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

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FOREWORD

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the executive, legislative, and judicial branches of the government, and of the professional bar and the general public. The first twenty volumes of opinions published covered the years 1977 through 1996; the present volume covers 1997. Volume 21 includes Office of Legal Counsel opinions that the Department of Justice has determined are appropriate for publication. A substantial number of Office of Legal Counsel opinions issued during 1997 are not included.

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

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OPINIONS

OF THE

ATTORNEY GENERAL OF THE UNITED STATES

Authority of the Attorney General to Grant Discretionary Relief from Deportation Under Section 212(c) of the Immigration and Nationality Act as Amended by the Antiterrorism and Effective Death Penalty Act of 1996

The amendment of section 212(c) of the Immigration and Nationality Act by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996 deprived the Attorney General of the authority to grant discretionary relief from deportation for aliens who committed certain crimes. Section 440(d) applies to section 212(c) applications for discretionary relief pending on the effective date of AEDPA *

February 21, 1997

IN DEPORTATION PROCEEDINGS

At the request of the Commissioner of Immigration and Naturalization, the Board of Immigration Appeals ("BIA") referred its decision in this matter pursuant to 8 C.F.R. § 3.1(h)(iii) (1996). Respondent Soriano, a native and citizen of the Dominican Republic, was admitted to the United States in 1985 as a lawful permanent resident alien. In 1992, he was convicted under New York law of the offense of an attempted sale of a controlled substance. Based on that conviction, the Immigration and Naturalization Service ("INS") instituted deportation proceedings against him in 1994.

In 1995, Respondent sought the relief of waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1182(c) (1994). Section 212(c) grants the Attorney General discretionary authority to admit otherwise excludable permanent resident aliens. Although the statute expressly authorizes only a waiver of exclusion, courts have interpreted it to authorize relief in deportation proceedings as well. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976); *De Osorio v. INS*, 10 F.3d 1034, 1039 (4th Cir. 1993). The Immigration Judge found that the respondent was eligible for that relief, but, in the exercise of discretion, denied his application. *See Matter of Soriano*, File No. A39 186 067 (Executive Office for Immigration Review ("EOIR"), Office of the Immigra-

* Editor's Note: In this opinion the Attorney General applied the two-step test for analyzing the temporal scope of a statute set forth in the Supreme Court's decision in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). The Attorney General concluded that under the first step of *Landgraf*, which asks whether Congress has expressly prescribed the temporal reach of a statute, Congress did not specify whether section 440(d) should be applied to section 212(c) applications pending on the effective date of AEDPA. After the Attorney General handed down this opinion, the majority of the federal courts of appeals disagreed with the Attorney General's conclusion. Acknowledging this disagreement, the Attorney General acquiesced on a nationwide basis in the decisions of the courts of appeals that disagreed with her decision *See* Section 212(c) Relief for Certain Aliens in Deportation Proceedings Before April 24, 1996, 66 Fed. Reg 6436 (Jan 22, 2001). Because nearly all of the courts of appeals decided this issue under the first step of *Landgraf*, these courts did not reach the Attorney General's determination under the second step of *Landgraf*, discussed in this opinion, that statutes affecting jurisdiction and prospective relief generally do not raise retroactivity concerns because such statutes do not impair a right, increase a liability, or impose new duties on criminal aliens. For this reason, this opinion is still relevant to such questions

tion Judge, Oct. 12, 1995). Respondent appealed from that decision on October 23, 1995.

On April 24, 1996, while Respondent's appeal was pending, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 ("AEDPA"). Section 440(d) of AEDPA amended INA § 212(c). The amendment provides in relevant part that section 212(c) relief shall not be available to aliens who are deportable by reason of having committed certain specified criminal offenses. Respondent's offense is among those specified.[1] Thus, a threshold issue on appeal was whether the amendment to section 212(c) applied to foreclose Respondent's application for relief from deportation.[2]

The BIA was unanimous in concluding that AEDPA § 440(d) was effective immediately upon enactment on April 24, 1996. The BIA was divided, however, as to whether AEDPA § 440(d) applied to applications for section 212(c) relief that were pending on the effective date of AEDPA. Six members of the BIA concluded that Congress did not intend that aliens who had applications pending on April 24, 1996, should be barred from seeking that relief. Accordingly, they found that Respondent continued to be eligible for waiver of inadmissibility.[3] Five members of the BIA dissented. They would have held that section 440(d) did apply to pending applications for section 212(c) relief. One member of the BIA concurred in part and dissented in part. That member agreed with the majority that AEDPA § 440(d) should not be applied to pending section 212(c) applications, but would also have declined to apply it to other cases, such as those of permanent resident aliens subject to an Order to Show Cause.

For the reasons stated below, I conclude that the amendment to INA § 212(c) made by AEDPA § 440(d) applies to proceedings such as Respondent's, in which an application for relief under section 212(c) was pending when AEDPA was signed into law.[4]

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[1] The amendment provides in relevant part that section 212(c) relief shall not be available to an alien who "is deportable by reason of having committed any criminal offense covered in [INA] section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i) " 110 Stat at 1277, as amended by section 306(d) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Department of Defense Appropriations Act, 1997, Pub. L. No. 104–208, § 306(d), 110 Stat 3009–546, 3009–612. Respondent's offense is covered by section 241(a)(2)(A)(iii) and (B) of the INA. *See* 8 U S C § 1251 (1994)

[2] It is important to note as a threshold matter that deportation proceedings are civil actions, and, thus, the constitutional bars to retroactive application of penal legislation do not apply *INS v Lopez-Mendoza*, 468 U S 1032, 1038 (1984); *Harisiades v. Shaughnessy*, 342 U S 580, 594–95 (1952) Moreover, it is well settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts *Lehman v Carson*, 353 U.S 685, 690 (1957); *Mulcahey v. Catalanotte*, 353 U.S. 692, 694 (1957).

[3] The majority agreed with the Immigration Judge's conclusions that Respondent's attempted criminal sale of cocaine, together with his three other drug-related felonies, required a demonstration of outstanding equities before he could receive a waiver of inadmissibility, and that Respondent had not made such a demonstration

[4] By Order dated September 12, 1996, I granted the request for review and vacated the opinion of the BIA in Matter of Bartolome Jhonny Soriano (A39 186 067)

· *Analysis*

In *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), the Supreme Court sought to "reconcile two seemingly contradictory statements found in [the Court's] decisions concerning the effect of intervening changes in the law": that " 'a court is to apply the law in effect at the time it renders its decision,' " and that " '[r]etroactivity is not favored in the law.' " *Id.* at 264 (citations omitted). The Court set forth the method for analyzing the temporal reach of a statute:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Id. at 280.

In the present case, nothing in the language of the newly enacted statute, AEDPA § 440(d), specifies either that it is to be applied in pending deportation proceedings, or that it is not to be. Thus, the next task is to determine whether the statute would be given retroactive effect if applied in pending deportation proceedings. In this regard, the Court observed that "[w]hile statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Id.* at 268. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269–70 (citation and footnote omitted).

Of particular relevance here, the Court suggested that changes in the law affecting prospective relief, as well as those affecting jurisdiction and procedure, are generally not to be considered "retroactive." Specifically, the Court said:

> Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations. When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive. Thus, in *American Steel Foundries v. Tri-City*

> *Central Trades Council*, 257 U.S. 184 (1921), we held that § 20 of the Clayton Act, enacted while the case was pending on appeal, governed the propriety of injunctive relief against labor picketing. In remanding the suit for application of the intervening statute, we observed that "relief by injunction operates *in futuro*," and that the plaintiff had no "vested right" in the decree entered by the trial court.

Id. at 273–74.

Similarly, the three separately concurring Justices (Scalia, J., joined by Kennedy and Thomas, JJ., concurring), emphasized that intervening law was typically applied to pending applications for prospective relief:

> Courts traditionally withhold requested injunctions that are not authorized by then-current law, even if they were authorized at the time suit commenced and at the time the primary conduct sought to be enjoined was first engaged in. The reason, which has nothing to do with whether it is possible to have a vested right to prospective relief, is that "[o]bviously, this form of relief operated only *in futuro*." Since the purpose of prospective relief is to affect the future rather than to remedy the past, the relevant time for judging its retroactivity is the very moment at which it is ordered.

Id. at 293 (citations omitted).

Both the majority and concurring Justices identified another set of intervening statutes — those that confer or eliminate jurisdiction — that do not operate retroactively merely because they are applied to conduct arising before the statute's enactment. Justice Scalia explained the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction . . . by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power — so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. at 292–93 (Scalia, J., concurring).[5]

In summary, under *Landgraf*, a new statute does not have retroactive effect if it does not impair rights a party possessed when he or she acted, increase a party's liability for past conduct, or impose new duties with respect to transactions

[5] The single dissenting Justice in *Landgraf* was of the opinion that the presumption against retroactive legislation, "which serves to protect settled expectations," and which "is grounded in a respect for vested rights," "need not be applied to remedial legislation that does not proscribe any conduct that was previously legal." *Id.* at 296–97 (Blackmun, J., dissenting) (citing *Sampeyreac v United States*, 32 U.S. (7 Pet.) 222, 238 (1833) ("Almost every law, by providing a new remedy, affects and operates upon causes of action existing at the time the law is passed") *and Hastings v Earth Satellite Corp.*, 628 F.2d 85, 93 (D.C. Cir.) ("Modification of remedy merely adjusts the extent, or method of enforcement, of liability in instances in which the possibility of liability previously was known."), *cert. denied*, 449 U.S. 905 (1980)).

already completed. More specifically, an intervening statute that either alters jurisdiction or affects prospective injunctive relief generally does not raise retroactivity concerns, and, thus, presumptively is to be applied in pending cases. As discussed below, the application of AEDPA § 440(d) to pending applications for section 212(c) relief does not impair a right, increase a liability, or impose new duties on criminal aliens. The consequences of Respondent's conduct remain the same before and after the passage of AEDPA: criminal sanctions and deportation. AEDPA § 440(d) is best understood as Congress's withdrawal of the Attorney General's authority to grant prospective relief. Thus, the statute alters both jurisdiction and the availability of future relief, and should be applied to pending applications for relief.[6]

The relief sought in a section 212(c) application, waiver of inadmissibility, is prospective in nature. A successful applicant for relief under section 212(c) will not, as a matter of the sovereign's discretion, be deported from the country, even though his or her past criminal convictions would otherwise lead to deportation. *See INS v. Lopez-Mendoza*, 468 U.S. at 1038 ("The deportation hearing looks prospectively to the respondent's right to remain in this country in the future. Past conduct is relevant only insofar as it may shed light on the respondent's right to remain."); *De Osorio v. INS*, 10 F.3d at 1042 (holding that an amendment barring applications for waivers of deportations filed after the effective date of the amendment to section 212(c) is not made retroactive merely because it applies to convictions for aggravated felonies before that time: "The past aggravated felony conviction is only the prerequisite for the prospective denial of discretionary relief. . . . Congress did not attach additional consequences, but merely withdrew a previously available form of discretionary relief.").

Moreover, Congress's modification of section 212(c) operates to eliminate the discretionary authority of the Attorney General to grant relief in certain cases, and, thus, its effect is to remove jurisdiction. As the Solicitor General argued in the brief of the United States to the Supreme Court in *Elramly v. INS*, 73 F.3d 220 (9th Cir. 1995), *cert. granted*, 516 U.S. 1170, and *vacated*, 518 U.S. 1051 (1996), a case raising the issue whether AEDPA divested the Attorney General of authority to grant section 212(c) relief in pending cases, "[j]ust as new 'jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties,' *Landgraf*, 511 U.S. at 274, [s]ection 212(c) speaks to the *power* of the Attorney General to waive deportation, not to any right of

[6] One formulation articulated in *Landgraf* for determining whether a statute operates retroactively — "whether [it] attaches new legal consequences to events completed before its enactment" — could be interpreted as compelling the conclusion that AEDPA § 440(d) should not be applied to pending applications for section 212(c) relief 511 U.S. at 270. Because the statute eliminates eligibility for a previously available form of relief from the immigration consequences of a prior criminal conviction, it could be argued that it attaches new legal consequence to a prior event Elimination of a form of relief in this context, however, is not the same as the attachment of new legal consequences in the sense that the Court meant in *Landgraf* If it were, most cases in the three categories that the Court identified as not constituting retroactive application when applied to past events — statutes that alter jurisdiction, procedural rules, and statutes affecting the availability of prospective injunctive relief — would also have to be understood as attaching new legal consequences to prior events and, hence, constituting retroactive application

an alien to such relief." Supplemental Brief for the Petitioner at 18, *INS v. Elramly*, 516 U.S. 1170 (1996) (No. 95–939). The majority opinion in *Landgraf* explains the practice of applying new jurisdictional statutes to pending cases by the fact that "a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.' " 511 U.S. at 274 (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)). Here, in contrast to the cases cited by the Court, there is no alternative tribunal to which the criminal alien may petition. Even assuming that the lack of an alternative tribunal would be relevant to retroactivity analysis where a substantive right is at stake, eligibility for a congressionally created form of purely discretionary relief from the immigration consequences of a prior criminal conviction cannot properly be characterized as a substantive right.[7]

The Third Circuit's discussion of the application of an earlier amendment to section 212(c) to make an applicant ineligible for relief based on a prior criminal conviction applies equally here:

> In this case, the consequences of petitioner's criminal conduct were clear at the time of that conduct and they remain unchanged today. He was subject to possible criminal sanctions and deportation. The only relevant change in the law relates to the permissible scope of the Attorney General's discretion to grant relief from one of those consequences. Like statutes altering the standards for injunctive relief, this change has only a prospective impact. It is not designed to remedy the past but only to affect petitioner's future status with respect to the legality of his presence in the United States. Like statutes constricting the jurisdiction of a judicial body, these changes speak only to the power of a public agency. . . . Given the facts that petitioner's pre-1987 conduct clearly subjected him to deportation as well as criminal sanctions, and that section 212(c), as it then existed, offered relief from the former only at the unfettered discretion of the Attorney General, petitioner does not, and could not, contend that his conduct was undertaken in reliance on the then current version of section 212(c).

Scheidemann v. INS, 83 F.3d 1517, 1523 (3d Cir. 1996).

The Seventh Circuit has expressed a contrary view in *Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. 1996), at least with respect to a narrow category of cases. In that case the petitioner had conceded deportability before the enactment of

[7] The concurring opinion further notes that while there may sometimes be an alternative forum, there is not always one, and even where there is, it may deny relief for some collateral reason such as a statute of limitations bar "Our jurisdiction cases are explained, I think, by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power — so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." *Landgraf*, 511 U.S. at 293 (Scalia, J. concurring)

AEDPA, when he was still eligible for section 212(c) relief. The court speculated that had the petitioner known that this relief would no longer be available to him, he might have contested deportability.

> Considering the fell consequences of deportation, especially in cases of exceptional hardship, which are precisely the cases in which an appeal to section 212(c) would have a chance of success, we think it unlikely that Congress intended to mousetrap aliens into conceding deportability by holding out to them the hope of relief under section 212(c) only to dash that hope after they had conceded deportability. No such ignoble intention appears in the statute. Its absence is determinative under *Landgraf* because to make the concession of deportability a bar to relief under section 212(c) would be to attach a new legal consequence to the concession, an event that occurred before the new law came into existence.

Id. at 492–93. The court held that section 440(d) of AEDPA does not apply to cases in which deportability was conceded before AEDPA became law, "provided that the applicant for discretionary relief would have had at least a colorable defense to deportability; for if not, he lost nothing by conceding deportability." *Id.* at 493.[8]

Amici curiae in the current case also emphasized the reliance aliens may have placed on the availability of section 212(c) relief. Amici argue that aliens may rely on the possibility of obtaining section 212(c) relief not only when deciding whether to contest deportability, but also when deciding whether to litigate their criminal liability or enter into a plea agreement. It is true that the majority opinion in *Landgraf* notes that "familiar considerations of fair notice, reasonable reliance, and settled expectations" are factors offering "sound guidance" in "hard cases." *Landgraf*, 511 U.S. at 270. However, the Court states expressly that a statute does not operate retroactively merely because it "upsets expectations based in prior law." *Id.* at 269.

In any event, it is difficult to see how the possibility of obtaining section 212(c) relief would affect an alien's decision whether to concede or contest deportability. First, the criteria for determining whether someone is deportable as a criminal alien are specific and fixed, and the grounds for challenging deportability are quite narrow. *See Rabiu v. INS*, 41 F.3d 879, 881 (2d Cir. 1994) (record of conviction sufficient to overcome alien's challenge to deportability); *Ortega de Robles v. INS*, 58 F.3d 1355, 1358 (9th Cir. 1995) (criminal convictions may not be collaterally challenged in deportation proceeding as ground for contesting deportability).

[8] The Seventh Circuit has confirmed that *Reyes-Hernandez* applies only in cases where the petitioner conceded deportability and had a colorable defense to deportability *Arevalo-Lopez v. INS*, 104 F 3d 100, 101 (7th Cir 1997)

Second, an alien need not choose between contesting deportability and seeking section 212(c) relief; an alien may pursue both.

It seems more plausible that an alien may enter a plea bargain hoping to obtain relief from deportation, but even so, the alien could not have reasonably relied upon the availability of that relief. For the past forty years, the law has been settled that Congress may legislate to alter the immigration consequences of past criminal convictions or acts. Moreover, as the Supreme Court recently unanimously reaffirmed in the context of analyzing a similar provision conferring discretionary authority upon the Attorney General, "suspension of deportation [is] . . . 'an act of grace' which is accorded pursuant to her 'unfettered discretion'. . . and [is similar to] 'a judge's power to suspend the execution of a sentence, or the President's to pardon a convict.' " *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citations omitted). Therefore, a criminal alien could not reasonably rely on the availability of section 212(c) relief in determining whether to plead guilty to a criminal offense or in determining whether to concede deportability.

Accordingly, the application of AEDPA § 440(d) to section 212(c) applications pending before the EOIR would not be retroactive. However, to eliminate even the remote possibility that an alien who had a colorable defense to deportability may have conceded deportability in reliance on the availability of section 212(c) relief, I direct the EOIR to reopen cases upon petition by an alien who conceded deportability before the effective date of AEDPA for the limited purpose of permitting him or her to contest deportability.

Conclusion

For the foregoing reasons, AEDPA § 440(d) should be applied to INA § 212(c) cases pending before the EOIR on the effective date of AEDPA. EOIR shall reopen cases upon petition by an alien who conceded deportability before April 24, 1996, the effective date of AEDPA, for the limited purpose of permitting the alien to contest deportability.

JANET RENO
Attorney General

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

Bureau of Prisons Disclosure of Recorded Inmate Telephone Conversations

The policy of the Criminal Division requiring outside law enforcement officials to obtain some form of legal process authorizing access to contents of inmate telephone conversations is not mandated by the Constitution or Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

The practice of profiling specific groups of inmates for monitoring raises concerns when it requires or causes the Bureau of Prisons to alter its established monitoring procedures for purposes unrelated to prison security or administration.

Inmates have a First Amendment right to some minimum level of telephone access, subject to reasonable restrictions related to prison security and administration. Under certain circumstances they also may have a Sixth Amendment right to make telephone calls to their attorneys

January 14, 1997

MEMORANDUM OPINION FOR THE ACTING ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

You have requested our views on the extent to which Bureau of Prisons ("BOP") officials may disclose tape recordings of non-privileged inmate telephone conversations to other law enforcement officials to assist in criminal investigations unrelated to prison security or administration.[1] In addition, you have asked for our views on the legal necessity of the Department of Justice's current policy regarding access by non-BOP law enforcement officials to such tapes.[2]

At the outset, we believe it is helpful to distinguish several questions raised by your memorandum. The first question is the extent to which BOP officials may take tape recordings made for prison security and administration purposes and disclose their contents to outside law enforcement officials for reasons unrelated to institutional purposes. We understand this question to encompass the related issues whether outside law enforcement officials may obtain this same information by participating in routine prison monitoring and whether those officials must seek legal process prior to obtaining the information, as required by the Department's current policy. A second question is the extent to which BOP may monitor and record (and thereafter, disclose) inmate telephone conversations for reasons unrelated to prison security and administration. Finally, there is a question whether inmates have a constitutional or other legal right to telephone privi-

[1] Memorandum for Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, from John C Keeney, Acting Assistant Attorney General, Criminal Division, *Re Request for an Opinion Regarding the Legality of the Disclosure by Bureau of Prison Officials, Acting Without Court Process, of Monitored/Recorded Non-Privileged Inmate Telephone Conversations to Law Enforcement to Assist in Criminal Investigations Unrelated to Prison Security or Administration* (Oct 11, 1996) ("Keeney Memorandum")

[2] *Id*

leges while incarcerated. We address each of these questions after setting forth some basic background principles that guide the analysis.[3]

BACKGROUND

As a general matter, the interception of wire communications is governed by two sources of law: the Fourth Amendment[4] and the federal wiretapping statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), Pub. L. No. 90–351, 82 Stat. 197, 211–225, *amended by* the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510–2522 (1994). The Supreme Court has not addressed the applicability of the Fourth Amendment or Title III to the practice of monitoring and recording inmate telephone conversations to ensure prison security and orderly administration. Many lower courts have addressed the issue, agreeing that neither poses an obstacle to the practice. These courts, however, have provided little analysis with respect to the Fourth Amendment and have diverged in their analyses with respect to Title III. *See* Attachment I to Keeney Memorandum (collecting cases). Because we believe that the particular analysis that is controlling may affect the answers to your questions, we lay out the proper approaches below.

I. Fourth Amendment

The Fourth Amendment protects individuals from "unreasonable searches." U.S. Const. amend. IV. The applicability of the Fourth Amendment in a particular case turns on whether "the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979). This inquiry, in turn, requires both an " 'actual (subjective) expectation of privacy' " and one that, viewed objectively, " 'society is prepared to recognize as "reasonable." ' " *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

In *Hudson v. Palmer*, 468 U.S. 517, 530 (1984), the Supreme Court held that "the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells." In that case, a prison inmate brought a § 1983 action, *see* 42 U.S.C. § 1983 (1994), alleging that prison officials had conducted a random, unannounced "shakedown" of his cell solely to harass him. The Court rejected his claim, holding that prison inmates have no legitimate expectation of privacy in

[3] We respectfully decline to answer your question concerning the extent to which an inmate's recorded conversations constitute Jencks Act or *Brady* material in the main because that question is the subject of ongoing litigation. *See* Keeney Memorandum at 5

[4] The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized " U.S. Const. amend. IV.

their cells. 468 U.S. at 530. Although the Court observed that prisoners retain certain constitutional rights while incarcerated, it reasoned that an expectation of privacy in the contents of a prison cell is incompatible with "what must be considered the paramount interest [of the prison] in institutional security." *Id.* at 528. This interest is so compelling, the Court found, that it justifies categorical treatment of cell searches. Thus, given the complete absence of any legitimate expectation of privacy, even when a particular cell search is conducted for "calculated harassment unrelated to prison needs," the Fourth Amendment provides no protection. *Id.* at 530.[5]

Although *Hudson* concerned the applicability of the Fourth Amendment to prison cells, we believe its reasoning applies with full force to inmate telephone conversations. As in Hudson, recognizing an expectation of privacy in inmate telephone conversations would conflict with the objectives of prison officials. *See United States v. Clark*, 651 F. Supp. 76, 81 (M.D. Pa. 1986) (recognition of a reasonable expectation of privacy would frustrate BOP objectives "to enhance the security of federal prisons through monitoring and recording of telephone conversations"), *aff'd sub. nom. United States v. Weeden*, 869 F.2d 592 (3d Cir.), *cert. denied*, 490 U.S. 1073 (1989); *United States v. Van Poyck*, 77 F.3d 285, 291 (9th Cir.), *cert. denied*, 519 U.S. 912 (1996). Inmates may use their telephone privileges in a variety of ways that violate prison regulations and threaten prison security. For example, they may request illegal drugs or weapons from the outside; they may plan prison escapes; they may relate information concerning illegal activities within the prison; they may facilitate illegal activities outside of the prison. The prison's interest in detecting and preventing this type of conduct outweighs any expectation of privacy inmates might have in their telephone conversations.

Furthermore, we believe inmates lack a credible claim of privacy with respect to their telephone conversations because they receive ample notice of the monitoring and taping practice. BOP, for example, posts notices of its monitoring system in English and Spanish on each inmate telephone and requires inmates to sign forms acknowledging their awareness of the system. In addition, public notice of the system is contained in the Code of Federal Regulations. 28 C.F.R. §§ 540.100–540.101 (1996). Under these circumstances, it would be difficult for inmates to argue that they have an actual expectation of privacy. *See United States v. Amen*, 831 F.2d 373, 379–80 (2d Cir. 1987), *cert. denied*, 485 U.S. 1021 (1988).[6] Even if inmates nonetheless subjectively expected their telephone con-

[5] In such a case, however, the Court stated that a prisoner may pursue claims under the Eighth Amendment or state tort and common-law remedies. *Hudson*, 468 U.S. at 530

[6] Indeed, it could be argued that inmates expressly or impliedly consent to have their telephone conversations monitored and recorded. *See Amen*, 831 F.2d at 379, *Van Poyck*, 77 F.3d at 291. Consent—whether express of implied—would render the prison's monitoring procedure lawful, even if it constituted a search *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (consent is "one of the specifically established exceptions to the requirements of both a warrant and probable cause"); *McGann v Northeast Ill. Regional Commuter R R Corp.*, 8 F.3d

Continued

versations to remain private, we believe that expectation would not be "one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361. "If security concerns can justify strip and body cavity searches and wholly random cell searches, then surely it is reasonable to monitor prisoners' telephone conversations, particularly where they are told that the conversations are being monitored." *Amen*, 831 F.2d at 379–80 (citations omitted). But even if inmates possessed a subjectively and objectively reasonable expectation of privacy in their telephone conversations, we believe that monitoring such conversations would be "reasonable" in light of the prison's compelling interest in security and orderly administration so long as the monitoring was conducted consistent with that purpose. *See Van Poyck*, 77 F.3d at 291.

II. Title III

Title III generally prohibits the use of any "electronic, mechanical, or other device" to intercept "any wire, oral, or electronic communication," in the absence of authorization by a court order. 18 U.S.C. § 2511(a), (b) (1994).[7] The statute provides several exceptions to this general prohibition, however. For example, it permits interception of oral communications uttered by a person with no justifiable expectation of privacy. *See* 18 U.S.C. § 2510(2). Interception of wire communications — the type of communications at issue here — does not similarly turn on expectation of privacy. Rather, Title III contains specific conditions under which interception of such communications is permissible. Section 2510(5)(a), for example, permits interception of wire communications by "an investigative or law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5)(a) ("ordinary course of duties exception").[8] Section 2511(1)(c) permits interception upon consent from a party to the communication. *Id.* § 2511(1)(c) ("consent exception").[9] Courts have held that one or both of these exceptions apply to monitoring and recording of inmate telephone conversations.

To qualify for the ordinary course of duties exception to Title III, interception of a wire communication must be conducted (1) by an investigative or law enforcement officer (2) in the ordinary course of his duties. Courts generally have

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1174, 1181 (7th Cir. 1993) (reviewing factors establishing implied consent, including whether "the person searched was on notice that undertaking certain conduct . . . would subject him to a search"). As discussed *infra* in the Title III context, several courts have questioned whether consent based solely on notice is valid.

[7] It is well settled that Title III applies to the prison system. *See Van Poyck*, 77 F.3d at 291; *Amen*, 831 F.2d at 377; *United States v. Paul*, 614 F.2d 115, 117 (6th Cir.), *cert. denied*, 446 U.S. 941 (1980); *Campiti v. Walonis*, 611 F.2d 387, 392 (1st Cir. 1979).

[8] Section 2510(5)(a) does so by excluding from the definition of "electronic, mechanical, or other device" equipment used by "an investigative or law enforcement officer in the ordinary course of his duties." 18 U.S.C. § 2510(5)(a). Investigative officers using an electronic, mechanical, or other device in the ordinary course of duties may intercept any wire, oral, or electronic communication

[9] Such consent may be express or implied. *See United States v. Willoughby*, 860 F.2d 15, 19 (2d Cir. 1988) (citing S. Rep. No. 90–1097, at 94 (1968), *reprinted in* 1968 U.S.C.C A.N. 2112, 2182), *cert. denied*, 488 U.S. 1033 (1989).

assumed that prison officials constitute "law enforcement" officers.[10] The "ordinary course of duties" requirement has engendered more discussion. Courts have concluded that prison monitoring occurs in the ordinary course of duties if conducted pursuant to an established policy that is related to institutional security, generally applicable rather than directed at a particular inmate, and made known to inmates.[11] We agree that a prison monitoring program will not violate Title III if it exhibits these characteristics.

Many courts have gone considerably further, holding that prison monitoring is exempt under Title III if inmates merely have notice of its occurrence. These courts imply consent under § 2511(1)(c) from circumstances suggesting that inmates voluntarily choose to make telephone calls with knowledge that they will be tape recorded.[12] Other courts have rejected or criticized this application of § 2511(1)(c). Some reason that consent to monitoring is not voluntary because inmates have no choice but to forego telephone privileges.[13] Others frame the problem as a failure to distinguish between knowledge and implied consent.[14] As Judge Posner has stated:

> [K]nowledge and consent are not synonyms. Taking a risk [that prison officials will not detect an abuse of telephone privileges] is not the same thing as consenting to the consequences if the risk materializes. A person who walks by himself late at night in a dangerous neighborhood takes a risk of being robbed; he does not consent to being robbed. We would be surprised at the argument that

[10] An "[i]nvestigative or law enforcement officer" is defined as "any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter" 18 U S C § 2510(7). Although prison officials are not empowered to conduct investigations of offenses directly related to Title III, they have authority to conduct investigations relating to prison security *See* 28 C F R § 541 14(b) (1996) Courts have found such authority sufficient for Title III purposes *See, e.g., Clark*, 651 F Supp at 78–79, *Crooker v United States Dept of Justice*, 497 F. Supp 500, 503 (D. Conn. 1980)

[11] *See, e.g., United States v Lanoue*, 71 F.3d 966, 982 (1st Cir. 1995) ("If the call was intercepted to gather evidence for Agent Brosnan's investigation, rather than for prison security purposes, it was not done in the ordinary course of duty"), *Paul*, 614 F.2d at 117 (monitoring in ordinary course of duties where conducted pursuant to the policy of the BOP and local prison rules that were posted by each telephone), *Campiti*, 611 F 2d at 390–92 (monitoring not in ordinary course of duties where unrelated to prison security, not pursuant to prison policy, without notice to inmates, and focused on one inmate); *United States v Green*, 842 F Supp 68, 73–74 (W.D.N Y. 1994) ("These facts, including the focus on the calls of one particular prisoner, the extraordinary long time period in which the taping continued, and the large volume of tapes sent to other investigative agencies, all contrast starkly with prior cases in which a few calls were taped in the course of routine monitoring."), *aff'd sub nom United States v. Workman*, 80 F.3d 688 (2d Cir), *cert denied*, 519 U S 955 (1996), *United States v. Cheely*, 814 F Supp 1430, 1442–43 (D Alaska 1992) (defining "ordinary course of duties" to exclude "ad hoc monitoring of a single inmate" and distinguishing *Campiti*), *aff'd*, 36 F 3d 1438 (9th Cir. 1994); *Clark*, 651 F Supp at 79–80 (*same*), *United States v Noriega*, 764 F Supp 1480, 1491 (D. Fla. 1991) ("If in fact the interception of Noriega's conversations was unrelated to any institutional considerations, then it would fall outside the scope of an MCC official's 'ordinary course of duties.'")

[12] *United States v Workman*, 80 F 3d 688, 693 (2d Cir), *cert denied*, 519 U S 955 (1996), *Van Poyck*, 77 F 3d at 291, *United States v Horr*, 963 F 2d 1124, 1126 (8th Cir), *cert denied*, 506 U S 848 (1992), *Willoughby*, 860 F 2d at 20, *Amen*, 831 F.2d at 378; *Green*, 842 F Supp at 72

[13] *See Langton v Hogan*, 71 F 3d 930, 936 (1st Cir 1995)

[14] *United States v Daniels*, 902 F 2d 1238, 1245 (7th Cir) (Posner, J), *cert. denied*, 498 U S 981 (1990), *Cheely*, 814 F Supp. at 1443; *Crooker*, 497 F. Supp at 503

> if illegal wiretapping were widespread anyone who used a phone would have consented to its being tapped and would therefore be debarred from complaining of the illegality.

United States v. Daniels, 902 F.2d at 1245.

Although we believe Judge Posner's analogy inapt, equating assumption of a risk with knowledge for the purpose of distinguishing voluntary consent, we do agree that, in certain circumstances, construing or equating knowledge as implied consent would allow the government to evade the requirements of Title III (and the Fourth Amendment) simply by announcing its intention to do so. We further appreciate without necessarily conceding that such circumstances may arise in the prison setting, on the theory that inmates have no alternative comparable to telephone facilities and thus no choice but acquiescence with respect to wiretapping. We therefore have reservations about reliance on the consent exception to Title III to monitoring of inmate telephone conversations based solely on evidence of notice. Nonetheless, we include this theory in our discussion below because it remains valid in several jurisdictions.

DISCUSSION

I. Monitoring for Purposes of Prison Security and Administration

In this section, we address issues related to BOP's practice of monitoring and recording inmate telephone conversations pursuant to established policy and for reasons related to prison security or administration. We address each issue under the applicable Fourth Amendment and Title III standards.

A. Disclosure for Purposes Unrelated to Prison Security

Because we believe inmates have no legitimate expectation of privacy in their telephone conversations, the seizure of those conversations by BOP officials (through routine monitoring and recording) does not implicate the Fourth Amendment. As a result, the subsequent disposition of those conversations does not implicate the Fourth Amendment. *Cf. Hudson*, 468 U.S. at 538–39 (O'Connor, J., concurring) ("[I]f the act of taking possession and the indefinite retention of the property are themselves reasonable, the handling of the property while in the government's custody is not itself of Fourth Amendment concern."). Thus, the Fourth Amendment does not prevent BOP officials from disclosing the contents of those conversations to outside law enforcement officials, even for purposes unrelated to prison security or administration.

Although Title III may impose greater constraints than the Fourth Amendment on the interception of wire communications, it furnishes no greater barrier to their disclosure in this instance. Title III expressly authorizes law enforcement officers

to disclose the contents of lawfully obtained communications to "another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure." 18 U.S.C. § 2517(1). In addition, Title III permits law enforcement officers to use the contents of lawfully obtained communications "to the extent such use is appropriate to the proper performance of his official duties." *Id.* § 2517(2).[15] We believe that either or both of these provisions permits BOP to disclose the contents of inmate telephone conversations to other law enforcement officials consistent with statutory limitations.

B. Participation of Non-BOP Law Enforcement Officials

From a Fourth Amendment perspective, the presence of outside law enforcement officials during taping is indistinguishable from disclosure thereafter.[16] Because inmates have no reasonable expectation of privacy in their telephone calls, the Fourth Amendment simply has nothing to say about the circumstances under which, or even the manner in which, the BOP seizes those conversations. Cf. Hudson, 468 U.S. at 529 (Fourth Amendment provides no protection for destruction of property during the course of lawful prison cell search). Thus, we believe that the Fourth Amendment does not prevent outside law enforcement officials from participating in routine prison monitoring and recording.[17]

In our view, Title III presents a more complicated question. Unlike the Fourth Amendment, the ordinary course of duties exception to Title III requires courts to consider the circumstances under which monitoring occurs. Under certain conditions, the unannounced or sporadic presence of outside law enforcement officials might indicate a course of conduct out of the ordinary. *Cf. United States v. Green*, 842 F. Supp. at 73 (dicta) (monitoring not in ordinary course of duties where, among other things, special arrangements for recording were set up and prison officials sent an unusually large volume of tapes to outside investigative agencies). As a general matter, however, we do not believe that the presence of outside law enforcement officials — in the absence of other unusual circumstances — is sufficient to call into question otherwise routine monitoring. Nor is it enough in our view, to vitiate implied consent to monitoring, particularly where inmates have

[15] Inmates have argued that disclosure to other law enforcement officials renders the initial monitoring unlawful under Title III, such that neither § 2517(1) nor § 2517(2) applies. Specifically, inmates have claimed that disclosure takes the initial seizure outside the ordinary course of duties. For the reasons discussed *infra* citing *Green*, we do not believe, however, that disclosure to outside law enforcement officials — absent other peculiar circumstances — is sufficient to taint otherwise routine monitoring and recording. Inmates also have argued that disclosure to other law enforcement officials exceeds the scope of their implied consent to monitoring. In *Noriega*, the court flatly rejected this argument, reasoning that Title III treats issues of consent and disclosure separately. 764 F. Supp. at 1491.

[16] For purposes of this discussion, we assume that the presence or participation of outside law enforcement officials is not so significant as to change the routine and established nature of the monitoring.

[17] Although the Eighth Amendment "always stands as a protection against 'cruel and unusual punishments,'" *Hudson*, 468 U.S. at 530, we do not believe that the presence of outside law enforcement officials during routine monitoring rises to that level.

notice of the periodic presence of outside law enforcement personnel. Even when inmates have no notice of the precise conditions under which monitoring occurs, their consent to the practice of monitoring remains valid and sufficient for Title III purposes. *Cf. Workman*, 80 F.3d at 694 (consent to monitoring valid even though inmates had no notice that their calls were recorded).

C. The Extent to Which Court Process is Required

We understand that the Criminal Division has voluntarily adopted a policy requiring outside law enforcement officials to obtain some form of legal process authorizing access to the contents of inmate telephone conversations.[18] With respect to previously recorded communications of a specifically identified inmate, the policy requires the requesting agency to obtain a search warrant, grand jury subpoena, administrative summons, or national security letter.[19] For future telephone conversations, the policy requires a Title III interception order from the courts.[20]

We do not believe that the policy of the Criminal Division is either constitutionally or statutorily mandated. As discussed above, neither the Fourth Amendment nor Title III limits or otherwise conditions disclosure to outside law enforcement officials. While the Criminal Division or BOP may voluntarily adopt procedural restrictions as a policy matter, they are not compelled by law to do so. Thus, the Criminal Division is free to modify or repeal its current policy.

II. Monitoring Unrelated to Prison Security and Administration

In this section, we address whether non-BOP law enforcement agencies may "profile" specific groups of inmates for BOP to monitor and record. It is our understanding that these profiles may enable non-BOP law enforcement agencies to prevent inmates from using their telephone privileges to facilitate criminal activities outside the institution and to gather information concerning the outside criminal activities themselves.

We believe the practice of profiling raises concerns only to the extent it requires or causes BOP to alter its established monitoring procedures. BOP has authority to monitor and record all inmate telephone conversations for institutional purposes. As discussed above, those conversations, once lawfully obtained, may be used for purposes unrelated to prison security and administration. If profiling merely enables outside law enforcement agencies to identify potentially useful inmate telephone conversations before they are lawfully seized, it is no more problematic

[18] *See* Memorandum for All United States Attorneys and Strike Force Chiefs, from William F. Weld, Assistant Attorney General, Criminal Division, *Re Electronic Surveillance Procedures Within the Federal Prison System* (Jan 9, 1987) (attaching guidelines).

[19] *Id*

[20] *Id.*

than allowing those officers to participate during the seizure or disclosing the tapes to them thereafter.

If profiling requires or causes BOP either to adopt special monitoring procedures or change its monitoring policy for purposes unrelated to prison security or administration, however, it may jeopardize the application of the ordinary course of duties exception. In *Green*, the court held that monitoring was not in the ordinary course of duties for purposes of Title III where focused on a particular inmate and recorded on special audio cassettes, rather than reel-to-reel tapes. 842 F. Supp. at 73; *see also Campiti*, 611 F.2d at 390–92 (monitoring not in ordinary course of duties where directed at a specific inmate for reasons unrelated to prison security and conducted without notice or regard to prison policy).[21] Similarly, if a prison that maintained a general policy of random monitoring (or random screening of monitored calls) decided to monitor or review all telephone conversations of certain inmates at the behest of outside law enforcement officers, a court might find the monitoring beyond the ordinary course of duties. Such a finding would be fatal in jurisdictions that reject the implied consent theory of monitoring.

Even in jurisdictions that accept the implied consent theory, however, the practice of targeting inmates for reasons unrelated to prison security raises troubling issues. For example, inmates who receive express notice of random monitoring (or random screening of monitored calls) might argue that their consent does not extend to the unwritten practice of monitoring or review *all* of their telephone conversations. To the extent inmates have been misled or deceived with respect to prison policy, a court might refuse to find implied consent.

III. Constitutional Right to Telephone Privileges

In this section, we discuss the extent to which the Constitution requires prisons to provide inmates with access to telephones. We believe that inmates have a First Amendment right to some minimal level of telephone access, subject to reasonable restrictions related to prison security and administration. Under certain circumstances, they also may have a Sixth Amendment right to make telephone calls to their attorneys, subject again to reasonable restrictions.[22]

The Supreme Court has recognized that " '[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution,' . . . nor do they bar free citizens from exercising their own constitutional rights by reaching out to those on the 'inside.' " *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989)

[21] *See also Cheely*, 814 F Supp at 1441 ("ad hoc monitoring" of particular inmates is beyond ordinary course of duties), *Lanoue*, 71 F.3d at 982 ("If the call was intercepted to gather evidence for Agent Brosnan's investigation, rather than for prison security purposes, it was not done in the ordinary course of duty."), *Noriega*, 764 F. Supp at 1491 ("If in fact the interception of Noriega's conversations was unrelated to any institutional considerations, then it would fall outside the scope of an MCC official's 'ordinary course of duties.' ").

[22] At least one court has held that inmates have no Eighth Amendment claim to telephone access because it is not a basic human need, such as food, medical care, and physical safety. *See Douglas v DeBruyn*, 936 F Supp. 572, 578 (S D. Ind 1996)

(quoting *Turner v. Safley*, 482 U.S. 78, 84, 94–99 (1987)). Thus, "a prison inmate retains those [consititutional] rights that are not inconsistent with his status as a prisoner [and] with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). With respect to telephone privileges, courts generally agree that inmates have a First Amendment right to some minimal level of access.[23] Although courts have not reached consensus on the precise level of access required,[24] the touchstone is reasonableness.[25] Thus, limitations on the right to telephone access will not violate the First Amendment if they are reasonable.[26] We acknowledge, however, that certain bases exist that justify a complete ban on telephone access by a particular inmate or a class of inmates, consistent with the First Amendment. *See* 28 C.F.R. § 501.2 (1996) (upon direction of Attorney General, Director of BOP may authorize Warden to limit telephone use as reasonably necessary to prevent the disclosure of classified information); *id.* § 501.3 (upon direction of Attorney General, Director of BOP may authorize Warden to limit telephone use as reasonably necessary to protect persons against the risk of acts of violence or terrorism). There may be other circumstances as well that support a similar revocation of telephone privileges.

In addition to the First Amendment, the Sixth Amendment may guarantee inmates a right to some telephone contact with their attorneys.[27] Even this right is not unlimited, however.[28] A prison need only provide access to counsel that is "adequate, effective, and meaningful when viewed as a whole." *Aswegan*, 981 F.2d at 314.[29] Thus, reasonable restrictions on access to attorney telephone calls are permissible, especially when other means of attorney contact are available.

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Office of Legal Counsel

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[23] *See Pope v. Hightower*, 101 F.3d 1382, 1384 (11th Cir. 1996); *Washington v. Reno*, 35 F.3d 1093, 1099 (6th Cir. 1994); *Tucker v. Randall*, 948 F.2d 388, 391 (7th Cir 1991), *Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986); *Morgan v. LaVallee*, 526 F.2d 221, 225 (2d Cir 1975); *Montana v. Commissioners Court*, 659 F.2d 19, 23 (5th Cir. 1981), *cert. denied*, 455 U S 1026 (1982), *Feeley v. Sampson*, 570 F.2d 364, 374 (1st Cir. 1978); *Johnson v. Galli*, 596 F. Supp. 135, 138 (D. Nev. 1984). This is true even though other forms of communication with the outside exit. *Cf Pell v Procunier*, 417 U.S. 817 (upholding prison regulations prohibiting face-to-face interviews by media of individual inmates because alternative means of communication existed).

[24] *See Wooden v Norris*, 637 F. Supp 543, 555 n.4 (M.D. Tenn. 1986) (collecting cases).

[25] *See Pope*, 101 F.3d at 1384 ("[W]hen a prison regulation impinges upon an inmate's constitutional rights, the regulation is valid if reasonably related to legitimate penological interests.") (citing *Turner*, 482 U.S. at 89), *Washington*, 35 F 3d at 1100 (prisoner's right to telephone access is " 'subject to rational limitations in the face of legitimate security interests of the penal institution' "); *Strandberg*, 791 F.2d at 747

[26] *See Washington*, 35 F.3d at 1099; *Benzel v. Grammar*, 869 F.2d 1105, 1108 (8th Cir.), cert. denied, 493 U.S. 895 (1989); *Strandberg*, 791 F 2d at 747; *Lopez v. Reyes*, 692 F 2d 15, 17 (5th Cir 1982); *Carter v. O'Sullivan*, 924 F. Supp. 903, 909 (C.D. Ill. 1996).

[27] *See Tucker*, 948 F.2d at 391; *Strandberg*, 791 F.2d at 747; *Carter*, 924 F. Supp. at 909

[28] *See Aswegan v Henry*, 981 F.2d 313, 314 (8th Cir. 1992) ("Although prisoners have a constitutional right of meaningful access to the courts, prisoners do not have a right to any particular means of access, including unlimited telephone use.") (citing *Bounds v. Smith*, 430 U.S. 817, 823, 832 (1977)).

[29] *See also Wooden*, 637 F Supp. at 554–55 (cordless telephone system does not violate First or Sixth Amendment rights of inmates or First Amendment rights of inmates' families).

Proposed Agency Interpretation of "Federal Means-Tested Public Benefit[s]" Under Personal Responsibility and Work Opportunity Reconciliation Act of 1996

The interpretation of the phrase "federal means-tested public benefit[s]" in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 proffered by the Departments of Health and Human Services and Housing and Urban Development — that it applies only to mandatory (and not discretionary) spending programs — constitutes a permissible and legally binding construction of the statute.

January 14, 1997

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

You have requested the views of the Office of Legal Counsel regarding a construction, proffered by the Departments of Health and Human Services ("HHS") and Housing and Urban Development ("HUD"), of the scope of the phrase "federal means-tested public benefit[s]" contained in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRA" or "Act").[1] In particular, HHS and HUD have concluded that this phrase is best construed to apply only to mandatory (and not discretionary) spending programs.[2] Both departments have determined that this construction of the PRA "best balances [their] other statutory obligations with Congressional goals embodied in the [PRA]."[3] We further understand that the Departments of Agriculture, Education, Labor and Veterans Affairs and the Social Security Administration all concur in, or defer to, the HHS and HUD proffered interpretation of the PRA.[4]

As explained more fully below, we believe that the proffered interpretation is a permissible construction of the statute. The PRA was enacted as a budget reconciliation bill, and, accordingly, must be construed against the backdrop of the Congressional Budget Act of 1974 ("CBA").[5] Under the CBA, budget reconciliation legislation is subject to expedited procedures in both the Senate and the House. To counterbalance these expedited procedures, the CBA permits a member of the Senate to raise a point of order against any material included in the legislation that is extraneous to the budget reconciliation process. Here, through application of this procedure, a broad definition of the phrase "federal means-tested

[1] Pub L No 104–193, 110 Stat 2105

[2] *See* Letter for Christopher H Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, from Harriet S Rabb, General Counsel, Department of Health and Human Services (Dec. 13, 1996) ("Rabb Request")

[3] *See, e g.*, Letter for Arthur Fried, General Counsel, Social Security Administration, from Harriet S Rabb, General Counsel, Department of Health and Human Services and Nelson A Diaz, General Counsel, Department of Housing and Urban Development (Nov 21, 1996) ("Rabb/Diaz Letter")

[4] Rabb Request at 1 Since receiving your letter of December 13, 1996, we have received oral advice from your office that the Social Security Administration concurs in the proffered definition

[5] Pub L. No 93–344, 88 Stat 297 (1974) (codified as amended in scattered sections of 2 U.S.C).

public benefit'' was struck from early versions of the bill that ultimately became the PRA. Significantly, the broad definition was struck because it reached discretionary spending programs, which, in this context, lay beyond the proper scope of the reconciliation process.

In light of this history, and the absence of a sufficiently clear indication that Congress intended, notwithstanding the CBA, to reach discretionary spending programs, we conclude that the meaning of the phrase ''federal means-tested public benefit'' is, at the very least, ambiguous. We further conclude that the HHS/HUD proffered definition is a reasonable construction of the statute, that the agency interpretation is entitled to judicial deference, and that, accordingly, the proffered definition should govern.

DISCUSSION

Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 110 Stat. at 2260, imposes various restrictions on aliens' eligibility for public benefits in the United States. A number of provisions in title IV establish restrictions with respect to aliens' receipt of ''federal means-tested public benefit[s].'' These restrictions fall into three general categories: (1) provisions that deny ''federal means-tested public benefit[s]'' to qualified aliens for the first five years after their entry into the United States;[6] (2) provisions that require certain groups of aliens who seek federal and state public benefits to prove that they can be credited with 40 qualifying quarters of work under title II of the Social Security Act (''SSA'') and have not received any ''federal means-tested public benefit'' during any of those quarters;[7] and (3) provisions that establish and define sponsor-to-alien deeming rules to be applied to aliens seeking ''federal means-tested public benefit[s].''[8]

The PRA contains no statutory definition of the phrase ''federal means-tested public benefit.'' HHS and HUD, however, have concluded that the restrictions on federal means-tested public benefits contained in title IV should apply only to mandatory spending programs, i.e. programs for which funding is not subject to a definite appropriation.[9] Under this construction of the Act, for example, newly arrived qualified aliens would be ineligible for benefits under mandatory programs for the first five years after their arrival in this country, but they would remain eligible for benefits under discretionary spending programs. The rationale of HHS and HUD for this approach is that ''affected departments should hesitate to apply

[6] *See* § 403(a) & (c), 110 Stat. at 2265–66.

[7] *See* §§ 402(a)(2)(B)(ii)(II), 402(b)(2)(B)(ii)(II), 412(b)(2)(B)(ii), 435; 110 Stat. at 2262–63, 2264–65, 2269, 2275–76.

[8] *See* § 421(a), (b)(2)(B), (c), (d), 110 Stat. at 2270–71.

[9] While we have not been provided with a comprehensive list of which programs would be subject to these title IV restrictions under the HHS/HUD interpretation, we understand that Medicaid, food stamps, Supplemental Security Income (''SSI''), and Temporary Assistance for Needy Families (''TANF'') are included within the mandatory category.

the term 'federal means-tested public benefit' broadly in a manner that would deny qualified aliens more benefits than Congress may have clearly intended." Rabb/Diaz Letter, attachment at 4. HHS and HUD assert that "this reading of the term best balances our Departments' other statutory obligations with Congressional goals embodied in [the PRA]," Rabb/Diaz Letter at 1, and that "sound legal and policy considerations support a conclusion that the term is limited to means-tested mandatory spending programs." Rabb/Diaz Letter, attachment at 1.

In evaluating the construction proposed by HHS and HUD, we are guided by the Supreme Court's landmark opinion, *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which explains the proper approach for reviewing the construction of statutes by the agencies that administer them. The first step in the *Chevron* analysis is to determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If congressional meaning, as discerned through "traditional tools of statutory construction," *id.* at 843 n.9, is clear, then no further inquiry is necessary, for the "unambiguously expressed intent of Congress" must control. *Id.* at 843. *See also United States v. Alaska*, 503 U.S. 569, 575 (1992). If the statute is silent or ambiguous with respect to the issue posed, then, under the second step in the *Chevron* analysis, the questions become whether Congress has implicitly or explicitly delegated to the agency the authority to resolve the ambiguity and, if so, whether "the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. *See also Alaska*, 503 U.S. at 575.

I. *Chevron Step I*

The starting point in determining whether "Congress had an intention on the precise question at issue," *Chevron*, 467 U.S. at 843 n.9, is, of course, the language of the statute itself. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Ordinarily, if the terms of the statute are plain, they control and that is the end of the matter. *See Chevron*, 467 U.S. at 843; *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398 (1996).

At the same time, it is well-established that a provision in one act of Congress should be read in conjunction with other relevant statutory provisions and not in isolation. *See Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 712–13, 722–36 (1989); *id.* at 738–39 (Scalia, J., concurring in part and concurring in the judgment); *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Thus, courts regularly construe statutory language in light of both other provisions of the same law and relevant provisions from other laws. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711–12 (1996); *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990); *cf. Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) (meaning of later enacted statute may affect interpretation of "previously

enacted statute, since statutes *in pari materia* should be interpreted harmoniously''). The fact that different statutory provisions may employ similar terms in varying contexts, for example, may give insight as to the meaning of the term in the particular context that is under review. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487–89 (1996) (plurality opinion). Similarly, the possibility that the adoption of a seemingly plain statutory meaning may cause a direct conflict with a different statutory provision, even if in a different law, may trigger application of the presumption against repeals by implication. *See Watt v. Alaska*, 451 U.S. 259, 266 (1981); *FAA v. Robertson*, 422 U.S. 255, 263 (1975); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). Moreover, courts commonly rely upon a general interpretive statute, the Dictionary Act, 1 U.S.C. § 1, in construing specific statutory language that, but for the otherwise-codified definitional provision, might suggest a different meaning. *See Rowland v. California Men's Colony*, 506 U.S. 194, 199–200, 209–10 (1993); *id.* at 212–13, 222 (Thomas, J., dissenting); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979); *United States v. A & P Trucking Co.*, 358 U.S. 121, 123 (1958).

The general rule that the meaning of particular statutory provisions should be determined with reference to the broader legislative landscape provides significant guidance here. As reconciliation legislation, the PRA must be interpreted in the context of both the Congressional Budget Act of 1974, which establishes general rules that govern the enactment of budget reconciliation measures, and congressional actions taken pursuant to that statutory regime. Just as courts, when considering a term that has been defined in the Dictionary Act, read that term in light of the Dictionary Act definition, so too, here, the rules set forth in the CBA provide important guidance in discerning the meaning of the relevant provisions of the PRA.

A.

The PRA was brought to the floor of the Senate as a reconciliation bill, and as such was subject to the special rules that govern the reconciliation process set forth in section 313 of the CBA. *See* 2 U.S.C. § 644 (1994); Robert Keith & Edward Davis, *The Senate's ''Byrd Rule'' Against Extraneous Matter in Reconciliation Measures* 1–2 (Congressional Research Service 1995). Section 313 serves to facilitate the expedited consideration of reconciliation legislation by providing a mechanism for restricting the content of such legislation to provisions that are material to the reconciliation process. *See* Allen Schick, *The Federal Budget: Politics, Policy, Process* 82–86 (1995). Over time, these subject matter restrictions have become known as the ''Byrd rule,'' after Senator Robert Byrd of West Virginia, their principal proponent. The basic purpose of the Byrd rule is twofold: to protect the effectiveness of the reconciliation process by excluding extraneous material that has no significant budgetary effect, and to preserve the

deliberative character of the Senate by exempting from expedited consideration all legislative matters that should properly be debated under regular procedures.[10]

Section 313 establishes the general framework that governs the nation's budgeting process and shapes the content of the legislation that Congress enacts through the reconciliation process. Indeed, the Byrd rule has been deemed sufficiently important to the fashioning of the nation's budget that it is not merely an internal rule of Senate procedure but, as we have noted, a statute duly passed by both houses of Congress and signed by the President. The meaning of a particular provision of reconciliation legislation, therefore, such as the phrase "federal means-tested public benefit" in the PRA, must be construed in light of congressional actions taken pursuant to the CBA.

Specifically, the CBA provides:

> When the Senate is considering a reconciliation bill or a reconciliation resolution . . . upon a point of order being made by any Senator against material extraneous to the instructions to a committee which is contained in any title or provision of the bill or resolution or offered as an amendment to the bill or resolution, and the point of order is sustained by the Chair, any part of said title or provision that contains material extraneous to the instructions to said Committee as defined in subsection (b) of this section shall be deemed stricken from the bill and may not be offered as an amendment from the floor.

Pub. L. No. 93–344, tit. III, § 313 (codified at 2 U.S.C. § 644(a)). Section 313(b)(1) outlines six categories of "extraneous" provisions, the most significant of which, for purposes of this analysis, is (b)(1)(D), which states that a provision shall be considered extraneous "if it produces changes in outlays or revenues which are merely incidental to the non-budgetary components of the provision." 2 U.S.C. § 644(b)(1)(D). The rule, as set forth in section 313, is enforced by a Senator raising a point of order against some provision or provisions of the bill, on the ground that that provision deals with subject matters extraneous to the legislation.

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[10] The Byrd rule was adopted in 1986, following years of struggle on the Senate floor over the inclusion of extraneous provisions in budget reconciliation legislation. Originally enacted as section 20001 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub L. No. 99–272, § 20001, 100 Stat 82, 390–91 (1986), it was, in 1990, incorporated as section 313 of the Congressional Budget Act of 1974 *See* Budget Enforcement Act of 1990, *enacted as* Title XIII of Omnibus Budget Reconciliation Act of 1990, Pub. L No. 101–508, § 13214(b)(1), 104 Stat 1388, 1388–622. As Senator Byrd explained in introducing the amendment that ultimately bore his name:

> Mr President, the Senate is a deliberative body, and the reconciliation process is not a deliberative process . . Such an extraordinary process, if abused, could destroy the Senate's deliberative nature Senate committees are creatures of the Senate, and, as such, should not be in the position of dictating to the Senate as is being done here By including mater[i]al not in their jurisdiction or matter which they choose not to report as separate legislation to avail themselves of the nondeliberative reconciliation process, Senate committees violate the compact which created both them and the reconciliation process

131 Cong. Rec. 28,968 (1985)

The PRA's original definition of "federal means-tested public benefit," contained in both the Senate and House bills, encompassed an expansive range of benefit and assistance programs and did not distinguish between those that were mandatory and those that were discretionary. When the Senate bill reached the floor, Senator Exon invoked the Byrd rule to raise an omnibus point of order against a number of provisions of the legislation, including the definition of "federal means-tested public benefit." 142 Cong. Rec. 18,296–97 (1996). His objection to this provision was based upon section 313(b)(1)(C) of the CBA, i.e. the provision was not within the Finance Committee's jurisdiction. *Id.* at 18,297.

The Parliamentarian upheld Senator Exon's Byrd rule objection on the grounds that the provision was outside the Finance Committee's jurisdiction and that, to the extent the definition encompassed discretionary programs, its impact on the budget was "merely incidental." [11] Rules determining eligibility for discretionary program benefits within a reconciliation bill have no direct effect on the budget. Rather, reducing the size of a discretionary program is accomplished by Congress reducing the appropriation for the program, which the proposed definition of "federal means-tested public benefit" did not do. By contrast, so-called entitlement, or mandatory, programs, generally operate under indefinite appropriations; the size of the program is not determined based on a fixed appropriation, but rather on expenditures incurred for all eligible program participants. Thus expenditures under mandatory programs can be directly reduced by restricting eligibility and thereby reducing the number of people receiving benefits.

The ruling sustaining Senator Exon's objection was not appealed by any other Senator. As a result, the definition of "federal means-tested public benefit" was struck from the Senate bill. Moreover, the House acceded to the Senate deletion and agreed to remove its own expansive definition of the term "federal means-tested public benefit" in conference. The conference committee acknowledged the deletion of the definition under the Byrd rule. 142 Cong. Rec. 20,484 (1996).

This legislative record provides strong evidence that the phrase "federal means-tested public benefit[s]," as used in the PRA, should be construed to reach only mandatory (and not discretionary) spending programs. In keeping with section 313, a Byrd rule objection was made and sustained, a definition was dropped from the bill in response to the objection, and the House acceded to the Senate version of the bill in light of the Byrd rule objection. To ignore these events

[11] The Parliamentarian upheld the objection on the basis of both sections 313(b)(1)(C) (not within Finance Committee's jurisdiction) and 313(b)(1)(D) (prohibition against policy changes with "merely incidental" budgetary impact). *See* 142 Cong Rec 20,975 (1996) (statement of Senator Graham during consideration of conference report on H R. 3734), *see also id* at 20,979 (statement of Senator Chafee) Although Senator Exon's specific objection to the definition, as itemized in his list, was jurisdictional only, he raised that objection in an omnibus point of order based generally upon section 313(b)(1), which permitted the Parliamentarian to consider any basis under (b)(1) for upholding the objection In any event, in this case it ultimately makes no difference to the analysis whether Senator Exon's objection was sustained on jurisdictional grounds alone or on both grounds because any jurisdictional objection under section 313 is based upon the fact that the Senate committee considering a reconciliation bill would only have jurisdiction over mandatory programs. *See* Schick, *The Federal Budget* 83 (1995) (under current practice, "reconciliation instructions are given only to committees that have jurisdiction over revenues or direct (mandatory) spending programs"). Thus, the underlying reasoning for objections under (b)(1)(C) and (b)(1)(D) is the same.

in determining the meaning of the phrase "federal means-tested public benefit" would be to disregard the purpose and language of section 313 itself, which serves to facilitate the budgeting process by providing a mechanism by which the scope of reconciliation legislation may be contained.[12]

B.

Several aspects of the text and legislative history of the PRA, when viewed in isolation, arguably support a broad interpretation of "federal means-tested public benefit" that would include discretionary programs. Ultimately, however, we find little evidence that Congress, in passing the final version of the bill, intended to reintroduce the very definition that had been struck through the operation of section 313 of the CBA. What evidence does exist is at best ambiguous, and thus, in our view, does not foreclose HHS and HUD, two of the agencies charged with administering the Act, from construing the PRA in the manner that they propose.

As previously noted, the PRA, as enacted, contains no definition of the phrase "federal means-tested public benefit." Had Congress intended for this phrase to include discretionary spending programs, over the sustained objection of a member of the Senate, it could have reinserted the deleted definition or similar language in the final version. Indeed, the conference committee did reintroduce a number of other provisions that also had been struck from the Senate bill through Senator Exon's omnibus Byrd rule objection, and Congress ultimately voted to retain these provisions in the final version of the PRA. *See* § 816, 110 Stat. at 2318 (caretaker exemption; originally § 1126 of S. 1956, 104th Cong. (1996)); § 838, *id.* at 2331 (expedited coupon service; originally § 1148 of S. 1956; § 850, *id.* at 2336–37 (waiver authority; originally § 1159 of S. 1956); § 729(d), *id.* at 2303 (WIC program/drug abuse; originally § 1259(d)(1) of S. 1956); § 912, *id.* at 2353–54 (abstinence education; originally § 2909 of S. 1956); *compare with* S. 1956 (July 16, 1996 and July 24, 1996 versions). The decision of the conference not to reintroduce the deleted definition of "federal means-tested public benefit" leaves

[12] Some language in one appellate decision might be read to suggest that courts should distinguish between procedural and substantive legislative motivations in inferring congressional intent. *See Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F 3d 170, 180 (3d Cir. 1995), *cert denied*, 516 U S 1093 (1996) The appellees in *Elizabeth Blackwell Health Center* argued that Congress, by using a rule of House parliamentary procedure to eliminate a provision in the 1994 Hyde Amendment requiring victims of rape or incest to report the crime to the police prior to seeking publicly funded abortions, intended to prohibit state statutes imposing such reporting requirements. The Third Circuit rejected that argument stating that, "[a]t most, the rejection [of the provision] is a sign that Congress did not wish to mandate reporting requirements on the states," and that Congress's rejection of mandatory reporting requirements "on procedural grounds provides no basis for any inference regarding Congress's views about the substantive provisions of the legislation" 61 F.3d at 180 Unlike here, the procedural objection made in *Elizabeth Blackwell Health Center* did not in any way suggest that Congress intended the specific interpretation offered in that case. The procedural objection raised to the reporting provision was based upon a House rule of parliamentary procedure that prohibited attempts to "legislate" on an appropriations bill. *Id* at 174 The basis for this objection bore no relationship to the substantive interpretation appellees urged. In contrast, here the definition proffered by HHS and HUD is based upon a budgetary distinction between mandatory and discretionary programs, precisely the same basis upon which Senator Exon's Byrd rule objection was made

the PRA without the most obvious textual guidance that Congress might have provided had it wished to adopt the previously stricken definition.

The PRA does, however, define the related phrase "federal public benefit" broadly, and in a manner that appears to draw no distinction between mandatory and discretionary programs.[13] The phrase "means-tested," moreover, though not defined in the statute, is defined in the dictionary.[14] It could be argued that these two phrases combine to produce a phrase that is sufficiently plain to make clear that, in enacting the bill, Congress effectively overruled the prior Byrd rule deletions.

Although not entirely without force, we find this argument inconclusive. First, even assuming that the phrases "federal public benefit" and "means-tested" are free of ambiguity, the proposition that combining plain terms necessarily results in an equally plain phrase is not at all self-evident.[15] *See, e.g., Smiley v. Citibank*, 517 U.S. 735, 746–47 (1996). It is not clear, therefore, that, even ignoring the deletion of the broad definition pursuant to the CBA, the bill's final language is so free from ambiguity as to be deemed plain.

More important, as we have explained, the PRA was enacted as reconciliation legislation, and thus can be understood only in light of the special rules that Congress set forth in the CBA and the congressional action taken pursuant to those

[13] Section 401(c)(1) defines "federal public benefit" as

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States, and
>
> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States

110 Stat at 2262

[14] The dictionary defines "means test" as "any examination of the financial state of a person as a condition precedent to receiving social insurance, public assistance benefits, or other payments from public funds," *Webster's Third New International Dictionary* 1399 (3d ed 1986) *See also Random House Dictionary of the English Language* 1192 (2d ed 1987) ("means test" is "an investigation into the financial position of a person applying for aid from public funds") Despite this definition, precisely what constitutes a "means test" in the context of federal programs that distribute benefits on the basis of need is not clear Some federal programs look to both an applicant's income *and* his or her resources to determine eligibility *See, e g*, Medicaid program, 42 U S C. §§ 1396–1396v (1994 & Supp II 1996), Supplemental Security Income program, 42 U S C. §§ 1381–1381a (1994), Food Stamp program, 7 U S.C §§ 2011–2032 (1994 & Supp II 1996) Others look *only* to income without any inquiry into resources. *See, e g*, National School Lunch program, 42 U S C §§ 1751–1769h (1994 & Supp II 1996); Women, Infants & Children program, 42 U S.C § 1786 (1994 & Supp II 1996) Still others presume need on the basis of area of residence, enrollment in another welfare program, or some other factor *See, e.g.*, Indian health services, 42 C F R. § 36 12 (eligibility based upon area of residence), Commodity Supplemental Food Program, 7 U S C. § 612c note (1994) (eligibility based upon enrollment in another government benefit program for low-income persons), Chapter 1 migrant education program, 20 U S.C. § 6398 (1994) (presumption of need for migrant children)

[15] An unrelated provision of the PRA itself hints at the ambiguity of the phrase "federal means-tested public benefit" Section 911 of the PRA ensures that individuals whose benefits have been reduced because of an act of fraud by the individual may not receive increased benefits under "any other means-tested welfare or public assistance program for which Federal funds are appropriated" as a result of such reduction. § 911(a), 110 Stat. at 2353. The provision then defines the phrase "means-tested welfare or public assistance program for which Federal funds are appropriated" to include "the food stamp program , any program of public or assisted housing under title I of the United States Housing Act of 1937 ., and any State program funded under part A of title IV of the Social Security Act." § 911(b), 110 Stat at 2353 The provision does not state whether these programs are intended to be exhaustive or exemplary, but, in any event, the fact that Congress concluded that it was necessary to provide a definition of some sort suggests that Congress did not believe that the meaning of the defined phrase was plain.

rules. Therefore, the critical question is not whether the phrase "federal means-tested public benefit" is plain when read in isolation, but rather whether the phrase reveals that Congress intended to incorporate the definition that the Senate had deleted, with the House's acquiescence, as a consequence of its compliance with the budgetary rules established by section 313. The PRA's definition of "federal public benefit" does not reveal such an intention. That same definition was already in the bill at the time Senator Exon raised his point of order objecting to the definition of "federal means-tested public benefit." Its inclusion in the final bill, therefore, cannot reasonably be viewed as a rejoinder to Senator Exon's objection.

Moreover, even apart from the operation of section 313, it is a well-settled canon of interpretation that "where the final version of a statute deletes language contained in an earlier draft, [it may be presumed] that the earlier draft is inconsistent with ultimate congressional intentions." *In re Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1153 (9th Cir. 1991); *see also Russello v. United States*, 464 U.S. 16, 23–24 (1983); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (Congress's deletion of provision "strongly militates against a judgment that Congress intended a result that it expressly declined to enact"); *cf. INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (" 'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.' ") (citations omitted). That canon surely applies with particular force in a context such as this, in which the deletion occurs by reason of an independent congressional statute that governs the nation's budgeting process.

A second textual argument that could be made in support of a broader definition arises from the list of exceptions to "federal means-tested public benefit" programs in section 403(c)(2) of the PRA. The inclusion of some discretionary programs in this list of exceptions would be unnecessary unless the term itself included such programs. As an initial matter, we note that the logic of this argument proves too much, particularly in light of other drafting flaws that appear in the Act. The same provision that excepts certain discretionary programs from the limitation on eligibility for "federal means-tested public benefit[s]," for example, also excepts certain programs specified by the Attorney General that are not conditioned on "the individual recipient's income or resources." § 403(c)(2)(G), 110 Stat. at 2266. The view that Congress would not have excepted a program that was not otherwise covered would erroneously suggest that "means-tested" must be a more expansive term than the phrase "condition[ed] . . . on the individual recipient's income or resources."

More to the point, the list of exceptions included in section 403(c)(2) is quite plausibly understood as an inconsistency resulting from the proper operation of the Byrd rule itself. The remedy provided in section 313 is a blunt instrument

offering a basis for striking extraneous material in a reconciliation bill, but no mechanism for re-drafting remaining legislative provisions to conform them to the legislation as revised by application of the Byrd rule. Indeed, there was no careful mark-up of the bill following the deletion of the definition of "federal means-tested public benefit," where inconsistent provisions might have been brought into conformity.[16]

Moreover, it is unlikely that members of Congress would have seen the list of exceptions as obviously inconsistent with the PRA as revised by application of the Byrd rule. The categorization of particular programs as mandatory or discretionary is not at all obvious, and it is likely that many, if not most, members did not know precisely which programs fell into which category.[17] In addition, the list of exceptions can be seen as Congress's attempt to safeguard certain programs from any definitional skirmishes and ensure their exception.[18]

We are also unpersuaded that the legislative history of the PRA supports the conclusion that Congress intended to enact extraneous material through the reconciliation process over the sustained objection of a member of the Senate. Although noting that the definition of "federal means-tested public benefit" was deleted from the bill through operation of section 313, the conferees' report on the PRA nonetheless asserts that "[i]t is the intent of the conferees that [the deleted] definition be presumed to be in place for purposes of this title." 142 Cong. Rec. 20,484 (1996). We believe that this statement in the conferees' report cannot be taken as controlling.

As noted above, " '[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.' " *Cardoza-Fonseca*, 480 U.S. at 442–43 (citations omitted). Here, this rule cannot plausibly give way to contrary legislative history. Both houses of Congress deleted the definition of "federal means-tested public benefit": the Senate did so on the basis

[16] Similar inconsistencies appear in other provisions of the PRA as a result of Byrd rule deletions For example, the family cap provision of S 1956, *see* § 103 of July 16 version of S 1956 (establishing new section 408(a)(2) of TANF program), was deleted through a Byrd rule objection The conference report notes this deletion and the provision does not appear in the final version of the PRA 142 Cong Rec 20,459 (1996) Nevertheless, a reference to the family cap provision remains, in § 103 of the PRA (establishing new § 402(a)(7) of title IV of the SSA), which permits states to waive program requirements in cases of domestic violence. 110 Stat. at 2112, 2115

[17] In fact, during Senate consideration of the conference version of the bill, Senator Graham confirmed, for himself and for any other members that might not have analyzed the list of excepted programs, that the post-conference version of the bill was consistent with the Senate's earlier Byrd rule objections, defining "federal means-tested public benefit" as applicable only to mandatory programs *See infra* note 20

[18] As a result, we do not believe it to be significant that the final version of the PRA also included exceptions for two discretionary programs that did not appear in the Senate version of the PRA from which the broad definition of "federal means-tested public benefit" had been deleted Specifically, the Head Start and Job Training programs were only included in the House's final list of exempted programs, and not the Senate's, even though they do appear in the final version of § 403(c)(2) 110 Stat. at 2266. The inclusion of these two additional exceptions does not change our conclusion because there is no reason to believe that the inclusion of exceptions for these particular discretionary programs, more than the exceptions for the other discretionary programs, was intended to do more than safeguard them from further definitional disagreements In any event, the inclusion in the final bill of two additional discretionary programs seems to us a most oblique means for Congress to reinsert a definition of "federal means-tested public benefit" that had previously been struck

of the CBA, and the House acceded to the Senate. A conference committee cannot essentially overrule those decisions by including contrary language in its report. To permit this to occur not only would run counter to the canon against construing a statute to include terms that Congress had earlier discarded, *id.*, but, even more fundamentally, would undermine the rules that were established with such care in section 313, which permit a Senator to object to extraneous material that the conference might include in the legislation itself, but provide no mechanism for correcting the conference's explanatory statement.[19] Finally, subsequent Senate colloquy — admittedly an insubstantial grounding for legislative intent if standing alone — confirms the understanding that a definition that would have extended the term to encompass discretionary programs was deleted because it was outside the subject matter scope of the reconciliation process.[20]

We thus conclude that the legislative record provides strong support for the proffered construction of the PRA and that the inconsistencies noted above, while giving rise to some ambiguity, are insufficient to rebut the evidence that Congress intended to reach only mandatory spending programs. We, accordingly, turn to the second step of the *Chevron* inquiry.

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[19] Section 313 permits a Byrd rule objection to be made at various points throughout the legislative process, including after the bill has been reported out of conference. 2 U.S.C. § 644(c). Thus, the statute allows for the possibility that Congress might attempt to reinsert a deleted provision into a bill during conference, and provides the Senate with the opportunity to renew its Byrd rule objection if it insists upon the deletion However, because a Byrd rule objection can be raised only against legislative language, not against explanatory statements in the conference report, *see* § 644(a), allowing a conference report statement to act as the equivalent of legislative language effectively abolishes the statutory mechanism established to ensure the integrity of the Byrd rule process

[20] Specifically, in the debate over the conference report on the Senate floor, Senator Graham sought to confirm the exact scope of the term "federal means-tested public benefit." After reviewing the history of the Byrd rule objection and the Parliamentarian's ruling, Senator Graham engaged Senator Kennedy in the following colloquy.

> *Mr. Graham* . . . [W]ould the Senator agree that, when the Senate struck these sections as violating the Byrd rule, the Senate's intent was to prevent the denial of services in appropriated programs such as those that provide services to victims of domestic violence and child abuse, the maternal and child health block grant, social services block grant, community health centers and migrant health centers?
>
> . . .
>
> *Mr. Kennedy* Yes. Under the Byrd rule, the budget reconciliation process cannot be used to change discretionary spending programs. Only mandatory spending is affected.

142 Cong. Rec. 20,975 (1996).

Senator Graham subsequently asked Senator Exon, who was one of the Senate conferees on the bill, whether "the version of the bill recommended in this conference report is consistent with this understanding." *Id* Senator Exon confirmed that it was. Later during the debate, Senator Graham raised this issue again with another conferee, Senator Chafee:

> *Mr. Graham* I wonder if my colleague could address one point on this bill. I notice that the term "Federal means-tested public benefit" was defined in previous versions of the bill However, in this conference report, no definition is provided.
>
> *Mr Chafee* . . [W]hen the bill was considered in conference, I understand that there was an intentional effort to ensure this provision complied with [the] Byrd rule by omitting the definition of that particular term.
>
> In other words, then, the term "Federal means-tested public benefit" — if it is to be in compliance with the Byrd rule — does not refer to discretionary programs.

Id at 20,979.

II. *Chevron Step II*

Under the second step of the *Chevron* analysis, two questions arise. First, it is necessary to determine whether Congress intended for agencies or courts to resolve the ambiguity that Congress, either intentionally or inadvertently, failed to resolve. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("[a] precondition to deference under Chevron is a congressional delegation of administrative authority"); *see also Johnson v. United States R.R. Retirement Bd.*, 969 F.2d 1082, 1088 (D.C. Cir. 1992) ("If agencies are simply interpreting a statute, but have not been granted the power to 'administer' it, the principle of deference applies with less force."), *cert. denied*, 507 U.S. 1029 (1993). Second, if Congress intended for agencies to resolve the ambiguity, then it is necessary to determine whether the proposed agency interpretation is "permissible." *Chevron*, 467 U.S. at 843.[21] If Congress intended for the agencies to resolve the interpretive ambiguity, and the agency resolution is permissible, then the agency construction is binding.[22] *See id.*

A.

Congress need not expressly authorize agencies to construe ambiguous statutory terms in order for courts to be bound by agency constructions. In *Chevron* itself, for example, the Court deferred to an Environmental Protection Agency ("EPA") construction of the Clean Air Act, even though no statutory language expressly empowered that agency to impose a binding interpretation of the term "stationary source." The Court simply inferred that Congress must have intended for the EPA, as the agency entrusted with administering the Clean Air Act, to resolve the policy choices that inhere in the interpretation of ambiguous statutory language. *See Chevron*, 467 U.S. at 843. The Court explained that this inference was reasonable because agencies generally possess superior expertise and greater political accountability than courts. *See id.* at 865–66.

On the other hand, Congress may impliedly authorize courts to interpret a particular statutory provision, even though an agency has been generally charged with administering the statute as a whole. In *Adams Fruit Co.*, for example, the Court refused to defer to the Department of Labor's resolution of the question whether exclusivity provisions in state worker compensation laws trumped a federal private right of action under the Migrant and Seasonal Agricultural Worker Protection

[21] Although the Court stated in *Cardoza-Fonseca* that *Chevron*-deference does not apply to pure questions of law, such as the one at issue here, it has subsequently retreated from this position Our memorandum proceeds on the assumption that *Chevron* applies to such questions. *Cardoza-Fonseca*, 480 U.S at 454–55 (Scalia, J., concurring)

[22] Even if Congress has *not* entrusted the interpretative function to an agency, courts should still give careful consideration to agency constructions that are based on expertise and to which they have consistently adhered. *See, e g., Atchison, Topeka and Santa Fe Ry. v. Pena*, 44 F 3d 437, 445 (7th Cir. 1994) (Easterbrook, J , concurring), *aff'd sub nom, Brotherhood of Locomotive Engineers v Atchison, Topeka & Santa Fe Ry*, 515 U S 1141 (1995).

Act, 29 U.S.C. §§ 1801–1872 (1994 & Supp. I 1995) ("Worker Protection Act"). Even though the Department was responsible for administering the Worker Protection Act generally, the Court concluded that Congress intended for the judiciary, not the agency, to construe the contours of the private right of action that the Worker Protection Act created. *See Adams Fruit Co.*, 494 U.S. at 649. The Court based that conclusion primarily on the fact that the Department was not required to interpret the private right of action provisions as an incident of its general administration of the Worker Protection Act, as those provisions established a parallel and independent enforcement mechanism. *See id.* at 649–50.

In our view, the delegation question presented here is more analogous to *Chevron* than to *Adams Fruit Co.* Although the PRA does not expressly delegate general administrative authority to HHS, HUD, or, for that matter, to any other particular agency, the PRA effectively amends the statutes that establish the assistance programs over which HHS, HUD and other federal agencies have already been delegated administrative authority. Because those agencies possess general administrative authority to interpret eligibility criteria set forth in statutes enacted prior to the PRA, we believe it to be a fair inference that Congress intended for the changes effected by the PRA to be administered in the same manner.

In an analogous context, the Third Circuit deferred to HHS' construction of the Hyde Amendment, even though, as the dissent in that case pointed out, the Hyde Amendment does not expressly delegate administrative authority to any agency. *Compare Elizabeth Blackwell Health Ctr. for Women*, 61 F.3d at 182, *with id.* at 196 (Nygaard, J., dissenting). The court concluded that HHS' authority to administer the Medicaid statute necessarily included the authority to construe legislation that amended the Medicaid statute's eligibility requirements. *Id.* at 182; *see also Fort Wayne Community Schools v. Fort Wayne Educ. Ass'n*, 977 F.2d 358, 365 (7th Cir. 1992) (deferring to Postal Service's construction of a criminal statute on the ground that it was "intimately connected" to the purposes of the statute that Postal Service was charged with administering), *cert. denied*, 510 U.S. 826 (1993); *Associated Third Class Mail Users v. United States Postal Serv.*, 600 F.2d 824, 826 n.5 (D.C. Cir.), *cert. denied*, 444 U.S. 837 (1979) (same).

The case for deference is even stronger here, moreover, because the PRA not only amends the eligibility requirements for the programs that these agencies administer, but also expressly assigns these agencies the responsibility of informing the public of the changes in those eligibility requirements that the PRA effects. Section 404(a) of the PRA requires federal agencies that administer assistance programs to provide the public with information about how the PRA changes the eligibility requirements for those programs.[23] This assignment, we believe, impliedly delegates to these agencies the authority to resolve the meaning of the

[23] "Each Federal agency that administers a program to which section 401, 402, or 403 applies shall, directly or through the States, post information and provide general notification to the public and to program recipients of the changes regarding eligibility for any such program pursuant to this subtitle." 110 Stat. at 2267

phrase "federal means-tested public benefit": agencies must first interpret the meaning of the term "federal means-tested public benefit" in order to comply with section 404(a)'s mandate to inform the public of the PRA's impact on eligibility requirements. Only by determining whether that term applies to both mandatory and discretionary assistance programs (among other questions of application) will agencies be able to determine who is eligible for the programs that they already administer pursuant to separate statutory delegations. Section 404(a)'s notification requirement serves a useful function, moreover, only to the extent that the agencies are able to provide *accurate* information about the eligibility changes that the PRA mandates. If courts are free to reject reasonable agency interpretations of that term, then agencies will be forced to risk providing inaccurate eligibility information or to refrain from providing complete eligibility information altogether. Because neither result seems consistent with the purpose behind section 404(a), it is proper to infer that Congress intended for the agencies to provide the authoritative construction of the term "federal means-tested public benefit" when it assigned them the notification task set forth in section 404(a).

In light of the agencies' statutorily assigned responsibilities, the agencies cannot fairly be viewed as "trying to 'bootstrap' [themselves] into an area in which [they have] no jurisdiction" in seeking deference for their construction of the term "federal means-tested public benefit." *Wagner Seed Co. v. Bush*, 946 F.2d 918, 923 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 970 (1992) (citation omitted). Rather, they are offering an interpretation that results from the "intimate connection" between the purposes of the statutes that the agencies already administer and those of the PRA generally, *Fort Wayne Community Schools*, 977 F.2d at 365, and that arises in connection with the "special duty" that section 404(a) of the PRA assigns them. *See FLRA v. Department of Treasury*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1055 (1990).

We are aware of those cases that assert that courts should not defer to statutes that are "general" in nature or that are subject to interpretation by more than one agency. *See, e.g., Johnson v. United States R.R. Retirement Bd.*, 969 F.2d at 1088 (citing cases). We do not believe that this rule of construction should apply here. The rule has been invoked primarily in cases in which agencies seek *Chevron* deference for their construction of statutes that have been expressly entrusted to other agencies for administration, *see id.; Cheney R.R. Co. v. Railroad Retirement Bd.*, 50 F.3d 1071, 1073–74 (D.C. Cir. 1995), that are designed to ensure that agencies remain publicly accountable or proceed in a fair manner, *see, e.g., Professional Reactor Operator Soc'y v. United States Nuclear Regulatory Comm'n*, 939 F.2d 1047, 1051 (D.C. Cir. 1991); *see Air North Am. v. Department of Transp.*, 937 F.2d 1427, 1436 (9th Cir. 1991), or that are not intimately connected to the mission of the agency that seeks deference. *See, e.g., Professional*

Airways Sys. Specialists v. FLRA, 809 F.2d 855, 857 n.6 (D.C. Cir. 1987). The results in these cases are, therefore, best explained as particular applications of the justifiable presumption that Congress does not intend for courts to be bound by agency constructions that are beyond agency expertise, *see, e.g., Colorado Nurses Ass'n v. FLRA*, 851 F.2d 1486, 1488 (D.C. Cir. 1988), or that concern provisions that are designed to ensure agencies proceed in a fair and accountable manner, *see Air North Am. v. Department of Transp.*, 937 F.2d at 1436. These cases do not establish, in our view, a general presumption in favor of judicial resolution of all statutory ambiguities that confront more than a single agency.

Indeed, *Chevron*'s emphasis on the greater political accountability of agencies counsels against a rule of construction that would afford judges the last word on the meaning of any statute that does not authorize a single agency to administer it. *See Chevron*, 467 U.S. at 865–66. Where, as here, a statute assigns a group of agencies a particular task that is related to the duties that the agencies already have been assigned by their governing statutes, Congress may be presumed to have intended for these agencies to resolve any ambiguities that may arise. That the PRA does not assign any particular agency primary interpretive responsibility does not change the analysis. Congress may have intended for the courts to resolve the meaning of the term "federal means-tested public benefit" in the event of unresolved interpretive conflicts among the agencies identified by section 404. There is no reason to suppose, however, that Congress intended for unelected judges to countermand a *unanimous* resolution of the policy question by the agencies closest to it. *Cf. American Fed'n of Gov't Employees v. FLRA*, 2 F.3d 6, 10 (2d Cir. 1993) ("[W]hen two agencies, each examining statutes they are charged with administering, agree as to the interplay of the statutes, there is no more reason to mistrust their congruent resolutions than there is to mistrust action taken by a single agency."); *see also Salleh v. Christopher*, 85 F.3d 689 (D.C. Cir. 1996) (suggesting that joint agency interpretations may deserve deference); *cf. Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir. 1985) (declining to defer to joint agency construction but noting that Congress may delegate "dual lawmaking authority"). So long as the agencies identified by section 404(a) concur in their interpretation of the term "federal means-tested public benefit," therefore, we believe that courts would be bound to accord that interpretation *Chevron* deference.

Finally, we do not believe that the deference that the agencies receive under *Chevron* should turn on whether their construction of the term "federal means-tested public benefit" would be deemed an "interpretative" or "legislative" rule under the Administrative Procedure Act. We agree with those courts that have concluded that *Chevron* deference turns solely on whether the agency's interpretation may fairly be understood to be one for which Congress intended judicial deference to apply, *see, e.g., Elizabeth Blackwell Health Ctr. for Women*, 61 F.3d at 182; *id.* at 190–96 (Nygaard J., dissenting) (reviewing conflicting caselaw);

Kelley v. EPA, 15 F.3d 1100, 1108 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1110 (1995); *see generally* Robert A. Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1 (1990), and not on whether the proposed construction is "interpretative" or "legislative" in nature.[24] The latter determination, in our view, relates only to the procedural question whether the agency's rule may be promulgated outside the process of notice and comment rulemaking. That determination should have no bearing on the entirely separate question whether Congress intends for courts or agencies to resolve the interpretive ambiguity at issue.[25]

B.

Given that Congress impliedly delegated to the agencies the responsibility for resolving the interpretive question raised by the PRA's use of the phrase "federal means-tested public benefit," the only remaining issue under step two of the *Chevron* analysis is whether the answer provided by the agencies "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. If it is, that construction is binding. *Id.*

A definition of the term "federal means-tested public benefit" that includes only mandatory assistance programs is manifestly "permissible." The second step of the *Chevron* analysis arises only if Congress failed to resolve whether the term "federal means-tested public benefit" applies to discretionary assistance programs. The conclusion that Congress left that question open is possible only if the phrase admits of the proffered construction. The same reasons that led us to conclude that there is strong evidence to support the HHS and HUD proffered definition of "federal means-tested public benefit," *see infra* pp. 22–31, therefore, also show that the proffered definition is a "permissible" one. Moreover, HHS and HUD assert that their reading "best balances our Departments' other statutory obligations with Congressional goals embodied in the [PRA]." Rabb/Diaz Letter at 1. Under *Chevron*, agency constructions based on reasonable assessments of statutory purposes are entitled to deference. *See Chevron*, 467 U.S. at 858.

[24] The Supreme Court has stated in post-*Chevron* dicta that interpretive rules are entitled to less weight than "norms that derive from the exercise of the Secretary's delegated lawmaking powers." *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991). More recently, however, the Court has intimated that interpretive rules may be entitled to *Chevron*-style deference. *See Reno v. Koray*, 515 U.S. 50, 60–61 (1995).

[25] Of course, there are clearly some instances in which informal agency interpretations may be presumed to be undeserving of full *Chevron* deference. There are sound reasons, for example, to presume that Congress does not intend for courts to defer to agency litigating positions. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212–13 (1988). Here, however, the agencies proffer their construction outside the litigation context. Moreover, we note that the very existence of the *Bowen* rule, which precludes the application of *Chevron* deference to agency litigating positions, would be unnecessary if all "interpretative" rules—including those fashioned outside the litigation process—were already precluded from receiving such deference.

CONCLUSION

We accordingly conclude that the HHS/HUD proffered definition constitutes a permissible and legally binding construction of the PRA.

DAWN E. JOHNSEN
Acting Assistant Attorney General

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

Delegation of the President's Power To Appoint Members of the National Ocean Research Leadership Council

Draft amendments to 10 U S.C. § 7902 empowering the President to delegate to the head of a department his authority to appoint certain members of the National Ocean Research Leadership Council would not violate the Constitution's Appointments Clause.

January 29, 1997

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE NAVY

This responds to your letter of January 6, 1997, seeking our opinion whether Congress could authorize the President to delegate, to the head of a department, his power to appoint members of the National Ocean Research Leadership Council ("Council"). Letter for Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, from Steven S. Honigman, General Counsel of the Navy (Jan. 6, 1997) ("January 6 Letter"). We believe that Congress could do so.

Attached to your letter are draft amendments to the provisions creating the Council, 10 U.S.C. §§ 7901–7903 (Supp. II 1996).[1] The existing provisions conflict with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, under which the President, with the Senate's advice and consent, appoints all officers of the United States, except that "the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." In our view, it is permissible for the members of the Council to be inferior (rather than principal) officers, because the Council will perform "certain, limited duties" and will be "limited in jurisdiction" to one particular program.[2] *See Morrison v. Olson*, 487 U.S. 654, 671–72 (1988); *cf.* 41 U.S.C. § 46(a) (1994) (creating Committee for Purchase From People Who Are Blind or Severely Disabled, the members of which may all be inferior officers). However, contrary to the Appointments Clause, the existing statute vests the appointment of some members of the Council in private entities or officers who are not the heads of departments. The draft amendments would correct this infirmity. *See Statement on Signing the National Defense Authorization Act for Fiscal Year 1997*, 2 Pub. Papers of William J. Clinton 1645, 1646–47 (Sept. 23, 1996).

[1] Editor's Note. Section 7902 was substantially revised by the National Defense Authorization Act for Fiscal Year 1998, Pub L No 105–85, § 241(a), 111 Stat 1629, 1665–66, on November 18, 1997 Section 7903 was completely revised by the same Act *Id* § 241(b)(1), 111 Stat. at 1666

[2] Some Council members, in addition, will be "limited in tenure" to two-year terms *See Morrison v. Olson*, 487 U S 654, 672 (1988)

Under the draft amendments, the President would appoint those members of the Council who, under the existing law, would not be properly appointed.[3] The amendments would empower the President to delegate this authority to the head of a department but would permit no further delegation. *See* Draft 10 U.S.C. § 7902(j).

We believe that such a provision would be constitutional. Under the Appointments Clause, Congress could vest the appointment of the Council's members in the President alone or in the head of a department. The Appointments Clause places broad discretion in the Congress to choose among the alternative appointment mechanisms "as they think proper." *See Morrison*, 487 U.S. at 673 ("[T]he inclusion of 'as they think proper' seems clearly to give Congress significant discretion to determine whether it is 'proper' to vest the appointment of, for example, executive officials in the 'courts of Law.' "). Furthermore, an exercise of Congress's discretion along the lines of the draft provision would not "diffus[e]" the appointment power beyond the officials named in the Constitution and thus would square with the principle "that those who wield[ ]" the appointment power should be "accountable to political force and the will of the people." *Freytag v. Commissioner*, 501 U.S. 868, 883, 884 (1991); *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 152 n.82 (1996). Congress would vest the appointment power only in the officials identified in the Appointments Clause and would simply authorize the President to decide which of those officials would act in a particular instance.

Although we believe that the proposal would be constitutional, you may wish to consider revising it to specify, at least by a description, the department heads to whom the President could delegate his authority. For example, the provision might be limited to the heads of departments whose responsibilities are germane to the work of the Council. This revision would counter any argument, whether ulimately persuasive or not, that Congress had improperly delegated its responsi-

[3] Under the draft, the President would thus appoint seven members, instead of the three who would have been appointed by private entities and the four who would have been appointed by an officer not the head of a department Draft 10 U S C § 7902(b)(13)–(16). As under existing law, 10 members of the Council would occupy full-time positions to which they have been appointed by the President, with the advice and consent of the Senate *Id* § 7902(b)(1)–(8), (11), (12) The statute would assign them additional germane duties Two others—the Director of the Defense Advanced Research Projects Agency and the Director of the Minerals Management Service of the Department of the Interior—would not be appointed to any position by the President, but appear to be inferior officers who have been properly appointed by heads of departments and who would be given additional germane duties The Director of the Defense Advanced Research Projects Agency carries out certain duties assigned to the position by statute, *see* 15 U S C § 5207(c) (1994), Congress has specifically set his salary, 5 U S C § 5316 (Supp II 1996), and he is appointed by the head of a department, the Secretary of Defense, under his statutory authority, DoD Directive No 5134 10, at 4 (Feb 17, 1995) *See Freytag v Commissioner*, 501 U.S 868, 883 (1991) The status of the Director of the Minerals Management Service may be less certain Although the Secretary of the Interior appoints the Director, *see* Reorganization Plan No 3 of 1950, § 2, 3 C F R. 1003, 1003 (1949–1953), *reprinted in* 5 U S C app at 1468 (1994), *and in* 64 Stat 1262 (1950), the Director's salary is not set by statute However, the Director has some responsibilities assigned by statute, *see, e.g* , 33 U S.C § 2803(e)(2) (1994), 25 U.S.C. § 4041 (1994), in addition to the very substantial duties he exercises by regulation, 30 C F R pts 201–290 (1996) Thus, he too appears to be a properly appointed inferior officer

bility under the Appointments Clause by conferring an authority on the President without any standards at all.

Finally, as you explain in your letter, one reason for specifically providing for delegation of the appointment power here is to take account of "the apparent emphasis on accommodation of a variety of interests in the deliberations of the Council." January 6 Letter at 2. While not disputing your point, we note that we would not interpret the requirements that some members of the Council "represent the views" of various interests as in any way disabling the President from insisting that all members of the Council act in accordance with his policies. *See Myers v. United States*, 272 U.S. 52, 135 (1926). We understand the statute as requiring the selection of persons with particular backgrounds and perspectives, but the "interests" to be sought by each member can only be those of the United States.

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

Waiver of Oath of Allegiance for Candidates for Naturalization

The required oath of allegiance as a condition of naturalization under section 337 of the Immigration and Nationality Act, 8 U.S.C. § 1448(a), cannot be waived.

February 5, 1997

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
IMMIGRATION AND NATURALIZATION SERVICE

This letter responds to your request for the advice of this Office as to whether the Immigration and Naturalization Service ("INS") can waive the statutory requirement that all applicants for naturalization take an oath of allegiance, found at section 337(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1448(a) (1994). *See* Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from David A. Martin, General Counsel, Immigration and Naturalization Service (Jan. 8, 1997) ("INS Memo"). We gave you our views on this question by telephone on January 31, 1997, and hereby memorialize that advice.

It is our conclusion that the oath requirement of section 337 cannot be waived. Since the earliest days of our republic, Congress has exercised its power to "establish an uniform Rule of Naturalization," U.S. Const. art. I, § 8, cl. 4, to require some form of an oath of allegiance as a condition of naturalization. *See* Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103, 103 (requiring applicants for naturalization to take oath "to support the Constitution of the United States"); *see also* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, 7 *Immigration Law and Procedure* § 96.05[1] (1996) (noting that "U.S. naturalization laws have always required an oath of allegiance as a prerequisite to naturalization" and chronicling statutory evolution of that oath). As "a promise of future conduct," *Knauer v. United States*, 328 U.S. 654, 671 (1946), the oath of allegiance has been, and remains, an "indispensable legal requirement[]" of naturalization. *United States v. Tuteur*, 215 F.2d 415, 417 (7th Cir. 1954); *see also United States v. Shapiro*, 43 F. Supp. 927, 929 (S.D. Cal. 1942) ("The alien makes a contract with the government of the United States. In return for the benefits and high privileges bestowed upon the alien, he makes a solemn agreement expressed in the oath required of all who become citizens."); *cf. Luria v. United States*, 231 U.S. 9, 22 (1913) ("Citizenship is membership in a political society and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other.").

The current version of the oath of allegiance contains five elements: (1) support the Constitution; (2) renounce all allegiance to any foreign state or sovereign; (3) support and defend the Constitution and laws of the United States against all enemies; (4) bear "true faith and allegiance" to the same; and (5) bear arms,

perform noncombatant service, or perform work of national importance on behalf of the United States. 8 U.S.C. § 1448(a). In order to attain U.S. citizenship, an applicant must satisfy each of these elements, for the INA demands strict compliance with its statutory conditions.[1] *See* 8 U.S.C. § 1421(d) (1994) ("A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter *and not otherwise.*") (emphasis added); *cf. INS v. Pangilinan*, 486 U.S. 875, 884 (1988) (courts' role in naturalization process requires "strict compliance with the terms of [the] authorizing statute"). Moreover, courts have long recognized that naturalization is a privilege, not a right, to be granted only in accordance with the precise conditions established by Congress. *See Rogers v. Bellei*, 401 U.S. 815, 830 (1971) (" 'No alien has the slightest right to naturalization unless all statutory requirements are complied with.' ") (quoting *United States v. Ginsberg*, 243 U.S. 472, 475 (1917)).

Your memorandum raises the possibility that Congress might have intended to waive the oath of allegiance requirement when, in 1994, it amended section 312(b) of the INA to permit waiver of the English language and civics requirements for naturalization applicants who are "unable because of physical or developmental disability or mental impairment to comply therewith." 8 U.S.C. § 1423(b)(1) (1994). According to this argument, by waiving the English language and civics requirements for disabled applicants who would otherwise be denied naturalization, Congress must also have intended to waive the oath of allegiance for those disabled applicants who could not satisfy that requirement.

We agree with the conclusion reached in your memorandum that this argument is unpersuasive. INS Memo at 3. To begin with, as you have also noted, not all disabled applicants who would benefit from a waiver of the English language and civics requirements would also need a waiver of the oath requirement in order to become U.S. citizens. The fact that Congress chose to waive one statutory requirement for a certain subset of naturalization applicants in no way compels the conclusion that Congress thereby implicitly intended to waive another statutory requirement for a larger subset of applicants. On the contrary, both the language and legislative history of section 312(b) indicate that Congress intended *only* to waive the English language and civics requirements. *See* 8 U.S.C. § 1423(b)(1) (waiver applies only to § 1423(a), language and civics requirements); 140 Cong. Rec. 29,220 (1994) (Rep. Mineta's statement that individuals obtaining waiver under section 312(b)(2) would benefit immigrants "who are eager to declare their loyalty to this, their adopted country, by taking the oath of citizenship").

Indeed, it can be argued that Congress's failure to provide an explicit waiver of the oath requirement supports the view that Congress considered the oath of allegiance a critical, indispensable element of the naturalization process. To be

[1] The only category of naturalization applicants that Congress exempted from the oath requirement are children who are applying for derivative citizenship pursuant to 8 U.S.C. § 1433 (1994) and who, in the opinion of the Attorney General, are "unable to understand [the oath's] meaning." 8 U.S.C. § 1448(a).

sure, Congress recognized that there might be naturalization applicants who, because of serious illness, permanent or developmental disability, advanced age, or other exigent circumstances, would be unable to take the oath of allegiance in a public ceremony as required by section 337(a). In 1990, Congress accommodated the needs of such applicants through the establishment of an alternative, expedited procedure for administration of the oath. *See* 8 U.S.C. § 1448(c). Notably, however, Congress chose not to excuse them from the oath requirement altogether, thereby reaffirming the centrality of the oath to the naturalization process.

In concluding that the oath requirement of section 337 cannot be waived, we do not disagree with the proposition advanced in your memorandum that section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1994), might require some sort of accommodation for persons who, because of their disabilities, cannot take the oath of allegiance. Whether there exists any accommodation to the oath requirement that would not result in a "fundamental alteration" of the naturalization program, *see Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979), and what the parameters of such an accommodation might be, are difficult and complex questions. Should you determine that you would like us to address these questions, we will solicit the views of the Civil Rights Division and the State Department.

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

Revocation of Citizenship

The Immigration and Naturalization Service has authority to institute either administrative or judicial proceedings to denaturalize citizens whose criminal convictions disqualified them from citizenship as a matter of law. Whether the proceedings are administrative or judicial, the INS must establish the allegations in its complaint by clear, unequivocal, and convincing evidence.

The INS has no authority to seek denaturalization if the INS examiner had discretion to find that an applicant was of good moral character, and in fact did exercise that discretion so as to find that the applicant was of good moral character, unless the INS establishes in its complaint by clear, unequivocal, and convincing evidence either that the applicant gave false testimony with the intention of obtaining an immigration benefit or that the examiner's decision resulted from the applicant's willful misrepresentation or concealment of a material fact.

The INS may seek denaturalization if the applicant made a false oral statement under oath (regardless of whether the testimony is material) with the subjective intent of obtaining immigration benefits. Alternatively, the INS may seek denaturalization if the applicant procured naturalization by concealment or willful misrepresentation of a material fact In either case, the INS must prove its complaint by clear, unequivocal, and convincing evidence.

March 3, 1997

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
IMMIGRATION AND NATURALIZATION SERVICE

You have asked for our opinion on certain questions that were originally raised by the House Subcommittee on National Security, International Affairs, and Criminal Justice of the Committee on Government Reform and Oversight, in connection with the Immigration and Naturalization Service's ("INS") naturalization program.[1] We begin by outlining the legal principles governing proceedings for denaturalization (or revocation of citizenship). See Parts I–III below. In light of those principles, we then answer the particular questions you have posed. See Part IV below.

I.

The controlling statute, the Immigration and Nationality Act ("INA") § 340(a), 8 U.S.C. § 1451(a) (1994), reads in relevant part as follows:

[1] *See* Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from the Office of the General Counsel, Immigration and Naturalization Service, *Re Request for OLC Opinion, Revocation of Naturalization: "Discretionary Approvals" and Misstatements* (Feb. 21, 1997) (the "INS Request").

Following the rule stated long ago by former Attorney General Murphy, this Office ordinarily declines to provide legal opinions in response to requests from Congress, its committees, or its Members, or to other persons or entities outside the executive branch. *See Request of the Senate for an Opinion as to the Powers of the President "In Emergency or State of War"*, 39 Op. Att'y Gen. 343, 347 (1939); *see also Office of Legal Counsel—Limitation on Opinion Function*, 3 Op O.L.C. 215 (1979). In this case, however, the request for an opinion has come to us from your agency, not from Congress

> It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any district court of the United States in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . .[2]

Section 340(a) provides two distinct legal bases for denaturalization or revocation of citizenship. The first permits the INS to seek revocation if the naturalized person has procured citizenship illegally. "[T]here must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship 'illegally procured;' and naturalization that is unlawfully procured can be set aside." *Fedorenko v. United States*, 449 U.S. 490, 506 (1981).

Second, revocation is available if the person procured naturalization "by concealment of a material fact or by willful misrepresentation." INA § 340(a), 8 U.S.C. § 1451(a).[3] Denaturalization on this basis "plainly contains four independent requirements: the naturalized citizen must have misrepresented or concealed some fact, the misrepresentation or concealment must have been willful, the fact must have been material, and the naturalized citizen must have procured citizenship as a result of the misrepresentation or concealment." *Kungys v. United States*, 485 U.S. 759, 767 (1988).

Whichever of these two theories the INS pursues in seeking denaturalization, it must prove the allegations in its complaint "by ' "clear, unequivocal, and convincing" evidence which does not leave "the issue in doubt." ' " *Id.* at 781 (citation omitted); *see also id.* at 772; *Fedorenko*, 449 U.S. at 505; *Polites v. United States*, 364 U.S. 426, 435 (1960); *Chaunt v. United States*, 364 U.S. 350, 355 (1960); *Schneiderman v. United States*, 320 U.S. 118, 123, 125 (1943).[4]

Once the United States has met its burden in a judicial denaturalization proceeding, the court must enter an order revoking the naturalization order and can-

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[2] The provision is undoubtedly constitutional. "The power of Congress to provide for denaturalization of naturalized citizens has long been viewed as an incident of its authority '[t]o establish a uniform Rule of Naturalization,' U.S. Const art I, § 8, cl 4, and necessary to protect the integrity of the naturalization process . . Conceptually, denaturalization does not fall within the general rule that citizenship can only be lost by voluntary action, because denaturalization is intended to redress errors in the naturalization process that would disentitle the individual to United States citizenship *ab initio* " *Voluntariness of Renunciations of Citizenship Under 8 U.S.C. § 1481(a)(6)*, 8 Op O L C 220, 226 n 14 (1984) (citations omitted)

[3] *See Costello v United States*, 365 U S 265, 272 (1961), *Knauer v. United States*, 328 U S 654, 671–74 (1946), *United States v Kowalchuk*, 773 F 2d 488, 494 (3d Cir 1985) (en banc), *cert denied*, 475 U S. 1012 (1986).

[4] *See* 4 Charles Gordon et al , *Immigration Law and Procedure* § 100 02[4][d][iv] at 100–38 (1996) (INS' burden is "conceptually not quite as exacting" as proof beyond a reasonable doubt)

celing the certificate of naturalization. *Fedorenko*, 449 U.S. at 518. The court "lack[s] equitable discretion to refrain from entering a judgment of denaturalization." *Id.* at 517.

Although proceedings for denaturalization have traditionally been judicial in character, administrative denaturalization is also permissible in some circumstances. We understand that, if the INS institutes denaturalization proceedings with regard to any of the naturalization cases approved between September 1995 and September 1996 that are currently the subject of a congressional investigation, those proceedings will ordinarily be administrative.

The relevant INA regulation, which was promulgated under the authority of INA § 340(h), *see Revocation of Naturalization*, 61 Fed. Reg. 55,550 (1996) (to be codified at 8 C.F.R. pt. 340),[5] provides a procedure for the reopening of naturalization proceedings by the district director under whose jurisdiction a naturalized citizen resides. The regulation authorizes the INS to "reopen a naturalization proceeding and revoke naturalization in accordance with this section, if the Service obtains credible and probative evidence which: (1) Shows that the Service granted the application by mistake; or (2) Was not known to the Service Officer during the original naturalization proceeding; and . . . (i) Would have had a material effect on the outcome of the original naturalization [proceeding]; and (ii) Would have proven that: (A) The applicant's application was based on fraud or misrepresentation or concealment of a material fact; or (B) The applicant was not, in fact, eligible for naturalization." *Id.* at 55,553–54 (to be codified at 8 C.F.R. § 340.1(a)). Notice of intent to reopen naturalization proceedings "must be served no later than 2 years after the effective date of the order admitting a person to citizenship," *id.* at 55,553 (§ 340.1(b)(1)), i.e., two years after the naturalized citizen has taken the oath of allegiance to the United States. The naturalized person has the opportunity to respond and may request a hearing, *id.* at 55,553 (§ 340.1(b)(3)), and has a right to counsel, *id.* at 55,554 (§ 340.1(b)(5)). The burden of proof in such administrative proceedings — as in judicial denaturalization cases — is on the INS to prove its complaint by clear, unequivocal and convincing evidence.[6] A decision adverse to the naturalized citizen may be appealed administratively, *id.* at 55,554 (§ 340.1(e)), and, if the administrative appeal is also adverse

[5] Statutory authority for administrative denaturalization proceedings was enacted in 1990, when Congress vested the Attorney General with the "sole authority to naturalize persons as citizens of the United States." Immigration Act of 1990, Pub. L. No. 101–649, § 401(a), 104 Stat. 4978, 5038, codified at INA § 310(a), 8 U.S.C. § 1421(a) (1994). At the same time, Congress extended to the Attorney General the authority to "correct, reopen, alter, modify or vacate an order naturalizing [a] person" that had previously been vested in naturalization courts. *Id.* § 407(d)(18)(D), 104 Stat. at 5046, codified at INA § 340(h), 8 U S C. § 1451(h) (1994). *See Magnuson v. Baker*, 911 F.2d 330, 335 n.11 (9th Cir. 1990) (construing the predecessor to § 340(h) to grant the naturalization courts "the inherent authority to set aside [naturalization] judgments for any reason cognizable under Federal Rule of Civil Procedure 60."); *see generally Simons v. United States*, 452 F.2d 1110, 1112–14 (2d Cir. 1971) (Friendly, J.) (outlining legislative intent of prior law).

[6] The INS' field guidance explains the Government's burden. *See Implementation Guidance: INA § 340(h); 8 C F.R. § 340: Standards for Issuance of Notice of Intent to Reopen Naturalization Proceedings and to Revoke Naturalization.*

to that individual, he or she may seek judicial review under INA § 310, 8 U.S.C. § 1421. *Id.* at 55,554 (§ 340.1(f)).

II.

In this Part, we examine revocation of citizenship on the first of the two bases — that naturalization was illegally procured. In Part III below, we turn to the second basis for denaturalization — that naturalization was procured by concealment of a material fact or willful misrepresentation.

As we have noted above, an alien may be naturalized only upon "strict compliance with the . . . 'terms and conditions specified by Congress.'" *INS v. Pangilinan*, 486 U.S. 875, 884 (1988) (quoting *United States v. Ginsberg*, 243 U.S. 472, 474 (1917)). *See also* INA § 310(d), 8 U.S.C. § 1421(d) ("A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this title *and not otherwise*") (emphasis added); *Maney v. United States*, 278 U.S. 17, 22 (1928) (Holmes, J.); *Tutun v. United States*, 270 U.S. 568, 578 (1926) (Brandeis, J.); *Johannessen v. United States*, 225 U.S. 227, 240–42 (1912); *Schneiderman*, 320 U.S. at 161–62 (Douglas, J., concurring); *United States v. Beda*, 118 F.2d 458, 459 (2d Cir. 1941) (A. Hand, J.). The ordinary prerequisites for naturalization are set forth in INA § 316, 8 U.S.C. § 1427 (1994), and include requirements as to lawful residence in the United States,[7] good moral character, attachment to the principles of the United States Constitution, and favorable disposition to the United States. At the time of applying for naturalization, the applicant bears the burden of establishing that he or she possesses the qualifications for citizenship. INA § 316(e), 8 U.S.C. § 1427(e); INA § 318, 8 U.S.C. § 1429 (1994). The standard of proof is whether the applicant has established the necessary facts by a preponderance of the evidence. *See* 8 C.F.R. § 316.2(b) (1997).

The requirement that the applicant be of good moral character is particularly relevant to the questions you have posed. A finding of good moral character is precluded as a matter of law if, within the statutory period required for establishing good moral character, the applicant falls within any of several categories set forth in INA § 101(f)(1)–(8), 8 U.S.C. § 1101(f)(1)–(8) (1994). These legally disqualifying categories include, among others, being an habitual drunkard; deriving one's income principally from illegal gambling; having two or more gambling convictions; and having been confined, as a result of a conviction, to a penal institution within the statutory period for 180 days or more. Of chief relevance here, the disqualifications include being "one who at any time has been convicted of an aggravated felony," INA § 101(f)(8), 8 U.S.C. § 1101(f)(8), or having other

[7] Accordingly, naturalization may be revoked for failure to enter the United States lawfully by means of a valid immigrant visa. *See, e.g., Fedorenko*, 449 U.S. at 514–15; *United States v. Schmidt*, 923 F.2d 1253, 1257 (7th Cir.), *cert. denied*, 502 U.S. 921 (1991); *Kowalchuk*, 773 F.2d at 492–93

criminal convictions or offenses detailed by the statute, INA § 101(f)(3), 8 U.S.C. § 1101(f)(3), or "one who has given false testimony for the purpose of obtaining any benefits under this Act," INA § 101(f)(6), 8 U.S.C. § 1101(f)(6). In Part II(A) below, we consider disqualifications based on a criminal record; in Part II(B), we turn to disqualifications based on false testimony.

A.

As we have noted, it is a requirement of being naturalized that the applicant be "a person of good moral character." INA § 316(a)(3), 8 U.S.C. § 1427(a)(3). As a matter of law, no applicant can be found to be "of good moral character" if he or she "at any time has been convicted of an aggravated felony." INA § 101(f)(8), 8 U.S.C. § 1101(f)(8).[8] Similarly, as a matter of law, no applicant is "of good moral character" if he or she has been convicted of, or has admitting to committing, certain other offenses within a specified period of time. INA § 101(f)(3), 8 U.S.C. § 1101(f)(3).[9] Accordingly, should the INS discover that a naturalized person, as a matter of law, had not satisfied the "good moral character" requirement because of disqualifying criminal convictions or offenses that fell within INA § 101(f)(3) or (f)(8), it could seek revocation on the grounds that that person's citizenship was "illegally procured," INA § 340(a), 8 U.S.C. § 1451(a). No statute of limitations applies to a judicial denaturalization proceeding under section 340(a).[10] Nor would the INS be estopped from seeking

[8] The definition of "aggravated felony" for this purpose is set forth in INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). "The legality of the [individual's] naturalization must be determined under the applicable provisions of the statutes as they were at the time of his admission to citizenship." *United States v. Riela*, 337 F.2d 986, 989 (3d Cir. 1964).

The INS has concluded that aggravated felonies other than murder bar a finding of good moral character as a matter of law only if the conviction occurred on or after November 29, 1990, relying on section 509(b) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5051 (1990) ("IMMACT"), *as amended by* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(7), 105 Stat. 1733, 1751 (1991) ("1991 Technical Amendments"). IMMACT § 509(a) struck out the reference in prior INA § 101(f)(8), 8 U.S.C. § 1101(f)(8), to the "crime of murder" as *per se* disqualifying, and inserted instead the more general term "aggravated felony." IMMACT § 509(b), however, made the new disqualification for aggravated felonies applicable only prospectively, *i.e.*, to convictions occurring on or after IMMACT's effective date (November 29, 1990). The 1991 Technical Amendments § 306(a)(7) reinstated a conviction for murder as *per se* disqualifying, regardless of the time of the conviction. Nonetheless, it is the INS' view that an aggravated felony conviction for a crime other than murder, entered at any time before November 29, 1990, would be relevant in the broader determination of whether a person is of good moral character. *See* Legal Opinion, INS General Counsel, *Amended definition of "aggravated felony" and the section 101(f)(8) bar to good moral character* at 2 (Dec. 3, 1996).

[9] Most convictions (other than aggravated felonies) bar a finding of good moral character only if the conviction, or the applicant's incarceration or probation, occurred during the statutory period for which the applicant must prove good moral character (which, as a general rule, covers the period of five years preceding the application for naturalization and the interval between the application for naturalization and the naturalization ceremony itself). *Compare* INA § 101(f)(8), 8 U.S.C. § 1101(f)(8), *with* introductory text and other paragraphs in INA § 101(f), 8 U.S.C. § 1101(f). *See also* 8 C.F.R. § 316.10(b)(1), (2) & (c)(1) (1997).

[10] *See Schneiderman*, 320 U.S. at 174 (Stone, C.J., dissenting); 4 Gordon et. al, *supra* note 4, § 100.02[1][e] at 100-9. Thus, the Government sought to denaturalize the petitioner in *Costello* in 1952, and again in 1958, although he had been naturalized in 1925. *See Costello*, 365 U.S. at 266-68.

denaturalization if naturalization was illegally procured because INS agents failed to exercise due diligence in examining the application for naturalization.[11]

On the other hand, in reviewing an application for naturalization, the INS examiner has a certain degree of discretion in determining whether the applicant has satisfied the statutory requisites. For example, an examiner may take account of adverse conduct that is outside the statutory period for which good moral character is required to be established. *See* INA § 101(f) (last sentence), 8 U.S.C. § 1101(f), and INA § 316(e), 8 U.S.C. § 1427(e). Although the prior misconduct may justify the examiner in denying naturalization, it does not *require* such a determination. Thus, an examiner could conclude, based on the totality of the facts, that an applicant with such a record had demonstrated "good moral character" and was eligible for naturalization. Assuming that that person had satisfied all the other statutory prerequisites and was naturalized, there would be no basis for the INS to seek revocation of citizenship in such circumstances.

Suppose, for example, that an applicant has been convicted of a theft. Assume that the conviction occurred many years before the applicant sought naturalization, that any incarceration was ended before the statutory period (normally 5 years before naturalization), and that the offense was not sufficiently serious to qualify as an aggravated felony. The applicant disclosed the conviction to the examiner. The examiner considered the conviction, but concluded that the applicant had shown sufficient evidence of reformation that the conviction did not prove that the applicant was not currently a person of good moral character. *See* 8 C.F.R. § 316.10(a)(2). Because the conviction would not in this case preclude a finding of good moral character, granting naturalization would be within the discretion of the examiner: the applicant had disclosed the relevant information, and the examiner was satisfied that the applicant was eligible. Although a different examiner, on the same facts, might have found that the applicant did not meet the good moral character requirement, *id.*, there would be no basis for revocation: the facts would show neither that the applicant misrepresented or concealed material facts, nor that the applicant was statutorily ineligible for naturalization.

B.

As pointed out above, only persons of good moral character are legally eligible for naturalization. INA § 316(a)(3), 8 U.S.C. § 1427(a)(3). An examiner cannot find an applicant to be of good moral character if, during the period for which good moral character is required, the applicant "has given false testimony for the purpose of obtaining any benefits under [the INA]." *Id.* § 101(f)(6), 8 U.S.C.

[11] *See Fedorenko*, 449 U S. at 517 (court lacks "equitable discretion" to decline to enter denaturalization judgment once INS has proven failure to have met statutory requirements for naturalization); *see also Reno v Catholic Social Servs , Inc* , 509 U S. 43, 75–76 (1993) (O'Connor, J., concurring in judgment) *Cf Office of Personnel Management v Richmond*, 496 U S 414, 419–24 (1990) (questioning but not deciding whether estoppel ever lies against the Government)

§ 1101(f)(6). In *Kungys*, 485 U.S. at 779–81, the Supreme Court set forth the elements of this provision.

First, in contrast with the "misrepresentation" and "concealment" provisions of INA § 340(a), 8 U.S.C. § 1451(a), there is no requirement that "false testimony" within the meaning of INA § 101(f)(6) be material.

> The absence of a materiality requirement in [8 U.S.C.] § 1101(f)(6) can be explained by the fact that its primary purpose is not (like [8 U.S.C.] § 1451(a)) to prevent false pertinent data from being introduced into the naturalization process (and to correct the result of the proceedings where that has occurred), but to identify lack of good moral character. The latter appears to some degree whenever there is a subjective intent to deceive, no matter how immaterial the deception.

Kungys, 485 U.S. at 780.

Second, "testimony" in the sense in question "is limited to oral statements made under oath . . . . [I]t does not include 'other types of misrepresentations or concealments, such as falsified documents or statements not made under oath.' " *Id.* at 780 (citation omitted).

Third, 8 U.S.C. § 1101(f)(6) "applies to only those misrepresentations made with the subjective intent of obtaining immigration benefits." *Id.*

Finally, "unlike the misrepresentation clause of [8 U.S.C.] § 1451(a), the false testimony provisions of § 1101(f)(6) do not apply to 'concealments.' " *Id.* at 781.

To illustrate how this provision operates, suppose that an applicant gave an INS examiner false testimony under oath on a matter that had no bearing on the applicant's eligibility for naturalization. Even though the truth, itself, would not require denying naturalization, the false testimony might do so, by rendering the applicant disqualified for lack of good moral character. However, denaturalization could not be based on the bare misrepresentation itself. Should the INS seek denaturalization on the basis of "false testimony," it would be required to show, by clear, unequivocal and convincing evidence, that the defendant had given the "false testimony" with the subjective intent of obtaining the benefits of the INA — for example, because the applicant mistakenly believed that the information would preclude naturalization. Making such a showing would often pose substantial proof problems for the INS. *See Kungys*, 485 U.S. at 780 ("[I]t will be relatively rare that the Government will be able to prove that a misrepresentation that does not have the natural tendency to influence the decision regarding . . . naturalization benefits was nonetheless made with the subjective intent of obtaining those benefits.").[12] Moreover, in a decision that the Supreme Court

[12] *But see id.* at 807 n 3 (White, J., dissenting) ("[I]t is quite clear that when misrepresentations of fact are made in the process of applying for immigration and naturalization benefits, in a very real and immediate sense those misrepresentations are made 'for the purpose of obtaining' such benefits ").

reversed on other grounds, one court of appeals has further restricted the INS' ability to prevail on a "false testimony" claim by holding that the naturalized individual must have given the challenged oral statements under oath before a *court* or *tribunal*. *See Phinpathya v. INS*, 673 F.2d 1013 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 183 (1984).[13]

III.

The second principal basis on which the INS may seek denaturalization under INA § 340(a), 8 U.S.C. § 1451(a), is that naturalization was procured by "concealment of a material fact" or by "willful misrepresentation." As explained above, denaturalization on the basis of this theory would require the INS to show, under "the unusually high burden of proof in denaturalization cases," *Kungys*, 485 U.S. at 776, that there existed a misrepresentation or concealment that was willful and of a material fact, and that "the naturalized citizen [had] procured citizenship as a result of the misrepresentation or concealment." *Id.* at 767.

Not every misrepresentation or concealment is of a "material" fact. To be "material," the misrepresentation or concealment must be shown to be "predictably capable of affecting, *i.e.*, [having] a natural tendency to affect, the official decision . . . whether the applicant [met] the requirements for citizenship" or, more specifically, "whether the misrepresentation or concealment had a natural tendency to produce the conclusion that the applicant was qualified." *Id.* at 771–72 (Scalia, J., joined by Rehnquist, C.J.); *see also id.* at 783 (Brennan, J., concurring) (joining lead opinion and agreeing with its construction of provision, but writing separately to state view that "a presumption of ineligibility does not arise unless the Government produces evidence sufficient to raise a fair inference that a statutory disqualifying fact actually existed"); *id.* at 801 (O'Connor, J., concurring in part of lead opinion in which this test of materiality was set forth); *id.* at 803 (White, J., agreeing with part of lead opinion in which this test is set forth).[14] Relying on this test, the Supreme Court has held that a misrepresentation of an applicant's date and place of birth in a naturalization proceeding was *not*

[13] Apparently, whether the naturalization examiner is a "tribunal" is a question that the Ninth Circuit has not yet addressed *Cf Toquero v. INS*, 83 F 3d 429 (9th Cir. 1996) (not designated as a published precedent).

[14] Commentators have suggested that the various separate opinions in *Kungys*, particularly on the test of the materiality of a misrepresentation or concealment, has produced "confusion and uncertainty" 4 Gordon et al , *supra* note 4, § 100.02[3][b] at 100–15 One court of appeals has stated that "[a]fter *Kungys*, . it is no simple task to define the meaning of 'material' under the denaturalization statute The eight Justices who decided *Kungys* (Justice Kennedy did not participate) wrote five separate opinions and offered three distinct tests for determining when a statement is material." *United States v. Puerta*, 982 F 2d 1297, 1302 (9th Cir. 1992). In this court's view, the controlling test is that set forth in Justice Brennan's concurring opinion in *Kungys*, *id* at 1303–04 It understood that test to permit denaturalization only "where false statements are coupled with evidence giving rise to a 'fair inference' of ineligibility" *Id.* at 1304 (quoting *Kungys*, 485 U.S at 783 (Brennan, J , concurring))

We note that the Supreme Court has recently framed the question whether materiality of falsehood is an element of a violation of 18 U.S.C § 1014 in terms of the explanation of "materiality" given in the lead opinion in *Kungys* *See United States v Wells*, 519 U S 482, 489–90 (1997). It might therefore be argued that the Court has implicitly adopted the definition in the lead opinion

"material" as that term is used in INA § 340(a). *Id.* at 774. "There has been no suggestion that those facts were themselves relevant to [the applicant's] qualifications for citizenship. Even though they were not, the misrepresentation of them would have a natural tendency to influence the citizenship determination, . . . if the true date and place of birth would predictably have disclosed other facts relevant to his qualifications. But not even that has been found here." *Id.*

Thus, not every willful misrepresentation or concealment of an applicant's criminal record is a sufficient basis for denaturalization. In *Chaunt*, the Supreme Court held that a naturalized citizen who had willfully and falsely stated during the naturalization process, in writing and (apparently) orally under oath, that he had never been arrested could not be denaturalized under INA § 340(a). The Court indicated that it would not find the misrepresentation "material" merely because of "the tenuous line of investigation that might have led from the arrests to the [applicant's] alleged communistic affiliations." 364 U.S. at 355. *See also United States v. Sheshtawy*, 714 F.2d 1038 (10th Cir. 1983) (no basis for denaturalization when naturalized citizen had willfully and falsely answered question on INS form regarding prior arrests). *But see Costello v. United States*, 365 U.S. 265 (1961) (naturalized citizen could be denaturalized when he had willfully and falsely stated during naturalization process that his occupation was "real estate" although it was, in fact, that of bootlegger); *United States v. Oddo*, 314 F.2d 115 (2d Cir.) (Thurgood Marshall, J.) (concealment of arrests in naturalization process justified revocation, especially in view of seriousness of charges for which arrests were made), *cert. denied*, 375 U.S. 833 (1963); *United States v. Montalbano*, 236 F.2d 757 (3d Cir. 1956) (misrepresentation of criminal record during naturalization process held to be basis for revocation of citizenship); *Corrado v. United States*, 227 F.2d 780, 783 (6th Cir. 1955) (same as to concealment), *cert. denied*, 351 U.S. 925 (1956). We note also that if the applicant has personally corrected prior misrepresentations or concealments by making a full and complete disclosure later in the naturalization process, that corrective action may remove any basis for revocation. *Cf. United States v. Anastasio*, 226 F.2d 912, 917 (3d Cir. 1955), *cert. denied*, 351 U.S. 931 (1956) (because applicant in second naturalization proceeding disclosed criminal record he had concealed in first proceeding, there was no basis for revocation).

IV.

In light of these principles, we now turn to the particular questions you have posed.

Question 1. What authority does the Department have to revoke the citizenship of individuals who were naturalized but had criminal convictions for offenses that disqualified them from citizenship as a matter of law?

Answer. The INS has authority to institute either administrative or judicial proceedings to denaturalize citizens whose criminal convictions, *e.g.*, for aggravated felonies, disqualified them from citizenship as a matter of law. (Administrative proceedings are subject to judicial review.) *See* Part II(A) above. Whether the proceedings are administrative or judicial, the INS must establish the allegations in its complaint by clear, unequivocal and convincing evidence. *See* Part I above.

Question 2. What authority does the Department have to revoke the citizenship of individuals who were naturalized but had criminal records for offenses that did not disqualify them from citizenship as a matter of law, but which, in the discretion of the INS examiner, could have supported a conclusion that the individual was not of good moral character?

Answer. The INS has no authority to seek denaturalization if the INS examiner had discretion to find that an applicant was of good moral character, and in fact did exercise that discretion so as to find that the applicant was of good moral character, unless the applicant gave false testimony with the intention of obtaining an immigration benefit, or unless the examiner's decision resulted from the applicant's willful misrepresentation or concealment of a material fact. *See* Parts II and III above.

Question 3. If individuals with convictions described in question 2 could be denaturalized, what legal requirements would have to be observed in the process?

Answer. The elements that the INS would be required to show to establish either false testimony or willful misrepresentation (or concealment) of a material fact are set forth in Parts II(B) and III above. On either theory, the INS would be required to establish its complaint by clear, unequivocal and convincing evidence.

Question 4. Is there any legal basis for revoking citizenship based upon the absence of information in the government's records at the time of the naturalization about whether the individual had been convicted of a per se disqualifying offense or an offense which could have supported a finding of bad moral character?

Answer. The absence of information in INS records at the time of the naturalization is not determinative in a denaturalization proceeding. A certificate of citizenship is illegally procured if the applicant has not strictly complied with all the congressionally imposed prerequisites to the acquisition of citizenship. Hence, if later-discovered evidence establishes that a naturalized citizen failed to satisfy a legally mandatory requirement of naturalization, the INS may institute denaturalization proceedings in that case. Similarly, if the absence of information is attributable to the willful concealment or misrepresentation of a material fact by the applicant, and the applicant procured citizenship as a result of that misrepresentation or concealment, the INS may institute denaturalization proceedings. *See* Parts II and III above.

Question 5. What is the standard for revoking citizenship based on misstatements? Does this standard differ from the standard for denying an application based on a misstatement?

Answer. The INS may seek denaturalization based on a showing that the naturalized person has given false testimony for the purpose of obtaining a benefit under the INA. The INS need not prove the materiality of such false testimony, but must show that the misrepresentation was made with the subjective intent of obtaining immigration benefits. The testimony in question must have been an oral statement made under oath. The INS must prove its complaint by clear, unequivocal and convincing evidence. *See* Part II(B) above.

Alternatively, the INS may seek denaturalization based upon a showing that the naturalized person procured naturalization by concealment of a material fact or by willful misrepresentation. Proof of the materiality of the misrepresentation or concealment is required. Again, the INS must prove its complaint by clear, unequivocal and convincing evidence. *See* Part III above.

The standard for denying an application differs from the standard for denaturalization in two pertinent respects. First, an application for naturalization should be denied if the INS examiner is not satisfied that the applicant has shown, by a preponderance of the evidence, that he or she satisfies the statutory requirements for naturalization. In contrast, the INS bears the burden in a denaturalization proceeding of proving its case by clear, unequivocal and convincing evidence. Second, while the INS examiner has discretion, in some circumstances, to determine whether or not an applicant for naturalization is of good moral character, that discretion does not extend to the denaturalization process. *See* Part II(A) above.

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Preemptive Effect of the Bill Emerson Good Samaritan Food Donation Act

The Bill Emerson Good Samaritan Food Donation Act preempts state "good samaritan" statutes that provide less protection from civil and criminal liability arising from food donated in good faith for distribution to the needy than the Act provides.

March 10, 1997

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF AGRICULTURE

You have requested our views on the question whether the Bill Emerson Good Samaritan Food Donation Act (the "Act"), Pub. L. No. 104–210, 110 Stat. 3011 (1996) codified as amended at 42 U.S.C. § 1791 (Supp. II 1996), preempts state statutes that provide less protection from civil and criminal liability arising from food donated in good faith for distribution to the needy. We believe that Congress intended to establish a minimum level of immunity for those engaged in food donation and distribution. Accordingly, we believe that Congress intended to preempt state "good samaritan" statutes that provide less liability protection than the Act.

I.

In order to "encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals," the Bill Emerson Good Samaritan Food Donation Act precludes civil and criminal liability arising from food donated in good faith, except in cases of gross negligence or intentional misconduct. 42 U.S.C. § 1791. It amended and converted to affirmative law the Model Good Samaritan Food Donation Act (the "Model Act"), 42 U.S.C. §§ 12671–12673 (1994), which had been enacted in 1990 to provide states with model language for revising their existing good samaritan laws.[1] The current Act provides:

> (1) LIABILITY OF PERSON OR GLEANER.—A person or gleaner shall not be subject to civil or criminal liability arising from

[1] Every state and the District of Columbia prior to 1990 had enacted some form of statutory protection from liability for food donation and distribution. *See* H R Rep. No. 104–661, at 2–3 (1996) (citing "Summary of Good Samaritan Food Donation Statutes" prepared by Winthrop, Stimson, Putnam and Roberts in 1992 for "Share Our Strength," a non-profit hunger relief organization). These statutes are exceptions to the common law or statutory rule of strict liability for distributing food or any other defective product, the defective aspect of which causes injury. *Id* The statutes vary considerably, however Some provide liability only for gross negligence or intentional acts, while others impose liability for negligence. Still others limit liability if the donor reasonably inspects the food at the time of donation and has no actual or constructive knowledge of any defective condition Only one state has adopted the language in the Model Act. *Id.*

> the nature, age, packaging, or condition of apparently wholesome food or an apparently fit grocery product that the person or gleaner donates in good faith to a nonprofit organization for ultimate distribution to needy individuals.
>
> (2) LIABILITY OF NONPROFIT ORGANIZATION. — A nonprofit organization shall not be subject to civil or criminal liability arising from the nature, age, packaging, or condition of apparently wholesome food or an apparently fit grocery product that the nonprofit organization received as a donation in good faith from a person or gleaner for ultimate distribution to needy individuals.
>
> (3) EXCEPTION. — Paragraphs (1) and (2) shall not apply to an injury to or death of an ultimate user or recipient of the food or grocery product that results from an act or omission of the person, gleaner, or nonprofit organization, as applicable, constituting gross negligence or intentional misconduct.

42 U.S.C. § 1791(c).[2]

II.

As the Supreme Court has observed, preemption is fundamentally a question of congressional intent. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[t]he purpose of Congress is the ultimate touchstone in every pre-emption case") (quoting *Retail Clerks Int'l Ass'n v. Schermerhorn*, 375 U.S. 96, 103 (1963)). In assessing congressional intent, the Court has "long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Id.* In cases where "Congress has 'legislated . . . in a field which the States have traditionally occupied' " the Court " 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). It is with this admonition in mind that we examine the preemptive effect of the Act.

The Supreme Court has identified three ways in which a federal law may preempt state law.[3] First, Congress may preempt state law explicitly in the text of its statute. *See English v. General Elec. Co.*, 496 U.S. 72, 78 (1990).[4] Second,

[2] The Act defines a "gleaner" as "a person who harvests for free distribution to the needy, or for donation to a nonprofit organization for ultimate distribution to the needy, an agricultural crop that has been donated by the owner" 42 U.S.C § 1791(b)(5)

[3] *See generally Freightliner Corp. v. Myrick*, 514 U S 280, 287 (1995), *Cipollone v. Liggett Group, Inc* , 505 U S 504, 516–17 (1992)

[4] For example, to expressly preempt state regulation on a particular subject, Congress may provide that "[n]o State or political subdivision of a State may establish or continue in effect any requirement — (1) which is

Congress may preempt state laws implicitly by demonstrating an intent to occupy the field exclusively with federal regulation. *See Rice*, 331 U.S. at 230. Finally, even where Congress permits concurrent state regulation in a field, such regulation is preempted to the extent it actually conflicts with federal law. The Supreme Court has found an actual conflict where "compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1962), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Although the Act contains no express preemption clause, its purpose is to supersede, at least to a certain extent, state good samaritan statutes. Thus, the question is *to what extent* it supersedes those statutes. We believe the Act clearly preempts state good samaritan statutes to the extent they provide less liability protection than federal law — for example, to the extent they permit liability based on evidence of negligence — because such laws literally would "stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67. As stated above, the express purpose of the Act is to "encourage the donation of food and grocery products to nonprofit organizations for distribution to needy individuals" by limiting liability for such activities. Unless potential donors and distributors are assured that the Act sets an absolute liability ceiling, they will continue to be deterred by the threat of liability under state law and will not be encouraged by the Act to donate food. Thus, to have any effect at all, the Act must preempt state statutes that provide less liability protection.

The legislative history of the Act confirms this interpretation. As Representative Danner explained when introducing the bill in the House,

> the current patchwork of State laws has been cited by many potential donors as the principal reason so much food is thrown away rather than given to food banks and food pantries for distribution to the hungry. . . .
>
> Simply put, we need a reasonable nationwide law that eliminates confusion and forges a stronger alliance between the public and private sectors in this Nation. That is exactly what this bill delivers.

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different from or in addition to, any requirement applicable under [federal law] . . . and (2) which relates . . to any other matter included in a requirement applicable . under [federal law]." 21 U.S.C. § 360k(a) (1994) (Federal Food, Drug, and Cosmetic Act, as amended by the Medical Device Amendments), *see also* 29 U.S.C. § 1144(a) (1994) (provision in ERISA preempting "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"). Congress instead may limit the extent to which states may regulate, by providing for example that "[a] State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement" Federal Railroad Safety Act, 45 U.S.C. § 434, *repealed by* Act of July 5, 1994, Pub. L. No. 103–272, § 7(b), 108 Stat. 1379

> The [Act] will establish a uniform national law to protect organizations and individuals when they donate food in good faith.
>
> A business should not have to hire a legal team to interpret numerous State laws so that it feels comfortable in contributing food to the hungry.

142 Cong. Rec. 17,066 (1996).

The remarks of other members of Congress also demonstrated an intent to preempt those state good samaritan statutes that conflict with the federal standard. *See e.g.*, H.R. Rep. No. 104–661, at 7 (1996) ("The bill would preempt civil and criminal liability laws of state and local governments that deal with the donation of food and grocery products to nonprofit organizations."); 142 Cong. Rec. 21,516 (1996) (statement of Sen. Kennedy) (acknowledging that the Act would "diminish the protections afforded by the tort laws"). Indeed, Representative Conyers expressed concern about the intended preemptive effect of the Act:

> Although I am supportive of the impetus behind the legislation — encouraging private entities to donate food to nonprofit organizations who distribute food to the needy — I question whether preempting traditional State law prerogatives in this area is desirable . . . . [A]ll 50 States have enacted special statutory rights concerning food donations. Not surprisingly, the States have crafted a variety of liability rules — ranging from those who subject all negligent parties to liability, to those who limit liability only to grossly negligent or intentional acts.
>
> Unfortunately, with the adoption of this bill, the House will be seeking to impose a one-size-fits-all [sic] legal standard for food donors . . . .

142 Cong. Rec. 17,067 (1996).

President Clinton also apparently believed that the Act would preempt conflicting state laws. In his signing statement the President observed:

> In working with various private sector donors and food banks . . . it has come to light that liability concerns are often an impediment to food recovery and donation efforts. Although many States have enacted their own "Good Samaritan" laws to support food recovery and donation efforts, many businesses have advised that these varying State statutes hinder food donations. This legislation will end the confusion regarding liability for food recovery and

donation operations through uniform definitions in one national law.

2 Pub. Papers of William J. Clinton 1737, 1737–38 (1996).

We believe that the legislative history of the Act, together with its express purpose and the context in which it was enacted, indicate that Congress intended to establish a "uniform national law" that displaces conflicting state good samaritan statutes—i.e., those that provide less liability protection than federal law. There is an argument that Congress intended to go even farther, preempting not only less protective state statutes but all state good samaritan laws. Although we acknowledge that some parts of the legislative history could be read to support this argument, we find insufficient evidence that Congress intended to preempt the field. "Field preemption" does not seem necessary to achieve the congressional goals underlying the Act. The Act should have the desired effect of encouraging food donation as long as it assures potential donors that they will not incur liability for conduct above a certain national level of culpability. The existence of state standards that provide even greater protection from liability should not deter food donation; indeed, they may further promote it. Furthermore, as noted above, the Supreme Court is reluctant to construe preemption broadly in areas traditionally regulated by the states.[5] For these reasons, we decline to interpret the Act to preempt all state good samaritan statutes. Rather, we construe the Act to preempt only those state good samaritan statutes that furnish less liability protection than federal law.

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

[5] *See Medtronic, Inc.*, 518 U.S. at 485; Rice 331 U.S. at 230

Qualification Requirement for Aliens Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

The phrase "40 qualifying quarters of coverage" in title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 can fairly be interpreted as incorporating the methodology under section 213 of the Social Security Act for calculating quarters of coverage, but not also the strict definitions of wages, employment, and self-employment income under other sections of the Social Security Act.

March 27, 1997

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
SOCIAL SECURITY ADMINISTRATION

You have asked for the views of the Office of Legal Counsel on the meaning of the phrase "40 qualifying quarters of coverage" in title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105, 2260 ("PRA" or "Act").[1] We understand that you have considered the issue and have concluded that the phrase "can fairly be interpreted as incorporating the methodology under section 213 of the Social Security Act for calculating quarters of coverage, but not also the strict definitions of wages, employment and self-employment income under other sections of the Social Security Act."[2] You have further indicated that the Department of Health and Human Services and the Department of Agriculture concur in your construction of the provision.[3] For the reasons set forth below, we also concur in your interpretation.

BACKGROUND

I. Personal Responsibility and Work Opportunity Reconciliation Act

Title IV of the PRA imposes a broad set of limitations on the availability of federal and state public benefits to aliens. Although the most categorical limitations apply to aliens who are not classified as "qualified alien[s]" for purposes

[1] *See* Letter for Randolph D. Moss, Deputy Assistant Attorney General, Office of Legal Counsel, from Arthur J. Fried, General Counsel, Social Security Administration (Nov 15, 1996)

[2] *Id.* at 1–2.

[3] When determining whether an agency's interpretation is entitled to judicial deference, the concurrence of other agencies may be relevant. *See Nashville Gas Co. v Satty*, 434 U S 136, 142 n.4 (1977) (agency interpretation may be entitled to more weight when consistent with interpretations of other agencies). In addition to the other agencies, Representative Bill Archer, Chairman, House Committee on Ways and Means, and Representative Clay Shaw, Chairman of the Ways and Means Subcommittee on Human Resources, have indicated that they also concur in your interpretation. We note, however, that the post-enactment views of members of Congress generally provide little guidance in statutory interpretation. *See Weinberger v Rossi*, 456 U S 25, 35 (1982), *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc*., 447 U.S 102, 118 (1980)

of the Act, *see, e.g.*, PRA § 401, 110 Stat. at 2261, significant limitations apply even to those aliens generally deemed "qualified."[4] For purposes of this memorandum, three such limitations are significant. First, under section 402 of the Act, with certain exceptions, "qualified aliens" are precluded from receiving Food Stamps and Supplemental Security Income benefits, and, at the option of the state in which the alien resides, might also be denied Temporary Assistance for Needy Families, Social Security Block Grants, and Medicaid benefits. Second, under section 412 of the Act, again subject to defined exceptions, states are authorized to deny "any State public benefits" to "qualified aliens." Finally, under section 421 of the Act, in determining the eligibility for "any Federal means-tested public benefits program," an alien's income and resources are deemed to include the income and resources of his or her sponsor (and the sponsor's spouse).

Each of these three limitations on the availability of benefits, however, comes to an end once the "qualified alien:"

> *has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act* or can be credited with such qualifying quarters as provided under section 435, and . . . in the case of any such qualifying quarter creditable for any period beginning after December 31, 1996, did not receive any Federal means-tested public benefit . . . during any such period.

PRA § 402(a)(2)(B)(ii), 110 Stat. at 2262–63 (emphasis added); PRA § 412(b)(2)(B)(i), 110 Stat. at 2269; PRA § 421(b)(2)(A), 110 Stat. at 2270.[5] Under section 435 of the Act, an alien is entitled to be credited with "qualifying quarters of coverage . . . worked by a parent . . . while the alien was under age 18" or by a spouse "during their marriage." PRA § 435(1) & (2), 110 Stat. at 2275.

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[4] A "qualified alien" is "an alien who, at the time the alien applies for, receives, or attempts to receive a Federal public benefit is—

> (1) an alien who is lawfully admitted for permanent residence under the Immigration and Nationality Act,
>
> (2) an alien who is granted asylum under section 208 of such Act,
>
> (3) a refugee who is admitted to the United States under section 207 of such Act,
>
> (4) an alien who is paroled into the United States under section 212(d)(5) of such Act for a period of at least 1 year,
>
> (5) an alien whose deportation is being withheld under section 243(h) of such Act, or
>
> (6) an alien who is granted conditional entry pursuant to section 203(a)(7) of such Act as in effect prior to April 1, 1980."

PRA § 431(b), 110 Stat. at 2274. In addition, certain categories of aliens who (or whose children) have been subjected to battery or extreme cruelty in the United States by a family member with whom they reside are also "qualified aliens" for purposes of the PRA. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, § 501, 110 Stat. 3009–546, 3009–670.

[5] In addition, under sections 402 and 412, the "qualified alien" must be "lawfully admitted . . . for permanent residence under the Immigration and Nationality Act." PRA § 402(a)(2)(B)(i), 110 Stat. at 2262, PRA § 412(b)(2)(A), 110 Stat. at 2269. No similar condition exists under section 421.

II. Social Security Act

Title II of the Social Security Act ("SSA"), 42 U.S.C. §§ 401–433 (1994), defines the phrase "quarter of coverage" in section 213. For calendar years before 1978, with certain exceptions, the phrase means a period of three calendar months in which an individual has been paid $50 or more in "wages" or for which he or she has been credited with $100 or more in "self-employment income." 42 U.S.C. § 413(a). For the calendar year 1978, the amount of wages and self-employment income required for a quarter of coverage is $250. *Id.* § 413(d). Thereafter, the requisite amount is indexed to national average wages and published in the Federal Register on or before November 1 of each year. *Id.*

A separate section of title II defines the term "wages." In particular, section 209 defines "wages" to mean, in relevant part, "remuneration paid . . . for employment." 42 U.S.C. § 409(a). Section 409 provides numerous exemptions from the term "wages," including remuneration above certain dollar thresholds in specified calendar years, *id.* § 409(a)(1), and below certain dollars thresholds for specified employment, such as domestic service, *id.* § 409(a)(6)(B), agricultural labor, *id.* § 409(a)(7)(B), home worker service, *id.* § 409(a)(8), and service for a tax-exempt organization, *id.* § 409(a)(14)(A).

Still another section of title II defines the term "employment" to mean, in pertinent part, "any service of whatever nature, performed . . . by an employee for the person employing him." 42 U.S.C. § 410(a). Section 210 contains various exemptions from the term "employment," including service performed by certain federal government employees, *id.* § 410(a)(5) & (6), service performed by certain state and local governments employees, *id.* § 410(a)(7), and service performed by certain church ministers and other employees, *id.* § 410(8)(A) & (B).

DISCUSSION

With this background in mind, we analyze the meaning of the phrase "has worked 40 qualifying quarters of coverage." Congress clearly provided that the phrase should be defined as "in title II of the Social Security Act." As described above, in defining the phrase "quarters of coverage," section 213 of the SSA describes the methodology for computing the amount of earnings that constitutes a quarter of coverage. In doing so, however, that provision uses the term "wages," which itself is defined elsewhere in title II of the SSA. The definition of the term "wages," in turn, uses the word "employment," which, similarly, is defined elsewhere in title II of the SSA. The definitions of both "wages" and "employment," moreover, contain limitations on the types of employment covered by the SSA (herein referred to as "covered employment limitations"). The question presented here is whether Congress intended to include these covered employment limitations in the PRA. Although a close question, we believe that

Congress did not and that the phrase "has worked 40 quarters of coverage as defined in title II of the Social Security Act" is best interpreted to adopt the SSA's mechanism for calculating the amount of wages necessary to obtain a quarter of coverage, but not the limitations on the types of employment in which the wages may be earned.

Although the most formalistic reading of the reference to title II of the SSA would incorporate all of its substantive provisions, including the cross-referenced covered employment limitations, it is not at all clear that this was what Congress intended. When confronting similarly complex statutory regimes that make use of cross-referenced definitional or comparable provisions, the courts of appeals have not mechanically incorporated the cross-referenced provisions on a wholesale basis. They instead have carefully considered the distinct statutory purposes and structures of the provisions at issue. For example, in *Skidgel v. Maine Dept. of Human Servs.*, 994 F.2d 930 (1st Cir. 1993), the Court of Appeals for the First Circuit refused to interpret a section of the SSA to include all the requirements of a cross-referenced provision of that statute. Section 602(a)(38) of the SSA governed the composition of a filing unit for purposes of receiving Aid to Families with Dependent Children. It provided that, in making the determinations of need with respect to a dependent child, states must include any parent of a dependent child and any sibling if such sibling "meets the conditions described in clauses (1) and (2) of section 606(a) . . . or in section 607(a)." 42 U.S.C. § 602(a)(38)(B) (1994). At issue was whether Congress intended to incorporate all of the descriptive terms in § 607(a), including a restrictive condition requiring a showing of need before the sibling may be included in the filing unit. The court rejected a rigid reading of the statutory language, observing that "[a] thorough analysis is especially warranted where, as here, we are charged with interpreting a complex and technical statute which has been amended over time and which contains elaborate, internal cross-references." *Skidgel*, 994 F.2d at 937. After carefully examining the family filing rule "in the context of its place in the statutory scheme and in light of its statutory purpose," *id.*, the court concluded that Congress did not intend the need requirement to apply. *Id.* at 938–39.

Similarly, in *Weingarden v. Commissioner*, 825 F.2d 1027 (6th Cir. 1987), the Court of Appeals for the Sixth Circuit declined to read a tax provision to include all the limitations of a cross-referenced section. Section 170(b)(1)(A) of the Internal Revenue Code permitted more generous charitable deductions for certain specified charitable organizations (such as churches, schools, and hospitals) and "an organization described in section 509(a)(2) or (3)." 26 U.S.C. § 170(b)(1)(A)(viii) (1994). The prefatory language contained in § 509(a) cross-referenced another tax provision, § 501(c)(3), that effectively would have limited the type of organizations that could qualify for more favorable tax treatment under § 170(b)(1)(A). 26 U.S.C. §§ 509(a), 501(c)(3) (1994). The court refused to interpret the ambiguous language of § 170(b)(1)(A) to incorporate this indirect limita-

tion, and instead followed the canon of construction that charitable donations should be construed liberally in favor of the taxpayer. *Weingarden*, 825 F.2d at 1029–30.

Likewise, in *United States v. National Marine Engineers' Beneficial Ass'n*, 294 F.2d 385 (2d Cir. 1961), the Court of Appeals for the Second Circuit, per Judge Friendly, refused to interpret a provision of the Labor Management Relations Act ("LMRA") to incorporate an exclusion in a cross-referenced statute. The LMRA defined the term "strike" to include "any concerted slowdown or other concerted interruption of operations by employees," 29 U.S.C. § 142(2) (1994), and defined "employee" to have "the same meaning as when used in [the National Labor Relations Act ("NLRA")]." *Id.* § 142(3). The NLRA, in turn, excluded supervisors from the definition of "employee." Thus, the question arose whether Congress intended to exclude supervisors from the definition of "strike" in the LMRA. Rejecting the claim that the court was required to read the statute to incorporate the cross-referenced limitation, Judge Friendly stated that "not only are we not required, we are not permitted to interpret statutes in the mechanical fashion for which appellants contend." *National Marine Engineers' Beneficial Ass'n*, 294 F.2d at 390–91. Rather, he stated, the court must look "to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning." *Id.* at 391. After comparing the history and purpose of the two labor statutes and their relationship to the supervisor exclusion, Judge Friendly concluded that Congress did not intend to exclude supervisors from the definition of "strike" in the LMRA.[6]

As in these cases, the path from the PRA to the covered employment limitations in the SSA is a circuitous one. The PRA makes no mention of any limitations on the types of employment covered by the exception, but refers only to the definition of "quarters of coverage" contained in the SSA. The SSA definition of "quarter of coverage," moreover, also makes no mention of the covered employment limitations, but simply uses the word "wages." It is not until we reach the definition of "wages" and the term "employment," which is used in defining "wages," that the covered employment limitations are introduced. In light of this circuitous path, it cannot be said that the PRA, on its face, plainly and unambiguously incorporates not only the mechanism for calculating "quarters of cov-

[6] In *Crilly v Southeastern Pa. Transp. Auth.*, 529 F 2d 1355 (3d Cir. 1976), the Court of Appeals for the Third Circuit adopted a similar approach, although it ultimately arrived at the same conclusion produced by a more formalistic reading of the provision in question There, the court construed the meaning of the term "employer" in the LMRA, which also was defined "as when used in [the NLRA] " 29 U S C. § 142(3) (1994). The cross-reference, the Court observed, "applied literally, suggests that political subdivisions of states are excluded from coverage under either act." *Crilly*, 529 F.2d at 1359. The court noted, however, that "several significant decisions have cautioned that literalism may not be [an] appropriate canon of . construction" in the labor relations context Id Thus, it began the process of discerning congressional intent Finding no dispositive legislative history, the court "assess[ed] the precedential consequences of attributing to Congress one or the other intention." *Id* at 1361 Only after conducting this extensive analysis did the court conclude that Congress intended to exclude state and local government employees from the coverage of the LMRA *Id* at 1362–63.

erage," but also the covered employment limitations. Accordingly, we believe it is necessary to examine the "design and purpose" of the PRA to determine whether Congress intended to incorporate the covered employment limitations of the SSA. In our view, such an analysis demonstrates that Congress did not.

Looking first to the language of the PRA, we note a specific emphasis on "work," but not on a particular type of work. While the SSA focuses on whether the applicant has acquired "not less than" the requisite number of quarters of coverage, the PRA focuses on whether the applicant "has worked" for at least ten years. The choice of this particular language suggests, on the face of the statute, an emphasis on work, without restriction.

The legislative history of the PRA confirms this emphasis. It contains numerous references to the length of work required to qualify under the exception to the bar on public benefits in the PRA, but no reference to the type of work. With respect to the public benefits restriction in section 402, the Conference Report states that "excepted are legal permanent residents who *have worked* (in combination with their spouse and parents) *for at least 10 years.*" H.R. Conf. Rep. No. 104–725, at 380 (1996) (emphasis added). Similarly, with regard to section 412, the Conference Report simply provides that "[e]xceptions to State authority to deny benefits are made for . . . permanent resident aliens who *have worked* in the United States (in combination with their spouse or parents) *for at least 10 years.*" Id. at 384 (emphasis added). In connection with section 421, the Conference Report states that "[d]eeming extends until citizenship, unless the noncitizen *has worked for at least 10 years* in the United States (either individually or in combination with the noncitizen's spouse and parents)." *Id.* at 385 (emphasis added). Finally, the Conference Report describes the qualifying quarters provision in section 435 as follows:

> In determining whether an alien may qualify for benefits under the exception for individuals who *have worked at least 40 quarters* while in the United States . . . work performed by parents and spouses may be credited to aliens under certain circumstances. *Each quarter of work performed by the parent while an alien was under the age of 18 is credited to the alien*, provided the parent did not receive any Federal public benefits during the quarter. Similarly, *each quarter of work performed by a spouse of an alien during their marriage is credited to the alien*, if the spouse did not receive any Federal public benefits during the quarter.

Id. at 391–92 (emphasis added).

The focus in the PRA and its legislative history on whether the applicant has worked the requisite number of quarters — without regard to the type of work performed — is consistent with the PRA's express purpose, among other things,

to promote self-sufficiency among immigrants. In the PRA, Congress observed that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes. . . . It is a compelling government interest to enact new rules . . . in order to assure that aliens be self-reliant." PRA § 400, 110 Stat. at 2260.

Title IV rewards self-sufficiency by denying certain public benefits to aliens unless they "ha[ve] worked" for ten years. The covered employment limitations in the SSA, by contrast, serve a very different purpose that is unrelated to the principle of self-sufficiency. They were designed for a purpose unique to the insurance scheme established by the SSA—namely, to prevent the payment of social security benefits to those who, for a variety of reasons, have not paid into that system. Incorporating the covered employment limitations into the PRA would fail to reward long-standing work in an equitable fashion and thus would be inconsistent with the Act's purpose of promoting self-sufficiency among immigrants. We can conceive of no reason to reward most aliens who have worked for ten years, but not those who have worked for that period in certain government jobs or for churches, for example.[7] We do not believe Congress intended such a strange result.[8]

Finally, interpreting the PRA to include the covered employment limitations of the SSA would run counter to the canon of construction that remedial provisions should be construed liberally. *See Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *see also Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994); *Jefferson County Pharm. Ass'n v. Abbott Lab.*, 460 U.S. 150, 159 (1983). Application of this canon of construction further supports our conclusion that Congress did not intend to restrict benefits only to those employees who could demonstrate 40 quar-

[7] In enacting title IV of the PRA, Congress also expressly intended that "the availability of public benefits not constitute an incentive for immigration to the United States" and found that "[i]t is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." PRA § 400, 110 Stat. at 2260. Construing the PRA to incorporate the covered employment limitations would not further this purpose. The need to demonstrate ten years of work might well provide a disincentive to immigration for the purpose of receiving benefits. There is no reason to believe, however, that Congress concluded that a different (and more severe) limitation need apply to qualified aliens, who have spent all or a portion of their careers working in non-covered employment, in order to achieve the statutory purpose of removing a possible incentive to immigration.

[8] It might be argued that Congress intended to include the covered employment limitations of the SSA to reduce the administrative burden of verifying quarters of coverage for PRA purposes. While administrators of PRA benefits may rely on the social security database in determining whether a "covered" alien had worked 40 qualifying quarters of coverage, they arguably have no such resource of "noncovered" aliens. Although this may be true in some cases, it does not apply categorically. Specifically, we understand that many covered employees have incomplete social security records, while many noncovered employees have complete records. Incomplete (or no) documentation exists for covered employees whose employers have failed properly to report their income to the Social Security Administration. In addition, no computer data generally exist for any quarters of covered employment worked in the current year (so-called "lag earnings"). Computer documentation does exist, however, for many noncovered employees dating as far back as 1978. In that year, due to a change in the law, many employers began reporting the annual earnings of all their employees, including noncovered employees. The Social Security Administration has retained the raw data for these noncovered employees in its database. In any event, there is no evidence whatsoever that Congress intended to exclude classes of potential welfare recipients—such as those who had once worked for state government—to reduce the burden of verification. To the contrary, § 432 recognizes the need to develop complicated verification procedures for the host of new criteria imposed by the Act. PRA § 432(a) & (b), 110 Stat. at 2274–75 (giving the Attorney General 18 months and states 24 months to comply).

ters of work in a particular type of employment.[9] Rather, to effectuate the remedial purpose of the 40 quarters exception, the Act extends benefits to all employees who have worked for at least ten years.

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

[9] We note that the Court of Appeals for the Sixth Circuit applied a similar analysis in determining whether Congress intended a provision of the tax code to incorporate all the limitations of a cross-referenced section. *See Weingarden*, 825 F 2d at 1029.

Calculating Rate of Pay of Department of Justice Employees for Purposes of "Covered Persons" Determination Under Independent Counsel Act

The term "rate of pay" in the section of the Independent Counsel Act that indicates which Department of Justice employees are "covered persons" does not include "locality-based comparability payments" under 5 U.S.C. § 5304.

April 2, 1997

MEMORANDUM OPINION FOR THE ACTING DEPUTY ATTORNEY GENERAL

Under 28 U.S.C. § 591(b)(4) (1994), the class of "covered persons" subject to investigation by an Independent Counsel includes "any individual working in the Department of Justice who is compensated at a rate of pay at or above level III of the Executive Schedule under section 5314 of title 5." You have asked whether the term "rate of pay" in this section includes "[l]ocality-based comparability payments" under 5 U.S.C. § 5304 (1994). We conclude that it does not.

Under provisions in the Ethics in Government Act of 1978, Pub. L. No. 95–521, § 601, 92 Stat. 1824, 1867 (codified as amended at 28 U.S.C. §§ 591–599 (1994 & Supp. II 1996)) ("Act" or "Independent Counsel Act"), an Independent Counsel may be appointed to investigate alleged crimes by certain high-level officials of the government.[1] In some instances, the officials subject to such investigations are identified by their level of pay. The Act reflects the judgment that, in the Department of Justice, officials whose rate of pay equals or exceeds Level III of the Executive Schedule "are those . . . closest to the Attorney General and the President and would, therefore, present the most serious conflict of interest of an institutional nature if the Department of Justice were to have to investigate and prosecute serious criminal allegations against any of these individuals." S. Rep. No. 95–170, at 53 (1977). The "covered persons" include the Deputy Attorney General, the Associate Attorney General, and the Solicitor General. *See* 5 U.S.C. § 5313 (1994 & Supp. II 1996); *id.* § 5314. The Act also specifies that the Assistant Attorneys General are "covered persons," even though they are paid less than the amount for Level III. *See* 28 U.S.C. § 591(b)(4); 5 U.S.C. § 5315.

The Act, however, does not make clear whether the "rate of pay" that identifies officials subject to investigation by an Independent Counsel refers to (1) total pay, including locality-based adjustments, or (2) "basic pay," exclusive of such

[1] The application of the Act to high-level officials is sometimes called the "mandatory coverage" of the Act *See, e.g.*, S. Rep. No. 103–101, at 19 (1993), *reprinted* in 1994 U.S.C.C.A.N. 748, 763 ("Senate Report") The Act also allows the Attorney General to seek appointment of an Independent Counsel where she "determines that an investigation or prosecution of a person by the Department of Justice may result in a personal, financial, or political conflict of interest," 28 U.S.C. § 591(c)(1) (1994), or where the allegation is against a member of Congress, *id.* § 591(c)(2)

adjustments. If locality-based adjustments are excluded, officials in the Senior Executive Service are not "covered persons." The rate of pay for such officials, excluding locality-based adjustments, can be no higher than $115,700 a year, but the benchmark for coverage — Level III of the Executive Schedule — is a yearly pay rate of $123,100. *See* Exec. Order No. 13033, 61 Fed. Reg. 68,987, 68,992 (1996). On the other hand, if locality-based adjustments are included, officials in the top three levels of the Senior Executive Service (ES–4, ES–5, and ES–6) could become "covered persons," depending on the area of the country where they work.[2]

We believe that locality-based adjustments do not count as part of the "rate of pay" under 28 U.S.C. § 591. When Congress provided for locality-based pay in the Federal Employees Pay Comparability Act of 1990, 5 U.S.C. § 5304(d)(1)(A), it aimed at "pay parity, between Federal employees and their nonfederal counterparts on a locality-by-locality basis." H.R. Conf. Rep. No. 101–906, at 87 (1990) (calling for comparison with the "rates of pay generally paid to non-Federal workers for the same levels of work within each pay locality"). A locality-based adjustment, therefore, corresponds to the supply-and-demand conditions in the particular location, rather than the importance of the official receiving the adjustment or his or her closeness to the Attorney General. As a consequence, interpreting "rate of pay" to include locality-based adjustments would distort the design of the Act. Persons otherwise not covered by the Act would become "covered persons" as a result of the location where they work, rather than the position they occupy. Such a result would not only fail to serve the purposes of the Act, but would actually be contrary to them as well. A *higher*-level official, paid as an ES–6 and working in an area to which a specific locality-based adjustment would not be applicable, would not be a "covered person," while a *lower*-level official, paid as an ES–4 and (for example) working in Houston, would be "covered."[3]

Inclusion of locality-based adjustments is also inconsistent with Congress's apparent intent, insofar as it can be discerned from the legislative history. When Congress most recently reauthorized the Independent Counsel Act in 1994, it assumed that approximately fifty officials would come within the mandatory coverage of the Act. Senate Report at 19, *reprinted in* 1994 U.S.C.C.A.N. at 764. If locality-based adjustments were included in the "rate of pay" under 28 U.S.C. § 591, the number of additional "covered persons" in the Federal Bureau of Investigation alone would double the total in the government as a whole otherwise reached by the Act. *See* Memorandum for Michael R. Stiles, United States

[2] For example, an official paid as an ES–4 who lived in the area of Houston-Galveston-Brazoria, Texas, would receive a locality-based increase of 11 52 percent, which would bring his or her salary to approximately $124,790. This amount would exceed the $123,100 benchmark Exec Order No 13033, 61 Fed Reg. at 68,996

[3] At present, there is a locality-based comparability adjustment of 4.81 percent for all parts of the United States not covered by specific adjustments. *See* Exec Order No 13033, 61 Fed. Reg at 68,996 However, an official paid at the ES–6 level who benefits from this general adjustment would still be making less than the Level III benchmark.

Attorney, and H. Marshall Jarrett, Chief, Criminal Division, from Steven W. Pelak and Carol Fortine, Assistant United States Attorneys, *Re: Additional Information Regarding the Scope of the Independent Counsel Statute* at 3 (Mar. 18, 1997). Such a broad sweep would be inconsistent with Congress's understanding.

We appreciate that there is a reasonable argument on the other side. Congress adopted the phrase "rate of pay," rather than "rate of basic pay," a term of art specifically meaning "the rate of pay . . . before any deductions and exclusive of additional pay of any other kind, such as locality-based comparability payments." 5 C.F.R. § 534.401(b)(3) (1996). Elsewhere, Congress has distinguished between "rate of basic pay" and "total" pay, including comparability payments, *see* 5 U.S.C. § 5304(g)(1), or, where it has wanted to include locality-based adjustments as part of "basic pay" for specific purposes, such as retirement and insurance, has done so expressly, *see id.* § 5304(c)(2). By not employing the term "rate of basic pay," but using "rate of pay" instead, Congress arguably meant to include comparability payments in determining the coverage of the Act. Indeed, when Congress set up the current system of locality-based comparability adjustments, it expressly provided that the post-employment restrictions dictating a one-year "cooling off" period would apply to (among others) persons "employed in a position . . . for which the basic rate of pay, exclusive of any locality-based pay adjustment," is above a specified level. 18 U.S.C. § 207(c)(2)(A)(ii) (1994 & Supp. II 1996). It enacted no such amendment to the Independent Counsel Act. Furthermore, the Act uses "rate of pay" as a proxy for closeness to the Attorney General, and because salary does not necessarily reflect this closeness, the fit between the statute's standard and its purpose already is imprecise. Therefore, although inclusion of locality-based pay might make the fit even less precise, this difference would be a matter of degree, rather than kind.

We nevertheless believe that, on the better view, locality-based pay should be excluded. The Act has contained the "rate of pay" language since its original passage in 1978. At that time, the provisions establishing a "pay comparability system," *see* 5 U.S.C. §§ 5301–5308 (1976), stated that "[p]ay may not be paid, by reason of any provision of this subchapter, at a rate in excess of the rate of basic pay for level V of the Executive Schedule," *id.* § 5308; *see also* Legislative Branch Appropriation Act, 1979, Pub. L. No. 95–391, § 304, 92 Stat. 763, 788–89 (1978). Under those provisions, therefore, an official's salary could not rise to the level at which the Act would apply. Although Congress could have clarified the issue by using the "rate of basic pay" formulation in the 1994 reauthorization (or earlier in the statute creating the current system of locality-based comparability adjustments), it does not appear to have focused on this matter,[4] and the legislative history (as discussed above) shows an understanding of the Act's coverage that

[4] The only consideration of locality-based adjustments during the passage of the 1994 reauthorization appears in connection with an amendment to the section on the pay of staff in an Independent Counsel's office. 28 U.S.C. § 594(c).

is more consistent with the interpretation we adopt than with the contrary one. We therefore do not believe that much weight can rest on the failure to use the "rate of basic pay" language[5] or that any fair inference against our conclusion can be drawn from amendments of other statutes making clear that locality-based comparability adjustments are, for particular purposes, to be disregarded. Furthermore, although the use of pay as a measure of closeness to the Attorney General is necessarily inexact, inclusion of locality-based pay in the "rate of pay" would greatly magnify the imprecision. An additional extraneous factor — geography — would become relevant, and officials at lower pay grades would come within the Act while others at higher grades would remain outside it. We thus believe that the argument for including locality-based pay, while reasonable, is ultimately less than persuasive.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

[5] *See also* Treasury, Postal Service and General Government Appropriations Act, 1991, Pub L No 101–509, § 101(c)(1)(B), 104 Stat 1389, 1442 (using "rate of pay" to refer to pay under the General Schedule *excluding* locality-based adjustments)

Personal Satisfaction of Immigration and Nationality Act Oath Requirement

Section 504 of the Rehabilitation Act does not require accommodation for persons unable to form the mental intent necessary to take the naturalization oath of allegiance prescribed by section 337 of the Immigration and Nationality Act.

The oath requirement of section 337 may not be fulfilled by a guardian or other legal proxy.

April 18, 1997

LETTER OPINION FOR THE GENERAL COUNSEL
IMMIGRATION AND NATURALIZATION SERVICE

You have requested advice concerning whether section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1994), requires some sort of accommodation for persons who are unable to form the mental intent necessary to take the naturalization oath of allegiance prescribed by section 337 of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1448 (1994). Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from David A. Martin, General Counsel, Immigration and Naturalization Service (Feb. 10, 1997). More specifically, your memorandum of February 10 asks us to consider the question whether, in the case of a person who cannot form the requisite intent, the oath requirement might be fulfilled by a guardian or other legal proxy. *Id.*

As we recently advised you, it is our conclusion that the oath requirement of section 337 may not be satisfied by a guardian or legal proxy. This letter briefly sets forth the reasoning underlying that conclusion.

Section 504 of the Rehabilitation Act prohibits discrimination against any "otherwise qualified individual with a disability . . . solely by reason of her or his disability" in "any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a). This Office has previously advised that all INS activities and programs constitute "program[s] or activit[ies] conducted by an Executive agency," *see* Memorandum for Maurice C. Inman, Jr., General Counsel, Immigration and Naturalization Service, from Robert B. Shanks, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Section 504 of the Rehabilitation Act of 1973* (Feb. 2, 1983). The INS must therefore comply with the requirements of section 504 in the implementation and operation of its naturalization program.

The critical question presented by your memorandum is whether an individual who cannot personally satisfy the oath requirement for naturalization because he or she lacks the ability to form the mental intent sufficient to take an oath can be considered "otherwise qualified" for naturalization; if so, section 504 would

require the INS to provide for the naturalization of that individual.[1] Department of Justice regulations define a "qualified handicapped person," in the context of a program or activity "under which a person is required to . . . achieve a level of accomplishment," as "a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature." 28 C.F.R. § 39.103 (1996). In other words, an individual would be "otherwise qualified" for a program if he or she could meet the essential eligibility requirements of that program, either without any modification at all, or with "reasonable" modifications. A particular program modification or accommodation is "reasonable," and therefore required under section 504, only if an examination of the basic nature or purpose of the program reveals that the requirement in question is not "fundamental" or "essential" to the accomplishment of that purpose. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987) (accommodation is "reasonable" if it does not "require[ ] 'a fundamental alteration in the nature of [the] program' " or does not "impose[ ] 'undue financial and administrative burdens' ") (alteration in original) (citations omitted).

Case law makes clear that, where a program requirement is found to be essential to the program, section 504 does not mandate an accommodation that would alter or eliminate that requirement. *Compare, e.g., Borkowski v. Valley Cent. School Dist.*, 63 F.3d 131 (2d Cir. 1995) (school board not required to accommodate disabled teacher who could not manage classroom alone if ability to manage classroom alone was essential function of job); *Bradley v. University of Texas M.D. Anderson Cancer Ctr.*, 3 F.3d 922 (5th Cir. 1993) (hospital not required to accommodate HIV-positive surgical technician where essential function of technician's job was to be present at and assist in the operative field), *cert. denied*, 510 U.S. 1119 (1994); and *Gilbert v. Frank*, 949 F.2d 637 (2d Cir. 1991) (postal service not required to accommodate disabled man who sought postal clerk position, where accommodation required waiver of essential functions of lifting and handling 70-pound mail bags) *with Strathie v. Department of Transp.*, 716 F.2d 227 (3d Cir. 1983) (where essential nature of school bus driver licensing program was to prevent only appreciable safety risks, rather than all potential safety risks, state must accommodate individual bus drivers who wear hearing aids); *Galloway v. Superior Court*, 816 F. Supp. 12 (D.D.C. 1993) (where visual observation was not essential function or attribute of juror's duties, state court required to accommodate blind individuals in juror program); and *Wallace v. Veterans Admin.*, 683 F. Supp. 758 (D. Kan. 1988) (where it was not essential to registered nurse program that each and every registered nurse administer narcotic injections, hos-

[1] We note by way of clarification that we are concerned here solely with whether an individual must be able to form and manifest mental intent in order to satisfy the oath requirement of section 337 We do not attempt to address the particulars of how or when that intent may be manifested in the naturalization process.

pital must accommodate registered nurse who was recovering from chemical dependency). The accommodation you have suggested — that a guardian or other legal proxy satisfy the oath requirement of section 337 on behalf of an individual who cannot form the requisite mental intent — would thus be considered "reasonable" under section 504 only if personal satisfaction of the oath requirement is not essential to naturalization.

An analysis of the statutory scheme that Congress has established for naturalization, and the function of the oath of allegiance within that process, convinces us that personal satisfaction of the oath requirement is essential to naturalization. At its core, naturalization concerns the establishment of a relationship between the individual and the state. *See generally* T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 Const. Commentary 9 (1990). In defining the prerequisites for this relationship, Congress always has required some form of an oath of allegiance. *See, e.g.*, Act of March 26, 1790, 1 Stat. 103; *see also* Charles Gordon, Stanley Mailman & Stephen Yale-Loehr, 4 *Immigration Law and Procedure* § 96.05[1] (1996) ("Gordon, Mailman & Yale-Loehr"). The naturalization oath set forth in the INA simultaneously affirms an individual's intent to become a U.S. citizen and to renounce "all allegiance and fidelity to any foreign prince, potentate, state or sovereignty," 8 U.S.C. § 1448(a), as well as his or her willingness to assume all the duties of citizenship required by the United States. By including this oath requirement and mandating strict compliance therewith, *see* 8 U.S.C. § 1421(d) (1994) ("A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise."), Congress has made individual volition, as manifested through the oath of allegiance, fundamental to naturalization. *See* Gordon, Mailman & Yale-Loehr § 91.02[1] (in contrast to citizenship at birth, which is acquired automatically, naturalization involves individual volition).

That Congress considers the oath requirement central to the naturalization process is underscored by the fact that Congress has crafted various statutory accommodations of the oath requirement for persons with disabilities, but has stopped short of exempting such persons from the oath requirement altogether.[2]

[2] We are not persuaded to reach a different conclusion simply because Congress excepted from the oath requirement one narrow class of persons — namely, children born abroad whose one U.S citizen parent petitions for naturalization on their behalf pursuant to section 322 of the INA and who are unable to understand the meaning of the oath. *See* 8 U.S.C. § 1448(a) This narrow statutory exception must be seen in the context of the unique treatment of children of U S citizens in the citizenship process and Congress's 1940 expansion of the oath requirement to certain children. Prior to 1940, Congress had granted automatic derivative citizenship to children born abroad of one U.S. citizen parent, without requiring them to live in the U.S at any time or to otherwise demonstrate their allegiance to the United States. However, in 1940, Congress for the first time required such children to demonstrate their allegiance to the United States Recognizing that some children might not be able to take an oath of allegiance, *see To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code: Hearings on H.R 5678 Before the House Comm on Immigration and Naturalization*, 76th Cong. 395 (1940), Congress included an exemption for such cases. *See* Pub L. No. 76–853, § 335(a), 54 Stat. 1137, 1157 (1940) (permitting waiver of the oath "if in the opinion of the [naturalization] court the child is too young to understand its meaning"); Pub L No 82–414, § 337(a), 66 Stat 163, 259 (1952) (permitting waiver of the oath "if in the opinion of the [naturalization] court the child is unable to understand its meaning"). Thus, in creating the § 1448(a) exemption,

See 8 U.S.C. § 1448(c) (providing for expedited judicial oath administration ceremony for persons with "developmental disability"); 8 U.S.C. § 1445(e) (1994) (Attorney General may provide for administration of oath of allegiance other than in public ceremony if person has disability that "is of a permanent nature and is sufficiently serious to prevent the person's personal appearance" or "is of a nature which so incapacitates the person as to prevent him from personally appearing").

We therefore find that, under the existing statutory scheme established by Congress, personal satisfaction of the oath requirement by each individual applicant is "essential" to naturalization and that permitting a legal guardian to fulfill that requirement on behalf of an individual whose disability precludes formation of the mental intent necessary to take the oath would not be a reasonable accommodation under section 504.

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

Congress was tailoring its expansion of the oath requirement rather than creating a general exemption to a long-standing requirement

Applicability of Executive Order No. 12976 to the FDIC

Neither the Federal Deposit Insurance Corporation's broad discretion to determine the compensation of its employees nor its status as an independent agency exempts the FDIC from the requirements of Executive Order No. 12976.

April 22, 1997

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF MANAGEMENT AND BUDGET

You have asked us to consider whether Executive Order No. 12976, 3 C.F.R. 412 (1996), "Compensation Practices of Government Corporations" ("E.O. 12976"), applies to the Federal Deposit Insurance Corporation ("FDIC"). E.O. 12976 provides that government corporations should not pay bonuses in excess of those authorized by § 4501 through § 4507 of Title 5 of the United States Code. It also directs government corporations to submit certain compensation information to the Office of Management and Budget ("OMB") and requires wholly owned government corporations to refrain from approving bonuses in excess of the statutory bonus ceilings until OMB has had an opportunity to review the information. The FDIC maintains that E.O. 12976 does not apply to it because it has statutorily vested broad discretion to determine the compensation of its employees and because it is an independent agency.[1] As we explain below, neither of these premises supports the conclusion that E.O. 12976 is inapplicable to the FDIC. Accordingly, we believe that E.O. 12976 applies to the FDIC.

I.

President Clinton issued E.O. 12976 on October 5, 1995, to "improve the internal management of the executive branch." E.O. 12976, § 8. The order does not require that government corporations comply with statutory bonus ceilings. Rather, it states that government corporations should comply with those bonus ceilings and requires government corporations to report certain compensation practices to OMB for review.

The first section contains a "Statement of Presidential Principles." It provides that "[g]overnment corporations subject to this Order *should not* pay bonuses in excess of those authorized by sections 4501 through 4507 of title 5, United States Code, except as otherwise specifically provided by law." E.O. 12976, § 1 (emphasis added). As the underscored language suggests, this section merely

[1] *See* Letter for Franklin D Raines, Director, OMB, from William F Kroener, III, General Counsel, FDIC (Dec. 2, 1996); Letter for John A. Koskinen, Deputy Director for Management, OMB, from Ricki Helfer, Chairman, FDIC (Mar 28, 1996).

expresses a policy against bonuses in excess of the statutory ceilings but does not mandate compliance with those limits.[2]

The remainder of the Order imposes certain reporting requirements on government corporations and certain review procedures on OMB. Specifically, the second section directs wholly owned government corporations to submit compensation information as directed by the Director of OMB "[b]efore taking action to approve any bonus in excess of those authorized in section 4502 of title 5, United States Code." E.O. 12976, § 2(a); § 6 ("Section 2 shall apply only to wholly owned corporations except such corporations that have specific authority to approve bonuses in excess of those authorized under section 4501 through 4507 of title 5, United States Code"). In addition, that section instructs wholly owned corporations to "refrain from approving any such bonus until the Director of OMB has had an opportunity to review the information provided by the corporation." *Id.* § 2(a).

The third section requires all government corporations subject to the order to provide information "relating to the compensation practices for senior executives" to OMB in accordance with its instructions for "when information is to be submitted, and the content and form of such information." *Id.* § 3(a); § 3(c). At a minimum, the information must include:

> (1) the compensation plan, procedures, and structure of such corporation;
> (2) base salary levels, annual bonuses, and other compensation; and
> (3) information supporting the senior executive compensation plan and levels.

Id. § 3(b).

The fourth section directs OMB, in consultation with the Department of Labor, to "review the information submitted pursuant to section 3, taking into consideration:"

> (1) consistency with statutory requirements;
> (2) consistency with corporate mission;
> (3) standards of Federal management and efficiency; and
> (4) equivalent private sector compensation practices.

Id. § 4.

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[2] *See Robinson Farms Co v. D'Acquisto*, 962 F 2d 680, 684 (7th Cir 1992) ("should" is usually precatory, while "shall" is usually mandatory); *Harris County Hosp. Dist v. Shalala*, 863 F Supp 404, 410 (S D Tex 1994) (same), *aff'd*, 64 F 3d 220 (5th Cir 1995), *cf* Memorandum for Alan Kreczko, Legal Adviser, National Security Council, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re WTO Dispute Settlement Review Commission Act* (Feb 9, 1995) (difficulty created by mandatory "shall" language avoided by substitution of precatory "should" language) This is not to say that the President or Congress could never use the word "should" with the intent that it be mandatory rather than precatory, but there is no indication in this case of any such intent

Finally, the fifth section requires government corporations to "make available through public dissemination the information submitted pursuant to section 3 of this order." *Id.* § 5.

II.

The FDIC argues that E.O. 12976 does not apply to it for two reasons: (1) the FDIC has broad discretion to determine the compensation of its employees under 12 U.S.C. § 1819(a)Fifth;[3] and (2) it is an independent agency. We believe that neither of these contentions entails the conclusion that E.O. 12976 is inapplicable to the FDIC. First, E.O. 12976 does not restrict the FDIC's authority to determine the compensation of its employees. As described above, it does not mandate compliance with statutory bonus ceilings or require OMB approval of agency bonus awards. With respect to the FDIC, it simply imposes reporting requirements. The waiting period applies only to wholly owned government corporations,[4] and the FDIC is a mixed-ownership corporation. *See* 31 U.S.C. § 9101(2)(C) (1994). These procedural reporting requirements do not limit or interfere with the Board's discretion to set compensation under § 1819(a)Fifth.[5]

Second, E.O. 12976 applies to the FDIC, regardless of its status.[6] E.O. 12976 is expressly premised on three specific statutory bases (in addition to the more general authority provided by the Constitution and the laws of the United States): 31 U.S.C. §§ 1105, 1108, and 1111. In enacting these statutes, Congress authorized the President to request compensation information from all agencies.

Section 1111 provides:

> To improve economy and efficiency in the United States Government, the President shall—
>
> (1) make a study of each agency to decide, and may send Congress recommendations, on changes that should be made in—

[3] Section 1819(a)Fifth provides in relevant part: "To appoint by its Board of Directors such officers and employees as are not otherwise provided for in this chapter, to define their duties, *fix their compensation*, require bonds of them and fix the penalty thereof, and to dismiss at pleasure such officers or employees." 12 U.S.C. § 1819(a)Fifth (1994) (emphasis added).

[4] *See* E.O. 12976, § 2(a); § 6.

[5] Indeed, the reporting requirements are similar to those to which the FDIC already is subject. *See* 12 U.S.C. § 1833b (1994) (requiring the FDIC, "in establishing and adjusting schedules of compensation and benefits," to inform several other agencies and Congress "of such compensation and benefits and . . . seek to maintain comparability regarding compensation and benefits") In any event, § 1819(a)Fifth only contains a broad grant of authority to fix compensation, which is subject to more specific limitations

[6] We do not mean to suggest concurrence in the FDIC's view of itself as an independent agency. A comprehensive discussion of the relevant principles appears in *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 166–70 (1996). For purposes of this memorandum, it is not necessary to decide what, if any, independence from presidential control the FDIC possesses.

> (A) the organization, activities, and business methods of agencies;
>
> (B) agency appropriations;
>
> (C) the assignment of particular activities to particular services; and
>
> (D) regrouping of services; and
>
> (2) evaluate and develop improved plans for the organization, coordination, and management of the executive branch of the Government.

31 U.S.C. § 1111 (1994). For purposes of the provisions relevant here, "agency" is defined as any "department, agency, or instrumentality of the United States" and includes any "*independent regulatory commission or board.*" 31 U.S.C. § 1101 note (1994) (emphasis added); § 101 (1994); *cf.* § 102 (defining "executive agency" as "a department, agency, or instrumentality in the executive branch of the United States Government").[7] Thus, Congress authorized the President to study and recommend changes with respect to all federal entities except Congress and the Supreme Court.

E.O. 12976 is an appropriate mechanism for complying with § 1111. The information requested in section 3 of the Order (compensation plan, procedures, and structure; compensation levels; related information) enables the President to evaluate "the organization, activities, and business methods" of agencies such as the FDIC, as well as their appropriations needs. Furthermore, the reporting requirements advance the goals of § 1111 to "improve economy and efficiency in the United States Government" by directing OMB to consider the compensation practices of government corporations against "standards of Federal management and efficiency" and "equivalent private sector compensation practices." E.O. 12976, § 3.

The reporting requirements also aid the President in carrying out his duties under section 1105. That section directs the President each year to "submit a budget of the United States Government" along with "supporting information." 31 U.S.C. § 1105(a) (1994). Toward that end, section 1108 requires the head of each agency to "prepare and submit to the President each appropriation request for the agency . . . in the form prescribed by the President under this chapter and by the date established by the President." 31 U.S.C. § 1108(b)(1) (1994); § 1108(d)(1)–(2) (head of each agency must "provide information supporting the agency's budget request for its missions by function and subfunction . . . and

[7] The term "agency" also includes the District of Columbia government but does not include "the legislative branch or the Supreme Court." 31 U.S.C. § 1101(1) (1994).

. . . relate the agency's programs to its missions''). E.O. 12976 prescribes the form and date for submitting certain compensation information.

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

Immunity of Smithsonian Institution from State Insurance Laws

The federal government immunity arising from the Supremacy Clause of the Constitution renders the Smithsonian Institution constitutionally immune from state insurance laws and state licensing requirements that would otherwise apply to its issuance of gift annuities.

April 25, 1997

MEMORANDUM OPINION FOR THE ASSISTANT GENERAL COUNSEL
SMITHSONIAN INSTITUTION

This responds to your inquiry regarding the applicability of state insurance laws and licensing requirements to gift annuities that may be issued by the Smithsonian Institution ("Smithsonian").[1] We conclude that the federal governmental immunity arising from the Supremacy Clause of the Constitution renders such laws and requirements inapplicable to the Smithsonian. U.S. Const. art. VI, cl. 2; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

I. BACKGROUND

The Smithsonian Institution was established by federal legislation 150 years ago to carry out the will of James Smithson, who bequeathed his estate to the United States "for the increase and diffusion of knowledge." Revised Statutes, title 73, §§ 5579–5594, preamble. Among other things, the Smithsonian maintains museums, supports scientific research, and serves as a national center for scholarship, culture, and the arts. *See Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst.*, 566 F.2d 289, 296 (D.C. Cir. 1977) (en banc), (describing the Smithsonian's function "as a national museum and center of scholarship"), *cert. denied*, 438 U.S. 915 (1978).

The structure, organization, oversight, and management of the Smithsonian are established and governed by federal statute. 20 U.S.C. §§ 41–80q (1994). The Smithsonian Institution is governed by a Board of Regents composed of the Vice President, the Chief Justice, three members each from the Senate and the House, and nine other persons appointed by Congress from outside the government. *Id.* § 42. The Smithsonian receives a substantial portion of its funding from federal appropriations, and a majority of its employees are from the federal civil service. *See Expeditions Unlimited*, 566 F.2d at 296 n.4 (noting that approximately 75% of the Smithsonian's operating funds came from federal appropriations). Further, all moneys "recovered by or accruing to" the Smithsonian are paid into the

[1] Letter for Edward J Snyder, Chief, Special Litigation, Tax Division, Department of Justice, from Ildiko P DeAngelis, Assistant General Counsel, Smithsonian Institution (July 18, 1996) ("Smithsonian Letter") Your letter was referred to this Office by the Tax Division

Treasury of the United States, where they are credited to the Smithsonian account. 20 U.S.C. § 53. The Smithsonian is also required to submit various periodic reports concerning its operations, expenditures, condition, and salaries to Congress, and is subject to periodic audits by the General Accounting Office. *Id.* §§ 49, 57–58.

Federal courts and this Office have previously recognized the Smithsonian's status as an establishment, agency, or authority of the federal government, at least in certain contexts. In *Expeditions Unlimited*, for example, the U.S. Court of Appeals for the D.C. Circuit held that the Smithsonian constituted an "independent establishment" falling within the "federal agency" definition of the Federal Tort Claims Act, 28 U.S.C. § 2671 (1994) ("FTCA"), and was therefore entitled to immunity against a defamation action under that act. 566 F.2d at 296.[2] *Accord Genson v. Ripley*, 681 F.2d 1240 (9th Cir.), *cert. denied*, 459 U.S. 937 (1982).[3] Some courts have held that the Smithsonian is an "authority of the United States" which therefore falls within the definition of an "agency" subject to the requirements of the Federal Privacy Act, *Dong v. Smithsonian Inst.*, 878 F. Supp. 244, 245 (D.D.C. 1995),* and that the Smithsonian is "an authority of the government properly subject to the [Freedom of Information Act]." *Cotton v. Adams*, 798 F. Supp. 22, 24 (D.D.C. 1992). *But see* Memorandum for Peter Powers, General Counsel, Smithsonian Institution, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Coverage of the Smithsonian Institution by certain Federal Statutes* (Feb. 19, 1976) ("Ulman Opinion") (discussed below). This Office has similarly concluded that the Smithsonian constitutes an "executive agency" for purposes of the Federal Property Act, 40 U.S.C. §§ 471–544 (1994), although we emphasized that we "express[ed] no opinion on whether the Smithsonian could be considered to be in the executive branch for any other purpose."[4] More recently, this Office has characterized the Smithsonian as a "congressional agency." *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 172 (1996).

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* Editor's Note: Subsequent to the issuance of this opinion, the U.S. Court of Appeals for the D.C. Circuit reversed the District Court opinion in *Dong*, holding that the Smithsonian Institution is not an "agency" for purposes of the Privacy Act. *See Dong v. Smithsonian Inst.*, 125 F.3d 877 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 922 (1998).

[2] The court wrote.

> Although the Smithsonian has a substantial private dimension, we conclude that the nature of its function as a national museum and center of scholarship, coupled with the substantial governmental role in funding and oversight, make the institution an "independent establishment of the United States," within the "federal agency" definition

Id. at 296 (footnotes omitted). The court further explained "The substantial federal funding and the important supervisory role played by governmental officials are the most important factors linking it to the government." *Id.* at 296 n.6.

[3] *See also Polcari v. John F. Kennedy Center for the Performing Arts*, 712 F. Supp. 230, 231 (D.D.C. 1989), holding that the Kennedy Center, established by statute as a bureau of the Smithsonian, *see* 20 U.S.C. §§ 76h–76q, also constitutes a federal agency for purposes of the FTCA.

[4] *The Status of the Smithsonian Institution Under the Federal Property and Administrative Services Act*, 12 Op. O.L.C. 122, 124 n.1 (1988).

Other historical and legal precedents, however, treat the Smithsonian quite differently. For example, Chief Justice Taft, speaking as Chancellor of the Smithsonian Board of Regents, asserted "that the Smithsonian Institution is not, and has never been considered a government bureau. It is a private institution under the guardianship of the Government." William H. Taft, *The Smithsonian Institution—Parent of American Science* 16 (1927), *quoted in* Ulman Opinion at 8. Moreover, this Office has opined that the Smithsonian is not an "agency" within the meaning of the Administrative Procedure Act, the Freedom of Information Act, the Federal Advisory Committee Act, or the Privacy Act. *See* Ulman Opinion. In reaching that conclusion, we observed that the Smithsonian "performs none of the purely operational functions of government which have been given such significant weight in determinations of agency status in other cases" and that "it plays no part in the process of administration, regulation, and government." *Id.* at 10.

We are advised that the Smithsonian is now considering the establishment of a gift annuity program as a funding resource. A gift annuity is an arrangement whereby a person donates a certain amount of principal to be held in trust by a non-profit or charitable organization, receiving in return an actuarially calculated annuity for the remainder of the donor's life. *See Ozee v. American Council on Gift Annuities*, 888 F. Supp. 1318, 1321–22 (N.D. Tex. 1995). Although the issuance of gift annuities is generally subject to state regulation and licensing requirements, you indicate your understanding that both the American Red Cross and the U.S. Holocaust Museum currently operate gift annuity programs "outside the various state licensing schemes." Smithsonian Letter at 1.[5] You also note that the Smithsonian has received requests from various states in the past to register under their charitable solicitation laws, but has declined to do so on the ground that it is a federal instrumentality that is immune from such regulation and registration requirements. *Id.* at 2.

Against this background, you have asked for our opinion (1) whether the Smithsonian may properly be subjected to state laws and licensing requirements regulating gift annuities; and (2) whether the Smithsonian may implement a gift annuity program without first obtaining prior recognition from individual state authorities that such state laws do not apply to the Smithsonian.

II. ANALYSIS

Under the intergovernmental immunity doctrine, the states may not directly regulate the federal government's operations or property. *See Hancock v. Train*, 426 U.S. 167, 178–80 (1976); *Mayo v. United States*, 319 U.S. 441 (1943);

[5] For example, the California Department of Insurance has acknowledged that the American Red Cross constitutes a "federal instrumentality" and is therefore exempt from California insurance laws and the related requirement to obtain a state license in order to issue gift annuities in California Letter for U S Department of Justice from John M. Fogg, Senior Counsel, California Department of Insurance (Oct 15, 1986) (enclosure to Smithsonian Letter)

McCulloch v. Maryland, 17 U.S. at 426; *Arizona v. Bowsher*, 935 F.2d 332, 334 (D.C. Cir.), *cert. denied*, 502 U.S. 981 (1991). As explained in the Supreme Court's landmark decision in *McCulloch*, this rule is firmly rooted in the Supremacy Clause:

> It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence.

17 U.S. at 427. *See also United States v. Montana*, 699 F. Supp. 835, 837 (D. Mont. 1988) ("Absent congressional consent, the property and functions of the United States are immune from regulation or taxation by the several states.").

Although the scope of federal government immunity from state regulation and taxation has been considerably narrowed over the past several decades, the doctrine applies with full force where a state seeks directly to regulate the federal government. *See, e.g., California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 848–49 (1989); *United States v. New Mexico*, 455 U.S. 720, 735 (1982) (excluding certain government contractors from coverage of federal governmental immunity from state taxation). In *North Dakota v. United States*, 495 U.S. 423 (1990), the Supreme Court summarized the current state of the law, as follows:

> The Court has more recently adopted a functional approach to claims of governmental immunity, accommodating of the full range of each sovereign's legislative authority and respectful of the primary role of Congress in resolving conflicts between the National and State Governments. Whatever burdens are imposed on the Federal Government by a neutral state law regulating its suppliers "are but normal incidents of the organization within the same territory of two governments." *A state regulation is invalid only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals.*

Id. at 435 (citations omitted; emphasis added). Thus, to the extent that the application of state insurance laws or licensing requirements to the Smithsonian may be said to "regulate[ ] the United States directly," they are invalid under the federal governmental immunity doctrine as explained in *North Dakota v. United States*.[6]

[6] Although we have not been provided detailed information on how the various state insurance laws would affect the proposed gift annuities, we have no indication that they would discriminate against the United States or those dealing with it within the meaning of the *North Dakota* standard.

In determining whether a state law seeks to "regulate the United States directly," the courts look to whether the provision merely imposes an obligation or burden on a government contractor, supplier, or employee, *see, e.g., id.* at 436–37, or whether it seeks to regulate the federal function itself. As the Supreme Court explained in holding that North Dakota's liquor distribution laws, as applied to suppliers of U.S. military facilities, did not violate the immunity doctrine:

> Both the reporting requirement and the labeling regulation operate against suppliers, not the Government, and concerns about direct interference with the Federal Government, *see City of Detroit v. Murray Corp. of America*, 355 U.S. 489, 504–505 (1958) (opinion of Frankfurter, J.), therefore are not implicated.

Id. at 437. Such state laws do not regulate the Government directly, and are valid as long as they are not discriminatory against the United States. *Id.* In contrast, state laws purporting to regulate the functions or operations of the Defense Department or the Internal Revenue Service themselves, for example, would constitute direct regulation of the United States under the *North Dakota* formula.

As the Supreme Court further explained in *Mayo v. United States*:

> These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the supremacy clause. We are not dealing . . . with a tax upon the salary of an employee, or . . . with a tax upon the purchases of a supplier, or . . . with price control exercised over a contractor with the United States. In these cases the exactions directly affected persons who were acting for themselves and not for the United States. These fees are like a tax upon the right to carry on the business of the post office or upon the privilege of selling United States bonds through federal officials.

319 U.S. at 447 (citations omitted).

Because the state insurance laws and licensing requirements in question here would operate directly upon the Smithsonian, the only remaining question is whether the Smithsonian is a part of the federal government itself. In our view, the answer to this question is relatively clear.

In an analogous case, the Ninth Circuit held that the American Red Cross was immune from local taxation based on its status as an instrumentality of the United States. *See United States v. City of Spokane*, 918 F.2d 84 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). In so holding, the court stressed that the Red Cross "is no mere private contractor" but, rather, is "imbedded in the structure of the

government'' to the extent that it is '' 'virtually . . . an arm of the Government.' '' *Id.* at 87–88 (quoting *Department of Employment v. United States*, 385 U.S. 355, 359–60 (1966)).

Here, we believe that the Smithsonian, like the Red Cross, is best regarded as an instrumentality of the United States that is ''imbedded in the structure of the government''—or a ''constituent part'' thereof, *see United States v. New Mexico*, 455 U.S. at 736—rather than as a private entity that merely acts on the Government's behalf pursuant to contract or agency arrangements. The dominant federal governmental role in the Smithsonian's governance, funding, operations, and oversight is critical in this regard. *See* 41 U.S.C. §§ 41–58 (1994). Given these factors, we believe the Smithsonian is ''so closely connected to the Government that the two cannot realistically be viewed as separate entities,'' *see United States v. New Mexico*, 455 U.S. at 735, for purposes of the intergovernmental immunities in question.[7] We therefore believe that the application of state insurance and licensing laws to the Smithsonian Institution's operations would ''regulate[ ] the United States directly'' within the meaning of *North Dakota v. United States*, 495 U.S. at 435.

The Supreme Court's decision in *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374 (1995), lends additional support to our conclusion. In *Lebron*, the Court held that the National Railroad Passenger Corporation (''Amtrak'') constituted an agency or instrumentality of the United States for purposes of determining the constitutional rights of citizens affected by its actions. In so holding, the Court reasoned that an entity qualifies as ''what the Constitution regards as the Government'' if it is government-created and government-controlled. *Id.* at 392. The Court held that Amtrak was government-created because it was established ''by special law for the furtherance of governmental objectives,'' and held that it was government-controlled because federally appointed members of Amtrak's governing board hold voting control over it. *Id.* at 400.

The Smithsonian is similarly government-created and government-controlled. It is established by federal statute to carry out a wide range of educational, cultural, and scientific functions supported by the Government. *See, e.g., Cotton v. Adams*, 798 F. Supp. at 24. Further, all members of its Board of Regents hold their positions either by virtue of other federal government posts they hold or through congressional appointment. 20 U.S.C. §§ 42–43. At least for purposes of the intergovernmental immunity at issue here, we conclude that the Smithsonian must also be considered ''what the Constitution regards as the Government.'' [8]

[7] In reaching this conclusion, we reiterate our view that the unique, hybrid nature of the Smithsonian requires that its legal or governmental status must be assessed from the particular standpoint of the constitutional, statutory or regulatory scheme in which questions arise and that broad generalizations regarding the Smithsonian's status are inappropriate. *See* 12 Op. O.L.C at 123–24

[8] We acknowledge that *Lebron* is distinguishable in at least one essential respect from the question presented here. In *Lebron*, even an express congressional declaration that Amtrak was not a government agency or instrumentality, *see* 49 U.S.C § 24301(a)(2)–(3) (1994), could not override Amtrak's functional status as a government entity because, as the Court stated, ''it is not for Congress to make the final determination of Amtrak's status as a Govern-

CONCLUSION

In light of all the foregoing considerations, we conclude that the Smithsonian cannot be separated from the United States for purposes of intergovernmental immunity and is entitled to immunity from state insurance laws and licensing requirements with respect to its proposed gift annuity program. On the basis of that immunity, which derives from the Supremacy Clause, we believe the Smithsonian may lawfully implement its gift annuity program without first obtaining prior confirmation from state authorities that such state laws and requirements do not apply to it. *See Johnson v. Maryland*, 254 U.S. 51 (1920);[9] *United States v. Montana*, 699 F. Supp. at 836–37. We express no view on the separate issue of whether it would be prudent or practical to proceed with such programs without first consulting with state officials asserting a regulatory interest in those programs.

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

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ment entity for purposes of determining the constitutional rights of citizens affected by its actions." 513 U.S at 392. In contrast, Congress *is* free to enact a statutory waiver of the inter-governmental immunity that would otherwise protect a federal governmental entity. *E g . Hancock v. Train*, 426 U.S. at 179; *Department of Employment v. United States*, 385 U.S. at 358. However, we find no indication that it has done so with respect to the Smithsonian in this context.

[9] As Justice Holmes stated in his opinion for the Court in *Johnson*:

> It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on

254 U.S. at 57

Service by Federal Officials on the Board of Directors of the Bank for International Settlements

18 U.S.C. § 208(a) does not prohibit the Chairman of the Federal Reserve Board and the President of the Federal Reserve Bank of New York from serving in their official capacities on the Board of Directors of the Bank for International Settlements

May 6, 1997

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL RESERVE BOARD

You have asked whether, absent a waiver, 18 U.S.C. § 208(a) would forbid the Chairman of the Federal Reserve Board and the President of the Federal Reserve Bank of New York from serving in their official capacities on the Board of Directors of the Bank for International Settlements ("BIS"). We believe that the statute would not forbid this service.

The BIS was formed in 1930 "for the main purpose of collecting and transferring German reparations." Charles J. Woelfel, *Encyclopedia of Banking and Finance* 95 (10th ed. 1994). It is now "the major forum for consultation, cooperation, and information exchange among central banks, including member central banks of thirty-two countries of which eight are on the BIS Board." Letter for Hon. Donald W. Riegle, Jr., Chairman, Committee on Banking, Housing and Urban Affairs, United States Senate, from Alan Greenspan, Chairman, Federal Reserve Board at 1 (June 20, 1994). Central banks own about 85 percent of the BIS's stock, with the remaining 15 percent in the hands of private shareholders. *Encyclopedia of Banking and Finance* at 96. Although the BIS is a profit-making institution and declares an annual dividend, "[t]he right of representation and voting, in proportion to the number of shares subscribed by each country, may be exercised by the central bank of that country, or by its nominee, or in cases where the central bank does not nominate an institution, the BIS may designate a financial institution not objected to by the central bank of the country in question." Federal Reserve Board Staff, *Background Note on the Federal Reserve's Relationship with the Bank for International Settlements* at 11 (June 1994).

The BIS reserves two seats on its Board for the central bank of the United States, but the Federal Reserve Board did not take up these seats until 1994. At that time, the Chairman assumed one seat and the President of the Federal Reserve Bank of New York assumed the other.

Under 18 U.S.C. § 208(a) (1994), an officer or employee of the executive branch may not participate personally or substantially in any particular matter in which he or she has a financial interest. The statute also imputes certain other financial interests to the officer and employee. These interests include those of any "organization in which [the officer or employee] is serving as . . . director."

An opinion of our office, issued November 19, 1996, concluded that 18 U.S.C. § 208(a) "would prevent a government employee from serving on the board of directors of an outside organization in his or her official capacity, in the absence of: (1) statutory authority or a release of fiduciary obligations by the organization that might eliminate the conflict of interest, or (2) a waiver of the requirements of § 208(a), pursuant to 18 U.S.C. § 208(b)." *Service on the Board of Directors of Non-Federal Entities by Federal Bureau of Investigation Personnel in Their Official Capacities*, 20 Op. O.L.C. 379, 379 (1996). We reasoned that an "employee performs *official* duties for [his or her agency] in serving on the board of the outside organization" and that, therefore, "§ 208 would apply to any action the employee takes *as a director* that affects the financial interests of the outside organization." *Id.* at 380. However, where Congress has authorized the service by statute, the official "serves . . . in an ex officio rather than personal capacity," owes a duty only to the United States, and does not violate § 208. *See Applicability of 18 U.S.C. § 208 to Proposed Appointment of Government Official to the Board of Connie Lee*, 18 Op. O.L.C. 136, 138 (1994).

On the particular facts here, we believe that the Chairman of the Federal Reserve Board and the President of the Federal Reserve Bank of New York have statutory authority to serve on BIS's Board and that § 208 thus does not preclude or affect that service. The Federal Reserve Board has broad statutory authority over negotiations between elements of the central banking system in the United States and foreign banks:

> The Board of Governors of the Federal Reserve System shall exercise special supervision over all *relationships and transactions of any kind* entered into by any Federal reserve bank with any foreign bank or banker, or with any group of foreign banks or bankers, and all such relationships and transactions shall be subject to such regulations, conditions, and limitations as the Board may prescribe. No officer or other representative of any Federal reserve bank shall conduct negotiations of any kind with the officers or representatives of any foreign bank or banker without first obtaining the permission of the Board of Governors of the Federal Reserve System. *The Board of Governors of the Federal Reserve System shall have the right, in its discretion, to be represented in any conference or negotiations by such representative or representatives as the Board may designate.*

12 U.S.C. § 348a (1994) (emphasis added). The "special supervision" provided for by § 348a extends not only to transactions but also to "relationships," which are subject to conditions prescribed by the Board of Governors. Relationships with *groups* of foreign banks are specifically covered. The Board of Governors, more-

over, possesses not only the power to regulate the specified international activities of the member banks but also the right to take part in such international activities in its own behalf.

To be sure, we ordinarily might well find that a provision of this nature would not amount to such statutory authority for service on an outside board as would overcome 18 U.S.C. § 208(a). The specific focus of the provision is the Board of Governors' control over Federal reserve banks, rather than its own authority to enter into "relationships" with foreign banking organizations. Furthermore, the provision does not expressly refer to directorships.

Nevertheless, there is an additional consideration that weighs in favor of reading § 348a as authority for the Chairman and the President of the Federal Reserve Bank of New York to serve on BIS's Board. That service is a means by which the United States negotiates with foreign governments, through their central banks. As President Bush suggested in a signing statement dealing with a provision that would have required Federal banking agencies to hold certain discussions with the BIS, the President has the power to control such communications because they are an exercise of his "constitutional authority to conduct the international relations of the United States." *Statement on Signing the Federal Deposit Insurance Corporation Improvement Act of 1991*, 2 Pub. Papers of George Bush 1649, 1650 (1991).

In this area, the President has broad latitude. *See, e.g., Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (the Supreme Court has "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive' ") (quoting *Haig v. Agee*, 453 U.S. 280, 293–94 (1981)); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705–06 n.18 (1976) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch . . . ."); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"). *See also Earth Island Inst. v. Christopher*, 6 F.3d 648, 652–54 (9th Cir. 1993); *Ward v. Skinner*, 943 F.2d 157, 160 (1st Cir. 1991) (Breyer, J.) ("[T]he Constitution makes the Executive Branch . . . primarily responsible" for the exercise of "the foreign affairs power."), *cert. denied*, 503 U.S. 959 (1992); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (Scalia, J.) ("[B]road leeway" is "traditionally accorded the Executive in matters of foreign affairs."). For example, statutory qualifications for officials who negotiate for the United States are suspect. *See Constitutionality of Statute Governing Appointment of United States Trade Representative*, 20 Op. O.L.C. 279 (1996). Although we do not doubt that Congress may impose conflict of interest restrictions on those who engage in such negotiations, the breadth of the President's power counsels a broad reading of congressional *authorization* for particular means by which the power may be exercised. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320–22 (1936).

Here, Secretary of State Christopher expressed the view "that active participation of the Federal Reserve on the BIS Board will serve U.S. foreign policy interests" and declared that "Federal Reserve membership on the BIS Board has the full support of the Department of State." Letter for Alan Greenspan, Chairman, Board of Governors, Federal Reserve System, from Warren Christopher, Secretary of State (June 15, 1994). The directorships in question, like the United States' membership in other international bodies, is a mode of conducting our foreign relations. Given this setting, we believe that 12 U.S.C. § 348a constitutes statutory authority for holding the directorships, notwithstanding 18 U.S.C. § 208(a).

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

National Archives Access to Taxpayer Information

Neither the Secretary of the Treasury nor the President can permit the National Archives and Records Administration to inspect tax returns or return information pursuant to 44 U.S.C. § 2906(a)(2) for purposes of appraising the records.

May 28, 1997

MEMORANDUM OPINION FOR THE ACTING ASSOCIATE ATTORNEY GENERAL

You have asked whether we concur in the conclusion of the Civil and Tax Divisions that neither "[t]he Secretary of the Treasury [n]or the President can[ ] permit [the National Archives and Records Administration ("NARA")] to inspect [tax] returns or return information pursuant to 44 U.S.C. § 2906(a)(2) for purposes of appraising the records." [1] For the reasons set forth below, we do concur.

Section 2906(a)(2) provides that "[r]ecords, the use of which is restricted by law or for reasons of national security or the public interest, shall be inspected [by NARA], in accordance with regulations promulgated by the Administrator [of General Services] and the Archivist, subject to the approval of the head of the agency concerned or of the President." Under the Internal Revenue Code, title 26 of the U.S. Code, tax returns and tax return information "shall be confidential" and may not be disclosed by the Internal Revenue Service ("IRS") "except as authorized by [title 26]." 26 U.S.C. § 6103(a) (Supp. II 1996). Because taxpayer information is thus "restricted by law," the question presented turns on whether the Secretary of the Treasury or the President is authorized by § 2906(a)(2) to approve NARA access to such information, notwithstanding § 6103's prohibition on disclosure except where authorized by the Internal Revenue Code. There are both narrow and broad bases for concluding that they lack such authority.

1. The narrow basis relies on the limited scope of § 2906(a)(2) and therefore does not even involve consideration of the impact of § 6103. Section 2906(a)(2) is not a freestanding provision applicable to all activities undertaken by NARA under title 44. Rather, it is contained within § 2906, which is limited to inspections of agency records that NARA undertakes under chapter 29 of that title. These inspections are not for NARA's own appraisal purposes but rather are for the purpose of providing agencies with recommendations on their records management practices. The first provision of § 2906 states as follows:

> In carrying out their respective duties and responsibilities *under this chapter*, the Administrator of General Services and the Archivist (or the designee of either) may inspect the records or the records

[1] Memorandum for the Acting Associate Attorney General, from Loretta C Argrett, Assistant Attorney General, Tax Division, and Frank W Hunger, Assistant Attorney General, Civil Division, *Re: Tax Analysts, et al. v. IRS, et al., No. 1 97CV260 JLG (D.D C.)* at 1 (Mar 28, 1997) (attaching separate memoranda from each component providing rationale for this conclusion).

> management practices and programs of any Federal agency *solely for the purpose of rendering recommendations for the improvement of records management practices and programs.* Officers and employees of such agencies shall cooperate fully in such inspections, *subject to the provisions of paragraphs (2)* and (3) of this subsection.

44 U.S.C. § 2906(a)(1) (1994) (emphasis added).

The underscored language indicates both that the NARA inspection authority under § 2906(a)(1) is limited to inspections of agency records under chapter 29 and that it is further limited by the special rule on statutorily restricted records set forth in § 2906(a)(2). NARA's mission under chapter 29 is to "provide guidance and assistance to Federal agencies with respect to ensuring adequate and proper documentation of the policies and transactions of the Federal Government and ensuring proper records disposition." *Id.* § 2904(a) (1994). To assist NARA in performing this function, § 2906(a)(1) authorizes NARA to "inspect" agency records "solely for the purpose of rendering recommendations for the improvement of records management practices and programs." Section 2906(a)(2) is a limitation on the § 2906(a)(1) authority, providing that where such inspections are of statutorily restricted information, they may take place only with the approval of the head of the agency concerned or the President.

The NARA appraisal function under chapter 33 is separate from its chapter 29 function of inspecting agency records in order to advise the agencies on their records management practices. Appraisal is the function that NARA undertakes in order to make *its own determinations* (in contrast to making recommendations to agencies) on whether agency records may be destroyed. Under chapter 33, NARA

> examine[s] the lists and schedules [of records agencies propose for destruction] submitted to [NARA] under section 3303 of this title. If [NARA] *determines* that any of the records listed in a list or schedule submitted to [it] do not, or will not after the lapse of the period specified, have sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government, [it] may . . . (1) notify the agency to that effect; and (2) *empower the agency* to dispose of those records . . . .

44 U.S.C. § 3303a(a) (1994) (emphasis added). Underscoring the decisionmaking authority NARA has under chapter 33, the statute further provides that these "[a]uthorizations granted [by NARA to agencies] shall be mandatory." *Id.* § 3303a(b).

Even if § 2906 did not by its terms limit its application to chapter 29, we believe that it would be difficult to argue that the § 2906(a)(2) authority is available with

respect to the chapter 33 authority. We have not identified any provision in chapter 33—or anywhere else in title 44—that links the chapter 29 inspection authority with the chapter 33 appraisal authority. For example, the provision granting NARA its appraisal authority is written in terms of "examin[ing] lists and schedules," not inspecting the records identified on these lists and schedules. *See id.* § 3303a(a).

We recognize, however, that NARA takes the view that its authorities under chapters 29 and 33 are intertwined. *See* Letter for John Dwyer, Acting Associate Attorney General, from Elizabeth A. Pugh, General Counsel, NARA, *Re: Appraisal of IRS records containing tax return and return information* at 1 (Mar. 21, 1997) ("NARA's paramount concern is to fulfill its statutory obligation to appraise and approve the disposition of IRS's records. 44 U.S.C. §§ 2906; 3303, 3303a."). Although it may be that there is sufficient past practice by NARA to constitute an administrative construction of title 44 to this effect, the memoranda that have been submitted to you do not address this point. Nonetheless, we have proceeded to assume, for the purpose of the following discussion, that the § 2906(a)(2) authority is available for appraisal purposes, so that we could consider the broader question of the interaction of that provision with § 6103 of the Internal Revenue Code.

2. Our broader basis for concurring in the conclusion reached by the Civil and Tax Divisions is the longstanding position of this Office that the general access provisions of title 44 do not override the subsequently enacted, more specific prohibition of § 6103.[2] We have written several memoranda on the relationship between NARA's access rights under title 44 and the subsequently enacted disclosure prohibition of § 6103.[3] We adhere to our established position, which was summarized in the most recent of these memoranda:

> We have thoroughly reexamined [the first two] memoranda, and we concur in their conclusion that the statutory provisions generally

[2] Section 6103 was adopted in 1976, as part of the Tax Reform Act of 1976, Pub L. No 94–455, § 1202, 90 Stat 1520, 1667. The authority to inspect statutorily restricted records contained in § 2906(a)(2) was first provided in 1950, by the Federal Records Act of 1950, Pub L No 754, ch 849, § 505(a), 64 Stat 578, 585. As first enacted, the inspection could take place only with the approval of the head of the agency possessing the records. *Id* The Federal Records Management Amendments of 1976 added the President as an alternative source of approval Pub L No 94–575, § 2(a)(3), 90 Stat. 2723, 2725 This was done in order to provide "for a clearly defined process in those instances where the [Archivist] and the agency head cannot agree on inspection procedures" S. Rep No 94–1326, at 10 (1976), *reprinted in* 1976 U S C C A N 6150, 6158 Thus, the addition of the President did not expand the substantive reach of § 2906(a)(2) It merely gave the approval authority under that provision to an additional person, which did not amount to a significant change because the President already possessed the authority to direct the Archivist and agency heads in their application of this provision, based on his constitutional authority to supervise and guide executive branch officials

[3] *See Transfer of Watergate Special Prosecution Force Records to the National Archives—Income Tax Information—26 U S C. § 6103(a)*, 1 Op O L C 216 (1977), Memorandum for Alice Daniel, Assistant Attorney General, Civil Division, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, *Re. Applicability of the Non-Disclosure Provisions of the Tax Reform Act* (Nov 7, 1980), Memorandum for Richard K Willard, Assistant Attorney General, Civil Division, from Samuel A. Alito, Jr, Deputy Assistant Attorney General, Office of Legal Counsel, *Re· Authority of the FBI to Transfer Restricted Records to the National Archives and Records Administration* (Feb 27, 1986) ("Alito Memorandum").

> empowering the Archivist to obtain . . . records that are subject to statutory restrictions . . . do not reach tax returns and tax return information, which are strictly protected by the Tax Reform Act of 1976, 26 U.S.C. 6103. The Tax Reform Act expressly and unequivocally prohibited the disclosure of tax returns or tax return information except as authorized by that Act (26 U.S.C. 6103(a)). The legislative history of the Act makes clear that these provisions expressed a strong congressional intent to maintain very strict privacy for such information. . . . Because neither the statutory language nor legislative history of the Act provides any indication that Congress intended to allow the Archives to obtain such information . . ., we continue to believe that this specific, subsequent enactment must take precedence over the previously enacted and more general terms of the provisions relating to the Archivist. We must assume that the members of Congress who voted for the Tax Reform Act understood it to mean what the plain language of section 6103(a) says, *viz.*, that tax returns and tax return information would be disclosed only under the carefully prescribed conditions set out in the Act. We think it is unrealistic to assume that Congress intended (but neglected to mention) that such materials would also be subject to disclosure under the Archives provisions.

Alito Memorandum at 1–2 (citations and footnote omitted).

We are aware that there is dictum in a D.C. Circuit decision that suggests that the § 2906(a)(2) authority may override § 6103 because the contrary view "would effectively nullify" the provision. *See American Friends Serv. Comm. v. Webster*, 720 F.2d 29, 76 n.75 (D.C. Cir. 1983). However, we adhere to our previously stated position that this dictum is incorrect. *See* Alito Memorandum at 2–3 ("because [the D.C. Circuit's] discussion is dictum, arose in a different context, and appears to us to be incorrect, we do not believe that it provides a sufficient basis for agreeing to a plan which, in our view, would violate important privacy rights that Congress wished to protect"). The Civil Division's memorandum contains a persuasive discussion of how giving effect to § 6103 does not render § 2906(a)(2) a nullity and how the D.C. Circuit's view fails to give effect to § 2906(b), which requires compliance "with all other Federal laws." 44 U.S.C. § 2906(b). *See* Memorandum for the Acting Associate Attorney General, from Frank W. Hunger, Assistant Attorney General, Civil Division, *Re: Tax Analysts, et al. v. IRS, et al., No. 1:97CV260 JLG (D.D.C.)* at 9 (Mar. 28, 1997).

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of 18 U.S.C. § 208 to the Federal Communications Commission's Representative on the Board of Directors of the Telecommunications Development Fund

Because the Telecommunications Development Fund is a non-profit entity that is owned, funded, and controlled by the federal government, it is not an "organization" within the meaning of 18 U.S.C. § 208. Therefore, the restrictions in § 208 do not apply to the service of the Federal Communications Commission's General Counsel on the Board of Directors of the Fund.

June 12, 1997

MEMORANDUM OPINION FOR THE ASSOCIATE GENERAL COUNSEL AND ALTERNATE DESIGNATED AGENCY ETHICS OFFICIAL FEDERAL COMMUNICATIONS COMMISSION

This memorandum responds to your request for an opinion whether the appointment of the General Counsel of the Federal Communications Commission ("FCC") to the Board of Directors of the Telecommunications Development Fund ("TDF") has created the possibility of a conflict of interest under 18 U.S.C. § 208 (1994) or a breach of fiduciary duty.[1] We have concluded that because the TDF is owned, funded, and controlled by the federal government, it is not an "organization" within the meaning of § 208, and that section's restrictions thus do not apply to the General Counsel's service on the TDF board. Because the existence or scope of a TDF director's fiduciary duty to the TDF is not material to our analysis, and because such a determination is a subject beyond our particular expertise, we have not addressed that question in our opinion.

I. Background

Congress established the TDF as part of the Telecommunications Act of 1996, Pub. L. No. 104–104, § 707, 110 Stat. 56, 154 ("the Act") "to promote access to capital for small businesses in order to enhance competition in the telecommunications industry." 47 U.S.C. § 614(a)(1) (Supp. II 1996). The TDF will operate as a non-profit "quasi-governmental entity." H.R. Conf. Rep. No. 104–458, at 210–11 (1996) ("Conference Report"). The TDF's primary source of funds is the interest accrued on the deposits of parties making competitive bids on electromagnetic spectrum bandwidth, 47 U.S.C. § 309(j) (1994); the Act also authorizes the TDF to receive appropriations and to accept donations. The TDF funds will be used for loans, investments, and other extensions of credit to eligible small businesses. 47 U.S.C. § 614(e).

[1] *See* Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Sheldon M. Guttman, Associate General Counsel and Alternate Designated Agency Ethics Official, Federal Communications Commission (May 30, 1996).

The TDF is governed by a seven member board of directors appointed by the FCC Chairman. 47 U.S.C. § 614(c)(1). "Four of such directors shall be representative of the private sector and three of such directors shall be representative of the [FCC], the Small Business Administration, and the Department of the Treasury, respectively." *Id.* The board of directors determines the general policies governing the operation of the TDF, approves the TDF Chairman's appointments of persons to fill the offices provided for in its bylaws, and defines the TDF's lending policies. *Id.* § 614(c)(3), (f)(4).

As of the date of your request, the FCC Chairman had appointed two members of the TDF board: the board's chairman, who is a representative of the private sector, and the General Counsel of the FCC, Mr. William E. Kennard, who is a representative of the FCC. Mr. Kennard will continue as the General Counsel of the FCC while serving on the TDF board. He will not receive any compensation for his service on the TDF board. You are concerned that this dual role may raise the possibility of a conflict of interest under 18 U.S.C. § 208.

II. Discussion

Under 18 U.S.C. § 208(a), an officer or employee of the executive branch generally is prohibited from participating personally and substantially for the government in a "particular matter in which . . . [an] organization in which he is serving as officer, director, trustee, partner or employee . . . has a financial interest." Section 208 thus usually would require a government official to be disqualified from taking part in a particular matter affecting the financial interest of an organization on whose board of directors he or she sits.[2]

We have not before considered, however, whether § 208 applies to a federal employee's service on the board of a quasi-governmental organization where each member of the board is appointed by a federal officer. Section 208 is premised on the concern that a federal official's personal obligations may conflict with the duties of his or her public office.[3] Section 208 was not meant to cover conflicts that might arise between the different interests of two federal entities. If the TDF is properly considered a governmental entity rather than a private entity, any potential conflict between the federal offical's duties to the FCC and his duties as a director of the TDF would be an intra-governmental conflict between two arms of the federal government, rather than a conflict between the interests of

[2] *See* Memorandum for David H. Martin, Director, Office of Government Ethics, from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re USIA Director's Service on the Board of the United States Telecommunications Training Institute* at 1 (Dec 3, 1986).

[3] *See Questions Raised by the Attorney General's Service as a Trustee of the National Trust for Historic Preservation*, 6 Op O.L.C 443, 446 (1982).

the federal government and the interests of an outside organization.[4] We thus begin by examining whether the TDF is a private entity for purposes of § 208.

A. Section 208's Applicability to Organizations in the Federal Government

Section 208 generally disqualifies an executive branch employee from participating for the government in a particular matter in which an "organization in which he is serving as a[ ] . . . director" has a financial interest. 18 U.S.C. § 208(a). Because the term "organization" is not defined in the statute, we have examined § 208's legislative history for indications as to what types of entities Congress intended the term to include.

According to the Senate Report that accompanied the Bribery, Graft and Conflicts of Interest Act of 1962, Pub. L. No. 87–849, 76 Stat. 1119, Congress used the term "organization" in § 208 in order to reach potential conflicts with both non-profit and for-profit entities outside of the federal government. S. Rep. No. 87–2213, at 14 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3862. Section 208 was modeled on the former § 434 of title 18, which "disqualifie[d] an employee of the Government who has an interest in the profits or contracts of a business entity from the transaction of business with such entity." *Id.* at 13, *reprinted in* 1962 U.S.C.C.A.N. at 3862. Section 208(a) was intended to improve upon § 434 "by abandoning the limiting concept of a 'transaction of business,'" instead embracing "any participation on behalf of the Government in a matter in which the employee has an *outside financial interest.*" *Id.* (emphasis added). The replacement of the term "business organization" with the more inclusive "organization," the Senate Report further states, was also intended to clarify that employees were not to act for the government in matters involving non-profit corporations to which they were connected. *Id.* at 14, *reprinted in* 1962 U.S.C.C.A.N. at 3862 (noting the many universities, non-profit foundations, and research entities then engaged in government work). The Senate Report nowhere

[4] In general, the same person may hold more than one office in the executive branch *See* Memorandum for Philip B Heymann, Deputy Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re Creation of an Office of Investigative Agency Policies* at 6 (Oct 26, 1993) (repeal of prohibition on dual office-holding and enactment of statute prohibiting dual compensation impliedly permits holding two offices simultaneously) Our office has suggested, however, that the common law doctrine of "incompatibility" might in some cases limit the ability of a person to hold two offices at the same time Two offices are "incompatible" at common law if public policy would make it improper for one person to perform both functions, as where, for example, Congress creates one of the two offices as a "statutory check" on the other. *See, e g*, Memorandum for Arnold Intrater, General Counsel, Office of White House Administration, from John O McGinnis, Deputy Assistant Attorney General, Office of Legal Counsel, *Re Dual Office of Executive Secretary of National Security Council and Special Assistant* at 3–4 (Mar 1, 1988) (also noting possible incompatibility where the official interests of the two positions conflict or where one office adjudicates matters in which the other is a party). While this office has "continued to refer to the doctrine in our opinions," we have recognized that "[i]t is arguable that it has either fallen into desuetude or been repealed by statute" Memorandum for Edward C Schmults, Deputy Attorney General, from Theodore B Olson, Assistant Attorney General, Office of Legal Counsel, *Re· Appointment of D. Lowell Jensen as Associate Attorney General* at 3, 4 (June 14, 1983) You have not asked, and this opinion does not address, whether the offices of General Counsel of the FCC and service on the TDF Board are incompatible, but we would be pleased to assist you with that question if you believe it is an issue.

suggests an intention to bar federal employees from involvement in matters affecting other federal agencies, or federally owned and controlled corporations.[5]

B. The TDF is a Federal Government Entity for Purposes of Section 208

We thus turn to the question of whether the TDF may be characterized as a part of the federal government for purposes of § 208, or whether it should be deemed an outside, non-governmental organization triggering that section's restrictions. The Telecommunications Act does not address whether service on the TDF board is to be considered service on a non-governmental organization within the meaning of § 208, and offers no definitive statement of the TDF's status in or with the federal government. The Conference Report's only comment on the status of the TDF is that it "is formulated to serve as a quasi-governmental entity." Conference Report at 210.

This lack of definition is not unusual. While the United States has long employed the corporate form to achieve governmental objectives; *see generally Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 386–91 (1995), there is "no comprehensive descriptive definition of or criteria for creating government corporations." U.S. General Accounting Office, *Government Corporations*, 2–3 (December 1995) ("GAO Report"). The Government Corporations Control Act, 31 U.S.C. §§ 9101–9110, imposes various recordkeeping, reporting, and budgetary requirements on the "wholly owned" and "mixed ownership" government corporations listed in § 9101 of that statute, but does not purport to list all of the corporate entities in which the federal government presently participates. The TDF is not among the organizations listed in 31 U.S.C. § 9101.

While undertaken for different purposes and in a different context, the analysis of the GAO in its most recent report on government corporations is instructive. *See* GAO Report. In that report, the GAO developed a taxonomy which first divided the universe into two categories: public and private. Public entities, owned and controlled by the public sector, were further divided between "government agencies" and "government corporations." Private entities, in turn, were subdivided into "government sponsored enterprises" and "private corporations." GAO Report at 4–5. The TDF had not been established at the time of the GAO's report. The GAO surveyed fifty-eight entities and included data on the twenty-two entities that reported themselves to be government corporations. The GAO also included data on five entities that did not consider themselves government corporations, but that the GAO and others frequently consider to be some type

[5] *Accord* Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev 1113, 1129–36 (1963) (consistently characterizing aim of § 208 as preventing conflicts with "private economic interests," "private parties," and "outside entities"), Bayless Manning, *Federal Conflict of Interest Law* § 2–4.2a (1964) (discussing two instances in which the former § 434 did not apply to a federal employee's service with organizations established and controlled by the federal government, in part because such organizations were "established by the government itself to carry out governmental policies considered to be in the public interest").

of government corporation, and that receive operating funds from yearly federal appropriations.[6]

For the purposes of our inquiry, the distinctions between public "government corporations" and private "government sponsored enterprises" are most relevant. The GAO's classification scheme focused on the following factors: funding sources, particularly receipt of government appropriations; ownership; control; non-profit or for-profit status; and the application of fifteen federal laws that generally govern the operation of federal agencies.[7] Government corporations typically receive full or partial funding from the U.S. government. While some are part of a government agency, government corporations are granted some flexibility in adhering to federal statutes and regulations. Government-sponsored enterprises, in contrast, were described as "federally established, privately owned corporations designed to increase the flow of credit to specific economic sectors." *Id.* at 4 n.9. These enterprises are typically financed by private investors, privately owned and controlled, and profit-seeking. They generally do not receive government appropriations. While regulated by the federal government to protect the government's interest, government enterprises are less likely to be subject to the range of statutes governing federal agency operations. *Id.* at 4–5.

With these factors in mind, we revisit the structure and operations of the TDF. On four of the five measures identified by the GAO — funding, ownership, control, and non-profit status — the TDF matches the paradigm of a government corporation. It is a non-profit entity primarily funded by interest on deposits with the FCC for bandwidth auctions. It is also authorized to receive appropriations and donations. The TDF is not a stock corporation, and presumably, its assets belong entirely to the United States. While the FCC Chairman does not direct the day-to-day operations of the TDF, his authority to appoint the entire Board gives him a significant degree of control over its policies and performance. Unlike the majority of the government corporations in the GAO study, however, the TDF is not expressly subject to the requirements of any of the federal statutes selected

[6] The twenty-two entities that reported themselves as government corporations in 1995 were the African Development Foundation, the Commodity Credit Corporation, the Community Development Financial Institutions Fund, the Corporation for National and Community Service, the Export-Import Bank, the Federal Crop Insurance Corporation, the FDIC, the Federal Housing Administration, the Federal Prison Industries, the Government National Mortgage Association, the National Credit Union Administration, Amtrak, the Overseas Private Investment Corporation, the Pennsylvania Avenue Development Corporation, the Pension Benefit Guaranty Corporation, the Resolution Funding Corporation, the Resolution Trust Corporation, the Rural Telephone Bank, the St Lawrence Seaway Development Corporation, the Tennessee Valley Authority, the Financing Corporation, and the United States Enrichment Corporation GAO Report at 7–8. The five other federally funded entities included in the GAO report were the Corporation for Public Broadcasting (which reported itself to be a private, non-profit corporation), the Inter-American Foundation (reported as a federal agency), the Legal Services Corporation (a private, non-profit corporation), the Neighborhood Reinvestment Corporation (a public, non-profit corporation), and the U.S. Postal Service (an independent establishment of the executive branch). *Id.* at 2 n 4.

[7] Most of the twenty-two government corporations in the GAO study were exempt from the pay and classification requirements of title 5; the requirements of competitive contracting; the Federal Manager's Integrity Act, and the Federal Credit Reform Act More than two-thirds, however, were subject to the Ethics in Government Act, the Government Corporation Control Act; the Privacy Act; the Freedom of Information Act, and the Inspector General Act. GAO Report at 9–10

for the study. You have indicated that the TDF is presently considering to what extent it will adopt policies and bylaws consistent with the requirements of some of these statutes.

In summary, the TDF is a non-profit entity wholly owned by the federal government. It also receives the vast majority of its funds from the federal government, although not from yearly appropriations. Its policy and operations will be governed by directors appointed by the FCC Chairman. Congress did not subject the TDF to the five statutes most often applicable to government corporations. Given the FCC Chairman's authority over the selection of the TDF's board, and the absence of any private ownership or interest, however, the failure to apply those statutes, which need not be applied to government corporations, does not counsel deeming the TDF an outside organization. It is thus appropriate to characterize the TDF as a federal government entity for purposes of § 208.[8]

III. Conclusion

Because the TDF is a non-profit entity that is entirely owned, funded, and controlled by the federal government, § 208's restrictions do not apply to the service of the FCC General Counsel on the TDF's board of directors.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

[8] In 1994, we examined a question similar to the issue you have presented and concluded that § 208 would apply to a Deputy Assistant Secretary of the Department of the Treasury appointed to the Board of Directors of the College Construction Loan Insurance Association ("Connie Lee"). *See Applicability of 18 U.S.C. § 208 to the Proposed Appointment of the Deputy Assistant Secretary to the Board of the College Construction Loan Insurance Association*, 18 Op. O.L.C. 136 (1994). While that opinion did not consider whether Connie Lee could be deemed a part of the federal government for purposes of § 208, we note that Connie Lee was established as a private, for-profit stock corporation. It began operating as a joint venture between the Secretary of Education and the Student Loan Marketing Association ("Sallie Mae"), but Congress directed that it ultimately become a private corporation. Three members of its eleven member board were appointed by the private Sallie Mae corporation, two by the Secretary of Education, and two by the Secretary of the Treasury. The four remaining directors were selected by the common stockholders, who at that time were the Secretary of Education and Sallie Mae. Upon the sale of the Secretary of Education's stock and privatization, the entire board will be elected by the stockholders.

Funding of State Department Settlements of Foreign Tort Claims

Because 22 U S.C. § 2669(f) expressly authorizes the Secretary of State to pay settlements of foreign tort claims from funds appropriated for the activities included in the State Department Basic Authorities Act or from funds "otherwise available," the payment of such settlements is "otherwise provided for" within the meaning of 31 U.S.C. § 1304(a), and therefore the Judgment Fund is not available for the payment of such settlements.

June 18, 1997

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

You have asked whether the Judgment Fund, 31 U.S.C. § 1304 (1994 & Supp. II 1996), is available to pay for settlements of tort claims arising in foreign countries pursuant to 22 U.S.C. § 2669(f) (1994). The Torts Branch of the Civil Division has concluded that such settlements are payable from the State Department's agency appropriation and that the Judgment Fund is therefore not available.[1] The State Department, relying on a 1980 opinion of the Comptroller General, concludes that its agency funds are not available for the payment of such settlements and that the Judgment Fund is available.[2] Because § 2669 expressly authorizes the Secretary of State to pay settlements of foreign tort claims from funds appropriated for the activities included in the State Department Basic Authorities Act, ch. 841, § 2, 70 Stat. 890 (1956), or from funds "otherwise available," we have concluded that the Judgment Fund is not available for the payment of such settlements.

I. Background

A. *The Judgment Fund*

In 1956, Congress established a permanent and indefinite appropriation to pay certain final judgments, compromise settlements, and interest and costs. Supplemental Appropriation Act, ch. 748, § 1302, 70 Stat. 678, 694 (1956). This "Judgment Fund" is the proper source of payment for a particular judgment or settlement under three conditions. First, the payment may not be "otherwise provided for," i.e., there must be no other appropriation that lawfully can be used for payment. Second, the payment must be certified by the Director of the Office of

[1] Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Frank W. Hunger, Assistant Attorney General, Civil Division, *Re Funding of State Department Settlements of Foreign Tort Claims* (Jan 16, 1997)

[2] *See* Letter for Frank W Hunger, Assistant Attorney General, Civil Division, from Michael J Matheson, Acting Legal Adviser, Department of State, Enclosure 2 at 4 ("State Analysis")

Management and Budget ("OMB").[3] Finally, the judgment or settlement must be payable under one of several listed statutes or under a decision of a board of contract appeals. 31 U.S.C. § 1304(a)(3) (1994).[4]

Agency operating appropriations are not generally available to pay judgments and compromise settlements. Thus, prior to the creation of the Judgment Fund, most agencies had to seek a specific appropriation from Congress to pay any judgment imposed on them. This cumbersome process led to undue delay in payment, resulting in excess charges for interest. The Judgment Fund was designed to address this problem by eliminating the need for Congress to pass specific appropriations bills for the payment of judgments that were not "otherwise provided for."[5] When an agency has specific and express statutory authority to pay judgments and settlements out of its own revenues, however, judgments continue to be payable out of those funds rather than the Judgment Fund.

B. *State Department Authority to Pay Settlements Under § 2669(f)*

The Federal Tort Claims Act ("FTCA") authorizes the head of each federal agency to adjust, compromise or settle any tort claim for money damages against the United States caused by the negligence of its employees while acting within the scope of their office or employment. 28 U.S.C. § 2672 (1994). Settlements of less than $2500 are paid by the head of the agency from available agency appropriations. Awards of more than $2500 are paid "in a manner similar to judgments and compromises in like causes." *Id.* Thus to determine the proper source of payment for the settlement of a claim of more than $2500, one must determine the proper source of payment for a judgment arising from a similar claim. If a judgment for a similar tort claim would be payable from the Judgment Fund, the settlement of the claim also will be payable from the Judgment Fund. If, however, a judgment for a similar claim would be payable from agency funds, the agency must use its available funds to pay the settlement.

While tort claims arising in a foreign country generally are excluded from the provisions of the FTCA, 28 U.S.C. § 2680(k) (1994), Congress has granted certain agencies the authority to settle such claims. Section 2 of the State Department Basic Authorities Act of 1956, 70 Stat. 890, as amended, authorizes the Secretary

[3] Section 1304(a) provides for certification by the Comptroller General. As of June 30, 1996, however, this function was transferred to the Director of OMB. Legislative Branch Appropriations Act, 1996, Pub L No 104–53, § 211, 109 Stat 514, 535 (1995) (codified at 31 U S C § 501 note (1994)) *

* Editor's Note: On October 19, 1996, § 1304(a) was amended again, this time to provide for certification by the Secretary of the Treasury. *See* General Accounting Office Act of 1996, Pub L No 104–316, tit II, § 202(m), 110 Stat 3826, 3843 (codified at 31 U.S C. § 1304(a) (Supp II 1996))

[4] The statutes include §§ 2414, 2517, 2672, and 2677 of title 28, 31 U S C. § 3723, and certain other specified acts

[5] *See Availability of the Judgment Fund for the Payment of Judgments or Settlements in Suits Brought Against the Commodity Credit Corporation Under the Federal Tort Claims Act*, 13 Op O L C 362, 363 (1989), 3 Office of the General Counsel, United States General Accounting Office, *Principles of Federal Appropriations Law* 14–24 to 14–26 (2d ed. 1994) ("GAO Principles")

of State to "use funds appropriated or otherwise available to the Secretary" for several functions, including to

> pay tort claims, in the manner authorized in the first paragraph of section 2672, as amended, of title 28, when such claims arise in foreign countries in connection with Department of State operations abroad.

22 U.S.C. § 2669(f).[6] In 1996, Congress appropriated $1.7 billion "[f]or necessary expenses of the Department of State and the Foreign Service not otherwise provided for, including expenses authorized by the State Department Basic Authorities Act of 1956, as amended." Department of State and Related Agencies Appropriations Act, 1997, Pub. L. No. 104–208, 110 Stat. 3009, 3009–46 (1996).

C. *Source of Funds for Settlements Made Pursuant to § 2669(f)*

The Torts Branch maintains that under the plain language of § 2669, an appropriation for that section is available to pay settlements of foreign tort claims under paragraph (f). If that agency appropriation is available, the settlements are "otherwise provided for" within the meaning of 31 U.S.C. § 1304, and the Judgment Fund is therefore not available.

The State Department contends that the Civil Division's analysis does not consider the full text of § 2669(f) and the legislative history of § 2672 of the FTCA, which is specifically referenced in paragraph (f). The State Department points to a 1980 opinion of the Comptroller General that considered whether settlements of foreign tort claims over $2500 under paragraph (f) were, like settlements for the same amount under the FTCA, payable from the Judgment Fund. *See* State Analysis at 2–5 (discussing Administrative Settlements of Tort Claims Arising in Foreign Countries, B–199449.OM, 1980 WL 16177 (C.G. Aug. 7, 1980) ("GAO Opinion")). That opinion concluded that when Congress enacted paragraph (f) and authorized the Secretary to pay settlements of foreign tort claims, Congress intended for those settlements to be paid in the same manner as domestic claims settled under § 2672 of the FTCA rather than paid in the manner of the other activities listed in § 2669. GAO Opinion at *3. Because FTCA claims over $2500 presently are payable from the Judgment Fund, the State Department concludes that settlements of more than $2500 made pursuant to § 2669(f) are payable from the Judgment Fund rather than from its operating appropriation. *See* State Analysis at 9–10.

Without expressing a view on the correctness of the GAO's interpretation of the law as it existed in 1980, the Torts Branch rejects the State Department's

[6] Section 2669 also authorizes the Secretary to provide for printing and binding outside of the United States; to settle claims of less than $15,000 presented by foreign governments; to obtain contract services abroad, to provide for official functions and courtesies, and to procure goods for use at Foreign Service posts. 22 U.S.C. § 2669

present reliance on the 1980 GAO opinion because § 2669 has since been amended.[7] In 1980, § 2669 provided that "[t]he Secretary of State, *when funds are appropriated therefor, may* . . . (f) pay tort claims, in the manner authorized in the first paragraph of section 2672, as amended, of title 28, when such claims arise in foreign countries in connection with Department of State operations abroad." 22 U.S.C. § 2669 (1976) (emphasis added). The authorization for the activities in § 2669 was thus conditioned on Congress making a specific appropriation.

In 1985, however, Congress replaced the conditional authorization with a permanent authorization, and made available additional funds to cover § 2669 activities. See Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99–93, § 114, 99 Stat. 405, 411 (1985). The amended statute provides that "[t]he Secretary of State *may use funds appropriated or otherwise available to the Secretary to* . . . (f) pay tort claims, in the manner authorized in the first paragraph of section 2672, as amended, of title 28, when such claims arise in foreign countries in connection with Department of State operations abroad." 22 U.S.C. § 2669 (emphasis added). The Torts Branch contends that the statute now permits the Secretary to pay for settlements without a specific appropriation, and that the Judgment Fund therefore is not available.

II. Analysis

Whether the Judgment Fund is available for payment of foreign tort claims under § 2669(f) turns on whether the payment of those claims is "otherwise provided for" within the meaning of 31 U.S.C. § 1304. Whether a payment is otherwise provided for is a question of legal availability rather than actual funding status. GAO Principles at 14–26. If any of the State Department's agency appropriations are lawful sources of payment for settlements under paragraph (f), payment is "otherwise provided for" and the Judgment Fund is not available.

We begin with the text of § 2669. That section states that funds appropriated for the specific purposes listed in § 2669 and funds "otherwise available to the Secretary" are available to pay settlements of foreign tort claims "in the manner authorized in the first paragraph of section 2672, as amended, of title 28." 22 U.S.C. § 2669(f). The first paragraph of § 2672, in turn, requires the Secretary to obtain the approval of the Attorney General for settlements of more than $25,000 and authorizes the Secretary to use arbitration. 28 U.S.C. § 2672.[8] The

[7] *See* Memorandum for Jeffrey Axelrad, Director, Torts Branch, Civil Division, from Tess Finnegan, Law Clerk, *Re: Use of State Department Funds to Settle Foreign Tort Claims, Reply Memorandum* (Dec 1996)

[8] The first paragraph of § 2672, in relevant part, states

> The head of each Federal agency . . . , in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for [torts committed by Federal employees]: *Provided*, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney

Continued

text of the first paragraph of § 2672 in no way limits or excepts the authorization to use funds appropriated under § 2669 to pay for settlements of foreign tort claims. Because § 2669 expressly makes those State Department appropriations available to pay foreign tort claims, the settlements are "otherwise provided for" and the Judgment Fund is not available.

We have considered the State Department's argument that, notwithstanding § 2669(f)'s direction that the Secretary pay foreign tort claims "in the manner authorized *in the first paragraph of section 2672*, as amended, of title 28," 22 U.S.C. § 2669(f) (emphasis added), Congress intended to incorporate all of the paragraphs and all subsequent amendments to § 2672 into § 2669(f). *See* State Analysis at 2–9 (citing GAO opinion). Because the third paragraph of § 2672 has been amended and now permits agencies to pay certain domestic tort claim settlements of more than $2500 from the Judgment Fund,[9] the State Department maintains that similar foreign tort settlements of this amount also are payable from the Judgment Fund.

We do not find this argument persuasive. First, when interpreting a statute of specific reference like § 2669(f), "only the appropriate parts of the statute referred to are considered." 2B Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 51.08, at 192 (5th ed. 1992). By restricting the reference in paragraph (f) to the first paragraph of § 2672, Congress presumably intended to exclude the other paragraphs from application to payment of § 2669(f) settlements.

Nor do we agree that because Congress had amended the third but not the first paragraph of 28 U.S.C. § 2672 at the time it enacted § 2669(f), Congress necessarily intended to incorporate the amendments to the third paragraph of § 2672 into the payment of § 2669(f) claims. There is another, more plausible explanation for Congress's inclusion of the phrase "as amended" in § 2669(f). A statute of specific reference "incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute." 2B Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 51.08, at 192 (5th ed. 1992). By specifically referring to the first paragraph of § 2672, "*as amended*," Congress provided that any amendments to the first paragraph would be incorporated into § 2669(f). Had Con-

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General . . . Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General . . . , to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States Each Federal agency may use arbitration, or other [specified] alternative means of dispute resolution . . . , to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General . . . .

[9] The third paragraph of § 2672 states, in relevant part,

Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section . shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

gress not included the phrase "as amended," § 2669(f) would have been interpreted as incorporating the $1000 cap on agency settlement authority contained in the first paragraph of § 2672 in 1956, rather than incorporating any subsequent amendments to the dollar cap or the other payment provisions in paragraph one.

Finally, we note that the GAO's interpretation of § 2669(f) fails to give any effect to the words "first paragraph." In the normal case, every word Congress uses in a statute should be given effect. *See, e.g., Feist Publications, Inc. v. Rural Telephone Serv. Co.*, 499 U.S. 340, 358–59 (1991); *United States v. Menasche*, 348 U.S. 528, 538–39 (1955). Congress had no reason to specify "the first paragraph" of § 2672 if it intended for all of the paragraphs of § 2672 to apply to payments under § 2669(f). We thus conclude that § 2669(f) incorporates only the provisions of the first paragraph of § 2672, and that the provisions of the third paragraph authorizing payment from the Judgment Fund for certain settlements do not apply to the State Department's settlement of foreign tort claims.

The State Department has advised us that because it has not budgeted funds to cover these settlements, it is likely that the Secretary of State will cease to settle foreign tort claims. *See* Letter for Frank W. Hunger, Assistant Attorney General, Civil Division, from Michael J. Matheson, Acting Legal Adviser, Department of State at 1–2 (Jan. 6, 1997). The State Department is concerned that this will be an irritant in the United States' relations with foreign countries, and will likely result in an increase in the number of suits filed against the United States in foreign courts. *Id.*

Although we are sensitive to these policy implications, we believe that, in light of the plain language of § 2669, the concerns the State Department expresses must be addressed to Congress.[10] In this regard, the Department may wish to consider working with the State Department to propose legislation that would make the Judgment Fund available for settlements of foreign tort claims under § 2669(f).

III. Conclusion

Because funds appropriated to the State Department for the activities listed in section 2 of the State Department Basic Authorities Act of 1956 and funds otherwise available to the Secretary are lawful sources of payment for settlements of foreign tort claims made pursuant to § 2669(f), the Judgment Fund is not available. The Secretary of State must comply with the first paragraph of 28 U.S.C. § 2672

[10] We also note that our conclusion is not entirely inconsistent with past practice After reviewing its records, the Office of the Legal Adviser informed us that the Secretary used agency appropriations to pay for two foreign tort settlements in the late 1970's

when settling such claims, but they are to be paid from State Department appropriations.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act

The Clean Air Act authorizes the Environmental Protection Agency administratively to assess civil penalties against federal agencies for violations of the Act or its implementing regulations.

Separation of powers concerns do not bar EPA's exercise of this authority, because it can be exercised consistent with the Constitution.

July 16, 1997

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

You have asked for our opinion resolving a dispute between the Environmental Protection Agency ("EPA") and the Department of Defense ("DOD") concerning whether the Clean Air Act ("the Act"), 42 U.S.C. §§ 7401–7671q (1994), authorizes EPA administratively to assess civil penalties against federal agencies for violations of the Act or its implementing regulations, and if so, whether this authority can be exercised consistent with the Constitution.[1] Applying the "clear statement" rule of statutory construction, which is applicable where a particular interpretation or application of an Act of Congress would raise separation of powers concerns, we conclude that the Act does provide EPA such authority. We also conclude that these separation of powers concerns do not bar EPA's exercise of this authority because it can be exercised consistent with the Constitution.

I.

A.

EPA's authority to initiate enforcement proceedings under the Clean Air Act is set forth in section 113 of the Act, entitled "Federal Enforcement," 42 U.S.C.

[1] *See* Letter for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Jonathan Z. Cannon, Assistant Administrator (General Counsel), EPA (Oct 3, 1995), enclosing *Memorandum on Assessment of Administrative Penalties Against Federal Facilities under the Clean Air Act* (Sept 11, 1995) ("EPA Memorandum"), Letter for Walter Dellinger, from Judith A Miller, General Counsel, DOD (Dec 15, 1995), enclosing *DOD Response Memorandum: Assessment of Administrative Penalties Against Executive Branch Agencies Under Section 113(d) of the Clean Air Act* (Dec 15, 1995) ("DOD Response"), Letter for Christopher Schroeder, Acting Assistant Attorney General, Office of Legal Counsel, from Jonathan Z Cannon (Oct 18, 1996), enclosing *EPA Memorandum in Reply to Department of Defense Concerning Administrative Assessment of Civil Penalties Against Federal Facilities Under the Clean Air Act* (Sept. 16, 1996) ("EPA Reply")

§ 7413 (1994). As summarized in section 113(a)(3),[2] section 113 provides that when EPA finds that "any person has violated, or is in violation of" the Act or its implementing regulations, EPA may issue an administrative penalty order or a compliance order, bring a civil action, or request the Attorney General to commence a criminal action. The questions presented to us are whether the Act authorizes EPA to issue an administrative penalty order to a federal agency under section 113(d), and if so, whether that authority can be exercised consistent with the Constitution.[3]

The Act authorizes EPA to issue two kinds of administrative penalty orders. Section 113(d)(1) authorizes EPA to "issue an administrative order against any person assessing a civil administrative penalty of up to $25,000, per day of violation" when EPA "finds that such person" has violated the Act or its implementing regulations. 42 U.S.C. § 7413(d)(1). Such a penalty may be assessed only after opportunity for a hearing on the record in accordance with the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 554, 556 (1994). 42 U.S.C. § 7413(d)(2).

In addition, section 113(d)(3) authorizes EPA to implement a field citation program under which "persons" who commit minor violations of the Act or the regulations may receive field citations assessing civil penalties not to exceed $5,000 per day. *Id.* § 7413(d)(3). Field citations may be issued without a hearing, but persons who have received citations may request a hearing. "Such hearing shall not be subject to [the APA], but shall provide a reasonable opportunity to be heard and to present evidence." *Id.* The Act provides for the two types of administrative penalty orders to be litigated in the courts in a variety of ways. Persons against whom either kind of penalty is imposed may seek judicial review in federal district court, and in any such proceeding the United States may seek an order requiring that the penalties be paid. *Id.* § 7413(d)(4). In addition, if a person fails to pay any penalty after receiving an order or assessment from EPA, "the Administrator shall request the Attorney General to bring a civil action in an appropriate district court to enforce the order or to recover the amount ordered or assessed." *Id.* § 7413(d)(5).

B.

EPA presents a straightforward position that section 113(d) authorizes EPA to assess administrative penalties against federal agencies. That subsection authorizes EPA to assess penalties against "persons." Although the term "person" is not

[2] *See* 42 U.S.C § 7413(a)(3) (where it finds a violation, EPA may "(A) issue an administrative penalty order in accordance with subsection (d) of this section, (B) issue an order requiring such person to comply with such requirement or prohibition, (C) bring a civil action in accordance with subsection (b) of this section or section 7605 of this title, or (D) request the Attorney General to commence a criminal action in accordance with subsection (c) of this section")

[3] We intend that our resolution of the questions concerning section 113(d) will also apply to the comparable authority provided to EPA with respect to mobile sources by sections 205(c) and 211(d)(1) of the Act, 42 U.S.C. §§ 7524(c), 7545(d)(1) (1994). *See* EPA Memorandum at 2–3.

defined in section 113, which is the Act's federal enforcement section, the term is defined in the Act's general definitions section, section 302(e), which provides that the term includes "any agency, department, or instrumentality of the United States and any office, agent or employee thereof." 42 U.S.C. § 7602(e) (1994). EPA concludes that "[s]ince federal facilities expressly fall within the Act's definition of person, [section 113(d)] unambiguously demonstrate[s] that EPA has authority to issue administrative penalties against federal facilities." EPA Memorandum at 3.

DOD argues in response that EPA's interpretation would raise significant separation of powers concerns, because it would authorize civil litigation proceedings between federal agencies, and therefore it can be adopted only if there is an express statement of congressional intent to provide such authority that is sufficient to meet the high standard applied by the courts and this Office with respect to statutory interpretation questions involving separation of powers concerns.[4] DOD argues that "[s]ection 113(d) fails to provide clear and express authority for EPA to impose administrative penalties against Executive Branch agencies." DOD Response at 4. DOD rejects EPA's argument that the inclusion of federal agencies in the Act's general definition of "person" constitutes "a sufficiently express statement to allow [EPA] to exercise enforcement authority against other Executive Branch agencies." *Id.* at 5.

II.

We agree with DOD that the interpretation of the Clean Air Act advanced by EPA — that EPA is authorized to initiate enforcement proceedings under section 113(d) against federal agencies — raises substantial separation of powers concerns, thus warranting application of the clear statement principle.

In 1994, this Office was asked whether the Department of Housing and Urban Development ("HUD") has the authority under the Fair Housing Act to initiate enforcement proceedings against other federal agencies. We concluded that such an interpretation of the Fair Housing Act would raise substantial separation of powers concerns "relat[ing] to both the President's authority under Article II of the Constitution to supervise and direct executive branch agencies and the Article III limitation that the jurisdiction of the federal courts extends only to actual cases and controversies." Fair Housing Act Opinion, 18 Op. O.L.C. at 105. We stated that "[w]ith respect to the Article III issue, this Office has consistently said that 'lawsuits between two federal agencies are not generally justiciable,'" *id.* at 106

[4] *See* DOD Response at 4 ("The assessment of administrative penalties against Executive Branch agencies by EPA is based on a statutory scheme that contemplates judicial intervention into what should be a purely Executive Branch function, thus raising significant constitutional separation of powers concerns, warranting the high standard of review") (citing *Authority of Department of Housing and Urban Development to Initiate Enforcement Actions Under the Fair Housing Act Against Other Executive Branch Agencies*, 18 Op. O.L.C. 101 (1994) ("Fair Housing Act Opinion")

(quoting *Constitutionality of Nuclear Regulatory Commission's Imposition of Civil Penalties on the Air Force*, 13 Op. O.L.C. 131, 138 (1989) ("NRC Opinion")), and that "[w]ith respect to Article II, we have indicated that construing a statute to authorize an executive branch agency to obtain judicial resolution of a dispute with another executive branch agency implicates 'the President's authority under Article II of the Constitution to supervise his subordinates and resolve disputes among them.'" *Id.* (quoting *Review of Final Order in Alien Employer Sanctions Cases*, 13 Op. O.L.C. 370, 371 (1989)).

We observed in our Fair Housing Act opinion that these separation of powers concerns

> are the essential backdrop for our analysis of whether the Fair Housing Act authorizes HUD to initiate enforcement proceedings against other executive branch agencies. Like the Supreme Court, we are "loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils."

Id. at 106–07 (quoting *Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989)). Accordingly, we applied a clear statement rule and concluded that the statute did not provide HUD this authority:

> Applying the standard the Supreme Court has used when a particular interpretation or application of an Act of Congress would raise separation of powers or federalism concerns, we believe that because substantial separation of powers concerns would be raised by construing the Act to authorize HUD to initiate enforcement proceedings against other executive branch agencies, we cannot so construe the Act unless it contains an express statement that Congress intended HUD to have such authority. Because the Act does not contain such an express statement, we conclude that it does not grant HUD this authority.

Id. at 101.

Our insistence in the Fair Housing Act Opinion that the statute must "contain[] an express statement that Congress intended HUD to have such authority" was consistent with a long line of opinions of the Supreme Court and this Office that require a clear statement of congressional intent when separation of powers or federalism concerns would be raised. Many of these opinions are cited in an opinion that we issued subsequent to the Fair Housing Act Opinion. *See Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350 (1995) (concluding that 28 U.S.C. § 458 (1994), which prohibits appointment or employment of relatives of judges in same court, does not apply

to presidential appointments of judges). We stated in that opinion that "[g]iven the central position that the doctrines of federalism and separation of powers occupy in the Constitution's design, [the clear statement rule] serves to 'assure[ ] that the legislature has in fact faced, and intended to bring into issue, the critical matters' of the balance of power among the three branches of the federal government, in the context of separation of powers, and between the federal and state governments, in the context of federalism." *Id.* at 352 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991)). *See also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989); *United States v. Bass*, 404 U.S. 336, 349 (1971).

III.

Based on the foregoing discussion, we must find a clear statement of congressional intent before we can conclude that the Clean Air Act authorizes EPA to initiate enforcement proceedings against other executive branch agencies. As discussed below, we believe that the statutory text provides a very strong basis for finding a clear statement of such intent and that this conclusion is fully supported by the legislative history of the Act, particularly the 1977 amendment of the definition of "person" to include federal agencies.

A straightforward review of the relevant provisions of the Clean Air Act's statutory text supports EPA's position that the statute gives EPA authority to assess civil penalties against federal agencies administratively. EPA's authority under section 113(d) is available with respect to "persons" who violate the Act.[5] The term "person" is defined in section 302(e): "When used in [the Clean Air Act] . . . [t]he term 'person' includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and *any agency, department, or instrumentality of the United States* and any officer, agent, or employee thereof." 42 U.S.C. § 7602(e) (emphasis added).

EPA rests its argument on the plain meaning of these two provisions. EPA does so with good justification, because read together sections 113(d) and 302(e) expressly provide that EPA may issue administrative penalty assessments against federal agencies. We have also reviewed the evolution of the relevant provisions of the Clean Air Act as reflected by various amendments to the Act over the years. As discussed below, that history fully supports the conclusion that Congress contemplated EPA enforcement against other federal agencies.

[5] Section 113(d)(1) provides for assessment of civil penalties against "persons". "The Administrator may issue an administrative order against any person " 42 U S C § 7413(d)(1) Section 113(d)(3) achieves the same result, but uses indirect language "The Administrator may implement a field citation program . . . [under] which field citations may be issued by officers or employees designated by the Administrator Any person to whom a field citation is assessed may . elect to pay the penalty assessment or to request a hearing on the field citation " *Id.* § 7413(d)(3). The plain language of these provisions refutes DOD's position that this language "cannot fairly be read to constitute an affirmative grant of authority to issue a field citation against 'any person '" DOD Response at 5.

The administrative enforcement provisions set forth in section 113(d) were enacted as part of the Clean Air Act Amendments of 1990 ("the 1990 Amendments"), Pub. L. No. 101–549, § 701, 104 Stat. 2399, 2677–79. We have reviewed the legislative history of the 1990 Amendments and have found no discussion of the application of those provisions to federal agencies. We have not limited our legislative history review to the 1990 Amendments, however, because the administrative enforcement authorities provided by those amendments merely supplemented the enforcement authorities EPA already had with respect to "persons" under the other provisions of section 113. Thus, Congress's intent in providing EPA those other authorities is controlling.

EPA's other enforcement authorities under section 113 originated with the Clean Air Act Amendments of 1970 ("the 1970 Amendments"), Pub. L. No. 91–604, § 4(a), 84 Stat. 1676, 1686–87. As with the current version of section 113, the 1970 version authorized federal enforcement against "persons." However, at that time the Act's definition of "person" did not include agencies of the federal government.[6] The 1970 Amendments also revised section 118 of the Act to make federal agencies subject to the substantive requirements of the Act: "[Federal agencies] shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements." *Id.* § 5, 84 Stat. at 1689.[7] Thus, the 1970 version of section 118 referred only to federal agencies complying with substantive requirements; it did not contain any language subjecting federal agencies to enforcement authority.

In 1977, the definition of "person" was expanded to include "any agency, department, or instrumentality of the United States." Clean Air Act Amendments of 1977 ("the 1977 Amendments"), Pub. L. No. 95–95, § 301(b), 91 Stat. 685, 770. This amendment was contained in the House-passed version of the 1977 Amendments, which was accepted by the conference committee. *See* H.R. 6161, § 113(d), 95th Cong., 1st Sess. (1977) ("House Bill"); H.R. Conf. Rep. No. 95–564, at 137, 172 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1502, 1517–18, 1552–53. The committee report accompanying the House Bill expressly stated that the specific purpose of the expansion of the definition of "person" was to make it clear that section 113 enforcement was available with respect to federal agencies:

[6] "Person" was limited to "an individual, corporation, partnership, association, State, municipality, and political subdivision of a State." Pub. L. No. 88–206, § 9(e), 77 Stat. 392, 400 (1963).

[7] The previous version of section 118, enacted in 1959, merely requested federal agencies to "cooperate" with air pollution enforcement control agencies. *See* Act of Sept. 22, 1959 ("the 1959 Amendments"), Pub. L. No. 86–365, § 2, 73 Stat. 646 ("It is hereby declared to be the intent of the Congress that any Federal department or agency . . . shall, to the extent practicable and consistent with the interests of the United States and within any available appropriations, cooperate with the Department of Health, Education, and Welfare, and with any interstate agency or any State or local government air pollution control agency in preventing or controlling the pollution of the air . . . ").

> Finally, in defining the term "person" for the purpose of section 113 of the act to include Federal agencies, departments, instrumentalities, officers, agents, or employees, the committee is expressing its unambiguous intent that the enforcement authorities of section 113 may be used to insure compliance and/or to impose sanctions against any Federal violator of the act.

H.R. Rep. No. 95–294, at 200 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077, 1279 ("House Report").[8]

In sum, the expansion of the definition of "person" to include federal agencies, together with the statement in the House Report that the definitional change was for the express purpose of subjecting federal agencies to EPA enforcement under section 113, leave no room for doubt that Congress clearly indicated in 1977 its intent to authorize EPA to use its section 113 enforcement authorities against federal agencies.

IV.

EPA takes the position that its authority under the Clean Air Act to assess civil penalties against federal agencies administratively can be exercised consistent with Articles II and III of the Constitution. EPA bases its position on the view that the Act

> provides sufficient discretion to the affected parties so that complete resolution of the dispute may occur within the Executive Branch, up to and including referral to the President of any issues that are not otherwise resolved, and the President is not deprived of his opportunity to review the matter in dispute.

EPA Memorandum at 1. We agree with EPA's position. We will discuss the Article II and Article III issues separately.

A.

EPA asserts that it can exercise its administrative enforcement authority under the Act in a way that is consistent with the President's supervisory authority under Article II. EPA emphasizes that the Act

> provides a federal facility with the right to a hearing before final assessment of a penalty, and therefore . . . provides federal facili-

[8] The quotation from the House Report indicates that the House Bill "defin[ed] the term 'person' for the purpose of section 113." The House Bill accomplished that purpose by amending the Act's general definition of "person," not by creating a special definition applicable only to section 113. *See* H.R. 6161, *supra*, § 113(d).

> ties with sufficient opportunity to raise any dispute to the President where considered appropriate. Nothing in the Act would prevent a federal facility from exercising this opportunity to raise any dispute to the President.

Id. at 5 (footnote omitted). Nor are federal agencies limited to using the hearing process to raise a dispute to the appropriate level within the executive branch: federal agencies will have the opportunity to consult with the EPA Administrator before any assessment is final, *see id.*, and the Attorney General could seek to resolve the matter if either EPA or the respondent federal agency sought to litigate the matter, *see id.* at 6.

The critical point for constitutional purposes is that the Act does not preclude the President from authorizing any process he chooses to resolve disputes between EPA and other federal agencies regarding the assessment of administrative penalties. "[I]t is not inconsistent with the Constitution for an executive agency to impose a penalty on another executive agency pursuant to its statutory authority so long as the President is not deprived of his opportunity to review the matter." NRC Opinion, 13 Op. O.L.C. at 136–37.

DOD attempts to distinguish our NRC Opinion, which concluded that the administrative enforcement authority of the Nuclear Regulatory Commission ("NRC") under the Atomic Energy Act, *see* 42 U.S.C. § 2282 (1994), could be exercised against federal agencies consistent with Article II. DOD suggests that the statutory regimes are different, arguing principally that they differ with respect to the Attorney General's authority to resolve a dispute. It notes that the Atomic Energy Act contains an express authorization to the Attorney General, in circumstances where the NRC has requested that the Attorney General institute a civil action to collect a penalty, "to compromise, mitigate, or remit such civil penalties." 42 U.S.C. § 2282(c). *See* DOD Response at 10–11. DOD then asserts that the Clean Air Act is different because it "limits the discretion of the Attorney General to compromise, mitigate or remit a penalty assessment." *Id.* DOD apparently bases that assertion on the language in section 113(d)(5) stating that in any civil action "the validity, amount, and appropriateness of such order or assessment shall not be subject to review." 42 U.S.C. § 7413(d)(5).

DOD's assertion that the Clean Air Act limits the Attorney General's discretion is incorrect. Section 113(d)(5) acts as a limitation only on the authority of the courts in any action that is brought before the courts. It is not a limitation on the Attorney General, acting under Executive Order No. 12146 or any litigation review process, or — more to the point — the President acting through whatever executive branch process he may authorize. The absence of any limitation on the President's discretion is the dispositive factor for constitutional purposes, and in that respect the two statutory regimes are the same. Neither statute precludes reso-

lution within the executive branch, including resolution by the President, of disputes between the enforcement agency and other federal agencies.[9]

B.

EPA acknowledges that the civil action provisions contained in sections 113(d)(4) and 113(d)(5) of the Act, *see* 42 U.S.C. §§ 7413(d)(4), 7413(d)(5), "raise the possibility of one executive branch agency suing another in federal court over the administrative penalty," EPA Memorandum at 9, but it takes the position that "[t]he constitutional concerns . . . could be avoided by an interpretation that the general reference to review in federal district court reasonably means only judicial review that was otherwise constitutional." *Id.* In particular, EPA emphasizes that "nothing in the Clean Air Act mandates that two executive branch agencies end up in federal court. There is at most an opportunity for any agency to seek judicial review, and a requirement that EPA 'request' that the Attorney General file a collection action." *Id.* EPA concludes that "the mere possibility that an interagency lawsuit might result does not invalidate an agency's ability to assess civil penalties against another executive branch agency, where the Attorney General has adequate discretion to control the filing of such a lawsuit." *Id.* at 10.

As stated in Section II of this opinion, "this Office has consistently said that 'lawsuits between two federal agencies are not generally justiciable.'" Fair Housing Act Opinion, 18 Op. O.L.C. at 106 (quoting NRC Opinion, 13 Op. O.L.C. at 138). "We have reasoned that federal courts may adjudicate only actual cases and controversies, that a lawsuit involving the same person as both plaintiff and defendant does not constitute an actual controversy, and that this principle applies to suits between two agencies of the executive branch." *Id.* We agree with EPA, however, that this Article III barrier to use of the civil action remedies of section 113(d) is not a barrier to EPA's exercise of its administrative enforcement authority under the Act. Put another way, we agree that the administrative authority can be exercised consistent with Article III. The Act does not require that civil actions be brought in the event of a dispute of an assessment by EPA; it merely authorizes the bringing of such actions.

Thus, as is the case with the comparable provisions contained in the Atomic Energy Act, which we concluded in our NRC opinion could be applied consistent with Article III, "this constitutional issue need not arise, because the framework

[9] Nor does the Clean Air Act's citizen suit provision operate to preclude resolution within the executive branch. Section 304 provides that "any person may commence a civil action on his own behalf . . against any person (including the United States) who is alleged to be in violation of . (B) an order issued by [EPA] . with respect to [an emission] standard or limitation" under the Act. 42 U.S.C. § 7604(a)(1) (1994). The filing of a citizen suit during the pendency of a dispute between EPA and a federal agency would not prevent the President from directing EPA to suspend, withdraw or modify the order it had issued to the agency. Such direction could be provided specifically in individual cases or generally by operation of a standing directive setting forth procedures for resolution of enforcement proceedings under section 113.

of the Act clearly permits [a] dispute over civil penalties to be resolved within the executive branch, and without recourse to the judiciary." NRC Opinion, 13 Op. O.L.C. at 141.[10] To the extent that the civil action provision of the two statutes are parallel, in that the Attorney General rather than the enforcement agency has control over whether to bring the civil action, our analysis in the NRC Opinion is directly controlling here:

> It is therefore clear that the Attorney General may exercise [her] discretion to ensure that no lawsuits are filed by [EPA] against other agencies of the executive branch. If the Attorney General and the President determine that no civil penalties should be collected, the Attorney General may simply refrain from bringing a lawsuit. If the Attorney General determines that certain civil penalties are appropriate, however, the Attorney General would still not bring a lawsuit because of the constitutional problems noted above. Rather, procedures internal to the executive branch are adequate to resolve the dispute through the determination that [the federal agency responsible for the federal facility] is liable.

Id. at 143.

The only difference between the two statutes that is relevant to the Article III question is that section 113(d)(4) of the Clean Air Act would also authorize the agency responsible for the federal facility to initiate a civil action to contest an EPA administrative order. *See* 42 U.S.C. § 7413(d)(4). The difference is not significant for constitutional purposes, however, because, as we have explained, the Act is permissive only and does not require any federal agency to bring a civil action. Moreover, the Attorney General and the President possess the authority to forestall litigation between executive branch entities. The Attorney General is responsible for conducting litigation on behalf of most federal agencies and therefore can ensure that no civil action is filed by those agencies against another federal entity. We would expect that the relatively few federal agencies that have relevant independent litigating authority similarly would decline to file civil actions, consistent with the conclusions set forth in this memorandum. In any event, the President could direct the agency head not to bring an action or to withdraw any action that might be filed.

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

[10] *See also id.* at 143 ("We thus conclude that a lawsuit between two agencies of the executive branch would involve substantial constitutional problems, but that the statutory scheme permits resolution of the interagency dispute within the executive branch.").

Applicability of 3 U.S.C. § 112 to Detailees Supporting the President's Initiative on Race

3 U.S.C. § 112 does not apply to the details of employees to support the President's Initiative on Race.

August 1, 1997

MEMORANDUM OPINION FOR THE DEPUTY ASSISTANT ATTORNEY GENERAL
JUSTICE MANAGEMENT DIVISION

You have asked us whether 3 U.S.C. § 112 will require the White House to reimburse the Department of Justice ("DOJ") and other agencies for details of employees to support the President's Initiative on Race.[1] On July 24, 1997, we advised you orally that § 112 would not apply to these details. This memorandum sets forth our reasoning.

As explained to us by the White House Counsel and by your office, the President's Initiative on Race will be supported by a Presidential Advisory Committee, known as the President's Advisory Board on Race, and by an Initiative staff headed by an Executive Director. The Board has been chartered by the DOJ, and the entire staff of the Initiative is to be detailed to DOJ. The Initiative staff's functions can be divided into two categories. The staff will provide administrative services, research, and other support to the President's Advisory Board on Race. The Initiative staff will also undertake activities apart from its support of the Board. These latter activities will further the President's Initiative on Race, but will not be at the behest of or for the use of the Advisory Board. The current plan calls for the Initiative staff to be housed in the White House complex and to have frequent interaction with White House staff.

Section 112 of title 3 requires any covered White House office[2] to which an employee has been detailed to reimburse the detailing agency for the pay of each employee

> (1) who is so detailed, and
> (2) who is performing services which have been or would otherwise be performed by an employee of such office,
>
> for any period occurring during any fiscal year after 180 calendar days after the employee is detailed in such year.

[1] *See* Memorandum for Dawn Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Janis A. Sposato, Deputy Assistant Attorney General, Justice Management Division (June 20, 1997).

[2] The offices covered by § 112 are the White House Office, the Executive Residence at the White House, the Office of the Vice President, the Domestic Policy Staff, and the Office of Administration. 3 U.S.C. § 112.

3 U.S.C. § 112 (1994). Neither § 112 nor any other statute defines the term "detail." The Federal Personnel Manual, which has been discontinued, formerly defined a detail as "the temporary assignment of an employee to a different position for a specified period, with the employee returning to his regular duties at the end of the detail." Letter for Honorable William D. Ford, Chairman, Committee on Post Office and Civil Service, House of Representatives, B–224033, 1987 WL 101529 (C.G.) at *2 (Jan. 30, 1987). While the Initiative staff will be detailed to DOJ, they will be housed in the White House complex and will have daily interaction with White House staff. You have therefore asked us whether § 112 will apply to detailees serving on the Initiative staff.

We thus consider whether § 112 applies to details of agency employees to the Initiative staff to carry out Board and non-Board activities. Because such details will be details to DOJ rather than to the White House, we have concluded that § 112 will not apply in either case.

I. Board Activities

The President's Advisory Board on Race is a presidential advisory committee chartered by the Attorney General pursuant to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. 1 (1994). *See* Exec. Order No. 13050, 62 Fed. Reg. 32,987 (1997). FACA provides that an agency is "responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise." 5 U.S.C. app. 1, § 12(b). FACA thus requires DOJ to fund the support of the Advisory Board, including support provided to the Board by the Initiative staff. If other agencies provide services to the Board beyond the participation of agency representatives[3] or the provision of information, DOJ would reimburse those agencies. Services of a detailed agency employee in support of the Advisory Board will thus support a DOJ function rather than a White House function. Because those services will not be in support of the White House, the employees will not be detailed to the White House and § 112 will not apply.

II. Non-Board Activities

As you have described them to us, the Initiative's non-Board activities can be characterized as an interagency venture on race. The Initiative staff will investigate and evaluate programs and policies in a variety of areas, including criminal justice, housing, education, employment, and health. The Initiative staff is likely to include representatives and detailees from several agencies, including the Departments of

[3] An "agency representative" is an agency employee who represents his or her home agency on a task force or working group. *See* U S General Accounting Office, Personnel Practices· Schedule C and Other Details to the Executive Office of the President at 14 (Nov. 6, 1992).

Justice, Education, Housing and Urban Development, Labor, Treasury, and Health and Human Services.

The Department of Justice plans to fund the support of this interagency venture. While section 613 of the most recent Treasury appropriation prohibits "interagency financing" of such ventures—i.e. support from more than one agency or instrumentality—absent specific statutory authority,[4] it does not "prevent a single agency with *a primary interest* in the success of [an] entire interagency venture from picking up the total cost."[5] *In Re: U.S. Equal Employment Opportunity Commission Funding of Federal Executive Boards*, B–219795, 1986 WL 64098 (C.G.) at *2 (Sept. 29, 1986) (emphasis added) (one agency can pay for a Federal Executive Board ("FEB") banquet, but banquet cannot be funded on a per capita basis). "However, in order to justify an expenditure of appropriated funds for an interagency venture, an agency must have *a substantial stake in the outcome* of the interagency endeavor and the success of the interagency venture *must further the agency's own mission, programs or functions*. . . . [I]f more than one agency has an equal stake in the success of the venture, an agreement must be reached as to which one will assume the total burden." 67 Comp. Gen. at 29. (emphasis added).

The Department therefore may use its appropriated funds to cover the expenses of the Initiative's non-Board activities if it has a "substantial stake" in the outcome of those activities and that outcome will further DOJ's own mission, programs, or functions. You have advised us that the Department has so concluded and that the Initiative staff will be detailed to the Civil Rights Division; thus, there does not appear to be any question that this condition is satisfied.[6] Employees detailed to support those activities will be performing functions of DOJ rather than the White House. Accordingly, the employees will not be "detailed" to the White House and § 112's restrictions will not apply.

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[4] Section 613 states:

> No part of any appropriation contained in this or any other Act shall be available for interagency financing of boards (except Federal Executive Boards), commissions, councils, committees, or similar groups (whether or not they are interagency entities) which do not have a prior and specific statutory approval to receive financial support from more than one agency or instrumentality.

Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104–208, § 613, 110 Stat. 3009–314, 3009–356 (1996). Mere agency participation in an interagency group, such as attendance at interagency meetings or functions, does not constitute financial support of the interagency venture as a separate entity or organization and is not prohibited by section 613 *See* 67 Comp Gen. 27, 29 (1987)

[5] *See* 67 Comp Gen. at 28, 65 Comp Gen. 689, 692 (1986) (one agency can support FEB). The predecessors to section 613 applied to Federal Executive Boards.

[6] If this condition were not satisfied, the use of the Department's appropriation would violate 31 U.S.C § 1301(a) (1994), which restricts the use of appropriations to "the objects for which the appropriation[ ] w[as] made." Section 613 does not provide authority for the Department to expend funds on activities that are not already authorized by an existing appropriation. *Cf* Memorandum for Jay B Stephens, Special Counsel to the Assistant Attorney General, Criminal Division, from Ralph W. Tarr, Deputy Assistant Attorney General, Office of Legal Counsel at 6 n.8 (Nov 5, 1982) (31 U.S.C § 691, now codified at 31 U.S.C § 1346, does not independently authorize expenditures on interagency committees not otherwise authorized). If you concluded that the condition was somehow not satisfied, we would be prepared to address the permissible alternatives for funding the Initiative's non-Board activities

III. Conclusion

Section 112 will not apply to a detailee's service on the Initiative in support of the Advisory Board on Race because FACA authorizes DOJ, which established the advisory committee, to provide support to the Board. Detailees supporting the Board will therefore provide services to DOJ and not to the White House. Section 112 will not apply to a detailee's services in support of the Initiative's non-Board activities if DOJ can lawfully use its appropriations to support the non-Board activities and if the Department is the single agency designated to provide that support.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Authority of Military Exchanges to Lease General Purpose Office Space

The Navy Exchange Service Command, a nonappropriated fund instrumentality, and similar military exchange units constitute integral components of the Department of Defense, and their leasing authority, like that of other DoD components, is subject to the provisions of Reorganization Plan No. 18 of 1950, notwithstanding their status as NAFIs. Accordingly, they are not authorized to lease general purpose urban office space unless such authority is delegated to them by the General Services Administration.

August 1, 1997

MEMORANDUM OPINION FOR THE GENERAL COUNSELS
OF THE DEPARTMENT OF DEFENSE
AND THE GENERAL SERVICES ADMINISTRATION

This responds to your request for the Attorney General to resolve a disagreement between the Department of Defense ("DoD") and the General Services Administration ("GSA") which has been submitted to her for resolution[1] pursuant to Executive Order No. 12146.[2] The Attorney General has delegated her authority to resolve such disputes to this Office pursuant to 28 C.F.R. § 0.25(a) (1996). The disagreement centers on whether the Navy Exchange Service Command ("NEXCOM"), a nonappropriated fund instrumentality ("NAFI") within DoD, has legal authority to lease general purpose office space in urban centers in the absence of a delegation of authority to do so from GSA. DoD asserts that NEXCOM has such authority, while GSA takes the contrary position.

We conclude that NEXCOM and similar military exchange units constitute integral components of DoD and that their leasing authority, like that of other DoD components, is subject to the provisions of Reorganization Plan No. 18 of 1950, notwithstanding their status as NAFIs. Accordingly, NEXCOM is not authorized to lease general purpose urban office space for itself unless such authority is delegated to it by GSA.

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[1] Letter for Janet Reno, Attorney General, from Judith A. Miller, General Counsel, Department of Defense (Sept. 13, 1996). DoD's views on the issue in question are set forth in Memorandum for the General Counsel, Department of the Navy, from Robert S. Taylor, Deputy General Counsel, Department of Defense, *Re: Authority of a Non-Appropriated Fund Instrumentality (NAFI) to Enter Into a Lease Without Delegation from GSA* (Aug. 30, 1996) ("DoD Memo"). The GSA's views are set forth in a letter to Robert S. Taylor, Deputy General Counsel, Department of Defense, from Emily C. Hewitt, General Counsel, General Services Administration (Aug. 23, 1996) ("GSA Letter").

[2] Executive Order No. 12146 is reprinted as a note following 28 U.S.C. § 509 (1994) and provides in section 1-402 thereof.

> Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve . . . a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is a specific statutory vesting of responsibility for resolution elsewhere.

I. BACKGROUND

A.

Except insofar as delegated to the head of an executive branch agency pursuant to 40 U.S.C. § 486(d) (1994) or section 3(b) of Reorganization Plan No. 18 of 1950 ("Reorg. Plan"),[3] GSA is the sole authority for leasing general purpose urban office space in the United States for any governmental entity that is covered by the Reorganization Plan.

Reorganization Plan No. 18 was promulgated pursuant to the provisions of the Reorganization Act of 1949, Pub. L. No. 81–109, 63 Stat. 203 ("Reorg. Act"). It provided that all functions regarding the Government's acquisition and disposition of building space by lease, with certain enumerated exceptions, were to be transferred from the "respective agencies" in which such functions were previously vested to the Administrator of General Services. Reorg. Plan § 1. Nothing in the text of Reorganization Plan No. 18 indicates that NAFIs in general, or military exchanges in particular, were to be excluded from its coverage. On the other hand, the Reorganization Plan did enumerate specific categories of government property that *were* excluded from its provisions: space in buildings located in foreign countries or on military bases; space in hospitals, laboratories, factories, and other "special purpose" buildings; and all leasing of the Post Office Department. Reorg. Plan § 1(a)–(d).

The Federal Property and Administrative Services Act ("Property Act") separately authorizes GSA to enter into lease agreements covering periods of not more than twenty years "for the accommodation of Federal agencies." 40 U.S.C. § 490(h)(1) (1994). This leasing authority provision was not part of the original Property Act (which was enacted in 1949, *see* Pub. L. No. 81–152, 63 Stat. 377), but was added by amendment in 1958. *See* Pub. L. No. 85–493, 72 Stat. 294 (1958). At the time the 1958 amendment was enacted, leasing authority for federal agencies and departments had already been transferred to GSA on July 1, 1950, pursuant to Reorganization Plan No. 18. Thus, the effect of the 1958 amendment enacting § 490(h)(1) was to expand the GSA's *existing* leasing authority to increase the permissible duration of authorized leases from five years to ten years (subsequently increased to 20 years). *See* Pub. L. No. 85–493, 72 Stat. at 294; H.R. Rep. No. 85–1814, at 2–3 (1958), *reprinted in* 1958 U.S.C.C.A.N. 2877, 2879.

[3] Section 3(b) of the Plan provides:

> When authorized by the Administrator of General Services, any function transferred to him by the provisions of this reorganization plan may be performed by the head of any agency of the executive branch of the Government or, subject to the direction and control of any such agency head, by such officers, employees, and organizational units under the jurisdiction of such agency head as such agency head may designate

Reorg Plan No 18 of 1950, § 3(b), 15 Fed Reg. 3177, *reprinted in* 40 U S C § 490 note (1994), *and in* 64 Stat 1270 (1950)

B.

NEXCOM is a nonappropriated fund instrumentality established under the authority of 10 U.S.C. § 136 (1994),[4] 10 U.S.C. § 3013(b)(9) (1994) (Secretary of the Navy's responsibility to provide for the morale and welfare of Navy personnel), and DoD Directive 1015.1 ("Establishment, Management, and Control of Nonappropriated Fund Instrumentalities") (Aug. 19, 1981). DoD Directive 1015.1 defines a military exchange NAFI as follows:

> An integral DoD organizational entity that performs an essential government function. It acts in its own name to provide or to assist other DoD organizations in providing [morale, welfare, and recreation] programs for military personnel and authorized civilians. It is established and maintained individually or jointly by the Heads of DoD Components. As a fiscal entity, it maintains custody of and control over its [nonappropriated funds]. It is also responsible for the exercise of reasonable care to administer, safeguard, preserve, and maintain prudently those appropriated fund resources made available to carry out its function. It contributes, with its [nonappropriated funds] to the [morale, welfare, and recreation] programs of other authorized organizational entities, when so authorized. It is not incorporated under the laws of any state or the District of Columbia and it enjoys the legal status of an instrumentality of the United States.

Id., Encl. 2.

We are advised that military exchange NAFIs are presently established under the authority of the Assistant Secretary of Defense for Force Management Policy or one of the Service Secretaries (or their respective designees). DoD Memo at 4–5 and n.2. Employees of a military exchange NAFI are classified as federal employees within the Department of Defense. *See Honeycutt v. Long*, 861 F.2d 1346, 1349 n.3 (5th Cir. 1988). The House Armed Services Committee has described the military exchange NAFIs as follows:

> Nonappropriated fund activities of the Department of Defense occupy a unique position. They render a service vital to the morale of military personnel and their dependents. Nonappropriated funds are instrumentalities of the Federal Government and are entitled to the sovereign immunities and privileges of the United States as pro-

[4] That section provides that the Under Secretary of Defense for Personnel and Readiness, "[s]ubject to the authority, direction, and control of the Secretary of Defense, . . shall perform such duties and exercise such powers as the Secretary of Defense may prescribe in the areas of . . exchange, commissary, and nonappropriated fund activities." *Id*

> vided in the Constitution, statutes, treaties, and agreements with foreign governments.

Special Subcomm. on Nonappropriated Fund Activities Within the Department of Defense of House Comm. on Armed Services, 92d Cong., *Review of Nonappropriated Fund and Other Resale Activities Within the Department of Defense* 16615 (Comm. Print 1972).

The nature and status of the military exchanges (sometimes called "post exchanges") was further described as follows by the U.S. Court of Appeals for the Fifth Circuit (there with particular reference to the Army and Air Force Exchange Service ("AAFES"), the Army/Air Force equivalent of NEXCOM):

> The AAFES is created by federal statute, 10 U.S.C. §§ 4779(c), 9779(c), and is under the military's control. *See Standard Oil Co. of Cal. v. Johnson*, 316 U.S. 481, 484, 62 S. Ct. 1168, 86 L.Ed. 1611 (1942) ("post exchanges . . . are arms of the government. . . . *They are integral parts of the war department . . . and partake of whatever immunities it may have under the Constitution and federal statutes.*"). Moreover, Congress controls the types of goods and services that can be provided, establishes price ceilings, and limits those who may use an AAFES. The purpose of the AAFES is to provide low cost merchandise and services to military personnel of the United States. The United States uses profits and dividends from the AAFES to fund military welfare plans. It is thus well established by the statutes and cases that the United States contemplates and manifests supervision and control over the AAFES and its property.

United States v. Sanders, 793 F.2d 107, 108–09 (5th Cir. 1986) (emphasis added; citations omitted).

DoD acknowledges that NAFIs such as NEXCOM derive their powers and authorities from regulations promulgated by DoD or the Service Departments and "cannot be given authority by the Secretary or the Secretaries of the Military Departments . . . that they [i.e., the DoD and Service Secretaries] do not have." DoD Memo at 5. Further, as noted in DoD's legal memorandum on this issue, military exchange NAFIs may not enter into lease agreements for the use of "non-DoD" lands or buildings "except upon specific approval by the head of the DoD Component concerned." *Id.* at 1 n.1 (quoting DoD Directive 1015.6, Encl. 3 ("Funding of Morale, Welfare, and Recreation Programs") (Aug. 3, 1984)) ("DoD Directive 1015.6").

It is our understanding that NEXCOM has not been delegated authority from GSA to enter into leases for general purpose office space in urban centers. The

question presented is whether, in the absence of such a delegation, NEXCOM has legal authority to enter into such leases on its own.

II. ANALYSIS

A.

In contending that NEXCOM has leasing authority independent of any delegation from GSA, DoD asserts three main arguments: (1) because military exchange NAFIs do not in themselves constitute "federal agencies" as defined in the Property Act, their leasing activities are not subject to GSA's authority under that act, DoD Memo at 2–4; (2) a federal statute's applicability to NAFIs may not be inferred from language encompassing federal entities in general, and neither the Property Act nor Reorganization Plan No. 18 contain special provisions explicitly stating that they apply to NAFIs, *id.* at 2–3; and (3) NEXCOM retains a residual leasing authority, derived through DoD, that is independent of both the Property Act and Reorganization Plan No. 18, *id.* at 4–8. The thrust of this latter argument appears to be that, because NAFIs are not themselves "federal agencies" under the Property Act, DoD's authority over their leases was never transferred to GSA under the Property Act or pursuant to Reorganization Plan No. 18, and such authority is therefore still retained by DoD or by the military exchanges.[5]

In contrast, GSA contends that (1) whether or not NEXCOM satisfies the Property Act's definition of a "federal agency" in its own right, it constitutes an integral component of DoD and the Department of the Navy, and (2) inasmuch as the leasing authority of DoD and the Department of the Navy was indisputably transferred to GSA under the provisions of Reorganization Plan No. 18, so was that of NEXCOM. GSA Letter at 1–2.

B.

Reorganization Plan No. 18 provides that "*[a]ll* functions with respect to acquiring space in buildings by lease . . . are hereby transferred from the respective agencies in which such functions are now vested to the Administrator of General Services," exclusive of certain enumerated exceptions. Reorg. Plan § 1 (emphasis added). The specified exceptions from GSA's comprehensive assumption of federal government leasing authority included space in buildings located in foreign countries or on military bases, certain "special purpose" properties

[5] DoD also contends that certain other statutory restrictions on government acquisition of real property (including leases) cited by GSA are not applicable to the leasing authority at issue here. DoD Memo at 9–12. Because we conclude that authority over NAFI leasing is vested in GSA under Reorganization Plan No. 18, we need not address these alternative sources of leasing restrictions. We do note that, whether or not the statutes cited by GSA are applicable in this context, leases undertaken by NEXCOM pursuant to a valid delegation from GSA would be "authorized by law" within the meaning of such statutes. *See, e.g.*, 10 U.S.C. § 2676(a) (1994).

(such as hospitals and prisons), and space occupied by the Post Office Department. President Truman described Reorganization Plan No. 18 as follows:

> The plan transfers to the Administrator of General Services the functions of the various Federal agencies with respect to leasing and assigning general-purpose space in buildings and the operation, maintenance, and custody of office buildings.
>
> . . . .
>
> This plan concentrates in the General Service Administration the responsibility for the leasing and assignment of what is termed general purpose building space; that is, space which is suitable for the uses of a number of Federal agencies. It specifically excludes space in buildings at military posts, arsenals, navy yards, and similar defense installations and space in hospitals, laboratories, factories, and other special purpose buildings.

Pub. Papers of Harry S. Truman 217–18 (1950).

It is not disputed that DoD's leasing authority was transferred to GSA under the Reorganization Plan. Moreover, DoD acknowledges that "the divestiture of [federal agency] leasing authority contained in Reorganization Plan No. 18 was *of all functions*, as opposed to just those functions being exercised on behalf of an agency," DoD Memo at 7. Nonetheless, DoD argues that the leasing authority of the military exchanges was implicitly excluded from the Reorganization Plan's wholesale divestiture of DoD leasing authority.

As in its contentions concerning the Property Act (see Part II.C, *infra*), DoD primarily argues that NAFIs fall outside the coverage of the Reorganization Plan because the Plan, and certain related official statements referring to it, used the term "agencies" or "federal agencies" in referring to the entities affected by it. DOD Memo at 6–7. Because NAFIs are "instrumentalities" that are not "federal agencies," the argument continues, authority over their leases was not transferred under the Reorganization Plan. *Id.* at 8.[6]

We do not find this line of argument persuasive. The Reorganization Plan contains no definition of "agency" or "federal agency," and it does not incorporate the definitions of the Property Act by reference or otherwise.[7] There is no sugges-

[6] DoD supplements this argument with the related contention that "any intent to circumscribe the authority of the NAFIs must be clearly evidenced." DoD Memo at 8. We address this contention in Part II.D, *infra*.

[7] Because the Reorganization Plan was enacted pursuant to the Reorganization Act of 1949, that act's definition of "agency" could be considered relevant to the scope of that term as used in the Reorganization Plan. That definition provides in relevant part:

> When used in this Act, the term "agency" means any executive department, commission, council, independent establishment, Government corporation, board, bureau, division, service, office, officer authority, administration, or other establishment, in the executive branch of the Government . . .

tion in the Reorganization Plan or related materials that its reference to "the respective agencies," Reorg. Plan § 1, was intended to exclude from coverage those components or sub-units of an agency that do not themselves satisfy some unspecified definition of the term "agency" or "federal agency." On the contrary, the text of the Reorganization Plan and the accompanying Presidential statement confirm that, apart from those discrete government programs and activities that were specifically excepted, the Plan's transfer of leasing functions was intended to extend throughout the Federal Government.[8]

We believe that DoD's argument that the leasing authority of the military exchanges was implicitly excluded from the comprehensive sweep of Reorganization Plan No. 18 is incompatible with the exchanges' status as integral components of DoD. That status is well-established and long-recognized. In *Standard Oil Co. v. Johnson*, for example, the Supreme Court concluded that the military post exchanges "are arms of Government . . . essential for the performance of governmental functions" and constitute an "integral part[ ] of the War Department [now DoD] . . . and partake of whatever immunities it may have under the Constitution and federal statutes." 316 U.S. at 485. Numerous other cases have similarly acknowledged the status of the military exchanges as integral components of DoD. *See, e.g., Honeycutt v. Long*, 861 F.2d 1346, 1349 (5th Cir. 1988) (holding that the Secretary of Defense or the Service Secretaries are proper named defendants in an employment discrimination suit brought by a NAFI employee, the court stated, "The AAFES is a part of the Department of Defense."); *Ellsworth Bottling Co. v. United States*, 408 F. Supp. 280, 284 (W.D. Okla. 1975) (statutory exclusion of DoD from procurement provisions of Property Act applies to AAFES as well because it "is an integral part of the Department of Defense"). As observed by the Seventh Circuit in *Champaign-Urbana News Agency, Inc. v. J. L. Cummins News Co.*, 632 F.2d 680 (7th Cir. 1980) (holding that NAFI post exchanges are entitled to governmental immunity under the Robinson-Patman Act), "[t]o try to separate [a military exchange] from our military forces is to wholly ignore all its unique features distinguishing it from private enterprise and to ignore the long established views of both the Congress and the Executive Branch." *Id.* at 692.[9]

Reorg Act § 7, 63 Stat at 205 This definition is comprehensive and would appear to readily encompass military exchange organizations such as NEXCOM.

[8] We note, for example, that section 3(b) of the Reorganization Plan provides that the GSA Administrator may authorize the head of any executive branch agency to designate "organizational units" under the jurisdiction of such agency to perform the leasing and other functions covered by the Reorganization Plan. We believe this provision demonstrates that Reorganization Plan No. 18 applies not only to the "respective agencies" referred to therein but also to the organizational units and components comprising such agencies. In this regard, DoD's own regulations recognize that a military exchange NAFI is "[a]n integral DoD organizational entity." DoD Directive 1015 1, Encl 2.

[9] A NAFI's status as an integral component of its "host" department has also been recognized by Congress. As stated in the House Report accompanying Pub. L No. 91-350, 84 Stat 449 (authorizing Tucker Act jurisdiction over claims *against nonappropriated fund agencies*), "[a] nonappropriated fund instrumentality may not be sued because *it has a privileged status as an integral part of a department or agency of the United States* and is not subject to suit unless consent thereto has been granted by Congress " Letter for Emanuel Cellar, Chairman, House

Continued

DoD itself acknowledges that "when we talk about the authority of the NAFIs we are always talking about the authority of the [Service] Secretaries acting through the NAFIs." DoD Memo at 8 n.6.[10] The NAFIs' status as subordinate DoD components extends to their leasing authority as well as to other functions. Thus, their leases of non-DoD land or buildings are subject to "specific approval by the head of the DoD Component concerned." DoD Directive 1015.6, *quoted in* DoD Memo at 1 n.1.

Given these factors, we are not persuaded that leasing authority for DoD NAFIs is independent and apart from DoD's overall leasing authority. Accordingly, in the absence of any provision or evidence to the contrary, the leasing authority of the military exchanges would have been transferred to GSA along with that of other DoD components under the terms of Reorganization Plan No. 18.

We find nothing in the text of the Reorganization Plan indicating that military exchange facilities were to be excluded from its provisions.[11] Although the Reorganization Plan explicitly enumerates those particular functions and facilities that *were* to be exempted — including facilities located on military bases — the list makes no reference to NAFIs or military exchanges.[12] Under the interpretative canon *expressio unius est exclusio alterius*, the NAFIs' absence from the Reorganization Plan's enumeration of excluded entities makes it difficult to conclude that they were somehow implicitly excluded from its coverage. *See TVA v. Hill*, 437 U. S. 153, 188 (1978) (*expressio unius* canon applied to support Court's conclusion that the similarly enumerated exceptions to the Endangered Species Act were exclusive).[13]

Judiciary Committee, from Spencer J Schedler, Assistant Secretary of the Air Force (Sept 24, 1969), *reprinted in* H.R Rep No. 91-933, at 10 (1970), *and in* 1970 U.S C C.A N 3477, 3486 (emphasis added)

[10] The NAFIs' status as integral and subordinate components of DoD is further confirmed and reinforced by the provisions of 10 U.S C § 2783 (1994), enacted in 1992, which directs the Secretary of Defense to "prescribe regulations governing — (1) the purposes for which nonappropriated funds of a nonappropriated fund instrumentality of the United States within the Department of Defense may be expended; and (2) the financial management of such funds to prevent waste, loss, or unauthorized use "

[11] The Acting Assistant Solicitor General provided an assessment of Reorganization Plan No. 18 for the Attorney General's consideration prior to its adoption Memorandum for the Attorney General from Abraham J Harris, Acting Assistant Solicitor General, *Re: Reorganization Plan No 18 of 1950 and Message of the President transmitting the plan to the Congress* (Mar 9, 1950) This memorandum noted the particular categories of property that were to be excluded from the Plan's coverage, but gave no indication that the leases or properties of NAFIs or military exchanges were to be excluded On the contrary, the memorandum described the Plan's coverage in comprehensive terms, noting that it gave GSA leasing authority over "government-owned or government-leased general purpose buildings " *Id.* at 1

[12] Military exchanges are excepted from the Reorganization Plan's provisions only insofar as they are located in foreign countries or on military bases, Reorg Plan § 1(a)–(b), but the leasing authority of such military exchanges is not in issue here.

[13] As one U.S. Court of Appeals stated in considering an antitrust suit against the Army and Air Force Exchange Service ("AAFES"), "when the Congress desires to modify the usual rule or to make special provision applicable to AAFES operations it knows how to do it " *Champaign-Urbana News Agency, Inc v J L. Cummins News Co.*, 632 F 2d 680, 692 (7th Cir 1980). We believe this applies generally to military exchange NAFIs

C.

DoD's argument initially focused on whether military exchange NAFIs independently conform to the definition of a "federal agency" under the Property Act (DoD Memo at 1–4). The appropriate focus, however, is on the Reorganization Plan. Although the Property Act authorizes GSA to enter into lease agreements "necessary for the accommodation of Federal agencies," 40 U.S.C. § 490(h)(1) (1994), that section did not give GSA *exclusive* federal government leasing authority or transfer previously existing agency leasing authority from the agencies to GSA. Rather, the wholesale transfer of federal government leasing authority from the federal departments and agencies to GSA was accomplished by Reorganization Plan No. 18 in 1950, not by the Property Act in 1949. Had the Property Act already transferred the departments' and agencies' leasing authority to GSA when it was enacted in 1949, the Reorganization Plan's transfer of agency leasing functions in 1950 would have been redundant and unnecessary.

In this regard, it is significant to note that Reorganization Plan No. 18 was promulgated pursuant to the Reorganization Act of 1949, not the Property Act. Moreover, the particular GSA leasing provision contained in subsection 490(h)(1) and relied upon by DoD was not added to the Property Act until 1958—eight years after the general transfer of agency leasing authority to GSA under the Reorganization Plan. *See* Pub. L. No. 85–493, 72 Stat. 294 (1958). Because Reorganization Plan No. 18, not the Property Act, is the source of GSA's exclusive leasing authority over DoD and its components, NEXCOM's failure to conform to the Property Act's definition of a "federal agency" in its own right (i.e., apart from DoD) does not remove it from the transfer of leasing authority effectuated by Reorganization Plan No. 18. An entity's status as a "federal agency" under the Property Act was simply not a precondition to coverage under the Reorganization Plan.[14]

Even if the Property Act (as opposed to the Reorganization Plan) were the source of GSA's exclusive government-wide leasing authority, DoD's argument that satisfying the Act's definition of "federal agency" is critical to an organization's coverage under the Act proves too much. Insofar as relevant here, the Property Act defines "federal agency" as "any executive agency," which includes

[14] For the same reasons, DoD's reliance on the Comptroller General's opinion in *Matter of LDDS Worldcom*, No B–270109, 1996 WL 45162 (C.G Feb 6, 1996), is unavailing That opinion concluded that NEXCOM's contracts are not subject to the Comptroller General's bid protest jurisdiction under the Competition in Contracting Act ("CICA") because NEXCOM did not independently meet CICA's definition of "federal agency," as adopted from the Property Act's definition of that same term Initially, we note that the Comptroller General's rulings are not binding on this Office or the executive branch in general, although they are generally informative sources on matters within the Comptroller General's authority *See Bowsher v Synar*, 478 U.S. 714, 728–32 (1986); *Implementation of the Bid Protest Provisions of the Competition in Contracting Act*, 8 Op O.L.C. 236, 246 (1984). Although we have serious questions regarding the reasoning of the opinion in *LDDS Worldcom*—i e., its reliance on whether NAFIs independently meet the definition of a "federal agency" rather than whether they constitute integral components of a federal agency for purposes of coverage under the Property Act—the resolution of that issue is not critical here in light of our conclusion that NEXCOM's leasing authority was transferred to GSA pursuant to Reorganization Plan No. 18.

"any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation." 40 U.S.C. § 472(a), (b) (1994). We agree that NEXCOM does not independently satisfy that definition. Neither, however, do various other DoD components that are indisputably covered by the Property Act[15] and the Reorganization Plan. The Department of the Navy, for example, does not constitute an "executive department" or an "independent establishment," *see* 5 U.S.C. §§ 101, 104 (1994), but, rather, constitutes a "military department," *id.* § 102. Yet it can hardly be maintained that the Navy Department falls outside the coverage of the Property Act because it does not meet the Act's technical definition of "federal agency." The Navy Department is covered under the Property Act not because it independently satisfies the Act's definition of "federal agency," but because it is an integral component of a larger federal agency, i.e., DoD. Because the military exchanges are likewise integral components of DoD (discussed further, *infra*), *see Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942), the same holds true for NEXCOM.

We recognize that in *Ellsworth Bottling Co. v. United States*, 408 F. Supp. at 284, a U.S. District Court held that the Army and Air Force Exchange Service ("AAFES"), a NAFI, was not subject to the requirements of the Property Act governing the procurement of goods and services, *see* 41 U.S.C. §§ 252, 253 (1994).[16] The court reached this conclusion in part because it determined that the AAFES did not constitute an "executive agency" for purposes of 41 U.S.C. § 252(a), as defined in 40 U.S.C. § 472 (1994). *Id.* at 283–84. Significantly, however, that conclusion rested upon the court's determination that AAFES did not satisfy the "independent establishment" prong of the "executive agency" definition *because it "is a part of the Department of Defense"* and therefore cannot be an independent establishment. *Id.* at 284 (emphasis added). The court further concluded that, because DoD was explicitly excluded from the procurement provisions of the Property Act in question under 41 U.S.C. § 252(a)(1), AAFES was also excluded as "an integral part of the Department of Defense." 408 F. Supp. at 284–85. Thus, *Ellsworth Bottling* is consistent with the view that a NAFI's coverage under federal statutes like the Property Act is a function of its status as an integral part of DoD rather than its status as an independent entity.

[15] Our discussion of the Property Act's coverage of DoD and its components in this memorandum refers only to those portions of the Property Act codified in Chapter 10 of title 40, United States Code ("Management and Disposal of Government Property"). We recognize that DoD and its components are explicitly exempted from the separate provisions of the Property Act governing the procurement of goods and services which are codified in Subchapter IV ("Procurement Provisions"), Chapter 4, of title 41, United States Code *See* 41 U S C § 252(a)(1) (1994)

[16] *See also MCI Telecommunications Corp v Army and Air Force Exch Serv*, No Civ.A 95-0607 RMU, 1995 WL 317435, at *6 (D.D C May 9, 1995) (holding in accord with *Ellsworth Bottling*)

D.

Citing a number of statutes where Congress has included specific provision for the coverage of NAFIs, or expressly provided for distinct treatment of NAFIs, DoD makes the additional contention that "it is clear as a matter of statutory interpretation that coverage of NAFIs is not to be inferred from language encompassing Federal entities in general." DoD Memo at 2–3. By this reasoning, statutes generally applicable to federal departments and agencies (like the Property Act and Reorganization Plan No. 18) would not apply to NAFIs unless they make explicit provision for such application. We think this argument proves too much.

As noted above, Reorganization Plan No. 18 went to considerable lengths in enumerating the particular types of organizations and facilities whose leasing authority was excluded from the Plan's otherwise comprehensive coverage. Reorg. Plan § 1(a)–(d). Particularly detailed provision was made for exempting various categories of military facilities and organizations from the transfer of leasing functions to GSA. *Id.* § 1(b). It is therefore apparent that careful consideration was given to identifying those categories of government and military leasing activity that were unsuitable for transfer to GSA, yet military exchanges were not listed among the exempted activities. Thus, although a specific provision for NAFIs may arguably be required to support their coverage in some statutory contexts, the carefully wrought provisions of Reorganization Plan No. 18 obviate the need for following that approach here.

We recognize that special statutory provisions have sometimes been considered necessary to support the Government's assumption of a NAFI's contractual liabilities or financial obligations, such as the provision for the Tucker Act's application to military exchange contracts. *See* 28 U.S.C. § 1491(a)(1) (1994). As the Supreme Court stated in *United States v. Hopkins*, 427 U.S. 123, 127 (1976):

> The nonappropriated-fund status of the exchanges places them in a position whereby the Federal Government, absent special legislation, does not assume the obligations of those exchanges in the manner that contracts entered into by appropriated fund agencies are assumed.

Although that observation explains why a specific amendment was considered necessary to extend the Government's liability for breach of contract under the Tucker Act to military exchange NAFIs, its reasoning does not extend to the leasing provisions of Reorganization Plan No. 18.

Under the Reorganization Plan and the Property Act, GSA assumes the NAFIs' leasing *functions*, not its ultimate financial *liabilities* as a lessee. Reorg. Plan § 1; 40 U.S.C. § 490(h)(1). NEXCOM is required to reimburse GSA for space leased by GSA and furnished to NEXCOM. 40 U.S.C. § 490(j) (1994) (GSA directed to charge those entities for whom it furnishes space at rates approximating

commercial charges for comparable space); 41 C.F.R. § 101–21.6 (1996) (providing billing procedures for rent charges to agencies occupying space furnished under the leasing responsibilities of GSA).[17] Thus, GSA's assumption of NEXCOM's leasing functions would not require GSA to subsidize the leases of the military exchanges with appropriated funds. Viewed from a functional standpoint, GSA would be acting in the manner of a sub-lessor to NEXCOM — i.e., entering into lease agreements for NEXCOM's "accommodation," *see* 40 U.S.C. § 490(h)(1) — rather than assuming lease liabilities undertaken by NEXCOM. Accordingly, the concerns regarding the Government's assumption of NAFI financial obligations that may justify a requirement for specific provision to make a law applicable to NAFIs in other contexts are not applicable here.

Conclusion

In the absence of a delegation from GSA pursuant to section 3(b) of Reorganization Plan No. 18, we conclude that NEXCOM and other military exchange NAFIs lack independent authority to lease general purpose office space in urban centers.

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Acting Assistant Attorney General
Office of Legal Counsel

[17] We recognize that GSA is authorized to exempt agencies from lease reimbursement requirements if it "determines that such charges would be infeasible or impractical" 40 U.S.C. § 490(j). However, we do not believe that this limited, contingent provision authorizes the kind of liability assumption that might require Congress to make specific provision in order for it to apply to NAFIs.

Removal of Holdover Officials Serving on the Federal Housing Finance Board and the Railroad Retirement Board

The President may remove, without cause, members of the Federal Housing Finance Board and the Railroad Retirement Board who are serving in holdover capacities and do not enjoy express tenure protection by statute.

August 1, 1997

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked for our opinion about the President's power to remove, without cause, members of the Federal Housing Finance Board ("FHFB") and Railroad Retirement Board ("RRB") who are serving in holdover capacities. Members of neither board enjoy express tenure protection.[1] Your question therefore requires us to address whether, in the face of congressional silence, a restriction on the President's power to remove the board members should be inferred. *See Wiener v. United States*, 357 U.S. 349 (1958). Without such an implied removal restriction, the President may remove the board members without cause even before their terms have expired. *See Myers v. United States*, 272 U.S. 52 (1926).

We conclude that although there is some small risk that a court would find a tenure protection during the holdover period, the clearly better legal view is that such a protection should not be inferred. The President may therefore remove, without cause, the board members serving in holdover capacities.

I.

In a thorough review of removal jurisprudence from the early days of the Republic to the present, our Office concluded that tenure protection should no longer be inferred when Congress is silent. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124 (1996); *see also id.* at 168 n.115 (explaining that rationale of *Wiener*, in which Court inferred a removal restriction for a quasi-adjudicatory officer, is suspect in light of subsequent cases, but continues to be followed by some courts). In accordance with this position, there would be no implied tenure protection during FHFB or RRB directors' regular terms, let alone during their holdover periods.

Nevertheless, some courts have continued to suggest that tenure protection may sometimes be inferred when Congress is silent. *See, e.g., Swan v. Clinton*, 100 F.3d 973, 981–84 (D.C. Cir. 1996); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994). These courts have

[1] By "tenure protection," we mean a prohibition against removal without cause *See, e.g.*, 5 U S C § 1211 (1994) ("The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office ")

held that such protection is justified whenever Congress has indicated, through the functions it has vested in an agency or through legislative history or statutory language, that the agency must be insulated from the control of the President in order to perform its functions adequately. This rationale does not necessarily extend to board members serving in holdover capacities, however, as they by definition are subject to the President's ability, with the Senate's advice and consent, to appoint successors to their positions. *See Swan*, 100 F.3d at 984. In holdover situations, therefore, a court may first ask (as did the court in *Swan*, despite the objections of the concurring judge, 100 F.3d at 990 (Silberman, J.)) whether tenure protection should be inferred during board members' terms of office. *See id.* at 981–83. If the court finds that tenure protection should be inferred, it asks whether such protection should also be inferred during holdover periods. *See id.* at 984–87. In answering this second question, courts are likely to require some rationale other than the one supporting tenure protection during appointed terms. *See id.* at 984. We have examined the question of removal of FHFB and RRB holdovers under this methodology in order to be as thorough as possible, although it is our view that removal is not limited even during the directors' terms, in light of the congressional silence on the question.

II.

The FHFB is an "independent agency in the executive branch." 12 U.S.C. § 1422a(a)(2) (1994). It is composed of the Secretary of Housing and Urban Development and four other directors appointed by the President with the advice and consent of the Senate. *See id.* § 1422a(b)(1). The four appointed directors must have "extensive experience or training in housing finance" or "a commitment to providing specialized housing credit." *Id.* § 1422a(b)(2)(A). At least one of the directors must also be chosen from an "organization with more than a 2-year history of representing consumer or community interests on banking services, credit needs, housing, or financial consumer protections." *Id.* § 1422a(b)(2)(B). No more than three of the directors, including the Secretary, may be of the same political party. *See id.* § 1422a(b)(2)(A). No more than one of the appointed directors may be from any single district of the Federal Home Loan Bank System. *See id.*

The four appointed directors of the FHFB serve seven year terms, *see id.* § 1422a(b)(1)(B), unless appointed to fill a vacancy occurring prior to the expiration of a director's term, in which case they serve for the remainder of the original term, *see id.* § 1422a(d)(1). Vacancies "shall be filled in the manner in which the original appointment was made." *Id.* Upon expiration of a director's term, that director "may continue to serve until a successor has been appointed and qualified." *Id.* Directors enjoy no express tenure protection. *See id.* § 1422a.

The primary duty of the FHFB is to "ensure that the Federal Home Loan Banks operate in a financially safe and sound manner." *Id.* § 1422a(a)(3)(A). Specifically, the FHFB supervises the Federal Home Loan Banks and ensures that they carry out their housing finance mission and stay adequately capitalized in the capital markets. *See id.* § 1422a(a)(3)(B). To carry out these duties, the FHFB may promulgate and enforce regulations and orders, may suspend or remove for cause Federal Home Loan Bank employees, may assess the Banks for the Board's expenditures, and may use the United States mails. *See* 12 U.S.C. § 1422b(a) (1994).

The FHFB is in many ways indistinguishable from the Board of the National Credit Union Administration ("NCUA") at issue in *Swan*, a recent case considering tenure protection during holdover periods. In that case, the D.C. Circuit found that although it might infer tenure protection for NCUA Board members during their fixed terms, it would not infer such protection during holdover periods. *See* 100 F.3d at 988. The D.C. Circuit made these determinations by examining the NCUA Board's structure, function, and legislative history, much of which is similar to that of the FHFB.[2]

Like the NCUA Board, nothing in the statutory language establishing the FHFB or its legislative history explicitly grants any protection from Presidential control. Moreover, the FHFB explicitly resides within the executive branch and is not among the "independent regulatory agenc[ies]" listed in the Paperwork Reduction Act, 44 U.S.C. § 3502(10) (1994), which identifies many of the agencies whose members are thought to have tenure protection.[3] Two aspects of the FHFB, however, suggest that Congress may have wanted the FHFB's directors to be independent from the President. These aspects are shared with the NCUA Board and were cited by the D.C. Circuit as indicators of independence. First, members of both boards serve for fixed terms of office. Although fixed terms alone do not provide removal protection, *Parsons v. United States*, 167 U.S. 324, 338–39 (1897), they may offer evidence of agency independence when combined with other factors. *See Swan*, 100 F.3d at 982. Second, the FHFB and NCUA Board serve similar functions in that both Boards regulate financial institutions. The D.C. Circuit determined that this type of function often is a sign of independence from the President as "people will likely have greater confidence in financial institu-

[2] The D C Circuit refrained from making any actual holding about the tenure protection of Board members during their ordinary terms On the other hand, the district court had "decline[d] to infer a restriction upon the President's power to remove NCUA Board members where none was expressly provided for by Congress." *Swan v. Clinton*, 932 F Supp 8, 13 (D D C 1996) (footnote omitted) This holding apparently would have extended to removal during a Board member's regular term, as well as during the holdover period

[3] The FHFB could, however, fall within the "other similar agency" language of the Paperwork Reduction Act. 44 U S C § 3502(10) (1994)

tions if they believe that the regulation of these institutions is immune from political influence." *Id.* at 983.[4]

In addition to these features, the *Swan* court relied on legislative history to suggest that tenure protection might be inferred for NCUA Board members. *See id.* at 982–83. It is less clear from the legislative history of the FHFB that tenure protection should be inferred. The NCUA Board was created in 1978 to replace the NCUA Administrator who had explicitly served at the pleasure of the President. The amendments creating the NCUA Board deleted all reference to the President's removal power. The D.C. Circuit interpreted this silence after an explicit reference as bolstering the inference of tenure protection during NCUA Board members' terms. In contrast, the directors of the FHFB, or its predecessor body, never explicitly served at the pleasure of the President. Early versions of the bill establishing the FHFB did provide that the President could remove the Board's directors at his discretion. *See* S. 413, 101st Cong. § 702(b) (1989). The proposed removal provision was later dropped without comment and the reports accompanying the enacted bill were silent on removal. *See* H.R. Conf. Rep. No. 101–209, at 427–29 (1989). This change in a draft of a bill is less indicative of congressional intent than an amendment to an already enacted law. The change prior to enactment, however, might lend some support to the argument that at least some members of Congress did not want to give the President express discretion to remove directors at will.[5]

The FHFB therefore shares some, but not all, of the features of the NCUA Board that led the D.C. Circuit to state that it would likely infer tenure protection during NCUA Board members' fixed terms of office. *See Swan*, 100 F.3d at 983–84.[6] Even if a court were to reach a similar conclusion with the FHFB, however, the D.C. Circuit held that such features did not necessitate tenure protection during holdover periods. *See id.* at 988. The reasoning behind this holding applies equally to the FHFB as to the NCUA Board. The D.C. Circuit found that inferring holdover protection was not necessary to ensure the independence of NCUA Board members because holdover members can be replaced by a Senate-confirmed successor at any time, including a time when the President disagrees with the mem-

[4] As the district court in *Swan* observed, however, the Comptroller of the Currency and the Office of Thrift Supervision "perform similar functions . . . albeit with respect to other financial institutions," but "Congress has not . . . found it necessary to insulate these entities from executive control." 932 F. Supp. at 13 n.8 (citations omitted).

[5] Other aspects of the Act's legislative history, however, indicate that Congress was not primarily concerned with the FHFB's independence from the Executive. Even though Congress explicitly describes the Board as an "independent agency," 12 U.S.C. § 1422a(a)(2), Congress was more concerned about the Board's independence from the banking industry and the Department of the Treasury than from the President, *see* S. Rep. No. 101–19, at 5–6 (1989), H.R. Conf. Rep. No. 101–209, at 428. Indeed, the President's involvement with the Board was designed to help ensure independence from the banking industry and Treasury Department. *See* S. Rep. No. 101–19, at 5. All that should be inferred from the status of an "independent agency" is that the entity is not located within another department or agency.

[6] A major difference between the two boards is that the Secretary of Housing and Urban Development serves on the FHFB, and one of the directors of the FHFB is, therefore, necessarily subject to the plenary supervision of the President. This structural feature may indicate that independence from the Executive is not necessary for the FHFB to carry out its functions. However, it may also indicate an increased need to insulate the FHFB's other directors from the power of the President.

ber's decisions. *See id.* at 984. "[H]oldover members know that even if they cannot be removed directly, an unpopular decision may lead the President to nominate a successor immediately or encourage the Senate to speed up confirmation hearings." *Id.* Similarly, FHFB directors serving in holdover capacities can be replaced at any time. *See* 12 U.S.C. § 1422a(d)(1). Therefore, during the holdover period there is no independence to be protected by restricting removal by the President.

The FHFB holdover clause is somewhat different from the NCUA Board holdover clause, however. The FHFB clause permits a director to serve until a successor has been "appointed and qualified," *id.*, whereas the NCUA Board holdover clause permits a member to serve until a successor has "qualified," *see* 12 U.S.C. § 1752a(c) (1994). The D.C. Circuit suggested in *Swan* that the use of "appointed and qualified," as opposed to just "qualified," may indicate Congress's intent to keep holdovers in office until the Senate has confirmed the President's appointees. *See Swan*, 100 F.3d at 986. Congress's intent presumably would be both to provide that the office would not be "vacan[t]" for purposes of the Recess Appointment Clause, so that there would be no ground for a recess appointment by the President, *see Wilkinson v. Legal Services Corp.*, 865 F. Supp. 891, 900 (D.D.C. 1994), *rev'd on other grounds*, 80 F.3d 535 (D.C. Cir.), *cert. denied*, 519 U.S. 927 (1996); *Mackie v. Clinton*, 827 F. Supp. 56, 57–58 (D.D.C. 1993), *vacated as moot*, 1994 WL 163761 (D.C. Cir. 1994), and to grant tenure protection against removal during holdover periods. It seems unlikely, however, that Congress had this intent with the FHFB. First, in suggesting such an intent, the D.C. Circuit relied on the fact that Congress explicitly changed the NCUA Board holdover clause from "appointed and qualified" to "qualified." In contrast, Congress never made any changes to the FHFB holdover clause. Indeed, Congress was completely silent on the issue and in the absence of clear and express legislative intent, a court should not assume that Congress intended to restrict the President's recess appointment powers. *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992) (textual silence insufficient to subject President to Administrative Procedure Act); *see also Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350 (1995). Second, contrary to the D.C. Circuit's suggestion, the "qualified" in "appointed and qualified" does not have to mean confirmed in order to avoid being surplusage. Rather, nominees qualify when they take their oaths and are sworn in to office, regardless if they have been confirmed by the Senate or have taken office through a recess appointment.[7] *See* Brief for Appellees at 39 n.7, *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996) (No. 96–5193). We therefore conclude that tenure protection should not be inferred for FHFB directors serving in holdover capacities.

[7] It would not be possible to argue that the requirement that FHFB vacancies "shall be filled in the manner in which the original appointment was made," 12 U.S.C. § 1422a(d)(1), indicates Congress's intent to bar recess appointments and keep holdovers in office. *See, e.g., Staebler v. Carter*, 464 F. Supp. 585, 590–91 (D.D.C. 1979).

III.

The RRB is an "independent agency in the executive branch." 45 U.S.C. § 231f(a) (1994). It is composed of three members appointed by the President with the advice and consent of the Senate. The President must choose one member from recommendations made by representatives of railroad employees and another member from recommendations made by representatives of railroad employers. The President appoints the final member, the Chairman, without recommendation. All three members serve five year terms, unless appointed to fill a vacancy occurring prior to the expiration of a Board member's term, in which case they serve for the remainder of the original term. Upon expiration of a member's term, that member "shall continue to serve until his successor is appointed and shall have qualified." *Id.* Members of the Board enjoy no express tenure protection. *See id.*

The Board is charged with exercising all duties and powers necessary to administer the Railroad Retirement Act. *See id.* § 231f(b). These duties and powers include determining what portion of the taxes collected under the Railroad Retirement Tax Act should be credited to the various benefit accounts, determining who receives annuities and death benefits, making decisions upon issues of law and fact relating to such benefits, arranging payment, keeping records of eligibility and payments, and developing rules and regulations to oversee the process. *See id.*

Nothing in the statutory language establishing the Board or its legislative history explicitly indicates a determination by Congress that the Board's functions require it to be independent of the President's plenary supervision. Moreover, the Board's structure contains features that militate against such independence. The Board is within the executive branch, *see id.* § 231f(a), and is not listed as an "independent regulatory agency" in the Paperwork Reduction Act, 44 U.S.C. § 3502(10). In addition, the statutory language explicitly provides that "[v]acancies in the Board shall not impair the powers or affect the duties of the Board or of the remaining members of the Board, of whom a majority of those in office shall constitute a quorum for the transaction of business." 45 U.S.C. § 231f(a). This provision could militate against independence because it could eviscerate the employer/employee balancing requirement whenever the employer or employee seat is vacant.

On the other hand, the Board's structure contains features that have been considered indicators of independence. First, the Board members serve for fixed terms. *See Swan*, 100 F.3d at 982; *but see Parsons*, 167 U.S. at 338–39 (fixed terms alone do not provide removal protection). Second, the Board has some quasi-judicial functions, which until *Morrison v. Olson*, 487 U.S. 654 (1988), was a determining factor in declaring an agency independent and therefore protecting its board members from arbitrary removal. *See Wiener*, 357 U.S. at 353–56.

We do not believe these features, without more, are enough to conclude that Congress intended the Board to possess that independence conferred by tenure protection. The Board is far from the War Claims Commission at issue in *Wiener*. For example, unlike the Board, *see* 45 U.S.C. § 231g (1994), that Commission was not subject to judicial review. The Board is more like the Social Security Administration, when it was part of the Department of Health and Human Services, than the War Claims Commission. Even if a court concluded, however, that the Board's functions require independence and Board members therefore need tenure protection to carry out these functions, it would not necessarily follow that the Board members would enjoy tenure protection while serving in holdover capacities. *See Swan*, 100 F.3d at 984. Rather, a court would most likely require that the nature of the holdover capacity or language and history of the holdover clause also provide some evidence of Congress's intent to provide tenure protection. *See id.*

The Board's holdover clause provides little evidence of an intent to grant tenure protection during holdover periods. First, holdover members can be replaced by a successor at any time, including a time when the President and Senate disagree with the member's decisions. *See id.* Second, tenure protection under the holdover clause is not necessary to ensure the Board's continuity, as the Board may continue to function with one or two members. *See* 45 U.S.C. § 231f(a). Third, Congress did not seem to be contemplating tenure protection when it added the holdover clause in 1968. *See* Amendments to the Railroad Retirement Act, Pub. L. No. 90–257, § 106, 82 Stat. 16, 21 (1968). In a report explaining the 1968 amendments, the House's only explanation of the holdover clause was that its "purpose is apparent and is similar to provisions for other agencies." H.R. Rep. No. 90–1054, at 27 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1622, 1649.

The only possible indication of holdover tenure protection is the language of the holdover clause itself. One court has held that the use of "shall," as opposed to "may," in a holdover clause indicates Congress's intent that an office occupied by a holdover official not be considered vacant for purposes of recess appointments until the Senate has confirmed the President's appointees. *See Wilkinson*, 865 F. Supp. at 900. Arguably, an additional consequence of the reading might be to grant tenure protection during holdover periods. However, because the statute here does not limit the holdover period, this reading of the holdover clause would give the Senate the power to keep holdovers in office indefinitely by simply refusing to confirm the President's appointees. *See Swan*, 100 F.3d at 986–87; *Staebler*, 464 F. Supp. at 590–91. While there is at least an argument (although not one we would endorse) that such power may be justified when Congress has explicitly stated the need to keep the agency free of political pressures, *see Wilkinson*, 865 F. Supp. at 900, it is unjustified when Congress has not explicitly stated that need, *see Swan*, 100 F.3d at 986; *Staebler*, 464 F. Supp. at 591. There-

fore, holdover tenure protection should not be inferred from the use of the word "shall" in the holdover clause.

Nor should holdover tenure protection be inferred from the "appointed and qualified" language of the holdover clause. As discussed above, the D.C. Circuit has suggested that the use of these terms, as opposed to just "qualified," may indicate Congress's intent to bar recess appointments and keep holdovers in office until the Senate has confirmed the President's appointees. *See Swan*, 100 F.3d at 986. However, the legislative history of the Board's holdover clause does not support an inference of this intent. The House's description of the clause states that it "provide[s] that a Board member would continue to serve until his successor has qualified." H.R. Rep. No. 90–1054, at 27, *reprinted in* 1968 U.S.C.C.A.N. at 1649. The House thus appears to have made no distinction between "appointed and qualified" and "qualified." The language of the Board's holdover clause therefore provides little evidence of Congress's intent to give Board members tenure protection during their holdover periods. If it did, it would apply to recess appointments too. In the absence of clear and express legislative intent, a court should not assume that Congress intended to restrict the President's recess appointment powers. *See, e.g., Staebler*, 464 F. Supp. at 590–91. We therefore conclude that tenure protections should not be inferred for members of the RRB serving in holdover capacities.

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Applicability of Section 514 of the 1997 Education Appropriations Act to Post-Secondary Student Aid Programs

Section 514 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1997, which bars the provision of appropriated funds, by contract or grant, to any institution of higher education that denies campus access to military recruiters or Reserve Officer Training Corps representatives, applies to so-called "campus-based" student aid programs, which involve grants to educational entities, but does not apply to direct aid programs, which involve grants to students rather than to educational entities.

August 6, 1997

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF EDUCATION

You have requested our advice as to whether certain post-secondary student financial assistance programs administered by the Department of Education ("the Department") are covered by section 514 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1997, which bars the provision of appropriated funds, by contract or grant, to any institution of higher education that denies campus access to military recruiters or Reserve Officer Training Corps ("ROTC") representatives. Letter for Dawn E. Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from Judith A. Winston, General Counsel, Department of Education (Mar. 18, 1997) ("Education Letter").

As explained more fully below, we believe that section 514 applies to some, though not all, of the post-secondary student aid programs you have inquired about. More specifically, it is our conclusion that section 514 reaches so-called "campus-based" student aid programs — the Federal Perkins Loan program, the Federal Work-Study program, and the Federal Supplemental Educational Opportunity Grant program — but that it does not affect direct aid programs — the Federal Pell Grant program, the William D. Ford Federal Direct Loan program, and the Federal Family Education Loan program.

BACKGROUND

Section 514 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 1997, as enacted by section 101(e) of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104–208, 110 Stat. 3009 (1996) ("the 1997 Appropriations Act"), prohibits federal departments and agencies from using funds appropriated under that legislation to provide grants or contracts to universities or colleges that do not permit

ROTC or military recruiting activities on campus. In pertinent part, section 514(a) provides:

> None of the funds made available in this or any other Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act for any fiscal year may be provided by contract or by grant (including a grant of funds to be available for student aid) to a covered educational entity if the Secretary of Defense determines that the covered educational entity has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—
>
> > (1) the maintaining, establishing, or operation of a unit of the Senior Reserve Officer Training Corps . . . at the covered educational entity; or
> > (2) a student at the covered educational entity from enrolling in a unit of the Senior Reserve Officer Training Corps at another institution of higher education.

110 Stat. 3009–270. Section 514(b) contains a similar funding prohibition for a "covered educational entity" (defined at subsection (f) as an institution of higher education) that refuses to permit federal military recruiters to conduct recruiting activities on campus or that refuses to give such recruiters access to student information.

Section 514 was offered as an amendment on the floor of the House, during consideration of the 1997 Appropriations Act for the Department of Education. The intent of its sponsors was to ensure equal college campus access to ROTC and military recruiters. *See* 142 Cong. Rec. 16,860 (1996) (statement of Rep. Solomon). As a legislative initiative, the proposed amendment was not new in concept; similar ROTC equal access amendments had been incorporated into other appropriations bills. *See, e.g.*, § 508(a) of H.R. 3816, Energy and Water Development Appropriations Act of 1997, Pub. L. No. 104–206, 110 Stat. 2984, 3003 (1996); § 541 of H.R. 1530, the National Defense Authorization Act for FY 1996, Pub. L. No. 104–106, 110 Stat. 186, 315–16 (1996); § 904 of H.R. 3322, the Omnibus Civilian Science Authorization Act of 1996. However, section 514 represented the first time that such a proposal had been attached to the appropriations bill for the Department of Education.

ANALYSIS

Section 514 applies to "funds . . . provided by contract or by grant (including a grant of funds to be available for student aid) to a covered educational entity." The question presented by your request is whether this language would include

funds provided to a college or university under the Department's student aid programs. You have asked us to focus on six programs in particular: the Federal Pell Grant program ("Pell Grant"), 20 U.S.C. § 1070a (1994 & Supp. III 1997); the William D. Ford Federal Direct Loan program ("Direct Loan"), 20 U.S.C. §§ 1087a–1087h (1994 & Supp. III 1997); the Federal Family Education Loan program ("FFEL"), 20 U.S.C. §§ 1071–1087–4 (1994 & Supp. III 1997); the Federal Perkins Loan program ("Perkins Loan"), 20 U.S.C. §§ 1087aa–1087ii (1994 & Supp. III 1997); the Federal Work-Study Program ("Work-Study"), 42 U.S.C. §§ 2751–2756b (1994); and the Federal Supplemental Educational Opportunity Grant program ("SEOG"), 20 U.S.C. §§ 1070b–1070b–3 (1994).

These programs can generally be grouped into two categories. In the first category (which includes the Pell Grant, Direct Loan and FFEL programs), grants or loans are made to students by the Department or third parties, and the educational entity acts as the disbursing or escrow agent or fiduciary for the funds. In the case of Pell Grants or Direct Loans, the Department calculates the necessary level of funding for each educational entity based upon the number of eligible students attending the institution, and places the funds in an institutional account targeted for these student aid programs. *See* 20 U.S.C. § 1070a(a); 20 U.S.C. § 1087b. The educational entity then either applies the funds directly to the student's tuition account, or issues a check to the student for living or other educational expenses. *See generally* 34 C.F.R. §§ 668.161–668.166 (1996) (describing cash management in student assistance programs). Under the FFEL program, a local bank or third party loans funds to the student, with the Department acting as guarantor for the loan, and the educational entity acting in essentially the same disbursing capacity as with Pell Grants or Direct Loans. 20 U.S.C. §§ 1071, 1077.

The second category (Perkins Loan, Work-Study, SEOG) includes programs known collectively as "campus-based programs." *See* 34 C.F.R. § 668.2. Under the campus-based programs, it is the educational entity, not the student, that submits an application to the Department for federal funds. Each year, educational entities seeking to participate submit one common application for all three programs, *see* 34 C.F.R. §§ 674.3, 675.3, 676.3; the Department then allocates funds to eligible educational entities primarily on the basis of their allocations from the previous year. *See* 20 U.S.C. §§ 1070b–3, 1087bb; 42 U.S.C. § 2752. Upon receiving a finite share of federal funds to provide financial aid to needy students in the form of loans (Perkins Loan), paid employment (Work-Study), and grants (SEOG), the educational entity has discretion, subject to certain restrictions, to determine which students will receive financial aid. *See* 20 U.S.C. §§ 1070b–2, 1087dd; 42 U.S.C. § 2753; 34 C.F.R. §§ 674.10, 675.10, 676.10. Thus, unlike the first category of aid programs, the campus-based programs require more involvement by the educational entities, in terms of applying for federal funds and determining how those funds will be distributed among needy students. In addition,

the educational entities act as more than mere conduits or escrow agents for the federal funds.

You have suggested that programs within the first category "do not appear to fall within the coverage of section 514 because they involve grants or loans *to students* from the Department or third parties." Education Letter at 3 (emphasis added). We agree. The language of section 514 makes clear that its prohibition applies only to funds "provided by contract or by grant (including a grant of funds to be available for student aid) *to a covered educational entity*" (emphasis added). By its terms, section 514 requires a direct connection between the Department as granting agency and the educational entity as recipient of the grant. In the case of Pell Grants, Direct Loans, and FFEL, the actual grant recipient is not the school but the student. It is the *student* who fills out the application for aid, *see, e.g.*, 20 U.S.C. § 1070a(d); 34 C.F.R. § 685.201(a); the school merely disburses funds that are targeted for specific eligible students. *See* 20 U.S.C. §§ 1070a(b)(5), 1070a(i) (Pell Grant is "awarded to a student"; institution of higher education "disburse[s] to students" the amounts students are eligible to receive under program); 20 U.S.C. § 1087a(a) (authorizing such funds for Direct Loan program "as may be necessary to make loans to all eligible students"). The statute's parenthetical reference to "a grant of funds to be available for student aid," cannot alone bring these programs within the scope of section 514 because they lack the prerequisite grantor-grantee relationship between the Department and the educational entity.

By contrast, the campus-based programs appear to fall well within the scope of section 514. Under the campus-based programs, educational entities themselves apply for federal funds and receive those funds from the Department. Grant money thus flows directly from the Department to the educational entity, to be disbursed to needy students at the entity's discretion. *See* 20 U.S.C. §§ 1087bb(a), 1087cc–1 (under Perkins Loan program, "the Secretary shall first allocate [funds] to each eligible institution;" each institution then "makes a loan to a student borrower"); 42 U.S.C. § 2753(a) (under Work-Study program, Secretary of Education is authorized "to enter into agreements with institutions of higher education under which the Secretary will make grants to such institutions to assist in the operation of work-study programs"); 20 U.S.C. § 1070b(b)(1) (SEOG program enables "the Secretary to make payments to institutions of higher education . . . for use by such institutions for payments to undergraduate students"); *see also Riggsbee v. Bell*, 787 F.2d 1564, 1565–66 (Fed. Cir. 1986) (distinguishing campus-based programs, under which "the federal government gives each participating institution a specific amount . . . [and the] individual institution ha[s] broad discretion to select the students to receive such aid," from Pell Grant program, under which "Secretary of Education makes direct payments to qualified students").

The distinction we make between the first category of aid programs and campus-based programs is one that Congress itself has made in describing the student aid programs under the Higher Education Act:

> The largest title of the Higher Education Act is Title IV, which involves the major student financial aid programs, including Pell Grants, Federal Family Education Loans, and Direct Loans. These three programs provide financial aid directly to the students. In addition, there are three programs that are campus-based financial aid initiatives which provide Federal assistance to postsecondary institutions. The institutions then allocate these funds to qualifying students.

S. Rep. No. 105–5, at 27 (1997) (discussing need to reauthorize Higher Education Act during 105th Congress). In light of the structure of the campus-based programs and Congress's own description of their funding mechanisms, it is difficult to describe such programs as anything other than a "grant of funds to be available for student aid" by the Department to an educational entity; thus, we conclude that they fall squarely within the terms of section 514.[1]

Our conclusion that student aid funds under the Pell Grant, Direct Loan, and FFEL programs are exempt from the prohibition in section 514 is not inconsistent with the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984). In *Grove City*, the Supreme Court held that, for purposes of the prohibition in title IX against sex discrimination in "any education program or activity receiving Federal financial assistance," student aid in the form of Basic Educational Opportunity Grants ("BEOG"s, predecessors of the current Pell Grants) constituted "Federal financial assistance" to the school. 465 U.S. at 569–70. Grove City College had chosen to use the Alternative Disbursement System ("ADS") of the BEOG program to administer its student loans. Under ADS, the school was required to certify which students were eligible for grants; once the Department of Education received this certification, it issued checks directly to the eligible students, without any further school involvement. Notwithstanding this relatively minimal involvement by the school, the Supreme Court found that the receipt of federal BEOG funds by some of Grove City's students was sufficient

[1] The fact that some courts have described some of the programs at issue here in terms of a trust arrangement, *see California Trade Technical Schools, Inc v United States*, 923 F.2d 641 (9th Cir 1991) (title IV student assistance funds were express trust funds and thus not property of educational institution debtor, for purposes of bankruptcy preferential transfer analysis), *United States v. Maxwell*, 588 F.2d 568 (7th Cir 1978) (because U.S retained "reversionary interest" in SEOG funds, such funds constituted "money, or thing of value of the United States" for purposes of federal criminal statute prohibiting theft or conversion), *cert. denied*, 441 U S 910, *cert. denied*, 444 U S. 877 (1979), does not resolve the question of whether these programs are covered by section 514 The language of section 514 is fully consistent with an interpretation that includes arrangements under which grants are made to institutions serving as trustees for the benefit of third parties

to bring Grove City's financial aid program within the ambit of Title IX. *Id.* at 573–74.

A critical distinction in the relevant language of section 514 leads us to a conclusion different from that reached by the Court in *Grove City*. In contrast to the language of title IX at issue in *Grove City* — "any education program or activity receiving Federal financial assistance" — section 514 refers to funds "provided by contract or by grant" to an educational entity by the Department. Any educational program that is receiving a benefit, direct or indirect, from student financial aid could be said to be receiving federal financial assistance. The restrictive language of section 514 is less susceptible to such an inclusive reading. Moreover, the line we have drawn — between programs that provide direct federal financial aid to individual eligible *students*, regardless of where they attend college, and programs that grant federal funds to individual eligible *schools* for campus-based student aid — is consistent with another line of jurisprudence that examines the nature and effect of student financial aid programs. Recent Establishment Clause decisions by the Supreme Court dispel the proposition that direct government financial aid to individual students necessarily constitutes an impermissible benefit that inures to the school the student chooses to attend. *See Agostini v. Felton*, 521 U.S. 203 (1997); *see also Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986).

Finally, of critical importance to the Supreme Court's conclusion in *Grove City* was the legislative history of title IX, which made clear that Congress intended the prohibition of section 901 to reach student aid funds. 465 U.S. at 565–69. The Court also drew upon the fact that title IX was patterned after title VI of the Civil Rights Act of 1964, and that the drafters of title VI contemplated the inclusion of student aid funds in identical language. *Id.* at 566. Other cases have refused to extend the holding of *Grove City* beyond title IX, based on the unique legislative history of that statute and the Court's reliance upon that history. *Cf. United States v. Wyncoop*, 11 F.3d 119, 122 (9th Cir. 1993) (criminal statute conferring federal jurisdiction over thefts from an entity that "receives benefits" in excess of $10,000 annually under a federal program involving "federal assistance" does not apply to thefts from college participating in Stafford Loan program).

The legislative history of section 514, as opposed to title IX, dictates a narrow rather than an expansive interpretation. As already noted, section 514 was added as an amendment to H.R. 3755, the appropriations bill for the Departments of Labor, Health and Human Services, Education, and related agencies, during floor debate in the House. *See* 142 Cong. Rec. 16,860. In proposing the amendment, Representative Solomon argued that the amendment had already "passed the House several times" and that "this amendment has always received such strong bipartisan support and become law for Defense Department funds." *Id.* Solomon's statements indicate an intention not to expand the scope of section 514 beyond

existing boundaries for similar provisions in other statutes. Those boundaries did not encompass student aid funds. For example, during floor debate six weeks before the debate on section 514, on an almost identical amendment to the Omnibus Civilian Science Authorization Act of 1996,[2] Representative Lofgren asked Representative Solomon, "[W]ill this include student loans?" 142 Cong. Rec. 12,713. Solomon responded, "It has nothing to do with student loans." *Id.* Lofgren pressed, "Would the prohibition of funds going to a university include Pell grants or student loans for students in universities where ROTC is not offered?" Solomon assured her, "No, it would not. These deal only with research grants." *Id.* While it is true that, because these other bills did not provide appropriations for the Department of Education, they necessarily did not reach general appropriations for the Department's student aid programs, Solomon's statements on the scope of the amendment, together with his assurances that section 514 was no different from prior proposals, suggest a narrow reading of the language of section 514.

CONCLUSION

We conclude, based upon the language and legislative history of section 514, that student aid funds under the Pell Grant, Direct Loan, and FFEL programs fall outside its prohibition because these programs involve grants from the Department to students rather than to educational entities. However, because the Department provides grants to educational entities under the campus-based programs (Perkins Loan, Work-Study, SEOG), section 514 is applicable to the latter category of programs.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

[2] That proposed amendment, incorporated as section 904 of the Omnibus Civilian Science Authorization Act of 1996, provided:

> No funds appropriated for civilian science activities of the Federal Government may be provided by contract or by grant (including a grant of funds to be available for student aid) to any institution of higher education that has an anti-ROTC policy

Use of General Agency Appropriations to Purchase Employee Business Cards

Nothing in the Omnibus Consolidated Appropriations Act of 1997 expressly provides for, or prohibits, the expenditure of appropriations of the General Services Administration for the purchase of employee business cards.

In the absence of a contrary provision or limitation in its appropriations act or other applicable legislation, GSA may lawfully obligate a general or lump-sum appropriation for the purchase of business cards for suitable mission-related use by GSA employees.

Depending upon the particular purpose for which they are to be used, GSA's purchases of business cards for its employees may be chargeable either to its limited appropriation for "reception and recreation expenses" or to its general appropriation.

August 11, 1997

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
GENERAL SERVICES ADMINISTRATION

This responds to your letter of April 7, 1997, seeking our opinion on the legality of obligating appropriations for the purchase of business cards to be used by employees of the General Services Administration ("GSA") for official purposes. We conclude that, in the absence of a specific appropriation for that purpose, GSA may lawfully obligate a general or lump-sum appropriation for the purchase of business cards for suitable mission-related use by GSA employees. Under GSA's current appropriations statute, business cards may be validly chargeable to its general "Policy and Operations" appropriation or to the allocation for "reception and representation" expenses within that appropriation, depending upon the purposes for which they are to be used. Because a limitation of $5,000 has been imposed upon appropriations that GSA may spend for "reception and representation" expenses, however, the purchase of employee business cards to be used for that purpose would be subject to the $5,000 limitation.

I.

As stated in the memorandum accompanying your letter[1], executives of GSA's business lines have asked your office whether an executive branch agency such as GSA may expend its appropriated funds to provide business cards for suitable employees. For purposes of this opinion, we assume that the cards would be issued only for use in connection with the operations and official activities of GSA—for example, GSA employees might give the cards to representatives of commer-

[1] Memorandum for David J. Barram, Acting Administrator, General Services Administration, from Emily C. Hewitt, General Counsel, General Services Administration, *Re. The Purchase of Business Cards with Appropriated Funds for Agency Employees* (Apr. 7, 1997) ("GSA Memo").

cial or governmental entities with whom GSA does business or conducts operations to facilitate mission-related communications between those entities and GSA. We also understand that the business cards in question would generally contain the employee's name, his position at GSA, and his GSA phone number, mailing address, e-mail address, and fax number. GSA Memo at 3.

You cite and acknowledge several opinions of the Comptroller General concluding that, with the exception of appropriations earmarked for official "reception and representation" expenses, an agency's appropriated funds may not be used for the purchase of employee business cards. *E.g., Matter of Department of Agriculture — Purchase of Business Cards*, B–246616, 1992 WL 174420 (C.G. July 17, 1992); 41 Comp. Gen. 529 (1962). Notwithstanding those opinions, you have concluded "that the [GSA] Administrator has the authority to determine that there is a need for business cards for certain employees and that the expenditure of appropriated funds for this purpose is necessary." GSA Memo at 1.

In light of your concerns regarding the Comptroller General's opinions on this issue, and the potential liabilities of certifying officers for approving the expenditure of GSA funds for employee business cards, you have requested an opinion from this Office to resolve the matter.

At the outset, we confirm that the 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. *See Bowsher v. Synar*, 478 U.S. 714, 727–32 (1986); *Implementation of the Bid Protest Provisions of the Competition in Contracting Act*, 8 Op. O.L.C. 236, 246 (1984). In the event of a conflict between a legal opinion of the Attorney General and that of the Comptroller General, the opinion of the Attorney General is controlling for executive branch officers. *See Comptroller General's Authority to Relieve Disbursing and Certifying Officials from Liability*, 15 Op. O.L.C. 80, 84 n.5 (1991). Pursuant to 28 C.F.R. § 0.25(a) (1996), the Attorney General has delegated to this Office her authority to render legal advice to the various departments and agencies of the Federal Government.

We also note that the Comptroller General has previously referred to the regulations of the Joint Committee on Printing ("JCP") as providing an additional basis for disallowing the expenditure of an agency's appropriated funds for the printing of employee business cards. *See, e.g.*, 68 Comp. Gen. 467, 468 n.2 (1989). As a Joint Committee of the Congress, the JCP is part of the legislative branch. We therefore reiterate our previously stated view that regulations and requirements promulgated by the JCP are not binding upon executive branch agencies, including GSA. *See Involvement of the Government Printing Office in Executive Branch Printing and Duplicating*, 20 Op. O.L.C. 214, 214 (1996) (opining that, in light of the supervision exercised over the Government Printing Office ("GPO") by the JCP, "GPO's extensive control over executive branch printing is unconstitutional under the doctrine of separation of powers").

II.

A.

We first consider the current appropriations statute governing GSA expenditures to determine whether the question presented may be resolved on the basis of the existence vel non of a provision that, by its plain language, establishes whether GSA appropriations may or may not be used for the purchase of employee business cards. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104–208, § 101(f) ("Independent Agencies — General Services Administration"), 110 Stat. 3009, 3009–331 to 3009–338 (1996) ("GSA Appropriations Act"). We find nothing in the GSA Appropriations Act that explicitly provides for, or prohibits, the expenditure of GSA appropriations for the purchase of employee business cards or a category of printed materials or communications aids that would clearly encompass such cards.

B.

The 1997 GSA Appropriations Act contains a section denominated "Policy and Operations," which appears to be the equivalent of a general expenses or lump-sum appropriation.[2] The GSA Policy and Operations appropriation provides as follows:

> For expenses authorized by law, not otherwise provided for, for Government-wide policy and oversight activities associated with asset management activities; utilization and donation of surplus personal property; transportation management activities; procurement and supply management activities; Government-wide and internal responsibilities relating to automated data management, telecommunications, information resources management, and related technology activities; utilization survey, deed compliance inspection, appraisal, environmental and cultural analysis, and land use planning functions pertaining to excess and surplus real property; agency-wide policy direction; Board of Contract Appeals; accounting, records management, and other support services incident to adjudication of Indian Tribal Claims by the United States Court of Federal Claims; services as authorized by 5 U.S.C.

[2] With respect to those GSA activities and operations that are allocable to the Federal Buildings Fund established pursuant to section 210(f) of the Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377, (codified as amended at 40 U S C § 490(f) (1994)), the portion of the 1997 GSA Appropriations Act falling under the heading "Federal Buildings Fund" can also be considered in the same vein as a general appropriation available for "necessary expenses " *See* GSA Appropriations Act, § 101(f), 110 Stat at 3009–331.

> 3109; *and not to exceed $5,000 for official reception and representation expenses*; $110,173,000..

Id. § 101(f), 110 Stat. at 3009–336 (emphasis added). We therefore consider whether the broadly-described expenditures authorized by this general appropriation may properly encompass the purchase of business cards for appropriate agency employees.

C.

It is well recognized in both judicial and administrative precedents that federal agencies have considerable discretion in determining whether expenditures further the agency's authorized purposes and therefore constitute proper use of general or lump-sum appropriations.[3] As the Supreme Court observed in *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993):

> The allocation of funds from a lump-sum appropriation is another administrative decision traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.

Similarly, in *International Union, United Auto., Aerospace & Agriculture Implement Workers v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 825 (1985), the court observed, "[a] lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it see [*sic*] fit."

This Office has applied a similarly flexible approach in addressing the legal propriety of agency expenditures of their general appropriations. Thus, in explaining the principles that governed our conclusion that the Justice Department's general appropriations could be used to settle certain claims against Departmental employees for actions taken within the scope of their employment, we stated:

> [O]ur conclusion was based on the basic rule that a general appropriation may be used to pay any expense that is necessary or incident to the achievement of the underlying objectives for which the appropriation was made. General Accounting Office, *Principles of Federal Appropriations Law* 3–12 to 3–15 (1982). If the agency

[3] Other than appropriations acts themselves, the most pertinent statutory restriction upon an agency's use of its appropriations is 31 U.S.C. § 1301(a) (1994), which simply provides, "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

> believes that the expenditure bears a logical relationship to the objectives of the general appropriation, and will make a direct contribution to the agency's mission, the appropriation may be used[.]

Indemnification of Department of Justice Employees, 10 Op. O.L.C. 6, 8 (1986).

The Comptroller General's general approach to this issue is similar—and difficult to reconcile with its prior opinions on the permissibility of using agency appropriations for business cards. The General Accounting Office ("GAO") recognizes a three-part test for determining whether a general appropriation may be used for an unspecified expenditure as a "necessary expense" of the agency:

> (1) The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.
>
> (2) The expenditure must not be prohibited by law.
>
> (3) The expenditure must 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 United States General Accounting Office, *Principles of Federal Appropriations Law* 4–16 (2d ed. 1991) (*"Principles"*). The Comptroller General has further explained his approach to this issue as follows:

> When we review an expenditure with reference to its availability for the purpose at issue, the question is not whether we would have exercised that discretion in the same manner. Rather, the question is whether the expenditure falls within the agency's legitimate range of discretion or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range.

Implementation of Army Safety Program, B–223608, 1988 WL 228374, at *6 (C.G. Dec. 19, 1988), *quoted in* 1 *Principles* at 4–17.

Considering the GAO's three-part test, we find no prohibition against the expenditure of GSA funds for items such as business cards. As discussed more fully below, however (see Part II.D, *infra*), the GSA Appropriations Act does limit to $5,000 GSA's general Policy and Operations appropriation for "reception and representation" ("R&R") expenses, a measure that "otherwise provides" for the purchase of business cards when they are to be used for purposes covered by that discrete function. On the other hand, business cards purchased for agency purposes *other than* R&R are not "otherwise provided for" within the meaning of the third part of the GAO test. That leaves the question of whether the purchase

of business cards can be said to make a direct contribution to carrying out an authorized GSA function for which its general appropriation is available.

We conclude that an agency head may reasonably determine that the appropriate use of business cards by agency employees who deal with outside organizations will further the agency's statutory mission and therefore constitutes a proper expenditure from its general appropriations. For example, we think it is beyond dispute that the distribution of business cards bearing the address, phone number, fax number, and e-mail address of active agency representatives will tend to facilitate prompt and efficient communications with the agency by the persons and organizations with whom it transacts agency business. In this respect, the function of the business card is similar to that of other well established government expenditures, such as agency letterhead stationery, fax coversheets, and agency telephone directories.

We have considered the Comptroller General opinions consistently asserting that the purchase of business cards is not a proper expenditure of general agency appropriations. *See, e.g.*, 68 Comp. Gen. 583 (1989); 68 Comp. Gen. 467 (1989); 41 Comp. Gen. 529 (1962). Those rulings are based to a large extent on the Comptroller General's view that business cards are items of a personal nature, primarily benefitting employees rather than serving the mission of the employing agency. In ruling that agency appropriations could not be used to purchase business cards for a Forest Service Public Affairs Officer, for example, the Comptroller General invoked and reapplied his prior decisions analogizing agency business cards to social "calling cards":

> [The public affairs officer], who is familiar with our earlier decisions, asserts that unlike calling cards, which are primarily for private use and private benefit, his "information" cards are "strictly for official business." In B–149151, July 20, 1962, we addressed a similar contention:
>
> > The cards in question, while denominated as "cards of introduction" . . . are actually calling . . . cards. The "cards of introduction" are calling cards issued to the foreign visiting student with his name added at the time of issuance of the card to him. *The card serves the purpose of introducing the bearer to anyone to whom the card is presented. This is a primary function of a calling card.* (emphasis added.)
>
> Likewise, [the officer's] "information cards serve the purpose of introducing him to those to whom he gives them and are there-

> fore no different than calling cards. Accordingly, he may not be reimbursed for the cost of purchasing the cards."

68 Comp. Gen. at 469.

Whether or not these determinations were correct in the factual context in which they arose, they are not binding upon, nor necessarily relevant to, the spending decisions of other executive branch agencies. Rather, agency heads may make their own findings and determinations as to the purposes that would be served by the use of business cards by employees of their agency in today's governmental and business environment. Here, GSA has determined that its business cards would provide information to "enable[ ] the public, GSA's vendors, and GSA's agency customers to communicate more efficiently and effectively with GSA in the conduct of official business." GSA Memo at 3. We believe that constitutes a clearly permissible use of general agency appropriations.

D.

Although we conclude that business cards used for appropriate agency-related purposes may be a proper expenditure of an agency's general appropriations, there remains the question of whether the purchase of such cards by GSA is governed or restricted by, or chargeable against, the specific limitation on R&R expenses.

The current GSA "Policy and Operations" appropriation includes language providing for "not to exceed $5,000 for official reception and representation expenses." *See* GSA Appropriations Act, § 101(f), 110 Stat. at 3009–336. This raises the question whether that specific provision is applicable to the purchase of business cards and, if so, whether the existence of the specific R&R limitation forecloses the use of more general appropriations.

Both this Office and the Comptroller General have applied the general principle that where a specific provision limits the amount that may be expended on a particular object or activity within a general appropriation, the agency's general appropriations cannot also be used for that same category of expenditure when the limits have been reached. We have applied that principle in concluding that such a limitation on the amount that can be used for R&R expenditures within a general appropriation precludes use of the general appropriation for R&R expenses when the R&R spending limits have been exhausted. Memorandum for Mike Kelly, Special Assistant to the Attorney General, from Mary C. Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Official Representation Fund* at 1 (Apr. 15, 1977) ("Kelly Memo"). The Comptroller General has endorsed and applied the same rule. *See* 1 *Principles* at 2–18 to 2–19; 20 Comp. Gen. 739 (1941).

Several opinions of the Comptroller General have stated that appropriations earmarked for R&R expenses may properly be used for the purchase of business cards for appropriate agency employees. For example, in ruling that the Depart-

ment of Agriculture could not use its general appropriations to purchase business cards for its public affairs officers, the Comptroller General opined that there must be "specific statutory authority" to justify such an expenditure. 68 Comp. Gen. 467, 468 (1989). As the opinion further explained:

> Such specific authority could be provided, for example, by a line-item agency appropriation for official reception and representation expenses. Calling or business cards are a legitimate means of "representation," and an agency head could determine that their use by certain officials or employees would be a necessary representation expense.

Id. at 468 n.1; *see also* 1 *Principles* at 4–200; *United States Trade Representative — Use of Reception and Representation Funds*, B–223678, 1989 WL 240750 (C.G. June 5, 1989).

This Office has also considered the proper use of R&R appropriations on a number of occasions. Referring to the Department of Justice's R&R appropriations, we observed that "the legislative history of the Fund indicates that one of its purposes is to pay the infrequent but necessary costs of official meetings with non-governmental organizations for which other appropriated funds are not available." Kelly Memo at 1. In another opinion, we concluded that the key consideration in determining whether an expenditure may be charged to the Department's R&R Fund is that "the Fund is intended to provide for infrequent, miscellaneous activities, usually (but not exclusively) involving 'outside [of the Department]' representatives who are of special interest to the Department," but which could not otherwise be funded from within existing appropriations. Memorandum for Kenneth E. Starr, Counselor to the Attorney General, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: Coffee Expenditure in Connection with Generator Meeting in United States v. Seymour Recycling Corp.* at 5 (Apr. 4, 1983) (alteration in original).

Considering all the foregoing, we conclude that agency business cards may be validly chargeable to either an R&R appropriation or to a general appropriation *depending upon the purpose for which they are to be used.*

If the business cards are to be used primarily as a means of facilitating necessary agency-related communications between the agency and those with whom it deals, both inside and outside the government — in the same way, for example, that letterhead stationery, fax coversheets, or agency telephone directories serve that purpose — we believe that they are properly chargeable to the general appropriation. This would particularly be the case with respect to agency employees who actually anticipate receiving agency-related telephone calls, correspondence, or other communications from those to whom they present the cards. We think an agency head's determination that such a use of business cards serves the agency's

lawful purposes is well within the substantial discretion allowed in this area. At the same time, we do not think that the use of business cards as a practical communications-facilitating tool is properly categorized along with meals, receptions, and gifts as a "reception and representation" expenditure.

On the other hand, we believe that some uses for which business cards might be employed would be properly, and exclusively, chargeable against an agency's limited R&R ceiling, if any. For example, the use of such cards merely to conform to social or business custom in a particular country, geographic area, or line of business fulfills a function more closely analogous to meals, receptions, and gifts than to such standard communications tools as letterhead stationery, fax coversheets, or agency phone directories.

We recognize that the uses for which particular agencies may employ business cards may not be precisely confined to one category or the other. Taking that into account, the appropriation account or category to which the purchase of business cards may be charged should depend upon the predominant purpose for which they are to be used. If the primary purpose is facilitating necessary agency-related communications, we believe they may properly be purchased with general appropriations. If, on the other hand, the primary purpose is to extend courtesies or conform to social or business custom in the context of agency-related activities, then the purchase of the cards should be charged as an R&R expense.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Disclosure of Grand Jury Material to the Intelligence Community

Grand Jury material subject to the requirements of Rule 6(e) of the Federal Rules of Criminal Procedure may be disclosed to agencies in the Intelligence Community pursuant to Rule 6(e) insofar as necessary to assist government attorneys in performing their duties to enforce federal criminal law, but may not, under Rule 6(e), be used by the recipient agencies for other purposes, including intelligence purposes.

In circumstances where there is a compelling necessity for grand jury material to be made available to the President in furtherance of his constitutional responsibilities over foreign affairs and national defense, and where the President has authorized the provision of such material to the Intelligence Community, we believe that a court should and would authorize such disclosure outside the provisions of Rule 6(e), on the basis of Article II of the Constitution and separation of powers principles. Indeed, in such compelling circumstances, a constitutionally necessitated disclosure could properly be made by attorneys for the Government even without prior court approval.

August 14, 1997

MEMORANDUM OPINION FOR THE ACTING COUNSEL
OFFICE OF INTELLIGENCE POLICY AND REVIEW

This responds to your request for our opinion concerning the permissibility of prosecutors in the Department of Justice disclosing grand jury information to agencies in the Intelligence Community ("IC") for certain official purposes.[1] In subsequent communications with your office, we have identified a number of more specific questions raised by your inquiry.

The permissibility of such disclosures will generally depend upon a number of factual considerations, particularly the specific nature of the information in question and the specific purposes for which Department attorneys would disclose it to IC officials. In addition, some materials considered by a grand jury (e.g., subpoenaed bank records) may not be subject to secrecy restrictions at all because they do not constitute "matters occurring before the grand jury" within the meaning of Rule 6(e) of the Federal Rules of Criminal Procedure. *See* Fed. R. Crim. P. 6(e)(2). With respect to material that is subject to Rule 6(e), we conclude that the Rule clearly does not authorize disclosure for intelligence purposes and that material that is disclosed to the IC for purposes of assisting the enforcement of federal criminal law may not, under the express terms of the Rule, be used for any other purpose.[2]

In response to a specific question, we nevertheless conclude that in a situation contemplated by neither Rule 6(e) nor the prevailing case law — i.e., where there

[1] The term "intelligence community" includes, inter alia, the Central Intelligence Agency ("CIA"), the National Security Agency, the Defense Intelligence Agency ("DIA"), and the intelligence elements of the Armed Services, the Federal Bureau of Investigation ("FBI"), and the Department of the Treasury *See* 50 U S C § 401a(4) (1994)

[2] For reasons of brevity, matters occurring before a grand jury are sometimes referred to herein as "6(e) material" or "grand jury information "

is a compelling necessity for 6(e) material to be made available to the President in furtherance of his constitutional responsibilities over foreign affairs and national defense and where the President has authorized the provision of such material to the IC — we believe a court should and would authorize such disclosure outside the provisions of Rule 6(e), on the basis of Article II of the Constitution and separation of powers principles. *Cf. Disclosure of Grand Jury Matters to the President and Other Officials*, 17 Op. O.L.C. 59, 65–69 (1993) ("1993 Opinion"). Indeed, in such compelling circumstances, a constitutionally necessitated disclosure could properly be made by attorneys for the Government even without prior court approval.

In any event, this constitutional authority should not be exercised as a matter of course, but rather only in extraordinary circumstances and with great care. For this reason, we recommend the adoption of procedures to ensure that the proper officials (e.g., the Attorney General or the Deputy Attorney General) are consulted before any constitutionally based disclosure is made.

Before turning to the specific questions presented, we address a number of preliminary matters that are important to the practical resolution of these questions.

I. GENERAL CONSIDERATIONS

A. *Rule 6(e) Restrictions and Exceptions*

Rule 6(e) of the Federal Rules of Criminal Procedure establishes a "General Rule of Secrecy" providing that certain persons, including attorneys for the Government, "shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules." Fed. R. Crim. P. 6(e)(2); *see United States v. John Doe, Inc. I*, 481 U.S. 102, 107 (1987). Under this rule, no attorney for the Department of Justice may disclose "matters occurring before the grand jury" to any other person unless one of the rule's enumerated exceptions applies. The exceptions to the general rule of secrecy are set forth under subparagraph (3) of Rule 6(e). Two of those exceptions are relevant here and may be summarized as follows:

(1) Disclosure to such government personnel as are deemed necessary to assist an attorney for the government in the performance of his duty to enforce federal criminal law, *see* Fed. R. Crim. P. 6(e)(3)(A)(ii); and

(2) Disclosure directed by a court preliminarily to or in connection with a judicial proceeding, *see* Fed. R. Crim. P. 6(e)(3)(C)(i).

Unless a disclosure of 6(e) material to IC personnel can be authorized under one of those two provisions, it cannot be authorized within the framework of Rule 6(e).[3]

[3] This opinion assumes that the information that is the subject of your inquiry would actually constitute "matters occurring before a grand jury" and is therefore subject to the restrictions of Rule 6(e). We note, however, that a number of significant opinions have interpreted that term somewhat restrictively, particularly with respect to docu-

B. *Restrictions on Intelligence Community Law Enforcement Activities*

The most likely basis for authorized disclosure of grand jury information to IC officials would be to provide assistance to prosecutors in their enforcement of federal criminal law pursuant to Rule 6(e)(3)(A)(ii). In such circumstances, the IC would be receiving the information on the basis of some connection to federal *law enforcement* activity. Although a survey of all IC agencies in this regard is not within the scope of this assessment, we note that the CIA, for example, is subject to specific statutory restrictions against law enforcement activity. That raises the preliminary question whether the CIA or its agents would be eligible to receive grand jury material under *any* construction of Rule 6(e)(3)(A)(ii).

In establishing the scope of the CIA's authority, the National Security Act ("NSA") specifies that "the Agency shall have no police, subpoena, or law enforcement powers or internal security functions." 50 U.S.C. § 403–3(d)(1) (1994). The same law provides, on the other hand, that the Director of Central Intelligence ("DCI") "shall be responsible for providing national intelligence" for the President and other executive branch department and agency heads, including the Attorney General. *Id.* § 403–3(a)(1).[4]

Your inquiry did not ask us to examine the various statutory restrictions on the domestic or law enforcement activities of the CIA and other IC agencies and we have refrained from doing so in this memorandum. We do not believe, however, that the restrictions imposed on the CIA under 50 U.S.C. § 403–3(d)(1) are necessarily inconsistent with providing the kind of informational assistance to federal prosecutors authorized under Rule 6(e)(3)(A)(ii). Such assistance may be provided without exercising the kind of police, subpoena, law enforcement, or internal security powers or functions which are foreclosed to the CIA under the statutory restrictions. In providing such authorized assistance, however, CIA officials would remain subject to those statutory restrictions and would be required to limit themselves to activities (such as providing informational support) that do not in themselves constitute the exercise of law enforcement powers.

C. *The DCI's Right of Access under the National Security Act*

One provision of the NSA could arguably be construed not only to authorize, but even to require, Department of Justice attorneys to make certain national secu-

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mentary material obtained by the grand jury *See, e g., United States v. Interstate Dress Carriers, Inc*, 280 F 2d 52, 54 (2d Cir 1960) (restricting Rule 6(e)'s secrecy requirement to material sought in order "to learn what took place before the grand jury," as distinguished from material sought "for its intrinsic value in the furtherance of a lawful investigation")

[4] The relationship between the intelligence-sharing requirements of the NSA and the secrecy restrictions of Rule 6(e) are discussed immediately below in Part I.C.

rity-related grand jury information available to the Director of Central Intelligence. Section 104(a) of the NSA provides as follows:

> To the extent recommended by the National Security Council and approved by the President, the Director of Central Intelligence shall have access to all intelligence related to the national security which is collected by any department, agency, or other entity of the United States.

50 U.S.C. § 403–4(a) (1994). Whether this provision may actually require disclosure of some 6(e) material to the DCI depends on several distinct considerations: (1) to what extent have the NSC and the President mandated the DCI access rights authorized by the statute; (2) may grand jury information covered by Rule 6(e) constitute "intelligence . . . collected by any department" within the meaning of the statute; and (3) if the NSA's access requirements can be construed to extend to grand jury information, do those requirements supersede the restrictions of Rule 6(e)?

1. *Implementation of Statutory Authorization.* The general authorization of section 104(a) is implemented by Executive Order No. 12333. Exec. Order No. 12333, 3 C.F.R. 200 (1982). Section 1.6(a) of the Executive Order provides:

> The heads of all Executive Branch departments and agencies shall, in accordance with law *and relevant procedures approved by the Attorney General under this Order*, give the Director of Central Intelligence access to all information relevant to the national intelligence needs of the United States, and shall give due consideration to the requests from the Director of Central Intelligence for appropriate support for Intelligence Community activities.

Id. at 204 (emphasis added).

The underscored language raises the question whether the Attorney General must issue specific procedures governing DCI access as a condition precedent to the agencies' obligation to provide access taking effect (it is our understanding that no formal procedures have been issued by the Attorney General under this provision). We do not interpret the Executive Order in that way. Rather, we believe that the Executive Order *itself* imposes a requirement for departments to provide access to the covered category of intelligence insofar as the DCI requests such access. The Executive Order *additionally* requires that the provision of such access must comply with any applicable procedural requirements that the Attorney

General has approved to govern particular categories of information covered by the Executive Order.[5]

Accordingly, we conclude that Executive Order No. 12333 implements section 104(a) of the NSA in a manner that requires the Justice Department, subject to such procedures as may be approved by the Attorney General, to provide the DCI with requested access to "intelligence related to the national security."

2. *"Intelligence" Subject to Access Requirement.* Section 104(a)'s access requirement extends only to "intelligence related to the national security." That phrase is a term of art, requiring consideration of several related NSA definitions in order to determine whether, and to what extent, it applies to national security-related information arising before a grand jury.

Under the NSA, the term "intelligence" includes "foreign intelligence and counter-intelligence." 50 U.S.C. § 401a(1) (1994). The term "foreign intelligence" means "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons." *Id.* § 401a(2).[6] Finally, "intelligence related to the national security" is jointly defined with the term "national intelligence" as follows:

> (5) The terms "national intelligence" and "intelligence related to the national security"—
>
> > (A) each refer to intelligence which pertains to the interests of more than one department or agency of the Government; and
> >
> > (B) do not refer to counterintelligence or law enforcement activities conducted by the Federal Bureau of Investigation except to the extent provided for in procedures agreed to by the Director of Central Intelligence and the Attorney General, or otherwise as expressly provided for in this title.

Id. § 401a(5).

These definitions are broad in scope. "Foreign intelligence," for example, extends to "information relating to the . . . activities of . . . foreign persons." *Id.* § 401a(2). Moreover, apart from the exclusion of information revealing certain counterintelligence or law enforcement activities "conducted by" the FBI, *id.*

[5] We should note, however, that to the extent that the information to which the DCI seeks access under section 104(a) concerns *United States persons*, compliance with procedures approved by the Attorney General is a condition precedent to access under the terms of section 2.3 of Executive Order No. 12333. *See* 3 C.F.R. at 211. That section specifies that Intelligence Community agencies are authorized to collect or retain information concerning United States persons "only in accordance with procedures established by the head of the agency concerned and approved by the Attorney General, consistent with the authorities provided by Part 1 of this Order." *Id.* We understand that such procedures have been approved by the Attorney General.

[6] "Counterintelligence" means "information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities." 50 U.S.C. § 401a(3).

§ 401a(5)(B),[7] the definitions contain no apparent indications that information coming to the Department of Justice through its involvement in grand jury proceedings is per se excluded from their scope.

Accordingly, we believe that grand jury information that (1) relates to the activities of foreign governments, foreign organizations, or foreign persons; (2) pertains to the interests of more than one federal department or agency; and (3) is "required for the formulation and/or implementation of national security policy,"[8] constitutes "intelligence related to the national security" within the meaning of section 104(a) of the NSA. Consequently, the DCI is authorized to gain access to grand jury information meeting that description when it is obtained by Department of Justice attorneys, unless such access is barred or restricted by the provisions of Rule 6(e).

3. *Conflict between NSA and Rule 6(e).* Even where 6(e) materials encompass national security intelligence subject to the DCI's access rights under section 104(a) of the NSA, Rule 6(e) contains no provision or exception for disclosing the information to the DCI on that basis. Moreover, Rule 6(e)'s provisions for disclosure of grand jury material for purposes of assisting attorneys for the Government, or pursuant to court approval in connection with "judicial proceedings," would not normally be available for purposes of DCI access. *See* Part I.A, *supra* at 160. Consequently, it is necessary to consider whether the DCI access requirements of the NSA should be construed to supersede or override the restrictions of Rule 6(e).

We find no case authority addressing this precise issue. In *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557 (1983), however, the Supreme Court addressed the comparable issue of whether a statute requiring the Attorney General to disclose information to state attorneys general in connection with certain joint antitrust enforcement matters may override the restrictions of Rule 6(e) when information covered by the disclosure statute encompasses grand jury material otherwise restricted by Rule 6(e). Emphasizing that the disclosure statute in question (section 4F(b) of the Clayton Act, 15 U.S.C. § 15f(b) (1994)) contained the limiting phrase "to the extent permitted by law," the Court held that it did not authorize disclosures of grand jury information outside the procedures of Rule 6(e). More generally, the Court indicated that a statute should not be construed to override the

[7] This exclusion from the NSA's definition of "national intelligence" was described as follows in the Senate Committee Report pertaining to that provision.

> In view of the prohibitions contained in section 103(d) of the Act (as added by the bill) as well as in existing law, that the CIA should have no law enforcement or internal security functions, the Committee believes it desirable to exclude information concerning certain of the counter-intelligence and law enforcement activities of the FBI from the definition of "national intelligence." This exclusion is intended to remove information concerning FBI operational activities from the purview of "national intelligence" except where the Director of Central Intelligence and the Attorney General agree that such information can and should be shared

S. Rep. No. 102-324, at 26 (1991).

[8] *See* S. Rep. No. 102-324, at 25, 33.

grand jury secrecy restrictions of Rule 6(e) unless Congress affirmatively expresses its intent to do so. As the Court stated:

> Congress, of course, has the power to modify the rule of secrecy by changing the showing of need required for particular categories of litigants. But the rule is so important, and so deeply rooted in our traditions, that we will not infer that Congress has exercised such a power without affirmatively expressing its intent to do so.

460 U.S. at 572–73 (footnote omitted).

In some respects, section 104(a) of the NSA is distinguishable from section 4F(b) of the Clayton Act as addressed by the Court in *Abbott*. Unlike the latter statute, section 104(a)'s DCI access requirement is not qualified by the phrase "to the extent permitted by law" or the equivalent. Moreover, that express qualification on the section 4F(b) disclosure requirement was a critical element of the *Abbott* Court's holding that it did not override Rule 6(e)'s restrictions. *See* 460 U.S. at 566–68. Further, the *Abbott* opinion also relied heavily upon the fact that section 4F(b)'s legislative history revealed that Congress specifically considered and rejected a provision that would have granted plaintiffs in civil antitrust actions a right of access to grand jury materials after the completion of federal civil or criminal proceedings. *Id.* at 569. There was also specific evidence in the floor debate on section 4F(b) that Congress did not intend to change existing law respecting grand jury materials. *Id.* at 570. Section 104(a)'s pertinent legislative history, in contrast, does not reflect any specific consideration of its relationship to grand jury secrecy. Given these distinguishing factors, it could be argued that the *Abbott* holding does not conclusively resolve the issue presented here.

Nonetheless, the *Abbott* Court's more general assertion that legislative modification of the grand jury secrecy rules can only be accomplished if Congress "affirmatively express[es] its intent to do so," 460 U.S. at 573, presents a formidable rejoinder to the argument that section 104(a) overrides the provisions of Rule 6(e).[9] Neither the text of section 104(a) nor its pertinent legislative history contains such an affirmative expression of intent to override grand jury secrecy restrictions. Section 104(a)'s provision for the DCI's access to "intelligence related to the national security" does not clearly manifest an intent to reach grand jury information, although the "intelligence" covered by the statute could reasonably be interpreted to encompass certain kinds of grand jury information in the

[9] One well-recognized rule of construction that is often relevant in reconciling conflicting statutory provisions is inconclusive here. Where there is no clearly expressed congressional intention to the contrary, "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). That raises the question whether Rule 6(e)'s restriction on the disclosure of matters occurring before a grand jury is more "narrow, precise, and specific" than section 104(a)'s later-enacted provision for DCI access to "intelligence related to the national security." Because both provisions deal with narrow and specialized categories of information, we find the rule of relative specificity to no avail in this context.

hands of the Department of Justice. The most that may be said about section 104(a)'s text in this regard is that it is unclear on the point.

Nor does the legislative history provide evidence that the provision was intended to apply to grand jury information that falls within the applicable definition of "intelligence." For example, the pertinent Senate Report's discussion of section 104(a) states that "this authority is similar to existing law" and emphasizes that "the DCI's right of access extends only to 'national intelligence' as that term is defined by the bill." S. Rep. No. 102–324, at 33. The indication that section 104(a) was not intended to substantially change existing law regarding access to national intelligence also tends to undercut the view that section 104(a) was intended to modify Rule 6(e) restrictions, inasmuch as there was no recognized national security exception to such restrictions when section 104(a) was enacted.

Finally, although section 104(a) is not qualified by the phrase "to the extent permitted by law" that was stressed by the Court in *Abbott*, the Executive Order that implements section 104(a) does contain an arguably comparable qualification. Executive Order No. 12333's requirement for agencies to provide the DCI with access to national intelligence is preceded by the qualifying phrase, "in accordance with law." *See* 3 C.F.R. at 204. Because section 104(a)'s requirements apply only "[t]o the extent recommended by the National Security Council and approved by the President," 50 U.S.C. § 403–4(a), those requirements are subject to the restrictions and limitations of Executive Order No. 12333 until it is replaced or revised. Under the Supreme Court's analysis in *Abbott*, *see* 460 U.S. at 565–67, the "in accordance with law" qualification of the Executive Order, although less clear than the "to the extent permitted by law" qualification at issue in *Abbott*, might be construed to mean that section 104(a)'s DCI access requirements are to be applied "in accordance with" the requirements of Rule 6(e), which is part of the "law" referred to in the qualification.[10]

We recognize that the national security concerns underlying the need for the DCI's access to 6(e) material will generally be considerably more compelling than the federal-state antitrust enforcement concerns reflected in section 4F(b) of the Clayton Act. If section 104(a)'s subordination to the restrictions of Rule 6(e) foreclosed all avenues for national security-based access to grand jury information in such compelling circumstances, the deference to Rule 6(e) reflected in the *Abbott* opinion would have to be weighed against countervailing national security considerations. As we explain in Part II, *infra*, however, we believe there is valid *constitutional* authority for executive branch access to grand jury material outside the provisions of Rule 6(e) when national security considerations are sufficiently compelling.

[10] We also note that section 2.8 of Executive Order No. 12333 provides: "Nothing in this Order shall be construed to authorize any activity in violation of the Constitution or statutes of the United States." *See* 3 C.F.R. at 213. We do not consider this provision as a conclusive indication that section 1.6(a) of the Order does not require DCI access to 6(e) material, because such access would not be unlawful if section 104(a) of the NSA actually and validly supersedes Rule 6(e) within the scope of its coverage.

In light of all the foregoing, we do not believe that section 104(a) of the NSA, as implemented by Executive Order No. 12333, provides sound authority for Justice Department disclosure of 6(e) material constituting "information related to the national security" to the DCI.

D. *Attorney-Initiated or Court-Approved Disclosure*

Another general consideration is whether, as a practical matter, the Government would be willing to seek prior judicial approval for disclosure of the information to the IC, or whether use of judicial procedures is incompatible with the objectives in question. In the vast majority of circumstances, the provisions for disclosure to government personnel under Rule 6(e)(3)(A)(ii) would provide the only relevant and practical means for possible authorized disclosure to IC officials. That procedure does not require any judicial approval, but it is limited to circumstances where a government attorney needs the assistance of other government personnel in connection with federal criminal law enforcement duties. We believe that most circumstances where disclosure to IC personnel could be justified under the Rule would be cases where a federal prosecutor, or the Attorney General, has a need for intelligence assistance or support in connection with a matter involving enforcement of federal criminal law. In those circumstances, disclosure without court approval would be authorized under subparagraph (A)(ii) insofar as the "necessary assistance" criterion is satisfied.

There may, however, be circumstances where the "self-initiated" disclosure provisions of subparagraph (A)(ii) are unavailable or unsuitable. For example, those provisions would not authorize disclosure of 6(e) material for purposes related to the investigation or prosecution of crimes committed under the laws of a foreign state or to civil enforcement proceedings. Under those circumstances, the additional avenues of disclosure provided by Rule 6(e)(3)(C) could be considered.[11] Under those provisions, disclosure of 6(e) material could arguably be made to IC personnel if the disclosure could be considered "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(C)(i). That limitation, like the (3)(A)(ii) "use" restrictions, clearly would not permit any disclosures made for intelligence-gathering purposes. However, it would arguably permit court-approved disclosure to IC personnel *if* the purpose was for government attorneys to obtain the IC's informational assistance or assessment in support, for example, of criminal or civil investigations intended to result in some form of judicial enforcement proceedings (e.g., an SEC enforcement proceeding culminating in an application for injunctive relief or a court-approved consent decree).[12]

[11] We note that Rule 6(e)(3)(D) permits the court to hold *ex parte* hearings when the Government petitions for court-approved disclosure under the (C)(i) provisions

[12] At least one court has suggested that the (C)(i) provision may extend even to "judicial proceedings" conducted in a foreign state *See, e.g., In Re Baird*, 668 F.2d 432, 434 n.3 (8th Cir.) ("We assume, without deciding, that

Continued

Moreover, 6(e) materials obtained under the judicial approval procedures are not subject to the same explicit limitation on use that apply to (A)(ii) disclosures, presumably because a court can address permissible uses in any order it might enter. *See* Fed. R. Crim. P. 6(e)(3)(C).

Some courts have applied a relatively flexible interpretation to the requirement that (3)(C)(i) disclosures must be made "preliminarily to . . . a judicial proceeding." [13] As the standard was described by Judge Learned Hand, writing for the Second Circuit:

> [T]he term "judicial proceeding" includes any proceeding determinable by a court, having for its object the compliance of any person subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime. An interpretation that should not go at least so far, would not only be in the teeth of the language employed, but would defeat any rational purpose that can be imputed to the Rule.

Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958). Further, as stated by the Ninth Circuit, "[n]either the possibility that no judicial proceeding will result nor the likelihood that litigation will occur is controlling." *In re Barker*, 741 F.2d at 254.

On the other hand, the Supreme Court has stressed that disclosure under the (3)(C)(i) exception is permitted only where "the primary purpose of disclosure is . . . to assist in preparation or conduct of a judicial proceeding." *United States v. Baggot*, 463 U.S. 476, 480 (1983). Even when the required connection to a judicial proceeding is satisfied, moreover, the courts additionally require a showing of "compelling necessity" and "particularized need" before they will order disclosure of grand jury information under Rule 6(e)(3)(C)(i). *See, e.g., Sobotka.*

In sum, court-approved disclosure of 6(e) material to IC personnel could conceivably be obtained in those circumstances where the purpose of the disclosure would be for the IC to provide information or intelligence in support of an investigation or proceeding that is intended to culminate in a foreseeable judicial proceeding (e.g., a civil proceeding to enjoin the export of dual-use technology to a terrorist front organization, or even the prosecution of a terrorist in the courts

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the phrase 'judicial proceeding' includes a criminal trial conducted in a foreign country "), *cert denied*, 456 U S 982 (1982)

[13] *See, e g , In re Barker*, 741 F.2d 250 (9th Cir 1984) (investigation of attorney by bar association held preliminary to a judicial proceeding), *United States v Sobotka*, 623 F.2d 764 (2d Cir 1980) (disclosure to bar grievance committee), *Special February 1971 Grand Jury v Conlisk*, 490 F 2d 894, 897 (7th Cir 1973) (disclosure to police board of inquiry); *In re Petition to Inspect and Copy Grand Jury Materials*, 576 F Supp 1275 (S D Fla. 1983) (disclosure to Circuit Judicial Council committee for judicial misconduct investigation), *aff'd*, 735 F 2d 1261 (11th Cir. 1984)

of a foreign state). Although disclosure for this purpose under subparagraph (3)(C)(i) would be very similar to disclosure in order to assist a prosecutor under (3)(A)(ii), the latter provision imposes explicit restrictions on use that are not contained in Rule 6(e)(3)(C)(i). In the case of "judicial proceedings" disclosure, the court is authorized to determine the conditions of disclosure depending upon the particular circumstances. *See* Fed. R. Crim. P. 6(e)(3)(C) (providing that disclosures pursuant to that subsection may be ordered under "such conditions as the court may direct"). Those conditions may or may not include a requirement that the information be used solely in furtherance of the judicial proceedings in question.[14]

Notwithstanding this departure from the explicit "use" restrictions applicable to self-initiated disclosures under Rule 6(e)(3)(A)(ii), however, the subparagraph (3)(C)(i) provision for court-approved disclosure is not likely to provide a meaningful and practical alternative to (A)(ii) disclosure in this context except in very rare circumstances. Insofar as a court might permit disclosure to IC personnel to provide assistance "preliminary to" a civil or criminal judicial enforcement proceeding pursuant to subparagraph (C)(i), we consider it unlikely that the courts would authorize such disclosure without imposing conditions and restrictions on use that would be similar to those applicable under subparagraph (A)(ii) (e.g., permitting use of the 6(e) material only in connection with the anticipated judicial proceeding).

II. SPECIFIC QUESTIONS

We now respond to the more particularized questions identified in discussions with your office.

Question 1. When grand jury material is lawfully disclosed to IC personnel for purposes of assisting an attorney for the Government in the enforcement of federal criminal law pursuant to Rule 6(e)(3)(A)(ii), and the IC does use it to provide such assistance, may the IC also make use of such material for purposes other than federal criminal law enforcement, such as foreign intelligence purposes?

Response: No. The law on this point, both codified in the text of Rule 6(e) and as applied in the case law, is unambiguously restrictive. Rule 6(e)(3)(B) provides that government personnel to whom 6(e) material is lawfully disclosed under subparagraph (A)(ii) of the Rule "shall not utilize that grand jury material *for any purpose other than* assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law" (emphasis added). As explained by the court in *United States v. Kilpatrick*, 821 F.2d 1456, 1471

[14] *Cf. In re Request for Access to Grand Jury Materials*, 833 F.2d 1438, 1445–46 (11th Cir. 1987) (approving order issued under Rule 6(e)(3)(C) subject to provision that grand jury materials disclosed in connection with impeachment proceedings would be limited to House of Representatives, as distinct from members of the Senate, because request was made by the House Judiciary Committee based upon the investigative powers held by the House)

(10th Cir. 1987), *aff'd sub nom. Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) (emphasis added) (citation and footnote omitted):

> Federal employees assisting the prosecutor in the investigation and prosecution of federal criminal violations are permitted access to grand jury materials without prior court permission. *However, such support personnel may not use the materials except for purposes of assisting Government attorneys to enforce federal criminal laws. Sells Engineering*, 463 U.S. at 428, 442; *see also* 8 J. Moore at ¶6.05.[4][a], at 6–119. The Rule 6(e) proscription is on the use of the grand jury material and not on who obtains it.

It should also be stressed, however, that the phrase "assist . . . in the performance of such attorney's duty to enforce federal criminal law" can be construed to cover a wide range of matters, such as identifying possible violators of far-reaching anti-drug and anti-terrorism laws in the federal criminal code.

Question 2. Under the same circumstances described in 1., above, if the IC incidentally learns certain collateral information solely by reason of its access to the 6(e) material — for example, it is able to deduce the identity and location of a foreign terrorist from certain related information adduced before the grand jury, although that identity and location did not *themselves* surface before the grand jury — can the IC lawfully use that *derivative* information for purposes other than federal criminal law enforcement, such as foreign intelligence purposes?

Response: Our research has failed to identify published opinions or commentary addressing this issue. A reasonable argument can be made, however, that as long as the IC was lawfully using the 6(e) material to assist the Government attorneys, and learned the collateral information within the scope of its authorized support operations, the Rule does not require the IC to refrain from using derivative information that it learns incidentally in the course of providing such assistance. Specifically, Rule 6(e)(3)(B) restricts the use of "grand jury material," and nothing else.[15] In the circumstances posited, the IC personnel would not be unlawfully utilizing the *grand jury* material for ulterior purposes; rather, they would be lawfully using the *derivative* information (which does not constitute "matters occurring before the grand jury"). We would caution, however, that the use of derivative information might violate the grand jury secrecy rules if such use would foreseeably result in the unauthorized disclosure of information that *does* constitute "matters occurring before the grand jury" — i.e., information that would reveal or compromise the secret deliberations of the grand jury itself, *see Anaya v. United States*, 815 F.2d 1373, 1379–80 (10th Cir. 1987). We would further caution that we cannot say with confidence that a court would approve the deriva-

[15] In contrast, statutory restrictions on the use of intercepted wire and oral communications extend not only to the contents of such communications, but also to "evidence derived therefrom." 18 U.S.C. §§ 2515, 2517 (1994)

tive use of Rule 6(e) material. Nor can we presume that, without prior court approval, a government attorney might not risk sanctions in permitting such derivative use.

Question 3. When 6(e) material is lawfully disclosed to the IC pursuant to Rule 6(e)(3)(A)(ii) for assistance purposes, what is the breadth of the federal criminal law enforcement purposes for which the IC may use such information? For example, if the "attorney for the government" to whom the assistance is to be provided is the Attorney General, may the assistance provided by the IC extend to the full range of the Attorney General's federal criminal law enforcement authorities? [16]

Response: Applying the plain language of Rule 6(e)(3)(A)(ii), the scope of authorized assistance is determined by (1) the scope of the requesting attorney's "duty to enforce federal criminal law" and (2) the scope of the attorney's request for assistance. If government personnel are rendering assistance to the Attorney General under the (A)(ii) provision, for example, their assistance may extend to a broad criminal law enforcement program for which the Attorney General is responsible or to a single case or investigation, depending upon the scope of her request for assistance.[17] This is consistent with our prior opinion on permissible disclosure of grand jury matters *by* the Attorney General, where we opined that the Attorney General could disclose 6(e) material to members of the National Security Council in order to obtain their assistance in carrying out her criminal law enforcement responsibilities. *See* 1993 Opinion, 17 Op. O.L.C. at 61–64. We noted the legislative history underlying the Rule 6(e)(3)(A)(ii) exception, which demonstrates that Congress intended federal prosecutors to have leeway "to make such disclosures of grand jury information to other government personnel as they deem necessary to facilitate the performance of *their duties relating to criminal law enforcement.*" S. Rep. No. 95–354, at 8 (1977), *reprinted in*, 1977 U.S.C.C.A.N. 527, 531 (emphasis added). However, personnel providing assistance to government attorneys under subparagraph (A)(ii) cannot assume a broad mandate for their activities merely because the requesting attorney has broad responsibilities (e.g., a U.S. Attorney or an Assistant Attorney General). The scope of assistance must be confined to the area of enforcement specified by the requesting attorney.

To the extent that 6(e) material may be disclosed to IC personnel under the (A)(ii) exception, it must be noted that a list naming all the officials to whom such disclosures are made must be submitted to the district court that empaneled the grand jury. *See* Fed. R. Crim. P. 6(e)(3)(B).

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[16] For purposes of the Federal Rules of Criminal Procedure, including Rule 6(e), the term "attorney for the government" includes the Attorney General, an authorized assistant of the Attorney General, a U.S Attorney, and an authorized assistant of a U.S Attorney Fed R Crim P 54(c), *see United States v Bates*, 627 F.2d 349, 351 (D.C Cir 1980).

[17] *See generally In re Federal Grand Jury Witness*, 597 F 2d 1166, 1168 (9th Cir 1979) (Hufstedler, J., concurring specially) ("if the government attorney's duties include the cooperative exchange of information with foreign officials to stop international drug trafficking, Rule 6(e) may permit disclosure")

Question 4. May 6(e) material be disclosed to IC officers where the information in question is urgently relevant to a matter of grave consequences for national security or foreign relations (e.g., information revealing that certain dual technology exports under investigation by the Grand Jury are to be used for the bombing of a major government building in a foreign state closely allied to the United States), even though the purpose of the disclosure does not fall within the coverage of Rule 6(e)'s listed exceptions to grand jury secrecy?

Response: Where approved by the President, we believe such disclosure would be lawful, although we caution that the legal principles supporting this conclusion are not firmly-established in the case law concerning grand jury secrecy. Nonetheless, we believe such disclosure would rest upon the same fundamental constitutional principle that has been held to justify government action overriding individual rights or interests in other contexts where the action is necessary to prevent serious damage to the national security or foreign policy of the United States. *See generally Haig v. Agee*, 453 U.S. 280, 309 (1981) (invoking the principle that the Constitution's guarantees of individual rights do not make it a "suicide pact"); *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 408 (1950) (to the same effect). Indeed, the justification for disclosure in this context would appear even stronger, inasmuch as the restrictions against disclosure are based upon the Federal Rules of Criminal Procedure rather than individual rights grounded in the Constitution.

In our 1993 opinion concerning disclosure of Rule 6(e) material to the President and members of the National Security Council, we recognized the general principle that, under certain compelling circumstances, the President's responsibilities under Article II of the Constitution can provide justification for disclosures of grand jury information that would not be authorized by the provisions of Rule 6(e) itself. *See* 1993 Opinion, 17 Op. O.L.C. at 65–69. Here, the application of that principle occurs in the context of the President's responsibilities under Article II for national defense and foreign affairs. The question is whether Rule 6(e) should be construed to limit the access of the President and his aides to information critical to the national security — information that, in the absence of Rule 6(e), unquestionably would be provided.

The information in question would be crucial to the discharge of one of the President's core constitutional responsibilities. The Constitution vests the President with responsibility over all matters within the executive branch that bear on national defense and foreign affairs, including the collection and dissemination of national security information.[18] Because "[i]t is 'obvious and unarguable' that

[18] *See Department of the Navy v Egan*, 484 U.S 518, 527 (1988) ("The President, after all, is the 'Commander in Chief of the Army and Navy of the United States.' U S Const , Art. II, § 2 His authority to control access to information bearing on national security . flows primarily from this constitutional investment of power . and exists quite apart from any explicit congressional grant . The authority to protect such information falls on the President as head of the Executive Branch and Commander in Chief."), *New York Times Co v United States*, 403 U S. 713, 728–30 (1971) (Stewart, J., concurring) ("If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under

no governmental interest is more compelling than the security of the Nation," *Haig*, 453 U.S. at 307 (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)), the President has a powerful claim, under the Constitution, to receive the information in question here and to authorize its disclosure to the IC. *See United States v. United States District Court*, 407 U.S. 297, 310 (1972) (President "has the fundamental duty under Art. II, § 1, of the Constitution, to 'preserve, protect and defend the Constitution of the United States.' ").

On the other side of the balance is a rule whose words do not specifically address the President's powers in the field of foreign affairs and national security, and whose purpose is not affected by the disclosure at issue. The rule of grand jury secrecy advances "several distinct interests":

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There would also be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218–19 (1979) (footnotes and citations omitted). Although routine disclosure even within the government may implicate these interests, *see United States v. Sells Engineering, Inc.*, 463 U.S. 418, 431–32 (1983), and the Court accordingly has held that Rule 6(e) does not permit disclosing grand jury materials to Civil Division lawyers for use in pursuing civil suits, *id.*, here (in addition to the "crucial need" for the information not present in *Sells*) the extraordinary nature of the circumstances leading to disclosure would remove the threat to the grand jury's integrity. That grand jury materials may be revealed to the IC under exceptional and exigent circumstances would not appreciably reduce the willingness of witnesses to come forward and would pose little danger that the government could use grand jury powers to pursue non-criminal matters or overcome the otherwise applicable limits on national security investigations. *Id.*

Disclosure in these circumstances would not conflict with the place of grand juries in the constitutional structure of government or with the constitutional rights

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the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully [I]t is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law— . to protect the confidentiality necessary to carry out its responsibilities in the field of international relations and national defense ").

of individuals. *Cf. United States v. United States District Court*, 407 U.S. at 316–17 (President, acting through Attorney General, lacked power to authorize electronic surveillance in domestic security matters without prior judicial warrant).[19] Where the President's powers to protect national security are in tension with a statutory rather than a constitutional rule, the statute cannot displace the President's constitutional authority and should be read to be "subject to an implied exception in deference to such presidential powers." *Rainbow Navigation, Inc. v. Department of the Navy*, 783 F.2d 1072, 1078 (D.C. Cir. 1986) (Scalia, J.).[20] There, the court stated, albeit in a discussion not central to its holding, that it doubted that "a [Presidential] decision that the Navy should use a foreign ship, faster or less vulnerable than any American ship available, to deliver urgently needed supplies to troops in wartime" would be prohibited by a statute that, on its face, required the United States to prefer domestic shippers if they were available. *Id.* We think Rule 6(e) should be read to be subject to such an implied exception.

Thus, we believe there are circumstances where grand jury information learned by an attorney for the government may be of such importance to national security or foreign affairs concerns that to withhold it from the President (or his Cabinet members and other key delegatees and agents, acting on his behalf) would impair his ability to discharge his executive responsibilities under Article II of the Constitution. We believe the hypothetical scenario posited in the above question — i.e., grand jury proceedings reveal reliable evidence of a plot to bomb a major government building in a friendly foreign state — would clearly constitute such circumstances. In those circumstances, the attorney learning the information would be obliged to convey the information to appropriate superiors (e.g., the U.S. Attorney), who would report it to the Attorney General, who would in turn report it to the President. The President (or appropriate officials acting on his behalf, such as the Attorney General) would clearly be authorized to share such crucial information with his executive branch subordinates, including IC officials, to the extent necessary to discharge his constitutional responsibilities.

As we noted in our 1993 opinion, such "emergency" disclosure of 6(e) material would be necessitated and authorized by Article II of the Constitution, rather than permitted by Rule 6(e). *See* 1993 Opinion, 17 Op. O.L.C. at 65–69. Accordingly, in the limited and extraordinary kind of circumstances posited, we do not believe that prior judicial approval of such disclosure would be, or could be, constitu-

[19] We note, however, that if the exigency were extreme enough, even constitutional protections might yield to national security concerns *See Haig*, 453 U S at 308 (" '[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops ' ") (quoting *Near v Minnesota ex rel Olson*, 283 U S 697, 716 (1931))

[20] *See also United States v Truong Dinh Hung*, 629 F 2d 908, 914 (4th Cir 1980) (foreign intelligence exception to Fourth Amendment warrant requirement, in view of "the need of the executive branch for flexibility, its practical experience, and its constitutional competence" for foreign affairs), *cert denied*, 454 U S 1144 (1982), *United States v. Butenko*, 494 F 2d 593, 608 (3d Cir) (en banc), *cert. denied*, 419 U.S 881 (1974) (interpreting statute and Fourth Amendment in light of President's constitutional authority)

tionally required. Moreover, in the scenario presented, we think self-initiated disclosure would also be authorized under Rule 6(e)(3)(A)(ii) if the plot involved any violations of U.S. criminal law (i.e., the disclosure would be in furtherance of the disclosing attorney's duty to enforce federal criminal law). To the extent, however, that the disclosure involved no violation of U.S. law and thus falls outside the scope of Rule 6(e)'s recognized exceptions, and to the extent that the exigencies of the situation would render it appropriate and prudent to request judicial approval, there is precedent for court-ordered disclosure outside the parameters of Rule 6(e).

Specifically, a number of court decisions have recognized that, under truly exceptional or compelling circumstances, a federal court may order or permit disclosure of confidential grand jury information on grounds other than those authorized by Rule 6(e). These cases include *In re Petition to Inspect and Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir.) (disclosure in aid of judicial misconduct investigation and possible impeachment), *cert. denied*, 469 U.S. 884 (1984); *In re Biaggi*, 478 F.2d 489 (2d Cir. 1973); *In re Craig*, 942 F. Supp. 881 (S.D.N.Y. 1996) (recognizing permissibility of extra-Rule 6(e) disclosure under "exceptional circumstances," but holding that it was not justified merely to assist a scholar with his dissertation), *aff'd* 131 F.3d 99 (2d Cir. 1997); *In re Petition of May*, No. M 11-189 (S.D.N.Y. Jan. 20, 1987), *withdrawn* 651 F. Supp. 457 (S.D.N.Y. 1987) (granting scholar's request to disclose grand jury testimony of public official accused of being a Communist spy); *In re Report and Recommendation of June 5, 1972, Grand Jury*, 370 F. Supp. 1219, 1228–30 (D.D.C. 1974) (Sirica, C.J.) ("Rule 6(e), which was not intended to create new law, remains subject to the law or traditional policies that gave it birth"; disclosure of 6(e) material permitted in form of a grand jury report to the House Judiciary Committee in connection with Watergate investigation); *see also Atlantic City Elec. Co. v. A.B. Chance Co.*, 313 F.2d 431, 434 (2d Cir. 1963) ("a court may order the disclosure of grand jury minutes when there is a showing of special and compelling circumstances sufficient to overcome the policy against disclosure"; no reference to Rule 6(e) as source of such judicial authority).

Again, in light of the extraordinary nature of this authority to disclose Rule 6(e) material, and to ensure careful consideration of the constitutional basis for any disclosure made outside the provisions of Rule 6(e), we recommend the adoption of procedures requiring consultation with, and approval by, the appropriate officials (e.g., the Attorney General or the Deputy Attorney General) preceding any such disclosure.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of Emoluments Clause to "Representative" Members of Advisory Committees

The Emoluments Clause of the Constitution does not apply to "representative" members of advisory committees, that is, members who are chosen to present the views of private organizations and interests.

September 2, 1997

LETTER OPINION FOR THE GENERAL COUNSEL
UNITED STATES TRADE REPRESENTATIVE

This is in response to your inquiry about the application of the Emoluments Clause, U.S. Const. art. I, § 9, cl. 8, to members of advisory committees. The Clause forbids anyone "holding any Office of Profit or Trust" under the United States from accepting, without the consent of Congress, "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."

In 1991, we expressed the categorical opinion that members of federal advisory committees hold offices of profit or trust within the meaning of the Clause. *Applicability of 18 U.S.C. § 219 to Members of Federal Advisory Committees*, 15 Op. O.L.C. 65, 68 (1991). However, we later receded from that sweeping view and concluded that "not every member of an advisory committee necessarily occupies an 'Office of Profit or Trust' under the Clause." Letter for Conrad K. Harper, Legal Adviser, Department of State, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel (Mar. 1, 1994). Later, we specifically determined that members of the State Department's Advisory Committee on International Economic Policy did not hold such offices because those members "meet only occasionally, serve without compensation, take no oath, and do not have access to classified information," and because "the Committee is purely advisory, is not a creature of statute, and discharges no substantive statutory responsibilities." *The Advisory Committee on International Economic Policy*, 20 Op. O.L.C. 123, 123 (1996).

In light of these refinements to our position, we now believe that "representative" members of advisory committees are not covered by the Clause. Such representatives are chosen to present the views of private organizations and interests. Under well-established precedents, a representative is not an "officer or employee" of the United States under the conflict of interest laws: " '[O]ne who is requested to appear before a Government department or agency to present the views of a non-governmental organization or group which he represents, or for which he is in a position to speak, *does not act as a servant of the Government* and is not its officer or employee.' " Memorandum to Heads of Departments and Agencies of the Executive Branch, from J. Jackson Walter, Director, Office of Government Ethics, *reprinted in* Informal Advisory Letters and Memoranda and

Formal Opinions 1979–1988, at 330 (1982) (quoting Memorandum of the President, *Preventing Conflicts of Interest on the Part of Special Government Employees* (May 2, 1963)). It would be exceedingly incongruous if, as we have concluded, special government employees on some advisory committees do not occupy offices of profit or trust under the Clause, but representatives who are not even employees are covered. Because representatives owe their loyalty to outside interests and are not "servant[s] of the Government," they do not, in our view, hold offices of profit or trust under the United States.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

Authority to Investigate Federal Aviation Administration Employee Complaints Alleging Reprisal for Whistleblowing

The Office of Special Counsel lacks authority to investigate complaints brought by Federal Aviation Administration employees alleging reprisals against them in response to whistleblowing activity.

September 23, 1997

MEMORANDUM OPINION FOR THE SPECIAL COUNSEL
U.S. OFFICE OF SPECIAL COUNSEL

This responds to the Deputy Special Counsel's letter of May 20, 1997, requesting our legal opinion on the authority of the Office of Special Counsel ("OSC") to investigate complaints brought by employees of the Federal Aviation Administration ("FAA") alleging reprisals for whistleblowing.[1] For the reasons set forth below, we conclude that OSC lacks authority to investigate such complaints.

I. BACKGROUND

In the 1996 Department of Transportation and Related Agencies Appropriations Act, Congress directed the FAA to establish a "personnel management system to address the unique demands of the agency's work force." Department of Transportation and Related Agencies Appropriations Act for Fiscal Year 1996, Pub. L. No. 104–50, § 347, 109 Stat. 436, 460 (1995), *as amended by* Pub. L. No. 104–122, 110 Stat. 876 (1996), *reprinted in* 49 U.S.C.A. § 106 note (West 1997) ("DOT Appropriations Act" or "Act").[2] Section 347(b) of the Act provides that title 5 of the United States Code is inapplicable to FAA personnel matters, with certain enumerated exceptions:

> (b) The provisions of title 5, United States Code, shall not apply to the new personnel management system developed and implemented pursuant to subsection (a), *with the exception of*—

[1] Letter for Dawn E. Johnsen, Acting Assistant Attorney General, Office of Legal Counsel, from James A. Kahl, Deputy Special Counsel, U.S. Office of Special Counsel (May 20, 1997) ("OSC Letter"). This letter enclosed an undated memorandum from the FAA, together with supporting documentation, setting forth the FAA's position on the issue.

[2] Section 347 of the Act provides in part

> (a) In consultation with the employees of the Federal Aviation Administration and such non-governmental experts in personnel management systems as he may employ, *and notwithstanding the provisions of title 5, United States Code, and other Federal personnel laws*, the Administrator of the Federal Aviation Administration shall develop and implement, not later than January 1, 1996, a personnel management system for the Federal Aviation Administration that addresses the unique demands on the agency's workforce

109 Stat. at 460 (emphasis added)

(1) *section 2302(b), relating to whistleblower protection*;
(2) sections 3308–3320, relating to veterans' preference;
(3) chapter 71, relating to labor-management relations;
(4) section 7204, relating to antidiscrimination;
(5) chapter 73, relating to suitability, security, and conduct;
(6) chapter 81, relating to compensation for work injury; and
(7) chapters 83–85, 87, and 89, relating to retirement, unemployment compensation, and insurance coverage.

109 Stat. at 460 (emphasis added).

Section 2302(b) of title 5 lists eleven prohibited personnel practices, but section 347(b) of the DOT Appropriations Act adopts for the FAA personnel management system only those "relating to whistleblower protection," which are found in subsection (8) of § 2302(b). That subsection prohibits federal government supervisors from taking retaliatory personnel actions against employees who disclose agency legal violations, gross mismanagement or waste of funds, abuses of authority, or substantial and specific dangers to public health or safety. 5 U.S.C. § 2302(b)(8) (1994).[3] Disclosures covered under this provision include not only public disclosures, but also disclosures "to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures." *Id.* § 2302(b)(8)(B).

Normally, when federal employees allege that they have been subject to a prohibited personnel practice, including violations of the whistleblower provisions of § 2302(b)(8), OSC has authority to receive and investigate such allegations. *See* 5 U.S.C. § 1214 (1994). If the Special Counsel finds reasonable grounds to believe that a violation has occurred and corrective action is required, the Special Counsel must report the determination to the Merit Systems Protection Board ("MSPB"), the affected agency, and the Office of Personnel Management. *Id.* § 1214(b)(2)(B). If the agency fails to act to correct the prohibited personnel practice, the Special Counsel may petition the MSPB for corrective action. *Id.* § 1214(b)(2)(C). Because these procedures are set forth in parts of title 5 other than the provisions specifically adopted for the FAA in section 347(b) of the DOT Appropriations Act, the question posed by OSC is whether these procedures are

[3] Specifically, subsection 2302(b)(8) provides that federal government supervisors shall not, with respect to their authority over personnel actions,

> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—(i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,—if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs, .

5 U S C. § 2302(b)(8) The subsection also prohibits the same forms of retaliation in response to the same kinds of disclosures "to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures." *Id.* § 2302(b)(8)(B)

nonetheless included in the Act's application of the § 2302(b) whistleblower protections to FAA employees.

OSC contends that "the 'whistleblower protection' that Congress mandated be preserved for FAA employees is, and always has been, inseparable from OSC's investigatory and enforcement functions," OSC Letter at 5, and therefore that section 347(b)'s incorporation of the whistleblower-protection provisions of 5 U.S.C. § 2302(b) should be construed to include OSC's investigative and enforcement provisions. The FAA, in contrast, asserts that the Act makes applicable to the FAA the substantive protection from whistleblower reprisals, but does not incorporate OSC enforcement procedures or MSPB review. Therefore, the FAA claims, complaints based on alleged reprisal for whistleblowing, like other personnel disputes raised by FAA employees, should be handled under the mechanisms of the newly authorized FAA personnel management system.

II. ANALYSIS

A.

Congress specified in the DOT Appropriations Act that the FAA should develop a new personnel management system "notwithstanding the provisions of title 5, United States Code, and other Federal personnel laws." DOT Appropriations Act § 347(a). It repeated that "[t]he provisions of title 5, United States Code, shall not apply to the new personnel management system" when it listed seven specific exceptions from the withdrawal of title 5 coverage. *Id.* § 347(b). Thus, Congress was clear that title 5 would not apply to the FAA unless it provided otherwise. We have proceeded to consider, therefore, whether Congress provided for application to the FAA of the title 5 OSC procedures normally followed in whistleblower cases, by addressing two possibilities: (1) that the text of 5 U.S.C. § 2302(b)(8) itself sufficiently incorporates the OSC procedures; or (2) that the OSC procedures are such an essential element of the whistleblower protections of § 2302(b) that Congress must have implicitly included them in the provision extending substantive whistleblower protections to FAA employees.

B.

There is only one explicit reference to OSC in the provisions that are made applicable to the FAA under 5 U.S.C. § 2302(b). Generally, § 2302(b) defines prohibited personnel practices but does not prescribe the mechanisms for investigation and enforcement, which, for whistleblower protections, are provided in chapter 12 of title 5. *See* 5 U.S.C. §§ 1201–1222 (1994 & West Supp. 1997). Subsection 2302(b)(8), however, defines protected "whistleblowing" to include disclosures made "to the Special Counsel" as well as to agency Inspectors Gen-

eral or to other agency employees authorized to receive such disclosures. *Id.* § 2302(b)(8)(B). Although OSC does not rely on this reference in its submission, we have nonetheless considered whether it somehow incorporates the OSC procedures as part of the substantive protection extended to FAA employees by section 347(b).

The reference to disclosures to the Special Counsel, as well as to Inspectors General and to authorized agency officials, merely reflects Congress's efforts to define expansively the universe of persons to whom protected disclosures may be made without fear of retaliation. It does not independently authorize the investigative and enforcement powers that the referenced officials possess. Instead, those powers are authorized separately in chapter 12 of title 5. Thus, we do not believe that § 2302(b)(8)(B)'s reference to disclosures to the Special Counsel can, by itself, be construed to mean that Congress applied to the FAA the panoply of OSC investigative and enforcement provisions authorized under separate provisions of title 5 when it retained § 2302(b)(8) as part of the FAA personnel management system.

C.

OSC does contend, however, that § 2302(b)(8) is not self-executing and that the whistleblower protections extended by the Act to FAA employees necessarily include the OSC procedures. This contention is based on OSC's view that Congress gave it a special role in the protection of whistleblowers, so that those protections are rendered ineffectual unless OSC has jurisdiction over their claims of reprisal.

In making this argument, OSC invokes the legislative histories of both the Civil Service Reform Act of 1978, Pub. L. No. 95–454, 92 Stat. 1111 ("CSRA") and the Whistleblower Protection Act of 1989, Pub. L. No. 101–12, 103 Stat. 16 ("WPA").[4] The CSRA established whistleblower reprisals as one of the eleven prohibited personnel practices of § 2302(b), and authorized the MSPB and its Special Counsel (the Special Counsel was attached to the MSPB under the original CSRA) to enforce that protection. *See* S. Rep. No. 95–969, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. at 2730. The Senate Report explained the role originally contemplated for the Special Counsel in whistleblowing cases:

> For the first time, and by statute, the Federal Government is given the mandate — through the Special Counsel of the Merit Systems

[4] With respect to the DOT Appropriations Act itself, OSC has not identified (and we have not found) legislative history providing evidence that Congress intended the OSC investigative and enforcement authority authorized under chapter 12 of title 5 to apply to claims of whistleblower retaliation by FAA employees. The Conference Report on Pub. L. No. 104–50, for example, is not instructive on the issue. *See* H.R. Conf. Rep. No. 104–286, at 76 (1995) (describing the Conference amendment to the FAA personnel management provision of section 347 by merely stating that it "[r]etain[ed], with amendment, language in the Senate bill requiring development of a new personnel management system for the Federal Aviation Administration.").

> Protection Board—to protect whistle blowers from improper reprisals. The Special Counsel may petition the Merit Board to suspend retaliatory actions against whistle blowers. Disciplinary action against violators of whistle blowers' rights also may be initiated by the Special Counsel.

Id.

The WPA was subsequently enacted in response to perceived conflicts between the Special Counsel's duty to protect the rights of employees and its role in protecting the civil service merit system. *See* 135 Cong. Rec. 5034 (1989) (Joint Explanatory Statement on S. 508). In resolving this conflict, the WPA established the Office of Special Counsel "as a separate, distinct, and independent entity." *Id.* at 5032 (statement of Rep. Sikorski). The WPA also established that "the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices," and that "the protection of individuals who are the subject of prohibited personnel practices remains the [OSC's] paramount consideration." WPA § 2(b)(2)(A)–(C), 135 Cong. Rec. at 5026. As further explained in a Joint Explanatory Statement inserted in the record of the House debate on the WPA:

> Simply put, the Special Counsel must never act to the detriment of employees who seek the help of the Special Counsel. Unless employees have the assurance that the Office of Special Counsel is a safe haven, the Office can never be effective in protecting victims of prohibited personnel practices.

135 Cong. Rec. at 5034 (Joint Explanatory Statement on S. 508).

This legislative history, OSC contends, establishes that the protection and the procedures incorporated in the CSRA and the WPA must go hand in hand. OSC further emphasizes that, when Congress passed the WPA, it limited OSC's authority to release information about whistleblowers to their employing agencies, and thus "reaffirmed that a key element of whistleblower protection for federal employees is an independent agency that ensures that information discovered during an investigation is not put to use by the agency against the employee." OSC Letter at 3–4.

We do not dispute the validity of OSC's assertions that Congress generally believed that the whistleblower protections provided under title 5 should be enforced by OSC. We are not persuaded, however, that the legislative history on which OSC relies demonstrates, as OSC contends, that Congress believed that whistleblower protections are inherently meaningless unless an independent entity

such as OSC enforces them.[5] Although the passages reveal a congressional preference for independent enforcement as a general matter, and concern about agency retaliation, those preferences and concerns must be considered in light of the later enacted provisions of section 347 of the DOT Appropriations Act. Congressional intent in passing that statute, rather than in passing the CSRA or the WPA, is most critical in resolving the issue presented here.

The predominant congressional purpose of section 347 of the DOT Appropriations Act was to address the unique personnel needs of the FAA with a suitably modified personnel management system, *outside the purview of title 5.* Pub. L. No. 104–50, § 347, 109 Stat. at 460. Notwithstanding the significance of the role OSC plays in enforcing the whistleblower-protection provisions and other government personnel laws, OSC's investigative and enforcement authority is part and parcel of the government personnel regulatory structure embodied in title 5, which Congress rejected for the FAA. Considering the objectives of the 1996 FAA personnel management reform legislation, it does not seem anomalous that Congress would allow the FAA to deal with alleged prohibited personnel practices, including whistleblower-reprisal matters, under the FAA's new internal grievance or administrative procedures.

D.

Our approach to this question is guided by basic canons of statutory construction. Although the interpretive canon "*expressio unius est exclusio alterius*" should be applied with caution, we believe it applies here with some force. As the Supreme Court has observed, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980).

In section 347(b), Congress "enumerate[d] certain exceptions" to its general mandate that the provisions of title 5 would not apply to FAA personnel matters. In the case of whistleblower reprisal, Congress listed only the substantive prohibition among the excepted provisions, but did not list the separate provisions of title 5 providing for OSC and MSPB enforcement jurisdiction over such matters. This selective incorporation of only the substantive whistleblower provisions appears to be the very kind of explicit enumeration that forecloses the inference that additional exceptions were intended under the *expressio unius* canon applied in *Glover Construction* and similar authorities.

Nor does it appear that the limited incorporation of only the substantive whistleblower protection provision was merely inadvertent. In contrast to the whistleblower provision, other provisions of title 5 retained for the new FAA system

[5] As we note below, for example, Congress has enacted numerous whistleblower protection laws for the employees of federally regulated or quasi-governmental financial institutions and those laws do not involve enforcement by an independent investigative agency such as OSC *See* note 9, *infra*

under section 347(b) were broadly drawn to incorporate not only discrete substantive measures but entire regulatory and enforcement schemes.[6] Thus, close examination of section 347(b) reveals that Congress listed the portions of title 5 that were to apply to the FAA's personnel management system with deliberate selectivity. Congress could have readily incorporated OSC's whistleblower enforcement procedures as part of the new FAA system in the same manner that it incorporated other enforcement and regulatory schemes in the explicit language of section 347(b). Its failure to do so is difficult to reconcile with the view that Congress intended to apply those procedures to the FAA.

Generally, when Congress incorporates a specific statutory subsection by reference in subsequent legislation, it intends to have accomplished no more than what is afforded by that subsection. *See, e.g., Sperling v. Hoffmann-La Roche, Inc.*, 24 F.3d 463, 469–70 (3d Cir. 1994) (where Congress was precise in selecting the portions of other acts "selectively incorporat[ed]" into the Age Discrimination in Employment Act, only the subsections specifically named in the statute were incorporated).[7]

Moreover, when Congress intends to exempt entities generally from title 5 but to apply not only the substantive whistleblower protections but also all the ancillary enforcement procedures set forth in chapter 12 (*see* 5 U.S.C. §§ 1201–1219), it has demonstrated that it knows how to do so unambiguously. Thus, when Congress applied only selected provisions of title 5 to the Panama Canal Commission, it provided for application of the whistleblower protection provisions as follows: "Section 2302(b)(8) (relating to whistleblower protection) *and all provisions of Title 5 relating to the administration or enforcement or any other aspect thereof*, as identified in regulations prescribed by the Commission in consultation with the Office of Personnel Management." 22 U.S.C.A. § 3664(3) (West Supp. 1997) (emphasis added). Similarly, when Congress excluded the Federal Bureau of Investigation from the general regulation of federal agency personnel practices, *see* 5 U.S.C.A. § 2302(a)(2)(C)(ii) (West Supp. 1997), it prohibited whistleblower reprisals and specified that "[t]he President shall provide for the enforcement of this section in a manner consistent with applicable provisions of sections 1214

[6] Among the provisions explicitly applied to the FAA under section 347(b), for example, chapter 73 of title 5 incorporates an entire program of penalties and procedures governing employee "suitability, security, and conduct." It includes specific procedures and rulemaking authority for dealing with employee violations of the illegal gift rules, 5 U S C § 7351(b)–(c) (1994), and provision for the MSPB to impose or mitigate penalties for illegal political activities by federal employees, *id.* § 7326 Similarly, chapter 81 of title 5 encompasses the comprehensive regulatory and procedural scheme for worker's compensation in federal employment, including the procedures for asserting, evaluating, and resolving a claim *See* 5 U S C. §§ 8119–8128 (1994) Chapter 84 of title 5 incorporates not only the substance of the Federal Employees' Retirement System, but also the provisions for the presentation and adjudication of claims arising under that system *See* 5 U S C A. §§ 8461–8467 (West 1996) The broad incorporation of these provisions stands in conspicuous contrast to section 347(b)'s narrow reference to the whistleblower protection provision of § 2302(b) only, with no reference to the enforcement provisions of chapter 12.

[7] Conversely, when Congress cites to a general provision of a statute, it is error to presume that the reach of the reference is confined to a specific subsection *See E.I. du Pont de Nemours & Co v Train*, 430 U S 112, 136 (1977) ("[I]n other portions of § 509 [of the Federal Water Pollution Control Act], Congress referred to specific subsections of the Act and presumably would have specifically mentioned § 301(c) if only action pursuant to that subsection were intended to be reviewable in the court of appeals")

and 1221 of this title [i.e., the OSC and MSPB enforcement provisions]." 5 U.S.C. § 2303(c) (1994).

The absence of any similar reference to the whistleblower protection enforcement provisions of title 5 in section 347(b)(1) of the DOT Appropriations Act supports our conclusion that Congress did not intend those provisions to apply to the FAA. *Cf. Badaracco v. Commissioner*, 464 U.S. 386, 395 (1984) (when Congress intends to accomplish a precise statutory end, "it knows how unambiguously to accomplish that result"); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981) ("[i]n the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate"); *Lannom Mfg. Co. v. United States Int'l Trade Comm'n*, 799 F.2d 1572, 1580 (Fed. Cir. 1986) ("when Congress intends to grant a right of action, it does so clearly and unambiguously").[8]

E.

Finally, we do not find that FAA employees are deprived of meaningful protection against whistleblower reprisals under the FAA's new personnel management system. That system fully incorporates the provisions of 5 U.S.C. § 2302(b)(8) as a prohibited personnel practice. *See Federal Aviation Administration Personnel Management System*, Para. VIII((a)(vi) p. v (1996) ("FAAPMS"). An FAA employee who suffers a significant adverse personnel action (e.g., a suspension of over 14 days, reductions in pay or grade, and removal or reduction-in-force actions) that he or she believes is motivated by whistleblower reprisal can therefore invoke the provisions of section 2302(b)(8) under the FAA Appeals Procedure.

That procedure guarantees the aggrieved employee an evidentiary hearing before a panel of three arbitrators. FAAPMS Ch. III.5.[9] If the employee fails to obtain satisfactory relief under these procedures, judicial review is available. The FAA

[8] A number of other federal statutes apply various forms of whistleblower protection to the employees of government contractors and the employees of federally established or regulated financial institutions *See* 10 U S C § 2409 (1994) (Department of Defense contractors' employees), 12 U S C § 1441a(q) (1994) (Resolution Trust Corporation employees), 12 U S.C § 1790b (1994) (federally-insured credit union employees), 12 U S C § 1831j(a) (1994) (employees of federal banking agencies), 31 U.S C § 5328 (1994) (non-depository financial institutions); and 41 U S C § 265(b) (1994) (government contractors' employees) These statutes all specify a particular mode of enforcement, i.e , investigations by agency Inspectors General followed by agency- or court-ordered remedies in the case of government contractor employees, *see, e.g.*, 10 U S C § 2409(c), and direct enforcement by employee civil actions in U S district court in the case of the financial institution employees, *see, e g* , 12 U S C § 1790b(b) These statutes further reinforce our view that Congress specifies the whistleblower enforcement remedies it intends to enact, rather than implying them

[9] The arbitration panels for the FAA Appeals Procedure are composed of one neutral arbitrator, one "partisan" selected by the appellant-employee from within the FAA, and one "partisan" selected by an FAA official from the area within the FAA where the appeal was generated FAAPMS Ch. III 5(e) A "partisan" means an FAA employee who is knowledgeable of the working conditions, environment, and practices of the work area where the appeal was filed, the partisan selected by management cannot be the proposing official or the deciding official *Id* Ch III 5(c)(u).

Appeals Procedure expressly provides that decisions of the panel shall be issued as final orders of the FAA Administrator under 49 U.S.C. § 46110 (1994), which are subject to judicial review upon petition to the U.S. Court of Appeals. FAAPMS Ch. III.5(m). Additionally, when alleged whistleblower reprisal does not involve a significant adverse action that is subject to the FAA Appeals Procedure, the aggrieved FAA employee may pursue his charges under the FAA Grievance Procedure. *Id.* Ch. III.4.

We acknowledge, as OSC points out, that these procedures are not coextensive with those provided by OSC under title 5 — particularly in the absence of a neutral enforcement body like OSC to investigate alleged violations — but they nonetheless provide a reasonable mechanism to enforce the provisions of the whistleblower reprisal statute on behalf of FAA employees.[10] For example, OSC emphasizes that, unlike the specific standards of proof governing employee claims of whistleblower reprisal governed by the provisions of 5 U.S.C. § 1214, the applicable FAA appeals and grievance procedures provide no guidance for establishing the burden of proof that must be satisfied when such claims are asserted by FAA employees. OSC Letter at 5. Although specific rules governing the standard of proof may be desirable, the absence of such rules does not render the FAA procedures incapable of providing a reasonable means for enforcement of the whistleblower protection statute.[11] Rather, the more flexible hearing procedures adopted by the FAA are consistent with Congress's intent to allow it to develop a personnel management system outside the purview of title 5 "that addresses the unique demands on the agency's workforce." DOT Appropriations Act § 347(a).

Whatever shortcomings may be discerned in the FAA's current procedures for implementing the whistleblower protection law, they do not demonstrate that OSC enforcement under the procedures of title 5 is so indispensable to the whistleblower protection law that Congress could not have intended any other mechanism to apply under the FAA personnel management system. Rather, while section 347 of the Act provides the FAA with sufficient authority to implement the whisteblower protection law effectively, it does not guarantee perfect implementa-

[10] We also acknowledge OSC's point that FAA probationary employees apparently do not have access to the current FAA Appeals and Grievance Procedures because they are not covered "employees" under those procedures *See* FAAPMS Chs. III 4(d)(ii) and III 5(c)(iii) Probationary employees aggrieved by unlawful reprisal action, however, could still make use of whatever formal or informal mechanisms are provided by the FAA for complaints by probationary employees, or lodge charges against the responsible supervisors with DOT's Inspector General In any event, this gap in the coverage of FAA's grievance and appeals procedures does not establish that OSC enforcement procedures are so essential to whistleblower protection that Congress must have intended for them to apply to the FAA when it enacted section 347 of the DOT Appropriations Act, it merely demonstrates a possible deficiency in the FAA's implementation of the whistleblower protection provisions made applicable to it by that Act

[11] We do not understand OSC to contend, nor do we believe, that the absence of specific provisions for allocating the burden of proof in the FAA's internal appeal and grievance procedures is a matter of constitutional concern The Supreme Court has repeatedly stated that "[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment" *Concrete Pipe and Prods. of Cal., Inc v. Construction Laborers Pension Trust for Southern Cal*, 508 U S 602, 626 (1993) (quoting *Lavine v Milne*, 424 U S 577, 585 (1976)).

tion by the agency. Although the alleged deficiencies in the FAA's procedures raised by OSC may provide grounds for further assessment of those procedures, they do not provide persuasive evidence that Congress intended OSC enforcement procedures to apply to the FAA in whisteblower reprisal cases.

Conclusion

A reasonable argument can be made that FAA employees would benefit from the protections of various provisions of title 5 that, like the OSC/MSPB enforcement provisions of 5 U.S.C. § 1214, were not incorporated in the new FAA personnel management system through section 347(b) of the Act. That choice, however, was for Congress to make in enacting the law, not for those who are required to interpret and apply what Congress enacted. Congress incorporated only selected provisions of title 5 into the FAA personnel management system, and the investigative and enforcement authorities of OSC were not among them.[12] Accordingly, we conclude that OSC is without statutory authority to investigate or otherwise pursue alleged violations of 5 U.S.C. § 2302(b)(8) asserted by FAA employees.

RICHARD L. SHIFFRIN
Deputy Assistant Attorney General
Office of Legal Counsel

[12] Our conclusion is consistent with a decision issued by an Administrative Law Judge "(ALJ)" of the MSPB regarding another provision of title 5 — MSPB's jurisdiction over employee appeals under subchapter II of ch. 75 — invoked by an FAA employee challenging his removal from his position of employment. *Allen v. Department of Transp.*, No. CH–0752–97–0026–I–1 (MSPB Central Regional Field Office, 1996) ("Initial Decision"), *petition for review pending*, No. 97–3163 (Fed. Cir. 1997). The ALJ ruled that, under the new FAA personnel management system enacted by Pub. L. No. 104–50, the MSPB no longer had jurisdiction over such appeals. As the ALJ observed:

> Chapter 75 of Title 5, which provides for a right of appeal to the Board from adverse actions to those who meet the definition of employee, is not listed as one of the provisions of Title 5 which remain applicable to the FAA personnel management system.

Initial Decision at 2.

Funds Available for Payment of Natural Resource Damages Under the Oil Pollution Act of 1990

The President, acting through the Department of Transportation, is authorized to use the Oil Spill Liability Trust Fund to pay the claims of Natural Resource Trustees for uncompensated natural resource damages in accordance with section 1013 of the Oil Pollution Act of 1990, without the need for further enactment of appropriations.

September 25, 1997

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

This responds to your memorandum of May 28, 1997, requesting this Office to resolve a dispute among several federal departments concerning section 1012 of the Oil Pollution Act of 1990, Pub. L. No. 101–380, 104 Stat. 484, 498 (codified at 33 U.S.C. §§ 2701–2761 (1994)) ("OPA" or "the Act").[1] We conclude that the President, acting through the Department of Transportation, is authorized to use the Oil Spill Liability Trust Fund ("Fund") under section 1012(a)(4) of OPA to pay the claims of Natural Resource Trustees for uncompensated natural resource damages in accordance with section 1013 of OPA, without the need for further appropriation.

I. BACKGROUND

A.

OPA established a comprehensive regulatory framework for a coordinated intergovernmental response to oil spills that threaten U.S. resources or occur on or near U.S. navigable waters. *See* 33 U.S.C. §§ 2701–2761. A key component of the Act is its provision for the designation of federal, state, tribal, and foreign natural resource trustees ("Trustees") who have authority to recover damages for injury to, destruction of, loss of, or loss of the use of natural resources under their trusteeship, including the reasonable costs of assessing the damage. *Id.* §§ 2702(b)(2)(A), 2706(b).[2] OPA further provides that the functions of Trustees are to assess natural resource damages and to develop and implement plans for

[1] Because this dispute is between executive branch departments, and its resolution will affect the position taken by the Department of Justice in litigation, it is appropriate for resolution by this office *See* Exec Order No 12146, 3 C.F.R. 409 (1980), *reprinted in* 28 U.S.C § 509 note (1994), 28 C.F.R § 0.25 (1996) The positions asserted by the several involved departments are discussed in Section I B, *infra*

[2] *See also* 33 U.S.C § 2701(20) (1994), which provides.

> 'natural resources' includes land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government

the restoration, rehabilitation, replacement, or acquisition of the equivalent, of the natural resources under their trusteeship. *Id.* § 2706(c).

The party found responsible for a spill ("responsible party," *see id.* § 2701(32)) is liable for removal costs and damages specified in the Act. *Id.* § 2702(b)(1)–(2). Among the damages specified are "natural resource damages." The Act further provides that only Trustees, the statutory custodians of the affected natural resources, may recover natural resource damages from a responsible party, either by settlement or litigation. *Id.* § 2702(b)(2)(A).

Section 1013 of OPA provides the procedural framework for the presentation and processing of claims for removal costs or damages. 33 U.S.C. § 2713. After preparing an assessment of damages, claimants must, in general, first present their claims for removal costs and damages to the responsible party for consideration of settlement. If the claim is not settled within 90 days after presentment, the claimant may either sue the responsible party in court or "present the claim to the [Oil Spill Liability Trust] Fund." *Id.* § 2713(a), (c)(2). The presentation and disposition of claims against the Fund pursuant to section 1013 is governed by detailed regulations and is subject to administrative adjudication. *Id.* § 2713(e); 33 C.F.R. pt. 136 (1996). In pursuing a claim against the Fund, "[t]he claimant bears the burden of providing all evidence, information, and documentation deemed necessary by the Director, NPFC [National Pollution Funds Center], to support the claim." *Id.* § 136.105(a). Among other information, the written claim must include a description of the oil spill and "the nature and extent of the impact of the incident" on the claimant; a statement of damages claimed; "[a]n explanation of how and when the [claimed] damages were caused" and what steps were taken to mitigate those damages; supporting evidence; a list of relevant witnesses to the incident and the damages, with a description of each witness's relevant knowledge; information confirming that the claim was first submitted to the responsible party; and any other information deemed relevant by the National Pollution Funds Center ("NPFC") of the U.S. Coast Guard. *Id.* § 136.105.

OPA provides that the Oil Spill Liability Trust Fund is "available to the President" for designated categories of payments. 33 U.S.C. § 2712(a). The Fund, originally created in 1986 as a separate account within the Treasury, has been funded by a five-cent per barrel fee on domestic and imported oil, by civil and criminal penalties, and by other cost recoveries.[3] It is administered by the NPFC under the authority of the Secretary of Transportation. Section 1012(a) of OPA authorizes five separate uses of the Fund, of which the following two lie at the heart of this dispute:

> The Fund shall be available to the President for—

[3] *See* section 8033(a) of the Omnibus Budget Reconciliation Act of 1986, Pub. L No. 99-509, 100 Stat. 1874, 1959–62 (codified at 26 U.S.C § 9509(a) (1994)), 26 U.S C. § 4611(a)–(c) (1994); *id* § 9509(b)(2), (5) (1994)

> (2) the payment of costs incurred by Federal, State, or Indian tribe trustees in carrying out their functions under section 2706 of this title for assessing natural resource damages and for developing and implementing plans for the restoration, rehabilitation, replacement, or acquisition of the equivalent of damaged resources determined by the President to be consistent with the National Contingency Plan; [and]
>
> . . . .
>
> (4) the payment of claims in accordance with section 2713 [section 1013 of OPA] of this title for uncompensated removal costs determined by the President to be consistent with the National Contingency Plan or uncompen-sated damages.

33 U.S.C. § 2712(a)(2), (4).

For most of the purposes authorized by section 1012 — including the payment under section 1012(a)(2) of "costs incurred" by domestic Trustees in carrying out their functions under section 1006 of OPA — payments may be made from the Fund "only as provided in annual appropriation Acts." 33 U.S.C. § 2752(a) (1994 & Supp. III 1997). Several specified categories of payments, however, may be made directly out of the Fund without the need for further appropriation by Congress. One of those excepted categories is the payment of claims pursuant to section 1012(a)(4), which authorizes the payment of claims in accordance with section 1013. *See* OPA § 6002(b), 33 U.S.C. § 2752(b).

The President has delegated, by Executive Order, the functions vested in him respecting management and use of the Fund. Exec. Order No. 12777, 3 C.F.R. 351 (1992) ("Exec. Order"). His functions regarding the payment of removal costs and claims under section 1012(a)(1), (3), and (4) have been delegated to the Secretary of Transportation ("the Department in which the Coast Guard is operating"). Exec. Order § 7(a)(1)(A), 3 C.F.R. at 357. His functions respecting the payment of "costs incurred" under section 1012(a)(2), on the other hand, have been delegated "to the Federal trustees designated in the [National Contingency Plan]." *Id.* § 7(a)(2), 3 C.F.R. at 357.

B.

As summarized in your memorandum, the Department of Transportation ("DOT")[4] contends that payments from the Fund to federal, state, and Indian tribe Trustees for natural resource damages may only be made under the provi-

[4] Except where otherwise specified, we refer collectively herein to the Department of Transportation, the Coast Guard, and the National Pollution Funds Center as "DOT."

sions of section 1012(a)(2), and thus require an annual appropriation before they can be made. On the other hand, the Federal agencies designated as Trustees—including the National Oceanic and Atmospheric Administration ("NOAA") of the Department of Commerce, the Department of the Interior, and the Department of Defense—assert that such damages may be compensated, as appropriate, either as a "cost incurred" under section 1012(a)(2), or as a claim for "uncompensated damages" under section 1012(a)(4). Payment under section 1012(a)(2) requires an annual appropriation, while payment under section 1012(a)(4) of a claim, established in accordance with section 1013, does not.

Before reaching its current position on Trustee access to the Fund, the Coast Guard issued an "interim rule" governing the filing of claims authorized to be presented against the Fund under section 1013 of OPA. *See* Claims under the Oil Pollution Act of 1990, 57 Fed. Reg. 36,314 (1992) (codified at 33 C.F.R. pt. 136 (1996)). With respect to claims against the Fund for natural resource damages, the Coast Guard regulations provide in relevant part: "*Authorized claimants.* (a) Claims for uncompensated natural resource damages may be presented by an appropriate natural resources trustee." 33 C.F.R. § 136.207(a). Thus, the interim regulations characterize natural resource Trustees as "authorized claimants" for purposes of filing claims against the Fund pursuant to section 1013. The rule goes on to provide detailed requirements for a Trustee's natural resource damages claims against the Fund, including specific requirements for submitting "the assessment and restoration plans which form the basis of the claim," *id.* § 136.209(a).

Although the interim rule suggests that Trustees may pursue claims against the Fund for natural resource damages, the preamble to the rule explains that it is "an interim measure needed primarily to explain how eligible claimants may file a claim against the [Fund]," and that "a more comprehensive rule may be developed and published for public comment." 57 Fed. Reg. at 36,314. The preamble to the rule further explains:

> Legal issues concerning whether, under section 1013, Federal, State or Indian tribe trustees can claim against the Fund for natural resources damages and whether Federal agencies can claim against the Fund for any costs or damages have been raised. These issues are presently under review. This interim rule does not resolve these issues and leaves the matter open for future decision.

Id. at 36,315. Accordingly, little guidance can be taken from the only implementing regulations promulgated to date.

In an attempt to resolve the question left open by the interim rule, in December of 1993, the Coast Guard asked the Comptroller General for an opinion addressing whether Trustees could present claims against the Fund under section 1012(a)(4).

In response, the Comptroller General issued an opinion concluding that "natural resources trustees may be reimbursed from the Fund for costs incurred for damage assessments and the development and implementation of restoration plans only under section 1012(a)(2) of the [OPA], subject to the annual appropriations process. Section 1012(a)(4) of OPA is not available to natural resources trustees for claims for damages." *Matter of U.S. Coast Guard—Oil Spill Liability Trust Fund*, B–255979, 1995 WL 632510, at *1 (C.G. Oct. 30, 1995) ("CG Op.").[5]

The Coast Guard then sent letters to federal and other Trustees stating that the Comptroller General's opinion precluded the Coast Guard from entertaining Trustee claims against the Fund under section 1012(a). The Coast Guard stated in one such letter:

> As a consequence of the Comptroller General's decision, the Trustees can no longer rely upon OPA's claims process as a backup should responsible parties be unavailable to pay for natural resource damages resulting from their oil spills. And, the National Pollution Funds Center has no choice but to return all natural resource damage claims to their submitters without adjudication. Those claims held in abeyance pending the Comptroller General's decision will be returned shortly under a separate cover.[6]

Subsequently, the Coast Guard has declined to entertain section 1013 claims against the Fund made by Trustees seeking compensation for natural resource damages. The Coast Guard's rejection of such claims is presently being contested in litigation brought by State Trustees who have been denied their claims against the Fund. *See New York v. Oil Spill Liability Trust Fund*, No. 96 Civ. 1951 (E.D.N.Y. filed Apr. 24, 1996); *Wetherell v. National Pollution Funds Center*, No. 4:96CV517/MP (N.D. Fla. filed Dec. 6, 1996). You seek resolution of the inter-agency dispute over the proper interpretation of section 1012's provisions for allowable payments from the Fund in order to formulate the legal position of the United States in the litigation involving Trustees' access to the Fund.

II. ANALYSIS

A.

The starting point for resolving disputes concerning the interpretation of a statute is, of course, the text of the statute itself. *See United States v. Ron Pair*

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

[6] Letter for Ms Debra Preble, from Daniel F Sheehan, Director, National Pollution Funds Center, *Re. Natural Resource Damage Claims* at 1 (Dec 21, 1995)

Enterprises, Inc. 489 U.S. 235, 241 (1989). Here, the text of the statute seems plainly to authorize natural resource trustees to pursue claims for natural resource damages and to recover directly from the Fund, without requiring a separate appropriation, where they have established a valid claim under section 1013 of the Act. Section 1012(a)(4) of the Act authorizes "the payment of claims in accordance with section [1013 of the Act] for uncompensated . . . damages," 33 U.S.C. § 2712(a)(4), and section 6002 of the Act provides that a separate appropriation is not required for payments made pursuant to section 1012(a)(4), *see* 33 U.S.C. § 2752. A "claim" is defined to include a written request for payment "for compensation for damages," *id.* § 2701(3), and, in turn, a "'claimant' means any person *or government* who presents a claim for compensation" under the Act, *id.* § 2701(4) (emphasis added).[7] Finally, the term "damages" is defined to include damages to "natural resources, including the reasonable costs of assessing the damage, which shall be recoverable by a *United States trustee, a State trustee, an Indian tribe trustee, or a foreign trustee.*" *Id.* §§ 2701(5), 2702(b)(2)(A) (emphasis added).

Congress expressly authorized a claimant under section 1013 to present a claim to the Fund in three separate provisions: once in section 1013(c), once in section 1013(d), and once again in section 1012(a)(4). None of those provisions indicate, or in any way suggest, that Trustees are excluded from the category of claimants to which they apply. Nor is there any ambiguity as to which provision of section 1012 governs the payment of such claims. Section 1012(a)(4) expressly governs "the payment of claims *in accordance with section [1013]*" (emphasis added), whereas section 1012(a)(2) makes no reference to the section 1013 claims procedure.

The various provisions authorizing payments from the Fund under section 1012, moreover, were drawn with considerable precision. For example, Congress specified that only costs incurred by "Federal, State, or Indian tribe trustees"—but not *foreign* trustees—could be paid pursuant to section 1012(a)(2). Had the congressional drafters similarly intended to exclude Trustees from the class of claimants eligible to receive payments on their claims under section 1012(a)(4)—a class that would naturally encompass Trustees under the straightforward definitions of the statute—it seems unlikely that they would have left such a significant exclusion to be inferred. Rather, the exclusion of Trustees' claims could have been readily and unambiguously achieved by inserting a single phrase in subsection (a)(4)—by selectively authorizing, for example, "(4) the payment of claims, *other than payments otherwise authorized under subparagraph (a)(2) of this section*, in accordance with section 2713 of this title." Congress refrained, however, from drawing any such distinction.

[7] It does not appear to be in dispute that OPA's definition of "claimant" includes Trustees who present a claim for natural resource damages compensation under section 1013 of the Act

The text of OPA, accordingly, seems clearly to provide that the Fund may be used to pay the claims of Trustees, pursuant to the provisions of sections 1012(a)(4) and 1013, without the requirement for annual appropriations.

B.

DOT interprets the relevant provisions of OPA in a different manner. DOT asserts that, because section 1012(a)(2) of OPA separately authorizes Fund payments to Trustees for "costs incurred," and because such costs overlap to a large extent with the removal costs and uncompensated damages that may form the basis of a claim under section 1012(a)(4), there is a conflict or inconsistency between the two provisions if the latter also applies to Trustees. This asserted inconsistency derives from the related provisions of section 6002, 33 U.S.C. § 2752, which make "costs incurred" payments under section 1012(a)(2) contingent on further appropriations, whereas the payment of perfected claims under section 1012(a)(4) may be paid directly from the Fund without more. In essence, DOT contends that Congress could not have intended to exempt Fund payments to Trustees under subsection (a)(4) from the fiscal discipline of the annual appropriations requirement that applies to payments for their costs incurred under subsection (a)(2).

1.

DOT first argues that section 1012(a)(4)'s explicit provision for use of the Fund to pay claims presented by Trustees and other claimants pursuant to section 1013 must give way to principles of appropriations law applied in rulings of the Comptroller General. Letter for Mr. Charles A. Bowsher, Comptroller General, from Adm. J. W. Kime, Commandant, U.S. Coast Guard at 3 (Dec. 6, 1993) ("Coast Guard Ltr."). Invoking the analysis used by the Comptroller General in his 1995 ruling in this dispute, DOT likens the payment authorization of section 1012(a)(4) to a general appropriation which cannot be used to fund payments covered by a more specific appropriation, in the form of section 1012(a)(2)'s provision for payment of costs incurred by Trustees. Coast Guard Ltr. at 2. Specifically, DOT relies upon the following principle of statutory construction applied by the Comptroller General in his opinion on access to the Fund:

> Where there is a seeming conflict between a general provision and a specific provision and the general provision is broad enough to include the subject to which the specific provision relates, the specific provision should be regarded as an exception to the general provision so that both may be given effect, the general applying only where the specific provision is inapplicable.

CG Op. at 4 (quoting B–163375, 1971 WL 5205 (C.G. Sept. 2, 1971)).

Initially, we note that the specific/general principle relied upon by DOT is but a canon of statutory construction, which, like other such rules, must yield to superior evidence of legislative intent. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Rubin v. United States*, 449 U.S. 424, 430 (1981). Here, not only the plain meaning of the statute, but other indicia of statutory intent counsel against the construction proposed by DOT. The principal basis proferred by DOT for precluding federal, state, and Indian tribe trustees from recovering pursuant to section 1012(a)(4), for example, is that they are expressly entitled to recover costs incurred pursuant to section 1012(a)(2). That section, however, by its own terms does not apply to foreign trustees, and thus, under DOT's reasoning, foreign trustees may still recover under section 1012(a)(4), without the discipline of a further appropriation. It seems highly improbable, however, that Congress intended to provide foreign trustees more liberal access to the Fund than it provided to domestic trustees.

The most fundamental difficulty with DOT's argument, however, concerns its critical premise: we do not find an irreconcilable conflict or inconsistency, *see* CG Op. at 4, between the payment provisions of subsections (a)(2) and (a)(4), even taking into account their relationship with the appropriations provisions of section 6002 of the Act. Absent such a conflict or inconsistency, or other compelling indicia of contrary congressional intent, there is no need or justification to depart from a straightforward application of the statutory text.

Although compensable "costs incurred" under subsection (a)(2) concededly overlap to a large extent with the "uncompensated damages" that may be claimed under subsection (a)(4),[8] there are a number of important distinctions between the two payment provisions. First, the Trustees' access to the Fund under section 1012(a)(4) is specifically limited to those claims that have been pursued "in accordance with section [1013]." That section requires claimants to first present their claims to the responsible party and to wait at least 90 days before submitting a claim to the Fund in order to provide reasonable opportunity for settlement. 33 U.S.C. § 2713(a), (c). Moreover, the payment of claims under section 1013 is subject to detailed regulations governing the presentation, filing, processing, settlement, and adjudication of such claims. *Id.* § 2713(e); 33 C.F.R. pt. 136. Those regulatory requirements include, inter alia, the preparation and presentation of the often costly assessment and restoration plans which form the basis of the claim; a description of damages claimed by category; documented costs and cost estimates for the plan; evidence relating to the spill and the damages; witness lists and descriptions of their knowledge of the incident; certification of the accuracy of claims submitted to the Fund; and certification as to whether the assessment was conducted in accordance with applicable provisions of the natural resources damage assessment regulations. *Id.* §§ 136.105, 136.209. Only if the NPFC deter-

[8] For purposes of this opinion, we need not decide whether the overlap is complete or only partial.

mines, after review of the claim, that the claimant has carried its burden of "providing all evidence, information, and documentation deemed necessary . . . to support the claim" is the claimant entitled to payment. *Id.* § 136.105(a).[9]

Consequently, a Trustee's claim that has been prepared and documented (including assessment of damages), presented for settlement to the responsible party, and otherwise perfected in accordance with section 1013's procedures cannot be equated with a direct application for costs incurred under subsection (a)(2).[10] Unlike claims presented under subsection (a)(4), a Trustee seeking payment under subsection (a)(2) need not first present a claim to a responsible party in order to allow the opportunity for settlement. Nor are subsection (a)(2) payment requests governed by 33 C.F.R. pt. 136's detailed evidentiary and adjudication requirements, which in terms apply only to "claims authorized to be presented to the [Fund] *under section 1013* of [OPA]." 33 C.F.R § 136.1(a)(1) (1996) (emphasis added). These requirements, moreover, are important to the overall enforcement scheme established under OPA. The 90-day waiting period, for example, was designed to encourage settlement.[11] Similarly, the evidentiary and adjudicatory provisions set forth in the regulations governing claims presented to the Fund promote fiscal discipline.[12]

In sum, the submission of a subsection (a)(4) claim to the NPFC by a Trustee differs in significant respects from a request for payment under subsection (a)(2). Accordingly, we find no irreconcilable conflict between the provision for these two categories of payments to Trustees.

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[9] For a case illustrating the application of the 33 C F R pt. 136 regulatory requirements for presentment of a claim under section 1013, *see Johnson v Colonial Pipeline Co.*, 830 F. Supp 309, 311 (E D Va. 1993) (property owner's claim for oil spill damages held inadequate for compliance with the Coast Guard's 33 C F R pt 136 claims regulations and section 1013 requirements, "[t]he need for specificity in OPA claims is underscored by the [Coast Guard] regulations for filing such claims against the OPA Fund.").

[10] This basic distinction between the payment of costs outside the claims procedure and the payment of claims perfected pursuant to section 1013 was recognized in OPA's legislative history. Thus, the House Report characterized the kind of cost reimbursement that could be obtained outside the claims procedure as "direct uses . . which can be paid from the Fund prior to the presentment and payment of a claim under section 104 of this Act" H R Rep No. 101–242, pt. 2, at 64 (1989) The Senate Report also recognized this distinction between the two modes of payments from the Fund. *See* S. Rep No 101–94, at 10 (1989), *reprinted in* 1990 U S C C A N 722, 731

[11] As recognized by the Eleventh Circuit in *Boca Ciega Hotel, Inc v. Bouchard Transp. Co.*, 51 F 3d 235 (11th Cir 1995), a key purpose of OPA's section 1013 claims procedure — and, in particular, the 90-day waiting period — "was to temper the Act's increased liability with a congressional desire to encourage settlement and avoid litigation" *Id* at 238–39. *Accord Johnson*, 830 F. Supp. at 310–11 ("The purpose of the claim presentation procedure is to promote settlement and avoid litigation").

[12] We acknowledge that payments authorized under section 1012(a)(2) are also subject to certain statutory and regulatory requirements, notably the requirement that actions be taken in a manner "consistent with the National Contingency Plan." 33 U S C. § 2712(a)(2), *see also* 15 C.F R. pt. 990 (1996) (NOAA regulations governing natural resource damage assessments as required by section 1006(e)(1) of OPA, 33 U S.C § 2706(e)(1)) These requirements cannot, however, be equated with the mandatory claims exhaustion requirements of section 1013 or the prerequisites for the presentation, proof, and successful adjudication of a claim under the Coast Guard's 33 C F R pt 136 regulations.

In a related argument, DOT and the Comptroller General's opinion assert that allowing Fund payments to Trustees under section 1012(a)(4) would effectively render meaningless the provision for payment of their "costs incurred" under section 1012(a)(2). CG Op. at 4–5. By this reasoning, Trustees would invariably bypass the subsection (a)(2) mechanism in favor of the claims provision of subsection (a)(4) because the latter allows the direct payment of damages without the need for further congressional appropriation. This argument is premised on the interpretive canon providing that a statute should not be interpreted in a way that renders portions of it meaningless or ineffective. *See Department of Revenue v. ACF Industries, Inc.*, 510 U.S. 332, 340–41 (1994).

DOT and the Comptroller General, however, have failed to demonstrate that subsection (a)(2) would be rendered meaningless if Trustees were permitted access to the Fund under subsection (a)(4). Before pursuing a claim under section 1013, for example, a claimant must generally present the claim to the responsible party and wait the required 90 days. When submitted, moreover, the claim must be supported by extensive assessment and documentation of the nature and extent of costs and damages, accompanied by certification of the accuracy and integrity of the claim as presented. *See* 33 C.F.R. §§ 136.105 to 136.113, 136.209. Payment of the claim must then await NPFC review, evaluation, and adjudication.

Congress might well have contemplated occasions when Trustees would be better served by seeking payments under subsection (a)(2), rather than comply with these substantial requirements applicable to claims under subsection (a)(4), even though payment under subsection (a)(2) would require a congressional appropriation. For example, a Trustee with limited resources might find it preferable to obtain payment for at least a portion of its allowable costs under subsection (a)(2) rather than complying with the procedural requirements for the presentation and adjudication of a claim against the Fund under section 1012(a)(4). Additionally, if a Trustee's claim is denied by the NPFC under subsection (a)(4) — due to noncompliance with the 33 C.F.R. pt. 136 procedural requirements, for example, *see* 33 C.F.R. § 136.105(a) — it could have a basis for pursuing those portions of its claim that constitute costs incurred under the provisions of subsection (a)(2). Indeed, if Congress were to make available a significant portion of the Fund for payments under subsection (a)(2) in an annual appropriations act, *see* 33 U.S.C. § 2752(a), it seems unlikely that eligible Trustees would bother to pursue payment under sections 1012(a)(4) and 1013 for costs otherwise recoverable under subsection (a)(2) pursuant to the appropriation.

Accordingly, we cannot conclude that the reading of the Act proposed by DOT is necessary to avoid rendering subsection (a)(2) meaningless.

3.

DOT also argues that the legislative history of OPA supports its understanding of the Trustees' access to the Fund. Memorandum for the Commander, National Pollution Funds Center, from Chief, General Law Division, U.S. Coast Guard at 4 (Oct. 27, 1992); *see also* CG Op. at 4. The pertinent legislative history, however, fails to provide persuasive support for DOT's position. The limited evidence of congressional intent that is available suggests that Congress intended to permit Trustees to obtain compensation directly from the Fund for natural resource damages under section 1013 of the Act. Moreover, given the great significance of a conclusion that Trustees may not obtain such compensation, the very paucity of evidence supporting the DOT construction of the statute, standing alone, casts doubt on that construction.

Because the provision excluding the payment of claims pursuant to section 1012(a)(4) from the annual appropriations requirement was first introduced as part of the Conference substitute version of the bill, our review of the legislative history must focus on the Conference Report and subsequent debate.[13] In describing section 1012(a)(4), the OPA Conference Report stated that "amounts are available under category (4), without further appropriation, *to pay uncompensated claims in accordance with section 1013.*" H.R. Conf. Rep. No. 101–653, at 114 (1990), *reprinted in* 1990 U.S.C.C.A.N. 779, 792 ("Conference Report") (emphasis added). In differentiating the uses of the Fund authorized under subsections (a)(1) through (3) of section 1012, which were made subject to appropriations, the Conference Report stressed that "[t]hese amounts may be obligated by the Federal official or officials designated under the regulations authorized in subsection (c), *and are not necessarily subject to the claims procedures in section 1013.*" *Id.* at 113, *reprinted in* 1990 U.S.C.C.A.N. at 792. (emphasis added). Thus, the Conferees recognized the distinguishing characteristic warranting payment of claims under section 1012(a)(4) without a requirement for further appropriation — i.e., such payments were predicated on prior compliance with the section 1013 claims procedure.

The Conference Report also contained a separate explanation of the section 1013 claims procedure and how it was adopted by the Conference. *Id.* at 117, *reprinted in* 1990 U.S.C.C.A.N. at 795. The explanation states, "[i]f full compensation is not available to settle a claim presented in accordance with this section, a claim for uncompensated removal costs and damages may be presented to the Fund." *Id.* This explanation contains no suggestion that a claim for damages presented

[13] It should also be noted, however, that the legislative history preceding the Conference Report is consistent with the view that Congress intended that Trustees should be able to receive compensation from the Fund pursuant to the section 1013 claims process *See, e g*, S Rep No 101–94, at 10 (1989), *reprinted in* 1990 U.S C.C A N 722, 731 ("the Fund is to assure *prompt access* to sufficient sums to pay all removal costs and *restoration of natural resource damages*") (emphasis added); H.R. Rep. No 101–242, pt 2, at 35 (explaining that "all claimants, whether governmental or individual," would be able to submit their claims to the Fund following exhaustion of the settlement provisions and "recover in full for a broad list of clearly spelled out damages")

to the Fund by Trustees would be treated any differently than one presented by any other claimant. Given the fact that Trustees are the *only* claimants able to assert natural resource damages claims under section 1013, and given that prompt compensation for natural resource damages was a paramount concern of the legislation, it would be surprising for the Conferees to use such unqualified language if they intended to bar Trustees from obtaining compensation from the Fund on their claims unless an annual appropriation was enacted.

Additionally, the floor debates on the Conference Report reflect the fundamental objective that the Fund "should be available for prompt, adequate compensation to oilspill victims without having to endure endless and costly litigation." [14] 136 Cong. Rec. 22,289 (1990) (remarks of Rep. Stangeland). Similarly, in urging adoption of the Conference Report on the House floor, the House sponsor of the bill, Representative Jones, explained as follows:

> Finally, we make it easier for victims of oilspills to recover for economic damages, *natural resource damages*, subsistence loss, and others. They can seek reimbursement from the spiller or *directly from the $1 billion Federal trust fund.*

136 Cong. Rec. at 22,285 (emphasis added) (remarks of Rep. Jones). Likewise, in further House debate on the Conference Report, Representative Fields observed:

> [T]his landmark legislation provides that those injured by an oilspill will be fully and swiftly compensated for their losses — such as property damage, lost income, *damage to natural resources*, and lost business opportunities. Once this legislation is signed into law, those adversely affected will not have to wait years in order to recover their losses. In fact, if an agreement with a spiller cannot be reached within 90 days, injured parties will be compensated from the $1 billion oil industry-financed fund and the fund will seek reimbursement from the spiller later.

136 Cong. Rec. at 22,291 (emphasis added) (remarks of Rep. Fields). A similar understanding of the Conference Substitute was expressed in debate in the Senate. *See id.* at 21,718 ("we include [a] $1 billion industry-financed cleanup fund, and full compensation for natural resource damage") (remarks of Sen. Kerry); *id.* at

[14] Legislative history preceding the Conference Report also stresses this purpose. As stated in the Senate Committee Report on OPA.

> One of the purposes of the Fund is to provide a source of money for *immediate cleanup activities or damage compensation* in the event a spiller does not act promptly. In such a case, the Fund would be used for removal costs and *would be available for prompt damage compensation*

S. Rep. No 101–94, at 5, *reprinted in* 1990 U.S C C.A.N. at 727 (emphasis added) The Senate Report further stated that the Fund's availability for such prompt damage compensation extended to natural resource damages claims. *Id* at 10, *reprinted in* 1990 U.S.C C.A.N. at 731

21,716 (to compensate Federal agencies, States and citizens for damages from oil spills, "the legislation makes available $1 billion — from a fee on the oil industry — to pay for spills where the polluter cannot be found, cannot pay, or where liability limits have been reached") (remarks of Sen. Baucus).

These statements demonstrate that providing compensation for damages to natural resources was a central purpose of OPA and that Congress envisioned that payment of such claims would occur within the comprehensive framework established in the Act. Against this backdrop, it seems unlikely that Congress would have precluded Trustees from pursuing these claims under section 1013 without any reference in the text or legislative history to such an important limitation.

We recognize that portions of OPA's legislative history demonstrate that Congress sought to limit expenditures under OPA by imposing substantial limits on payments from the Fund through the appropriation restrictions of section 6002. *See* CG Op. at 3. For example, during debate on the Jones Amendment to the House bill, which first subjected most payments from the Fund to the appropriations process, Representatives Jones and Panetta both expressed concern regarding the bill's direct spending implications as scored by the Congressional Budget Office. 135 Cong. Rec. 28,258–59 (1989). As Representative Panetta explained, the Jones Amendment was intended to address such concerns:

> The effect of this amendment would be, then, to reduce the direct spending authorized in the bill to $1 million per year, instead of the $114 million in the bill as reported. This is critical, in terms of controlling Federal spending.

Id. at 28,259 (remarks of Rep. Panetta). Had such comments reflected congressional understanding of the intended effect of the appropriations restrictions ultimately enacted under section 6002, they would arguably provide some support for DOT's contentions that permitting Trustee claims to be paid from the Fund without further appropriation conflicts with fiscal restraint objectives underlying the measure.

The remarks of Representatives Jones and Panetta, however, were made before the Conference Committee modified the Jones Amendment to provide explicitly that the payment of claims from the Fund pursuant to section 1012(a)(4) of the Act would not require a further appropriation. Rather, the remarks in question were aimed at a fundamentally different provision and could not reflect congressional understanding or intent with respect to the substantially different (and less restrictive) appropriations provisions ultimately enacted in section 6002.

4.

Finally, it has been argued that congressional inaction with respect to a subsequently proposed amendment intended to overturn the Comptroller General's

interpretation of OPA's Fund access provisions should be regarded as a form of legislative ratification of that interpretation. We do not find this line of reasoning persuasive here for a number of reasons.

This argument invokes the Supreme Court's approach in cases such as *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), where the Court explained:

> Although we are chary of attributing significance to Congress' failure to act, a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it.

Id. at 137; *Bob Jones University v. United States*, 461 U.S. 574, 599–600 (1983) (although "[n]onaction by Congress is not often a useful guide," inaction following prolonged and extensive congressional consideration of legislative proposals to overturn an administrative interpretation may produce "unusually strong" evidence of legislative acquiescence).

The cases ascribing significance to legislative inaction are generally premised upon informed congressional acquiescence in a longstanding interpretation by the executive branch agency charged with administering the statute in question. In *Bob Jones University*, for example, the Court invoked the principle only after stressing that "for a dozen years Congress has been made aware — acutely aware — of the IRS rulings of 1970 and 1971." 461 U.S. at 599. Here, the ruling in which Congress allegedly acquiesced was considered only by a committee of Congress in early 1996, only a few months after it had been issued in October, 1995, by the Comptroller General. Thus, the circumstances posed here simply do not fit the pattern of the leading cases finding persuasive evidence of acquiescence by inaction.[15]

Moreover, congressional attention to the proposal that would have effectively nullified the Comptroller General's ruling was not only very brief in duration but limited in nature. The amendment in question, originally proposed as section 204 of S. 1730 during the 104th Congress, would have added section 1012(a)(2) to the existing Fund payment provisions exempted from section 6002's subsequent

[15] The limited congressional attention to the Comptroller General opinion at issue here presents the same considerations addressed by the court in *Lanehart v Horner*, 818 F 2d 1574 (Fed. Cir 1987), where the court rejected a similar legislative ratification argument concerning an administrative interpretation of federal firefighters' overtime pay under the Fair Labor Standards Act As the court stated:

> We find this argument singularly unpersuasive in the context of this case. In the cited cases, the issue involved "considerable public controversy," or Congress had a "prolonged and acute awareness" of the importance of the issue, *Bob Jones*, 461 U.S. at 601, 103 S. Ct at 2033. The overtime pay of firefighters did not rise to these levels in Congress.

Id. at 1579 (citation omitted)

appropriations requirement. It would thus have removed the crucial premise to the Comptroller General's decision and would have eliminated any doubt that Trustees could recover natural resource damages from the Fund without further appropriation. However, that amendment was modified by the Senate Committee on Environment and Public Works, which approved and reported S. 1730 with an amendment to section 6002 that did not include the appropriations exemption for section 1012(a)(2) and thus did not nullify the Comptroller General's opinion. *See* S. Rep. No. 104–292, at 31–32 (1996). In any event, however, S. 1730 was never taken up by the full Senate or the House. Consequently, congressional consideration of the proposal to override the Comptroller General's interpretation was apparently limited to action on a single amendment by a single committee of the Senate.[16]

In *Bob Jones University*, the Court departed from the general rule[17] that congressional inaction "is not often a useful guide" only after stressing that "few issues have been the subject of more vigorous and widespread debate and discussion in and out of Congress" than the educational segregation issue implicated by the IRS ruling under consideration there. 461 U.S. at 599. In light of the lengthy and widespread congressional exposure to legislation concerning that ruling, the Court observed:

> It is hardly conceivable that Congress — and in this setting, any Member of Congress — was not abundantly aware of what was going on. In view of its prolonged and acute awareness of so important an issue, Congress' failure to act on the bill proposed on this subject provides added support for concluding that Congress acquiesced in the IRS rulings in 1970 and 1971.

Id. at 600–01.

Here, the record does not demonstrate anything like the prolonged, acute, and widespread congressional consideration of the Comptroller General's 1995 opinion that provides the necessary justification for ascribing significance to congressional action under the holding of *Bob Jones University*. *See also Missouri v. Andrews*, 787 F.2d 270, 287 (8th Cir. 1986) (rejecting argument that failure to amend statute ratified agency's interpretation of statute where the "record fails to show the degree of congressional approval necessary to override the intent of the . . . Congress"), *aff'd sub nom. ETSI Pipeline Project v. Missouri*, 484 U.S. 495 (1988). Moreover, the interpretation at issue here was not longstanding and, indeed, was never incorporated in the governing agency regulations. Finally, the interpretation

[16] The 104th Congress did enact some unrelated amendments to OPA as part of the Coast Guard Authorization Act of 1996, Pub L No 104–324, 110 Stat 3901, but the amendment originally intended to overturn the Comptroller General's ruling on Trustee access to the Fund was not included in that legislation *See* S. Rep. No. 104–160 (1995), *reprinted in* 1996 U S C C A N. 4239

[17] *See Brecht v Abrahamson*, 507 U S 619, 632 (1993)

is at odds with the language of the statute and is not supported by the legislative history. Under such circumstances, the fact that Congress did not enact legislation overturning the Comptroller General's interpretation does not provide persuasive evidence of congressional ratification.

Considering the legislative record as a whole, therefore, we are unable to conclude that Congress's response to proposed amendments to section 6002 of OPA offered in the 104th Congress provides significant legislative evidence supporting the Comptroller General's opinion concerning Trustee access to the Fund.

Conclusion

In light of all the foregoing considerations, we conclude that section 1012(a)(4) of OPA authorizes payments from the Fund to natural resource trustees on claims for uncompensated natural resource damages pursued in accordance with section 1013. Under section 6002(b) of OPA, such payments may be made from the Fund without the need for further enactment of appropriations.

RANDOLPH D. MOSS
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Office of Legal Counsel

Applicability of 18 U.S.C. § 209 to Acceptance by FBI Employees of Benefits Under the "Make a Dream Come True" Program

The criminal prohibition on supplementation of salary, 18 U.S.C. § 209, does not prohibit Federal Bureau of Investigation employees from receiving benefits under the Society of Former Special Agents of the FBI's "Make a Dream Come True" Program.

October 28, 1997

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL BUREAU OF INVESTIGATION

You have asked for our opinion whether the criminal prohibition on supplementation of salary, 18 U.S.C. § 209 (1994), forbids Federal Bureau of Investigation ("FBI") employees from receiving benefits under the "Make a Dream Come True Program" ("Program") sponsored by the Society of Former Special Agents of the FBI ("Society"). We understand that the Program is run by the Former Agents of the FBI Foundation ("Foundation"), an instrument of the Society that is exempt from taxes under the Internal Revenue Code, *see* 26 U.S.C. § 501(c)(3) (1994), and whose purpose is "to contribute generally to the public welfare through the alleviation of human suffering and the advancement of science, education and the cultural arts." [1] We further understand that the Program is designed to fulfill the wishes of terminally ill children or grandchildren of Society members or deceased Society members and the terminally ill children of any current, permanent FBI employees. To be eligible, a child must be between three and eighteen years of age and have a terminal condition certified by a doctor. For the reasons set forth below, we believe that § 209 does not prohibit current FBI employees from accepting benefits under the Program.[2]

DISCUSSION

Section 209(a) of title 18 provides in pertinent part that "[w]hoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States" shall be subject to the penalties set forth in § 216 of that title, i.e., impris-

[1] Memorandum for Mary Braden, Director, Departmental Ethics Office, from Patrick W Kelley, Acting Deputy Designated Agency Ethics Official at 1 (June 26, 1997) ("Kelley Memorandum") (*internal quotations and citations* omitted)

[2] Because § 209 prohibits, inter alia, the receipt of outside compensation for government services only by an "officer or employee of the executive branch," *see* 18 U S C § 209(a), we consider it necessary to address the receipt of benefits only by current FBI employees.

onment of up to one year for non-willful violations and/or a fine.[3] *See* 18 U.S.C. §§ 209(a), 216.

Section 209(a) has four elements. It prohibits: "(1) an officer or employee of the executive branch . . . of the United States Government from (2) receiving salary or any contribution to or supplementation of salary from (3) any source other than the United States (4) as compensation for services as an employee of the United States." *United States v. Raborn*, 575 F.2d 688, 691–92 (9th Cir. 1978). Benefits to employees under the Program likely satisfy the first three elements of § 209(a). *But see Crandon v. United States*, 494 U.S. 152, 168–69 (1990) (Scalia, J., concurring) ("Payments which are neither made periodically during the term of federal service[ ] nor calculated with reference to periodic compensation" do not qualify as salary or as a contribution to or supplementation of salary.). Thus, as has often been the case, the focus, for our purposes, is on the fourth element, i.e., whether a benefit given to an FBI employee under the Program is "compensation for services as an employee of the United States." *Raborn*, 575 F.2d at 692; *see* Memorandum for Fred F. Fielding, Counsel to the President, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel and J. Jackson Walter, Director, Office of Government Ethics, *Re: "Stand By Fund"—Applicability of Federal Law to Beneficiaries* at 3 (Feb. 2, 1982) ("Brady Fund Opinion"); OGE Informal Advisory Letter 85x19, 1985 WL 57318; OGE Informal Advisory Opinion 85x11, 1985 WL 57310.

To determine whether benefits given to FBI employees under the Program constitute compensation for government services, we must examine not only the language of § 209(a), but also the design of the statute as a whole and its purposes. *See Crandon*, 494 U.S. at 158. A literal reading of § 209(a) indicates that it prohibits payments from a private source to a government employee for that employee's government work, *see* The Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* 55 (1960); Roswell B. Perkins, *The New Federal Conflict-of-Interest Law*, 76 Harv. L. Rev. 1113, 1137 (1963), but that reading does not answer the question of what is meant by "compensation for services." We thus turn to the legislative history and purposes of the statute, but note at the outset that "[b]ecause construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Crandon*, 494 U.S. at 160.

In 1962 Congress amended the predecessor to § 209, which had prohibited payments "in connection with" an employee's services to the government, to prohibit payments "as compensation for" an employee's services to the government. The clarification responded to criticism founded on the vagueness and breadth of the reference to payments made "in connection with" the employee's services. *See*

[3] Paragraphs (b) through (f) of § 209 set forth several exemptions to § 209(a), none of which is directly relevant to the question you have asked

H.R. Rep. No. 87–748, at 13, 25 (1961) (amendment necessary because expression "in connection with" is imprecise and capable of an infinitely broad interpretation); S. Rep. No. 87–2213, at 14 (1962) ("The new language is more precise in expressing what is clearly intended by the present broad phrase."); *see also Crandon*, 494 U.S. at 161. According to the House Report on the amendment, the change was made "in order to emphasize the intent that the prohibition is against private payment *made expressly for* services rendered to the Government." H.R. Rep. No. 87–748, at 24–25 (emphasis added). The amendment was designed to clarify that there must be a "direct link" between the contribution to or supplementation of salary and the employee's services to the government. *See* Bayless Manning, *Federal Conflict of Interest Law* 171 (1964); *see also United States v. Muntain*, 610 F.2d 964, 969 (D.C. Cir. 1979) (violation of § 209 requires that "the contribution must have been received as compensation for 'services' "); OGE Informal Advisory Letter 81x31, 1981 WL 28075, at *1 ("[T]o make out an offense under section 209, it is essential to establish the linkage between the transfer of the thing of value and the services rendered.").

The question before us, therefore, is whether there is an intentional, direct link between a benefit given under the Program to a terminally ill child of an FBI employee and the FBI employee's services to the government. To ascertain the intent of the payor and/or the recipient, there are several factors that may be relevant, but no one of which is necessarily determinative, including, for example: (1) whether there is a substantial relationship or pattern of dealings between the agency and the payor; (2) whether the employee is in a position to influence the government on behalf of the payor; (3) whether the expressed intent of the payor is to compensate for government service; (4) whether circumstances indicate that the payment was motivated by a desire other than to compensate the employee for her government service, such as sympathy and respect or a familial relationship; (5) whether payments would also be made to non-government employees; and (6) whether payments would be distributed on a basis unrelated to government service, such as medical need. *See generally* Brady Fund Opinion;[4] *see also Private Compensation Paid to Member of the Turkey Industry Advisory Committee of the Department of Agriculture*, 41 Op. Att'y Gen. 217, 221 (1955).

[4] It could be argued that this opinion, which concluded that Mr. Brady could accept payments from a relief fund established specifically in response to the injuries he sustained in the course of the 1981 attempted assassination of then-President Reagan, has been called into question by the enactment of § 209(f) Section 209(f) expressly exempts from the prohibition of § 209(a) the "acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments" from a non-profit, tax-exempt organization 18 U.S.C.A. § 209(f) (West Supp 1997) The cross-references are to sections of title 18 that protect high-level officials of the government, and the exception was passed specifically to cover contributions to and payments from a fund for James Brady. *See* 128 Cong Rec 6322–23, 6381–82 (1982) Although the legislative history indicates that certain Members of Congress believed that payments to Mr. Brady from the relief fund would have been prohibited absent the exemption, we need not decide whether the enactment of § 209(f) was precautionary or necessary. Whereas Mr Brady was injured in the course of his government service, the FBI employees eligible for the Program did not have their terminally ill children as part of their services to the government, nor are their children's terminal illnesses in any way related to the employees' service

All but one of these factors weigh against finding an intent to compensate for government services in this case. The Foundation has neither a substantial relationship with the FBI nor interests that may be substantially affected by its employees.[5] Because one of the Foundation's stated purposes is "to contribute generally to the public welfare through the alleviation of human suffering," [6] and because the benefits are distributed only to those employees with terminally ill children, the benefits appear to be motivated by sympathy, rather than by a desire to compensate the employees for their government service. The only factor weighing on the other side is that, although the Program is open to the descendants of former government employees, the class of potential recipients is defined in part by their nexus to the FBI. *Cf.* Brady Fund Opinion (approving establishment of fund in large part because the beneficiaries of the fund would not be limited to federal employees).

The identity of eligible participants in the Program, by itself, is insufficient to make a benefit given under the Program "compensation for [the parent's] services" as an FBI employee. 18 U.S.C. § 209. First, the nexus between some of the eligible recipients and employment with the FBI is extremely attenuated. The Program extends even to the grandchildren of deceased former FBI agents. Moreover, the scope of the Program also demonstrates that it is motivated generally by sympathy for those who share a common bond rather than by an intent to supplement the salary of employees who may not be able to afford to grant the dreams of their terminally ill children.[7]

Second, nothing employees do in the course of their government service affects eligibility for the Program. Having a terminally ill child is an unpredictable and rare occurrence that has no connection to the performance of services for the government. *Cf.* OGE Informal Advisory Letter 93x21 (1993) (no violation of § 209(a) for legal defense fund to make payments to employee for legal expenses incurred during an administrative disciplinary proceeding brought against him by his agency because preparation of the employee's defense is not part of his govern-

[5] According to the available information, we understand that the extent of the FBI's relationship with the Foundation is limited to such matters as the inclusion of a flyer from the Society in retirement packages given to FBI employees, a brief presentation at the FBI employees' retirement seminar by a member of the Society, and a speech by the Director of the FBI at the Society's annual dinner. In addition, we understand that the primary source of the Foundation's funds is donations by members of the Society The Foundation is also funded by bequests from deceased members of the Society and donations from charities. Telephone conversations between Caroline Krass, Attorney-Advisor, Office of Legal Counsel, and Brian Smith, Assistant General Counsel, Administrative Law Unit, Office of the General Counsel, Federal Bureau of Investigation (Oct. 20–21, 1997) If this situation were to change and a significant portion of the Foundation's funds were to come from persons or entities whose interests could be substantially affected by the performance or nonperformance of the official duties of the eligible FBI employees, or were otherwise "prohibited source[s]" (*see* 5 C F R § 2635 203(d) (1997)), it would be important to examine more closely the possibility of an intent to compensate. *Cf* 41 Op. Att'y Gen at 221 ("An important factor in determining intent is whether the individual rendering service to the Government is in a position by virtue of his Government service to assist his private employer ")

[6] Kelley Memorandum at 1 (internal quotations and citations omitted)

[7] We understand that the Program is not based on financial need. Telephone conversation between Caroline Krass, Attorney-Advisor, Office of Legal Counsel, and Brian Smith, Assistant General Counsel, Administrative Law Unit, Office of the General Counsel, Federal Bureau of Investigation (Oct 20, 1997).

ment work). In these respects, it is analogous to being struck by a natural disaster. *Cf.* Memorandum for All Department of Justice Employees, from William P. Barr, Attorney General, *Re: Hurricane Andrew Relief Fund* (Aug. 28, 1992) (soliciting funds from Department employees to provide financial assistance to those Department employees affected by Hurricane Andrew).

Nor do any of the purposes served by § 209(a) counsel in favor of prohibiting the acceptance of benefits given under the Program by current FBI employees. In *Crandon*, the only Supreme Court decision to address squarely the meaning of § 209(a), the Court pointed out that although § 209(a) is a prophylactic rule, "[i]t is nevertheless appropriate, in a case that raises questions about the scope of the prohibition, to identify the specific policies that the provision serves as well as those that counsel against reading it too broadly." 494 U.S. at 165. To summarize the policies implemented by § 209(a), the Court quoted extensively from a 1960 report prepared by the Special Committee on the Federal Conflict of Interest Laws of the Association of the Bar of the City of New York:

> The rule is really a special case of the general injunction against serving two masters. Three basic concerns underlie this rule prohibiting two payrolls and two paymasters for the same employee on the same job. First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers.

494 U.S. at 165–66 (quoting The Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* 211 (1960)); *see also Business Organizations Defraying Expenses of Agents of the Department of Commerce*, 33 Op. Att'y Gen. 273, 275 (1922) (object of predecessor to § 209(a) was that "no Government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States").

None of the policy justifications for § 209(a)'s ban is implicated here. A one-time benefit based on an employee's having a terminally ill child would not give the Foundation an economic hold over the employee. Because neither the Foundation nor those who donate a significant portion of its funds has interests that could be affected by the employee,[8] the employee would not be in a position to favor the Foundation. Nor would it be reasonable for fellow employees and outside observers to feel bitter or suspicious about a Program that fulfills the dreams of terminally ill children. *Cf. Crandon*, 494 U.S. at 152 (endorsing a narrow reading

[8] *See supra* note 5.

of § 209(a) even where the interpretation potentially contravened one of the statute's three primary policy justifications).

Moreover, private payments to government employees because of their status as employees of the executive branch are not automatically intended as compensation for services to the government. Prohibiting all such payments would be inconsistent with the implicit exception for commemorative awards for public service recognized by this office. *See Gifts Received on Official Travel*, 8 Op. O.L.C. 143, 144 (1984) ("such awards are permissible primarily because the grantors are typically detached from and disinterested in the performance of the public official's duties"); OGE Informal Advisory Letter 83x11, 1983 WL 31714 (Department of Justice has consistently held that intent to compensate may not be inferred from the granting to a public official of a bona fide award for public service); *see also* 5 C.F.R. § 2635.204(d) (1997) (permitting employees to accept bona fide awards given for meritorious public service by a person who does not have interests that may be substantially affected by the performance or nonperformance of the employee's official duties). A public service award bears more resemblance to compensation for government services than does a benefit to an employee that is motivated in part by the employee's child's terminal illness and in part by the employee's status as an FBI employee.

Were we to conclude that § 209(a) prohibits all non-government payments to an individual where there is any nexus between the payment and the individual's employment by the government, we would effectively eviscerate § 2635.204(c)(2)(iii) of the Standards of Ethical Conduct for Employees of the Executive Branch ("Standards"). 5 C.F.R. § 2635.204(c)(2)(iii) (1997). Section 2635.204(c)(2)(iii) allows employees to accept "[o]pportunities and benefits, including favorable rates and commercial discounts" given because of an employee's official position when:

> [o]ffered by a person who is not a prohibited source to any group or class that is not defined in a manner that specifically discriminates among Government employees on the basis of type of official responsibility or on a basis that favors those of higher rank or rate of pay.

Id. Section 2635.204(c)(2)(iii), in relevant respects, reflects the administrative practice preceding the adoption of the Standards, which permitted the acceptance in certain circumstances of discounts offered to government employees as a class or to a more narrowly defined group of government employees. *See, e.g.*, OGE Informal Advisory Opinion 85x13, 1985 WL 57312; *accord* OGE Informal Advisory Letter 86x7; 1986 WL 69190; OGE Informal Advisory Letter 87x2, 1987 WL 109912.

We recognize that our reluctance to find that § 209(a) forbids all private payments to government employees that are motivated in part by the employees' government status may seem to be at odds with our earlier view that § 209 would prohibit the operation of a scholarship program for which only the children of living FBI employees would be eligible. *See* 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* (Feb. 10, 1989) ("1989 Opinion"). The 1989 Opinion stated our belief that "a scholarship given . . . directly to an FBI employee to ease the burden of financing his or her child's education . . . constitutes a prohibited 'supplement' to the salary of an employee of the United States Government, if there is a nexus between the payment and the employee's federal employment." *Id.* at 8.

We continue to believe that § 209(a) would be violated if the circumstances indicate that the intent of a scholarship program (or any other program) is to supplement the employee's government salary. Because of the fact-intensive nature of analyzing whether a program is intended to compensate an employee for services to the government, however, we must resolve these difficult issues on a case-by-case basis. The 1989 Opinion may be read to suggest that any scholarship program limited to FBI employees would invariably violate § 209(a). Insofar as it can be so read, we think it unsound and reject it.

In sum, we conclude that § 209 does not prohibit eligible FBI employees from accepting benefits under the Program. To ensure that acceptance of the benefits does not violate the Standards of Conduct, we advise that you continue to consult with the Departmental Ethics Office and the Office of Government Ethics.

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Reappointment of a Retired Judge to the Court of Federal Claims

The President may nominate and, subject to the advice and consent of the Senate, appoint to the U.S. Court of Federal Claims an individual who has previously retired from that Court and who is receiving a retirement annuity as a senior judge. Upon assumption of active judicial service, the judge must forfeit the retirement annuity for the duration of the service

December 3, 1997

MEMORANDUM OPINION FOR THE DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF POLICY DEVELOPMENT

This memorandum responds to your request for our opinion concerning whether the President may reappoint to the United States Court of Federal Claims a nominee who has completed a fifteen-year term on that court and is a retired "senior judge" as of the time of her nomination and subsequent reappointment. For the reasons set forth below, we conclude that the President may nominate and, with the advice and consent of the Senate, appoint a retired judge to the Court of Federal Claims.

I.

We turn first to the statutory framework concerning the appointment and retirement of judges serving on the Court of Federal Claims. The issue raised here is whether under these provisions, a judge who has elected to take senior status and receive the corresponding retirement annuity becomes ineligible for reappointment.

Section 171(a) of title 28 of the United States Code states that the "President shall appoint, by and with the advice and consent of the Senate," sixteen judges constituting the Court of Federal Claims. 28 U.S.C. § 171(a) (1994). Section 172 provides that each judge "shall be appointed for a term of fifteen years." 28 U.S.C. § 172 (1994).

Section 178 of title 28 prescribes certain criteria under which a judge on the Court of Federal Claims is eligible to retire as a "senior judge" and receive an annuity.[1] 28 U.S.C. § 178(a)–(b) (1994). We understand that the judge in question is eligible to take senior status and receive a retirement annuity under § 178(b), which provides for the retirement of judges who have not been reappointed following the expiration of their terms of office.[2]

[1] The statute states that a "senior judge" shall perform certain judicial duties requested by the Chief Judge of the court 28 U S C § 178(d)–(e) (1994)

[2] In addition to those judges who are not reappointed (under specified circumstances), the statute also provides that judges may take senior status and receive a retirement annuity based upon certain criteria relating to age and

Continued

The retirement provisions under § 178(b) appear to have been intended to support greater judicial independence by providing an annuity (equal to an active judge's salary) to those judges who would have accepted, but did not receive, reappointment and who are not otherwise eligible to receive the retirement annuity based upon age. *See* H.R. Rep. No. 101–734, at 24–25 (1990). Accordingly, to be eligible for senior status and to receive the retirement annuity under § 178(b), a judge must have served at least one full term on the court and have expressed in writing to the President her willingness to be reappointed.[3] 28 U.S.C. § 178(b). A judge meeting these eligibility requirements may then elect to take senior status and to receive the retirement annuity pursuant to § 178 by notifying the Administrative Office of the United States Courts "any time before the day after the day on which his or her successor takes office." *Id.* § 178(f)(1)(A) (1994).

The statute also sets out certain circumstances under which a retired judge will forfeit, permanently or temporarily, the annuity otherwise due under § 178. *See generally* 28 U.S.C. § 178(j) (1994). Specifically relevant here, a judge on the Court of Federal Claims who retires under the senior status annuity provisions shall forfeit all rights to her annuity if she "accepts compensation for civil office or employment under the Government of the United States" other than for her judicial duties as a senior judge on the Court of Federal Claims. *Id.* § 178(j)(3). The forfeiture, however, is limited to the period during which such compensation is received. *Id.*

II.

Upon review of the statutory scheme regarding the appointment and retirement of judges on the Court of Federal Claims, we find no relevant limitation on whom the President may nominate and appoint. First, § 171 provides for presidential appointment, subject only to the advice and consent of the Senate. The provision is straightforward and includes no restriction on presidential appointment or other requirement for eligibility.

Second, we find nothing in the retirement scheme in § 178 or elsewhere in the statute that limits, by implication or otherwise, the ability of the President to reappoint a retired judge to the Court of Federal Claims. The time frame prescribed in the statute during which a Federal Claims judge must express interest in reappointment limits only the eligibility of the judge to take senior status retire-

length of service 28 U S C § 178(a). A judge who retires or who is removed from office solely on the basis of disability is also eligible to receive the retirement annuity, but cannot retire as a "senior judge" *Id.* § 178(c), (e)(1).

[3] The statute further prescribes that the judge's willingness to serve another term must be expressed within a specific time period: not earlier than nine months prior to the expiration of her term and not later than six months prior to the date of expiration 28 U S C § 178(b)(2) We understand that the judge in question has expressed her willingness to accept reappointment within the prescribed time frame

ment and receive the annuity under § 178; it does not limit or even relate to the judge's eligibility for reappointment.[4]

Furthermore, the annuity scheme contemplates that a senior judge receiving an annuity may accept subsequent government employment. In such a case, the statute provides that during the period she accepts other federal compensation, the senior judge forfeits the annuity that she would receive as a senior judge. 28 U.S.C. § 178(j)(3). Thus, it appears that a judge who has retired under § 178 may be reappointed to the court and, upon resumption of active service, would forfeit her retirement annuity during the period of her term of office.

Third, we find nothing in the legislative history of the statute that suggests any intention to limit the President's ability to reappoint a retired judge. As we have observed, the retirement provisions under § 178(b) appear to have been designed to foster judicial independence by providing an annuity to those judges who, although willing to serve, are not reappointed to another term. Thus, the legislative purpose of the retirement provisions appears to have been to protect judges from the failure of reappointment, not to prevent such reappointment.

III.

On the basis of the plain language of the statute and its purpose, we conclude that pursuant to 28 U.S.C. § 171, the President may nominate and, subject to the advice and consent of the Senate, appoint to the Court of Federal Claims an individual who has previously retired from the Court and who is receiving, under 28 U.S.C. § 178, a retirement annuity as a senior judge. Upon assumption of active judicial service as a Federal Claims judge, the judge would be required to forfeit her retirement annuity for the duration of her compensated service as an active judge.

BETH NOLAN
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[4] Thus, for the purposes of the appointment issue considered here, whether the judge in question has expressed formally her willingness to accept reappointment within the statutory period is relevant only as condition precedent to her taking senior status A judge who failed to so notify the President would be ineligible to receive a retirement annuity under § 178, but nothing would prevent the President from reappointing the judge notwithstanding her failure to notify him

Application of Consumer Credit Reporting Reform Act of 1996 to Presidential Nomination and Appointment Process

Section 2403(b)(3) of the Consumer Credit Reporting Reform Act of 1996, which requires persons "using a consumer report for employment purposes" to notify the consumer prior to taking any "adverse action" based on the report, does not apply to the process used by the President in considering individuals for nomination and appointment

December 11, 1997

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

The Consumer Credit Reporting Reform Act of 1996 ("CCRRA"), 15 U.S.C.A. § 1681s–2 (West Supp. 1997), offers heightened protections to individuals whose credit histories are being examined by prospective employers. Section 2403(b)(3) of the CCRRA amends section 604 of the Fair Credit Reporting Act ("FCRA") to require any person "using a consumer report for employment purposes" to notify the consumer prior to taking "any adverse action based in whole or in part on the report." *Id.* § 1681b(b)(3). You have requested our advice whether § 2403(b)(3) would apply to the process used by the President in considering individuals for nomination and appointment with the advice and consent of the Senate or appointment to his personal staff. As explained briefly below, we conclude that this provision of the CCRRA does not apply to the President's decisions affecting such positions.

It is a well settled principle of law, applied frequently by both the Supreme Court and the executive branch, that statutes that do not expressly apply to the President must be construed as not applying to him if such application would involve a possible conflict with his constitutional prerogatives. *See, e.g., Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). This Office has described that principle as a "clear statement rule." *See Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges*, 19 Op. O.L.C. 350, 351 (1995) ("§ 458 opinion"); *see also Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991). As the § 458 opinion explains in greater detail, the clear statement rule has two sources. First, a fundamental canon of statutory interpretation requires that statutes be construed to avoid raising serious constitutional questions. 19 Op. O.L.C. at 352. Second, the constitutional principle of separation of powers assures a division of power among the federal government's three coordinate branches. The clear statement rule "exists in order to protect 'th[is] usual constitutional balance' of power." *Id.* (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991)).

Thus, where a statute does not by its express terms apply to the President, it may not be applied to him if doing so would raise a serious separation of powers concern. We first consider the possible application of the CCRRA to the process by which the President nominates non-inferior officers, subject to advice and con-

sent of the Senate. Application of the CCRRA in this context would raise a serious separation of powers concern, for it could interfere with a power committed to the President by the Constitution.

The Appointments Clause provides that the President

> shall nominate, and by and with the 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 . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2. The Constitution thus vests in the President alone the power to nominate non-inferior officers of the United States. Although Congress has an important role in the appointment of such officers by virtue of the Senate's assigned responsibility to advise and consent with regard to such appointments, any attempt by Congress to exercise power over the process of *nominating* a particular individual to a non-inferior office would raise a serious constitutional question. *See* 19 Op. O.L.C. at 358; *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993), *cert. dismissed*, 513 U.S. 88 (1994).

As noted above, section 2403(b)(3) of the CCRRA requires any person who uses a credit report for employment purposes to notify the subject of any adverse action based in whole or in part on the report.[1] To the extent this requirement were applied to the process under which potential nominees are considered by the President, it could impose a burden upon the unfettered nomination power accorded the President under the Constitution. The Constitution does not compel the President to disclose to a nominee the reasons for his decision not to nominate that person; indeed, it does not require that the President have articulable reasons for not nominating someone. To the extent section 2403(b)(3) would require an assessment whether information contained in a credit report contributed to an adverse decision, and then would further require communication of that fact to a potential nominee, section 2403(b)(3) effectively places limitations on the President's constitutional prerogative to nominate non-inferior officers of the United States. We need not here decide whether Congress may, consistent with the Constitution, impose such limitations; it is enough for purposes of this analysis to conclude that such a restriction potentially conflicts with the President's constitu-

[1] Section 2403(b)(2) also requires any person procuring a consumer report for employment purposes to inform the consumer and to receive the consumer's authorization in writing for the procurement of such a report. Because we understand that you intend to comply with this separate statutory requirement (and indeed may already be doing so by virtue of the authorization signed by those undergoing background investigations), we need not resolve here the question whether the requirement of section 2403(b)(2), if applied to the President, might interfere with the President's power under the Appointments Clause and thus need to be interpreted in light of a clear statement rule. We therefore focus our attention on the requirement imposed by section 2403(b)(3).

tional responsibilities. Where, as here, a potential conflict exists, the clear statement rule requires that the statutory requirement be explicitly applied to the President.

Neither the language nor the legislative history of the CCRRA, however, contains any such express statement. The definitions of "person" and "employment purposes" in section 603 of the FCRA do not explicitly refer to the President or to presidential nominations. Nor does any other provision of the FCRA or the CCRRA state specifically that the requirements of these statutes apply equally with respect to the President as to other potential employers. Respect for the separation of powers and the "unique constitutional position of the President" require such an explicit textual reference. *Franklin v. Massachusetts*, 505 U.S. at 800–01. The legislative history of the CCRRA similarly is silent with respect to its specific application to presidential nominees. What is clear from that history is that the primary focus of the CCRRA was to grant the ordinary consumer greater control over the use of his or her consumer credit report by consumer reporting agencies. *See* 142 Cong. Rec. 26,666, 26,667 (1996) (statement of Sen. Bryan, original sponsor of CCRRA). The absence of any clear statement including the President within the scope of the CCRRA, together with the serious constitutional questions that such an interpretation would raise, compels us to conclude that the CCRRA does not apply to the President's use of credit information with respect to potential presidential nominees for non-inferior offices.

We turn now to two other categories of appointees — inferior officers appointed by the President with the Senate's advice and consent and appointees to positions (other than those requiring advice and consent) on the President's personal staff. Application of the CCRRA to these categories of appointees, at least in some circumstances, might well raise separation of powers concern. However, we need not reach this issue. We have already concluded that section 2403(b) would not apply to the President, because it could do so only if there were a clear statement to that effect. Given that conclusion, we would be rewriting the statute if we were to conclude that the President had to follow the statute with regard to particular classes of potential appointees. Therefore, our conclusion that the clear statement rule prohibits application of section 2403(b)(3) to presidential nominations for non-inferior offices applies equally to all categories of individuals under consideration by the President for nomination or appointment.

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