opinion, 33 Op. Att'y Gen. at 24 (noting that this report was "most significant of all" authorities in supporting the conclusion that a substantial intrasession adjournment was a constitutional "recess"). The Senate continues to cite that report as an authoritative source "on what constitutes a 'Recess of the Senate.'" *Riddick's Senate Procedure* 947 & n.46 (1992), http://www.gpo.gov/fdsys/pkg/GPO-RIDDICK-1992/pdf/GPO-RIDDICK-1992-88.pdf (citing report). The Comptroller General attributed a similar understanding to the entire Congress when he opined that the "primary purpose" of the Pay Act was

> to relieve "recess appointees" of the burden of serving without compensation during periods when the Senate *is not actually sitting and is not available to give its advice and consent in respect to the appointment*, irrespective of whether the recess of the Senate is attributable to a final adjournment *sine die* or to an adjournment to a specified date.

Appointments—Recess Appointments, 28 Comp. Gen. at 37 (emphasis added).

2.

Guided by these principles, we conclude that the President may determine that pro forma sessions at which no business is to be conducted do not interrupt a Senate recess for purposes of the Recess Appointments Clause. Our conclusion rests on three considerations.

First, both the Framers' original understanding of the Recess Appointments Clause and the longstanding views of the Executive and Legislative Branches support the conclusion that the President may make recess appointments when he determines that, as a practical matter, the Senate is not available to give advice and consent to executive nominations. The Recess Appointments Clause was adopted to allow the President to fill offices when the Senate was not "in session for the appointment of officers." *The Federalist No. 67*, at 410 (Alexander Hamilton). And, from the early days of the Republic, the Executive has taken the position that "all vacancies which . . . happen to exist at a time when the Senate cannot be consulted as to filling them, may be temporarily filled by the President." *Executive Authority to Fill Vacancies*, 1 Op. Att'y Gen. at 633. Likewise, in 1905, the Senate Judiciary Committee defined "recess" as used in the Clause to be the period of time when the Senate cannot "participate as a body in making appointments." S. Rep. No. 58-4389, at 2.

We do not believe that the convening of periodic pro forma sessions precludes the President from determining that the Senate is unavailable during an intrasession recess otherwise long enough to support the President's recess appointment authority. During the last three Congresses, such sessions ordinarily have lasted only a few seconds. *See, e.g.*, 157 Cong. Rec. D1404 (daily ed. Dec. 30, 2011) (noting that day's pro forma session lasted from 11:00:02 until 11:00:34 a.m.); *see also supra* note 2.

Records of the sessions typically do not disclose the presence of any Senator other than the single convening member. *See, e.g.*, 157 Cong. Rec. S8793 (daily ed. Dec. 30, 2011) (reflecting the presence of only Senator Reed). And importantly, the pertinent Senate order states in advance that there is to be "no business conducted" during the ensuing sessions. *See, e.g.*, 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011); *see also supra* pp. 16–17.[17] The purpose of these sessions avowedly is not to conduct business; instead, either the Senate has intended to prevent the President from making recess appointments during its absence or the House has intended to require the Senate to remain in session (toward the same end). *See supra* pp. 17–18; *see also* Henry B. Hogue, Cong. Research Serv., RS21308, *Recess Appointments: Frequently Asked Questions* 3 (rev. Mar. 2008) (noting use of such sessions "for the stated purpose of preventing [recess] appointments").

Under these circumstances, the President could properly consider the pertinent intrasession recess period to be one during which the Senate is not genuinely "capable of exercising its constitutional function of advising and consenting to executive nominations," *Recess Appointments*, 41 Op. Att'y Gen. at 467; *see* Dellinger Opinion, 20 Op. O.L.C. at 161 (noting the President's "discretion to make a good-faith determination of whether a given recess is adequate to bring the Clause into play"); Daugh-

[17] The Senate's rules would also prevent it from acting on nominations or transacting other legislative business during such sessions if, as expected, only a few Senators are present. Under those rules, a quorum consists of "a majority of the Senators duly chosen and sworn." Senate Rule VI(1), Senate Standing Rules at 5. Whenever it is determined that "a quorum is not present, a majority of the Senators present may direct the Sergeant at Arms to request, and, when necessary, to compel the attendance of the absent Senators, which order shall be determined without debate; and pending its execution, and until a quorum shall be present, no debate nor motion, except to adjourn, or to recess pursuant to a previous order entered by unanimous consent, shall be in order." Senate Rule VI(4), *id.* at 5–6; *see also Riddick's Senate Procedure* at 1046 ("No debate nor business can be transacted in the absence of a quorum[.]"). We recognize that, as a practical matter, neither the scheduling order nor the quorum requirement will always prevent the Senate from acting without a quorum through unanimous consent. Indeed, the Senate has occasionally enacted legislation by unanimous consent during pro forma sessions. *See infra* p. 45. But as more fully explained below, we do not believe that this sporadic practice requires the President to consider the Senate available to perform its constitutional functions when it is in recess and, particularly, when it has provided by order that no business will be conducted.

erty Opinion, 33 Op. Att'y Gen. at 25 (discussing the President's "large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate"). Indeed, as noted above, presidential messages delivered to the Senate during previous recesses were not laid before that body and entered into the Congressional Record until after the recess was over, notwithstanding the convening of pro forma sessions before that date. *See supra* note 5 & accompanying text. And the Senate has made special arrangements for the appointment of its own officers during the recess, in apparent recognition of the fact that it will not be in session for the purpose of making appointments under its usual procedures. *See supra* note 4 & accompanying text. "[T]he rationale for treating substantial intrasession adjournments as 'recesses' for purposes of the Recess Appointments Clause is that substantial adjournments prevent the Senate from acting on nominations." *Intrasession Recess Appointments*, 13 Op. O.L.C. at 273. By the same reasoning, brief pro forma sessions of this sort, at which the Senate is not capable of acting on nominations, may be properly viewed as insufficient to terminate an ongoing recess for purposes of the Clause.[18]

This view of the effect of pro forma sessions on the President's recess appointment power finds additional support in one of this Office's prior opinions, *Recess Appointments During an Intrasession Recess*, 16 Op. O.L.C. 15. That opinion addressed the propriety of making recess appointments during a recess that began on January 3, 1992, and ended on January 21, 1992. We noted that, aside from a "brief formal session on January 3" at which the body conducted no business (and which evidently was held to address the terms of the Twentieth Amendment, *see infra* note 22), the Senate had been in recess since November 27, 1991. 16 Op. O.L.C. at 15 n.1. Thus, we observed that "[f]or practical purposes with

---

[18] In reaching this conclusion, we need not look behind the actual terms of the Senate's orders. The Senate itself labels the sessions "pro forma" and specifies that there is to be "no business conducted" during those sessions. *See, e.g.*, 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011). These orders make clear that the Senate cannot perform its advise-and-consent role during the pro forma sessions. The issue we have been asked to address relates to the legal effect of such sessions on the intrasession recess, and the Senate orders on their face warrant the conclusion that the Senate is unavailable to provide advice and consent during the intrasession recess.

respect to nominations, this recess closely resembles one of substantially greater length." *Id.* To be sure, this Office there stated only that two recesses broken solely by a pro forma session "closely resemble[]" a single recess of greater length, not that they were constitutionally indistinguishable from one. Nevertheless, we thought the *effective length* of the recess relevant in determining whether the President could make a recess appointment. The same consideration applies here. A lengthy intrasession recess broken only by pro forma sessions closely resembles an unbroken recess of the same length; thus, "[e]xcept for its brief formal session[s] . . . the Senate will have been absent from [January 3, 2012] until [January 23, 2012], a period of [twenty] days." *Id.* And in determining whether such a recess triggers the President's appointment authority under the Recess Appointments Clause, we believe the critical inquiry is the "practical" one identified above—to wit, whether the Senate is available to perform its advise-and-consent function. For practical purposes, the President may properly view the Senate as unavailable for twenty days.

Second, allowing the Senate to prevent the President from exercising his authority under the Recess Appointments Clause by holding pro forma sessions would be inconsistent with both the purpose of the Clause and historical practice in analogous situations. As explained above, the Recess Appointments Clause has long been understood as intended to provide a method of appointment when the Senate was unavailable to provide advice and consent, so that offices would not remain vacant to the detriment of the public interest. If the Senate can avoid a "Recess of the Senate" under the Clause by having a single Member "gavel in" before an empty chamber, then the Senate can preclude the President from making recess appointments even when, as a practical matter, it is unavailable to fulfill its constitutional role in the appointment process for a significant period of time. The purpose of the Clause is better served by a construction that permits the President to make recess appointments when the Senate is unavailable to advise and consent for lengthy periods. *See Power of President to Fill Vacancies*, 2 Op. Att'y Gen. 525, 526–27 (1832) ("[A] construction that defeats the very object of the grant of power cannot be the true one. It was the intention of the constitution that the offices created by law, and necessary to carry on the operations of the government, should always be full, or, at all events, that the vacancy should not be a protracted one."); *cf. Wright v. United States*, 302 U.S.

583, 596 (1938) ("We should not adopt a construction [of the Veto Clauses] which would frustrate either of the[ir] purposes.").

Further, Presidents have routinely exercised their constitutional authority to make recess appointments between sessions of Congress since President Washington made such appointments in the earliest days of the Republic. Although we have focused in this opinion on the twenty-day intrasession recess at the beginning of the second session, the Senate in fact adjourned pursuant to an order that provided that there would also be "no business conducted" for the final seventeen days of the first session. This period of time, a total of thirty-seven days, in substance closely resembles a lengthy intersession recess. *See Recess Appointments During an Intrasession Recess*, 16 Op. O.L.C. at 15 n.1. Thus, an understanding of the Recess Appointments Clause that permits the President to make appointments during this recess also would be consistent with historical practice.

Third, permitting the Senate to prevent the President from making recess appointments through pro forma sessions would raise constitutional separation of powers concerns. To preserve the constitutional balance of powers, the Supreme Court has held that congressional action is invalid if it "'undermine[s]' the powers of the Executive Branch, or 'disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions.'" *Morrison v. Olson*, 487 U.S. 654, 695 (1988) (quoting *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 856 (1986); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (alterations in *Morrison*)); *accord Loving v. United States,* 517 U.S. 748, 757 (1996) ("[I]t remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another. Even 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." (citations omitted)).

The Constitution expressly confers upon the President the power to make recess appointments when the Senate is unable to give its advice and consent because it is in recess. It is the established view of the Executive Branch that

> Congress may not derogate from *the President's* constitutional authority to fill up vacancies during recesses, by granting less power to

> a recess appointee than a Senate-confirmed occupant of the office would exercise: "Provisions purporting to grant authority only to individuals confirmed by the Senate interfere with the President's recess appointment power, and are unconstitutional."

Memorandum for J. Paul Oetken, Associate Counsel to the President, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: Displacement of Recess Appointees in Tenure-Protected Positions* at 6 (Sept. 1, 2000) (quoting *Statement Upon Signing H.R. 5678* (Oct. 6, 1992), 2 Pub. Papers of Pres. George H.W. Bush 1767, 1768 (1992); *see also* Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Richard Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Foreign Claims Settlement Commission* at 6 (Nov. 12, 1993) (the principle that "recess appointees have the powers and rights of Senate-confirmed appointees" is "a constitutional principle of great importance").[19] In such circumstances, however, the President can still make recess appointments. Senate action that would completely prevent the President from making recess appointments in situations where the Senate is as a practical matter unavailable would do even more to "disrup[t] the proper balance between the coordinate branches," *Morrison*, 487 U.S. at 695, and "intrud[e] upon" the President's constitutional prerogatives, *Loving*, 517 U.S. at 757; *cf.* Daugherty Opinion, 33 Op. Att'y Gen. at 23 ("If the President's power of appointment is to be defeated because the Senate takes an adjournment to a specified date, the painful and inevitable result will be measurably to prevent the exercise of governmental functions. I can not bring myself to

[19] These concerns also have been enunciated in other presidential signing statements. *See Statement on Signing the Energy Policy Act of 1992* (Oct. 24, 1992), 2 Pub. Papers of Pres. George H.W. Bush 1962, 1963 (1992) (stating that a provision that "authorizes a Transition Manager to exercise the powers of the Corporation until a quorum of the Board of Directors has been 'appointed and confirmed,' must be interpreted so as not to interfere with my authority under Article II, section 2 of the Constitution to make recess appointments to the Board"); *Statement on Signing the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1985* (Aug. 30, 1984), 2 Pub. Papers of Pres. Ronald Reagan 1210, 1211 (1984) (explaining that a bill intended to restrict powers of recess appointees would raise "troubling constitutional issues").

believe that the framers of the Constitution ever intended such a catastrophe to happen.").[20]

There is also some judicial authority recognizing the need to protect the President's recess appointment authority from congressional incursion. *See McCalpin v. Dana*, No. 82-542, at 14 (D.D.C. Oct. 5, 1982) ("The system of checks and balances crafted by the Framers . . . strongly supports the retention of the President's power to make recess appointments."), *vacated as moot*, 766 F.2d 535 (D.C. Cir. 1985); *id.* at 14 (explaining that the "President's recess appointment power" and "the Senate's power to subject nominees to the confirmation process" are both "important tool[s]" and "the presence of both powers in the Constitution demonstrates that the Framers . . . concluded that these powers should coexist"); *Staebler v. Carter*, 464 F. Supp. 585, 597 (D.D.C. 1979) ("it is . . . not appropriate to assume that this Clause has a species of subordinate standing in the constitutional scheme"); *id.* at 598 ("It follows that a construction of [a statute] which would preclude the President from making a recess appointment in this situation—*i.e.*, during a Senate recess and after the statutory term of the incumbent [official] has expired—would

[20] This Office occasionally has raised similar concerns about the constitutionality of the Pay Act, 5 U.S.C. § 5503 (2006), which imposes certain restrictions on the payment of recess appointees. *See* Memorandum for the Attorney General, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Recess Appointments* at 7 n.7 (July 7, 1988) ("Because it places limitations on the President's exercise of his constitutional authority, 5 U.S.C. § 5503 may be unconstitutional."); *Intrasession Recess Appointments*, 13 Op. O.L.C. at 276 n.6 ("If the [Pay Act] were to preclude the President from paying a recess appointee in these circumstances, it would raise serious constitutional problems because of the significant burden that an inability to compensate an appointee would place on the textually committed power of the President to make recess appointments."). The Senate's use of pro forma sessions to prevent the President from making recess appointments, if valid, would constitute a greater restriction on recess appointment authority than the terms of the Pay Act. The latter allows payment of recess appointees under a number of circumstances and permits retroactive payment after a person serving under a recess appointment has been confirmed. *Foreign Claims Settlement Commission* at 9; Memorandum for Nicholas deB. Katzenbach, Assistant Attorney General, Office of Legal Counsel, from Herman Marcuse, Attorney-Adviser, Office of Legal Counsel, *Re: Constitutionality of 5 U.S.C. 56 (Recess Appointments)* at 1 (Sept. 27, 1961). In contrast, the Senate's use of pro forma sessions, if it had the effect of shortening recesses to a period insufficient to constitute a "recess" under the Recess Appointments Clause, would prevent the President from making recess appointments in the circumstances presented, even if the person to be appointed would serve without compensation.

seriously impair his constitutional authority and should be avoided [if it] is possible to do so."); *see also Swan v. Clinton*, 100 F.3d 973, 987 (D.C. Cir. 1996) (rejecting an argument that "rests on the assumption that a recess appointment is somehow a constitutionally inferior procedure"). *But see Wilkinson v. Legal Servs. Corp.*, 865 F. Supp. 891, 900 (D.D.C. 1994) (concluding, contrary to *McCalpin* and *Staebler*, that a holdover provision could preclude a recess appointment), *rev'd on other grounds*, 80 F.3d 535 (D.C. Cir. 1996); *Mackie v. Clinton*, 827 F. Supp. 56, 57–58 (D.D.C. 1993) (same), *vacated as moot*, Nos. 93-5287, 93-5289, 1994 WL 163761 (D.C. Cir. Mar. 9, 1994).

We recognize that the Senate may choose to remain continuously in session and available to exercise its advise-and-consent function and thereby prevent the President from making recess appointments. But, under the legal authority set forth above, the President may properly determine that the Senate is not available under the Recess Appointments Clause when, while in recess, it holds pro forma sessions where no business can be conducted. Such sessions do not have the legal effect of interrupting a Senate recess for purposes of the Recess Appointments Clause.

3.

We have considered several counterarguments to our analysis. In our judgment, these points, while not insubstantial, do not overcome the conclusion presented above.

First, we considered that the Senate has employed pro forma sessions in other contexts and that, in those contexts, a pro forma session may have the same legal effect as any other session and thus may fulfill certain constitutional requirements. For example, pro forma sessions are most commonly used to address the requirement that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." U.S. Const. art. I, § 5, cl. 4; *see* U.S. Senate Glossary, http://www.senate.gov/reference/glossary_term/pro_forma_session.htm (last visited ca. Jan. 2012) (defining "pro forma session" as a "brief meeting (sometimes only several seconds) of the Senate in which no business is conducted"; "[i]t is held usually to satisfy

the constitutional obligation that neither chamber can adjourn for more than three days without the consent of the other").[21] In addition, in 1980, and sporadically thereafter, pro forma sessions have been used to address the Twentieth Amendment's direction that, in the absence of legislation providing otherwise, Congress must convene on January 3.[22] Pro forma sessions have also been employed for parliamentary purposes, e.g., to permit a cloture vote to ripen, or to hear an address.[23]

Those precedents provide only weak support for the claim that a series of consecutive pro forma sessions may be used to block recess appointments in the circumstances presented here. There is no evidence of a

---

[21] *Riddick's Senate Procedure* identifies several examples in which "the Senate pursuant to a previous order has met for very brief periods and recessed over until a subsequent date, not in excess of 3 days," the earliest of which occurred in 1949. *Id.* at 251 & nn.1–3.

[22] U.S. Const. amend. XX, § 2 ("Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day."). Congress routinely enacts legislation when it wishes to vary the date of its first meeting. *See, e.g.*, Pub. L. No. 111-289 (2010); Pub. L. No. 105-350 (1998); Pub. L. No. 99-613 (1986); Pub. L. No. 94-494 (1978); Pub. L. No. 89-340 (1965); Pub. L. No. 83-199 (1953); Pub. L. No. 79-289 (1945). Occasionally, however, Congress (or an individual House) uses a pro forma session to comply with the Twentieth Amendment's default date. The first such use of a pro forma session that we are aware of occurred in 1980. *See* H.R. Con. Res. 232, 96th Cong., 93 Stat. 1438 (1979) ("[W]hen the Congress convenes on January 3, 1980, . . . neither the House nor the Senate shall conduct organizational or legislative business until Tuesday, January 22, 1980, [unless convened sooner by House and Senate leaders]."). Thereafter, it appears to have remained rare until the last decade. *See* H.R. Con. Res. 260, 102d Cong., 105 Stat. 2446 (1991) (providing that neither House shall "conduct organizational or legislative business" on January 3, 1992); 151 Cong. Rec. S14,421 (daily ed. Dec. 21, 2005) (Senate order providing for "a pro forma session only" on January 3, 2006"); 153 Cong. Rec. S16,069 (daily ed. Dec. 19, 2007) (same for January 3, 2008); 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2011) (same for January 3, 3012). On at least one occasion, Congress has changed the date of the first meeting of a session by law and both Houses held pro forma sessions to comply with that law. *See* Pub. L. No. 111-121, 123 Stat. 3479 (2009) (providing that the second session of the 111th Congress begin on January 5, 2010); 155 Cong. Rec. S14,140 (daily ed. Dec. 24, 2009) (Senate order providing for "a pro forma session only" on January 5, 2010); 156 Cong. Rec. H2–H8 (daily ed. Jan. 5, 2010) ("[N]o organizational or legislative business will be conducted on this day.").

[23] *See* 133 Cong. Rec. 15,445 (1987) ("The Senate will go over until Monday pro forma, no business, no speeches, just in and out, and the pro forma meeting on Monday would qualify the cloture motion to be voted on Tuesday[.]"); 139 Cong. Rec. 3039, 3039 (1993) ("Any sessions will be pro forma or solely for the purpose of hearing the Presidents' Day address on Wednesday morning.").

tradition of using pro forma sessions to prevent a "recess" within the meaning of the Recess Appointments Clause. That attempt began in 2007 with the 110th Congress.[24] There may be at least a limited tradition of a House of Congress using consecutive pro forma sessions to avoid adjournments of more than three days without obtaining the other House's consent.[25] But past uses of pro forma sessions for housekeeping purposes are not good analogies for the current use of pro forma sessions to block appointments under the Recess Appointments Clause. The former uses affect the operations of only the House in question, and the Constitution provides that "[e]ach House may determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2. Even uses in connection with interchamber relations affect the Legislative Branch *alone*. The question whether the

---

[24] It does appear, though, that the use of pro forma sessions to prevent recess appointments was at least contemplated as early as the 1980s. *See* 145 Cong. Rec. 29,915 (1999) (statement of Sen. Inhofe) ("[Senator Byrd] extracted from [the President] a commitment in writing that he would not make recess appointments and, if it should become necessary because of extraordinary circumstances to make recess appointments, that he would give the list to the majority leader . . . in sufficient time in advance that they could prepare for it either by agreeing in advance to the confirmation of that appointment or by not going into recess and staying in pro forma so the recess appointments could not take place.").

[25] For example, in 1929, a concurrent resolution provided that the House return from summer recess on September 23, 71 Cong. Rec. 3045 (June 18, 1929). The House passed a separate resolution providing that "after September 23, 1929, the House shall meet only on Mondays and Thursdays of each week until October 14, 1929," provided that the Speaker could call them back sooner if "legislative expediency shall warrant it," *id.* at 3228 (June 19, 1929). Although it was not so stated in the text of the resolution, it was "agreed that there shall be nothing transacted [during the Monday and Thursday sessions] except to convene and adjourn; no business whatever." *Id.* at 3229 (statement of Rep. Tilson); *see also* 8 *Cannon's Precedents of the House of Representatives* § 3369, at 820 (1935) (describing this incident as one in which the House "provid[ed] for merely formal sessions"). This arrangement was subsequently extended twice. 71 Cong. Rec. 4531–32 (Oct. 14, 1929) (H.R. Res. 59, described by Rep. Tilson as "the same resolution, the dates being changed, as the original recess resolution passed by the House last June"); *id.* at 5422 (Nov. 11, 1929). Subsequent examples from the Senate involve more formal agreements to the pro forma nature of the sessions. *See, e.g.*, 96 Cong. Rec. 16,980 (Dec. 22, 1950) (setting schedule of two consecutive pro forma sessions); *id.* at 17,020 (Dec. 26, 1950); *id.* at 17,022 (Dec. 29, 1950); 126 Cong. Rec. 2574 (Feb. 8, 1980) (setting schedule of two consecutive pro forma sessions); *id.* at 2614 (Feb. 11, 1980); *id.* at 2853 (Feb. 14, 1980); 127 Cong. Rec. 190 (Jan. 6, 1981) (setting schedule of three consecutive pro forma sessions); *id.* at 238 (Jan. 8, 1981); *id.* at 263 (Jan. 12, 1981); *id.* at 276 (Jan. 15, 1981).

use of pro forma sessions for those purposes is consistent with the Constitution is not presented here. Assuming that such uses are constitutional, however, it does not follow that pro forma sessions may be used to prevent the President from exercising his constitutional authority to make recess appointments when he determines that the Senate is unavailable to provide advice and consent.[26] Put differently, whether the House has consented to the Senate's adjournment of more than three days does not determine the Senate's practical availability during a period of pro forma sessions and thus does not determine the existence of a "Recess" under the Recess Appointments Clause.

Second, it might be argued that, in light of the Senate's power to "determine the Rules of its Proceedings," U.S. Const. art. I, § 5, cl. 2, the Executive Branch would be bound by the Chamber's own understanding of whether the pro forma sessions have the legal effect of interrupting a "Recess of the Senate" for the purposes of the Recess Appointments Clause. The Rules of Proceedings Clause has been understood to grant the Houses of Congress broad discretion in managing their internal affairs. *See, e.g.*, *United States v. Ballin*, 144 U.S. 1, 5 (1892) ("[A]ll matters of method [of proceeding] are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just."). That Clause might also be understood to permit them conclusively to determine when they are in session and when they are in recess. *See, e.g.*, Michael Herz, *Abandoning Recess Appointments?: A Comment on Hartnett (and Others)*, 26 Cardozo L. Rev. 443, 459 (2005) ("I would think that pursuant to the authority of each House to make rules for its own proceedings Congress could decide to hold twelve 'sessions' each calendar year, with a few days off—perhaps just a weekend—between them."); *cf.* Arthur S. Miller, *Congressional Power to Define the Presidential Pocket Veto Power*, 25 Vand. L.

---

[26] *Cf.* Letter for Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives, from Robert G. Dixon, Assistant Attorney General, Office of Legal Counsel at 4–5 (Dec. 4, 1973) ("Under Section 2 of H.R. 7386, Congress could prevent the exercise of a pocket veto, except at the close of a Congress, when one or both Houses adjourned for several months, by adjourning either to a date certain or pro forma to a date close to the beginning of the next working session. . . . To the extent that H.R. 7386 unconstitutionally permits Congress to keep a bill in suspended animation for lengthy periods during adjournments other than sine die, it unconstitutionally narrows the President's pocket veto authority.").

Rev. 557, 567 (1972) ("Surely the determination of what constitutes adjournment is a 'proceeding' within the terms of that section [the Rules of Proceeding Clause].").

The Supreme Court, however, has made clear that Congress's power under this provision is not unlimited, and specifically that Congress "may not by its rules ignore constitutional restraints or violate fundamental rights." *Ballin*, 144 U.S. at 5. Thus, the validity and application of congressional rules are subject to review in court when the rules affect interests outside of the Legislative Branch. *See, e.g.*, *United States v. Smith*, 286 U.S. 6, 33 (1932) ("As the construction to be given the rules affects persons other than members of the Senate, the question presented is of necessity a judicial one."); *Ballin*, 144 U.S. at 5 ("[T]here should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained."); *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1173 (D.C. Cir. 1983) ("Article I does not alter our judicial responsibility to say what rules Congress may not adopt because of constitutional infirmity."). A Senate rule that pro forma sessions interrupt a "Recess of the Senate" (or that otherwise seeks to prevent the President from exercising authority under the Recess Appointments Clause) would affect other persons—the President and potential appointees at the least. It would also disrupt the Constitution's balancing of executive and legislative authority in the appointments process. To be sure, as explained above, the President's authority to make recess appointments is constrained when the Senate is continuously in session and available to perform its advise-and-consent function. But the Senate could not by rule unilaterally prevent the President from exercising his authority to make temporary appointments under the Clause by declaring itself in session when, in practice, it is not available to provide advice and consent, any more than the President could make a recess appointment when the Senate was in practice available to do so. *See* Daugherty Opinion, 33 Op. Att'y Gen. at 25 (recognizing that a "palpable abuse" of the President's "discretion to determine when there is a real and genuine recess" of the Senate might subject his appointment to review").[27]

[27] The Senate's scheduling of pro forma sessions to frustrate the President's recess appointment authority does not require us to treat the President's constitutional recess appointment authority as operating at the "lowest ebb" of presidential power under the framework of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v.*

Third, it could be argued that the experience of recent pro forma sessions suggests that the Senate is in fact available to fulfill its constitutional duties during recesses punctuated by periodic pro forma sessions. Twice in 2011, the Senate passed legislation during pro forma sessions by unanimous consent, evidenced by the lack of objection from any member who might have been present at the time. 157 Cong. Rec. S8789 (daily ed. Dec. 23, 2011); *id.* at S5297 (daily ed. Aug. 5, 2011). During one of these sessions, the Senate also agreed to a conference with the House, and messages received from the House earlier in the intrasession recess were put into the Congressional Record. 157 Cong. Rec. S8789–90 (daily ed. Dec. 23, 2011). Conceivably, the Senate might provide advice and consent on pending nominations during a pro forma session in the same manner.

We do not believe, however, that these examples prevent the President from determining that the Senate remains unavailable to provide advice and consent during the present intrasession recess. The scheduling order under which the pro forma sessions are held during this recess expressly provides that there is to be "no business conducted." 157 Cong. Rec. S8783 (daily ed. Dec. 17, 2001). In our judgment, the President may properly rely on the public pronouncements of the Senate that it will not conduct business (including action on nominations), in determining whether the Senate remains in recess, regardless of whether the Senate has disregarded its own orders on prior occasions. Moreover, even absent a Senate pronouncement that it will not conduct business, there may be circumstances in which the President could properly conclude that the body is not available to provide advice and consent for a sufficient period to support the use of his recess appointment power. It is common for

---

Sawyer, 343 U.S. 579, 637 (1952). The Constitution explicitly grants recess appointment authority to the President, and the Attorney General has long taken the position that, through enactment of the Pay Act, Congress has "acquiesce[d]" to recess appointments under circumstances where that Act would permit payment. *See Recess Appointments*, 41 Op. Att'y Gen. at 466; *see also Appointments—Recess Appointments,* 28 Comp. Gen. at 34, 37 (recognizing the "accepted view" that an extended intrasession adjournment of the Senate is a "recess" in the constitutional sense during which "an appointment properly may be made" and that recipients of such appointments were entitled to pay). Moreover, it is unclear that Justice Jackson's framework would apply in matters involving the balance between the President's constitutional authority to make recess appointments and a single House of Congress's constitutional authority to set its internal rules.

resolutions of adjournment authorizing extended intrasession recesses to provide that the Senate "stand[s] recessed or adjourned until [a specified date], . . . or until the time of any reassembly" ordered by the leaders of the two Houses "as they may designate whenever, in their opinion, the public interest shall warrant it." *See, e.g.*, H.R. Con. Res. 361, 108th Cong. (2004). That potential for reassembly by itself does not deprive an extended Senate absence of its character as a recess. In fact, the Senate had adjourned pursuant to such a resolution before the intrasession recess during which Judge Pryor was appointed to the Eleventh Circuit. That recess appointment was approved by this Office, *see* Goldsmith Memorandum, and upheld by the court of appeals en banc, *see Evans v. Stephens*, 387 F.3d 1220.

Fourth, legal precedent addressing the President's authority to pocket veto during a recess a bill passed by Congress conceivably might be viewed as constraining the President's recess appointment authority in the current recess. For example, in *Wright v. United States*, 302 U.S. 583, the Supreme Court held that a temporary adjournment of the Senate (for which consent of the House was not required under Article I, Section 5, Clause 4 of the Constitution) did not prevent the President from vetoing a bill. And in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), the D.C. Circuit extended *Wright* to reach all intrasession adjournments, provided that arrangements were made for the receipt of presidential messages.[28] It could be argued that these cases either delineate the types of Senate adjournments that are insufficient to qualify as a "Recess of the Senate" under the Recess Appointments Clause, or establish that the Senate can take some action short of actually remaining in session to mitigate the consequences of its absence.

We have previously observed that "[w]hile the Pocket Veto and Recess Appointments Clauses deal with similar situations, that is, the President's powers while Congress or the Senate is not in session, their language, effects, and purposes are by no means identical." *Recess Appointments Issues*, 6 Op. O.L.C. 585, 589 (1982). And "[i]n light of the[se] differen[ces] . . . we do not believe [that *Sampson*] should be read as having any significant

---

[28] In *Barnes v. Kline*, 759 F.2d 21, 41 (D.C. Cir. 1985), the court held that the President is not "prevent[ed]" from returning a bill even during an intersession recess if a duly authorized officer of the originating house is available to receive it. That decision was later vacated as moot. *See Burke v. Barnes*, 479 U.S. 361 (1987).

bearing on the proper interpretation of the Recess Appointments Clause." *Id.* at 590. Moreover, we have concluded that "there are sound reasons to believe that the President has authority to make recess appointments in situations in which a pocket veto might well be inappropriate." *The Pocket Veto: Historical Practice and Judicial Precedent*, 6 Op. O.L.C. 134, 149 (1982).

The Pocket Veto Clause "ensures that the President will not be deprived of his constitutional power to veto a bill by reason of an adjournment." *Recess Appointments Issues*, 6 Op. O.L.C. at 590. The holdings in *Wright* and *Sampson*—that the President could not pocket veto a bill during an intrasession recess where the Senate had designated an agent to receive the return of a bill—were "bottomed on the theory that [the adjournments at issue] did not 'prevent' the return of disapproved bills." *The Pocket Veto*, 6 Op. O.L.C. at 149. Put another way, the designation of an agent to receive messages and the pocket veto serve the same purpose, i.e., protecting the President's right to disapprove bills, and therefore obviate the need for the power provided by the Clause.

The Recess Appointments Clause, however, serves a different purpose. It "enables the President to fill vacancies which exist while the Senate is unable to give its advice and consent because it is in recess." *Recess Appointments Issues*, 6 Op. O.L.C. at 590. The designation of an agent to receive messages neither allows the President to fill vacancies nor makes the Senate available to advise and consent. Thus, the President's ability to make appointments during a recess is necessary to further the Recess Appointments Clause's purpose, while the President's authority to pocket veto arguably is not necessary when the presence of a congressional agent allows him to return a bill, exercising his constitutional prerogative to disapprove legislation. While the congressional designation of an agent arguably addresses the constitutional concerns embodied in the President's pocket veto authority, the periodic convening of pro forma sessions at which no business is to be conducted simply does not address the constitutional concerns arising from the Senate's unavailability to consider appointments.

Finally, we considered whether the Department of Justice has already taken a different view. In arguing that the recess appointment of a member of the National Labor Relations Board ("NLRB") did not render moot the controversy about legal consequences of the absence of a Board quorum, the Solicitor General said that "the Senate may act to foreclose [recess appointments] by declining to recess for more than two or three days at a time over

a lengthy period," using the Senate's 2007 pro forma sessions as an example. Letter for William K. Suter, Clerk, Supreme Court of the United States, from Elena Kagan, Solicitor General, Office of the Solicitor General, at 3 (April 26, 2010), *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) (No. 08-1457). This portion of the letter is focused on the question whether an intrasession recess of three days or fewer constitutes a recess under the Recess Appointments Clause. *See id.* ("[T]he Senate did not recess intrasession for more than three days at a time for over a year beginning in late 2007."); *id.* at 3 n.2 ("[O]fficial congressional documents define a 'recess' as 'any period of three or more complete days . . . when either the House of Representatives or the Senate is not in session.'" (quoting *2003–2004 Congressional Directory* 526 n.2 (Joint Comm. on Printing, 108th Cong., comp. 2003)). The letter (like this opinion, *see supra* note 13) does not answer that question. Instead, the letter uses the uncertain status of recess appointments during intrasession recesses of three or fewer days to argue that the possibility of recess appointments did not render *New Process Steel* moot. Thus, it does not answer the question addressed here, whether pro forma sessions at which no business is conducted interrupt a recess that is more than three days long in a manner that would preclude the President from exercising his appointment power under the Clause.

III.

In our judgment, the text of the Constitution and precedent and practice thereunder support the conclusion that the convening of periodic pro forma sessions in which no business is to be conducted does not have the legal effect of interrupting an intrasession recess otherwise long enough to qualify as a "Recess of the Senate" under the Recess Appointments Clause. In this context, the President therefore has discretion to conclude that the Senate is unavailable to perform its advise-and-consent function and to exercise his power to make recess appointments.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

State of Residence Requirements for Firearms Transfers

Section 922(b)(3) of title 18, which forbids federal firearms licensees from selling or delivering "any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in . . . the State in which the licensee's place of business is located," cannot be interpreted to define "reside in . . . the State" differently for citizens and aliens.

January 30, 2012

MEMORANDUM OPINION FOR THE CHIEF COUNSEL
BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES

The Gun Control Act of 1968 ("GCA" or "the Act") contains a series of provisions that regulate transactions involving firearms and ammunition. 18 U.S.C. § 922 (2006 & Supp. IV 2010).[1] One such provision forbids federal firearms licensees ("FFLs")—persons who are licensed under federal law to import, manufacture, or deal in firearms—from selling or delivering "any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in . . . the State in which the licensee's place of business is located." *Id.* § 922(b)(3). In a proposed final rule interpreting this provision, the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") contemplates defining the term "reside in . . . the State" differently for citizens and aliens, as it has since 1968. *See* Memorandum for the Attorney General from Kenneth E. Melson, Deputy Director, Bureau of Alcohol, Tobacco, Firearms, and Explosives, *Re: Final Rule Concerning Residency Requirements for Persons Acquiring Firearms* at 2 (Apr. 30, 2010) (describing proposed final rule).

As part of our routine legal review of rules requiring the Attorney General's approval, this Office advised that the proposed definition was inconsistent with section 922(b)(3) of the Act. That section makes no distinction between citizens and aliens; it simply restricts the sale or delivery of firearms to "any person" who "does not reside in" the state

[1] Several of these provisions of the GCA, including 18 U.S.C. § 922(b)(3), were originally enacted several months before the enactment of the GCA, as part of title IV of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 901(a)(1), 82 Stat. 197, 225–35. Where appropriate, we accordingly refer to legislative findings that Congress adopted in enacting the Omnibus Crime Control and Safe Streets Act. *See infra* pp. 57–58.

where the FFL is located. 18 U.S.C. § 922(b)(3) (2006). The Supreme Court has rejected interpretations of statutes that would "adopt a construction" attributing "different meanings to the same phrase in the same sentence," as the proposed final rule would do. *See Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329 (2000). Here, it is particularly difficult to justify an inference, without textual support, that state residency should be defined differently for citizens and aliens, because elsewhere in the statute, Congress expressly addressed the treatment of certain categories of aliens and enacted a special definition of state residency for a particular category of persons (members of the military on active duty, *see* 18 U.S.C. § 921(b) (2006)). In light of these considerations, we advised that section 922(b)(3) cannot be interpreted to define "reside in . . . the State" differently for citizens and aliens. At your request, this opinion memorializes and elaborates on our prior advice. *See* Memorandum for the Office of Legal Counsel from Stephen R. Rubenstein, Chief Counsel, Bureau of Alcohol, Tobacco, Firearms, and Explosives (Dec. 18, 2011) ("Opinion Request").

I.

The federal Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921–931), sets out "a detailed federal scheme" to govern "the distribution of firearms." *Printz v. United States*, 521 U.S. 898, 902 (1997). The Act regulates FFLs directly and also lays out a series of so-called "prohibitors" that define particular categories of individuals prohibited from engaging in certain firearms transactions.

Section 922(b)(3) of the GCA imposes the limitation on FFLs at issue here, providing in pertinent part:

> It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver . . . any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in (or if the person is a corporation or other business entity, does not maintain a place of business in) the State in which the licensee's place of business is located[.][2]

[2] Section 922(b)(3) exempts certain transfers of rifles and shotguns from this general rule and provides that the rule "shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes."

The Act defines "person" broadly to "include any individual, corporation, company, association, firm, partnership, society, or joint stock company." 18 U.S.C. § 921(a)(1) (2006). The Act does not define what it means for such a person to "reside in . . . the State" as a general matter, but it does contain one special rule with respect to state residency: a member of the Armed Forces on active duty "is a resident of the State in which his permanent duty station is located" for purposes of the firearms provisions of title 18. *Id.* §§ 922(b)(3), 921(b).

Since 1968, ATF has maintained regulations defining the term "State of residence" (although that precise term does not appear in the GCA) and requiring potential firearms buyers to establish their state of residence, in order to implement the general statutory provision establishing that an FFL may not transact business with "any person" the FFL "knows or has reasonable cause to believe does not reside in . . . the State" in which the FFL is located. *See* Commerce in Firearms and Ammunition, 33 Fed. Reg. 18,555, 18,559 (Dec. 14, 1968) (defining "State of residence" for the first time); 27 C.F.R. § 478.11 (2011). These regulations have always given "State of residence" one meaning for U.S. citizens and another meaning for aliens. The definition of "State of residence" has changed somewhat over the years,[3] but the regulations have consistently required aliens to meet both the residency requirement that applies to citizens *and* an additional requirement that they have resided in the state "for a period of at least 90 days prior to the date of sale or delivery of a firearm." *See, e.g.*, Commerce in Firearms and Ammunition, 33 Fed. Reg. at 18,559; Residency Requirements for Persons Acquiring Firearms, 62 Fed. Reg. 19,442, 19,442 (Apr. 21, 1997); 27 C.F.R. § 478.11 (2011). (We will refer to this additional requirement as the "90-day requirement.") Consistent with this historical practice, the proposed final rule would provide that a citizen "present in a State with the intention of making a home in that State" would satisfy section 922(b)(3)'s requirement that he or she "reside in . . . the State" where the FFL is located, but that an alien lawfully "present in a State with the intention of making a home in that State" would not satisfy that statutory requirement until the alien proved as well that he or she had resided in that state for a mini-

[3] *See infra* note 4.

mum of 90 days.[4] Residency Requirements for Persons Acquiring Firearms at 21 (unpublished proposed rule, intended to be codified at 27 C.F.R. part 478).

In addition to laying out generally applicable restrictions, such as the one set forth in section 922(b)(3), the GCA also expressly prohibits certain categories of persons from engaging in firearms transactions. As relevant here, neither aliens "illegally or unlawfully in the United States," *see* 18 U.S.C. § 922(d)(5)(A) (2006); *id.* § 922(g)(5)(A), nor aliens who have been "admitted to the United States under a nonimmigrant visa," *see id.* § 922(d)(5)(B); *id.* § 922(g)(5)(B), may ship, transport, possess, or receive firearms or ammunition, with certain limited exceptions.[5] The GCA does not otherwise bar aliens as a category from engaging in firearms transactions; instead, aliens are subject to the same general regulatory requirements as U.S. citizens. *See generally United States v. Camacho*, 528 F.2d 464, 468–69 (9th Cir. 1976) (rejecting appellant's argument that the GCA does not restrict gun sales to visiting aliens who do not reside in any state, and stating: "An alien who has not established residence in the state where the licensed dealer is located falls within the class of persons to whom the dealer is not permitted to sell firearms under § 922(b)(3).").

The question we address is whether the proposed final rule's interpretation of section 922(b)(3) as authorizing different definitions of the term "reside in . . . the State" for citizens and aliens is consistent with the statutory scheme.

---

[4] In 1968, and for many years afterwards, ATF defined "State of residence" to mean "[t]he State in which an individual regularly resides, or maintains his home." Commerce in Firearms and Ammunition, 33 Fed. Reg. at 18,559. A 1997 interim final rule amended then-existing regulations interpreting section 922(b)(3) to require a purchaser of firearms to affirmatively declare his or her state of residence on the relevant ATF form and to require aliens legally in the United States to show substantiating documentation, such as a utility bill, to satisfy the 90-day rule. Opinion Request at 2–3. The proposed final rule would maintain these amendments but also eliminate an existing provision that allows aliens to establish residency by providing a letter from their embassy or consulate. We do not address that proposed rule change in this opinion. We also do not address the requirement that firearms purchasers affirmatively declare their "State of residence" on a form provided by ATF.

[5] Section 922(y)(2) lists various exceptions to the prohibitions applicable to nonimmigrant aliens admitted under a visa, and section 922(y)(3) sets out a waiver procedure for aliens subject to the same prohibitions. *See* 18 U.S.C. § 922(y) (2006).

II.

Based on the text of section 922(b)(3) and the overall statutory context, we conclude that the phrase "reside in . . . the State" in section 922(b)(3) cannot be interpreted differently for citizens and aliens and therefore may not be construed to impose different substantive requirements when aliens and citizens seek to obtain a firearm from an FFL.

The residency requirement in the text of section 922(b)(3) is established with a single phrase, "reside in . . . the State," that applies to all "person[s]." More specifically, section 922(b)(3) provides that a covered firearms transaction may not take place when "the [FFL] knows or has reasonable cause to believe" that the "person" who would receive the firearm "does not reside in . . . the State" where the FFL does business. 18 U.S.C. § 922(b)(3). The plain text of the statute thus appears to require ATF to apply the same standard to determine whether "any person . . . reside[s] in . . . the State," regardless of the citizenship status of the prospective buyer. *See id.*

The proposed final rule, however, would effectively adopt two different definitions of "reside in . . . the State." Citizens would be required to show only an intent to make a home in the state in which they were present, whereas aliens would be required to show that same intent and *also* prove that they had been present in the state for 90 days. We recognize that what it means to "reside" in a state may itself be susceptible to numerous interpretations. *See, e.g.*, *Downs v. Comm'r*, 166 F.2d 504, 508 (9th Cir. 1948); *Assistant U.S. Attorneys—Residency Requirement*, 3 Op. O.L.C. 360, 361 (1979). But regardless of how that term is defined, the plain text of section 922(b)(3) contemplates that the same definition will apply to "any person," citizen or alien, to whom an FFL seeks to sell or deliver a firearm (with the exception of members of the Armed Forces on active duty, to whom the Act expressly applies a different definition of state residency, *see supra* p. 51).

Nothing in the concept of state residence, moreover, suggests that it is appropriate to read a distinction between aliens and citizens into the statute where no such distinction exists in the text. We are aware of no background common-law definition of state residency, for example, that would suggest that state residency should be defined differently for aliens and citizens. *Cf. Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S.

440 (2003) (observing that courts interpreting the statutory term "employee" look to its common-law meaning in different settings).[6]

Supreme Court precedent squarely supports this reading of the plain text of section 922(b)(3). In *Clark v. Martinez,* 543 U.S. 371 (2005), for example, the Court made clear that a single undifferentiated statutory term in section 241 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a)(6), must be given the same meaning in all of its potential applications. In *Clark*, the Court interpreted INA section 241(a)(6), which authorizes the Attorney General to retain custody of aliens ordered removed from the United States beyond the 90-day period established by section 241(a)(1), *see* 8 U.S.C. § 1231(a)(1) (2000), and provides that three different categories of aliens "may be detained beyond the removal period." 543 U.S. at 377 (quoting 8 U.S.C. § 1231(a)(6)) (internal quotation marks omitted).

Four years earlier, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court had construed section 241(a)(6) in a particular way, in order to avoid a constitutional question. The Court held that the provision authorized the Executive Branch to detain one covered category of aliens—those deportable on certain crime-related grounds—for "only as long as 'reasonably necessary' to remove them from the country," rather than indefinitely, as the plain text of the statute might have suggested. *Clark*, 543 U.S. at 377 (quoting *Zadvydas*, 533 U.S. at 699). In light of *Zadvydas*, the *Clark* Court subsequently held that the construction it had given to the

---

[6] We examined the administrative record that accompanied ATF's 1968 interpretation of the state of residence requirement, but that record does not reveal a rationale behind the decision to establish different state residency requirements for citizens and aliens. Shortly after the GCA's enactment in 1968, the Director of the Alcohol and Tobacco Tax Division (which was then part of the Internal Revenue Service), issued a notice of proposed rulemaking defining a number of terms, but not "State of residence." *See* Commerce in Firearms and Ammunition, 33 Fed. Reg. 16,285, 16,288 (proposed Nov. 6, 1968). That definition first appeared in the final rule issued several weeks later, without elaboration. *See* Commerce in Firearms and Ammunition, 33 Fed. Reg. at 18,559; *see id.* at 18,555 ("Immediately following the definition of 'State' there is inserted a new definition."). We recognize that ATF's proposed definition is longstanding, but we do not think its "vintage" can overcome the meaning required by the statute's text. *Cf. Judulang v. Holder*, 132 S. Ct. 476, 488 (2011) ("vintage" is a "slender reed to support a significant government policy"); *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (abrogating a "longstanding administrative construction"—which the court below had noted dated back to "at least the year 1900," *Demarest v. Manspeaker*, 884 F.2d 1343, 1345 (10th Cir. 1989)—upon concluding that the agency's construction was inconsistent with the statute).

statutory phrase in *Zadvydas* also had to be applied to the inadmissible aliens covered by section 241(a)(6), even assuming that there were substantial reasons to treat inadmissible aliens and deportable aliens differently with respect to detention, as the government had argued. *Id.* at 380. The Court recognized that the constitutional concerns at issue in *Zadvydas* were not implicated in the case of inadmissible aliens. *Id.* But, the Court explained, "[t]he operative language of [the relevant statute], 'may be detained beyond the removal period,' applies without differentiation to all three categories of aliens that are its subject. To give these same words a different meaning for each category would be to invent a statute rather than interpret one." *Id.* at 378.

Notably, the Court acknowledged that the text of INA section 241(a)(6) was ambiguous and could have been validly interpreted to permit more protracted detention for inadmissible aliens. *Id.* But the Court rejected the notion that statutory ambiguity could justify two different simultaneous constructions of the same ambiguous phrase depending on the category of aliens to which the phrase applied:

> As the Court in *Zadvydas* recognized, the statute can be construed "literally" to authorize indefinite detention, or (as the Court ultimately held) it can be read to "suggest [less than] unlimited discretion" to detain. It cannot, however, be interpreted to do both at the same time.

Id. (citations omitted)*; see also id.* at 379 (giving the text the interpretation found in *Zadvydas* "because the statutory text provides for no distinction between admitted and nonadmitted aliens"). The Court observed that a contrary holding would establish "the dangerous principle that judges can give the same statutory text different meanings in different cases." *Id.* at 386; *see also Bossier Parish Sch. Bd.*, 528 U.S. at 329 ("As we have in the past, we refuse to adopt a construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying."); *Bankamerica Corp. v. United States*, 462 U.S. 122, 129 (1983) ("[W]e reject as unreasonable the contention that Congress intended the phrase 'other than' to mean one thing when applied to 'banks' and another thing as applied to 'common carriers,' where the phrase 'other than' modifies both words in the same clause.").[7]

---

[7] Since *Clark*, the Supreme Court has reaffirmed the basic principle of interpretation on which it relied there. *See United States v. Santos*, 553 U.S. 507 (2008) (concluding that

Clark thus supports our conclusion that the proposed rule is not consistent with the statute, because the proposed rule would give the same phrase—"reside in . . . the State"—different constructions for U.S. citizens and aliens, even though no textual foundation for imposing a different substantive rule on aliens exists.

Our reading of the text of section 922(b)(3) also finds support in other provisions of the GCA, and in the legislative findings accompanying the Act. In particular, as noted above, section 922(g)(5) prohibits certain categories of aliens—those unlawfully present and those admitted under a nonimmigrant visa—from shipping, transporting, possessing, and receiving firearms and ammunition, with certain exceptions. *See also* 18 U.S.C. § 922(d)(5) (2006) (making it unlawful for any person to sell or dispose of firearms to unlawfully present aliens or aliens admitted under a nonimmigrant visa). This specific treatment of aliens elsewhere in section 922 counsels against inferring that Congress intended differential treatment of citizens and aliens where there is no textual or other support for such an inference.

Similarly, although the GCA does not define the phrase "reside . . . in the State," the Act's definition section does create a unique state residency requirement for one class of persons. As noted above, section 921(b) states that "a member of the Armed Forces on active duty is a resident of the State in which his permanent duty station is located" for the purposes

---

the term "proceeds" in the federal money-laundering statute, 18 U.S.C. § 1956(a)(1)(A)(i) (2006), means "profits" and not "receipts," and that its meaning must be uniform across contexts); *compare id.* at 525 (Stevens, J., concurring in the judgment) (concluding that "proceeds" could mean "receipts" or "profits" depending on the context, suggesting that, "[i]f Congress could have expressly defined the term 'proceeds' differently when applied to different specified unlawful activities, it seems to me that judges filling the gap in a statute with such a variety of applications may also do so, as long as they are conscientiously endeavoring to carry out the intent of Congress"), *with id.* at 522 (Scalia, J., concurring in the judgment) (describing Justice Stevens's approach as a form of "interpretive contortion," and contending that the Court had "forcefully rejected" that approach in *Clark*), *and id.* at 532 (Alito, J., dissenting) ("I cannot agree with Justice Stevens's approach insofar as it holds that the meaning of the term 'proceeds' varies depending on the nature of the illegal activity that produces the laundered funds[.]"); *see also Pasquantino v. United States*, 544 U.S. 349, 358–59 (2005) (citing *Clark* in concluding that because the federal wire fraud statute, 18 U.S.C. § 1343, "applies without differentiation" to "fraudulent uses of domestic wires," it must necessarily apply to a scheme to use the domestic wires to deprive a foreign sovereign of taxes that are due).

of the firearms provisions of title 18. This language provides clear textual support for ATF's conclusion that the "State of residence" of active duty military personnel should be determined under a different standard than the one applicable to other persons. *See* 27 C.F.R. § 478.11 (2011) ("If an individual is on active duty as a member of the Armed Forces, the individual's State of residence is the State in which his or her permanent duty station is located."). Again, however, the presence of the express language defining state residency differently for one particular group of persons (military personnel) makes it difficult to argue that Congress intended to authorize a special definition of state residency for a second group of persons (aliens), because there is no express textual indication that Congress intended to do so. *See, e.g.*, *Demarest v. Manspeaker*, 498 U.S. 184, 188 (1991) (holding that prisoners who appear as witnesses in federal court are entitled to payment under a statute granting appearance fees to any "witness in attendance at any court of the United States," relying in part on the fact that other provisions of the statute expressly prohibited prisoners from receiving other kinds of fees, and in part on the fact that a subset of prisoners—detained aliens—was expressly excluded from the entitlement to appearance fees (internal quotation marks omitted)).[8]

Congress's express legislative findings with respect to the state residency requirement likewise fail to support the distinction made in the proposed final rule. These findings reflect Congress's concern over the "widespread traffic in firearms moving in or otherwise affecting interstate or foreign commerce," and the fact that "the existing Federal controls over such traffic do not adequately enable the States to control this traffic within their own borders through the exercise of their police power." Omnibus Crime Control and Safe Streets Act § 901(a)(1) (codified at 18 U.S.C. § 921 note). Congress concluded that this interstate traffic, which involved "the sale or other disposition of concealable weapons . . . to nonresidents of the State in which the licensees' places of business are located," tended to render ineffective "the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms." *Id.* § 901(a)(5). These findings focus on the states' ability to regulate and control firearms transactions and do not suggest any unique

[8] Congress subsequently adopted the Incarcerated Witness Fees Act of 1991, Pub. L. No. 102-417, 106 Stat. 2138 (1992), which amended the statute to eliminate witness fees for incarcerated persons.

concern with respect to state and local enforcement of firearms laws against aliens. In the Senate Report, statements concerning the state residency requirement, as originally enacted in the Omnibus Crime Control and Safe Streets Act, are to similar effect.[9]

In sum, we do not think Congress's use of the phrase "reside in . . . [a] State" supports different definitions of that phrase for citizens and aliens as a group, particularly in light of the principles of statutory interpretation laid out in *Clark*. We thus conclude that the proposed final rule reflects an interpretation of section 922(b)(3) that is not consistent with the statute.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

[9] *See, e.g.*, S. Rep. No. 90-1097, at 80 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2167 ("The provisions of the title which prohibit a licensee from disposing of firearms (other than rifles and shotguns) to persons who are not residents of the State in which [the FFL] conducts his business is justified by the record, which is replete with testimony documenting the fact that the purchase of such firearms by persons in other than their residence State is a serious contributing factor to crime."); *id.* at 114, *reprinted in* 1968 U.S.C.C.A.N. at 2204 (explaining that section 922(b)(3) "implements the strict controls over the interstate movements of pistols and revolvers in section 922(a)(2) as contained in the title," and is also "designed to prevent the avoidance of State and local laws controlling firearms other than rifles and shotguns by the simple expediency of crossing a State line to purchase one").

Use of FY 2009/2010 Funds by the General Services Administration to Assist the Department of Veterans Affairs in Acquiring Human Resources for FY 2012

The Department of Veterans Affairs properly obligated its Fiscal Year 2009/2010 funds when it and the General Services Administration signed an interagency agreement in August 2010, under which GSA agreed to assist the VA in obtaining a new contract for the provision of human resources.

GSA may use those funds in Fiscal Year 2012 to perform its obligations under the interagency agreement without running afoul of the requirement, developed by the Government Accountability Office, that servicing agencies acting under interagency agreements perform within a "reasonable time."

March 2, 2012

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF VETERANS AFFAIRS
AND THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

The Department of Veterans Affairs ("VA") and the General Services Administration ("GSA") have asked whether, consistent with federal appropriations law, they may undertake certain activities contemplated by an interagency agreement between the VA and GSA. This opinion memorializes the advice we provided in response to that question.

In the interagency agreement, GSA agreed to assist the VA in obtaining a new contract for the provision of human resources ("HR") services. Under Part B of the agreement, signed on August 3, 2010, the VA purported to obligate funds from its Fiscal Year ("FY") 2009/2010 appropriation to GSA. However, as of November 2011, GSA had not engaged in any meaningful services under that agreement because the VA and GSA have, until recently, been waiting for the Office of Management and Budget ("OMB") and the Office of Personnel Management ("OPM") to review and approve the VA's decision to proceed with a competition among private shared service centers to select the new HR services provider. Those approvals were finally granted in September 2011. The VA would now like to proceed with the acquisition.

Given the fact that it is now FY 2012, both agencies have asked whether GSA may still properly use the VA's FY 2009/2010 funds to

provide the agreed-upon assisted acquisition services. More specifically, they have asked whether, in using the VA's funds, GSA would satisfy the requirement, developed by the Government Accountability Office ("GAO"), that servicing agencies acting under interagency agreements perform within a "reasonable time." They also have asked whether the "reasonable time" construct applies at all in this unique context, where the delay in performing the tasks specified in an interagency agreement was caused not by the servicing agency but rather by the time required for the requesting agency—here, the VA—to meet conditions that had to be satisfied prior to performance.[1]

We informally advised that under the unusual circumstances presented here, the VA properly obligated its FY 2009/2010 funds when the VA and GSA signed Part B of the interagency agreement in August 2010, and that GSA may use those funds without running afoul of the "reasonable time" limitation developed by the GAO. Initially, we hesitated to extend the "reasonable time" concept to delay by requesting as well as servicing agencies in the absence of clear guidance from the GAO. But the logic of the GAO's concept is that an unreasonable delay by the servicing agency may cast doubt on whether the requesting agency had a bona fide need in the year of the appropriation and may suggest that the requesting agency was attempting to "park" funds for use during a later fiscal year. We believe that this logic may also apply when the requesting agency itself has unreasonably delayed performance of its assigned responsibilities, if that delay hinders the servicing agency's ability to use the funds, and circumstances suggest that the requesting agency did not have a bona fide need in the fiscal year of the appropriation. However, on the facts presented here—where the VA had an uncontested bona fide need for a nonseverable service in FY 2010; where neither the VA nor GSA had any reason or incentive to delay the use of the funds; and where the delay was attributable to a new, untried regulatory review process conducted by

[1] *See* Letter for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, from Will A. Gunn, General Counsel, Department of Veterans Affairs, and Kris E. Durmer, General Counsel, General Services Administration (Nov. 10, 2011), *with accompanying* Memorandum for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, from Will A. Gunn, General Counsel, Department of Veterans Affairs ("VA Memo"), *and* GSA Position Paper on VA Human Resources IT Procurement ("GSA Paper").

OMB and OPM—we conclude that neither the VA nor GSA failed to use the funds within a reasonable time and that the VA cannot be charged with having improperly "parked" its FY 2009/2010 funds with GSA.

I.

As noted above, the VA and GSA have entered into an interagency agreement in which GSA agreed to assist the VA in selecting a new provider of HR information systems services, which, in addition to providing new HR services, would migrate the VA's current HR system to the new system. GSA has the authority to perform these services for the VA under 40 U.S.C. § 501 (2006 & Supp. IV 2010), which authorizes GSA to perform services for executive agencies, and 40 U.S.C. § 321 (2006), which establishes the Acquisition Services Fund that finances GSA's Federal Acquisition Service.[2] The agreement was formed in two parts. The VA and GSA entered into Part A of the agreement on April 30, 2009. That part set out the purpose of the agreement and the respective roles and responsibilities of the two agencies. *See* Interagency Agreement Between Department of Veterans Affairs and General Services Administration, Federal Acquisition Service ("IA") pt. A (General Terms and Conditions). No fiscal obligations were created through the execution of Part A. *See id.* § A.1 (Purpose).

On August 3, 2010, the agencies signed Part B of the interagency agreement, which served as the funding document. The purpose of Part B was "to establish an agreement with the Servicing Agency [GSA] to assist the Requesting Agency [the VA] in obtaining a new contract to support the selection of a provider of Human Resources Information Systems (HRIS) services and migrate the VA to that provider for those services." IA pt. B (Requirements and Funding Information), § B.1 (Purpose). Part B specified that GSA would procure IT support for the VA and provide acquisition support services, including, among other things, preparing a solicitation, conducting a competition, and administering the contract, in order to assist the VA in migrating to "an HR system that is mandated by OMB." *Id.* §§ B.6, B.9. Part B purported to obligate to GSA $36,710,332.66 of the VA's information technology systems funds, from a two-year appropria-

[2] Accordingly, GSA was acting under statutory authority independent of the Economy Act, 31 U.S.C. § 1535 (2006).

tion that expired on September 30, 2010. *Id.* § B.12; *see* Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, div. E, tit. II, 122 Stat. 3574, 3706–07 (2008).[3] That total included a fee for GSA of $1,105,000. Part B of the interagency agreement did not condition the obligation of funds on any contingency or the need for regulatory approval.

Section B.9 of Part B incorporated by reference section A.6 of Part A, which set forth the specific roles and responsibilities of the VA and GSA. That section specified, among other things, that the VA, as the requesting agency, had to "comply fully with applicable procurement regulations and policies in all matters related to this IA." IA § A.6, Requesting Agency Roles and Responsibilities, #4. Among these applicable policies was the requirement, set out in relevant OMB and OPM guidance regarding so-called Human Resources Line of Business ("HRLoB") migrations, that an agency seeking to conduct a less than fully-open competition (such as a private-private or public-public competition) submit a full justification for that approach, set out in an Excepted Business Case ("EBC"), to OMB and OPM.[4] *See* Memorandum for Chief Human Capital Officers et al. from Linda M. Springer, Chairman & Director, Office of Personnel Management, and Clay Johnson III, Vice Chairman & Deputy Director for Management, Office of Management and Budget, *Re: Competition Framework for Human Resources Management Line of Business Migrations* at 4 (May 21, 2007) ("Agencies that wish to conduct a non-competitive migration or a migration based on private-private (if authorized) or public-public competition shall prepare a full justification, generally including the type of information called for by section 6.303-2 of the FAR [Federal Acquisition Regulations System]. . . . Agencies shall confer with OMB prior to proceeding with a migration through other than

[3] Section B.12 of the interagency agreement incorrectly stated that the appropriation expired in 2011. The VA and GSA agree that this statement was a clerical error. Section B.11 states that the agreement was for a "severable service." The agencies agree that this statement, too, was in error. As we discuss below, we agree that the services to be performed by GSA were plainly nonseverable, or "entire."

[4] Because a congressional rider was construed as barring public-private competitions for HRLoB services, *see* Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 737, 123 Stat. 524, 691, federal agencies seeking to migrate to new HR shared service centers were required to conduct either a public-public or a private-private competition, either of which involved a less than full competition. Thus, an EBC was required in any event.

a public-private competition."); OPM, *Migration Planning Guidance*, § 7.1, Selection Guidance: Migration Competition Framework ("Migration Competition Framework"), http://www.opm.gov/egov/documents/MPG/selectionguidance.asp#7.1 (last visited ca. Mar. 2012) ("Agencies that wish to conduct a non-competitive migration or a migration based on private-private competition or public-public competition shall prepare a full justification. . . . Agencies may wish to use the *Exception Business Case Template* . . . in preparing their justification to the Office of Management and Budget."); *see also* Migration Competition Framework (incorporating by reference the May 21, 2007 OMB memorandum).

Although the precise timing of its choice is unclear, either by the time the VA signed Part B of the interagency agreement or shortly thereafter, the VA had decided to use a private-private competition to select its HR service provider. The extent to which OMB and OPM had the authority to veto that decision is also unclear, but both the VA and GSA understood that the VA was required to submit a justification for its decision to OMB and OPM to obtain these agencies' approval. That understanding was not only supported by the OMB-OPM guidance requiring migrating agencies contemplating a public-public or private-private competition to submit an EBC to and "confer" with OMB before proceeding, but also was apparently confirmed in a meeting in August 2010 in which, according to subsequent VA e-mails, OMB and OPM provided the VA guidance on how to proceed with its HR services acquisition and suggested that the VA submit an EBC justifying its choice of either a public or private sector provider. VA Memo app. A, ¶ 16; *see* E-mail for Tonya Deanes from Robert Baratta, *Re: OMB/OPM Meeting on HRIS* (Aug. 2, 2010, 3:24 PM); E-mail for Carol A. Bales from Robert Baratta, *Re: VA's Plan for Selecting an HR LoB Shared Services Center* (Aug. 23, 2010, 3:24 PM). In addition, the memorandum from OPM ultimately recommending that the VA be allowed to proceed with its planned private-private competition states that agencies seeking to select and migrate to a new HR service provider "must seek OPM's and OMB's approval of their selection and migration decision"; and at the end of the memorandum, a box next to "Approve" is checked. Memorandum for Matthew E. Perry, Chief Information Officer, Office of Personnel Management, from Elizabeth A. Mautner, Program Manager, Office of Personnel Management, *Re: Human Resources Lines of Busi-*

ness, Department of Veterans Affairs—Exception Business Case at 1, 2 (Sept. 29, 2011) ("OPM Approval Memo").

The VA's submission of an EBC to OMB and OPM to justify a private-private competition was the first such submission ever made under the HRLoB process. The VA and GSA expected relatively quick approval, but the process of preparing an EBC and obtaining OMB and OPM approval was new and untried and took far longer than the VA and GSA had expected. *See* VA Memo at 6 ("It is important to note that no other federal agency has ever undertaken this exact private-private competition to modernize and migrate its HRLoB systems. No agency has gone through the OMB/OPM review process. There are no benchmarks, no regulatory deadlines, or temporal boundaries to guide the HRLoB migration."); GSA Paper at 2 ("The time it took for VA to obtain final approval of its EBC was substantially longer than either VA or GSA anticipated when they entered the IA[]."). The VA submitted a draft EBC to OPM in September 2010, VA Memo app. A, ¶ 17, but the VA needed both to conduct further market research before the EBC could pass muster with OMB and OPM, and to obtain necessary internal approvals. VA Memo at 6. Various unexpected developments delayed the necessary market research and vendor demonstrations, and the VA did not submit a final EBC for review until June 2011, followed by an updated version in August 2011. *Id.* at 6 & app. A, ¶¶ 27, 31. In the meantime, in November 2010, GSA advised the VA by letter that it would be unable to proceed with the issuance of a solicitation for bids until the VA's EBC was approved. Letter for Robert Baratta, Director, HR Line of Business/HRIS Program Office, Department of Veterans Affairs, from Bjorn Miller, Contracting Officer, General Services Administration, *Re: Approval of Exception Business Case* (Nov. 4, 2010).

On or about September 12, 2011, OMB notified the VA that it had approved its planned private-private competition. VA Memo app. A, ¶ 32. On September 29, 2011, at the very end of FY 2011, the HRLoB (OPM) program manager also recommended that the VA be allowed to proceed with its plan. *Id.* ¶ 33; OPM Approval Memo. As of that date, GSA had engaged in no meaningful services under the interagency agreement and had made no charges against the obligated funds. The VA and GSA are ready to proceed with the acquisition, but prior to doing so have asked

this Office whether GSA may properly use the VA's FY 2009/2010 funds in FY 2012.

II.

Under the VA and GSA's interagency agreement, the VA obligated FY 2009/2010 funds in order to obtain "acquisition services" from GSA—in particular, GSA's assistance in selecting a new HR provider for the VA and administering the contract with that provider. We advised that GSA may properly use those funds to perform its obligations under the interagency agreement, for three principal reasons. First, we think that the funds were validly obligated to procure nonseverable services for which the VA had a bona fide need in FY 2010 (during the availability of its appropriation), and it is settled law that such validly obligated funds can be used in subsequent fiscal years. Second, we do not think that the fact that the VA had to navigate a novel regulatory approval process before GSA could begin work renders the obligation invalid. And third, we conclude that the "reasonable time" doctrine does not prohibit GSA from using the funds, even though they are FY 2009/2010 funds that would be used in FY 2012.

A.

The recording statute, 31 U.S.C. § 1501 (2006), contemplates that agencies may enter into binding agreements creating recordable obligations with other agencies. *See id.* § 1501(a) ("An amount shall be recorded as an obligation of the United States Government only when supported by documentary evidence of . . . (1) a binding agreement between an agency and another person (including an agency)[.]"). It is settled fiscal law that where, as here, an interagency agreement is based on statutory authority other than the Economy Act,[5] an obligation under the agree-

[5] The Economy Act provides authority for agencies to contract with other agencies for goods or services. That Act requires that an amount obligated by one agency to another be deobligated if the agency filling the order has not incurred obligations to "provid[e] goods or services" or "mak[e] an authorized contract with another person to provide the requested goods or services," "before the end of the period of availability of the appropriation." 31 U.S.C. § 1535(d). As GSA points out, however, *see* GSA Paper at 1 n.1, the interagency agreement between the VA and GSA rests on authority independent

ment "will remain payable in full from the appropriation initially charged, regardless of when performance occurs, in the same manner as contractual obligations generally" if it satisfies "the *bona fide* needs rule and . . . any restrictions in the legislation authorizing the agreement." 2 Government Accountability Office, *Principles of Federal Appropriations Law* 7-30 (3d ed. 2006) ("*Federal Appropriations Law*"). "An interagency agreement . . . is akin to a contract and the obligational consequences are the same as if it were a contract." *Chemical Safety and Hazard Investigation Board—Interagency Agreement with the General Services Administration*, B-318425, 2009 WL 5184705, at *1 n.6 (Comp. Gen. Dec. 8, 2009).[6]

For contracts generally, as well as interagency agreements, funds may be obligated for the provision of services beyond the fiscal year of a time-limited appropriation only to the extent that a bona fide need existed in the year that obligational authority existed, and that the services constitute a single nonseverable undertaking. *See Transfer of Fiscal Year 2003 Funds from the Library of Congress to the Office of the Architect of the Capitol*, B-302760, 2004 WL 1146276, at *5 n.9, *7 (Comp. Gen. May 17, 2004) ("*Library of Congress*") (Library of Congress's FY 2003 funds obligated to the Architect of the Capitol through an interagency agreement are available for use in FY 2004 and 2005 to redesign and renovate a loading dock); *Interagency Agreement—Administrative Office of the U.S. Courts*, 55 Comp. Gen. 1497, 1498, 1500–01 (1976) (interagency agreement for automatic data processing services constitutes a valid obligation against the FY 1976 appropriation even though the necessary work would be performed in both FY 1976

---

of the Economy Act (40 U.S.C. §§ 321, 501), and thus is not subject to this restriction. *See, e.g.*, *National Park Service Soil Surveys*, B-282601, 1999 WL 795735, at *2 (Comp. Gen. Sept. 27, 1999) ("Where an interagency agreement is based on specific statutory authority independent of the Economy Act, the funds do not expire at the end of the period of availability if they have been otherwise properly obligated.").

[6] In addressing issues of fiscal law, we give serious consideration to the views of the Comptroller General, although they are not "controlling for executive branch officers." *Use of General Agency Appropriations to Purchase Employee Business Cards*, 21 Op. O.L.C. 150, 151 (1997); *see also id.* ("[T]he opinions and legal interpretations of the Comptroller General, although useful sources on appropriations matters, are not binding upon departments or agencies of the executive branch."). In addressing the issues here, we agree with the GAO's general approach.

and 1977); *see also Independent Statutory Authority of Consumer Product Safety Commission to Enter Into Interagency Agreements*, B-289380, 2002 WL 31628522, at *2 (Comp. Gen. July 31, 2002); *National Park Service Soil Surveys*, 1999 WL 795735, at *3; *Obligation of Funds for Purchase of Oil for Strategic Petroleum Reserve*, B-193005, 1978 WL 11174, at *3 (Comp. Gen. Oct. 2, 1978); *HUD—Corps of Engineers Flood Insurance Studies*, B-167790, 1977 WL 12105, at *2 (Comp. Gen. Sept. 22, 1977). Appropriated funds remain available to liquidate obligations properly chargeable to that account for five fiscal years after the period of availability. *Library of Congress*, 2004 WL 1146276, at *5 n.9 (citing 31 U.S.C. §§ 1552(a), 1553(a) (2000)).

Here, we believe that the VA had a bona fide need in FY 2010, when its obligational authority still existed, and that the services for which it was contracting were nonseverable. We discuss each conclusion in turn. The bona fide needs rule is a longstanding gloss by the GAO on the requirements of 31 U.S.C. § 1502 (2006).[7] The rule is that "[a] fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in, or in some cases arising prior to but continuing to exist in, the fiscal year for which the appropriation was made." 1 *Federal Appropriations Law* 5-11 (3d ed. 2004); *see also Funding of Grants by the National Institutes of Health*, 10 Op. O.L.C. 19, 21 (1986) ("*Funding of Grants*"); *National Park Service Soil Surveys*, 1999 WL 795735, at *3. Consistent with this rule, delivery of goods or performance of services in a fiscal year subsequent to the year in which a contract is executed does not necessarily preclude charging earlier fiscal year funds with the full cost of the goods or services. The test is whether the goods or services meet a bona fide need during the period in which obligational authority exists, regardless of when the work is actually performed. *EEOC—Payment for Training of Management Interns*, B-257977, 1995 WL

[7] The statute provides in relevant part:

> The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law.

31 U.S.C. § 1502(a).

683813, at *2 (Comp. Gen. Nov. 15, 1995); *see also Library of Congress*, B-302760, 2004 WL 1146276, at *5 & n.9.

The VA maintains that it had a clear bona fide need in FY 2010, during the availability of its two-year appropriation, to migrate its HR systems to a modern shared service center. VA Memo at 2; *see also* IA § B.6 (describing the VA's bona fide need to provide continuous HR services and support to its employee population and to migrate those services and support to an approved third-party provider by direction from OMB under the HRLoB initiative). Consistent with this contention, the VA's Determinations and Findings supporting the interagency agreement, signed by the VA in June 2010, expressed the VA's goal of selecting a new provider as soon as possible in FY 2010. Determinations and Findings for Project Entitled Human Resources Information Systems (HRIS) Human Resources Migration at 3. GSA does not dispute that the VA had a bona fide need for GSA's acquisition assistance services at the time the agencies signed Part B of the interagency agreement; indeed, GSA believes that the VA validly obligated its FY 2009/2010 funds at that time. GSA Paper at 3. GSA likewise does not dispute that the VA's bona fide need continues to exist.

A bona fide need, moreover, may arise in one fiscal year for services that by their nature cannot be separated for performance in separate fiscal years. The GAO has explained that the question whether to charge the appropriation current on the date the contract is made or the funds current at the time services are rendered depends upon whether the services are "severable" or "entire." 1 *Federal Appropriations Law* at 5-23; *see also Funding of Grants*, 10 Op. O.L.C. at 22. "The term 'severable services' refers to those services which are continuing and recurring in nature, such as window cleaning, maintenance or security services"; they are services "that can be separated into components that independently provide value to meet agency needs." *National Park Service Soil Surveys*, 1999 WL 795735, at *3. Under the bona fide needs rule, any portion of severable services completed in a subsequent fiscal year is chargeable only to appropriations available in the subsequent year. *Id.*

By contrast, an entire, or nonseverable, service is one that is not recurring in nature; such a service is more akin to a single project, the components of which do not individually provide value to the agency. For example, training tends not to be severable. 1 *Federal Appropriations Law* at 5-27; *Proper Appropriation to Charge for Expenses Relat-*

ing to Nonseverable Training Course, 70 Comp. Gen. 296, 297 (1991); *Payment for Training of Management Interns*, 1995 WL 683813, at *2. A nonseverable service for which an agency had a bona fide need at the time the agency orders or contracts for the service is properly charged to an appropriation current when the agency enters into the contract. *Interagency Agreement with the General Services Administration*, 2009 WL 5184705, at *3; *see, e.g.*, *Library of Congress*, 2004 WL 1146276, at *5 n.9 (construction of building loading dock was nonseverable undertaking) ; *Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders*, 73 Comp. Gen. 77, 79–80 (1994) (research work order was "entire" for purposes of the bona fide needs rule and thus chargeable to the appropriation available at execution rather than funds current when the research was performed); *Proper Fiscal Year Appropriation to Charge for Contract and Contract Increase*, 65 Comp. Gen. 741, 743 (1986) (study on adjustment needs of Vietnam veterans was not severable and should have been charged to the appropriation available when the contract was executed).

We agree with the VA and GSA that, in this instance, the VA contracted with GSA to obtain indivisible acquisition assistance services that would culminate in the selection of and migration to a new HR services provider. The individual activities in which GSA is to engage pursuant to the interagency agreement will be of no independent value to the VA; the point of the agreement, and its entire value to the VA, will be realized only when the migration of the VA's HR systems to the new provider is complete. Under these circumstances, we think that GSA's services are nonseverable. *See Financial Crimes Enforcement Network—Obligations Under a Cost-Reimbursement, Nonseverable Services Contract*, B-317139, 2009 WL 1621304, at *5 (Comp. Gen. June 1, 2009) (contract called for delivery of a defined end product—the design, development, and deployment of a data retrieval system—and thus was for a nonseverable services contract). Because the VA had a bona fide need in the year that obligational authority existed, and the services for which it contracted with GSA constitute a single nonseverable undertaking, GSA can perform services under the interagency agreement in a later fiscal year so long as the VA otherwise properly obligated the funds. *See Continued Availability of Expired Appropriation for Additional Project Phases*, B-286929, 2001 WL 717355, at *4 (Comp. Gen. Apr. 25, 2001) ("Nothing in the bona fide needs rule

suggests that expired appropriations may be used for a project for which a valid obligation was not incurred prior to expiration merely because there was a need for that project during that period.”).

B.

GSA agrees that the VA successfully obligated its FY 2009/2010 funds when the agencies signed Part B in August 2010. GSA Paper at 3. Although the agencies do not dispute that the funds were validly obligated, we considered whether the agreement satisfied the various statutory and GAO requirements for a valid obligation, including specificity, certainty, and definiteness. We also considered whether the existence of a required regulatory approval process post-dating the execution of Part B of the interagency agreement—through which the VA had to secure OMB and OPM concurrence before GSA could issue a solicitation and begin providing its assisted acquisition services—rendered the VA’s attempt to obligate its funds in August 2010 invalid. As we now explain, we conclude that the obligation satisfied these requirements and that the regulatory approval process did not render the obligation invalid.

Part B of the interagency agreement, which purports to obligate the VA’s FY 2009/2010 funds to GSA, satisfies the basic criteria for an “obligation” under the recording statute—namely, that an amount to be recorded as an obligation of the United States be supported by “documentary evidence of . . . a binding agreement between an agency and another person (including an agency) that is . . . in writing, in a way and form, and for a purpose authorized by law” and “executed before the end of the period of availability for obligation of the appropriation or fund used for specific . . . work or service to be provided.” 31 U.S.C. § 1501(a).

In our view, Part B also satisfies the basic definition of “obligation” set out in a long line of GAO authorities. *See, e.g.*, 2 *Federal Appropriations Law* at 7-3 (defining “obligation” as “a definite commitment which creates a legal liability of the Government for the payment of appropriated funds for goods and services ordered or received”); *see also* Government Accountability Office, GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process* 70 (2005); *To the Administrator, Agency for International Development*, 42 Comp. Gen. 733, 734 (1963). To be valid, an obligation of appropriations must be “definite and certain,” 2 *Federal Appropriations Law* at 7-3, and the agreement must be

for "specific" goods or services, *id.* at 7-17; 31 U.S.C. § 1501(a)(1)(B). As the Comptroller General has explained, "Congress did not want agencies to record obligations against current appropriations based on inchoate agreements—whether with vendors or other agencies." *Expired Funds and Interagency Agreements between GovWorks and the Department of Defense*, B-308944, 2007 WL 2120292, at *7 (Comp. Gen. July 17, 2007) ("*GovWorks*").

While the need for a regulatory step to be taken during the pendency of the VA's and GSA's agreement adds a complication on which we have found little guidance, the interagency agreement between the VA and GSA was, in our view, sufficiently definite, certain, and specific within the meaning of those terms as articulated by the GAO to create a binding obligation. Part B specifies the acquisition-related services the VA engaged GSA to perform. Part A, incorporated by reference in Part B, further delineates the roles and responsibilities of both the VA and GSA. Although the VA was required to obtain advance OMB-OPM approval of its plan to conduct a private-private competition, and although Part B of the agreement does not specify that GSA would be assisting the VA in conducting a private-private (as opposed to some other form of) competition, the services the VA asked GSA to provide were not so vague, contingent, tentative, or uncertain that they would cause the agreement to fail the GAO's specificity test. Rather, the VA hired GSA to provide "acquisition services" that consisted of conducting a competition for a new HR services provider for the VA.

In providing this specific, definite description of the tasks the servicing agency was to perform, the interagency agreement between the VA and GSA stands in contrast to other situations in which the GAO has found an agreement too indefinite or inchoate to form a valid obligation. *See, e.g.*, *To Betty F. Leatherman, Department of Commerce*, 44 Comp. Gen. 695, 697–98 (1965) (no "firm and complete" order for printing of sales promotion materials when a manuscript was not provided until more than seven months after the end of the fiscal year); *Natural Resources Conservation Service—Obligating Orders with GSA's AutoChoice Summer Program*, B-317249, 2009 WL 2004210, at *5–6 (Comp. Gen. July 1, 2009) (agency's order for motor vehicles was not "firm and complete" because the agency could not finalize its order until the following fiscal year when the next-year model car information first became available); *GovWorks*, 2007

WL 2120292, at *7 (three of four interagency agreements were too vague in their descriptions to establish the rights and duties of the Department of Defense and GovWorks—e.g., "equipment through the Pentagon IT Store"); *Status of Purchase Order as Obligation*, B-196109, 1979 WL 11928, at *1 (Comp. Gen. Oct. 23, 1979) (order lacking a description of the products to be provided, but which relied on "requisitions" to be sent under separate cover, was not "firm and complete"); *Director, International Operations Division*, B-155708-O.M. (Comp. Gen. Apr. 26, 1965), http://redbook.gao.gov/4/fl0016226.php (last visited ca. Mar. 2012) (loan agreement between United States and Brazil was not sufficiently "definite or specific" in providing that the funds would be used to finance programs in certain areas "as may, from time to time, be agreed upon in writing by A.I.D. and the Government"); *To the Honorable Secretary of State*, B-147196, 1965 WL 2883, at *2–4 (Comp. Gen. Apr. 5, 1965) (contracts were not specific as to services to be rendered when they provided for funds for refugee assistance "as determined by the supervising officer").

As we have noted, the fact that a particular regulatory step had to be taken after the agencies signed Part B of the interagency agreement complicates our assessment of the agreement's specificity and definiteness. We have not found definitive analysis on this point by the Comptroller General. For purposes of discussion, we accept the VA's and GSA's view that review and concurrence by OMB and OPM in the VA's planned private-private competition was a necessary regulatory step to be completed in the process before GSA was free to use the funds in conducting the acquisition. This step appears to have been the responsibility of the VA, the requesting agency. *See* IA § A.6, Requesting Agency Roles and Responsibilities, #4 (requesting agency must "comply fully with applicable procurement regulations and policies in all matters related to this IA"). Nevertheless, we do not perceive the requirement that the VA pursue this consultation-concurrence step as negating either the certainty or definiteness of the obligation the VA undertook with GSA. In at least one instance, the Comptroller General concluded that a contract with an express regulatory contingency was nonetheless sufficiently definite to create a valid obligation. *See Lawrence W. Rosine Co.*, 55 Comp. Gen. 1351, 1354–55 (1976) (award to a business on the condition that the contract would be terminated at no cost if the Small Business Administration found that it was not a small business was sufficiently definite to create a

binding agreement supporting the obligation of funds). Here, the VA obligated its FY 2009/2010 funds to GSA without even imposing an express condition in Part B—the obligation, in other words, was more certain and definite than the one at issue in *Rosine* because it was not *expressly* conditioned on OMB-OPM approval, which seems instead to be part of an assumed regulatory background for the contract. Furthermore, under Part A of the interagency agreement, section A.12, both agencies retained the right to terminate the agreement upon 30 days' written notice, enabling either agency to cancel the agreement in the event that a failure by OMB or OPM to approve the contemplated competition or conditions placed on that competition prevented GSA from carrying out the duties imposed on it under the interagency agreement. Thus, the agreement was definite, certain, and specific as written and understood by the agencies, but in the event that OMB or OPM interceded with a requirement that would have prevented GSA's performance, the agreement could have been terminated by either agency. We conclude, therefore, that the VA's obligation to comply with the OMB-OPM review process did not preclude it from entering into a binding agreement with GSA.

C.

Finally, although GSA agrees that the VA validly obligated its FY 2009/2010 funds when it signed Part B of the interagency agreement, GSA asks whether it will have acted within a "reasonable time" of the obligation of the funds if it renders services under the agreement more than one fiscal year after the funds' expiration. It also asks whether the "reasonable time" for a servicing agency to perform applies only to the time required for the servicing agency to fulfill its duties or whether it also includes time required by the requesting agency to satisfy conditions necessary for the servicing agency to begin performance. *See* GSA Paper at 2–4. We believe that on the facts presented here, the "reasonable time" requirement developed by the GAO would not prevent GSA from performing under the interagency agreement and using the funds in FY 2012.

The GAO has adopted a requirement, as a further gloss on the bona fide needs rule, that the servicing agency in an interagency agreement award a contract to a third party or otherwise perform within a "reasonable time." Although we have discovered little fiscal law from the Comptroller General on this point, the GAO appears to use a "reasonableness" standard to

evaluate the timeliness of a performing agency's actions. For example, in answering the question how long a performing agency has to execute a contract with a third party, consistent with the bona fide needs rule, the GAO has explained: "There is no hard and fast rule in this regard. Rather, the GAO uses a 'reasonableness' standard when evaluating the timeliness of a performing agency's actions, examining the circumstances surrounding transactions on a case-by-case basis." *See* Government Accountability Office, *Interagency Transactions: Roles and Responsibilities—Frequently Asked Questions* #3 (Mar. 13, 2008) ("GAO FAQ"), http://www.gao.gov/special.pubs/appforum2008/interagencytransactions.pdf. The Comptroller General has applied this test in circumstances in which an unreasonable delay on the part of the servicing agency might cast doubt on whether the requesting agency had a bona fide need for the goods or services during the fiscal year in which the funds were obligated.

The GAO's decision in *GovWorks*, an example of an agency's failure to satisfy the reasonable time requirement, involved circumstances wholly distinguishable from those here. In that case, the Department of Defense incurred an obligation against its FY 2004 appropriation in April 2004, when it transferred FY 2004 funds to GovWorks to obtain laser printers. GovWorks did not execute the contract to acquire those printers until almost 17 months later and 11 months after the end of FY 2004. The GAO had "no information suggesting that the printers GovWorks purchased on DOD's behalf [were] anything but readily available commercial items that GovWorks could have purchased on DOD's behalf with little lead time." 2007 WL 2120292, at *8. As such, the GAO found it "unreasonable" that GovWorks took 17 months to execute the contract to purchase the printers. *Id.* The GAO treated the passage of time prior to execution of the contract for the printers as strong evidence that, rather than fulfilling a bona fide need of FY 2004, the contract at best fulfilled a need of FY 2005. Moreover, the GAO concluded that, by transferring funds to GovWorks under several inadequate interagency agreements, three of which lacked specificity, the Department of Defense had improperly "parked" funds at GovWorks in an effort to extend the availability of time-limited appropriated funds. *Id.* at *10; *Federal Appropriations Law*, Annual Update of the Third Edition 5-3 (Mar. 2011), http://www.gao.gov/special.pubs/appforum2011/d11210sp.pdf (discussing the *GovWorks* decision). In this instance, by contrast, the VA was not contracting for the

purchase of a readily available commodity or service but for a major project, the migration of its HR system to a new provider. Nor, the agencies agree, was the delay in the use of the funds within the control of the servicing agency, GSA.

We know of no GAO decision applying the "reasonable time" restriction to delays on the part of the requesting, rather than the servicing, agency. But we also see no reason in principle why the logic of this GAO standard would not extend to unreasonable delays by the requesting agency, including delays that would cast doubt on whether the agency entered into an interagency agreement to fulfill a bona fide need of that first fiscal year and delays that would suggest that the agency was "parking" funds to prevent their lapse. We are not required to decide whether the "reasonable time" doctrine extends to delays on the part of the requesting agency, however, because even assuming it does, under the unusual circumstances present here, the VA has satisfied any such requirement.

In procuring a new HR system, the VA was proceeding under a new and untried regulatory process that involved obtaining approval from OMB and OPM to conduct a private-private competition. At the time the VA and GSA signed Part B of the interagency agreement, there were no benchmarks or settled expectations about the amount of time it would take to prepare an EBC that would pass muster and for OMB and OPM to concur. VA Memo at 6; GSA Paper at 2. The VA and GSA believed that the process would be reasonably quick, and certainly not as long as a year. Indeed, the VA's Determinations and Findings supporting the interagency agreement, signed by the VA in June 2010, expressed the VA's goal of selecting a new provider as soon as possible in FY 2010. Neither the VA nor GSA had any incentive to delay the performance of the agreement or the issuance of the solicitation. The VA's immediate need for the HR migration in FY 2010 was clear and undisputed; and, as noted above, the agreement was definite and intended for the acquisition of a unique, rather than routinely available, product. We have been given no basis to believe that the delay in OMB's and OPM's approval was attributable to dilatoriness by the VA. On these facts, and in the absence of any reason the VA should have expected the EBC process to take an entire fiscal year to complete, we conclude that the VA acted reasonably, that the delay was not attributable to any fault on its part, and that the lapse of time did not

throw into question the VA's bona fide need for GSA's services in FY 2010, when it obligated the funds.

Finally, we find that GSA would not run afoul of the "reasonable time" requirement by further contracting the VA's funds in FY 2012, two fiscal years after the VA incurred the obligation, rather than in the following year. *See, e.g.*, *Library of Congress*, 2004 WL 1146276, at *8 (FY 2003 funds could be applied to cover costs incurred in FY 2004 and 2005). Again, our understanding of the reasonable time concept is that it is contextual and imposes no rigid standard regarding the time in which a servicing agency must perform under an interagency agreement. *See* GAO FAQ #3. Because the OMB and OPM approvals have only recently been issued, and because we do not think the delay in obtaining those approvals violates the "reasonable time" requirement, we also conclude that GSA's reasonably timely performance following issuance of those necessary approvals would not violate that requirement.

For all of these reasons, we conclude that, in the unique circumstances here, the "reasonable time" requirement would not be violated by GSA's use of the VA's FY 2009/2010 funds in FY 2012, even if that requirement applies to delay by a requesting agency.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments

Where federal law enforcement officers have been deployed pursuant to the Stafford Act and are properly carrying out federal disaster relief in a local community, they may accept deputation under state or local laws that expressly authorize them to make arrests, where such arrests would bear a logical relationship to or advance the purposes of the Stafford Act deployment.

March 5, 2012

MEMORANDUM OPINION FOR THE ACTING CHIEF COUNSEL
BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES

You have asked whether federal law enforcement officers ("FLEOs") may accept deputation, conferred by state or local law, to make arrests for violations of state or local criminal laws, when they have been deployed to provide either disaster or emergency relief, or assistance in the aftermath of an act of terrorism.[1] Such deployments generally occur after a presidential declaration of a major disaster or emergency under the Robert

[1] *See* Memorandum for Kelly Dunbar, Attorney-Adviser, Office of Legal Counsel, from Stephen R. Rubenstein, Chief Counsel, Bureau of Alcohol, Tobacco, Firearms, and Explosives (Dec. 22, 2010) ("ATF Modified Request"). This request for advice superseded an earlier ATF request. *See* Memorandum for David Barron, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Stephen R. Rubenstein, Chief Counsel, Bureau of Alcohol, Tobacco, Firearms, and Explosives (July 16, 2010). In preparing our advice in response to the modified request, we solicited and received views from the Department of Homeland Security, *see* Memorandum for Cristina M. Rodríguez, Deputy Assistant Attorney General, Office of Legal Counsel, from the Office of the General Counsel, Department of Homeland Security (May 2, 2011) ("DHS Memo"); the Drug Enforcement Administration, *see* Memorandum for Cristina M. Rodríguez, Deputy Assistant Attorney General, Office of Legal Counsel, from Wendy H. Goggin, Chief Counsel, Drug Enforcement Administration (Mar. 4, 2011) ("DEA Memo"); the Federal Bureau of Investigation, *see* Memorandum for the Deputy Assistant Attorney General, Office of Legal Counsel, from Valerie Caproni, General Counsel, Federal Bureau of Investigation (Mar. 15, 2011) ("FBI Memo"); the Department of Agriculture, *see* E-mail for Cristina M. Rodríguez, Deputy Assistant Attorney General, Office of Legal Counsel, from Thomas Millet, Associate General Counsel, Natural Resources, Department of Agriculture (Mar. 8, 2011) ("Forest Service Memo"); and the United States Marshals Service, *see* E-mail for Cristina M. Rodríguez, Deputy Assistant Attorney General, Office of Legal Counsel, from Gerald Auerbach, General Counsel, United States Marshals Service (Feb. 24, 2011) ("USMS Memo").

T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5208 (2006 & Supp. IV 2010) ("Stafford Act"). As an operational matter, we understand that the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") coordinates the deployment of certain FLEOs under the auspices of Emergency Support Function 13 ("ESF-13"), the public safety and security component of the National Response Framework ("NRF"), which is the set of comprehensive plans and protocols that structure the federal government's response to disasters and emergencies.

We conclude that FLEOs may accept the deputation conferred by state law[2] and make arrests for violations of state law, as authorized by state deputation statutes,[3] when two conditions are met: Authority to make arrests under state law must be granted *expressly* by either federal or state law; and the FLEOs' exercise of authority must comply with the Purpose Act, 31 U.S.C. § 1301(a) (2006), which requires that federal funds be used only for the purposes for which they were appropriated. With respect to the first condition, we find that ATF's organic statute does not expressly grant FLEOs authority to make arrests for *state* law violations, and that the Stafford Act does not expressly grant federal officials *any* arrest authority, much less authority to make arrests for violations of state law. But state deputation laws that expressly authorize federal officials to make arrests for state law violations may fulfill the federal law requirement that FLEOs' arrest authority be expressly granted. With respect to the second condition, although state law may authorize FLEOs to make arrests for state law violations, state law cannot authorize the expenditure of federal resources. We conclude, however, that arrests made by FLEOs pursuant to express state law authorization and in the context of a Stafford Act deployment satisfy the Purpose Act when the arrests bear a "logical relationship to the objectives" of the Stafford Act. *See Use of General*

[2] You requested advice concerning state and local deputation laws. For ease of exposition, we will refer to state deputation laws throughout, but our analysis is equally applicable to valid local laws.

[3] Our conclusions in this memorandum pertain solely to FLEOs' authority to make arrests pursuant to state deputation laws during a Stafford Act deployment. Although our analysis may have implications for FLEOs' authority to perform other state law enforcement functions, such as the execution of search warrants, the seizure of evidence, or other investigatory activities, we do not address those authorities in this opinion.

Agency Appropriations to Purchase Employee Business Cards, 21 Op. O.L.C. 150, 153 (1997) ("*Employee Business Cards*"); *Indemnification of Department of Justice Employees*, 10 Op. O.L.C. 6, 8 (1986) ("*Indemnification of DOJ Employees*").

I.

The Stafford Act is the principal federal statute relied upon to deploy federal officials to assist state and local communities with disaster or emergency relief (collectively, "emergency relief"). Pursuant to the Act, the President may direct federal personnel, including FLEOs, to undertake various activities in support of state and local authorities in the event of any "major disaster." *See* 42 U.S.C. §§ 5170a, 5170b, 5192. The Act defines "major disaster" as "any natural catastrophe . . . or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this [Act]." *Id.* § 5122(2). The Act authorizes executive departments and agencies, under the direction of the Federal Emergency Management Agency within the Department of Homeland Security ("DHS"), to provide various forms of assistance to state and local communities. *See id.* § 5170a(1) (authorizing the President in "any major disaster" to "direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law (including personnel, equipment, supplies, facilities, and managerial, technical, and advisory services) in support of State and local assistance response or recovery efforts"); *id.* § 5170b(a) (authorizing federal agencies to "provide assistance essential to meeting immediate threats to life and property resulting from a major disaster," including "[p]erforming . . . any work or services essential to saving lives and protecting and preserving property or public health and safety"); *id.* § 5192 (authorizing similar federal assistance in "any emergency").

The federal government coordinates its emergency response efforts using the National Response Framework, a comprehensive set of planning documents and annexes that has been in place since January 2008. *See* DHS, *National Response Framework* (Jan. 2008), http://www.fema.gov/emergency/nrf/. ATF agents, in particular, are deployed pursuant to

ESF-13, the annex that sets out the federal resources that may be used to secure public safety and security in the event of an emergency.[4] *Emergency Support Function #13—Public Safety and Security Annex* at 13–14 (Jan. 2008) ("ESF-13"), http://www.fema.gov/pdf/emergency/nrf/nrf-esf-13.pdf. This annex designates the Department of Justice as the lead agency during response efforts, and the Department has, in turn, designated ATF to implement ESF-13 by coordinating federal security planning and general law enforcement efforts. According to the annex, state, tribal, local, and private-sector authorities "have primary responsibility for public safety and security." ESF-13, however, enables FLEOs to provide "public safety and security assistance to support preparedness, response, and recovery priorities in circumstances where State, tribal, and local resources are overwhelmed or inadequate, or where Federal-to-Federal support is needed or a unique Federal capability is required." ESF-13 at 4.

You have asked us whether FLEOs have the authority pursuant to state deputation laws to make arrests for violations of state criminal law during an ESF-13 deployment. As you have explained, to fulfill their public safety and security mission during such a deployment, FLEOs currently "polic[e] [certain] misdemeanor offenses," as authorized by state peace officer statutes. ATF Modified Request at 1. We concluded in a prior opinion that such statutes may confer arrest authority on federal officials in certain circumstances. *See infra* p. 85. But, as you have also explained, those peace officer statutes generally confer on FLEOs only authority to enforce state felony or violent misdemeanor laws. The state peace officer statutes may therefore leave FLEOs unable to fully address security threats in the wake of disasters, because the statutes do not provide FLEOs with authority to make arrests for non-violent misdemeanors, which could include violations associated with the "looting of businesses, pharmacies, banks, and homes." ATF Modified Request at 2. You have advised us that certain state deputation statutes, in contrast, would authorize FLEOs to exercise the same law enforcement authority that state

---

[4] Your request concerns circumstances in which an ESF-13 activation has occurred upon the request of the appropriate state official and after the President has made a Stafford Act declaration. *See* ATF Modified Request at 1; 42 U.S.C. § 5170.

officials possess, thus providing FLEOs with the authority to fully enforce state laws when deployed under ESF-13. *Id.*

Before turning to the question you have raised, we note that there is an additional federal statute that authorizes federal emergency assistance to states. The Emergency Federal Law Enforcement Assistance Act ("EFLEA"), 42 U.S.C. §§ 10501–10513 (2006), authorizes the Attorney General to provide federal law enforcement assistance to states during crime emergencies, in a manner analogous to the federal provision of assistance through the Stafford Act. Under EFLEA, upon receipt of a written application for assistance from a state governor, the Attorney General may provide "Federal law enforcement assistance" to a state overwhelmed by a "law enforcement emergency," where "State and local resources are inadequate to protect the lives and property of citizens or to enforce the criminal law." *Id.* §§ 10501, 10502(3). Such assistance may include "funds, equipment, training, intelligence information, [or] personnel." *Id.* §§ 10501(a)–(b), 10502(1). Congress made clear, however, that EFLEA is not the exclusive source of authority for federal emergency assistance to states and would not displace federal emergency assistance under the Stafford Act, by providing that "[n]othing" in the statute should "be construed to limit any authority to provide emergency assistance otherwise provided by law." *Id.* § 10503(e). Because EFLEA does not displace the Stafford Act, and because your request for advice concerns FLEOs' authority during an ESF-13 activation following a Stafford Act declaration, we do not consider whether EFLEA might provide FLEOs with express authority to make arrests for violations of state law. *See also infra* note 12.

II.

To determine whether FLEOs may make arrests for violations of state law during Stafford Act deployments, we begin with the well-established premise that federal authority to exercise law enforcement powers, including the authority to make arrests, "must be conferred expressly by statute." *Authority of the State Department Office of Security to Investigate Passport and Visa Fraud*, 8 Op. O.L.C. 175, 181 (1984) ("*Visa Fraud*"); *see* Memorandum for the Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Request by the*

Department of Justice for Assistance from the Department of Treasury in the Enforcement of the Controlled Substances Act, 21 U.S.C. §§ 801 et seq., and the Controlled Substances Import and Export Act, 21 U.S.C. §§ 951 et seq. at 7 (Dec. 23, 1983) ("special law enforcement powers such as the right to make arrests without warrant and execute search warrants must be conferred expressly by statute"). This requirement derives in part from the fact that the power to arrest is an "awesome power." *Moore v. Marketplace Rest., Inc.*, 754 F.2d 1336, 1346 (7th Cir. 1985). The requirement accordingly ensures that this power is exercised only pursuant to specific legislative authorization. *See also Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000); *Guffey v. Wyatt*, 18 F.3d 869, 872 (10th Cir. 1994).

Numerous federal statutes expressly authorize various federal officers to make arrests for specified types of violations, but we are aware of no authority for the proposition that "a federal officer may exercise these powers without express statutory authority." Memorandum for Robert Davis, Special Assistant to the Deputy Attorney General, from Jim Hirschhorn, Attorney-Adviser, Office of Legal Counsel, *Re: Present Statutory Authority for DEA Deputization Arrangements* (May 31, 1979); *see also* Memorandum for William H. Webster, Director, Federal Bureau of Investigation, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Use of FBI Support Personnel to Monitor Title III Surveillance* at 19 (Oct. 31, 1984) ("law enforcement powers such as the right to carry firearms, make arrests without warrant, execute search warrants, and seize evidence, are expressly conferred by statute on 'agents' of the responsible agency").

Moreover, though many federal statutes expressly confer arrest authority on FLEOs, as a general rule these statutes expressly authorize FLEOs to enforce only *federal* law.[5] For example, in reviewing the authorities

[5] *See* 28 U.S.C. § 533 (2006 & Supp. III 2009) (authorizing Attorney General to appoint officials to "detect and prosecute crimes against the United States"; "assist in the protection of the person of the President" and the "Attorney General"; and conduct "other investigations regarding official matters under the control of" the Departments of Justice and State); 28 C.F.R. § 0.85(a) (2008) (authorizing the Federal Bureau of Investigation to investigate violations of federal law unless jurisdiction is specifically assigned to another agency); 18 U.S.C. § 3052 (2006) (authorizing certain officials, and "inspectors and agents" of the Federal Bureau of Investigation, to "carry firearms, serve

that define the jurisdiction of the Federal Bureau of Investigation ("FBI"), we have emphasized that they provide FBI agents with authority to enforce federal law, *not* to take action with respect to violations of state law. *See Responsibility and Authority of FBI Agents to Respond to Criminal Offenses Outside the Statutory Jurisdiction of the FBI*, 2 Op. O.L.C. 47, 47–48 (1978) ("*FBI Jurisdiction*"). As we also have observed, "[s]everal courts have noted that, in the absence of a congressional mandate, Federal agents have no power under Federal law to arrest for State offenses." *Id.* at 48; *cf. Authority of the Federal Bureau of Investigation to Investigate Police Killings*, 5 Op. O.L.C. 45, 48–49 (1981) ("*Police Killings*") (reaffirming conclusions of *FBI Jurisdiction* opinion). We accordingly have advised that, if no explicit federal authority to arrest for state offenses exists, "FBI agents cannot act under Federal authority and must rely instead on State law." *FBI Jurisdiction*, 2 Op. O.L.C. at 48; *see also Authority of FBI Agents, Serving as Special Deputy United States Marshals, to Pursue Non-Federal Fugitives*, 19 Op. O.L.C. 33, 45 (1995) (advising that U.S. Marshals "generally lack any inherent or common law authority to pursue or arrest fugitives wanted solely for state law violations," where there is no "reason to believe that the pursuit or arrest will prevent the commission of a federal felony").

In light of this long-settled precedent, we must find an express statutory grant of authority to FLEOs to make arrests for state law violations in order to conclude that FLEOs mobilized during an ESF-13 activation have that power. We conclude that, while neither ATF's organic statute nor the

---

warrants and subpoenas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony"); 28 U.S.C. § 566(d) (2006) ("[e]ach United States marshal, deputy marshal, and any other official of the Service as may be designated by the Director may carry firearms and make arrests without warrant for [certain federal offenses]"); 21 U.S.C. § 878 (2006) (authorizing any "officer or employee of the Drug Enforcement Agency" to "carry firearms"; "execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States"; and "make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony").

Stafford Act expressly provides such authority, certain state deputation laws may.

A.

As set forth above, the organic statutes of federal law enforcement agencies typically provide FLEOs with express authority to enforce federal but not state law. *See supra* note 5 and accompanying text (collecting statutory authorities). Under its organic statute, ATF is charged primarily with investigating "criminal and regulatory violations of the *Federal* firearms, explosives, arson, alcohol, and tobacco smuggling laws." 28 U.S.C. § 599A(b)(1) (2006) (emphasis added). By its terms, that statute does not confer on ATF agents the authority to make arrests for state law violations or otherwise to enforce state law.

We also conclude that the Stafford Act does not expressly authorize FLEOs to make state law arrests. The Stafford Act contains no reference at all to law enforcement or arrest authority. And the NRF and ESF-13 frameworks implementing FLEO deployments in disasters and emergencies are not themselves legal authorities that could provide the requisite express authorization. This determination is in accord with the conclusions of several of the agencies whose views we solicited.[6]

To be sure, certain provisions of the Stafford Act, if construed broadly, could be read to contemplate FLEO enforcement of some state laws. Section 5170b(a)(3) authorizes federal agencies to perform "any work or services essential to saving lives and protecting and preserving property or public health and safety," and "includ[es]," as one example of such work, actions to "reduc[e] . . . immediate threats to life, property, and

[6] *See* DEA Memo at 3 ("Neither ESF-13 nor the Stafford Act appears to provide authority for [FLEOs] to enforce state laws."); DHS Memo at 4 ("[T]he Stafford Act contains no explicit provision authorizing [FLEOs] to make arrests and detentions in connection with violations of State criminal law in a manner other than in accordance with State or local law, such as State law regulating deputation."); FBI Memo at 3 ("We do not believe that the Stafford Act provides authority for federal law enforcement officials to make arrests in connection with an ESF-13 activation."); Forest Service Memo at 5 ("We have not interpreted [the Stafford Act] alone as authorizing Forest Service [law enforcement officers] to investigate or enforce violations of state criminal law."); USMS Memo at 2 n.4 ("[T]he 'Stafford Act' does not appear to provide for federal law enforcement assistance during national emergencies.").

public health and safety." 42 U.S.C. § 5170b(a)(3). It could be argued, for example, that in certain circumstances, FLEOs' enforcement of state criminal laws would be "essential" to saving lives and protecting public health and safety, and would "reduce" immediate threats to "life, property, and public health and safety." *Id.* As a result, these provisions could be read to confer some law enforcement authority, including arrest authority, on deployed FLEOs. But, as detailed above, arrest authority must be "conferred expressly," *Visa Fraud*, 8 Op. O.LC. at 181, and the most one could say of these provisions is that the authority to enforce state criminal law, including through the making of arrests, may be inferred from them. In any event, the other examples of activities Congress expected federal agencies to perform, as listed in section 5170b(a)(3), include "debris removal," "search and rescue," "clearance of roads," and "demolition of unsafe structures." *Id.* These activities are different in kind from the enforcement of state criminal law, making it difficult to conclude that Congress intended the Stafford Act to authorize FLEOs to make arrests for state law violations. *See Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 8 (1985) (noting "familiar principle of statutory construction that words grouped in a list should be given related meaning" (internal quotation marks omitted)).

B.

The fact that neither ATF's organic statute nor the Stafford Act provides FLEOs with express authority to make arrests for state law violations does not end the analysis. As this Office explained in an opinion addressing the authority of FBI agents, although "agents may be without *Federal* authority to intervene in State offenses," state law may supply the necessary authority to act in certain circumstances. *FBI Jurisdiction*, 2 Op. O.L.C. at 47 (emphasis added). In particular, in the *FBI Jurisdiction* opinion, we identified state laws conferring arrest authority upon "private citizens" and "peace officers" as examples of laws that might authorize "FBI agents . . . in certain instances . . . to arrest those who have violated State or local law," depending upon their precise provisions. *Id.*

In neither the *FBI Jurisdiction* opinion nor subsequent advice have we identified state deputation laws as potential sources of authority for FLEOs to make state law arrests. We do not, however, see a material

difference between the peace officer and citizens' arrest provisions we have assessed in the past and state deputation laws generally. As we discuss below, during a Stafford Act deployment, it may often serve a federal purpose for FLEOs to make arrests for violations of state law. *See infra* p. 91. In that setting, the requirement that legislation expressly confer arrest authority on FLEOs, as well as that requirement's purpose—that the "awesome power," *Moore*, 754 F.2d at 1346, to arrest and detain be clearly assigned and delineated—will have been fulfilled if state law expressly authorizes FLEOs to make such arrests. In other words, there is no requirement that FLEOs' arrest authority come from a federal source, only that it be expressly conferred by a legislative act.

We therefore conclude that state deputation laws may provide FLEOs with the express authority to make arrests for violations of state criminal laws. You have not asked us about the scope of any particular state deputation law. As a result, we have not considered whether any such law would provide the requisite express authority. We emphasize, however, that whether a law confers express arrest authority in any given circumstance will depend on the details of the state law at issue, which may, for example, limit which federal officials may be deputized, or require that certain prerequisites be satisfied for deputation to be effective. *See FBI Jurisdiction*, 2 Op. O.L.C. at 49 ("The authority granted by the States to peace officers and private citizens to arrest without warrant may . . . vary from State to State."); *see, e.g.*, Okla. Stat. Ann. tit. 19, § 547 (West 2011) ("The sheriff or the undersheriff may in writing depute certain persons to do particular acts."); N.C. Gen. Stat. § 15A-406 (2010) (authorizing particular federal officers to enforce state criminal laws at the request of various state officials). As a result, when deployed pursuant to an ESF-13 mobilization, FLEOs should carefully review any relevant state deputation law (or other state authorizing laws) to determine whether any prerequisites to the state deputation exist, and to identify the scope of the authority granted.

III.

The final dimension of our inquiry concerns whether federal appropriations law precludes FLEOs mobilized pursuant to the Stafford Act from making arrests authorized by state law. Even if FLEOs have been express-

ly authorized to make arrests for violations of state criminal law by state statutes, they cannot exercise that authority if doing so would contravene the federal Purpose Act. State law cannot authorize federal officers to make "expenditures that would be incurred in the course of" enforcing state law. *Police Killings*, 5 Op. O.L.C. at 49. As explained below, under the Constitution and applicable statutes, only Congress may authorize expenditures of federal funds. Unlike arrest authority itself, however, the authority to expend funds to make state law arrests need not be expressly conferred. Instead, FLEOs may exercise state-conferred arrest authority: (1) when they have been properly deployed under federal law; and (2) when the arrest would advance the purposes of that federally authorized deployment.

The Constitution directs 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. Congress has adopted several statutes reflecting this constitutional principle, among them the Purpose Act, which the Comptroller General has described as "one of the cornerstones" of federal appropriations law. 1 General Accounting Office, *Principles of Federal Appropriations Law* 4-6 (3d ed. 2004) ("*Federal Appropriations Law*"). The Purpose Act provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law." 31 U.S.C. § 1301(a). The Act reflects longstanding Supreme Court precedent under which it is an "established rule" that "the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." *United States v. MacCollom*, 426 U.S. 317, 321 (1976); *see also Reeside v. Walker*, 52 U.S. 272, 291 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.").

Equally well established, however, is the principle that the Purpose Act leaves federal agencies with "considerable discretion in determining whether expenditures further the agency's authorized purposes and therefore constitute proper use of general or lump-sum appropriations." *Employee Business Cards*, 21 Op. O.L.C. at 153. We have advised that, "'[i]f the agency believes that [an] expenditure bears a logical relation-

ship to the objectives of the general appropriation, and will make a direct contribution to the agency's mission, the appropriation may be used,'" unless some "specific provision limits the amount that may be expended on a particular object or activity within [the] general appropriation." *Id.* at 153–54, 156 (quoting *Indemnification of DOJ Employees*, 10 Op. O.L.C. at 8); *see also Indemnification of Treasury Department Officers and Employees*, 15 Op. O.L.C. 57, 60 (1991) (an expenditure satisfies this doctrine if it "directly accomplishes the specific congressional purpose underlying the appropriation"; "incidentally accomplishes a specific congressional purpose"; or "is generally 'necessary' for the realization of broader agency objectives covered by the appropriation").

The Comptroller General has adopted a doctrine that mirrors this Office's standard. The Comptroller General will find an expenditure permissible as a necessary expense if the expenditure, among other things, "bear[s] a logical relationship to the appropriation sought to be charged," i.e., "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." 1 *Federal Appropriations Law* at 4-21; *see also, e.g.*, *U.S. Commodity Futures Trading Commission—Availability of the Consumer Protection Fund*, B-321788, 2011 WL 3510145, at *3 (Comp. Gen. Aug. 8, 2011).[7] With respect to this "logical relationship" requirement, the Comptroller General has explained that it is not "essential" that a federal agency have "specific statutory authority" to make an expenditure. 1 *Federal Appropriations Law* at 4-26. If an expenditure "is directly connected with and is in furtherance of the purposes for which a particular appropriation has been made . . . the appropriation is available for the expenditure." *Id.*; *see also National Transportation Safety Board—Insurance for Employees Traveling on Official Business*, B-309715, 2007 WL 2792189, at *2 (Comp. Gen. Sept. 25, 2007) ("The necessary expense rule recognizes that when Congress makes an appropriation for a particular purpose, by

[7] The Comptroller General's test for necessary expenses also requires that the expenditure "not be prohibited by law" and "not be otherwise provided for, that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme." 1 *Federal Appropriations Law* at 4-21 to 4-22. We have found no prohibition on the expenses that might be implicated here, and we discuss below the requirement that the expenditure not fall within the scope of some other appropriation. *See infra* note 12.

implication it authorizes the agency involved to incur expenses which are necessary or incident to the accomplishment of that purpose."); *Department of Homeland Security—Use of Management Directorate Appropriations to Pay Costs of Component Agencies*, B-307382, 2006 WL 2567514, at *3 (Comp. Gen. Sept. 5, 2006) ("Even if a particular expenditure is not specifically provided for in the appropriation, the expenditure may be permissible under the necessary expense doctrine if it will contribute materially to the effective accomplishment of the [agency] function.").[8]

To decide whether expenditures related to the exercise of state-conferred arrest authority would satisfy the "logical relationship" standard, we must first determine whether an appropriation is available to pay for such expenditures.[9] We find that an appropriation would be available in certain circumstances. Actions taken by FLEOs in the course of their deployment pursuant to the Stafford Act would likely be funded by the appropriations available for the "salaries and expenses" of ATF officers. Thus, for example, ATF's appropriation for "salaries and expenses" would be available to fund Stafford Act-related activity for which ATF officers were properly deployed. *See* Consolidated and Further Continuing

---

[8] Though not binding on Executive Branch agencies, "[t]he opinions and legal interpretations of the General Accounting Office and the Comptroller General often provide helpful guidance on appropriations matters and related issues." *Applicability of Government Corporation Control Act to "Gain Sharing Benefit" Agreement*, 24 Op. O.L.C. 212, 216 n.3 (2000).

[9] In our *Police Killings* opinion, we interpreted the Purpose Act to limit FLEOs' exercise of authority to engage in state law enforcement activity, concluding that no matter how expansive the scope of authority conferred by state law, federal appropriations law would bar such officers from generally exercising that authority except "in an emergency situation" that "involve[s] no extraordinary expenses." 5 Op. O.LC. at 49 n.7 (citing *FBI Jurisdiction*). In the *FBI Jurisdiction* opinion, we defined such emergency situations as those in which a federal agent "witnesses, or is in the immediate vicinity of, [a state law] crime, and immediate action is required to detain or arrest the offender." 2 Op. O.L.C. at 47. But you have asked not whether FLEOs *generally* have authority to make arrests for state law violations, but instead whether FLEOs properly deployed under the Stafford Act may make arrests for state law offenses after they have been deputized under state laws. *See* Modified ATF Request at 1–2. Thus, the Purpose Act inquiry here differs from our inquiry in the *Police Killings* opinion because our analysis here turns on the logical relationship between the FLEOs' state law enforcement activity and the specific purposes of the federally authorized deployment of those FLEOs.

Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609–10 (2011); *see also* 42 U.S.C. § 5170a(1) ("In any major disaster, the President may direct any Federal agency, with or without reimbursement, to utilize its authorities and the resources granted to it under Federal law . . . in support of State and local assistance response").[10]

We thus conclude that the funds appropriated for ATF salaries and expenses may be used for expenditures arising from arrests expressly authorized by state law and made by deputized ATF officers deployed under the Stafford Act, as long as such expenditures bear "a logical relationship to the objectives" of the Stafford Act deployment. *Indemnification of DOJ Employees*, 10 Op. O.L.C. at 8. Determining whether a logical relationship exists between an expenditure and the purposes of the Stafford Act will require an assessment of the factual circumstances that FLEOs encounter in connection with the disaster or emergency in question. ATF and appropriate Department of Justice officials will have to make the required determination based on the particular circumstances the ATF officers face during their deployment. *See Customs and Border Protection—Relocation Expenses*, B-306748, 2006 WL 1985415, at *3 (Comp. Gen. July 6, 2006) (noting the relevant agency "is in the best position to determine whether" an expenditure of funds is necessary to carry out the agency's mission effectively); *Department of the Air Force—Purchase of Decals for Installation on Public Utility Water Tower*, B-301367, 2003 WL 22416499, at *2 (Comp. Gen. Oct. 23, 2003) ("The application of the necessary expense rule, in the first instance, is a matter of agency discretion.").

In the context of some Stafford Act deployments, it may be clear from the outset that particular expenditures will directly further, and thus

[10] As DHS has explained to us, to fulfill its responsibilities under the Stafford Act, DHS "receives an appropriation known as the Disaster Relief Fund (DRF)." DHS Memo at 12. Pursuant to the Stafford Act, agencies other than DHS may seek reimbursement from the DRF for expenditures undertaken in the context of a Stafford Act deployment to "provide assistance essential to meeting immediate threats to life and property resulting from a major disaster," 42 U.S.C. § 5170b(a), including "any work or services essential to saving lives and protecting and preserving property or public health and safety," *id.* § 5170b(a)(3). But regardless of whether reimbursement from the DRF is sought, ATF's expenditures during a Stafford Act deployment would be covered in the first instance by its appropriation for salaries and expenses.

logically relate to and materially advance, the purposes of the relevant deployment. In enacting the Stafford Act, Congress found that "disasters often disrupt the normal functioning of governments and communities" and that "special measures, designed to aid the efforts of the affected States in expediting the rendering of aid, assistance, and emergency services, and the reconstruction and rehabilitation of devastated areas, are necessary." 42 U.S.C. § 5121(a); *see id.* § 5121(b). Thus, for example, we think it likely that ATF could reasonably conclude that federal assistance in maintaining law and order by making arrests for violations of state criminal law in the aftermath of an emergency (as when FLEOs are deployed to prevent looting and maintain order in a populated area following a natural disaster) would advance those Stafford Act objectives.[11] It is also easy to envision situations in which state law arrests by FLEOs would be incident to or necessary to carry out an activity expressly authorized by the Stafford Act, such as "assist[ing] State and local government in the distribution of medicine, food, and other consumable supplies," *id.* § 5170a(4), or "[p]erforming . . . work or services essential to saving lives and protecting and preserving property or public health and safety," *id.* § 5170b(a)(3). *See also* DHS Memo at 13 (suggesting that state law arrests by deputized FLEOs would be "eligible for reimbursement from the [Disaster Relief Fund] because it furthers a specific purpose authorized by the Stafford Act—meeting an immediate threat to life and property").

IV.

We underscore that appropriated funds are available to pay for ATF's exercise of state-conferred arrest authority only when FLEOs have been deployed pursuant to the Stafford Act to carry out a federal mission and are therefore in a position to make arrests for state law violations in the course of their deployment. Our analysis would not support the dispatch

[11] In light of this analysis, we need not determine whether arrests in the circumstances you have identified might fall within the exigent circumstances exception discussed in our *FBI Jurisdiction* opinion, *see supra* note 9. If the relevant FLEOs have been deputized by a state law that expressly confers arrest authority, and if the arrests you describe will advance the objectives of the relevant Stafford Act deployment, there is no need to invoke exigent circumstances to support arrest authority.

of FLEOs to make arrests for state law violations in the absence of a valid Stafford Act deployment. *See supra* note 9. We conclude only that, where FLEOs have been deployed pursuant to the Stafford Act and are properly carrying out federal disaster relief in a local community, FLEOs may accept deputation under state laws that expressly authorize them to make state law arrests, where such arrests would bear a logical relationship to or advance the purposes of the Stafford Act deployment.[12]

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

---

[12] As noted above, *see supra* pp. 87–88, this Office has indicated that a general appropriation may not be used if some "specific provision limits the amount that may be expended on a particular object or activity within [the] general appropriation." *Employee Business Cards*, 21 Op. O.L.C. at 156 (quoting *Indemnification of DOJ Employees*, 10 Op. O.L.C. at 8). Similarly, under the Comptroller General's formulation of the doctrine, "the existence of a more specific source of funds, or a more specific statutory mechanism for getting them," can "override[] the 'necessary expense' considerations." 1 *Federal Appropriations Law* at 4-30; *see also supra* note 8.

We previously observed that another federal statute, EFLEA, may be relevant to FLEOs' authority to make arrests for violations of state criminal laws in the specific law enforcement emergencies that EFLEA identifies. *See supra* p. 81. This raises the potential concern that, where EFLEA applies, funds appropriated under EFLEA must be used for deployments, and invocation of the necessary expense doctrine in relation to the Stafford Act would be precluded. In fact, however, Congress has clearly indicated that EFLEA is not exclusive, even where it applies, and therefore that EFLEA does not limit the President's authority to provide emergency assistance under the Stafford Act. *See* 42 U.S.C. § 10503(e) ("Nothing" in EFLEA should "be construed to limit any authority to provide emergency assistance otherwise provided by law."). Thus, the President may always elect to respond to emergencies under the Stafford Act, using appropriated funds that are available to further the purposes of Stafford Act deployments. *Cf. Securities and Exchange Commission—Supplemental Appropriation*, B-322062, 2011 WL 6076288, at *3 (Comp. Gen. Dec. 5, 2011) ("where one appropriation clearly supplements another appropriation, then both appropriations may be used for the same purpose").

Altering Puerto Rico's Relationship with the United States Through Referendum

Legislation conditioning a change in Puerto Rico's political relationship with the United States on the results of one or more referenda by the Puerto Rican electorate, without subsequent congressional action, would be constitutional, insofar as the referendum or referenda presented voters in the territory with a limited set of options specified in advance by Congress.

March 7, 2012

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

In your role as co-chair of the President's Task Force on Puerto Rico's Status, you asked us to consider whether "the President [may] support and Congress enact legislation that triggers implementation of whichever status outcome the citizens of Puerto Rico choose with no further action by Congress (with the understanding that such legislation may not be binding on future Congresses)."[1] This memorandum memorializes advice we provided to you prior to the release of the Report by the President's Task Force in March 2011.[2] For the reasons given below, we concluded that legislation conditioning a change in Puerto Rico's political relation-

[1] E-mail for Jonathan Cedarbaum, Deputy Assistant Attorney General, Office of Legal Counsel, from Mala Adiga on behalf of Thomas J. Perrelli, Associate Attorney General, *Re: Puerto Rico Questions* (June 14, 2010).

[2] *Report by the President's Task Force on Puerto Rico's Status* (Mar. 2011), http://www.whitehouse.gov/sites/default/files/uploads/Puerto_Rico_Task_Force_Report.pdf ("2011 Task Force Report"). President Clinton established the President's Task Force on Puerto Rico's Status by executive order on December 23, 2000. *See* Exec. Order No. 13183, 3 C.F.R. 340 (2001), *reprinted as amended in* 48 U.S.C. § 731 note (2006 & Supp. IV 2010). As amended by subsequent executive orders, this order provides that the Task Force is "composed of designees of each member of the President's Cabinet and the Deputy Assistant to the President and Director for Intergovernmental Affairs," and is co-chaired by the Attorney General's designee and the Deputy Assistant to the President and Director for Intergovernmental Affairs. *Id.* § 2; *see* Exec. Order No. 13517, 74 Fed. Reg. 57,239 (Oct. 30, 2009); Exec. Order No. 13319, 3 C.F.R. 267 (2004); Exec. Order No. 13209, 3 C.F.R. 765 (2002). The Task Force is responsible for, among other things, "ensur[ing] official attention to and facilitat[ing] action on matters related to proposals for Puerto Rico's status and provid[ing] advice and recommendations on such matters to the President and the Congress." Exec. Order No. 13183, § 3.

ship with the United States on the results of one or more referenda by the Puerto Rican electorate, without subsequent congressional action, would be constitutional, insofar as the referendum or referenda presented voters in the territory with a limited set of options specified in advance by Congress.

Congress generally may condition the legal effect of legislation on the existence of future contingencies, including whether an affected constituency approves the legislation. Neither of the clauses of the Constitution relevant here—the Territory Clause or the State Admission Clause—restricts Congress's authority to enact legislation that would condition a change in a territory's political relationship with the United States on the outcome of a territorial referendum. Moreover, an extensive and longstanding congressional practice of granting statehood or independence to territories upon approval by the territory's electorate and without the need for subsequent congressional action confirms the constitutionality of this method for changing a territory's status. This Office and various Department officials repeatedly have endorsed this view over the years, including with respect to Puerto Rico.

We note at the outset that there are limitations on Congress's authority to provide for certain outcomes. The Executive Branch, for example, has long taken the position that Congress may not constitutionally provide for the so-called "enhanced commonwealth" status, to the extent that such status would entail requiring the consent of the Puerto Rican people before Congress could make any subsequent changes in Puerto Rico's political relationship with the United States.[3] In this memorandum, we address only the constitutionality of a particular process by which a change in Puerto Rico's relationship with the United States might be brought about: a process that would involve the passage of federal legislation that would condition its own effects on the outcome of a vote by Puerto Rico's electorate and would not require any subsequent action by Congress.

I.

The Supreme Court has described Puerto Rico as having "a relationship to the United States 'that has no parallel in our history.'" *Califano v.*

---

[3] *See* 2011 Task Force Report, *supra* note 2, at 26.

Torres, 435 U.S. 1, 3 n.4 (1978) (per curiam) (quoting *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 596 (1976)). The United States acquired Puerto Rico from Spain in 1898, pursuant to the Treaty of Paris that concluded the Spanish-American War. Over time, in successive organic statutes that established local governmental institutions for the territory, Congress gave Puerto Rico increasing degrees of autonomy. Puerto Rico acquired its current status as a self-governing "commonwealth" through federal statutes passed in 1950 and 1952. The former authorized the Puerto Rican people to adopt a constitution for Puerto Rico's local self-government, and the latter approved the proposed constitution (subject to the inclusion of certain amendments). *See* Pub. L. No. 82-447, 66 Stat. 327 (1952); Pub. L. No. 81-600, 64 Stat. 319 (1950) (codified at 48 U.S.C. §§ 731b–731e (2006)).[4]

Today, Puerto Rico has extensive powers of self-government. In "many respects," its government "resembles that of a state," in that it consists of "an elected governor and legislature, and its legislature has powers akin to those exercised by the states." *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 7 (1st Cir. 1992); *see also Examining Bd.*, 426 U.S. at 594 (Puerto Rico possesses "the degree of autonomy and independence normally associated with States of the Union"). Indeed, for many federal administrative purposes, Puerto Rico is treated as the functional equivalent of a State. In 1992, President George H.W. Bush issued a directive that remains in force today, requiring:

> all Federal departments, agencies, and officials, to the extent consistent with the Constitution and the laws of the United States, henceforward to treat Puerto Rico administratively as if it were a State, except insofar as doing so with respect to an existing Federal program or activity would increase or decrease Federal receipts or expenditures, or would seriously disrupt the operation of such program or activity.

[4] *See also* Treaty of Paris, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754; Foraker Act, ch. 191, 31 Stat. 77 (1900); Jones Act (Puerto Rico), ch. 145, 39 Stat. 951 (1917); *see generally Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671–72 (1974) (discussing history of relations between Puerto Rico and the United States); *United States v. Sanchez*, 992 F.2d 1143, 1151 (11th Cir. 1993) (same); *Trailer Marine Transp. Corp. v. Rivera Vazquez*, 977 F.2d 1, 6–7 (1st Cir. 1992) (same).

Memorandum for the Heads of Executive Departments and Agencies, 57 Fed. Reg. 57,093 (Nov. 30, 1992), *reprinted in* 48 U.S.C. § 734 note (2006).

For constitutional purposes, Puerto Rico nonetheless remains a territory of the United States and is therefore subject to the Territory Clause and the State Admission Clause—constitutional provisions that give Congress the general authority to govern territories and the specific authority to admit new territories as states, respectively.[5] *See* U.S. Const. art. IV, § 3. The question thus becomes whether either of these two provisions, or any other constitutional requirement, precludes Congress from changing Puerto Rico's relationship with the United States through legislation that would condition the effect of that legislation on the results of a vote by the Puerto Rican electorate.

As a general matter, Congress may enact legislation conditioning the effectiveness of laws or regulations on approval by affected parties,[6] and we conclude that neither the Territory Clause nor the State Admission Clause prevents Congress from enacting such legislation to change Puerto

---

[5] *See, e.g.*, *Examining Bd.*, 426 U.S. at 586 (discussing Congress's "establishment of the civil government in Puerto Rico in the exercise of its territorial power under Const., Art. IV, § 3, cl. 2"); *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (per curiam) (describing Congress as "empowered under the Territory Clause of the Constitution" to "treat Puerto Rico differently from States so long as there is a rational basis for its actions"); *Igartua-de la Rosa v. United States*, 417 F.3d 145, 147 (1st Cir. 2005) (en banc) (holding that Puerto Rico "is not a 'state' within the meaning of the Constitution").

[6] *See, e.g.*, *Currin v. Wallace*, 306 U.S. 1, 15–16 (1939) (upholding law permitting tobacco regulations to take effect only if approved by two-thirds of growers in a prescribed referendum); *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 577–78 & n.64 (1939) (upholding similar referendum provision based on *Currin*); *Wickard v. Filburn*, 317 U.S. 111, 117–18 (1942) (rejecting challenge to referendum among wheat growers on quotas proposed by Secretary of Agriculture); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisc. v. United States*, 367 F.3d 650, 653, 659–60 (7th Cir. 2004) (upholding requirement of state governor's concurrence in federal official's determination because "[t]here is no 'delegation of legislative authority' to [an] actor whose assent is a precondition to the execution of the law" (quoting *Currin*, 306 U.S. at 15)); *Confederated Tribes of Siletz Indians of Ore. v. United States*, 110 F.3d 688, 695 (9th Cir. 1997) ("[b]y requiring local approval, Congress is exercising its legislative authority by providing what conditions must be met before a statutory provision goes into effect"); *Mutual Consent Provisions in the Proposed Guam Commonwealth Act*, __ Op. O.L.C. Supp. __, *14 n.13 (July 28, 1994) (concluding, based on *Currin*, that "approval of federal legislation by" the government of a territory (in that case Guam) may be "a legitimate condition for making that legislation applicable").

Rico's status. First, under the Territory Clause, Congress has "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The Supreme Court has characterized this clause as "grant[ing] Congress and the President the power to acquire, dispose of, and govern territory." *Boumediene v. Bush*, 553 U.S. 723, 765 (2008). It has long been established that Congress's authority to govern and dispose of territories includes the authority to provide for changes in territories' degree of self-government,[7] and to provide for even more fundamental changes in their political relationship with the United States, including by granting them independence.[8] Nothing in the text, structure, or purpose of the Territory Clause limits Congress's authority to provide for a change in a territory's governmental structure through the referendum process under consideration here, nor are we aware of any judicial decisions articulating such limits. In addition, nothing in the Clause would prevent Congress from making any change in Puerto Rico's status effective upon a favorable vote by the territory's electorate and without need for subsequent congressional action.

Second, though the State Admission Clause places certain express limitations on Congress's authority to create new states, these limitations would not apply to the admission of Puerto Rico. The Clause provides:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

U.S. Const. art. IV, § 3, cl. 1. The State of Puerto Rico would neither be formed within the jurisdiction of any other state nor formed by the junc-

---

[7] *See, e.g.*, *United States v. Lara*, 541 U.S. 193, 203–04 (2004) (noting that "[t]he political branches" historically have made "radical adjustments" in the "autonomous status of . . . dependent entities," including Puerto Rico); *Calero-Toledo*, 416 U.S. at 671 (describing series of congressional enactments under which Puerto Rico progressed from initial "military control" to appointed government to substantial self-governance); *Clinton v. Englebrecht*, 80 U.S. (13 Wall.) 434, 441–45 (1871) (discussing enactments organizing governments for the United States' first territories).

[8] *See, e.g.*, *Barber v. Gonzales*, 347 U.S. 637, 638–39 & n.1 (1954) (discussing legislation that resulted in the independence of the Philippines).

tion of parts of two or more states. What is more, the Clause includes no express limitation on Congress's authority to condition the admission of a state on an affirmative vote of a territory's electorate without subsequent congressional action. In fact, as described in detail below, Congress has often admitted states through such means.

II.

A.

Congress has frequently admitted states to the Union through contingent legislation. While the conditions Congress has imposed have varied, contingent statutes have often made admission of a territory effective upon the issuance of a presidential proclamation certifying that the statutory conditions have been fulfilled, without any subsequent action by Congress having been required. Congress has identified a vote by the territorial electorate in favor of statehood or in support of a state constitution (or constitutional amendment) as the triggering event for admission in many instances.

The two newest states—Alaska and Hawaii—were both admitted under statutes that conditioned admission on a referendum of the territorial electorate. In the case of Alaska, the statehood statute directed the governor of the territory to submit three propositions to the territory's voters. Act of July 7, 1958, Pub. L. No. 85-508, § 8(b), 72 Stat. 339, 343–44. One of these propositions asked voters: "Shall Alaska immediately be admitted into the Union as a State?" *Id.*, 72 Stat. at 344. The other two sought Alaska voters' consent to specific territorial boundaries and certain other conditions of Alaska's admission under the Act. *Id.* The Act required the governor to "certify the results of said submission, as . . . ascertained [by the Secretary of Alaska through a specified process], to the President of the United States." *Id.*

The statehood statute ultimately provided that, "[i]n the event any one of the [specified] propositions is not adopted at [the designated] election by a majority of the legal votes cast on said submission, the provisions of this Act shall thereupon cease to be effective," meaning that Alaska would not become a state under the statute. *Id.* If the propositions were approved, however, the Act authorized admission of Alaska upon presidential proclamation, without further action by Congress. The Act provided:

> If the President shall find that the propositions set forth in [the Act] have been duly adopted by the people of Alaska, the President, upon certification of the returns of the election of the [congressional Representative and Senators] required to be elected [under the Act], shall thereupon issue his proclamation announcing the results of said election as so ascertained. Upon the issuance of said proclamation by the President, the State of Alaska shall be deemed admitted into the Union as provided in section 1 of this Act.

Id. § 8(c), 72 Stat. at 344. Section 1 of the Act in turn provided "[t]hat, subject to the provisions of this Act, and upon issuance of the proclamation required by section 8(c) of this Act, the State of Alaska is hereby declared to be a State of the United States of America[] [and] is declared admitted into the Union on an equal footing with the other States in all respects whatever." *Id.* § 1, 72 Stat. at 339.

President Eisenhower signed the Alaska Statehood bill on July 7, 1958, and said he was "pleased with the action of Congress admitting Alaska." *Statement by the President Upon Signing Alaska Statehood Bill* (July 7, 1958), 1 Pub. Papers of Dwight D. Eisenhower 525 (1958). On January 3, 1959, after Alaska voters had considered the propositions contemplated by the statute, the President issued the required proclamation "find[ing] and announc[ing] that the people of Alaska have duly adopted the propositions required to be submitted to them by the act of July 7, 1958 and have duly elected the officers required to be elected by that act." Proclamation No. 3269, 3 C.F.R. 16 (Supp. 1959), *reprinted in* 48 U.S.C. ch. 2 note following table of contents (2006). President Eisenhower thus "declare[d] and proclaim[ed] that the procedural requirements imposed by the Congress on the State of Alaska to entitle that State to admission into the Union have been complied with in all respects and that admission of the State of Alaska into the Union on an equal footing with the other States of the Union is now accomplished." *Id.*

Congress enacted Hawaii's statehood statute several months after Alaska's admission and provided for a virtually identical admissions process. Congress required Hawaii's voters to answer three questions similar to those specified in the Alaska referendum, including "Shall Hawaii immediately be admitted into the Union as a State?" Pub. L. No. 86-3, § 7(b), 73 Stat. 4, 7 (1959). Congress also required the election of a congressional Representative and Senators for Hawaii; directed the President to issue a

proclamation certifying when these conditions were satisfied; and provided that "[u]pon the issuance of said proclamation by the President, the State of Hawaii shall be deemed admitted into the Union as provided in section 1 of this Act." *Id.* The Act, like the Alaska statute, established that, "subject to the provisions of this Act, and upon issuance of the proclamation required by [the Act], the State of Hawaii is hereby declared to be a State of the United States of America[] [and] is declared to be admitted into the Union on an equal footing with the other States in all respects whatever." *Id.* §§ 1, 7, 73 Stat. at 4, 7–8. Upon signing the Hawaii statehood bill, President Eisenhower observed that "[i]t has given me great satisfaction to sign the Act providing for the admission of Hawaii into the Union" and noted that, "[u]nder this legislation, the citizens of Hawaii will soon decide whether their Islands shall become our fiftieth State." S*tatement by the President Upon Signing the Hawaii Statehood Bill* (Mar. 18, 1959), 1 Pub. Papers of Dwight D. Eisenhower 286 (1959). After the territorial referendum, the President issued the required proclamation certifying Hawaii's admission to the union on August 21, 1959. Proclamation No. 3309, 3 C.F.R. 60 (Supp. 1959), *reprinted in* 48 U.S.C. ch. 3 note following table of contents (2006).

Although Alaska and Hawaii are the only states whose admission was conditioned on referenda that expressly addressed statehood, Congress has admitted some ten other states pursuant to statutes that granted statehood once territorial voters had approved certain measures, without further congressional action. Congress made the admission of Arizona and West Virginia effective upon popular ratification of certain amendments to the proposed state constitutions.[9] Similarly, Congress provided for the admission of Oklahoma, Utah, Washington, Montana, South Dakota, North Dakota, Colorado, and Nevada effective upon presidential proclamation, without further congressional action, once territorial voters had approved state constitutions meeting specified criteria.[10]

---

[9] *See* S.J. Res. 57, § 7, 37 Stat. 39, 42 (Aug. 21, 1911) (Arizona); Proclamation of Feb. 14, 1912, 37 Stat. 1728 (noting approval of amendment); Act of Dec. 31, 1862, ch. 6, § 2, 12 Stat. 633, 634 (West Virginia); Proclamation of Apr. 20, 1863, 6 *Compilation of the Messages and Papers of the Presidents* 167 (James D. Richardson ed., 1897) ("*Messages & Papers*") (noting compliance with condition).

[10] *See* Pub. L. No. 59-234, § 4, 34 Stat. at 271 (Oklahoma); Proclamation of Nov. 16, 1907, 35 Stat. 2160 (Oklahoma); Act of July 16, 1894, ch. 138, § 4, 28 Stat. 107, 108–09 (Utah); Proclamation of Jan. 4, 1896, 29 Stat. 876 (Utah); Act of Feb. 22, 1889, ch. 180,

Congress also has passed contingent admission legislation for territories that were ultimately admitted under different, subsequent legislation, in some cases because voters in the territory rejected the conditions imposed by Congress in the original contingent legislation. *See, e.g.*, Pub. L. No. 59-234, §§ 24, 26, 34 Stat. 267, 278, 280–81 (1906) (providing for admission of State of Arizona following voter approval of constitution, but only if voters in the territories of both Arizona and New Mexico answered in the affirmative, "Shall Arizona and New Mexico be united to form one state?")[11]; Act of Apr. 19, 1864, ch. 59, § 5, 13 Stat. 47, 48–49 (providing for admission of Nebraska upon voter approval of state constitution)[12]; Act of May 4, 1858, ch. 26, 11 Stat. 269, 270 (providing for admission of Kansas upon voter acceptance of specified propositions)[13]; Act of Mar. 3, 1847, ch. 53, § 4, 9 Stat. 178, 179 (providing for admission of Wisconsin upon voter approval of state constitution)[14]; Act of Mar. 3,

---

§ 8, 25 Stat. 676, 678–79 (North Dakota, South Dakota, Montana, and Washington); Proclamation of Nov. 11, 1889, 26 Stat. 1552 (Washington); Proclamation of Nov. 8, 1889, 26 Stat. 1551 (Montana); Proclamation of Nov. 2, 1889, 26 Stat. 1549 (South Dakota); Proclamation of Nov. 2, 1889, 26 Stat. 1548 (North Dakota); Act of Mar. 3, 1875, ch. 139, § 5, 18 Stat. 474, 475, as amended by Act of Mar. 3, 1876, ch. 17, 19 Stat. 5 (Colorado); Proclamation of Aug. 1, 1876, 9 *Messages & Papers* n.s. 4346 (1897) (Colorado); Act of Mar. 21, 1864, ch. 36, § 5, 13 Stat. 30, 31–32 (Nevada); Proclamation of Oct. 31, 1864, 13 Stat. 749 (Nevada). New Mexico's admission became effective once the territory had held a referendum on specified propositions, although Congress did not require that the vote result in any particular outcome. *See* S.J. Res. 57, §§ 3–6, 37 Stat. 39, 39–42 (Aug. 21, 1911) (requiring "as a condition precedent" to admission that the New Mexico electorate vote on specified amendments to the New Mexico constitution); Proclamation of Jan. 6, 1912, 37 Stat. 1723 (finding that vote was held and thus deeming New Mexico admitted to Union); Robert W. Larson, *New Mexico's Quest for Statehood: 1846–1912* 296 (1968).

[11] Arizona voters rejected this proposition. *See* John D. Leshy, *The Making of the Arizona Constitution*, 20 Ariz. St. L.J. 1, 15–16 (1988).

[12] A constitutional convention convened pursuant to this statute failed to approve a constitution. 2 *The Uniting States: The Story of Statehood for the Fifty United States* 739–40 (Benjamin F. Shearer ed., 2004). Nebraska was later admitted under a different statute. *See infra* note 16.

[13] Kansas voters rejected the pro-slavery constitution on which this admission statute was based. Kansas was later admitted by statute with a different state constitution. *See* Act of Jan. 29, 1861, ch. 20, 12 Stat. 126; 1 *Uniting States*, *supra* note 12, at 450–51.

[14] Wisconsin voters rejected a constitution proposed pursuant to this Act, but Congress later admitted Wisconsin by statute following the ratification of a different state constitu-

1845, ch. 48, §§ 2, 4, 5 Stat. 742, 743 (providing for admission of Iowa upon popular approval of conditions, including specified boundaries for the State, set forth in the act)[15]; Act of June 15, 1836, ch. 96, §§ 2, 3, 5 Stat. 49, 49–50 (providing for admission of Michigan upon acceptance of boundary conditions by popularly elected convention).[16]

The historical record thus provides overwhelming support for the conclusion that Congress may adopt legislation that would authorize Puerto Rico's admission as a State, effective upon approval by the Puerto Rican electorate.

B.

In addition to enacting contingent legislation to govern transitions to statehood, Congress has relied on such legislation to accomplish other

---

tion. *See* Act of May 29, 1848, ch. 50, 9 Stat. 233; 3 *Uniting States*, *supra* note 12, 1344, 1346.

[15] Iowa voters rejected these conditions, but Iowa was later admitted by statute with adjusted boundaries. *See* Act of Dec. 28, 1846, ch. 1, 9 Stat. 117; Act of Aug. 4, 1846, ch. 82, 9 Stat. 52; 1 *Uniting States*, *supra* note 12, at 424.

[16] The first convention elected pursuant to this statute rejected the boundary conditions, but a second convention accepted them and Congress admitted Michigan by statute, declaring the conditions in its prior enactment satisfied. *See* Act of Jan. 26, 1837, ch. 6, 5 Stat. 144; 2 *Uniting States*, *supra* note 12, at 610–14.

In other cases, Congress has provided for admission of territories as States upon presidential proclamation following satisfaction of conditions that did not necessarily involve a referendum. *See* Act of Feb. 9, 1867, ch. 36, § 3, 14 Stat. 391, 392 (conditioning Nebraska's admission on the legislature's declaration of assent to "the fundamental condition that within the State of Nebraska there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed"); Proclamation of Mar. 1, 1867, 14 Stat. 820 (deeming condition satisfied and Nebraska admitted as a state); J. Res. No. 1 of Mar. 2, 1821, 3 Stat. 645 (conditioning Missouri's admission upon the legislature's assent, "by a solemn public act," to the "fundamental condition" that a provision in the proposed Missouri state constitution "shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen, of either of the states in this Union, shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the constitution of the United States"); Proclamation of Aug. 10, 1821, 2 *Messages & Papers* 95 (1896) (deeming condition satisfied and Missouri admitted); *cf.* Act of Feb. 4, 1791, ch. 4, 1 Stat. 189 (deeming Kentucky admitted as of date some sixteen months after enactment).

changes in territories' political relationship with the United States, including transitions to independence.

In 1933 and 1934, for example, Congress passed contingent legislation providing for the independence of the Philippines, which had become a United States territory in 1898 after the Spanish-American War and through the Treaty of Paris. Both statutes provided that the Philippines would acquire independence upon issuance of a presidential proclamation, without further congressional action, ten years after the formation of a new Philippine government pursuant to a popularly ratified constitution that satisfied certain requirements.[17] The Philippine legislature rejected the terms of the 1933 Act, but the territory ultimately acquired independence under the 1934 Act.[18]

In the 1934 Act, Congress authorized the Philippine legislature to provide for the drafting, by elected delegates, of a constitution that met the Act's requirements. *Id.* §§ 1–2, 48 Stat. at 456–58. The Act required that the constitution be submitted for the President's review within two years of the Act's enactment. If the President certified that the constitution "conform[ed] substantially with the provisions of [the] Act," the constitution was to be submitted "to the people of the Philippine Islands for their ratification or rejection at an election to be held within four months after the date of such certification." *Id.* §§ 3–4, 48 Stat. at 458. Under the Act, a majority vote in favor of the constitution was to be "deemed an expression of the will of the people of the Philippine Islands in favor of Philippine independence." *Id.* § 4. Following ratification of such a constitution, the Governor General of the territory was to provide for an election of officers under the new constitution, and upon certification of the results of this election, the President was required to "issue a proclamation announcing the results of the election." *Id.* § 4, 48 Stat. at 458–59. The Act provided that "upon the issuance of such proclamation by the President

---

[17] *See* Pub. L. No. 73-12, 748 Stat. 456 (1934) ("1934 Act") (codified as amended at 22 U.S.C. §§ 1391–1395 (2006)); Pub. L. No. 72-311, 47 Stat. 761 (1933) ("1933 Act"); *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 674–76 (1945) (discussing history of congressional enactments relating to government of the Philippines), *overruled on other grounds by Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1984).

[18] *See generally Evatt*, 324 U.S. at 675–76; *Valmonte v. INS*, 136 F.3d 914, 916–17 (2d Cir. 1998); *Rabang v. INS*, 35 F.3d 1449, 1451 (9th Cir. 1994); Arnold H. Leibowitz, *Defining Status: A Comprehensive Analysis of United States Territorial Relations* 54 (1989).

the existing Philippine government shall terminate and the new government shall enter upon its rights, privileges, powers, and duties, as provided under the constitution." *Id.* The Act required the President to issue a further proclamation surrendering United States control of the territory and recognizing Philippine independence on July Fourth, ten years after the inauguration of this new government. *Id.* § 10, 48 Stat. at 463; *see also* J. Res. of June 29, 1944, § 3, 58 Stat. 625, 626 (authorizing the President "to advance the date of the independence of the Philippine Islands by proclaiming their independence as a separate and self-governing nation prior to July 4, 1946").

In accordance with the terms of this Act, President Roosevelt recognized, by proclamation effective November 15, 1935, the formation of a new constitutional government for the Philippines. On July 4, 1946, President Truman proclaimed the independence of the Philippines. *See* Proclamation No. 2148, 49 Stat. 3481 (1935); Proclamation No. 2695, 3 C.F.R. 86, 86 (1946), *reprinted in* 60 Stat. 1352 (1946), *and in* 22 U.S.C. § 1394 note (2006).

More recently, the United States altered its political relationship with Palau through legislation that conditioned the change on a vote by the territorial electorate. After World War II, Palau became part of a "trust territory" of the United States under the United Nations Charter. *See, e.g.*, *Morgan Guar. Trust Co. of N.Y. v. Republic of Palau*, 924 F.2d 1237, 1237–40 (2d Cir. 1991). In the 1980s, the United States negotiated a "Compact of Free Association" with the territory, according to which Palau would become a sovereign republic while maintaining extensive ties with the United States. *See* Compact of Free Association, Pub. L. No. 99-658, § 201, 100 Stat. 3672, 3678–79 (1986); *see generally* Stanley K. Laughlin, Jr., *The Law of United States Territories and Affiliated Jurisdictions* 461–78 (1995) ("Laughlin"). The compact provided that it would take effect only upon approval by the United States and Palau governments according to each government's constitutional processes, and approval by Palau's voters in a plebiscite. *See* Compact of Free Association § 411, 100 Stat. at 3698.

Congress initially approved this compact in a 1986 statute that required enactment of a further joint resolution before the compact could take effect. Pub. L. No. 99-658, § 101(a), (d)(1)(B), 100 Stat. at 3673, 3674. But in 1989, Congress passed a second statute authorizing "entry into force" of the compact, following a specified period of notice to

Congress, "subject to the condition that the Compact, as approved by the Congress in [the first statute], is approved by the requisite percentage of votes cast in a referendum conducted pursuant to the Constitution of Palau, and such approval is free from any legal challenge." Pub. L. No. 101-219, § 101, 103 Stat. 1870, 1870 (1989).[19] Palau voters approved the compact by plebiscite on November 9, 1993, and on September 27, 1994, President Clinton issued a proclamation deeming the compact effective as of October 1, 1994. The proclamation declared that "Palau will thereafter be self-governing and no longer subject to [United States] Trusteeship." Proclamation No. 6726, 3 C.F.R. 104, 105 (1994), *reprinted in* 108 Stat. 5631, 5632 (1994). Palau thus gained full independence under legislation that authorized the change in status upon the occurrence of a future contingency—voter approval in a plebiscite—without further action by Congress.[20]

Even Puerto Rico itself previously has undergone a significant change in its political relationship with the United States as a result of self-executing contingent legislation. In 1950, in Public Law 81-600, Congress established a process through which Puerto Rico's voters could adopt a constitution for the local government of the territory. The statute, however, made the drafting of a new constitution contingent upon approval of the Act's terms by a majority of voters participating in "an island-wide referendum to be held in accordance with the laws of Puerto Rico." *Id.* § 2, 64 Stat. at 319. Moreover, Public Law 81-600 provided that a constitution drafted and approved in accordance with the Act's procedures would "become effective" only "[u]pon approval by the Congress," *id.*

[19] The Palau Supreme Court ruled initially that a provision in Palau's constitution regarding nuclear materials on the island necessitated seventy-five percent approval for ratification of the compact, a decision that resulted in several failed votes to ratify the compact. Palau's constitution was eventually amended to allow approval of the compact by majority vote. *See* Chimene I. Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 Tex. Int'l L.J. 1, 50–51 (2003); Laughlin at 98–100, 477–78.

[20] Two other states formed from the Trust Territory of the Pacific Islands—the Republic of the Marshall Islands and the Federated States of Micronesia—also entered into compacts of free association with the United States. These territories, however, approved the compacts in plebiscites prior to approval of the compacts by Congress. *See* Proclamation No. 5564, 51 Fed. Reg. 40,399 (Nov. 3, 1986) (describing plebiscite in Federated States of Micronesia on June 21, 1983, and in the Marshall Islands on September 7, 1983), *reprinted in* 48 U.S.C. § 1801 note (2006); Pub. L. No. 99-239, 99 Stat. 1770 (1986) (providing congressional approval of compacts for these territories).

§ 3, 64 Stat. at 319, and Congress ultimately provided such approval only in further contingent legislation. Specifically, in 1952, Congress approved a locally adopted constitution for Puerto Rico, but provided that certain provisions would have "no force and effect" until specified amendments were adopted "by the people of Puerto Rico." Congress also provided that the constitution as a whole would "become effective" only "when the Constitutional Convention [that drafted the constitution] shall have declared in a formal resolution its acceptance in the name of the people of Puerto Rico of the conditions of approval herein contained, and when the Governor of Puerto Rico, being duly notified by the proper officials of the Constitutional Convention of Puerto Rico that such resolution of acceptance has been formally adopted, shall issue a proclamation to that effect." Pub. L. No. 82-447, 66 Stat. at 327–28. In accordance with the terms of this statute, the Puerto Rican Constitutional Convention adopted the required resolution, and the Governor of Puerto Rico deemed the constitution effective in a proclamation issued on July 25, 1952.[21]

Considered in combination with Congress's longstanding and repeated use of contingent legislation to admit territories as states, these examples of the Philippines' and Palau's transitions to independence and Puerto Rico's acquisition of commonwealth status present a powerful historical case for the permissibility of legislation that authorizes an alteration of Puerto Rico's status as triggered by a vote of the Puerto Rican electorate. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("'traditional ways of conducting government . . . give meaning' to the Constitution") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)); *The Pocket Veto Case,* 279 U.S. 655, 689 (1929) ("[l]ong settled and established practice is a consideration of great weight" in constitutional interpretation); *Whether Uruguay Round Agreements Required Ratification as a Treaty*, 18 Op. O.L.C. 232, 233 (1994) ("a significant guide to the interpretation of the Constitution's requirements is the practical construction placed on it by the executive and legislative branches acting together").

---

[21] *See* 48 U.S.C. § 731d note (2006); Resolution 34, Constitutional Convention of Puerto Rico (July 10, 1952), *reprinted in Documents on the Constitutional History of Puerto Rico* 196–97 (Office of the Commonwealth of Puerto Rico ed., 2d ed. 1964); *Establishment of the Commonwealth of Puerto Rico*, Proclamation by the Governor of Puerto Rico (July 25, 1952), *reprinted in Documents on the Constitutional History of Puerto Rico* at 198.

III.

In accord with the analysis offered above, this Office and the Department of Justice have indicated on many occasions that Congress may provide for a change in Puerto Rico's status, contingent upon actions by the Puerto Rican electorate, without the need for subsequent congressional action.

In 1959, this Office reviewed a bill that would have provided for admission of Puerto Rico as a State upon presidential proclamation, without further congressional action, following ratification of a state constitution and election of congressional representatives by Puerto Rico voters. *See* Memorandum for Lawrence E. Walsh, Deputy Attorney General, from Robert Kramer, Assistant Attorney General, Office of Legal Counsel, *Re: H.R. 7003, 86th Cong., 1st Sess., a bill "To provide for a referendum in Puerto Rico on the admission of Puerto Rico into the Union as a State, and to establish the procedure for such admission if the people of Puerto Rico desire it"* (Oct. 12, 1959) ("Kramer Memo"); H.R. 7003, 86th Cong. § 206(a) (as introduced in House, May 7, 1959). We questioned the propriety of "using this procedure in the case of Puerto Rico," because it would have provided for admission of Puerto Rico without prior congressional review of the state constitution to be adopted by the territory, thus reducing congressional "control" over the procedure. But we expressed no uncertainty about the constitutional permissibility of the procedure in the bill. On the contrary, we noted that it was "patterned upon one of the methods frequently used to admit states to the Union" and that "a great many territories [had] secured admission as the result of a single act passed by the Congress" establishing similar preconditions. Kramer Memo at 2, 3.

Thirty years later, our Office provided advice regarding "the general legal requirements for admitting Puerto Rico to the Union." Memorandum for Thomas M. Boyd, Assistant Attorney General, Office of Legislative Affairs, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Statehood for Puerto Rico* at 1 (Mar. 3, 1989). Explaining that "Congress has employed a variety of methods to admit new States into the Union," we gave a summary description of some of the types of contingent legislation Congress has used to grant statehood, including making admission effective upon the results of a

territorial vote following adoption of a constitution. "Congress . . . may set conditions for a territory to meet before it becomes a state," we explained, so long as the conditions do not "violate some other textual provision of the Constitution or . . . interfere with essential aspects of state sovereignty, such as dictating the location of the state capital." *Id.*[22]

In the same year, this Office and the Department commented on S. 712, a bill that would have provided for self-executing changes in Puerto Rico's status based on the results of a plebiscite.[23] Although the Department expressed concerns about other aspects of the bill, including concerns related to the proposed referendum process, it did not suggest that Congress lacked authority to provide for a change in Puerto Rico's political relationship with the United States contingent on a referendum in Puerto Rico.[24] On the contrary, the Acting Deputy Attorney General stated in testimony that "[t]he Administration strongly supports the right of the people of Puerto Rico to choose their political status by means of a referendum," and that "the referendum can present options that, if select-

[22] The Supreme Court has found the so-called "equal footing" doctrine implicit in the terms "State" and "Union" in the provisions governing admission of States. According to the doctrine, all states in the Union must stand on terms of "constitutional equality" with all other states regardless of when they were admitted, and Congress, therefore, may not "deprive[]" a new state of "any of the power constitutionally possessed by other States." *Coyle v. Smith*, 221 U.S. 559, 570, 580 (1911); *see also, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203–04 (1999). At the same time, the Court has recognized that Congress "may require, under penalty of denying admission," that a territory seeking admission as a State satisfy certain conditions before being admitted to the Union. *Coyle*, 221 U.S. at 568.

[23] *See* Memorandum for Edith E. Holiday, General Counsel, Department of Treasury, from John O. McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: S. 712 Puerto Rico Status* (July 6, 1989); *see also* S. 712, 101st Cong. (as introduced in Senate, Apr. 5, 1989); S. 712, 101st Cong. (as ordered reported by Senate Committee on Energy and Natural Resources, Sept. 6, 1989); S. Rep. No. 101-481 (1990) (report of Senate Finance Committee); S. Rep. No. 101-120 (1989) (report of Senate Energy and Natural Resources Committee).

[24] *See, e.g.*, *Puerto Rico's Political Status: Hearing on S. 712 Before the S. Comm. on Finance*, S. Hrg. No. 101-557, pt. 1, at 6 (1989) (statement of Shirley D. Peterson, Assistant Attorney General, Tax Division); *Political Status of Puerto Rico: Hearings on S. 710, 711, and 712 Before the S. Comm. on Energy & Nat. Resources*, S. Hrg. No. 101-198, pt. 3, at 13 (1989) (statement of Edward S.G. Dennis, Acting Deputy Attorney General).

ed by a majority of the voters in Puerto Rico, *can immediately be implemented*."[25]

In the following Congress, the Attorney General raised concerns about legislation similar to S. 712 that was *not* self-executing, but rather called for specified House and Senate Committee Chairmen to introduce legislation, with terms prescribed by the bill, that would have enacted a particular outcome upon approval by voters in Puerto Rico through a referendum. *See* S. 244, 102d Cong. § 101(e)–(f) (as introduced in Senate, Jan. 23, 1991). Attorney General Thornburgh observed that, "[i]f Congress intends to truly *commit* itself to implement whatever status option receives a majority in accordance with [the bill], *it should return to the self-executing approach and language of S. 712*." *Political Status of Puerto Rico: Hearings on S. 244, to Provide for a Referendum on the Political Status of Puerto Rico Before the S. Comm. on Energy & Nat. Resources*, 102d Cong. 195 (1991) (prepared statement by Attorney General Richard Thornburgh) (second emphasis added); *see also* H.R. 4765, 101st Cong. (as passed by House, Oct. 10, 1990); H.R. Rep. No. 101-790, pts. 1 & 2 (1990).

These past statements by the Justice Department provide further support for the constitutionality of legislation conditioning a self-executing change in Puerto Rico's political relationship with the United States on the results of a referendum in Puerto Rico.

IV.

In light of the permissibility of contingent legislation and the numerous historical precedents for legislation that conditions both statehood and independence on votes by territorial electorates without the need for subsequent congressional action, we think it clear that Congress may provide that a change in Puerto Rico's political relationship with the United States will take effect upon approval of the change by Puerto Rico's voters.

[25] S. Hrg. No. 101-198, *supra* note 24, pt. 3, at 22 (statement of Edward S.G. Dennis, Acting Deputy Attorney General) (emphasis added); *see also id.* at 13 (testimony of Edward S.G. Dennis, Acting Deputy Attorney General) ("the President is very much in favor of the approach of having the referendum process be one through legislation that would be self-executing").

We recognize that the legislation currently being contemplated, like some of the prior bills concerning Puerto Rico's status discussed in Part III, may provide voters in Puerto Rico with more than two status options from which to choose; the legislation might include statehood, independence, and a modified commonwealth relationship as alternatives. *See, e.g.*, S. 712, 101st Cong. § 2 (as introduced in Senate, Apr. 5, 1989) (providing for options of "statehood," "independence," or "commonwealth" to take effect, in accordance with terms and procedures set forth in the bill, following approval by a majority of voters in an initial referendum or runoff referendum). In this respect, the legislation would depart from the historical practice we have reviewed, where contingent legislation provided territorial voters with only two status options. This divergence might form the basis of an argument that a referendum offering voters more than two status options would cross a constitutional line by impermissibly delegating Congress's authority to territorial voters.

In our judgment, however, this potential, limited divergence from historical practice is immaterial to our constitutional analysis. Congress historically has offered to territorial electorates two choices—statehood (or in some cases independence) on the one hand, and continued territorial status on the other—each of which was acceptable to Congress, and each of which came with different legal and policy implications. Congress thus has given territorial electorates ultimate control over whether their territories have become states (or occupied some other status), as would be the case with a referendum that offered Puerto Rico voters three choices. As we note above, *see supra* note 6 and accompanying text, Congress may enact legislation conditioning the effectiveness of a law on approval by affected parties.[26] In our view, as long as Congress offered Puerto Rico voters a limited range of options specified in advance, it would make no meaningful constitutional difference whether those options numbered two

[26] The outcome of voting on referenda that specify a limited set of options remains simply a "condition[]" that Congress has "exercise[d] its legislative authority" to "prescribe[e] [as] the condition[] of [the statute's] application." *Currin*, 306 U.S. at 16; *see also Clinton v. City of New York*, 524 U.S. 417, 443–44 (1998) (indicating the permissibility of legislation that makes specified results "contingent upon a condition that did not exist when the [statute] was passed," requires executive officials to effectuate that result upon occurrence of the contingency, and provides for execution of a "policy that Congress had embodied in the statute").

or three, and the process for resolving Puerto Rico's status would not present delegation concerns. We therefore conclude that the present proposals for referenda would be lawful.

CRISTINA M. RODRÍGUEZ
Deputy Assistant Attorney General
Office of Legal Counsel

Online Terms of Service Agreements with Open-Ended Indemnification Clauses Under the Anti-Deficiency Act

Traditional principles of contract law govern the standard for consent to an online terms of service agreement, and, as a result, consent to such an agreement turns on whether the web user had reasonable notice of and manifested assent to the online agreement.

A government employee with actual authority to contract on behalf of the United States violates the Anti-Deficiency Act by entering into an unrestricted, open-ended indemnification agreement on behalf of the government.

A government employee who lacks authority to contract on behalf of the United States does not violate the Anti-Deficiency Act by consenting to an agreement, including an agreement containing an unrestricted, open-ended indemnification clause, because no binding obligation on the government was incurred.

March 27, 2012

MEMORANDUM OPINION FOR THE
ASSISTANT GENERAL COUNSEL FOR ADMINISTRATION
DEPARTMENT OF COMMERCE

You have asked whether a Department of Commerce ("Department") employee violates the Anti-Deficiency Act ("ADA") when he consents on behalf of the government to terms of service ("TOS") that include an unrestricted, open-ended indemnification clause in the course of registering for an account with a social media application on the Internet.[1]

We first address the preliminary question whether the standard for consent to an online TOS agreement is different from the standard for consent in traditional contract law. We conclude that traditional principles of contract law govern this question and that, as a result, consent to an online TOS agreement turns on whether the web user had reasonable notice of and manifested assent to the online agreement.

---

[1] *See* Letter for Caroline D. Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Barbara S. Fredericks, Assistant General Counsel for Administration, Department of Commerce (June 2, 2011) ("Commerce Letter"). We also received the views of the General Services Administration ("GSA"). *See* Letter for Caroline D. Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Kris E. Durmer, General Counsel, General Services Administration (July 8, 2011) ("GSA Letter").

We next consider whether entry into an unrestricted, open-ended indemnification agreement violates the ADA. We conclude that the answer to this question is different for employees with actual authority to contract on behalf of the United States and those without such authority. Although an unrestricted, open-ended indemnification clause is not enforceable against the United States in either circumstance, *see, e.g.*, *Hercules, Inc. v. United States*, 516 U.S. 417, 427 & n.10 (1996), an employee with actual authority to contract on behalf of the government violates the ADA by entering into such an obligation. In contrast, a government employee who lacks authority to contract on behalf of the United States cannot enter into an agreement that creates binding obligations for the United States. Thus, we conclude that an employee without any contracting authority does not violate the ADA by consenting to an agreement, including an agreement containing an unrestricted, open-ended indemnification clause, because no obligation was ever incurred.

I.

You have described to us two situations in which Department employees have consented to social media TOS agreements that include indemnification clauses. In the first situation, an agency within the Department sought to establish a database of images available to employees to use in their print and online materials. In setting up the database, an employee downloaded images for free from at least three websites: MorgueFile.com, Dreamstime.com, and Stock.xchng. To download images from these websites, a user must first register for an account by agreeing to the website's TOS, which is done by checking a box that reads: "I have read and agree to the Terms of Use." The TOS agreement for each of these websites incorporates an indemnification clause. Commerce Letter at 1–2.[2] Thus, by registering for accounts with

[2] The indemnification clause for MorgueFile.com, for example, provides:

> You agree to indemnify and hold harmless morguefile.com, its contractors, and its licensors, and their respective directors, officers, employees and agents from and against any and all losses, damages, claims and expenses, including attorneys' fees, arising out of your use of the Website, including but not limited to any such losses, damages, claims and expenses arising out of your violation of the Agreement.

Commerce Letter at 2 n.4.

these three websites, the employee consented to TOS agreements that contained indemnification clauses. *Id.* at 2. According to the Department, the employee is not a contracting officer, does not maintain a purchase card, and has not been delegated proper authority to register to use social media applications. *Id.* at 3.

In the second situation, an employee with a different agency within the Department registered for an account with watershed.ustream.tv, a self-serve platform for live, interactive video. Watershed does not offer a free account; the user must pay for a subscription or select a pay-as-you-go option. Watershed also requires that the user consent to a TOS agreement that includes an indemnification clause. The Department discovered that the agency had established an account with watershed.ustream.tv and that one of its offices had been subscribing to that account for the past two years and was billed quarterly through its purchase card. In this case, the employee consenting to the TOS agreement was a purchase card holder and thus, by regulation, was a contracting officer or other authorized individual designated by the agency to contract on its behalf. *Id.* at 2, 4.[3]

You have asked whether the ADA is violated whenever a government employee, in establishing a social media account, consents to a TOS agreement containing an indemnification clause and what practical consequences flow from such unauthorized agreements. You also have asked whether a passive TOS agreement—one in which (unlike the situations described above) a user agrees to the TOS of an online application simply by using the application—can bind the government. While we decline to address whether particular past actions violated the ADA, we will use the basic features of these scenarios to provide general guidance in response to your questions.

II.

The Anti-Deficiency Act provides in relevant part:

> (a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—

[3] We assume, for purposes of discussion, that all of the indemnification clauses at issue are similar to that quoted above for MorgueFile.com.

> (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(a)(1) (2006).[4] Violations of section 1341(a) must be reported immediately to the President and Congress, with a copy of each report going to the Comptroller General. *Id.* § 1351. Officers or employees violating this section are subject to administrative discipline, and knowing and willful violators may face criminal penalties. *Id.* §§ 1349, 1350.

As recognized by the courts and this Office, the Comptroller General has long taken the position that the ADA is violated by any indemnification agreement that, without statutory authorization, imposes on the United States an open-ended, potentially unrestricted liability. In such circumstances, there can never be certainty that sufficient funds have been appropriated to cover the liability. For example, in *Hercules*, 516 U.S. 417, the Supreme Court refused to find an implied-in-fact indemnity agreement. It explained that "the Comptroller General has repeatedly ruled that Government procurement agencies may not enter into . . . open-ended indemnity for third-party liability" because such agreements are barred by the ADA. *Id.* at 427; *see also Cal.-Pac. Utils. Co. v. United States*, 194 Ct. Cl. 703, 715 (1971) ("The United States Supreme Court, the Court of Claims, and the Comptroller General have consistently held that absent an express provision in an appropriation for reimbursement adequate to make such payment, [the ADA] proscribes indemnification on the grounds that it would constitute the obligation of funds not yet appropriated."); *Indemnification Agreements and the Anti-Deficiency Act*, 8 Op. O.L.C. 94, 96 (1984) ("*Indemnification Agreements*") (recognizing the Comptroller General's long series of opinions holding that "the Anti-Deficiency Act is transgressed by any indemnity provision that subjects

[4] In addition, the Adequacy of Appropriations Act, 41 U.S.C. § 11 (2006), prohibits any contractual arrangement of the government "unless the same is authorized by law or is under an appropriation adequate to its fulfillment." We refer to both statutes collectively as the Anti-Deficiency Act or ADA.

the United States to an indefinite, indeterminate, or potentially unlimited liability"); *e.g.*, *Federal Aviation Administration Negotiations with Pacific Gas and Electric Company*, B-260063, 1995 WL 390069, at *5 (Comp. Gen. June 30, 1995); *Assumption by Government of Contractor Liability to Third Persons—Reconsideration*, 62 Comp. Gen. 361, 363–66 (1983); *To the Administrator, General Services Administration*, 35 Comp. Gen. 85, 87 (1955); *To the Secretary of the Interior*, 16 Comp. Gen. 803, 804 (1937); *To the Secretary of War*, 7 Comp. Gen. 507, 507–08 (1928).[5]

Not every indemnification agreement violates the ADA,[6] but the kind of open-ended, uncapped indemnification clause at issue in many social media TOS agreements would run afoul of the statute. Although the online context does not alter the invalidity of such an indemnification clause, TOS agreements in this relatively new and growing area present some distinct legal issues, both because of the absence of traditional paper contracts and because of the ease with which government employees who are not authorized contracting officers can enter into agreements that purport to bind the United States.

[5] *See also* 2 Gov't Accountability Office, *Principles of Federal Appropriations Law* 6-59 to 6-60 (3d ed. 2006) ("*Federal Appropriations Law*") ("[A]bsent express statutory authority, the government may not enter into an agreement to indemnify where the amount of the government's liability is indefinite, indeterminate, or potentially unlimited. Such an agreement would violate both the Antideficiency Act . . . and the Adequacy of Appropriations Act . . . , since it can never be said that sufficient funds have been appropriated to cover the government's indemnification exposure."); Office of Management and Budget, Circular No. A-11, § 145, at 3 (2010) ("If you . . . [s]ign a contract that obligates the Government to indemnify parties against losses ('open-ended indemnification' clause) . . . , [t]hen, you must report a violation of . . . 31 U.S.C. 1341(a).").

[6] As we have recognized, the Comptroller General has upheld indemnification clauses when the potential liability of the United States is limited to an amount that is *both* known at the time of the agreement and within the amount of available appropriations. The Comptroller General has also created a narrow exception permitting indemnification of a public utility service, in limited circumstances, for injury or damage not caused by the utility company; and, of course, exceptions to the ADA have been created by statute. *Indemnification Agreements*, 8 Op. O.L.C. at 97–99 (citing Comptroller General decisions and statutes recognizing or creating exceptions to the ADA). Without an applicable exception, however, an indemnification agreement must include a limitation on the amount of liability and must state both that the liability is limited to the amount of appropriated funds available at the time of payment and that the contracting agency implies no promise that Congress will appropriate additional funds to meet any deficiency in the event of loss. *Id.* at 98.

A.

Online TOS agreements often present basic questions regarding whether the consent necessary to form a contract is present. *See Total Med. Mgmt., Inc. v. United States*, 104 F.3d 1314, 1319 (Fed. Cir. 1997) (among the requirements for a valid contract with the United States is "a mutual intent to contract including offer, acceptance, and consideration"). In this emerging area, courts have applied traditional principles of contract law and focused on whether the web user had reasonable notice of, and manifested assent to, the online agreement. *See Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 28–30 (2d Cir. 2002).

As both you and GSA recognize, the two scenarios you describe in which Department employees "actively consented to the terms" raise no substantial legal questions regarding whether adequate consent to contract was present. *See* Commerce Letter at 3, 4; GSA Letter at 2. The type of TOS agreement you have described is commonly called a "clickwrap" agreement, in which a user must manifest assent to the website's terms of service by affirmatively taking an action, such as checking a box or clicking an "I accept" or "I agree" button. Because clickwrap agreements require affirmative consent on the part of the user, courts generally have upheld their enforceability as contracts. *See, e.g.*, *Segal v. Amazon.com, Inc.*, 763 F. Supp. 2d 1367, 1369 (S.D. Fla. 2011), *mandamus denied*, No. 11-10998-D, 2011 WL 1582517 (11th Cir. Apr. 21, 2011); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 235–39 (E.D. Pa. 2007); *Burcham v. Expedia, Inc.*, No. 4:07CV1963 CDP, 2009 WL 586513, at *2–4 (E.D. Mo. Mar. 6, 2009); *Moore v. Microsoft Corp.*, 741 N.Y.S.2d 91, 92 (N.Y. App. Div. 2002). Whether the web user actually reads the website's TOS is immaterial. "Absent a showing of fraud, failure to read an enforceable clickwrap agreement, as with any binding contract, will not excuse compliance with its terms." *Feldman*, 513 F. Supp. 2d at 236.

You have also asked about the legal ramifications of a government employee's *passive* agreement to a website's TOS—often called a "browsewrap" agreement—simply by using the online application. Commerce Letter at 4. Browsewrap agreements, unlike clickwrap agreements, do not require the user to give express assent to the website's terms, such as by checking a box or clicking a button. Instead, browsewrap agreements typically "involve a situation where notice on a website conditions use of

the site upon compliance with certain terms or conditions, which may be included on the same page as the notice or accessible via a hyperlink. . . . Thus, a party gives his or her assent simply by using the website." *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 790 (N.D. Ill. 2011) (quoting *Sw. Airlines v. Boardfirst, L.L.C.*, No. 06-CV-0891-B, 2007 WL 4823761, at *4 (N.D. Tex. Sept. 12, 2007)).

Both you and GSA suggest that such an agreement could not constitute a binding contract because the web user has taken no affirmative action to agree to its terms. Commerce Letter at 4; GSA Letter at 2. Current case law, however, suggests that there is no categorical rule that browsewrap agreements are unenforceable. Instead, their validity is assessed on a case-by-case basis. Specifically, for a browsewrap agreement to be enforceable, "[r]easonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential." *Specht*, 306 F.3d at 35. As other courts have put it: "[A]bsent a showing of actual knowledge of the terms by the webpage user, the validity of a browsewrap contract hinges on whether the website provided reasonable notice of the terms of the contract." *Van Tassell*, 795 F. Supp. 2d at 790–91; *see also Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) ("In ruling on the validity of a browsewrap agreement, courts consider primarily 'whether a website user has actual or constructive knowledge of a site's terms and conditions prior to using the site.'"), *aff'd*, 380 F. App'x 22 (2d Cir. 2010).

Different facts have produced different conclusions about the enforceability of browsewrap agreements. In *Specht*, the Second Circuit held that a reasonably prudent Internet user would not have known or learned of the existence of the license terms before responding to a particular website's invitation to download free software and, accordingly, that the website did not provide reasonable notice of the license terms. 306 F.3d at 20, 28–30. As a result, "plaintiffs' bare act of downloading the software did not unambiguously manifest assent to the arbitration provision contained in the license terms." *Id.* at 20. Similarly, in *Hines*, the court found no contract because the user was never advised of the terms and conditions and could not see the link to them without scrolling down to the bottom of the screen, which she was not required to do to make her purchase. 668 F. Supp. 2d at 367. By contrast, an Illinois appellate court found that an online contract provided reasonable notice where a blue hyperlink entitled

"Terms and Conditions of Sale" appeared on numerous web pages the plaintiffs completed in the ordering process, and where the plaintiffs were advised on three separate web pages that "[a]ll sales are subject to Dell's Term[s] and Conditions of Sale." *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 121–22 (Ill. App. 2005); *see also PDC Labs., Inc. v. Hach Co.*, No. 09-1110, 2009 WL 2605270, at *3 (C.D. Ill. Aug. 25, 2009) (finding online terms sufficiently conspicuous where the terms were "hyperlinked on three separate pages of the online Plate order process in underlined, blue, contrasting text" and were brought to the user's attention by specific reference in the final order step, which directed the user to "[r]eview terms," followed by a hyperlink to the terms).

As this case law reflects, browsewrap agreements often present more difficult questions about user consent than clickwrap agreements, but there is no per se rule against their enforceability. Government employees registering for Internet social media accounts will need to ensure that they do not inadvertently consent to TOS agreements that violate the ADA (or other provisions of law), whether or not the online application requires the user to give express consent to the website's terms of service.

B.

You first ask whether a government employee without authority to bind the government who signs up for a social media account, and thereby assents to the terms of an agreement containing an open-ended, unrestricted indemnification clause, has violated the ADA. In your view, while the employee may have made an unauthorized commitment, there would be no valid agreement because the employee has no authority to bind the government. Accordingly, the employee would not have violated the ADA. Commerce Letter at 3; *see also* GSA Letter at 3 (same). Although the question is a difficult one on which little authority exists, we agree that government employees who lack authority to contract on behalf of the United States have made unauthorized commitments, but have not violated the ADA, even if they purport to consent to contract terms, such as an open-ended, unrestricted indemnification clause, that would impose an obligation on the United States exceeding or preceding available funds in an appropriation.

An open-ended, unrestricted indemnification clause potentially violates the ADA because it represents an "obligation exceeding an amount available in an appropriation or fund." 31 U.S.C. § 1341(a)(1)(A). It may also "involve" the government in an "obligation" for "payment of money before an appropriation is made." *Id.* § 1341(a)(1)(B). To violate the statute, therefore, the government officer or employee entering into the contract must have authorized or involved the government in an "obligation" in excess or in advance of funds available in an appropriation. Only a government officer or employee with actual authority to bind the government in contract, however, can authorize or involve the government in such an obligation.

The term "obligation" has a well-understood meaning in fiscal law, as is illustrated in the usage of the term by the Comptroller General and the U.S. Government Accountability Office ("GAO"). They have defined "obligation" as "[a] definite commitment that creates a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States." Gov't Accountability Office, GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process* 70 (2005); *To the Administrator, Agency for International Development*, 42 Comp. Gen. 733, 734 (1963) (an "obligation of funds" exists if there is "a legal duty on the part of the United States which constitutes a legal liability or which could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States"); *accord Contract for Legal Services*, B-322147, 2011 WL 2644733, at *2 (Comp. Gen. July 6, 2011); *Obligational Practices of the Corporation for National and Community Service*, B-300480, 2003 WL 1857402, at *3 (Comp. Gen. Apr. 9, 2003); *see also McDonnell Douglas Corp. v. United States*, 39 Fed. Cl. 665, 671 (1997). Thus, "[w]hen an agency takes some action that creates a legal liability, the agency 'obligates' the United States government to make a payment. . . . A legal liability is a claim that may be legally enforced against the government." *National Mediation Board—Compensating Neutral Arbitrators Appointed to Grievance Adjustment Boards Under the Railway Labor Act*, B-305484, 2006 WL 1669294, at *4 (Comp. Gen. June 2, 2006).

For example, in discussing the Anti-Deficiency Act implications of National Mediation Board ("NMB") appointments of arbitrators to grievance adjustment boards, the Comptroller General explained that "only an authorized officer of the United States government can enter into a contract or other binding commitment on behalf of the government." *Id.* at *11. "Consequently, if someone other than an authorized officer attempts to sign a contract or other agreement committing the government to some action, *the commitment is not binding on the government*." *Id.* (emphasis added). Thus, the Comptroller General concluded that the NMB incurs an "obligation" for ADA purposes "when an authorized NMB official appoints an arbitrator to a specific case or a specified group of related cases," *id.*, and it is the appointment "by an authorized NMB official . . . that is the obligating event for NMB." *Id.* at *12.

Determining whether a government officer or employee has authorized or involved the government in an "obligation" for ADA purposes, then, requires an assessment whether the officer or employee has entered into a contract that binds the United States. A binding contract is formed only if an authorized employee has entered into (or ratified) the agreement. *See Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997) (in addition to the usual contract-formation elements, "[a] contract with the United States also requires that the Government representative who entered or ratified the agreement had actual authority to bind the United States"); *accord Total Med. Mgmt.*, 104 F.3d at 1319. It is settled law that the United States is not bound by a contract entered into by a government employee acting outside his authority.[7] Anyone entering into an arrangement with the government "takes the risk of having accurately ascertained

[7] A government employee purporting to bind the United States in contract acts outside his authority when he has no authority to contract for the United States *or* when he exceeds whatever contract authority he possesses. As GSA observes, under the Federal Acquisition Regulations System ("FAR"), "[c]ontracting officers may bind the Government only to the extent of the authority delegated to them," GSA Letter at 4 (citing 48 C.F.R. § 1.602-1(a) (2010)), and that authority may be limited to a specific dollar amount in the contracting officer's warrant, *id.*; *see also* 48 C.F.R. § 1.603-3(a) (2010) (certificate of appointment of contracting officer shall state any limitations on the scope of authority to be exercised). Thus, a contracting officer whose warrant, for example, authorizes him to bind the United States only up to $10,000 would have no authority, in consenting to an open-ended indemnification agreement, to obligate the United States to pay more than that limit.

that he who purports to act for the Government stays within the bounds of his authority." *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *see, e.g.*, *City of El Centro v. United States*, 922 F.2d 816, 820–21 (Fed. Cir. 1990) (rejecting hospital's claim for costs in treating injured illegal aliens at the request of a Border Patrol agent where the agent had no authority to bind the government in contract); *Stout Rd. Assocs. v. United States*, 80 Fed. Cl. 754, 757–58 (2008) (rejecting claim by hotel based on canceled hotel reservation where the agreement was entered into by an intern with no contracting authority and her supervisors lacked authority to delegate such authority to her or to ratify the agreement themselves); *cf. Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 415–16, 424–25, 434 (1990) (erroneous advice given by a government employee to a benefits claimant does not give rise to estoppel against the Government and thereby entitle the claimant to a monetary payment not permitted by law).[8]

For these reasons, a government employee without contracting authority cannot bind the United States to an online TOS agreement. Accordingly, that unauthorized employee has neither "authorize[d]" nor "involve[d]" the government in an "obligation" to indemnify the social

[8] *See also, e.g.*, *To Clyde Esnard Malle*, 18 Comp. Gen. 568, 571–73 (1938) (rejecting claim for compensation where the government employees involved had no authority to contract on behalf of the United States for the claimant's services); *Architect of the Capitol—Contract Ratification*, B-306353, 2005 WL 2810714, at *2 (Comp. Gen. Oct. 26, 2005) (Architect of Capitol not obligated to pay contractor for construction performed pursuant to directives by employee who lacked authority); *Instructions for Settling Claim of Anthony R. Grijalva*, B-204002.OM, 1982 WL 27962, at *1 (Comp. Gen. Mar. 31, 1982) (agreement for rental of horse void because district ranger lacked contracting authority); *Claim of Hertz Corporation for Payment of Car Rental Charges*, B-199804.OM, 1981 WL 24420, at *1–3 (Comp. Gen. Feb. 24, 1981) (no liability to Hertz Corporation for credit card where supply officer had no authority to bind the government to a contract for open-ended use of credit cards).

Many social media services are provided at no immediate cost to the government, raising the question whether a government employee is required to have contracting authority to bind the agency in such an arrangement. GSA Letter at 2–3. We see nothing in the FAR or case law that would permit an unauthorized government employee to bind the government in contract even if the contract imposes no upfront costs on the government. Furthermore, social media agreements containing indemnification clauses could impose costs, because such clauses, if enforceable, could impose monetary liability on the United States.

media company and therefore has not violated the Anti-Deficiency Act. 31 U.S.C. § 1341(a)(1)(A)–(B). By the same token, the employee cannot be said to have "involve[d]" the government in a "contract" for the payment of money in advance of an appropriation. *Id.* § 1341(a)(1)(B).[9] As one pair of commentators put it, "an obligation cannot arise against the United States merely because an unauthorized official has procured goods or services. Much more is necessary, and it does not follow that an Anti-Deficiency Act violation occurs, *eo instanti*, with every irregular procurement." Gary L. Hopkins & Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3679): And Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51, 89 (1978).[10]

Furthermore, it would be inappropriate and, indeed, would likely violate the ADA if an authorized official were to ratify a TOS agreement containing an unenforceable indemnification clause executed by an employee without contract authority or with insufficient contract authority. *See* Commerce Letter at 3. Under the FAR, the head of a contracting activity or higher-level official, if designated, may ratify an unauthorized commitment but only if "[t]he resulting contract would otherwise have been proper if made by an appropriate contract-

[9] Although, as GSA points out, a contracting officer with restricted contracting authority cannot bind the United States to an open-ended online indemnification agreement in an amount that exceeds his contracting authority, GSA Letter at 4, such a contracting officer may nonetheless violate the ADA by entering into such an indemnification agreement—effectively capped at the limit of the officer's contracting authority—because the loss subject to the indemnification agreement may arise in a future year in which the availability of an appropriation to pay that potential liability is unknown. For that reason, as we have previously recognized, the Comptroller General has insisted that even an indemnification agreement "limited to a definite maximum" must provide "(1) that only the amount of appropriated funds actually available at the time of loss will be paid, and (2) that it creates no obligation to appropriate additional funds." *Management of Aircraft Hijacking*, 2 Op. O.L.C. 219, 224 (1978); *see also Indemnification Agreements*, 8 Op. O.L.C. at 96 (same); 2 *Federal Appropriations Law* at 6-73 (to ensure that agency will have sufficient funds available should contingent liability under an indemnification agreement ripen into an obligation, the agency must either "obligate or . . . reserve administratively sufficient funds to cover the potential liability," or the agreement must "expressly limit the government's liability to appropriations available at the time of the loss with no implication that Congress will appropriate funds to make up any deficiency").

[10] We do not address here whether a government employee without contracting authority may violate the ADA by "mak[ing] . . . an expenditure . . . exceeding an amount available in an appropriation or fund." 31 U.S.C. § 1341(a)(1)(A).

ing officer." 48 C.F.R. § 1.602-3(b)(2), (c)(3) (2010); Dep't of Commerce, Commerce Acquisition Manual 1301.602, Ratification of Unauthorized Commitments § 3.2.1(b)(iii), at 5 (2009), http://www.osec.doc.gov/oam/acquistion_management/policy/commerce_acquisition_manual_cam/default.htm. Entering into a TOS agreement containing an indemnification clause that violates the ADA would not otherwise have been proper, even if approved by an authorized official.

C.

We turn now to whether a government officer or employee *with contracting authority* violates the ADA by entering into a TOS agreement that includes an unrestricted, open-ended indemnification clause.[11] Such agreements violate the ADA and, as a consequence, are unenforceable. As noted, open-ended, unrestricted indemnification clauses are unenforceable against the government because they violate the ADA—whether or not the official involved otherwise has contracting authority. GSA Letter at 3. On several occasions, the Supreme Court held under earlier versions of the ADA or related statutes that the government was legally incapable of incurring a contractual obligation to pay more money than Congress had appropriated or to pay money over a longer period than covered by an appropriation. *See, e.g.*, *Leiter v. United States*, 271 U.S. 204, 206–07 (1926); *Sutton v. United States*, 256 U.S. 575, 580–81 (1921); *Hooe v. United States*, 218 U.S. 322, 332–34 (1910); *Bradley v. United States*, 98 U.S. 104, 116–17 (1878); *see generally* Memorandum for Stephen R. Colgate, Assistant Attorney General for Administration, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: Applicability of the Antideficiency Act to a Violation of a Condition or*

[11] We recognize that some indemnification agreements, although appearing to be open-ended and unrestricted, are in fact limited, such as when the government's potential liability is determinable (for example, when that potential liability is capped at the value of a commodity, *see, e.g.*, *To the Administrator, Federal Aviation Agency*, 42 Comp. Gen. 708, 710 (1963)), or when its liability or commitment to indemnify can be avoided by actions under the government's control, s*ee, e.g.*, *To the Honorable Howard M. Metzenbaum, U.S. Senate*, 63 Comp. Gen. 145, 148 (1984); *see also* 2 *Federal Appropriations Law* at 6-72 to 6-74. This opinion does not address these or any similar circumstances in which there would be no violation of the ADA despite the government's having entered into an apparently open-ended, unrestricted indemnification agreement.

Internal Cap Within an Appropriation at 16–17 (Jan. 19, 2001) (discussing Supreme Court decisions). Similarly, with respect to open-ended indemnification clauses, courts have relied on the ADA in refusing to find implied indemnification agreements and in rejecting express indemnification agreements. *See, e.g.*, *Hercules*, 516 U.S. at 427; *Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1346 (Fed. Cir. 2008); *In re All Asbestos Cases*, 603 F. Supp. 599, 611–12 (D. Haw. 1984); *Union Pac. R.R. Corp. v. United States*, 52 Fed. Cl. 730, 732–34 (2002); *Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1, 22–25 (1987); *Cal.-Pac. Utils. Co.*, 194 Ct. Cl. at 715; *Ins. Co. of N. Am. v. Dist. of Columbia*, 948 A.2d 1181, 1186–88 (D.C. 2008). Thus, the courts have held that, by operation of the ADA itself, a government officer or employee who purports to agree to an indemnification clause has not actually committed the United States to a binding obligation. In *Leiter*, for example, the trustees of a landlord sued for the rent under leases to the Treasury Department, but because the leases were contrary to the Anti-Deficiency Act, the Court held that the trustees could not recover. 271 U.S. at 205, 207–08.

This situation, then, gives rise to the peculiar question whether a government employee with contracting authority violates the ADA when, *because of the ADA*, the employee has failed to authorize an enforceable "obligation" that otherwise would exceed funds available in an appropriation. We conclude that the ADA has been violated in these circumstances. The mere fact that commitments made in violation of the ADA are not legally enforceable does not somehow erase the ADA violation; otherwise, the ADA could not be violated. The ADA mandates that, for violations of section 1341(a), the head of the agency "shall report immediately to the President and Congress all relevant facts and a statement of actions taken," with a copy of each report to be transmitted simultaneously to the Comptroller General. 31 U.S.C. § 1351. A government officer or employee who violates section 1341(a) can be subject to administrative discipline and penal sanctions. *Id.* §§ 1349, 1350. These provisions would have no effect, and would make no sense, if an ADA violation does not occur because the violation itself makes the obligation invalid. Moreover, an otherwise binding contract that contains a clause violating the ADA may create precisely the sort of moral obligation for Congress to appropriate money for payments under the contract—a so-called "coercive deficien-

cy"—that Congress enacted the ADA to counteract. *See* 2 *Federal Appropriations Law* at 6-34 to 6-35; *Project Stormfury—Australia—Indemnification for Damages*, 59 Comp. Gen. 369, 372 (1980) ("coercive deficiencies" involve situations where an agency has legally or morally committed the United States to make good on a promise). Finally, we note, based on seven years of reports by the GAO compiling ADA violations,[12] that at least some agencies appear to have treated open-ended indemnification clauses subjecting the government to indefinite liability as violating the ADA and have reported such violations. *See* GAO, Antideficiency Act Reports—Fiscal Year 2011, at 1 (Feb. 9, 2012), https://www.gao.gov/legal/appropriations-law-decisions/resources; GAO, Antideficiency Act Reports—Fiscal Year 2010, at 7 (Jan. 9, 2011) (same); GAO, Antideficiency Act Reports—Fiscal Year 2008, at 12, 13 (Mar. 3, 2009) (same); GAO, Antideficiency Act Reports—Fiscal Year 2006, at 4, 5, 11 (Mar. 9, 2007) (same); GAO, Antideficiency Act Reports—Fiscal Year 2005, at 6 (Aug. 11, 2006) (same).

For these reasons, we conclude that the Anti-Deficiency Act is violated when a government officer or employee with authority to bind the government agrees, without statutory authorization or some other exception, to an open-ended, unrestricted indemnification clause.

III.

You have asked about the practical consequences for the government (rather than for the employee) that flow from an authorized government employee's consent to an online TOS agreement that contains an unenforceable indemnification clause. We make two observations in this regard.

First, the Department has a duty to mitigate an ADA violation—particularly when an agreement is in effect—as soon as possible. *See To the Chairman, Committee on Appropriations, House of Representatives*, 55 Comp. Gen. 768, 772 (1976) ("*Committee on Appropriations*") ("We believe it is obvious that, once an Antideficiency Act violation has been discovered, the agency concerned must take all reasonable steps to miti-

---

[12] Congress amended 31 U.S.C. § 1351 in 2004 to require that a copy of each report of an ADA violation be transmitted to the Comptroller General. *See* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 1401(a), 118 Stat. 2809, 3192 (2004).

gate the effects of the violation insofar as it remains executory."); *The Honorable Glenn English*, B-223857, 1987 WL 101593, at *6 (Comp. Gen. Feb. 27, 1987) ("Once CCC [Commodity Credit Corporation] determined that sufficient funds were not available to pay for the meat it had ordered because its borrowing authority had been depleted . . . , the Antideficiency Act required CCC to do what it could to mitigate or minimize the magnitude of a possible Antideficiency Act violation."). Often, mitigation requires terminating the contract. *See Committee on Appropriations*, 55 Comp. Gen. at 772. Accordingly, for those online social media TOS agreements that have already been executed and that contain an indemnification provision that violates the ADA, the Department should renegotiate the terms of service to revise or eliminate the indemnification clause[13] or cancel the Department's enrollments in social media applications when their operators insist on such a clause.

Second, you ask whether, if agency employees without authority to bind the agency do not violate the ADA when, in the course of signing up for social media applications, they agree to TOS agreements with indemnification clauses, the government is "subject to no legal ramifications despite the apparent benefits to the government." Commerce Letter at 5. Although such indemnification clauses would not be enforceable, in some circumstances the government arguably may pay, or be ordered to pay, for the reasonable value of benefits received from a contractor (e.g., the reasonable value of downloaded photos) under the equitable principle of quantum meruit. "Under the doctrine of quantum meruit, the government pays the reasonable value of services it actually received on an implied, quasi-contractual basis." *Maintenance Service & Sales Corporation*, 70 Comp. Gen. 664, 666 (1991) (concluding that requirements for quantum meruit payment for repair services for government-owned vehicles were satisfied). "Payment under this authority is appropriate where there is no enforceable contractual obligation on the part of the government but where the government has received a benefit not prohibited by law conferred in good faith." *Unauthorized Legal Services Contracts Improperly Charged to Resource Management Appropriation*, B-290005, 2002 WL

[13] GSA has provided examples of TOS agreements that correct or eliminate problematic provisions such as indemnification clauses. *See* GSA Letter at 3 n.3 (citing agreements posted on GSA's website apps.gov).

1611488, at *3 n.9 (Comp. Gen. July 1, 2002). Thus, for example, the Comptroller General opined that, even though the Fish and Wildlife Service had entered into a contract for legal services without authority and in violation of the ADA, the Solicitor of the Department of the Interior could choose to pay the contractors on a quantum meruit basis, so long as sufficient unobligated funds were available in the applicable appropriation. *Id*. at *3, *4 n.9; *see also Perri v. United States*, 340 F.3d 1337, 1344 (Fed. Cir. 2003) (quantum meruit recovery may be available in the Court of Federal Claims to a plaintiff who provides goods or services to the government pursuant to an express contract that contains defects rendering it invalid or unenforceable); *e.g.*, *Prestex, Inc. v. United States*, 320 F.2d 367, 373 (Ct. Cl. 1963). In some circumstances, it may be that no quantum meruit payment could be made or ordered, particularly if the website provided free access (apart from the value of the unenforceable indemnification agreement) or if the government already has paid for access. Nevertheless, in other situations, the government arguably could be required to make a quantum meruit payment.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

Whether Reservists Must Exhaust Available Leave Under 5 U.S.C. § 6323(b) Before Taking Leave Under 5 U.S.C. § 6323(a)

A reservist who performs military service that qualifies for leave under 5 U.S.C. §§ 6323(a) and 6323(b) may elect to take leave under section 6323(a) without first using all of his or her available leave under section 6323(b).

April 3, 2012

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF VETERANS AFFAIRS

The Department of Veterans Affairs ("VA") has asked whether a federal employee who performs military service that qualifies for leave under both 5 U.S.C. § 6323(a) (2006) and 5 U.S.C. § 6323(b) (2006 & Supp. IV 2010) must exhaust available leave under section 6323(b) before taking leave under section 6323(a). Letter for Eric Holder, Attorney General, from Will A. Gunn, General Counsel, VA at 6 (Apr. 1, 2011) ("Opinion Request"). In our view, the statute does not impose such an exhaustion requirement. An employee who otherwise qualifies for leave under both section 6323(a) and section 6323(b) may elect to take leave under section 6323(a) even if the employee has unused leave under section 6323(b).

As we explain in detail below, the text of section 6323(a), which entitles an employee to military leave under specified conditions, does not require that an employee first exhaust available military leave under section 6323(b). Nor does anything in the text of section 6323(b) suggest that exhaustion of the leave it provides is a prerequisite to an employee's use of leave under section 6323(a). We do not find section 6323(a) and (b) ambiguous with respect to exhaustion. Indeed, had we found any ambiguity in these leave provisions, we would have construed them in favor of those who perform military service. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1206 (2010).

The conclusion that exhaustion is not required is also supported by the legislative and drafting history of section 6323(b), which demonstrates that this provision was enacted to supplement the existing leave provided by section 6323(a), not to displace or restrict it. Our reading of section 6323(a) and (b) is also consistent with the provisions of, and practice under, other federal leave statutes: Some of these statutes use language

similar to that in section 6323, yet they generally do not oblige an employee to use one type of leave before or instead of another when the employee qualifies for multiple types of leave. Finally, reading an exhaustion requirement into section 6323(b) would frustrate Congress's purposes in enacting the statute, which included expansion of existing military leave and alleviation of the financial hardship of employees who perform military service. If exhaustion were required, some employees who perform military service would be worse off than they were before the statute's enactment.

Some agencies appear to have concluded that a 1996 amendment to the statute, which clarified that employees may elect to use *annual leave* or *compensatory time* instead of leave under section 6323(b), indicates that section 6323(b) leave must be exhausted before military leave may be taken under section 6323(a). That inference is unwarranted. The 1996 amendment does not address whether employees may use leave under section 6323(a) before or instead of section 6323(b) leave, and the amendment is consistent with the conclusion that they may.

For all of these reasons, we conclude that employees are not required to exhaust military leave under section 6323(b) before using the military leave conferred by section 6323(a).

I.

A federal employee (as defined by 5 U.S.C. § 2105 (2006)) who is a member of the National Guard or another reserve component of the armed forces ("reservist") is entitled to two overlapping types of paid leave from his or her civilian job for military service. The first and most longstanding type of military leave is conferred by section 6323(a). That provision states that a reservist is "entitled to leave without loss in pay, time, or performance or efficiency rating for active duty, inactive-duty training . . . , funeral honors duty . . . , or engaging in field or coast defense training." 5 U.S.C. § 6323(a). Thus, reservists may use section 6323(a) leave for both annual training exercises, *see* 10 U.S.C. § 10147 (2006); 32 U.S.C. § 502 (2006), and active duty, which generally includes all "full-time duty in the active military service of the United States," 10 U.S.C. § 101(d)(1) (2006), including service to assist in civil law enforcement or to perform traditional military operations. *See* Opinion Request at 3; *Leave of Absence—Civilians on Military Duty—Excess*

Leave, 47 Comp. Gen. 761, 762 (1986). Section 6323(a) leave accrues at the rate of 15 days per fiscal year, and a reservist may carry forward up to 15 days of accumulated leave into the next fiscal year. *Id*. A reservist taking section 6323(a) leave receives his or her full civilian salary as well as military pay.

Section 6323(a) leave is nearly a century old. It originated with Public Law 65-11, 40 Stat. 40, 72 (1917), which provided

> [t]hat all officers and employees of the United States or of the District of Columbia who shall be members of the Officers' Reserve Corps shall be entitled to leave of absence from their respective duties, without loss of pay, time, or efficiency rating, on all days during which they shall be ordered to duty with troops or at field exercises, or for instruction, for periods not to exceed fifteen days in anyone calendar year.

In its original form, as today, section 6323(a) provided leave for both training ("field exercises" or "instruction") and active duty ("duty with troops"). *Id*. By the mid-1960s, section 6323(a) had evolved to closely resemble its current version and provided that covered reservists were "entitled to leave without loss of pay, time, or performance or efficiency rating for each day, not in excess of 15 days in a calendar year," devoted to "active duty" or "field or coast defense training." 5 U.S.C. § 6323(a) (Supp. II 1966).[1]

Beginning around the mid-1960s, the government increasingly began to call upon reservists to perform active-duty military service, particularly in aid of civil law enforcement, for significant periods of time. Due to those additional demands, the 15 days of leave provided by section 6323(a)

---

[1] Congress has made few substantive changes to section 6323(a) since that time. In 1970, Congress expanded section 6323(a) to cover all reservists, eliminating an exception for certain postal field service employees. *See* Postal Reorganization Act, Pub. L. No. 91-375, § 6(c)(18), 84 Stat. 719, 776. In 1980, the statute was revised to provide that leave would accrue on a fiscal year basis and that employees could carry over up to 15 days of accrued leave into the next fiscal year. *See* Pub. L. No. 96-431, § 1, 94 Stat. 1850, 1850 (1980). In 1999, Congress added inactive-duty training as a qualifying form of military service, *see* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 1106(a), 113 Stat. 512, 777; and, in 2001, Congress added funeral honors duty, *see* National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, div. A, § 563, 115 Stat. 1012, 1120.

often proved insufficient to cover all of a reservist's military service. *See* H.R. Rep. No. 90-1560, at 3, 4–5 (1968); S. Rep. No. 90-1443, at 2 (1968). Reservists frequently would use up the leave provided by section 6323(a) while performing service in aid of law enforcement and therefore would be forced to use annual leave, or to go on military furlough without civilian pay, for their remaining military service, including their training. *See* H.R. Rep. No. 90-1560, at 2–3; 114 Cong. Rec. 11,114 (1968) (statement of Rep. Machen).

Members of Congress viewed the "personal inconvenience" and "financial hardship" caused by the inadequacy of section 6323(a) leave as an "inequity" in need of correction. H.R. Rep. No. 90-1560, at 3–4; 114 Cong. Rec. at 11,114 (statement of Rep. Machen); 114 Cong. Rec. at 19,390 (same). Consequently, in 1968, Congress enacted a second type of military leave, now codified in section 6323(b), to provide "additional" leave that would supplement the 15 days of military leave already provided by section 6323(a). H.R. Rep. No. 90-1560, at 2, 6; S. Rep. No. 90-1443, at 1.[2] That supplemental leave was, however, less expansive and somewhat less advantageous to reservists than the basic leave provided under section 6323(a). As originally enacted, section 6323(b) stated that a covered reservist who performed either federal service "for the purpose of providing military aid to enforce the law" or "full-time military service for his State, the District of Columbia," or a federal territory was, except as provided in 5 U.S.C. § 5519, "entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise [was] entitled, credit for time or service, or performance or efficiency rating." Pub. L. No. 90-588, § 2(a), 82 Stat. 1151 (1968).[3] Section 6323(b) did not provide additional leave for all types of active duty covered by section 6323(a) leave, but instead provided extra leave for only the specific kind of military service—service in aid of civil law

[2] As originally enacted, the new provision was denominated section 6323(c). Pub. L. No. 90-588, § 2(a), 82 Stat. at 1151. It was re-designated as section 6323(b) in 1979. Pub. L. No. 96-54, § 2(a)(40), 93 Stat. 381, 383 (1979). We refer to the provision as section 6323(b) throughout this opinion.

[3] The reservists covered by section 6323(b) originally included all federal employees under 5 U.S.C. § 2105 except certain employees of the postal field service. Congress eliminated the exception for postal employees in 1970, at the same time that it eliminated the parallel exception under section 6323(a). Postal Reorganization Act § 6(c)(18), 84 Stat. at 776; *supra* note 1.

enforcement—that had created problems with the adequacy of existing leave. Congress also limited section 6323(b) leave to "22 workdays in a calendar year" and did not permit reservists to carry over any unused section 6323(b) leave to the following year. *Id*. In addition, in section 5519, Congress required that the military pay received by a reservist while on leave under section 6323(b) be credited against his or her civilian pay (so that a reservist taking leave under section 6323(b) would receive the higher of his or her military or civilian pay, but not both). *See* 5 U.S.C. § 5519 (2006).

In 1969, the United States Civil Service Commission, the predecessor agency to the Office of Personnel Management ("OPM"), requested the Comptroller General's views on several interpretative questions concerning section 6323(b). In responding to that request, the Comptroller General opined that an employee who performs military duty qualifying for leave under section 6323(b), and who has available leave under that provision, (1) may not "involuntarily be charged annual leave or any other type of leave" for the time spent performing military duty and (2) "may not elect to use" annual or other available leave. *To Chairman, United States Civil Service Commission*, 49 Comp. Gen. 233, 237 (1969) ("1969 CG Opinion"). The Comptroller General stated that this conclusion followed from the language in section 6323(b) admonishing that an employee is entitled to leave "without loss of[,] or reduction in[,] . . . leave to which he otherwise is entitled." *Id.* at 236 (quoting section 6323(b)).

The 1969 CG Opinion provoked no immediate response from Congress. Beginning with the appropriations act for the Department of Defense for fiscal year 1991, however, Congress began including in the Defense Department appropriations acts language making clear that reservists could use annual leave instead of leave under section 6323(b) if they so requested. *See* Pub. L. No. 101-511, § 8086, 104 Stat. 1856, 1895–96 (1990); Pub. L. No. 102-172, § 8068, 105 Stat. 1150, 1187 (1991); Pub. L. No. 102-396, § 9064, 106 Stat. 1876, 1916–17 (1992); Pub. L. No. 103-139, § 8047, 107 Stat. 1418, 1450–51 (1993); Pub. L. No. 103-335, § 8042, 108 Stat. 2599, 2627 (1994).

In 1996, Congress amended section 6323(b) to make that clarification permanent. The 1996 amendment added the following language to the end of the subsection:

> Upon the request of an employee, the period for which an employee is absent to perform service [that qualifies for leave under this subsection] may be charged to the employee's accrued annual leave or to compensatory time available to the employee instead of being charged as leave to which the employee is entitled under this subsection. The period of absence may not be charged to sick leave.

National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 516(a), 110 Stat. 186, 309 ("NDAA for FY 1996"). The 1996 amendment thus only addressed the relationship between section 6323(b) leave and annual leave, compensatory time, and sick leave, not the relationship between section 6323(b) leave and any other type of leave, including leave under section 6323(a).

Apart from the 1996 amendment, the only other changes that Congress has made to section 6323(b) have been expansions in the types of military service that qualify for leave. In 1991, Congress added, as qualifying service, military service "for the purpose of providing assistance to civil authorities in the protection or saving of life or property or the prevention of injury." National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, div. A, sec. 528, § 6323(b)(2), 105 Stat. 1290, 1364. And, in 2003, Congress added "full-time military service as a result of a call or order to active duty in support of a contingency operation." National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, div. A, sec. 1113(a), § 6323(b)(2)(B), 117 Stat. 1392, 1635.[4] Those expansions in the types of active duty that qualify for leave under section 6323(b) have increased the overlap between section 6323(b) leave and section 6323(a) leave. At the same time, Congress has retained the provisions that make section 6323(b) leave less advanta-

---

[4] A "contingency operation" is

> a military operation that—
>
> (A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or
>
> (B) results in the call or order to, or retention on, active duty of members of the uniformed services . . . during a war or during a national emergency declared by the President or Congress.

10 U.S.C. § 101(a)(13) (2006).

geous to reservists than section 6323(a) leave, most notably the provision limiting a reservist's pay while on section 6323(b) leave to the higher of his military or civilian pay.

As explained in its letter requesting our opinion, the VA sees nothing in section 6323 that requires a reservist to exhaust available leave under section 6323(b) before taking leave under section 6323(a), and the VA therefore believes that its reservist employees may elect, at their option, to use military leave under section 6323(a) rather than section 6323(b). Opinion Request at 2. OPM has adopted a contrary interpretation of the statute, citing the 1969 CG Opinion. *See* OPM, *OPM Policy Guidance Regarding Reservist Differential Under 5 U.S.C. 5538* at 5–6 (Apr. 13, 2011) ("*Reservist Differential Policy Guidance*"). The VA, however, maintains that neither the text nor the legislative history of section 6323 supports an exhaustion requirement. *See* Opinion Request at 3–4. The VA believes that the 1996 amendment to section 6323(b) has undermined the reasoning in the 1969 CG Opinion. *See id.* at 5. The VA also contends that OPM's interpretation is inconsistent with an OPM regulation implementing the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. §§ 4301–4334 (2006 & Supp. IV 2010), and that OPM's interpretation would, in some instances, force employees to forfeit accrued leave under section 6323(a). Opinion Request at 5–6.

In response to the VA's opinion request, we solicited the views of OPM, which adhered to the position expressed in its policy guidance that a reservist is required to exhaust available leave under section 6323(b) before using leave under section 6323(a). Letter for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, from R. Alan Miller, Associate General Counsel, United States Office of Personnel Management at 7 (Sept. 2, 2011) ("OPM Views Letter"). We also requested the views of the Department of Defense ("DoD"), which informed us that it considers the question a close one but agrees with OPM. Letter for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Jeh Charles Johnson, General Counsel, Dep't of Defense, at 2 (Nov. 10, 2011) ("DoD Views Letter").

II.

We have carefully considered the text, context, legislative history, and purposes of section 6323, as well as the interpretations of the agencies whose views we solicited. In light of these factors, and cognizant of the principle that statutes providing benefits to individuals engaged in military service should be construed in the beneficiaries' favor, we conclude that a reservist need not exhaust his or her available leave under section 6323(b) before using leave under section 6323(a).

A.

Section 6323 does not contain an express exhaustion requirement, and we can identify no basis for reading the text to include such a requirement. As described above, section 6323(a) states that an employee "is entitled to leave" under that provision "for active duty, inactive-duty training . . . , funeral honors duty . . . , or engaging in field or coast defense training . . . as a Reserve of the armed forces or a member of the National Guard." Nothing in that language suggests that leave under section 6323(a) is contingent on an employee's first using leave available under other provisions. Instead, Congress's use of the word "entitled" indicates that an employee has a right to leave under that provision so long as he or she performs certain military activities as a Reserve or National Guard member. The ordinary meaning of the word "entitled," in legal and general usage, is "give[n] a right or title to," "qualif[ied] . . . for," or "furnish[ed] with proper grounds for seeking or claiming something." *Webster's Third New International Dictionary* 758 (1993) ("*Webster's Dictionary*"); *accord Random House Dictionary of the English Language* 649 (2d ed. 1987) ("*Random House Dictionary*"); *see Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Comp. Programs, Dep't of Labor*, 519 U.S. 248, 255–56 (1997). The statute does not condition the employee's right to leave on satisfaction of additional prerequisites, such as exhaustion of other available types of leave.

Similarly, nothing in the text of section 6323(b) indicates that exhaustion of the leave it provides is a prerequisite to an employee's use of leave under section 6323(a). Section 6323(b) states that an employee who "(1) is a member of a reserve component of the Armed Forces . . . or the National Guard" and (2) performs one of three specified types of military

service "is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating." As discussed above, use of the word "entitled" makes clear that the employee has "a right" to leave under section 6323(b) if he or she satisfies the listed conditions. It does not suggest that the employee is required to take section 6323(b) leave, much less that the employee is required to take section 6323(b) leave before using a different type of leave to which the employee has a right under another statutory provision.

We have found no reason to depart from the plain meaning of section 6323 and to import into the statute a requirement that employees exhaust section 6323(b) leave before using section 6323(a) leave. On the contrary, as explained below, reading section 6323 to contain an exhaustion requirement would be in tension with its legislative and drafting history, would be inconsistent with the interpretation of other leave statutes, and would undermine Congress's purposes in enacting section 6323(b), which included improving the financial situation of reservists by supplementing the military leave already available to them. *See infra* Part II.B–D.

OPM advances two textual arguments in support of an exhaustion requirement. First, OPM observes that sometimes when a statute provides that an individual is "entitled" to a certain benefit, the individual is required to accept that benefit. OPM Views Letter at 2. For example, OPM notes, employees who are "entitled" to pay under various statutory provisions must accept that pay and cannot chose to waive it. *Id*. (citing 5 U.S.C. §§ 5334(b), 5363, 5534, 5562 (2006); 5 U.S.C. §§ 5551, 5595 (2006 & Supp. IV 2010)). OPM thus contends that "the word 'entitled' in section 6323(b) should be interpreted as meaning 'required.'" *Id*. at 3.

OPM is correct that federal employees are prohibited from waiving pay to which they are statutorily entitled, but the basis for that prohibition is not that the word "entitled" means "required." Instead, the prohibition derives from the principle, first recognized in *Glavey v. United States*, 182 U.S. 595 (1901), that allowing a federal employee to agree to accept a salary lower than the one set by Congress would violate public policy. *See Employment of Retired Army Officer as Superintendent of Indian School*, 30 Op. Att'y Gen. 51, 56 (1913). Such salary waivers are against public policy because permitting them would effectively cede to the Executive Branch Congress's power to fix the salaries of federal

officials and would disadvantage those individuals who are unable or unwilling to work for less than the salary prescribed by the legislature. *See Glavey*, 182 U.S. at 609. We are not aware of any comparable public policy that requires federal employees to use all of the leave for which they qualify. On the contrary, employees may donate annual leave to other employees, 5 U.S.C. § 6332 (2006), or forfeit leave by not using it, *see, e.g.*, *id.* § 6304 (2006 & Supp. IV 2010). In any event, reading the word "entitled" to mean "required" would not support a rule that employees must use leave under section 6323(b) before they may use leave under section 6323(a), because section 6323(a) also states that employees are "entitled" to leave under its provisions. Thus, the word "entitled" provides no basis for requiring an employee to exhaust section 6323(b) leave before using leave under section 6323(a).[5]

Second, OPM (along with DoD) contends that an exhaustion requirement is mandated by section 6323(b)'s admonition that leave under its provisions is "without loss of, or reduction in, pay, leave to which [the employee] otherwise is entitled, credit for time or service, or performance or efficiency rating." 5 U.S.C. § 6323(b); *see* OPM Views Letter at 3; DoD Views Letter at 2. OPM and DoD maintain that requiring an employee to use all available leave under section 6323(b) before using leave under section 6323(a) is necessary to prevent "loss of" or "reduction in" section 6323(a) leave, which is "leave to which [the employee] otherwise is entitled." OPM Views Letter at 3; DoD Views Letter at 2. That position, however, is based on the faulty premise that a reservist loses or suffers a reduction in section 6323(a) leave by taking that leave.

The use of leave is not a loss of leave. The word "loss" means a "deprivation" or a "decrease in amount, magnitude, or degree." *Webster's Dictionary* at 1338; *accord Random House Dictionary* at 1137. Similarly, the word "reduction" generally means "a decrease in size, amount, extent, or number," a "diminution," a "limitation in scope," or some other "restriction." *Webster's Dictionary* at 1905; *accord Random House Dic-*

---

[5] OPM also points out that entitlements may be conditioned on the satisfaction of statutory prerequisites, so that even though section 6323(a) states that an employee is "entitled" to leave, the employee may not be able to take that leave unless he or she satisfies certain conditions, such as first exhausting other available leave. OPM Views Letter at 3. We agree that entitlements may be conditional, but, as discussed above, nothing in the text of section 6323 conditions the use of leave under section 6323(a) on exhaustion of leave under section 6323(b).

tionary at 1618. An employee's voluntary decision to take leave under section 6323(a) for the purposes for which it is provided is not a "deprivation" of, "diminution" in, or other "limitation" or "restriction" on that leave. Thus, just as an employee does not suffer a "loss of" or "reduction in" annual leave when the employee chooses to take such leave to go on vacation, an employee does not suffer a "loss of" or "reduction in" section 6323(a) leave when the employee chooses to take that leave, rather than leave under section 6323(b), to perform military service.

In fact, a requirement that employees use section 6323(b) leave before using section 6323(a) leave may itself contravene the prohibition against loss of, or reduction in, other leave. Requiring an employee to exhaust available leave under section 6323(b) before using leave under section 6323(a) can be viewed as a "reduction in" section 6323(a) leave. The exhaustion requirement can be seen as a "limitation" or "restriction" on section 6323(a) leave because it mandates that employees first use another, less desirable form of leave. Moreover, at least in some cases, an exhaustion requirement might result in an employee's actual "loss of" section 6323(a) leave. As the VA points out, reservists are permitted to carry forward no more than 15 days of section 6323(a) leave into the next fiscal year. Opinion Request at 6. Thus, if 15 days before the end of the fiscal year a reservist with a leave balance under section 6323(a) of 30 days were called to participate in active duty that qualified for leave under both section 6323(a) and section 6323(b), and the reservist were required by the exhaustion requirement to use section 6323(b) leave for those 15 days, the reservist would forfeit 15 days of section 6323(a) leave. *Id.* Absent an exhaustion requirement, the reservist could use those 15 days of section 6323(a) leave rather than forfeiting them.

Even assuming the existence of some ambiguity about whether section 6323's text imposes an exhaustion requirement, we would resolve that ambiguity by declining to read the statute to contain such a requirement. Section 6323 provides benefits for federal employees who perform military service, and it is well established that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 131 S. Ct. at 1206 (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21 n.9 (1991)); *see also, e.g.*, *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (observing that the Selective Training and Service Act of 1940 should "be liberally construed for the benefit of those who left private life to serve their coun-

try in its hour of great need”). Accordingly, we conclude that the statutory text does not require that employees exhaust leave under section 6323(b) before using leave under section 6323(a).

B.

The legislative and drafting history of section 6323(b) confirms our interpretation of the statute’s text. The committee reports and floor statements accompanying section 6323(b)’s enactment make clear that it was intended to supplement existing leave under section 6323(a), not to displace or restrict it. The committee reports and individual Members of Congress consistently described section 6323(b) as providing “additional” leave, above and beyond the military leave already provided by section 6323(a). *See, e.g.*, H.R. Rep. No. 90-1560, at 2, 6; S. Rep. No. 90-1443, at 1; 114 Cong. Rec. at 19,388 (statement of Rep. Henderson); 114 Cong. Rec. at 19,389 (statement of Rep. Corbett); 114 Cong. Rec. at 22,496 (description of legislation by Senate’s Assistant Legislative Clerk); 114 Cong. Rec. at 27,321 (statement of Rep. Dulski); 114 Cong. Rec. at 29,633 (statement of Sen. Mansfield).

The House Committee Report explained that, although reservists were already “entitled to leave, not in excess of 15 days in a calendar year, for active duty,” “[t]he 15 days generally [were] sufficient to cover only the statutory required participation during each year by such employees in training.” H.R. Rep. No. 90-1560, at 3. As a result, reservists who were called to perform further military duties—for example, to help quell the civil disturbances in the spring of 1968—were forced to take annual leave or leave without civilian pay for some of their military service. *See id.* at 2–3; 114 Cong. Rec. at 11,114 (statement of Rep. Machen) (“A number of members of the Maryland National Guard who are Federal employees informed me that because of their activation for civil disturbance duty they would be forced to take annual leave later this year when they go into their 2-week annual training periods.”). Section 6323(b) was enacted to provide “more military leave” in order to “correct this inequity.” 114 Cong. Rec. at 19,390 (statement of Rep. Machen); *id.* at 11,114 (same); *see* H.R. Rep. No. 90-1560, at 2–4 (stating that the “additional leave” provided by section 6323(b) would alleviate the “personal inconvenience” and “financial hardship” caused by the inadequacy of existing military leave).

The legislative history's discussion of the language "without loss of, or reduction in, . . . leave to which [the employee] otherwise is entitled," 5 U.S.C. § 6323(b), in no way suggests that this language was intended to impose a requirement that employees exhaust other available leave before using leave under section 6323(b). The sole reference to the language appears in the House Committee Report, which stated that

> [t]he leave to be granted under [section 6323(b)] is to be granted without loss or reduction in pay; leave to which [the employee] otherwise is entitled, whether annual leave, sick leave, or military training leave; credit for time or service; or performance or efficiency rating.

H.R. Rep. No. 90-1560, at 6. The phrasing in the Report suggests that the prohibition on loss of or reduction in leave becomes relevant only once leave is "granted" and thus does not impose a requirement that an employee request section 6323(b) leave whenever entitled to it or before using other leave. In addition, the Report suggests that the qualification "without loss of, or reduction in," applies to leave in the same manner that it applies to pay, credit for time or service, and performance or efficiency rating, and the concept of exhaustion makes no sense with respect to the latter items. For these reasons, the Report supports the conclusion drawn from the statutory text—that the phrase is best and most naturally read as protecting employees from being deprived of other leave (or being otherwise penalized) when they use leave under section 6323(b).

This interpretation of the statutory language is confirmed by the drafting history of section 6323(b). An earlier version of the legislation did not contain language prohibiting loss of or reduction in "leave to which [the employee] otherwise is entitled" but stated only that section 6323(b) leave would be "without loss of pay, time, or efficiency rating." H.R. 2635, 90th Cong. (1967). The Civil Service Commission recommended various technical changes to that version of the bill, including modifications to "mak[e] clear that leave provided by it is *in addition to* military leave provided by [section 6323(a)]." H.R. Rep. No. 90-1560, at 12 (Letter for L. Mendel Rivers, Chairman, House Committee on Armed Services, from John M. Macy, Jr., Chairman, Civil Service Commission (Apr. 19, 1968)) (emphasis added). The House Committee on the Post Office and Civil Service subsequently reported a new version of the legislation, which for the first time contained the phrase "without loss of or reduction in . . .

leave to which [the employee] otherwise is entitled." *Id*. at 6. The Committee Report explained that the Civil Service Commission's recommendations had been "embodied" in the changes that the Committee had made to the bill. *Id*. at 2. Thus, the drafting history suggests that the phrase "without loss of, or reduction in, . . . pay to which [the employee] otherwise is entitled" was intended to clarify that section 6323(b) leave is supplemental to other available leave, not to impose an exhaustion requirement.

OPM and DoD maintain that the legislative history supports the inference of an exhaustion requirement because, at the end of its discussion of the provisions added by the 1968 legislation, the House Committee Report states that "[t]he granting of leave and the reduction in civilian pay under these provisions are mandatory, and neither the agency nor the employee will have any discretion in this regard as to the application of the provisions involved." H.R. Rep. No. 90-1560, at 7; *see* OPM Views Letter at 4–5; DoD Views Letter at 2. In our view, this passage does not suggest that section 6323(b) contains an exhaustion requirement or make the "requesting" of leave mandatory. It states that the "granting" of leave is mandatory, which indicates only that an agency must grant leave if an employee requests it. The passage also says that "neither the agency nor the employee will have any discretion in this regard as to the application of the provisions involved." H.R. Rep. No. 90-1560, at 7 (emphasis added). But the statement that the employee lacks discretion appears to refer to the fact that an employee who chooses to take section 6323(b) leave must accept "the reduction in civilian pay" mandated by section 5519, not to require employees to request leave whenever they are entitled to it. Accordingly, the legislative and drafting history does not suggest that section 6323(b) contains an exhaustion requirement.

C.

Related statutory provisions also support the conclusion that section 6323(b) does not contain an exhaustion requirement. Generally, other statutes providing for leave do not require an employee to use one type of leave before, or instead of, another if the employee's activity qualifies for multiple types of leave.

For example, employees are "entitled" to annual leave under 5 U.S.C. § 6303 (2006) and sick leave under 5 U.S.C. § 6307 (2006). When an

employee qualifies for both annual and sick leave for the same time period, the employee is not required to exhaust one type of leave before using the other. *See* 5 C.F.R. § 630.401(a) (2011) (stating that an employing agency "must" grant sick leave if an employee meets specified criteria); General Accounting Office, GAO/OGC-96-6, *Civilian Personnel Law Manual, Title II—Leave* at 2-15 (4th ed. 1996) (noting that "[a]n absence which is otherwise chargeable to sick leave may be charged to annual leave if the employee so requests and the agency agrees").

The same interpretation and practice are followed under statutes that, like section 6323(b), state that leave under their provisions is "without loss of, or reduction in, . . . leave to which [the employee] otherwise is entitled."[6] For example, 5 U.S.C. § 6323(d)(1) (2006) provides that a military reserve technician

> is entitled at such person's request to leave without loss of, or reduction in, pay, leave to which such person is otherwise entitled, credit for time or service, or performance or efficiency rating, for each day, not to exceed 44 workdays in a calendar year, in which such person is on active duty without pay . . . for participation in operations outside the United States, its territories and possessions.

DoD guidance, with which OPM has expressed its agreement, makes clear that a military reserve technician may choose to use other forms of leave, including annual leave and leave under section 6323(a), before using section 6323(d)(1) leave. *See* Memorandum for Human Resources Offices and Civilian Personnel Offices from Earl T. Payne, Director, Civilian Personnel Management Service, DoD, *Subject: Military Leave* att. 2, at 2–3 (Apr. 2, 1996) ("1996 DoD Memorandum"); Memorandum to Directors of Personnel from Office of Compensation Policy, OPM, *Subject: Military Leave* (Apr. 24, 1996). That conclusion is confirmed by

[6] Many of these provisions, unlike section 6323(b), do not entail a concomitant reduction in pay. An employee therefore has little or no incentive to substitute another type of leave for the leave provided, as he or she does in the case of section 6323(b) leave. In our view, however, the salient fact about these provisions is that an employee retains the right to make such a substitution notwithstanding the fact that the provisions contain the same admonition as section 6323(b) that the leave provided is "without loss of, or reduction in," other types of leave.

section 6323(d)(1)'s text, which states that leave under its provisions is "at [the technician's] request."[7]

Similarly, 5 U.S.C. § 6326 (2006), which was enacted by the same law as section 6323(b), *see* Pub. L. No. 90-588, §§ 1(a), 2(a), 82 Stat. at 1151, provides that an employee is

> entitled to not more than three days of leave without loss of, or reduction in, pay, leave to which he is otherwise entitled, credit for time or service, or performance or efficiency rating, to make arrangements for, or attend the funeral of, or memorial service for, an immediate relative who died as a result of wounds, disease, or injury incurred while serving as a member of the Armed Forces in a combat zone.

OPM guidance on section 6326 does not require that an employee exhaust available section 6326 leave before using annual leave or another applicable type of leave. *See* OPM, *Leave for Funerals and Bereavement, Funeral Leave for Combat-Related Death of an Immediate Relative*, http://opm.gov/oca/leave/HTML/Funeral.asp (last visited ca. Apr. 2012). Moreover, OPM's regulations suggest that an employee may use other types of leave before, or instead of, taking leave under section 6326, because the regulations provide that section 6326 leave shall be granted "as is needed and requested by" the employee. 5 C.F.R. § 630.804 (2011).[8]

---

[7] Although, unlike section 6323(d)(1), section 6323(b) does not expressly state that its leave is "at [the employee's] request," the absence of that language does not imply that section 6323(b) leave is mandatory. Section 6323(b) and section 6323(d)(1) were enacted by separate laws, 28 years apart. *Compare* Pub. L. No. 90-588, § 2(a), 82 Stat. at 1151 (originally enacting what is now section 6323(b), as amended), *with* NDAA for FY 1996, § 1039, 110 Stat. at 432–33 (originally enacting section 6323(d)(1)). In those circumstances, the presumption that Congress acts intentionally when it includes language in one section of a statute but omits it in another section of the same act does not apply. *See Johnson v. United States*, 130 S. Ct. 1265, 1272–73 (2010). Moreover, leave statutes generally do not include language stating that leave is "at [the employee's] request" even when the leave provided is voluntary rather than mandatory. *See, e.g.*, 5 U.S.C. § 6303 (annual leave); 5 U.S.C. § 6307 (sick leave).

[8] OPM guidance on 5 U.S.C. § 6328 (2006)—which provides that "[a] Federal law enforcement officer or a Federal firefighter may be excused from duty without loss of, or reduction in, pay or leave to which such officer is otherwise entitled, or credit for time or service, or performance or efficiency rating, to attend the funeral of a fellow Federal law

OPM guidance on 5 U.S.C. § 6327 (2006) also suggests that an employee may choose which type of applicable leave he or she wants to use. That statute provides that an employee is "entitled to leave without loss of or reduction in pay, leave to which [the employee is] otherwise entitled, credit for time or service, or performance or efficiency rating, for the time," up to certain annual limits, "necessary to permit such employee to serve as a bone-marrow or organ donor." *Id.* OPM's guidance states that an employee "may," rather than "must," use section 6327 leave and that such leave "is in addition to annual leave and sick leave." OPM, Bone Marrow or Organ Donor Leave, http://www.opm.gov/oca/leave/html/DONOR.asp (last visited ca. Apr. 2012).[9]

---

enforcement officer or Federal firefighter, who was killed in the line of duty"—also gives no indication that section 6328's funeral leave must be used instead of annual leave or other applicable types of leave. *See* OPM, *Leave for Funerals and Bereavement, Funeral Leave for First Responders*, http://opm.gov/oca/leave/HTML/Funeral.asp (last visited ca. Apr. 2012).

[9] We are aware of only one leave statute that may not permit employees to choose among multiple available types of leave. Under 5 U.S.C. § 6322 (2006), an employee is "entitled to leave without loss in, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating" for jury service or service as a witness in certain cases to which the government is a party. OPM's guidance on section 6322 does not state that an employee must use leave under that section rather than other applicable leave, *see* OPM, *Court Leave*, http://www.opm.gov/oca/leave/HTML/courtlv.asp (last visited ca. Apr. 2012), but the Comptroller General has concluded that, where applicable, leave under section 6322 must be used, rather than annual leave. *See, e.g.*, *Mr. Thomas*, B-119969, 1969 WL 4324, at *2 (Comp. Gen. Mar. 21, 1969) ("1969 CG Letter"); *Richard A. Gresham*, B-119969, 1955 WL 1962, at *1 (Comp. Gen. Mar. 3, 1955) ("1955 CG Letter"); *Witnesses; Jurors—Government Employees—Compensation, etc.*, 27 Comp. Gen. 83, 87–88 (1947). The Comptroller General based that conclusion, however, on analyses of earlier, different versions of the statute, which also differed from section 6323(b). *See* 1955 CG Letter at *1 (quoting section 1 of Public Law 76-676, 54 Stat. 689, 689, which provided that time for jury service "shall not . . . be deducted from the time allowed for any leave of absence authorized by law"); 1969 CG Letter at 2 (quoting 5 U.S.C. § 6322 (Supp. IV 1968), which provided that "[t]he period of absence for jury service is without deduction from other leave of absence authorized by statute"). We have found no Comptroller General guidance attempting to reconcile this interpretation of section 6322 with the current statutory language. In fact and to the contrary, a 1981 Comptroller General opinion concluded that section 6322's prohibition on "loss of, or reduction in, . . . leave to which [the employee] otherwise is entitled" "specifically prohibited" a forfeiture of annual leave that resulted when an agency required an employee to use leave under section 6322 instead of "use it or lose it" annual leave. *George J. DiGiulio—Restoration of Forfeited*

In sum, we believe that Congress expected that, like most leave statutes, section 6323(b) would be interpreted to allow employees to choose between using leave under its provisions and using other applicable types of leave.

D.

Interpreting section 6323(b) to contain an exhaustion requirement would also be contrary to the purposes underlying the statute. As discussed above, Congress enacted section 6323(b) to supplement the existing 15 days of military leave provided in section 6323(a) and to alleviate the financial hardship of employees who were being forced to take leave without civilian pay when they performed military duty in excess of those 15 days. *See supra* Part II.B (discussing legislative history). Requiring employees to exhaust section 6323(b) leave before using leave under section 6323(a) would frustrate those purposes in two ways.

First, interpreting section 6323(b) to contain an exhaustion requirement would undermine Congress's intent to supplement the leave granted under section 6323(a). An exhaustion requirement would reduce the value of section 6323(a) leave by making it subject to an additional limitation—that it may not be used until after an alternative, less favorable form of leave has been used. Moreover, as described above, an exhaustion requirement could cause some employees to forfeit section 6323(a) leave that they could otherwise have used. *See supra* p. 139. Those consequences would conflict both with Congress's intent that section 6323(b) supplement existing leave and with the specific statutory admonition that section 6323(b) not trigger any "loss of, or reduction in" other leave to which employees are entitled.

Second, reading section 6323(b) to contain an exhaustion requirement would undermine Congress's intent to alleviate the financial hardship faced by employees who perform military duty, because it would put some of those employees in a worse financial position than before section 6323(b) was enacted. For employees whose military pay exceeds their

Annual Leave, B-201093, 1981 WL 22549, at *2–3, *4 (Comp. Gen. July 15, 1981). In any event, the Comptroller General's construction of section 6322 would not determine the proper interpretation of section 6323(b).

civilian pay, taking section 6323(b) leave does not provide a significant financial advantage over taking leave without civilian pay, because, in either scenario, the employees receive only military pay.[10] Taking section 6323(a) leave, in contrast, provides a significant financial advantage over taking leave without civilian pay, because employees on section 6323(a) leave receive both civilian pay and military pay. As a result, a requirement that employees exhaust section 6323(b) leave before using section 6323(a) leave could increase the financial hardship of some employees whose military pay exceeds their civilian pay. For example, before section 6323(b) was enacted, if such employees were called to active duty to aid in law enforcement for 20 days, they could receive both military and civilian pay for the first 15 days and then military pay alone for the five remaining days (while on leave without civilian pay). If section 6323(b) were interpreted to contain an exhaustion requirement, those employees would now be required to use section 6323(b) leave for the entire 20 days, during which time they would receive only military pay.[11] It is doubtful that Congress intended that result.

E.

In support of their view that section 6323(b) contains an exhaustion requirement, OPM and DoD rely in significant part on developments subsequent to the statute's original enactment. *See* OPM Views Letter at 5–6; DoD Views Letter at 2–3. In particular, they point to the statutory language added in 1996, which states that, at an employee's request, an absence that qualifies for leave under section 6323(b) may instead "be

---

[10] In some situations, if an employee's military service is of especially long duration, taking leave under section 6323(b) might provide a slight financial advantage because extended periods of leave without pay can adversely affect an employee's right to benefits. *See* OPM, *Effect of Extended Leave Without Pay (LWOP) (or Other Nonpay Status) on Federal Benefits and Programs*, http://www.opm.gov/oca/leave/html/LWOP_eff.asp (last visited ca. Apr. 2012).

[11] If those employees also performed their 15 days of annual training later in the same fiscal year, then the financial disadvantage would be minimal, because the employees would have to use leave without civilian pay, rather than section 6323(a) leave, for the training period. Even in that situation, however, an exhaustion requirement would deprive the employees of the opportunity to choose which ordering of leave was most advantageous in light of all their financial and other personal circumstances.

charged to the employee's accrued annual leave or to compensatory time available to the employee," but "[t]he period of absence may not be charged to sick leave." 5 U.S.C. § 6323(b) (as amended by the NDAA for FY 1996, § 516(a), 110 Stat. at 309). OPM and DoD reason that, by adding this language, which makes clear that employees need not exhaust section 6323(b) leave before using annual leave or compensatory time, Congress must have intended that employees be required to exhaust leave under section 6323(b) before using any type of leave not specified in the amendment, including leave under section 6323(a). *See* OPM Views Letter at 5–6; DoD Views Letter at 2–3.

We do not believe, however, that it is appropriate to draw that negative inference from the 1996 amendment. Although the 1996 amendment expressly permits use of annual leave or compensatory time instead of section 6323(b) leave without mentioning section 6323(a) leave, the amendment likewise expressly prohibits use of sick leave instead of section 6323(b) leave without mentioning section 6323(a) leave. As a result, one could draw a negative inference from the amendment in either direction—that using section 6323(a) leave in lieu of section 6323(b) leave is not permitted, because of the express permission granted for annual leave, or that using section 6323(a) leave is not prohibited, because of the express prohibition regarding sick leave. Because it is not possible to draw *both* of those contradictory inferences, we think it is not appropriate to draw either. Moreover, inferring from Congress's silence a requirement that reservists must exhaust section 6323(b) leave before using section 6323(a) leave would be contrary to the well-established principle, discussed above, that provisions governing benefits for individuals who perform military service must be construed in the beneficiaries' favor. Accordingly, the 1996 language should be read to mean only what it says: Reservists may choose to use annual leave or compensatory time in lieu of section 6323(b) leave, and they may not choose to use sick leave. The 1996 amendment simply does not address whether reservists may use other types of leave, such as section 6323(a) leave, instead of or before using section 6323(b) leave.

OPM and DoD nonetheless suggest that, because the Comptroller General had interpreted section 6323(b) to require exhaustion before use of all other types of leave, and the 1996 amendment addressed only whether exhaustion is required before use of annual leave and compensatory time,

Congress's failure to address whether exhaustion is required before use of other types of leave, including leave under section 6323(a), should be construed as ratifying the exhaustion requirement as applied to those types of leave. *See* OPM Views Letter at 5; DoD Views Letter at 2. Although the Supreme Court has sometimes found that Congress has ratified or acquiesced in a prior judicial or administrative interpretation by reenacting the statutory language on which that interpretation was based, that principle does not apply here.

Recent Supreme Court cases make clear that the concept of congressional acquiescence in prior statutory interpretations must be applied "with extreme care" and that courts should conclude that Congress has ratified a prior administrative interpretation only if there is "overwhelming evidence of acquiescence" in the agency's interpretation. *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 169–70 & n.5 (2001). The circumstances surrounding the 1996 amendment to section 6323(b) do not present "overwhelming" evidence of congressional ratification. Indeed, several requirements for congressional ratification identified in the Court's recent cases are not satisfied.

First, ratification occurs only when Congress has reenacted without change the precise language that was the subject of the prior interpretation. *See Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005); *United States v. Wells*, 519 U.S. 482, 495–96 (1997); *Estate of Cowart v. Nicklas Drilling Co.*, 505 U.S. 469, 478 (1992). The 1996 amendment did not reenact the language on which the Comptroller General based his 1969 interpretation ("without loss of, or reduction in, . . . leave to which he otherwise is entitled"); instead, the amendment added new language making clear that exhaustion of section 6323(b) leave is not required before use of annual leave or compensatory time, a result that is inconsistent with the reasoning in the Comptroller General's opinion.

Second, the Court's cases indicate that courts should find ratification only when "the record of congressional discussion preceding reenactment makes" some "reference" to the prior interpretation or there is "other evidence to suggest that Congress was . . . aware of" that interpretation. *Brown v. Gardner*, 513 U.S. 115, 121 (1994); *see also Solid Waste Agency*, 531 U.S. at 169 n.5 (suggesting that the legislative record must show that Congress considered the "precise issue"). Nothing in the legislative

history of the 1996 amendment, however, indicates that Congress was aware of a requirement that employees exhaust leave under section 6323(b) before using leave under section 6323(a).[12] The relevant committee reports simply state that, under the amendment, employees could "elect, when performing public safety duty, to use either military leave, annual leave, or compensatory time to which they are otherwise entitled." S. Rep. No. 104-112, at 241 (1995); H.R. Rep. No. 104-406, at 803 (1995); H.R. Rep. No. 104-450, at 794 (1996) (Conf. Rep.).[13]

---

[12] DoD notes that it had consistently interpreted the statute to contain such a requirement, and it presumes that Congress was aware of its interpretation. *See* DoD Views Letter at 2. But we have not been able to locate any DoD articulation of its interpretation predating the 1996 amendment. On the contrary, shortly before the amendment's enactment, DoD published its regulations implementing USERRA, one of which stated that "[a]n employee performing service with the uniformed services must be []permitted, upon request, to use any accrued annual leave (or sick leave, if appropriate), or military leave during such service." 5 C.F.R. § 353.208 (1996). That regulation seems inconsistent with the proposition that section 6323(b) contains an exhaustion requirement, because the regulation states that an employee performing military service "must be []permitted, upon request, to use any . . . military leave during such service," *id.*, and "military leave" includes section 6323(a) leave in addition to section 6323(b) leave. OPM asserts that the regulation does not override the statutory conditions that generally apply to the various leave types and therefore would not displace any exhaustion requirement imposed by section 6323(b). *See* OPM Views Letter at 7. But even assuming that the regulation is not actually inconsistent with an exhaustion requirement, it provides no indication that such a requirement exists.

[13] As DoD notes, the 1996 amendment essentially made permanent language that had been included in appropriations legislation for the several preceding fiscal years. *See* DoD Views Letter at 2. Nothing in the text or history of those appropriations acts shows congressional awareness of a requirement that an employee exhaust leave under section 6323(b) before using leave under section 6323(a). We know of only one document arguably suggesting that some in Congress may have been aware of an administrative policy requiring such exhaustion. During 1990 hearings held by a subcommittee of the House Appropriations Committee, Gen. Donald Burdick, Director of the Army National Guard, and Maj. Gen. Philip G. Killey, Director of the Air National Guard, stated, in response to questions about whether military technicians could be assigned to drug interdiction missions in Active Duty for Special Work status, that they could, "exhausting first their law enforcement leave and then election of either annual leave, compensatory time, leave without payor unused military leave." *Dep't of Def. Appropriations for 1991: Hearings Before the Subcomm. on the Dep't of Def. of the H. Appropriations Comm.*, pt. 3, 101st Cong. 405, 506 (1990). If the phrase "law enforcement leave" was intended to refer to leave under section 6323(b), and the phrase "military leave" was intended to refer to leave under section 6323(a), then Gen. Burdick's and Maj. Gen. Killey's remarks may

Finally, congressional ratification occurs only when the statutory language can reasonably be read to embody the prior administrative or judicial interpretation. *See Brown*, 513 U.S. at 121 ("[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction" (quoting *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (internal quotation marks omitted))). As explained above, the text of section 6323(b) cannot be read to impose an exhaustion requirement. *See supra* Part II.A. The language stating that an employee is entitled to section 6323(b) leave "without loss of[,] or reduction in[,] . . . leave to which he otherwise is entitled," 1969 CG Opinion at 236 (quoting section 6323(b)), fails to support, and is arguably inconsistent with, an exhaustion requirement. *See supra* p. 138.[14]

At most, in the 1996 amendment, Congress failed to reject the Comptroller General's interpretation of section 6323(b) as applied to leave types other than annual leave and compensatory time. Such "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences [about Congress's intent] may be drawn

---

have reflected their belief that reservists were required to exhaust section 6323(b) leave before using section 6323(a) leave. Neither witness, however, explained which statutory provisions they were referring to, and leave under both subsections (a) and (b) of section 6323 is commonly called "military leave." We think it very unlikely that any legislators who heard or read this testimony would have understood it to articulate the legal position that reservists must exhaust section 6323(b) leave before using section 6323(a) leave or would have retained awareness of the testimony when a different Congress amended section 6323(b) six years later.

[14] The Supreme Court has accepted ratification arguments in only three cases over the past 20 years, each involving circumstances very different from those presented here. In *Forest Grove School District v. T.A.*, 557 U.S. 230, 239–40 (2009), Congress had reenacted the precise language that the Supreme Court had previously interpreted. In *Barnhart v. Walton*, 535 U.S. 212, 220 (2002), Congress had "frequently amended or reenacted the relevant provisions without change," and the Court viewed those reenactments only as "further evidence" for giving deference to the agency's longstanding construction of its statute under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143–56 (2000), the Court concluded that Congress had ratified the agency's longstanding interpretation by enacting six pieces of legislation that were inconsistent with the agency's recent attempt to alter that interpretation. Indeed, even cases from an earlier era more hospitable to claims of congressional ratification generally involved enactment of the precise language on which the prior interpretation was based, coupled with specific evidence that Congress was aware of the interpretation. *See, e.g.*, *Lorillard v. Pons*, 434 U.S. 575, 580–82 (1978).

from" it. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (internal quotation marks omitted).[15]

III.

For these reasons, we conclude that section 6323(b) does not contain an exhaustion requirement. A reservist who performs military service that qualifies for leave under both section 6323(a) and section 6323(b) may elect to take leave under section 6323(a) without first using all of his or her available leave under section 6323(b).

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

[15] OPM and DoD do not argue that their interpretation of section 6323(b) is entitled to deference. Nonetheless, we considered whether, if the statute were ambiguous, their view would receive deference from a court under either *Chevron* or *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). But neither OPM nor DoD has "express congressional authorization[] to engage in the process of rulemaking or adjudication," as is generally required for an agency to receive deference under *Chevron*. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). Nor would OPM and DoD's interpretation receive significant weight under *Skidmore*. Neither OPM nor DoD is charged with administering section 6323, and neither OPM's *Reservist Policy Differential Guidance* nor the 1996 DoD Memorandum articulates a thorough analysis of the exhaustion issue confronted here. Instead, both rely almost exclusively on the 1969 CG Opinion. *See Reservist Policy Differential Guidance* at 5–6; 1996 DoD Memorandum. In any event, traditional tools of statutory construction demonstrate that section 6323(b) does not contain an exhaustion requirement. *See Chevron*, 467 U.S. at 842–43 (deference to agency is overcome where Congress has resolved the issue).

Appointment of Uncompensated Special Attorneys Under 28 U.S.C. § 515

The proposal of two components of the Department of Justice to hire a modest number of uncompensated litigation attorneys would not violate the Antideficiency Act (1) because the services would be provided by a person acting in an official capacity under a regular appointment and (2) because 28 U.S.C. § 515 authorizes the Attorney General to appoint special attorneys to perform these services and does not specify a minimum salary.

The Department and the special attorneys should enter into agreements acknowledging that the special attorneys will not receive compensation for their services.

April 25, 2012

MEMORANDUM OPINION FOR THE DIRECTOR
OFFICE OF ATTORNEY RECRUITMENT AND MANAGEMENT

Section 515(a) of title 28 of the United States Code authorizes the Attorney General to appoint special attorneys to "conduct any kind of legal proceeding, civil or criminal," that "United States attorneys are authorized by law to conduct." Invoking this authority, two components of the Department of Justice seek to hire a modest number of uncompensated litigation attorneys to perform the same functions that compensated attorneys within those components perform. The Department's Office of Attorney Recruitment and Management ("OARM") has asked whether implementing this proposal would violate the Antideficiency Act, which forbids federal agencies to accept voluntary services, *see* 31 U.S.C. § 1341 (2006). We conclude that it would not.

Attorneys General, this Office, and the Government Accountability Office ("GAO") have long applied a two-part test that must be satisfied for the federal government lawfully to accept uncompensated services. First, the services must be provided by a person acting in an official capacity under a regular appointment. Second, Congress must have authorized the appointment of unpaid persons to the position at issue. If both elements of the test are satisfied, the appointees are providing lawful "gratuitous" services, not unlawful "voluntary" services, and thus the government's acceptance of those services would not violate the Antideficiency Act. The Department's proposed appointments under section 515(a) would fulfill both parts of the standard and therefore would not

violate the Act. We strongly advise, however, that the Department and section 515(a) appointees enter into agreements acknowledging that the latter will not receive compensation for their services.

Appointments that satisfy the standard for lawful gratuitous services also comply with the anti-augmentation rule of appropriations law (assuming that principle applies to the receipt of services as well as funds). Although federal agencies may not *unilaterally* augment their appropriations from outside sources, they may do so with congressional permission. Section 515(a) provides the Department with the requisite authority.

I.

The Justice Department's use of uncompensated legal services is not new. For many years lawyers have served without compensation as Special Assistant United States Attorneys ("SAUSAs") within U.S. Attorneys' offices. *See, e.g.*, Memorandum for Edward R. Slaughter, Jr., Special Assistant to the Attorney General for Litigation, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Proposal by United States Attorney's Office Concerning the Use of Private Attorneys for Service Without Compensation* at 1 (May 29, 1980) ("*Proposal by United States Attorney's Office*") (approving SAUSA appointment). These appointments are authorized by a statute providing that "[t]he Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires." 28 U.S.C. § 543(a) (2006 & Supp. IV 2010). Recently, U.S. Attorneys have increased their offices' use of unpaid SAUSA appointments, often in the form of fellowships or temporary positions for junior attorneys seeking experience and training. *See* Memorandum for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, from Louis DeFalaise, Director, OARM, *Re: Appointment of Uncompensated Special Attorneys Pursuant to 28 U.S.C. § 515* at 1–2 (Sept. 26, 2011) ("OARM Memo").

OARM's question arises because two litigating divisions—the Criminal Division and the Civil Rights Division—are now contemplating similar programs under a different statutory authority. *See id.* at 2. Specifically, those divisions wish to hire a limited number of special attorneys to serve without compensation under a provision that authorizes the Attorney General to appoint these attorneys to "conduct any kind of legal proceeding, civil or criminal, . . . which United States attorneys are authorized by

law to conduct." 28 U.S.C. § 515(a) (2006).[1] Section 515(b) provides that "[e]ach attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law." The statute further states that "[t]he Attorney General shall fix the annual salary of a special assistant or special attorney." *Id.* § 515(b).

OARM informs us that the Criminal Division would like to hire roughly 30 uncompensated special attorneys, or approximately five percent of its workforce, through the proposed program. OARM Memo at 2. The Civil Rights Division proposes to hire up to twelve uncompensated special attorneys. OARM has asked whether the proposal would violate the Antideficiency Act ("ADA").

II.

A.

Generally speaking, federal agencies may not accept voluntary services. *See Employment Status of "Volunteers" Connected with Federal Advisory Committees*, 6 Op. O.L.C. 160, 161 (1982) ("*Federal Advisory Committees*"). This prohibition is embodied in the ADA, which provides that "[a]n officer or employee of the United States Government . . . may not accept voluntary services for [the] 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 (2006).[2] But the ADA does not forbid federal agencies to accept all uncompensated services. Instead, the Department of Justice has long distinguished between "voluntary services," which the federal government cannot lawfully accept, and "gratuitous services," for which the govern-

[1] The Attorney General has delegated his appointment authority to the Deputy Attorney General and authorized the Deputy Attorney General to further re-delegate it. 28 C.F.R. § 0.15 (2011); *see also United States v. Prueitt*, 540 F.2d 995, 1000 (9th Cir. 1976) ("Section 515(a) imposes no limitation on the Attorney General's authority to delegate his power of appointment to other officers within the Department of Justice.").

[2] Congress reworded and reorganized the ADA in 1982 to modernize its language without changing its meaning. *See* Pub. L. 97-258, 96 Stat 877 (1982) ("To revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, 'Money and Finance.'"). The relevant provision was previously located at 31 U.S.C. § 665(b).

ment may lawfully contract. *See Employment of Retired Army Officer as Superintendent of Indian School*, 30 Op. Att'y Gen. 51, 52 (1913) ("*Employment of Retired Army Officer*"). As Attorney General Wickersham explained:

> [I]t seems plain that the words 'voluntary service' were not intended to be synonymous with 'gratuitous service' and were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be nonsalaried. In their ordinary and normal meaning these words refer to service intruded by a private person as a 'volunteer' and not rendered pursuant to any prior contract or obligation . . . . It would be stretching the language a good deal to extend it so far as to prohibit *official* services without compensation in those instances in which Congress has not required even a minimum salary for the office.

Id. at 52. This Office has repeatedly adhered to this distinction. *See, e.g.*, Memorandum for Francis A. Keating II, Acting Associate Attorney General, from Michael Carvin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Independent Counsel's Authority to Accept Voluntary Services—Appointment of Laurence W. Tribe* at 2 (May 19, 1988) ("*Independent Counsel's Authority*") (describing Attorney General Wickersham's opinion as "the authoritative construction of the prohibition on voluntary services in the [ADA]").

As we have explained, gratuitous services are lawful (and voluntary services are not) because "the [ADA] was intended to eliminate subsequent claims against the United States for compensation of the 'volunteer,' rather than to deprive the government of the benefit of truly gratuitous services." *Federal Advisory Committees*, 6 Op. O.L.C. at 162; *see also Employment of Retired Army Officer*, 30 Op. Att'y Gen. at 55 ("[T]he evil at which Congress was aiming was not appointment or employment for authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress."). Forbidding federal agencies to accept voluntary services prevents potential future liability based on claims for compensation for such services. In contrast, a contract for "truly gratuitous" services would not create concerns about future liability. We have also noted the separate but related point that "employees may not waive a salary for which Congress has set

a minimum," *Federal Advisory Committees*, 6 Op. O.L.C. at 161 (citing *Glavey v. United States*, 182 U.S. 595 (1901)). Thus, the federal government may not accept uncompensated services in positions for which Congress has mandated a threshold salary. But when Congress has not specified a minimum salary for particular positions, the acceptance of such services cannot be said to circumvent congressional intent.

With those points in mind, we have consistently found that service is gratuitous, and hence lawful, if it satisfies two requirements. First, a person must render the service in an official capacity under a regular appointment to a position. *See Authority to Decline Compensation for Service on the National Council of Arts*, 13 Op. O.L.C. 113, 114 (1989) ("*National Council of Arts*"). Second, the position must be permitted by law to be nonsalaried. Permission is inferred if Congress sets "no specific statutory rate of compensation" for a position, "but only a maximum." *Id.* As a result, "if the level of compensation for an office is entirely discretionary, or if it has only a fixed maximum and no minimum, salary for that office may be set at zero." *Id.*

Many opinions of this Office illustrate this approach. We advised the White House, for instance, that it could accept gratuitous secretarial and clerical services obtained under the Executive Office Appropriations Act of 1977, Pub. L. No. 94-363, 90 Stat. 966 (1976), because "Congress has mandated no minimum salary for these positions." *Acceptance of Voluntary Service in the White House*, 2 Op. O.L.C. 322, 323 (1977) ("*Voluntary Service*"). We also concluded that the Department of Commerce could appoint uncompensated consultants under 5 U.S.C. § 3109, *Federal Advisory Committees*, 6 Op. O.L.C. at 162, and that a member of the National Council of the Arts appointed by the President, with the advice and consent of the Senate, could "serv[e] without compensation, or more precisely, . . . serve with compensation fixed at zero," *National Council of the Arts*, 13 Op. O.L.C. at 114. And we determined that the Independent Counsel for Iran-Contra had statutory authority to appoint a law professor to work on a Supreme Court brief as special counsel without pay. *Independent Counsel's Authority* at 1, 5.

The GAO has adopted this approach as well. Recognizing Attorney General Wickersham's opinion as "the leading case construing 31 U.S.C. § 1342," the GAO "continue[s] to follow to this day . . . the distinction between 'voluntary services' and 'gratuitous services.'" 2 *Principles of*

Federal Appropriations Law 6-96 (3d ed. 2006) ("GAO Redbook"). For the government to accept "gratuitous" services, the GAO requires "the appointment of an individual to an official government position," *id.* at 6-99, and it instructs that "if the level of compensation is discretionary, or if the relevant statute prescribes only a maximum (but not a minimum), the compensation can be set at zero, and an appointment without compensation or a waiver, entire or partial, is permissible," *id.* at 6-97.

Applying this well-established two-part inquiry, we conclude that the Department may appoint uncompensated special attorneys under 28 U.S.C. § 515 without violating the ADA. The first element of the gratuitous-service test—that the appointee render service in an official capacity under regular appointment to an office—is satisfied because section 515 is a "sourc[e] of explicit statutory authority to hire attorneys." Memorandum for Edward R. Slaughter, Jr., Special Assistant to the Attorney General for Litigation, from Thomas O. Sargentich, Office of Legal Counsel, *Re: Hiring Law Professors or Private Attorneys to Litigate on behalf of the United States as Department of Justice Attorneys* at 2 (July 10, 1980) ("*Private Attorneys*"); *see also United States v. Plesinski*, 912 F.2d 1033, 1037 n.5 (9th Cir. 1990) ("[S]ection 515 authorizes the appointment of attorneys to assist the Attorney General.").

The second element of the test for gratuitous service is also satisfied, because the statute expressly authorizes the Attorney General to "fix the annual salary of a special assistant or special attorney." 28 U.S.C. § 515(b). The statutory grant of such discretion establishes that the position is permitted by law to be unsalaried. *See, e.g.*, *Independent Counsel's Authority* at 5 ("[T]he independent counsel's authority in section 594(c) to fix the compensation of his employees includes the authority to fix their compensation at zero[.]"). Apart from this general rule, specific evidence in the legislative history of section 515 shows that Congress intended to dispose of minimum salaries for special attorneys. Section 202 of the Department of Justice Appropriation Act of 1954, Pub. L. No. 83-195, 67 Stat. 372, 375 (1953), allocated funds for the salaries of Department officials including "special attorneys and special assistants to the Attorney General . . . without regard to the Classification Act," with the proviso that "in no event shall the annual salary of . . . any special attorney or special assistant be less than $6,000, if the official has been admitted to the practice of law for 3 years, or more than $12,000." But shortly after that, the Department informed Congress that it could "pro-

cure lawyers to fill some of these positions, who . . . are willing to serve for less than the $6,000 minimum," S. Rep. No. 83-1541, at 14, and the next appropriation act provided that "[t]he minimum annual salary of . . . any special attorney or special assistant, as set forth in section 202 of the [prior act] shall no longer apply to any such official after June 30, 1954," Departments of State, Justice, and Commerce and the U.S. Information Agency Appropriations Act of 1955, Pub. L. No. 83-471, § 202, 68 Stat. 413, 421–22 (1954). This provision eliminating the statutory minimum salary for special attorneys was codified as part of section 515 in 1966. *See* 28 U.S.C. § 515 note. Consistent with this Office's general rule and the specific legislative history of section 515, we have repeatedly advised that this section "permits employment without compensation." *E.g.*, *Private Attorneys* at 2.[3]

These conclusions find strong support in our longstanding opinions, noted above, concluding that the Department of Justice may employ the uncompensated services of SAUSAs appointed under 28 U.S.C. § 543 without violating the ADA. The salary of Special Assistant U.S. Attorneys is "fixed administratively as authorized by 28 U.S.C. § 548." Memorandum for William B. Gray, Director, Executive Office for U.S. Attorneys, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Appointment of the Dean of the University of Arizona Law School to be a Special Assistant United States Attorne[y]* at 2–3 (June 18, 1976) ("*Arizona Dean*"). Thus, "no minimum salary is established by law for such positions." Memorandum for Frances M. Green, Deputy Associate Attorney General, from Larry A. Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Questions Raised by Proposed Appointment of Lawyer in Private Practice as Gov-*

---

[3] We previously advised that section 515 "does not except the appointments of § 515 special attorneys from the civil service classification act" because the recodification of that provision in 1966 "does not include [the] exception from the Classification Act" found in the prior appropriation law. Memorandum for Warren Oser, Chief, Staffing and Employee Relations Unit, Administrative Division, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Interpretation of the $12,000 Salary Limitation Imposed on Special Attorneys by 28 U.S.C. § 515(b)* at 3, 4 (Mar. 12, 1974). We do not believe that advice, which also suggested that salaries set under 28 U.S.C. § 548 were subject to the General Schedule ("GS"), survives *Private Attorneys*, our other opinions discussing the appointment of SAUSAs, or our adherence to the rule that permission for a position to be unsalaried is inferred when the law states only a maximum salary.

ernment Attorney for Purposes of Trying Selected Civil Cases at 4 (Mar. 23, 1979) ("Hammond Memo"). Because the statute authorizes a SAUSA to "be appointed without compensation should he so desire," the ADA does not proscribe an uncompensated appointment. *Id.*; *accord Proposal by United States Attorney's Office* at 1 (advising that it was "legally permissible" under the ADA for the U.S. Attorney for the Northern District of California to implement a program under which associates in private law firms would be employed without compensation by the U.S. Attorney's Office as SAUSAs under 28 U.S.C. § 543); *Arizona Dean* at 3 ("[O]ur conclusion that special assistants to United States Attorneys may serve without compensation is not inconsistent with the prohibition in 31 U.S.C. § 665(b) against the acceptance of 'voluntary service.'").

Many of these opinions suggest that their conclusions would apply equally to special attorneys appointed under section 515. For example, in *Private Attorneys*, we explained that "if the statute authorizing the Department to hire an employee permits employment without compensation—as we believe 28 U.S.C. §§ 515 and 543 do—then the otherwise applicable prohibition on the government's acceptance of 'voluntary services' in 31 U.S.C. § 665(b) would not apply." *Private Attorneys* at 2. Similarly, when our Hammond Memo addressed the legality of temporarily appointing a lawyer in private practice (whom we dubbed "L") as a government attorney to try selected civil cases, "[w]e assume[d] that L would be employed on a temporary basis either as a Special Assistant United States Attorney pursuant to 28 U.S.C. § 543, or as a special attorney or special assistant to the Attorney General pursuant to 28 U.S.C. § 515." Hammond Memo at 3. Either way, we concluded, L's uncompensated service would not offend the ADA. "Like § 543," we explained, "§ 515(b) does not establish a minimum salary; service without compensation would thus . . . be permissible." *Id.* at 4. And in advice that did not directly address the ADA question, we treated sections 515 and 543 as materially similar authorities for the hiring of uncompensated attorneys. *See Assignment of Army Lawyers to the Department of Justice*, 10 Op. O.L.C. 115, 117 n.3 (1986); *Acceptance of Funds by the Department of Justice from Other Agencies to Employ Attorneys in Land Acquisition Cases*, 2 Op. O.L.C. 302, 306–07 (1978).

We therefore conclude that the uncompensated service of special attorneys appointed under section 515, like that of SAUSAs under section 543, is "gratuitous," not "voluntary," and does not violate the ADA. The

attorneys would be (1) regularly appointed to positions (2) for which Congress has specified no minimum compensation. We suggest, however, that the Department enter into prior agreements with the appointed attorneys memorializing that they would serve without salary. *See Private Attorneys* at 2 (stating that there should be "a prior agreement between the Government and the attorney that the latter will serve at no compensation"); GAO Redbook at 6-100 ("Proper documentation is important for evidentiary purposes should a claim subsequently be attempted. . . . [T]he individuals should acknowledge in writing and in advance that they will receive no compensation and that they should explicitly waive any and all claims against the government on account of their service.") (citations omitted).

B.

Although the above analysis answers the question presented, language in some of our opinions suggests that appointees providing uncompensated service may not perform "official work of [a] Department that would otherwise have been performed by paid government employees as part of their regular duties." Memorandum for Judith A. Winston, General Counsel, Department of Education, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Uncompensated Voluntary Services* at 2 (Nov. 28, 1994). OARM asks whether that language is relevant to analysis of the proposed special attorney appointments here. OARM Memo at 3–5. Such a limitation does not appear in Attorney General Wickersham's "authoritative construction of the prohibition on voluntary services in the [ADA]," *Independent Counsel's Authority* at 2, or in our most recent published opinion on the issue, *National Council of Arts*, 13 Op. O.L.C. 113. Nor does the GAO Redbook or any Comptroller General decision of which we are aware discuss such a consideration.

We now clarify that the type of work to be performed by an uncompensated official is not a relevant factor in assessing whether appointments under section 515 violate the ADA. The type-of-work limitation may be germane under some statutes authorizing federal appointments, such as the authority to hire consultants or experts under 5 U.S.C. § 3109. *See Employment of Temporary or Intermittent Attorneys and Investigators*, 3 Op. O.L.C. 78, 78–79 (1979) ("*Temporary or Intermit-*

tent Attorneys and Investigators") (defining the terms "consultant" and "expert" and advising that they may not be hired without compensation simply "to perform the same functions as are performed by regular employees"). But any constraint on the type of work an appointee may perform is imposed by the authorizing statute, not the ADA, and no such constraint is present here. Section 515 grants broad authority to the Attorney General to appoint and direct the litigation activities of special attorneys, *see Infelice v. United States*, 528 F.2d 204, 206–07 (7th Cir. 1975); *United States v. Wrigley*, 520 F.2d 362, 367–69 (8th Cir. 1975); Congress did not restrict the type of work that such appointees may perform (so long as it is of the type that U.S. Attorneys are authorized to perform). As explained above, the appointment of attorneys to perform uncompensated services complies with the ADA so long as the two elements of the test for gratuitous service are satisfied.

The language suggesting a limit on the type of federal service that an uncompensated employee may provide has appeared only a few times in our opinions. We first cautioned in *Federal Advisory Committees* "against the use of volunteers on a broad scale or to accomplish tasks ordinarily performed by paid government employees." 6 Op. O.L.C. at 163. That passing statement, however, immediately followed our observation that "volunteer consultants" may provide gratuitous services because Congress had fixed no minimum salary for such appointments. *Id*. And we had previously observed that consultants appointed under 5 U.S.C. § 3109 "may not be employed to perform 'governmental functions.'" *Id*. at 162.

After *Federal Advisory Committees*, we considered four separate inquiries from federal agencies proposing to use the voluntary services of a private foundation, association, corporation, or person. *See Uncompensated Voluntary Services* at 9–11 (voluntary services from retirees and private companies or persons); Memorandum for the Files from Randy Beck, Attorney-Adviser, Office of Legal Counsel, *Re: Points of Light Initiative Foundation Meeting* at 5 (Feb. 9, 1990) (voluntary services from a private, nonprofit foundation); Memorandum for Joseph R. Davis, Assistant Director, Legal Counsel Division, Federal Bureau of Investigation, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: FBI Foundation* at 1, 7 (Feb. 10, 1989) (same); Memorandum for Richard C. Stiener, Chief, INTERPOL-National Central Bureau, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: USNCB Sponsorship of INTERPOL Gen-*

eral Assembly Meeting at 2 n.1, 7–8 (Aug. 16, 1983) ("*INTERPOL*") (volunteers from a private, nonprofit association). At various points these opinions suggested that the type of service a volunteer would provide is a relevant factor in determining whether the acceptance of that service would violate the ADA. We stated, for instance, that "[g]ratuitous services are those for which the individual knows he will receive no recompense *and* which do not involve tasks that would normally be provided by the agency." *FBI Foundation* at 6–7; *see also Uncompensated Voluntary Services* at 9.

In all of these opinions, however, either no regular appointment to office was to be made, or the statute authorizing the acceptance of services imposed an independent limit on the scope of services that could be accepted. In *INTERPOL*, for example, the United States National Central Bureau ("USNCB") of INTERPOL proposed to accept free services from a private, nonprofit association without any regular appointment of its members. *Id.* at 7–8. We advised that USNCB may not "necessarily" be able "to use [uncompensated] services if the [private association] personnel would be used to perform tasks that otherwise would be performed by USNCB staff," because USNCB personnel—like most federal civilian personnel—"are covered by the [General Schedule], for which Congress has set fixed minimums." *Id.* at 8. The root problems this somewhat opaque passage identifies appear to be that the volunteers would not be appointed to any regular position, and that the positions through which the services ordinarily would be performed (even if there were to be appointments) required minimum compensation.[4] Similarly, *Uncompensated Voluntary Services* rested in large measure on our determination that the Department of Education's statutory authority to accept services "'aiding or facilitating'" the Department's work could not "be construed to extend to services that would entail the direct *performance* or *execution* of the official work of the Department that would otherwise be done by paid government employ-

[4] In fact, reading this passage to suggest that an agency's acceptance of gratuitous services amounts to an impermissible salary waiver if the services would mirror those otherwise performed by an employee on the GS scale would place the *INTERPOL* advice in conflict with our earlier published opinion that the White House possesses statutory authority to accept gratuitous secretarial and clerical services, even though those services are normally provided by individuals with statutorily mandated minimum rates of pay. *Voluntary Service*, 2 Op. O.L.C. at 323.

ees." *Uncompensated Voluntary Services* at 6, 8 (quoting 20 U.S.C. § 3481). In other words, the Department of Education's gift-acceptance statute did not authorize the Department either to accept the free services as a gift or to appoint the volunteers to an uncompensated office. In both opinions, we observed that the agencies could hire consultants under 5 U.S.C. § 3109, *INTERPOL* at 8; *Uncompensated Voluntary Services* at 10—with the caveat that, as noted above, "consultants cannot be employed to perform 'governmental functions,' and their services must be limited to tasks of an advisory nature," *INTERPOL* at 8.

For the reasons described earlier, we do not believe that an agency violates the ADA when it uses the services of persons obtained through a regular appointment to a position for which Congress set no minimum salary, even if such persons perform the type of work that other agency employees perform. Any suggestion to the contrary in our prior opinions was incorrect. Because the language suggesting that uncompensated appointees cannot perform the type of service paid employees provide was not needed to support the conclusions of any prior opinions, our clarification here does not cast doubt on our prior advice. Each opinion discussed above reached an outcome consistent with the approach we now reaffirm.

In sum, we adhere to the two-part test for lawful gratuitous service as articulated by Attorney General Wickersham and long applied by this Office and the GAO to determine whether uncompensated appointments to federal positions violate the ADA. Although the type of service to be performed does not alter that test, it may be a relevant consideration under the statute authorizing the appointment if that statute imposes a restriction on the scope of services that may be performed by the appointee.

III.

Finally, the ADA is not the sole constraint on government agencies' acceptance of gratuities from outside sources. The anti-augmentation principle of appropriations law provides that "an agency may not augment its appropriations" from outside sources "without specific statutory authority." *Authority for the Removal of Fugitive Felons Apprehended under 18 U.S.C. § 1073*, 7 Op. O.L.C. 75, 93 (1983). The objective of this rule, which is derived both from Congress's constitutional authority over

spending and from several statutory sources, is "to prevent a government agency from undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for [an] activity." GAO Redbook at 6-162–63.

Our opinions and those of the GAO have generally applied the anti-augmentation rule only to receipts of *money*, leaving the ADA to govern the lawfulness of receipts of *services*. But there are exceptions. *See* GAO Redbook at 6-164–65; *see also, e.g.*, Memorandum for D. Lowell Jensen, Associate Attorney General, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Additional Questions Raised by Alan Hruska in Connection with His Employment as General Counsel to the President's Commission on Organized Crime* at 4 (Sept. 16, 1983) ("In order to avoid an unlawful augmentation, the Commission would have to pay for the fair value of the [office] space, [office] equipment, and [secretarial] services it receives."); Letter for Michael Castine, Acting Director for Private Sector Initiatives, The White House, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel at 3 (Feb. 16, 1983) ("An agency that accepts voluntary *services or gifts* which it is not authorized to receive may violate the prohibition against unlawful 'augmentation' of its appropriations.") (emphasis added).

Assuming for purposes of argument that the anti-augmentation principle applies to services, we conclude that the Department's proposal here would not offend it. The anti-augmentation rule prohibits only *unauthorized* augmentations. As explained above, Congress has authorized the Department of Justice to employ the gratuitous services of special attorneys. *See* 28 U.S.C. § 515. Statutorily authorized gratuitous services present no anti-augmentation concerns. *See Authority of the Nuclear Regulatory Commission to Collect Annual Charges from Federal Agencies*, 15 Op. O.L.C. 74, 78 (1991) ("The anti-augmentation principle . . . is not applicable here because [a provision of the Omnibus Budget Reconciliation Act of 1990] provides express statutory authority for the NRC to recover 100% of its budget authority through user fees and annual charges from outside sources."); *Community Work Experience Program—State General Assistance Recipients at Federal Work Sites*, B-211079, B-211079.2, 1987 WL 101336, at *1 (Comp. Gen. Jan. 2, 1987) (concluding that an amendment to the Social Security Act "specifically authorized" federal agencies "to accept gratuitous services").

Although the acceptance of congressionally authorized uncompensated services does not violate the anti-augmentation principle, we have without elaboration protectively "caution[ed] . . . against the use of volunteers on a broad scale." *Federal Advisory Committees*, 6 Op. O.L.C. at 163. Here, the Criminal Division proposes the appointment of up to 30 lawyers—five percent of its attorney workforce—as special attorneys, and the Civil Rights Division proposes the appointment of an even smaller number of special attorneys. Thus, no broad-scale deployments of uncompensated volunteers are contemplated, and we need not consider whether our analysis would differ in the event that gratuitous services were solicited on a significantly more expansive scale.

IV.

For the reasons set forth above, we conclude that OARM's proposal that the Department of Justice appoint a modest number of special attorneys to provide uncompensated services in two litigating divisions under 28 U.S.C. § 515 does not violate the ADA or the anti-augmentation principle, even though the attorneys would perform the same functions that compensated attorneys within those components perform. Acceptance of the uncompensated service is lawful because the attorneys will be appointed to positions for which Congress has specified no minimum salary. The Department should, however, enter a prior agreement with the appointed attorneys specifying that they will serve without pay.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

Duty to Report Suspected Child Abuse Under 42 U.S.C. § 13031

Under 42 U.S.C. § 13031—a provision of the Victims of Child Abuse Act of 1990—all covered professionals who learn of suspected child abuse while engaged in enumerated activities and professions on federal land or in federal facilities must report that abuse, regardless of where the suspected victim is cared for or resides.

The fact that a patient has viewed child pornography may "give reason to suspect that a child has suffered an incident of child abuse" under the statute, and a covered professional is not relieved of an obligation to report the possible abuse simply because neither the covered professional nor the patient knows the identity of the child depicted in the pornography.

May 29, 2012

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF VETERANS AFFAIRS*

Section 13031 of title 42, a provision in the Victims of Child Abuse Act of 1990 ("VCAA" or "Act"), Pub. L. No. 101-647, tit. II, § 226, 104 Stat. 4789, 4792, 4806, requires persons engaged in certain activities and professions on federal lands or in federal facilities to report "facts that give reason to suspect that a child has suffered an incident of child abuse" if they learn such facts in the course of their professional activities. Failure to make a report required by section 13031 could subject such persons to criminal penalties. *See* 18 U.S.C. § 2258. You have raised two questions about the scope of section 13031. *See* Letter for Eric Holder, Attorney General, from Will A. Gunn, General Counsel, Department of Veterans Affairs (Nov. 9, 2009) ("VA Letter").

First, you have asked whether section 13031's reporting requirement is limited to situations in which the suspected victim of child abuse is cared for or resides on federal land or in a federal facility. We conclude that it is not. Instead, under the VCAA, all persons who learn of suspected child abuse (as defined by the Act) while engaged in the enumerated activities and professions on federal land or in federal facilities must report that

* Editor's Note: After this opinion was issued, 42 U.S.C. § 13031 was reclassified and renumbered as 34 U.S.C. § 20341. The statute has also repeatedly been amended by Congress since 2012, but not in any way that appears to undermine the analysis or conclusions reached by this opinion.

abuse, regardless of where the suspected victim is cared for or resides. We recognize that the scope of some of the statutory language may be ambiguous, and that narrower readings of the reporting requirement find some support in certain of the statute's provisions. But we believe that section 13031, read as a whole and in light of its purpose, is best interpreted broadly.

Second, you have inquired whether the VCAA's reporting obligation is triggered when a person covered by section 13031 learns that a patient under his or her care has viewed child pornography, even if the person does not know, and has no reason to believe the patient knows, the identity of the child or children depicted in the pornography. We conclude that the fact that a patient has viewed child pornography may be a "fact[] . . . giv[ing] reason to suspect that a child has suffered an incident of child abuse" under section 13031, and that the statute does not require a covered professional to possess knowledge of the identity of an affected child in order for the reporting duty to apply.

We have concluded that the interpretive questions you have raised can be resolved using ordinary tools of statutory construction, so we have not applied the rule of lenity even though the VCAA provides for criminal penalties. We note, however, that a person who fails to make a report required by section 13031 will not necessarily be subject to criminal penalties under the statute. The criminal penalty provision contains no explicit *mens rea* requirement, and thus one would almost certainly be inferred. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994). While we need not decide what *mens rea* would apply, a court construing section 13031 might well require a defendant to have known that a report was legally required before imposing criminal liability for a failure to report. Such a reading would, among other things, address any concern about imposing criminal liability on persons who lacked clear notice that the failure to report in their particular circumstances was unlawful.

I.

Congress enacted the VCAA, including section 13031, as title II of the Crime Control Act of 1990. Pub. L. No. 101-647, §§ 201–255, 104 Stat. at 4792–4815. Section 13031 requires persons on "Federal land or in a

federally operated (or contracted) facility" who are engaged in certain activities—individuals the statute calls "[c]overed professionals"—to report suspected incidents of child abuse. 42 U.S.C. § 13031(a)–(b) (2006). Specifically, section 13031(a) provides that

> [a] person who, while engaged in a professional capacity or activity described in subsection (b) of this section on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d) of this section.[1]

Section 13031(d) directs the Attorney General to designate the agency or agencies to which the reports described in subsection (a) should be made. It states:

> For all Federal lands and all federally operated (or contracted) facilities in which children are cared for or reside, the Attorney General shall designate an agency to receive and investigate the reports described in subsection (a) of this section. By formal written agreement, the designated agency may be a non-Federal agency. When

[1] Subsection (b) provides:

> Persons engaged in the following professions and activities are subject to the requirements of subsection (a) of this section:
>
> (1) Physicians, dentists, medical residents or interns, hospital personnel and administrators, nurses, health care practitioners, chiropractors, osteopaths, pharmacists, optometrists, podiatrists, emergency medical technicians, ambulance drivers, undertakers, coroners, medical examiners, alcohol or drug treatment personnel, and persons performing a healing role or practicing the healing arts.
>
> (2) Psychologists, psychiatrists, and mental health professionals.
>
> (3) Social workers, licensed or unlicensed marriage, family, and individual counselors.
>
> (4) Teachers, teacher's aides or assistants, school counselors and guidance personnel, school officials, and school administrators.
>
> (5) Child care workers and administrators.
>
> (6) Law enforcement personnel, probation officers, criminal prosecutors, and juvenile rehabilitation or detention facility employees.
>
> (7) Foster parents.
>
> (8) Commercial film and photo processors.

> such reports are received by social services or health care agencies, and involve allegations of sexual abuse, serious physical injury, or life-threatening neglect of a child, there shall be an immediate referral of the report to a law enforcement agency with authority to take emergency action to protect the child. All reports received shall be promptly investigated, and whenever appropriate, investigations shall be conducted jointly by social services and law enforcement personnel, with a view toward avoiding unnecessary multiple interviews with the child.

Consistent with this directive, the Attorney General has issued a regulation designating the agencies authorized to receive and investigate reports of child abuse submitted under section 13031(a). That rule, which appears as 28 C.F.R. § 81.2 (2010), provides:

> Reports of child abuse required by 42 U.S.C. 13031 shall be made to the local law enforcement agency or local child protective services agency that has jurisdiction to investigate reports of child abuse or to protect child abuse victims in the land area or facility in question. Such agencies are hereby respectively designated as the agencies to receive and investigate such reports, pursuant to 42 U.S.C. 13031(d), with respect to federal lands and federally operated or contracted facilities within their respective jurisdictions, provided that such agencies, if non-federal, enter into formal written agreements to do so with the Attorney General, her delegate, or a federal agency with jurisdiction for the area or facility in question. If the child abuse reported by the covered professional pursuant to 42 U.S.C. 13031 occurred outside the federal area or facility in question, the designated local law enforcement agency or local child protective services agency receiving the report shall immediately forward the matter to the appropriate authority with jurisdiction outside the federal area in question.

Att'y Gen. Order No. 2009-96, 61 Fed. Reg. 7704 (Feb. 29, 1996).

Under section 13031, "the term 'child abuse' means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child." 42 U.S.C. § 13031(c)(1). Section 13031 further explains that "the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another

person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." *Id.* § 13031(c)(4). "[T]he term 'exploitation' means child pornography or child prostitution." *Id.* § 13031(c)(6).

Two other provisions in section 13031 are also relevant. Section 13031(e) provides that "[i]n every federally operated (or contracted) facility, and on all Federal lands, a standard written reporting form, with instructions, shall be disseminated to all mandated reporter groups," and makes clear as well that although "[u]se of the form shall be encouraged, . . . its use shall not take the place of the immediate making of oral reports . . . when circumstances dictate." Section 13031(h) provides that "[a]ll individuals in the occupations listed in subsection (b)(1) of this section who work on Federal lands, or are employed in federally operated (or contracted) facilities, shall receive periodic training in the obligation to report, as well as in the identification of abused and neglected children."

Finally, in section 226(g)(1) of the VCAA (codified as amended at 18 U.S.C. § 2258), Congress criminalized the failure to report child abuse as mandated by 42 U.S.C. § 13031. The criminal provision states:

> A person who, while engaged in a professional capacity or activity described in subsection (b) of section 226 of the Victims of Child Abuse Act of 1990 [42 U.S.C. § 13031] on Federal land or in a federally operated (or contracted) facility, learns of facts that give reason to suspect that a child has suffered an incident of child abuse, as defined in subsection (c) of that section, and fails to make a timely report as required by subsection (a) of that section, shall be fined under this title or imprisoned not more than 1 year or both.

18 U.S.C. § 2258 (2006). When the VCAA was originally enacted, the offense was a Class B misdemeanor punishable by six months of imprisonment, Pub. L. No. 101-647, § 226(g)(1), 104 Stat. at 4808; *see* 18 U.S.C. § 3581(b)(7) (1988), but in 2006, Congress amended 18 U.S.C. § 2258 by raising the maximum punishment from six months to one year of imprisonment. Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 209, 120 Stat. 587, 615. Other than this change, Congress has amended neither 18 U.S.C. § 2258 nor 42 U.S.C. § 13031 since it enacted the provisions in 1990.

II.

A.

We first consider the circumstances under which covered professionals must report suspected child abuse under the VCAA.[2] We conclude that, although no interpretation of section 13031 perfectly reconciles all of its provisions, section 13031 is best read to impose a reporting obligation on all persons who, while engaged in the covered professions and activities on federal lands or in federal facilities, learn of facts that give reason to suspect that child abuse has occurred, regardless of where the abuse might have occurred or where the suspected victim is cared for or resides. In reaching this conclusion, we considered the construction of section 13031 that you propose, as well as two other readings that would narrow the reporting obligation. As explained below, while all of these narrowing constructions find support in certain provisions of the statute, they are also in significant tension with other parts of section 13031, leading us to conclude that section 13031 "'as a whole'" is best read to impose the broad reporting obligation described above. *See United States v. Atl. Rsch. Corp.*, 551 U.S. 128, 135 (2007) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)).

Section 13031(a) sets forth the reporting requirement that is the VCAA's core directive. It provides that a covered professional engaged in a covered activity "on Federal land or in a federally operated (or contracted) facility" who "learns of facts that give reason to suspect that a child

---

[2] In preparing our opinion, we considered views provided by your office, the Department of Justice's Criminal Division, the Department of Defense, the Department of State, and the Attorney General's Advisory Council. *See* E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, Office of Legal Counsel ("OLC"), from Alexandra Gelber, Criminal Division (Jan. 15, 2010, 10:15 AM); E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, OLC, from John Casciotti, Office of General Counsel, Department of Defense (Feb. 26, 2010, 5:02 PM); E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, OLC, from Robert Choo, Office of the Legal Adviser, Department of State (July 21, 2010, 2:35 PM); E-mail for Cristina M. Rodríguez, Deputy Assistant Attorney General et al., from Carter Stewart, United States Attorney for the Southern District of Ohio (Feb. 3, 2012, 6:45 PM). We also solicited the opinion of the Department of Health and Human Services, which indicated that it "has no view about the interpretation advanced by the Veterans Administration." E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, OLC, from Elizabeth J. Gianturco, Senior Advisor to the General Counsel, Department of Health and Human Services (Apr. 21, 2010, 2:16 PM).

has suffered an incident of child abuse, shall as soon as possible make a report of the suspected abuse to the agency designated under subsection (d) of this section." On its face, this is a broad provision: It applies to covered professionals on all federal lands and in all federal facilities and requires a report as soon as possible no matter where the suspected child victim resides, is cared for, or may have been abused. The express incorporation of subsection (d), however, gives rise to doubt about the scope of subsection (a)'s reporting requirement, because subsection (d) appears to require the Attorney General to designate an agency to receive reports only "[f]or all Federal lands and all federally operated (or contracted) facilities in which children are cared for or reside." The central question, then, is whether the cross-reference to subsection (d) limits subsection (a)'s otherwise broad language, and if so, in what way.[3]

You suggest that it would be reasonable to read the reporting requirement as applying "only with regard to suspected abuse of children residing or cared for on Federal lands and in federally operated and contracted facilities," because "42 U.S.C. § 13031(a) requires reporting only to agencies as designated under subsection (d), and subsection (d) provides for designation only of agencies to receive and investigate reports for Federal reservations in which children are cared for or reside." VA Letter at 2. In other words, you maintain that, because subsection (d) specifies agencies to receive reports only for "Federal lands and . . . facilities in which children are cared for or reside," Congress intended to require reports only for suspected abuse of children who reside or are cared for on federal lands or in federal facilities. Moreover, it might be argued that when the Attorney General designates an agency to receive reports for federal lands and facilities in which children are not cared for and do not reside, he is not making designations "under" subsection (d), because that provision expressly addresses designations only for federal lands and facilities "in which children are cared for or reside." This construction of section 13031, in your view, would appropriately align the location of the

[3] We assume for purposes of this opinion, as do you, that the phrase "in which children are cared for or reside" modifies both "Federal lands" and "federally operated (or contracted) facilities." VA Letter at 2 ("subsection (d) provides for designation . . . of agencies to receive and investigate reports for Federal reservations in which children are cared for or reside"). The Attorney General's regulations do not address the issue, 28 C.F.R. pt. 81 (2010), nor do any of the submissions we received.

suspected child victims with subsection (d)'s designation of agencies to receive reports.

This interpretation is not without some force, but we believe it is inconsistent with other subsections of section 13031 and with the statute viewed in its entirety. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). As noted above, Congress phrased subsection (a) using broad language that contains no limitation on the federal lands or facilities in which reporting is required, and no residence-based limitation on the suspected child victims whose potential abuse can give rise to a reporting obligation. In fact, section 13031 as a whole is devoid of any language that explicitly limits the suspected child victims whose potential abuse triggers the reporting requirement.

If Congress had intended to limit the scope of the VCAA's reporting requirement in the significant manner you propose, an isolated cross-reference to subsection (d) would have been an obscure and backhanded way to do so. *Cf. Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 170–71 (1971) ("To accept the Board's reasoning that the union's § 302(c)(5) responsibilities dictate the scope of the § 8(a)(5) collective-bargaining obligation would be to allow the tail to wag the dog."). Subsection (d) is entitled "[a]gency designated to receive report and action to be taken," and purports to address only the agencies to which reports must be made, not the professionals who must make reports or the children who may be the subject of reports. Nothing in subsection (d) expressly narrows the scope of potential child victims covered by the reporting requirement. *Cf. Comm'r v. Clark*, 489 U.S. 726, 739 (1989) ("In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.").

Indeed, subsection (d) does not say that the Attorney General may only designate agencies to receive reports for federal lands and facilities "in which children are cared for or reside." It simply specifies that the Attorney General "shall designate an agency to receive and investigate" reports for such lands and facilities, saying nothing about what the Attorney General should do with respect to other federal lands and facilities. And in

implementing this authority, the Attorney General has in fact specified reporting locations for all covered professionals who learn of any covered abuse while engaged in their profession or activity on any federal land or facility, not solely abuse connected to lands or facilities where children are cared for or reside. *See* 28 C.F.R. § 81.2.

The broad reading of the reporting requirement gains further support from two other provisions in the VCAA that unambiguously apply to all federal lands and facilities, not just those where children are cared for or reside. Subsection (e) requires dissemination of a standard written reporting form to "all mandated reporter groups" "[i]n every federally operated (or contracted) facility, and on all Federal lands." In other words, reporting forms must be disseminated not only to federal lands and facilities where children are cared for or reside, but to all federal lands and facilities. This provision thus appears to presume that mandated reporter groups exist in every federally operated or contracted facility and on all federal lands. This presumption, in turn, strongly suggests that Congress intended to require the reporting of abuse discovered by covered professionals in the course of their covered activities on all federal lands and in all federal facilities, not simply abuse that occurs on the lands and in the facilities where children are cared for or reside.

Subsection (h) embodies a similar premise. That provision, entitled "[t]raining of prospective reporters," requires "periodic training in the obligation to report, as well as in the identification of abused and neglected children," for "[a]ll individuals in the occupations listed in subsection (b)(1) of this section who work on Federal lands, or are employed in federally operated (or contracted) facilities." Again, this provision appears to assume that all individuals who work in the listed occupations on all federal lands and in all federal facilities—not solely those where children are cared for or reside—might encounter suspected abuse that must be reported. This further suggests that Congress intended to require covered professionals working on *all* federal lands and in *all* federal facilities to report suspected abuse, because the across-the-board training requirement otherwise would serve no clear purpose.

The broad reading of the reporting requirement is also consistent with the scope of subsection (b). Subsection (b)'s specific list of relevant professions and activities echoes the mandatory reporter provisions of numerous state laws requiring the reporting of abuse. *Compare* 42 U.S.C.

§ 13031(b) (list set forth *supra* note 1), *with* Child Welfare Information Gateway, Dep't of Health & Human Services, *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws* at 2 (Apr. 2010) ("*Summary of State Laws*"), http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf (last visted ca. May 2012). The reporting requirement, as defined in subsections (a) and (b), focuses on the nature of the covered professional's employment activity, not the place where the child victim is cared for or resides. Indeed, many of the covered professionals—such as film processors, coroners, and ambulance drivers—would likely learn of suspected child abuse in circumstances that provide no indication whether the child victim is cared for or resides on federal lands or in a federal facility.

The VCAA's legislative history also reflects a congressional intent to enact a far-reaching reporting obligation that would protect as many victims of suspected child abuse as possible. Senator Biden, a co-sponsor of the legislation, called it a "sweeping title aimed at mak[ing] our criminal justice system more effective in cracking down on child abusers, and more gentle in dealing with the child abuse victims." 136 Cong. Rec. 36,312 (1990); *see also id.* at 16,240 (statement of Sen. Biden) ("[Y]ou, the innocent bystander, you, the third party, you have a legal obligation to report when you observe or have reason to believe that an abuse of an innocent child takes place."); *id.* at 16,238 (statement of co-sponsor Sen. Reid) ("A critical step in protecting our children is to identify child victims . . . before it is too late. My proposed bill of rights requires certain professionals to identify who they suspect are victims of abuse and neglect.").

As we recognize above, our interpretation of the statute does not reconcile perfectly all of the statute's parts, specifically subsection (a)'s cross-reference to subsection (d). Read in context, however, we think subsection (d) need not and should not be construed to limit either the scope of the reporting requirement under subsection (a) or the Attorney General's authority to designate agencies to receive the required reports. Such an interpretation would be in marked tension with the breadth of subsection (a)'s terms, the requirements of subsections (e) and (h), the scope of subsection (b), and the general evidence of Congress's intent.

The two additional narrowing constructions we identified also fail to make better sense of the statute than the broad reading we have adopted.

We first considered whether the reporting requirement should be limited to situations involving children who had been abused on federal lands or facilities. But under this reading, as under your suggested reading, we would have to conclude that Congress acted to limit the apparently broad reporting requirement set forth in subsection (a) through the oblique mechanism of a cross-reference to subsection (d). What is more, this reading, too, would make it difficult to explain the breadth of the mandated training and provision of forms on all federal lands and in all federal facilities in subsections (e) and (h) and the scope of covered professionals in subsection (b). Further, and significantly, this reading would narrow the class of children whose suspected abuse could give rise to a required report, despite the fact that *no* provision in the statute—including subsection (d)—addresses the location of the suspected abuse.

We also considered a third alternative reading—one that would require reporting only from covered professionals who engage in the specified professions and activities on federal lands or in federal facilities where children are cared for or may have been abused. This construction, too, would rest on a presumption that Congress intended to limit the scope of the reporting obligation through a single cross-reference to subsection (d). Further, it would be in particularly sharp tension with subsections (e) and (h), which require training and distributing reporting forms on *all* federal lands and in *all* federal facilities, not just where children are cared for or reside. This reading would also produce an anomalous result—a professional's obligation to report facts giving reason to suspect that a child unconnected with federal lands or facilities had been abused would turn on the apparently unrelated question whether other children happened to be cared for or reside on the lands or in the facility where the professional works. In our judgment, these difficulties make this interpretation less coherent than the broad reading we have given the statute.

We therefore conclude that the best reading of section 13031 as a whole is that a covered professional is required to report suspected child abuse discovered while engaged in the professions or occupations specified in subsection (b) on federal lands or in federal facilities.[4]

---

[4] This interpretation of the reporting requirement is consistent with the law of most states. "All States, the District of Columbia, [and all U.S. territories] have statutes identifying persons who are required to report child maltreatment under specific circumstances," and, in most states, the list of individuals with reporting obligations closely resembles

B.

We next consider whether "the mere knowledge that a patient has viewed child pornography [would] trigger a covered professional's duty to report the suspected child abuse, even if he or she does not know the identity of the child or children depicted and has no reason to believe the patient knew their identity." VA Letter at 2.[5] In raising this question, you point to language in a later part of subsection (d) providing that, when reports required by subsection (a) are "received by social services or health care agencies, and involve allegations of sexual abuse, serious physical injury, or life-threatening neglect of a child, there shall be an immediate referral of the report to a law enforcement agency with authority to take emergency action to protect the child." Based on subsection (d)'s reference to "the" child, you note that, while it is clear that "the [reporting] requirement applies when the identity of an abused child can be determined by the covered provider so that the law-enforcement agency with jurisdiction can be identified, . . . it is less clear . . . that it applies when that is not the case." VA Letter at 2.[6] We conclude, however, that the text of the statute covers the situation you describe.

---

the list of covered professionals in section 13031. *Summary of State Laws* at 1–2. In fact, some jurisdictions require *all* persons, not just certain professionals, to report suspected child abuse. *Id.* at 3. Thus, many, if not all, covered professionals who learn of suspected child abuse on federal lands or in federal facilities would also be required to report under state laws. Covered professionals should therefore consult relevant state law to ensure that they are fully informed about the scope of their legal reporting requirements.

[5] As we have noted, section 13031(b) subjects a wide range of individuals to the reporting duty of subsection (a), including physicians, pharmacists, school officials, detention facility employees, and commercial film and photo processors. *See supra* note 1 (quoting 42 U.S.C. § 13031(b)). Those covered professionals thus may learn of possible child abuse from a variety of individuals besides those commonly referred to as "patients." For simplicity, however, we use the term "patient" as shorthand for any person from whom a covered professional may learn of potential child abuse.

[6] Similarly, the Department of Defense states that its relevant policy "does not contemplate that the statute applies in a situation where the patient merely blurts out that he has an addiction to child pornography." Instead, under its policy, reporting would be required in contexts where the patient "is drawn to a particular child," "knows the identity or whereabouts of a child depicted in the pornography," "help[s] to produce the pornography," or in other contexts where "there is an identifiable child or identifiable children that could be the subject of action by the child protective agency." E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, OLC, from John Casciotti, Office of General Coun-

The text of section 13031(a) imposes a reporting duty on a covered professional "who, while engaged in a professional capacity or activity described in subsection (b) . . . , learns of facts that give reason to suspect that a child has suffered an incident of child abuse." "[C]hild abuse," in turn, is defined as "the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child." 42 U.S.C. § 13031(c)(1). The statute further provides that "the term 'sexual abuse' includes the employment [or] use . . . of a child to engage in . . . sexual exploitation of children," and that "the term 'exploitation' means child pornography or child prostitution." *Id.* § 13031(c)(4), (6). Under these definitions, covered professionals must report suspected abuse if they learn of facts giving reason to suspect that a child "has suffered an incident of [employment or use to engage in child pornography],"[7] or "has suffered an incident of [child pornography]."

Although section 13031 does not define the term "child pornography," it is defined elsewhere in the U.S. Code as

> any visual depiction, . . . whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where—

---

sel, Department of Defense (Feb. 26, 2010, 5:02 PM). The Department of State "does not have a formal position or policy addressing whether the reporting requirement is triggered when a covered professional learns that someone has viewed child pornography, but the professional does not know the identity of the child or children depicted and has no reason to believe that the viewer knows their identities." E-mail for Jeannie S. Rhee, Deputy Assistant Attorney General, OLC, from Robert Choo, Office of the Legal Adviser, Department of State (July 21, 2010, 2:35 PM). It recognizes, however, that this situation "may trigger other actions including the enforcement of child pornography laws, if applicable, or internal discipline." *Id.*

[7] The substitution in the text is not completely straightforward, in that the statute defines "exploitation"—without any qualification—to include "child pornography or child prostitution," but defines "sexual abuse" to include "rape, molestation, prostitution, or other form[s] of sexual exploitation of children." *Compare* 42 U.S.C. § 13031(c)(6) (definition of "exploitation"), *with id.* § 13031(c)(4) (definition of "sexual abuse"). We do not think, however, that the statute intends to draw a strong distinction between "exploitation" and "sexual exploitation." The latter phrase is not a defined term. And the statute in other respects seems to treat the two terms as essentially interchangeable. In particular, the definition of "sexual abuse" expressly provides that "prostitution . . . of children" is a form of "sexual exploitation of children," and the definition of "exploitation" similarly provides that "child prostitution" is a form of "exploitation." *Id.* § 13031(c)(4), (6).

> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is . . . of a minor engaging in sexually explicit conduct; or
>
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

18 U.S.C. § 2256(8).[8] This definition is consistent with dictionary definitions of child pornography. *See, e.g.*, *Black's Law Dictionary* 1279 (9th ed. 2009) (defining "child pornography" as "[m]aterial depicting a person under the age of 18 engaged in sexual activity").

Under these definitions, child pornography is not a specific action or set of actions, but an end product, a particular kind of visual depiction that is "made or produced." 18 U.S.C. § 2256(8). It is thus not entirely clear what it means "to engage in child pornography," or for "a child" to have "suffered an incident of" child pornography. Notably, however, certain other forms of "child abuse" in section 13031 are also defined as end results rather than actions. "[P]hysical injury," for example, is defined to include, among other things, "lacerations, fractured bones, burns, [and] internal injuries." 42 U.S.C. § 13031(c)(2). And it is relatively straightforward to conclude that a child has "suffered an incident of" lacerations or fractured bones if the child has been subjected to physical abuse that results in those injuries. We think it is similarly clear that, whatever else the phrase may include, a person has "engage[d] in child pornography" if that person has produced or created pornographic images of children, and that "a child has suffered an incident of" child pornography if that child has been made the subject of pornographic images. The pornography is "a permanent record" of the abusive conduct of creating a pornographic image of a child. *New York v. Ferber*, 458 U.S. 747, 759 (1982).

Based on this analysis, we conclude that a covered professional who learns that a patient under his or her care has viewed child pornography may be aware of "facts that give reason to suspect that a child"—the

---

[8] Other definitions in section 13031, including the definition of "sexually explicit conduct"—a concept closely related to "child pornography," as the definition quoted above makes clear—track definitions in the same chapter (chapter 110) of the criminal code. *Compare* 42 U.S.C. § 13031(c)(5) (2006), *with* 18 U.S.C. § 2256(2) (2006).

subject of the specific pornographic images viewed by the patient—"has suffered an incident of child abuse." 42 U.S.C. § 13031(a).

We do not believe a covered professional in such a situation is relieved of an obligation to report such facts simply because he or she does not know or have reason to know, or have reason to believe a patient knows, the identity of the child depicted in the pornography. Subsections (a) and (d) of section 13031 do not require, either expressly or by implication, that a covered professional (or his or her patient) know the identity of the child or children abused in order to have a reporting obligation. We generally "'resist reading words or elements into a statute that do not appear on its face.'" *Dean v. United States*, 556 U.S. 568, 572 (2009) (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997)). Moreover, imposing a requirement that the victim's identity be known would be in tension with Congress's protective purpose. *See, e.g.*, 136 Cong. Rec. 36,312 (1990) (statement of Sen. Biden) (noting that the statute would "make [the] criminal justice system more effective in cracking down on child abusers").

Even assuming that the statute's references to "a child" in section 13031(a) and (d) limit the reporting requirement to situations involving "a" specific, potentially identifiable child, that limitation provides no basis for imposing the additional prerequisites to reporting that the covered professional know or have reason to believe his or her patient knows the identity of a child depicted in pornography the patient admits to viewing. Pornography may well involve "a" specific, potentially identifiable child even if neither covered professionals nor their patients know the child's identity. Even if covered professionals (or their patients) do not know the identity of any children depicted in pornography viewed by a patient, a report may lead authorities to specific, identifiable children. While some child pornography may be the work of professionals and therefore difficult to link to specific identifiable children, other such images are homemade recordings, taken in domestic contexts, of sexually abusive acts "committed against young neighbors or family members," and therefore traceable through law enforcement investigation to a particular child or children. Philip Jenkins, *Beyond Tolerance: Child Pornography on the Internet* 82 (2001); *see also* Richard Wortley & Stephen Smallbone, Community Oriented Policing Services, Dep't of Justice, Problem-Oriented Guides for Police, Problem-Specific Guides Series No. 41, *Child Pornography on the Internet* at 9 (2006), http://

www.cops.usdoj.gov/Publications/e04062000.pdf (last visited ca. 2012) ("[M]ore commonly, amateurs make records of their own sexual abuse exploits, particularly now that electronic recording devices such as digital cameras and web cams permit individuals to create high quality, homemade images.").

For the same reasons, section 13031(d)'s statement that, in certain circumstances, social services or health care agencies must refer reports of suspected child abuse "to a law enforcement agency with authority to take emergency action to protect *the child*" (emphasis added) should not be read to restrict the reporting obligation to situations in which covered professionals know the identity of the children who are the victims of suspected abuse. This law-enforcement referral requirement applies not to covered professionals, but to the "social services or health care agencies" that receive reports of suspected child abuse. 42 U.S.C. § 13031(d). The statute expressly contemplates that the agency receiving the report, not the covered professional, must ascertain which law enforcement agency is "authori[zed] to take emergency action to protect the child." *Id.* And although the referral requirement could be read to reflect an assumption that these agencies generally will know the identity of the child in need of protection, the requirement also could be satisfied by identifying a law enforcement agency with authority to initiate an investigation to ascertain the identity and location of the suspected victim.

We therefore conclude that the fact that a patient has viewed child pornography may constitute a "fact[] that give[s] reason to suspect that a child has suffered an incident of child abuse" under section 13031, and that a covered professional is not relieved of the obligation to report such a fact simply because the identity of the injured child is unknown.

C.

As noted, the VCAA provides for criminal penalties. 18 U.S.C. § 2258. When interpreting a statute's civil provision, the violation of which is also subject to criminal sanction, the rule of lenity may be invoked to resolve ambiguity in the provision. *See Leocal v. Ashcroft*, 543 U.S. 1, 11–12 & n.8 (2004); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517–18 & n.10 (1992) (plurality opinion). Here, however, we resolved both of the interpretive questions you presented without employing the rule of lenity, because we concluded

that the provisions at issue did not present any "grievous ambiguity or uncertainty" that could not be addressed by applying ordinary tools of statutory construction. *Muscarello v. United States*, 524 U.S. 125, 139 (1998) (internal quotation marks omitted).

We recognize, however, that the statutory trigger for the reporting requirement—the learning of "facts that give reason to suspect that a child has suffered an incident of child abuse"—is extremely broad. For example, the statute's text does not appear to require either that the suspected abuse have occurred recently or that there be a direct connection between the facts and a particular perpetrator of or witness to abuse. Thus, a doctor's duty to report conceivably could be triggered by a patient's revelation that his neighbor confided that he was abused as a child some decades ago, a patient's revelation that acquaintances long ago had viewed child pornography, or a patient's expression of amazement that he had learned from the Internet that child abuse or child pornography was far more prevalent than he had previously believed.[9] Because failures to report may be criminally prosecuted, courts may be concerned about the uncertain breadth of the suspected abuse that may be subject to section 13031's reporting requirement, particularly when combined with the ambiguities discussed in Parts II.A and II.B.

You have not asked us to define the boundaries of the phrase "facts that give reason" to suspect child abuse or to discuss the application of 18 U.S.C. § 2258, but we note that covered professionals who fail to make a report required by the statute may not always be criminally liable for their failure to do so. Significantly, although the VCAA's criminal penalty provision lacks an express *mens rea* requirement, courts generally "interpret[] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." *X-Citement Video*, 513 U.S. at 70.[10] Courts deciding whether to impose

---

[9] We do not consider here whether other aspects of the language quoted in the text above, or of language elsewhere in the statute, might limit its application in some such situations. A court might also adopt a narrowing construction of the statutory trigger for the reporting requirement to avoid notice concerns. *See Skilling v. United States*, 130 S. Ct. 2896, 2931 (2010).

[10] As the Supreme Court has explained, the presumption that a statute contains a *mens rea* requirement even when that requirement is not explicit in the statutory text is consistent with the rule of lenity. *See Liparota v. United States*, 471 U.S. 419, 427–28 (1985).

criminal penalties on a covered professional for failing to file a report would have to decide (i) whether to construe 18 U.S.C. § 2258 to impose a *mens rea* requirement, and (ii) if they do so, what the required *mens rea* is. And while for some statutes, courts have required only that a defendant have knowledge of the "facts that make his conduct illegal," *Staples v. United States*, 511 U.S. 600, 605 (1994), for others, courts have required that a defendant know that his or her conduct was "unauthorized or illegal" before criminal liability could be imposed, particularly where failure to impose such a requirement would "criminalize a broad range of apparently innocent conduct," *Liparota v. United States*, 471 U.S. 419, 426, 434 (1985). Here, a court concerned about ordinary citizens' ability to decipher the contours of the abuse that must be reported, or about the statute's punishment of a failure to act rather than an affirmative act, might be inclined to adopt this kind of heightened *mens rea* requirement. *See Skilling v. United States*, 130 S. Ct. 2896, 2927–28 (2010) (noting that a "'criminal offense'" must be defined "'with sufficient definiteness that ordinary people can understand what conduct is prohibited'" (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))); *id.* at 2933 (noting that a "*mens rea* requirement" can help "blunt[] . . . notice concern[s]"); *Lambert v. California*, 355 U.S. 225, 228 (1957) (holding that due process requires that a person who is "wholly passive and unaware of any wrongdoing" have notice of a registration requirement before she may be held criminally liable).

III.

In sum, any person who, while engaged in a professional capacity or activity described in subsection (b) of section 13031 on any federal land or in any federally operated (or contracted) facility, learns of "facts that give reason to suspect that a child has suffered any incident of child abuse" must report the suspected abuse to a designated agency. The fact that a patient has viewed child pornography may "give reason to suspect that a child has suffered an incident of child abuse" under the statute, and

---

Inferring a *mens rea* requirement is, however, a distinct practice from applying the rule of lenity, and the Court has suggested that lenity principles may not apply in determining the degree of *mens rea* that is required. *See Staples v. United States*, 511 U.S. 600, 619 n.17 (1994).

a covered professional is not relieved of an obligation to report the possible abuse simply because neither the covered professional nor the patient knows the identity of the child depicted in the pornography. As described, however, a covered professional's failure to file a required report will not necessarily result in criminal liability.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

Exempting the Records of the SEC Fraud Surveillance Team from Reporting Obligations in the Privacy Act

The Securities and Exchange Commission is authorized by 5 U.S.C. § 522a(j)(2) of the Privacy Act to exempt the records of the proposed Fraud Surveillance Team from reporting obligations in 5 U.S.C. § 552a(e)(3) of the Act.

July 3, 2012

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
SECURITIES AND EXCHANGE COMMISSION

You have requested the views of this Office on whether the Securities and Exchange Commission ("SEC" or "Commission") may invoke the authority provided by 5 U.S.C. § 522a(j)(2) of the Privacy Act to exempt a proposed SEC special unit from reporting obligations imposed by 5 U.S.C. § 552a(e)(3) of the Act. *See* Letter for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel ("OLC"), from Mark D. Cahn, General Counsel, SEC at 1 (Dec. 5, 2011) ("Request Letter").

You explained that SEC staff is contemplating recommending to the Commission that it authorize the creation of a special unit within the SEC, to be called the Fraud Surveillance Team ("FST"), which would investigate criminal violations of federal securities laws. To facilitate the FST's efforts, the staff may recommend that the Commission invoke 5 U.S.C. § 552a(j)(2), which permits an agency to promulgate a rule exempting certain records systems connected with criminal law enforcement from some of the Privacy Act's requirements. Doing so would allow the Commission to exempt the FST's records of its investigations from the reporting requirements of section 552a(e)(3), which generally requires agencies seeking information from the public to inform those from whom the information is sought of the authority for collecting the information, the uses to which it will be put, and the consequences of not providing it. *Id*.

We previously advised informally that section 552a(j)(2) authorizes the Commission to exempt the FST's record system from section 552a(e)(3). *See* E-mail for Mark D. Cahn, General Counsel, SEC, from Matthew D. Roberts, Senior Counsel, OLC, *Re: OLC's Informal Advice Regarding Your Privacy Act Inquiry of December 5, 2011* (Feb. 6, 2012, 5:42 PM). This memorandum memorializes that prior advice. *Cf.* Letter for Virginia

A. Seitz, Assistant Attorney General, OLC, from Mark D. Cahn, General Counsel, SEC at 1 (Apr. 6, 2012) (requesting written opinion).[1]

I.

The Privacy Act sets forth certain requirements governing the collection, maintenance, use, and dissemination of personal information by federal Executive Branch agencies, *see* S. Rep. No. 93-1183, at 1 (1974); H.R. Rep. No. 93-1416, at 2 (1974), including independent agencies such as the SEC, *see* 5 U.S.C. §§ 552a(a)(1), 552(f)(1) (2006). At issue here is the requirement set forth in section 552a(e)(3), which provides that

> [e]ach agency that maintains a system of records shall . . . inform each individual whom it asks to supply information [of] . . . (A) the authority . . . which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary; (B) the principal purpose or purposes for which the information is intended to be used; (C) the routine uses which may be made of the information . . . ; and (D) the effects on [the individual], if any, of not providing all or any part of the requested information.

The Act also provides agency heads with the authority to exempt certain systems of records from section 552a(e)(3) and other Privacy Act requirements. Most relevant here is section 552a(j)(2), which provides that

> [t]he head of any agency may promulgate rules, in accordance with the requirements [for notice-and-comment rulemaking of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(b), (c) (2006)], to exempt any system of records within the agency from any part of [the Privacy Act] except [5 U.S.C. § 552a](b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is . . . maintained by an agency or component thereof which performs as its principal function any activity pertain-

---

[1] In preparing this opinion, we sought the views of the Office of Management and Budget ("OMB"), which is charged with "prescrib[ing] guidelines and regulations for the use of agencies in implementing the provisions of" the Privacy Act and "provid[ing] continuing assistance to and oversight of the implementation of" the Act "by agencies." 5 U.S.C. § 552a(v). OMB indicated that it had no objections to the informal advice we previously provided to you.

> ing to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of . . . information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual.

As you explained in the Request Letter (at 2 & nn.2–3), the SEC is authorized to investigate all conduct that may violate the federal securities laws, and every "willful" violation of those laws constitutes a criminal offense. *See* 15 U.S.C. § 77t(a) (2006) (authority to investigate potential violations of the Securities Act of 1933); 15 U.S.C. § 78u(a)(1) (Supp. IV 2010) (same for the Securities Exchange Act of 1934); 15 U.S.C. § 80a-41(a) (2006) (same for the Investment Company Act of 1940); 15 U.S.C. § 80b-9(a) (2006) (same for the Investment Advisers Act of 1940); 15 U.S.C. § 77x (2006) (criminal penalty for willful violation of the Securities Act); 15 U.S.C. § 78ff (2006) (same for the Securities Exchange Act); 15 U.S.C. § 80a-48 (2006) (same for the Investment Company Act); 15 U.S.C. § 80b-17 (2006) (same for the Investment Advisers Act). Although the SEC may investigate conduct that it suspects is criminal and may take action to remedy civil violations, the Commission cannot prosecute criminal violations. Instead, if the SEC finds evidence of a potential criminal violation, the Commission is authorized to transmit that evidence to the Department of Justice ("DOJ") or other criminal authorities, as appropriate, for possible criminal prosecution. *See* 15 U.S.C. § 77t(b) (2006) (Securities Act); 15 U.S.C. § 78u(d)(1) (2006) (Securities Exchange Act); 15 U.S.C. § 80a-41(d) (2006) (Investment Company Act); 15 U.S.C. § 80b-9(d) (2006) (Investment Advisers Act); Request Letter at 2, 3, 6; *see generally SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1376–77 (D.C. Cir. 1980) (describing SEC's role in investigating possible criminal violations of the securities laws and making referrals to DOJ).

To enhance the Commission's ability to identify, investigate, and facilitate prosecution of criminal violations of the securities laws, SEC staff is considering recommending the creation of the Fraud Surveillance Team. The FST's primary mission would be to identify ongoing criminal violations of the federal securities laws, to develop evidence of such violations, and to refer that evidence to criminal law enforcement authorities

for further investigation and possible criminal prosecution. Request Letter at 3. SEC staff contemplates that a significant part of the FST's investigative efforts would involve contacting individuals suspected of conducting criminal securities fraud schemes through e-mail, mail, or telephone. *Id.* at 3–4. FST investigators would pose as potential investors in the schemes and seek information from the promoters in an attempt to develop evidence to support criminal prosecutions. *Id.* at 4.

A cadre of SEC staff members would be designated to serve on the FST and would be specially trained and separately supervised in connection with their FST activities. Request Letter at 4–5.[2] The FST would undertake an investigation only if its staff had a bona fide basis to believe that the targets were engaged in conduct amounting to a criminal violation of one of the securities laws. *Id.* at 4. The FST would maintain the information that it collected in its investigations in a separate system of records, which would not be utilized for other purposes and would not be generally accessible to Commission staff performing non-FST duties. *Id.* at 5; E-mail for Matthew D. Roberts, Senior Counsel, OLC, from George S. Canellos, Director, New York Regional Office, SEC (Dec. 22, 2011, 5:02 PM) ("Follow-up E-mail"). Limited, summary information in the FST records system—for example, a description of the general nature of the information that prompted the investigation, the persons or entities contacted, and the other investigative steps taken—would, however, subsequently be recompiled into another SEC records system or systems, which would be more broadly available to Commission staff. Request Letter at 5 & n.9; Follow-up E-mail.

---

[2] At least initially, the members of the FST would be drawn from the enforcement and inspection staffs of the Commission's New York and Miami Regional Offices. Because their duties for the FST probably would not require all of their time, FST staff members would also continue to perform their existing enforcement and inspection duties on a part-time basis. Those duties would not, however, include work on any civil investigation that arose from or related to evidence gathered by the FST. FST staff members would be under the immediate supervision of individuals at the level of Assistant Director in the SEC's Enforcement Division, who also would not participate in or supervise any civil investigation that arose from or related to evidence gathered by the FST. Those supervisors would, in turn, be subject to supervision by the directors of the New York and Miami Regional Offices, who currently are former federal prosecutors. *See* Request Letter at 4–5 & n.8; E-mail for Matthew D. Roberts, Senior Counsel, OLC, from Brian A. Ochs, Counsel to the General Counsel, SEC (Mar. 5, 2012, 12:27 PM).

When conducting an investigation, FST staff would consult on a regular basis with DOJ, as well as relevant state or local prosecutors, and those criminal law enforcement authorities would have continuous and open access to the FST's records system. Request Letter at 4; Follow-up E-mail. The FST would generally make a referral to criminal authorities at the conclusion of its investigation if it determined that sufficient grounds existed for criminal prosecution. Request Letter at 4. Civil enforcement staff at the SEC would neither participate in FST investigations nor have standing access to FST records. Follow-up E-mail.[3] Although the FST would be able to make referrals to civil enforcement staff, the FST would do so only after completing its criminal investigation; and, after a referral, the FST would not undertake any further investigation. *Id.*; Request Letter at 4.

II.

As you explained in the Request Letter, SEC staff believes that the undercover operations described above would be impeded if FST members had to identify themselves as associated with the SEC and provide the notifications required by section 552a(e)(3) when contacting individuals suspected of fraud. Request Letter at 1, 4. In your view, section 552a(j)(2) of the Privacy Act authorizes the Commission to exempt the FST's system of records from section 552a(e)(3), thus relieving FST investigators of the obligation to provide the targets of their investigations with the notifications specified in that provision. Request Letter at 5–8. We agree.[4]

---

[3] As discussed in note 2, some FST staff members would also independently perform civil enforcement duties unrelated to their work on the FST. In this opinion, we use the term "civil enforcement staff" to refer to enforcement staff members while they are in the course of performing civil enforcement duties.

[4] The exemption in section 552a(j)(2) is not self-executing. As we explained in our informal advice, the Privacy Act requires that the Commission satisfy certain procedural requirements of the APA in order to invoke the exemption, and the Privacy Act itself imposes additional procedural requirements. *See* E-mail for Mark D. Cahn, General Counsel, SEC, from Matthew D. Roberts, Senior Counsel, OLC, *Re: OLC's Informal Advice Regarding Your Privacy Act Inquiry of December 5, 2011* (Feb. 6, 2012, 5:42 PM); *see generally* 61 Fed. Reg. 6428, 6435–39 (Feb. 20, 1996) (OMB guidance discussing the Privacy Act's publication and reporting requirements). Commission staff charged with implementing the FST proposal would be required to ensure compliance with the

A.

The proposal described in your letter satisfies the substantive requirements for the section 552a(j)(2) exemption, because (1) the FST would be a separate "component" of the SEC; (2) the FST's "principal function" would be an "activity pertaining to the enforcement of criminal laws"; and (3) the FST's records system would "consist of . . . information compiled for the purpose of a criminal investigation . . . and associated with an identifiable individual." 5 U.S.C. § 552a(j)(2).[5]

1.

The Privacy Act does not define the term "component," and we are not aware of any other federal statute that specifies the characteristics necessary for a subdivision of an agency to be considered a "component." The ordinary meaning of the word "component" is "a constituent part." *Webster's Third New International Dictionary* 466 (1993) ("*Webster's Third*"); *The Random House Dictionary of the English Language* 419 (2d ed. 1987) ("*Random House*"). The language of section 552a(j)(2), however, suggests Congress had a particular type of component in mind. By referring to an "agency or a component thereof" whose "principal function" pertains to the enforcement of the criminal laws, section 552a(j)(2) suggests that a "component" must not only be a constituent part of an agency but also have a "principal" function of its own, namely engaging in the enforcement of criminal law. We believe that the FST would satisfy these criteria and thus qualify as a "component" of the SEC.

The FST would have its own particular mission within the context of the SEC as a whole. As we explain in more detail below, while the SEC enforces the securities laws generally, the FST's principal purpose would be criminal investigation. In addition, the FST would have a designated staff and an independent records system that would not be broadly acces-

---

applicable procedural requirements of the Privacy Act and the relevant portions of the APA.

[5] Your letter assumes that FST staff would be required to provide the section 552a(e)(3) notifications if the exemption were not invoked. *See* Request Letter at 3 & n.6. We make the same assumption in this opinion. Other agencies engaged in similar undercover activities have suggested that section 552a(e)(3) would not apply to such activities, *see id.*, but we have not considered the analyses of those agencies or assessed their validity.

sible to other SEC staff. Although FST staff would likely also perform other duties within the agency, we do not believe that the part-time nature of its staff would preclude the FST from qualifying as a "component," because the FST would have its own special function and would be an official, enduring "constituent part" of the SEC.

Moreover, as an agency subdivision that specialized in investigative activities, the FST would resemble several other agency units that courts have treated as "components" under section 552a(j)(2). *See, e.g.*, *Seldowitz v. Office of the Inspector Gen.*, No. 00-1142, 2000 WL 1742098, at *4, 238 F.3d 414 (Table) (4th Cir. Nov. 13, 2000) (Office of the Inspector General ("OIG") in the Department of State); *Gowan v. U.S. Dep't of the Air Force*, 148 F.3d 1182, 1189–90 (10th Cir. 1998) (Office of Special Investigations in the Department of the Air Force); *Carp v. Internal Revenue Serv.*, No. 00-5992, 2002 U.S. Dist. LEXIS 2921, at *16–17 (D.N.J. Jan. 28, 2002) (Criminal Investigation Division in the Internal Revenue Service ("IRS")); *Anderson v. U.S. Postal Serv.*, 7 F. Supp. 2d 583, 586 n.3 (E.D. Pa. 1998) (Postal Inspection Service in the U.S. Postal Service), *aff'd*, 187 F.3d 625 (Table) (3d Cir. 1999). The FST would also resemble other units that agencies have viewed as "components" in regulations claiming the section 552a(j)(2) exemption. *See, e.g.*, 32 C.F.R. § 701.128(m) (2011) (Naval Criminal Investigation Service in the Department of the Navy); 40 C.F.R. § 16.11(c) (2011) (Criminal Investigation Division and National Enforcement Investigations Center in the Office of Criminal Enforcement, Forensics, and Training of the Environmental Protection Agency).[6]

2.

We also conclude that the FST would have as its "principal function" an "activity pertaining to the enforcement of criminal laws." 5 U.S.C. § 552a(j)(2). The FST's principal activities would be investigating poten-

[6] We note that entities viewed as separate agency "components" are usually established through some formal mechanism, such as an internal agency order. *See, e.g.*, *Chairman Levitt Announces Two Initiatives to Improve Investor Protection*, SEC News Release No. 95-50, 1995 WL 119773 (Mar. 22, 1995) (announcing SEC Chairman's creation of the Office of Compliance, Inspections, and Examinations). We therefore recommend that the mechanism used to create the FST entail the same level of formality that the SEC generally uses in creating Commission components.

tial criminal violations of the securities laws, developing evidence of such violations, and providing that evidence to the appropriate authorities for possible criminal prosecution. Request Letter at 3. We need not decide whether those activities would themselves constitute criminal law enforcement, because the section 552a(j)(2) exemption is applicable so long as a component's principal activities "pertain[] to" criminal law enforcement. 5 U.S.C. § 552a(j)(2). Moreover, the statute makes clear that criminal law enforcement includes the "activities" of both "police" and "prosecutors." *Id*.

The FST's activities—the identification of potential criminals and the development of the evidence necessary to prosecute them—clearly would "pertain[] to" the activities of "police" and "prosecutors," because the FST's investigative activities would assist police and prosecutors in performing their law enforcement duties of conducting investigations and bringing criminal prosecutions. Moreover, numerous courts have concluded that other agency components that engage in similar investigative activities qualify for the section 552a(j)(2) exemption. *See, e.g.*, *Seldowitz*, 2000 WL 1742098, at *4 (State Department OIG); *Gowan*, 148 F.3d at 1189–90 (Air Force Office of Special Investigations); *Carp*, 2002 U.S. Dist. LEXIS 2921, at *16–17 (IRS Criminal Investigation Division); *Anderson*, 7 F. Supp. 2d at 586 n.3 (Postal Inspection Service).

It is true that assistance to criminal law enforcement would not be the FST's only activity. After the FST completed a criminal investigation and made any referrals to criminal law enforcement authorities that it considered appropriate, the FST could also make a referral to SEC civil enforcement staff. Request Letter at 4; Follow-up E-mail. The civil enforcement staff would then determine (possibly after further investigation in which the FST would not participate) whether a civil enforcement action was warranted. Follow-up E-mail. In our view, however, the prospect that the FST might refer some matters for potential civil enforcement does not undermine the conclusion that the FST's "principal" function would be assisting criminal law enforcement. "Principal" means "first or highest in rank, importance, value, etc."; "chief"; or "foremost." *Random House* at 1539; *see also Webster's Third* at 1802 (defining "principal" as "most important, consequential, or influential"). Assisting criminal law enforcement would be the FST's "chief" and "most important" function. The FST would only undertake an investigation if it had reason to believe that the targets were engaged in criminal conduct. Request Letter

at 4. Criminal law enforcement authorities would have an active and ongoing role in the FST's investigations and standing access to the FST's records system, but the SEC's civil enforcement staff would not. Follow-up E-mail. And the FST would refer matters for possible civil enforcement actions only upon completion of its criminal investigations, after which the FST would perform no further investigative activities. *Id.*[7]

3.

We further believe that the FST's records system would consist of "information compiled for the purpose of a criminal investigation" and "associated with an identifiable individual." 5 U.S.C. § 552a(j)(2)(B). As discussed above, the records system would consist of files compiled by the FST to carry out its principal function of investigating potential criminal violations of the securities laws, and the system would be directly accessible only to FST staff (and their supervisors) for use in connection with their criminal investigations, and to criminal law enforcement authorities participating in those investigations. In our view, these circumstances suffice to establish that the information in the system would be "compiled for the purpose of a criminal investigation." *Id.* The information in the system also would be "associated with an identifiable individual," *id.*, because it would be associated with the individuals whom the FST investigators contacted in the course of their criminal investigations.

In two limited circumstances, information in the FST's records system would be shared with others in the SEC for purposes other than criminal investigation and enforcement: At the conclusion of the FST's criminal investigation, information that supported the existence of a civil violation of the securities laws would sometimes be referred to the SEC's civil enforcement staff for possible further investigation and civil enforcement action. *See* Request Letter at 4. In addition, a limited amount of summary

[7] Given our conclusions that the FST's principal function would be assisting criminal law enforcement, and that any involvement in civil law enforcement would be only a secondary function, we need not decide whether a component may have more than one "principal function" within the meaning of section 552a(j)(2), or whether the exemption applies when "only *one* of the [component's] principal functions . . . [is] the investigation of criminal conduct." *Alexander v. Internal Revenue Serv.*, No. 86-0414-LFO, 1987 WL 13958, at *4 (D.D.C. June 30, 1987); *see Anderson v. Dep't of the Treasury*, No. 76-1404, slip op. at 6 (D.D.C. filed July 19, 1977) (concluding that section 552a(j)(2) does not apply in that circumstance).

information from the FST's system would be recompiled into a separate records system that would be used by SEC staff for market monitoring and civil enforcement. *Id*. at 5 & n.9; *see* Follow-up E-mail. In our view, however, those additional uses of the information in the FST's records system would not alter the conclusion that the system would be compiled for the purpose of criminal investigations. The FST system would be created for criminal enforcement purposes, and the sharing of the data in the system with civil enforcement staff would merely be incidental to, or an ancillary consequence of, the system's creation. In addition, section 552a(j)(2) does not state that the information must be compiled for the "sole" or even "principal" purpose of a criminal investigation.

The Privacy Act as a whole supports our conclusion. The Act makes clear that records eligible for the criminal law enforcement exemption may be disclosed to others in the agency with a need for the records, which would include SEC employees using the FST records for market monitoring and civil law enforcement purposes. Section 552a(j)(2) indicates that the provisions of the Privacy Act governing disclosure apply to records that are eligible for the exemption. *See* 5 U.S.C. § 552a(j) (listing 5 U.S.C. § 552a(b)(1)–(12), the Act's disclosure provisions, as provisions from which the records may not be exempted). The Act's disclosure provisions, in turn, state that records may be disclosed for a variety of purposes, including "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." 5 U.S.C. § 552a(b)(1). In the case of the SEC, which is charged with ensuring compliance with the securities laws and is empowered to bring enforcement actions for civil violations of those laws, such officers and employees would include Commission employees who needed the information compiled by the FST to carry out their monitoring and civil enforcement responsibilities. The Privacy Act also provides that records may be disclosed on request to another agency or government entity "for a civil or criminal law enforcement activity if the activity is authorized by law." 5 U.S.C. § 552a(b)(7). We can think of no reason why Congress would permit disclosure outside the agency for civil law enforcement purposes but forbid disclosure inside the agency for the same purposes.

Case law also supports our analysis. For example, in *Seldowitz*, the Fourth Circuit concluded that criminal investigation records compiled by the State Department's OIG were protected by the section 552a(j)(2)

exemption, even though information in the records was used to pursue a civil prosecution, because the "OIG investigators contemplated a possible criminal prosecution." 2000 WL 1742098, at *3. And, in *Doe v. Federal Bureau of Investigation*, 936 F.2d 1346, 1356 (1991), the D.C. Circuit held that "information contained in a document qualifying for [the] subsection (j) . . . exemption . . . does not lose its exempt status when recompiled in a non-law enforcement record if the purposes underlying the exemption of the original document pertain to the recompilation as well."[8]

Additionally, our interpretation is consistent with the purposes of the securities laws. As the Request Letter explained, investigators cannot know at the start of a criminal investigation whether they will ultimately assemble enough evidence to justify a criminal prosecution. Request Letter at 8. If they prove unable to make out a criminal case, they may nonetheless uncover sufficient evidence to establish a civil violation of the securities laws. The purposes behind the securities laws would be ill-served if the SEC were barred from using that information to stop the civil violation and obtain relief for the victims.

B.

Because the SEC plans to recompile summary information from the FST's database into a separate records system that would be used for market monitoring and civil law enforcement, we also considered whether that recompilation would independently trigger the requirement in section 552a(e)(3) that investigators provide notifications when collecting the information. In our view, the notification requirement would not be triggered. The information would be initially entered into the FST's records system, and only subsequently recompiled from that system into the other system, which would be used by other SEC staff in performing their statutorily assigned duties. As we noted in Part II.A.3, the Privacy Act contemplates that information from exempted records systems will be shared within the agency for other purposes, *see* 5 U.S.C. § 552a(b)(1); in our view, recompilation into another database is a legitimate means of effectuating such information-sharing. This conclusion is supported by interpretive guidance issued by the Office of Management and Budget, which states that "records which are part of an exempted

[8] We discuss the applicability of this standard to your proposal in Part II.B below.

system may be . . . incorporated into . . . non-exempt records systems" without losing their exempt status. 40 Fed. Reg. 28,948, 28,971 (July 9, 1975).[9]

The D.C. Circuit suggested in *Doe* that recompilation of a criminal law enforcement record into another non-law enforcement records system would vitiate an otherwise properly invoked section 552a(j)(2) exemption unless the reasons for exempting the criminal law enforcement records also justified exempting the recompiled records. *See* 936 F.2d at 1356. Assuming that this condition on the applicability of the section 552a(j)(2) exemption exists, the recompilation contemplated by your proposal would satisfy the condition. The reason for exempting the FST's investigative records system from the section 552a(e)(3) notification requirements is that notice would compromise the FST investigations, because the targets of those investigations would not provide the requested information if they knew that it was being collected for possible criminal prosecutions. The same rationale would apply to the recompiled records, which would be used largely for civil law enforcement purposes: the sources of the information would also likely be unwilling to provide it if they knew that it would be used for civil law enforcement. Accordingly, we believe that recompiling summary information from the FST's records system into a records system used for civil law enforcement and related purposes would not preclude reliance on section 552a(j)(2) to exempt the FST's information collection from the section 552a(e)(3) notification requirements.

III.

In sum, we conclude that section 552a(j)(2) would permit the Commission to exempt the FST's records system from section 552a(e)(3), provided that the Commission complies with the procedural requirements imposed by the Privacy Act.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

---

[9] We need not and do not decide whether the answer would be different if the information were initially entered simultaneously into two systems, one maintained by the FST for criminal investigations and another used for other purposes.

Requiring Identifying Information for Access to Financial Disclosure Reports During the Period Governed by Section 11(a) of the STOCK Act

A procedure under which prospective viewers are required to provide basic identifying information similar to that described in section 105(b)(2) of the Ethics in Government Act in order to access financial disclosure reports made available under section 11(a) of the Stop Trading on Congressional Knowledge Act is consistent with both these statutes.

This procedure may be implemented by Executive Branch agencies at the direction of the Office of Government Ethics, pursuant to its authority under section 402 of the Ethics in Government Act to prescribe procedures governing the public availability of financial disclosure reports.

The interim regime established by section 11(a) of the Stop Trading on Congressional Knowledge Act terminates upon implementation of the permanent public disclosure system on the Office of Government Ethics website required by section 11(b). Section 11(b)(2) makes clear that viewers may not be required to provide identifying information in order to view reports made available through that system.

August 22, 2012

MEMORANDUM OPINION FOR THE ACTING DIRECTOR
OFFICE OF GOVERNMENT ETHICS

The Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, 126 Stat. 291, also known as the STOCK Act, requires the President to ensure that financial disclosure reports filed pursuant to title I of the Ethics in Government Act of 1978 ("EIGA") (codified as amended at 5 U.S.C. app. §§ 101–111 (2006 & Supp. IV 2010)), are made available to the public electronically. For an initial interim period, the President must ensure that the reports are made available through the official websites of Executive Branch agencies. *See* STOCK Act § 11(a), 126 Stat. at 298–99. This interim period begins on September 30, 2012, and ends no later than October 4, 2013. *See* Pub. L. No. 112-173, § 1, 126 Stat. 1310, 1310 (2012); STOCK Act § 11(b)(1), 126 Stat. at 299.[1] Thereafter, the

[1] The STOCK Act originally required that the first stage of Internet access begin on August 31, 2012. *Id.* § 11(a)(1), 126 Stat. at 298. The STOCK Act was subsequently amended to move this deadline to the end of September. Pub. L. No. 112-173, § 1, 126 Stat. at 1310. As noted below, section 11(b)(6) of the STOCK Act permits the Director

President must provide public access to the reports through a database on the website of the Office of Government Ethics ("OGE"). *See* STOCK Act § 11(b), 126 Stat. at 299. You have asked for our opinion whether, during the interim period when reports are made available on agency websites under section 11(a), prospective viewers may be required to provide basic identifying information similar to the information described in section 105(b)(2) of the EIGA, 5 U.S.C. app. § 105(b)(2), in order to access the reports. *See* Letter for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, from Don W. Fox, Acting Director, OGE, at 1 (July 13, 2012) ("Request Letter"). We conclude that such a procedure would be consistent with the STOCK Act and the EIGA and could be implemented by Executive Branch agencies at the direction of OGE, pursuant to its authority under section 402 of the EIGA, 5 U.S.C. app. § 402 (2006), to prescribe procedures governing the public availability of financial disclosure reports. We note, however, that the interim regime established by section 11(a) of the STOCK Act terminates upon implementation of the permanent public disclosure system on the OGE website required by section 11(b). STOCK Act § 11(a)(4), 126 Stat. at 299. As we explain below, section 11(b)(2) of the STOCK Act makes clear that viewers may *not* be required to provide identifying information in order to view reports made available through that system.

I.

Section 101 of the EIGA requires certain officers and employees in the Executive Branch to file financial disclosure reports containing detailed information about their income, assets, liabilities, and financial transactions. *See* 5 U.S.C. app. §§ 101–102. Section 105(a) of the EIGA requires that each executive agency and supervising ethics office "make available to the public" those reports, in accordance with section 105(b). *Id.* § 105(a). Section 105(b)(1) provides that any person seeking to inspect or copy a report must be permitted to do so. *Id.* § 105(b)(1). Section 105(b)(2), however, provides that a report

---

of the Office of Government Ethics to extend the October 4, 2013 deadline for commencing the second stage of Internet access.

> may not be made available under this section to any person nor may any copy thereof be provided under this section to any person except upon a written application by such person stating—
>
> (A) that person's name, occupation and address;
>
> (B) the name and address of any other person or organization on whose behalf the inspection or copy is requested; and
>
> (C) that such person is aware of the prohibitions on the obtaining or use of the report.

Id. § 105(b)(2). Section 105(c)(1) of the EIGA sets forth the prohibitions on obtaining or using reports:

> It shall be unlawful for any person to obtain or use a report—
>
> (A) for any unlawful purpose;
>
> (B) for any commercial purpose, other than by news and communications media for dissemination to the general public;
>
> (C) for determining or establishing the credit rating of any individual; or
>
> (D) for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

Id. § 105(c)(1).

The EIGA assigns the Director of OGE various responsibilities in connection with the financial disclosure reports and with preventing conflicts of interest on the part of officers and employees of the Executive Branch. Of particular relevance to your inquiry, the EIGA provides that "[t]he responsibilities of the Director shall include—(1) developing . . . rules and regulations establishing procedures for the . . . public availability of financial statements filed by officers and employees in the executive branch" pursuant to the EIGA. *Id.* § 402(b).[2] The EIGA further provides that the

---

[2] Section 402(b)(1), which was enacted as part of the original EIGA in 1978, states that the disclosure statements are "required by title II of [the EIGA]." *Id.* The EIGA was substantially amended by the Ethics Reform Act of 1989, however; and, in that process, title II was repealed, and the provisions governing the filing of disclosure reports by Executive Branch officers and employees were moved to title I. *See* Ethics Reform Act of 1989 ("1989 Act"), Pub. L. No. 101-194, tit. II, §§ 201–202, 103 Stat. 1716, 1724–44. We have found nothing in either the text of the 1989 Act or its legislative history suggesting that this revision was intended to affect the Director's authority under section

"Director shall . . . ensure that each executive agency has established written procedures relating to how the agency is to . . . , if applicable, make publicly available, financial disclosure statements filed by any of its officers or employees," *id.* § 402(d)(1), and "shall ensure that each agency's procedures are in conformance with all applicable requirements, whether established by law, rule, regulation, or Executive order," *id.* § 402(d)(2).

The STOCK Act imposes enhanced requirements regarding the public availability of financial disclosure reports. Specifically, it establishes a two-stage process for making reports available to the public through the Internet. The first stage is described in section 11(a) of the Act. That provision requires that, not later than September 30, 2012, "the President shall ensure" that financial disclosure reports filed by Executive Branch employees pursuant to title I of the EIGA "are made available to the public on the official websites of the respective executive branch agencies not later than 30 days after such forms are filed." STOCK Act § 11(a)(1), 126 Stat. at 298; Pub. L. No. 112-173, § 1, 126 Stat. at 1310. The interim requirements of section 11(a)(1) terminate upon the implementation of the second stage, a "public disclosure system established under subsection (b)" of section 11. STOCK Act § 11(a)(4), 126 Stat. at 299.

Paragraph (1) of section 11(b) describes the general contours of that public disclosure system. It requires that, not later than October 4, 2013 (eighteen months after enactment of the STOCK Act), unless that deadline is extended pursuant to section 11(b)(6), "the President, acting through the Director of [OGE], shall develop systems to enable" (A) "electronic filing" of the financial disclosure reports required by the EIGA and (B)

402(b)(1) to prescribe rules and regulations governing the public availability of financial disclosure reports filed by Executive Branch officers and employees. On the contrary, section 111 of the EIGA, as added by the 1989 Act, expressly assigns the Director responsibility for administering the provisions of the newly enacted title I with regard to those officials. 5 U.S.C. app. § 111(1). We therefore conclude that the 1989 Act did not impair the Director's rulemaking authority under section 402(b)(1). *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009) ("'repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest'" (brackets in original)). Accordingly, section 402(b)(1)'s reference to "title II" of the EIGA should be understood as a reference to the provisions governing disclosure reports by Executive Branch officials currently located in title I.

"public access" to reports filed by Executive Branch officials "through databases that—(i) are maintained on the official website of [OGE]; and (ii) allow the public to search, sort, and download data contained in the reports." *Id.* § 11(b)(1), 126 Stat. at 299.

Paragraph (2) of subsection (b) addresses the information that may be required from individuals seeking access to financial disclosure reports under section 11. It states:

> No login shall be required to search or sort the data contained in the reports made available by this subsection. A login protocol with the name of the user shall be utilized by a person downloading data contained in the reports. For purposes of filings under this section, section 105(b)(2) of the Ethics in Government Act of 1978 (5 U.S.C. App. 105(b)(2)) does not apply.

Id. § 11(b)(2), 126 Stat. at 299.

II.

In our view, during the interim period governed by section 11(a) of the STOCK Act, Executive Branch agencies may implement that section's electronic disclosure requirement through a procedure that requires individuals to provide information similar to that specified in section 105(b)(2) of the EIGA before accessing a financial disclosure report via an agency website. OGE may prescribe that procedure under section 402 of the EIGA, which authorizes it to establish rules governing the public availability of financial disclosure reports.

A.

As noted, your letter requests our opinion about the implementation of section 11(a) of the STOCK Act. In the letter, you first raise the possibility that section 105(b)(2) of the EIGA—which requires a requester to supply certain identifying information in order to obtain access to a report—continues to apply when reports are made available on agency websites pursuant to section 11(a). *See* Request Letter at 2 n.1. If section 105(b)(2) applied in that circumstance, then the answer to your inquiry would be straightforward: A procedure requiring an individual seeking access to a report via a website to first provide the identifying infor-

mation specified in section 105(b)(2) would clearly be permissible; indeed, that procedure would be statutorily mandated. *See* 5 U.S.C. app. § 105(b)(2) (stating that a report "may not be made available . . . except upon a written application" including the specified information). We do not, however, believe that to be the natural reading of the statutory scheme.

Instead, we believe that under the best reading of the pertinent provisions, EIGA section 105(b)(2) does not apply when reports are made available on agency websites pursuant to section 11(a) of the STOCK Act. To be sure, the STOCK Act does not repeal section 105(b)(2). The preconditions to disclosure set forth in section 105(b)(2) therefore continue to apply when individuals seek to inspect or obtain copies of reports through non-electronic means (such as in person or by mail). But section 105(b)(2) applies only when a report or copy thereof is "made available under this section," *id.*, i.e., under section 105 of the EIGA. And a report that is made available via the Internet pursuant to section 11(a) of the STOCK Act has not been "made available under" section 105 of the EIGA, as that phrase is naturally understood. Thus, section 105(b)(2), by its own terms, is inapplicable to reports made available under section 11(a) of the STOCK Act.

In any event, even assuming that section 105(b)(2) would otherwise apply to reports made available under section 11(a) of the STOCK Act, section 11(b)(2) of the STOCK Act states that, "[f]or purposes of filings *under this section*, section 105(b)(2) of the Ethics in Government Act of 1978 (5 U.S.C. App. 105(b)(2)) does not apply." 126 Stat. at 299 (emphasis added). That provision renders the conditions on disclosure in section 105(b)(2) inapplicable to reports governed by section 11 of the STOCK Act, including reports made available pursuant to section 11(a).

In context, the phrase "[f]or purposes of filings under this section" is best read to mean "for purposes of reports governed by this section." The term "filings" appears to refer to financial disclosure reports, which the STOCK Act uses varying terminology to describe. *Compare, e.g.*, STOCK Act § 11(a)(1), 126 Stat. at 298 (referring to the disclosure reports as "forms"), *with id.* § 11(b)(1), 126 Stat. at 299 (referring to them as "reports"). Section 105(b)(2) addresses public access to reports after they have been filed with the relevant agencies, at which point the reports are appropriately called "filings." *See Black's Law Dictionary*

705 (9th ed. 2009) (defining "filing" as "[a] particular document . . . in the file of a . . . record custodian"). The term "under," when used in a statute, frequently means "governed by" or "subject to the requirements of." *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 39 (2008); *The American Heritage Dictionary of the English Language* 1874 (4th ed. 2006) ("*American Heritage Dictionary*") (definitions 7–10 of "under"); *Webster's Third New International Dictionary of the English Language* 2487 (1993) ("*Webster's Dictionary*") (definitions 8b, 9b, and 10a of "under").

The term "section" is best understood as referring to section 11 of the STOCK Act in its entirety, including section 11(a). Congress ordinarily adheres to a hierarchical scheme when subdividing statutory sections and referencing those sections and their subdivisions. *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004). Thus, Congress generally uses the term "section" to refer to a statutory section as whole and the term "subsection" to refer to one of the section's first-level subdivisions, which are typically preceded by lowercase letters, such as "(a)" or "(b)." *See id.* at 60–61. Congress appears to have followed that practice in the STOCK Act, including in section 11. *See, e.g.*, STOCK Act § 6(b), 126 Stat. at 294 (referring to "subsection (a)"); *id.* § 11(a)(4), 126 Stat. at 299 (distinguishing between "this subsection" and "subsection (b)"); *id.* § 14, 126 Stat. at 300–01 (referring to "section 6 of this Act"). The Supreme Court has, on rare occasions, concluded that a statutory reference to "section" or "subsection" was a drafting error and should be disregarded. *See, e.g.*, *Dir., Workers' Comp. Programs v. Rasmussen*, 440 U.S. 29, 41 (1979) (concluding that use of the term "subsection" was "plainly in error" where the provision referred to "[d]eterminations under this subsection" and no determinations were made under the subsection). We see no indication, however, that Congress made a drafting error here. On the contrary, as we have noted, in drafting the STOCK Act, Congress appears to have observed the distinction between the terms "section" and "subsection" throughout. We therefore believe that section 11(b)(2) of the STOCK Act makes clear that section 105(b)(2) of the EIGA does not apply for purposes of disclosure reports governed by section 11 of the STOCK Act. Accordingly, the EIGA's requirement that a requester seeking financial disclosure reports supply specified identifying information is inapplicable when reports are made available pursuant to section 11(a).

In your Request Letter, you identify a potential alternative reading of the statement in section 11(b)(2) that "[f]or purposes of *filings under this section*, section 105(b)(2) of the Ethics in Government Act of 1978 (5 U.S.C. App. 105(b)(2)) does not apply." 126 Stat. at 299 (emphasis added). *See* Request Letter at 2 n.1. Under that reading, this statement declares that section 105(b)'s preconditions for disclosure are inapplicable only for reports actually filed pursuant to requirements imposed by section 11. *Id.* You note that, while section 11(b) requires the filing of reports, because it imposes a new electronic filing requirement, STOCK Act § 11(b)(1)(A), 126 Stat. at 299, section 11(a) primarily addresses public access to reports *that have already been filed*. Request Letter at 2 n.1. You therefore suggest that section 105(b)(2)'s requirements would, as a practical matter, be inapplicable when an individual seeks access to reports filed under section 11(b), but that the requirements would continue to apply when an individual seeks access to reports under section 11(a). *Id.* In our view, however, this alternative reading of section 11(b)(2) has significant weaknesses.

For the alternative reading to be correct, "filings" would have to refer to "submissions" of financial disclosure reports, rather than to the reports themselves, and "under" would have to mean "as required by," rather than "governed by." Those are plausible meanings of "filings" and "under." *See* STOCK Act § 11(b)(1)(A), 126 Stat. at 299 (referring to "electronic filing of reports"); *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011) (noting that "file" can mean "to place among official records as prescribed by law"); *Kucana v. Holder*, 558 U.S. 233, 244 (2010) (noting that "under" can mean "pursuant to" or "by reason of the authority of"); *Webster's Dictionary* at 849 (definition 3a(1) of "file") ("to deliver (as a legal paper or instrument) after complying with any condition precedent (as the payment of a fee) to the proper officer for keeping on file among the records of his office"); *id.* at 2487 (definition 8a of "under") ("required by"). But taken in context, those meanings do not seem as likely as the meanings that we have ascribed to the terms.

Moreover, the alternative reading has two serious flaws: First, it provides no explanation for Congress's use of the word "section," as opposed to the word "subsection," in section 11(b)(2). Under the alternative read-

ing, the provision would have the same meaning regardless of which word Congress used. Therefore, if Congress had intended the alternative reading, Congress presumably would have used the word "subsection," the word it used earlier in section 11(b)(2); but Congress did not do so.

In addition, the alternative reading rests on the mistaken premise that section 11(b) is the only provision in section 11 that requires "filings." Contrary to that premise, one provision in section 11(a) also requires filings: Section 11(a)(3) states that "transaction disclosure[s] required by section 103(l) of the [EIGA] . . . *shall be filed* not later than the date required by that section." STOCK Act § 11(a)(3), 126 Stat. at 299 (emphasis added). Thus, the practical effect of the alternative reading would be that section 105(b)(2)'s preconditions on disclosure would be inapplicable both when an individual seeks reports under section 11(b) *and* when an individual seeks *transaction* reports under section 11(a). The preconditions would continue to apply when an individual seeks access to *other* disclosure reports under section 11(a). We have found no basis for this counter-intuitive reading in the legislative history and cannot conceive of any reason why Congress would have adopted such a patchwork scheme of conditions on disclosure.

For these reasons, we conclude that, pursuant to section 11(b)(2) of the STOCK Act, the requirements for disclosure in section 105(b)(2) do not apply during the interim period when reports are made available on agency websites under section 11(a).

B.

Because section 105(b)(2) does not apply, agencies have no statutory obligation to condition a requester's access to reports made available under section 11(a) on the requester's provision of the information specified in section 105(b)(2). Nonetheless, the fact that agencies are not *obligated* to impose that condition does not mean that agencies are *prohibited* from imposing the condition through the exercise of discretion if they otherwise have the authority to do so. And, in our view, agencies have the authority, subject to the direction of OGE, to require that individuals seeking access to financial disclosure reports during the period governed by section 11(a) of the STOCK Act provide basic identifying information like the items specified in section 105(b)(2).

As an initial matter, we believe that section 11(a) of the STOCK Act, in conjunction with section 402 of the EIGA, authorizes the agencies that receive financial disclosure reports from their officers and employees to establish, under the direction of OGE, appropriate procedures governing how the reports are made available on agency websites. Section 11(a) imposes on the President the obligation to "ensure" that the reports are "made available to the public on the official websites of the respective executive branch agencies." STOCK Act § 11(a)(1), 126 Stat. at 298. The President could not fulfill that obligation unless the Executive Branch had authority to develop and implement appropriate procedures to make the reports available. Section 11(a) thus necessarily implies that the Executive Branch has that authority.

The STOCK Act does not assign the authority to establish procedures for complying with section 11(a) to any specific component of the Executive Branch. The nature of the obligation, however, together with EIGA section 402, makes clear that the authority lies with the various Executive Branch agencies that receive the reports, subject to the direction of OGE. Because the reports must be made available on the websites of the "respective executive branch agencies," those agencies are logical repositories of the authority to establish procedures governing how the reports are made available. Moreover, the EIGA confirms that each agency generally has the authority to establish "procedures relating to how the agency is to . . . make publicly available[] financial disclosure statements filed by any of its officers or employees." 5 U.S.C. app. § 402(d)(1). The EIGA makes clear, however, that OGE also has authority to "establish[] procedures" governing the "public availability" of financial disclosure reports, *id.* § 402(b)(1), and that OGE may use that authority to superintend the procedures established by the agencies and ensure their "conformance with all applicable requirements," including requirements prescribed by OGE, *id.* § 402(d)(2).

The procedures governing how reports are made available on agency websites may incorporate reasonable prerequisites to or limitations on access, provided that those prerequisites are consistent with section 11(a)'s command that the reports be "made available," as well as with any other applicable legal requirements. *See generally Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984) (explaining that, when an agency has been delegated authority to fill a gap in a statute,

the agency's action is controlling if Congress has not addressed the point at issue and the agency's action is reasonable); *e.g.*, *United States ex rel. Touhy v. Regan*, 340 U.S. 462, 468 (1951) (holding that a statute authorizing the Attorney General to prescribe regulations for "the custody, use, and preservation of the records, papers, and property" of the Department of Justice, 5 U.S.C. § 22 (1946), empowered the Attorney General to promulgate a regulation that reserved to himself the decision whether to release documents in response to a subpoena).

C.

1.

In our view, requiring prospective viewers to provide basic information, similar to the information listed in EIGA section 105(b)(2), before accessing reports is a reasonable limitation consistent with section 11(a)'s general command that the reports be "made available to the public" on agency websites. STOCK Act § 11(a)(1), 126 Stat. at 298. "Available" means "accessible" or "obtainable." *See American Heritage Dictionary* at 123 (definitions 1 and 2); *Webster's Dictionary* at 150 (definition 4). Thus, reports are made "available" if prospective viewers may access or obtain the reports upon presentation of basic identifying information.

Significantly, section 105 of the EIGA supports the conclusion that requiring prospective viewers to provide information like that specified in section 105(b)(2) before they may access reports is consistent with section 11(a)'s command that reports be "made available to the public." Section 105's public availability requirement is phrased in virtually identical language, *see* 5 U.S.C. app. § 105(a) (stating that each agency shall "make available to the public" each report filed with the agency); yet section 105(b)(2) requires an individual to provide the specified information as a precondition to inspecting or copying a report. *See id.* § 105(b)(2). Thus, section 105 demonstrates that Congress considered a requirement that prospective viewers provide such information before accessing reports to be consistent with a command that reports be "made available to the public."

Moreover, when Congress enacts a new statute using language that has a settled meaning, the new statute is generally construed to embody that

settled meaning. *See Evans v. United States*, 504 U.S. 255, 260 n.3 (1992) ("[A]s Justice Frankfurter advised, 'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'" (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947))). Because section 11(a) incorporates language that was understood to be consistent with a requirement that prospective viewers provide basic identifying information before accessing reports, section 11(a) also should be construed as consistent with that requirement.

Other statutory provisions confirm that if Congress had intended to preclude OGE and other agencies from requiring prospective viewers to provide basic identifying information before accessing reports made available under section 11(a), Congress would have done so explicitly. For example, section 11(b)(2) of the STOCK Act states that "[n]o login shall be required to search or sort the data contained in the reports made available by this subsection." 126 Stat. at 299. As we explain in more detail below, that provision does not address whether identifying information may be required to access reports made available under section 11(a), because the provision applies only to reports made available under section 11(b). *See infra* pp. 214–216. The provision strongly suggests, however, that a requirement that prospective viewers provide identifying information is permissible in this context absent an express statement to the contrary. Otherwise there would have been no need for Congress to add the provision in order to preclude OGE and other agencies from requiring a login to search or sort reports made available under section 11(b). *See Corley v. United States*, 556 U.S. 303, 314 (2009) (statutes should be construed to avoid rendering any of their provisions superfluous).

In other statutes as well, where Congress has intended to prohibit a requirement that users provide identifying information before availing themselves of a feature on agency websites, Congress has made that prohibition explicit. Thus, the Inspector General Reform Act of 2008, which requires the website of the Office of the Inspector General of each agency to include a link that allows individuals to report fraud, waste, or abuse, expressly provides that individuals using the links "shall not be required to provide personally identifying information." Pub. L. No. 110-409, sec. 13(a), § 8L(b)(2)(A), 122 Stat. 4302, 4316.

Finally, a procedure under which prospective viewers must provide basic identifying information and acknowledge the legal prohibitions on obtaining and using reports is a reasonable way to achieve the purposes of section 11(a) of the STOCK Act, consistent with the limitations on public access to financial disclosure reports imposed by the EIGA. Although section 11(a) of the STOCK Act aims to enhance public access to financial disclosure reports by making those reports accessible via the Internet, *see, e.g.*, 158 Cong. Rec. S195 (daily ed. Jan. 31, 2012) (statement of Sen. Begich); *id.* at S196 (statement of Sen. Lieberman); *id.* at S1979 (daily ed. Mar. 22, 2012) (statement of Sen. Lieberman), section 11(a) and the rest of the STOCK Act leave in place the restrictions on obtaining and using reports imposed by EIGA section 105(c)(1). Conditioning access to reports via agency websites on the provision of basic information, including an acknowledgement of those restrictions, would facilitate enforcement of the restrictions without impairing section 11(a)'s goal of making reports available via the Internet during the interim period before implementation of the permanent disclosure system required by section 11(b).[3]

For these reasons, we believe that a procedure requiring prospective viewers to provide basic identifying information, such as the items listed in EIGA section 105(b)(2), before accessing disclosure reports via agency websites would be a reasonable means of implementing section 11(a) of the STOCK Act.

2.

An argument can be constructed, based on the legislative history of the EIGA, that such a procedure is not a permissible method for implementing section 11(a). In our view, however, that argument is not persuasive.

---

[3] As we explain in Part II.D, Congress imposed limitations on the collection of identifying information from prospective users during the second stage of Internet access, once a permanent database (with search, sort, and download capability) is established on the OGE website. Nonetheless, requiring identifying information during the first stage (before establishment of the permanent OGE database) would facilitate a smooth transition to the second stage by providing enhanced protections against potential misuse of the reports while the President determines whether to exempt from the disclosure requirements certain filers who may be particularly vulnerable to misuse of their reports. *See infra* pp. 214–216.

The versions of the EIGA originally passed by the Senate and considered on the floor of the House of Representatives contained provisions, similar to current section 105(b)(2), that required prospective viewers to provide basic identifying information before accessing reports. *See* S. 555, 95th Cong. § 305(c) (as passed by Senate, June 27, 1977); 124 Cong. Rec. 30,434, 30,436 (1978) (H.R. 13850, 95th Cong. § 104(c) (1978)) (considered as substitute to H.R. 1, 95th Cong. (1978)) (requirement with respect to reports by congressional officials); 124 Cong. Rec. at 30,468 (H.R. 13850, 95th Cong. § 205(b)(1)) (requirement with respect to reports by executive officials); 124 Cong. Rec. at 32,028 (H.R. 13850, 95th Cong. § 305(b)(1)) (requirement with respect to reports by judicial officials). Those provisions were, however, removed before final passage of the EIGA. *See* 124 Cong. Rec. at 30,447 (amendment, offered by Rep. Frenzel, striking the requirement with respect to reports by congressional officials); H.R. Rep. No. 95-1756, at 24–25, 37–38 (1978) (Conf. Rep.) (Conference Committee agreement removing the requirements with respect to reports by Executive Branch and judicial employees); Ethics in Government Act of 1978, Pub. L. 95-521, §§ 104, 205, 305, 92 Stat. 1824, 1832–33, 1846–47, 1859 (legislation as enacted). In offering the amendment to strike the requirement with respect to reports by congressional officials, Representative Frenzel stated that the amendment revised the section governing public availability of reports "so that a person requesting" access to a report "may not or need not be required to leave his name and organization." 124 Cong. Rec. at 30,447.

The following year, the Director of OGE testified before a congressional subcommittee that, based on this drafting history, OGE did not believe that it had authority to require an individual to provide his name as a condition of receiving a report. *See Financial Disclosure Provisions of the Ethics in Gov't Act of 1978: Hearing on H.R. 2805 Before the Subcomm. on Human Res. of the H. Comm. on the Post Office & Civil Serv.*, 96th Cong. 9–10 (1979). Congress subsequently amended the EIGA to add requirements that prospective viewers provide basic identifying information before accessing reports, *see* Act of June 13, 1979, Pub. L. No. 96-19, § 8, 93 Stat. 37, 41–42, and those requirements were consolidated in section 105(b)(2) as part of the EIGA's reorganization in 1989, *see supra* note 2; 1989 Act, sec. 202, § 105, 103 Stat. at 1738.

Based on this history, it could be argued that (1) the EIGA, as originally enacted (without section 105(b)(2)), did not permit OGE and other agencies to require prospective viewers of reports to provide identifying information; (2) section 11(b)(2) of the STOCK Act, by declaring that section 105(b)(2) does not apply to reports made available under section 11(a), effectively restores the EIGA as originally enacted for reports made available under section 11(a); and (3) OGE and other agencies therefore do not have authority to condition access to reports under section 11(a) on the requester's providing basic identifying information. We believe, however, that this argument has several fatal defects.

First, it is not accurate to view section 11(b)(2) as effectively restoring the EIGA as originally enacted. As we explained above, section 11(b)(2) does not repeal section 105(b)(2). Section 105(b)(2) remains a part of the EIGA and continues to apply at least when reports are accessed through means other than the Internet access mandated by section 11. *See supra* p. 203. And, as described above, section 105(b)(2) supports the conclusion that OGE and other agencies may require prospective viewers of reports under section 11(a) to provide identifying information. *See supra* p. 208. In addition, section 11(b)(2) contains other provisions besides the declaration that section 105(b)(2) does not apply to reports made available under section 11(a). As explained above, one of those other provisions, the login prohibition for searching and sorting reports made available under section 11(b), also supports the permissibility of a requirement that prospective viewers provide identifying information before viewing reports under section 11(a). *See supra* p. 209.

Second, we do not believe that the legislative history establishes that the EIGA as originally enacted prohibited OGE and other agencies from conditioning access to Executive Branch financial disclosure reports on the requester's providing basic identifying information. The provisions that were removed from the EIGA during the legislative process would have *required* agencies to impose that condition. Congress's decision not to require agencies to impose the condition does not establish that Congress also intended to prohibit OGE and other agencies from imposing the condition as an exercise of their discretion to establish procedures implementing the public availability requirement. The floor statement by Representative Frenzel suggests that he may have believed that the deletion of the requirement meant that the condition could not be imposed. But floor

statements, even by amendment sponsors, are of limited utility in interpreting legislative provisions. *See Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980) ("[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."); *Zuber v. Allen*, 396 U.S. 168, 186 (1969) ("Floor debates reflect at best the understanding of individual Congressmen."). Moreover, Representative Frenzel's statement concerned only the deletion of the requirement with respect to reports filed by congressional officials. The requirement that access to Executive Branch reports be conditioned on the requester's providing identifying information was retained in the bill passed by the House, *see* 124 Cong. Rec. at 32,024, 32,028 (S. 555, 95th Cong. § 205(b)(1) (Sept. 27, 1978)), and was deleted in the House-Senate Conference. The Conference Report does not discuss the deletion and gives no indication that the conferees understood the deletion to preclude OGE and other agencies from deciding, in their discretion, to condition access to Executive Branch reports on the provision of identifying information. *See* H.R. Rep. No. 95-1756.

As noted above, the Director of OGE later testified that he interpreted this legislative history to preclude any requirement that prospective viewers provide identifying information, and Congress in 1979 subsequently added that requirement to the EIGA. Those events, however, constitute, at most, subsequent legislative history about the meaning of the EIGA as originally enacted, and "'subsequent legislative history is a "hazardous basis for inferring the intent of an earlier" Congress.'" *Jones v. United States*, 526 U.S. 227, 238 (1999) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting, in turn, *United States v. Price*, 361 U.S. 304, 313 (1960))). Moreover, the 1979 enactment establishes only that Congress wanted to require that prospective viewers provide identifying information; the 1979 enactment does not indicate whether Congress believed that agencies could have imposed the requirement on their own volition.

Finally, the argument based on this legislative history turns on Congress's decision not to include a particular provision in the EIGA as originally enacted. The argument is not anchored in the statutory text that was in fact enacted. And "courts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point." *Shannon v. United States*, 512 U.S. 573, 584 (1994) (quota-

tion omitted, brackets in original). This aspect of the legislative history of the EIGA thus does not alter our conclusion that conditioning access to disclosure reports on the requester's providing basic identifying information, similar to the information listed in EIGA section 105(b)(2), would be a reasonable means of implementing section 11(a) of the STOCK Act.

D.

Even though that procedure would be a reasonable means of implementing section 11(a) of the STOCK Act, the procedure would not be permissible if some other provision of the STOCK Act or the EIGA prohibited it. The only provision of either statute that could be construed to contain such a prohibition, however, is the first sentence in section 11(b)(2) of the STOCK Act, and the text of that provision is best read not to contain such a prohibition.

As discussed above, the provision states that "[n]o login shall be required to search or sort the data contained in the reports made available by this *subsection*." STOCK Act § 11(b)(2), 126 Stat. at 299 (emphasis added). The prohibition on requiring a "login" to "search or sort" the data in the reports is, in our view, tantamount to a prohibition on requiring prospective viewers to provide identifying information before viewing the reports. The ordinary meaning of "login" is "[t]he process of identifying oneself to a computer, usually by entering one's username and password." *American Heritage Dictionary* at 1029; *accord Random House Dictionary of the English Language* 1130 (2d ed. 1987) (definition 17a of "log"). A prohibition on requiring a prospective user to provide identifying information before "search[ing] or sort[ing]" data necessarily includes a prohibition on requiring a prospective user to provide such information before taking the lesser step of viewing the data.

Nonetheless, we believe that the login prohibition applies only when prospective viewers seek access to a financial disclosure report under the second stage of the process mandated by section 11—the permanent public disclosure system required by subsection (b). The login prohibition does not apply when prospective viewers seek access to reports during the first stage, when reports are accessible via websites pursuant to subsection (a). The login prohibition, by its plain terms, applies only to reports

"made available by this subsection." STOCK Act § 11(b)(2), 126 Stat. at 299. The phrase "this subsection" refers to subsection (b) of section 11, not section 11 as a whole. As explained above, Congress generally uses the term "subsection" to refer to a first-level subdivision of a statutory section, rather than the section as a whole, and Congress generally adhered to that practice in the STOCK Act, including in section 11. *See supra* p. 204.

Although, as noted above, Congress may sometimes make drafting errors and use the term "subsection" when it actually means "section," again we do not believe that Congress erred here. On the contrary, as set forth above, Congress carefully adhered to the distinction between the terms "section" and "subsection" throughout the STOCK Act. *See supra* p. 204. Moreover, Congress could reasonably have concluded that OGE and other agencies should have discretion to require that prospective users provide identifying information in order to access financial disclosure reports during the eighteen-month period before establishment of the permanent database required by subsection (b). As members of Congress recognized, broader public access to financial disclosure reports increases the risk that the officers and employees who file those reports may be subject to misuse of their personal information for unlawful or other nefarious purposes. *See, e.g.*, 158 Cong. Rec. S1979 (daily ed. Mar. 22, 2012) (statement of Sen. Levin). Requiring prospective viewers to supply identifying information and to acknowledge the restrictions on using reports provides some deterrent against misuse of the information in the reports. Allowing OGE and other agencies to maintain that deterrent during the eighteen-month period before establishment of the permanent database serves a valuable purpose: During that time, the President could evaluate whether some categories of officers and employees may be particularly vulnerable to misuse of their information, *see id.* (statement of Sen. Levin) (suggesting that law enforcement, military, and intelligence officers may be particularly vulnerable), and, if necessary, invoke statutory provisions that allow him to exempt from public disclosure reports filed by certain officers and employees, *see, e.g.*, 5 U.S.C. app. § 105(a)(1) (allowing the President to exempt from public disclosure reports filed by individuals engaged in intelligence activities); 158 Cong. Rec. S1980 (daily ed. Mar. 22, 2012) (colloquy between Senators Reid and Lieberman stating that this exemption authority applies to section 11 of the STOCK Act).

For these reasons, we conclude that the login prohibition in the first sentence of section 11(b)(2) does not prohibit OGE and other agencies from requiring that prospective viewers provide basic identifying information before they may access financial disclosure reports made available during the interim period governed by subsection (a).

III.

In sum, a procedure under which prospective viewers are required to provide information similar to that described in section 105(b)(2) of the EIGA in order to access financial disclosure reports made available under section 11(a) of the STOCK Act is consistent with both the STOCK Act and the EIGA. In our judgment, this procedure may be implemented by Executive Branch agencies at the direction of OGE pursuant to its authority under section 402 of the EIGA to prescribe procedures governing the public availability of financial disclosure reports.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

Authority of the Department of Labor to Control the Disclosure of Federal Employees' Compensation Act Records Held by the United States Postal Service

The Federal Employees' Compensation Act gives the Department of Labor the authority to control and limit the disclosure of FECA records held by the United States Postal Service, and DOL's FECA regulations prohibit USPS from disclosing FECA records in a manner inconsistent with DOL's Privacy Act routine uses.

The Department of Labor's regulatory regime for FECA records is consistent with and furthers the purposes of the Privacy Act.

Neither the Postal Reorganization Act nor the National Labor Relations Act authorizes USPS to control the disclosure of FECA records.

November 16, 2012

MEMORANDUM OPINION FOR THE SOLICITOR
DEPARTMENT OF LABOR

The U.S. Department of Labor ("DOL"), through its Office of Workers' Compensation ("OWCP"), is responsible for administering the Federal Employees' Compensation Act ("FECA" or the "Act"). *See* Letter for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, from M. Patricia Smith, Solicitor of Labor, DOL at 1 (Jan. 23, 2012) ("Request Letter"). DOL has established a government-wide system of records that contains all records created in the process of filing and resolving FECA claims, including those held by other agencies. It has asserted control over those records and provided that they will generally be kept confidential. DOL has also published a notice pursuant to the Privacy Act of 1974 that enumerates the circumstances in which FECA records may be disclosed. (These circumstances are known as "routine uses.") The United States Postal Service ("USPS" or "Postal Service") is the largest federal agency whose employees are covered by FECA. *Id.* Like other agencies covered by FECA, USPS maintains certain records related to the FECA claims its employees file. USPS has taken the position that it has authority to control the FECA records in its possession, and it has published its own Privacy Act notice listing routine uses that would permit it to disclose its FECA records when DOL's regulations would not. In light of this conflict, you asked whether DOL has authority

to control and limit the disclosure of FECA records held by the Postal Service. Request Letter at 1.[1]

We conclude that FECA gives DOL such authority, and that DOL's FECA regulations prohibit USPS from disclosing FECA records in a manner inconsistent with DOL's routine uses. We further conclude that DOL's regulatory regime for FECA records is consistent with and furthers the purposes of the Privacy Act. USPS thus may not establish routine uses for FECA records that result in disclosures that would not be permitted under DOL's regulations. Finally, we disagree with USPS's arguments that the Postal Reorganization Act and the National Labor Relations Act ("NLRA") provide it with authority to control the disclosure of FECA records.

I.

Two statutory schemes are particularly relevant to our analysis: FECA and the Privacy Act. Initially passed in 1916, FECA is now codified in chapter 81 of title 5 of the United States Code.[2] It "provides a comprehensive system of compensation for federal employees who sustain work-related injuries." *United States v. Lorenzetti*, 467 U.S. 167, 168 (1984). FECA grants the Secretary of Labor or her designee exclusive authority to "administer[] and decide all questions arising under" FECA. 5 U.S.C. § 8145 (2006); *see Mathirampuzha v. Potter*, 548 F.3d 70, 81 (2d Cir. 2008) ("Congress has vested the Secretary of Labor or her delegate with exclusive authority to 'administer[] and decide all questions arising under the FECA.'" (quoting 5 U.S.C. § 8145) (alteration in original)). The Secretary has delegated this authority to OWCP. *See* Delegation of Authorities and Assignment of Responsibilities to the Director, Office of Workers' Compensation Programs, 74 Fed. Reg. 58,834, 58,834 (Nov. 13, 2009). FECA also authorizes the Secretary to

[1] The request for this opinion came solely from DOL, and USPS declined to offer its views when contacted by this Office. However, both DOL and USPS submitted extensive views letters on this dispute to the Office of Management and Budget in October 2010, and DOL provided those letters to us. We considered those letters in preparing this opinion.

[2] *See* Pub. L. No. 64-267, 39 Stat. 742 (1916). FECA's text frequently references its subchapters. Because only the first subchapter is relevant here, we refer to that subchapter as "FECA" for ease of reading.

"prescribe rules and regulations necessary for the administration and enforcement of [the Act]." 5 U.S.C. § 8149 (2006).

FECA and the accompanying DOL regulations establish a process through which federal employees can submit claims of workplace-related injury or disease to DOL for adjudication and compensation. Generally, the process involves submission of a notice of a covered injury or disease accompanied by a claim form with supporting evidence, followed by investigation and adjudication of the claim by OWCP. If a claim is accepted, the employee receives relief in the form of benefits and possible reassignment. *See generally id.* §§ 8101–8152 (2006 & Supp. V 2011); Questions and Answers about the Federal Employees' Compensation Act (FECA), http://www.dol.gov/owcp/dfec/regs/compliance/DFECfolio/q-and-a.pdf (last visited Nov. 13, 2012).

Two features of this process are significant here. First, while DOL manages much of the claims process, a claimant's employing agency is also required to participate. For example, the statute requires injured employees to provide notice of and information about their injuries to their "immediate superior[s]," 5 U.S.C. § 8119, and instructs that, "immediately after an injury to an employee which results in his death or probable disability, his immediate superior shall report to the Secretary of Labor," *id.* § 8120. *See also, e.g.*, 20 C.F.R. § 10.100 (2012) (describing employee procedure for notifying supervisor of traumatic injury); *id.* § 10.110 (describing employing agency responsibilities when employees file such notices). Employing agencies, including USPS, also contribute to the fund through which injured employees are compensated. *See* 5 U.S.C. § 8147(b) (requiring agency contributions to a general compensation fund); 39 U.S.C. § 2003(g) (2006) (regulating timing of mandatory USPS deposits in the general fund).

Second, during the claims process, both the claimant and the employing agency create and submit numerous records documenting the employee's compensation claim. The Secretary has substantial control over the information included in these records. For example, in addition to giving the Secretary broad general authority to administer and regulate FECA, the statute specifically permits the Secretary to determine the required content in the immediate superior's report of an employee injury, and to require the filing of supplementary reports. *See* 5 U.S.C. § 8120. The statute also instructs covered employees to submit their FECA claims "on a form

approved by the Secretary . . . [that] contain[s] all information required by the Secretary." *Id.* § 8121. DOL regulations further prescribe the forms that initiate claims for compensation, the respective responsibilities of the employer and employee in filling out these forms, and the timing and manner of their transmittal. *See, e.g.*, 20 C.F.R. §§ 10.7, 10.111, 10.102. The regulations also permit employees and employing agencies to submit additional relevant evidence, such as medical reports or other investigative materials. *See, e.g.*, *id.* § 10.115. In addition, during claim adjudication, an employing agency must submit any relevant facts in its possession, may contest facts submitted by the claimant, and may conduct certain independent assessments of the claimed injury or disability. *See id.* §§ 10.117, 10.118.

DOL has explained orally that, as a result of its involvement in the FECA claims process, employing agencies typically have physical custody of certain FECA records, including the records the employing agency gathers or creates when an employee files a claim. In addition, during claim adjudication, DOL may provide employing agencies with records it obtains from an injured employee. According to DOL, employing agencies are given access to FECA records because those agencies play a significant role in the submission and adjudication of FECA claims and are generally responsible for their payment. *See* 5 U.S.C. § 8147(b).

The Privacy Act of 1974, 5 U.S.C. § 552a, is the second statutory scheme relevant to this dispute. It was passed "to protect the privacy of individuals identified in information systems maintained by Federal agencies," and governs the "collection, maintenance, use, and dissemination of information by such agencies." Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896, 1896 (1974). The Privacy Act applies to any "record" kept in an agency "system of records." The Act defines a "record" as any information maintained by an agency pertaining to an individual and linked to that individual through some means of specific identification. *See* 5 U.S.C. § 552a(a)(4) (2006). It defines a "system of records" as any group of records under the control of an agency from which information is retrieved through use of an individual's name or other identifying information. *See id.* § 552a(a)(5). To promote transparency, the Privacy Act requires agencies to publish a notice in the *Federal Register* announcing the establishment or revision of their systems of records (commonly called a "system-of-records notice") and providing detailed information about the characteristics of each system, including the sources and catego-

ries of the records the systems contain and the agency's procedures governing their use. *See id.* § 552a(e)(4).

As a general matter, the Privacy Act prohibits agencies from disclosing any record contained in a system of records absent the written request or written consent of the person to whom the record pertains. *See id.* § 552a(b). There are exceptions to this general rule, including an exception permitting disclosures for a "routine use." *Id.* § 552a(b)(3). "Routine use" of a record is defined as "the use of such record for a purpose which is compatible with the purpose for which it was collected." *Id.* § 552(a)(7). To employ the "routine use" exception, an agency must describe all routine uses under which the agency will disclose records in the relevant system-of-records notice. *See id.* § 552a(e)(4)(D). The requirement that a published routine use be compatible with the purpose for which the record was collected is known as the Privacy Act's "compatibility requirement."

To fulfill its obligations under the Privacy Act, DOL has published a system-of-records notice covering FECA records. This notice, entitled "DOL/GOVT-1, Office of Workers' Compensation Programs, Federal Employees' Compensation Act File" ("DOL/GOVT-1"), describes the records DOL/GOVT-1 covers and the routine uses for which they may be disclosed. Records covered by DOL/GOVT-1 may include, for example, DOL forms filed in connection with a FECA claim, underlying medical records, payment records, hearing transcripts, demographic information, investigative material, and consumer credit reports. *See* Publication of Five New Systems of Records; Amendments to Five Existing Systems of Records, 77 Fed. Reg. 1728, 1738 (Jan. 11, 2012) (republishing DOL/GOVT-1 with amendment providing for an additional routine use). The DOL/GOVT-1 system-of-records notice expressly states that DOL/GOVT-1 includes FECA records in the possession of other agencies. *See id.* at 1738 (DOL/GOVT-1 includes "[c]opies of claim forms and other documents" and in some instances "original forms" related to FECA claims that are "maintained by the employing agency"); *see also* Publication in Full of All Notices of Systems of Records Including Several New Systems, 67 Fed. Reg. 16,816, 16,823 (April 8, 2002) ("It is presumed that most, if not all, federal agencies maintain systems of records comprising a portion of [DOL/GOVT-1]."); Use and Disclosure of Federal Employees' Compensation Act Claims File Material, 63 Fed. Reg. 56,752, 56,753 (Oct. 22, 1998) ("When . . . claim forms are submitted to the

OWCP . . . all materials relating to that claim or injury, whether in the possession of the OWCP or the agency, are covered by DOL/GOVT-1, and thus subject to OWCP's exclusive control.").

DOL has established twelve universal routine uses for records maintained in any of its systems of records, and has supplemented that basic list with seventeen routine uses specifically applicable to DOL/GOVT-1. 77 Fed. Reg. at 1729–30 (universal routine uses); *id.* at 1739–40 (DOL/GOVT-1 routine uses). DOL/GOVT-1 further specifies that FECA records cannot be disclosed under a specific routine use unless "the purpose of the disclosure is both relevant and necessary and is compatible with the purpose for which the information was collected." *Id.* at 1739.

Like DOL, USPS has published a system-of-records notice for the FECA records in its possession, entitled "Office of Workers' Compensation Programs (OWCP) Record Copies." This system of records overlaps with the system created by DOL/GOVT-1. It includes FECA records related to claims filed by USPS employees, such as "[r]ecords and supporting information related to the claim, including copies of Department of Labor forms, postal forms and correspondence, and automated payment and accounting records." Privacy Act of 1974, System of Records, 70 Fed. Reg. 22,516, 22,530 (Apr. 29, 2005) (notice 100.850). This USPS system-of-records notice incorporates nine of the routine uses that USPS applies to all of its systems of records. *See id.* at 22,521. There are substantial differences between the disclosures allowed by DOL's and USPS's routine uses, and USPS's routine uses conflict with the routine uses in DOL/GOVT-1 because they allow some disclosures that would not be permitted under DOL/GOVT-1.

II.

We first address whether FECA gives DOL exclusive authority to regulate the disclosure of all FECA records—and therefore bars USPS from regulating the disclosure of its FECA records in a manner that is inconsistent with DOL regulations—or whether USPS's status as a uniquely independent establishment in the federal government gives it authority to control disclosure of the FECA records in its possession. We then consider whether USPS's regulation of FECA record disclosure is barred by, or is inconsistent with, the purposes of the Privacy Act. Finally, we address whether USPS's information disclosure obligations under the NLRA give

it the authority to establish a routine use permitting disclosure of FECA records to labor unions when such disclosure is necessary for collective bargaining.

A.

DOL and USPS disagree about which agency has authority over FECA records in the custody of the Postal Service and thus the responsibility to establish routine uses for those records under the Privacy Act. *See* Request Letter at 1. DOL contends that "it alone has authority over . . . FECA records for Privacy Act purposes," and that, as a result, "OWCP's regulations and Privacy Act System of Records Notice listing the routine uses of FECA file information extend government-wide and cover the Postal Service." *Id.* USPS, however, argues that it has exclusive authority over FECA records in its custody. *See* Statement of the United States Postal Service in Support of Its Authority to Release Copies of OWCP Records at 2–7 (Oct. 6, 2010) ("USPS Statement") (attached to Request Letter). USPS asserts that it is an agency with a uniquely independent status in the federal government, "free from many facets of the federal bureaucracy," including many federal record-keeping statutes. *Id.* at 3. On this basis, it claims that it has authority to control the disclosure of FECA records in its possession, even where disclosure would not be permitted under DOL/GOVT-1's routine uses. *Id.*

In our view, FECA gives DOL authority to control the disclosure of FECA records in USPS's possession. As set forth above, *see supra* pp. 218–219, FECA gives the Secretary of Labor exclusive authority to administer the FECA program, 5 U.S.C. § 8145, and to "prescribe rules and regulations necessary for the administration and enforcement of [FECA]," *id.* § 8149. Although the text of FECA does not explicitly address the maintenance and disclosure of FECA records, it does create a claims process that expressly contemplates the creation of records related to FECA claims, including by employing agencies, *see supra* pp. 218–220, and gives DOL broad authority to prescribe the rules and regulations necessary to administer that process, *see id.* For many years, DOL has held—and its regulations have reflected—the view that its authority to regulate the FECA process includes authority to control access to and disclosure of FECA records. We believe this is a reasonable reading of the statute.

DOL's predecessor, the United States Employees' Compensation Commission, long ago determined that its authority to administer and enforce FECA includes the authority to regulate the maintenance and disclosure of the records the FECA process generates, and further determined that regulating such disclosure was an important part of administering FECA. Decades before Congress restricted disclosure of personally identifiable information through the Privacy Act, the Compensation Commission relied on FECA's broad grant of regulatory authority to promulgate regulations making FECA records confidential. *See* 20 C.F.R. § 1.1 (1938) ("[FECA] authorizes the [United States Employees' Compensation] Commission to make necessary rules and regulations for the enforcement of the Act and to decide all questions arising under the Act."); *see also id.* § 1.21(a) (1938) ("[Employment compensation] records and papers pertaining to any . . . injury or death are confidential and no official or employee of a Government establishment . . . shall disclose information from or pertaining to such records to any person."); 20 C.F.R. § 1.21 (1974) (same). DOL and other predecessor entities have promulgated and enforced similar regulations ever since.

At present, DOL has two regulations that address the confidentiality, custody, and control of FECA records. The first, 20 C.F.R. § 10.10, is entitled "Are all documents relating to claims filed under the FECA considered confidential?"[3] It provides:

> All records relating to claims for benefits, including copies of such records maintained by an employer, are considered confidential and may not be released, inspected, copied or otherwise disclosed except as provided in the Freedom of Information Act ["FOIA"] and the Privacy Act of 1974 or under the routine uses provided by DOL/GOVT-1 if such release is consistent with the purpose for which the record was created.

The second regulation, 20 C.F.R. § 10.11, is entitled "Who maintains custody and control of FECA records?" It provides:

[3] The FECA regulations were amended to their current interrogative form in 1997 to make them easier to use. *See* Claims for Compensation under the Federal Employees' Compensation Act, 62 Fed. Reg. 67,120, 67,120 (Dec. 23, 1997) (proposed rule to be codified at 20 C.F.R. pt. 10).

> All records relating to claims for benefits filed under the FECA, including any copies of such records maintained by an employing agency, are covered by the government-wide Privacy Act system of records entitled DOL/GOVT-1 (Office of Workers' Compensation Programs, Federal Employees' Compensation Act File). This system of records is maintained by and under the control of OWCP, and, as such, all records covered by DOL/GOVT-1 are official records of OWCP. The protection, release, inspection and copying of records covered by DOL/GOVT-1 shall be accomplished in accordance with the rules, guidelines and provisions of this part [i.e., DOL's FECA regulations], as well as those contained in 29 CFR parts 70 and 71 [i.e., DOL's FOIA and general Privacy Act regulations], and with the notice of the system of records and routine uses published in the *Federal Register*. All questions relating to access/disclosure, and/or amendment of FECA records maintained by OWCP or the employing agency, are to be resolved in accordance with this section.

As DOL explains, these regulations reflect the "careful control over the disclosure of documents from [FECA] case files" that OWCP has maintained for "decades." DOL's Position Statement at 1 (Oct. 1, 2010) ("DOL Statement") (attached to Request Letter). Consistent with this view, a DOL notice of final rulemaking announcing a revision to an earlier version of 20 C.F.R. § 10.11 notes that DOL "considers all records collected because a claim was filed seeking benefits under FECA[] to be official records of the Department and, with one limited exception, covered by DOL/GOVT-1." Use and Disclosure of Federal Employees' Compensation Act Claims File Material, 63 Fed. Reg. 56,752, 56,753 (Oct. 22, 1998).[4] The notice further asserts that all materials covered by DOL/GOVT-1 are "subject to OWCP's exclusive control." *Id.* DOL reaffirmed this view when it finalized the regulation in its current form. *See* Claims for Compensation Under the Federal Employees' Compensation Act, 63 Fed. Reg. 65,284, 65,286 (Nov. 25, 1998).

Under the two regulations reproduced above, the Postal Service lacks authority over the disclosure of FECA records in its possession. Both

[4] The "limited exception" referenced in the notice permits agencies to retain FECA forms in the personnel folders of employees, in accordance with guidelines issued by the Office of Personnel Management, if those forms were not submitted to OWCP. 63 Fed. Reg. at 56,753.

regulations expressly cover "copies" of FECA records maintained by employing agencies other than DOL; and both make clear that FECA records are confidential, and that "routine use" disclosure is permissible *only* "under the routine uses provided by DOL/GOVT-1." 20 C.F.R. § 10.10; *id.* § 10.11.[5] The plain text of these regulations thus bars USPS from disclosing FECA records under a "routine use" that is inconsistent with the DOL/GOVT-1 notice.[6]

These regulations constitute a valid exercise of DOL's statutory authority under FECA. As noted above, FECA grants the Secretary broad authority to "administer[] and decide all questions arising under" FECA, and to "prescribe rules and regulations necessary for the administration and enforcement of [FECA]." 5 U.S.C. §§ 8145, 8149. And FECA records are an integral part of the FECA process. As DOL explains, "[t]he records maintained in [DOL/GOVT-1] are created as a result of and are necessary to" DOL's statutory duties of "processing and adjudicating claims" for federal workers' compensation. 67 Fed. Reg. at 16,827. In light of the importance of FECA records to the processing and adjudication of claims, DOL reasonably concluded that the question of when and how to disclose FECA records "aris[es] under" FECA, and falls within the Secretary's jurisdiction. 5 U.S.C. § 8145; *cf. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (an agency's reasonable construction of a statute it is charged with administering is entitled to deference). The reasonableness of DOL's conclusion is supported by DOL's consistent guarantee of the confidentiality of FECA records since 1938. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (the "consistency of an agency's position is a factor in assessing the weight that the position is due"); *see also supra* p. 224 (describing history).

---

[5] Because the DOL–USPS disagreement at issue does not concern disclosures of FECA records under FOIA or provisions of the Privacy Act other than the routine use exception, we do not address those issues. *Cf.* 5 U.S.C. § 552a(b)(1)–(2), (4)–(12), (d) (2006) (providing for disclosure of Privacy Act records other than through a "routine use").

[6] Even if the regulations were ambiguous, we would defer to DOL's reasonable interpretation of them. *See Auer v. Robbins*, 519 U.S. 452, 461–62 (1997) (the Secretary of Labor's interpretation of a DOL regulation, advanced in a legal brief, is "controlling unless plainly erroneous or inconsistent with the regulation" (internal quotation marks omitted)).

It was likewise reasonable for DOL to conclude that regulations protecting the confidentiality and restricting the disclosure of FECA records are "necessary" for the Act's administration. 5 U.S.C. § 8149; *cf. Chevron*, 467 U.S. at 843–44. FECA records often contain sensitive medical and health information, *see, e.g.*, 20 C.F.R. § 10.115(f) (requiring submission of medical report), and disclosure of such information may implicate significant individual privacy interests, *cf. Plain Dealer Publ'g Co. v. Dep't of Labor*, 471 F. Supp. 1023, 1026 (D.D.C. 1979) (protecting documents in an active OWCP claims file under FOIA exemption for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). Protecting the confidentiality of such information, except where DOL has determined that disclosure is consistent with the purposes of FECA, serves those privacy interests. And prohibiting other agencies from disclosing FECA records outside of DOL's framework ensures that these confidentiality interests are protected wherever the records are physically maintained.

DOL's protection of FECA records is also consistent with its efficient implementation of the Act. If DOL cannot ensure the confidentiality of FECA records, employees may be deterred from submitting all information necessary to evaluate their claims, to the detriment of DOL's adjudication process. *Cf. id.* (describing the serious harm that would result from public release of an OWCP claims file); *see also* DOL Statement at 8 ("DOL does not want to risk an employee being less than forthcoming in his workers' compensation claim because he fears the information will . . . not be held close[ly] by OWCP or that the information may somehow be used against him in another, unrelated, proceeding.").

In its submission to the Office of Management and Budget ("OMB"), USPS challenges DOL's control of the FECA records in its possession, claiming that DOL control over the Postal Service's copies of FECA records would "improperly ignore[] the Postal Service's unique independence from many federal statutes and regulations." USPS Statement at 1. USPS contends that DOL's exercise of authority over its FECA records would be burdensome, requiring USPS to seek DOL's permission every time it wishes to disclose a FECA record, and would intrude on the Postal Service's statutory independence. *Id.* at 2–4. In making these arguments, USPS relies on 39 U.S.C. § 410(a) (2006), a provision of the Postal Reor-

ganization Act of 1970, *as amended*, 39 U.S.C. §§ 101–5605 (2006 & Supp. V 2011) ("PRA"). That provision states that, "[e]xcept as provided in subsection (b) of this section, and except as otherwise provided in this title . . . no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds . . . shall apply to the exercise of the powers of the Postal Service." *Id.* § 410(a). USPS notes that it views all records in its possession as USPS "property," and has therefore historically relied on section 410(a) as authority for its independence from statutes regulating records (e.g., the Federal Records Act, 44 U.S.C. §§ 3101–3107 (2006)). USPS Statement at 3–4.

We agree that the Postal Service has a unique status within the federal government. But it has no general characteristic that exempts its FECA records from DOL's regulatory regime. Instead, the question whether the Postal Service is subject to the burdens and obligations imposed by FECA is a matter of statutory interpretation. And here, Congress, through the PRA, expressly subjected USPS to FECA, and thus to DOL's control of FECA records.

Although the PRA relieved USPS from its obligation to comply with "many . . . statutes governing federal agencies," it also "specifically subjected [USPS] to some others." *U.S. Postal Serv. v. Flamingo Indus. (USA), Inc.*, 540 U.S. 736, 741 (2004). Indeed, the PRA provision USPS cites, section 410(a), states that the Postal Service is exempt from various federal laws "*except as otherwise provided in this title*." 39 U.S.C. § 410(a) (emphasis added). Another provision of the relevant title, 39 U.S.C. § 1005(c) (2006), expressly provides that "[o]fficers and employees of the Postal Service shall be covered by subchapter I of chapter 81 of title 5, relating to compensation for work injuries." And subchapter I of chapter 81 of title 5 codifies the FECA statute, including (among other things) the Secretary of Labor's authority to enforce and administer FECA. 5 U.S.C. § 8149. Thus, under the PRA's plain language, USPS officers and employees are "covered" by FECA, including the provisions authorizing the Secretary of Labor to issue regulations governing FECA records. 39 U.S.C. § 1005(c).[7] Far from exempting USPS from DOL's

[7] By stating that FECA benefits will be provided to USPS "officers and employees," the PRA necessarily subjects USPS to the obligations that FECA imposes on employers, including the obligation to abide by DOL's regulations regarding disclosure of FECA records.

authority to administer FECA, the PRA clarifies that USPS falls within the ambit of DOL's FECA authority.[8]

B.

DOL also suggests that the Privacy Act independently gives it authority to control the disclosure of FECA records through DOL/GOVT-1. *See* DOL's Reply to USPS at 1–2 (undated) ("DOL Reply") (attached to Request Letter). Specifically, DOL notes that OMB, the agency with authority to oversee implementation of the Privacy Act, has issued guidance that would forbid USPS from either creating a system of records that overlaps with DOL's government-wide system of FECA records or establishing inconsistent routine use exceptions. USPS counters that OMB's guidance does not apply to it. *See* USPS Statement at 4–6.

We agree that OMB's guidance suggests that DOL's assertion of exclusive control over the disclosure of FECA records under its government-wide system-of-records notice is consistent with and furthers the purposes of the Privacy Act. However, for the reasons explained below, we decline to resolve whether OMB's guidance actually binds USPS in this situation.

The Privacy Act gives OMB the authority to "develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing [the Privacy Act]," and to "provide continuing assistance to and oversight of the implementation of [the

---

[8] In its views letter for OMB, USPS cites a 2002 statement in which DOL asserted that it has "control over [the FECA system of records] to the same extent as the Office of Personnel Management ['OPM'] has control over systems of records containing federal employee personnel records." USPS Statement at 5 (quoting Publication of All Notices of Systems of Records, 67 Fed. Reg. 16,816, 16,823 (Apr. 8, 2002)) (internal quotation marks omitted). USPS then notes that OPM specifically disclaims authority over USPS personnel files, and contends that, by comparing its control over FECA records to OPM's control over personnel records, DOL must have been conceding that its control over FECA records does not extend to USPS files. *Id.* But DOL plainly has not disclaimed authority over FECA records in USPS's possession. Instead, in its 2002 statement, DOL appears to be pointing out that its authority over the FECA system of records is generally similar to OPM's authority over personnel records, and (in particular) that its authority extends to files held by other agencies. *See* 5 C.F.R. § 293.301 (2012). Furthermore, OPM disclaims authority over USPS personnel files because USPS has an independent personnel system. *See* 39 U.S.C. § 410(a). In contrast, USPS does not have an independent employee compensation system, but rather is subject to FECA.

Privacy Act].” 5 U.S.C. § 552a(v) (2006). One OMB Privacy Act guidance document recognizes the category of government-wide systems of records, and directs other agencies not to publish their own systems of records that duplicate such government-wide systems:

> *Governmentwide Systems of Records*. Certain agencies publish systems of records containing records for which they have governmentwide responsibilities. The records may be located in other agencies, but they are being used under the authority of and in conformance with the rules mandated by the publishing agency. . . . Agencies should not publish systems of records that wholly or partly duplicate existing governmentwide systems of records.

OMB Circular A-130, Transmittal No. 1, Management of Federal Information Resources, 58 Fed. Reg. 36,068, 36,078 (July 2, 1993). Under this guidance, agencies may not publish—and therefore cannot utilize—separate routine uses for records that are part of a government-wide system maintained by another agency. *See* 5 U.S.C. § 552a(b)(3) (permitting routine uses as “described under subsection (e)(4)(D),” which requires their publication in systems-of-records notices). OMB’s guidance thus seeks to ensure that the only routine use disclosures of records in government-wide systems will be those established in the relevant system-of-records notice.

OMB expanded on this guidance in a later document implementing a presidential memorandum issued by President Clinton on May 14, 1998, which directed heads of executive departments and agencies to conduct, “in accordance with instructions to be issued by [OMB],” a variety of tasks related to Privacy Act requirements. *Memorandum on Privacy and Personal Information in Federal Records* (May 14, 1998), 1 Pub. Papers of Pres. William J. Clinton 759, 759 (1998). OMB’s subsequent instructions stated in part:

> [A]gency systems of records should not duplicate or be combined with those systems which have been designated as “government wide systems of records.” A government wide system of records is one for which one agency has regulatory authority over records in the custody of many different agencies. . . . Such government-wide systems ensure that privacy practices with respect to those records are carried out in accordance with the responsible agency’s regula-

> tions uniformly across the federal government. For example, a civilian agency subject to the personnel rules of the Office of Personnel Management should manage its official personnel folders in accordance with the government wide notice published by OPM for those records, OPM/GOVT-1. The custodial agency need not, and should not, publish a system of records which covers the same records.

Memorandum for Heads of Departments and Agencies from Jacob J. Lew, Director, OMB, *Re: Instructions on Complying with President's Memorandum of May 14, 1998, "Privacy and Personal Information in Federal Records"* att. B (Jan. 7, 1999) ("Memorandum 99-05").

These OMB documents demonstrate that DOL's assertion of authority over FECA records is consistent not only with FECA, but also with the purposes of the Privacy Act, as interpreted by OMB in Circular A-130 and Memorandum 99-05. DOL's designation of DOL/GOVT-1 as a government-wide system of records, *see supra* pp. 224–225; 67 Fed. Reg. at 16,825, comports with OMB's definition, *see* Memorandum 99-05, att. B (defining government-wide system of records as a system including records for which a single agency has government-wide responsibilities). Thus, under the terms of OMB's guidance, DOL/GOVT-1 should be the sole system that includes FECA records, in order to ensure uniform privacy protection for such records across the government. *See* Memorandum 99-05, att. B ("[G]overnment-wide systems ensure that privacy practices with respect to those records are carried out in accordance with the responsible agency's regulations uniformly across the federal government."). DOL's FECA regulations further these Privacy Act objectives.

We do not determine here, however, whether OMB's guidance either binds USPS or provides an independent source of authority for DOL's exclusive control over FECA records. As USPS points out, while the Privacy Act itself applies to the Postal Service, "no regulation issued under [the Privacy Act] shall apply to the Postal Service unless expressly made applicable." 39 U.S.C. § 410(b). According to USPS, the OMB guidance fails this test. USPS Statement at 4. In our view, it is unclear whether either Circular A-130 or Memorandum 99-05 has been "expressly made applicable" to the Postal Service. Although the relevant portion of Circular A-130, appendix I, does not mention USPS by name, it defines "agency" by express cross-reference to the Privacy Act, which includes

USPS within its definition of "agency." *See* 5 U.S.C. § 552a(a)(1).[9] Circular A-130 also states that it "applies to *all agencies subject to the Act*." 58 Fed. Reg. at 36,075 (emphasis added). Memorandum 99-05, for its part, likewise uses the term "agency" without specifically mentioning USPS, but does so while discussing Privacy Act obligations, which (given the Privacy Act's inclusion of USPS in its definition of "agency") might include USPS. Memorandum 99-05, att. B. It is thus not immediately apparent whether the guidance in either document has been made "expressly applicable" to USPS. As set forth in Part II.A above, however, FECA by itself gives DOL the authority to control the disclosure of FECA records held by USPS. Accordingly, we need not decide whether OMB's regulations independently give DOL the same authority.[10]

C.

USPS's final argument is that the NLRA requires it to maintain a routine use permitting disclosure of FECA records to labor unions. USPS points out that it is the "only federal entity subject to the National Labor Relations Act," a statute that governs certain aspects of the employer-employee relationship, including collective bargaining. USPS Statement at 7.[11] USPS argues that the NLRA requires it "to provide unions with otherwise confidential information"—including FECA records—"when that information is relevant to the unions' role in collective bargaining."

---

[9] The Privacy Act's definition of "agency" cross-references and incorporates by reference the FOIA definition of "agency" in 5 U.S.C. § 552(e), which, after amendment, is now contained in 5 U.S.C. § 552(f)(1) (2006). *See* Pub. L. No. 99-570, § 1802(b), 100 Stat. 3207, 3207-49 (1986); Pub. L. No. 104-231, § 3, 110 Stat. 3048, 3049 (1996). There is no dispute that FOIA's definition of "agency" covers USPS.

[10] DOL also devotes a substantial portion of its OMB submission to arguing that, under the Privacy Act's compatibility requirement, "routine use" disclosures are permissible only for purposes closely related to the purpose for which records were collected, and that some of USPS's routine uses—including the one providing for disclosures of FECA records related to collective bargaining—do not meet this standard. *See* DOL Statement at 6. Our conclusion that FECA gives DOL authority to control disclosure of FECA records means that, whether or not USPS's routine uses satisfy the compatibility requirement, USPS may not promulgate its own routine uses for FECA records. Thus, we need not resolve this issue here.

[11] Other federal entities are covered by the Federal Service Labor-Management Relations Act, 5 U.S.C. §§ 7101–7135 (2006 & Supp. V 2011).

Id. at 8. USPS thus concludes that it must be authorized to establish a routine use permitting, "[a]s required by applicable law," disclosure of OWCP records "to a labor organization when needed by that organization to perform its duties as the collective bargaining representative of Postal Service employees." 70 Fed. Reg. at 22,521; *see* USPS Statement at 9.

For two reasons, we do not believe that the NLRA gives USPS authority to establish a routine use permitting disclosure to labor unions for purposes related to collective bargaining. First, as set forth above, FECA gives DOL broad authority over the FECA process, including the power to control disclosure of FECA records. The NLRA, in contrast, does not directly address the disclosure of FECA records, and nothing in its text suggests that it should be read to displace DOL's authority over the government-wide FECA system of records. As a result, the best way to harmonize DOL's broad authority over FECA records with the possibility that the NLRA (or some other statute) might sometimes require those records' disclosure is to presume that the entity with control of the records—DOL—will authorize the disclosure of FECA records when and if disclosure is in fact required. *See infra* note 14. USPS's potential disclosure obligations under the NLRA, in other words, do not give rise to an inference that USPS must have independent authority to promulgate routine uses for FECA records.

Second, as a practical matter, the potential for conflict between USPS's obligations under the NLRA and FECA is insufficient to support an inference that Congress intended to authorize USPS to control disclosure of the FECA records in its possession. It is true that the NLRA imposes on employers a duty to "bargain collectively," 29 U.S.C. § 158(a)(5) (2006), which includes a broad obligation "to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *see also* USPS Statement at 8. But this duty requires the provision of *information*, not particular documents, and it is not absolute. *See, e.g.*, *Detroit Edison*, 440 U.S. at 318 (the duty to disclose information can be outweighed by legitimate privacy interests in the requested information); *cf. NLRB v. U.S. Postal Serv.*, 841 F.2d 141, 146 (6th Cir. 1988) ("*NLRB I*") (applying *Detroit Edison* to evaluate privacy interests involved in disclosure of records covered by USPS collective bargaining routine use); *NLRB v. U.S. Postal Serv.*, 660 F.3d 65, 66 (1st

Cir. 2011) ("*NLRB II*") (USPS employees have a "legitimate and substantial privacy interest in their test scores," which the NLRB must balance against the union's interests); *id.* at 77 (USPS's routine use authorizing disclosure of certain records neither mandates disclosure nor "defeat[s] all expectations of privacy" in the covered information).[12] To be sure, employers cannot simply refuse to give unions sensitive information; rather, employers must accommodate a union's reasonable request for information while protecting the privacy interests involved by, for example, obtaining employee consent to disclosure, redacting records, or submitting records in a summary format. *See, e.g.*, *Detroit Edison*, 440 U.S. at 317 (consent); *Oil, Chem. & Atomic Workers, Local Union No. 6 v. NLRB*, 711 F.2d 348, 363 (D.C. Cir. 1983) (redaction); *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998) (redaction); *Pa. Power & Light Co.*, 301 N.L.R.B. 1104, 1107 (1991) (summary).

Relevant here, the privacy interests in FECA records, which often include medical reports, are substantial. *See* DOL Statement at 7; *see also, e.g.*, *U.S. Testing*, 160 F.3d at 21; *Oil, Chem. & Atomic Workers*, 711 F.2d at 363. And, in most (if not all) cases, a union's need for information about FECA claims in collective bargaining will not require receipt of individual FECA records of a given employee, but instead will be capable of satisfaction through a compilation, summary, or aggregation of anonymized information concerning one or more employees.[13] It thus seems

[12] USPS itself has recognized that the NLRA's disclosure obligation is not absolute. *See NLRB II*, 660 F.3d at 68 (referencing USPS argument that the NLRA did not require it "to release employee test scores unconditionally under the routine use exception"). The cases USPS cites in its OMB submission are not to the contrary. Three of those cases recognize that the NLRA's disclosure obligations are not absolute. *See NLRB v. U.S. Postal Serv.*, 888 F.2d 1568, 1572 & n.3 (11th Cir. 1989) (the NLRA's disclosure obligations do not absolutely require disclosure of all relevant information in all cases); *NLRB I*, 841 F.2d at 146 ("[T]he union's right to disclosure of relevant information is not absolute."); *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 9 F.3d 138, 144 (D.C. Cir. 1993) ("*Letter Carriers*") (noting the *Detroit Edison* exception to the NLRA's disclosure requirement); *id.* at 149–50 (Randolph, J., dissenting) (same). The fourth case denied enforcement of an NLRB order requiring disclosure of certain personnel files on the grounds that they were not needed for collective bargaining, and thus did not consider *Detroit Edison* balancing. *See NLRB v. U.S. Postal Serv.*, 128 F.3d 280, 283–85 (5th Cir. 1997).

[13] There may be circumstances in which a specific FECA record is essential to determination of an employee's individual grievance; and because an employer's obligation to

likely that the balance between privacy interests and the union's need for information would not generally require the disclosure of the records under *Detroit Edison*. *Cf.* 440 U.S. at 319 (weighing the "sensitive nature" of the information requested in that case against the "minimal burden" that a privacy-protecting accommodation would have placed on the union).[14] The very limited potential for conflict between USPS's NLRA obligations and DOL's FECA regulations is a further reason why we would not treat Congress's decision to apply the NLRA to USPS as an

---

provide information extends through the term of any collectively bargained agreement, *see NLRB v. Acme Indus. Co.*, 385 U.S. 432, 436 (1967), the NLRA might require disclosure of the record to a union assisting an employee with his or her grievance. However, the Privacy Act authorizes the disclosure of FECA records to a union in that setting with employee consent. *See* 5 U.S.C. § 552a(b).

[14] If a situation did arise in which the *Detroit Edison* balance tipped in favor of disclosure of a FECA record, DOL would have to consider how best to reconcile the NLRA with the Privacy Act. The NLRA might be interpreted as either (i) requiring DOL to create a routine use permitting disclosure in such circumstances (if concerns about the Privacy Act's compatibility requirement could be overcome); or (ii) in effect creating a statutory exception to the Privacy Act's general confidentiality requirement, a kind of legislatively created routine use, permitting disclosure in those circumstances. *Cf.* Privacy Act Guidelines, 40 Fed. Reg. 28,949, 28,954 (July 9, 1975) (disclosures expressly required by laws other than FOIA are "in effect congressionally-mandated 'routine uses'"); *Letter Carriers*, 9 F.3d at 143 (opinion of Silberman, J.) (USPS could have an obligation under the NLRA to publish a routine use); *Dep't of Def. v. FLRA*, 510 U.S. 487, 506 n.3 (1994) (Ginsburg, J., concurring) (suggesting that agencies have discretion to publish their routine uses, but noting possibility of obligatory routine uses raised in *Letter Carriers*). On the other hand, it may be that under the PRA, the NLRA would not in fact require USPS to disclose FECA records to a union if doing so would violate DOL's FECA regulations. The PRA states that USPS's "[e]mployee-management relations shall . . . be subject to" the NLRA *only* "to the extent not inconsistent with the provisions of [title 39]." 39 U.S.C. § 1209(a) (2006); DOL Reply at 3. Title 39, in turn, subjects USPS to both the Privacy Act and FECA. The PRA might thus be interpreted to require USPS to comply with the NLRA generally, but to make an exception to the extent that the NLRA required a disclosure barred under the Privacy Act or FECA. *Cf. Letter Carriers*, 9 F.3d at 147 (Williams, J., concurring) (noting possibility that the PRA may require NLRA disclosures only to the extent not barred by the Privacy Act). While the application of OMB's Privacy Act guidance to USPS is uncertain, *see supra* Part II.B, FECA, as administered by DOL pursuant to its statutory authority, plainly prohibits USPS from disclosing FECA records in contravention of DOL's FECA regulations. Accordingly, under the PRA, USPS is arguably not required to disclose FECA records in contravention of DOL's FECA regulations promulgated under FECA. This is, however, another issue we are not required to resolve.

indicator that USPS must have authority to regulate the disclosure of the FECA records in its possession.[15]

III.

In sum, we conclude that DOL has authority to control the disclosure of FECA records, including those in the possession of USPS, and that DOL's exercise of this authority is consistent with and furthers the purposes of the Privacy Act. We further conclude that USPS is not separately authorized to control the disclosure of FECA records by virtue of its independent status within the federal government, or by the NLRA.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

---

[15] USPS also claims that it may be required to disclose FECA records in proceedings before the United States Equal Employment Opportunity Commission ("EEOC") and the United States Merit Systems Protection Board ("MSPB"), and that limiting disclosure in such proceedings would be "unworkable and contrary to Congressional intent." USPS Statement at 6–7. However, USPS does not point to any provision in the statutes establishing the EEOC or the MSPB that would confer disclosure authority on USPS, let alone override the authority conferred on DOL by FECA. We further note that DOL has already published a routine use that allows the production of otherwise private records to a "court or adjudicative body" where such disclosure is necessary. 77 Fed. Reg. at 1730. It may be that the EEOC and the MSPB would constitute "adjudicative bod[ies]" and therefore that such disclosures are already authorized.

Residence Requirement for Assistant United States Attorneys Under 28 U.S.C. § 545(a)

Under 28 U.S.C. § 545(a), Assistant United States Attorneys must physically reside in or within 25 miles of the district that they serve.

November 20, 2012

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS

Federal law provides that "[e]ach assistant United States attorney shall reside in the district for which he or she is appointed or within 25 miles" of that district. 28 U.S.C. § 545(a) (2006). In 1979, we interpreted the phrase "shall reside" to require the "physical presence" of Assistant United States Attorneys ("AUSAs"), reasoning that the ordinary meaning of the word "residence" as well as the legislative history established Congress's intent to regulate where AUSAs could physically live while serving their districts. *Assistant U.S. Attorney—Residence Requirement (28 U.S.C. § 545)*, 3 Op. O.L.C. 360 (1979) ("1979 Opinion"). You asked us to revisit the 1979 Opinion's reading of section 545(a) in light of advances in technology that would make it possible for AUSAs to work remotely while living outside their districts.[1] Specifically, you asked whether maintaining a "virtual presence" in a district through a telework arrangement could satisfy the section 545(a) residence requirement. Although we appreciate that telework capabilities now allow some AUSAs to perform their duties even while stationed more than 25 miles from their districts, we believe that the 1979 Opinion correctly interpreted the statute and that AUSAs must physically reside in or within 25 miles of the district that they serve.[2]

---

[1] *See* Letter for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, from Jay Macklin, General Counsel, Executive Office for United States Attorneys (Oct. 1, 2012) ("EOUSA Letter").

[2] The 1979 Opinion interpreted an earlier version of the statute, which required all AUSAs, save those serving in the District of Columbia and the Southern District of New York, to reside within their appointing district. *See* 28 U.S.C. § 545(a) (1976). The current statute does not except AUSAs appointed for the District of Columbia and the Southern District of New York from the residence requirement, but rather allows all AUSAs, regardless of district, to live "in . . . or within 25 miles" of the district they

I.

Section 545(a) states in its entirety:

> Each United States attorney shall reside in the district for which he is appointed, except that these officers of the District of Columbia, the Southern District of New York, and the Eastern District of New York may reside within 20 miles thereof. Each assistant United States attorney shall reside in the district for which he or she is appointed or within 25 miles thereof. The provisions of this subsection shall not apply to any United States attorney or assistant United States attorney appointed for the Northern Mariana Islands who at the same time is serving in the same capacity in another district. Pursuant to an order from the Attorney General or his designee, a United States attorney or an assistant United States attorney may be assigned dual or additional responsibilities that exempt such officer from the residency requirement in this subsection for a specific period as established by the order and subject to renewal.

The text indicates, in a number of ways, that Congress intended section 545(a) to impose a physical residence requirement. To start, the statute focuses on where AUSAs (and U.S. Attorneys) must "reside"—a word that generally connotes physically living in a particular place. *See Webster's Third New International Dictionary* 1931 (1993) (to reside is "to dwell permanently or continuously: have a settled abode for a time: have one's residence or domicile"); *Random House Dictionary of the English Language* 1648 (1987) (to reside is "to dwell permanently or for a considerable time"); *see also Black's Law Dictionary* 1423 (9th ed. 2009) (defining residence as "[t]he act or fact of living in a given place for some time"; "[t]he place where one actually lives, as distinguished from a domicile"; and "bodily presence as an inhabitant in a given place").

Beyond the use of the word "reside," the way the statute marks the bounds of the residence requirement also indicates that Congress intended to regulate physical presence. AUSAs must reside in "or within 25 miles" of the district they serve, and U.S. Attorneys for D.C. and for New York's

---

serve. 28 U.S.C. § 545(a) (2006). Despite this change, the statute's key phrase—which restricts where AUSAs "shall reside"—has remained constant, and the 1979 Opinion's analysis is therefore relevant to the amended statute.

Southern and Eastern Districts may live "within 20 miles" of their district. 28 U.S.C. § 545(a). By framing the residence requirements in terms of permissible geographic ranges, Congress indicated that it was using the phrase "shall reside" to specify where these federal attorneys must physically dwell.

Other parts of section 545(a) reinforce this understanding of the residence requirement. The statute does not apply to federal attorneys "appointed for the Northern Mariana Islands who at the same time [are] serving in the same capacity in another district." *Id.* Nor does it reach anyone to whom the Attorney General assigns "dual or additional responsibilities that exempt such officer from the residency requirement . . . for a specific period." *Id.*[3] If U.S. Attorneys and AUSAs could satisfy the requirements of section 545(a) by maintaining a virtual presence in one district while residing in another, these exceptions for those that take on dual roles in different districts would not be necessary. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (A statute "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." (internal quotation marks omitted)). Based on this and the other textual indications discussed above, we conclude that section 545(a) requires that AUSAs physically reside in or within 25 miles of the district they serve.[4]

---

[3] Since 2008, Congress has prohibited the use of funds "for the salary, benefits, or expenses of any United States Attorney assigned dual or additional responsibilities by the Attorney General . . . that exempt that United States Attorney from the residency requirements of 28 U.S.C. 545," effectively rendering the dual-responsibilities exception inapplicable to U.S. Attorneys. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, div. B, § 215, 121 Stat. 1844, 1915 (2007); *see also* Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, div. B, § 214, 125 Stat. 552, 620 (2011) (same). By preventing U.S. Attorneys from taking on dual responsibilities that would take them away from their home districts, this appropriations rider presumes that section 545(a) regulates physical presence and further reinforces our reading of the statute.

[4] We would not read the residence requirement to apply to special attorneys appointed under section 543 of title 28 of the U.S. Code, which authorizes "[t]he Attorney General [to] appoint attorneys to assist United States attorneys when the public interest so requires." Even though special attorneys "assist" U.S. Attorneys, they are not the "assistant United States attorney[s]" to whom section 545(a) refers. Rather, section 545(a)'s use of the term "assistant United States attorneys" appears to be a reference only to attorneys appointed under section 542, which provides that "[t]he Attorney General may appoint one or more *assistant United States attorneys*." (Emphasis added.) We draw support for

II.

The legislative history confirms that section 545(a) requires physical residence. In 1896, when Congress first considered whether to authorize the appointment of AUSAs (then "assistant district attorneys"), the draft language did not include a residence requirement. Representative Johnson asked the bill sponsor whether assistants would need to be "actual residents of the district" for which they are appointed. 28 Cong. Rec. 2464 (1896). When the sponsor said no, Representative Johnson offered an ultimately successful amendment "for the purpose of imposing a restriction in that regard," commenting that he did "not think that there ought to be anybody sent out to fill such positions in the State or Territory unless he lives there." *Id.*; *see also* Act of May 28, 1896, ch. 252, 29 Stat. 140, 181 (providing that assistant district attorneys "must be residents of the district for which they are appointed").

Floor statements from the debates on subsequent amendments to the statute similarly indicate that Congress has long understood the statute to regulate physical presence. As your letter notes, EOUSA Letter at 2, the 1979 Opinion relied in part on two statements made during the 1941 debate on amending the statute, the first of which explains that the then-current version of the statute required attorneys to "move into the District and live in the District," and the second of which states that it was in "the best interest of the people whom [AUSAs] serve to require [AUSAs] to live among such people during their tenure of office." *See* 1979 Opinion, 3 Op. O.L.C. at 361; 87 Cong. Rec. 3269 (1941) (statements of Reps. McLaughlin and South). And when Congress considered another amendment in 1979, the sponsor described section 545(a) as "a codification of the policy that law enforcement officials should reside in the same community in which they enforce the law." 125 Cong. Rec. 4164 (1979) (statement of Rep. DeConcini). We have found nothing in the legislative history to suggest that Congress has ever understood the residence requirement as anything other than a limit on where U.S.

---

that reading from floor statements made by the sponsor of the original AUSA residence requirement. When asked whether the residence requirement would apply to "a special assistant," the amendment's sponsor responded that the restriction was "only for regular deputies, not the special deputies," and that the Attorney General "has a right to employ special deputies at any time." 28 Cong. Rec. 2465 (1896) (statement of Rep. Johnson).

Attorneys and AUSAs may physically live, and we do not think the technological advances that make telework an option for some AUSAs undermine the current relevance of Congress's stated purpose.

III.

We recognize that permitting remote work arrangements like the one you describe in your letter (through which an appellate attorney sought to telework for two years while his spouse completed an overseas assignment) could assist the Department's retention efforts and alleviate potential difficulties arising from the hiring freeze.* And we are mindful that current technology could "ensure the availability" of at least some attorneys—and thereby achieve one of the important "purpose[s] of the residency requirement"—in ways that were not contemplated when Congress passed the first residence requirement in 1896, or even when we wrote the 1979 Opinion cited above. *See* 1979 Opinion, 3 Op. O.L.C. at 361. We nevertheless believe that the text and legislative history require us to adhere to the 1979 Opinion's analysis—an analysis that is consistent with other past readings of both section 545(a) and a similar residence requirement for circuit judges. *See* Memorandum for Philip H. Modlin, Director, Executive Office for United States Attorneys, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, *Residence Requirement for U.S. Attorneys* at 1 (July 11, 1974) ("Lawton Memo") (considering section 545(a) and suggesting that "it is accepted almost without question that a public employee can be required to live in the district in which he works"); Memorandum for Dennis Mullins, Deputy Assistant Attorney General, Office of Legal Policy, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Residency Requirements for Circuit Judges* at 4 (Sept. 26, 1984) (advising that a judicial nominee "establish his physical presence in California" to comply with the requirement under 28 U.S.C. § 44(c) that a circuit judge "be a resident of the circuit for which appointed"); E-mail for Kurt Didier from

---

* Editor's Note: The Department of Justice instituted a hiring freeze from 2011 to 2014 in response to budgetary problems. *See* Dep't of Justice, Press Release, *Attorney General Holder Announces Justice Department to Lift Hiring Freeze* (Feb. 10, 2014), https://www.justice.gov/opa/pr/attorney-general-holder-announces-justice-department-lift-hiring-freeze.

Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: US Atty Residency Req't* (Aug. 2, 2002, 10:46 AM) (adhering to the 1979 Opinion's interpretation of "reside" to conclude that "presence in the district seems to meet the statutory purpose").

This is not to say that a U.S. Attorney could never approve an AUSA's request to telework away from the district in which he or she serves (and outside the 25-mile radius that the statute permits) for a reasonable period of time, subject to any requirements of the Department's Telework Policy. *See* DOJ Policy Statement 1200.01 (approved on July 20, 2012), http://www.justice.gov/jmd/hr/doj1200-01.pdf. The residence requirement, we have said, "contemplates a home in which [AUSAs] are present most of the time," not all of the time. Lawton Memo at 1. So while we do not think that an AUSA telecommuting overseas for a period of two years could fairly be considered "present most of the time" in his home district, other, short-term telework arrangements would be permissible under the statute, as long as the AUSA usually has a physical presence in or within 25 miles of the appointing district.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

Index

Appointments, Assignments of Duties, and Removals
- Recess appointments amid pro forma Senate sessions 15
- Appointment of uncompensated special attorneys under 28 U.S.C. § 515 153
- State and local deputation of federal law enforcement officers during Stafford Act deployments 77

Congress
- Recess appointments amid pro forma Senate sessions 15
- Assertion of executive privilege over deliberative materials generated in response to congressional investigation into Operation Fast and Furious 1

Constitution
- Altering Puerto Rico's relationship with the United States through referendum 93
- Executive privilege 1
- Recess Appointments Clause 15

Executive Branch
- Department of Commerce 112
- Department of Justice 1, 49, 153, 237
- Department of Labor 217
- Department of Veterans Affairs 59, 129
- General Services Administration 59
- Office of Government Ethics 198
- Securities and Exchange Commission 186
- United States Postal Service 217

Finance
- GSA's use of FY 2009/2010 Funds to assist the VA in acquiring human resources for FY 2012 59

Statutes
- Anti-Deficiency Act 112, 153

Ethics in Government Act of 1978 198
Gun Control Act of 1968 49
Privacy Act 186
Purpose Act 77
Stafford Act 77
Stop Trading on Congressional Knowledge Act of 2012
("STOCK Act") 198
Victims of Child Abuse Act of 1990 167