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Nos. 24-5163, 24-5170

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAMPAIGN FOR ACCOUNTABILITY,

Plaintiff-Appellee/Cross-Appellant,

v.

U.S. DEPARTMENT OF JUSTICE,

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX – VOLUME II

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TABLE OF CONTENTS

Page

VOLUME 1

Docket entries ..... JA 1

Complaint, Doc. 1 (June 8, 2016) ..... JA 10

Order, Doc. 18 (Sept. 29, 2017) ..... JA 22

Memorandum Opinion, Doc. 19 (Oct. 6, 2017) ..... JA 24

Amended Complaint, Doc. 22 (Oct. 27, 2017) ..... JA 62

Index of Exhibits ..... JA 86

FOIA request under 5 U.S.C. § 552(a)(2) ..... JA 88

Response to FOIA request ..... JA 102

Barron Best Practices Memorandum (omitted here, reproduced as attachment to Doc. 56)

Bradbury Best Practices Memorandum ..... JA 105

Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(A) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs (2009) ..... JA 111

The Authority of the Equal Employment Opportunity Commission To Order a Federal Agency To Pay a Monetary Award To Remedy a Breach of a Settlement Agreement (2008) ..... JA 126

Payment of Back Wages to Alien Physicians Hired Under H-1B Visa Program (2008) (omitted here, reproduced as attachment to Doc. 59)

Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply With Orders Issued by EEOC Administrative Judges (2003) (omitted here, reproduced as attachment to Doc. 59)

Whether the Defense of Marriage Act Precludes the Nonbiological Child of a Member of a Vermont Civil Union From Qualifying for Child's Insurance Benefits Under the Social Security Act (2007) ..... JA 141

Application of 18 U.S.C. § 1913 to "Grass Roots" Lobbying by Union Representatives (2005) ..... JA 147

Whether Postal Employees Are Entitled To Receive Service Credit, for Purposes of Their Retirement Annuity Under The Federal Employees' Retirement System, for Periods of Employment during which the United States Postal Service Has Not Made Its Required Employer Contributions (2011) ..... JA 157

Responsibility of Agencies to Pay Attorney's Fee Awards Under the Equal Access to Justice Act (2007) ..... JA 174

Constitutionality of the Direct Reporting Requirement in Section 802(e)(1) of the Implementing Recommendations of the 9/11 Commission Act of 2007 (2008) ..... JA 189

Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize (2009) ..... JA 210

Attachments to Joint Status Report, Doc. 27 (Jan. 23, 2018)

OLC Response Letter to Amended Complaint ..... JA 224

Payment of Attorney's Fees under the Equal Access to Justice Act (1994) ..... JA 231

Applicability of 18 U.S.C. § 1913 to the Provision of Official Time to Employee Union Representatives to Lobby Congress on Representational Issues (2001) ..... JA 233

VOLUME II

Memorandum Opinion, Doc. 40 (Sept. 11, 2020) ..... JA 237

Order, Doc. 41 (Sept. 11, 2020) ..... JA 276

Answer to Amended Complaint, Doc. 42 (Sept. 25, 2020) ..... JA 277

Stipulation, Doc. 56 (July 15, 2021) ..... JA 290

Barron Best Practices Memorandum ..... JA 298

Defendant's Statement of Material Facts Not in Dispute, Doc. 57-2 (July 15, 2021) ..... JA 304

Exhibits to Plaintiff's Cross-Motion for Summary Judgment, Doc. 59 (Aug. 12, 2021)

Plaintiff's Statement of Material Facts Pursuant to Local Civil Rule 7(h)(1) ..... JA 307

Plaintiff's Response to Defendant's Statement Pursuant to Local Civil Rule 7(h)(1) ..... JA 315

Declaration of Stephanie Krent ..... JA 319

Opinions of Attorneys General and Decisions of Auditors (1849) ..... JA 323

Office and Duties of Attorney General (1854) ..... JA 326

Comptroller – Solicitor of the Treasury – Attorney General ..... JA 357

Letter from then-Assistant Attorney General Peter Kadzik to Representatives Jason Chaffetz and Elijah E. Cummings ..... JA 364

Attorney General's Remarks, Benjamin N. Cardozo School of Law, November 15, 1992 ..... JA 375

Letter from then-Attorney General Richard Thornburgh to Representative Don Edwards ..... JA 387

Application of the Endangered Species Act of 1972 to the Sale of Sperm Whale Oil by the General Services Administration (1974).....JA 397

Whether Reservists Must Exhaust Available Leave Under 5 U.S.C. § 6323(b) Before Taking Leave Under 5 U.S.C. § 6323(a) (2012) .....JA 406

EEOC Authority to Order Federal Agency to Pay for Breach of Settlement Agreement (2014) .....JA 431

Authority of the Department of Labor to Control the Disclosure of Federal Employees' Compensation Act Records Held by the United States Postal Service (2012) .....JA 449

Payment of Back Wages to Alien Physicians Hired Under H-1B Visa Program (2008) .....JA 470

Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act (1997).....JA 480

Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply With Orders Issued by EEOC Administrative Judges (2003).....JA 491

Obligating Carryover Funds in Violation of OMB Zero-Dollar Apportionment Rule (2016) .....JA 502

Service Credit for Retirement Annuities of USPS Employees When USPS Has Not Made Required Contribution (2011).....JA 518

Obligation of Federal Agencies to Pay Stormwater Assessments Under the Clean Water Act (2011).....JA 542

Disposition of Proceeds from the Sale of Government Buildings Acquired with Social Security Trust Funds (2010).....JA 562

Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding (1987).....JA 576

Defendant's Response to Plaintiff's Statement of Material Facts, Doc. 62-1 (Oct. 11, 2021) ..... JA 589

Memorandum Opinion, Doc. 67 (Apr. 19, 2024) ..... JA 602

Order, Doc. 68 (Apr. 19, 2024) ..... JA 623

Notice of Appeal, Doc. 70 (June 18, 2024) ..... JA 624

Notice of Cross-Appeal, Doc. 73 (June 28, 2024) ..... JA 625

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	No. 1:16-cv-1068 (KBJ)

MEMORANDUM OPINION

Plaintiff Campaign for Accountability ("CfA") has filed an amended complaint that alleges that the Department of Justice's Office of Legal Counsel ("OLC") must make certain specified categories of OLC legal opinions automatically available to the public pursuant to the Freedom of Information Act's ("FOIA's") seldom-litigated reading-room provision. (*See* Am. Compl., ECF No. 22, ¶ 13 (citing 5 U.S.C. § 552(a)(2)).) In the wake of this Court's prior conclusion that not all of OLC's opinions qualify for affirmative disclosure under section 552(a)(2) of Title 5 of the United States Code, *see generally Campaign for Accountability v. Dep't of Justice ("Campaign for Accountability I")*, 278 F. Supp. 3d 303 (D.D.C. 2017), CfA now maintains that the reading-room provision requires affirmative disclosure of at least four types of OLC opinions: those that (1) resolve inter-agency disputes (*see* Am. Compl. ¶¶ 35–38); (2) interpret an agency's non-discretionary legal obligations (*see id.* ¶¶ 41–44); (3) "find[] that particular statutes are unconstitutional and that therefore

agencies need not comply with them" (*id.* at 18; *see also id.* ¶¶ 45–46); or (4) adjudicate or determine private rights (*see id.* at ¶¶ 47–49).[1]

Before this Court at present is Defendant OLC's renewed motion to dismiss CfA's amended complaint (*see* Mem. in Supp. of Def.'s Renewed Mot. to Dismiss the Am. Compl. ("Def.'s Mot."), ECF No. 29-1), which invokes Federal Rule of Civil Procedure 12(b)(6) and argues that CfA's amended complaint *still* does not plausibly allege that OLC has a legal obligation to disclose any of these categories of opinions under the FOIA (*see id.* at 19–20), primarily because, in the agency's view, OLC opinions are "legal advice documents [] rather than final agency policy decisions" (*id.* at 22) and do "not regulate private parties[]" (*id.* at 21), so these kinds of agency records do not fall within the ambit of the FOIA's affirmative disclosure provisions (*see id.*).[2] In response, CfA both reiterates its argument that, due to their "binding" and "controlling" nature, all OLC opinions are subject to affirmative disclosure (Pl.'s Opp'n to Def.'s Mot. ("Pl.'s Opp'n"), ECF No. 30, at 18), and asserts that, in any event, the identified categories of OLC opinions satisfy the statutory requirements, because they qualify as either "statements of policy and interpretations which have been adopted by the agency[,]" 5 U.S.C. § 552(a)(2)(B), or "final opinions . . . made in the adjudication of cases[,]" *id.* § 552(a)(2)(A) (*see* Pl.'s Opp'n at 31–42).

For the reasons explained below, this Court adheres to its prior conclusion that not all—but also not none—of OLC's written opinions must be affirmatively disclosed

[1] CfA's amended complaint specifically identified a fifth category of OLC opinions—opinions issued to independent agencies (*see* Am. Compl. ¶ 39)—but CfA subsequently withdrew its claims with respect to that separate category of records (*see infra* n.4).

[2] Page-number citations to the documents that the parties and the Court have filed refer to the page numbers that the Court's Electronic Case Filing System ("ECF") automatically assigns.

pursuant to the FOIA's reading room provision, and it further finds that only *one* of the categories of OLC opinions that CfA has now identified is plausibly included in the classes of records that an agency must affirmatively disclose under section 552(a)(2). In particular, the Court finds that CfA has plausibly alleged that OLC opinions relating to inter-agency disputes are "final opinions . . . made in the adjudication of cases[,]" 5 U.S.C. § 552(a)(2)(A), and such opinions may also plausibly be characterized as "statements of policy and interpretations" that have been adopted *ex ante* by at least one of the disputing agencies, *id.* § 552(a)(2)(B). The Court considers it implausible that any of the other types of OLC opinions to which CfA points fit into the FOIA's affirmative-disclosure classifications, and thus concludes that CfA has failed to state a claim with respect to those categories of opinions. Consequently, OLC's motion to dismiss CfA's amended complaint will be **GRANTED IN PART and DENIED IN PART**. A separate Order consistent with this Memorandum Opinion will follow.

I. BACKGROUND

In the initial complaint that was filed in this matter, CfA asserted that *all* of OLC's written legal opinions were uniformly and categorically subject to disclosure under the FOIA's reading-room provision, section 552(a)(2) of Title 5 of the United States Code. (*See* Compl., ECF No. 1, ¶ 31.) OLC moved to dismiss CfA's FOIA claim and, in a Memorandum Opinion concerning OLC's motion, this Court held that CfA had not "plausibly alleged that OLC opinions, as a general matter, are subject to the reading-room provision," *Campaign for Accountability I*, 278 F. Supp. 3d at 321 (cleaned up), and CfA also "ha[d] not identified an ascertainable set of OLC opinions that OLC [] withheld from the public and that is also plausibly subject to the FOIA's

reading-room requirement[,]" *id.* at 306. The relevant background for the parties' FOIA dispute over the characterization and release of OLC opinions is described in detail in this Court's prior Memorandum Opinion, *see id.* at 306–12, and is incorporated into the instant discussion by reference. This Court will assume familiarity with those background facts moving forward; therefore, only a brief recounting of certain relevant background facts and legal principles is necessary here.

First of all, the reader is reminded that, as a general matter, section 552(a)(2) of Title 5 of the United States Code furthers the FOIA's goal of fostering public access to government records by requiring agencies to act proactively to publish and index certain specified types of documents. In relevant part, the provision states that

> [e]ach agency, in accordance with published rules, shall make available for public inspection in an electronic format—
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
>
> (C) administrative staff manuals and instructions to staff that affect a member of the public;
>
> (D) copies of all records, regardless of form or format—
>
> (i) that have been released to any person under paragraph (3); and . . .
>
> (E) a general index of the records referred to under subparagraph (D)[.]

5 U.S.C. § 552(a)(2).

It is clear beyond cavil that the reading-room provision has as its "primary objective [] the elimination of secret law." *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989) (internal quotation marks and

citation omitted). That is, "[t]he FOIA's reading-room provision 'represents an affirmative congressional purpose to require disclosure of documents which have the force and effect of law.'" *Campaign for Accountability I*, 278 F. Supp. 3d at 307 (quoting *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975)). And the requirement that certain categories of records be automatically published by the agency that produces them mitigates against the risk of secret law, insofar as it "prevent[s] an agency from subjecting members of the public to a rule that the agency has not publicly announced." *Id.* (internal citations omitted).

As explained in *Campaign for Accountability I*, in addition to requiring the disclosure of certain agency records, the FOIA permits an agency to withhold covered documents pursuant to certain statutory exemptions, *see* 278 F. Supp. 3d at 308 (citing 5 U.S.C. § 552(b)(1)–(9)), and one of those exemptions—Exemption 5—"correlates with, and sheds light on, the scope of the FOIA's reading-room provision[,]" *id.* Exemption 5 generally authorizes agencies to withhold "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency[.]" 5 U.S.C. § 552(b)(5). Moreover, and significantly for present purposes, making a determination that an agency can properly withhold a particular record pursuant to the attorney work-product and deliberative-process privileges that Exemption 5 protects means that the record in question is also not subject to automatic disclosure under the FOIA's reading-room provision. *See Campaign for Accountability I*, 278 F. Supp. 3d at 322. The reverse is also true: documents that are not properly withheld as privileged under Exemption 5 can be deemed to reflect an agency's working law and, as such, must be affirmatively

disclosed under section 552(a)(2). In other words, "if a record can be withheld under Exemption 5, then it is generally not subject to affirmative disclosure under the reading-room provision and vice versa[.]" *Id.* at 308.

This Court's previous observations about the OLC's authority to provide legal advice to the Executive Branch also warrant restating. This responsibility is "nearly as old as the Republic itself[,]" *Citizens for Responsibility & Ethics in Washington v. Dep't of Justice ("CREW II")*, 922 F.3d 480, 483 (D.C. Cir. 2019) (internal quotation marks omitted), and "[f]or decades, [OLC] has been the most significant centralized source of legal advice within the Executive Branch[,]" *Citizens for Responsibility & Ethics in Wash. v. Dep't of Justice ("CREW I")*, 846 F.3d 1235, 1238 (D.C. Cir. 2017) (internal quotation marks and citation omitted). OLC advises the rest of the Executive Branch on behalf of the Attorney General, and it is important to note that "the Attorney General's legal advice to the President and various executive agencies spans a wide range of issues and contexts." *Campaign for Accountability I*, 278 F. Supp. 3d at 309; *see also* 28 C.F.R. § 0.25(a) (charging OLC with "[p]reparing the formal opinions of the Attorney General[,] rendering informal opinions and legal advice to the various agencies of the Government[,] and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet").

Notably, "[a]lthough the OLC frequently conveys its legal advice to executive agencies through informal means, it sometimes does so through 'formal written opinions.'" *CREW II*, 922 F.3d at 484. Furthermore, with respect to its written opinions, OLC "has a longstanding internal process in place for regular consideration

and selection of significant opinions for official publication." (Memorandum from David J. Barron, Acting Assistant Attorney General, to Attorneys of the Office, Best Practices for OLC Legal Advice and Written Opinions at 5 (July 16, 2010) ("Best Practices Memo"), Ex. 3 to Def.'s Mot. to Dismiss, ECF No. 9-5.)[3]

II. PROCEDURAL HISTORY

In *Campaign for Accountability I*, this Court relied on the D.C. Circuit's holding in *Electronic Frontier Foundation v. Department of Justice ("EFF")*, 739 F.3d 1 (D.C. Cir. 2014), to conclude that "an OLC opinion does not constitute an agency's working law merely by virtue of being a controlling and precedential statement of the legal constraints on an agency's decision[,]" *Campaign for Accountability I*, 278 F. Supp. 3d at 322 (internal quotation marks omitted), and it further held that a complaint that alleges that an agency has violated the FOIA's reading-room provision can survive a Rule 12(b)(6) motion to dismiss only if it "identif[ies] ascertainable records or categories of records that are plausibly subject to the reading-room requirement and that the agency has failed to make publicly available[,]" *id.* at 320. The Court dismissed CfA's claims in light of this holding, but granted CfA leave "to amend its complaint to add allegations [concerning] specific, ascertainable categories of records[.]" *Id.* at 324.

Three weeks after this Court dismissed CfA's initial complaint, CfA filed an amended complaint that identifies distinct categories of OLC written opinions (out of the broad range of opinions that OLC typically issues) that CfA maintains are

[3] OLC has opted to publish approximately 1,339 opinions, dating from 1934 to the present. *See* Office of Legal Counsel, *Opinions*, Dep't of Justice (Sept. 11, 2020), https://www.justice.gov/olc/opinions. *Cf. Cannon v. District of Columbia*, 717 F.3d 200, 205 n.2 (D.C. Cir. 2013) (authorizing courts to take judicial notice of the fact that material has been posted to a government website pursuant to Federal Rule of Evidence 201).

indisputably subject to section 552(a)(2) of the FOIA. (*See Am. Compl.* ¶¶ 35–49.) These categories are: (1) opinions resolving inter-agency disputes (*see id.* ¶¶ 35–38); (2) opinions interpreting non-discretionary legal obligations (*see id.* ¶¶ 41–44); (3) opinions finding that particular statutes are unconstitutional (*see id.* at 18; *see also id.* ¶¶ 45–46); and (4) opinions adjudicating or determining private rights (*see id.* at ¶¶ 47–49).[4] With respect to each of these four categories of records, CfA's amended complaint alleges that the government has failed to comply with the disclosure obligations of section 552(a)(2) by not making these opinions automatically available for public inspection (*see id.* ¶¶ 54–59 (Count I)), and that the government has failed to comply with the indexing requirement of section 552(a)(2)(E) of the Act (*see id.* ¶¶ 60–64 (Count II)).

OLC has once again moved to dismiss CfA's pleading under Federal Rule of Civil Procedure 12(b)(6), claiming that CfA's amended complaint does not plausibly allege that OLC has a legal obligation to disclose the specified categories of opinions. (*See* Def.'s Mot. at 19–20.) The agency's argument largely echoes its prior position that *none* of OLC's opinions *ever* satisfies the FOIA's affirmative-disclosure mandates, because OLC merely generates "legal advice documents [] rather than final agency policy decisions[.]" (*Id.* at 22.) The agency also argues that none of the types of OLC opinions that CfA specifically identifies is a "final opinion[] . . . made in the

[4] As explained previously (*see supra* n.1), CfA's amended compliant makes the same claims with respect to a fifth category of OLC opinions—opinions issued to independent agencies (*see* Am. Compl. ¶ 39)—but CfA has withdrawn this distinct allegation because "[t]he OLC has now confirmed that the express agreement that independent agencies make to be bound by the OLC's formal written opinions is no different than the implied agreement of non-independent agencies to be bound by those opinions[.]" (Pl.'s Opp'n at 35 n.11; *see also id.* (explaining that CfA "no longer contends that those opinions constitute [a separate category of] working law under this Court's interpretation of *EFF*").)

adjudication of cases[,]" 5 U.S.C. § 552(a)(2)(A), because OLC opinions "do not finally dispose of any agency action" and none concerns "adversarial disputes involving private parties[.]" (*Id.* at 22–24.) Moreover, according to OLC, CfA "does not identify any concrete features of these OLC advice documents that would make them *the recipient agencies'* law or policy" beyond the mere fact that they are considered "precedential" and "controlling[.]" (*Id.* at 33 (emphasis in original); *see also id.* at 39 (asserting that, "[e]ven when the necessary result of an OLC opinion is to foreclose a particular action or actions, that does not eliminate the need for the agency still to make a policy decision—*i.e.*, to decide how to address the underlying situation").) OLC further maintains that it "does not purport—nor does it have authority—to adjudicate or determine any private rights" (*id.* at 43 (internal quotation marks and citation omitted)), and that interpreting the FOIA's reading-room provision to include any subset of OLC opinions "would [both] undermine important values within the Government and raise significant constitutional concerns" (*id.* at 44).

In response, CfA holds fast to its prior contention that all of OLC's opinions are subject to disclosure under section 552(a)(2) (*see* Pl.'s Opp'n at 7 ("[R]espectfully[] urg[ing] this Court to reconsider its prior holding.")), and it further insists that the four categories of OLC opinions that its amended complaint has identified are either "statements of policy and interpretations" adopted by the agency, 5 U.S.C. § 552(a)(2)(B), or "final opinions . . . made in the adjudication of cases[,]" *id.* § 552(a)(2)(A), for the purpose of the FOIA's reading-room provision, such that they are subject to automatic disclosure (*see* Pl.'s Opp'n at 30–42). Additionally, CfA maintains that "[r]equiring the disclosure of the OLC's formal written opinions would

serve, not threaten, important constitutional values." (*Id.* at 48.)

The Court held a hearing on the government's motion to dismiss on July 20, 2018 (*see* Minute Entry of July 20, 2018), at the end of which it took the government's motion, now ripe for review, under advisement.

III. LEGAL STANDARDS

"Because the FOIA permits a court to order the production of any agency records improperly withheld from the complainant, a FOIA plaintiff states a claim where it properly alleges that an agency has (1) improperly (2) withheld (3) agency records[.]" *Campaign for Accountability I*, 278 F. Supp. 3d at 312 (cleaned up). Notably, what qualifies as improper withholding can vary based upon the particular FOIA provision that the plaintiff invokes. Unlike section 552(a)(3), which requires agencies to produce records in response to a proper request for *any* documents in the agency's possession (subject to specified withholdings), *see Shapiro v. C.I.A.*, 170 F. Supp. 3d 147, 154–56 (D.D.C. 2016), the FOIA's reading-room provision requires the agency's proactive disclosure of specific, statutorily delineated categories of records, *see, e.g.*, 5 U.S.C. §§ 552(a)(2)(A)–(B). Accordingly, "in order to state a claim that an agency has improperly withheld records that it was obligated to make public under section 552(a)(2), the complaint must identify particular records (or categories of records) that the agency has failed to publicize and that plausibly fit within one of the statutory categories." *Campaign for Accountability I*, 278 F. Supp. 3d at 312.

In the context of a complaint that alleges improper withholding of agency records in violation of section 552(a)(2) the FOIA, a plaintiff states a claim upon which relief can be granted if the records that the complaint identifies as having been withheld

plausibly qualify as, *inter alia*, "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases[,]" 5 U.S.C. § 552(a)(2)(A), or "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register[,]" *id.* § 552(a)(2)(B). And because courts are required to dismiss a complaint that "fail[s] to state a claim upon which relief can be granted" under Federal Rule of Civil Procedure 12(b)(6), Fed. R. Civ. P. 12(b)(6), "[t]o survive a motion to dismiss, [such] a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face[,]'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

IV. ANALYSIS

The parties in this case have repeatedly asked the Court to adopt an all-or-nothing stance with respect to the OLC's affirmative disclosure obligations: either *all* OLC opinions must be disclosed pursuant to the FOIA's reading-room provision because such opinions are binding on the agencies to which they are issued, as CfA argues (*see* Pl.'s Opp'n at 7), or *none* of OLC's opinions is subject to proactive disclosure, as OLC contends, because OLC is not itself a policymaking authority and instead only advises administrative agencies that regulate private parties (*see* Def.'s Mot. at 22). This Court persists in rejecting this dichotomy and, as explained fully below, it further finds that one of the four types of OLC opinions that CfA points to—opinions that resolve inter-agency disputes—can plausibly be classified as either "final opinions . . . made in the adjudication of cases[,]" or "statements of policy and interpretations" that one or more of the disputing agencies have adopted, for the

purpose of the FOIA's reading-room provision. 5 U.S.C. §§ 552(a)(2)(A)–(B). The Court also concludes that it is not plausible that the remaining types of OLC opinions that appear in CfA's amended complaint fit into any of the section 552(a)(2) classifications that CfA has invoked.

A. This Court Will Not Reconsider Its Prior Conclusion That OLC's Formal Written Opinions Do Not Necessarily Constitute The Working Law Of The Recipient Agency

In *Campaign for Accountability I*, this Court held that "CfA cannot state a plausible claim that OLC violated its obligation to make such reading-room documents publicly available simply by pointing to OLC's failure to publicize all of its opinions that provide controlling advice to executive branch officials and agencies on questions of law and that serve as precedent[,]" 278 F. Supp. 3d at 322 (internal quotation marks and citation omitted), because where "OLC does not speak with authority on the [client agency]'s policy[,]" *id.* at 321 (internal quotation marks and citation omitted), "an OLC opinion does not necessarily reflect the adopted policy of the agency that requests it[,]" *id.* at 323. In its opposition to the agency's motion to dismiss its second amended complaint, CfA "respectfully[] urges this Court to reconsider [this] prior holding[]" and to rule that all of OLC's formal written opinions are subject to section 552(a)(2)'s affirmative disclosure requirement. (Pl.'s Opp'n at 7; *see also id.* at 12–34.) The thrust of CfA's argument is that this Court was wrong to conclude otherwise. (*Id.*) But "it is well established that such assertions of error, standing alone, are insufficient" for a court to reconsider a prior ruling. *Pierce v. District of Columbia*, 146 F. Supp. 3d 197, 201 (D.D.C. 2015). Indeed, "where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it

again." *Singh v. George Washington Univ.*, 383 F.Supp.2d 99, 101 (D.D.C. 2005) (internal quotation marks and citation omitted); *see also, e.g., All. of Artists & Recording Companies, Inc. v. Gen. Motors Co.*, 306 F. Supp. 3d 413, 416 (D.D.C. 2016) (denying reconsideration).

CfA does not contend that the Court misunderstood its legal argument, nor does it point to any change in law or facts that might persuade this Court to revisit its prior ruling. *Cf. AFL-CIO v. N.L.R.B.*, No. 20-cv-0675, 2020 WL 3605656, at *3 (D.D.C. July 1, 2020) ("[I]t is clear beyond cavil that justice requires reconsideration when, among other things, a court has patently misunderstood a party or has made an error not of reasoning but of apprehension" (cleaned up)). To the contrary, if anything, intervening developments strongly suggest that this Court's prior holding was *not* erroneous. In a recent ruling, a panel of the D.C. Circuit explicitly blessed the reasoning in *Campaign for Accountability I*, by reaffirming that the Circuit's holding in *EFF* precludes a "universal claim" for the proactive publication of all OLC opinions simply because they are "controlling" and "binding[.]" *CREW II*, 922 F.3d at 486–87 (affirming another district court ruling concerning FOIA's reading-room provision, and noting the overlap between that case and the instant litigation); *see also id.* at 488–89 (explaining that *EFF* "adopted the broader rule that the OLC's formal written opinions are not the 'working law' of an agency simply because they are nominally 'controlling.'" (internal citation omitted)). Thus, this Court confidently adheres to its rejection of CfA's contention that all OLC opinions are subject to the FOIA's reading-room provision, and it respectfully declines CfA's invitation to reconsider that holding.

B. OLC Mischaracterizes The Reading-Room Provision And Fails To Accept The Amended Complaint's Allegations Concerning The Nature Of At Least Some Of Its Opinions

The Court also rejects OLC's contention that its formal written opinions can *never* qualify for affirmative disclosure under section 552(a)(2). (*See* Def.'s Mot. at 21–23.) OLC's argument in this regard rests, first, on the much-heralded assertion that the affirmative disclosure requirements of the FOIA's reading-room provision are "limited" to records that pertain to "agency regulation of private citizens' rights and obligations" (*id.* at 23), which effectively excludes OLC because that agency "does not regulate private parties" (*id.* at 21). OLC also insists that its written opinions are merely "legal advice documents—rather than final agency policy decisions"—and that only the latter are subject to disclosure under the reading-room provision. (*Id.* at 22.) Neither of these contentions carries the day, for OLC's cramped characterization of the scope of the reading-room provision does not comport with a plain reading of the statute, and the narrow aperture through which OLC views its own opinions improperly fails to account for the plausible opinion-related facts and circumstances that CfA alleges in its second amended complaint.

1. The FOIA's Reading-Room Provision Is Not Limited To Agency Records That Regulate Private Parties

The fact that "OLC does not issue any opinions in adversarial disputes involving private parties" (Def.'s Mot. at 22) seems neither here nor there, given that nothing in the plain text or history of section 552(a)(2), or in the few cases that have interpreted that statutory provision, establishes that the FOIA's affirmative obligation to publish certain agency records extends only to agency records that pertain to the regulation of private entities. In fact, as explained in Part I, *supra*, section 552(a)(2) specifies each

kind of document that an agency must "make available for public inspection," 5 U.S.C. § 552(a)(2), and none of the relevant categories explicitly states that, to be disclosable per section 552(a)(2), the record has to have been generated in connection with the agency's regulation of private parties. To be sure, section 552(a)(2)(C)—which is not invoked in the instant case—requires affirmative disclosure of "administrative staff manuals and instructions to staff *that affect a member of the public*[,]" *id.* § 552(a)(2)(C) (emphasis added), but no other subdivision of section 552(a)(2) is similarly qualified and, as a result, one cannot assume that Congress intended the public-impact limitation to apply to any of the other listed categories. *Cf. N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) ("If a sign at the entrance to a zoo says 'come see the elephant, lion, hippo, and giraffe,' and a temporary sign is added saying 'the giraffe is sick,' you would reasonably assume that the others are in good health."). Likewise, it is well established that Congress's primary concern when it enacted section 552(a)(2) was mandating the disclosure of government records that might constitute the working law of an agency, *see CREW II*, 922 F.3d at 486, and that objective obviously encompasses more than merely requiring automatic publication and indexing of the subset of agency records that pertain to the regulation of "private citizens' rights and obligations" (Def.'s Mot. at 23).

Thus, the Court is genuinely puzzled by OLC's insistence that the text of section 552(a)(2) "makes clear that the covered documents refer to typical adjudicatory and regulatory contexts involving private individuals, not internal agency documents." (*Id.*) Again, neither section 552(a)(2)(A) nor section 552(a)(2)(B) makes any such distinction. And the mere fact that section 552(a)(2) subsequently notes that certain

covered records—*i.e.*, "[a] final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public"—"may be relied on, used, or cited as precedent by an agency against a party other than an agency" only under specified circumstances, 5 U.S.C. § 552(a)(2), does not make OLC's argument (*see* Def.'s Mot. at 23) any less perplexing. This statutory provision simply prescribes the preclusive impact of an agency's violation of the affirmative disclosure provision in a certain context: a covered document may not be used *against* private parties, *unless* it has first been disclosed pursuant to the reading-room provision (or the private parties have sufficient notice). It says nothing about whether the statutory list of covered documents must be read to include only records that pertain to private parties.

If OLC's text-based argument for concluding that agency records must pertain to private parties in order to be subject to the reading-room provision (*see id.*) derives from subdivision (A) of section 552(a)(2)—which requires affirmative disclosure of "final opinions, including concurring opinions and dissenting opinions, as well as orders, made in the adjudication of cases[,]" 5 U.S.C. § 552(a)(2)(A)—then OLC has ignored the fact that "the adjudication of cases" is not defined in the statute as the resolution of disputes *involving private parties* (indeed, it is not defined at all), and non-private entities can certainly be involved in adversarial disputes that, when adjudicated, qualify as "cases." *See Comm. on Judiciary of United States House of Representatives v. McGahn*, 968 F.3d 755, 774 (D.C. Cir. 2020) (en banc) (rejecting the view that there is an Article III case or controversy "only when an individual right is implicated"); *see, e.g.*, *Dep't of Treasury v. F.L.R.A.*, 494 U.S. 922 (1990); *Nevada v. United States*, 463 U.S. 110 (1983); *United States v. Interstate Com. Comm'n*, 337 U.S.

426 (1949). In any event, the opinions that must be disclosed under section 552(a)(2)(A) are but one of the four categories of records that the reading-room provision covers, which means that, by its plain text, section 552(a)(2) transcends agency records that opine on the adjudication and regulation of private rights and responsibilities. *See, e.g.*, 5 U.S.C. § 552(a)(2)(B)–(C) (requiring affirmative disclosure of non-adjudicative agency materials, such as "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register[,]" and "administrative staff manuals and instructions to staff that affect a member of the public").

The legislative history of the FOIA's reading-room provision does not compel a different conclusion. Far from OLC's representation that "Congress's primary concern in [section] 552(a)(2) was with the adjudication of private rights" (*see* Def.'s Mot. at 23), the House Report to which OLC points demonstrates that Congress enacted section 552(a)(2) to counteract the vague authorization for withholding that existed in a prior version of the FOIA, which had "permit[ted] an agency's orders and opinions to be withheld from the public if the material is 'required for good cause found to be held confidential.'" H.R. Rep. 89-1497, at 29 (1966). Section 552(a)(2) was aimed at eliminating that "undefined authority for secrecy[,]" and the House Report clarified that the purpose of the provision was to provide an explicit requirement that agencies "make available statements of policy, interpretations, staff manuals, and instructions that affect any member of the public." *Id.*

It is also clear to this Court that OLC's assertion that the Supreme Court and the D.C. Circuit have embraced a reading of section 552(a)(2) that requires affirmative

disclosure only with respect to records that relate to an agency's adjudication of private rights (*see* Def.'s Mot. at 23–24 (citing cases)) is mistaken. To the contrary, the cited rulings are consistent with the thrust of Congress's intent in enacting the reading-room provision, which was to ensure that agencies do not develop, in some way, whether through individual adjudications or otherwise, a body of "secret law" through which to "discharge . . . [their] regulatory duties and [to] deal[] with the public." *Schlefer*, 702 F.2d at 244; *see also Reporters Comm.*, 489 U.S. at 772 (noting that the "basic purpose" of the FOIA is "to open agency action to the light of public scrutiny" (internal quotation marks and citation omitted)). And it is well established that the "working law" exception to an agency's authority to withhold records derives from more than a mere concern about how an agency has adjudicated private parties' rights; rather, requiring affirmative disclosure of the broad categories of records and information listed in section 552(a)(2) promotes the overarching objective of the FOIA, which is to codify "the citizens' right to be informed about what their government is up to." *Dep't of Def. v. F.L.R.A.*, 510 U.S. 487, 495 (1994) (internal quotation marks and citation omitted); *see also Elec. Privacy Info. Ctr. v. Dep't of Justice*, 442 F. Supp. 3d 37, 51–52 (D.D.C. 2020) ("The FOIA's policy of broad disclosure of government documents not only gives citizens access to the information on the basis of which government agencies make their decisions, thereby equipping the populace to evaluate and criticize those decisions, but also ensures an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed[.]" (cleaned up)).

Public Citizen v. Office of Management and Budget, 598 F.3d 865 (D.C. Cir.

2010), provides just one example of the D.C. Circuit's consistent holdings in this regard. In that case, the D.C. Circuit reviewed a legal challenge that sought disclosure of memoranda from the Office of Management and Budget ("OMB") that designated which agencies were permitted to submit their budgetary materials to Congress without first clearing them with OMB. *Id.* at 867–68. The court of appeals concluded that, because such memoranda "reflect[] OMB's formal or informal policy how it carries out its responsibilities[,]" *id.* at 875, which has "real-world effects on the behavior of . . . agencies[,]" *id.* at 872, those documents "fit comfortably within the working law framework" and, therefore, could not be withheld, *id.* at 875.

The D.C. Circuit opinion in *Vaughn v. Rosen ("Vaughn II")*, 523 F.2d 1136 (D.C. Cir. 1975) is yet another holding that casts doubt upon the OLC's view that the reading-room provision (and, thus, the working law doctrine) is limited to agency records that concern the rights of private parties. In *Vaughn*, the D.C. Circuit considered a FOIA request that was submitted by "a law professor doing research into the Civil Service Commission[.]" *Id.* at 1139. The professor sought to obtain certain personnel reports that the Civil Service Commission—an administrative agency tasked with "evaluat[ing], oversee[ing], and regulat[ing] the personnel management activities of the various federal agencies[,]" *Vaughn v. Rosen ("Vaughn I")*, 484 F.2d 820, 822 (D.C. Cir. 1973)—had prepared, *see Vaughn II*, 523 F.2d at 1139. The reports at issue had been created "in furtherance of [the Commission]'s responsibility to inspect agency personnel action and to determine whether that action conforms to applicable rules and regulations[,]" and they consisted of "the Commission's evaluation of the way the agencies' managers and supervisors are carrying out their personnel management

responsibilities." *Id.* (internal quotation marks and citation omitted). And the D.C. Circuit determined that the agency could not withhold these reports under Exemption 5, *see id.* at 1143–47, notwithstanding the fact that they manifestly concerned agency operations and did not involve any agency's regulation or adjudication of private rights.

Thus, contrary to OLC's representations, it is clear that what matters for FOIA purposes is whether the agency record at issue reflects agency determinations, interpretations, or policies that have the force of law, and not whether it involves the regulation or adjudication of private rights.

2. The D.C. Circuit's *EFF* Opinion Establishes That An OLC Opinion Has The Potential To Become The Working Law Of An Agency

To support its motion to dismiss CfA's amended complaint, OLC also vigorously restates its argument that OLC only "provides legal advice for other agencies, and those agencies in turn make policy decisions within the legal framework articulated by OLC[,]" and, therefore, section 552(a)(2) *never* requires the agency publish any of the legal opinions that it is has provided to other agencies. (Def.'s Mot. at 26–27.) OLC relies primarily on the D.C. Circuit's *EFF* ruling as the authority for this contention. But given this Court's explanation in *Campaign for Accountability I*, *EFF* compels a different result. To recap, "[i]n *EFF*, a FOIA requester sought access to a legal opinion that OLC had prepared for the Federal Bureau of Investigation ('FBI') in connection with an inquiry into the FBI's information-gathering techniques[,]" and "[t]he D.C. Circuit determined that the Department of Justice had properly withheld the OLC opinion pursuant to the deliberative process privilege under FOIA Exemption 5, because it was an advisory opinion, recommendation and deliberation comprising part of a process by which governmental decisions and policies are formulated, instead of a

document reflecting a decision or policy already made." *Campaign for Accountability I*, 278 F. Supp. 3d at 321 (cleaned up). Most notably for present purposes, "the *EFF* court reasoned that the OLC Opinion could not be the working law of the FBI *unless* the FBI adopted what OLC offered, because OLC does not speak with authority on the FBI's policy[.]" *Id.* (quoting *EFF*, 739 F.3d at 9) (cleaned up) (emphasis added).

This Court's primary intention when it described *EFF* in *Campaign for Accountability I* was to respond to CfA's argument that the binding nature of OLC opinions rendered *all* such opinions susceptible to affirmative disclosure pursuant to the FOIA's reading-room provision and, as a result, the Court emphasized both the D.C. Circuit's rejection of the argument that "the OLC opinion at issue constituted the FBI's 'working law' because it was 'controlling' and 'precedential,'" *id.* (quoting *EFF*, 739 F.3d at 9), and the panel's clear holding that "these indicia of a binding legal decision do[] not overcome the fact that OLC does not speak with authority on the FBI's policy[,]" *id.* (quoting *EFF*, 739 F.3d at 9). But this Court's analysis applies equally well to OLC's argument that *no* OLC opinions can ever qualify as an agency's working law, since OLC always and inevitably serves a mere advisory role. (*See* Def.'s Mot. at 22.) To the contrary, properly understood, the D.C. Circuit's decision in *EFF* plainly leaves open the possibility that a client agency (such as the FBI) can "adopt" the OLC's legal advice such that the OLC opinion becomes that agency's working law, or that OLC might, in some cases, "speak with authority" as to the client agency's policies and interpretations. *EFF*, 739 F.3d at 9.

Nor is the mere fact that "*all* of OLC's opinions constitute the opinion of the Attorney General on questions of law[,]" and therefore "OLC's opinions *always* advise

on legal questions, even if the agency that receives an OLC opinion will use it to inform a policy decision[,]" *Campaign for Accountability I*, 278 F. Supp. 3d at 323 (internal quotation marks and citations omitted), sufficient to dispose of the question of whether an OLC opinion can constitute an agency's working law. The *EFF* panel, too, characterized the OLC opinion at issue in that case as one that merely "describe[d] the legal parameters of what the FBI [wa]s *permitted* to do[.]" *EFF*, 739 F.3d at 10 (emphasis in original). However, that description of OLC's ubiquitous function does not establish whether, or to what extent, an OLC opinion can ever speak with authority on the client agency's policies, or whether a receiving agency's adoption of OLC's legal advice can trigger the OLC's affirmative disclosure obligations under the FOIA. In other words, just as the binding or conclusive nature of an OLC opinion is insufficient to support CfA's contention that all OLC opinions trigger section 552(a)(2)'s affirmative disclosure mandate, so, too, is the fact that all OLC opinions provide legal advice insufficient to establish that none of the agency's opinions ever qualify as the working law of the agency to which the opinion is directed. *See CREW II*, 922 F.3d at 487 n.2 (expressing "skeptic[ism] of the Department of Justice's position that *none* of the OLC's formal written opinions constitutes the 'working law' of an agency subject to disclosure under [the] FOIA's reading-room provision").

3. The OLC's Constitutional Avoidance And Rule-Of-Law Concerns With Respect To The Disclosure of OLC Opinions Are Misplaced

Lastly, this Court is unmoved by OLC's argument that mandating the proactive disclosure of any of its opinions would have unacceptable rule-of-law and constitutional repercussions that the Court ought to avoid by interpreting section 552(a)(2) to exclude OLC opinions altogether. (*See* Def.'s Mot. at 45–46.) In this regard, OLC frets that if

the FOIA's reading-room provision is applied to OLC opinions, then its client agencies would feel less comfortable seeking OLC's advice, and the "free and candid flow of information between agency decision-makers and their outside legal advisers" will end (*id.*), and it also fears that requiring the disclosure of its opinions might interfere with the agency's obligation to provide confidential and candid legal advice to assist the President in "effectively execut[ing] his duties under Article II" (*id.* at 47).

These assertions are plainly based on sheer speculation about the potential impact of any such mandated disclosure on the operations of the executive branch, and are also not within the province of a Rule 12(b)(6) motion to dismiss. What is more, given that OLC already routinely releases certain legal opinions voluntarily and without incident (*see* Am. Compl. ¶ 6)—which the agency's website confirms (*see supra* n.2)—these concerns seem largely overblown. At the very least, it is not implausible that mandatory releases of certain OLC opinions per section 522(a)(2) would have a *de minimis* effect. And because CfA's amended complaint does not specifically seek OLC opinions that "flow up the chain of command to the president" (Pl.'s Opp'n at 49), its pleading does not fail to state a claim on the grounds that the types of opinions that *are* alleged to be subject to mandatory disclosure *might* include such a record (*see id.* at 49–50 (arguing that, even if "formal written opinions to the president's closest advisors would implicate [interference] concerns, the government may argue that those opinions are exempt on summary judgment")).

C. CfA Has Identified Only One Ascertainable Set Of OLC Opinions That Plausibly Constitutes The Working Law Of The Recipient Agency For Section 552(a)(2) Purposes

Notably, CfA's amended complaint invokes only two of the four FOIA

provisions that list categories of agency records that Congress has made subject to affirmative disclosure: "final opinions . . . made in the adjudication of cases[,]" 5 U.S.C. § 552(a)(2)(A), and "statements of policy and interpretations which have been adopted by the agency[,]" *id.* § 552(a)(2)(B). Moreover, as explained above, CfA's amended complaint alleges that four types of OLC opinions must be provided to the public proactively under these two statutory provisions: opinions that (1) resolve inter-agency disputes (*see* Am. Compl. ¶¶ 35–38); (2) interpret an agency's non-discretionary legal obligations (*see id.* ¶¶ 41–44); (3) find that particular statutes are unconstitutional (*see id.* ¶¶ 45–46); and (4) adjudicate or determine private rights (*see id.* at ¶¶ 47–49).

For the reasons explained below, this Court finds that it is plausible that OLC opinions that resolve disputes between agencies qualify for affirmative disclosure under the FOIA's reading-room provision, but the other types of OLC opinions that CfA identifies do not plausibly fit into the statute's affirmative-disclosure classifications.

1. It Is Plausible That OLC Opinions That Resolve Disputes Between Agencies Qualify For Affirmative Disclosure Under Section 552(a)(2)

According to CfA's amended complaint, "a core function of the OLC is to adjudicate disputes between agencies concerning the law[,]" and, indeed, "Executive Order 12,146 directs executive agencies to submit legal disputes to the OLC for resolution." (Compl. ¶ 35.) Pursuant to that executive order, if two or more independent executive agencies "are unable to resolve a legal dispute between them . . . , each agency is encouraged to submit the dispute to the Attorney General[.]" *Executive Order 12146: Management of Federal Legal Resources* ("E.O. 12,146"), 44 Fed. Reg. 42,657, 42,658 at § 1-401 (July 18, 1979). Moreover, Executive Order 12,146 provides that if two or more non-independent executive agencies—*i.e.*, those

"whose heads serve at the pleasure of the President"—reach a similar impasse, "the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere." *Id.* § 1-402. And, by regulation, the Attorney General has delegated to OLC the authority to provide executive agencies with advice on questions of law, including resolving both types of inter-agency legal disputes. *See* 28 C.F.R. § 0.25.

According to CfA's amended complaint, such inter-agency disputes "constitute at least 25% of opinions rendered to outside agencies[.]" (Am. Compl. ¶ 35 (internal quotation marks and citation omitted).) A memorandum from former Acting Assistant Attorney General David Barron expounds upon the OLC's established role in resolving such conflicts; among that agency's many responsibilities, it is apparently "most likely to be necessary" for the OLC to write a formal written opinion "when the legal question is the subject of a concrete and ongoing [inter-agency] dispute[.]" (*Id.* (quoting Best Practices Memo at 2 (internal quotation marks omitted)).) Thus, CfA alleges that OLC opinions adjudicating inter-agency disputes "constitute both 'final opinions . . . made in the adjudication of cases'" and "statements of policy and interpretations which have been adopted by the agency" (*see id.* ¶ 38 (quoting 5 U.S.C. § 552(a)(2)(A)–(B)), and thus must be affirmatively disclosed to the public. For the following reasons, this Court finds that allegation sufficiently plausible to survive OLC's motion to dismiss.

a. *OLC Opinions That Resolve Disputes Between Agencies Are Plausibly "Final Opinions . . . Made In the Adjudication Of Cases"*

First of all, given the amended complaint's allegations, OLC opinions that resolve inter-agency disputes are plausibly characterized as "final opinions[.]" 5 U.S.C. § 552(a)(2)(A). It is indisputable that OLC writes formal opinions (*see* Best Practices

Memo at 1), and CfA's amended complaint describes OLC's role as the ultimate, authoritative adjudicator of disputes between different entities within the executive branch, such that the opinions that OLC issues in this context are plausibly final (*see* Am. Compl. ¶ 35). The plausibility of this contention is based, in part, on Article II's vesting of the "executive Power" in one President, U.S. Const. art. II, § 1, cl. 1, and OLC's alleged position as the presidential appointee that serves as "a neutral arbiter to resolve the differing stances" of two agencies, *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 92 (D.C. Cir. 1986). The formal, written OLC opinions that resolve such inter-agency disputes also plausibly qualify as "final opinions" insofar as they constitute the executive branch's self-professed "final word on the controlling law[.]" (Best Practices Memo at 2.) Indeed, there is no indication, at this stage, that such OLC opinions are only *tentative*, as would be the case if OLC's opinions must later be affirmed or reversed by a higher dispute resolution authority within the executive branch. (*Cf. id.* at 4 (explaining that OLC issues an opinion "only if" OLC receives "an agreement that [the client agency] will conform its conduct to [OLC's] conclusion").) Accordingly, it is at least plausible that those OLC opinions that resolve inter-agency disputes qualify as "final opinions" within the meaning of the FOIA's reading-room provision.

Such OLC opinions are also plausibly issued in the context of an "adjudication[.]" 5 U.S.C. § 552(a)(2)(A). The Best Practices Memo indicates that, before accepting a request for an opinion concerning a dispute between agencies, OLC typically requires each side to submit "a detailed memorandum setting forth the agency's own analysis of the question[,]" and OLC further requests that "the agencies

on each side of a dispute [] share their memoranda with the other side . . . so that [OLC] may have the benefit of reply comments, when necessary." (Best Practices Memo at 4.) OLC renders its decisions partly based on this briefing, and it may even "solicit the views of other agencies not directly involved in the opinion request that have subject-matter expertise or a special interest in the question presented." (*Id.*) Furthermore, the OLC's decisions derive from that agency's duty to "consider fully and address impartially the points raised on both sides" (*id.* at 5), which means that its process for resolving such disputes is adjudicative in nature, such that it is at least plausible that opinions rendered in this context fall within the scope of the plain meaning of section 552(a)(2)(A). *See, e.g.*, *Adjudication*, Black's Law Dictionary (11th ed. 2019) ("Adjudication is the effort to identify the rights of the contending parties now by identifying what were, in law, the rights and wrongs, or validity or invalidity, of their actions and transactions when entered upon and done." (cleaned up)); *see also* 5 U.S.C. §§ 551(6)–(7) (defining "adjudication" as the "agency process for the formulation of an order[,]" which is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making").

Finally, this Court finds that OLC's resolution of an inter-agency dispute concerning a question of law can plausibly be characterized as a "case[]" for section 552(a)(2)(A) purposes. OLC's insistence that the statute's reference to "cases" can only mean "adversarial disputes involving private parties" (*see* Def.s' Mot. at 22) is contrary to both ordinary practice and the common understanding of that term. *See, e.g.*, *S.E.C. v. F.L.R.A.*, 568 F.3d 990 (D.C. Cir. 2009) (adjudicating a dispute between

two independent agencies); *see also McGahn*, 968 F.3d at 774 (rejecting the view that there is an Article III case or controversy "only when an individual right is implicated"). And, as explained previously in Section IV.B.1, nothing in the text or legislative history of section 552(a)(2)(A) suggests that Congress meant to require affirmative disclosure of only final opinions that are rendered in the context of an agency's adjudication of disputes that involve private parties.

The fact that OLC opinions that resolve inter-agency disputes "do not finally dispose of any agency action" (Def.'s Mot. at 24) is also entirely beside the point. The reading-room provision does not predicate affirmative disclosure on whether the agency's "final opinions . . . made in the adjudication of cases" have a discernable policy impact. 5 U.S.C. § 552(a)(2)(A). Regardless, where two disputing agencies submit their disagreement to OLC for resolution consistent with Executive Order 12,146, it is at least plausible that OLC is "speak[ing] authoritatively" with respect to the agencies' legal dispute, *EFF*, 739 F.3d at 9, and as a result, OLC's resolution of that dispute plausibly qualifies as a final opinion made in the adjudication of a case within the meaning of section 552(a)(2)(A) of the FOIA.

b. *OLC Opinions Resolving Disputes Between Agencies Plausibly Qualify As "Statements Of Policy And Interpretations" That Are Adopted By OLC's Client Agencies*

OLC opinions arising out of inter-agency disputes also plausibly satisfy section 552(a)(2)(B), which requires affirmative disclosure of "statements of policy and interpretations" that have been "adopted" by the agencies to which they were addressed. 5 U.S.C. § 552(a)(2)(B); *see also CREW II*, 922 F.3d at 486. Once disputing agencies submit their legal disagreement to OLC, either because they have no other way of resolving their dispute or because they choose to do so pursuant to Executive Order

12,146, it is plausible that the OLC opinion that results from the resolution of an inter-agency disagreement is a statement of policy and/or interpretation adopted by the client agencies *ex ante*. (*See* Pl.'s Opp'n at 38–39.) This is because, according to CfA's amended complaint, OLC issues an opinion "only if the OLC has received in writing from that agency an agreement that it will conform its conduct to the OLC's conclusion" (Am. Compl. ¶ 3 (quoting Best Practices Memo at 4) (cleaned up)), and this arrangement suggests that the submission of an inter-agency dispute to OLC pursuant to Executive Order 12,146 is plausibly akin to arbitration within the executive branch: the agencies that resort to OLC as "a neutral arbiter to resolve the[ir] differing stances[,]" *Randolph-Sheppard*, 795 F.2d at 92, accept at the outset that OLC's resolution of their dispute will become the governing interpretation of that legal issue.

Consequently, CfA's allegations are significantly different from the circumstances presented in *EFF*. In that case, the D.C. Circuit considered whether an OLC opinion had to be disclosed as the working law of the FBI, where the FBI had solicited OLC's opinion regarding whether and to what extent that agency had the legal authority to request certain telephone records from service providers. *See* 739 F.3d at 4–5, 8. In holding that OLC's legal opinion did *not* constitute the working law of the FBI, and was thus subject to withholding pursuant to Exemption 5's deliberative-process privilege, the D.C. Circuit emphasized that OLC could not "authoritatively state or determine the agency's policy" with respect to the subject upon which OLC opined, *id.* at 8, and therefore that "the OLC Opinion could not be the 'working law' of the FBI unless the FBI 'adopted' what OLC offered[,]" *id.* at 9. Not so in the instant case; here, CfA plausibly alleges that, by virtue of a dispute-resolution system in which agencies

submit contested legal issues to OLC for resolution, OLC *does* "speak with authority" concerning those particular policies or legal interpretations, *id.*, and that such disputing agencies seek an authoritative settlement of their own interpretations when they turn to OLC for an adjudication of their conflicting positions.

Put another way, CfA's amended complaint plausibly alleges that OLC essentially serves as an authoritative arbiter of legal disputes that are submitted to it in this particular context, which is quite unlike the circumstance in which a single agency elects to solicit OLC's views as the first step in an anticipated policy-making process. Thus, whether or not the "agencies do something with [OLC's] predecisional legal advice" (Hr'g Tr., ECF No. 33, at 34:5–6), is largely irrelevant; OLC's opinion has *already* done the work of authoritatively resolving a dispute over a contested legal issue under circumstances in which it is plausible that the agencies submitted the dispute for resolution simply and solely for that purpose and with the understanding that OLC's determination would provide the governing interpretation moving forward. And, indeed, this Court finds it is entirely plausible that, once OLC settles a dispute among two or more agencies over a question of law, the client agencies that have submitted that dispute to OLC for resolution can be deemed to have "adopted" OLC's interpretation with respect to the matter that prompted their request for OLC's views within the meaning of section 552(a)(2)(B).

In sum, this Court concludes that CfA has stated a plausible claim that OLC opinions that resolve inter-agency disputes must be affirmatively disclosed under section 552(a)(2) of the FOIA, either because these types of OLC opinions are final opinions made in the adjudication of cases or because these types of OLC opinions

provide statements of policy and interpretations that have been adopted *ex ante* by the OLC's client agencies within the meaning of the FOIA's reading-room provision.

2. The Three Other Categories Of OLC Opinions That CfA Identifies In Its Amended Complaint Are Not Plausibly Subject To Affirmative Disclosure Under Section 552(a)(2)

In this Court's view, none of the three remaining categories of OLC opinions that appear in CfA's amended complaint—(a) opinions interpreting non-discretionary legal obligations; (b) opinions determining that particular statutes are unconstitutional; and (c) opinions adjudicating or determining private rights (*see* Am. Compl. ¶¶ 41–49)—plausibly qualifies as "final opinions . . . made in the adjudication of [such] cases[,]" or "statements of policy and interpretations which have been adopted by the agency[,]" 5 U.S.C. § 552(a)(2)(A)–(B), and therefore none is subject to affirmative disclosure under the FOIA. To understand why this is so, it important to clarify exactly what CfA alleges concerning each of these categories of OLC opinions.

With respect to the first category, according to the amended complaint, OLC "issues binding interpretations of statutes and other authorities that impose non-discretionary legal obligations on federal agencies." (Am. Compl. ¶ 41.) One of the examples that CfA points to in this regard is a 2007 OLC opinion that "address[es] whether the Defense of Marriage Act affected the obligation of the Social Security Administration to provide 'child's insurance benefits' to children of disabled parents in same-sex unions." (*Id.* ¶ 42 (referencing *Whether the Defense of Marriage Act Precludes the Nonbiological Child of a Member of a Vermont Civil Union From Qualifying for Child's Insurance Benefits Under the Social Security Act*, 31 Op. O.L.C. 243 (Oct. 16, 2007)).) OLC's 2007 opinion allegedly "determined that the Defense of

Marriage Act did not interfere with the Administration's legal obligation to provide social security benefits" (*id.*), and, according to CfA, this OLC opinion qualifies for affirmative disclosure because (1) it "had the effect of deciding the Social Security Administration's policies and the legal entitlement to social security benefits of the children of same-sex couples" (*id.*; *see also id.* at ¶ 41 (asserting that OLC opinions such as this one "have the effect of directly determining an agency's policies and practices, because the agency is under a non-discretionary obligation to comply with the authority at issue, and because the OLC's interpretation of that authority is binding on the agency")), and (2) it "adjudicated the entitlement to social security benefits of a specific child" (*id.* at ¶ 42).

However, there is no allegation in the amended complaint that any particular regulatory or statutory provision actually bestows upon OLC the authority to adjudicate the underlying dispute, let alone issue a final opinion concerning whether a particular child is or is not entitled to benefits. Rather, the 2007 OLC opinion simply determined that "[t]he Defense of Marriage Act would not prevent the non-biological child of a partner in a Vermont civil union from receiving child's insurance benefits under the Social Security Act." 31 Op. O.L.C. at 243. And while the underlying claim for social security benefits that prompted the Social Security Administration ("SSA") to turn to OLC for advice plausibly is most likely a "case" within the meaning of the reading-room provision, *see, e.g.*, *Ely v. Saul*, No. 18-cv-0557, 2020 WL 2744138, at *1–2 (D. Ariz. May 27, 2020) (adjudicating a case concerning a claim for spousal benefits brought by a decedent's same-sex spouse), it is the SSA—not OLC—that has discretion to adjudicate such matters, *see* 42 U.S.C. § 416(h)(2); all that OLC can do, when its

advice on a particular legal interpretation is sought, is opine over how that agency might resolve that particular legal issue within the broader case that the SSA has been tasked with adjudicating.

Moreover, and importantly, nothing in CfA's amended complaint gives rise to a reasonable inference that this first category of OLC opinions *necessarily* announces the client agency's working law from the moment the opinion is issued. Much like the opinion that OLC rendered to the FBI in *EFF*—where OLC could not speak with authority as to the FBI's policies—the SSA needed to adopt OLC's legal interpretation by acting upon it in the context of its adjudication or policy development in order for that opinion to be plausibly considered the SSA's working law, *see EFF*, 739 F.3d at 9—or, at the very least, CfA's pleading must allege circumstances that suggest that the SSA was constrained with respect to any subsequent decision to adopt and implement OLC's advice, such as a plausible *ex ante* decision to accept whatever OLC decides when the agency solicits OLC's interpretation. Instead, CfA's allegations amount to little more than the assertion that this category of OLC opinions is "binding" (*see* Am. Compl. ¶ 41), and it is well established that *that* categorization is insufficient to support a plausible claim that such opinions are the working law of the agency subject to disclosure under section 552(a)(2)(B). *See EFF*, 739 F.3d at 9; *see also CREW II*, 922 F.3d at 488–89.

Similar pleading flaws are evident with respect to CfA's allegations concerning OLC opinions that "determine that a congressional enactment is unconstitutional[.]" (Am. Compl. ¶ 45 (referring to *Constitutionality of the Direct Reporting Requirement in Section 802(e)(l) of the Implementing Recommendations of the 9/11 Commission Act of*

2007, 32 Op. O.L.C. 27 (Jan. 29, 2008); *see also id.* (alleging that OLC held that "certain reports of the Department of Homeland Security's Chief Privacy Officer be sent directly to Congress [] would be unconstitutional if applied to restrict the president's review of the reports")).) In this regard, CfA alleges that OLC's written opinions "have the unique effect of freeing agencies from congressional commands, and of essentially editing the text of the U.S. Code itself[,]" and, thus, they are "the OLC's purest expressions of policy, akin to legislative repeals or judicial invalidations of the law." (Pl.'s Opp'n at 45.) But CfA neither identifies circumstances that plausibly suggest that such opinions, however policy-infused, are "made in the adjudication of cases[,]" 5 U.S.C. § 552(a)(2)(A), nor does CfA allege any facts that support a reasonable inference that such OLC opinions are automatically "adopted" by the agency that solicited them for the purpose of section 552(a)(2)(B). And, indeed, *EFF* suggests that, even when OLC addresses the constitutionality of a legislative command, its opinions merely "describe[] the legal parameters of what the [client agency] is *permitted* to do," which is different from "stat[ing] or determin[ing] the [client agency]'s policy." *EFF*, 739 F.3d at 10 (emphasis in original).

To the extent that CfA is suggesting that OLC opinions that declare an act of Congress unconstitutional are an expression of OLC's *own* policy—separate and apart from the client agency that requested OLC's opinion (*cf.* Pl.'s Opp'n at 46–47 (asserting that "effectively invalidating congressional enactments determine[s] policy at that point in time, even if an agency later adopts a related policy"))—CfA fails to provide any allegations or arguments that could plausibly distinguish OLC legal opinions that pertain to the constitutionality of a statute from any other legal conclusion

that that agency makes. In either case, OLC is conceivably setting forth its own policy concerning what the law is or what it requires and, yet, such advice only qualifies as working law for FOIA purposes when it has been adopted by the client agency or is, in some way, authoritatively stating that agency's policy and/or interpretation. *See EFF*, 739 F.3d at 9; *CREW II*, 922 F.3d at 489–90.

CfA's allegations concerning OLC opinions that "directly or indirectly determine private rights" (Am. Compl. ¶ 47) fare no better. The amended complaint lists various examples of OLC opinions that concern "the availability of monetary relief for the violation of an agreement settling discrimination claims, the availability of back wages to redress improperly withheld pay, the entitlement to service credit under a federal retirement and disability plan, and the entitlement to social security benefits for the children of same-sex couples" (*id.* ¶ 48), and it alleges that all of these pronouncements by OLC are "similar in effect to administrative or judicial decisions concerning private rights" because "they define, at least in the first instance, the rights and liabilities of private individuals vis-à-vis the government" (*id.* ¶ 47; *see also id.* ¶ 48 (characterizing these kinds of OLC opinions as "decid[ing] the rights of classes of individuals as well as the rights of specific individuals whose claims, entitlements, or benefits the OLC was addressing").) But, here again, the amended complaint does not allege that OLC has the *authority* to "adjudicat[e]" the rights of the private individuals whom OLC's client agencies regulate. 5 U.S.C. § 552(a)(2)(A). And there are no facts that support any inference that OLC *controls* its client agencies' own policy-related determinations, such that OLC opinions concerning the rights of individuals necessarily qualify as pronouncements of the client agency's own policies and interpretations with respect to

that agency's adjudication of private rights. *Id.* § 552(a)(2)(B). At most, such OLC opinions are plausibly conceived of as "binding" and "controlling" statements of relevant law that the client agency *may* adopt and apply to a particular case adjudicating private rights, *EFF*, 739 F.3d at 9; however, as explained above, unless and until that adoption occurs, this category of OLC opinions is not plausibly within the scope of section 552(a)(2)(B) of the FOIA in light of *EFF*.

CfA's arguments to the contrary are unpersuasive. CfA's view is that "OLC opinions in this category conclusively resolve discrete legal questions that have the effect of resolving an agency's adjudication of private rights[,]" and thus resemble instances where "a federal court adjudicating private rights certifies a question of law to a state supreme court," because, "[w]hile the federal court ultimately issues the judgment in the case, the state court's interpretation of law is an essential component of that judgment." (Pl.'s Opp'n at 43.) This certification analogy misses the mark for at least two reasons. First, even if CfA's construct is accepted, it is indisputably the federal court (*i.e.*, the entity with jurisdiction over the underlying matter) that issues the final opinion adjudicating the case, not the state court whose opinion was solicited; thus, it would be the client agency (not OLC) that would have the affirmative disclosure obligation under section 552(a)(2)(A). Second, unlike state courts that have ultimate authority over certified questions of state law, CfA does not allege that any provision of law makes *OLC* the entity that conclusively determines the client agency's own interpretation regarding applicable law in a dispute concerning the allocation of private rights. In other words, there is no allegation in the amended complaint—short of the fact that OLC opinions are generally binding and controlling—that suggests that OLC

opinions concerning private rights actually and indisputably establish the client agency's policies or legal interpretations such that those OLC opinions may plausibly be subject to the FOIA's reading-room requirement.

In this regard, CfA would apparently have this Court *assume* that, even in cases where the client agency "ha[s] primary responsibility for adjudicating private rights," the agency's request for OLC's opinion on the matter is, in effect, the invocation of "a higher authority for an authoritative determination of the scope of those rights" such that "the legal determination issued in response to the request constitute[s] the agency's final legal position with respect to the private rights of a class of individuals[.]" (Pl.'s Opp'n at 43–44.) But courts need not accept such legal conclusions when evaluating a motion to dismiss under Rule 12(b)(6), *see Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994), and the plain holding of the D.C. Circuit in *EFF* belies CfA's assumption, *see EFF*, 739 F.3d at 9 (concluding that, notwithstanding the fact that the FBI sought OLC's legal advice, "the OLC Opinion could not be the 'working law' of the FBI unless the FBI 'adopted' what OLC offered" or if OLC could "speak with authority on the FBI's policy"). CfA has also failed to provide any precedents that adopt its "higher authority" characterization, given that the two D.C. Circuit cases upon which it relies involved an agency's invocation of a higher authority *within the agency itself*. *See Tax Analysts v. I.R.S.*, 117 F.3d 607, 617 (D.C. Cir. 1997) (holding that the FOIA's Exemption 5 did not apply to legal memoranda that the IRS's Office of Chief Counsel had distributed to the agency's field offices, on the ground that the memos amounted to "considered statements of the agency's legal position"); *Tax Analysts v. I.R.S.*, 294 F.3d 71, 81 (D.C. Cir. 2002) (holding that memoranda from the IRS's Office

of Chief Counsel did not qualify for Exemption 5 because the fact that they traveled "horizontally" to individual agency offices indicated that those statements actually represented the agency's "final legal position" on various matters).

* * *

In sum, CfA has failed to state a plausible claim that OLC opinions that (a) interpret non-discretionary legal obligations, (b) announce the unconstitutionality of particular statutes, or (c) make pronouncements that are applicable to the adjudication of private rights are subject to affirmative disclosure under the FOIA's reading-room provision. Unlike the allegations concerning OLC opinions that resolve inter-agency disputes, CfA's amended complaint does not allege that client agencies seek OLC's advice with respect to these categories of opinions pursuant to some presidential or congressional mandate, and it does not allege sufficient facts—beyond the general binding and controlling nature of OLC opinions—that could make it plausible that these OLC opinions necessarily amount to either "final opinions . . . made in the adjudication of cases[,]" or "statements of policy and interpretations which have been adopted by the agency" for the purpose of section 552(a)(2). 5 U.S.C. § 552(a)(2)(A)–(B).

V. CONCLUSION

Over the span of its prior Memorandum Opinion and the instant one, this Court has now firmly rejected the parties' polarized propositions that either *all* of OLC's opinions are subject to affirmative disclosure under the FOIA's reading-room provision, or *none* of them is required to be made automatically available per that statute. Instead, the Court concludes that one of the ascertainable sets of records that CfA has now identified plausibly qualifies as "final opinions . . . made in the adjudication of

cases[,]" 5 U.S.C. § 552(a)(2)(A), or "statements of policy and interpretations which have been adopted by the agency[,]" *id.* § 552(a)(2)(B): OLC opinions that adjudicate inter-agency disputes.

Notably, at this juncture, the Court's conclusion is based simply and solely on the amended complaint's allegations, and it might eventually determine, in the context of summary judgment, that OLC opinions resolving inter-agency disputes are *not* "statements of policy and interpretations" adopted by those agencies *ex ante*, or that "'adjudications' between two parts of the executive branch are not the kind of 'adjudication of cases' to which that section refers." *CREW II*, 922 F.3d at 491 (Pillard, J., dissenting). But, for now, the Court finds that CfA's amended complaint contains a plausible allegation that OLC is required to make its opinions that resolve inter-agency disputes available for "public inspection" under section 552(a)(2) of the FOIA, for the reasons explained above, and that the other categories of OLC opinions identified in the amended complaint do not plausibly violate the FOIA's reading-room provision. Therefore, as set forth in the accompanying Order, OLC's motion to dismiss is **GRANTED IN PART and DENIED IN PART**.

DATE: September 11, 2020

Ketanji Brown Jackson

KETANJI BROWN JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	No. 16-cv-1068 (KBJ)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendant's Motion to Dismiss (ECF No. 29) is **GRANTED IN PART and DENIED IN PART**.

DATE: September 11, 2020

Ketanji Brown Jackson
KETANJI BROWN JACKSON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 1:16-cv-1068 (KBJ)

DEFENDANT'S ANSWER TO AMENDED COMPLAINT

With all claims previously dismissed from this lawsuit except as to one category of Office of Legal Counsel (OLC) opinions—*i.e.*, those formal, written OLC opinions resolving inter-agency disputes pursuant to Executive Order 12,146, *see* ECF Nos. 40-41—defendant United States Department of Justice (DOJ) hereby answers plaintiff's Amended Complaint, *see* ECF No. 22, as follows:

Plaintiff's inclusion of footnotes throughout the Amended Complaint does not comply with Federal Rule of Civil Procedure 10(b), requiring that allegations be stated "in numbered paragraphs, each limited as far as practicable to a single set of circumstances." As such, no response is required to these footnotes. To the extent a response is required, when appropriate, footnotes are discussed in the relevant numbered paragraph below.

1. This paragraph consists of plaintiff's characterization of its claims and plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied that DOJ has failed to comply with 5 U.S.C. § 552(a).

2. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, admit that executive branch agencies have

traditionally treated OLC's legal opinions as "binding" in the sense that an opinion's conclusion is customarily treated as an authoritative interpretation of the law within the Executive Branch, but aver that this feature (or any other feature) of OLC's advice does not change the privileged, pre-decisional nature of such legal advice.

3. This paragraph consists of plaintiff's characterization of a law review article and a government document, to which no response is required. Defendant further avers that the article and document speak for themselves and respectfully refers the Court to the article and document for a full and accurate statement of their contents. The remaining allegations of this paragraph consist of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, admit that executive branch agencies have traditionally treated OLC's legal opinions as "binding" in the sense that an opinion's conclusion is customarily treated as an authoritative interpretation of the law within the Executive Branch, but aver that this feature (or any other feature) of OLC's advice does not change the privileged, pre-decisional nature of such legal advice.

4. This paragraph consists of plaintiff's characterization of a news article, to which no response is required. Defendant further avers that the article speaks for itself and respectfully refers the Court to the article for a full and accurate statement of its contents. The remaining allegations of this paragraph consist of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, admit that executive branch agencies have traditionally treated OLC's legal opinions as "binding" in the sense that an opinion's conclusion is customarily treated as an authoritative interpretation of the law within the Executive Branch, but aver that this feature (or any other feature) of OLC's advice does not change the privileged, pre-decisional nature of such legal advice.

5. This paragraph consists of plaintiff's legal conclusions, to which no response is required. Further, the purported OLC opinions listed in this paragraph do not appear to relate to the sole remaining claim in this case—*i.e.*, those formal, written OLC opinions resolving inter-agency disputes pursuant to Executive Order 12,146—and therefore no response is required. To the extent a response is required, admit that OLC has addressed a variety of different topics in its formal written opinions.

6. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, admit that OLC has published some, but not all, of its formal written opinions; but denied that OLC's opinions constitute "secret law," and denied that OLC has not complied with 5 U.S.C. § 552(a)(2).

7. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, admit that OLC has published approximately 1300 opinions, and aver that OLC has fully complied with § 552(a)(2).

8. This paragraph consists of plaintiff's characterization of its claims and plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied that OLC has failed to comply with 5 U.S.C. § 552(a)(2).

9. This paragraph consists of plaintiff's legal conclusions, to which no response is required.

10. This paragraph consists of plaintiff's legal conclusions, to which no response is required.

11. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in this paragraph.

12. This paragraph consists of plaintiff's legal conclusions, to which no response is required.

13. This paragraph consists of plaintiff's legal conclusions, to which no response is required.

14. This paragraph consists of plaintiff's legal conclusions, to which no response is required.

15. This paragraph consists of plaintiff's legal conclusions, to which no response is required.

16. This paragraph consists of plaintiff's legal conclusions, to which no response is required.

17. This paragraph consists of plaintiff's characterization of an Attorney General opinion, to which no response is required. Defendant further avers that the opinion speaks for itself and respectfully refers the Court to the opinion for a full and accurate statement of its contents. The remaining allegations of this paragraph consist of plaintiff's legal conclusions, to which no response is required.

18. This paragraph consists of plaintiff's legal conclusions, to which no response is required.

19. This paragraph consists of plaintiff's characterization of a law review article, to which no response is required. Defendant further avers that the article speaks for itself and respectfully refers the Court to the article for a full and accurate statement of its contents. The remaining allegations of this paragraph consist of plaintiff's legal conclusions, to which no response is required.

20. This paragraph consists of plaintiff's characterization of a government website, to which no response is required. Defendant further avers that the website speaks for itself and respectfully refers the Court to the website for a full and accurate statement of its contents. The remaining allegations of this paragraph consist of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, admit that executive branch agencies have traditionally treated OLC's legal opinions as "binding" in the sense that an opinion's conclusion is customarily treated as an authoritative interpretation of the law within the Executive Branch, but aver that this feature (or any other feature) of OLC's advice does not change the privileged, pre-decisional nature of such legal advice.

21. This paragraph consists of plaintiff's characterization of a government document, to which no response is required. Defendant further avers that the document speaks for itself and respectfully refers the Court to the document for a full and accurate statement of its contents. The remaining allegations of this paragraph consist of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, admit that executive branch agencies have traditionally treated OLC's legal opinions as "binding" in the sense that an opinion's conclusion is customarily treated as an authoritative interpretation of the law within the Executive Branch, but aver that this feature (or any other feature) of OLC's advice does not change the privileged, pre-decisional nature of such legal advice.

22. This paragraph consists of plaintiff's characterization of a government document, to which no response is required. Defendant further avers that the document speaks for itself and respectfully refers the Court to the document for a full and accurate statement of its contents.

23. This paragraph consists of plaintiff's characterization of a government document, to which no response is required. Defendant further avers that the document speaks for itself and respectfully refers the Court to the document for a full and accurate statement of its contents.

24. This paragraph consists of plaintiff's characterization of a government document, to which no response is required. Defendant further avers that the document speaks for itself and respectfully refers the Court to the document for a full and accurate statement of its contents.

25. This paragraph consists of plaintiff's characterization of a government document, to which no response is required. Defendant further avers that the document speaks for itself and respectfully refers the Court to the document for a full and accurate statement of its contents.

26. This paragraph consists of plaintiff's characterization of a law review article, to which no response is required. Defendant further avers that the article speaks for itself and respectfully refers the Court to the article for a full and accurate statement of its contents. The remaining allegations of this paragraph consist of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, admit that executive branch agencies have traditionally treated OLC's legal opinions as "binding" in the sense that an opinion's conclusion is customarily treated as an authoritative interpretation of the law within the Executive Branch, but aver that this feature (or any other feature) of OLC's advice does not change the privileged, pre-decisional nature of such legal advice.

27. This paragraph consists of plaintiff's characterization of a law review article, to which no response is required. Defendant further avers that the article speaks for itself and respectfully refers the Court to the article for a full and accurate statement of its contents.

28. This paragraph consists of plaintiff's characterization of a law review article, to which no response is required. Defendant further avers that the article speaks for itself and

respectfully refers the Court to the article for a full and accurate statement of its contents. Footnote 25 likewise consists of plaintiff's characterization of law review articles, to which no response is required. Defendant further avers that the articles speak for themselves and respectfully refers the Court to the articles for a full and accurate statement of their contents. The remaining allegations of footnote 25 consist of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, admit that executive branch agencies have traditionally treated OLC's legal opinions as "binding" in the sense that an opinion's conclusion is customarily treated as an authoritative interpretation of the law within the Executive Branch, but aver that this feature (or any other feature) of OLC's advice does not change the privileged, pre-decisional nature of such legal advice.

29. This paragraph consists of plaintiff's legal conclusions and characterization of unspecified OLC opinions, to which no response is required. To the extent a response is required, admit that executive branch agencies have traditionally treated OLC's legal opinions as "binding" in the sense that an opinion's conclusion is customarily treated as an authoritative interpretation of the law within the Executive Branch, but aver that this feature (or any other feature) of OLC's advice does not change the privileged, pre-decisional nature of such legal advice.

30. This paragraph consists of characterization of an OLC opinion, to which no response is required. Defendant further avers that the OLC opinion speaks for itself and respectfully refers the Court to the opinion for a full and accurate statement of its contents. The remainder of this paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, admit that executive branch agencies have traditionally treated OLC's legal opinions as "binding" in the sense that an opinion's conclusion is customarily treated as an authoritative interpretation of the law within the Executive Branch, but

aver that this feature (or any other feature) of OLC's advice does not change the privileged, pre-decisional nature of such legal advice.

31. This paragraph consists of plaintiff's characterization of law review articles, to which no response is required. Defendant further avers that the articles speak for themselves and respectfully refers the Court to the articles for a full and accurate statement of their contents. The remainder of this paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, admit that executive branch agencies have traditionally treated OLC's legal opinions as "binding" in the sense that an opinion's conclusion is customarily treated as an authoritative interpretation of the law within the Executive Branch, but aver that this feature (or any other feature) of OLC's advice does not change the privileged, pre-decisional nature of such legal advice.

32. This paragraph and footnote 30 consist of plaintiff's characterization of a purported statement and a government document, to which no response is required. Defendant further avers that the statement and document speak for themselves and respectfully refers the Court to the statement and the document for a full and accurate statement of their contents. The remainder of this paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, admit that executive branch agencies have traditionally treated OLC's legal opinions as "binding" in the sense that an opinion's conclusion is customarily treated as an authoritative interpretation of the law within the Executive Branch, but aver that this feature (or any other feature) of OLC's advice does not change the privileged, pre-decisional nature of such legal advice.

33. This paragraph consists of plaintiff's characterization of law review articles, to which no response is required. Defendant further avers that the articles speak for themselves and

respectfully refers the Court to the articles for a full and accurate statement of their contents. The remainder of this paragraph consists of plaintiff's characterization of its claim, to which no response is required.

34. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied that OLC's opinions fall within the scope of FOIA's affirmative-disclosure provisions. Admit that executive branch agencies have traditionally treated OLC's legal opinions as "binding" in the sense that an opinion's conclusion is customarily treated as an authoritative interpretation of the law within the Executive Branch, but aver that this feature (or any other feature) of OLC's advice does not change the privileged, pre-decisional nature of such legal advice.

35. This paragraph consists of plaintiff's characterization of an Executive Order, a government document, and a law review article, to which no response is required. Defendant further avers that these materials speak for themselves and respectfully refers the Court to the materials for a full and accurate statement of their contents. The remainder of this paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied that OLC "adjudicates" disputes between agencies.

36. This paragraph consists of plaintiff's characterization of an OLC opinion, to which no response is required. Defendant further avers that the OLC opinion speaks for itself and respectfully refers the Court to the OLC opinion for a full and accurate statement of its contents. The remainder of this paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied that the OLC opinion was issued as part of OLC "adjudicating" a dispute between agencies.

37. This paragraph consists of plaintiff's characterization of an OLC opinion, to which no response is required. Defendant further avers that the OLC opinion speaks for itself and respectfully refers the Court to the OLC opinion for a full and accurate statement of its contents. The remainder of this paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied that the OLC opinion was issued as part of OLC "adjudicating" a dispute between agencies.

38. This paragraph and footnote 36 consist of plaintiff's characterization of an OLC opinion, to which no response is required. Defendant further avers that the OLC opinion speaks for itself and respectfully refers the Court to the OLC opinion for a full and accurate statement of its contents. The remainder of this paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied that OLC "adjudicates" disputes between agencies, and denied that OLC opinions fall within 5 U.S.C. § 552(a)(2)(A) or § 552(a)(2)(B).

39-49. These paragraphs relate to claims that have now been dismissed, and therefore no response is required.

50. Admit that OLC received a letter from plaintiff dated March 22, 2016. The remaining allegations of this paragraph consist of plaintiff's characterization of correspondence from plaintiff to OLC, to which no response is required. Defendant further avers that the correspondence speaks for itself and respectfully refers the Court to the correspondence for a full and accurate statement of its contents.

51. Admit that OLC responded to plaintiff in a letter dated May 26, 2016. The remaining allegations of this paragraph consist of plaintiff's characterization of correspondence from OLC to plaintiff, to which no response is required. Defendant further avers that the

correspondence speaks for itself and respectfully refers the Court to the correspondence for a full and accurate statement of its contents.

52. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied.

53. Admit that plaintiff filed this lawsuit on June 8, 2016, and that the district court previously granted the Government's motion to dismiss on October 6, 2017. The remainder of this paragraph consists of plaintiff's legal conclusions and characterizations of pleadings and decisions in this case, to which no response is required. Defendant further avers that the pleadings and decisions speak for themselves and respectfully refers the Court to them for a full and accurate statement of their contents.

54. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied.

55. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied.

56. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied.

57. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied.

58. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied.

59. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied.

60. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied.

61. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied.

62. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied.

63. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied.

64. This paragraph consists of plaintiff's legal conclusions, to which no response is required. To the extent a response is required, denied.

The remaining paragraphs of the Amended Complaint consist of plaintiff's legal conclusions and plaintiff's requested relief, to which no response is required. To the extent a response is deemed necessary, Defendant denies the allegations contained in the remaining paragraphs of the Complaint and further avers that plaintiff is not entitled to any relief.

Defendant hereby denies all allegations in plaintiff's Amended Complaint not expressly admitted or denied.

WHEREFORE, having fully answered plaintiff's Amended Complaint, Defendant asserts that plaintiff is not entitled to the relief requested, or to any relief whatsoever, and requests that this action be dismissed in its entirety with prejudice and that Defendant be given such other relief as this Court deems proper, including costs and disbursements.

Dated: September 25, 2020

Respectfully Submitted,

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Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	)	Civil Action No. 1:16-cv-1068 (KBJ)

STIPULATION

The parties in the above-captioned matter hereby stipulate to the following facts for purposes of this litigation.[1]

HISTORY AND NATURE OF OLC

1. The Office of Legal Counsel ("OLC") is a component of the Department of Justice ("DOJ" or the "Department"). The core function of OLC, pursuant to a delegation of authority from the Attorney General, is to provide controlling legal advice to executive branch officials on questions of law involving the operations of the executive branch.

2. A statute deriving from the Judiciary Act of 1789 charges the Attorney General with providing advice and opinions on questions of law when required by the President and rendering opinions on questions of law when requested to do so by the heads of executive departments. 28 U.S.C. §§ 511–512.

3. In 1925, the Attorney General delegated his opinion-writing authority to the Office of the Solicitor General. In 1933, it was delegated to the newly created Office of the

[1] Although the parties stipulate to the facts contained herein, this stipulation does not constitute agreement that all of the facts have relevance to the remaining dispute.

Assistant Solicitor General. In 1950, the responsibility for the Department's opinion-writing was transferred out of the Office of the Solicitor General to a newly created office, then known as the Executive Adjudications Division. Renamed the Office of Legal Counsel in 1953, the Office is headed by an Assistant Attorney General who reports to the Attorney General, including through the Deputy Attorney General.

4. Under current regulations, OLC is tasked with preparing the formal opinions of the Attorney General, rendering opinions and legal advice to agencies[2] of the Government, and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet. *See* 28 C.F.R. § 0.25(a).[3]

5. OLC rarely issues opinions unless it is requested to do so by one or more agencies. Requests may be made through formal letters or memoranda, informally by email, or orally, in person or by telephone. Requests may be received directly by OLC, or they may arrive through other components in the Department, including through the offices of the Attorney General, Deputy Attorney General, or Associate Attorney General.

6. OLC is often asked to provide advice and analysis with respect to very difficult and unsettled issues of law. Requests for opinions may arise in connection with highly complex activities of the executive branch on matters that can be controversial.

[2] OLC provides advice to a variety of entities within the Executive Branch, including to the Attorney General and other divisions within DOJ. Some of these entities are agencies or departments, while others are components of larger agencies or of the Executive Office of the President. For clarity, this Stipulation refers to all such entities as "agencies."

[3] The operative regulation refers to opinions prepared for the Attorney General's signature as "formal" and those rendered by OLC as "informal." This terminology dates to an earlier period, when all OLC opinions were termed "informal." *See* Foreword, 1 Op. O.L.C., at v-vi (1977). This distinction is no longer maintained, and the parties agree that OLC renders "formal opinions" as defined by Plaintiff's FOIA request.

OLC OPINIONS RESOLVING INTERAGENCY DISPUTES

7. OLC is occasionally asked to provide legal opinions in order to resolve disputes between two or more agencies about questions of law. The attorneys currently at OLC do not recall an instance in which a request for a formal written opinion resolving an interagency dispute has ever been declined by OLC when two or more agencies maintained conflicting legal positions.

8. Interagency disputes may come to OLC in different forms. For example, two or more agencies may indicate in a joint request to OLC that they disagree about a question of law. By Executive Order, "[w]henever two or more Executive agencies are unable to resolve a legal dispute between them . . . each agency is encouraged to submit the dispute to the Attorney General." Exec. Order No. 12146, 44 Fed. Reg. 42657 (July 18, 1979), § 1-401. When those agencies are both "agencies whose heads serve at the pleasure of the President," they "shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere." *Id.* § 1-402. Although the Attorney General is authorized to resolve such disputes, this role is as a general matter delegated to OLC as part of its authority under 25 C.F.R. § 0.25(a) to "render[] . . . legal advice to the various agencies of the Government." Some OLC opinions resolving such disputes expressly cite Executive Order No. 12146, but others do not.

9. OLC may also resolve interagency disputes submitted to it by a single agency. On rare occasions, OLC issues an opinion in such circumstances even where the other agency or agencies implicated in the dispute oppose OLC's resolution of the matter. *See, e.g.*, Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding, 11 Op. O.L.C. 92, 98 (1987).

10. Additionally, OLC may resolve disputes between agencies that emerge during the course of OLC's opinion-writing process. Such disputes often become apparent once OLC has solicited views from another interested agency and that agency's submission makes clear that it does not agree with some aspect of the views expressed by the initial requesting agency. *See, e.g.*, Obligation of Federal Agencies to Pay Stormwater Assessments Under the Clean Water Act, 35 Op. O.L.C. 1 (2011).

11. Although in some cases OLC addresses opinions resolving interagency disputes to both agencies, in other cases OLC addresses such an opinion only to the agency that raised the question to OLC, despite the existence of another agency with differing views. *Compare, e.g.*, Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply With Orders Issued by EEOC Administrative Judges, 27 Op. O.L.C. 24 (2003) (addressed jointly to the General Counsel of the Department of the Navy and the Acting Deputy General Counsel of the Equal Employment Opportunity Commission), *with, e.g.*, Disposition of Proceeds from the Sale of Government Buildings Acquired with Social Security Trust Funds, 34 Op. O.L.C. 263 (2010) (addressed only to the Acting General Counsel of the Social Security Administration, but noting a disagreement on a point of law between that agency and the General Services Administration).

12. OLC opinions resolving interagency disputes are not stored separately or separately identified within OLC's records. With respect to opinions issued in the future, OLC would have the capability of maintaining records reflecting which formal opinions addressed interagency disputes in instances where OLC was aware at the time it rendered the opinions.

OLC'S PROCESS FOR RESOLVING INTERAGENCY DISPUTES

13. OLC's ordinary process for providing formal written opinions is set forth in a

publicly available memorandum. *See* Memorandum from David J. Barron, Acting Assistant Attorney General to Attorneys of the Office of Legal Counsel, *Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf ("Best Practices Memo"). That memorandum applies to situations in which OLC writes formal opinions resolving interagency disputes. A true and correct copy of the Best Practices Memo is attached hereto as **Exhibit A**. The Best Practices Memo speaks for itself, and the parties stipulate to its contents as an accurate description of OLC's best practices for the preparation of formal written opinions, including those resolving interagency disputes.

14. To date, OLC has not updated the Best Practices Memo, and there have been no similar memoranda detailing OLC's process for writing, issuing, or publishing formal opinions since the Best Practices Memo was published.

15. Pursuant to the Best Practices Memo, OLC may solicit the views of outside agencies when "consistent with the confidentiality interests of the requesting agency." Best Practices Memo at 3. To the best of the knowledge of current OLC attorneys, in the context of opinions resolving interagency disputes OLC has rarely declined to request the views of an outside agency due to the confidentiality interests of one of the requesting agencies. In those circumstances, the confidentiality interests at issue are most commonly the "need to know" requirement for classified information or law enforcement sensitivities.

16. If OLC believes that soliciting the views of another agency would be a necessary precondition to OLC being able to provide its advice, OLC may refuse to provide an opinion if the requesting agency did not agree to share information with that agency. The current OLC attorneys do not recall an instance in which OLC refused to provide a formal written opinion for

this reason.

17. Consistent with the Best Practices Memo, when resolving interagency disputes, OLC expects "agencies on each side of a dispute to share their memoranda with the other side, or permit [OLC] to share them." Best Practices Memo at 3. Although not every communication between OLC and the interested agencies is shared with every other interested agency, OLC's current attorneys are not aware of any instances in which an agency involved in an interagency dispute has refused a request to share its memoranda with all other agencies involved in the dispute.

PUBLICATION AND DISCLOSURE OF OLC OPINIONS

18. OLC may share drafts or final versions of formal, written opinions with other agencies in the executive branch, particularly if an aspect of the analysis bears on an agency's area of expertise, or if the legal conclusions therein are relevant to their operations. OLC does not require the consent of requesting agencies before disseminating an opinion within the executive branch, although OLC may ask the requesting agency's views about distribution and takes into account the requesting agency's confidentiality interests.

19. OLC publishes bound volumes containing some of its formal written opinions. OLC published its first such volume in 1980, containing opinions issued in 1977, at the direction of then-Attorney General Griffin Bell. According to the preface for the 1977 volume of OLC opinions, Bell "believed that [OLC opinions'] value as precedents and as a body of executive law on important matters would be enormously enhanced by publication and distribution in a manner similar to those of the formal opinions of the Attorney General." Foreword, 1 Op. O.L.C., at vi (1977).

20. These bound volumes do not include all of OLC's formal written opinions. The opinions published in OLC's 1977 volume, for example, represented "approximately one-quarter of the written opinions rendered by" OLC in that year. *Id.* at v.

21. OLC's process for selecting and preparing opinions for publication and for disclosure by other means is further described in the 2010 Best Practices Memo at 5–6. The Best Practices Memo speaks for itself, and the parties stipulate to its contents as an accurate description of OLC's best practices for the publication and disclosure of formal written opinions, including those resolving interagency disputes.

DATED: July 15, 2021

Respectfully submitted,

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July 16, 2010

MEMORANDUM FOR ATTORNEYS OF THE OFFICE

Re: Best Practices for OLC Legal Advice and Written Opinions[*]

By delegation, the Office of Legal Counsel (OLC) exercises the Attorney General's authority under the Judiciary Act of 1789 to provide the President and executive agencies with advice on questions of law. OLC's core function, pursuant to the Attorney General's delegation, is to provide controlling advice to Executive Branch officials on questions of law that are centrally important to the functioning of the Federal Government. In performing this function, OLC helps the President fulfill his or her constitutional duties to preserve, protect, and defend the Constitution, and to "take Care that the Laws be faithfully executed." It is thus imperative that the Office's advice be clear, accurate, thoroughly researched, and soundly reasoned. The value of OLC advice depends upon the strength of its analysis. OLC must always give candid, independent, and principled advice—even when that advice is inconsistent with the aims of policymakers. This memorandum reaffirms the longstanding principles that have guided and will continue to guide OLC attorneys in all of their work, and then addresses the best practices OLC attorneys should follow in providing one particularly important form of controlling legal advice the Office conveys: formal written opinions.

I. Guiding Principles

Certain fundamental principles guide all aspects of the Office's work. As noted above, OLC's central function is to provide, pursuant to the Attorney General's delegation, controlling legal advice to Executive Branch officials in furtherance of the President's constitutional duties to preserve, protect, and defend the Constitution, and to "take Care that the Laws be faithfully executed." To fulfill this function, OLC must provide advice based on its best understanding of what the law requires—not simply an advocate's defense of the contemplated action or position proposed by an agency or the Administration. Thus, in rendering legal advice, OLC seeks to provide an accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration's or an agency's pursuit of desired practices or policy objectives. This practice is critically important to the Office's effective performance of its assigned role, particularly because it is frequently asked to opine on issues of first impression that are unlikely to be resolved by the courts—a circumstance in which OLC's advice may effectively be the final word on the controlling law.

[*] This memorandum updates a prior memorandum, "Best Practices for OLC Opinions," issued May 16, 2005.

In providing advice, the Office should focus intensively on the central issues raised by a request and avoid addressing issues not squarely presented by the question before it. As much as possible, the Office should be attentive to the particular facts and circumstances at issue in the request, and should avoid issuing advice on abstract questions that lack the concrete grounding that can help focus legal analysis. And regardless of the Office's ultimate legal conclusions, it should strive to ensure that it candidly and fairly addresses the full range of relevant legal sources and significant arguments on all sides of a question. To be sure, the Office often operates under severe time constraints in providing advice. In such instances, the Office should make clear when it needs additional time to permit proper and thorough review of the relevant issues. If additional time is not available, the Office should make clear that its advice has been given with only limited time for review, and thus that more thorough consideration of the issue has not been possible.

On any issue involving a constitutional question, OLC's analysis should focus on traditional sources of constitutional meaning, including the text of the Constitution, the historical record illuminating the text's meaning, the Constitution's structure and purpose, and judicial and Executive Branch precedents interpreting relevant constitutional provisions. Particularly where the question relates to the authorities of the President or other executive officers or the allocation of powers between the Branches of the Government, precedent and historical practice are often of special relevance. On other questions of interpretation, OLC's analysis should be guided by the texts of the relevant documents, and should use traditional tools of construction in interpreting those texts. Because OLC is part of the Executive Branch, its analyses may also reflect the institutional traditions and competencies of that branch of the Government. For example, OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question, but as with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes.

Finally, OLC's analyses may appropriately reflect the fact that its responsibilities also include facilitating the work of the Executive Branch and the objectives of the President, consistent with the law. As a result, unlike a court, OLC will, where possible and appropriate, seek to recommend lawful alternatives to Executive Branch proposals that it decides would be unlawful. Notwithstanding this aspect of OLC's mission, however, its legal analyses should always be principled, forthright, as thorough as time permits, and not designed merely to advance the policy preferences of the President or other officials.

II. Opinion Preparation

While the Office frequently conveys its controlling legal advice in less formal ways, including through oral presentations and by e-mail, the best practices for preparing the Office's formal written opinions merit particular attention. These opinions take the form of signed memoranda, issued to an Executive Branch official who has requested the Office's opinion.

A. ***Evaluating opinion requests***. Each opinion request is assigned initially to at least one Deputy Assistant Attorney General and one Attorney-Adviser, who will review the question

presented and any relevant primary materials, prior OLC opinions, and leading cases to determine preliminarily whether the question is appropriate for OLC advice and whether it appears to merit a signed written opinion. The legal question presented should be focused and concrete; OLC generally avoids providing a general survey of an area of law or issuing broad, abstract legal opinions. There should also be a practical need for the written opinion; OLC should avoid giving unnecessary advice, such as where it appears that policymakers are likely to move in a different direction. A written opinion is most likely to be necessary when the legal question is the subject of a concrete and ongoing dispute between two or more executive agencies. If we are asked to provide an opinion to an executive agency the head of which does not serve at the pleasure of the President (*e.g.*, an agency head subject to a "for cause" removal restriction), our practice is to issue our opinion only if we have received in writing from that agency an agreement that it will conform its conduct to our conclusion. As a prudential matter, OLC generally avoids opining on questions likely to arise in pending or imminent litigation involving the United States as a party (although the Office may provide assistance to Justice Department divisions engaged in ongoing litigation). Finally, the opinions of the Office should address legal questions prospectively; OLC avoids opining on the legality of past conduct (though from time to time we may issue prospective opinions that confirm or memorialize past advice or that necessarily bear on past conduct in addressing an ongoing legal issue).

B. ***Soliciting the views of interested agencies***. Before we proceed with an opinion, our general practice is to ask the requesting agency for a detailed memorandum setting forth the agency's own analysis of the question; in many cases, we will have preliminary discussions with the requesting agency before it submits a formal opinion request to OLC, and the agency will be able to provide its analysis along with the opinion request. (A detailed analysis is not required when the request comes from the Counsel to the President, the Attorney General, or one of the other senior management offices of the Department of Justice.) In the case of an interagency dispute, we will ask each side to submit such a memorandum. We expect the agencies on each side of a dispute to share their memoranda with the other side, or permit us to share them, so that we may have the benefit of reply comments, when necessary. When appropriate and helpful, and consistent with the confidentiality interests of the requesting agency, we will also solicit the views of other agencies not directly involved in the opinion request that have subject-matter expertise or a special interest in the question presented. We will not, however, circulate a copy of an opinion request to third-party agencies without the prior consent of the requesting agency.

C. ***Researching, outlining, and drafting***. A written OLC opinion is the product of a careful and deliberate process. After reviewing agency submissions and relevant primary materials, including prior OLC opinions and leading judicial decisions, the Deputy and Attorney-Adviser should meet to map out a plan for researching the issues and preparing an outline and first draft of the opinion. The Deputy and Attorney-Adviser should set target deadlines for each step in the process and should meet regularly to review progress on the opinion. Consultation with others in the Office is encouraged, as are meetings, as needed, with other Deputies and the Assistant Attorney General (AAG). An early first draft often will help identify weaknesses or holes in the analysis requiring greater attention than initially anticipated. As work on the opinion progresses, it will generally be useful for the Deputy and the Attorney-Adviser to meet from time to time with the AAG to discuss the status and direction of the draft opinion.

The Office must strive in our opinions for clear and concise analysis and a balanced presentation of arguments on each side of an issue. If the opinion resolves an issue in dispute between executive agencies, we should take care to consider fully and address impartially the points raised on both sides. In doing so, we generally avoid characterizing agencies with differing views as the "prevailing" and "losing" parties. OLC's obligation is to provide its view of the correct answer on the law, taking into account all reasonable counterarguments, whether provided by an agency or not.

D. ***Review of draft opinions***. Before an OLC opinion is signed it undergoes rigorous review within OLC. When the primary Deputy and the Attorney-Adviser responsible for the opinion are satisfied that the draft opinion is ready for secondary review, they should provide the draft opinion to a second Deputy for review. Along with the draft opinion, the Attorney-Adviser should provide to the second Deputy copies of any key materials, including statutes, regulations, important cases, relevant prior OLC opinions, and the views memoranda received from interested agencies. Once the second Deputy review is complete and the second Deputy's comments and proposed edits have been addressed, the primary Deputy should circulate the draft opinion for final review by the AAG, the remaining Deputies (though it is not necessary in each case for each of them to review an opinion), and any other attorneys within the Office with relevant expertise.

Because OLC issues opinions pursuant to the Attorney General's delegated authority, the Office keeps the Office of the Attorney General and the Office of the Deputy Attorney General apprised of its work through regular meetings and other communications. This practice ensures that the leadership offices are kept informed about OLC's work, and also permits OLC to benefit from suggestions about additional interests OLC should consider or views OLC should solicit before finalizing its opinions, which are nevertheless based on its own independent analysis and judgment. The Office also keeps the Office of the Counsel to the President appropriately apprised of its work.

Consistent with its tradition of providing advice that reflects its own independent judgment, OLC does not ordinarily circulate draft opinions outside the Office. However, as part of our process, we may share an aspect of a draft opinion's analysis with the requestor or others who will be affected by the opinion, particularly when their submissions have not addressed issues that arise in the draft. In some other cases, OLC may share the substance of an entire draft opinion or the opinion itself within the Department of Justice or with others, primarily to ensure that the opinion does not misstate any facts or legal points of interest.

E. ***Finalizing opinions***. Once all substantive work on an opinion is complete, it must undergo a thorough cite-check by our paralegal staff to ensure that all citations are accurate and that the opinion is consistent with the Office's rules of style. After all cite-checking changes have been approved and implemented, the final opinion should be printed on bond paper for signature. Each opinion ready for signature should include a completed opinion control sheet signed by the primary and secondary Deputies and the Attorney-Adviser. If the opinion is unclassified, after it is signed and issued to the requesting agency it must be loaded into our ISYS database and included in the Office's unclassified Day Books. A separate file containing a copy of the signed opinion, the opinion control sheet, and copies of key materials not readily

available, such as the original opinion request, the views memoranda of interested agencies, and obscure sources cited in the opinion, should also be retained in our files for future reference.

III. Opinion Publication and Other Public Disclosure

Pursuant to Executive Order 12146 and directives from the Attorney General, OLC has a longstanding internal process in place for regular consideration and selection of significant opinions for official publication. At the first stage of the process, the attorneys who have worked on an opinion and the front-office personnel who have reviewed it are asked for a recommendation about whether the opinion should be published. After these recommendations are collected, the opinion is forwarded to an internal publication review committee, made up of attorneys from the front office, as well as at least one career attorney. If the committee makes a preliminary judgment that the opinion should be published, the opinion is circulated to the requesting Executive Branch official or agency and any other agencies that have interests that might be affected by publication, to solicit their views on whether there are reasons why the opinion should not be published. Taking this input into account, the publication committee then makes a final judgment about whether the Office should publish the opinion. After the Office makes a final decision to publish an opinion, the opinion is rechecked and reformatted for online publication; a headnote is prepared and added to the opinion; and the opinion is posted to the Department of Justice Web site at www.usdoj.gov/olc/opinions.htm. All opinions posted on the Web site as published opinions of the Office are eventually published in OLC's hardcover bound volumes.

In deciding whether an opinion is significant enough to merit publication, the Office considers such factors as the potential importance of the opinion to other agencies or officials in the Executive Branch; the likelihood that similar questions may arise in the future; the historical importance of the opinion or the context in which it arose; and the potential significance of the opinion to the Office's overall jurisprudence. In applying these factors, the Office operates from the presumption that it should make its significant opinions fully and promptly available to the public. This presumption furthers the interests of Executive Branch transparency, thereby contributing to accountability and effective government, and promoting public confidence in the legality of government action. Timely publication of OLC opinions is especially important where the Office concludes that a federal statutory requirement is invalid on constitutional grounds and where the Executive Branch acts (or declines to act) in reliance on such a conclusion. In such situations, Congress and the public benefit from understanding the Executive's reasons for non-compliance, so that Congress can consider those reasons and respond appropriately, and so that the public can be assured that Executive action is based on sound legal judgment and in furtherance of the President's obligation to take care that the laws, including the Constitution, are faithfully executed.

At the same time, countervailing considerations may lead the Office to conclude that it would be improper or inadvisable to publish an opinion that would otherwise merit publication. For example, OLC will decline to publish an opinion when disclosure would reveal classified or other sensitive information relating to national security. (Declassification decisions are made by the classifying agency, not OLC.) Similarly, OLC will decline to publish an opinion if doing so would interfere with federal law enforcement efforts or is prohibited by law. OLC will also

decline to publish opinions when doing so is necessary to preserve internal Executive Branch deliberative processes or protect the confidentiality of information covered by the attorney-client relationship between OLC and other executive offices. The President and other Executive Branch officials, like other public- and private-sector clients, sometimes depend upon the confidentiality of legal advice in order to fulfill their duties effectively. An example is when an agency requests advice regarding a proposed course of action, the Office concludes it is legally impermissible, and the action is therefore not taken. If OLC routinely published its advice concerning all contemplated actions of uncertain legality, Executive Branch officials would be reluctant to seek OLC advice in the early stages of policy formulation—a result that would undermine rule-of-law interests. Some OLC opinions also may concern issues that are of little interest to the public or others besides the requesting agency. OLC's practice of circulating opinions selected for publication to the requesting Executive Branch official or agency and any other agencies that have interests that might be affected by publication helps ensure that the Office is aware of these competing considerations. In cases where delaying publication may be sufficient to address any of these concerns, OLC will reconsider the publication decision at an appropriate time.

OLC also receives a large number of Freedom of Information Act (FOIA) requests for its unpublished legal opinions. The volume of such requests has increased substantially in recent years, particularly with respect to opinions concerning national security matters. By definition, these requests seek disclosure of documents that the Office has not yet chosen to release pursuant to its own internal publication procedures. In responding to these requests, OLC is guided by President Obama's January 21, 2009 FOIA Memorandum and Attorney General Holder's March 19, 2009 FOIA memorandum. As the Attorney General's memorandum observes, various FOIA exemptions protect "national security, . . . privileged records, and law enforcement interests." OLC will consult with relevant agencies in determining whether particular requested documents fall within and should be withheld under any applicable FOIA exemptions. If a requested document does not fall within an exemption, OLC will disclose it promptly. In addition, OLC will consider disclosing documents even if they technically fall within the scope of a FOIA exemption. As the Attorney General also stated in his March 19, 2009 memorandum, "an agency should not withhold information simply because it may do so legally." In particular, consistent with President Obama's directions, the Office will not withhold an opinion merely to avoid embarrassment to the Office or to individual officials, to hide possible errors in legal reasoning, or "because of speculative or abstract fears."

OLC has a unique mission, and a long-established tradition—sustained across many administrations—as to how its work should be carried out. The Office depends not only upon its leadership but also upon each of its attorneys to ensure that this tradition continues.

David J. Barron
Acting Assistant Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	No. 1:16-cv-1068 (Calendar Committee)

DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

Pursuant to Local Civil Rule 7(h), Defendant United States Department of Justice hereby submits the following statement of material facts as to which Defendant contends there are no genuine issues in connection with its motion for summary judgment under Federal Rule of Civil Procedure 56(b):

(1) A statute deriving from the Judiciary Act of 1789 charges the Attorney General with providing advice and opinions on questions of law when required by the President and rendering opinions on questions of law when requested to do so by the heads of executive departments. Stipulation ¶ 2 (ECF No. 56).

(2) The Attorney General has delegated that function to the Office of Legal Counsel ("OLC"), a component of the Department of Justice. Stipulation ¶¶ 1, 3.

(3) Under current regulations, OLC renders opinions and legal advice to agencies of the Government. Stipulation ¶ 4.

(4) OLC assists the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet. Stipulation ¶ 4.

(5) OLC rarely issues opinions unless it is requested to do so by one or more agencies. Requests may be made through formal letters or memoranda, informally by email, or orally, in person or by telephone. Stipulation ¶ 5.

(6) OLC is often asked to provide advice and analysis with respect to very difficult and unsettled issues of law. Stipulation ¶ 6.

(7) Requests for OLC opinions may arise in connection with highly complex activities of the executive branch on matters that can be controversial. Stipulation ¶ 6.

(8) OLC is occasionally asked to provide legal opinions in order to resolve disputes between two or more agencies about questions of law. Stipulation ¶ 7.

(9) Interagency disputes may come to OLC through a joint request from two or more agencies, or through a submission by a single agency. Stipulation ¶¶ 8-9.

(10) OLC opinions resolving interagency disputes are not stored separately or separately identified within OLC's records. Stipulation ¶ 12.

(11) OLC's process for providing formal written opinions addressing interagency disputes is set forth in the OLC's Best Practices Memo, which speaks for itself. Stipulation ¶ 13 (citing Memorandum from David J. Barron, Acting Assistant Attorney General to Attorneys of the Office of Legal Counsel, Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010)) (ECF No. 56-1).

(12) *Applicability of the Cargo Preference Act to the Transportation of Alaskan Oil to the Strategic Petroleum Reserve*, 7 Op. O.L.C 139 (1983), is an OLC opinion that addresses an interagency dispute.

(13) *Scope of the Environmental Protection Agency's Discretion to Adopt Any One of Three Alternative Interpretations of the Mitchell-Conte Amendment to the Clean Air Act*, 13 Op. O.L.C. 105 (1989), is an OLC opinion that addresses an interagency dispute.

(14) *Applicability of Government Corporation Control Act to "Gain Sharing Benefit" Agreement*, 24 Op. O.L.C. 212 (2000), is an OLC opinion that addresses an interagency dispute.

(15) *The Authority of the Equal Employment Opportunity Commission To Order a Federal Agency To Pay a Monetary Award To Remedy a Breach of a Settlement Agreement*, 38 Op. O.L.C. 22 (2014), is an OLC opinion that addresses an interagency dispute.

(16) *Payment of Back Wages to Alien Physicians Hired Under H-IB Visa Program,* 32 Op. O.L.C. 47 (2008), is an OLC opinion that addresses an interagency dispute.

Dated: July 15, 2021

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	No. 1:16-cv-1068 (Calendar Committee)

PLAINTIFF'S STATEMENT OF MATERIAL FACTS
PURSUANT TO LOCAL CIVIL RULE 7(h)(1)

I. History and Nature of the OLC

1. The Office of Legal Counsel ("OLC") is a component of the Department of Justice ("DOJ") that provides controlling legal advice to executive agencies by rendering formal written opinions that resolve questions of law upon the request of one or more agencies. Stip. ¶¶ 1, 3–5, ECF No. 56.

2. In performing this function, the OLC exercises the delegated authority of the attorney general under the Judiciary Act of 1789. *Id.*

3. The Judiciary Act of 1789 requires the attorney general to issue opinions on questions of law when requested to do so by the heads of executive departments. Stip. ¶ 2.

4. In 1849, then–Attorney General Reverdy Johnson explained that the attorney general's opinions issued under the Judiciary Act "should be considered as law." Declaration of Stephanie Krent ("Krent Decl.") Ex. 1, *Opinions of Attorneys General and Decisions of Auditors*, 5 Op. Att'y Gen. 97, 97 (1849).

5. In 1854, then–Attorney General Caleb Cushing stated that the attorney general's opinions "officially define the law, in a multitude of cases, where his decision is in practice final and conclusive" and that the opinion-writing function is "quasi judicial." Krent Decl. Ex. 2, *Office and Duties of Attorney General*, 6 Op. Att'y Gen. 326, 333–34 (1854).

6. In 1893, then–Attorney General Richard Olney wrote that, in passing the Judiciary Act, Congress "contemplates that the official opinions signed or [e]ndorsed in writing by the Attorney-General shall have some actual and practical force. Congress's intention cannot be doubted that administrative officers should regard them as law until withdrawn by the Attorney-General or overruled by the courts . . . ." Krent Decl. Ex. 3, *Comptroller – Solicitor of the Treasury – Attorney-General*, 20 Op. Att'y Gen. 654, 659 (1893).

7. The office now known as the OLC originated in 1925, when the attorney general delegated his opinion-writing authority to the Office of the Solicitor General. Stip. ¶ 3. In 1950, the responsibility for the Justice Department's opinion-writing was transferred to a newly created office, then known as the Executive Adjudications Division. *Id*. Renamed as the Office of Legal Counsel in 1953, the Office is headed by an assistant attorney general that reports directly to the deputy attorney general. *Id*.

8. The OLC's currently operative Best Practices Memo explains that formal written opinions issued by the OLC frequently provide "the final word on the controlling law." Stip. Ex. A, Memorandum from David J. Barron, Acting Assistant Attorney General to Attorneys of the Office of Legal Counsel, *Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010) (the "Best Practices Memo") at 1, ECF No. 56-1.

II. OLC Opinions Resolving Interagency Disputes

9. The OLC often issues opinions that resolve legal disputes between two or more agencies. Stip. ¶ 7.

10. Executive Order 12,146, issued in 1979 by then–President Carter, requires that all executive agencies whose heads "serve at the pleasure of the President" submit interagency disputes to the attorney general for resolution. Stip. ¶ 8. Independent agencies are also encouraged to submit their disputes to the attorney general. *Id.* By regulation, the role of resolving disputes between two or more agencies has been delegated to the OLC. *Id*.

11. In 1989, then–Attorney General Richard Thornburgh wrote a letter to Congress that explained the unique role that opinions resolving interagency disputes play within the executive branch: "OLC has long performed this role, which is reflected in Executive Order 12146 (enclosed), issued during the Carter Administration and continued in effect ever since. As you can see, its purpose was to authorize the Attorney General, and, hence, OLC, to resolve legal disputes within the Executive Branch. Without the ability to issue binding opinions, OLC's review function would have less effect in resolving disputes and maintaining a consistent legal position within the Administration." Krent Decl. Ex. 6, *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Const. Rights of the H. Comm. on the Judiciary*, H.R. Rep. No. 101-134, at 122 (1989) (Letter from Richard Thornburgh, Att'y Gen. of the United States).

12. Then–Attorney General William P. Barr likened the OLC's resolution of interagency disputes to judicial review in 1992: "Because each agency has its own staff of lawyers, disputes between them come before the Attorney General with legal positions already well-established. Each agency will usually have legal authority or good arguments to support its view. The Office of Legal Counsel requires each side to come in with briefs, just as if it were a judicial proceeding. Deciding among the positions being taken requires the Attorney General—or in most cases the Office of Legal Counsel—to function as a judge." *See* Krent Decl. Ex. 5, William P.

Barr, *Attorney General's Remarks, Benjamin N. Cardozo School of Law, November 15, 1992*, 15 Cardozo L. Rev. 31, 37 (1993).

13. The OLC may become aware of interagency disputes in multiple ways. Stip. ¶ 10. The agencies with conflicting legal positions may jointly submit a request for OLC to resolve their dispute. *Id*. A single agency may also notify the OLC that it is involved in a dispute with another agency. *Id*. Finally, a dispute between agencies may emerge during the course of the OLC's opinion-writing when the agencies submit differing views of the law to the OLC. *Id*.

14. The OLC is not aware of any instance in which it declined to resolve an interagency dispute when the agencies in the dispute maintained their conflicting legal positions. Stip. ¶ 7. The issuance of a formal written opinion is also most likely to be necessary when the OLC is acting in its dispute-resolution role. Best Practices Memo at 3.

15. The following are examples of OLC opinions resolving interagency disputes:

a. *Application of the Endangered Species Act of 1972 to the Sale of Sperm Whale Oil by the General Services Administration* (1974). Krent Decl. Ex. 7.

b. *Whether Reservists Must Exhaust Available Leave Under 5 U.S.C. § 6323(b) Before Taking Leave Under 5 U.S.C. § 6323(a)*, 36 Op. O.L.C. 129 (2012). *Id.* Ex. 8.

c. *EEOC Authority to Order Federal Agency to Pay for Breach of Settlement Agreement*, 38 Op. O.L.C. 1 (2014). *Id.* Ex. 9.

d. *Authority of the Department of Labor to Control the Disclosure of Federal Employees' Compensation Act Records Held by the United States Postal Service*, 36 Op. O.L.C. 217 (2012). *Id.* Ex. 10.

e. *Payment of Back Wages to Alien Physicians Hired Under H-1B Visa Program*, 32 Op. O.L.C. 47 (2008). *Id.* Ex. 11.

f. *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act*, 21 Op. O.L.C. 109 (1997). *Id.* Ex. 12.

g. *Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply with Orders Issued by EEOC Administrative Judges*, 27 Op. O.L.C. 24 (2003). *Id.* Ex. 13.

h. *Obligating Carryover Funds in Violation of OMB Zero-Dollar Apportionment Rule*, 40 Op. O.L.C. 90 (2016). *Id*. Ex. 14.

i. *Service Credit for Retirement Annuities of USPS Employees When USPS Has Not Made Required Contribution*, 35 Op. O.L.C. 181 (2011). *Id.* Ex. 15.

j. *Obligation of Federal Agencies to Pay Stormwater Assessments Under the Clean Water Act*, 35 Op. O.L.C. 1 (2011). *Id.* Ex. 16.

k. *Disposition of Proceeds from the Sale of Government Buildings Acquired with Social Security Trust Funds*, 34 Op. O.L.C. 263 (2010). *Id.* Ex. 17.

l. *Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding*, 11 Op. O.L.C. 92 (1987). *Id.* Ex. 18.

III. The OLC's Process for Resolving Interagency Disputes

16. When resolving interagency disputes, OLC attorneys follow the process outlined in the Best Practices Memo. Stip. ¶ 13; *see also* Best Practices Memo at 1.

17. The OLC solicits detailed memoranda from each agency involved in the dispute, which explain each agency's analysis of the legal questions at issue. Best Practices Memo at 3. The OLC may also solicit memoranda from additional agencies who may have subject-matter expertise or a special interest in the question presented. *Id*.; Stip. ¶¶ 15–16.

18. The OLC may also request that one or more agencies submit reply memoranda responding to the arguments made by other agencies. Best Practices Memo at 3.

19. The OLC ensures that all agencies who submit memoranda share them with all other agencies who are involved in the dispute. Stip. ¶ 17.

20. When drafting an opinion, OLC attorneys are instructed to fully consider each point raised in agencies' memoranda, as well as traditional sources of constitutional and statutory meaning, including the relevant textual provision, the text's structure and purpose, and judicial and executive branch precedent. Best Practices Memo at 2, 4.

21. OLC attorneys are also instructed to focus their analysis on the central legal dispute presented by an opinion request, to avoid opining on abstract questions, and to address the arguments raised by each party to the interagency dispute. Best Practices Memo at 2, 4.

22. Before an opinion is signed and finalized, it undergoes what the OLC considers a "rigorous review" process. Best Practices Memo at 4. The attorney assigned to draft a formal written opinion and the primary deputy responsible for the opinion may exchange several drafts of an opinion. *Id*. Once they are satisfied the opinion is ready for secondary review, they provide the draft opinion to a second deputy attorney general. *Id*. Once that review is complete and all comments and edits have been addressed, the opinion is next circulated to the assistant attorney general in charge of the OLC, all remaining deputy attorney generals, and any other attorneys within the OLC who have relevant expertise. *Id*.

23. During the review process, the OLC may also discuss the opinion or share a draft opinion with the Office of the Attorney General, the Office of the Deputy Attorney General, or the agencies involved in the dispute. Best Practices Memo at 4. The OLC may also share a draft with other executive agencies, particularly when the draft relates to an agency's area of expertise or its

operations. Stip. ¶ 18. The OLC does not require the consent of the agencies involved in the dispute before sharing drafts in this manner. *Id*.

24. Once an opinion is completed and cite-checked, it is printed on bond paper and signed by the attorney who drafted the opinion. Best Practices Memo at 4. Completed unclassified opinions are added to the OLC's database and included in its "day books." *Id*. The OLC also maintains separate files of all signed opinions, opinion control sheets, and copies of the original request, the submissions of interested agencies, and any obscure sources cited in the opinion so that future OLC attorneys may refer back to the opinion and its underlying sources. *Id*. at 4–5.

25. Although the OLC does not currently store or identify its opinions resolving interagency disputes separately from other formal opinions, it has the capacity to maintain records that would identify opinions resolving interagency disputes in the future. Stip. ¶ 12.

26. After they are finalized, OLC opinions resolving interagency disputes are accorded precedential weight. Best Practices Memo at 2. OLC attorneys may cite past completed opinions in the way they would cite a judicial opinion, and may not depart from a past opinion's holding unless it has been formally withdrawn. *Id*.

27. OLC opinions resolving interagency disputes may be shared with other agencies in the executive branch without the prior consent of the agencies involved in the dispute. Stip. ¶ 18.

28. The OLC publishes a subset of its formal written opinions to members of the public in bound volumes. Stip. ¶ 19. In the foreword to the first volume of published OLC opinions, then–Attorney General Griffin Bell explained that the opinions' "value as precedents and as a body of executive law on important matters would be enormously enhanced by publication and distribution in a manner similar to those of the formal opinions of the Attorney General." *Id*.

29. The OLC has never published all of its formal written opinions. *Id*. ¶ 20. Its internal publication review committee decides whether to publish opinions on a case-by-case basis, taking into account the views of the requesting agencies and the attorneys within the OLC who drafted or reviewed the opinion. Best Practices Memo at 5; Stip. ¶ 21.

August 12, 2021

Respectfully submitted,

/s/ *Alex Abdo*

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	No. 1:16-cv-1068 (Calendar Committee)

PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT PURSUANT TO LOCAL CIVIL RULE 7(h)(1)

Pursuant to Local Civil Rule 7(h)(1), Plaintiff Campaign for Accountability hereby submits this response to Defendant's Statement of Material Facts in conjunction with its cross-motion for summary judgment under Federal Rule of Civil Procedure 56(a).

Defendant's Statement	Plaintiff's Response
1. A statute deriving from the Judiciary Act of 1789 charges the Attorney General with providing advice and opinions on questions of law when required by the President and rendering opinions on questions of law when requested to do so by the heads of executive departments. Stipulation ¶ 2 (ECF No. 56).	1. Not disputed.
2. The Attorney General has delegated that function to the Office of Legal Counsel ("OLC"), a component of the Department of Justice. Stipulation ¶¶ 1, 3.	2. Not disputed.

3. Under current regulations, OLC renders opinions and legal advice to agencies of the Government. Stipulation ¶ 4.	3. Not disputed.
4. OLC assists the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet. Stipulation ¶ 4.	4. Not disputed.
5. OLC rarely issues opinions unless it is requested to do so by one or more agencies. Requests may be made through formal letters or memoranda, informally by email, or orally, in person or by telephone. Stipulation ¶ 5.	5. Not disputed.
6. OLC is often asked to provide advice and analysis with respect to very difficult and unsettled issues of law. Stipulation ¶ 6.	6. Not disputed.
7. Requests for OLC opinions may arise in connection with highly complex activities of the executive branch on matters that can be controversial. Stipulation ¶ 6.	7. Not disputed.
8. OLC is occasionally asked to provide legal opinions in order to resolve disputes between two or more agencies about questions of law. Stipulation ¶ 7.	8. Not disputed.
9. Interagency disputes may come to OLC through a joint request from two or	9. Not disputed.

more agencies, or through a submission by a single agency. Stipulation ¶¶ 8-9.	
10. OLC opinions resolving interagency disputes are not stored separately or separately identified within OLC's records. Stipulation ¶ 12.	10. Not disputed.
11. OLC's process for providing formal written opinions addressing interagency disputes is set forth in the OLC's Best Practices Memo, which speaks for itself. Stipulation ¶ 13 (citing Memorandum from David J. Barron, Acting Assistant Attorney General to Attorneys of the Office of Legal Counsel, Best Practices for OLC Legal Advice and Written Opinions (July 16, 2010)) (ECF No. 56-1).	11. Not disputed.
12. *Applicability of the Cargo Preference Act to the Transportation of Alaskan Oil to the Strategic Petroleum Reserve*, 7 Op. O.L.C 139 (1983), is an OLC opinion that addresses an interagency dispute.	12. Not disputed.
13. *Scope of the Environmental Protection Agency's Discretion to Adopt Any One of Three Alternative Interpretations of the Mitchell-Conte Amendment to the Clean Air Act*, 13 Op. O.L.C. 105 (1989), is an OLC opinion that addresses an interagency dispute.	13. Not disputed.
14. *Applicability of Government Corporation Control Act to "Gain Sharing Benefit" Agreement*, 24 Op. O.L.C. 212 (2000), is an OLC opinion that addresses an interagency dispute.	14. Not disputed.

15. *The Authority of the Equal Employment Opportunity Commission To Order a Federal Agency To Pay a Monetary Award To Remedy a Breach of a Settlement Agreement*, 38 Op. O.L.C. 22 (2014), is an OLC opinion that addresses an interagency dispute.	15. Not disputed.
16. *Payment of Back Wages to Alien Physicians Hired Under H-IB Visa Program,* 32 Op. O.L.C. 47 (2008), is an OLC opinion that addresses an interagency dispute.	16. Not disputed.

August 12, 2021

Respectfully submitted,

/s/ *Alex Abdo*

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Counsel for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	No. 1:16-cv-1068 (Calendar Committee)

DECLARATION OF STEPHANIE KRENT

Pursuant to 28 U.S.C. § 1746, I, Stephanie Krent, declare and state as follows:

1. I am a staff attorney at the Knight First Amendment Institute at Columbia University (the "Knight Institute"). I have served in this role since September 16, 2019.

2. I represent Plaintiff Campaign for Accountability in this matter.

3. I submit this declaration in support of Plaintiff's Cross-Motion for Summary Judgment.

4. Attached hereto as Exhibit 1 is a true and correct copy of an opinion written by then–Attorney General Reverdy Johnson, entitled *Opinions of Attorneys General and Decisions of Auditors*, 5 Op. Att'y Gen. 97 (1849).

5. Attached hereto as Exhibit 2 is a true and correct copy of an opinion written by then–Attorney General Caleb Cushing, entitled *Office and Duties of Attorney General*, 6 Op. Att'y Gen. 326 (1854).

6. Attached hereto as Exhibit 3 is a true and correct copy of an opinion written by then–Attorney General Richard Olney entitled *Comptroller – Solicitor of the Treasury – Attorney General*, 20 Op. Att'y Gen. 654 (1893).

7. Attached hereto as Exhibit 4 is a true and correct copy of an April 1, 2016 letter from then–Assistant Attorney General Peter Kadzik to Representatives Jason Chaffetz and Elijah E. Cummings in response to inquiries sent by the Representatives regarding the Office of Legal Counsel ("OLC").

8. Attached hereto as Exhibit 5 is a true and correct copy of a law review article memorializing remarks made by then–Attorney General William P. Barr, entitled *Attorney General's Remarks, Benjamin N. Cardozo School of Law, November 15, 1992*, 15 Cardozo L. Rev. 31 (1993).

9. Attached hereto as Exhibit 6 is a true and correct copy of a May 17, 1990 letter from then–Attorney General Richard Thornburgh to Representative Don Edwards, contained within a conference report entitled *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary House of Representatives*, H.R. Rep. No. 101-134 (1989).

10. Attached hereto as Exhibit 7 is a true and correct copy of an OLC opinion entitled *Application of the Endangered Species Act of 1972 to the Sale of Sperm Whale Oil by the General Services Administration*. The OLC produced this record to the Knight Institute on April 28, 2020, in conjunction with *Francis v. U.S. Department of Justice*, No. 2:19-cv-01317-RAJ (W.D. Wash. 2019).

11. Attached hereto as Exhibit 8 is a true and correct copy of an OLC opinion entitled *Whether Reservists Must Exhaust Available Leave Under 5 U.S.C. § 6323(b) Before Taking Leave Under 5 U.S.C. § 6323(a)*, 36 Op. O.L.C. 129 (2012).

12. Attached hereto as Exhibit 9 is a true and correct copy of an OLC opinion entitled *EEOC Authority to Order Federal Agency to Pay for Breach of Settlement Agreement*, 38 Op. O.L.C. 22 (2014).

13. Attached hereto as Exhibit 10 is a true and correct copy of an OLC opinion entitled *Authority of the Department of Labor to Control the Disclosure of Federal Employees' Compensation Act Records Held by the United States Postal Service*, 36 Op. O.L.C. 217 (2012).

14. Attached hereto as Exhibit 11 is a true and correct copy of an OLC opinion entitled *Payment of Back Wages to Alien Physicians Hired Under H-1B Visa Program*, 32 Op. O.L.C. 47 (2008).

15. Attached hereto as Exhibit 12 is a true and correct copy of an OLC opinion entitled *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act*, 21 Op. O.L.C. 109 (1997).

16. Attached hereto as Exhibit 13 is a true and correct copy of an OLC opinion entitled *Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply with Orders Issued by EEOC Administrative Judges*, 27 Op. O.L.C. 24 (2003).

17. Attached hereto as Exhibit 14 is a true and correct copy of an OLC opinion entitled *Obligating Carryover Funds in Violation of OMB Zero-Dollar Apportionment Rule*, 40 Op. O.L.C. 90 (2016).

18. Attached hereto as Exhibit 15 is a true and correct copy of an OLC opinion entitled *Service Credit for Retirement Annuities of USPS Employees When USPS Has Not Made Required Contribution*, 35 Op. O.L.C. 181 (2011).

19. Attached hereto as Exhibit 16 is a true and correct copy of an OLC opinion entitled *Obligation of Federal Agencies to Pay Stormwater Assessments Under the Clean Water Act*, 35 Op. O.L.C. 1 (2011).

20. Attached hereto as Exhibit 17 is a true and correct copy of an OLC opinion entitled *Disposition of Proceeds from the Sale of Government Buildings Acquired with Social Security Trust Funds*, 34 Op. O.L.C. 263 (2010).

21. Attached hereto as Exhibit 18 is a true and correct copy of an OLC opinion entitled *Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding*, 11 Op. O.L.C. 92 (1987).

August 12, 2021

Respectfully submitted,

/s/ *Stephanie Krent*

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EXHIBIT 1

OPINIONS OF ATTORNEYS GENERAL AND DECISIONS OF AUDITORS.

Although the acts prescribing the duties of Attorneys General do not declare the effect of their advice, it has been the practice of the departments to heed it. It has been found greatly advantageous, if not absolutely necessary, to have uniformity of action upon analogous questions and cases; and that result is more likely to be attained under the guidance of a single department constituted for the purpose, than by a disregard of its opinions and advice.

Acts of Congress granting relief in special cases, and referring claims to the Second Auditor, confer upon him a jurisdiction exclusive of any other department; and where one Auditor settles such accounts, his successors are bound by his decisions.

ATTORNEY GENERAL'S OFFICE,
May 8, 1849.

SIR: In the matter of the claim of the representatives of George Fisher, made under the act for their relief of the 12th of April, 1848, the two questions you have submitted to this office I have duly considered. They are these: First, is the opinion of a former Attorney General upon the decision of the late Second Auditor obligatory upon the present incumbent? and secondly, ought interest to have been allowed under the act of Congress referred to?

First, the duties of the Attorney General are prescribed by the judiciary act of 1789, and are, "to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments." The act does not declare what effect shall be given to such advice and opinion, but it is believed that the practice of the government has invariably been to follow it. This has been done from the great advantage and almost absolute necessity of having uniform rules of decision in all questions of law in analogous cases—a result much more certain under the guidance and decision of a single department, constituted for the very purpose of advising upon all questions, and with supposed special qualifications for such a duty. In my opinion this practice should be considered as law.

By reference to the act giving relief in this case, it will be

seen that the whole subject of the claim is submitted to the exclusive judgment of the Second Auditor. No other department has any jurisdiction over it. His judgment was made absolute. By the last report of that officer he did allow interest, and the interest, with the principal then allowed, has been paid the claimants. This, in my judgment, decides the question as to the title to interest under the act. The Auditor thought—whether correctly or not, is (and I express no opinion upon it) not submitted to me—that such was the meaning of the law. His successor, under another rule perfectly well settled, has no right to disregard the decision. He is bound to esteem it a correct one. (*The United States* vs. *Bank of the Metropolis*, 15 *Pet.*, 377.)

I have the honor to be, very respectfully, sir, your obedient servant,

REVERDY JOHNSON.

Hon. WM. M. MEREDITH,
Secretary of the Treasury.

PAYMENT OF AN APPROPRIATION FOR THE CREEKS.

The moneys appropriated in execution of the treaty of 24th January, 1826, with the Creeks, may be paid to the chiefs and headmen of that nation, upon their executing a release in full for all claims for principal and interest on account of the emigration of thirteen hundred Indians, &c.

Had Congress intended to exact a release from the individual Indians, they would have doubtless expressed that intention in the law.

The treaty will be executed by a payment to the chiefs.

ATTORNEY GENERAL'S OFFICE,
May 10, 1849.

SIR: In compliance with your request, I have considered the question you have submitted to this office, as to the true construction of the fourth section of the civil and diplomatic bill of the 12th of August, 1848. But for the opinion of the late Attorney General, I should have had little, if any, difficulty in giving you an answer. Unaffected respect for that officer, which the files of this office cause me to entertain, renders me somewhat doubtful of the correctness of my own judgment. I have no right, however, as you have submitted the

EXHIBIT 2

by the 9th section of the act of 1836, and the 14th section of the act of 1837.

The acts of 1836 and 1837 appropriate the Patent Fund for certain objects. It is money in the Treasury appropriated. There is no express repeal of the Patent Fund, in the act of 3d March, 1853, and nothing repugnant to, nor inconsistent with, the specific appropriation and pledge of the Patent Fund as contained in the acts of 1836 and 1837,—nothing which hints at the repeal of that pledge. We have already seen that the mention of "money in the Treasury not otherwise appropriated" does not divert the Patent Fund from the objects for which it is created and appropriated. To make the one or the other, or both, of the statutes of 1852 and 1853 work by implication a repeal of the 9th section of the act of 1836, and 14th section of the act of 1837, would be contrary to the established rules of statutory construction, to the plain import of the respective provisions, and to the legal meaning, as well as the undoubted intention, of the several acts of Congress.

My opinion, therefore, is, that the salaries of the clerks should, notwithstanding the act of 1853, nay, by the very force of the language of the act itself, continue to be paid, as required by the acts of 1836 and 1837, out of the special fund of the office.

I am, very respectfully,

C. CUSHING.

Hon. ROBERT MCCLELLAND,
Secretary of the Interior.

OFFICE AND DUTIES OF ATTORNEY GENERAL.

Exposition of the constitution of the office of Attorney General as a branch of the executive administration of the United States.

ATTORNEY GENERAL'S OFFICE,
March 8, 1854.

SIR: At the expiration of a year's experience in the discharge of my present official duties, and observation of their

relation to other branches of federal administration, it seems to me not unseasonable now to lay before you some suggestions of possible improvement in the manner of conducting the legal business of the Government.

The Constitution of the United States provides, that "the executive power shall be vested in the President of the United States," who shall be Commander-in-chief of the Army and Navy; who shall, by and with the advice and consent of the Senate, make treaties; who shall nominate and, by and with the advice and consent of the Senate, appoint, all officers of the United States, military, judicial, diplomatic, or administrative, whose appointments are not otherwise provided for, and which shall be established by law; who shall have a qualified participation in the enactment of laws, and take care that they be faithfully executed; and who shall, from time to time, give to Congress information of the state of the Union.

The President is thus made the responsible depositary and chief functionary, for the time being, of the ministerial powers and administrative duties of the United States regarded as a political sovereignty.

But the Constitution does not specify the subordinate, ministerial, or administrative functionaries, by whose agency or counsels the details of the public business are to be transacted. It recognises the existence of such official agents and advisers, in saying, that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices;" and these officers are again recognised by the Constitution in the clause which vests the appointment of certain inferior officers "in the heads of departments;" and it leaves the number and the organization of those departments to be determined by Congress.

In the execution of this duty, the constitutional Congress proceeded, at an early day of its first session, (July 27, 1789,) to establish the Department of Foreign Affairs, with "a principal officer therein," to be called the Secretary for the Department of Foreign Affairs, and to perform and execute such duties respecting foreign affairs as the President should assign to him,

and to conduct the business of the department in such manner as the President should, from time to time, order or instruct.

But this act, which was the commencement of the organization of executive departments under the Constitution, and a commencement in the direction of a systematic and proper distribution of duties, gave place, after the lapse of a few months, (September 15, 1789,) to an act, which changed the name of the Department of Foreign Affairs to that of Department of State, though it in no respect changed the duties of the Secretary, except to provide that he should receive, keep, and cause to be promulgated, the laws enacted by Congress; and that he should keep the seal of the United States, and affix the same to the commissions of all civil officers of the United States lawfully appointed by the President, whether with or without the advice and consent of the Senate.

In changing the name of this department from Foreign Affairs to that of State, Congress did not change the main duties of the department, consisting then, as now, of the charge of the foreign relations of the Government. There is no very obvious connexion between the new name given to the department, and the only important fact which accompanied the change, namely, the commitment of the seal of the United States to the secretary, and the duty of affixing it to the commissions of civil officers. If on this account, as it would seem, the designation of the Secretary was changed, certainly the new title had not, according to the received previous use of the term in our mother tongue, any special relation to the new duties, it not being coupled with the custody of the great seal in England, and being applied there to the office of several of the principal secretaries. Probably it was deemed convenient, in that early period, when the public business was little in amount relatively to later times, that the head of the most important of the departments should bear a name indicative of higher, general, and political duty, and so indefinite, that much miscellaneous business might be consigned to his charge, either by act of Congress, or by direction of the President.

Next, after establishing the Department of Foreign Affairs, Congress, at the same session, (August 7, 1789,) established the

Department of War, with a principal officer therein, to be called the Secretary for the Department of War, and required to perform such duties as might from time to time be lawfully enjoined on or intrusted to him by the President, relative to military or naval affairs; and to conduct the business of the department in such manner as the President might from time to time order or instruct.

This department was also formed on proper premises of classification, even though including, as it did, the jurisdiction of Indian affairs; for the arrangement of frontier posts, and other considerations, devolved of necessity, at that period, the charge of the Indians on the Secretary of War.

Next came, at the same session, (September 2, 1789,) a Department of Treasury, (not *the* Treasury,) the head of it, however, being called the Secretary of the Treasury, and his general duty being defined to be to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue and the public expenditures; to superintend the collection of the revenue; to grant warants for money to be issued from the treasury in pursuance of appropriations by law; and to have charge of the sale of the lands belonging to the United States.

In the organization of the business of this department by this act, facts peculiar, as compared with the other two departments, are prominent.

One is, that the Secretary of the Treasury, instead of being made subject only to the direction of the President by name, is required "generally to perform all such services, relative to the finances, as he shall be directed to perform;" which phraseology has relation to the provision of the act, that he shall "make report and give information to either branch of the legislature, *in person or writing, as he may be required*, respecting all matters referred to him by the Senate or House of Representatives, or (and) which shall appertain to his office."

Another peculiarity of the act is, that whereas, in the others, provision is made for a chief and other clerks only, here, on the other hand, is the commencement of sub-departments, or bureaus, commonly so called, in the provision for the appointment of a

comptroller, an auditor, a treasurer, and a register, among whom a portion of the business of the department is distributed permanently and upon system.

At the same session of Congress, in organizing the judicial business of the United States, (September 24, 1789) provision was made for an Attorney General, to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law, when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters which may concern their departments.

By another act of the same session of Congress, (September 22, 1789,) the office of Postmaster General was appointed, with an assistant, or clerk and deputies, subject, in performing the duties of his office, and in forming contracts for the transportation of the mail, to the direction of the President, but not in other respects then placed in the same high official relation to the Government as at the present time.

Such was the original basis of the executive organization of the Government. The Secretary of State for political and foreign affairs, the Secretary of War for military and naval matters, the Secretary of the Treasury for those of finance, and the Attorney General for legal and judicial ones, were the immediate superior ministerial officers of the President, and his constitutional counsellors during the whole period of the administration of Washington.

We find abundant evidence, both in the public archives and in the printed correspondence and other writings of Washington and Jefferson, that it was the practice in their time for the President not only to call for written opinions of the Attorney General, as at present, and to advise orally or by informal correspondence with him and the three Secretaries, but also to require of all these officers written opinions upon critical subjects of executive deliberation, as expressly provided by the Constitution.

Conspicuous illustration and evidence of these facts may be deduced from the extracts given in the text and the notes to Washington's writings. (See *e. g.*, vol. x, p. 321, note; vol. x, p. 546, note.) In one of these cases it will be perceived that the Cabinet, so called, consisting of the Secretary of State, Secre-

tary of the Treasury, Secretary of War, and Attorney General, though not in any sense an organized body with legal attributes as such, yet proceeded to act in concert, adopting joint rules, signed by them, as to the political and military questions pending between the United States and France.

By an act of the next Congress, various modifications were made in minor details of the duty of the Secretaries of Treasury and War and of the Attorney General. (May 8, 1792.)

Meanwhile an organization had been effected of all those branches of the public service which are localized in the States, including, among other things, officers of the revenue, deputy postmasters, courts, and ministerial officers of the law, and the survey and sale of the public lands; but no material modification occurred in the great outlines of superior administration, until during the administration of John Adams, when the magnitude of our commerce, and the importance of our maritime relations, induced the Government to pay more attention to the military marine, and to establish the Department of the Navy, the chief officer of which to be called the Secretary of the Navy, whose duty it should be to execute such orders as he might receive from the President relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as to all other matters connected with the naval establishment of the United States. (April 30, 1798.)

Subsequently to this, and in the long period of the administrations of Jefferson, Madison, Monroe, and John Quincy Adams, no change in the general character of the executive departments took place, although all of them underwent more or less modification in details, by the intertransfer of old, or the creation of new branches of business, and especially the establishment of new bureaus, or the enlargement of old ones, materially affecting the internal organization of the Departments of State, War, Treasury, Navy, and Post-Office.

But, at the opening of Jackson's administration, the Postmaster General, whose duties and responsibilities had grown with the growth of the country to be of vast importance, was called, as the public interests required he should be, to the same duties

of a cabinet counsellor of the President, which had been discharged theretofore by the four Secretaries and the Attorney General.

This fact constitutes the first important alteration in the arrangements of superior administrative duty and accountability which had occurred since 1798, when the Department of the Navy was established.

Perhaps an equally important fact, occurring at the same period, was the decision, by Jackson, in the circumstances attending the removal of Mr. Duane, as Secretary of the Treasury, and the appointment of Mr. Taney, of the question of the responsibility of the heads of departments to the President.

Finally, by an act passed at the close of Mr. Polk's administration, (March 3d, 1849,) in order to relieve the Departments of State, War, Treasury, and Navy, of branches of public business, created from time to time, which,—attached to those offices originally from considerations of fitness which had ceased to exist, or from the want of any more convenient destination to be given to them, now required to be placed in other hands,—a new executive department was organized, to be called the Department of the Interior, to the secretary of which was committed the supervision of the Patent Office, the General Land Office, the accounts of officers of the courts of the United States, Indian Affairs, the Pension Office, the Census, Mines, and the Public Buildings.

This act, it should be observed, does not provide in terms that the Secretary of the Interior shall be subject to the general direction of the President, as in the case of the Secretaries of State, War, Navy, and Postmaster General; nor do the acts appointing the Secretary of the Treasury and the Attorney General. On the other hand, none of the acts, except that establishing the Treasury Department, subject the chief executive officers to the duty of responding to direct calls for information on the part of the two Houses of Congress. This, however, has come, by analogy or by usage, to be considered a part of their official business. And the established sense of the subordination of all of them to the President, has, in like manner, come to exist, partly by construction of the constitu-

tional duty of the President to take care that the laws be faithfully executed, and his consequent necessary relation to the heads of departments, and partly by deduction from the analogies of statutes.

One other fact, which has been alluded to already, requires more particular attention.

It is the constitutional duty of the President, and of course his right, to recommend legislative measures to Congress, which is in effect the suggestive initiation of laws. By express provision of law, it is made the duty of the Secretary of the Treasury to communicate information to either House of Congress when desired; and it is practically and by legal implication the same with the other secretaries, and with the Postmaster and the Attorney General. But the provision of law, which enacts that the Secretary of the Treasury shall make report and give information to either branch of Congress *in person*, when required, and which, if carried into operation, would in fact confer on the Secretary the advantage, though not a member of Congress, yet of explanatory discussion both in the Senate and the House of Representatives, does not appear to have been at any time practised upon by Congress, either in regard to the Secretary of the Treasury or any other head of department by analogy. But heads of departments have in some cases been called on to make explanations in person to committees of Congress.

It has appeared necessary to take this retrospective survey of the formation of the several executive departments, and of their general relation one to another, as preliminary to an explanation of the manner, in which existing laws provide for the superintendence and management of the judicial and legal business of the Government.

We have seen that the act establishing the office of Attorney General expressly imposed on him two classes of duty: first, to prosecute all suits in the Supreme Court in which the United States are concerned, and secondly, to give his advice and opinion in questions of law to the President and to the heads of departments.

In the discharge of the second class of the above-mentioned

duties, the action of the Attorney General is quasi judicial. His opinions officially define the law, in a multitude of cases, where his decision is in practice final and conclusive,—not only as respects the action of public officers in administrative matters, who are thus relieved from the responsibility which would otherwise attach to their acts,—but also in questions of private right, inasmuch as parties, having concerns with the Government, possess in general no means of bringing a controverted matter before the courts of law, and can obtain a purely legal decision of the controversy, as distinguished from an administrative one, only by reference to the Attorney General.

Accordingly, the opinions of successive Attorneys General, possessed of greater or less amount of legal acumen, acquirement, and experience, have come to constitute a body of legal precedents and exposition, having authority the same in kind, if not the same in degree, with decisions of the courts of justice.

It frequently happens that questions of great importance, submitted to him for determination, are elaborately argued by counsel; and whether it be so or not, he feels, in the performance of this part of his duty, that he is not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation.

Although the act, requiring this duty of the Attorney General, does not expressly declare what effect shall be given to his opinion, yet the general practice of the Government has been to follow it;—partly for the reason already suggested, that an officer going against it would be subject to the imputation of disregarding the law as officially pronounced, and partly from the great advantage, and almost necessity, of acting according to uniform rules of law in the management of the public business: a result only attainable under the guidance of a single department of assumed special qualifications and official authority.

But the Attorney General is under no obligation to render an award, or determine a question of fact in cases referred to him; nor does an appeal to him lie from another department

by any party assuming to be aggrieved by its action, and seeking to have it reviewed; nor is he to give advice to heads of departments on matters which do not concern their departments, and in which the United States have no interest; nor is he authorized to give official opinions in any case not falling within the scope of his duties, so as to connect the Government with individual controversies, in which it has no concern, and with which it ought not to interfere; nor is he in general to give official opinions to subordinate officers of the Government; nor ought he to advise individuals in regard to any question of legal right depending between them and the Government.

Some uncertainty has existed upon the point whether it is the duty or the right of the Attorney General to give *mere legal* opinions to the Senate or the House of Representatives, it having been denied in one case by Mr. Wirt. But he, in common with other persons holding the office, has recognised, by his action in sundry cases, the right of either House of Congress to call on him for information in any matters within the scope of his office, and his duty to communicate the same.

The other duty prescribed by the act of 1789, that of conducting the suits of the United States in the Supreme Court, is, of course, the function of an advocate, subject to the conditions only of the conscientious and honorable discharge of such a function, and with official relation both to the Government and the Supreme Court.

The act speaks of the Supreme Court alone, and it is the regular statute duty of the Attorney General only to conduct in person the causes of the United States there; but the President may undoubtedly, in the performance of his constitutional duty, instruct the Attorney General to give his direct personal attention to legal concerns of the United States elsewhere, when the interests of the Government seem to the President to require this. An example of this, having the force of contemporaneous exposition, occurs in the case of the instructions of Washington to the Attorney General, in 1792, to attend the circuit court at York, on occasion of certain indictments pending there, "to see that that business be conducted in a manner to which no exception can be taken with propriety, and for the

purpose of giving to the measures of Government a more solemn and serious aspect." This precedent has been followed in other and later cases, which seemed to call for the special direction of the Government.

At successive periods in the history of the Government, the Attorney General has been invested with various other powers and duties, some of them special and temporary, and some permanent, some of them purely legal, and some administrative rather than legal, but all of them having apparent relation to the general nature of his office, and which it may be well to briefly indicate.

By an act passed at the second session of the first constitutional Congress, (April 10, 1790,) the foundations were laid for the system of granting letters patent of exclusive privileges for useful inventions or discoveries, this branch of public business being placed in the joint charge of the Secretaries of State and War and the Attorney General. Subsequently, (February 21, 1793,) it was committed to the charge, first, of the Secretary of State,—then of a bureau created for it, under the immediate authority of a special commissioner, and subject to the supervision of the Secretary of State,—until, as before stated, it was transferred to the new Department of the Interior.

By the act establishing the Mint of the United States, it was required that the Chief Justice of the United States, the Secretary and Comptroller of the Treasury, the Secretary of State, and the Attorney General, should constitute a board to inspect the assay of gold and silver for coinage; (April 2, 1792;) but this duty has been transferred since to the district judge and district attorney of Eastern Pennsylvania.

That was a duty administrative in its nature; as was that under the provision of law which appointed the Attorney General, together with the Secretary of State and the Postmaster General, a board to prepare forms and schedules for the agricultural, commercial, and other statistical facts to be collected in the taking of the seventh census of the United States, (March 3, 1849.)

In a very early case of commissioners appointed under treaty to adjudicate claims provided for thereby, it was made the duty

of the President to appoint a person to act before such commissioners, in behalf of the United States, under the direction of the Attorney General, who was required to counsel such agent, and to attend in person whenever any questions of law or fact to be determined by the commissioners might render his presence necessary; and he was authorized to employ such agents, in the different parts of the United States, as the business before the commissioners should, in his opinion, require, and to be paid for their services at such rate as the President of the United States might order. (June 30, 1797.)

If the same proceeding, or something analogous to it, had been adopted in regard to some later cases of the same character, so as to insure a contentious investigation of all claims presented, it would have tended greatly to guard the responsibility and facilitate the safe action of the commissioners, and to produce results more satisfactory to the interests of the Government.

The Attorney General has himself been called on to act as commissioner to adjudicate claims under treaty, as in the case of the convention of indemnities between the United States and the Republic of Peru. (August 8, 1841.)

But the most serious of his incidental duties has been that of supervising the litigation of land claims arising under cessions of territory made to the United States by France, Spain, or the Mexican Republic.

By a series of acts for the adjudication of land claims under the treaties ceding Louisiana and Florida to the United States, it was made the duty of the Attorney General to decide on appeals from the district courts in which the claims were in the first instance litigated; to instruct the district attorney in regard to them, and to appear and prosecute those appeals in the Supreme Court. (May 26, 1824.)

By the various provisions of law for the adjudication of land claims in California, it is in like manner made his duty to receive and examine the transcripts of cases decided by the commissioners, before whom they are in the first instance to be heard, and determine which of the cases shall be appealed to the district courts and to the Supreme Court of the United

States, (March 3, 1851, and August 31, 1852.) This branch of business, though in some sort temporary in its character, yet involves responsible present relations to, and ultimate management of, a large number of suits of the highest importance and interest, and therefore constitutes one of the most onerous of the present occupations of the Attorney General.

Another class of duties of a permanent nature, and of constant recurrence, is the examination, which he is required to make, of all titles of lands or sites purchased by the United States for the purpose of erecting thereon armories, arsenals, forts, fortifications, navy yards, custom houses, lighthouses, or other public buildings of any kind whatever; and without his certificate of the validity of the title, no public money can be expended upon any such land or site. (September 11, 1841.)

In all cases of suspended entries of public lands, the approbation of the Secretary of the Interior and of the Attorney General is necessary to the valid adjudication of the same by the commissioner. (August 3, 1846, and March 3, 1853.)

Finally, in regard to the great variety of duties appointed for the Solicitor of the Treasury, including the collection of debts due to the Government, the disposition of property taken by execution in its behalf, the management of suits in the local courts of the United States, and the instruction of district attorneys and marshals in the premises, (concerning which business more will be said hereafter,) it is made the duty of the Attorney General, at the request of the Solicitor, "to advise with and direct" him in such matters. (May 29, 1830.)

It remains only to say, in speaking of the legislation of Congress in regard to the office of Attorney General, that his department, in common with the others, has an official seal, and all copies of records authenticated by certificate under this are declared to be evidence equally with the original record or paper; that he, in common with other officers of the same class, appoints the clerks or other persons allowed by law for the service of his office, in virtue of the clause of the Constitution authorizing certain appointments to be vested in the heads of departments: and he exercises all such general powers as are by law vested in them, such, for instance, as the employment

of counsel or other legal assistance in behalf of the United States.

Such are the general duties, ordinary and extraordinary, of the office of Attorney General, as expressly set forth by statute, and in addition to implied contingent duties, which, as already intimated, he may be called upon by the President or the Houses of Congress to perform.

On this point, which has been touched already, it may not be amiss to state more fully the constitutional and legal nature of the relation of the President to the heads of departments in matters of detail not explicitly provided for by acts of Congress.

We have cursorily seen that the act establishing the Department of State provides that the Secretary shall "perform and execute such duties as shall, from time to time, be enjoined on, or intrusted to him by the President, agreeably to the Constitution, relative to correspondence, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to said department;" but the act does not say that the President may assign to him, or that he shall perform any duties not relating to the *foreign* affairs of the government. It proceeds further to provide that he shall "*conduct the business of the said department in such manner* as the President of the United States shall from time to time order or instruct;" which provision decides nothing as to what shall be the business of the department.

The act establishing the Department of War in like manner provides, that the Secretary shall "perform and execute such duties as shall from time to time be enjoined upon him by the President of the United States, agreeably to the Constitution, relative to military commissions, or to the land or naval forces, ships, or warlike stores of the United States, or to such other matters respecting military and naval affairs, as the President of the United States shall assign to said department, or relative

to the granting of lands to persons entitled thereto for military services rendered to the United States, or relative to Indian affairs; and furthermore, that the said principal officer shall conduct the business of said department in such manner as the President of the United States shall, from time to time, order or instruct." Here also the statute power of the President to assign business to the Department, and to direct in it, is limited to a class of enumerated matters and the *manner* of conducting the business assigned.

In the act of 1789, "for the temporary establishment of the Post Office," it is provided "that the Postmaster General shall be subject to the direction of the President of the United States, in performing the duties of his office;" but that act at length expired by its own limitation, and the subsequent acts giving a more stable form to the Post Office, do not appear to contain any provision as to the directory power of the President. (See acts of February 20th, 1792, and March 3d, 1825.)

The act establishing the Department of Treasury, requires the Secretary "to perform all such services relative to the finance as he shall be directed to perform," but makes no reference, *eo nomine*, to the President.

The act establishing the office of Attorney General is wholly silent on this point.

The act establishing the Department of the Navy is precise in terms, to the effect that the Secretary shall "execute such orders as he shall receive from the President of the United States, relative to the procurement of naval stores and materials, and the construction, armament, equipment, and employment of vessels of war, as well as all other matters connected with the naval establishment of the United States." Nothing is said here of any general directory power on the part of the President.

Finally, the act establishing the Department of the Interior is silent on this point.

Now, upon this full exhibition of the statute provisions on the matter, questions arise both as to the substance of the business of the Departments, and the manner of conducting it, in regard to the directory power of the President.

It is impossible for Congress to foresee, and circumstantially provide for, all the possible future contingencies of executive business, either in respect of the business itself or the manner of conducting it. A necessary discretion must exist in the nature of things somewhere as to all such matters. And that ultimate discretion, when the law does not speak, must reside, as to all executive matters, with the President, who has the power to appoint and remove, and whose duty it is to take care that the laws be faithfully executed. Where the laws define what is to be done by a given head of department, and how he is to do it, there the President's discretion stops; but if the law require an executive act to be performed, without saying how or by whom, it must be for him to supply the direction, in virtue of his powers under the Constitution, he remaining subject always to that, to the analogies of statute, and to the general rules of law and of right. And this view of the question has been followed, uniformly, in the practical administration of the Government.

We shall appreciate the value of this conclusion in the sequel, when we come to perceive that great branches of public business are to be found, which are not assigned by statute to any particular department, or as to which there is no provision of statute deciding all questions of the manner of transacting such business.

The Supreme Court have recognised the existence of such a discretion, as being reposed for numerous contingencies, not only in the President in regard to the business of the departments, but in the heads of the departments themselves, by implication of law or as the executive agents of the President. The court say, that to attempt to regulate by law the minute movements of every part of the complicated machinery of administration, would evince complete disregard of the limits of the possible and the impossible. While the great lines of its movements may be marked out, and limitations be thus imposed on the exercise of its powers, there are numberless things to be done which cannot be anticipated or defined, but are, nevertheless, indispensable to the action of the Government. These things must of necessity be left to a wise and judicious discre-

tion. (United States *v.* McDaniel, vii Peters, 1; United States *v.* Bailey, ix Peters, 238.)

Question has existed as to the relation of the President and the respective heads of departments to the chiefs of bureaus, and especially the accounting officers of the Treasury.

It is not the duty of the President, and in general it is not convenient for him, to entertain appeals from the departments on the various matters of business, and especially the private claims, on which they have occasion from time to time to pass. Though he is to take care that the laws be faithfully executed, still it is physically impossible that he should do everything in person. Therefore, the Constitution and the laws give to him agents, through whose instrumentality the executive business may be transacted. Among these are the Heads of Departments, and other subordinate officers of the Government.

Now, from the fact that the executive agents, primary and secondary, are assigned by law to particular duties, it has been somewhat hastily inferred, that while it is indubitably true that he may direct the heads of departments, yet he has no authority over the chiefs of bureaus, and especially those in the department of Treasury. It needed only to carry this course of thought one step further, to say that the heads of departments themselves had no authority over those officers. This step was taken, and the doctrine it involves was, for a time, asserted. If maintained, it would have been the singular condition of a great government, in which the executive power was vested by Constitution in the President, and he had authority over the primary executive officers, but neither he nor they had any authority over the secondary executive officers, and, of course, it would be in the power of the latter to arrest, at any time, all the action of the Government.

Such a doctrine was against common sense, which assumes that the superior shall overrule the subordinate, not the latter the former. It was contrary to the settled constitutional theory. That theory, as we shall hereafter see, while it supposes, in all matters not purely ministerial, that executive discretion exists, and that judgment is continually to be exercised, yet requires unity of executive action, and, of course, unity of executive

decision; which, by the inexorable necessity of the nature of things, cannot be obtained by means of a plurality of persons wholly independent of one another, without corporate conjunction, and released from subjection to one determining will; and the doctrine is contradicted by a series of expositions of the rule of administrative law by successive Attorneys General.

Thus, in a controverted matter of military allowance, requiring an act of decisive judgment, Mr. Berrien adjudged that the Third Auditor and the Second Comptroller are bound to take the decision of the Secretary of War, who may give it either by previous direction or by subsequent review. (Opinion, December 4, 1829.)

Mr. Taney gave similar advice on a question arising in the same department. (Opinion, September 10, 1831.)

Mr. Butler, Mr. Johnson, and Mr. Crittenden have affirmed the same doctrine. And on a question raised by the refusal of the Commissioner of Customs to take the direction of the Secretary of the Treasury, Mr. Crittenden elaborately reviewed the whole subject, and determined, by unanswerable argument, the right of the Secretary of the Treasury in the given case, and by analogy that of other heads of departments in correspondent cases. (Opinion, November 13, 1852.)

Meanwhile, if an opinion delivered many years ago by Mr. Wirt is now to be received as law, then, although an auditor, as even he admits, is subject to the direction of the Secretary of War, or the Secretary of the Interior, or some other Secretary, as the case may be, yet such auditor is wholly above the authority of the President, who, nevertheless, directs the Secretary. Had the idea presented itself as a mere question of the *order* of business, to the effect that the President should act upon the subordinate officers through the heads of departments, it might have answered as a matter of convenience, but not one of legal necessity. But the idea utterly excludes the authority of the President, and so, while recognising the authority of the head of department, in effect makes the latter also superior to the President: which is in conflict with universally admitted principles. Such an assumed anomaly of relation, therefore, as this idea supposes, resting upon mere opinion or exposition,

must, of course, yield to better reflection, whenever it comes to be a practical question demanding the reconsideration of any Attorney General.

Upon the whole, then, heads of departments have a threefold relation, namely: 1. To the President, whose political or confidential ministers they are, to execute his will, or rather to act in his name and by his constitutional authority, in cases in which the President possesses a constitutional or legal discretion. 2. To the law; for where the law has directed them to perform certain acts, and where the rights of individuals are dependent on those acts, then, in such cases, a head of department is an officer of the law, and amenable to the laws for his conduct. (Marbury *v.* Madison, i Cranch, 49–61.) And 3. To Congress, in the conditions contemplated by the Constitution.

This latter relation, that of the departments to Congress, is one of the great elements of responsibility and legality in their action. They are created by law; most of their duties are prescribed by law; Congress may at all times call on them for information or explanation in matters of official duty; and it may, if it see fit, interpose by legislation concerning them, when required by the interests of the Government.

Some further explanation may be necessary, in regard to the relation of the departments to law as represented by the courts of justice. I do not speak now of the responsibilities of a head of department in the relation of crime, whether in questions of indictment or of impeachment. That is a matter of course. I speak of the power of the courts to act on the administrative business of the Government.

The Constitution in terms vests the legislative power in Congress, the executive power in the President, and the judicial power in the Supreme Court and in such inferior courts as the Congress may, from time to time, ordain and establish. It is perfectly clear that in general, and except at certain points where they necessarily touch one another, such as the participation of the Senate in treaties and appointments, and of the President in acts of legislation, it was intended that the three great departments shall move apart, each in its orbit. (Martin

v. Hunter, i Wheaton, 304, 329.) This would not be the case if the courts of law had the power to review and overrule the acts of the Executive. Therefore, on the first great occasion in which the relation of the courts of the United States to the Executive came up for solemn adjudication, that of Marbury *v.* Madison, which was an attempt of a person to compel the Secretary of State to deliver to him a commission, the Supreme Court, while asserting the responsibility of a head of department to the law, in the general terms hereinbefore cited, and while discussing at length the legality of the act of the Secretary of State in refusing to deliver the commission, and thus voluntarily deciding *arguendo* questions of which they had confessedly no jurisdiction, were compelled, in conclusion, to say this, and to admit that the Constitution had not constituted them to be an appellate tribunal to review and revise the administrative acts of the President of the United States. The Supreme Court thereupon refused a mandamus, the process prayed for in this case, as they did subsequently in the case of McIntire *v.* Wood, which was an application for that process to compel the register of a land office to issue a certificate of purchase, (vii Cranch, 504;) and in the case of Decatur *v.* Paulding, where a party sought, by the same means, to compel the Secretary of the Navy to pay a pension to the petitioner, (xiv Peters, 497; see also McClung *v.* Silliman, vi Wheaton, 349.) But the Supreme Court meanwhile had claimed for the courts jurisdiction in the case of Stokes *v.* Kendall, where parties applied to the court to compel the Postmaster General to make what he conceived to be an illegal payment, and had granted the order on the ground that this was a ministerial act, while the other cases were of executive acts. (Kendall *v.* United States, xii Peters, 524.) It is not easy for a head of department to extract from these cases any very satisfactory rule of conduct, so as to know which, of many acts which he may be called on to perform, is ministerial, and not executive. And the court became, apparently, conscious of this, when the later case of Decatur *v.* Paulding came before them. There they refused to take an appeal from the Secretary of the Navy on a question of alleged legal right to a money payment, after having sus-

tained an appeal from the Postmaster General on the same precise question, that of alleged legal right to a money payment, and proceeded to restate the limitations of the authority of the courts to act by mandamus on the Departments, confining the claim of jurisdiction more precisely to cases in which an act of Congress, lawfully passed, and within the proper powers of Congress, commands a specific act to be done, as, for instance, in the case of Stokes *v.* Kendall, a definite sum of money to be paid to a party named.

As the law now stands expounded by the Supreme Court, therefore, it is conceded that a head of an executive department of the Government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must do this in construing the acts of Congress, under which he is from time to time required to act. If he doubts, he has a right to call on the Attorney General for counsel. In general, his duties are not merely ministerial. The Supreme Court will not entertain an appeal from his decision, nor revise his judgment, in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide his judgment or discretion in the matter committed to his care in the ordinary discharge of his official duties. Any such interference would involve a confusion of constitutional powers, and produce nothing but mischief in the business of the Government.

The organization of the executive departments of administration implies order, correspondence, and combination of parts, classification of duties, in a word, system: otherwise there is waste and loss of power, or conflict of power, either of which is contrary to the public service, in the regard of so much work to be done by such and such persons, and at a given cost of either time or money. Besides which, in a political relation, want of due arrangement of public functionaries and their functions, is want of due responsibility to society and to the law.

Accordingly, it has been the general purpose of Congress, at all times, both as to the great subdivision of departments, and

the arrangement of the duties of each, to classify and to systematize.

This was an exigency of wise public policy, even when the business of the Government was little, and the number of its officers comparatively small; and it was, even then, accomplished approximately. But now,—when the territorial limits of the Union have spread from the Atlantic to the Pacific Ocean,—when the vast interests of the people of the Union are co-extensive with the habitable globe,—when the progress of wealth, intelligence, and mechanical invention has wonderfully enlarged and complicated the interests of society,—when our commerce extends to every land, and our ships are abroad on every sea,—when the American Union has become a primary power in Christendom,—and when the number of persons requisite to work this mighty machine of government has been proportionally augmented,—in such a state of things, that exigency of order, which was political wisdom always, has now come to be material necessity.

At such a period of the history of the Government, it seems fitting to consider where, if at all, in the conduct of its business, its mechanism can be saved from waste or collision, and its agents subjected to more complete and exact responsibility. And on these premises it is that the present suggestions are made as to the conduct of the law business of the Government.

According to the obvious theory of the constitution of the office of Attorney General, he has the superior charge of that business. And this theory is carried into practice in the main outlines of the duty of his office, as the following analysis will show.

1. Upon the great questions of law arising in the administration of public affairs, he gives opinion officially, both to the President and to the heads of departments.

2. As one of the confidential political counsellors of the President, it may be supposed that he advises more particularly in regard to the legal incidents of the appointments or other acts of the Government.

3. He conducts directly all suits in the Supreme Court in which the United States are concerned.

4. He advises or directs the Solicitor as to suits in which the

United States are concerned, pending in the inferior courts of the United States.

5. He directs and prosecutes appeals in the great questions of land-title, which involve the proprietorship of all the soil in the successive increments of territory acquired by the United States.

6. He performs occasional duty, from time to time, in the protection of the interests of the United States in matters of adjudication under treaties with foreign powers.

7. He passes upon the title of all interest in lands acquired by the United States, by purchase for any of the local uses of government.

8. He communicates to Congress such information as they require, appertaining to the duties and business of his department.

In all these particulars he is, either directly or indirectly, and by statute, either express or implied, the administrative head, under the President, of the legal business of the Government. So far the administrative power, and the correspondent administrative responsibility exist, and they require modification in details only in order to be completely adapted to the theory of departmental organization.

Among these modifications, it is respectfully submitted, should be provision, either by law or regulation, for a periodical report by the Attorney General to the President, and through him to Congress, of the business of his office, including the official opinions given by him, and any pertinent suggestions regarding the interests of the Government.

Then come three important branches of public business, which the President is required, either by the Constitution or laws, to discharge in person or through lawful agents, as to which there is no specific provision by Congress, namely:

1. Suits in which the United States are ultimately concerned, but in which they are not a party of record, or which are not brought in the courts of the United States.

Thus it is that suits, on a foreign alleged grant, against a tenant in possession under patent from the United States, who will be called on to indemnify the tenant if he be evicted, are

brought from time to time in the States; but no provision exists for protecting the eventual interests of the United States in such cases by notice to the Government; there may be collusion in the suit in the court below, or mismanagement; and even if the case come up to the Supreme Court, it may become known to the Attorney General by accident only, if at all.

Or, suit may be brought by some individual against an officer of the United States for some official act performed by him, and judgment rendered against him for heavy damages, perhaps without due defence, but for which Congress will be required to make indemnity.

Or a suit is brought by some person, or by a State, against an officer of the United States in the alleged possession of a citadel as its commander, or of a custom-house as collector of the revenue, for the purpose of thus obtaining a judgment of ejectment, which, in fact, evicts the United States.

Or conflicts of jurisdiction may arise in the States, involving the whole question of the execution of the laws of the United States, or the domestic or foreign peace of the Union, without the United States being in any sense a party, but in which the political interests of the Government as such are above all possible estimation.

These are cases of daily occurrence, and subsisting examples of which, in various forms, do now occupy the attention of the Executive; but the legal controversies thus arising have to be conducted by this or that head of department in whose branch of service they may happen respectively to arise, without any adequate and proper provision for their conduct.

The President undoubtedly has power to assign all these cases, as they arise, to the charge of the Attorney General; and it would be fitting that he should do so, provided the correspondent changes in the organization of this office be authorized by Congress.

2. Pardons. Applications are, of course, continually made to the President for the exercise of his constitutional power to grant reprieves and pardons for offences against the United States. Being constitutional, it is a power which Congress cannot take away or impair. It might, however, as it has done

in other cases where needed, provide legal means and legal agents to aid the President in its exercise; in the absence of which he must of necessity exercise a lawful discretion in those respects. The conscientious determination of questions of this class requires, generally, the investigation of proceedings in court, and that of questions of law as well as of evidence, and the conduct of correspondence, in all which the President requires the instrumentality of a public officer. Formerly, this duty was performed by the Secretary of State; of late, it has been assigned to the Attorney General, in whose department, by reason of the nature of the business, it appropriately falls.

3. Commissions of public officers of a judicial character or relation.

No provision of law exists prescribing the department which shall receive the applications and recommendations, conduct the correspondence, and analyze or abstract the documents, in this branch of the public service. Formerly it was done by the Secretary of State; but it has no natural connection with the general duties of his office, and it has been assigned to the Attorney General as a more appropriate agent.

There is need of legislation in this respect to give method and convenience to the public business. When the commencement of organization took place in 1789, it was provided that all civil commissions should issue from the Department of State, and all military (including naval) ones from the Department of War. Thirty years afterwards, it was provided that all commissions of officers, employed in levying and collecting the public revenue, shall be made out and recorded at the Treasury Department, and sealed with its seal. As the duties of administration continued to increase, it was found convenient to give an official seal to the other departments, and to make it evidence in law; but no correspondent provision of law was enacted relative to the issue of civil commissions, which remained on the footing of the acts as to the Departments of State and Treasury. A systematic arrangement of things would require, that, as in the Departments of State, Treasury, War, and Navy, so in those of the Postmaster General, Interior, and Attorney

General, commissions should be sealed, issued, and recorded in the office to which they belong.

One remaining branch of public service is to be considered, in order to dispose of this part of the subject, namely, supervision of the accounts of judicial and legal officers of the Government.

When the Home Department was established, the supervisory power previously exercised by the Secretary of the Treasury over the accounts of marshals, clerks, and other officers of the courts of the United States was transferred to the Secretary of the Interior. In this no special fitness appears. The Secretary of the Interior does not superintend the appointment of those officers; he has no power by statute to correspond with or direct them; and in several successive reports to Congress from that department, it has been recommended that the accounts of judicial officers, in common with their appointment, be transferred to the Attorney General.

Finally, if any of these proposed changes be adopted, or whether they be so or not, it is desirable that there should be some provision for the case of temporary vacancy in the office of Attorney General. By two acts, one of 1792, and another of 1795, provision is made that, in case of the absence from the seat of government or sickness of the Secretary of State, the Secretary of the Treasury, or the Secretary of War, or the death of either, or the temporary vacancy of either office, for not exceeding six months, it shall be lawful for the President to authorize any person, at his discretion, to perform the duties of such office until a successor be appointed, or until such absence or inability by sickness shall cease. (May 8th, 1792, and February 13th, 1795.) There is also an enactment by which, in case of the death, resignation, or absence of the Postmaster General, all his powers and duties shall devolve, for the time being, on the First Assistant Postmaster General, (July 2d, 1836.) No general provision exists for a temporary appointment by the President, either in regard to this, or to the Departments of the Navy, Interior, and Attorney General. The existing legislation leads to opposite and contradictory conclusions. It may be said, on the one hand, that the power expressly conferred on the

President in three of the Departments, may be applied by analogy to the others. On the other hand, it may be said that the express enactment conferring the power on the President in those three cases, and making special peculiar legal provision in regard to a fourth, is the implied exclusion of any power of the President as to the remaining three. Perhaps the truer view of the question is to consider the two statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one. It has been exercised in regard to all the departments. In the most questionable of the cases, that of Attorney General, whose quasi judicial functions especially would seem to require to stand on legislative authority, proof exists in the files of the department that temporary appointment has been made by the President, as in the case of the departments whose heads are more exclusively executive officers. But a general provision is desirable to remove all doubt on the subject, as well respecting the Attorney General as the other non-enumerated departments.

I submit the propriety, therefore, of some further provision of law as to the arrangement of the legal affairs of the Government. The proposed changes do not enlarge the present power of the Executive in any respect. But they devolve additional labor on this office by transfer from others: on which account, I beg leave to add a few words of personal explanation.

When the office of Attorney General was created, and for long afterwards, inequality existed between his salary and that of other officers of the same class. The reason why he received less than the others is given by Washington in his letter to Mr. Edmund Randolph, tendering to him the first appointment of Attorney General, in which he says: "The salary of this office appears to have been fixed at what it is from a belief that the station would confer pre-eminence on its possessor, and procure for him a decided preference of professional employment." On this basis things continued until a very late period, the Attorney General receiving less salary than his associates, but being invited, as it were, by the nature of the office, into private professional practice in the courts, for which his near association with the Government, united to the professional qualifications

which, from his being appointed to the office, he may be assumed to possess, would serve to give him great advantages. The published correspondence of the eminent statesmen of the first and second generations of our constitutional history, the reports of legal adjudications, the printed opinions of this office, and the documents on file in it, show that it was the received practice of the Attorney General not only to give opinions in private cases, and argue private causes at the seat of Government, but also to attend, as a practising barrister, at the sittings of courts in the States.

The office of Attorney General of the United States has been filled, in past times, by men, who, while eminent in their special profession, have been not less eminent in the career of parliamentary, diplomatic, administrative, or judicial distinction; and many of whom now live, enjoying, by just title, the respect and the confidence of their countrymen. At the bar of the Supreme Court they did honor to their station; and their official opinions are the law which guides the action of the Government. Nothing could be more foreign to my purpose than to reflect, in what follows, upon any of those distinguished persons for pursuing a course in office which was not forbidden, but, on the contrary, invited by law, and was justified by official usage, and by the approbation or acquiescence of Washington, Adams, Jefferson, and Madison.

Heretofore, the custom of the Attorney General in this respect did not essentially interfere with his proper official duties, nor prejudicially affect his general relation to the Government.

Within the last few years, however, the condition of the country has undergone changes, occasioning a vast augmentation in the amount of administrative business, which heads of department are called upon to perform; and it would not be possible now, as it has been heretofore, for the Attorney General, compatibly with performing well the duties of his office, to be frequently absent from the seat of Government, attending to private professional pursuits, nor could he find much leisure to prepare and argue private causes even before the Supreme Court.

It may deserve consideration, whether Congress, in establish-

ing quite recently a common rate of salary for the Attorney General and the other heads of departments, did not have in mind the new state of facts above referred to, and for that cause intend to repeal, by implication, the previous implication of law, which prompted a continuance of the private professional pursuits of the Attorney General.

There is one other pertinent consideration. Most of the ordinary doctrines of law, and much of what is political organization, we have derived from the institutions of our mother country. The original theory of the office of Attorney General of the United States, which authorized and prompted him to engage in private professional practice, flowed, perhaps unconsciously, in part from the correspondent usage in Great Britain. But there the Attorney General is not a member of the cabinet, the Lord Chancellor performing the political duties which devolve upon the Attorney General here. And there is reason to doubt whether, at the present day, in the United States, it is expedient that a head of department should, under any circumstances, continue in the practice of law as a profession. Whatever change in the amount of public business the present greatness and wealth of the country may have produced, they have produced a still greater change in the multitude and the urgency of the private interests which assail the Government. No person, who has been conversant with public affairs here for the last twenty years, can fail, on comparing the state of things at the beginning and at the end of that period, to see how striking is the transition in this respect. Formerly, in an age of simpler manners, when the public expenditures were less, the number of places less, the population of the country less, the frequentation of the capital less, the ingenuity of self-interests less,—at such a time a Secretary, eminent in the legal profession, might, without possibility of reproach or suspicion of evil, take charge of private suits or interests at the seat of Government. He may do so now, perhaps; but that is not so clear as it formerly was; and it is not easy to perceive any distinction in this between what befits one or another head of department. Nay, arguments of objection could be suggested.

especially applicable in the existing state of society to the Attorney General.

However all these things may be, the actual incumbent of this office, in the magnitude and complication of the public interests with which it is now charged, experiences that its necessary duties are quite sufficient to task to the utmost all the faculties of one man; and he willingly regards those recent acts of Congress, which have at length placed the salary of his office on equal footing with other public offices of the same class, as intimation at least that the Government has the same precise claim on his services, in time and degree, as on those of the Secretary of State or the Secretary of the Treasury. As the corollary of that principle, he now proposes such modifications in the office as may render it really and effectually, as well as in theory, responsible for the law business of the Government.

The same thing in substance was earnestly proposed by Jackson in his first annual message to Congress, (December 8, 1829,) and has been twice recommended to Congress by later Presidents. Whatever reasons of public utility seemed then to require change in this respect, have, in the progress of time, acquired such additional force as to lead me to conviction of the propriety of presenting the subject to your notice, and with your approbation to the notice of Congress.

I have the honor to be, very respectfully, your obedient servant,

C. CUSHING.

The PRESIDENT.

EMPLOYMENT OF COUNSEL BY A DEPARTMENT.

Counsel, specially employed by the Secretary of State to aid the District Attorney in the prosecution of persons accused of being engaged in illegal military enterprises in Texas, should be paid out of the funds of the State Department.

ATTORNEY GENERAL'S OFFICE,
March 9, 1854.

SIR: I have examined the papers referred to me by your note of the 8th instant, consisting of the account of Hugh McQueen,

EXHIBIT 3

DISTRICT ATTORNEY—EXTRA COMPENSATION.

The opinions of Attorneys-General Garland and Miller (18 Opin., 192; 19 Opin., 354) followed as to construction of Revised Statutes 827, relating to extra compensation of the district attorney for the southern district of New York.

DEPARTMENT OF JUSTICE,
September 7, 1893.

SIR: In your communication of September 2, you ask my official opinion as to whether the district attorney for the southern district of New York is entitled to compensation, under section 827 of the Revised Statutes, for appearing in customs cases in his district, in addition to the salary of $6,000 which is provided "for all his services" in section 770.

Departmental service has always allowed additional compensation in the cases referred to, notwithstanding the restrictive words of section 770. This practice was not adopted inadvertently, but received careful consideration from the Solicitors of the Treasury and Commissioners of Customs. The question was also submitted to my immediate predecessors, Attorneys-General Garland and Miller, each of whom, in an official opinion, held that the practice was correct. (18 Opin., 192; 19 Opin., 354.) I see nothing which would warrant me to reverse their decisions. Your question is therefore answered in the affirmative.

Very respectfully,

RICHARD OLNEY.

The SECRETARY OF THE TREASURY.

COMPTROLLER—SOLICITOR OF THE TREASURY—ATTORNEY-GENERAL.

The Comptroller and Commissioner of Customs have no legal status as advisers of the Secretary of the Treasury upon legal questions. Their opinions are purely extra official and rendered by courtesy only.

The opinion of the Solicitor of the Treasury may be asked upon any question of pure law or of mixed law and fact arising in the Treasury Department, except questions involving the construction of the Constitution of the United States. His opinions have, however, no binding force.

Case 1:16-cv-01068-KBJ Document 59-8 Filed 08/12/21 Page 3 of 7

Comptroller—Solicitor of the Treasury—Attorney-General.

Questions of pure law actually arising in the administration of the Treasury Department, and requiring the personal consideration of the Secretary, may be referred to the Solicitor of the Treasury or to the Attorney-General. If referred to the latter, however, his answer should be regarded by the Department as law until withdrawn by him or overruled by the courts.

DEPARTMENT OF JUSTICE,
September 8, 1893.

SIR: I am in receipt of your communication of August 30, inclosing reports from the First and Second Comptrollers, the Commissioner of Customs and the Solicitor of the Treasury, in relation to the extent of their respective jurisdictions and the extent to which they are customarily called upon to give legal opinions. You ask me to advise you what I consider to be the limits of the jurisdiction of each of the said officers in this matter.

I do not think that the First or Second Comptroller or the Commissioner of Customs has any legal status as an adviser upon legal questions. These gentlemen are accounting officers holding great power, but their function is to take action, not to advise others how to act. Each is the trial judge within his own sphere, and, as provided by section 191 of the Revised Statutes, the balances certified by him upon the settlement of public accounts "shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the Executive branch of the Government, and be subject to revision only by Congress or the proper courts." It is, however, customary to ask their opinions on questions of law, and this custom is a convenient and proper and even necessary one within certain limits. The custom doubtless arose from the importance of knowing beforehand when expenses were to be incurred what the decision of the Comptroller would be afterwards when the question of legality should come up upon the settlement of accounts. In form the Comptroller is asked for legal advice; in fact, what is desired is information as to his future action. He is in no way bound in settling accounts to follow his own unofficial opinion previously formed. He does, however, do so on the principle of *stare decisis*. I should infer from the reports of the Comptrollers that their advice is often asked on other points of law which are not anticipatory of future decisions by themselves. Answering such questions is a

merely voluntary matter, and the answers are, of course, purely extra-official. The advice thus given is doubtless intrinsically most valuable, but otherwise it differs in no way from advice on the same subject by any outsider.

The Solicitor of the Treasury is, however, an adviser recognized by the law. Section 349 of the Revised Statutes provides that "there shall be in the Department of Justice a Solicitor of the Treasury." Section 350 provides that "the officers named in the preceding section shall exercise their functions under the supervision and control of the head of the Department of Justice." Section 360 provides that "the Attorney-General may require any solicitor or officer of the Department of Justice to perform any duty required of the Department or any officer thereof." Section 361 provides that "the officers of the Department of Justice, under the direction of the Attorney-General, shall give all opinions and render all services requiring the skill of persons learned in the law necessary to enable the President and heads of Departments and the heads of bureaus and other officers in the Departments to discharge their respective duties."

The Solicitor of the Treasury had been, prior to the act of June 22, 1870, establishing the Department of Justice, an officer of the Treasury Department. It had, as I am informed, been the custom, long prior to that time, for him to give legal advice to the Treasury Department. That statute provided that he, with the Solicitor of Internal Revenue and other officers, "shall be transferred from the Departments with which they are now associated to the Department of Justice." I have not found any general instructions in writing from the Attorney-General to the Solicitor of the Treasury in relation to the performance of his duties subsequent to the taking effect of the act of 1870. This is, perhaps, due to the fact that at that time the two officers occupied adjoining rooms in the Treasury Department, so that communication between them was oral. The Solicitor of the Treasury, however, has ever since continued to advise the Secretary of the Treasury and heads of bureaus subordinate to him; and such advice has been regarded as rendered by him in the character of assistant to the Attorney-General and in accordance with the

provision of section 361 above quoted. His advice may be asked upon any question of pure law or of mixed law and fact arising in the Treasury Department, with the single exception of questions involving the construction of the Constitution of the United States, which should be submitted to the Attorney-General for his personal opinion. (Rev. Stat., 358.) The Solicitor's opinions, however, have in no way binding force, nor are they distinguishable from those rendered by the Comptrollers, except by the fact that the advice of the Comptrollers is purely voluntary, while it is the Solicitor's duty to render legal assistance. This is one of the duties for which he receives compensation, while to compensate the Comptrollers for such work would be a violation of law. (Rev. Stat., 189.)

The Solicitor of the Treasury is the only person from whom legal advice can be required by the Treasury Department, except upon questions of pure law actually arising in the administration of the Department and requiring the personal consideration of the head of the Department, as distinguished from mere questions of administration arising in its subordinate bureaus. The advisory relation of the Solicitor to the Secretary of the Treasury is precisely that of the Assistant Attorney-General, appointed in pursuance of the act of February 25, 1871, to the Secretary of the Interior. This Assistant Attorney-General is not expressly endowed by statute with any advisory relation to the Interior Department, but he performs there, by assignment of the Attorney-General, under section 361, the same general duties which the Solicitor of the Treasury performs in the Treasury Department by like assignment. As illustrative, therefore, of the functions of the Solicitor of the Treasury in your Department, I may quote from an opinion rendered to the Secretary of the Interior on June 7, 1893, by Solicitor-General Maxwell and approved by myself. In that case the question was whether the Commissioner of Patents could legally appoint a referee to take testimony in a disbarment proceeding before him. He was advised that this question was not a question of law arising in the administration of the Department such as could properly be submitted to the Attorney-General for an official opinion. The following language was used:

"It has been held frequently that the statutes prescribing the duties of the Attorney-General (Rev. Stat., 354, 356) do not authorize or require him to give an official opinion except to the President or to the head of an Executive Department; and it would seem to follow that the opinion should be needed for the guidance of the head of a Department, and should relate to some matter calling for action or decision on his part. * * * For the guidance of the heads of bureaus and other officers of the Departments in the discharge of their duties, provision is made by section 361 of the Revised Statutes for assistance from the officers of the Department of Justice, under the direction of the Attorney-General; and an Assistant Attorney-General and law clerks have accordingly been assigned to the Department of the Interior, to whom, it seems to me, the Commissioner of Patents should submit his question. * * * It is not meant by this opinion to deny the authority or duty of the Attorney-General to answer questions of law submitted to him by the head of a Department, although at the instance of the head of a bureau, where the question relates to matters within the direct or supervisory control of the head, and is deemed by the head to be of such difficulty or importance as to require the personal attention of the Attorney-General."

There is thus, in the matter of rendering opinions, an exclusive jurisdiction of the Attorney-General, an exclusive jurisdiction of the Solicitor of the Treasury, and a concurrent jurisdiction in both. Whether questions arising in the concurrent jurisdiction (that is, questions of pure law actually arising in the administration of the Department and relating to matters within the direct or supervisory control of its head) shall be referred to the Attorney-General, to the Solicitor of the Treasury, or to both, is entirely within the discretion of the Secretary of the Treasury. I do not feel that I can intelligently advise as to the exercise of this discretion, nor would it, indeed, be proper for me to do so (17 Opin., 332). Any suggestions made by me must be considered extra-official and as coming from one whose lack of practical knowledge of the administration of the Department makes his opinion on this point far inferior in value to your own. I would, however, call attention to one point in

which the opinions of the Attorney-General differ from those of the Solicitor of the Treasury.

The act of 1870, section 4, establishing the Department of Justice, provided that written opinions prepared by a subordinate in the Department may be approved by the Attorney-General, and that "such approval so indorsed thereon shall give the opinion the same force and effect as belong to the opinions of the Attorney-General." This provision is embraced in substantially the same language in section 358 of the Revised Statutes. Evidently, therefore, Congress contemplates that the official opinions signed or indorsed in writing by the Attorney-General shall have some actual and practical force. Congress's intention can not be doubted that administrative officers should regard them as law until withdrawn by the Attorney-General or overruled by the courts, thus confirming the view which generally prevailed, though sometimes hesitatingly expressed, previous to the establishment of the Department of Justice. (5 Opin., 97; 6 Opin., 334; 7 Opin., 699,700; 9 Opin., 36, 37.)

Instances have recently come to my notice where official opinions of former Attorneys-General have been practically overruled by the Solicitor of the Treasury or administrative boards. These cases were probably due to inadvertence, yet I would suggest that questions of great importance and involving the future course of practice should be referred to the Attorney-General, and that the fact of such reference and the opinion when received should be brought to the notice of the gentlemen whose advice is customarily asked in your Department, that uniformity of rulings may be secured.

Very respectfully,

RICHARD OLNEY

The SECRETARY OF THE TREASURY.

EXHIBIT 4

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 1, 2016

The Honorable Jason Chaffetz
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

The Honorable Elijah E. Cummings
Ranking Member
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Chaffetz and Ranking Member Cummings:

This responds to your letter to the Attorney General, dated March 14, 2016, which requested documents regarding the Office of Legal Counsel (OLC), its processes and the work it performs. We have endeavored to provide answers to your inquiries directly in this letter, including our best estimates for the numbers requested, and explanations for the information provided, wherever possible.

1. **Documents sufficient to show how many full-time employees work in OLC, and of those, how many are attorneys.**

   OLC generally employs between eighteen and twenty-five attorneys and between three and six full-time paralegals and support staff. As of March 31, 2016, excluding two employees currently on detail elsewhere in the executive branch, OLC has 28 total full-time employees. Of these, 22 are attorneys.

2. **Documents sufficient to show how many requests for formal opinions OLC has received each year from 2005 to 2015.**

   OLC has no comprehensive system in place for tracking each incoming request for a formal opinion. Such requests can come in many forms, including by telephone or in person. Moreover, it is not unusual for such requests to be withdrawn or made moot by subsequent events, resulting in no formal opinion being prepared or issued. Consequently, we are not in a position to provide a reliable estimate of the number of requests received in any given calendar year.

3. **Documents sufficient to show how many formal opinions OLC has issued each year from 2005 to 2015, including the number which were classified and the number which were unclassified.**

OLC's practices have varied over the years and the term "formal opinions" has been used to refer to different categories of documents by different people. In the interest of clarity, for this question and others, this response uses the term "formal opinion" to describe a letter or memorandum containing substantive final legal advice of OLC, transmitted to a client agency, and signed by an OLC Assistant Attorney General or Deputy Assistant Attorney General, generally drafted pursuant to the process described in the "Best Practices Memorandum" cited in your letter.[1] We also want to note that due to the nature of compartmented information, OLC does not maintain a complete list of classified formal opinions. As a result, the numbers in the following chart represent OLC's best efforts to estimate the number of classified opinions issued for each year, but it is possible that this count may inadvertently omit one or more compartmented opinions issued during these time periods:

Calendar Year	Estimate of Unclassified Opinions Issued	Estimate of Classified Opinions Issued
2005	29	8
2006	16	4
2007	28	10
2008	28	4
2009	31	9
2010	18	8
2011	12	2
2012	16	2
2013	12	1
2014	5	0
2015	4	1

[1] *See* Memorandum for Attorneys of the Office, from David J. Barron, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010) ("Best Practices Memorandum"), *available at* https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf.

4. **Documents sufficient to show how many regulations requiring the Attorney General's approval OLC reviewed each year from 2005 to 2015, and of those, how many each year resulted in the issuance of a formal opinion.**

In 28 C.F.R. § 0.25(d), the Attorney General has assigned to OLC responsibility for reviewing all orders of the Attorney General for form and legality. Department of Justice regulations published in the Federal Register are issued by order of the Attorney General and, consequently, undergo form and legality review by OLC under this provision. At the same time, Attorney General orders include not only regulations published in the Federal Register but also internal administrative orders of various types, including, for example, the appointment or designation of Department officials or Department delegations, the number of which are affected by many factors and may vary widely from year to year. For each Attorney General order reviewed, OLC prepares a short form and legality memorandum to the Attorney General providing advice on the lawfulness and form of the order. Although OLC does not track the circumstances in which requests for formal opinions arise in connection with proposed Attorney General orders or Department regulations, it is possible that issues raised during the form-and-legality review process may prompt a client agency request for a formal opinion on legal issues relating to a proposed order or regulation. In such an event, the resulting opinion would be counted among the total number of formal opinions issued by the Office provided in response to question 3 above. The following chart represents an estimate of the number of Attorney General orders reviewed by OLC each year, and an estimate of how many of those orders were published as regulations in the Federal Register:

Calendar Year	Estimate of Total AG Orders	Estimate of Orders Published in Federal Register
2005	47	11
2006	60	12
2007	71	13
2008	103	21
2009	94	10
2010	108	17
2011	75	13
2012	44	14
2013	51	11
2014	75	23
2015	122	15

5. Documents sufficient to show how many formal OLC opinions have been released publicly each year from 2005 to 2015.

Formal OLC opinions may be released publicly through a variety of mechanisms. First, as described in the Best Practices Memorandum, OLC has a process in place for regular consideration and selection of its opinions for official publication. In deciding whether an opinion merits publication, OLC considers such factors as the potential importance of the opinion to other agencies or officials in the Executive Branch, the likelihood that similar questions may arise in the future, the historical importance of the opinion or the context in which it arose, and the potential significance of the opinion to OLC's overall jurisprudence. OLC also considers countervailing considerations such as the need "to preserve internal executive branch deliberative processes or protect the confidentiality of information covered by the attorney-client relationship between OLC and other executive offices." Best Practices Memorandum at 6. If OLC makes a preliminary judgment that the opinion may be appropriate for publication, OLC solicits the views of the requesting Executive Branch official or agency and any other Department components or Executive Branch agencies or entities that have interests that might be affected by publication. After receiving any views, OLC makes a final determination regarding publication.

In addition, when OLC receives FOIA requests that cover formal opinions, as with all other documents, it considers whether the documents are exempt from disclosure, and, if so, whether the documents are appropriate for discretionary release. The numbers set forth in the chart below do not include opinions that were released under FOIA but not formally published. For information on that process, see the response below to question 8.

The following hardbound volumes of the Opinions of the Office of Legal Counsel were published over the time period for which your letter requests information.[2] With the exception of the opinions published in the first volume of a new supplemental series,[3] many of these were published online before the final publication dates of the hardbound volumes:

Volume	Year of Publication	Number of OLC Opinions
Vol. 21 (1997)	2005	28 opinions
Vol. 22 (1998)	2005	31 opinions
Vol. 23 (1999)	2006	24 opinions
Vol. 24 (2000)	2006	29 opinions

[2] Imaged copies (i.e., in PDF form) of all hardbound volumes published by OLC are available online at https://www.justice.gov/olc/opinions-volume. Imaged copies of the individual opinions in all hardbound volumes are also available in a searchable index at https://www.justice.gov/olc/opinions.

[3] The purpose of this supplemental series (Op. O.L.C. Supp.) is to provide a vehicle for publishing opinions that predate the commencement of the primary series (Op. O.L.C.) in 1977 and also for publishing post-1977 opinions even after publication of the hardbound volume for that opinion year.

Volume	Year of Publication	Number of OLC Opinions
Vol. 25 (2001)	2012	34 opinions
Vol. 26 (2002)	2012	22 opinions
Vol. 27 (2003)	2013	19 opinions
Vol. 28 (2004)	2013	23 opinions
Supp. Vol. 1 (1933–77)	2013	50 opinions
Vol. 29 (2005)	2014	16 opinions
Vol. 30 (2006)	2014	8 opinions
Vol. 31 (2007)	2014	19 opinions
Vol. 32 (2008)	2014	14 opinions

For the years not yet covered by hardbound volumes in the primary series, the publication review process is continuing, and additional opinions issued during those years may still be published. The following numbers of OLC opinions for those years, however, has already been published online, available at https://www.justice.gov/olc/opinions:

Calendar Year	Opinions Already Published Online
2009	19 opinions
2010	10 opinions
2011	11 opinions
2012	11 opinions
2013	4 opinions
2014	3 opinions
2015	1 opinion

6. **Documents sufficient to show how many formal OLC opinions have been shared with Congress each year from 2005 to 2015, other than those shared publicly.**

In accordance with the new procedure established by the Attorney General and the Director of National Intelligence pursuant to section 322 of the Intelligence Authorization Act for Fiscal Year 2014, Pub. L. No. 113-126, 128 Stat. 1390, 1400-01 (2014), OLC now evaluates each classified opinion it issues to an element of the intelligence community to determine whether it would be appropriate for publication if not for the fact that the opinion contains classified national security information. Any opinion that meets these criteria will be shared with the appropriate committees of Congress. As of this time, no opinions have been shared pursuant to this procedure, although one classified opinion from 2015 is currently under review. OLC has no system in place to track any other limited disclosures of opinions that may have occurred during the noted time period.

7. **Documents sufficient to show how many FOIA requests OLC received each year from 2005 to 2015 requesting OLC opinions.**

OLC receives FOIA requests on a variety of topics. These requests may be divided roughly into three categories: (1) requests that expressly seek formal OLC opinions or, more generally, records containing OLC legal advice; (2) broader requests—for example those that seek correspondence between OLC and other executive branch entities, or all documents concerning a given topic or individual—that may include formal opinions among the responsive records, if such opinions exist, but do not expressly seek such opinions; and (3) requests that are extremely unlikely to include formal opinions as responsive, such as those seeking OLC's FOIA logs.

The following chart represents OLC's total FOIA requests, as reported by the Department's Office of Information Policy ("OIP") at https://www.justice.gov/oip/reports-1, and an estimate of how many of those requests could be construed to potentially call for any responsive formal OLC opinions or other records containing OLC legal advice (that is, how many fall within the first two categories discussed above), regardless of whether any OLC formal opinions existed that were responsive to the requests. Please note that this chart, in keeping with Department and government-wide practice, tracks FOIA requests by fiscal year, rather than by calendar year:

Fiscal Year	Total FOIA Requests	Estimate of FOIA Requests That Potentially Call For Formal Opinions or Other Legal Advice
2005	80	N/A[4]
2006	78	N/A
2007	72	48
2008	57	34
2009	79	64
2010	72	52
2011	77	49
2012	130	84
2013	86	47
2014	91	59
2015	111	67

[4] OLC's FOIA logs prior to Fiscal Year 2007 do not contain enough detail to identify the subject matter of the requests or the content of OLC's responses, and OLC's FOIA records from that era are not organized in a way that allows for this information to be easily reconstructed.

8. **Documents sufficient to show how many formal OLC opinions were released under FOIA each year from 2005 to 2015.**

We have provided below estimates of how many formal OLC opinions were provided to FOIA requesters in each year from 2005 to 2015. Determining these numbers is particularly difficult because OLC's records do not track whether a document provided in response to a FOIA request in a given year was released for the first time in response to that request, or if it had also previously been released to another FOIA requester. Consequently, the following chart identifies OLC's estimate of how many formal opinions were provided to FOIA requesters in a given fiscal year. Because OLC's FOIA records do not generally reflect when an opinion released in response to a FOIA request had been previously released to other FOIA requesters, these estimates include all opinions released to FOIA requesters in a given year regardless of whether the same opinions may have been previously released to another FOIA requester, except that we have excluded opinions from these counts where OLC's readily available records or other context clearly establish that the opinion had been previously released or published:

Calendar Year	Estimate of Opinions Released to FOIA Requesters
2005	N/A[5]
2006	N/A
2007	8
2008	2
2009	63
2010	19
2011	39
2012	56
2013	11
2014	21
2015	7

9. **Documents sufficient to show the average length of time each year from 2005 to 2015 for OLC to respond to FOIA requests.**

The following chart provides the median number of days taken by OLC to process simple, complex, and expedited FOIA requests, by fiscal year, drawn from data reported publicly by OIP at https://www.justice.gov/oip/reports-1:[6]

[5] *See supra* note 4.

[6] Prior to Fiscal Year 2008, the Department tracked only the median number of days taken by components to respond in each category. From Fiscal Year 2008 to the present, further information, including the mean, median, highest, and lowest number of days for requests in each category, may be found in the published reports.

Fiscal Year	Simple	Complex	Expedited
2005	10	30	40
2006	10	60	45
2007	10	60	N/A
2008	35	134	N/A
2009	38	75	N/A
2010	15	178	N/A
2011	23.5	376	211
2012	7	195	118
2013	13	173	92.5
2014	11.5	193	46.5
2015	15	198	133

10. Documents sufficient to show how many OLC employees have FOIA responsibilities in their job descriptions, along with the roles and responsibilities of each.

OLC's FOIA administration and processing are carried out primarily by a FOIA Attorney and a Lead Paralegal under the supervision of a number of senior attorneys in OLC, with additional duties undertaken by OLC's Paralegal Supervisor and two other paralegals, as needed. Other OLC attorneys also assist in the process as necessary, consistent with their other job responsibilities.

11. Documents sufficient to show the records disposition guidelines that apply to OLC for Federal Records Act purposes.

OLC records retention and disposition is covered by SF-115 Records Retention Schedule N1-060-10-31. As described more fully therein, OLC program records are permanent with a 30-year retention after cut off. The SF-115 includes the following eight categories of OLC records:

a. OLC Leadership Program Records
b. Daybooks
c. Attorney General Orders
d. Form and Legality Memoranda
e. Presidential Executive Orders and Proclamations Tracking Logs
f. Attorney General Numbering Log
g. Formal Legal Opinions
h. File Memoranda

E-mail records of OLC senior leadership are governed by Records Retention Schedule

SF-115, DAA-0060-2015-0006, the Department's Capstone schedule for Assistant Attorneys General and their direct reports.[7]

12. **Documents sufficient to show whether OLC, or the Department more generally, utilizes any automatic program, such as Capstone, for Federal Records Act purposes.**

DOJ Order 0801 and DOJ Policy Statement 0801.04 provide high level policy for Department-wide Records and Information Management and Department-wide e-mail record retention respectively. Capstone is not an automated program. The Capstone approach is a revised approach to record keeping that permits agencies to treat e-mail as a records series (rather than segregate e-mail records by substance) for officials considered Capstone officials. As stated above, DOJ Policy Statement 0801.04 provides Department-wide guidance on e-mail retention and sets forth the Department's implementation of the "Capstone" approach in accordance with the Capstone schedule for e-mail referenced above in response to question 11. Records retention schedule DAA-0060-2015-0006 applies the Capstone approach to OLC. These records are retained for thirty years after the individual's tenure ends and are then accessioned to NARA. For more information on Department-wide records retention, please refer to the Department's Senior Agency Official for Records Management FY2015 Annual Report to NARA, dated January 27, 2016, available at https://www.archives.gov/records-mgmt/agency/doj-sao-annual-report-2015.pdf.

13. **Documents sufficient to show the number of requests for informal advice received and the number of requests in which OLC provided informal advice each year from 2005 to 2015, including whether the request originated within the Department, another agency, or the Executive Office of the President.**

OLC provides legal advice to client agencies throughout the executive branch. Similar to a law firm, OLC receives requests for legal advice and provides that legal advice in many forms and across many media, both oral and written. Consequently, OLC has no system in place to track or record every conversation or communication that could be viewed as a request for legal advice.

OLC treats prior advice of the Office as precedential, as described in the Best Practices Memorandum. To facilitate research regarding past OLC advice, OLC maintains a database of unclassified legal advice provided to clients, formal and informal, for its own internal research, regardless of the form the legal advice took or whether it was formally published.[8] The only mechanism OLC has for attempting to make a reasonable estimate regarding the total quantity of legal advice given in a particular year across all formats is to

[7] The Records Retention Schedules discussed in this paragraph are enclosed. They, and all other such schedules for the Department, are publicly available at the website of the National Archives and Records Administration ("NARA"), at http://www.archives.gov/records-mgmt/rcs/schedules/?dir=/departments/department-of-justice/.

[8] Because it is kept current for OLC's internal research purposes, this database is also the starting point for most of OLC's searches for records responsive to FOIA requests, especially when such requests seek records containing OLC legal advice transmitted outside of the Office.

count the items in the database from each year, excluding records of OLC's decisions not to comment on proposed legislation or testimony, which are referred to as "bill no-comments" and stored separately. Because of the nature of the database, the counts in the following chart necessarily include the unclassified opinions noted in response to question 3, above, and the form and legality memoranda associated with the AG orders discussed in response to question 4, above:

Calendar Year	Total Items, Excluding Bill No-Comments
2005	304
2006	570
2007	742
2008	706
2009	610
2010	612
2011	699
2012	571
2013	521
2014	586
2015	628

14. Information on whether Department e-mails containing legal guidance from OLC to the President, the Attorney General, or other agencies, whether formal or informal, are considered to be permanent federal records under the Department's applicable records schedules.

OLC considers its written legal advice, no matter the form, to fall within one or more of the categories of permanent federal records retained by OLC noted in response to question 11 above.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

for

Peter J. Kadzik
Assistant Attorney General

EXHIBIT 5

ATTORNEY GENERAL'S REMARKS, BENJAMIN N. CARDOZO SCHOOL OF LAW, NOVEMBER 15, 1992

*William P. Barr**

While the modern Attorney General is active in a broad array of policy decisions and legal matters, this evening we are concerned only with what was once the core of the Attorney General's duties: legal interpretation within the executive branch. First, I would like to trace the evolution of the office of Attorney General from part-time legal advisor for the new government to head of a major department involved in making policy across a broad range of subjects. Second, I want to discuss the Attorney General's role in interpreting the law, both in rendering legal advice to the executive branch and in determining its litigating positions. In doing so, I will discuss the alleged tension between the Attorney General's roles as a legal advisor and as a policy subordinate of the President.

I.

Although the office of Attorney General was among the first cabinet positions created in 1789,[1] it was some time before the office carried the same weight and rank as the other departments, in both size and responsibility. Initially, the Attorney General was in many ways like an attorney on retainer. He had no staff, no office space, and no supplies.[2] It appears that he was not required to live in the capital.[3] And he was paid half what the other cabinet secretaries were paid.[4] In keeping with the contemporary practice in England, the Attorney General was a part-time government employee. Congress expected him to supplement his meager salary through private practice. In offering the job to Edmund Randolph, the first Attorney General, George Washington suggested that it would help him attract clients.[5] So much for government ethics in those days.

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* Attorney General, 1991-1993; Deputy Attorney General, 1990-1991; Assistant Attorney General for the Office of Legal Counsel, 1989-1990.

1 *See* Act of Sept. 24, 1989, ch. 20, 1 Stat. 73, 93.

2 Luther A. Huston, *History of the Office of the Attorney General, in* ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 1, 1-2 (1968).

3 *Id.* at 6.

4 CORNELL W. CLAYTON, THE POLITICS OF JUSTICE: THE ATTORNEY GENERAL AND THE MAKING OF LEGAL POLICY 16 (1992).

5 Huston, *supra* note 2, at 5-6.

Initially, the Attorney General's duties were quite limited. As specified in the Judiciary Act of 1789, he had only two responsibilities: one, "to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned,"[6] and two, "to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments . . . ."[7] Although that statute was enacted in 1789, it remains the law. As head of the Office of Legal Counsel, I was often asked by members of Congress for legal advice. I would refuse: it is not the responsibility of the Attorney General's office to give legal advice to Congress, which has its own counsel. They would protest, but the statute dictates that the Attorney General is to give advice when asked by the President.

The Attorney General was not initially responsible for the conduct of litigation in the lower courts, and did not have supervisory authority over the district attorneys. Soon it was recognized, however, that even the limited functions of the Attorney General would require more than part-time work. In 1818, Congress finally gave the Attorney General one clerk, an office, and some supplies.[8] The next year, Congress increased the Attorney General's salary to that of other cabinet officials.[9]

Yet by tradition as much as by duties, the Attorney General was primarily a detached legal advisor, and not really involved in policymaking. Abraham Lincoln's Attorney General, Edward Bates, observed: "The office I hold is not properly *political*, but strictly *legal*; and it is my duty, above all other ministers of State to uphold the Law and to resist all encroachments, from whatever quarter, of mere will and power."[10]

After the Civil War, the office of the Attorney General began to expand dramatically. In 1870, the Department of Justice was formed, and Congress placed litigation conducted by district attorneys in the lower courts under the supervision of the Attorney General.[11] Over the next century, federal law enforcement became a far greater concern, and the Attorney General acquired further duties and responsibilities. Today, the Attorney General's office is responsible for the

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6 Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 93.

7 *Id.*

8 Act of Apr. 20, 1818, ch. 87, 3 Stat. 445, 447.

9 Act of Mar. 3, 1819, ch. 54, 3 Stat. 496, 500.

10 *See* Arthur S. Miller, *The Attorney General as the President's Lawyer*, *in* ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 41, 51 (1968).

11 Act of June 22, 1870, ch. 150, 16 Stat. 162, 164.

Immigration and Naturalization Service, the Bureau of Prisons, the Drug Enforcement Agency, the Federal Bureau of Investigation, the United States Marshals, the United States Trustees, the Pardon Attorney, the Parole Board, ninety-four U.S. Attorneys, six litigating divisions in Washington, a large grant program, an asset forfeiture program that has $1 billion in the pipeline at any one time, and numerous other responsibilities. It has been the fastest-growing department by far since 1980. Its budget is almost $12 billion. Thus, the Attorney General now has substantial policy as well as legal responsibilities.[12]

While the Attorney General has been acquiring increased policy responsibilities, the other agencies and departments have acquired their own legal staffs. This has somewhat reduced the Attorney General's burden of advising on day-to-day operations; at the same time, it has created complications and conflicts. For every day that I am glad that there is a general counsel available to each agency, there is another day that I wish there were one general counsel in the Justice Department who answered all the questions. Yet on significant and constitutional issues, the Attorney General has clearly remained the principal legal advisor to the President and to the executive branch.

II.

Today, the Attorney General remains responsible for his two initial functions: providing advice to the executive branch officials on matters of law, and conducting litigation in the Supreme Court. The advice function is performed by the Office of Legal Counsel, and the litigation function is performed by the Office of the Solicitor General. The Attorney General's greater policymaking involvement has created additional challenges in remaining a detached and effective legal advisor. Those challenges vary with the context in which the legal advice is given. Before directly addressing those issues, I will briefly discuss the Attorney General's various interpretative functions.

First, the Attorney General acts as a counselor, in a paradigmatic attorney-client sense, to the President in his official capacity and to the heads of the executive branch agencies. The most obvious example is providing opinions on contemplated executive actions. No less important is the advice provided on bills presented to the President for his approval. Second, the Attorney General is responsible for the resolution of legal disputes between agencies within the executive

[12] *See generally* 1992 ATT'Y GEN. ANN. REP. (describing current activities of the Department of Justice).

branch. A third and sometimes overlooked aspect of legal interpretation by the Attorney General is the control the Attorney General exerts over the litigating positions of the executive branch. But the bulk of the Attorney General's role, and certainly the most controversial aspect of it, is the legal interpretation that is done as the direct legal advisor to the President and to the cabinet. Here the Attorney General functions most like a typical attorney, advising a client on his legal options.

For example, when I was head of the Office of Legal Counsel under Attorney General Thornburgh, we gave advice about the United States's options in Panama, the legal justification for the invasion, and how we could arrest Manuel Noriega—and make it stick in court.[13] We also dealt with the international law questions that would be raised.[14] We gave advice on establishing martial law in St. Croix after Hurricane Hugo. Sometimes the questions are extremely important. Some of you may have read the book *The Commanders*,[15] about the war in the Persian Gulf. In that book, Bob Woodward writes that when Attorney General Thornburgh was out of town and I was Deputy Attorney General, I was asked to advise the President on whether or not he could initiate operations against Iraq without the authorization of Congress.[16] Woodward writes that I told President Bush that he could.[17] Of course, we also get more mundane questions, such as "What is the effective date of this statute?" and "When does the ninety days run out?" But sometimes the questions are quite interesting, and do keep one awake at night.

The unique position of the Attorney General raises special considerations. The Attorney General's oath to uphold the Constitution raises the question whether his duty lies ultimately with the President who appointed him or more abstractly with the rule of law. I said in my confirmation hearings, and have said several times since, that the Attorney General's ultimate allegiance must be to the rule of law.[18] In my experience, there has not been any substantial tension between the role of upholding the rule of law and the role of the Attorney

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13 13 Op. Off. Legal Counsel 387 (1989).

14 Giving advice on international law questions is a long-standing practice of the Office of the Attorney General. *See, e.g.*, 1 Op. Att'y Gen. 27 (1792) (applicability of "law of nations" to United States); 1 Op. Att'y Gen. 30 (1793) (reprisals against foreign states under law of nations); 1 Op. Att'y Gen. 68 (1797) (entry into Spanish territory to recover property under law of nations).

15 BOB WOODWARD, THE COMMANDERS (1991).

16 *Id.* at 356-57.

17 *Id.*

18 *See Confirmation Hearings on Federal Appointments*, 102d Cong., 1st Sess., pt. 2, at 1, 16-17, 80 (1991).

General as a policy subordinate of the President. As with any lawyer, the Attorney General best serves his client by providing unvarnished, straight-from-the-shoulder legal advice as to what the Attorney General thinks the law is, without regard to political considerations. Being a good legal advisor requires that I reach sound legal conclusions, even if sometimes they are not the conclusions that some may deem to be politically preferable.

Much depends on the question that is asked. As head of the Office of Legal Counsel and as Attorney General, I have paid a great deal of attention to what question is being asked of me as a lawyer. In this administration, my experience has been that the question asked usually is, what is the right answer. What is the *legally* right position? You could get another question, which is, can you advance a reasonable argument to sustain a given action. But more than nine times out of ten, the question is, is this regulation lawful, in your best judgment. That certainly was the question asked about the line-item veto. My predecessor, Charles J. Cooper, wrote a long memorandum concluding that the line-item veto was unconstitutional.[19] I spent about six months reexamining that issue. I came to the conclusion that the line-item veto was not in the Constitution, and that it would be very difficult to mount any reasonable argument that it was.

Another more recent example is the question of indexing capital gains.[20] There was a great deal of pressure—not from the administration but from writers and from Republicans on the Hill—to conclude that the President could index capital gains. There again, I paid close attention to the question that was being asked. Robert Novak wrote that the real problem was that I was not sent sufficient signals as to what answer was wanted.[21] While I agree with Novak on many things, here he was mistaken. On the contrary, I was clearly told what the question was, which was, is indexing lawful. Also, I understood the policy preferences of the administration. The question was: Can we, simply through administrative action, index capital gains. And not only did I not think we could, I did not think that a reasonable argument could be made to support that position.[22]

The reason that I had no hesitation in rejecting the legal bases for a line-item veto and capital gains indexing is rooted in my view that the President has a responsibility to his office to advance responsible

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19 12 Op. Off. Legal Counsel 159 (1988).

20 16 Op. Off. Legal Counsel 145 (1992).

21 *See* Rowland Evans & Robert Novak, *A Presidential Test on Capital Gains*, WASH. POST, Sept. 2, 1992, at A21.

22 16 Op. Off. Legal Counsel 145 (1992).

positions of law. I believe that President Bush fully shares this position. Ultimately, if you attempt to push too hard—even as a matter of litigation risks—and take legal positions that clearly will not be sustained, or that are not responsible and reasonable legal positions, you will lose ground. That certainly was the consequence of the *Steel Seizure Case*.[23] And so in this administration, that is why the question has been, what is the right legal answer—not whether we can provide a veneer of justification for a given action. Our view has been that if we go into court with untenable positions and lose, we ultimately weaken the office of the President.

Another special consideration that confronts the Attorney General that does not confront the private attorney when giving advice is that the Attorney General's opinions are binding in a way that private attorneys' opinions rarely are. Obviously, Attorney General opinions cannot bind the President, but by executive order, the Attorney General's opinions do bind the executive branch, at least with respect to interagency disputes.[24] This highlights another change from the early days of the Office of the Attorney General. Although the opinion is not uniform, many of the early Attorneys General looked upon their advice as no more binding on the executive branch than is a private attorney's on his client. Attorney General Jeremiah Black, for example, observed in 1857 that:

> The duty of the Attorney General is to advise, not to decide. . . . You may disregard his opinion if you are sure it is wrong. He aids you in forming a judgment on questions of law; but still the judgment is yours, not his. You are not bound to see with his eyes, but only to use the light which he furnishes, in order to see the better with your own.[25]

In the interest of uniformity within the executive branch, the contrary view has prevailed, although the issue is not free from debate as to so-called "independent" agencies. Therefore, when giving his opinion, the Attorney General, unlike a typical lawyer, must pay close attention to consistency and precedent, rather than simply to the immediate interests of his client. This necessary concern for continuity contributes to the Attorney General's resistance to temporary political pressures.

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[23] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *see* WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 61-98 (1987).

[24] Exec. Order No. 12,146, § 1-401, 3 C.F.R. 409 (1979), *reprinted in* 28 U.S.C. § 509 (1992); *see generally* Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 489-91 (1993) (discussing role of the Department of Justice in resolving interagency disputes).

[25] 9 Op. Att'y Gen. 32, 36 (1857).

Interagency disputes on legal matters present a particularly strong test of that resistance. By executive order, the President has delegated to the Attorney General the responsibility for resolving disputes between agencies over what the law is.[26] In this context, the Attorney General's role is much like a court's in an adversarial proceeding. Because each agency has its own staff of lawyers, disputes between them come before the Attorney General with legal positions already well-established. Each agency will usually have legal authority or good arguments to support its view. The Office of Legal Counsel requires each side to come in with briefs, just as if it were a judicial proceeding. Deciding among the positions being taken requires the Attorney General—or in most cases the Office of Legal Counsel—to function as a judge.

The Department of Justice does not in this context make policy decisions. Just as a court would, the Department confines itself to the legal questions presented. Its reason for doing so, however, is different from a court's reason. If a court were making the decision, we would say with certainty that policy choices should be left to the political branches of government. Being part of a political branch, however, the Department cannot fall back on that principle. Some observers might argue, therefore, that if both positions are arguably correct, the Attorney General should, as the President's legal advisor, favor the approach most consistent with the administration's overall program. Some argued this during the capital gains indexing debate (although this was not a dispute between two agencies).

In the context of resolving legal disputes under the executive order, we reject this view. Furthering the administration's policy goals is not our role in giving legal advice, and it is not our role in resolving disputes. The question in both contexts is, what is the right legal answer. The Attorney General's authority to decide at all comes from the President.[27] Traditionally, this mandate has been understood to encompass only legal questions. Policy disputes are resolved elsewhere within the executive branch. Any other arrangement would undermine the Attorney General's credibility in rendering legal opinions. Hence, both prudence and the President's delegation of authority require the Attorney General to consider, when resolving disputes, not the administration's policy objectives, but the rule of law. This is true unless a different question is asked, which is, can you sustain a given position with reasonable, good faith legal arguments.

Different concerns arise in the context of advice on bills

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[26] Exec. Order No. 12,146, § 1-401, *supra* note 24.

[27] *See id.*; *see* U.S. CONST. art. II, § 2.

presented to the President for approval. The role of presidential signing statements in executive branch legal interpretation is sometimes overlooked, but is of growing importance.[28] The use of signing statements dates back at least to Andrew Jackson,[29] but Presidents Reagan and Bush have used them much more frequently to identify constitutionally problematic provisions. The Attorney General advises the President on potential constitutional problems in all legislation presented for his signature. The Department of Justice reviews more legislation than any other government agency by far. Many people in a practical, pragmatist government are contemptuous of the Department of Justice for examining constitutional details in legislation.

But consider, for example, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA),[30] the savings and loan bailout statute. The Office of Legal Counsel recognized an Appointments Clause problem in the FIRREA bill. The director of the Office of Thrift Supervision should have been appointed by the President; he could not be grandfathered in by the chairman of the Home Loan Bank Board.[31] Many people in the Treasury Department and on the Hill thought it was absurd that the Department of Justice was worried about that kind of issue, while they were trying to solve the savings and loan crisis. So the views of the Department of Justice were overridden. Political deals were made, and the bill passed. The law was then struck down by a federal court as unconstitutional.[32] This created a panic, and delayed dealing effectively with the savings and loan crisis. When a provision raises constitutional difficulties, in most cases the Attorney General should recommend veto.[33] I have—I even recommended the veto of our own appropriations bill. No other agency, I think, has ever done that.

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28 *See generally* Douglas W. Kmiec, *Of Balkanized Empires and Cooperative Allies: A Bicentennial Essay on the Separation of Powers*, 37 CATH. U. L. REV. 73, 81-83 (1987) (describing increasing use of presidential signing statements).

29 Douglas W. Kmiec, *Judges Should Pay Attention to Statements by President*, NAT'L L.J., Nov. 10, 1986, at 13.

30 12 U.S.C. § 1462a (1992).

31 The Office of Thrift Supervision replaced the Federal Home Loan Bank Board under FIRREA. *See* 12 U.S.C. § 1462a(e)(1) (1992).

32 Olympic Fed. Sav. & Loan v. Assoc. Director, Office of Thrift Supervision, 732 F. Supp. 1183 (D.D.C.), *dismissed as moot*, 903 F.2d 837 (D.C. Cir. 1990).

33 The President ultimately must act on the basis of his own understanding of the Constitution. If the Attorney General believes that a given statute is unconstitutional, but also believes that it is more probable than not that the statute would be upheld by the courts, it would still be appropriate to recommend veto on constitutional grounds. Providing one's view on a statute is not merely a question of predicting litigation risks. *See* Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 771-76 (1993) (discussing President's responsibility to veto bills believed to be unconstitutional).

In many cases, the Department of Justice will propose, as a fallback position, that an issue be addressed in a signing statement if it would be politically impossible simply to veto a bill. For instance, at the very end of its session, Congress frequently passes large bills and then leaves town. The only choice we have is to veto the bill and, say, shut down the foreign operations of the United States altogether for six months, or to sign the bill and note exception to some provision we think is unconstitutional. Thus, in some instances, signing statements have directed subordinate officials to disregard provisions of a bill that are thought to be clearly unconstitutional and severable.

The use of signing statements to say that agencies should refuse to enforce part of a law because it is unconstitutional has been extremely controversial. Our position, or my position when I was at the Office of Legal Counsel, was that the President could use signing statements in that way where the law encroached on executive authority.[34] For example, a 1990 foreign relations bill had a provision forbidding spending funds on sending a delegation to a negotiating session, unless the delegation included members of the (Congress-controlled) Commission on Security and Cooperation in Europe.[35] Essentially, Congress tried to control the President's appointment power by forcing him to appoint members of a legislative entity to a diplomatic delegation. In our view, that was a clearly unconstitutional encroachment on the President's appointment authority as well as on his authority to administer the foreign relations of the United States.[36] Since the bill contained all of our foreign relations money, we said that the President could sign the bill and at the same time announce that the provision would not be enforced.[37] In fact, that is what was done, and no legislative members were appointed. We said that the power to decline to enforce the law flows from the Take Care Clause—"take Care that the Laws be faithfully executed . . . ."[38] The Constitution is the law. If the President is confronted with a circumstance where the Constitution says one thing and a statute says another, the President or the Attorney General has to choose the supreme law of the land. Particularly where a law encroaches on executive power, the only effective way of challenging the law is by declining to enforce it. Otherwise, the President would be at the mercy

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[34] 14 Op. Off. Legal Counsel 38 (1990).

[35] Foreign Relations Authorization Act, Fiscal Years 1990 & 1991, Pub. L. No. 101-246, § 102, 104 Stat. 15, 19 (1990).

[36] 14 Op. Off. Legal Counsel 38 (1990).

[37] Statement on Signing the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, 26 PUB. PAPERS 239 (Feb. 16, 1990).

[38] U.S. CONST. art. II, § 3.

of Congress. The only reference to this issue at the Constitutional Convention was by James Wilson, who said that one of the President's defenses to encroachments on presidential power is the President's refusal to execute those unconstitutional parts of the law.[39]

We have also used signing statements to set forth the President's understanding of how a particular provision in the bill is to be interpreted, his understanding of what it means, or his directive as to how the executive branch is going to interpret it. It is unclear what weight, if any, the courts will give such statements. The President has a constitutionally-mandated part in the legislating process. To the extent that legislative history is given effect, it may be that presidential signing statements should be viewed as part of legislative history. Beyond that, the Constitution requires that the President "take Care that the Laws be faithfully executed . . . ."[40] Signing statements provide the needed direction to guide subordinate executive officers on how to execute the law faithfully.

The final method of executive branch legal interpretation I would like to address tonight is the Attorney General's role in determining the litigating posture of the United States. Obviously, the position that the Department takes in a brief carries no weight apart from its persuasiveness. But it is in this area that it is most likely that charges of political gamesmanship will be leveled. It must be remembered that in litigation, the Attorney General represents the United States. And I believe that the Attorney General as an advocate must strive for the correct legal result. Observers often equate the correct result with that which is most consistent with a position previously adopted by the courts. Thus, when the Department tries to persuade a court to reconsider its position, or advances a novel argument on a subject previously thought to have been closed, some people have suggested that this is inappropriate—that this is being political. But it is entirely consistent with the Attorney General's duties to advocate such a position. If the Attorney General concludes that a particular line of precedent is incorrect as a matter of law, it is as much a policy decision, if not more so, to acquiesce in that line of decision as to urge that it be discarded. Like the President, the Attorney General is sworn to uphold the Constitution. While the executive branch will not disregard a decision of the Supreme Court, even one that is clearly wrong, this does not mean that presidents are forever debarred from seeking reconsideration of a position that has previously been taken by the

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[39] 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 450-51 (Merrill Jensen ed., 1976) (statement of James Wilson on Dec. 1, 1787).

[40] U.S. CONST. art. II, § 3.

Court.[41] I believe that urging the Court to reconsider a prior decision serves the executive branch's obligation to the Constitution, without diminishing the Court's constitutional role.

III.

The issues I have highlighted afford no easy solutions. Much depends on the personal integrity of the attorneys at the Department of Justice and throughout the executive branch who are responsible for the professional and faithful implementation and administration of the law. Of course, the policymakers themselves must value the legal conclusions of those attorneys. Robert Novak said that if Lyndon Johnson—and I do not necessarily believe this of Lyndon Johnson—were then President, William Barr would have been out on the street thirty seconds after giving the capital gains indexing opinion.[42] Indeed, it is true that President Jackson once consulted his Attorney General on a proposal to designate certain banks as depositaries of U.S. funds. The President told his Attorney General, "Sir, you must find a law authorizing the act or I will appoint an Attorney General who will."[43] Ultimately, it falls upon the Attorney General to resist such pressure, in Attorney General Bates's words, "from whatever quarter."[44] Honest legal advice is valuable to policymakers in assessing the litigation risks of their actions, but more importantly it is essential to our system of government. Nothing would be so destructive to the rule of law as to permit purely political considerations to overrun sound legal judgment.

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[41] *See* John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 394-96 (1993).

[42] *See* Rowland Evans & Robert Novak, *A Presidential Test on Capital Gains*, WASH. POST, Sept. 2, 1992, at A21.

[43] *See* Miller, *supra* note 10, at 51.

[44] *See supra* note 10 and accompanying text.

EXHIBIT 6

FBI AUTHORITY TO SEIZE SUSPECTS ABROAD

HEARING

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

NOVEMBER 8, 1989

Serial No. 134



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CONTENTS

HEARING DATE

	Page
November 8, 1989	1

WITNESSES

Barr, William P., Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice	2
Sofaer, Abraham D., the Legal Adviser, U.S. Department of State	22
Revell, Oliver B., Associate Deputy Director-Investigations, Federal Bureau of Investigation	43

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Barr, William P., Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice: Prepared statement	9
Sofaer, Abraham D., the Legal Adviser, U.S. Department of State: Prepared statement	26
Revell, Oliver B., Associate Deputy Director-Investigations, Federal Bureau of Investigation: Prepared statement	46

APPENDIX

Letter from Chairman Edwards to Attorney General Thornburgh, dated November 2, 1989	73
Letter from Assistant Attorney General Crawford to Chairman Edwards, dated November 7, 1989	74
Office of Legal Counsel opinion, March 31, 1980	75
Letter from Chairman Edwards to Attorney General Thornburgh, dated November 20, 1989	91
Letter from Attorney General Thornburgh to Chairman Edwards, dated November 28, 1989	92
Letter from Chairman Edwards to Attorney General Thornburgh, dated December 7, 1989 through January 24, 1990	94
Letter from Assistant Attorney General Barr to Chairman Edwards, dated January 24, 1990	99
Letter from Chairman Brooks to Attorney General Thornburgh, dated January 31, 1990	101
Memorandum from the General Counsel to the Clerk of the House dated November 8, 1989, re: "Justice Department Assertions of Unconstitutionality of Laws Implementing Congressional Authority"	103
Letter from Attorney General Thornburgh to Chairman Brooks, dated February 20, 1990	118
Letter from Attorney General Thornburgh to Chairman Brooks, dated May 17, 1990	122
Executive Order 12146, "Management of Federal Legal Resources"	124



Office of the Attorney General
Washington, D. C. 20530

May 17, 1990

Honorable Don Edwards
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Don:

Yesterday, when I testified before the Judiciary Committee, you asked me two questions relating to the binding nature of opinions issued by the Department's Office of Legal Counsel (OLC). This letter is intended to dispel any confusion which may have resulted from my response.

In your first question, you asked me whether I would be able to provide you with a copy of OLC's opinion on extra-territorial arrest authority. As I have indicated in a letter I sent to Chairman Brooks recently, and in my answer to you yesterday, OLC's legal advice to me is analogous to confidential information conveyed in the context of a lawyer-client relationship. It is therefore not binding, but rather advisory.

When you next asked me about OLC's 1987 opinion on the applicability of the Davis-Bacon Act to leases negotiated by the Veterans Administration, now the Department of Veterans Affairs (VA), I did not clarify the distinction between advisory opinions conveyed to me and OLC opinions issued for the purpose of resolving disputes between agencies within the Executive Branch. OLC issued its Davis-Bacon Opinion in its latter role, and its determination that VA leases of privately owned facilities are not covered by the Act is binding on both the Department of Labor and the VA, as well as other agencies involved in the dispute.

OLC has long performed this role, which is reflected in Executive Order 12146 (enclosed), issued during the Carter Administration and continued in effect ever since. As you can see, its purpose was to authorize the Attorney General, and, hence, OLC, to resolve legal disputes within the Executive Branch. Without the ability to issue binding opinions, OLC's review function would have less effect in resolving disputes and maintaining a consistent legal position within the Administration.

I hope the foregoing has clarified matters, and I look forward to working with you and your colleagues in the weeks and months remaining in this Congress.

Sincerely,

Dick Thornburgh
Attorney General

Enclosure

cc: Honorable Jack Brooks

nees. The Attorney General shall receive recommendations of such persons from any person, commission or organization.

1-103. The use of commissions to notify the public of vacancies and to make recommendations for district judge is encouraged. The Attorney General shall make public the suggested guidelines for such commissions.

1-104. Before making recommendations, the Attorney General shall consider whether:

(a) Public notice of the vacancy has been given and an affirmative effort has been made, in the case of each vacancy, to identify qualified candidates, including women and members of minority groups;

(b) The selection process was fair and reasonable;

(c) The person or persons recommended meet the standards for evaluation set forth in Section 1-2 of this Order.

1-105. In evaluating proposed nominees, consideration will be given to reports of Department of Justice investigations and all other relevant information concerning potential nominees and their qualifications.

1-2. *Standards for Evaluating Proposed Nominees.*

1-201. The standards to be used in determining whether a person is qualified to serve as a district judge are whether that person:

(a) Is a citizen of the United States, is a member of a bar of a state, territory, possession or the District of Columbia, and is in good standing in every bar in which that person is a member;

(b) Possesses, and has a reputation for, integrity, good character, and common sense;

(c) Is, and has a reputation for being, fair, experienced, even-tempered and free of biases against any class of citizens or any religious or racial group;

(d) Is of sound physical and mental health;

(e) Possesses and has demonstrated commitment to equal justice under law;

(f) Possesses and has demonstrated outstanding legal ability and competence, as evidenced by substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and writing, and familiarity with courts and their processes;

(g) Has the ability and the willingness to manage complicated pretrial and trial proceedings, including the ability to weigh conflicting testimony and make factual determinations, and to communicate skillfully with jurors and witnesses.

1-3. *Amendments of Existing Orders.*

[Sec. 1-3 amended EO 12059 of May 11, 1978, and EO 12084 of Sept. 27, 1978, both of which were revoked by EO 12305 of May 5, 1981.]

Executive Order 12146—Management of Federal legal resources

SOURCE: The provisions of Executive Order 12146 of July 18, 1979, appear at 44 FR 42657, 3 CFR, 1979 Comp., p. 409, unless otherwise noted.

By the authority vested in me as President by the Constitution and statutes of the United States of America, it is hereby ordered as follows:

1-1. *Establishment of the Federal Legal Council.*

1-101. There is hereby established the Federal Legal Council, which shall be composed of the Attorney General and the representatives of not more than 15 other agencies. The agency representative shall be designated by the head of the agency.

1-102. The initial membership of the Council, in addition to the Attorney General, shall consist of representatives designated by the heads of the following agencies:

(a) The Department of Commerce.
(b) The Department of Defense.
(c) The Department of Energy.
(d) The Environmental Protection Agency.
(e) The Equal Employment Opportunity Commission.
(f) The Federal Trade Commission.
(g) The Department of Health, Education, and Welfare.[1]
(h) The Interstate Commerce Commission.
(i) The Department of Labor.
(j) The National Labor Relations Board.
(k) The Securities and Exchange Commission.
(l) The Department of State.
(m) The Department of the Treasury.
(n) The United States Postal Service and
(o) the Veterans Administration.

1-103. The initial members of the Council shall serve for a term of two years. Thereafter, the agencies which compose the membership shall be designated annually by the Council and at least five positions on the Council, other than that held by the Attorney General, shall rotate annually.

1-104. In addition to the above members, the Directors of the Office of Management and Budget and the Office of Personnel Management, or their designees, shall be advisory members of the Council.

1-105. The Attorney General shall chair the Council and provide staff for its operation. Representatives of agencies that are not members of the Council may serve on or chair subcommittees of the Council.

1-2. *Functions of the Council.*

1-201. The Council shall promote:

(a) coordination and communication among Federal legal offices;
(b) improved management of Federal lawyers, associated support personnel, and information systems:
(c) improvements in the training provided to Federal lawyers;
(d) the facilitation of the personal donation of *pro bono* legal services by Federal attorneys;
(e) the use of joint or shared legal facilities in field offices; and
(f) the delegation of legal work to field offices.

1-202. The Council shall study and seek to resolve problems in the efficient and effective management of Federal legal resources that are beyond the capacity or authority of individual agencies to resolve.

1-203. The Council shall develop recommendations for legislation and other actions: (a) to increase the efficient and effective operation and management of Federal legal resources, including those matters

[1] EDITORIAL NOTE: Redesignated as the Department of Health and Human Services by Pub. L. 96-88 (93 Stat. 695, 20 U.S.C. 3508).

specified in Section 1-201, and (b) to avoid inconsistent or unnecessary litigation by agencies.

1-3. *Litigation Notice System.*

1-301. The Attorney General shall establish and maintain a litigation notice system that provides timely information about all civil litigation pending in the courts in which the Federal Government is a party or has a significant interest.

1-302. The Attorney General shall issue rules to govern operation of the notice system. The rules shall include the following requirement:

(a) All agencies with authority to litigate cases in court shall promptly notify the Attorney General about those cases that fall in classes or categories designated from time to time by the Attorney General.

(b) The Attorney General shall provide all agencies reasonable access to the information collected in the litigation notice system.

1-4. *Resolution of Interagency Legal Disputes.*

1-401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

1-402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

1-5. *Access to Legal Opinions.*

1-501. In addition to the disclosure now required by law, all agencies are encouraged to make available for public inspection and copying other opinions of their legal officers that are statements of policy or interpretation that have been adopted by the agency, unless the agency determines that disclosure would result in demonstrable harm.

1-502. All agencies are encouraged to make available on request other legal opinions, when the agency determines that disclosure would not be harmful.

1-6. *Automated Legal Research and Information Systems.*

1-601. The Attorney General, in coordination with the Secretary of Defense and other agency heads, shall provide for a computerized legal research system that will be available to all Federal law offices on a reimbursable basis. The system may include in its data base such Federal regulations, case briefs, and legal opinions, as the Attorney General deems appropriate.

1-602. The Federal Legal Council shall provide leadership for all Federal legal offices in establishing appropriate word processing and management information systems.

1-7. *Responsibilities of the Agencies.*

1-701. Each agency shall (a) review the management and operation of its legal activities and report in one year to the Federal Legal Council all steps being taken to improve those operations, and (b) cooperate with the Federal Legal Council and the Attorney General in the performance of the functions provided by this Order.

1-702. To the extent permitted by law, each agency shall furnish the Federal Legal Council and the Attorney General with reports, information and assistance as requested to carry out the provisions of this Order.

Executive Order 12250—Leadership and coordination of nondiscrimination laws

SOURCE: The provisions of Executive Order 12250 of Nov. 2, 1980, appear at 45 FR 72995, 3 CFR, 1980 Comp., p. 298, unless otherwise noted.

By the authority vested in me as President by the Constitution and statutes of the United States of America, including section 602 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1), Section 902 of the Education Amendments of 1972 (20 U.S.C. 1682), and Section 301 of Title 3 of the United States Code, and in order to provide, under the leadership of the Attorney General, for the consistent and effective implementation of various laws prohibiting discriminatory practices in Federal programs and programs receiving Federal financial assistance, it is hereby ordered as follows:

1-1. *Delegation of Function.*

1-101. The function vested in the President by Section 602 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1), relating to the approval of rules, regulations, and orders of general applicability, is hereby delegated to the Attorney General.

1-102. The function vested in the President by Section 902 of the Education Amendments of 1972 (20 U.S.C. 1682), relating to the approval of rules, regulations, and orders of general applicability, is hereby delegated to the Attorney General.

1-2. *Coordination of Nondiscrimination Provisions.*

1-201. The Attorney General shall coordinate the implementation and enforcement by Executive agencies of various nondiscrimination provisions of the following laws:

(a) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq.*).

(b) Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*).

(c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794).

(d) Any other provision of Federal statutory law which provides, in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance.

1-202. In furtherance of the Attorney General's responsibility for the coordination of the implementation and enforcement of the nondiscrimination provisions of laws covered by this Order, the Attorney General shall review the existing and proposed rules, regulations, and orders of general applicability of the Executive agencies in order to identify those which are inadequate, unclear or unnecessarily inconsistent.

EXHIBIT 7

AS:DRE:caj

Files
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DEC 19 1974

Mr. Karl E. Bakke
General Counsel
Department of Commerce
Washington, D.C. 20230

Dft 12/19/74

Mr. Harold S. Trimmer, Jr.
General Counsel
General Services Administration
Washington, D.C. 20405

Dear Sirs:

Attached is our memorandum in answer to your request for our views on the applicability of the Endangered Species Act of 1973 to sales of sperm whale oil by the General Services Administration.

As is stated in more detail in the memorandum, it is our opinion that the Endangered Species Act applies to the sales in question and prohibits them.

Sincerely,

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

DEC 19 1974

MEMORANDUM

Re: Application of the Endangered Species Act of 1973 to the Sale of Sperm Whale Oil by the General Services Administration

We have been asked by the Department of Commerce and the General Services Administration what effect the Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq., has on two contracts made by GSA for the sale of sperm whale oil.

By contracts dated December 27, 1973, the day before the Endangered Species Act became effective, and January 31, 1974, the General Services Administration (GSA) sold two lots of sperm whale oil to two private companies. This oil was originally held by the government in the strategic materials stockpile in accordance with the authority provided by the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. § 98-98h. In 1972 sperm whale oil was removed from the list of strategic and critical materials and GSA was asked to dispose of the material. Pursuant to 50 U.S.C. § 98b(e) notice of the proposed disposal was published in the Federal Register (38 Fed. Reg. 1157 (Jan. 9, 1973)) and given to Congress. Negotiations regarding the sale of the whale oil took place commencing in the fall of 1972 and culminated in the contracts of December 27, 1973 and January 31, 1974. 1/ Commerce asserts that the sales are prohibited; GSA asserts the contrary.

The Endangered Species Act of 1973, which became effective on December 28, 1973, makes it unlawful for any "person" to "sell or offer for sale in interstate or foreign commerce" an endangered species (16 U.S.C. § 1538(a)(1)(F)), or to "deliver, receive, carry, transport, or ship in interstate

1/ All details as to the history of the acquisition and sale of the sperm whale oil are taken from a memorandum entitled "Stockpiling of Strategic and Critical Materials," prepared by GSA and attached as exhibit III to the letter of September 27, 1974 from the General Counsel of the Department of Commerce to the Assistant Attorney General, Office of Legal Counsel, Department of Justice.

or foreign commerce, by any means whatsoever and in the course of commercial activity" an endangered species (16 U.S.C. § 1538(a)(1)(E)). This prohibition extends to parts or products of "fish or wildlife" (whether dead or alive) that are designated as "endangered species". 16 U.S.C. § 1532(5). The Act was specifically made applicable to the Federal Government, since "person" is defined to include "any officer, employee, agent, department, or instrumentality of the Federal Government. . . ." 16 U.S.C. § 1532(8).

It is clear that the foregoing provisions of the Endangered Species Act would prohibit GSA's sale of the whale oil and GSA's and the buyer's transportation of the whale oil unless some exemption in the Act applies. 2/ The only exemption that is even arguably applicable is contained in 16 U.S.C. § 1538(b), which provides in pertinent part:

> "The provisions of this section [which include the prohibitions set out above] shall not apply to any fish or wildlife held in captivity or in a controlled environment on December 28, 1973, if the purposes of such holding are not contrary to the purposes of this chapter; except that this subsection shall not apply in the case of any fish or wildlife held in the course of a commercial activity." (Emphasis added.)

"Commercial activity" is defined as--

> "all activities of industry and trade, including, but not limited to, the buying and selling of commodities and activities conducted for the purpose of facilitating such buying and selling." 16 U.S.C. § 1532(1).

GSA contends that the holding of the sperm whale oil was not "in the course of a commercial activity" and that the prohibitions of the Act therefore do not apply. While

---

2/ Note that the sale of some of the oil prior to the effective date of the Act does not affect the coverage of the Act, for it applies to the transport of the product as well as its sale. Although the first sale might not come within the prohibitions of the Act, the subsequent shipment of the oil would.

this might have been true when the oil was on the list of strategic and critical materials stockpiled by the Government, at least once the notice of proposed disposal was published the oil was being held only for sale. "Selling of commodities" is expressly included within the meaning of "commercial activity" under the Act; and holding the oil in the course of selling it was therefore a holding "in the course of a commercial acitivity.".

The cases cited by GSA to support its proposition that the Government is not engaged in "normal trade" when it disposes of surplus property are inapposite to the question of whether the activity is commercial. All the cited cases stand for is the proposition that in order to protect the public treasury and the public good, the Government can impose more restrictive contractual conditions than can a private entity, and the conditions imposed will be strictly interpreted in favor of the Government. See Kirkland Distributing Co. v. United States, 276 F.2d 138 (4th Cir. 1960); United States v. Weisbrod, 202 F.2d 629 (7th Cir.), cert. denied, 346 U.S. 819 (1953); Krupp v. Federal Housing Administration, 185 F. Supp. 638 (D. Mass. 1960), rev'd, 285 F.2d 833 (1st Cir. 1961) 3/, Boy v. United States, 179 F. Supp. 67 (M.D.N.C. 1959).

The conclusion which one draws from the clear and explicit terminology of the statute might be modified if it appears to be contrary to the legislative history or the purpose of the legislation. In this case there is nothing to indicate that it is--and to the contrary, inclusion of this transaction seems necessary both in order to give effect to the apparent intent of those who introduced the limited exemption and in order to meet the concerns of those who sought to narrow it by the limiting clause in its conclusion.

The exemption was introduced on the floor of the Senate by Senator Tunney and his introductory remarks make it clear that the intended purpose was to protect from prosecution private persons who might, for non-commercial purposes, have a pet of an endangered species, or a fur coat.

3/ The District Court case cited by GSA was reversed on appeal. The Circuit Court stated that the Government was to be treated the same as any other litigant, 285 F.2d at 836.

> "This amendment would exempt from Government interference endangered species now lawfully held in captivity or in a controlled environment which might come under the provisions of this bill. These animals include pets, species held for obligation purposes for which permits might otherwise have to be secured under the bill, and species held in similar circumstances. The Government has made several attempts in the recent past to prosecute certain individuals attempting to enhance the condition of endangered species for seemingly technical violations of the law." 119 Cong. Rec. S. 14530 (daily ed. July 24, 1973) (remarks of Senator Tunney).

Senator Tunney then inserted in the Record, by way of illustration, a series of newspaper stories about the difficulties encountered by a falconer who was attempting to save the species by breeding them in captivity.

The conference committee, although continuing in the same vein, narrowed the coverage of the exemption:

> "The Senate bill restricted the prohibitions of the Act so as not to apply them to species held in captivity or in a controlled environment as of the date of enactment; the House bill was silent on the subject and hence included such animals. As drafted, the Senate language may have made it very difficult, and perhaps even impossible, to enforce the action [Act?]. The real problems envisioned by the Senate had to do with live animals in captivity, such as zoos and privately-owned animal products, and the conferees agreed that these animals are rarely transferred for commercial purposes.
>
> The conferees rewrote the provision to create an affirmative defense with respect to noncommercial activities, permitting a qualified person to plead in defense to a charge of violation of the Act that the goods or animals themselves were in their hands or under control on the effective date of the Act. Only persons holding such goods and animals for other than commercial purposes would be enabled to plead this subsection as a defense, such as noncommercial zoos, private collectors of animals and the owners of fur coats and rugs. The section would not apply in the case of later born progeny of animals alive at the time of enactment." H.R. Rep.

No. 93-740, 93d Cong. 1st Sess. 27 (1973) (emphasis added) [hereinafter; Conference Report].

The references to "privately owned animal products" and "noncommercial activities" clearly do not embrace the Government's sale of surplus material. The Government clearly does not fit within the delineated category of those for whom the exemption was meant -- "noncommercial zoos, private collectors of animals and the owners of fur coats and rugs."

The examples selected in this legislative history to exemplify "noncommercial activities" are not remotely comparable to the Government's sale of a surplus commodity, nor is there any other indication in the legislative history that Congress meant to exempt such sales. Their exemption would, moreover, clearly frustrate one of the purposes sought to be achieved by the exemption as written. Significant in the Conference Report is the reference to the difficulty or impossibility of enforcement of the Senate version of the bill. The conference committee added to the Senate version the language limiting the exception to non-commercial activity (see Conference Report at 27, set out above), which it narrowly limited by defining commercial activity broadly (see 16 U.S.C. § 1532(1), and Conference Report at 24). The enforcement problem alluded to in the Conference Report would appear to be that caused by having so many endangered species and their products in legitimate circulation that detecting and proving the existence of contraband products would be nearly impossible. Clearly, the sale by the Government of 23 million pounds of sperm whale oil would cause just such a problem.

Finally, it is asserted by GSA that the prohibition of sale of the oil in the hands of a holder of the oil at the time the Act was passed constitutes a taking of the oil without just compensation raising serious constitutional questions. 4/ The answer to this contention is that if a party believes that there is a "taking", it may seek damages in the

4/ In not one of the cases cited by GSA (North American Co. v. Securities & Exchange Commission, 327 U.S. 686 (1946); Taylor v. United States, 320 F.2d 843 (9th Cir. 1963), cert. denied, 376 U.S. 914 (1964); Sagastivelza v. Puerto Rico Housing Authority, 195 F.2d 289 (1st Cir. 1952); and United States v. Ryan, 213 F. Supp. 763 (D. Colo. 1963)) was a challenge on the basis of lack of just compensation sustained, and only in the first (and arguably the third) cited case was this issue even given serious consideration.

Court of Claims. See Regional Rail Reorganization Act Cases, Nos. 74-165, 74-166, 74-167, 74-168 (U.S. Sup. Ct. Dec. 16, 1974); United States v. Causby, 328 U.S. 256 (1946); Yearsley v. W.A. Ross Construction Co., 309 U.S. 18 (1940). If the court concludes that there is a "taking" it will grant recovery of damages; if it concludes that there is no taking there will be no recovery. In either case the Act will stand.

While the point loses some of its importance in view of the above, and although the law in this area is far from clear, we are of the opinion that there is no "taking" because the action of the Congress in this case is a valid exercise of the commerce clause power (similar to the State's exercise of the police power) and is for the general public good and not in furtherance of some governmental enterprise. Regulation in this area, even when it results in the destruction of private economic value, does not give rise to a "taking" in the Fifth Amendment sense. See Mugler v. Kansas, 123 U.S. 623 (1887), upholding a state prohibition of the manufacture and sale of intoxicating beverages. See also National Board of YMCA v. United States, 395 U.S. 85 (1969); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); United States v. Central Eureka Mining Co. 357 U.S. 155 (1958); United States v. Caltex, 344 U.S. 49 (1952) 5/ For an example of the extremes to which the Government can go without violating the strictures of the just compensation clause see Calero-Toledo v. Pearson Yacht Leasing Co., 94 S. Ct. 2080 (1974), where the Court upheld the forfeiture of a yacht in accordance with a statute providing for such action when the vessel was used for unlawful purposes (here the transportation of marijuana), even though the owner was neither involved in, nor knew of, the illegal activity.

5/ For a more thorough look at this problem see Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964); both of which, on different grounds, support the conclusion we have reached. (Michelman would find no taking because that result is essentially "fair", i.e., the best result in the circumstances; Sax would find no taking because the Government is acting in its mediator or public interest capacity as opposed to its enterprise capacity.)

In sum, it is our opinion that the sale and shipment of the sperm whale oil is in violation of the Endangered Species Act of 1973, and is not covered by any exemption of that Act.

Antonin Scalia
Assistant Attorney General
Office of Legal Counsel

EXHIBIT 8

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

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

April 3, 2012

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF VETERANS AFFAIRS

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

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

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

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

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

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

I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[4] A "contingency operation" is

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

10 U.S.C. § 101(a)(13) (2006).

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

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

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

II.

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

A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B.

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

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

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

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

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

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

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

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

C.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D.

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

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

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

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

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

E.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III.

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

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

EXHIBIT 9

EEOC Authority to Order Federal Agency to Pay for Breach of Settlement Agreement

Based on principles of sovereign immunity, the Equal Employment Opportunity Commission lacks authority to order the Social Security Administration to pay a monetary award as a remedy for breach of a settlement agreement entered to resolve a dispute under Title VII of the Civil Rights Act of 1964.

August 13, 2014

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
SOCIAL SECURITY ADMINISTRATION

This memorandum responds to your letter of March 28, 2013, requesting our views on the authority of the Equal Employment Opportunity Commission ("EEOC") to order the Social Security Administration ("SSA") to pay a monetary award as a remedy for breach of a settlement agreement entered to resolve a dispute under Title VII of the Civil Rights Act of 1964.[1] We conclude, based on principles of sovereign immunity, that EEOC lacks authority to order SSA to pay such a monetary award for breach of the settlement agreement.

I.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin. 42

[1] Memorandum for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel ("OLC"), from David Black, General Counsel, SSA, *Re: Equal Employment Opportunity Commission's Monetary Award Authority* (Mar. 28, 2013). In considering SSA's request, we received additional views from that agency. *See* E-mail for OLC from Andrew Maunz, Office of the General Counsel, SSA, *Re: Additional Questions* (June 14, 2013) ("Maunz E-mail"); E-mail for OLC from Jay Ortis, Director, Labor and Employment Division, Office of General Law, SSA, *Re: Fwd: Solicitation of Views* (July 17, 2013, 9:58 AM). We also obtained the views of EEOC and the Civil Division of the Department of Justice. *See* Letter for John E. Bies, Deputy Assistant Attorney General, OLC, from Peggy R. Mastroianni, Legal Counsel, EEOC, *Re: Social Security Administration Request for OLC Opinion* (July 2, 2013); E-mail for OLC from Gary Hozempa, Office of Legal Counsel, EEOC, *Re: EEOC Breach of Settlement Decisions re Social Security Administration* (July 23, 2013, 2:16 PM); E-mail for OLC from Kerry A. Bollerman, Civil Division, Department of Justice, *Re: Solicitation of Views* (May 14, 2013, 5:20 PM).

U.S.C. § 2000e-2(a) (2012). A provision of Title VII extends this prohibition to employment by the federal government. Title VII's federal-sector provision states that "[a]ll personnel actions affecting employees or applicants for employment . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin." *Id.* § 2000e-16(a). Congress authorized EEOC "to enforce the provisions of [section 2000e-16(a)] through appropriate remedies, including reinstatement or hiring of employees with or without back pay." *Id.* § 2000e-16(b). In addition, Congress authorized EEOC to "issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under [section 2000e-16]." *Id.*

Title VII and EEOC regulations set out a procedure for the filing, processing, and adjudication of complaints of unlawful discrimination in federal employment. The regulations, however, reflect a preference for voluntary settlement of discrimination complaints, *see* 29 C.F.R. § 1614.603 (2013), and treat settlement agreements as binding on the parties, *id.* § 1614.504(a). If a complainant believes that the respondent agency has failed to comply with the agreement, the regulations allow the complainant to "request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further processing from the point processing ceased." *Id.* If EEOC determines that the agency is not in compliance with the settlement agreement, the regulations provide that EEOC may "order . . . compliance with the . . . settlement agreement, or, alternatively, . . . order that the complaint be reinstated for further processing from the point processing ceased." *Id.* § 1614.504(c). The regulations further provide that "allegations that subsequent acts of discrimination violate a settlement agreement shall be processed as separate complaints . . . rather than [through actions to enforce the settlement]." *Id.*

In 1995, a group of African-American male employees working in the Baltimore, Maryland headquarters of SSA filed a class complaint alleging that the agency had discriminated against them with respect to promotions, awards, bonuses, and other personnel decisions. EEOC certified the class in 1998. The parties subsequently decided to settle their dispute and entered into an agreement under which the class members received monetary and non-monetary relief in exchange for dismissing their complaint.

See Settlement Agreement, *Burden v. Barnhart*, EEOC Case No. 120-99-6378X (Jan. 11, 2002) ("Settlement Agreement"). The Settlement Agreement made clear that it did not "represent an admission of liability by [SSA]." *Id.* at 20.

Pertinent here, Provision III.D of the Settlement Agreement, which appears under the heading "Non-Monetary Relief," reads in relevant part:

> [SSA] agrees that its policies and practices for granting performance awards and Quality Step Increases will be fair and equitable and consistent with merit principles. [SSA] agrees that it will correct any misapplications of its policies for granting performance awards and Quality Step Increases to ensure fair and equitable distribution of such awards, consistent with merit principles. At [SSA's] discretion, an expert may be retained to recommend ways to assess these policies and practices and to ensure compliance with relevant statutes, regulations, EEO principles, and applicable collective bargaining agreements in [SSA's] awards process. Any corrections [SSA] implements will be made after providing a 30-day notice and comment period to the Oversight Committee. [SSA] will provide a report to the Administrative Judge within 6 months of the Effective Date of this agreement of the actions it has taken to comply with this paragraph.

Id. at 10. The Settlement Agreement provided that the Administrative Judge ("AJ") would "retain jurisdiction over this matter for a period of 4 years" to monitor compliance with the agreement. *Id.* at 6.

In 2005, the class contended that SSA had not fulfilled its obligation to correct "misapplications of its policies for granting performance awards and Quality Step Increases." The class accordingly requested that the agency provide a "corrective action plan." Letter for John E. Bies, Deputy Assistant Attorney General, Office of Legal Counsel, from Peggy R. Mastroianni, Legal Counsel, EEOC, *Re: Social Security Administration Request for OLC Opinion* at 2 (July 2, 2013) ("EEOC Letter"). SSA responded that the expert analysis on which the class premised its request was flawed, and promised to hire another expert. *Id.*

SSA delivered a second expert report to the class in 2006. That report showed underrepresentation of African-American males in the distribution of Quality Step Increases ("QSIs"), cash awards, and honor awards in

certain SSA offices. In a September 2006 letter, SSA set forth a plan to address the areas of concern identified in the report and to prevent future disparities.

The class subsequently requested that the AJ find that SSA was not in compliance with the Settlement Agreement, arguing that the agency had not offered a plan to correct all of the disparities revealed in the second expert report. *See Jefferson v. Astrue*, Hearing No. 120-99-6378X, slip op. at 11 (Apr. 28, 2011) ("OFO Decision"). The judge denied the motion as moot because SSA had provided the statistical information the class demanded. *Id.* at 12.

The complainants appealed the AJ's decision to EEOC's Office of Federal Operations ("OFO"). In their appeal, the class members requested specific implementation of Provision III.D, which, they argued, included retroactive awards and QSIs for class members who had been unfairly denied those benefits. Class Brief in Support of Appeal at 13–14, *Burden v. Astrue*, EEOC Case No. 120-99-6378X (May 20, 2008) ("Class Brief in Support of Appeal"). SSA, on the other hand, took the position that implementation of Provision III.D did not include retroactive awards and QSIs. The Settlement Agreement, the agency contended, did not authorize prospective relief for any alleged breach; while SSA had agreed to ensure that its policies for awarding promotions and other honors would be fair and equitable and to correct any misapplications of its policies, it had not agreed that the distribution of such benefits would be mathematically exact, or that the class members would be entitled to relief in the event they disagreed with the distribution of awards. Agency's Response to Class's Brief on Appeal at 8–10, *Burden v. Astrue*, EEOC Case No. 120-99-6378X (May 20, 2008) ("Agency's Response to Class's Brief on Appeal").

OFO, acting on behalf of the Commission, reversed the AJ's decision. Relying on the 2006 expert report, OFO found that "the Agency did not ensure that its policies and practices for granting performance awards and QSIs were fair and equitable between April 1, 2003 and September 30, 2005." OFO Decision at 18. OFO further found that SSA had failed to correct misapplications of its policies to ensure fair and equitable distribution of awards. OFO explained that there was no evidence to show that the policies and procedures described in SSA's September 2006 letter had been implemented or that the agency had effectively corrected

the misapplication of its policy for granting performance awards and QSIs. *See id.* at 19.

Based on these conclusions, OFO determined that the complaining class members were "entitled to specific enforcement of the class settlement agreement." *Id.* OFO then ordered that "all African-American males working for the Agency's Headquarters Office in Baltimore, Maryland from April 1, 2003, through September 30, 2005, [be] presumptively entitled to the average honor award, monetary award, and QSI received during the relevant time." *Id.* OFO added that "the presumption of entitlement to the average honor award, monetary award, and QSI can be rebutted if the Agency can establish by clear and convincing evidence that an employee is not entitled to this relief." *Id.* OFO remanded the case to an administrative judge to oversee the processing of relief, including calculating the total and individual amounts due. *Id.* at 20.

SSA sought reconsideration of the decision, arguing that the relief awarded exceeded the scope of EEOC's authority. OFO denied the motion. *Jefferson v. Astrue*, Hearing No. 120-99-6378X (Dec. 18, 2012). SSA then submitted its request for the views of this Office on whether EEOC had authority to order the agency to pay a monetary award for breach of a settlement agreement, contending that the absence of an applicable waiver of sovereign immunity precludes EEOC from ordering SSA to pay such a monetary award.

II.

A.

The question whether EEOC has authority to issue a monetary award to remedy a breach of a settlement agreement by a federal agency turns on the doctrine of sovereign immunity, which bars suit against the federal government except to the extent it has consented. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Consent to suit must be provided by Congress explicitly, in clear statutory language; ambiguous statements will not suffice. *See Lane v. Pena*, 518 U.S. 187, 192 (1996); *see also United States v. Shaw*, 309 U.S. 495, 500–01 (1940) (explaining that "without specific statutory consent, no suit may be brought against the United States. No officer by his action can confer jurisdiction"). Waivers of sovereign

immunity are "strictly construed, in terms of [their] scope, in favor of the sovereign." *Lane*, 518 U.S. at 192. Waivers for one type of relief, such as injunctive relief, do not thereby waive immunity for other forms of relief, such as money damages. *See id.* at 195–96; *United States v. Nordic Vill.*, 503 U.S. 30, 34–37 (1992) (relying on sovereign immunity principles to construe statutory waiver of sovereign immunity to permit equitable but not monetary claims); *cf. Library of Congress v. Shaw*, 478 U.S. 310, 317–19 (1986) (statutory waiver of immunity from attorney's fees does not thereby waive immunity from interest on those fees). Rather, "[t]o sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192. We have previously explained that a statutory provision "does not waive sovereign immunity for monetary claims" where the provision can plausibly be read in a manner that would not authorize monetary relief. *Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply with Orders Issued by EEOC Administrative Judges*, 27 Op. O.L.C. 24, 26–27 (2003) ("Navy Opinion") (citing *Availability of Money Damages Under the Religious Freedom Restoration Act*, 18 Op. O.L.C. 180, 180 (1994)). The rule that suit is permitted only on the terms Congress has authorized extends as well to matters of forum; a waiver of immunity for suits in one forum does not necessarily constitute a waiver in all forums. *See Shaw*, 309 U.S. at 501 ("Even when suits [against the United States] are authorized[,] they must be brought only in designated courts.").

As we observed in a prior opinion, "[a]lthough most of the sovereign immunity case law arises in the context of suits before federal district courts, these principles apply with equal force to agency adjudications." Navy Opinion, 27 Op. O.L.C. at 27. "In our view, there can be no doubt that normal sovereign immunity presumptions apply" to the question whether an agency can itself grant a particular form of relief against the government. *Id.* at 28.[2]

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[2] In *West v. Gibson*, 527 U.S. 212 (1999), the Supreme Court suggested in dicta that "ordinary sovereign immunity presumptions" may not apply to the question whether an agency may grant relief against the government when Congress has unambiguously waived sovereign immunity with respect to that form of relief for claims brought in district court. *Id.* at 217. In our 2003 opinion, we disagreed with that suggestion,

In 2003, we considered whether the statute conferring authority on EEOC to enforce Title VII's federal-sector provision through "appropriate remedies," 42 U.S.C. § 2000e-16(b), supplied the requisite waiver of sovereign immunity to support an order of attorney's fees against an agency as a sanction for failure to follow an administrative judge's orders. We concluded that it did not. We observed that section 2000e-16(b) waives federal agencies' immunity from suits seeking remedies for unlawful discrimination, but "[a]ttorney's fees imposed as a sanction for failure to comply with AJ orders relating to the adjudicatory process . . . are not a remedy for any act of discrimination." Navy Opinion, 27 Op. O.L.C. at 29. We further explained that "neither section 2000e-16(b), nor any other statute, contains a provision that even pertains to violations of AJ orders, much less provides an explicit waiver of the government's immunity to monetary sanctions for violations of such orders." *Id.* Finally, we rejected EEOC's argument that the Federal Rules of Civil Procedure supplied the necessary waiver. "[E]ven if Congress had waived sovereign immunity for violations of the Federal Rules of Civil Procedure in federal court," we explained, "it would not follow that it has also waived immunity for arguably analogous (though formally distinct) violations before an entirely different body where these rules do not apply." *Id.* at 31. "Indeed, . . . the doctrine of sovereign immunity requires the exact opposite presumption." *Id.*

B.

Within this framework, we consider EEOC's authority to award the monetary relief at issue in this case. Our 2003 opinion, SSA argues, compels the conclusion that EEOC may not issue such an award absent an express waiver of sovereign immunity. No such waiver exists, the agency urges, because Title VII waives the government's immunity only for damages awards upon a finding of unlawful discrimination, and the Settlement Agreement included no admission of liability. Memorandum for Virginia A. Seitz, Assistant Attorney General, Office of Legal Counsel, from David Black, General Counsel, SSA, *Re: Equal Employment Oppor-*

observing that "'[i]t is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums.'" Navy Opinion, 27 Op. O.L.C. at 27–28 (quoting *West*, 527 U.S. at 226 (Kennedy, J., dissenting)).

tunity Commission's Monetary Award Authority at 3 (Mar. 28, 2013) ("SSA Memorandum").

EEOC responds that our 2003 opinion is inapposite because the Commission did not impose sanctions on SSA for failing to comply with an AJ's order. Rather, "the relief awarded . . . pertains only to SSA's breach of an EEOC settlement agreement." EEOC Letter at 10. In the past, EEOC observes, we have held that "an agency can award through a settlement agreement any relief which a court could order if a finding of prohibited discrimination were made." *Id.* (citing *Proposed Settlement of* Diamond v. Department of Health and Human Services, 22 Op. O.L.C. 257, 262 (1998) ("Diamond Opinion")); *see also Authority of USDA to Award Monetary Relief for Discrimination*, 18 Op. O.L.C. 52, 53 (1994) ("USDA Opinion"). In EEOC's view, it follows that, "when an agency breaches an EEO settlement, EEOC can order as relief whatever a court could award upon a finding of a breach." EEOC Letter at 10. Hence, the Commission asserts, if a court may order monetary relief upon finding that an agency has breached a Title VII settlement, so too can EEOC.

EEOC does not appear to dispute that the waiver of sovereign immunity in Title VII applies only to claims of unlawful discrimination and does not extend to monetary claims against the government for breach of a Title VII settlement. *See* EEOC Letter at 5 & n.2. Rather, EEOC argues that courts may award money damages for breach of a settlement agreement under the Tucker Act, which waives the government's sovereign immunity with respect to claims "founded . . . upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1) (2012). EEOC notes that in *Holmes v. United States*, 657 F.3d 1303 (Fed. Cir. 2011), the Federal Circuit determined that the Court of Federal Claims may exercise jurisdiction under the Tucker Act over suits alleging breach of a Title VII settlement, provided that the agreement itself contemplates money damages in the event of a breach. *Id.* at 1311–15. The agreement at issue in this matter, EEOC argues, contemplates money damages in the manner *Holmes* requires. Therefore, in EEOC's view, the Tucker Act's waiver applies, and sovereign immunity poses no bar to the Commission's order of the monetary relief at issue in this matter.

EEOC further contends that "the fact that the waiver [of sovereign immunity]" is found in the Tucker Act rather than Title VII "is not

significant vis-à-vis EEOC's authority to award back pay." EEOC Letter at 11. In *West v. Gibson*, 527 U.S. 212 (1999), EEOC notes, the Supreme Court held that EEOC may award compensatory damages as an "appropriate remed[y]" for a violation of Title VII, 42 U.S.C. § 2000e-16(b), even though the provision authorizing that form of relief is found in a 1991 Title VII amendment that expanded the remedial authority of courts without explicitly referring to EEOC proceedings. 527 U.S. at 217. Similarly, here, EEOC argues that the Commission has authority to award money damages for breach of a Title VII settlement agreement because of the waiver of immunity contained in the Tucker Act. A contrary conclusion, EEOC contends, would "strip EEOC's authority to enforce Title VII against agencies through appropriate remedies, and rob it of the ability to ensure that an agency complies with its Title VII settlement promises." EEOC Letter at 11 (internal quotation marks omitted).

III.

A.

We are not persuaded by EEOC's arguments. EEOC's reliance on the Tucker Act is misplaced because the Tucker Act confers jurisdiction only on the Court of Federal Claims to hear contractual claims against the United States exceeding $10,000. *See* 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.").[3] That limited waiver of sovereign immunity does not authorize EEOC to provide a forum for such disputes. *See Shaw*, 309 U.S. at 501 ("Even when suits [against the United States] are authorized[,] they must be brought only in designated courts."); *cf. Minnesota v. United States*, 305 U.S. 382, 388

[3] Section 1346 of title 28, known as the "Little Tucker Act," confers jurisdiction on United States district courts for claims founded "upon any express or implied contract with the United States" that do not exceed $10,000.

(1939) ("[I]t rests with Congress to determine not only whether the United States may be sued, but in what courts the suit may be brought.").

1.

In *Holmes*, on which EEOC places principal reliance, the Federal Circuit determined that Title VII posed no bar to the Court of Federal Claims' exercise of jurisdiction under the Tucker Act to adjudicate a claim that an agency breached a Title VII settlement agreement, notwithstanding Title VII's comprehensive remedial scheme and its conferral of jurisdiction on federal district courts. 657 F.3d at 1312–13.[4] In so holding, the court relied on the Supreme Court's decision in *Kokkonen v. Guardian Life Insurance*, 511 U.S. 375 (1994), which held that a court with jurisdiction over an underlying dispute does not necessarily also have jurisdiction over claims that parties have breached an agreement settling that dispute. *Id.* at 381. Rather, the Court ruled, an independent basis of jurisdiction is generally needed for a federal court to adjudicate such breach of settlement claims. *Id.*; *see Holmes*, 657 F.3d at 1312–13. Following *Kokkonen*, the Federal Circuit explained that, "although the [settlement agreement] arose out of Title VII litigation, [the plaintiff's] suit for breach of contract is just that: a suit to enforce a contract with the government." 657 F.3d at 1312. The court therefore held that the case was properly heard in the Court of Federal Claims under the Tucker Act, rather than in the federal district courts authorized to hear claims under Title VII.

Conversely, federal courts with jurisdiction over Title VII claims have held that they may *not* adjudicate claims for damages resulting from a federal agency's breach of a Title VII settlement agreement. *See Taylor v. Geithner*, 703 F.3d 328, 334 (6th Cir. 2013); *see also Munoz v. Mabus*, 630 F.3d 856, 861–64 (9th Cir. 2010); *Frahm v. United States*, 492 F.3d 258, 262–63 (4th Cir. 2007); *Lindstrom v. United States*, 510 F.3d 1191,

[4] Neither party challenges this aspect of the Federal Circuit's decision; we therefore assume that it is correct for purposes of this opinion. As it is irrelevant to our resolution of the question presented, we likewise take no position on the parties' dispute over whether the contract at issue contemplates money damages. *Compare* EEOC Letter at 6–8 *with* Maunz E-mail, *supra* note 1.

1194–96 (10th Cir. 2007). Those courts have explained that the waiver of sovereign immunity in Title VII, which authorizes suits against federal agencies for unlawful discrimination, "does not expressly extend to monetary claims against the government for breach of a settlement agreement that resolves a Title VII dispute." *Frahm*, 492 F.3d at 262. And while the waiver of sovereign immunity in the Tucker Act does extend to such claims, "invoking the Tucker Act is a non sequitur" in federal district court, "because where . . . a suit involves a claim for money damages over $10,000, the Act waives the government's immunity only in the Court of Federal Claims." *Franklin-Mason v. Mabus*, 742 F.3d 1051, 1054 (D.C. Cir. 2014); *see id.* at 1056 ("[T]he Tucker Act does not contain a waiver of sovereign immunity *in the district court* for breach of a Title VII settlement agreement seeking damages in excess of $10,000." (emphasis added)); *accord Munoz*, 630 F.3d at 864 ("Because [the plaintiff's] breach of settlement agreement claim is essentially a contract action against the federal government whose resolution requires no interpretation of Title VII itself, his claim cannot seek jurisdictional refuge in Title VII and belongs, if anywhere, in the Court of Federal Claims.").[5]

This case law highlights why, even if we were to accept EEOC's position that it "can order as relief whatever a court could award upon a finding of a breach," EEOC Letter at 10, that standard does not help its case. The waiver of sovereign immunity in the Tucker Act is limited to cases heard in the Court of Federal Claims. It does not waive the federal government's immunity, either in federal district court or in EEOC proceedings, for claims arising from breach of a settlement agreement. As explained above, waivers of sovereign immunity are to be "strictly construed, in terms of [their] scope, in favor of the sovereign." *Lane*, 518 U.S. at 192. Consequently, the Tucker Act provides no authority for EEOC to award money damages to remedy a federal agency's breach of a Title VII settlement.

[5] Notably, "unlike the district courts, . . . the [Court of Federal Claims] has no general power to provide equitable relief against the Government or its officers." *United States v. Tohono O'Odham Nation*, 563 U.S. 307, 313 (2011). And the Federal Circuit has found that "[e]xcept in strictly limited circumstances . . . there is no provision in the Tucker Act authorizing the Court of Federal Claims to order equitable relief." *Massie v. United States*, 226 F.3d 1318, 1321 (2000).

2.

The Supreme Court's decision in *West* does not compel a contrary result. In that case, the Supreme Court construed the provision granting EEOC authority to enforce Title VII "through appropriate remedies," 42 U.S.C. § 2000e-16(b), as including the power to order remedies Congress deemed appropriate for enforcing Title VII's substantive provisions in a later Title VII amendment. 527 U.S. at 218. Because Congress determined that compensatory damages are an appropriate remedy for victims of discrimination by federal agencies in the Civil Rights Act of 1991, the Court concluded, section 2000e-16(b) authorizes EEOC to afford such relief in its enforcement proceedings. *Id.* at 218–19.

West provides no support for construing the limited waiver of sovereign immunity in the Tucker Act to apply to breach-of-settlement proceedings before EEOC. Unlike the Civil Rights Act of 1991, which amended Title VII itself, the Tucker Act is an unrelated statute that predated Title VII by several decades and as such says nothing about the remedies Congress considered suitable to effectuate the aims of Title VII. *Cf. id.* at 218 ("[I]n context the word 'appropriate' most naturally refers to forms of relief that *Title VII itself authorizes*." (emphasis added)). More fundamentally, this matter does not concern the scope of EEOC's authority to award "appropriate remedies" for workplace discrimination, but its authority to award remedies for a federal agency's breach of a settlement agreement. *See Frahm*, 492 F.3d at 262–63 (section 2000e-16(b) waives the government's sovereign immunity with respect to substantive Title VII claims but "does not expressly extend to monetary claims against the government for breach of a settlement agreement that resolves a Title VII dispute"). The Court's interpretation of the term "appropriate remedies" as it appears in Title VII provides no basis for reading the limited waiver of sovereign immunity in the Tucker Act to authorize EEOC to award monetary relief for a federal agency's breach of a Title VII settlement agreement.

B.

In addition to considering EEOC's argument that the Tucker Act allows it to order a compensatory remedy for breach of a settlement agreement, we have also considered whether EEOC's award of monetary relief is authorized by Title VII itself insofar as the award constitutes an order to

perform on promises SSA made in the Settlement Agreement—in particular, promises to "distribute performance awards on a fair and equitable basis, consistent with merit principles" and "to take corrective action if it did not keep this promise." *See* EEOC Letter at 12 ("SSA promised to distribute performance awards on a fair and equitable basis, consistent with merit principles. It also promised to take corrective action if it did not keep this promise. OFO found that SSA breached these promises. As relief, EEOC ordered SSA to take corrective action, the very corrective action which SSA promised to, but did not, take.").

As EEOC notes, this Office has repeatedly recognized that Title VII's waiver of sovereign immunity means that an agency may settle an administrative Title VII complaint by awarding monetary relief to a complainant, even without admitting liability for the alleged discrimination. USDA Opinion, 18 Op. O.L.C. at 52–54; *see* Diamond Opinion, 22 Op. O.L.C. at 261 & n.6 (quoting *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986)). As long as the intended relief does not exceed the scope of remedies available in court, the government's consent to be sued for violations of Title VII ordinarily permits voluntary settlement of a complaint alleging such violations. *See* Diamond Opinion, 22 Op. O.L.C. at 261–62 & n.6; *see also* USDA Opinion, 18 Op. O.L.C. at 53 (explaining that, under appropriations law, "agencies have authority to provide for monetary relief in a voluntary settlement of a discrimination claim only if the agency would be subject to such relief in a court action regarding such discrimination brought by the aggrieved person").

It might follow from this principle that EEOC has authority in certain circumstances to enforce a settlement agreement by ordering an agency to perform on its promises, even if those promises include a commitment to pay money to a complainant. If, for example, the agency had settled a Title VII claim by promising to provide a particular amount of back pay or other monetary relief and the complainant requested specific performance of that promise, EEOC might be able to order that relief without violating the doctrine of sovereign immunity. In such a circumstance, one could argue that the dispute is not, in essence, a contract dispute with the federal government, but rather a continuation of the same Title VII proceeding that gave rise to the settlement itself. Consequently, the same waiver of sovereign immunity that permitted the agency to resolve

the Title VII complaint by voluntary settlement might also permit EEOC to compel the agency to make good on its promise.[6]

But whatever effect the waiver of sovereign immunity in Title VII might have on EEOC's authority to award monetary relief in other circumstances, we do not believe it authorizes the monetary award at issue here. The award at issue was not an order to perform on an agreement that provided back pay or other specific monetary relief to settle an underlying Title VII claim alleging past misconduct. Rather, it was an order to perform on a promise to take corrective action in the future to remedy any failure to distribute performance awards and QSIs on a "fair and equitable basis." EEOC Letter at 12. Based on two principal considerations, we conclude that, for purposes of the sovereign immunity analysis, the dispute at issue here cannot fairly be characterized as merely a continuation of the same Title VII proceeding that gave rise to the settlement itself. Accordingly, the remedy EEOC awarded is not authorized by the waiver of sovereign immunity that allowed SSA to settle the class complaint and provide relief to the claimants in the first place.

The nature of the present dispute over the meaning and application of Provision III.D illustrates that the dispute was not merely a continuation of the Title VII claim that gave rise to the settlement, but rather a distinct proceeding beyond the scope of the waiver of sovereign immunity upon which the settlement rested. First, the present dispute does not concern a specific settlement term that imposes clear obligations on the SSA—such as an agreement to provide a particular sum in back pay—but instead concerns SSA's alleged failure to comply with a non-specific prospective promise to "correct any misapplications of its policies for granting performance awards and Quality Step Increases to ensure fair and equitable distribution of such awards, consistent with merit principles." Settlement Agreement at 10. As SSA points out, in agreeing to this provision, it neither expressly consented to a particular numerical distribution of awards and QSIs, nor expressly agreed that the class members would be entitled to monetary relief in the event that they were dissatisfied with the number of awards and promotions received. Agency's Response to

[6] Editor's Note: The text of this footnote has been redacted. It includes privileged information and addresses an issue not necessary for the discussion here.

Class's Brief on Appeal at 8–10. Provision III.D, SSA observes, "contains no discussion of a monetary component and neither memorializes nor evidences a meeting of the minds between the parties that all class members could receive the average monetary award, or any monetary award for that matter, for the oversight period." SSA Memorandum at 3–4. Rather, in SSA's view, the disputed settlement term simply required compliance with merit principles and active oversight of its policies for issuing promotions and performance awards. *See* Maunz E-mail, *supra* note 1 ("[S]pecific enforcement [of Provision III.D] could include an ordered review of the agency's policies, perhaps even by an expert."). As a consequence, the proceedings regarding the enforcement dispute at issue required not only extensive debate over the meaning of SSA's promise to distribute awards and QSIs on a "fair and equitable basis" and to "correct any misapplications of its policies," but also extensive fact-finding regarding SSA's post-settlement conduct to determine whether the relevant standards had been met. *See* OFO Decision at 16–19.[7]

[7] Although OFO characterized its order as "specific enforcement" of the Settlement Agreement, we note that OFO's order appears more akin to a legal remedy for breach than the equitable remedy of specific performance as that term is generally understood in contract law. The Supreme Court has observed that specific performance requires an agreement that is "certain, fair, and just in all its parts." *Dalzell v. Dueber Watch-Case Mfg. Co.*, 149 U.S. 315, 325 (1893). "'The contract which is sought to be specifically executed ought not only to be proved,'" the Court explained, "'but the terms of it should be so precise as that neither party could reasonably misunderstand them.'" *Id.* at 326 (quoting *Colson v. Thompson*, 15 U.S. (2 Wheat.) 336, 341 (1817)). Accordingly, "'[i]f the contract be vague or uncertain . . . a court of equity will not exercise its extraordinary jurisdiction to enforce it, but will leave the party to his legal remedy.'" *Id.* (quoting *Colson*, 15 U.S. (2 Wheat.) at 341); *see also* Restatement (Second) of Contracts § 368 (1981) ("Specific performance . . . will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order.").

In determining that the class members were presumptively "entitled to the average honor award, monetary award, and QSI" (a number unknown at the time of decision), we do not believe that OFO enforced a term "'so precise as that neither party could reasonably misunderstand [it].'" *Dalzell*, 149 U.S. at 326 (quoting *Colson*, 15 U.S. (2 Wheat.) at 341); *cf. TAS Distrib. Co., Inc. v. Cummins Engine Co.*, 491 F.3d 625, 637 (7th Cir. 2007) (rejecting claim that district court abused its discretion in refusing to order defendant to specifically perform on its "obligation to make 'all reasonable efforts' to manufacture and market the subject technology").

Second, the present dispute does not concern monetary remedies for the alleged Title VII violations underlying the settlement, but monetary remedies for failure to comply with a settlement term governing SSA's *future* conduct, i.e., SSA's failure to distribute performance awards and QSIs on a "fair and equitable" basis after the settlement was reached. That is apparent from the extensive fact-finding required to determine SSA's compliance with Provision III.D—if the monetary remedy awarded to the class members in the present dispute rested on the conduct that gave rise to their initial Title VII claims, there would have been no need for such additional fact-finding because those claims were resolved by the Settlement Agreement. It is, at a minimum, questionable whether the waiver of sovereign immunity in Title VII that permitted SSA to enter the Settlement Agreement in the first place would also permit SSA to promise to provide a monetary remedy in the event it failed to abide by a promise to refrain from particular conduct in the future. We have previously observed that, consistent with limitations on agencies' ability to compromise or abandon claims made against the United States in litigation, "settlement of a discrimination claim should be based on the agency's good faith assessment of the litigation risk that a court might find complainants entitled to relief" based on the claims raised in their complaint. Diamond Opinion, 22 Op. O.L.C. at 262. An agreement to provide monetary relief in the event of future noncompliance with a term of the settlement agreement would arguably be an impermissible agreement to compensate complainants for injuries not alleged in their complaint. Such conduct would not be at issue if the complainants were to proceed to court on their original claim. As such, an agreement to provide monetary compensation for future noncompliance would raise significant questions about whether the agency had acted in a manner consistent with its obligation to provide settlement remedies based on a "good faith assessment" of the complainants' likely recovery from the pending complaint.[8]

[8] We do not suggest that an agency is precluded from including in a settlement its promise not to discriminate in the future. Title VII explicitly authorizes courts to enjoin agencies from engaging in unlawful employment practices. 42 U.S.C. § 2000e-5(g)(1). And we have recognized that "an appropriate remedy under Title VII . . . may include relief, including injunctive relief, that will make the plaintiff whole, prevent future violations of the act, and prevent retaliation against complainants." Diamond Opinion, 22 Op. O.L.C. at 263. Because agencies may settle a discrimination claim and award any

For both of these reasons, taken together, we conclude that the dispute at issue was not merely a continuation of the underlying Title VII proceedings that resulted in the Settlement Agreement, and that the waiver of sovereign immunity upon which the settlement rested therefore cannot be said to authorize the award EEOC provided to remedy SSA's alleged failure to comply with Provision III.D of the Settlement Agreement.[9]

IV.

We conclude that the doctrine of sovereign immunity precludes the monetary relief ordered in this case.

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relief that would be available in court, a promise to refrain from discriminatory behavior in the future would be entirely proper.

[9] As noted in Part I, EEOC's regulations provide that "allegations that subsequent acts of discrimination violate a settlement agreement shall be processed as separate complaints . . . rather than [through actions to enforce the settlement]." 29 C.F.R. § 1614.504(c). In proceedings before OFO, SSA argued that this provision precluded the class from receiving relief on their claims that the agency's unequal post-settlement distribution of awards violated the Settlement Agreement. We express no view on this question, and do not address the scope of EEOC's regulations. Rather, we consider the fact that EEOC effectively compensated the class members for discrimination that followed the settlement only insofar as that fact informs our view that the Commission's award is barred by the doctrine of sovereign immunity.

EXHIBIT 10

Authority of the Department of Labor to Control the Disclosure of Federal Employees' Compensation Act Records Held by the United States Postal Service

The Federal Employees' Compensation Act gives the Department of Labor the authority to control and limit the disclosure of FECA records held by the United States Postal Service, and DOL's FECA regulations prohibit USPS from disclosing FECA records in a manner inconsistent with DOL's Privacy Act routine uses.

The Department of Labor's regulatory regime for FECA records is consistent with and furthers the purposes of the Privacy Act.

Neither the Postal Reorganization Act nor the National Labor Relations Act authorizes USPS to control the disclosure of FECA records.

November 16, 2012

MEMORANDUM OPINION FOR THE SOLICITOR
DEPARTMENT OF LABOR

The U.S. Department of Labor ("DOL"), through its Office of Workers' Compensation ("OWCP"), is responsible for administering the Federal Employees' Compensation Act ("FECA" or the "Act"). *See* Letter for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, from M. Patricia Smith, Solicitor of Labor, DOL at 1 (Jan. 23, 2012) ("Request Letter"). DOL has established a government-wide system of records that contains all records created in the process of filing and resolving FECA claims, including those held by other agencies. It has asserted control over those records and provided that they will generally be kept confidential. DOL has also published a notice pursuant to the Privacy Act of 1974 that enumerates the circumstances in which FECA records may be disclosed. (These circumstances are known as "routine uses.") The United States Postal Service ("USPS" or "Postal Service") is the largest federal agency whose employees are covered by FECA. *Id.* Like other agencies covered by FECA, USPS maintains certain records related to the FECA claims its employees file. USPS has taken the position that it has authority to control the FECA records in its possession, and it has published its own Privacy Act notice listing routine uses that would permit it to disclose its FECA records when DOL's regulations would not. In light of this conflict, you asked whether DOL has authority

to control and limit the disclosure of FECA records held by the Postal Service. Request Letter at 1.[1]

We conclude that FECA gives DOL such authority, and that DOL's FECA regulations prohibit USPS from disclosing FECA records in a manner inconsistent with DOL's routine uses. We further conclude that DOL's regulatory regime for FECA records is consistent with and furthers the purposes of the Privacy Act. USPS thus may not establish routine uses for FECA records that result in disclosures that would not be permitted under DOL's regulations. Finally, we disagree with USPS's arguments that the Postal Reorganization Act and the National Labor Relations Act ("NLRA") provide it with authority to control the disclosure of FECA records.

I.

Two statutory schemes are particularly relevant to our analysis: FECA and the Privacy Act. Initially passed in 1916, FECA is now codified in chapter 81 of title 5 of the United States Code.[2] It "provides a comprehensive system of compensation for federal employees who sustain work-related injuries." *United States v. Lorenzetti*, 467 U.S. 167, 168 (1984). FECA grants the Secretary of Labor or her designee exclusive authority to "administer[] and decide all questions arising under" FECA. 5 U.S.C. § 8145 (2006); *see Mathirampuzha v. Potter*, 548 F.3d 70, 81 (2d Cir. 2008) ("Congress has vested the Secretary of Labor or her delegate with exclusive authority to 'administer[] and decide all questions arising under the FECA.'" (quoting 5 U.S.C. § 8145) (alteration in original)). The Secretary has delegated this authority to OWCP. *See* Delegation of Authorities and Assignment of Responsibilities to the Director, Office of Workers' Compensation Programs, 74 Fed. Reg. 58,834, 58,834 (Nov. 13, 2009). FECA also authorizes the Secretary to

[1] The request for this opinion came solely from DOL, and USPS declined to offer its views when contacted by this Office. However, both DOL and USPS submitted extensive views letters on this dispute to the Office of Management and Budget in October 2010, and DOL provided those letters to us. We considered those letters in preparing this opinion.

[2] *See* Pub. L. No. 64-267, 39 Stat. 742 (1916). FECA's text frequently references its subchapters. Because only the first subchapter is relevant here, we refer to that subchapter as "FECA" for ease of reading.

"prescribe rules and regulations necessary for the administration and enforcement of [the Act]." 5 U.S.C. § 8149 (2006).

FECA and the accompanying DOL regulations establish a process through which federal employees can submit claims of workplace-related injury or disease to DOL for adjudication and compensation. Generally, the process involves submission of a notice of a covered injury or disease accompanied by a claim form with supporting evidence, followed by investigation and adjudication of the claim by OWCP. If a claim is accepted, the employee receives relief in the form of benefits and possible reassignment. *See generally id.* §§ 8101–8152 (2006 & Supp. V 2011); Questions and Answers about the Federal Employees' Compensation Act (FECA), http://www.dol.gov/owcp/dfec/regs/compliance/DFECfolio/q-and-a.pdf (last visited Nov. 13, 2012).

Two features of this process are significant here. First, while DOL manages much of the claims process, a claimant's employing agency is also required to participate. For example, the statute requires injured employees to provide notice of and information about their injuries to their "immediate superior[s]," 5 U.S.C. § 8119, and instructs that, "immediately after an injury to an employee which results in his death or probable disability, his immediate superior shall report to the Secretary of Labor," *id.* § 8120. *See also, e.g.*, 20 C.F.R. § 10.100 (2012) (describing employee procedure for notifying supervisor of traumatic injury); *id.* § 10.110 (describing employing agency responsibilities when employees file such notices). Employing agencies, including USPS, also contribute to the fund through which injured employees are compensated. *See* 5 U.S.C. § 8147(b) (requiring agency contributions to a general compensation fund); 39 U.S.C. § 2003(g) (2006) (regulating timing of mandatory USPS deposits in the general fund).

Second, during the claims process, both the claimant and the employing agency create and submit numerous records documenting the employee's compensation claim. The Secretary has substantial control over the information included in these records. For example, in addition to giving the Secretary broad general authority to administer and regulate FECA, the statute specifically permits the Secretary to determine the required content in the immediate superior's report of an employee injury, and to require the filing of supplementary reports. *See* 5 U.S.C. § 8120. The statute also instructs covered employees to submit their FECA claims "on a form

approved by the Secretary . . . [that] contain[s] all information required by the Secretary." *Id.* § 8121. DOL regulations further prescribe the forms that initiate claims for compensation, the respective responsibilities of the employer and employee in filling out these forms, and the timing and manner of their transmittal. *See, e.g.*, 20 C.F.R. §§ 10.7, 10.111, 10.102. The regulations also permit employees and employing agencies to submit additional relevant evidence, such as medical reports or other investigative materials. *See, e.g.*, *id.* § 10.115. In addition, during claim adjudication, an employing agency must submit any relevant facts in its possession, may contest facts submitted by the claimant, and may conduct certain independent assessments of the claimed injury or disability. *See id.* §§ 10.117, 10.118.

DOL has explained orally that, as a result of its involvement in the FECA claims process, employing agencies typically have physical custody of certain FECA records, including the records the employing agency gathers or creates when an employee files a claim. In addition, during claim adjudication, DOL may provide employing agencies with records it obtains from an injured employee. According to DOL, employing agencies are given access to FECA records because those agencies play a significant role in the submission and adjudication of FECA claims and are generally responsible for their payment. *See* 5 U.S.C. § 8147(b).

The Privacy Act of 1974, 5 U.S.C. § 552a, is the second statutory scheme relevant to this dispute. It was passed "to protect the privacy of individuals identified in information systems maintained by Federal agencies," and governs the "collection, maintenance, use, and dissemination of information by such agencies." Pub. L. No. 93-579, § 2(a)(5), 88 Stat. 1896, 1896 (1974). The Privacy Act applies to any "record" kept in an agency "system of records." The Act defines a "record" as any information maintained by an agency pertaining to an individual and linked to that individual through some means of specific identification. *See* 5 U.S.C. § 552a(a)(4) (2006). It defines a "system of records" as any group of records under the control of an agency from which information is retrieved through use of an individual's name or other identifying information. *See id.* § 552a(a)(5). To promote transparency, the Privacy Act requires agencies to publish a notice in the *Federal Register* announcing the establishment or revision of their systems of records (commonly called a "system-of-records notice") and providing detailed information about the characteristics of each system, including the sources and catego-

ries of the records the systems contain and the agency's procedures governing their use. *See id.* § 552a(e)(4).

As a general matter, the Privacy Act prohibits agencies from disclosing any record contained in a system of records absent the written request or written consent of the person to whom the record pertains. *See id.* § 552a(b). There are exceptions to this general rule, including an exception permitting disclosures for a "routine use." *Id.* § 552a(b)(3). "Routine use" of a record is defined as "the use of such record for a purpose which is compatible with the purpose for which it was collected." *Id.* § 552(a)(7). To employ the "routine use" exception, an agency must describe all routine uses under which the agency will disclose records in the relevant system-of-records notice. *See id.* § 552a(e)(4)(D). The requirement that a published routine use be compatible with the purpose for which the record was collected is known as the Privacy Act's "compatibility requirement."

To fulfill its obligations under the Privacy Act, DOL has published a system-of-records notice covering FECA records. This notice, entitled "DOL/GOVT-1, Office of Workers' Compensation Programs, Federal Employees' Compensation Act File" ("DOL/GOVT-1"), describes the records DOL/GOVT-1 covers and the routine uses for which they may be disclosed. Records covered by DOL/GOVT-1 may include, for example, DOL forms filed in connection with a FECA claim, underlying medical records, payment records, hearing transcripts, demographic information, investigative material, and consumer credit reports. *See* Publication of Five New Systems of Records; Amendments to Five Existing Systems of Records, 77 Fed. Reg. 1728, 1738 (Jan. 11, 2012) (republishing DOL/GOVT-1 with amendment providing for an additional routine use). The DOL/GOVT-1 system-of-records notice expressly states that DOL/GOVT-1 includes FECA records in the possession of other agencies. *See id.* at 1738 (DOL/GOVT-1 includes "[c]opies of claim forms and other documents" and in some instances "original forms" related to FECA claims that are "maintained by the employing agency"); *see also* Publication in Full of All Notices of Systems of Records Including Several New Systems, 67 Fed. Reg. 16,816, 16,823 (April 8, 2002) ("It is presumed that most, if not all, federal agencies maintain systems of records comprising a portion of [DOL/GOVT-1]."); Use and Disclosure of Federal Employees' Compensation Act Claims File Material, 63 Fed. Reg. 56,752, 56,753 (Oct. 22, 1998) ("When . . . claim forms are submitted to the

OWCP . . . all materials relating to that claim or injury, whether in the possession of the OWCP or the agency, are covered by DOL/GOVT-1, and thus subject to OWCP's exclusive control.").

DOL has established twelve universal routine uses for records maintained in any of its systems of records, and has supplemented that basic list with seventeen routine uses specifically applicable to DOL/GOVT-1. 77 Fed. Reg. at 1729–30 (universal routine uses); *id.* at 1739–40 (DOL/GOVT-1 routine uses). DOL/GOVT-1 further specifies that FECA records cannot be disclosed under a specific routine use unless "the purpose of the disclosure is both relevant and necessary and is compatible with the purpose for which the information was collected." *Id.* at 1739.

Like DOL, USPS has published a system-of-records notice for the FECA records in its possession, entitled "Office of Workers' Compensation Programs (OWCP) Record Copies." This system of records overlaps with the system created by DOL/GOVT-1. It includes FECA records related to claims filed by USPS employees, such as "[r]ecords and supporting information related to the claim, including copies of Department of Labor forms, postal forms and correspondence, and automated payment and accounting records." Privacy Act of 1974, System of Records, 70 Fed. Reg. 22,516, 22,530 (Apr. 29, 2005) (notice 100.850). This USPS system-of-records notice incorporates nine of the routine uses that USPS applies to all of its systems of records. *See id.* at 22,521. There are substantial differences between the disclosures allowed by DOL's and USPS's routine uses, and USPS's routine uses conflict with the routine uses in DOL/GOVT-1 because they allow some disclosures that would not be permitted under DOL/GOVT-1.

II.

We first address whether FECA gives DOL exclusive authority to regulate the disclosure of all FECA records—and therefore bars USPS from regulating the disclosure of its FECA records in a manner that is inconsistent with DOL regulations—or whether USPS's status as a uniquely independent establishment in the federal government gives it authority to control disclosure of the FECA records in its possession. We then consider whether USPS's regulation of FECA record disclosure is barred by, or is inconsistent with, the purposes of the Privacy Act. Finally, we address whether USPS's information disclosure obligations under the NLRA give

it the authority to establish a routine use permitting disclosure of FECA records to labor unions when such disclosure is necessary for collective bargaining.

A.

DOL and USPS disagree about which agency has authority over FECA records in the custody of the Postal Service and thus the responsibility to establish routine uses for those records under the Privacy Act. *See* Request Letter at 1. DOL contends that "it alone has authority over . . . FECA records for Privacy Act purposes," and that, as a result, "OWCP's regulations and Privacy Act System of Records Notice listing the routine uses of FECA file information extend government-wide and cover the Postal Service." *Id.* USPS, however, argues that it has exclusive authority over FECA records in its custody. *See* Statement of the United States Postal Service in Support of Its Authority to Release Copies of OWCP Records at 2–7 (Oct. 6, 2010) ("USPS Statement") (attached to Request Letter). USPS asserts that it is an agency with a uniquely independent status in the federal government, "free from many facets of the federal bureaucracy," including many federal record-keeping statutes. *Id.* at 3. On this basis, it claims that it has authority to control the disclosure of FECA records in its possession, even where disclosure would not be permitted under DOL/GOVT-1's routine uses. *Id.*

In our view, FECA gives DOL authority to control the disclosure of FECA records in USPS's possession. As set forth above, *see supra* pp. 218–219, FECA gives the Secretary of Labor exclusive authority to administer the FECA program, 5 U.S.C. § 8145, and to "prescribe rules and regulations necessary for the administration and enforcement of [FECA]," *id.* § 8149. Although the text of FECA does not explicitly address the maintenance and disclosure of FECA records, it does create a claims process that expressly contemplates the creation of records related to FECA claims, including by employing agencies, *see supra* pp. 218–220, and gives DOL broad authority to prescribe the rules and regulations necessary to administer that process, *see id.* For many years, DOL has held—and its regulations have reflected—the view that its authority to regulate the FECA process includes authority to control access to and disclosure of FECA records. We believe this is a reasonable reading of the statute.

DOL's predecessor, the United States Employees' Compensation Commission, long ago determined that its authority to administer and enforce FECA includes the authority to regulate the maintenance and disclosure of the records the FECA process generates, and further determined that regulating such disclosure was an important part of administering FECA. Decades before Congress restricted disclosure of personally identifiable information through the Privacy Act, the Compensation Commission relied on FECA's broad grant of regulatory authority to promulgate regulations making FECA records confidential. *See* 20 C.F.R. § 1.1 (1938) ("[FECA] authorizes the [United States Employees' Compensation] Commission to make necessary rules and regulations for the enforcement of the Act and to decide all questions arising under the Act."); *see also id.* § 1.21(a) (1938) ("[Employment compensation] records and papers pertaining to any . . . injury or death are confidential and no official or employee of a Government establishment . . . shall disclose information from or pertaining to such records to any person."); 20 C.F.R. § 1.21 (1974) (same). DOL and other predecessor entities have promulgated and enforced similar regulations ever since.

At present, DOL has two regulations that address the confidentiality, custody, and control of FECA records. The first, 20 C.F.R. § 10.10, is entitled "Are all documents relating to claims filed under the FECA considered confidential?"[3] It provides:

> All records relating to claims for benefits, including copies of such records maintained by an employer, are considered confidential and may not be released, inspected, copied or otherwise disclosed except as provided in the Freedom of Information Act ["FOIA"] and the Privacy Act of 1974 or under the routine uses provided by DOL/GOVT-1 if such release is consistent with the purpose for which the record was created.

The second regulation, 20 C.F.R. § 10.11, is entitled "Who maintains custody and control of FECA records?" It provides:

[3] The FECA regulations were amended to their current interrogative form in 1997 to make them easier to use. *See* Claims for Compensation under the Federal Employees' Compensation Act, 62 Fed. Reg. 67,120, 67,120 (Dec. 23, 1997) (proposed rule to be codified at 20 C.F.R. pt. 10).

> All records relating to claims for benefits filed under the FECA, including any copies of such records maintained by an employing agency, are covered by the government-wide Privacy Act system of records entitled DOL/GOVT-1 (Office of Workers' Compensation Programs, Federal Employees' Compensation Act File). This system of records is maintained by and under the control of OWCP, and, as such, all records covered by DOL/GOVT-1 are official records of OWCP. The protection, release, inspection and copying of records covered by DOL/GOVT-1 shall be accomplished in accordance with the rules, guidelines and provisions of this part [i.e., DOL's FECA regulations], as well as those contained in 29 CFR parts 70 and 71 [i.e., DOL's FOIA and general Privacy Act regulations], and with the notice of the system of records and routine uses published in the *Federal Register*. All questions relating to access/disclosure, and/or amendment of FECA records maintained by OWCP or the employing agency, are to be resolved in accordance with this section.

As DOL explains, these regulations reflect the "careful control over the disclosure of documents from [FECA] case files" that OWCP has maintained for "decades." DOL's Position Statement at 1 (Oct. 1, 2010) ("DOL Statement") (attached to Request Letter). Consistent with this view, a DOL notice of final rulemaking announcing a revision to an earlier version of 20 C.F.R. § 10.11 notes that DOL "considers all records collected because a claim was filed seeking benefits under FECA[] to be official records of the Department and, with one limited exception, covered by DOL/GOVT-1." Use and Disclosure of Federal Employees' Compensation Act Claims File Material, 63 Fed. Reg. 56,752, 56,753 (Oct. 22, 1998).[4] The notice further asserts that all materials covered by DOL/GOVT-1 are "subject to OWCP's exclusive control." *Id.* DOL reaffirmed this view when it finalized the regulation in its current form. *See* Claims for Compensation Under the Federal Employees' Compensation Act, 63 Fed. Reg. 65,284, 65,286 (Nov. 25, 1998).

Under the two regulations reproduced above, the Postal Service lacks authority over the disclosure of FECA records in its possession. Both

[4] The "limited exception" referenced in the notice permits agencies to retain FECA forms in the personnel folders of employees, in accordance with guidelines issued by the Office of Personnel Management, if those forms were not submitted to OWCP. 63 Fed. Reg. at 56,753.

regulations expressly cover "copies" of FECA records maintained by employing agencies other than DOL; and both make clear that FECA records are confidential, and that "routine use" disclosure is permissible *only* "under the routine uses provided by DOL/GOVT-1." 20 C.F.R. § 10.10; *id.* § 10.11.[5] The plain text of these regulations thus bars USPS from disclosing FECA records under a "routine use" that is inconsistent with the DOL/GOVT-1 notice.[6]

These regulations constitute a valid exercise of DOL's statutory authority under FECA. As noted above, FECA grants the Secretary broad authority to "administer[] and decide all questions arising under" FECA, and to "prescribe rules and regulations necessary for the administration and enforcement of [FECA]." 5 U.S.C. §§ 8145, 8149. And FECA records are an integral part of the FECA process. As DOL explains, "[t]he records maintained in [DOL/GOVT-1] are created as a result of and are necessary to" DOL's statutory duties of "processing and adjudicating claims" for federal workers' compensation. 67 Fed. Reg. at 16,827. In light of the importance of FECA records to the processing and adjudication of claims, DOL reasonably concluded that the question of when and how to disclose FECA records "aris[es] under" FECA, and falls within the Secretary's jurisdiction. 5 U.S.C. § 8145; *cf. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (an agency's reasonable construction of a statute it is charged with administering is entitled to deference). The reasonableness of DOL's conclusion is supported by DOL's consistent guarantee of the confidentiality of FECA records since 1938. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (the "consistency of an agency's position is a factor in assessing the weight that the position is due"); *see also supra* p. 224 (describing history).

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[5] Because the DOL–USPS disagreement at issue does not concern disclosures of FECA records under FOIA or provisions of the Privacy Act other than the routine use exception, we do not address those issues. *Cf.* 5 U.S.C. § 552a(b)(1)–(2), (4)–(12), (d) (2006) (providing for disclosure of Privacy Act records other than through a "routine use").

[6] Even if the regulations were ambiguous, we would defer to DOL's reasonable interpretation of them. *See Auer v. Robbins*, 519 U.S. 452, 461–62 (1997) (the Secretary of Labor's interpretation of a DOL regulation, advanced in a legal brief, is "controlling unless plainly erroneous or inconsistent with the regulation" (internal quotation marks omitted)).

It was likewise reasonable for DOL to conclude that regulations protecting the confidentiality and restricting the disclosure of FECA records are "necessary" for the Act's administration. 5 U.S.C. § 8149; *cf. Chevron*, 467 U.S. at 843–44. FECA records often contain sensitive medical and health information, *see, e.g.*, 20 C.F.R. § 10.115(f) (requiring submission of medical report), and disclosure of such information may implicate significant individual privacy interests, *cf. Plain Dealer Publ'g Co. v. Dep't of Labor*, 471 F. Supp. 1023, 1026 (D.D.C. 1979) (protecting documents in an active OWCP claims file under FOIA exemption for "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"). Protecting the confidentiality of such information, except where DOL has determined that disclosure is consistent with the purposes of FECA, serves those privacy interests. And prohibiting other agencies from disclosing FECA records outside of DOL's framework ensures that these confidentiality interests are protected wherever the records are physically maintained.

DOL's protection of FECA records is also consistent with its efficient implementation of the Act. If DOL cannot ensure the confidentiality of FECA records, employees may be deterred from submitting all information necessary to evaluate their claims, to the detriment of DOL's adjudication process. *Cf. id.* (describing the serious harm that would result from public release of an OWCP claims file); *see also* DOL Statement at 8 ("DOL does not want to risk an employee being less than forthcoming in his workers' compensation claim because he fears the information will . . . not be held close[ly] by OWCP or that the information may somehow be used against him in another, unrelated, proceeding.").

In its submission to the Office of Management and Budget ("OMB"), USPS challenges DOL's control of the FECA records in its possession, claiming that DOL control over the Postal Service's copies of FECA records would "improperly ignore[] the Postal Service's unique independence from many federal statutes and regulations." USPS Statement at 1. USPS contends that DOL's exercise of authority over its FECA records would be burdensome, requiring USPS to seek DOL's permission every time it wishes to disclose a FECA record, and would intrude on the Postal Service's statutory independence. *Id.* at 2–4. In making these arguments, USPS relies on 39 U.S.C. § 410(a) (2006), a provision of the Postal Reor-

ganization Act of 1970, *as amended*, 39 U.S.C. §§ 101–5605 (2006 & Supp. V 2011) ("PRA"). That provision states that, "[e]xcept as provided in subsection (b) of this section, and except as otherwise provided in this title . . . no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds . . . shall apply to the exercise of the powers of the Postal Service." *Id.* § 410(a). USPS notes that it views all records in its possession as USPS "property," and has therefore historically relied on section 410(a) as authority for its independence from statutes regulating records (e.g., the Federal Records Act, 44 U.S.C. §§ 3101–3107 (2006)). USPS Statement at 3–4.

We agree that the Postal Service has a unique status within the federal government. But it has no general characteristic that exempts its FECA records from DOL's regulatory regime. Instead, the question whether the Postal Service is subject to the burdens and obligations imposed by FECA is a matter of statutory interpretation. And here, Congress, through the PRA, expressly subjected USPS to FECA, and thus to DOL's control of FECA records.

Although the PRA relieved USPS from its obligation to comply with "many . . . statutes governing federal agencies," it also "specifically subjected [USPS] to some others." *U.S. Postal Serv. v. Flamingo Indus. (USA), Inc.*, 540 U.S. 736, 741 (2004). Indeed, the PRA provision USPS cites, section 410(a), states that the Postal Service is exempt from various federal laws "*except as otherwise provided in this title*." 39 U.S.C. § 410(a) (emphasis added). Another provision of the relevant title, 39 U.S.C. § 1005(c) (2006), expressly provides that "[o]fficers and employees of the Postal Service shall be covered by subchapter I of chapter 81 of title 5, relating to compensation for work injuries." And subchapter I of chapter 81 of title 5 codifies the FECA statute, including (among other things) the Secretary of Labor's authority to enforce and administer FECA. 5 U.S.C. § 8149. Thus, under the PRA's plain language, USPS officers and employees are "covered" by FECA, including the provisions authorizing the Secretary of Labor to issue regulations governing FECA records. 39 U.S.C. § 1005(c).[7] Far from exempting USPS from DOL's

[7] By stating that FECA benefits will be provided to USPS "officers and employees," the PRA necessarily subjects USPS to the obligations that FECA imposes on employers, including the obligation to abide by DOL's regulations regarding disclosure of FECA records.

authority to administer FECA, the PRA clarifies that USPS falls within the ambit of DOL's FECA authority.[8]

B.

DOL also suggests that the Privacy Act independently gives it authority to control the disclosure of FECA records through DOL/GOVT-1. *See* DOL's Reply to USPS at 1–2 (undated) ("DOL Reply") (attached to Request Letter). Specifically, DOL notes that OMB, the agency with authority to oversee implementation of the Privacy Act, has issued guidance that would forbid USPS from either creating a system of records that overlaps with DOL's government-wide system of FECA records or establishing inconsistent routine use exceptions. USPS counters that OMB's guidance does not apply to it. *See* USPS Statement at 4–6.

We agree that OMB's guidance suggests that DOL's assertion of exclusive control over the disclosure of FECA records under its government-wide system-of-records notice is consistent with and furthers the purposes of the Privacy Act. However, for the reasons explained below, we decline to resolve whether OMB's guidance actually binds USPS in this situation.

The Privacy Act gives OMB the authority to "develop and, after notice and opportunity for public comment, prescribe guidelines and regulations for the use of agencies in implementing [the Privacy Act]," and to "provide continuing assistance to and oversight of the implementation of [the

[8] In its views letter for OMB, USPS cites a 2002 statement in which DOL asserted that it has "control over [the FECA system of records] to the same extent as the Office of Personnel Management ['OPM'] has control over systems of records containing federal employee personnel records." USPS Statement at 5 (quoting Publication of All Notices of Systems of Records, 67 Fed. Reg. 16,816, 16,823 (Apr. 8, 2002)) (internal quotation marks omitted). USPS then notes that OPM specifically disclaims authority over USPS personnel files, and contends that, by comparing its control over FECA records to OPM's control over personnel records, DOL must have been conceding that its control over FECA records does not extend to USPS files. *Id.* But DOL plainly has not disclaimed authority over FECA records in USPS's possession. Instead, in its 2002 statement, DOL appears to be pointing out that its authority over the FECA system of records is generally similar to OPM's authority over personnel records, and (in particular) that its authority extends to files held by other agencies. *See* 5 C.F.R. § 293.301 (2012). Furthermore, OPM disclaims authority over USPS personnel files because USPS has an independent personnel system. *See* 39 U.S.C. § 410(a). In contrast, USPS does not have an independent employee compensation system, but rather is subject to FECA.

Privacy Act]." 5 U.S.C. § 552a(v) (2006). One OMB Privacy Act guidance document recognizes the category of government-wide systems of records, and directs other agencies not to publish their own systems of records that duplicate such government-wide systems:

> *Governmentwide Systems of Records*. Certain agencies publish systems of records containing records for which they have governmentwide responsibilities. The records may be located in other agencies, but they are being used under the authority of and in conformance with the rules mandated by the publishing agency. . . . Agencies should not publish systems of records that wholly or partly duplicate existing governmentwide systems of records.

OMB Circular A-130, Transmittal No. 1, Management of Federal Information Resources, 58 Fed. Reg. 36,068, 36,078 (July 2, 1993). Under this guidance, agencies may not publish—and therefore cannot utilize—separate routine uses for records that are part of a government-wide system maintained by another agency. *See* 5 U.S.C. § 552a(b)(3) (permitting routine uses as "described under subsection (e)(4)(D)," which requires their publication in systems-of-records notices). OMB's guidance thus seeks to ensure that the only routine use disclosures of records in government-wide systems will be those established in the relevant system-of-records notice.

OMB expanded on this guidance in a later document implementing a presidential memorandum issued by President Clinton on May 14, 1998, which directed heads of executive departments and agencies to conduct, "in accordance with instructions to be issued by [OMB]," a variety of tasks related to Privacy Act requirements. *Memorandum on Privacy and Personal Information in Federal Records* (May 14, 1998), 1 Pub. Papers of Pres. William J. Clinton 759, 759 (1998). OMB's subsequent instructions stated in part:

> [A]gency systems of records should not duplicate or be combined with those systems which have been designated as "government wide systems of records." A government wide system of records is one for which one agency has regulatory authority over records in the custody of many different agencies. . . . Such government-wide systems ensure that privacy practices with respect to those records are carried out in accordance with the responsible agency's regula-

> tions uniformly across the federal government. For example, a civilian agency subject to the personnel rules of the Office of Personnel Management should manage its official personnel folders in accordance with the government wide notice published by OPM for those records, OPM/GOVT-1. The custodial agency need not, and should not, publish a system of records which covers the same records.

Memorandum for Heads of Departments and Agencies from Jacob J. Lew, Director, OMB, *Re: Instructions on Complying with President's Memorandum of May 14, 1998, "Privacy and Personal Information in Federal Records"* att. B (Jan. 7, 1999) ("Memorandum 99-05").

These OMB documents demonstrate that DOL's assertion of authority over FECA records is consistent not only with FECA, but also with the purposes of the Privacy Act, as interpreted by OMB in Circular A-130 and Memorandum 99-05. DOL's designation of DOL/GOVT-1 as a government-wide system of records, *see supra* pp. 224–225; 67 Fed. Reg. at 16,825, comports with OMB's definition, *see* Memorandum 99-05, att. B (defining government-wide system of records as a system including records for which a single agency has government-wide responsibilities). Thus, under the terms of OMB's guidance, DOL/GOVT-1 should be the sole system that includes FECA records, in order to ensure uniform privacy protection for such records across the government. *See* Memorandum 99-05, att. B ("[G]overnment-wide systems ensure that privacy practices with respect to those records are carried out in accordance with the responsible agency's regulations uniformly across the federal government."). DOL's FECA regulations further these Privacy Act objectives.

We do not determine here, however, whether OMB's guidance either binds USPS or provides an independent source of authority for DOL's exclusive control over FECA records. As USPS points out, while the Privacy Act itself applies to the Postal Service, "no regulation issued under [the Privacy Act] shall apply to the Postal Service unless expressly made applicable." 39 U.S.C. § 410(b). According to USPS, the OMB guidance fails this test. USPS Statement at 4. In our view, it is unclear whether either Circular A-130 or Memorandum 99-05 has been "expressly made applicable" to the Postal Service. Although the relevant portion of Circular A-130, appendix I, does not mention USPS by name, it defines "agency" by express cross-reference to the Privacy Act, which includes

USPS within its definition of "agency." *See* 5 U.S.C. § 552a(a)(1).[9] Circular A-130 also states that it "applies to *all agencies subject to the Act*." 58 Fed. Reg. at 36,075 (emphasis added). Memorandum 99-05, for its part, likewise uses the term "agency" without specifically mentioning USPS, but does so while discussing Privacy Act obligations, which (given the Privacy Act's inclusion of USPS in its definition of "agency") might include USPS. Memorandum 99-05, att. B. It is thus not immediately apparent whether the guidance in either document has been made "expressly applicable" to USPS. As set forth in Part II.A above, however, FECA by itself gives DOL the authority to control the disclosure of FECA records held by USPS. Accordingly, we need not decide whether OMB's regulations independently give DOL the same authority.[10]

C.

USPS's final argument is that the NLRA requires it to maintain a routine use permitting disclosure of FECA records to labor unions. USPS points out that it is the "only federal entity subject to the National Labor Relations Act," a statute that governs certain aspects of the employer-employee relationship, including collective bargaining. USPS Statement at 7.[11] USPS argues that the NLRA requires it "to provide unions with otherwise confidential information"—including FECA records—"when that information is relevant to the unions' role in collective bargaining."

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[9] The Privacy Act's definition of "agency" cross-references and incorporates by reference the FOIA definition of "agency" in 5 U.S.C. § 552(e), which, after amendment, is now contained in 5 U.S.C. § 552(f)(1) (2006). *See* Pub. L. No. 99-570, § 1802(b), 100 Stat. 3207, 3207-49 (1986); Pub. L. No. 104-231, § 3, 110 Stat. 3048, 3049 (1996). There is no dispute that FOIA's definition of "agency" covers USPS.

[10] DOL also devotes a substantial portion of its OMB submission to arguing that, under the Privacy Act's compatibility requirement, "routine use" disclosures are permissible only for purposes closely related to the purpose for which records were collected, and that some of USPS's routine uses—including the one providing for disclosures of FECA records related to collective bargaining—do not meet this standard. *See* DOL Statement at 6. Our conclusion that FECA gives DOL authority to control disclosure of FECA records means that, whether or not USPS's routine uses satisfy the compatibility requirement, USPS may not promulgate its own routine uses for FECA records. Thus, we need not resolve this issue here.

[11] Other federal entities are covered by the Federal Service Labor-Management Relations Act, 5 U.S.C. §§ 7101–7135 (2006 & Supp. V 2011).

Id. at 8. USPS thus concludes that it must be authorized to establish a routine use permitting, "[a]s required by applicable law," disclosure of OWCP records "to a labor organization when needed by that organization to perform its duties as the collective bargaining representative of Postal Service employees." 70 Fed. Reg. at 22,521; *see* USPS Statement at 9.

For two reasons, we do not believe that the NLRA gives USPS authority to establish a routine use permitting disclosure to labor unions for purposes related to collective bargaining. First, as set forth above, FECA gives DOL broad authority over the FECA process, including the power to control disclosure of FECA records. The NLRA, in contrast, does not directly address the disclosure of FECA records, and nothing in its text suggests that it should be read to displace DOL's authority over the government-wide FECA system of records. As a result, the best way to harmonize DOL's broad authority over FECA records with the possibility that the NLRA (or some other statute) might sometimes require those records' disclosure is to presume that the entity with control of the records—DOL—will authorize the disclosure of FECA records when and if disclosure is in fact required. *See infra* note 14. USPS's potential disclosure obligations under the NLRA, in other words, do not give rise to an inference that USPS must have independent authority to promulgate routine uses for FECA records.

Second, as a practical matter, the potential for conflict between USPS's obligations under the NLRA and FECA is insufficient to support an inference that Congress intended to authorize USPS to control disclosure of the FECA records in its possession. It is true that the NLRA imposes on employers a duty to "bargain collectively," 29 U.S.C. § 158(a)(5) (2006), which includes a broad obligation "to provide relevant information needed by a labor union for the proper performance of its duties as the employees' bargaining representative." *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979); *see also* USPS Statement at 8. But this duty requires the provision of *information*, not particular documents, and it is not absolute. *See, e.g.*, *Detroit Edison*, 440 U.S. at 318 (the duty to disclose information can be outweighed by legitimate privacy interests in the requested information); *cf. NLRB v. U.S. Postal Serv.*, 841 F.2d 141, 146 (6th Cir. 1988) ("*NLRB I*") (applying *Detroit Edison* to evaluate privacy interests involved in disclosure of records covered by USPS collective bargaining routine use); *NLRB v. U.S. Postal Serv.*, 660 F.3d 65, 66 (1st

Cir. 2011) ("*NLRB II*") (USPS employees have a "legitimate and substantial privacy interest in their test scores," which the NLRB must balance against the union's interests); *id.* at 77 (USPS's routine use authorizing disclosure of certain records neither mandates disclosure nor "defeat[s] all expectations of privacy" in the covered information).[12] To be sure, employers cannot simply refuse to give unions sensitive information; rather, employers must accommodate a union's reasonable request for information while protecting the privacy interests involved by, for example, obtaining employee consent to disclosure, redacting records, or submitting records in a summary format. *See, e.g.*, *Detroit Edison*, 440 U.S. at 317 (consent); *Oil, Chem. & Atomic Workers, Local Union No. 6 v. NLRB*, 711 F.2d 348, 363 (D.C. Cir. 1983) (redaction); *U.S. Testing Co. v. NLRB*, 160 F.3d 14, 21 (D.C. Cir. 1998) (redaction); *Pa. Power & Light Co.*, 301 N.L.R.B. 1104, 1107 (1991) (summary).

Relevant here, the privacy interests in FECA records, which often include medical reports, are substantial. *See* DOL Statement at 7; *see also, e.g.*, *U.S. Testing*, 160 F.3d at 21; *Oil, Chem. & Atomic Workers*, 711 F.2d at 363. And, in most (if not all) cases, a union's need for information about FECA claims in collective bargaining will not require receipt of individual FECA records of a given employee, but instead will be capable of satisfaction through a compilation, summary, or aggregation of anonymized information concerning one or more employees.[13] It thus seems

[12] USPS itself has recognized that the NLRA's disclosure obligation is not absolute. *See NLRB II*, 660 F.3d at 68 (referencing USPS argument that the NLRA did not require it "to release employee test scores unconditionally under the routine use exception"). The cases USPS cites in its OMB submission are not to the contrary. Three of those cases recognize that the NLRA's disclosure obligations are not absolute. *See NLRB v. U.S. Postal Serv.*, 888 F.2d 1568, 1572 & n.3 (11th Cir. 1989) (the NLRA's disclosure obligations do not absolutely require disclosure of all relevant information in all cases); *NLRB I*, 841 F.2d at 146 ("[T]he union's right to disclosure of relevant information is not absolute."); *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 9 F.3d 138, 144 (D.C. Cir. 1993) ("*Letter Carriers*") (noting the *Detroit Edison* exception to the NLRA's disclosure requirement); *id.* at 149–50 (Randolph, J., dissenting) (same). The fourth case denied enforcement of an NLRB order requiring disclosure of certain personnel files on the grounds that they were not needed for collective bargaining, and thus did not consider *Detroit Edison* balancing. *See NLRB v. U.S. Postal Serv.*, 128 F.3d 280, 283–85 (5th Cir. 1997).

[13] There may be circumstances in which a specific FECA record is essential to determination of an employee's individual grievance; and because an employer's obligation to

likely that the balance between privacy interests and the union's need for information would not generally require the disclosure of the records under *Detroit Edison*. *Cf.* 440 U.S. at 319 (weighing the "sensitive nature" of the information requested in that case against the "minimal burden" that a privacy-protecting accommodation would have placed on the union).[14] The very limited potential for conflict between USPS's NLRA obligations and DOL's FECA regulations is a further reason why we would not treat Congress's decision to apply the NLRA to USPS as an

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provide information extends through the term of any collectively bargained agreement, *see NLRB v. Acme Indus. Co.*, 385 U.S. 432, 436 (1967), the NLRA might require disclosure of the record to a union assisting an employee with his or her grievance. However, the Privacy Act authorizes the disclosure of FECA records to a union in that setting with employee consent. *See* 5 U.S.C. § 552a(b).

[14] If a situation did arise in which the *Detroit Edison* balance tipped in favor of disclosure of a FECA record, DOL would have to consider how best to reconcile the NLRA with the Privacy Act. The NLRA might be interpreted as either (i) requiring DOL to create a routine use permitting disclosure in such circumstances (if concerns about the Privacy Act's compatibility requirement could be overcome); or (ii) in effect creating a statutory exception to the Privacy Act's general confidentiality requirement, a kind of legislatively created routine use, permitting disclosure in those circumstances. *Cf.* Privacy Act Guidelines, 40 Fed. Reg. 28,949, 28,954 (July 9, 1975) (disclosures expressly required by laws other than FOIA are "in effect congressionally-mandated 'routine uses'"); *Letter Carriers*, 9 F.3d at 143 (opinion of Silberman, J.) (USPS could have an obligation under the NLRA to publish a routine use); *Dep't of Def. v. FLRA*, 510 U.S. 487, 506 n.3 (1994) (Ginsburg, J., concurring) (suggesting that agencies have discretion to publish their routine uses, but noting possibility of obligatory routine uses raised in *Letter Carriers*). On the other hand, it may be that under the PRA, the NLRA would not in fact require USPS to disclose FECA records to a union if doing so would violate DOL's FECA regulations. The PRA states that USPS's "[e]mployee-management relations shall . . . be subject to" the NLRA *only* "to the extent not inconsistent with the provisions of [title 39]." 39 U.S.C. § 1209(a) (2006); DOL Reply at 3. Title 39, in turn, subjects USPS to both the Privacy Act and FECA. The PRA might thus be interpreted to require USPS to comply with the NLRA generally, but to make an exception to the extent that the NLRA required a disclosure barred under the Privacy Act or FECA. *Cf. Letter Carriers*, 9 F.3d at 147 (Williams, J., concurring) (noting possibility that the PRA may require NLRA disclosures only to the extent not barred by the Privacy Act). While the application of OMB's Privacy Act guidance to USPS is uncertain, *see supra* Part II.B, FECA, as administered by DOL pursuant to its statutory authority, plainly prohibits USPS from disclosing FECA records in contravention of DOL's FECA regulations. Accordingly, under the PRA, USPS is arguably not required to disclose FECA records in contravention of DOL's FECA regulations promulgated under FECA. This is, however, another issue we are not required to resolve.

indicator that USPS must have authority to regulate the disclosure of the FECA records in its possession.[15]

III.

In sum, we conclude that DOL has authority to control the disclosure of FECA records, including those in the possession of USPS, and that DOL's exercise of this authority is consistent with and furthers the purposes of the Privacy Act. We further conclude that USPS is not separately authorized to control the disclosure of FECA records by virtue of its independent status within the federal government, or by the NLRA.

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Assistant Attorney General
Office of Legal Counsel

[15] USPS also claims that it may be required to disclose FECA records in proceedings before the United States Equal Employment Opportunity Commission ("EEOC") and the United States Merit Systems Protection Board ("MSPB"), and that limiting disclosure in such proceedings would be "unworkable and contrary to Congressional intent." USPS Statement at 6–7. However, USPS does not point to any provision in the statutes establishing the EEOC or the MSPB that would confer disclosure authority on USPS, let alone override the authority conferred on DOL by FECA. We further note that DOL has already published a routine use that allows the production of otherwise private records to a "court or adjudicative body" where such disclosure is necessary. 77 Fed. Reg. at 1730. It may be that the EEOC and the MSPB would constitute "adjudicative bod[ies]" and therefore that such disclosures are already authorized.

EXHIBIT 11

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

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

February 11, 2008

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

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

I.

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

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

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

II.

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

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

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

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

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

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

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

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

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

III.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV.

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

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

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

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Deputy Assistant Attorney General
Office of Legal Counsel

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

EXHIBIT 12

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.").

EXHIBIT 13

Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply With Orders Issued by EEOC Administrative Judges

The doctrine of sovereign immunity precludes the Equal Employment Opportunity Commission from imposing monetary sanctions against federal agencies for violations of orders of EEOC administrative judges.

January 6, 2003

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
DEPARTMENT OF THE NAVY
AND
ACTING DEPUTY GENERAL COUNSEL
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Department of the Navy ("the Navy") has asked our opinion as to whether the Equal Employment Opportunity Commission ("EEOC") has authority to impose attorney's fees against federal agencies as a sanction for failure to comply with the orders of EEOC administrative judges ("AJs") in connection with hearings before AJs. In the past, for example, AJs have assessed such sanctions against federal agencies for failures to comply with discovery orders. *See* Letter for Randolph Moss, Assistant Attorney General, Office of Legal Counsel, from Ellen J. Vargas, Legal Counsel, United States Equal Employment Opportunity Commission at 3 n.4 (Jan. 9, 2001) ("EEOC Letter"). EEOC, of course, maintains that it may impose such sanctions. We agree with the Navy that, pursuant to basic principles of sovereign immunity, EEOC lacks authority to impose monetary sanctions (such as attorney's fees) on federal agencies for failure to comply with AJ orders.

I. Jurisdiction

Before reaching the merits, we address EEOC's concerns that this matter is not appropriate for resolution by the Office of Legal Counsel. *See* EEOC Letter at 1. We agree with the Navy that it is entitled to our opinion on this issue pursuant to Executive Order 12146, 3 C.F.R. § 409 (1979) ("EO 12146").[1] As presented to us by the Navy, this is a dispute between two executive agencies on a question of law and therefore comes within the terms of section 1-401 of EO 12146, among other provisions. The fact that one agency (here, EEOC) sits in an adjudicatory posture

[1] EO 12146 authorizes the Attorney General to resolve certain legal disputes between agencies. The Attorney General has delegated that function to this Office. *See* 28 C.F.R. § 0.25 (2002).

with respect to an agency requesting our opinion (here, the Navy) does not alter this conclusion, and we have previously resolved such disputes. *See, e.g.*, *Authority of the General Services Board of Contract Appeals to Order Reimbursement of the Permanent Judgment Fund for Awards of Bid Protest Costs*, 14 Op. O.L.C. 111 (1990).

Further, neither the fact that EEOC has authority to enforce Title VII in the federal workplace nor the fact that agencies "shall comply" with EEOC rules and orders, *see* 42 U.S.C. § 2000e-16(b) (2000), divests us of authority to issue this opinion. The Navy contends that EEOC has exceeded its statutory authority. If that is the case—and we conclude that it is—EEOC has no power to impose monetary sanctions on federal agencies for failure to comply with AJ orders. At its base, the present dispute is whether EEOC has exceeded its own jurisdiction; the dispute is therefore entirely appropriate for resolution by this Office. *See* EO 12146, § 1-401 (listing questions of agency jurisdiction among the issues for resolution under that section); s*ee also* Memorandum for Henry L. Solano, Solicitor, Department of Labor, and Leigh A. Bradley, General Counsel, Department of Veterans Affairs, from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Re: The Effect of Veterans' Health Administration Nurses' Additional Pay for Sunday and Night Duty on Calculation of Workers' Compensation Benefits* (Jan. 19, 2001).

II. Sovereign Immunity

Because the resolution of this dispute hinges on the doctrine of sovereign immunity, we begin by explaining its basic principles. Most fundamentally, the federal government may not be sued without its consent, *see, e.g.*, *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821). The absence of consent bars proceeding against the government. *See Meyer*, 510 U.S. at 475. The authority to consent to suit—to waive sovereign immunity—does not rest with the Executive Branch, *see, e.g.*, *United States v. Shaw*, 309 U.S. 495, 500–01 (1940) (explaining "that without specific *statutory consent*, no suit may be brought against the United States"; "[n]o *officer* by his action can confer jurisdiction") (emphases added); *Munro v. United States*, 303 U.S. 36, 41 (1938); *United States v. Horn*, 29 F.3d 754, 761 (1st Cir. 1994), or with the courts, *see, e.g.*, *Lane v. Pena*, 518 U.S. 187, 192 (1996); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990); *Shaw*, 309 U.S. at 502, but solely with Congress.

Accordingly, waivers of the "Federal Government's sovereign immunity must be unequivocally expressed *in statutory text*." *Lane*, 518 U.S. at 192 (emphasis added); *see also United States v. Nordic Village*, 503 U.S. 30, 37 (1992). Furthermore, waivers must be "strictly construed, in terms of [their] scope, in favor of the sovereign." *Lane*, 518 U.S. at 192. It follows that waivers of immunity with respect to one type of relief do not thereby waive immunity with respect to other

forms of relief. Thus, although the Clean Water Act and the Resource Conservation and Recovery Act waived the immunity of federal agencies with respect to "coercive fines" designed to insure compliance with the statutes, those statutes did not render such agencies liable for "punitive fines" for past violations. *See Dep't of Energy v. Ohio*, 503 U.S. 607, 614–20 (1992) (concluding that the statutes do not contain a "clear and unequivocal waiver of anything more" than the coercive fines and declining to infer "a broader reading"). And statutes that clearly waive the government's immunity from attorney's fees do not thereby waive immunity from interest on those fees, even if private parties would be liable for interest. *See, e.g.*, *Library of Cong. v. Shaw*, 478 U.S. 310, 317–19 (1986). Instead, the government's sovereign immunity must be clearly and specifically waived with respect to each form of relief claimed. *See id.* at 314, 321; *see also Nordic Village*, 503 U.S. at 34 (recognizing that a provision of the bankruptcy code waived sovereign immunity from monetary claims in two settings but declining to find such a waiver in a third setting); *cf. Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255 (1999).[2]

The presumption against waivers of sovereign immunity is especially strong in the context of monetary claims; it "operates on the broadest possible level" and "stands as an obstacle to *virtually all direct assaults against the public fisc*, save only those incursions from time to time authorized by Congress," *Horn*, 29 F.3d at 761 (emphasis added). "To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192 (citing *Nordic Village*, 503 U.S. at 34). As we have previously explained, a statutory provision does not waive sovereign immunity for monetary claims if there exists any plausible reading that would not authorize monetary relief. *See Availability of*

[2] On close examination, several cases that may appear to be narrow exceptions to the traditional sovereign immunity canons are actually consistent with them. The Court, for example, has held that equitable tolling generally applies to suits against the government for which Congress has waived immunity. *See Irwin*, 498 U.S. at 95–96. To reach this result, however, the Court first concluded that application of equitable tolling "amounts to little, if any, broadening of the congressional waiver," because "[f]ederal courts have typically extended equitable relief only sparingly," *id.* at 95–96. Even so, the Court has shown great reluctance to extend *Irwin*. *See Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002) (declining to extend *Irwin* to the context of state sovereign immunity). And although the Court has sustained attorney's fee awards for representation in administrative proceedings under part of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A) (2000) (providing for such awards to a "prevailing party . . . *in any civil action* . . . for judicial review of agency action") (emphasis added), it did so only after first finding that the administrative proceedings at issue were "so intimately connected with judicial proceedings as to be considered part of the 'civil action' for purposes of a fee award." *Sullivan v. Hudson*, 490 U.S. 877, 892 (1989); *see id.* at 885 (emphasizing that the judicial review provision at issue entailed "a degree of interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act"). In any event, the Court has stressed that such cases "do not . . . eradicate the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign and not enlarge[d] beyond what the language required." *Nordic Village*, 503 U.S. at 34 (alteration in original) (quotations and citations omitted).

Money Damages Under the Religious Freedom Restoration Act, 18 Op. O.L.C. 180, 180 (1994).

It follows that attorney's fees may not be imposed against the United States absent an express statutory waiver. In fact, such claims are treated more strictly than other monetary claims because of, among other things, the so-called "American Rule." Under the American Rule, even "the prevailing litigant is ordinarily not entitled to collect a reasonable attorney's fee from the loser." *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); *see also Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 602 (2001). Moreover, prevailing-party requirements are often read into fee-recovery statutes that do not explicitly require such. *See, e.g.*, *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 686, 694 (1983) (holding that "a fee claimant must 'prevail' before it may recover attorney's fees," despite a provision of the Clean Air Act, 42 U.S.C. § 7607(f) (2000), allowing the district court to "award costs [and attorney's fees against the United States] whenever it determines that such an award is appropriate"). Further, the Supreme Court narrowly construes who qualifies as a prevailing party. *See, e.g.*, *Buckhannon*, 532 U.S. at 600 (concluding that a plaintiff who secures the desired relief because a lawsuit induced the defendant *voluntarily* to change its conduct is not a "prevailing party"). Finally, even prevailing-party status may be insufficient. *See, e.g.*, *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (concluding that "[i]n some circumstances, even a plaintiff who formally 'prevails' under [42 U.S.C.] § 1988 should receive no attorney's fees at all"). Thus, multiple canons of construction come into play in considering the imposition of attorney's fees against the United States, all of which presume that such awards are unavailable.

Although most of the sovereign immunity case law arises in the context of suits before federal district courts, these principles apply with equal force to agency adjudications. This follows most immediately, we believe, from the fact that, as discussed above, Congress—not the Executive Branch—controls the terms of any waiver of sovereign immunity. Moreover, any other rule would undermine Congress's ability to waive immunity in a specific forum to the exclusion of another, *see, e.g.*, *McElrath v. United States*, 102 U.S. 426, 440 (1880), and more generally, to control the terms under which the United States would be liable to private parties. And, unsurprisingly, the courts have applied the sovereign immunity canons to proceedings before agencies and non-Article III courts. *See, e.g.*, *Ardestani v. INS*, 502 U.S. 129, 137 (1991) (holding that sovereign immunity bars fee award to prevailing party in INS proceeding); *Nordic Village*, 503 U.S. at 30 (holding sovereign immunity presumptions applicable in Bankruptcy Court); *Foreman v. Dep't of Army*, 241 F.3d 1349, 1352 (Fed. Cir. 2001) (applying sovereign immunity principles to conclude that the Merit Systems Protection Board lacks authority to impose monetary damages). *Cf. United States v. Sherwood*, 312 U.S. 584, 587–88 (1941) (noting that "[e]xcept as Congress has consented there is no jurisdiction in the Court of Claims [a legislative court] more

than in any other court to entertain suits against the United States"). This Office has likewise opined that sovereign immunity principles govern agency awards of monetary relief. *See Authority of USDA to Award Monetary Relief for Discrimination*, 18 Op. O.L.C. 52 (1994).

Finally, we note that the Supreme Court has raised the question whether "ordinary sovereign immunity presumptions" apply to the question whether an agency may itself grant a specific form of relief against the government when Congress has clearly waived immunity from such relief in suits brought before the district courts. *West v. Gibson*, 527 U.S. 212, 222 (1999). The Court explicitly declined to decide this question, however, concluding in that case that sufficient evidence of a waiver before the agency existed under the traditional presumptions. *See id*. In our view, there can be no doubt that normal sovereign immunity presumptions apply even to the question of how "the waived damages remedy is to be administered," *id*. *See also id*. at 224–28 (Kennedy, J., dissenting). As the dissent in *West* pointed out, "[i]t is settled law that a waiver of sovereign immunity in one forum does not effect a waiver in other forums." *Id*. at 226 (Kennedy, J., dissenting) (citing *McElrath*, 102 U.S. at 440; *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 & n.6 (1944); and *Case v. Terrell*, 78 U.S. (11 Wall.) 199, 201 (1870)). But, in any event, there is no suggestion in *West* that the *existence* of a waiver should be ascertained differently in the administrative context than it would be in an Article III court. It is also worth observing that the Court recently declined to distinguish between "court-like administrative tribunals" and Article III proceedings for purposes of state sovereign immunity. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 759–60 (2002).

III. Analysis

Against this backdrop, we turn to EEOC's arguments in support of its power to impose attorney's fees on federal agencies for failure to comply with AJ orders. EEOC appears to put forth two main arguments supporting its authority to impose such fees upon the government. First, EEOC contends that both its statutory mandate to eliminate discrimination from the federal workplace "through appropriate remedies," 42 U.S.C. § 2000e-16(b), and the Federal Rules of Civil Procedure suffice to waive the federal government's sovereign immunity from the type of sanctions at issue here. Second, EEOC maintains that it has inherent power, as an adjudicatory body, to impose these sanctions against federal agencies. The doctrine of sovereign immunity forecloses both arguments.

A. No Express Waiver Allows EEOC to Impose Monetary Sanctions on Federal Agencies in the Absence of a "Prevailing Party" Determination

EEOC cites 42 U.S.C. § 2000e-16(b) as evidence that Congress has waived the federal government's immunity from the sanctions at issue here. That section empowers EEOC to enforce the prohibition on discrimination in the federal workplace "through appropriate *remedies*," *id*. (emphasis added). Attorney's fees imposed as a sanction for failure to comply with AJ orders relating to the adjudicatory process (such as discovery orders), however, are not a remedy for any act of discrimination. Because the waiver contained in section 2000e-16 must be interpreted in accordance with the above-mentioned rules of construction, this statutory provision does not supply the authority EEOC seeks. EEOC's reliance on *West v. Gibson*, 527 U.S. 212 (1999), is therefore entirely misplaced. In *West*, the Court determined that compensatory damages are an "appropriate remedy" for violations of Title VII as applied to the federal workplace, *see id*. at 217, and that EEOC therefore "possesses the legal authority to enforce" Title VII through such awards. *Id*. at 223. As discussed above, the parties in *West* agreed that Congress had waived the government's sovereign immunity from compensatory damages. By contrast, neither section 2000e-16(b), nor any other statute, contains a provision that even pertains to violations of AJ orders, much less provides an explicit waiver of the government's immunity to monetary sanctions for violations of such orders.

EEOC next asserts that "the Federal Rules of Civil Procedure provide the statutory waiver of sovereign immunity for payments by federal agencies of attorney's fees as sanctions incurred during the federal court adjudicatory process." EEOC Letter at 4. Without further analysis, EEOC simply declares that "[t]hose rules also allow agencies engaged in administrative adjudicatory processes to sanction parties before them, including federal agencies." *Id*. Some courts have concluded that the Federal Rules of Civil Procedure, either by their own force or through the EAJA, waive the United States' sovereign immunity from monetary sanctions imposed by federal district courts. *See, e.g.*, *M.A. Mortenson Co. v. United States*, 996 F.2d 1177, 1181–84 (Fed. Cir. 1993); *Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir. 1991); *Adamson v. Bowen*, 855 F.2d 668, 671–72 (10th Cir. 1988). We disagree with this position. *See* Memorandum for Roger B. Clegg, Associate Deputy Attorney General, Office of the Attorney General, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Departmental Policy on Special Masters* (Oct. 2, 1984).[3] But even were we to

[3] In *Mattingly*, the Ninth Circuit noted that the Federal Rules of Civil Procedure "apply by their own force to all litigants before the court" and that Rule 11 did not expressly exempt attorneys representing the United States. 939 F.2d at 818. The court concluded that because Congress authorized promulgation of the Rules, "applying them to the government with full force cannot be said to violate the principles of sovereign immunity." *Id*. Sovereign immunity principles, however, clearly foreclose

agree with these holdings, nothing in them supports EEOC's assertion that the Federal Rules of Civil Procedure somehow work such a waiver for sanctions imposed during the administrative process for violations of AJ orders.

The Federal Rules of Civil Procedure do not even apply to EEOC proceedings, *see* Fed. R. Civ. P. 1 ("These rules govern the procedure *in the United States district courts* . . . .") (emphasis added), a point on which EEOC has itself relied, *see Bell v. Dalton*, EEOC Appeal No. 01940852, 1994 WL 741530, at *5 (Aug. 17) ("While the Federal Rules of Civil Procedure are used as guidance, they are not binding upon the Commission."). Thus, even if we accepted the proposition that the Federal Rules of Civil Procedure waive the government's sovereign

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the result reached by the court, even assuming that the Federal Rules of Civil Procedure are functionally equivalent to a statute for these purposes. Because the Rules wholly fail to mention the federal government, it certainly cannot be said that they contain an unequivocal waiver of sovereign immunity. *See Lane*, 518 U.S. at 192. And, of course, such waivers may not be implied. *See, e.g.*, *id.*; *Irwin*, 498 U.S. at 95. The fact that the Rules seemingly apply equally to all parties appearing before the court does not change the analysis. As the Supreme Court has explained, "when it comes to an award of money damages, sovereign immunity place[s] the Federal Government on an entirely different footing than private parties." *Lane*, 518 U.S. at 196.

Moreover, both the Rules Enabling Act, 28 U.S.C. § 2072 (2000), and the Federal Rules of Civil Procedure themselves preclude the conclusion that the Rules constitute such a waiver. The Rules Enabling Act provides that the Rules may not "enlarge substantive rights." 28 U.S.C. § 2072(b). But by awarding attorney's fees under the Federal Rules of Civil Procedure, where such awards would otherwise be unavailable, these courts have enlarged substantive rights. *See, e.g.*, *Alyeska*, 421 U.S. at 259 n.31 (suggesting strongly that rules for awarding attorney's fees are substantive for purposes of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)). Further, the Supreme Court has explained that "it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978); *United States v. Sherwood*, 312 U.S. 584, 589–90 (1941). The Federal Rules of Civil Procedure themselves clearly state that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein," Fed. R. Civ. P. 82. Because, as we explained above, sovereign immunity *is jurisdictional*, *see, e.g.*, *Meyer*, 510 U.S. at 475, the Federal Rules of Civil Procedure are quite incapable of providing a waiver.

Although not discussed by EEOC, some courts have found that the EAJA, 28 U.S.C. § 2412 (2000), waives sovereign immunity for sanctions imposed for violations of the Federal Rules of Civil Procedure. *See, e.g.*, *Mortenson*, 996 F.2d at 1181–84 (finding it "permissible to look beyond the specific language used" in the EAJA and resorting quite candidly to legislative history to find a waiver of sovereign immunity for discovery sanctions imposed in violation of Rule 37(b)(2) of the U.S. Claims Court); *Adamson v. Bowen*, 855 F.2d 668, 671–72 (10th Cir. 1988). *But see Mattingly*, 939 F.2d at 818 (declining to find the asserted waiver in the EAJA). This does not help EEOC either, if for no other reason than that, as noted below, the Federal Rules of Civil Procedure do not apply to EEOC proceedings. We must note, however, that the approach taken by these courts cannot be reconciled with clear Supreme Court precedent, which requires that waivers of the "Federal Government's sovereign immunity must be *unequivocally expressed in statutory text*." *Lane*, 518 U.S. at 192 (emphasis added). The EAJA allows "the *prevailing party* in any *civil action*" to recover from the United States certain costs and fees. 28 U.S.C. § 2412(a), (b) (emphases added). In *Adamson*, the court simply ignored the pellucid prevailing-party requirement. Instead, the court relied on legislative history and its estimation of Congress's intent. *See Adamson*, 855 F.2d at 671–72. But this flouts the Supreme Court's admonition that "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. *If clarity does not exist there, it cannot be supplied by a committee report*." *Nordic Village*, 503 U.S. at 37 (emphasis added) (citation omitted).

immunity from fee awards imposed by federal district courts for breach of those rules, we do not see how this waiver could extend to agency proceedings in which the rules do not apply. That is, even if Congress had waived sovereign immunity for violations of the Federal Rules of Civil Procedure in federal court, it would not follow that it has also waived immunity for arguably analogous (though formally distinct) violations before an entirely different body where these rules do not apply. Indeed, as we have emphasized, the doctrine of sovereign immunity requires the exact opposite presumption. *See supra* Part II; *see also McElrath*, 102 U.S. at 440.

The tentative and unsupported suggestion in *West*—that the traditional sovereign immunity canons may not apply in determining whether an administering agency may grant a form of relief for which sovereign immunity has clearly been waived at least before the district courts—could not help EEOC, even if we believed that it represented the best view of the law. *See West*, 527 U.S. at 222; *see also supra* Part II. In *West*, everyone agreed that sovereign immunity from compensatory damages had been waived; the only issue was *when* such damages could be awarded. Because it is impossible to violate the Federal Rules of Civil Procedure in EEOC proceedings for the simple reason that those rules do not apply, there is no need to analyze the timing issue here.

Finally and in light of the foregoing analysis, we note that Congress has in fact waived sovereign immunity from attorney's fees to a limited extent in the Title VII context. Section 2000e-5(k) provides that "[i]n any action or proceeding under this subchapter *the court*, in its discretion, may allow the *prevailing party* . . . a reasonable attorney's fee (including expert fees) as part of the costs." 42 U.S.C. § 2000e-5(k) (2000) (emphasis added). When an agency violates an AJ order in an EEOC proceeding, we do not yet have a prevailing party in an administrative proceeding, let alone in a civil action. This consideration (among others) renders section 2000e-5(k) inapplicable to violations of such AJ orders. Furthermore, "[t]he clarity of [this] provision[] is in sharp contrast to the waiver [EEOC] seeks to tease out of" other provisions, and "illustrates Congress' ability to craft a clear waiver of the Federal Government's sovereign immunity against particular remedies." *Lane*, 518 U.S. at 194. Extending this waiver to cover awards of attorney's fees for violations of orders issued by AJs in the course of EEOC proceedings would constitute an impermissible broadening of the terms and scope of the waiver.

Because EEOC points to no explicit statutory text in which we could begin to find a waiver of sovereign immunity, let alone a waiver that "unambiguously . . . extends to monetary claims," *Nordic Village*, 503 U.S. at 34, we conclude that EEOC lacks express authority to impose monetary sanctions on federal agencies for failure to comply with AJ orders.

B. EEOC Does Not Have Inherent Power to Impose Monetary Sanctions on Federal Agencies

EEOC next argues that its power to impose attorney's fees against federal agencies flows from "the judicial doctrine of the 'inherent powers' of the forum." EEOC Letter at 3. EEOC directs our attention to *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991), in which the Court discussed the inherent power of the federal courts. But EEOC is not a federal court, and the sanctioned party in *Chambers* was not a federal agency. Because we conclude that the latter difference proves decisive, we address the former only in passing.

To be sure, Congress has waived sovereign immunity to some extent by applying Title VII to the federal workplace and empowering EEOC to investigate and remedy violations of the statute. Furthermore, agencies *may* possess *some* inherent power to impose sanctions designed to protect the integrity of their proceedings, at least against litigants other than the federal government. *See, e.g.*, *Touche Ross & Co. v. SEC*, 609 F.2d 570, 582 (2d Cir. 1979) (upholding SEC rule enabling agency to bar attorneys from practicing before it); *see also Am. Bus Ass'n v. Slater*, 231 F.3d 1, 7 (D.C. Cir. 2000) (discussing inherent powers of agencies). *But see Slater*, 231 F.3d at 9 (Sentelle, J., concurring) ("Agencies have no inherent powers. They instead are creatures of statute and may act only because, and only to the extent that, Congress has delegated them the power to act.") (citations omitted). And arguably, EEOC may have some inherent power to impose some type of sanctions designed to maintain the integrity of its proceedings even against federal agencies. One could infer this from the fact that Congress is presumed to have made its statutory scheme effective.

But it follows from our discussion above that whatever inherent power EEOC may possess cannot possibly extend to the imposition of *monetary* sanctions against the federal government. As we have explained, the imposition of such sanctions would require a clear statement of consent in the text of a statute (the very antithesis of inherent power). That is, as discussed above, the authority to waive sovereign immunity (especially with respect to monetary claims) rests with Congress, not the Executive Branch. Thus, no act of EEOC (including promulgation or invocation of a regulation) can, by itself, waive the government's sovereign immunity. Because we have already concluded that Congress has not waived this immunity, it follows that EEOC lacks the authority to impose these monetary sanctions.[4]

[4] EEOC contends that 29 C.F.R. § 1614.109(f)(3) (2002) provides AJs with the authority to impose monetary sanctions against the Government. That provision allows AJs to impose certain sanctions for failure to comply with their orders. Those sanctions include drawing adverse inferences against the noncomplying party, exclusion of other evidence offered by the noncomplying party, issuing an adverse ruling against that party, and taking "such other actions as appropriate." *Id*. Noticeably absent is any mention of monetary sanctions, a fact that has not evaded EEOC, *see* EEOC Letter at 3 (noting that EEOC regulations "explicitly provide for sanctions other than attorney's fees"). Even if this

Finally, we note that significant controversy surrounds the question whether even Article III courts enjoy inherent power to impose monetary sanctions against the federal government. *Compare Horn*, 29 F.3d at 763–67; *id*. at 765 n.13 (noting that "when the two doctrines [sovereign immunity and inherent powers] lock horns, contempt is barred by sovereign immunity"), *with Cobell v. Norton*, 226 F. Supp. 2d 1, 154–55 (D.D.C. 2002) (arguing that if sovereign immunity were to bar the court from exercising its claimed inherent power, the court would be unable to enforce its orders against the Executive Branch, a result that the court believed to be inconsistent "with the tripartite framework established by the Constitution"); *see also United States v. Waksberg*, 112 F.3d 1225, 1227 (D.C. Cir. 1997) (characterizing the separation of powers argument as serious enough to invoke the canon of constitutional avoidance); *cf. Chambers*, 501 U.S. at 58 (Scalia, J., dissenting) (agreeing with the majority that Article III courts derive a measure of independent authority from the Constitution). Whatever the merit of this debate, it has no application in this context, because EEOC and the Navy are both part of the Executive Branch.

IV. Conclusion

We conclude that the doctrine of sovereign immunity bars EEOC from imposing monetary sanctions against federal agencies for violations of AJ orders.

JOAN L. LARSEN
Deputy Assistant Attorney General
Office of Legal Counsel

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provision were found in a statute (and not merely a regulation), the provision "fails to establish unambiguously that the waiver extends to monetary claims," *Nordic Village*, 503 U.S. at 34, and therefore fails to waive immunity from those claims, *see id*. at 37. *See also Availability of Money Damages Under the Religious Freedom Restoration Act*, 18 Op. O.L.C. 180, 181 (1994) (concluding that the term "appropriate relief" in the Religious Freedom Restoration Act does not suffice to authorize monetary relief against the federal government). Indeed, in *United States v. Woodley*, 9 F.3d 774, 781–82 (9th Cir. 1993), the Ninth Circuit refused to find a waiver of sovereign immunity in the similarly-worded Federal Rule of Criminal Procedure 16(d)(2), under which "the court may order [a non-complying] party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, *or it may enter such other order as it deems just under the circumstances*" (emphasis added). The court found fatal the fact that Federal Rule of Criminal Procedure 16(d)(2), unlike several provisions of the Federal Rules of Civil Procedure, "provides no independent authority for a monetary sanction." *Woodley*, 9 F.3d at 781–82. *See also Tri-State Steel Constr. Co. v. Herman*, 164 F.3d 973, 980 (6th Cir. 1999) (concluding that agency rule providing for non-monetary sanctions "indicates an intention to preclude monetary sanctions").

EXHIBIT 14

Obligating Carryover Funds in Violation of OMB Zero-Dollar Apportionment Rule

At least in circumstances where an agency fails to submit an apportionment request for carryover funds to the Office of Management and Budget before the start of a fiscal year, the automatic zero-dollar apportionment effected by section 120.57 of OMB Circular A-11 is a valid apportionment for purposes of the Anti-Deficiency Act. As a result, in such circumstances, 31 U.S.C. § 1517 would prohibit an agency from expending or obligating funds exceeding that apportionment of zero.

September 29, 2016

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

For purposes of federal fiscal law, an "apportionment" specifies the amount of money in an appropriation account an agency can obligate or expend during a particular period of time, or on a particular project or function. *See* 31 U.S.C. § 1512. The Anti-Deficiency Act ("ADA" or "Act") gives the President the authority to apportion the appropriations available to federal agencies. *Id.* § 1513(b)(1). The President has delegated this authority to the Office of Management and Budget ("OMB"). Exec. Order No. 6166, § 16 (June 10, 1933), *as amended by* Exec. Order No. 12608, § 2 (Sept. 9, 1987), 3 C.F.R. 245 (1987 comp.). The ADA also provides that United States Government officers and employees may not make or authorize expenditures or obligations of funds "exceeding . . . an apportionment." 31 U.S.C. § 1517(a)(1). You have asked whether an official would violate this provision of the Act if she obligated appropriated funds in violation of an OMB rule that automatically apportions certain kinds of funds in the amount of zero dollars.[1]

[1] *See* Letter for Karl Remón Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Rafael A. Madan, Acting Assistant General Counsel for Administration, Department of Commerce (Sept. 18, 2015) ("Commerce Letter"). In preparing this opinion, we also received the views of OMB. *See* Letter for Karl Remón Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Ilona Cohen, General Counsel, Office of Management and Budget (Jan. 8, 2016) ("OMB Letter"). At our request, both the Department and OMB supplemented their initial views

The OMB rule at issue, which appears in section 120.57 of OMB Circular A-11,[2] imposes an automatic zero-dollar apportionment for carryover funds—i.e., unobligated balances that remain available from a prior fiscal year—until and unless OMB issues an account-specific apportionment for the same funds. You have explained that, in your view, while OMB's rule is formally structured as an apportionment, it is in effect a prohibition on agencies' obligating carryover funds in advance of later, account-specific apportionments. As you point out, the text of the ADA suggests, and at least one federal court of appeals has held, that while the ADA expressly forbids obligations in advance of appropriations, it does not similarly bar obligations in advance of apportionments. Relying on that reading of the ADA, you contend that section 120.57 improperly eliminates this distinction between appropriations and apportionments under the Act; converts a violation of an administrative rule that temporarily precludes the use of funds pending an account-specific apportionment into a full-blown ADA violation; and wrongly imposes ADA penalties on agencies for using carryover funds even after they have made clear that there is a programmatic need to use them. OMB disagrees, explaining that in its view, section 120.57 constitutes a fully valid apportionment that "achieve[s] the most effective and economical use" of carryover funds, as the ADA itself requires. *See* 31 U.S.C. § 1512(a). As a result, OMB asserts, any obligation or expenditure made in excess of the zero-dollar apportionment set forth in section 120.57 would violate the ADA.

As explained in more detail below, we conclude that, at least in circumstances where an agency fails to request a non-zero apportionment of carryover funds before the start of a fiscal year, section 120.57 effects a valid apportionment for purposes of the ADA. Nothing in the ADA for-

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by e-mail. *See* E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Angelia Talbert-Duarte, Department of Commerce, *Re: DOC Opinion Request* (Feb. 12, 2016, 9:36 AM) ("Talbert-Duarte E-mail"); E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Heather V. Walsh, Office of Management and Budget, *Re: DOC Opinion Request* (May 12, 2016, 9:37 AM) ("Walsh E-mail"); E-mail for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Andrea Torczon, Department of Commerce, *Re: DOC Opinion Request* (June 2, 2016, 9:57 AM) ("Torczon E-mail").

[2] OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget* (July 2016) ("Circular A-11"), https://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/a11_2016.pdf.

bids automatic zero-dollar apportionments, or requires OMB to issue account-specific apportionments in non-zero amounts. And even if the requirement that OMB apportion carryover funds to achieve "the most effective and economical use" of those appropriations imposes a substantive standard whose violation could render an apportionment ineffective under the ADA, we believe OMB's application of section 120.57 in the circumstances described above would meet that "effective and economical use" standard. Further, under such circumstances, we do not think automatically imposing a zero-dollar apportionment on carryover funds impermissibly eliminates any feature of the ADA, improperly punishes violations of an administrative rule, or improperly imposes ADA penalties on agencies obligating or expending funds at a time when the ADA suggests that they should be able to use them. As a result, in the circumstances described, an agency's obligation of carryover funds in excess of the rule's zero-dollar apportionment would be an expenditure "exceeding . . . an apportionment" in violation of the ADA.

This opinion has two parts. In Part I, we discuss the relevant statutory and factual background. In Part II, we explain our reasons for concluding that section 120.57 effects a valid apportionment under the ADA.

I.

A.

The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Anti-Deficiency Act "reinforces and elaborates on this constitutional limitation." Memorandum for Judith R. Starr, General Counsel, Pension Benefit Guaranty Corporation, from Troy A. McKenzie, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Whether the Pension Benefit Guaranty Corporation May Enter Into and Incrementally Fund Multiyear Leases Exceeding Five Years* at 3 (Sept. 30, 2015). A key provision of the Act, 31 U.S.C. § 1341, states that officers and employees of the United States Government may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation," or "involve [the] government in a contract or obligation for the payment

of money before an appropriation is made unless authorized by law." *Id.* § 1341(a)(1)(A), (B).

The ADA also requires appropriated funds to be "apportioned." *Id.* § 1512(a). As suggested above, apportionment is "an administrative process by which . . . appropriated funds are distributed to agencies in portions over the period of their availability." 2 Government Accountability Office ("GAO"), *Principles of Federal Appropriations Law* 6-116 (3d ed. 2006) ("*Federal Appropriations Law*").[3] The purpose of apportionment is "to minimize the potential for engaging in expenditures that exceed congressional appropriations." *United States Marshals Service Obligation to Take Steps to Avoid Anticipated Appropriations Deficiency*, 23 Op. O.L.C. 105, 106 (1999). Consistent with that goal, the ADA requires "appropriation[s] available for obligation for a definite period" to be apportioned "to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period," and "appropriation[s] for an indefinite period"—the kind of appropriation at issue here—to be apportioned "to achieve the most effective and economical use" of those appropriations. 31 U.S.C. § 1512(a).

As noted above, the President has the responsibility to make written apportionments for the Executive Branch, *id.* § 1513(b)(1), and has delegated this responsibility to OMB, Exec. Order No. 6166, § 16. In exercising this delegated authority, OMB has the discretion to apportion funds by time periods, activities, functions, projects, objects, or some combination thereof. 31 U.S.C. § 1512(b)(1)–(2). In the case of carryover funds—i.e., "unobligated balances that are available from the prior fiscal year(s) in multi-year and no-year accounts," Circular A-11, *supra* note 2, § 120.2—the ADA requires agency heads to submit apportionment requests to OMB no later than forty days before the beginning of the next fiscal year. 31 U.S.C. § 1513(b)(1)(A). OMB, in turn, must apportion the funds not later than twenty days before the start of the fiscal year. *Id.* § 1513(b)(2)(A).

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[3] Although the legal interpretations and opinions of the GAO and the Comptroller General are not binding on Executive Branch agencies, they "'often provide helpful guidance on appropriations matters and related issues.'" *State and Local Deputation of Federal Law Enforcement Officers During Stafford Act Deployments*, 36 Op. O.L.C. 77, 89 n.8 (2012) (quoting *Applicability of Government Corporation Control Act to "Gain Sharing Benefit" Agreement*, 24 Op. O.L.C. 212, 216 n.3 (2000)).

In a provision that resembles, but does not fully parallel, section 1341's prohibition on expenditures and obligations in excess or advance of appropriations, section 1517 of title 31 states that government officers and employees "may not make or authorize an expenditure or obligation *exceeding* . . . an apportionment." *Id.* § 1517(a)(1) (emphasis added). Unlike section 1341, section 1517 does not also expressly bar entering into a contract or making an obligation *before* an apportionment is made. In light of the textual difference between these provisions, at least one federal court of appeals has held that while the ADA prohibits expenditures that "exceed" an existing apportionment, it does not prohibit expenditures made in advance of a later apportionment. *See Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442, 1451 (Fed. Cir. 1997). Agency heads must report violations of section 1517 immediately to the President and Congress, and transmit a copy of those reports to the Comptroller General. 31 U.S.C. § 1517(b). Officials who violate the section are subject to administrative and criminal penalties, including suspension without pay, removal from office, and, in the case of knowing and willful violations, a fine and possible imprisonment. *Id.* §§ 1518, 1519.

Circular A-11 implements the ADA's apportionment provisions by giving instructions to agencies about the apportionment process. Section 120.57 of the Circular addresses the apportionment of carryover funds. That provision, in question-and-answer form, states:

> Must I request that funds apportioned in one fiscal year be apportioned in the next fiscal year if the funds were not obligated and remain available?
>
> Yes. When budgetary resources remain available (unexpired) beyond the end of a fiscal year, you must submit a new apportionment request for the upcoming fiscal year. You cannot incur obligations in any year absent an approved apportionment for that year. For instance, if OMB apportioned $1 million for a no-year [account] in [Fiscal Year ("FY")] 2012 and you obligated no funds, you must still submit an FY 2013 request and receive OMB approval of that request before incurring obligations in FY 2013. Until you receive a written apportionment from OMB, the amount of carryover apportioned is zero dollars. In addition, apportioned anticipated or estimated resources are not available for obligation until the resources are realized.

Circular A-11, § 120.57. Circular A-11 contrasts the apportionment effected by section 120.57, as well as other kinds of "automatic apportionments," with "written apportionments" in which OMB approves an agency's request for an apportionment in a specific amount. *Id.* § 120.2.[4] OMB also sometimes refers to these "written apportionments" as "account-specific apportionments." *See* OMB Letter at 2.

B.

We understand that your request for advice was prompted by a situation that arose during Fiscal Year 2014 involving the National Oceanic and Atmospheric Administration ("NOAA"), an operating unit within the Department of Commerce ("Department"). NOAA has a no-year fund called the "Fisheries Enforcement Asset Forfeiture Fund" ("Fisheries Enforcement AFF" or "Fund"), which consists generally of sums received by NOAA as fines, penalties, and forfeitures of property for violations of marine resource laws, along with transferred amounts that are "available until expended." *See* Department of Commerce Appropriations Act, 2012, Pub. L. No. 112-55, div. B, § 110, 125 Stat. 552, 591, 602 (2011) (establishing the Fund).[5] Because Fiscal Year 2014 began on October 1, 2013, OMB's statutory deadline to apportion the unobligated carryover amounts in the Fund fell on September 11, 2013. *See* 31 U.S.C. § 1513(b)(2)(A). In anticipation of that deadline, the ADA required the Department to submit an apportionment request to OMB by August 22, 2013. *See id.* § 1513(b)(1)(A). NOAA submitted an initial request to the Department's internal Office of Budget ("OB") in August. Commerce Letter at 2. However, due to subsequent back-and-forth between OB and NOAA, the Department did not submit its apportionment request to OMB until December 2013. *Id.* OMB approved a final version of the apportionment request several months later, on April 11, 2014. *Id.* This final

[4] As Circular A-11 explains, "[a]n *automatic apportionment* is approved by the OMB Director in the form of a Bulletin or provision in Circular A-11, and typically describes a formula that agencies will use to calculate apportioned amounts. An automatic apportionment is in contrast to the written apportionments, which typically include specific amounts, and which are approved by an OMB Deputy Associate Director (or designee)." *Id.* § 120.2.

[5] A no-year appropriation is an appropriation "that is available for obligation for an indefinite period." 1 *Federal Appropriations Law* at 2-14 (3d ed. 2004).

version apportioned the unobligated carryover funds in the Fisheries Enforcement AFF by project. *Id.* The apportionment therefore nominally covered the full fiscal year, even though two quarters of that year had already passed when the apportionment was approved. Until OMB issued this account-specific apportionment in April, however, section 120.57 of Circular A-11 was in effect with respect to the relevant funds. As a result, between October 1, 2013, and April 11, 2014, NOAA was operating under an automatic zero-dollar apportionment for the Fisheries Enforcement AFF. NOAA nonetheless "obligated" funds from the Fisheries Enforcement AFF during Fiscal Year 2014 "before the [account-specific] apportionment was issued." *Id.* "The total Fisheries Enforcement AFF obligations during that time," however, "did not exceed the final apportionment amount for FY 2014" that OMB approved in April. *Id.*

Your opinion request asks us to address whether an agency official violates section 1517 when she obligates funds in violation of OMB's automatic zero-dollar apportionment under the circumstances just described. *Id.* at 1, 4 ("I am charged with determining whether NOAA's violation of OMB's rule, [section] 120.57 of OMB Circular A-11, of itself constitutes a violation of the ADA."). As in prior situations involving ADA questions prompted by past conduct, we decline to address whether particular past actions violated the ADA. *See Online Terms of Service Agreements with Open-Ended Indemnification Clauses Under the Anti-Deficiency Act*, 36 Op. O.L.C. 112, 114 (2012). We will, however, use the features of the scenario you have described to provide general guidance in response to your question. *See id.*

II.

As noted above, section 120.57 states in relevant part that "[u]ntil [an agency] receive[s] a written apportionment from OMB, *the amount of carryover apportioned* [for a given fiscal year] *is zero dollars*." Circular A-11, § 120.57 (emphasis added). By its terms, this provision purports to make a default, automatic apportionment of zero dollars in carryover funds until and unless an agency receives a different written apportionment from OMB. Section 120.57 is thus, as OMB explains, an exercise of its delegated statutory authority to apportion appropriations. *See* OMB Letter at 2 ("[Section] 120.57[] is . . . an application of 31 U.S.C. § 1513, which requires that the President (and, by delegation, OMB) apportion

appropriations."). Assuming section 120.57 is a valid exercise of that authority, it would appear straightforward to conclude that obligations or expenditures made in excess of this zero-dollar apportionment would violate the ADA. *See* 31 U.S.C. § 1517(a)(1).

And on its face, the automatic apportionment in section 120.57 does not exceed the limits of OMB's authority to apportion funds under the ADA. Nothing in the ADA, and no other authority of which we are aware, prevents OMB from using categorical rules that operate automatically to apportion funds in preset amounts, or requires it to issue apportionments on an account-specific basis. Indeed, OMB often relies on automatic, categorical apportionments: another provision of the Circular automatically apportions newly enacted full-year appropriations on a pro rata basis, *see* Circular A-11, § 120.41, and OMB frequently issues automatic apportionments of amounts provided in continuing resolutions, *see, e.g.*, OMB Bulletin No. 15-03, *Apportionment of the Continuing Resolution(s) for Fiscal Year 2016* (Sept. 30, 2015), https://www.whitehouse.gov/sites/default/files/omb/bulletins/2015/15-03.pdf (last visited ca. Sept. 2016); *see also* 2 *Federal Appropriations Law* at 6-141 (3d ed. 2006) (noting OMB's practice of issuing automatic apportionments in the context of continuing resolutions). We are likewise aware of nothing in the ADA that would preclude OMB from apportioning carryover funds in the amount of zero dollars in the circumstances at issue here.[6] And while the ADA does require apportionments to be "in writing," 31 U.S.C. § 1513(b)(1), OMB's automatic-apportionment rules—including the one that appears in section 120.57—satisfy this requirement, because they are set forth in writing in Circular A-11 or in OMB Bulletins.

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[6] The ADA does provide that "[i]n apportioning or reapportioning an appropriation, a reserve may be established only—(A) to provide for contingencies; (B) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (C) as specifically provided by law." 31 U.S.C. § 1512(c)(1). However, we understand that OMB has never considered the zero-dollar apportionments of carryover funds effected by section 120.57 to create "reserves." As discussed below, *see infra* p. 98, the purpose of the zero-dollar apportionment in section 120.57 is not to "set aside" budgetary resources that might otherwise be used, or be required to be used, in order to "provide for contingencies," "effect savings," or for some other purpose. GAO, *A Glossary of Terms Used in the Federal Budget Process* 25 (Sept. 2005) (defining "reserve"). Rather, the purpose of section 120.57 is simply to ensure that carryover funds will not be used during those portions of their period of availability when they are not needed.

Automatic apportionments further the purposes of the ADA by (among other things) helping OMB meet the deadlines set forth in that statute. As we explained above, the ADA requires OMB to apportion appropriated funds by a set date—in the case of carryover funds, no later than twenty days before the beginning of the fiscal year for which those funds are available. By requiring apportionments to be in place before the fiscal year starts, these deadlines help ensure that the underlying purposes of the apportionment process are served—"prevent[ing] obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period" in the case of time-limited appropriations, and ensuring that appropriations are used "effective[ly] and economical[ly]" in the case of appropriations available for an indefinite period. 31 U.S.C. § 1512(a). Automatic apportionments make it possible for OMB to meet these statutory deadlines even when doing so would otherwise be difficult, such as when Congress provides temporary funding for agency operations through short-term continuing resolutions, or when an agency fails to submit a specific apportionment request prior to the statutory deadline. *See* Walsh E-mail.

As was just noted, 31 U.S.C. § 1512(a) requires OMB to apportion appropriations for an indefinite period to achieve "the most effective and economical use" of those appropriations. *See also* 2 *Federal Appropriations Law* at 6-121 (3d ed. 2006) (identifying this provision as the applicable requirement for no-year funds). OMB agrees that "[a]ll apportionments, including the one in section 120.57, are subject to the requirements of section 1512(a)." Walsh E-mail. It is less clear that if an OMB apportionment failed to meet these requirements, it would then be invalid, such that agencies could make obligations or expenditures in excess of the purported apportionment without violating the ADA. We need not resolve this question, however, because we believe that application of the automatic zero-dollar apportionment in section 120.57 in the circumstances at issue here satisfies the "effective and economical use" standard.

To begin with, in requiring every appropriation to be apportioned by certain time periods, projects, or a combination thereof, 31 U.S.C. § 1512(b)(1), the ADA makes clear that the official designated to make an apportionment subject to those requirements must do so "as the official considers appropriate," *id.* § 1512(b)(2). The ADA thus gives OMB substantial discretion in making each apportionment, consistent with the

requirement that the apportionment achieve the most effective and economical use of the funds. And we think that OMB's exercise of this discretion in section 120.57 was sound. OMB has explained that when an agency "has not requested the use of carryover funds at the beginning of the fiscal year"—as was the case with respect to the Fisheries Enforcement AFF—OMB presumes that the agency "has no present programmatic need for [those] funds." Walsh E-mail. In our view, it is reasonable for OMB to assume both that agencies are best positioned to evaluate their own fiscal needs, and that they have an incentive to seek any necessary funds for their own operations. It is also reasonable for OMB to assume that agencies understand that the ADA itself requires them to submit apportionment requests for carryover funds forty days prior to the start of a fiscal year, and requires OMB to complete the apportionments twenty days later. *See* 31 U.S.C. § 1513(b)(1)(A), (b)(2)(A). In light of these considerations, we think it is similarly reasonable to presume that if an agency fails to request funds before the start of a fiscal year, it has no present need for those funds. And in that situation, it makes further sense that imposing a default zero-dollar apportionment would not only allow OMB to comply with its statutory apportionment deadline, but also achieve the most "effective and economical use" of the relevant carryover funds, by ensuring that they are not used during a period when they are not needed.[7]

As we understand its position, the Department does not dispute that section 120.57 is, by its terms, an "apportion[ment]." Circular A-11, § 120.57; *see, e.g.*, Talbert-Duarte E-mail ("[W]e recognize that OMB structured § 120.57 as an apportionment of zero."). Rather, we take the Department's argument to be that, whatever its formal structure, the substantive effect of section 120.57 is to prevent agencies from obligating or expending funds in advance of an account-specific apportionment.

[7] Because we consider only the application of section 120.57 in circumstances where an agency has failed to submit an apportionment request for carryover funds before the start of a fiscal year, we express no view on whether OMB could justify an automatic apportionment of zero dollars by operation of section 120.57 under any other circumstances, including where an agency submits an apportionment request by the agency's forty-day deadline, where the agency submits a request after the forty-day deadline but before OMB's twenty-day deadline, or where the agency submits its request after OMB's twenty-day deadline but before the start of the fiscal year.

See Commerce Letter at 1 (Although "[the] OMB prohibition is structured as an automatic apportionment of carryover amounts at zero," "[a]s a consequence of this structure, an agency official who obligates funds in advance of an apportionment violates the OMB rule by exceeding the automatic apportionment amount of zero."); Talbert-Duarte E-mail ("From the perspective of an agency official to whom the [apportionment rule in section 120.57] applies, the purpose and effect of the rule is the same—there can be no obligation before there is an apportionment of an actual dollar amount."). According to the Department, this is problematic for three reasons, which we consider in turn.

First, the Department contends that, by creating a situation in which agencies can never obligate carryover funds before they are apportioned, "the statutory distinction between [section] 1341"—which prohibits obligations and expenditures both in advance and in excess of appropriations—"and [section] 1517"—which prohibits obligations and expenditures only in excess of apportionments—"is entirely erased." Talbert-Duarte E-mail; *see id.* (noting that OMB itself states that "[b]y operation of § 120.57, an agency will never be in 'advance of' an apportionment of carryover, because it will always have an apportionment" (quoting OMB Letter at 2)). This argument rests on the premise that, as the Federal Circuit has held, section 1517 does not bar obligations or expenditures in advance of an apportionment. *See Cessna Aircraft*, 126 F.3d at 1451. We will assume for purposes of this opinion that this conclusion is correct. Even with this assumption, we do not think the Department's argument is convincing. The Department in effect asserts that the ADA prevents OMB from creating a situation in which an agency will never find itself without an apportionment, because it would then never have the opportunity to obligate or expend funds in advance of an apportionment. But as we explained above, nothing in the ADA bars automatic apportionments, requires that apportionments be account-specific, or requires that apportionments always be made in non-zero amounts. *See supra* p. 97. Thus, so long as an automatic apportionment meets the standards for apportionment in the ADA, *see supra* p. 98 (discussing standards), it is a valid apportionment, even if it precludes agencies from ever being without an apportionment. Indeed, such a result seems fully consistent with the ADA's statutory design. As discussed earlier, Congress specifically created deadlines for apportionments of carryover funds, seeking to ensure

that they would be completed before the start of any fiscal year. If agencies and OMB adhered to their statutory deadlines, there would—at least in the ordinary course—never be a situation in which an agency had available carryover funds without an apportionment. Thus, the mere fact that OMB has created an automatic-apportionment mechanism that ensures that an apportionment will always be in effect does not by itself make section 120.57 invalid, and in fact accords with congressional design.

The Department's second argument is that section 120.57 should be considered a kind of administrative rule that "temporarily precludes the use of funds as a matter of administrative control" while enabling "OMB to comply with [its statutory] deadlines," rather than an "apportionment that prescribes [the relevant funds'] use in definite amounts by time periods or activities"—violation of which would trigger potential penalties under the ADA. Torczon E-mail. The Department appears to suggest that, if an OMB rule is merely designed to temporarily prevent agencies from using funds for purposes of administrative control and to ensure OMB's own ADA compliance, rather than to actually apportion funds under the standards set forth in the ADA, it would not be appropriate to subject agency officials to ADA penalties for violating that rule. *Cf.* Talbert-Duarte E-mail ("[T]he question we are raising does not concern a 'zero dollar' apportionment in a specific situation where programmatic needs dictate that amounts are not necessary for a particular time period. Our question concerns only the automatic, across-the-board application of [section] 120.57."); Torczon E-mail (While "agencies and OMB are required to comply with the time deadlines established for submitting and approving apportionments," "[a] violation of the deadlines . . . is not a reportable violation of the [ADA], and we question the appropriateness of factoring the deadlines into the analysis of the issue we raise regarding a reportable violation of section 1517."). We need not decide whether a rule that merely precluded the use of funds as a matter of administrative control and deadline compliance would be a valid apportionment under the ADA, however, because, at least as applied in situations where an agency fails to submit an apportionment request before the start of a fiscal year, we do not believe section 120.57 is such a rule. For the reasons explained above, *see supra* pp. 96–99, OMB's automatic zero-dollar apportionment for carryover funds complies with the ADA's formal

requirements for apportionments, and represents a reasonable exercise of OMB's apportionment discretion. If an agency fails to request an apportionment before the start of a fiscal year, it is reasonable to presume that the agency has no programmatic need for the relevant funds during that year. There is thus no basis to conclude that a rule setting a zero-dollar apportionment in such a situation is merely an administrative control measure that prevents obligations and expenditures until OMB has time to make an account-specific apportionment.

Finally, the Department argues that OMB's "blanket presumption of no programmatic need" is "inapposite in at least many cases where an agency is actively engaged in the apportionment process with OMB." Torczon E-mail. The Department acknowledges that, in the situation involving NOAA that gave rise to its opinion request, "internal revisions and delays within the Department . . . caused the [proposed Fisheries Enforcement AFF] apportionment to be submitted late to OMB." *Id.* But it points out that "issues raised by sequestration (among other things) delayed the apportionment further for several months *after* submission to OMB." *Id.* OMB's rationale for its zero-dollar apportionment, the Department suggests, may make sense prior to the point at which an agency makes a request for a non-zero apportionment, but not during the period *after* such a request is made, but before the account-specific apportionment process is completed. *See id.* The Department thus contends that, whether because OMB's rule would not "achieve the most effective and economical use" of the funds during that period, or because the rule would impermissibly undermine Congress's decision not to subject obligations and expenditures in advance of apportionments to ADA penalties, violation of the rule after a request has been submitted should not give rise to penalties under the ADA. *See id.*

Again, we disagree. For the reasons we have explained, it is in our view reasonable for OMB to presume that, if a request for a non-zero apportionment of carryover funds is not pending at the start of a fiscal year, the agency has no current need for those funds. An agency's belated request for a non-zero apportionment might call into question the continuing factual accuracy of OMB's assumption after the request is made. But we do not think such a belated request somehow undermines the validity of the initial default apportionment. The ADA itself makes the start of each fiscal year the critical time for making apportionments for carryover

funds. *See* 31 U.S.C. § 1513(b)(2)(A). It is therefore reasonable for OMB to set apportionments based on its analysis of the appropriate apportionment as of the start of the fiscal year. The ADA does reflect the possibility that circumstances might change during a fiscal year, by requiring OMB to review apportionments at least four times a year. *See id.* § 1512(d). But the ADA does not provide any specific instructions about what OMB must do if it determines that an apportionment is no longer appropriate after one of its reviews, let alone provide a specific timeline for providing a revised apportionment. The Act thus appears to leave those matters to OMB's discretion to "apportion an appropriation . . . as [it] considers appropriate." *Id.* § 1512(b)(2). In light of that discretion and the statutory focus on the start of the fiscal year, we do not think the passing of several months between an agency's belated apportionment request for carryover funds and OMB's issuance of a new account-specific apportionment would render the original, default apportionment invalid at any point during the period in which the belated request was pending.[8]

III.

For the reasons set forth above, we conclude that, at least in circumstances where an agency fails to submit an apportionment request for carryover funds before the start of a fiscal year, the automatic zero-dollar apportionment in section 120.57 of OMB Circular A-11 is a valid appor-

[8] The Department also argues that, in light of the potential penalties involved, the question whether violation of section 120.57 constitutes an ADA violation "should be examined with an eye to the familiar rule of statutory construction commonly known as the rule of lenity." Commerce Letter at 3–4; *see also Use of Appropriated Funds to Provide Light Refreshments to Non-Federal Participants at EPA Conferences*, 31 Op. O.L.C. 54, 69 (2007) (explaining that the rule of lenity holds that "if ambiguity remains in a criminal statute after textual, structural, historical, and precedential analyses have been exhausted, the narrower construction should prevail"). However, we do not believe this question involves sufficient statutory ambiguity to justify application of the rule of lenity. Rather, for the reasons explained above, we think it clear that, applying ordinary tools of statutory construction to the relevant provisions in the ADA, section 120.57 effects a valid apportionment under that statute. *See Lockhart v. United States*, 136 S. Ct. 958, 968 (2016) ("We have used the lenity principle to resolve ambiguity in favor of the defendant only . . . when the ordinary canons of statutory construction have revealed no satisfactory construction.").

tionment for purposes of the ADA. As a result, in such circumstances, 31 U.S.C. § 1517 would prohibit an agency from expending or obligating funds exceeding that apportionment.

KARL R. THOMPSON
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Office of Legal Counsel

EXHIBIT 15

Service Credit for Retirement Annuities of USPS Employees When USPS Has Not Made Required Contributions

The Office of Personnel Management may not address the United States Postal Service's failure to make statutorily required retirement contributions by denying its employees accrued service credit under the Federal Employees' Retirement System during their periods of qualifying federal employment.

November 1, 2011

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
OFFICE OF PERSONNEL MANAGEMENT
AND
THE GENERAL COUNSEL AND EXECUTIVE VICE PRESIDENT
UNITED STATES POSTAL SERVICE

On June 22, 2011, the United States Postal Service ("USPS" or "Postal Service") notified the Office of Personnel Management ("OPM") that, because of its financial difficulties, the Postal Service, as a cash conservation measure, was suspending its employer contributions to the Civil Service Retirement and Disability Fund ("the Fund") on behalf of those postal employees covered by the Federal Employees' Retirement System Act ("FERS"), 5 U.S.C. §§ 8401–8479 (2006 & Supp. IV 2010). In light of that suspension, OPM requested an opinion from our Office regarding (1) whether, and to what extent, OPM has discretion to offset the Postal Service's obligation to make employer retirement contributions against a "surplus" the Postal Service asserts that it has accumulated in the Fund; and (2) whether postal employees are entitled to receive service credit, for purposes of determining their eligibility for retirement and calculating the amount of their retirement annuity, for periods of employment during which the Postal Service has not made its required employer contributions.[1] The Postal Service, an independent agency, joined OPM in the request for an opinion and agreed to be bound by our decision.[2]

[1] *See* Memorandum for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, from Elaine Kaplan, General Counsel, Office of Personnel Management (July 14, 2011) ("OPM Memo"). OPM enclosed with its submission an undated paper it had received from USPS, with the heading "Effect of Suspension of Agency Contribution to

In its submission to the Office of Legal Counsel ("OLC"), the Postal Service indicated that, despite earlier disagreement, it now "does not contest OPM's position that the Postal Service is still obligated by the statute to make its employer contribution, despite the existence of the surplus." USPS Memo at 14; *see also id.* at 4. The Postal Service, however, also specifically stated that it considers the question "whether the [Postal Service's] Board [of Governors] was justified in its decision to suspend the employer contribution in order to conserve cash so as to avoid a shutdown in mail service" to be outside "the scope of [OLC's] review." *Id.* at 3 n.2. Thus, we do not address (i) whether OPM could offset the Postal Service's required contributions against any surplus it may have in the Fund; (ii) whether the Postal Service's apparent statutory violation may be excused; or (iii) what other avenues of recourse OPM may have against the Postal Service for its failure to make the statutorily required contributions. Instead, this opinion addresses only the question whether, under the relevant provisions of the FERS statute, postal employees are entitled to receive service credit for periods during which the Postal Service has not made the required employer contributions to the Fund. The Postal Service argues that its employees should receive such credit. *Id.* at 2–14. OPM disagrees, maintaining that employees cannot be credited with service for periods in which no employer contributions have been made into the Fund. OPM Memo at 5–9. For the reasons that follow, we agree with the Postal Service that OPM may not address the Postal Service's failure to make statutorily required contributions by denying its employees accrued service credit under FERS during their periods of qualifying federal employment.

I.

In 1986, Congress enacted the Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (codified as amended at

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FERS on Employees" ("USPS Paper"). OPM has agreed provisionally to provide service credit to postal employees who may retire while the issue is pending before our Office. OPM Memo at 2.

[2] *See* Memorandum for Virginia Seitz, Assistant Attorney General, Office of Legal Counsel, from Mary Anne Gibbons, General Counsel and Executive Vice President, United States Postal Service (Aug. 12, 2011) ("USPS Memo").

5 U.S.C. §§ 8401–8479 and scattered U.S.C. sections), a system of retirement and other benefits for federal employees that will gradually supersede the Civil Service Retirement System ("CSRS"), which has been in effect since 1920. *See* Pub. L. No. 66-215, 41 Stat. 614 (1920) (codified as amended at 5 U.S.C. §§ 8331–8351 (2006 & Supp. 2010)). In enacting FERS, Congress set out, among other things, "to establish a Federal employees' retirement plan which is coordinated with title II of the Social Security Act"; "to ensure a fully funded and financially sound retirement benefits plan for Federal employees"; and "to assist in building a quality career work force in the Federal Government." Pub. L. No. 99-335, § 100A(1), (2), & (5), 100 Stat. at 516 (codified at 5 U.S.C. § 8401 note (2006)).[3] With certain exceptions, the Act became effective on January 1, 1987. *Id.* § 702, 100 Stat. at 631 (codified at 5 U.S.C. § 8401 note). Since then, most newly hired federal employees who are covered by Social Security have also been covered by FERS.

FERS is a three-tiered retirement system that consists of Social Security, a basic annuity, and a Thrift Savings Plan ("TSP"). *See* 5 U.S.C. § 8403 (2006) (except as otherwise provided, benefits payable under FERS are in addition to benefits payable under the Social Security Act); *id.* §§ 8410–8425 (2006 & Supp. IV 2010) (basic annuity); *id.* §§ 8431–8440f (2006 & Supp. IV 2010) (TSP).[4] The Postal Service and its employees fall within FERS coverage. 39 U.S.C. § 1005(d) (2006 & Supp. III 2009). The dispute between OPM and the Postal Service concerns the basic annuity.

Under FERS, an "employee," as defined in 5 U.S.C. § 8401(11) (2006), must complete at least five years of creditable civilian service under 5 U.S.C. § 8411 to be eligible for the annuity. 5 U.S.C. § 8410

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[3] From Congress's enactment of the Social Security Act in 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935), until 1983, federal employees were excluded from Social Security coverage. In 1983, the Social Security Act was amended to cover newly hired federal employees. Pub. L. No. 98-21, § 101, 97 Stat. 65, 67–70 (1983) (codified at 42 U.S.C. § 410). That expansion of Social Security was a major impetus behind the adoption of FERS, the new retirement system for federal employees, in 1986. *See generally* S. Rep. No. 99-166, at 1–2 (1985) (providing background on the CSRS and amendment of the Social Security Act to cover federal employees).

[4] The TSP is a tax-deferred savings plan for federal employees in which employee contributions are matched in part by employer agency contributions.

(2006). As a general matter, creditable service includes "employment as an employee . . . after December 31, 1986." *Id.* § 8411(b)(1). With certain exceptions, the annuity of a retiring employee is 1 percent of that individual's average pay (the highest average pay in effect over any three consecutive years of service) multiplied by that individual's "total [years of] service." *Id.* §§ 8415(a), 8401(3) (defining "average pay"). The statute establishes different potential retirement ages for employees depending on the number of years of service completed. *Id.* § 8412 (2006 & Supp. IV 2010). For example, an employee who is separated from service after becoming 62 years old and completing five years of service is entitled to an annuity. *Id.* § 8412(c). "[S]ervice," in turn, "means service which is creditable under section 8411." *Id.* § 8401(26). As these provisions make clear, the determination whether service is creditable under the statute has important ramifications for an employee's eligibility to receive a basic annuity, the applicable retirement age, and the calculation of the amount of the annuity.[5]

The FERS basic annuity is funded through a combination of employee deductions and employer agency contributions to the Civil Service Retirement and Disability Fund. *Id.* §§ 8422, 8423, 8401(6) (2006 & Supp. IV 2010). Under FERS, the employing agency is required to deduct and withhold from each employee's basic pay a percentage that is equal to 7 percent of basic pay (with a different percentage applicable to Members of Congress and certain categories of employees) less the Old Age, Survivors, and Disability Insurance ("OASDI") tax rate in effect, which is now 6.2 percent. *Id.* § 8422(a), (c) (2006 & Supp. IV 2010); 26 U.S.C. § 3101(a) (2006). Accordingly, the employer is required by the statute to deduct 0.8 percent of most employees' basic pay for contribution to the Fund.

The employing agency's own contribution to the Fund is much larger and is based on the "normal-cost percentage," which is "the entry-age normal cost of the provisions of [FERS] which relate to the Fund," as computed by OPM "in accordance with generally accepted actuarial

[5] Creditable service is also important to other facets of the retirement system. For example, an employee is not entitled to retain the employer's contributions to the TSP and earnings attributable to such contributions before completing specific periods of service. *See* 5 U.S.C. § 8432(g)(2) (2006).

practice and standards" and "expressed as a level percentage of aggregate basic pay." 5 U.S.C. § 8401(23) (defining "normal-cost percentage"); *see id.* § 8423(a) (2006 & Supp. IV 2010).[6] Under the statute, "each employing agency having any employees or Members subject to section 8422(a) shall contribute to the Fund an amount" that is the product of the applicable normal-cost percentage and the aggregate amount of basic pay payable by the agency for the period involved. *Id.* § 8423(a)(1). In determining the normal-cost percentage to be applied, the employee deductions required by section 8422 must be taken into account. *Id.* § 8423(a)(2).[7] Thus, for

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[6] "Entry age normal cost" is

> generally understood as the percentage of every paycheck that should be invested, over the total career of each employee in a group of new entrants, to pay fully for all benefits received by that group, including all eligible survivors. Normal cost is formally defined as the present value of future benefits divided by the present value of future compensation. These values are expressed as a percentage of payroll, and provide a consistent measure of relative pension costs over time.

S. Rep. No. 99-166, at 35 (1985). OPM publishes the "normal cost percentages" for particular categories of employees in the Federal Register. At the time the Postal Service suspended its employer contributions to the Fund, the government-wide normal cost percentage for most employees was 12.5 percent. Federal Employees' Retirement System; Normal Cost Percentages, 75 Fed. Reg. 35,098 (June 21, 2010). For the first pay period commencing on or after October 1, 2011, the normal cost percentage for most employees rose to 12.7 percent. Federal Employees' Retirement System; Normal Cost Percentages, 76 Fed. Reg. 32,242, 32,243 (June 3, 2011).

[7] Section 8422(a) requires that "[t]he employing agency shall deduct and withhold from basic pay of each employee . . . a percentage of basic pay." 5 U.S.C. § 8422(a)(1). Thus, so long as the individual is an "employee," *see id.* § 8401(11), and is not otherwise excluded from coverage under the statute, *see id.* § 8402 (2006), the individual is "subject to section 8422(a)," and the employing agency is required to make contributions to the Fund under section 8423. There is no dispute here that the Postal Service's employees for whom the employer contributions have been withheld are "employees" for purposes of FERS. As a general matter, the FERS definition of "employee" refers to the definition of "employee" for CSRS benefits under chapter 83, in 5 U.S.C. § 8331(1) (2006). Section 8331(1), in turn, defines the term by reference to 5 U.S.C. § 2105. Under section 2105(a), an "employee" is an individual who is "appointed in the civil service" by a federal official; "engaged in the performance of a Federal function"; and "subject to the supervision" of a federal official. 5 U.S.C. § 2105(a) (2006); *see Taylor v. OPM*, 82 M.S.P.R. 237, 241 (M.S.P.B. 1999). Employees of the Postal Service, who are generally covered by the retirement statutes by virtue of 39 U.S.C. § 1005(d), must still meet the definition of "employee" to be covered by FERS. *See Taylor*, 82 M.S.P.R. at 241. An "employee" for purposes of FERS must also be covered by title II of the Social Security Act. 5 U.S.C. § 8401(11).

most employees, employing agencies contribute to the Fund an amount equal to 11.9 percent of basic pay—the aggregate normal cost of 12.7 percent minus the 0.8 percent employee deduction—which is more than 93 percent of the normal cost. OPM, which has authority to prescribe regulations under the statute, *id.* § 8461(g) (2006), has construed FERS to require the employing agency to "remit in full the total amount of normal cost (which includes both employee deductions and Government contributions), so that payment is received by the Fund on the day of payment to the employee of the basic pay from which the employee deductions were made." 5 C.F.R. § 841.504(h) (2011); *see also id.* § 841.413 (2011).[8]

II.

The dispute between OPM and the Postal Service was precipitated by the Postal Service's decision, in light of its current financial crisis, to conserve cash by suspending its employer contributions for the basic annuity, effective June 24, 2011, for those postal employees covered by FERS. OPM Memo at 1; USPS Memo at 2. The Postal Service is continuing to withhold employee deductions from basic pay; it also continues to make its automatic and matching contributions to the TSP accounts of FERS employees and to remit those contributions, along with employee TSP contributions. USPS Memo at 2. OPM does not dispute that the Postal Service and its employees continue to satisfy all the requirements of the statute *except* the agency's obligation to make employer contributions to the Fund for the basic annuity. The question we must address is

[8] FERS further requires OPM to compute the amount of the "supplemental liability" of the Fund as of the close of each fiscal year, both with respect to current or former employees of the Postal Service and other individuals. 5 U.S.C. § 8423(b)(1). The "supplemental liability" is the estimated excess of the actuarial present value of all future benefits payable from the Fund based on the service of current or former employees or Members of Congress over the sum of the actuarial present value of employee deductions, employer contributions, and the Fund balance. *Id.* § 8401(27). The amount of any supplemental liability must be amortized in 30 equal annual installments, with interest. *Id.* § 8423(b)(2). At the end of each fiscal year, OPM must notify the Postmaster General of the amount of the required installment computed with respect to current or former postal employees and the Secretary of the Treasury of the amount computed with respect to other individuals. *Id.* § 8423(b)(3). Upon receiving such notifications, the Postal Service is required to pay, and the Secretary of the Treasury is required to credit, to the Fund the amounts specified. *Id.* § 8423(b)(4).

thus narrow: whether postal employees are entitled to service credit for retirement purposes for the periods in which the Postal Service has suspended its employer contributions under 5 U.S.C. § 8423, but in all other respects has complied with the FERS statute.

OPM states that its "longstanding interpretation of the statute," as codified in its regulations, provides that "in order for an employee to be covered under FERS, an agency must make the periodic contributions to the Retirement Fund that are required by law." OPM Memo at 2. OPM does not claim that FERS expressly provides that employer contributions are a necessary precondition for employee coverage or that employees shall not receive service credit for periods in which their employing agencies fail to make employer contributions. Instead, OPM points out that section 8423 of FERS mandates that USPS must make contributions to the Fund on behalf of employees covered by FERS. *See* 5 U.S.C. § 8423(a)(1) ("[e]ach employing agency having any employees . . . subject to section 8422(a) *shall contribute* to the Fund" an amount that is based on the normal-cost percentage set by OPM) (emphasis added)). And while section 8423 does not expressly make the mandatory employer contributions a precondition to employee eligibility, in OPM's view, the relevant OPM regulation does:

To be covered under FERS, an individual must:

> (a) Be an employee, Member, or specifically covered by another provision of law;
>
> (b) Be covered by social security;
>
> (c) Have retirement deductions withheld from pay and have agency contributions made; and
>
> (d) Be paid based on units of time.
>
> Except as provided in § 842.104 and as excluded by § 842.105, an employee or Member is covered by FERS.

5 C.F.R. § 842.103 (2011) (emphasis added); *see also id.* § 842.304(a) (2011) (providing, with exceptions not relevant here, that "an employee . . . is entitled to credit for all purposes under FERS for a period of civilian service with the Government or the U.S. Postal Service—[p]erformed after December 31, 1986, *which is covered service under subpart A of this part*," a reference back to section 842.103) (emphasis added).

As OPM explains, section 842.103 "merges the various statutory requirements applicable to FERS into one regulatory provision that determines whether an individual is covered by FERS." OPM Memo at 5. OPM's basic claim is thus that, "while there is no single provision in the statute which states that each of these requirements is essential to 'coverage,' when read as a whole, it was clearly reasonable for OPM to make coverage dependent upon compliance with all of the statutory requirements." *Id.* at 6. In OPM's view, section 842.103 makes "clear" that "to be 'covered by FERS' an individual must not only have deductions withheld from their pay—their employing agency must make the necessary contributions" as well. *Id.* at 5–6.

On its face, section 842.103 is not as free from ambiguity as OPM suggests. In particular, the last sentence in the provision states that "[e]xcept as provided in § 842.104 and as excluded by § 842.105, an employee or Member is covered by FERS," 5 C.F.R. § 842.103, language that appears to define coverage under FERS without making employer contributions a prerequisite. We do not think that the ambiguity in this language can be resolved by examining OPM's practice because there does not appear to be any relevant practice: OPM has pointed us to no instance of an agency refusing to remit the contributions it is statutorily required to pay under CSRS or FERS. *Cf.* OPM Memo at 9 (stating that no agency has failed to make employer contributions under CSRS). Nonetheless, we assume that OPM's interpretation of its own regulation is entitled to deference, and thus that section 842.103 has the meaning OPM suggests. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011).

In addition to relying on the statutory text and its regulation, OPM also finds support for its view in Congress's purpose. OPM notes that "Congress created FERS as a fully funded pension system," intending that "the Fund would be placed on a firm financial footing by requiring agencies to pay the full 'normal costs' for FERS employees." OPM Memo at 6. In light of Congress's "'interest in sound fiscal and accounting management,'" *id.* at 7 (quoting S. Rep. No. 99-166, at 29 (1985)), OPM contends that it is "highly unlikely that Congress would have provided that employees would be considered 'covered' by FERS and credited for their service if their employing agencies did not make the requisite contribution to the Fund." *Id.*

The Postal Service, for its part, does not deny that FERS requires it to make its employer contributions, USPS Memo at 4, 14, or that Congress intended that FERS be placed on a sound financial footing, *id.* But it points out that Congress chose to further this goal by requiring all employers to contribute to the Fund, not by depriving employees of service credit in the highly unusual situation in which an agency fails to make its required payments. *Id.* at 2–3. The Postal Service contends that under the statute, "creditable service is generated so long as employees are performing the required service for the Federal government and are contributing the required amounts to their pension, without regard to whether the employing agency cannot or does not make its employer contribution." *Id.* at 2. None of the key statutory provisions, in the Postal Service's view, "indicate[s] that creditable service under FERS is dependent on the employer contribution." *Id.* at 6. The Postal Service emphasizes that in enacting the basic annuity, Congress "intended to provide clearly defined and reliable benefits to employees"—a purpose that would be "vitiated by OPM's interpretation, which would predicate the level of employee benefits on the funding decisions of agency officials." *Id.* at 3; *see also id.* at 12. Accordingly, the Postal Service argues that OPM's interpretation of FERS, as embodied in its regulations, is at odds with the statute or, at least, unreasonable, *id.* at 5, and that OPM cannot enforce the Postal Service's statutory obligation to contribute by denying service credit to its employees.

We assume that OPM's authority to implement FERS by regulation, 5 U.S.C. § 8461(g), would entitle it, in appropriate circumstances, to deference in its construction of FERS pursuant to *Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). However, OPM's construction of the statute is entitled to deference only "if the statute is silent or ambiguous with respect to the specific issue" at hand. *Id.* at 843. If, on the other hand, "Congress has directly spoken to the precise question at issue," and in so doing made its intent clear, "that is the end of the matter." *Id.* at 842. And here, for the reasons set forth below, we conclude that FERS makes clear that postal employees who otherwise qualify for retirement benefits under FERS are both covered by and accrue service credit under the statute notwithstanding the Postal Service's failure to make its employer contributions pursuant to 5 U.S.C. § 8423. Thus, OPM's interpretation of FERS—that OPM can address the

Postal Service's failure to remit the required contributions by depriving employees of accrued service credit—is foreclosed by the statute.

III.

A.

"We begin with the text of the statute." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011). Section 8410 of FERS, which governs eligibility, provides: "Notwithstanding any other provision of this chapter, an employee or Member must complete at least 5 years of civilian service creditable under section 8411 in order to be eligible for an annuity under this subchapter." 5 U.S.C. § 8410. Central to resolving this controversy is section 8411, which governs creditable service. It provides that "[t]he total service of an employee . . . is the full years and twelfth parts thereof, excluding from the aggregate the fractional part of a month, if any." *Id.* § 8411(a)(1). Section 8411 further specifies, in relevant part, that for purposes of FERS, "creditable service of an employee . . . includes . . . employment as an employee . . . after December 31, 1986." *Id.* § 8411(b), (b)(1). These provisions are not vague or unclear. They indicate plainly the category of employees who are eligible for FERS benefits, and Congress's broad, but not unbounded, definition of "creditable service" for FERS purposes.

Section 8401(11) excludes certain categories of individuals from the definition of "employee," and section 8402 excludes certain categories of individuals from coverage under FERS. *Id.* §§ 8401(11), 8402. But these exclusions are irrelevant to the present dispute. As USPS points out, OPM does not argue that "the non-payment of the employer contribution means that Postal Service employees are no longer 'employees' under the FERS statute or that they now fall within one of the exceptions in 5 U.S.C. § 8402 by virtue of such non-payment." USPS Memo at 6. And the postal employees potentially affected by their employer's non-payment of its contributions are still engaged in "employment." The plain language of FERS, then, supports the view that employees earn creditable service so long as they are employed as "employee[s]" after December 31, 1986, 5 U.S.C. § 8411(b)(1), regardless of whether their employer has suspended its contributions to the Fund.

To be sure, as noted earlier, OPM acknowledges that FERS's definition of "creditable service" does not mention employer contributions. Its argument is that a correct determination of what counts as "creditable service" under FERS does not depend on the wording of section 8411(b)(1) alone, but also on the overall statutory plan—in particular, on the fact that another provision of FERS clearly requires employer contributions as part of the overall FERS scheme.

We agree that section 8423 of FERS requires employers to make contributions to the Fund. We further agree that "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). However, the mere fact that employer contributions are a mandatory part of the overall FERS scheme does not indicate that OPM is authorized to suspend or eliminate the accrual of employees' service credit as a remedy for an employer's failure to make such contributions. *Cf. Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 247 (2000) (ERISA's "'comprehensive and reticulated' scheme warrants a cautious approach to inferring remedies not expressly authorized by the text" (citations and internal quotation marks omitted)). As noted above, the specific statutory provision that addresses creditable service says nothing that suggests that an employee's accrual of credit depends on the fact or extent of employer contributions. Section 8423 of FERS likewise fails to mandate, or even suggest, that a lapse in an employing agency's contributions should result in a denial of service credit to that agency's employees.

Certainly, as OPM states, section 8423 reflects Congress's goal that "the Fund . . . be placed on a firm financial footing by requiring agencies to pay the full 'normal costs' for FERS employees." OPM Memo at 6. But it does so not by stipulating that employees will earn service credit (and therefore future benefits) only if their employers make all required contributions, but rather by imposing on agency employers a legal obligation to make the required contributions. OPM itself has suggested no reason to think that in practice this statutory mechanism has proven ineffective in serving Congress's goal. *Cf.* OPM Memo at 9 ("no agency has ever defaulted on its obligation to make the required contributions" under CSRS).

Moreover, the text of the FERS statute suggests that Congress considered the question of statutory mechanisms to address funding shortfalls and enacted a mechanism to deal with one kind of shortfall, without indicating that the suspension of employee service credit might be used as a solution to that or any other funding deficiency. Specifically, the statute provides that, in the event that OPM determines, on an annual review, that an agency's employer contributions do not in fact satisfy the statute's funding goals, OPM must notify the Postmaster General (or the Secretary of the Treasury, as applicable) of any "supplemental liability" and the amount of the required installment payments, amortized over 30 years. 5 U.S.C. § 8423(b); *see supra* note 8. The Postal Service must then pay the amount specified in the notification to address the funding shortfall. 5 U.S.C. § 8423(b)(4)(B). The existence of this supplemental liability process does not affirmatively authorize the Postal Service to avoid making its employer contributions as they come due in favor of amortizing such payments over 30 years. But the existence of a supplemental liability remedy for at least one type of funding shortfall shows that Congress was aware of the possibility that the employer contributions remitted under section 8423 might in some circumstances fail to result in agency funding of the full costs of employee benefits. Congress chose nonetheless to provide expressly for only one response to such a possibility. In light of that awareness, the omission of any other mechanism for addressing this or other kinds of shortfalls, such as denying service credit to employees when their employer defaults on its contributions, suggests that "the statute fails to mention [other responses] 'by deliberate choice, not inadvertence.'" *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1076 (2011) (citation omitted).

In sum, none of the most clearly relevant provisions of the statute suggests that either employee eligibility or creditable service under FERS depends upon the extent of the employer's contributions to the Fund. As OPM insists, and the Postal Service effectively concedes, the plain language of FERS's key provisions specifies that agency employers must contribute to the Fund the normal cost of their covered employees' basic pay. At the same time, these provisions fail to link an agency's failure to comply with this requirement to the affected employees' eligibility for an annuity or accrual of creditable service. Instead, they appear on their face to provide that an employee is entitled to service credit so long as he or

she is employed as an "employee" after December 31, 1986. *See* 5 U.S.C. § 8411(a) & (b). Given the harsh penalty federal employees would suffer if they were denied FERS coverage or service credit for periods of employment during which their agency employers failed to make the required contributions to the Fund—an action over which the employees have no control—the absence of any reference in FERS's key provisions to OPM's authority to impose that particular remedy for an agency's noncompliance strongly suggests that Congress did not intend such authority to exist. As we discuss next, we do not think any of OPM's additional arguments in support of this authority are persuasive.

B.

OPM offers several other arguments that, in its view, show that the FERS statute requires employer contributions as a condition of employees' coverage and accrual of creditable service under FERS. First, OPM relies heavily on the Postal Service's concession that, to receive service credit under FERS, an employee must have deductions withheld from his or her wages, even though, in the Postal Service's view, the employing agency's contributions are not required for that purpose. OPM Memo at 7; *see* USPS Memo at 5–10. OPM insists that these two propositions cannot be reconciled because it is illogical to distinguish between the employee's deduction and the employer's contribution—both of which are statutorily required and neither of which is expressly linked by the statutory text to accrual of service credit—for purposes of determining whether an employee accrues creditable service for periods when employee deductions or employer contributions have not been made. OPM Memo at 7.

We need not resolve this issue. As a practical matter, the Postal Service has continued to withhold from its employees' basic pay the deductions required under 5 U.S.C. § 8422—including the employee deductions—and to deposit the deductions into the Fund. USPS Memo at 2. If fulfillment of the Postal Service's obligations under section 8422 is a necessary condition to postal employees receiving credit under FERS, that condition is being met. Furthermore, although OPM and the Postal Service agree that a failure to make these employee deductions would affect employees' ability to earn creditable service, we are unsure that they are correct. In our view, this issue is difficult, particularly in the context of a scheme in

which it is the *agency's* legal obligation to effectuate the employee deduction. *See* 5 U.S.C. § 8422(a). In fact, the answer to the question may well depend on the reason that employee deductions have not been made.[9] In any event, even if employee deductions constitute a prerequisite to the accrual of service credit under FERS—one that does not appear in the FERS eligibility or accrual provisions themselves—that would not necessarily mean that employer contributions likewise would be a prerequisite for the accrual of such credit, because the significance and treatment of employee deductions and employer contributions within the statutory scheme are different. Each argument for linking employee service credit to separate requirements in the statute would have to be considered on its own terms.

Both OPM and the Postal Service cite different subsections of section 8411—some requiring employee deductions as a condition of receiving creditable service and a couple requiring employee deductions *and* em-

[9] For example, if the employer failed to make the employee deduction because the affected employee was not subject to deductions under 5 U.S.C. § 8422, the employee's eligibility for coverage and ability to accrue creditable service under FERS might be implicated. *Cf. Tomboc v. OPM*, 355 Fed. Appx. 422, 424 (Fed. Cir. 2009) (noting that "[w]hile the absence of deductions" under the CSRA "is an indication" regarding whether a position is covered, "it is not necessarily dispositive"). Alternatively, if the employer failed to make the employee deductions because of an agency error, the error may be corrected, *see* 5 C.F.R. § 841.505 (2011); and, in any event, an agency error would not necessarily affect the employee's entitlement to coverage. *Cf. Noveloso v. OPM*, 45 M.S.P.R. 321, 324 n.2 (M.S.P.B. 1990) (noting, in addressing CSRS coverage, that "[i]f no deductions were withheld because of agency error, or because it was not determined until after the fact that such service should have been covered, the employment will still constitute covered service"); *accord Staffney v. OPM*, 54 M.S.P.R. 99, 102–03 (M.S.P.B. 1992) (same, under CSRS coverage); *In re Kaltakji*, 1 M.S.P.R. 63, 64 (M.S.P.B. 1978) (same). *But see* 5 U.S.C. § 8339(i) (2006) (providing, for purposes of computing a CSRS annuity, that the total service of an employee "shall not include any period of civilian service . . . for which retirement deductions or deposits [under section 8334] have not been made" unless the employee makes a deposit under section 8334(c) or (d)(1) or no deposit is required for such service as specified under section 8334(g) or another statute). And, for the same reasons that an agency error may not affect the employee's entitlement to coverage, a willful agency refusal to make the required employee deductions likewise may not affect that entitlement. For the reasons stated in the text, however, we need not decide the circumstances, if any, in which an employing agency's failure to make the employee deductions and deposit them into the Fund would affect an employee's coverage and accrual of service under FERS.

ployer contributions—to support their respective positions. On the one hand, OPM contends that, where Congress intended to permit service credit to be afforded even if no contributions were made by the agency, it did so explicitly. It cites as an example section 8411(b)(3), which permits employees to receive service credit for periods of employment during which no employing agency contributions or employee deductions were paid into the Fund for certain service performed prior to January 1, 1989. OPM Memo at 8 n.5. In such instances, the employee must make a deposit into the Fund of 1.3 percent of his or her basic pay, with interest, for that period of service. *Id.* (citing 5 U.S.C. § 8411(f)(2)).[10] However, no employing agency contribution is required for that period. *Id.*[11] The Postal

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[10] Section 8411(b)(3), with the introductory language in section 8411(b), provides:

> For the purpose of this chapter, creditable service of an employee or Member includes[,] except as provided in subsection (f) or (h), any civilian service (performed before January 1, 1989, other than any service under paragraph (1) or (2)) which, but for the amendments made by subsections (a)(4) and (b) of section 202 of the Federal Employees' Retirement System Act of 1986, would be creditable under subchapter III of chapter 83 of this title (determined without regard to any deposit or redeposit requirement under such subchapter, any requirement that the individual become subject to such subchapter after performing the service involved, or any requirement that the individual give notice in writing to the official by whom such individual is paid of such individual's desire to become subject to such subchapter)[.]

5 U.S.C. § 8411(b), (b)(3). Section 8411(f)(2) prohibits an employee from receiving "credit under this chapter for any service described in subsection (b)(3) for which retirement deductions under subchapter III of chapter 83 have not been made, unless such employee or Member deposits an amount equal to 1.3 percent of basic pay for such service, with interest." *Id.* § 8411(f)(2). Section 8411(f)(1) requires an employee who has received a refund of CSRS retirement deductions for service described in subsections (b)(2) or (b)(3) to "deposit[] an amount equal to 1.3 percent of basic pay for such service, with interest," as a condition of receiving credit for such service. *Id.* § 8411(f)(1).

The Senate Committee on Governmental Affairs released a Committee Print in October 1986, four months after the enactment of FERS, that set out a detailed section-by-section analysis of the statute. The committee print explains that section 8411(b)(3) "provides that creditable service includes . . . service before January 1, 1989, which was either non-covered or was not vested under CSRS in which case a contribution must be made under subsection (f)." S. Comm. on Governmental Affairs, 99th Cong., Supplemental Information Regarding the Federal Employees' Retirement System Act of 1986, at 7 (Comm. Print 1986) ("FERS Comm. Print").

[11] Section 8411(b)(3) is not unique in requiring employees who had not contributed to the Fund (sometimes because they had been covered by other retirement systems) but who

Service, on the other hand, cites two instances in which the statute expressly requires the payment of an employer contribution to render certain service creditable, arguing that there would have been no reason for Congress to have explicitly required an employer contribution if accrual of service credit is invariably conditioned on an agency's having made employer contributions to the Fund. USPS Memo at 8 (citing 5 U.S.C. § 8411(e), (g) (the latter of these added in subsequent amendments to FERS)).[12]

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seek service credit within the FERS system, to make payments to the Fund equal to the amounts that would have been deducted as FERS employee contributions for that period of service—without any mention of the necessity of an employer contribution. *See, e.g.*, 5 U.S.C. § 8411(b)(4) & (5) (the latter of these added in subsequent amendments to FERS); USPS Paper at 6. In still other instances, Congress treated service for which deductions were not paid to the Fund as creditable with no requirement of any kind of employee or employer deposit. *See* 5 U.S.C. § 8411(c)(1)(A) (military service performed before January 1, 1957); *id.* § 8411(d) (certain periods of leave without pay); USPS Paper at 7.

[12] Section 8411(e) provides:

> Credit shall be allowed for periods of approved leave without pay granted an employee to serve as a full-time officer or employee of an organization composed primarily of employees . . . , subject to the employee arranging to pay, through the employee's employing agency, within 60 days after commencement of such leave without pay, *amounts equal to the retirement deductions and agency contributions which would be applicable under sections 8422(a) and 8423(a)*, respectively, if the employee were in pay status. If the election and all payments provided by this subsection are not made, the employee may not receive credit for the periods of leave without pay, notwithstanding the third sentence of subsection (d).

5 U.S.C. § 8411(e) (emphasis added). Section 8411(g), in turn, provides that "[a]ny employee who—

> "(1) served in a position in which the employee was excluded from coverage under this subchapter because the employee was covered under a retirement system established under section 10 of the Federal Reserve Act; and
>
> "(2) transferred without a break in service to a position to which the employee was appointed by the President, with the advice and consent of the Senate, and in which position the employee is subject to this subchapter,

"shall be treated for all purposes of this subchapter as if any service that would have been creditable under the retirement system established under section 10 of the Federal Reserve Act was service performed while subject to this subchapter *if any employee and employer deductions, contributions or rights with respect to the employee's service are transferred from such retirement system to the Fund*." *Id.* § 8411(g) (emphasis added).

None of these examples, in our view, supports either inference. As the Postal Service observes, section 8411 sets forth a variety of rules regarding when certain types of service that fall outside the scope of section 8411(b)(1) (the service at issue here) nonetheless may be credited for FERS purposes. *Id.* Congress's varying responses to divergent coverage and employee deduction scenarios do not shed light on what it intended as a general matter for employees otherwise covered by FERS. With respect to section 8411(b)(3), for example, Congress's decision to allow the accrual of service credit for employees in a transitional period during the early implementation of FERS and to address the absence of retirement deductions by requiring that the employee deposit an amount compensating for those missing employee deductions, 5 U.S.C. § 8411(f)(2), suggests, at most, that Congress viewed employee deductions as more significant to coverage requirements than employer contributions. By the same token, that Congress required employer contributions to be made as a condition of receiving service credit in the examples cited by the Postal Service, *id.* § 8411(e), (g), shows little more than that Congress chose to impose that additional requirement in those instances and explicitly provided for employer contributions to make the requirement clear.[13]

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[13] For similar reasons, we do not find Congress's treatment of reemployed annuitants in 5 U.S.C. § 8468, on which the Postal Service relies, *see* USPS Memo at 6–7, particularly illuminating. In language added to that section after the enactment of FERS, the statute provides that, with certain exceptions, if the annuitant becomes reemployed, "deductions for the Fund shall be withheld from the annuitant's pay under section 8422(a) and contributions under section 8423 shall be made." 5 U.S.C. § 8468(a) (2006). The Postal Service makes much of the fact that a subsequent subsection provides that if an annuitant "*subject to deductions* under the second sentence of subsection (a)" serves for at least 5 years, the annuitant may elect to have his or her rights redetermined under FERS. *Id.* § 8468(b)(2)(A) (emphasis added). The Postal Service finds it significant that this subsection mentions "deductions" and not employer "contributions." But an employee subject to "deductions" under the second sentence of section 8468(a) would also be subject to "contributions," and so there was no need for Congress to repeat the full phrase in section 8468(b)(2)(A) to indicate the employees to whom it was referring. Moreover, contrary to the Postal Service's assertion that Congress made clear that reemployed annuitants earn service credit "so long as 'deductions' are being made from their basic pay," USPS Memo at 7, Congress merely referred to reemployed annuitants who were "subject to deductions," without regard to whether the deductions were actually "being made." *See* 5 U.S.C. § 8468(b)(2)(A). More importantly, however, we believe again that Congress's policy determination about the coverage of reemployed annuitants tells us little about

What these examples reveal is that, even where there was no other statutory commitment to treat service as creditable under FERS or where employees were covered under other federal retirement systems, Congress sometimes extended FERS service credit in exchange for the payment of specified employee deductions—or the payment of employer contributions, or the relinquishment of service credit under other retirement systems, or without imposing any conditions—to serve some other policy goal, such as increased portability of retirement benefits. *See* Pub. L. No. 99-335, § 100A(3), 100 Stat. at 516 (codified at 5 U.S.C. § 8401 note) (one purpose of FERS was "to enhance portability of retirement assets earned as an employee of the Federal Government"). In our view, the discrete scenarios addressed in section 8411 provide little assistance, one way or another, in the assessment whether Congress intended to authorize OPM to deny service credit to employees otherwise subject to the FERS retirement plan for periods of employment under that plan if agencies violated the statutory requirement that they make employer contributions to the Fund.

Finally, as noted above, OPM argues that, in light of Congress's creation of FERS as a "fully funded pension system," OPM Memo at 6, and its purpose to ensure "sound fiscal and accounting management," *id.* at 7 (citing S. Rep. No. 99-166, at 29), "it is highly unlikely that Congress would have provided that employees be considered 'covered' by FERS and credited for their service if their employing agencies did not make the requisite contribution[s] to the Fund." *Id.* But, of course, Congress did require employing agencies to make specified contributions to the Fund, and the Postal Service is legally obligated to do so. *See supra* pp. 184–186, 191. The question here is only whether Congress intended that the remedy for the Postal Service's failure to meet its obligations would be to deny employees the service credit that the statute contemplates they will earn.

We agree with OPM that Congress was concerned with the fiscal management of the Fund. But "ensur[ing] a fully funded and financially sound retirement benefits plan for Federal employees," Pub. L. No. 99-335, § 100A(2), 100 Stat. at 516 (codified at 5 U.S.C. § 8401 note), was only

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whether Congress intended generally to condition coverage and accrual of service credit for FERS employees on the agency's deposit of its employer contributions into the Fund.

one of several congressional purposes in enacting FERS. Among other things, Congress also enacted FERS to establish a new retirement plan "to assist in building a quality career work force in the Federal Government." *Id.* § 100A(5). That goal could well be subverted if Congress were to create a retirement system in which employees' retirement benefits could be diminished or stripped away by their agencies' failure to pay the statutorily required contributions into the Fund. Even recognizing that a fully funded pension system was an important congressional objective, "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular object is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987).

Further, although we do not "resort to legislative history to cloud a statutory text that is clear," *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994), we believe that, to the extent that the legislative history of FERS is illuminating, it undermines, rather than supports, the view that Congress intended to deny employees eligibility and creditable service under FERS for periods of employment in which their employing agencies fail to make their required employer contributions to the Fund.

The legislative history makes clear that Congress intended the basic annuity in FERS to operate as a defined benefit plan. *See, e.g.*, S. Rep. No. 99-166, at 6, 9, 30, 42; FERS Comm. Print at 7. Such a plan consists of "a general pool of assets" out of which an employee, "upon retirement, is entitled to a fixed periodic payment." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439 (1999) (citation omitted). "A defined benefit plan promises a participant a specific amount of pension benefits at retirement determined under a formula based on years of participation in the plan, and in most nonbargained plans, based on an average of compensation." Stephen R. Bruce, *Pension Claims: Rights and Obligations* 17–18 (1988) ("Bruce"); *see also* James E. Burk, *Pension Plan Management Manual: Administration and Investment* ¶ 1.01[8], at 1-8 (1987) ("Burk") (benefits in a defined benefits plan determined "by a formula that is generally related to service and compensation"); H.R. Comm. on Post Office and Civil Serv., 98th Cong., *Designating a Retirement System for Federal Workers Covered by Social Security* 6 (Comm. Print 1984) (prepared by

the Congressional Research Service) ("CRS Comm. Print") ("A defined benefit plan determines benefit amount by a formula. Upon reaching the terms specified in the definition of eligibility (usually a combination of age and years of service), the worker receives the benefit computed from the application of the formula to the employee's years of service and salary.").[14]

The FERS basic annuity follows this model. FERS promises participants a specific level of benefits by application of a formula that is generally dependent on the employee's average pay and total service, 5 U.S.C. § 8415(a), and that bases the employing agencies' contributions on the "normal-cost percentage" of benefits, *id.* § 8423(a), which is actuarially computed by OPM. *Id.* § 8401(23); *cf.* Burk ¶ 2.01, at 2-4 (employer's contribution in a defined benefit plan is actuarially computed). The benefit formula in a defined benefit plan "is geared to providing a specific retirement benefit rather than based on the rate of contributions made by the employer to the pension fund." Burk ¶ 2.01, at 2-5. A pension plan covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001–1461 (2006 & Supp. III 2009), for example, "is liable for benefits without regard to whether the employer has made required contributions." ABA Section of Labor and Employment Law, *Employment Benefits Law* 279 (1991). Thus, it was well established by the time Congress enacted FERS, *see* USPS Memo at 9, that a multiemployer pension plan covered by ERISA, which is analogous in many respects to the multi-agency approach of FERS, must award credit based on the service performed for a participating employer regardless of whether the employer made the required contributions for such service. As the Supreme Court recognized a year before the enactment of FERS:

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[14] By contrast, under a "defined contribution plan," the promise is that "certain contributions will be made and credited to an employee's individual account. Contribution rates are fixed, usually as a percentage of the employee's earnings. Such plans do not guarantee an employee any fixed level of benefits at retirement. An employee's benefit will vary, depending on the amount of the contributions and the interest and capital appreciation accumulated on them." Burk ¶ 1.02[8], at 1-8–1-9; *see also Hughes*, 525 U.S. at 439; Bruce at 18. "Under defined contribution plans, employers know exactly what the pension obligation is and the benefits are fully funded at the time of the contribution. Employees bear the risk of variable market performance[.]" CRS Comm. Print at 6–7.

> The consistent view of the Secretary of Labor is that, under ERISA's minimum participation, vesting, and benefit accrual standards for pension plans . . . a pension plan covered by ERISA *must* award credit "solely on the basis of service performed for a participating employer, regardless [of] whether that employer is required to contribute for such service or has made or defaulted on his required contributions." In the Secretary's judgment, "[a]ny plan term or Trustees' resolution to the contrary is . . . unlawful and unenforceable."

Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 567 n.7 (1985) (citations omitted).[15]

Given this backdrop, it would be reasonable to expect some indication in the text of FERS, or at least in its legislative history, if Congress had intended to depart from these principles and make accrual of employee

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[15] *Accord Cent. States, Se. & Sw. Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1151 (7th Cir. 1988) ("Multi-employer plans are defined-contribution in, defined-benefits out. Once they promise a level of benefits to employees, they must pay even if the contributions they expected to receive do not materialize[.]"); Bruce at 135–36 ("[H]ours of service for use in determining [years of work] are determined solely on the basis of hours of work, or hours for which payment is due the employee from the employer, without reference to the delinquency or nondelinquency of the employer's contributions to the [multiemployer] plan."). As the Supreme Court noted, the longstanding position of the Secretary of Labor at the time of the enactment of FERS was that ERISA required that credit for hours worked "must be given solely on the basis of service performed for a participating employer, regardless whether that employer is required to contribute for such service or has made or defaulted on his required contributions. Any plan term or Trustees resolution to the contrary is, in our judgment, unlawful and unenforceable." Dep't of Labor Advisory Op. No. 76–89 (Aug. 31, 1976); *accord* Dep't of Labor Advisory Op. No. 78-28A (Dec. 5, 1978); Dep't of Labor Advisory Op. 78-21A (Oct. 16, 1978); Dep't of Labor Advisory Op. No. 78-20A (Oct. 6, 1978); *see also* Rules and Regulations for Minimum Standards for Employee Pension Benefit Plans, 41 Fed. Reg. 56,462, 56,464 (Dec. 28, 1976) (explaining, with respect to 29 C.F.R. § 2530.200b-2, regarding accrual of hours of service, that employee hours "must be credited to an employee regardless of whether contributions are required to be made to the plan on account of such hours or whether such contributions, even though required, have not in fact been made"). Before the passage of FERS, the IRS had also issued a Revenue Ruling explaining that a multiemployer plan that did not credit all years of service because of an employer's failure to make the required contributions failed to meet the requirements of "a qualified pension plan" that it provide "definitely determinable benefits" to its employees and violated the minimum participation and vesting standards of the Internal Revenue Code. Rev. Ruling 85-130, 1985-2 C.B. 137.

benefits contingent on employer contributions. Instead, the legislative history underlines that Congress intended to establish a new retirement plan for federal employees that would "provid[e] employees with financial security through a retirement program that compares favorably with those found in the private sector." S. Rep. No. 99-166, at 38.[16] It is unlikely, in light of this goal, that Congress would have incorporated into FERS an arrangement that would have been unlawful in the private sector without saying so.

Finally, OPM argues that construing FERS to give employees an entitlement to service credit without the employer's contribution "would be inconsistent with the Director's fiduciary responsibilities to the Fund." OPM Memo at 7. But, as set forth above, OPM is obligated under the statute to award service credit to employees who satisfy the statutory conditions set forth, *see supra* Part III.A, and to "pay all benefits that are payable under subchapter II, IV, V, or VI of this chapter from the Fund." 5 U.S.C. § 8461(a). As we read the statute, OPM is required to pay those benefits without regard to whether the employing agency—here, the Postal Service—has made its employer contributions to the Fund. The Director's fiduciary obligations thus include awarding service credit and paying benefits in accordance with the statute, and he would not violate those obligations by doing so.

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[16] *See also, e.g.*, 132 Cong. Rec. 11,912 (1986) (statement of Rep. Myers) (conference report includes "many of the concepts that a great many of the better private retirement programs have"); *id.* at 11,909 (1986) (statement of Rep. Ford) (Congress had an opportunity "to create a new pension system with the best features found in the private sector"); *id.* at 11,304 (1986) (statement of Sen. Gore) ("The retirement system which we have developed employs a three-tier design that combines Social Security with a defined benefit tier that focuses on providing a reliable base pension benefit[.]"); *id.* at 11,303 (1986) (statement of Sen. Glenn) (FERS "provides Government employees with a three-part program which is comparable to plans widely used in private industry" and "one that helps to recruit and maintain an excellent and skilled work force"); *id.* at 11,301 (1986) (statement of Sen. Stevens) (praising the new retirement plan as "a top notch, economical retirement system for the Federal workforce which is on part with the best in the private sector," providing "solid retirement benefits" and "offering financial security to Federal retirees"); S. Rep. No. 99-166, at 4 (emphasizing that "the Federal Government must have the ability to attract and retain highly qualified individuals in all occupations" and that "[a]n attractive, flexible retirement plan can assist the government in meeting these objectives . . . to build a career workforce" and "to assist in recruiting midcareer employees").

IV.

"If, upon examination of 'the particular statutory language at issue, as well as the language and design of the statute as a whole,' . . . it is clear that [the agency's] interpretation is incorrect, then we need look no further[.]" *Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 645 (1990) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). In our view, FERS has "directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, and OPM may not address the Postal Service's failure to make the employer contributions required by FERS by denying postal employees coverage or creditable service under FERS. We do not address the propriety of any other action OPM might take to address the Postal Service's failure to make the required contributions to the Fund.

VIRGINIA A. SEITZ
Assistant Attorney General
Office of Legal Counsel

EXHIBIT 16

Obligation of Federal Agencies to Pay Stormwater Assessments Under the Clean Water Act

Section 313(c)(2)(B) of the Clean Water Act does not impose a specific-appropriation requirement for the payment of stormwater assessments. Federal agencies may pay appropriate stormwater assessments from annual—including current—lump-sum appropriations.

February 25, 2011

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
ENVIRONMENTAL PROTECTION AGENCY

Congress recently passed "An Act To amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution," Pub. L. No. 111-378, 124 Stat. 4128 (2011) (the "Stormwater Amendment"), which revised section 313 of the Clean Water Act ("CWA"), 33 U.S.C. § 1323 (2006), to clarify that reasonable service charges payable by federal agencies, as described in section 313(a), include certain stormwater assessments. Section 313(c)(2)(B), enacted as part of this amendment, provides that federal agencies may not pay certain stormwater assessments "except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment." You have asked whether section 313(c)(2)(B) bars federal agencies from paying stormwater assessments unless Congress makes a specific appropriation (for example, a line-item appropriation) for such payments, or instead whether agencies may "use general, lump-sum appropriations" for such payments.[1] We believe that the best reading of

[1] *See* Letter for Jonathan Cedarbaum, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Scott C. Fulton, General Counsel, Environmental Protection Agency at 1 (Jan. 21, 2011) ("EPA Letter"). In preparing this opinion, we have received comments from the Tax Division, *see* Memorandum for John A. DiCicco, Acting Assistant Attorney General, Tax Division, from David A. Hubbert, Chief, Special Litigation (Jan. 26, 2011) ("Tax Memorandum"); the Bonneville Power Administration, *see* Letter for Jonathan Cedarbaum, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Randy A. Roach, General Counsel, Bonneville Power Administration (Feb. 2, 2011); the Environment and Natural Resources Division, *see* Memorandum for Karen Wardzinski, Section Chief, Law & Policy Section, Environment and Natural Resources Division, from Peter J. McVeigh, Attorney, Law & Policy Section (Feb. 3, 2011) ("ENRD Memorandum"); the General Services Administration, *see* Letter for

section 313(c)(2)(B), when construed in accord with the structure, purpose, and history of the Stormwater Amendment, is that the provision does not impose a specific-appropriation requirement. In our view, federal agencies may pay appropriate stormwater assessments from annual—including current—lump-sum appropriations consistent with section 313(c)(2)(B) of the CWA. We emphasize that our opinion is limited to the application of that subsection.

I.

A.

The CWA, as amended, established a National Pollution Discharge Elimination System ("NPDES") that is "designed to prevent harmful discharges into the Nation's waters." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 650 (2007). As a general matter, "the NPDES requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004). Because stormwater runoff collects debris, chemicals, and other pollutants and therefore may be a source of pollution when discharged into the Nation's waters, Congress amended the CWA in 1987 to direct the Environmental Protection Agency ("EPA") to issue rules requiring and governing NPDES permits for certain categories of discharges of stormwater, including municipal and industrial discharges. *See* 33 U.S.C.

Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Kris Durmer, General Counsel, General Services Administration (Feb. 3, 2011) ("GSA Letter"); the U.S. Postal Service, *see* Letter for Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Carrie M. Branson, Attorney, Law Department, U.S. Postal Service (Feb. 3, 2011) ("USPS Letter"); the Council on Environmental Quality, *see* Letter for Caroline Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Nancy H. Sutley, Chair, Council on Environmental Quality (Feb. 3, 2011) ("CEQ Letter"); the U.S. Department of Agriculture, *see* Letter for Daniel Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from James Michael Kelly, Associate General Counsel, U.S. Department of Agriculture (Feb. 7, 2011) ("USDA Letter"); and the Department of Defense, *see* Letter for Caroline Krass, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Robert S. Taylor, Principal Deputy General Counsel, Department of Defense (Feb. 8, 2011) ("DOD Letter").

§ 1342(p)(3)(B) (2006); Final Rule, National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990); Final Rule, National Pollutant Discharge Elimination System—Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999); *see also Natural Res. Def. Council v. EPA*, 526 F.3d 591, 594–601 (9th Cir. 2008) (recounting statutory and regulatory history of EPA stormwater regulations).

The EPA has issued regulations that, among other things, require municipalities operating separate storm sewer systems to obtain NPDES permits and undertake certain control measures designed to minimize the discharge of pollution from stormwater into the Nation's waters. *See, e.g.*, 40 C.F.R. § 122.34 (2010). Municipal separate storm sewer systems are "publicly owned conveyances or systems of conveyances that discharge to waters of the U.S. and are designed or used for collecting or conveying storm water, are not combined sewers, and are not part of a publicly owned treatment works." Notice, Stakeholder Input; Stormwater Management Including Discharges From New Development and Redevelopment, 74 Fed. Reg. 68,617, 68,619 (Dec. 28, 2009); *see* 40 C.F.R. § 122.26(b)(8) (defining "municipal separate storm sewer").

Under this federal regulatory scheme, municipalities operating municipal separate storm sewer systems are required to undertake costly control efforts to minimize pollution from stormwater discharges into the Nation's waters. In response, many municipalities have adopted local stormwater ordinances that attempt to recover the costs of these compliance efforts from property owners, including federal agencies.

B.

The efforts by municipalities to recover stormwater assessments from federal agencies gave rise to a controversy whether federal agencies could be required to pay such assessments. The Supreme Court has explained that as a general matter "the activities of the Federal Government are free from regulation by any state," *Mayo v. United States*, 319 U.S. 441, 445 (1943), and that a state or local law that "regulate[s] the [federal] Government directly" "run[s] afoul of the Supremacy Clause." *North Dakota v. United States*, 495 U.S. 423, 434 (1990) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425–37 (1819)); *see also Penn Dairies, Inc.*

v. Milk Control Comm'n, 318 U.S. 261, 269 (1943) ("in the absence of Congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation" of federal entities). Nevertheless, "a clear congressional mandate" divests the presumptive immunity of federal agencies from state and local regulatory compulsion. *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1956).

Prior to Congress's enactment of the Stormwater Amendment, there was some doubt whether section 313(a) of the CWA, 33 U.S.C. § 1323(a), divested the immunity of federal agencies with respect to stormwater assessments. *See* ENRD Memorandum at 2–3; EPA Letter at 5–7; USDA Letter at 1–2. Section 313(a), in relevant part, provides that federal agencies owning property or engaged in activities that may result

> in the discharge or runoff of pollutants . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges.

33 U.S.C. § 1323(a). The section further mandates that these requirements attach "notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law." *Id.*; *see Dep't of Energy v. Ohio*, 503 U.S. 607 (1992) (interpreting section 313(a) of the CWA). In dispute was whether the phrase "reasonable service charges" in section 313(a) included stormwater assessments, thereby waiving federal immunity and requiring federal agencies to pay such assessments.[2]

As we explain further in Part II below, the Stormwater Amendment reflected an effort by Congress to resolve the controversy whether local

[2] For example, the Government Accountability Office ("GAO") had concluded that federal agencies could not pay the District of Columbia's stormwater assessment because it was a "tax" for which "Congress has not . . . legislated a waiver of sovereign immunity." Letter for David A. Lebryk, Commissioner, Financial Management Service, U.S. Department of the Treasury, from Lynn H. Gibson, Acting General Counsel, Government Accountability Office, B-320868, at 1 (Sept. 29, 2010); *see also* Letter for Peter J. Nickles, Attorney General of the District of Columbia, from Lynn H. Gibson, Acting General Counsel, Government Accountability Office, B-320795 (Sept. 29, 2010).

governments could levy stormwater assessments against the federal government for its facilities. On June 10, 2010, Senator Cardin introduced S. 3481, "A bill to amend the Federal Water Pollution Control Act to clarify Federal responsibility for stormwater pollution." *See* 156 Cong. Rec. S4855 (daily ed. June 10, 2010). He explained that "the issue of polluted stormwater runoff from federal properties has . . . gained significant attention" and that he had "grave concerns about the failure of the Federal Government to pay localities for reasonable costs associated with the control and abatement of pollution that is originating on its properties." *Id.* Senator Cardin stressed that "Uncle Sam must pay his bills" and that he was "introducing legislation that makes [that] clear." *Id.*; *see also id.* at S4856 ("Adopting the legislation that I am introducing today will remove all ambiguity about the responsibility of the Federal Government to pay these normal and customary stormwater fees."). At that time, S. 3481 would have accomplished this objective by adding a subsection (c) to section 313 of the CWA to make explicit that the "reasonable service charges" described in section 313(a) include certain stormwater assessments. S. 3481 also stated that such stormwater assessments "may be paid using appropriated funds." *Id.* at S4856 (text of S. 3481).

The Senate amended S. 3481 in the nature of a substitute, S. Amdt. 4917, on Dec. 21, 2010, a day before its passage. The apparent aim of the last-minute revision was to address certain appropriations issues that might otherwise arise with the payment of stormwater assessments. Like the original amendment, the substitute bill, which was introduced on behalf of Senator Cardin, contained language in proposed section 313(c)(1) to make explicit that the phrase "reasonable service charges" includes certain stormwater assessments. *See* 156 Cong. Rec. S10,932 (daily ed. Dec. 21, 2010) (text of amendment).[3]

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[3] Section 313(c)(1) provided in full:

> (1) IN GENERAL.—For the purposes of this Act, reasonable service charges described in [section 313(a)] include any reasonable nondiscriminatory fee, charge, or assessment that is—
>
> (A) based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution (in terms of quantities of pollutants, or volume or rate of stormwater discharge or runoff from the property or facility); and

The substitute bill also added a new subsection (c)(2), with the heading "Limitation on Accounts," containing the appropriations language that is at issue here. *See id.* Proposed section 313(c)(2) provided in full:

> (2) LIMITATION ON ACCOUNTS.—
>
> (A) LIMITATION.—The payment or reimbursement of any fee, charge, or assessment described in paragraph (1) shall not be made using funds from any permanent authorization account in the Treasury.
>
> (B) REIMBURSEMENT OR PAYMENT OBLIGATION OF FEDERAL GOVERNMENT.—Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government, as described in [section 313(a)], shall not be obligated to pay or reimburse any fee, charge, or assessment described in paragraph (1), except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment.

Id. The substitute bill passed the Senate by unanimous consent on December 21, 2010, and passed the House by unanimous consent on December 22, 2010 (the last day of the 111th Congress). The President signed the enrolled bill into law on January 4, 2011.

On January 21, 2011, you requested our opinion whether "it is permissible to construe . . . section 313(c)(2)(B) as authorizing federal governmental entities to use general, lump-sum appropriations to pay the reasonable service charges described in . . . section 313(c)(1)," EPA Letter at 1, or instead whether section 313(c)(2)(B) "requires a specific appropriation"—for example, a line-item appropriation—"for the payment of the stormwater charges," *id.* at 12.

> (B) used to pay or reimburse the costs associated with any stormwater management program (whether associated with a separate storm sewer system or a sewer system that manages a combination of stormwater and sanitary waste), including the full range of programmatic and structural costs attributable to collecting stormwater, reducing pollutants in stormwater, and reducing the volume and rate of stormwater discharge, regardless of whether that reasonable fee, charge, or assessment is denominated a tax.

156 Cong. Rec. S10,932 (daily ed. Dec. 21, 2010). The relevant text of section 313(a) is set forth above. *See supra* p. 4.

II.

The issue we address here is whether section 313(c)(2)(B)'s language limiting the payment of stormwater assessments "except to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee" forbids federal agencies from paying stormwater assessments from annual lump-sum appropriations. We conclude that it does not.

The Stormwater Amendment contains two principal provisions. The first provision, section 313(c)(1), instructs that the "reasonable service charges described in [section 313(a)] include any reasonable nondiscriminatory fee, charge, or assessment that is . . . based on some fair approximation of the proportionate contribution of the property or facility to stormwater pollution" and that is "used to pay or reimburse the costs associated with any stormwater management program." The first provision thus resolves the dispute over federal agencies' duty to pay stormwater assessments, by making clear that the phrase "reasonable service charges" in section 313(a)—which is an unambiguous waiver of immunity—includes certain stormwater assessments. *See* 33 U.S.C. § 1323(a) (requirements of section 313(a) apply "notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law").[4]

The second provision, section 313(c)(2), sets forth requirements for the payment of such stormwater assessments by federal agencies. After stating in section 313(c)(2)(A) that federal agencies may not pay these assessments from "any permanent authorization account in the Treasury," section 313(c)(2)(B) allows payment only "to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the fee, charge, or assessment." Section 313(c)(2)(B) could be read to allow

[4] Some agencies providing views on EPA's opinion request suggested that this Office clarify the meaning of certain terms in section 313(c)(1) and address other legal issues under the Stormwater Amendment. *See, e.g.*, GSA Letter at 2–5; USPS Letter at 1–3; USDA Letter at 5. To respond to EPA's request expeditiously, we confine this opinion to the interpretation of the appropriations language in section 313(c)(2)(B). GSA, for example, asked us to advise whether the Federal Buildings Fund may be used to pay stormwater assessments in light of section 313(c)(2)(A). *See* GSA Letter at 4–5. Although we recognize the importance of this question, it lies beyond the scope of EPA's request, which is focused on section 313(c)(2)(B).

federal agencies to pay stormwater assessments out of lump-sum appropriations, but could also be read to impose a rule that Congress must annually enact a specific appropriation (for example, a line item) for such payments. In our view, the best reading of the text, structure, purpose, and history of the Stormwater Amendment, taken together, is that Congress did not intend to require a specific appropriation.

A.

Although "[s]tatutory construction is a holistic endeavor," *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (internal quotation marks omitted), our analysis of the Stormwater Amendment, "begin[s], as always, with the text of the statute." *Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1443 (2009). The text of section 313(c)(2)(B), standing alone, does not unambiguously resolve the issue before us. On the one hand, the phrase "except to the extent and in an amount provided in advance by any appropriations Act" might be read to authorize the payment of stormwater assessments only when Congress makes a specific appropriation of funds for that purpose. *See* USPS Letter at 1 ("The language lends itself to only one logical interpretation, i.e., federal entities are not required to pay stormwater fees unless Congress has provided specific appropriations for that purpose."); USDA Letter at 2–4. On the other hand, the phrase might be interpreted as authorizing federal agencies to pay stormwater assessments, not from a "permanent authorization account in the Treasury," declared off limits by section 313(c)(2)(A),[5] but instead from annual lump-sum appropriations.

While the text of section 312(c)(2)(B), standing alone, does not resolve the issue, reading the section to allow payment from annual lump-sum appropriations is ultimately the better reading of the text. First, such a reading accords with basic principles of appropriations law. The "except to the extent and in an amount" language can be read to clarify that the Stormwater Amendment provides spending authority for payment of

[5] Although we do not address here the meaning of the phrase "permanent authorization account in the Treasury," we note that Senator Cardin explained section 313(c)(2)(A) as "rectify[ing] a specific problem in the District of Columbia, where the Department of Treasury has been paying some stormwater fees" and as reflecting "that agencies and departments *should use their annual appropriated funds to pay for stormwater fees*." 156 Cong. Rec. S11,024 (daily ed. Dec. 22, 2010) (emphasis added).

stormwater assessments, but is not itself an appropriation. *See* U.S. General Accounting Office, GAO-04-261SP, *Principles of Federal Appropriations Law* 2–5 (3d ed. 2004) ("*Federal Appropriations Law*") ("While other forms of budget authority may authorize the incurring of obligations, the authority to incur obligations by itself is not sufficient to authorize payments from the Treasury. Thus, at some point if obligations are paid, they are paid by and from an appropriation.") (internal citations omitted); 31 U.S.C. § 1301(d) (2006) ("A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made."). The phrase further can be understood to embody the basic principle that any stormwater assessments paid by federal agencies must come from and may not exceed an actual appropriation. *See, e.g.*, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 14 (1990) (noting that a statute providing that payments "are effective only 'in such amounts as are provided in advance in appropriation Acts'" reflects a "concept that mirrors Art. I, § 9, of the Constitution ('No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law')"). *See generally* EPA Letter at 12; CEQ Letter at 6; Tax Memorandum at 5.

Second, this reading of the text comports with earlier opinions of this Office interpreting other authorization or appropriations provisions. For instance, faced with a statute that authorized the Secretary of Defense to make available five million dollars out of previously appropriated funds to the Director of the National Science Foundation "[t]o the extent provided in appropriations Acts," this Office concluded that this condition did not require that there have been a specific line-item appropriation in those appropriations acts. *See Funding for the Critical Technologies Institute*, 16 Op. O.L.C. 77, 79–83 (1992) ("*Critical Technologies Institute*") (interpreting section 822(d)(1) of the National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, 105 Stat. 1290, 1435 (1991)). In reaching this conclusion, we noted that the term "provided" can mean "to make a proviso or stipulation," but can also mean, more generally, "to make preparation to meet a need." *Id.* at 81 (citing *Webster's Ninth New Collegiate Dictionary* 948 (1986)). Construing the term against the background of the "fundamental principle of appropriations law" that "Congress is not required to enact a specific

appropriation for a program," and in the absence of any textual indication that Congress intended to depart from this principle, we concluded that a lump-sum appropriation was sufficient to meet the condition. *Id.* at 81–82; *see also id.* at 79–80 (observing that it is "axiomatic" that Congress uses lump-sum appropriations to "cover[] a wide range of activities without specifying precisely the objects to which the appropriation may be applied").[6]

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[6] Nor do we think this Office's interpretation of section 207 of the Equal Access to Justice Act ("EAJA")—which provided that the payment of fees as provided by the statute was "effective only to the extent and in such amounts as are provided in advance in appropriations Acts," Pub. L. No. 96-481, 94 Stat. 2321, 2330 (1980)—is to the contrary. *See Funding of Attorney Fee Awards Under the Equal Access to Justice Act*, 6 Op. O.L.C. 204, 208–09 (1982) ("Olson Memorandum"). Although this Office observed in *Critical Technologies Institute* that the Department of Defense's reliance on the Olson Memorandum was inapposite because the different statutory language presented a "significantly different question" and that the addition of the phrase "and in such amounts" requires "a greater degree of precision than 'to the extent provided' would alone," 16 Op. O.L.C. at 83, we do not believe that this analysis, which effectively was dicta, precludes the interpretation of section 313(c)(2)(B) we set forth here. As explained in *Critical Technologies Institute*, section 207 of EAJA had *not* been "interpreted" by the Olson Memorandum to "require a specific line-item appropriation." 16 Op. O.L.C. at 83. Rather, "the concern motivating section 207's clause was not," we said, "whether a line-item appropriation rather than a lump-sum appropriation was required, but instead whether an appropriation was necessary at all." *Id.* On this view, section 207 was an effort to "make clear that the bill merely authorized funds, but did not appropriate them" and thus to avoid "hav[ing] the EAJA bill ruled out of order because it contained appropriations, in violation of House rules." *Id.* For these reasons, far from mandating that section 313(c)(2)(B) be interpreted to impose a specific-appropriation requirement, *Critical Technologies Institute*, read as whole, supports our conclusion that section 313(c)(2)(B)'s function is not to impose a rigid specific-appropriation requirement but rather to clarify that the Stormwater Amendment "merely authorized funds, but did not appropriate them." 16 Op. O.L.C. at 82.

The GAO has suggested a contrary interpretation of similar language in other statutory contexts, *see, e.g.*, Letter for Hon. William Lehman, Chairman, Subcommittee on Transportation and Related Agencies, Committee on Appropriations, House of Representatives, from Milton J. Socolar, Acting Comptroller General of the United States, B-204078 (May 6, 1988) (construing a similar phrase as reflecting "a clear prohibition on the obligation or expenditure of funds . . . unless specifically provided for in an appropriation act"), but the GAO has not addressed this particular statutory context and, to the extent that its interpretation of other provisions might be extended here, its interpretation is not binding in any event, *see, e.g.*, *Prioritizing Programs to Exempt Small Businesses from Competition in Federal Contracts*, 33 Op. O.L.C. 284, 302 (2009) ("Our Office has on many occasions issued opinions and memoranda concluding that GAO decisions are not binding on Executive Branch agencies and that the opinions of the Attorney General and

Finally, section 313(c)(2)(B)'s limitation that stormwater assessments can be paid only "to the extent and in an amount provided in advance by any appropriations Act to pay or reimburse the [stormwater assessment]," which makes clear that the amendment itself is not an appropriation, plainly responded to the need to ensure that the statute conformed to the requirements of 2 U.S.C. § 651 (2006). *See* EPA Letter at 7–8. That section provides that "[i]t shall not be in order in either the House of Representatives or the Senate to consider any bill . . . that provides," among other things, "new authority to incur indebtedness . . . for the repayment of which the United States is liable . . . unless that bill . . . also provides that the new authority is to be effective for any fiscal year *only to the extent or in the amounts provided in advance in appropriation Acts*." 2 U.S.C. § 651(a) (emphasis added). Under section 651, "legislation providing new [spending] authority will be subject to a point of order in either the Senate or the House of Representatives unless it also provides that the new authority will be effective for any fiscal year *only to such extent or in such amounts as are provided in advance in appropriation acts*." *Federal Appropriations Law* at 2–6 (emphasis added).[7] Section 313(c)(2)(B)'s confirmation that the Stormwater Amendment is not an appropriation thus served the important function of avoiding a point of order, thereby enabling passage of the bill. *See* EPA Letter at 8 (setting forth this explanation); *accord* DOD Letter at 3.[8]

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of this Office are controlling."); *see also Critical Technologies Institute*, 16 Op. O.L.C. at 84 (disagreeing with GAO advice).

[7] Section 651 traces its statutory lineage to section 401(a) of the Congressional Budget Act of 1974 (originally codified at 31 U.S.C. § 1351(a) (Supp. IV 1974)). The legislative history of the 1974 statute explains that the purpose of the requirement was to ensure that "backdoor spending authority (such as contract authority, loan authority, and mandatory or open-ended entitlements) could not take effect until funds were provided through the appropriations process." H.R. Rep. No. 93-658, at 17 (1973), *reprinted in* 1974 U.S.C.C.A.N. 3462, 3463.

[8] Because we understand section 313(c)(2)(B) to be serving several purposes on this reading—including clarifying that the Stormwater Amendment authorizes spending but is not itself an appropriation; forbidding federal agencies from incurring any stormwater assessment obligations in excess of their appropriations; and conforming with the requirements of 2 U.S.C. § 651—we do not believe that this reading gives no effect to, and thus renders surplusage, the phrase "except to the extent and in an amount provided in advance by any appropriations Act." *Cf.* DOD Letter at 4. Indeed, we rejected a similar objection lodged against our interpretation of the phrase "[t]o the extent provided in

B.

Our textual interpretation is supported by consideration of the text in the context of the Stormwater Amendment's overall structure, purpose, and legislative history. The structure of the Stormwater Amendment favors reading section 313(c)(2)(B) to allow payment from lump-sum appropriations and undermines a specific-appropriation interpretation of that section. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . interpret the statute as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole.") (internal quotation marks and citations omitted). Reading section 313(c)(2)(B) to restrict payment of stormwater assessments unless and until a *future* Congress makes a *specific* appropriation for that purpose would be in considerable tension with Congress's decision in the immediately preceding subsection—section 313(c)(1)—to clarify that federal agencies are responsible for paying reasonable stormwater assessments. Such a restriction would frustrate the ability of federal agencies to pay those assessments, and "[w]e are disinclined to say that what Congress imposed with one hand . . . it withdrew with the other." *Logan v. United States*, 552 U.S. 23, 35 (2007); *see Greenlaw v. United States*, 554 U.S. 237, 251 (2008) ("We resist attributing to Congress an intention to render a statute so internally inconsistent."). Rather, here, a provision that "seem[s] ambiguous in isolation is . . . clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC*, 543 U.S. at 60.

Interpreting section 313(c)(2)(B) to require a specific appropriation also would substantially conflict with the general purpose of the Stormwater Amendment. *See Stafford v. Briggs*, 444 U.S. 527, 535 (1980) (statutory interpretation must take account of the "'the objects and policy of the law'") (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)); *McCreary County, Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844,

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Appropriations acts" in *Critical Technologies Institute*, reasoning, among other things, that the phrase "makes clear that the act merely authorized funds, and that a further appropriation is required." 16 Op. O.L.C. at 82. In any event, "[s]urplusage does not always produce ambiguity and [a] preference for avoiding surplusage constructions is not absolute." *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004).

861 (2005) ("[e]xamination of purpose is a staple of statutory interpretation"). The central purpose of the Stormwater Amendment was to resolve the controversy surrounding the payment of stormwater assessments by requiring that federal agencies pay such assessments. The very first words of the amendment—"[a]n Act To . . . clarify Federal responsibility for stormwater pollution"—show Congress's purpose to resolve the dispute regarding stormwater assessments and make clear that the federal government as an owner of federal facilities is responsible for the payment of stormwater assessments. Although "[t]he title of an act cannot control its words," it "may furnish some aid in showing what was in the mind of the legislature." *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 630 (1818) (Marshall, C.J.); *see Holy Trinity Church v. United States*, 143 U.S. 457, 462 (1892) ("title of the act" may shed light on the "intent of the legislature"). The title here does just that. *See* ENRD Memorandum at 4 (arguing that the "purpose is readily apparent from the title of the act").

In addition to the title, all of the available legislative history confirms this account of Congress's purpose.[9] The Senate sponsor of the bill, Senator Cardin, explained in introducing the bill: "Adopting the legislation that I am introducing today will remove all ambiguity about the responsibility of the Federal Government to pay these normal and customary stormwater fees." 156 Cong. Rec. S4856 (daily ed. June 10, 2010).[10] Several members of the House repeated this understanding of the objective of the Stormwater Amendment, including after the substitute

[9] This Office has previously found legislative history one potentially instructive factor to consider, along with other evidence, when confronted with ambiguous appropriations language. *See Critical Technologies Institute*, 16 Op. O.L.C. at 80 (relying on legislative history in ascertaining the meaning of similar appropriations language); *see also Authority of Chrysler Corporation Loan Guarantee Board to Issue Guarantees*, 43 Op. Att'y Gen. 219, 219–23 (1980) (construing phrase "to the extent such amounts are provided in advance in appropriations acts" based principally on legislative history).

[10] Although some of the legislative history we cite here was in connection with the bill as it existed prior to the last-minute addition of section 313(c)(2)(B), that does not render that prior history irrelevant. Senator Cardin's explanation of the purpose of the Stormwater Amendment was the same before and after the addition of the relevant appropriations language (which was added at Senator Cardin's request), and is consistent with statements made by members of the House *after* the revised language was added. Standing alone, the fact that Congress revised the Stormwater Amendment provides no basis for adopting a restrictive interpretation of section 313(c)(2)(B), especially when all available legislative evidence is to the contrary.

version of the bill passed the Senate. Representative Oberstar, for example, noted that "[s]everal states and municipalities . . . have taken aggressive action to address ongoing sources of stormwater pollution" but that such action is undermined "when a significant percentage of Federal property owners take the position that they cannot be held responsible for their pollution." 156 Cong. Rec. H8978 (daily ed. Dec. 22, 2010). He explained that the amendment would "clarif[y] that Federal agencies and departments are financially responsible for any reasonable . . . charges for treating or otherwise addressing stormwater pollution that emanates from Federal property." *Id.* Other statements in the legislative record are to the same effect.[11]

Indeed, after the Senate's passage of the Stormwater Amendment, Senator Cardin again explained the purpose of the amendment in similar terms:

> [T]oday the Congress stands ready to approve S. 3481, a bill to clarify Federal responsibility to pay for stormwater pollution. This legislation, which will soon become law, requires the Federal government to pay localities for reasonable costs associated with the control and abatement of pollution that is originating on its properties. At stake is a fundamental issue of equity: polluters should be financially responsible for the pollution that they cause. That includes the Federal Government.

156 Cong. Rec. S11,023 (daily ed. Dec. 22, 2010); *see id.* at S11,024 (statement of Sen. Cardin) (the federal responsibility "to manage . . . stormwater pollution . . . needs to translate into payments to the local governments that are forced to deal with this pollution"). Senator Cardin's consistent, public, and unambiguous articulation of the intended purpose

[11] *See* 156 Cong. Rec. E2259 (daily ed. Dec. 29, 2010) (statement of Rep. Johnson) (describing the bill as "a simple effort to clarify . . . that the Federal Government bears a proportional responsibility for addressing pollution originating from its facilities"); *id.* at E2258 (statement of Rep. Johnson) (explaining that the "common sense bill" would "ensure[] that the Federal Government maintains its equitable responsibility for stormwater pollution runoff originating or emanating from its property"); 156 Cong. Rec. E2245 (daily ed. Dec. 22, 2010) (statement of Del. Norton, who sponsored the Stormwater Amendment in the House) ("The consequence of failing to pass this bill is that we give the Federal Government a free ride and pass its fees on to our constituents throughout the United States.").

and effect of the Stormwater Amendment confirms our view that Congress intended the Stormwater Amendment to facilitate the payment of stormwater assessments by the federal government. *See NLRB v. Fruit & Vegetable Packers, Local 760*, 377 U.S. 58, 66 (1964) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.") (internal quotation marks omitted); *see also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 238 (1989) (relying on the stated understanding of "the principal sponsor of the Senate bill" in interpreting a statute). Although the "remarks of a single legislator who sponsors a bill" may not be "controlling in analyzing legislative history," *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980), Senator Cardin's remarks accord with *all* of the available legislative history. There is no indication in the legislative record that the understanding of the Stormwater Amendment offered by Senator Cardin and others was not shared universally in Congress.

Reading the statute to impose a specific-appropriation requirement would frustrate that purpose. Such a requirement would place a substantial obstacle in the path of payment of stormwater assessments because of the practical burdens associated with attaining specificity in annual appropriations, especially specificity in appropriations bills applying to a range of federal agencies. *See, e.g.*, *Critical Technologies Institute*, 16 Op. O.L.C. at 80 ("A rule requiring greater specificity in appropriations would create extreme obstacles for the functioning of the Federal Government."). Indeed, we note that, to the extent some federal agencies were paying stormwater assessments from lump-sum appropriations prior to the passage of the Stormwater Amendment, a specific-appropriation interpretation would require ascribing to Congress an intent to forbid such ongoing payments unless and until Congress made a specific appropriation. We can find no indication of such a congressional intent. Equally important, a specific-appropriation interpretation of section 313(c)(2)(B), rather than resolving once and for all the obligation of the federal government as an owner of federal facilities to pay certain stormwater assessments, would effectively leave the issue where Congress found it—passing on to future Congresses the task of determining, on an annual basis, whether stormwater assessments should be paid. Such a reading of section 313(c)(2)(B) would reintroduce the same cloud of legal uncertainty Congress intended the Stormwater Amendment to dispel.

Furthermore, the legislative history relating specifically to the addition of section 313(c)(2)(B) weighs heavily against interpreting the section to impose a specific-appropriation requirement. Senator Cardin explained the appropriations language at issue here as follows:

> [W]e added a provision to the bill in order to rectify a specific problem in the District of Columbia, where the Department of Treasury has been paying some stormwater fees. The provision simply says that agencies and departments should use their annual appropriated funds to pay for stormwater fees. This is exactly what they all do today in paying for their drinking water and wastewater bills or any other utility bill, for that matter. This new language requires that Congress make available, in appropriations acts, the funds that could be used for this purpose. *It does not mean that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges*. The legislative language doesn't say that, and I want to be perfectly clear that such a restrictive reading is not our intent.

156 Cong. Rec. S11,024 (daily ed. Dec. 22, 2010) (emphasis added).[12] Senator Cardin's view was echoed by several members of the House of Representatives, including the House sponsor of the Stormwater Amendment, Delegate Norton. She explained: "The bill requires that Congress make available, in appropriations acts, the funds that could be used to pay for stormwater management charges, but *not that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges*." *Id.* at H8979 (daily ed. Dec. 22, 2010) (emphasis added).[13] There is no legislative history pointing to a contrary result. *See*

[12] Although Senator Cardin's statement was made after the passage of the Senate version of the bill, his description is consistent with the understanding expressed by members of the House, including the sponsor, prior to passage there. *See infra* n. 13 and accompanying text.

[13] *See also* 156 Cong. Rec. H8979 (daily ed. Dec. 22, 2010) (statement of Rep. Oberstar) ("In addition, the intent of subsection (c)(2)(B) of Section 313 of the Clean Water Act, as added by S. 3481, is to require that Congress make available, in appropriations acts, the funds that could be used to pay stormwater fees, but not that the appropriations act would need to state specifically or expressly that the funds could be used to pay these charges."); *id.* at H8980 (daily ed. Dec. 22, 2010) (statement of Rep. Johnson) ("This new language requires that Congress make available, in appropriations acts, the funds

CEQ Letter at 5 (canvassing legislative history supporting an interpretation of section 313(c)(2)(B) as authorizing annual appropriations to pay stormwater assessments and noting "[n]o comments to the contrary appear anywhere in the legislative history" of the Stormwater Amendment).

In sum, we conclude that the best reading of the text of the appropriations provision in section 313(c)(2)(B), in light of the structure, purpose, and history of the Stormwater Amendment, is that Congress did not intend to impose a specific-appropriation requirement. Indeed, a specific-appropriation requirement—which, as we have noted, would have the predictable effect of restricting payment by federal agencies and would leave the status of future stormwater payments in legal limbo—would undermine Congress's central aims in enacting the Stormwater Amendment. We therefore believe that federal agencies may pay stormwater assessments out of annual—including current—lump-sum appropriations.[14]

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that could be used for this purpose. It should not be interpreted as requiring appropriations act [sic] to state specifically or expressly that the funds could be used to pay these charges. The statutory language does not require this, and such a restrictive reading is not intended.").

[14] USDA suggests that section 313(c)(2)(B), in all events, forbids the use of *current* appropriations to pay stormwater assessments because an "additional act of Congress is required." USDA Letter at 4. But the conclusion does not follow from the premise. It is true that an "additional act of Congress is required"—because the Stormwater Amendment is not an appropriation, a point that is central to our reading of section 313(c)(2)(B)—but the view that section 313(c)(2)(B) may be satisfied by a lump-sum appropriation leads logically to the conclusion that such an appropriation may be a current *or* future lump-sum appropriation. Payment of stormwater assessments from a current appropriation would not countermand the statutory requirement that funds be "provided in *advance* by any appropriations Act" because federal agencies' payments of stormwater assessments going forward would be made from appropriations acts previously enacted by Congress. This same analysis largely responds to the Department of Defense's concern that section 313(c)(2)(B) "clearly require[s] some additional action by Congress." DOD Letter at 3. DOD appears to posit that the "shall not be obligated" clause in section 313(c)(2)(B) means that federal agencies *may* pay stormwater assessments out of general operating funds but that agencies *must* pay such assessments in the event that Congress enacts specific "appropriations act language." *Id.* at 4. As we have explained, we agree that "additional action by Congress" is required, but that additional action may be a current or future general lump-sum appropriation. Therefore, we disagree with DOD's suggested interpretation of the "shall not be obligated" phrase because, in our view, a general lump-sum appropriation is sufficient to trigger the "mandatory" payment of stormwater assessments. *Id.*

C.

One significant argument might be advanced against our reading of the Stormwater Amendment. It might be said that, if the plain text of section 313(c)(2)(B) does not definitively resolve the source of payment, then we must embrace a construction that restricts payment on the ground that "a condition to [a] waiver of sovereign immunity . . . must be strictly construed." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990). We disagree that this rule of construction justifies reading section 313(c)(2)(B) to impose a specific-appropriation requirement.

In our view, the appropriations language in section 313(c)(2)(B) is not properly understood as a condition on the waiver of immunity. Sections 313(a) and 313(c)(1), read together, accomplish that waiver for stormwater assessments. *See supra* p. 7. Section 313(c)(2)(B) serves a different function, operating as an internal accounting provision, directing when and how federal agencies may pay such assessments. *Cf. Henderson v. United States*, 517 U.S. 654, 667–68 (1996) (holding that, notwithstanding that the Suits in Admiralty Act is a broad waiver of sovereign immunity, the provisions in section 742 of the statute governing service of process are not "sensibly typed 'substantive' or 'jurisdictional'"—and therefore a condition on the waiver—but "[i]nstead, they have a distinctly facilitative, 'procedural' cast" as "[t]hey deal with case processing, not substantive rights or consent to suit"). The heading of section 313(c)(2), "Limitation on Accounts," supports the view that section 313(c)(2) is not a condition on a waiver of immunity but rather that it governs the sources from which federal agencies may pay stormwater assessments. *See* Government Accountability Office, GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process* 2 (Sept. 2005) (defining account as "[a] separate financial reporting unit for budget, management, and/or accounting purposes"); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (noting that the "heading of a section" is a "tool[] available for the resolution of a doubt about the meaning of a statute") (internal quotation marks omitted); ENRD Memorandum at 4. For these reasons, reading section 313(c)(2)(B) not as a condition on the waiver of immunity, but as a separate internal accounting provision specific to stormwater assessments, is most faithful to the Supreme Court's instruction to "interpret [a] statute as a symmetrical and coherent regulatory scheme" that "fit[s] . . . all parts into a harmonious whole." *Brown &*

Williamson, 529 U.S. at 133 (internal quotation marks and citations omitted).

We recognize that section 313(c)(2)(B)'s direction that federal agencies "shall not be obligated to pay" stormwater assessments "except to the extent and in an amount provided in advance by any appropriations Act" might be read as a condition on the waiver of immunity. *See* DOD Letter at 4; *cf.* Tax Memorandum at 4 (suggesting that section 313(c)(2)(B) "read[s] more like a traditional waiver given the context of the amendment"). But we believe, in this statutory context, that the phrase "shall not be obligated to pay . . . except to the extent and in an amount provided in advance by any appropriations Act" is instead a textual cue that the Stormwater Amendment is not an appropriation and that stormwater assessment payments require a separate appropriation by Congress. In other words, the "shall not be obligated to pay" phrase is an instruction that federal agencies may not pay stormwater assessments unless there is a separate appropriation of funds by Congress to do so. Because we do not read section 313(c)(2)(B) as a condition on the waiver of immunity effected by sections 313(a) and 313(c)(1), the strict construction canon governing conditions on waivers of immunity is inapposite.

For these reasons, we conclude that section 313(c)(2)(B) of the CWA does not impose a specific-appropriation requirement. Instead, federal agencies may pay appropriate stormwater assessments from annual—including current—lump-sum appropriations.

CAROLINE D. KRASS
Principal Deputy Assistant Attorney General
Office of Legal Counsel

EXHIBIT 17

Disposition of Proceeds from the Sale of Government Buildings Acquired with Social Security Trust Funds

The General Services Administration is authorized, under section 412 of the Consolidated Appropriations Act of 2005, to convey Social Security Administration buildings that were acquired with money derived from the Social Security Trust Funds and to retain the net proceeds in the Federal Buildings Fund.

December 17, 2010

MEMORANDUM OPINION FOR THE ACTING GENERAL COUNSEL
SOCIAL SECURITY ADMINISTRATION

You have asked us to resolve a disagreement about the retention of proceeds from the sale of certain government office buildings.[1] At issue is whether the Social Security Administration ("SSA") or the General Services Administration ("GSA") is entitled to the proceeds from the sale of buildings currently occupied by SSA and originally acquired with money from the Federal Old-Age and Survivors Insurance Trust Fund and the Disability Insurance Trust Fund ("Social Security Trust Funds" or "Trust Funds").[2] Relying on the Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified as amended at 40 U.S.C. § 101 *et seq*. (2006 & Supp. III 2009)) ("Property Act"), SSA argues that any proceeds from the sale of the buildings should be credited to the Social Security Trust Funds. GSA contends that it is entitled to the funds, citing both section 574 of the Property Act and a separate authority to convey property and to keep any resulting income—section 412 of division H of the Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, div. H, § 412, 118 Stat. 2809, 3199, 3259 (2004) ("section

[1] *See* Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from David Black, General Counsel, Social Security Administration (Oct. 1, 2008) ("SSA Memo").

[2] More precisely, your question pertains to "the sale of real property purchased, constructed, or otherwise acquired with money" from the Social Security Trust Funds. SSA Memo at 1. In this opinion, we use the term "acquired" as a shorthand for the various means by which Trust Fund money may have been used to obtain real property. Furthermore, we have used interchangeably the terms "building" and "real property"; nothing in our opinion turns on the distinction.

412").[3] We conclude that section 412 authorizes GSA to convey the SSA-occupied buildings acquired with Trust Fund monies and to retain the net proceeds from those transactions.[4] We thus have no occasion to address the application of section 574 of the Property Act to the contemplated sale of the SSA buildings here.

I.

Ordinarily, when federal property is sold under the Property Act,[5] the proceeds of the sale, excluding certain expenses incurred by GSA in disposing of the property, are deposited in the Land and Water Conservation Fund in the Treasury. *See generally* 40 U.S.C. § 572(a); *see also* 16 U.S.C. § 460*l*-5 (2006).[6] Section 574 of the Property Act establishes an

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[3] GSA's initial submission to our Office contained only a brief description of section 412. Memorandum for Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from Leslie A. Nicholson, General Counsel, General Services Administration (Jan. 13, 2009) ("GSA Memo"). We then solicited the supplemental views of both agencies about the applicability of section 412 to the conveyance of real property acquired with Trust Fund monies. *See* Memorandum for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from Kris E. Durmer, General Counsel, General Services Administration (Jan. 15, 2010) ("GSA Supp. Memo"); Memorandum for Daniel L. Koffsky, Deputy Assistant Attorney General, Office of Legal Counsel, from David F. Black, General Counsel, Social Security Administration (Jan. 19, 2010) ("SSA Supp. Memo").

[4] GSA's own regulations pertaining to the conveyance of federal real property provide that "[e]xcept for disposals specifically authorized by *special legislation*, disposals of real property must be made only under the authority of Chapter 5 of Subtitle I of Title 40 of the United States Code [i.e., the Property Act]." 41 C.F.R. § 102-75.290 (2010) (emphasis added). GSA's Associate General Counsel has informed us of GSA's determination that section 412 falls under the exception for "special legislation," so that this regulation would not restrict its authority under section 412 to dispose of property and retain the net proceeds. (GSA has made similar determinations with respect to other statutory disposal authorities, e.g., 42 U.S.C. § 2201(g) (2006) (authorizing Atomic Energy Commission to dispose of its real and personal property).) We have not been asked to address section 102-75.290, and we intimate no view on GSA's interpretation of the regulation as it pertains to section 412.

[5] Not all federal property is subject to the Property Act. *See* 40 U.S.C. § 113(e) (listing numerous exceptions to the application of the Act).

[6] In pertinent part, section 460*l*-5 of title 16 provides:

> During the period ending September 30, 2015, there shall be covered into the land and water conservation fund in the Treasury of the United States, . . . the following

exception to this general rule. If "property [has been] acquired with amounts . . . not appropriated from the general fund of the Treasury,"

> [t]he net proceeds of a disposition or transfer of [such] property . . . shall be . . . [1] [either] credited to the applicable reimbursable fund or appropriation; or . . . [2] paid to the federal agency that determined the property to be excess.

40 U.S.C. § 574(a).[7] SSA contends that section 574 applies to sales of SSA-occupied office buildings that were originally acquired with money from the Social Security Trust Funds and that the provision enables it to keep the proceeds from such sales.

GSA disagrees with SSA's interpretation of section 574, but, more important for resolving the question before us, GSA contends that its claim to any proceeds from the sale of SSA-occupied buildings rests on an independent statutory authority: section 412. *See* GSA Memo at 10-11; *see also* GSA Supp. Memo at 1-2.[8] Because we agree with GSA that

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> revenues and collections: . . . All proceeds [with certain exceptions] hereafter received from any disposal of surplus real property and related personal property under the Federal Property and Administrative Services Act of 1949, as amended, notwithstanding any provision of law that such proceeds shall be credited to miscellaneous receipts of the Treasury.

16 U.S.C. §§ 460*l*-5 & 460*l*-5(a). Thus, although the Property Act provides that the "excess amounts [from the sale of federal real property] beyond [the] current operating needs [of GSA] shall be transferred . . . to miscellaneous receipts," 40 U.S.C. § 572(a)(3), section 460*l*-5 of title 16 instead directs those amounts to the Land and Conservation Fund.

[7] "Excess" property is a term of art in the Property Act and means property that an agency determines it no longer requires in order to meet that "agency's needs or responsibilities." 40 U.S.C. § 102(3); *see also id.* § 524(a)(2) (requiring each executive agency subject to the Act to "continuously survey property under its control to identify excess property").

[8] Noting that "SSA has provided no evidence that monies of the Trust Funds were used to directly acquire the[] properties" at issue, GSA argues that it, and not SSA, is the "landholding agency that would declare any of the SSA-occupied [b]uildings excess to the Government's needs." GSA Memo at 3. Furthermore, GSA contends that it, and not SSA, "acquired" some of the properties at issue using money from GSA's Federal Buildings Fund—a fund that is created by the Property Act and contains revenue collected by GSA, including rent from federal agencies, *see* 40 U.S.C. § 592 (establishing the Federal Buildings Fund). GSA Memo at 6. In light of our conclusion—that section 412 vests GSA with discretion to convey SSA property and to retain the net proceeds, notwithstanding

section 412 would permit GSA to retain the net proceeds of sales of SSA-occupied buildings, we have no occasion to address the applicability of section 574.

II.

A.

Section 412 authorizes GSA to convey property and retain any resulting net proceeds in the Federal Buildings Fund. Section 412 provides:

> Notwithstanding any other provision of law, the Administrator of General Services may convey, by sale, lease, exchange or otherwise, including through leaseback arrangements, real and related personal property, or interests therein, and retain the net proceeds of such dispositions in an account within the Federal Buildings Fund to be used for the General Services Administration's real property capital needs: *Provided*, That all net proceeds realized under this section shall only be expended as authorized in annual appropriations Acts: *Provided further*, That for the purposes of this section, the term "net proceeds" means the rental and other sums received less the costs of the disposition, and the term "real property capital need" means any expenses necessary and incident to the agency's real property capital acquisitions, improvements, and dispositions.

118 Stat. at 3259. Invoking section 412, GSA has retained approximately $140 million in proceeds from the sale of real property since Congress enacted the provision in 2004. See E-mail for Pankaj Venugopal, Attorney-Adviser, Office of Legal Counsel, from Richard R. Butter-

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section 574—we need not resolve the agencies' dispute about the application of section 574.

SSA's request for our opinion is not limited to any specific building SSA intends to vacate, and we thus have no need to consider whether a particular SSA building was in fact acquired with money from the Trust Funds. We understand that, at the least, SSA occupies some buildings acquired with those funds. *Cf.* Memorandum for Stanley Ebner, General Counsel, Office of Management and Budget, from Robert G. Dixon, Jr., Assistant Attorney General, Office of Legal Counsel at 8 (Dec. 20, 1973) (noting that SSA's facility in Woodlawn, Maryland "was funded by appropriations from the Federal Old Age and Survivors Insurance Trust Fund").

worth, Jr., Senior Assistant General Counsel, General Services Administration (Dec. 6, 2010).

Section 412 supports GSA's claim to proceeds from a sale of SSA buildings, including those acquired with money from the Social Security Trust Funds. The provision authorizes the GSA Administrator to "convey" "by sale" "real and related personal property," and GSA may retain the "net proceeds of such dispositions" for its Federal Buildings Fund. On its face, section 412 makes no exception for the type of Social Security buildings at issue here.

Section 574 of the Property Act, however, might be read to entitle SSA to the proceeds of the sale of SSA buildings. Assuming that section 412 and section 574 lead to divergent outcomes, we have a "duty . . . to regard each as effective" if the two statutes are "capable of co-existence." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also* SSA Supp. Memo at 2 (urging the application of the presumption against implied repeal). Under a "'long-standing maxim of statutory construction . . . statutes are enacted in accord with the legislative policy embodied in prior statutes, and . . . therefore statutes dealing with the same subject should be construed together.'" *Relationship Between Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and Statutory Requirement for Confidentiality of Census Information*, __ Op. O.L.C. Supp. __, at *5 (May 18, 1999) ("IIRIRA Opinion") (quoting Memorandum for Glen E. Pommerening, Assistant Attorney General for Administration, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, *Re: Establishing a Maximum Entry Age Limit for Law Enforcement Officer Positions in the Department of Justice* at 3 (Apr. 3, 1975), https://www.justice.gov/olc/page/file/936041/download). We believe that the apparent conflict between the two statutes is properly resolved by reading section 412 to give GSA the discretion to convey SSA buildings, *see* 118 Stat. at 3259 ("the Administrator of General Services *may* convey" (emphasis added)), and retain the proceeds of the sales, with section 574 potentially applying if GSA chooses not to exercise this discretion.

Even if we assume that section 574 of the Property Act would otherwise entitle SSA to the net proceeds of a building sale, section 412 would apply "[n]otwithstanding any other provision of law," a category that necessarily includes section 574. As a general rule, "the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the

provisions of the 'notwithstanding' section override conflicting provisions of any other section." *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18 (1993); *see also, e.g.*, *Applicability of Tax Levies to Thrift Savings Plan Accounts*, 34 Op. O.L.C. 157, 161–62 (2010) ("Tax Levies Opinion"); IIRIRA Opinion at *7 (observing that a prefatory "notwithstanding" clause "does reflect a congressional intention to displace inconsistent law"). Some courts have observed that "'a clearer statement'" of congressional intent "'to supersede all other laws . . . is difficult to imagine,'" *Cisneros*, 508 U.S. at 18 (quoting *Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) (internal quotation marks omitted) (collecting cases)); *see also Miccosukee Tribe of Indians of Fla. v. Army Corps of Eng'rs*, 619 F.3d 1289, 1298 (11th Cir. 2010) (noting that a "'notwithstanding' clause'" was "'Congress's indication that the statute containing that language is intended to take precedence over any preexisting or subsequently-enacted legislation [on the same subject]'" (alteration in original)); *United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) (en banc) ("[T]he '[n]otwithstanding any other provision of law' clause demonstrates that Congress intended to supersede any previously enacted conflicting provisions") (alterations in original, internal quotation marks omitted). In our view, section 412's "notwithstanding" clause indicates Congress's intent to override potentially applicable and inconsistent statutes, including section 574 of the Property Act.[9]

We do not read section 412's "notwithstanding" clause as making an implicit exception for section 574. Indeed, other sections of the same law in which section 412 appears authorize the sale of certain federal real property under a more narrowly tailored "notwithstanding" clause. *See* Consolidated Appropriations Act §§ 407, 638, 118 Stat. at 2922, 3258 ("[n]otwithstanding 40 U.S.C. 524, 571, and 572"). Congress thus knew how to restrict the scope of a "notwithstanding" clause to certain provi-

[9] A "notwithstanding" clause is "'best read simply to qualify the substantive requirement that follows.'" Tax Levies Opinion, 34 Op. O.L.C. at 162 n.4 (quoting *Prioritizing Programs to Exempt Small Businesses from Competition in Federal Contracts*, 33 Op. O.L.C. 284, 296 (2009)). Thus, such a clause does not itself "'support a broad construction of the substantive provision that would give rise . . . to inconsistencies' with other statutes." *Id*. (quoting IIRIRA Opinion at *7). Here, we conclude only that the substantive clauses of section 412 authorize GSA to retain the net proceeds of the sales of real property, while section 574 of the Property Act, when applicable, might direct such proceeds to SSA.

sions of the Property Act, but chose instead to make section 412 broadly applicable "notwithstanding any other provision of law." Furthermore, on several occasions when Congress has intended section 574 to apply, it has made that intention plain. When the same Congress that enacted section 412 authorized the Secretary of Defense to convey a certain parcel of land, it expressly stated that "[s]ection 574(a) of title 40, United States Code, shall apply to the consideration received." Pub. L. No. 108-136, § 2861(c), 117 Stat. 1392, 1736 (2003). Similarly, when Congress directed proceeds from the sale of surplus real property and related personal property to the Land and Water Conservation Fund ("LWCF"), it excluded proceeds governed by section 574. 16 U.S.C. § 460*l*-5(a) (providing that the LWCF receives "[a]ll proceeds (except so much thereof as may be otherwise obligated, credited, or paid under authority of those provisions of law set forth in section . . . 574(a)–(c) of title 40") hereafter received from any disposal of surplus real property and related personal property under the [Property Act], as amended, notwithstanding any provision of law that such proceeds shall be credited to miscellaneous receipts of the Treasury"). In light of these other provisions, the absence in section 412 of any reference to section 574 bolsters the conclusion that section 412 overrides "any other federal law," including section 574.

We accordingly believe that section 412 vests the Administrator of GSA with discretion to sell SSA-occupied buildings that have been acquired with money from the Social Security Trust Funds and to retain the net proceeds of those sales in the Federal Buildings Fund.

B.

Contending that section 412 would not displace the application of section 574 of the Property Act to the buildings at issue, SSA relies upon the canon of statutory interpretation that a general statute will not be construed to repeal a specific statute by implication, unless Congress expresses a clear intention to effect the repeal. SSA Supp. Memo at 2–3; *see generally Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) (noting the "strong presumption against repeals by implication, especially an implied repeal of a specific statute by a general one" (internal citation omitted)). SSA contends that section 412 "does not amend, expressly or implicitly, the more specific legislation that addresses a particular subset of real property proceeds [i.e., section 574]." SSA Supp.

Memo at 2–3. It further argues that the rule against implied repeal has special force with respect to provisions, such as section 412, that were enacted in appropriations laws. Alternatively, SSA contends that section 412 was a temporary measure that expired at the end of the 2005 fiscal year. *Id.* at 3.

We first consider the argument that "repeals by implication are especially disfavored in the appropriations context." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 440 (1992). Although section 412 was enacted as part of an appropriations statute, we do not believe that this admonition applies here, because section 412 is substantive legislation. A special rule for implied repeals by appropriations statutes is necessary because without it, "every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure." *Tenn. Valley Auth. v. Hill,* 437 U.S. 153, 190 (1978) ("*TVA*"). For this reason, the canon against implied repeal by appropriations bills is codified in the rules of both houses of Congress, including House Rule XXI(2)(b), H.R. Doc. No. 107-284, at 814 (2003) ("A provision changing existing law may not be reported in a general appropriation bill"); *see also* Senate Rule 16.4, S. Doc. No. 107-1, at 15 (2002). Citing House Rule XXI, the *TVA* Court observed that the absence of a presumption against implied repeal by appropriations statutes would "lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, [and] it would flout the very rules the Congress carefully adopted to avoid this need." *TVA*, 437 U.S. at 190; *see also United States v. Will*, 449 U.S. 200, 222 (1980) ("[T]he rules of both Houses limit the ability to change substantive law through appropriations measures."); *Andrus v. Sierra Club*, 442 U.S. 347, 359–60 (1979) (noting that the "rules of both Houses prohibit [substantive] legislation from being added to an appropriation bill" (internal quotation marks omitted)).

Here, the House rule cited by the *TVA* Court was invoked against the language in section 412 when it was being considered by the House acting as the Committee of the Whole. The provision that was enacted ultimately as section 412 first appeared in one of the several appropriations bills later incorporated into the 2005 Consolidated Appropriations Act—specifically, the identically worded section 409 of the Transporta-

tion, Treasury, and Independent Agencies Appropriations Act, H.R. 5025, 108th Cong. (as reported by H. Comm. on Appropriations, Sept. 8, 2004). During the debate over H.R. 5025, a member raised a point of order that section 409 violated House Rule XXI. 150 Cong. Rec. 18,426 (2004) (statement of Rep. Shays). The Chair sustained the objection and, as a result, section 409 was struck from H.R. 5025 before its passage by the House. *Id.* ("The Chair finds that this section [409] explicitly supersedes existing law. The section therefore constitutes legislation in violation of clause 2 of rule XXI."). When H.R. 5025, along with several other appropriations bills, was referred to the conference committee, however, section 409's authority for GSA to convey property and retain its proceeds was reinserted as section 412 of the Consolidated Appropriations Bill. *See* H.R. Rep. No. 108-792, at 665 (2004) (Conf. Rep.) (noting that the "conference agreement" included the "Transportation, Treasury, and Independent Agencies Appropriations Act, 2005 [H.R. 5025]").[10] In light of the determination under the House Rules that the language of section 412, as contained in section 409 of H.R. 5025, "supersede[d] existing law," 150 Cong. Rec. at 18,426, we believe that the special rule against "implied repeals" by appropriations measures does not apply to section 412.

More broadly, SSA contends that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." SSA Supp. Memo at 2–3 (quoting *Morton*, 417 U.S. at 550–51). We believe that section 412 reveals a sufficiently "clear intention" to supersede conflicting law, including provisions concerning specific types of federal property, such as section 574.[11] Congress made section 412 appli-

[10] Although section 412 is identical to section 409 of H.R. 5025, no objection appears to have been raised in the House against the inclusion of section 412 in the Consolidated Appropriations Act. But because the House chose to waive all points of order in the consideration of the omnibus appropriations bill, *see* H.R. Res. 866, 108th Cong. (2004), 150 Cong. Rec. at 25,051, we do not believe that this silence undercuts the House's earlier determination that the same language—contained in section 409 of H.R. 5025—"explicitly supersede[d] existing law."

[11] The conference report accompanying the passage of section 412 notes only that section 412 "allow[s] GSA to convey property and retain the proceeds in the Federal Buildings Fund." H.R. Rep. No. 108-792, at 1455 (2004). An earlier House Report sets out an identical description of the provision that became section 412. H.R. Rep. No. 108-671, at 147 (2004).

cable "notwithstanding any other provision of law," and although it expressly referred to section 574 in similar statutes about disposition of property or retention of proceeds, it omitted any such reference in section 412. *See United States v. DeCay*, 620 F.3d 534, 540 (5th Cir. 2010) (rejecting application of canon of specific trumps the general, noting that "'notwithstanding any other Federal law' clause signals a clear Congressional intent to override conflicting federal law"); *see also Novak*, 476 F.3d at 1055-56 (holding similar "notwithstanding" phrase constitutes, *inter alia*, "clear intention" for general statute to supersede arguably more specific statute). The intention to override provisions such as section 574 appears plain enough.

This conclusion is buttressed by the text of the Property Act, as amended in 2002, when Congress revised and recodified the provisions of the 1949 Act. *See* Pub. L. No. 107-217, 116 Stat. 1062. In section 5(b)(3) of the 2002 Act, Congress provided that "[t]his Act restates certain laws enacted before April 1, 2002. Any law enacted after March 31, 2002, that is inconsistent with this Act . . . supersedes this Act to the extent of the inconsistency." 116 Stat. at 1303 (codified as note preceding 40 U.S.C. § 101). This provision shows congressional intent to "suspend[ ]the Property Act's applicability" in the face of a subsequent, inconsistent statute. *Shawnee Tribe v. United States*, 423 F.3d 1204, 1215–16 (10th Cir. 2005) (noting that although section 5(b)(3) is "not an operative part of the statute itself," "th[e] statement was legislatively enacted as part of the public law and is a good indication of Congressional intent").[12] Thus, even if the

[12] In *Shawnee Tribe*, the Tenth Circuit held that a 2005 provision under which the Secretary of the Army could convey a former military installation on an Indian reservation overrode section 523 of the Property Act, which would have directed GSA to transfer that property to a tribe. 423 F.3d at 1215–16; *see also* 40 U.S.C. § 523(a) ("The Administrator of General Services shall prescribe procedures necessary to transfer to the Secretary of the Interior, without compensation, excess real property located within the reservation of any group, band, or tribe of Indians that is recognized as eligible for services by the Bureau of Indian Affairs.").

Moreover, the Tenth Circuit held that section 113 of the Property Act did not compel a different conclusion. Section 113 provides that (save for certain exceptions applicable neither here nor in the *Shawnee Tribe* case), the "authority conferred by this subtitle [including, as pertinent here, sections 523 and 574] is in addition to any other authority conferred by law and *is not subject to any inconsistent provision of law*." 40 U.S.C. § 113(a) (emphasis added). But in light of section 5(b)(3) of the 2002 Act, the court held that section 113 "stand[s] for the relatively unremarkable proposition that the Property

application of section 412 to Trust Fund buildings would be inconsistent with section 574 of the Property Act, section 412 would "supersede[]" section 574 "to the extent of the inconsistency," in accordance with section 5(b)(3) of the 2002 Act.

SSA alternatively contends that "even if Section 412 repealed or superseded 40 U.S.C. § 574, that effect expired at the close of Fiscal Year (FY) 2005 when the annual appropriations act expired." SSA Supp. Memo at 3. GSA argues that section 412 operates as "permanent" legislation that remained in effect beyond the end of the 2005 fiscal year ("FY 2005"). Indeed, GSA has collected approximately $136 million in net proceeds under its section 412 authority since the end of FY 2005.

To determine whether a provision in an appropriations measure operates as permanent law, we follow these "basic governing principles":

> While appropriation acts are "Acts of Congress" which can substantively change existing law, there is a very strong presumption that they do not, and that when they do, the change is only intended for one fiscal year. In fact, a federal appropriations act applies only for the fiscal year in which it is passed, unless it expressly provides otherwise. Accordingly, a provision contained in an appropriations bill operates only in the applicable fiscal year, unless its language clearly indicates that it is intended to be permanent.

Severability and Duration of Appropriations Rider Concerning Frozen Poultry Regulations, 20 Op. O.L.C. 232, 240 (1996) (quoting *Bldg. & Constr. Trades Dep't, AFL-CIO v. Martin*, 961 F.2d 269, 273–74 (D.C. Cir. 1992)). The "whole question" of permanence "depends on the intention of Congress as expressed in the statutes." *Id*. at 239 (internal quotation marks omitted). On balance, we believe that the text of section 412 shows that the provision remains in effect.

The text of section 412 accords with the conclusion that it is permanent legislation. As we have explained, Congress's intent to enact permanent legislation is "principally established though 'words of futurity or permanence,' such as the phrase 'to apply in all years hereafter.'" *Id*. at 240; *see*

Act trumps any pre-existing laws not specifically excluded by [section] 113 when it was re-enacted in 2002, but that the Congress . . . is free to change the Property Act's coverage in the future by any act enacted after March 31, 2002." *Shawnee Tribe*, 423 F.3d at 1216.

also, *e.g.*, *Whatley v. Dist. of Columbia*, 447 F.3d 814, 819 (D.C. Cir. 2006) (noting that phrase "[n]one of the funds appropriated under this Act, *or in appropriations Acts for subsequent fiscal years*" "clearly indicate[d] that it is intended to be permanent"). Section 412 provides that "all net proceeds realized under this section shall only be expended as authorized in annual appropriations Acts."[13] The reference to spending net proceeds pursuant to future spending legislation shows that, at a minimum, the authority to retain the net proceeds from property sales made under section 412 is permanent. If GSA's authority to retain the net proceeds of its dispositions under section 412 in the Federal Buildings Fund had been effective only for FY 2005, any such proceeds would presumably have been transferred from GSA's Federal Buildings Fund to the Treasury at the end of that fiscal year. Yet if GSA no longer retained any such net proceeds, it would have made little sense for Congress to have permitted GSA's "expend[itures]" of that money only "as authorized in annual appropriations Acts." Thus, the reference to future "annual appropriations Acts" presumes that GSA is able to retain the net proceeds collected under section 412 beyond FY 2005.[14]

It might be argued that while the authority to retain proceeds in the Federal Buildings Fund is permanent for proceeds of conveyances made in FY 2005, the authority to make those conveyances is limited to FY

[13] "[T]he words 'notwithstanding any other provision of law' are not words of futurity and, standing alone, offer no indication as to the duration of the provision." 1 Government Accountability Office, *Principles of Federal Appropriations Law* 2-36 (3d ed. 2004).

[14] The term "annual appropriations Acts" appears in a proviso, Consolidated Appropriations Act, div. D, § 412, 118 Stat. at 3259 ("*Provided*, That all net proceeds realized under this section shall only be expended as authorized in annual appropriations Acts"), and we recognize that words of futurity that "appear[] only in an exception clause" may apply only to that clause and not to the entire statute. *See Principles of Federal Appropriations Law* at 2-35. If the words of futurity were read as limited only to the proviso, the restriction on GSA's spending of net proceeds from conveyances in FY 2005 would be permanent, while the authorities contained in section 412's operative clause—both the authority to convey property and the authority to retain the net proceeds in the Federal Building Fund—would have expired at the end of FY 2005. We do not believe that section 412's words of futurity should be understood in this manner. Because the reference to future spending legislation presupposes the permanence of GSA's authority to retain the proceeds of its conveyances, section 412's words of futurity are applicable not only to the proviso in which those words are contained, but also to the statute's operative clause.

2005. There is no indication that Congress intended to divide section 412's operative provision—both the agency's authority to convey property and its authority to retain the net proceeds in the Federal Buildings Fund—into temporary and permanent parts. To the contrary, the closely connected nature of section 412's authorities to convey property and retain proceeds strongly indicates that both of these authorities were intended to be permanent. Unlike the Property Act, where GSA's disposal function (contained in subchapter III of chapter 5 of title 40 of the United States Code) is separate from its authority to retain proceeds (contained in subchapter IV), section 412 ties those two authorities in the same opening clause: "[GSA] may convey [property by various means] . . . and retain the proceeds of *such dispositions* in an account within the Federal Buildings Fund." 118 Stat. at 3259 (emphasis added). Accordingly, that GSA's authority to retain proceeds is permanent strongly suggests that the authority to convey property is likewise permanent.

Finally, we note that, although the views of the Comptroller General are not legally binding on the Executive Branch, *see Submission of Aviation Insurance Program Claims to Binding Arbitration*, 20 Op. O.L.C. 341, 343 n.3 (1996), the Government Accountability Office has also concluded that section 412 is permanent legislation. *See* Government Accountability Office, GAO-07-349, *Federal Real Property: Progress Made Toward Addressing Problems, but Underlying Obstacles Continue to Hamper Reform* at 19 n.24 (2007).

III.

For these reasons, we conclude that GSA has the authority to invoke the discretion afforded by section 412 in order to convey SSA property acquired with money derived from the Social Security Trust Funds and to retain any net proceeds in the Federal Buildings Fund.

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

EXHIBIT 18

Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding

Section 110 of the Housing and Community Development Act of 1974 requires that those engaged in construction work that is financed with federal funds (whether in whole or in part) receive wages at rates prevailing in the locality as determined by the Secretary of Labor under the Davis-Bacon Act. However, if the construction work is not financed with federal funds, the Davis-Bacon Act wage rates need not be paid, even if other aspects of the construction project, such as land, fixtures, or services, receive federal funds pursuant to the Act.

This question arose pursuant to a dispute between the Secretary of Labor and the Secretary of Housing and Urban Development in the course of exercising their respective authorities under the Act. The Office of Legal Counsel has jurisdiction to resolve the dispute pursuant to Executive Order No. 12146.

August 6, 1987

MEMORANDUM OPINION FOR THE SECRETARY,
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

This memorandum responds to your request for the opinion of the Attorney General on the proper interpretation of § 110 of the Housing and Community Development Act of 1974 (Act), 42 U.S.C. § 5310. The Attorney General has referred this matter to the Office of Legal Counsel for resolution.

I. Background

Title I of the Act authorizes the Secretary of Housing and Urban Development (HUD) to provide Community Development Block Grants (CDBG) and Urban Development Action Grants (UDAG) to States and localities for "the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c). Section 110 of the Act requires that "[a]ll laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates . . . determined by the Secretary of Labor in accordance with the Davis-Bacon Act." 42 U.S.C. § 5310.

In 1985, the Department of Labor took the view that § 110 requires payment of Davis-Bacon wages not only when UDAG and CDBG funds are used directly to pay for the activities commonly thought of as "construction" of a building, but also when those funds are used for other activities that are integrally and proximately related to that construction, even if no federal funds are expended directly for the construction work. The Department of Labor provided three examples of the application of this standard:

> For example, if UDAG or CDBG funds were used to acquire the land upon which construction was later to take place, that construction should be done with Davis-Bacon wages, even if all UDAG or CDBG dollars had been expended before the commencement of the direct construction activity. . . . Other such costs could include, for example, engineering and architectural fees, materials, and equipment or machinery to be installed as part of the building.

Letter to Robert A. Georgine, President, Building & Construction Trades Department, AFL-CIO from Susan R. Meisinger, Deputy Under Secretary for Employment, Department of Labor at 2 (July 31, 1985) (Labor Opinion).

HUD disputes this interpretation on the grounds that, in HUD's view, it would initiate a drastic departure from the consistent application of Davis-Bacon requirements under the Act. Accordingly, HUD requested that Labor reconsider the position taken in its July 31, 1985 letter. On July 21, 1987, the Secretary of Labor responded by withdrawing the "integrally and proximately related" test and stating that "the question must be whether the construction work is federally financed," and that "the mere use of federal funds to finance the purchase of land . . . does not trigger Davis-Bacon coverage under the statute." Letter to the Honorable Samuel R. Pierce, Jr., Secretary, Department of Housing and Urban Development, from the Honorable William E. Brock, Secretary, Department of Labor (July 21, 1987).

The Secretary of Labor's letter, however, reserved the question of "the application of Davis-Bacon requirements to projects on which UDAG/CDBG funds are used to purchase equipment installed as part of the project," and, apparently, the question of the application of Davis-Bacon requirements to non-federally funded construction work when federal funds are used to pay for "engineering and architectural fees." *Id.* After reviewing the Secretary of Labor's letter, the Secretary of HUD noted that the letter "does not resolve other issues . . . raised [in the Labor Opinion]. In particular, whether UDAG/CDBG financing of architectural and engineering fees and purchase of equipment would require prevailing wages on related private construction work is unanswered . . . . As your letter fails to resolve all the issues springing from the [Labor Opinion], I must continue to seek a comprehensive decision from the Attorney General." Letter to the Honorable William E. Brock, Secretary, Department of Labor, from the Honorable Samuel R. Pierce, Jr., Secretary, Department of Housing and Urban Development (July 28, 1987).

II. Discussion

A. Jurisdiction

Before turning to the substantive issues presented by your request, we address a threshold jurisdictional matter: whether the Attorney General, and hence this Office, has authority to render an opinion on the proper interpretation of the Housing and Community Development Act at the request of the Secretary of HUD. The Department of Labor has suggested that Reorganization Plan No. 14 of 1950, 15 Fed. Reg. 3176 (*reprinted in* 5 U.S.C. app. at 1050 (1982) *and in* 64 Stat. 1267 (1950)), precludes the Attorney General from rendering such an opinion. In its view, the Secretary of Labor has the exclusive authority to issue a ruling concerning the proper interpretation of the Davis-Bacon provisions of the Housing and Community Development Act. This view, however, misconstrues the Reorganization Plan as well as the authority and functions of the Attorney General and the Secretary of Housing and Urban Development.

Section 110 of the Act provides:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. §§ 276a, 276a-5) . . . The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of title 40.

42 U.S.C. § 5310. The Reorganization Plan, in turn, provides:

> In order to assure coordination of administration and consistency of enforcement of the labor standards provisions of each of the following Acts by the Federal agencies responsible for the administration thereof, the Secretary of Labor shall prescribe appropriate standards, regulations, and procedures, which shall be observed by these agencies . . . .

Reorganization Plan No. 14 of 1950, 15 Fed. Reg. 3176 (*reprinted in* 5 U.S.C. app. at 1050 (1982) *and in* 64 Stat. 1267 (1950)).

Labor argues that its interpretation of § 110 constitutes an appropriate standard, regulation, or procedure to enforce the labor standard provisions of the Act. But even assuming the validity of this argument, the Reorganization Plan speaks only to the respective functions of HUD and Labor in administering the Housing and Community Development Act. The Reorganization Plan does not preclude either the head of a department from seeking, or the Attorney General

from rendering, an opinion on a question of law arising in the administration of his department.

By law, "[t]he head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department." 28 U.S.C. § 512. The only limitation on the right of the head of an executive department to obtain an opinion of the Attorney General is that the question presented must be one that actually arises in the administration of his department. *See* 31 Op. Att'y Gen. 234 (1918); 31 Op. Att'y Gen. 127 (1917); 20 Op. Att'y Gen. 178 (1891). Thus, the initial inquiry is whether the question presented by the Secretary of HUD — whether the acquisition of land, fixtures, or architectural and engineering services with federal assistance requires a finding that "integrally and proximately related" construction work paid for entirely with non-federal funds must be deemed financed in whole or in part with federal assistance — is one "arising in the administration of his department" within the meaning of 28 U.S.C. § 512.

We think that it clearly is. The Secretary of HUD is charged with the administration of the Act. The interpretation given to § 110 determines the nature and contents of the contracts the Secretary must enter into with state and local recipients of UDAG and CDBG funds. As the Secretary stated in his letter of May 13, 1987, to the Attorney General:

> The need for a resolution of this dispute is even more urgent now than when I wrote you last October: the construction season has begun; our Urban Development Action Grant (UDAG) submissions are due in May and July; and the majority of our Community Development Block Grant (CDBG) submissions will be coming in the next two months.

Letter to the Honorable Edwin Meese III, Attorney General, from the Honorable Samuel R. Pierce, Jr., Secretary, Department of Housing and Urban Development (May 13, 1987). The Reorganization Plan confirms this conclusion. The Plan itself recognizes that although federal agencies must observe "appropriate standards, regulations, and procedures" prescribed by the Secretary of Labor, these agencies remain responsible for the administration of the underlying Acts. As the Message of the President accompanying the Reorganization Plan states: "The actual performance of enforcement activities . . . will remain the duty of the respective agencies awarding the contracts or providing the Federal assistance." 5 U.S.C. app. at 1050–51 (1982).

Our conclusion that the Secretary is entitled by law to the opinion of the Attorney General is consistent with the analysis and conclusion of Attorney General Levi in a situation virtually identical to this one. *See* 43 Op. Att'y Gen. No. 8 (Jan. 11, 1977). There, the Secretary of Commerce sought the opinion of the Attorney General concerning the meaning of the phrase "contractors or subcontractors" as used in § 109 of the Local Public Works Capital Development and Investment Act of 1976. That section, in language virtually identical to that of § 110, provides:

> All laborers and mechanics employed by contractors or subcontractors on projects assisted by the Secretary under this Act shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. §§ 276a-276a-5). . . . The Secretary of Labor shall have, with respect to the labor standards specified in this provision, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267; 5 U.S.C. §§ 133z-15), and section 2 of the Act of June 13, 1964, as amended (40 U.S.C. § 276c).

The Secretary of Labor took the position that the phrase included state and local governments who performed construction work with their own work force. The Secretary of Commerce disagreed, contending that the terms "contractors or subcontractors" could refer only to those who contracted with laborers and mechanics to perform the work. The Attorney General rejected the Labor Department's claim that he was without authority to render the requested opinion, finding that "the Secretary of Commerce's administrative responsibility for implementation of the Local Public Works Act at least requires him to satisfy himself concerning any doubts he may have regarding the lawfulness of the Secretary of Labor's determination, and permits him to seek my advice for that purpose." 43 Op. Att'y Gen. No. 8, at 3. The opinion continued:

> This conclusion will be seen as particularly appropriate when it is recognized that, as will be discussed below, the present controversy does not involve a uniform interpretation which the Secretary of Labor seeks to apply to the Davis-Bacon Act and all related acts, but rather a special rule applicable to the Local Public Works Act. To the extent the outcome hinges upon the peculiar text or peculiar circumstances of that law, the policy considerations supporting an assertion of exclusive cognizance in the Secretary of Labor become less persuasive, and the issue becomes more appropriate for — if not resolution by the Secretary of Commerce — at least examination by the Attorney General at the Secretary's instance.

Id. at 3–4. This passage applies with equal force to the present request.

Executive Order No. 12146, concerning the resolution of interagency legal disputes, does not alter this conclusion. Executive Order No. 12146 provides in pertinent part:

> 1–401. Whenever two or more executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

> 1–402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

Section 1–401 authorizes and encourages executive agencies to submit their legal disputes to the Attorney General. This provision applies not only to the executive departments, but also to all other agencies in the Executive Branch. Executive Order No. 12146 thus expands the authority of the Attorney General to render legal opinions beyond his statutory obligation to render opinions at the request of the heads of executive departments on questions of law arising in the administration of their departments. *See* 28 U.S.C. § 512.[1]

In addition, when the heads of the agencies serve at the pleasure of the President, § 1–402 *requires* the agencies to submit legal disputes they are unable to resolve to the Attorney General "except where there is specific statutory vesting of responsibility for a resolution elsewhere." Labor contends that the exception precludes resolution of the current dispute by the Attorney General. Even assuming, however, that Reorganization Plan No. 14 of 1950 — directing the Secretary of Labor to prescribe appropriate labor-related standards, regulations, and procedures — constitutes "specific statutory vesting of responsibility for a resolution" of the present dispute within the Secretary of Labor, the reorganization legislation in no sense affects the authority of the head of an executive department to seek, or the Attorney General to render, an opinion under 28 U.S.C. § 512 on questions of law that arise in the administration of his department. Rather, under the above assumption, Reorganization Plan No. 14 of 1950 at most would mean that § 1–402 of Executive Order No. 12146 does not *require* the Secretaries of HUD and Labor to submit this legal dispute to the Attorney General.

Thus, Executive Order No. 12146 is not fully apposite to the present request. Neither Reorganization Plan No. 14 of 1950 nor Executive Order No. 12146 purport in any way to preclude the head of an executive department from requesting the opinion of the Attorney General on questions of law arising in the administration of his department. Since 1789, it has been the duty of the Attorney General "to give his advice and opinion upon questions of law . . .

[1] Under 28 U.S.C. § 512, Attorneys General have felt constrained to decline requests for legal opinions from executive agencies not within one of the executive departments. *See, e.g.*, 37 Op. Att'y Gen. 488, 490 (1934) (declining to give an opinion at the request of the Reconstruction Finance Corporation on the ground that "the Attorney General is authorized to render opinions only upon the request of the President or the head of an executive department"); 20 Op. Att'y Gen. 312, 313 (1892) (stating that the "Civil Service Commission is not included within any of the great Departments of Government" and that "[u]ntil the Commission shall request the President, to whom they are directly responsible, to present the question of law arising in the discharge of their duties to the Attorney General, he is not called upon to give, and should not under the law give, his opinion"). With the promulgation of Executive Order No. 12146, the President has authorized all executive agencies to request the opinion of the Attorney General whenever a legal dispute arises between such agencies.

when requested by the heads of any of the departments, touching any matters that may concern their departments." Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 93. Accordingly, by law, the heads of executive departments may require the opinion of the Attorney General, *regardless of whether a dispute exists on the question within the Executive Branch. See* 28 U.S.C. § 512. All that is required is that the question presented be one arising in the administration of the department whose head requests the opinion. Thus, even if HUD had never disagreed with Labor's interpretation of § 110 the Secretary of HUD would be entitled to request and receive the opinion of the Attorney General on that question. It goes without saying, therefore, that the Secretary of Labor's withdrawal of the Labor Department's prior interpretation of § 110 in no way relieves the Attorney General of his statutory authority — indeed, his responsibility — to provide the Secretary of HUD with his opinion.[2] The presence or absence of a contrary or consistent Labor Department interpretation is simply irrelevant to the Secretary's statutory right "to require the opinion of the Attorney General." 28 U.S.C. § 512. Because the Secretary of HUD has not withdrawn his request, the Attorney General's legal obligation is to render an opinion on the question presented.

Finally, the Attorney General's authority to give his opinion at the request of the Secretary is also confirmed by 28 U.S.C. § 516 and 5 U.S.C. § 3106. The former reserves generally to the Attorney General the conduct of all litigation in which the United States, an agency, or officer thereof is a party. The latter generally prohibits the head of an Executive department from employing an attorney for the conduct of litigation in which the United States, an agency, or an employee thereof is a party, requiring instead that the matter be referred to the Department of Justice. Both provisions admit of exceptions only when "otherwise authorized by law." Although Congress has established "a solicitor for the Department of Labor," 29 U.S.C. § 555, the solicitor has no general litigating authority; his authority is narrowly drawn, *see* 29 U.S.C. § 663 (representation of the Secretary of Labor in occupational safety and health litigation); 29 U.S.C. § 1852(b) (litigation for the protection of migrant and seasonal workers); 30 U.S.C. § 822 (representation of the Secretary of Labor in mine safety and health litigation), and nevertheless "subject to the direction and control of the Attorney General." *Id.* The Attorney General's authority to conduct litigation on behalf of the United States necessarily includes the exclusive and ultimate authority to determine the position of the United States on the proper interpretation of statutes before the courts. Thus, because this question of the proper interpretation of § 110 is the subject of pending litigation to which the Secretary of HUD is a party, *see Dairy Development Ltd.* v. *Pierce*, Civ. Action No. 86–1353–R (W.D. Okla.), the Attorney General has both the authority and the obligation to decide the question presented by the Secretary of HUD.

[2] *See* 2 Op. Att'y Gen. 311 (1830), in which Attorney General Berrien observed "that it is made my duty to give my opinion on all questions referred to me by the heads of departments 'touching any matters that may concern their departments.'" *Id.* at 311.

B. Substantive Issues

Section 110 of the Act provides:

> All laborers and mechanics employed by contractors or subcontractors in the performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. § 276a, 276a-5): Provided, That this section shall apply to the rehabilitation of residential property only if such property is designed for residential use for eight or more families. The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and section 276c of title 40.

42 U.S.C. § 5310.

We adhere to the well-established principle that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'n Fly, Inc.* v. *Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985); *see American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982); 2A N. Singer, *Sutherland's Statutory Construction* § 46.04 (4th ed. 1984). The operative language of § 110 is "construction work financed in whole or in part with assistance received under this chapter." 42 U.S.C. § 5310. The narrow question is whether the use of CDBG or UDAG funds to pay for the land, fixtures, or services — but not for the construction work — associated with a particular project means that the construction work is "financed in whole or in part with" such funds within the meaning of the Act. We think the language used in § 110 indicates that it is not.

Construction work that is part of a project receiving federal funds to pay for non-construction activities of the project is, of course, benefited indirectly by such funds because the federal funds reduce the total amount of nonfederal funds needed to finance the project. Nevertheless, the construction work itself is not financed with the federal funds that are used to pay for the project's other activities. The ordinary meaning of the verb, "finance," is "to raise or provide funds or capital for" or "to furnish with necessary funds." *Webster's Ninth New Collegiate Dictionary* 463 (1986). Because the funds used to finance the construction work are nonfederal, the only way to conclude that the statute applies is, in effect, to substitute "construction project" for "construction work." Such a construction, however, conflicts with both the statutory language and its history.

The language of § 110, requiring the payment of Davis-Bacon wages when "construction work" is financed with federal funds,[3] contrasts sharply with the broader, project-oriented approach of several other federal statutes. For example, the labor standards section of the Public Works and Economic Development Act of 1965 provides that "[a]ll laborers and mechanics employed by contractors or subcontractors on *projects* assisted by the Secretary under this chapter shall be paid [Davis-Bacon] wages." 42 U.S.C. § 3222 (emphasis added). Similarly, a 1974 amendment to the United States Housing Act of 1937 states that "[a]ll laborers and mechanics employed by contractors or subcontractors in housing or development *activities* assisted under this section shall be paid [Davis-Bacon] wages." 42 U.S.C. § 1440(g) (emphasis added).

The latter provision is particularly significant because it was enacted as part of the Housing and Community Development Act of 1974, *see* Pub. L. No. 93–383, § 802(g), 88 Stat. 633, 724, the same Act that contains the provision under consideration here. *See id.* § 110, 88 Stat. at 649. Sections 110 and 802(g) of the Act are identical in all material respects except that the former is triggered by federal funding of "construction work" and the latter by federal assistance to "housing or development activities." By its terms, § 802(g) requires more expansive Davis-Bacon coverage than § 110. Thus, the argument that § 110 requires the payment of Davis-Bacon wages whenever any activity associated with a particular project (such as the acquisition of land, fixtures, or architectural and engineering services) is financed with federal funds, even though the project's construction work is not, negates the distinction between the effect of the two provisions, in contravention of the clear and unambiguous language of the Act.

The conclusion that § 110 requires payment of Davis-Bacon wages only when construction work is financed with federal funds is also suggested by the history of the Act. The version of the Act considered initially by the Senate would have required the payment of prevailing wages to "[a]ll laborers and mechanics employed by contractors and subcontractors in the performance of *work on any construction project financed in whole or in part with funds received under this chapter*." S. 3066, 93d Cong., 2d Sess. 314 (1974) (emphasis added). A "construction project" necessarily encompasses all activities needed in order to undertake and complete the project, most notably, the purchase of land, equipment, and raw materials, as well as actual construction. Thus, under the Senate bill, federal funding of any activity associated with a construction project would constitute partial federal financing of the project and trigger the requirement that prevailing wages be paid to all laborers and mechanics employed by contractors and subcontractors in the performance of work on the project. The report accompanying the Senate bill acknowledges the breadth of the Senate proposal, stating that the Senate bill would require the payment of prevailing wages "with respect to all multifamily housing projects

[3] *Accord* 49 U.S.C. app. § 1609(a) (requiring the payment of Davis-Bacon wages to "laborers and mechanics employed by contractors or subcontractors in the performance of *construction work* financed with the assistance of loans or grants under this chapter") (emphasis added).

. . . , health facilities, and land development projects." S. Rep. No. 693, 93d Cong., 2d Sess. 36 (1974).

The House bill, by contrast, would have required payment of prevailing wages to laborers and mechanics employed by contractors and subcontractors only "in the performance of *construction work financed in whole or in part with assistance received under this chapter.*" H.R. 15361, 93d Cong., 2d Sess. 110 (1974) (emphasis added). As discussed, construction work is merely one element of a construction project. The specific inquiry under the House provision, then, is whether federal funds are used to finance construction work. Whether federal funds are used to finance any other activity associated with the construction project is immaterial. The House Report reiterates the specific focus of the House provision, stating that the House bill would require the payment of prevailing wages to workers employed on "construction funded under this title." H.R. Rep. No. 1114, 93d Cong., 2d Sess. 55 (1974). Thus, whereas the Senate bill would have required payment of prevailing wages whenever federal funds were used to finance any part of a construction project (including construction work), the House bill would have required the payment of such wages only when the activity financed with federal funds was construction work.

With minor changes not relevant here, the Conference Committee adopted the labor standards provision of the House bill. As the Conference Report states, "[t]he conference report contains the House provision with a technical amendment." H.R. Conf. Rep. No. 1279, 93d Cong., 2d Sess. 133 (1974). As finally enacted, § 110 applied only to "construction work financed in whole or in part with grants received under this title."

We recognize that neither the Conference Report nor the floor debates contain an explanation of the conference decision to adopt the "construction work" language of the House bill instead of the "project" approach of the Senate bill.[4] This lack of legislative discussion hardly yields a conclusion that

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[4] The Conference Report explains:

> The Senate bill applied the prevailing wage requirements of the Davis-Bacon Act to residential construction involving 12 or more units and to rehabilitation involving 8 or more units The House amendment applied such requirements only to the construction of 8 or more units without reference to rehabilitation. The conference report contains the House provision with a technical amendment making it clear that the requirement applies only to rehabilitation, since construction of residential structures is not a permissible use of community development funds.

H.R. Conf. Rep. No. 1279, 93d Cong., 2d Sess. 133 (1974). Contrary to Labor's suggestion, this discussion does not necessarily reveal the *exclusive* reason for Congress' adoption of the House provision. The selection of the House provision was consistent with Congress' desire to carry forward the Davis-Bacon coverage of the Housing Act of 1949. Under the 1949 Act, Davis- Bacon wage requirements applied only to the "undertakings and activities of a local public agency in an urban renewal area." 42 U.S.C. § 1460 (1976). Thus, all privately undertaken construction and activity, even though part of a project receiving federal assistance, was exempt from Davis-Bacon requirements. Section 105 of the 1974 Act, delineating the activities eligible for CDBG funding, specifically includes "payment of the cost of completing a project funded under title I of the Housing Act of 1949 " 42 U.S.C. § 5305(a)(10). By choosing the labor standards provision of the House bill, Congress ensured that the use of CDBG funds to complete outstanding projects would not result in expanding Davis-Bacon coverage to the privately funded construction work associated with such projects because such work is not financed in whole or in part with federal funds. The Senate bill,

Continued

Congress intended Davis-Bacon coverage to be less restrictive than the choice of the House provision would suggest. Such an anomalous conclusion would ignore the best evidence of congressional intent — the language adopted. That language is clear, and evinces an unambiguous intent to require less Davis-Bacon coverage than the Senate bill.[5]

Because there have been numerous, inconsistent interpretations of § 110 to various activities in the past, we pause to consider several applications of § 110 in light of our interpretation of the Act. For example, HUD has previously agreed with Labor that the use of CDBG or UDAG funds to purchase equipment may require the payment of prevailing wages with respect to the installation of the equipment when such installation involves "more than an incidental amount" of construction work. *See* Letter to John S. Selig, Esq., Mitchell, Williams, Selig, Jackson & Turner, from Justin L. Logsdon, Assistant to the Secretary for Labor Relations, Department of Housing and Urban Development (Dec. 1, 1986) (advising that Davis-Bacon requirements do not apply to the installation of federally funded equipment where the cost of installation is only 1.5 percent of the cost of the equipment). Assuming that installation of equipment constitutes or requires "construction work,"[6] we believe that § 110 does not require the payment of prevailing wages with respect to installation where federal funds are provided exclusively for the purchase of equipment and not for its installation. Thus, to the extent that Labor and HUD have adopted a contrary interpretation of § 110, they have misconstrued the Act.

[4] (. . . continued)
by contrast, would have required the payment of prevailing wages for construction work exempt under the 1949 Act. This is so because construction work is part of a construction project, and the Senate bill would have required the payment of Davis-Bacon wages whenever "any construction project is financed in whole or in part with [federal] funds."

Moreover, we wish to stress that Congress need not express an intent that clear language means what it says. Indeed, legislative history tending to contradict the plain meaning of a statute is often discounted. Here, where we have no expression in the legislative history of a congressional intent contradicting the plain language of § 110, the statutory language necessarily controls.

[5] This conclusion is consistent with the subsequent amendments to the Act authorizing the Urban Development Action Grant program *See* 42 U.S.C. § 5318 The UDAG program authorizes grants to cities and urban areas experiencing severe economic distress to help stimulate economic development activity. *Id.* § 5318(a). Under the program, the Secretary (1) must determine that there is a strong probability that without the grant, the nonfederal investment in the project would not be made, *id.* § 5318(j), and (2) "assure that the amount of the grant is the least necessary to make the project feasible." *Id.* § 5318(k). Thus, the UDAG program is designed to encourage and leverage nonfederal investment in depressed urban areas. In fact, the average UDAG project has involved six nonfederal dollars for every dollar of UDAG funds. Significantly, Congress did not change the "construction work" focus of Section 110 in adding the UDAG program to the Act. This means that if UDAG funds are used exclusively to finance the non-construction work activities of a particular project (as they often are), Davis-Bacon wages need not be paid. A conclusion that Section 110 required the payment of prevailing wages under these circumstances would substantially impair the intended effect of the program. Because the program is designed to minimize the amount of federal funds necessary to cause a project to go forward, a requirement that Davis-Bacon wages be paid with respect to the entire project could significantly increase (conceivably in excess of the total federal investment) the amount of nonfederal funds needed for the project. Given the language of Section 110 and the general, although admittedly not wholly consistent, practice of HUD to require the payment of Davis-Bacon wages only when federal funds are used to finance construction work, it is reasonable to conclude that Congress added the UDAG program with this understanding in mind. A construction of Section 110 expanding its traditional scope, therefore, could significantly undermine the program in terms of its cost and effect.

[6] If in a given case installation does not entail construction work, then § 110 is inapplicable in any event.

Similarly, we agree with Labor's position that "UDAG or CDBG financing of certain 'soft costs' would not, in and of itself, trigger Davis-Bacon coverage for building construction when there was no direct UDAG or CDBG financing of the actual construction." Labor Opinion at 2. Labor gave as examples of such "soft costs" legal services and tenant allowances for purchasing furniture or obtaining business licenses. *See id.* In short, we do not believe that § 110 requires payment of Davis-Bacon wages when federal funds are used to pay for any activity other than construction work. So long as no part of the cost of construction work is paid for with UDAG or CDBG funds, § 110 does not apply.

Conclusion

Given the language of § 110 and Congress' contemporaneous rejection of alternative language that expressly would have required the payment of Davis-Bacon wages for all work associated with any "construction project," not just "construction work," we conclude that the Act requires the payment of prevailing wages only when federal funds are used to pay for construction work. The mere use of federal funds to acquire the land upon which that work is to take place does not constitute federal financing of the construction work.

Similarly, the use of federal funds either to purchase materials, equipment, machinery, or other fixtures installed during the construction work or to pay for the architectural and engineering services rendered prior to that work, does not trigger Davis-Bacon coverage when no federal funds are used to pay for the construction work itself.

CHARLES J. COOPER
Assistant Attorney General
Office of Legal Counsel

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	No. 1:16-cv-1068 (Calendar Committee)

DEFENDANT'S RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS

Pursuant to Local Civil Rule 7(h), Defendant United States Department of Justice hereby submits the following response to Plaintiff's statement of material facts:

Plaintiff's Statement	Defendant's Response
1. The Office of Legal Counsel ("OLC") is a component of the Department of Justice ("DOJ") that provides controlling legal advice to executive agencies by rendering formal written opinions that resolve questions of law upon the request of one or more agencies. Stip. ¶¶ 1, 3–5, ECF No. 56.	Not disputed.
2. In performing this function, the OLC exercises the delegated authority of the attorney general under the Judiciary Act of 1789. *Id*.	Not disputed.
3. The Judiciary Act of 1789 requires the attorney general	Not disputed.

Plaintiff's Statement	Defendant's Response
to issue opinions on questions of law when requested to do so by the heads of executive departments. Stip. ¶ 2.	
4. In 1849, then–Attorney General Reverdy Johnson explained that the attorney general's opinions issued under the Judiciary Act "should be considered as law." Declaration of Stephanie Krent ("Krent Decl.") Ex. 1, *Opinions of Attorneys General and Decisions of Auditors*, 5 Op. Att'y Gen. 97, 97 (1849).	Not disputed.
5. In 1854, then–Attorney General Caleb Cushing stated that the attorney general's opinions "officially define the law, in a multitude of cases, where his decision is in practice final and conclusive" and that the opinion-writing function is "quasi judicial." Krent Decl. Ex. 2, *Office and Duties of Attorney General*, 6 Op. Att'y Gen. 326, 333–34 (1854).	Not disputed.
6. In 1893, then–Attorney General Richard Olney wrote that, in passing the JudiciaryAct, Congress "contemplates that the official opinions signed or [e]ndorsed in writing by the Attorney-General shall have some actual and practical force. Congress's intention cannot be doubted that administrative officers should regard them as law until withdrawn by the Attorney-General or overruled by the courts . . . ." Krent Decl.	Not disputed.

Plaintiff's Statement	Defendant's Response
Ex. 3, *Comptroller – Solicitor of the Treasury – Attorney-General*, 20 Op. Att'y Gen. 654, 659 (1893).	
7. The office now known as the OLC originated in 1925, when the attorney general delegated his opinion-writing authority to the Office of the Solicitor General. Stip. ¶ 3. In 1950, the responsibility for the Justice Department's opinion-writing was transferred to a newly created office, then known as the Executive Adjudications Division. *Id*. Renamed as the Office of Legal Counsel in 1953, the Office is headed by an assistant attorney general that reports directly to the deputy attorney general. *Id*.	Not disputed.
8. The OLC's currently operative Best Practices Memo explains that formal written opinions issued by the OLC frequently provide "the final word on the controlling law." Stip. Ex. A, Memorandum from David J. Barron, Acting Assistant Attorney General to Attorneys of the Office of Legal Counsel, *Best Practices for OLC Legal Advice and Written Opinions* (July 16, 2010) (the "Best Practices Memo") at 1, ECF No. 56-1.	Not disputed.
9. The OLC often issues opinions that resolve legal disputes between two or more agencies. Stip. ¶ 7.	Disputed. As stated in the agreed stipulation of facts,

Plaintiff's Statement	Defendant's Response
	OLC "is occasionally asked" to draft such opinions, not "often." Stip. ¶ 17.
10. Executive Order 12,146, issued in 1979 by then–President Carter, requires that all executive agencies whose heads "serve at the pleasure of the President" submit interagency disputes to the attorney general for resolution. Stip. ¶ 8. Independent agencies are also encouraged to submit their disputes to the attorney general. *Id.* By regulation, the role of resolving disputes between two or more agencies has been delegated to the OLC. *Id*.	Not disputed.
11. In 1989, then–Attorney General Richard Thornburgh wrote a letter to Congress that explained the unique role that opinions resolving interagency disputes play within the executive branch: "OLC has long performed this role, which is reflected in Executive Order 12146 (enclosed), issued during the Carter Administration and continued in effect ever since. As you can see, its purpose was to authorize the Attorney General, and, hence, OLC, to resolve legal disputeswithin the Executive Branch. Without the ability to issue binding opinions, OLC's	Not disputed.

Plaintiff's Statement	Defendant's Response
review function would have less effect in resolving disputes and maintaining a consistent legal position within the Administration." Krent Decl. Ex. 6, *FBI Authority to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Const. Rights of the H. Comm. on the Judiciary*, H.R. Rep. No. 101-134, at 122 (1989) (Letter from Richard Thornburgh, Att'y Gen. of the United States).	
12. Then–Attorney General William P. Barr likened the OLC's resolution of interagency disputes to judicial review in 1992: "Because each agency has its own staff of lawyers, disputes between them come before the Attorney General with legal positions already well-established. Each agency will usually have legal authority or good arguments to support its view. The Office of Legal Counsel requires each side to come in with briefs, just as if it were a judicial proceeding. Deciding among the positions being taken requires the Attorney General—or in most cases the Office of Legal Counsel—to function as a judge." *See* Krent Decl. Ex. 5, William P. Barr, *Attorney General's Remarks, Benjamin N. Cardozo School of Law, November 15, 1992*, 15 Cardozo L. Rev. 31, 37 (1993).	Not disputed.
13. The OLC may become aware of interagency disputes in	Not disputed.

Plaintiff's Statement	Defendant's Response
multiple ways. Stip. ¶ 10. The agencies with conflicting legal positions may jointly submit a request for OLC to resolve their dispute. *Id*. A single agency may also notify the OLC that it is involved in a dispute with another agency. *Id*. Finally, a dispute between agencies may emerge during the course of the OLC's opinion-writing when the agencies submit differing views of the law to the OLC. *Id*.	
14. The OLC is not aware of any instance in which it declined to resolve an interagency dispute when the agencies in the dispute maintained their conflicting legal positions. Stip. ¶ 7. The issuance of a formal written opinion is also most likely to be necessary when the OLC is acting in its dispute-resolution role. Best Practices Memo at 3.	Not disputed.
15. The following are examples of OLC opinions resolving interagency disputes: a. *Application of the Endangered Species Act of 1972 to the Sale of Sperm Whale Oil by the General Services Administration* (1974). Krent Decl. Ex. 7. b. *Whether Reservists Must Exhaust Available Leave Under 5 U.S.C. § 6323(b) Before Taking Leave Under 5 U.S.C. § 6323(a)*, 36 Op. O.L.C. 129 (2012).	Not disputed.

Plaintiff's Statement	Defendant's Response
Id. Ex. 8. c. *EEOC Authority to Order Federal Agency to Pay for Breach of Settlement Agreement*, 38 Op. O.L.C. 1 (2014). *Id.* Ex. 9. d. *Authority of the Department of Labor to Control the Disclosure of Federal Employees' Compensation Act Records Held by the United States Postal Service*, 36 Op. O.L.C. 217 (2012). *Id.* Ex. 10. e. *Payment of Back Wages to Alien Physicians Hired Under H-1B Visa Program*, 32Op. O.L.C. 47 (2008). *Id.* Ex. 11 f. *Administrative Assessment of Civil Penalties Against Federal Agencies Under the Clean Air Act*, 21 Op. O.L.C. 109 (1997). *Id.* Ex. 12. g. *Authority of the Equal Employment Opportunity Commission to Impose Monetary Sanctions Against Federal Agencies for Failure to Comply with Orders Issued by EEOC Administrative Judges*, 27 Op. O.L.C. 24 (2003). *Id.* Ex. 13. h. *Obligating Carryover Funds in Violation of OMB Zero-Dollar Apportionment Rule*, 40 Op. O.L.C. 90 (2016). *Id*. Ex. 14.	

Plaintiff's Statement	Defendant's Response
i. *Service Credit for Retirement Annuities of USPS Employees When USPS Has Not Made Required Contribution*, 35 Op. O.L.C. 181 (2011). *Id.* Ex. 15. j. *Obligation of Federal Agencies to Pay Stormwater Assessments Under the Clean Water Act*, 35 Op. O.L.C. 1 (2011). *Id.* Ex. 16. k. *Disposition of Proceeds from the Sale of Government Buildings Acquired with Social Security Trust Funds*, 34 Op. O.L.C. 263 (2010). *Id.* Ex. 17. l. *Application of the Davis-Bacon Act to Urban Development Projects that Receive Partial Federal Funding*, 11 Op. O.L.C. 92 (1987). *Id.* Ex. 18.	
16. When resolving interagency disputes, OLC attorneys follow the process outlined in the Best Practices Memo. Stip. ¶ 13; *see also* Best Practices Memo at 1.	Not disputed.
17. The OLC solicits detailed memoranda from each agency involved in the dispute, which explain each agency's analysis of the legal questions at issue. Best Practices Memo at 3. The OLC may also solicit memoranda from additional agencies who may have subject-matter expertise or a special interest in the question presented. *Id.*; Stip. ¶¶ 15–16.	Not disputed.

Plaintiff's Statement	Defendant's Response
18. The OLC may also request that one or more agencies submit reply memoranda responding to the arguments made by other agencies. Best Practices Memo at 3.	Not disputed.
19. The OLC ensures that all agencies who submit memoranda share them with all other agencies who are involved in the dispute. Stip. ¶ 17.	Disputed. As stated in the agreed stipulation of facts, OLC "expects" submitting agencies to share their submissions or permit them to be shared. Stip. ¶ 17.
20. When drafting an opinion, OLC attorneys are instructed to fully consider each point raised in agencies' memoranda, as well as traditional sources of constitutional and statutory meaning, including the relevant textual provision, the text's structure and purpose, and judicial and executive branch precedent. Best Practices Memo at 2, 4.	Not disputed.
21. OLC attorneys are also instructed to focus their analysis on the central legal dispute presented by an opinion request, to avoid opining on abstract questions, and to address the arguments raised by each party to the interagency dispute. Best	Not disputed.

Plaintiff's Statement	Defendant's Response
Practices Memo at 2, 4.	
22. Before an opinion is signed and finalized, it undergoes what the OLC considers a "rigorous review" process. Best Practices Memo at 4. The attorney assigned to draft a formal written opinion and the primary deputy responsible for the opinion may exchange several drafts of an opinion. *Id*. Once they are satisfied the opinion is ready for secondary review, they provide the draft opinion to a second deputy attorney general. *Id*. Once that review is complete and all comments and edits have been addressed, the opinion is next circulated to the assistant attorney general in charge of the OLC, all remaining deputy attorney generals, and any other attorneys within the OLC who have relevant expertise. *Id*.	Not disputed.
23. During the review process, the OLC may also discuss the opinion or share a draft opinion with the Office of the Attorney General, the Office of the Deputy Attorney General, or the agencies involved in the dispute. Best Practices Memo at 4. The OLC may also share a draft with other executive agencies, particularly when the draft relates to an agency's area of expertise or its operations. Stip. ¶ 18. The OLC does not require the consent of the agencies involved in the dispute	Not disputed.

Plaintiff's Statement	Defendant's Response
before sharing drafts in this manner. Id.	
24. Once an opinion is completed and cite-checked, it is printed on bond paper and signed by the attorney who drafted the opinion. Best Practices Memo at 4. Completed unclassified opinions are added to the OLC's database and included in its "day books." *Id*. The OLC also maintains separate files of all signed opinions, opinion control sheets, and copies of the original request, the submissions of interested agencies, and any obscure sources cited in the opinion so that future OLC attorneys may refer back to the opinion and its underlying sources. *Id*. at 4–5.	Not disputed.
25. Although the OLC does not currently store or identify its opinions resolving interagency disputes separately from other formal opinions, it has the capacity to maintain records that would identify opinions resolving interagency disputes in the future. Stip. ¶ 12.	Not disputed.
26. After they are finalized, OLC opinions resolving interagency disputes are accorded precedential weight. Best Practices Memo at 2. OLC attorneys may cite past completed opinions in the way they would cite a judicial opinion, and may not depart from a past opinion's holding unless it has been	Disputed. As stated in the Best Practices Memo, "OLC opinions should consider and ordinarily give great weight to any

Plaintiff's Statement	Defendant's Response
formally withdrawn. *Id*.	relevant past opinions of Attorneys General and the Office" and "should not lightly depart from such past decisions," *id.* at 2, but there is no rule requiring that an opinion be "formally withdrawn."
27. OLC opinions resolving interagency disputes may be shared with other agencies in the executive branch without the prior consent of the agencies involved in the dispute. Stip. ¶ 18.	Not disputed.
28. The OLC publishes a subset of its formal written opinions to members of the publicin bound volumes. Stip. ¶ 19. In the foreword to the first volume of published OLC opinions, then–Attorney General Griffin Bell explained that the opinions' "value as precedents and as a body of executive law on important matters would be enormously enhanced by publication and distribution in a manner similar to those of the formal opinions of the Attorney General." *Id*.	Not disputed.
29. The OLC has never published all of its formal written opinions. *Id*. ¶ 20. Its internal publication review committee	Not disputed.

Plaintiff's Statement	Defendant's Response
decides whether to publish opinions on a case-by-case basis, taking into account the views of the requesting agencies and the attorneys within the OLC who drafted or reviewed the opinion. Best Practices Memo at 5; Stip. ¶ 21.	

Dated: October 11, 2021

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 16-1068 (JMC)

MEMORANDUM OPINION

This lawsuit arises under the "reading-room" provision of the Freedom of Information Act (FOIA), which requires agencies to affirmatively make certain records available to the public, without the need for a prior request.[1] *See* 5 U.S.C. § 552(a)(2). The Campaign for Accountability (CfA) initiated this litigation seeking an order requiring the Department of Justice, Office of Legal Counsel (OLC) to make certain records available under that provision. Following two orders by this Court dismissing the majority of Plaintiff's claims, the Parties have cross-moved for summary judgment on the limited claims that remain.

Specifically, CfA seeks a judgment that the OLC's formal, written opinions resolving interagency disputes are subject to FOIA's reading-room provision because such opinions are both "final opinions . . . made in the adjudication of cases," § 552(a)(2)(A), and "statements of policy

[1] Unless otherwise indicated, the formatting of quoted materials has been modified throughout this opinion, for example, by omitting internal quotation marks and citations, and by incorporating emphases, changes to capitalization, and other bracketed alterations therein. All pincites to documents filed on the docket are to the automatically generated ECF Page ID number that appears at the top of each page.

and interpretations which have been adopted by the agency," § 552(a)(2)(B). The OLC, on the other hand, seeks a judgment that they are not. The Court agrees with CfA that such opinions are subject to disclosure under § 552(a)(2)(A) as "final opinions . . . made in the adjudication of cases," and accordingly does not reach CfA's other argument that these opinions would also be subject to disclosure under § 552(a)(2)(B). The Court DENIES Defendant's motion for summary judgment, ECF 57, and GRANTS Plaintiff's cross-motion for summary judgment, ECF 59.

I. BACKGROUND

A. The Office of Legal Counsel

The following facts are undisputed. The OLC "is a component of the Department of Justice" charged with "provid[ing] controlling legal advice to executive branch officials on questions of law involving the operations of the executive branch." ECF 56 ¶ 1.[2] Specifically, the OLC's responsibilities include "[p]reparing the formal opinions of the Attorney General; rendering informal opinions and legal advice to the various agencies of the Government; and assisting the Attorney General in the performance of his functions as legal adviser to the President and as a member of, and legal adviser to, the Cabinet." 28 C.F.R. § 0.25(a).

As part of its advice-giving function, the OLC sometimes prepares "formal written opinions" to advise the President and executive agencies on questions of law.[3] The guiding principles for preparing and publishing such opinions are laid out in a 2010 "Best Practices Memo" published by the agency, ECF 56-1, which has been cited as authoritative by both Parties, *see, e.g.*,

[2] Prior to filing its motion for summary judgment, the agency submitted a joint stipulation of facts for purposes of the litigation. ECF 56 at 1 & n.1. The Court accepts the facts in the stipulation as undisputed.

[3] The OLC also "frequently conveys its legal advice to executive agencies through informal means." *Citizens for Resp. & Ethics in Washington v. Dep't of Just. (CREW II)*, 922 F.3d 480, 484 (D.C. Cir. 2019); *see also* ECF 56-1 at 2. Such informal opinions are not at issue in this case. *See* ECF 59-1 at 11 n.2.

ECF 56 ¶ 13; ECF 57-1 at 7; ECF 59-1 at 10, as well as the D.C. Circuit, *see Citizens for Resp. & Ethics in Washington v. Dep't of Just. (CREW II)*, 922 F.3d 480, 484 (D.C. Cir. 2019). The Best Practices Memo suggests—and the OLC appears to concede—that the OLC's formal written opinions are legally binding. ECF 56-1 at 1–2; ECF 57-1 at 23.

"A [formal] written opinion is most likely to be necessary when the legal question is the subject of a concrete and ongoing dispute between two or more executive agencies." ECF 56-1 at 3. In 1979, President Carter formalized the OLC's role as the arbiter of such disputes. *See* Exec. Order No. 12,146, 44 Fed. Reg. 42657 (July 18, 1979), § 1-402. Through Executive Order 12,146, President Carter required that "[w]henever 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." *Id*. That same executive order also "encouraged [independent agencies] to submit the[ir] dispute[s] to the Attorney General." *Id.* § 1-401. By regulation, the Attorney General has in turn delegated the responsibility to resolve such disputes to the OLC. *See* 28 C.F.R. § 0.25(a). Consistent with that responsibility, the OLC is unaware of any time it has declined an agency's request to issue an opinion resolving an interagency dispute. ECF 56 ¶ 7.

In resolving interagency disputes, the OLC's "general practice" is to "ask" each agency to submit "a detailed memorandum setting forth the agency's own analysis of the question." ECF 56-1 at 3. The OLC then ensures that those memoranda are shared with the opposing agency so that the agency can submit "reply comments, when necessary." *Id*. The OLC sometimes solicits the views of other agencies with subject-matter expertise regarding a dispute, but will only do so after acquiring the consent of the requesting agency. *Id.* In drafting an opinion to resolve an interagency dispute, the OLC strives to address only "concrete and ongoing" disputes that focus on specific legal questions. *Id*. The Best Practices Memo is clear that the OLC should refrain from providing

"unnecessary advice," opining on "broad" or "abstract" legal issues, or making definitive statements about "the legality of past conduct." *Id.* A formal written opinion resolving an interagency dispute "should take care to consider fully and address impartially the points raised on both sides," although the OLC may sometimes also consider arguments that are not raised by a party. *Id.* at 4.[4]

Once finalized, the OLC's formal written opinions become a part of the agency's "system of precedent," from which its attorneys may not "lightly depart." *Id*. at 2. Opinions are printed on bond paper and signed by the drafting attorney. *Id*. at 4. Unclassified opinions are added to the OLC's database and included in its "day books." *Id*. In addition, the OLC maintains a separate file for each opinion, containing a copy of the signed opinion, the opinion control sheet, the original request, the submissions of interested agencies, and any "obscure sources" cited in the opinion, so that future OLC attorneys may refer back to the opinion and its underlying sources. *Id*. at 4–5.

The OLC also has a "longstanding internal process" to select and voluntarily publish "significant opinions" to the public. *Id.* at 5. In deciding which opinions to publish, the OLC "operates from the presumption that it should make its significant opinions fully and promptly available to the public"—a presumption that "furthers the interests of Executive Branch transparency, thereby contributing to accountability and effective government, and promoting public confidence in the legality of government action." *Id*. In some cases, however,

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[4] Then-Attorney General William P. Barr described the OLC's role in resolving interagency disputes as follows:

> In this context, the Attorney General's role is much like a court's in an adversarial proceeding. Because each agency has its own staff of lawyers, disputes between them come before the Attorney General with legal positions already well-established. Each agency will usually have legal authority or good arguments to support its view. The [OLC] requires each side to come in with briefs, just as if it were a judicial proceeding. Deciding among the positions being taken requires the Attorney General—or in most cases the [OLC]—to function as a judge.

ECF 59-10 at 8.

"countervailing considerations may lead the Office to conclude that it would be improper or inadvisable to publish an opinion that would otherwise merit publication." *Id.* For example, in some cases "disclosure would reveal classified or other sensitive information relating to national security." *Id.* In others, an agency may "request[] advice regarding a proposed course of action, the Office concludes it is legally impermissible, and the action is therefore not taken." *Id.* at 6. The Best Practices Memo also cautions that, as a matter of policy, if the "OLC routinely published its advice concerning all contemplated actions of uncertain legality, Executive Branch officials would be reluctant to seek OLC advice in the early stages of policy formulation—a result that would undermine rule-of-law interests." *Id.* According to the agency's website, the OLC has published over 1,400 opinions, dating from 1934 to the present, including some that addressed interagency disputes. OLC, *Opinions*, http://www.justice.gov/olc/opinions-main (last visited April 17, 2024).

B. Procedural History

This case has a somewhat complicated history, which is briefly recounted here. CfA originally filed a complaint seeking an order that the OLC "mak[e] available for public inspection . . . *all past and future final opinions* . . . that provide controlling legal advice to executive branch officials and agencies on questions of law."[5] ECF 1 ¶ 35 (emphasis added). CfA alleged that all such opinions are subject to the reading-room provision of FOIA for two reasons: first, because those documents are "final opinions . . . made in the adjudication of cases," 5 U.S.C. § 552(a)(2)(A); and second, because they qualify as "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register,"

[5] At the time this lawsuit was filed, another court in this jurisdiction had recently ruled that FOIA, and not the Administrative Procedure Act, was the proper vehicle for CfA to pursue the relief it sought. *See Citizens for Resp. & Ethics in Washington v. Dep't of Just.*, 164 F. Supp. 3d 145, 147 (D.D.C. 2016). That decision was subsequently affirmed. *See Citizens for Resp. & Ethics in Washington v. Dep't of Just. (CREW I)*, 846 F.3d 1235 (D.C. Cir. 2017).

§ 552(a)(2)(B). ECF 1 ¶ 31. The Court granted Defendant's motion to dismiss CfA's original complaint for failure to state a claim, finding that Plaintiff had failed to "identif[y] an ascertainable set of OLC opinions that OLC has withheld from the public and that is also plausibly subject to the FOIA's reading-room requirement." *CfA v. Dep't of Just. (CfA I)*, 278 F. Supp 3d 303, 306 (D.D.C. 2017). However, that dismissal was without prejudice; the Court ordered that Plaintiff would be permitted to file an amended complaint to remedy that shortcoming.[6] *Id.*

CfA took the Court up on that offer. In its amended complaint, ECF 22, CfA alleges that FOIA's reading-room provision requires affirmative publication of four, more specific categories of OLC opinions: (1) formal written opinions that resolve interagency disputes, *id.* ¶¶ 35–38; (2) formal written opinions that interpret an agency's non-discretionary legal obligations, *id.* ¶¶ 41–44; (3) opinions that "find[] that particular statutes are unconstitutional and that therefore agencies need not comply with them," *id.* ¶¶ 45–46; and (4) opinions that adjudicate or determine private rights, *id.* ¶¶ 47–49.[7] With respect to each of those four categories of records, Plaintiff alleges that the agency has failed to comply with the disclosure obligations of § 552(a)(2) by failing to make the documents automatically available for public inspection, *id.* ¶¶ 54–59 (Count I), and has therefore also failed to comply with the indexing requirement of § 552(a)(2), which requires an agency to maintain and make available for public inspection indices of materials that are subject to the reading-room provision, *see id.* ¶¶ 60–64 (Count II). CfA seeks a declaratory judgment that the OLC has failed to comply with its obligations under § 552(a)(2), an order that the OLC disclose

[6] The Court also clarified that it lacks the authority under FOIA to order the OLC to publish any materials to the public in general. *CfA I*, 278 F. Supp. 3d at 315–16. Rather, the Court's authority under FOIA is limited to issuing an order that OLC produce materials directly to Plaintiff. *Id.*

[7] The amended complaint also identified a fifth category of OLC opinions—formal written opinions issued to independent agencies. ECF 22 ¶¶ 39–40. Plaintiff has since withdrawn its claims with respect to that category of records. ECF 30 at 35 n.11.

to CfA "all formal written opinions issued by the OLC to executive branch agencies or to executive branch officials other than the president," and an order that the OLC make indices of all such opinions available for public inspection and copying. *Id.* at 23. The OLC moved to dismiss the amended complaint, contending that Plaintiff had still failed to state a claim that the OLC has an affirmative obligation to disclose the specified categories of materials. ECF 29.

While that motion was pending, the D.C. Circuit issued an opinion in a related case, *CREW II*, 922 F.3d 480. In that case, the plaintiff brought claims similar to those made in the original complaint in this case, which were dismissed for substantially the same reasons. *Id.* at 485. However, instead of filing an amended complaint in district court, the plaintiff in *CREW II* appealed the dismissal. *Id.* The D.C. Circuit affirmed. Citing heavily to another case, *Elec. Frontier Found. v. Dep't of Just. (EFF)*, 739 F.3d 1 (D.C. Cir. 2014), the *CREW II* court held that, for a plaintiff to state a claim under 5 U.S.C. § 552(a)(2), it is insufficient to allege merely that the OLC's opinions are "controlling," "authoritative," and/or "binding." 922 F.3d at 486. The court's opinion in *CREW II* also cites to this case (and the motion to dismiss that was pending at the time), suggesting that the *CREW II* plaintiff would have been better off had it followed the same course as CfA has here, filing an amended complaint that identified specific "subcategories of OLC's formal written opinions." *Id.* at 489.

Following the release of *CREW II*, this Court turned to the OLC's motion to dismiss the amended complaint. Citing to both *EFF* and *CREW II*, the Court dismissed CfA's claims as to three of the four categories of opinions at issue: (1) those that interpret an agency's non-discretionary legal obligations; (2) those that announce the unconstitutionality of particular statutes; and (3) those that adjudicate or determine private rights. *CfA v. Dep't of Just. (CfA II)*, 486 F. Supp. 3d 424, 444 (D.D.C. 2020). For each of those three categories of documents, the

Court reasoned that CfA failed to state a claim because the amended complaint alleged only that the OLC's opinions were controlling, authoritative, and binding—not that they were final opinions made in the adjudication of cases, or that a client agency had adopted those opinions as its own. *See id.* at 441–44. As for "the OLC's opinions regarding the unconstitutionality of statutes," the Court determined that CfA did not effectively distinguish those documents from the broader category containing all of the OLC's formal written opinions—a shortcoming that would be fatal to CfA's claims given the D.C. Circuit's holding in *CREW II* that the OLC has no categorical obligation to affirmatively disclose its opinions. *See id.* at 443.

Although this Court dismissed the bulk of CfA's claims, it agreed with CfA that the D.C. Circuit's opinions in *EFF* and *CREW II* had left open the possibility that *some* categories of OLC opinions might be subject to the reading-room provision. *Id.* at 435–36. Indeed, the Court found that the first category of opinions described in the amended complaint—formal written opinions that resolve disputes between agencies—is, at least plausibly, such a category. *Id.* at 441. More specifically, the Court found that CfA had stated a plausible claim regarding those opinions for two reasons—first, OLC opinions that resolve interagency disputes are plausibly "final opinions made in the adjudication of cases," *id.* at 438 (citing § 552(a)(2)(A)); and second, such opinions are plausibly "statements of policy and interpretations" that are adopted *ex ante* by subject agencies when they consent to submit the dispute to the OLC, *id.* at 439–40 (citing § 552(a)(2)(B)). The Court, however, stressed the legal limits of its conclusions:

> [A]t this juncture, the Court's conclusion is based simply and solely on the amended complaint's allegations, and it might eventually determine, in the context of summary judgment, that OLC opinions resolving inter-agency disputes are not "statements of policy and interpretations" adopted by those agencies *ex ante*, or that "'adjudications' between two parts of the executive branch are not the kind of 'adjudication of cases' to which that section refers."

CfA II, 486 F. Supp. 3d at 445 (quoting *CREW II*, 922 F.3d at 491 (Pillard, J., dissenting)). The Court addresses those questions today.

II. LEGAL STANDARD

FOIA cases are typically decided at summary judgment. *See Laverpool v. Dep't of Hous. & Urban Dev.*, 315 F. Supp. 3d 388, 390 (D.D.C. 2018). A court will grant a motion for summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In FOIA cases, it is the defending agency's burden to prove it has complied with its obligations under the statute. *Dep't of Just. v. Tax Analysts*, 492 U.S. 136, 142 n.3 (1989); *see also CREW II*, 922 F.3d at 487 (stating the rule in the context of the reading-room provision). To satisfy its burden, the "agency must prove that each document that falls within the [request] has been produced, is unidentifiable[,] or is wholly exempt from the Act's inspection requirements." *Weisberg v. Dep't of Just.*, 627 F.2d 365, 368 (D.C. Cir. 1980).

III. ANALYSIS

Two FOIA provisions are relevant here: the reading-room provision itself, § 552(a)(2), and FOIA's Exemption 5, § 552(b)(5). FOIA's reading-room provision requires an agency to "make available for public inspection" several enumerated categories of records. *See* 5 U.S.C. § 552(a)(2)(A)–(E). Two such categories are "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases," § 552(a)(2)(A), and "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register," § 552(a)(2)(B). The "primary objective" of FOIA's reading-room provision is the "elimination of secret law." *Dep't of Just. v. Reps. Comm. for Freedom of the Press*, 489 U.S. 749, 772 n.20 (1989). Because FOIA's reading-room provision reflects "an affirmative congressional purpose to require disclosure of documents which have the force and effect of law,"

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975), courts have sometimes referred to the categories of documents that are subject to disclosure under § 552(a)(2) as the "working law" of the agency, *see, e.g.*, *id.*; *CREW II*, 922 F.3d at 486.

"[I]n addition to requiring the disclosure of certain agency records, [] FOIA permits an agency to withhold covered documents pursuant to certain statutory exemptions." *CfA II*, 486 F. Supp. 3d at 427. Where a FOIA exemption applies, the duty to disclose "does not apply," regardless of whether a document would be otherwise disclosable. § 522(b); *see also Sears*, 421 U.S. at 154 n.21. One of these exemptions—Exemption 5—allows an agency to withhold any and all materials that would normally be privileged from discovery in civil litigation, including under the deliberative process privilege, the attorney-client privilege, or the attorney work-product doctrine. *Tax Analysts v. I.R.S.*, 117 F.3d 607, 616 (D.C. Cir. 1997). Exemption 5 is relevant to this opinion not because it may be invoked to protect specific documents from disclosure, but because the Supreme Court has suggested that there is a mutually exclusive relationship between materials protected by that exemption and materials subject to disclosure under § 552(a)(2). *See Sears*, 421 U.S. at 153 ("We should be reluctant, therefore, to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2)."); *see also CfA II*, 486 F. Supp. 3d at 428 ("[I]f a record can be withheld under Exemption 5, then it is generally not subject to affirmative disclosure under the reading-room provision and vice versa."). More specifically, if a document is pre-decisional (i.e., if it "reflect[s] the agency's group thinking in the process of working out its policy and determining what its law shall be"), it cannot be said to constitute the agency's working law for purposes of the reading-room provision. *Sears*, 421 U.S. at 153. On the other hand, "final opinions, which not only invariably explain agency action already taken or an agency decision

already made, but also constitute final dispositions of matters by an agency," are "never" protected from disclosure under the deliberative process privilege in Exemption 5. *Id.* at 153–54.

Turning to this case, CfA argues that the OLC's final written opinions resolving interagency disputes are subject to disclosure under both §§ 552(a)(2)(A) and (B). The Court finds that the documents at issue are "final opinions . . . made in the adjudication of cases," § 552(a)(2)(A), and thus subject to affirmative disclosure. Having made this determination, the Court finds it unnecessary to opine whether the documents might also be subject to disclosure under § 552(a)(2)(B).

A. The OLC's formal written opinions resolving interagency disputes are "final opinions . . . made in the adjudication of cases" and must therefore be affirmatively disclosed under § 552(a)(2)(A).

To satisfy the requirements of § 552(a)(2)(A), a document must be (1) a final opinion and (2) made in the adjudication of a case. At the motion to dismiss phase, this Court concluded that CfA's amended complaint stated a plausible claim that the OLC's formal opinions resolving interagency disputes satisfy both of those conditions and are therefore subject to disclosure under § 552(a)(2)(A). Now, the Court considers the issue under the summary judgment standard, ultimately concluding that the documents at issue are subject to disclosure under § 552(a)(2)(A). The Court also finds that the OLC has not created a genuine dispute that those opinions are categorically protected by Exemption 5. Accordingly, the Court grants CfA's cross-motion for summary judgment and denies the OLC's motion for summary judgment.

1. Final Opinion

Agency opinions are final when they both (1) "serve as law in the specific case to which they are addressed" and (2) "serve as law-like precedent in subsequent cases." *Schlefer v. United States*, 702 F.2d 233, 237, 244 (D.C. Cir. 1983). To be final, an opinion must have legal effect; if it has no effect until it is ratified or adopted by a higher authority, then it is not final until that

occurs. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867–68 (D.C. Cir. 1980). The mere possibility of legal review (for instance, via discretionary appeal) does not affect the finality of an agency opinion, provided the opinion has "real operative effect" prior to any review. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 186–87 (1975). In determining whether a document is an opinion, a court may consider whether that document provides legal reasoning to explain its conclusions, *Sears*, 421 U.S. at 158–59, and whether that reasoning is communicated in "straight-forward, objective, and impersonal prose," *Schlefer*, 702 F.2d at 243.

According to the Best Practices Memo, the OLC's formal opinions constitute "controlling legal advice," which represents—short of intervention by the courts—the "final word on the controlling law." ECF 56 ¶ 13 (adopting ECF 56-1); ECF 56-1 at 1. As this Court previously explained, the OLC's authority to issue such controlling advice flows from "Article II's vesting of the 'executive power' in one President," *CfA II*, 486 F. Supp. 3d at 438, and from the agency's position as the presidential appointee that serves as a "neutral arbiter to resolve the differing stances" of two agencies, *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 92 (D.C. Cir. 1986). The OLC does not contest that client agencies treat its opinions as binding. ECF 57-1 at 23. Nor does it dispute that the OLC gives its own opinions precedential effect. ECF 56-1 at 2. The OLC has not suggested that its written opinions are mere "recommendations" that have no effect absent approval by some higher authority. Moreover, looking to the OLC opinions cited and submitted as evidence in this case, the OLC consistently explains its legal reasoning using "straight-forward, objective, and impersonal prose." *Schlefer*, 702 F.2d at 243. In other words, OLC opinions read like legal opinions, not ruminations on government policy. *See, e.g.*, *Scope of the Environmental Protection Agency's Discretion to Adopt Any One of Three Alternative Interpretations of the Mitchell-Conte Amendment to the Clean Air Act*, 13 Op. O.L.C. 105, 105

(1989) ("For the reasons set forth below, we conclude that EPA does possess the authority to adopt either the second or third alternative interpretation, in addition to the first interpretation.").

Despite all that, the OLC argues that its formal written opinions resolving interagency disputes are more like "advice documents" than final opinions. ECF 57-1 at 19. That is because those opinions sometimes "leave agencies with a broad range of potential avenues for action and prospective policy choices," and therefore do not necessarily dispose of any agency action. *Id*. at 23. The OLC cites several opinions that it contends illustrate that point. For example, in *Scope of the Environmental Protection Agency's Discretion to Adopt Any One of Three Alternative Interpretations of the Mitchell-Conte Amendment to the Clean Air Act*, the OLC determined that the EPA could lawfully choose any one of three interpretations of a statute, disagreeing with another agency that took the position there was only one valid interpretation. 13 Op. O.L.C. at 105. According to the OLC, that opinion was not final because it deferred to the EPA on the question of which of those three interpretations it should ultimately adopt. ECF 57-1 at 26. The OLC makes similar arguments regarding two other opinions. *See Whether the Defense of Marriage Act Precludes the Non-Biological Child of a Member of a Vermont Civil Union From Qualifying for Child's Insurance Benefits Under the Social Security Act*, 31 Op. O.L.C. 243 (2007); *Applicability of Government Corporation Control Act to Gain Sharing Benefit Agreement*, 24 Op. O.L.C. 212 (2000). Those opinions, in the OLC's view, only decided whether a client agency had the legal authority to take a proposed action, not whether the agency was required to do so. ECF 57-1 at 27–28.[8] The OLC argues that none of the above opinions are subject to § 552(a)(2)(A) because, like

[8] The OLC cites one additional opinion, *Applicability of the Cargo Preference Act to the Transportation of Alaskan Oil to the Strategic Petroleum Reserve*, 7 Op. O.L.C 139 (1983), in which it contends not only that the agency did not dictate the policy of the affected agency, but also that the OLC did not even fully resolve the agencies' dispute when it declined to take a position on two non-legal questions presented by one of the agencies, ECF 57-1 at 25–26. Perhaps.

the opinion in *EFF*, they are each binding only in the legal sense, and do not "speak with authority on the [agency's] policy." 739 F.3d at 9.

That argument misses the mark. As an initial matter, neither *EFF* nor *CREW II* were decided on the basis of § 552(a)(2)(A). Although both of those opinions cite to and discuss § 552(a)(2)(A), the requirement that an agency "adopt" an OLC opinion as its own was developed and has been applied only in the context of § 552(a)(2)(B). *See CREW II*, 922 F.3d at 486 ("An OLC opinion *in the latter category* qualifies as the 'working law' of an agency only if the agency has 'adopted' the opinion as its own." (emphasis added) (citing *EFF*, 739 F.3d at 9)). And that rule makes perfect sense in the context of § 552(a)(2)(B). After all, when it comes to a question of policy or legal interpretation where the agency has discretion to choose its preferred path, the solicitation of an OLC opinion to determine the scope of that discretion may indeed be pre-decisional. For example, in *EFF* the OLC issued an opinion concluding the FBI had the authority to request telephone records "without legal basis or qualifying emergency," 739 F.3d at 5, which the FBI then chose not to do as a matter of policy, *id.* at 10.

Section 552(a)(2)(A) is different. For one thing, it makes no mention of policy. *See CfA II*, 486 F. Supp. 3d at 439 ("The reading-room provision does not predicate affirmative disclosure on whether the agency's 'final opinions . . . made in the adjudication of cases' have a discernable policy impact."). The fact that an OLC opinion does not definitively resolve questions of policy has no bearing on whether it is final as to the legal issue it resolves. Consider the judicial context. Nobody would dispute that the D.C. Circuit's opinion in *CREW II* was a "final opinion." But in that case, despite the court's conclusion that the OLC has no general obligation to publish its

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But, to the extent the OLC is correct that the cited opinion does not resolve the agencies' dispute, that opinion would lie outside the category described by the amended complaint and would not be at issue in this case.

opinions, the agency remained perfectly free to voluntarily do so. Indeed, the OLC's website shows it has continued to do just that. *See* OLC, *Opinions*, http://www.justice.gov/olc/opinions-main (including opinions published as recently as March 26, 2024). Similarly, the OLC's opinions—which represent both the "final word" on the matter at hand and are treated as binding precedent in future cases—are also final.

2. Made in the adjudication of cases

Having determined that the OLC's formal opinions resolving interagency disputes are "final opinions," the Court next concludes that such opinions are "made in the adjudication of cases." § 552(a)(2)(A). According to the statute, "adjudication" is an "agency process for the formulation of an order." § 551(7). An "order" is "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making." § 551(6). An advisory opinion is not a final disposition. *See Int'l Tel. & Tel. Corp., Commc'ns Equip. & Sys. Div. v. Loc. 134, Int'l Bhd. of Elec. Workers*, 419 U.S. 428, 446 (1975).

As detailed in the Best Practices Memo, the OLC diligently avoids issuing advisory opinions—issuing written opinions only for disputes that are "concrete and ongoing." ECF 56-1 at 3. Moreover, the process by which the OLC researches, drafts, and finalizes its opinions that resolve interagency disputes is standardized, thorough, and bears many of the hallmarks of adversarial adjudication. *See generally id.* Before formulating its order, the OLC solicits a "detailed" brief from each of the client agencies laying out its side of the dispute. *Id.* at 3. Those briefs are shared with the opposing agency (or agencies) so that it (or they) may have an opportunity to respond when necessary. *Id*. The OLC functions like a neutral decisionmaker, "tak[ing] care to consider fully and address impartially" all the arguments made by each side, *id.* at 4, applying not only its own precedents, but judicial caselaw and the various tools of statutory interpretation as well, *see, e.g.*, *Payment of Back Wages to Alien Physicians Hired Under H-1B*

Visa Program, 32 U.S. Op. O.L.C. 47 (2008). The OLC's formal opinions, once complete, are carefully edited and cite-checked, signed, and filed away for use as precedent in the future. ECF 56-1 at 4–5.

The OLC makes two arguments that the opinions at issue in this case are not "made in adjudications." The first of those arguments is that the OLC's procedures (as described in the Best Practices memo) lack some of the characteristics of a formal adjudication under the Administrative Procedures Act (APA), as described by 5 U.S.C. § 554. Specifically, the OLC asserts that it has "no formal procedures governing how [agency briefs] are submitted, let alone opportunity for an adversarial hearing, prohibitions on *ex parte* communications, or a requirement of a decision that rests solely on a hearing record." ECF 62 at 19 (citing ECF 56 ¶¶ 7–17). The OLC is correct that its procedures do not satisfy all the requirements of § 554. But that provision concerns only the subset of "adjudication[s] required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a). That language, as a matter of ordinary meaning, carves out a subcategory of adjudications, which must mean that the term "adjudication" encompasses something broader than only those "formal" adjudications that satisfy the requirements of § 554(a). That proposition finds additional support elsewhere in the statute, *see* 5 U.S.C. § 551(7) (defining "adjudication" broadly as any "agency process for the formulation of an order"); 5 U.S.C. § 551(6) (defining "order" as "a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making"), as well as in myriad opinions that differentiate between "formal" and "informal" adjudications, *see, e.g.*, *Watts v. SEC*, 482 F.3d 501, 506 (D.C. Cir. 2007) (referencing "the broad scope of formal and informal adjudications under the APA"). In other words, even granting that the OLC's decision-making process does not qualify as

a *formal* adjudication under the APA, that has no bearing as to whether the opinions at issue are "made in the adjudication of cases."

Next, the OLC asks the Court to revisit an argument it rejected at the motion to dismiss phase. Specifically, the OLC argues that the phrase "made in the adjudication of cases" cannot apply to the OLC's opinions because the phrase was only intended to encompass "agencies' adjudications of private rights." ECF 62 at 18; *see also id*. at 21 (asking the Court to reconsider). In support of that argument, the OLC points out that the preclusive effect of an agency's failure to disclose documents that are subject to FOIA's reading-room provision is that the undisclosed documents may not be "relied on, used, or cited as precedent by an agency *against a party other than an agency*." 5 U.S.C. § 552(a)(2)(E) (emphasis added). In the OLC's view, the nature of that remedy, considered together with the legislative history of the reading-room provision, confirms that "Congress's primary concern in § 552(a)(2) was with the adjudication of private rights." ECF 57-1 at 21. The OLC goes on to cite several cases in which the D.C. Circuit suggested that § 552(a)(2)'s central focus is to safeguard private rights. *See, e.g.*, *Schlefer*, 702 F.2d at 244 ("A strong theme of our opinions has been that an agency will not be permitted to develop a body of 'secret law,' used by it in the discharge of its regulatory duties and in its dealings with the public."); *Bannercraft Clothing Co. v. Renegotiation Bd*., 466 F.2d 345, 352 (D.C. Cir. 1972) (Congress enacted § 552(a)(2) because it was "troubled by the plight of those forced to litigate with agencies on the basis of secret laws or incomplete information"), *rev'd on other grounds*, 415 U.S. 1 (1974); *see also Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 352–53, 360 n.23 (1979) (policy directives are "intra-agency memorandums" exempt from § 552(a)(2) because they "do not establish rules that govern the adjudication of individual rights, nor do they require particular conduct or forbearance by any member of the public").

The Court is unpersuaded and reaffirms its earlier conclusion that the phrase "made in the adjudication of cases" has no such meaning. *See CfA II*, 486 F. Supp. 3d at 432–35, 439. As the Court has explained, there is "nothing in the plain text or history of section 552(a)(2), or in the few cases that have interpreted that statutory provision, [to] establish[] that [] FOIA's affirmative obligation to publish certain agency records extends only to agency records that pertain to the regulation of private entities." *Id.* at 432. Moreover, the Court finds that the overarching purpose of the reading-room provision—to prevent the development of secret law—casts a wider net than the OLC imagines. FOIA embodies the principle that the public has a strong interest in keeping "informed about what their government is up to." *Dep't of Def. v. F.L.R.A.*, 510 U.S. 487, 495 (1994). That purpose encompasses all manner of documents that are not themselves adjudications of private rights. *See, e.g.*, *Pub. Citizen v. Off. of Mgmt. & Budget*, 598 F.3d 865 (D.C. Cir. 2010) (Office of Management and Budget memoranda designating which agencies are permitted to submit budgetary materials to Congress without prior clearance "fit comfortably within the working law framework"); *Vaughn v. Rosen*, 523 F.2d 1136 (D.C. Cir. 1975) (reports evaluating how various federal agencies had been carrying out their personnel management responsibilities not subject to Exemption 5). Even if one accepts that FOIA's drafters were primarily concerned that a "citizen [might] los[e] a controversy with an agency because of some obscure or hidden order or opinion which the agency knows about but which has been unavailable to the citizen," ECF 57-1 at 21 (quoting *Clarifying and Protecting the Right of the Public to Information*, H.R. Rep. No. 89-1497 at 2425 (1966)), that is not decisive because it is easy to imagine scenarios in which many of the opinions cited by the OLC, if undisclosed, could be cited as "secret law" in a subsequent proceeding that directly involves the adjudication of individual rights.

In summary, there is no requirement in the APA that an "adjudication" must involve members of the public, and the Court declines to create one based on the legislative history alone. Here, the record shows that the OLC has developed a process to formulate a final disposition of an adversarial dispute that has been submitted to the agency as a neutral decisionmaker. That is an adjudication. Accordingly, the Court finds that the OLC's formal written opinions that resolve interagency disputes are "made in the adjudication of cases." § 552(a)(2).

3. Deliberative process

Finally, the OLC argues that, if the Court concludes that even a subset of its opinions are subject to disclosure under § 552(a)(2), the precedent could be invoked to require the publication of all sorts of legal advice throughout the executive branch. ECF 57-1 at 30. The result would be not only to discourage agencies from seeking advice from the OLC itself, but to hamstring agencies' ability to access confidential legal advice in general, even from their own counsel. *Id.* at 31–32. In the OLC's view, that result would fly in the face of the deliberative process privilege and constitute a serious threat to "rule-of-law values," outweighing any interest the public might have in the publication of the narrow category of opinions at issue in this case. ECF 62 at 21–23.

The OLC's argument touches on a real concern. The deliberative process privilege is meant to protect "confidential [] advisory opinions disclosure of which would be injurious to the consultative functions of government." *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 677 (quoting *Sears*, 421 U.S. at 149). It "serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism." *Coastal States*, 617 F.2d at 866. To the extent agencies rely on the OLC's expertise as part of their decision-making process, subjecting its opinions to the harsh and sometimes distorting glare of the public spotlight could affect agencies' ability to think through their decisions. At the very least, that outcome would

create some tension with the Supreme Court's observation in *Sears* that the deliberative process privilege and the reading-room provision are generally mutually exclusive. *See* 421 U.S. at 153.

The Court has carefully considered that argument, but it is unpersuaded for three reasons. First, the Court does not find that there is any ambiguity as to whether § 552(a)(2)(A) applies to the opinions at issue here. Having found that the plain text of § 552(a)(2)(A) encompasses the documents, the Court is "reluctant" to construe § 552(b)(5) to apply to those documents. *Sears*, 421 U.S. at 153. Second, the OLC's predictions as to how agencies will respond to the Court's decision is entirely speculative. There is nothing in the record that can be construed as evidence that agencies would stop turning to the OLC to resolve their disputes—particularly given that many of the OLC's opinions resolving interagency disputes are already published voluntarily under the status quo. *See* ECF 56-1 at 5. Finally, the OLC's argument that today's decision will have serious "rule-of-law" ramifications throughout the executive branch ignores the limited scope of this opinion. All the Court decides today is that the subset of the OLC's formal opinions that resolve interagency disputes are subject to the requirements of § 552(a)(2)(A), and (by implication) that they are not categorically protected by the deliberative process privilege. Any individual document might still be shielded from disclosure under one or more of FOIA's other exemptions. Those exemptions protect, amongst other things, classified materials, § 522(b)(1), materials that pertain to the internal practices of an agency, § 522(b)(2), materials that would be subject to the attorney-client privilege,[9] § 522(b)(5), and materials compiled for law enforcement purposes, § 522(b)(7). The Court makes no ruling as to those exemptions, even with regard to the documents in this case.

[9] Although the OLC invoked the attorney-client privilege in its pre-litigation correspondence with CfA, ECF 22-3 at 2, it does not do so now.

In short, the Court finds little reason to conclude that today's opinion will drastically change the process by which the OLC releases its opinions to the public, let alone eviscerate the ability of the executive branch to obtain candid advice. Accordingly, the Court determines that the deliberative process privilege does not categorically protect the OLC's formal written opinions resolving interagency disputes, and that those opinions are therefore subject to the affirmative disclosure requirements of FOIA's reading-room provision.

IV. CONCLUSION

The Court DENIES the Department of Justice's motion for summary judgment, ECF 57, and grants CfA's cross-motion for summary judgment, ECF 59. As this Court explained in *CfA I*, FOIA grants the Court the authority to order that documents and indices be *produced* to the Plaintiff individually, not that they be *published* to the public at large. 278 F. Supp. 3d at 315–16; *see also CREW I*, 846 F.3d at 1244 ("CREW may, in a FOIA suit to enforce section 552(a)(2), seek an injunction that would . . . require disclosure of documents and indices only to CREW, not disclosure to the public."). Accordingly, the Court's order requires OLC to produce its responsive, formal written opinions that resolve interagency disputes to CfA, along with an index of those materials. A separate order accompanies this opinion, which includes the date upon which the Parties should submit a status report to propose a schedule for further proceedings.

SO ORDERED.

DATE: April 19, 2024

Jia M. Cobb
U.S. District Court Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	Civil Action No. 16-1068 (JMC)

ORDER

For the reasons stated in the accompanying memorandum opinion, it is hereby **ORDERED** that Defendant's motion for summary judgment, ECF 57, is **DENIED**, and that Plaintiff's cross-motion for summary judgment, ECF 59, is **GRANTED**.

The Parties are **DIRECTED** to confer and submit a status report by May 17, 2024, with a proposed schedule for further proceedings, including the release of responsive records.

This is a final appealable Order.

SO ORDERED.

JIA M. COBB
United States District Judge

Date: April 19, 2024

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	No. 1:16-cv-1068 (JMC)

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Defendant hereby appeals to the United States Court of Appeals for the District of Columbia Circuit this Court's final appealable Order of April 19, 2024, ECF No. 68, as well as all associated opinions and orders.

Dated: June 18, 2024

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAMPAIGN FOR ACCOUNTABILITY, Plaintiff, v. U.S. DEPARTMENT OF JUSTICE, Defendant.	No. 1:16-cv-1068 (JMC)

NOTICE OF CROSS-APPEAL

Notice is hereby given that Plaintiff Campaign for Accountability appeals to the United States Court of Appeals for the District of Columbia Circuit from the Order of this Court entered on September 29, 2017 (ECF No. 18), granting Defendant's Motion to Dismiss Plaintiff's Complaint (ECF No. 9), and the Memorandum Opinion and Order of this Court entered on September 11, 2020 (ECF Nos. 40, 41), granting in part and denying in part Defendant's Renewed Motion to Dismiss Plaintiff's Amended Complaint (ECF No. 29).

Defendant has filed a notice of appeal (ECF No. 70), which was docketed in the Court of Appeals on June 20, 2024, *see* No. 24-5163 (D.C. Cir.).

Respectfully submitted,

/s/ Alex Abdo

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June 28, 2024